

No. 18-60522

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**IN THE  
United States Court of Appeals for the Fifth Circuit**

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DISH NETWORK CORPORATION,  
*Petitioner Cross-Respondent,*  
*v.*

NATIONAL LABOR RELATIONS BOARD,  
*Respondent Cross-Petitioner.*

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On Petition for Review of the Order of the  
National Labor Relations Board, Case Nos.  
16-CA-173719, 16-CA-173720, 16-CA-173770, 16-CA-177314,  
16-CA-177321, 16-CA-178881, and 16-CA-178884

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**RESPONSE TO INTERVENOR'S  
PETITION FOR REHEARING EN BANC**

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Eric A. Shumsky  
Randall C. Smith  
Benjamin F. Aiken  
ORRICK, HERRINGTON &  
SUTCLIFFE LLP  
1152 15th Street NW  
Washington, DC 20005  
(202) 339-8400

*Counsel for Petitioner Cross-Respondent*

## CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5th Cir. R. 28.2.1, the number and style of the case are as follows: No. 18-60522, *DISH Network Corporation v. National Labor Relations Board*.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. DISH Network Corporation—Petitioner-Cross-Respondent
2. Orrick, Herrington & Sutcliffe LLP—Counsel for Petitioner-Cross-Respondent
3. Eric A. Shumsky—Counsel for Petitioner-Cross-Respondent
4. Benjamin F. Aiken—Counsel for Petitioner-Cross-Respondent
5. Randall C. Smith—Counsel for Petitioner-Cross-Respondent
6. National Labor Relations Board—Respondent-Cross-Petitioner
7. Linda Dreeben—Counsel for Respondent-Cross-Petitioner
8. Kira Vol—Counsel for Respondent-Cross-Petitioner
9. David Casserly—Counsel for Respondent-Cross-Petitioner
10. Communications Workers of America, AFL-CIO—Intervenor

11. David Van Os & Associates, P.C.—Counsel for Intervenor
12. Matthew G. Holder—Counsel for Intervenor

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellants DISH Network Corporation and DISH Network L.L.C. make the following disclosure: DISH Network L.L.C. is not a publicly held corporation or other publicly held entity. DISH Network L.L.C. is a wholly owned subsidiary of DISH DBS Corporation, a corporation with publicly traded debt. DISH DBS Corporation is a wholly owned subsidiary of DISH Orbital Corporation. DISH Orbital Corporation is a wholly owned subsidiary of DISH Network Corporation, a corporation with publicly traded equity (NASDAQ: DISH). Based solely on review of Form 13D and Form 13G filings with the Securities and Exchange Commission, no entity owns more than 10% of DISH Network Corporation's stock other than Telluray Holdings, LLC and Dodge & Cox.

Date: June 16, 2020

ORRICK, HERRINGTON & SUTCLIFFE LLP

*/s/ Eric A. Shumsky*

Eric A. Shumsky

*Counsel for Petitioner Cross-Respondent*

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## INTRODUCTION

The panel decided this case based on well-settled legal principles that no party disputes. First, applying the long-established standard of appellate review, the panel concluded that there was not substantial evidence to support the National Labor Relations Board’s conclusion that Petitioner Cross-Respondent DISH Network Corporation prematurely declared an impasse in bargaining. Op. 7-11. Second, applying long-established principles of administrative law articulated in *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), the panel rejected the post hoc rationalizations for the agency’s decision offered by the Board’s appellate counsel that formed no part of the Board’s reasoning. Op. 11-15.

In its petition for rehearing en banc, Intervenor the Communications Workers of America, AFL-CIO (“the Union”) challenges both of these holdings, but nowhere does it even claim that the panel got the law wrong. Instead, it openly frames its arguments as a challenge to the Court’s supposed “misapplication” of those principles to the facts of this case. Pet. 6. On the first point, the Union contests what it labels “an *incorrect application* of substantial evidence review.”

*Id.* (emphasis added). A correct application of substantial evidence review, the Union contends, should have led the panel to enforce the Board’s decision. And on the second point, the Union principally challenges the panel’s interpretation of the underlying Board decision, and secondarily argues that the panel’s “*application of Chenery ... was misplaced.*” Pet. 13 (emphasis added). But neither “alleged errors in the facts of the case” nor “in the application of correct precedent to the facts of the case” justify rehearing en banc. 5th Cir. I.O.P. 35.

Thus, as the Board itself now explains in arguing against the Union’s petition, “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.” NLRB Resp. 1. The panel applied settled legal principles to the facts of this case, and the Union’s petition should be denied.

### **COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE**

This matter came before the Court on a petition for review, and cross-petition for enforcement, of a decision of the National Labor Relations Board. On March 20, 2020, a panel of this Court issued its decision. It granted DISH’s petition, and denied the Board’s cross-

petition except as to portions of the Board's decision and order that DISH had not challenged. The Union petitioned for rehearing en banc on May 4, 2020. On May 15, 2020, the Court requested a response to the Union's petition. On May 21, 2020, this Court extended the deadline for DISH and the Board to respond to the Union's petition to June 16, 2020.

### **STATEMENT OF THE FACTS**

DISH is a satellite television provider. Op. 2. At its various branches, DISH employs technicians who install satellite dishes and troubleshoot any problems. Op. 2; ROA.876. This case arises from a multi-year negotiation over a first collective bargaining agreement between DISH and the Union, which represents technicians at DISH's North Texas locations in Farmers Branch and North Richland Hills.

The key sticking point in the negotiation was an incentive-based compensation system called Quality Performance Compensation (QPC), which DISH began as a pilot program at a handful of locations, including Farmers Branch and North Richland Hills. Op. 2; ROA.882-83. QPC reduced technicians' hourly compensation but allowed them to earn additional pay if they met performance-based metrics. Op. 2;

ROA.882-83. The technicians initially disliked QPC and unionized to fight against it. Op. 2; ROA.1076-77. But in 2013, the Union reversed positions, and its primary goal became preserving QPC as long as possible. Op. 2; ROA.599. It did so because improvements in technology allowed technicians to complete tasks far more efficiently and quickly than before. Op. 2; ROA.887-88. As a result, pay for unionized technicians at the Farmers Branch and North Richland Hills locations soared far beyond their nonunionized peers; in some circumstances, technicians even earned more than their managers. Op. 3; ROA.280, 291, 895-96, 1778. DISH, conversely, made clear that it “reject[ed] [the] continuation of QPC.” ROA.1725.

The parties continued in that posture for more than a year, with no progress on what everyone recognized was the core issue in the bargaining. Op. 3; ROA.1104-05. In November 2014, DISH proposed its last, best, and final offer, which would have eliminated QPC. Op. 3; ROA.1371-77, 1725. The Union rejected that offer and made a counteroffer that would have preserved QPC for all current technicians at the Farmers Branch and North Richland Hills locations, eliminating it for only new hires. Op. 4; ROA.1388. At that point, DISH’s

negotiator believed that bargaining had reached an impasse.

ROA.1375.

At the end of 2014, DISH's lead negotiator retired. Op. 4; ROA.1457. His replacement decided to hold off in contacting the Union, to test his theory that the Union had no intent of reaching an agreement and was instead simply stalling to preserve QPC as long as possible. ROA.1020. When more than a year passed and he heard nothing from the Union, he considered his theory confirmed.

ROA.1021. He accordingly wrote to the Union to reiterate that the final offer DISH made in November 2014 indeed was final. Op. 4; ROA.1405. In response, the Union vaguely demanded additional meetings, but indicated no willingness to abandon QPC. Op. 4-5; ROA.1427, 1447.

DISH implemented its last, best, and final offer in April 2016. Op. 5; ROA.103-04, 1635-45. In response, seventeen technicians quit. Op. 5; ROA.1892-1927.

The Union filed a complaint against DISH. Following a trial, an ALJ concluded that DISH violated the National Labor Relations Act by unilaterally implementing its final offer in the absence of a valid impasse. ROA.2176-77. In doing so, it relied heavily on its finding that

the Union’s December 2014 counteroffer represented a “white flag” on the QPC issue. The ALJ explained that, “given Dish’s high attrition rates,” which it described as “ranging from 116% to 13%[,] the Union’s willingness to abandon QPC for new hires[] meant that in a short time, the majority of the [Farmers Branch] and [North Richland Hills] units would have likely have turned over and no longer earn QPC wages,” thus setting the stage for the “wholesale elimination of QPC.”

ROA.2176. The ALJ also found that DISH constructively discharged the seventeen technicians who quit. ROA.2178.

DISH filed exceptions to the ALJ’s decision with the Board, ROA.2003-07, which issued its decision in June 2018, ROA.2168-71. The Board affirmed the ALJ’s no-impasse determination but did not adopt the findings underlying it. On the contrary, the Board noted that the ALJ “failed to explicitly apply” the correct analytical framework to the impasse issue, and concluded that “the parties may have been near a valid impasse” by November 2014. ROA.2168-69. The Board based its no-impasse determination on a single factor—that the Union’s December 2014 counteroffer represented a “white flag’ [that] offered a possible resolution on bargaining’s thorniest issue.” ROA.2169. The

Board also adopted the ALJ’s constructive discharge finding.

ROA.2170. One Board member dissented, explaining that DISH had validly declared an impasse. ROA.2170-71.

DISH petitioned for review in this Court; the Board cross-petitioned for enforcement. On March 20, 2020, a three-judge panel of this Court issued its decision. It concluded that the Board’s no-impasse finding was not supported by substantial evidence. Op. 7. In particular, it determined that the Board’s decision “flunks” basic standards governing whether there is an impasse, as articulated in *Carey Salt Co. v. NLRB*, 736 F.3d 405 (5th Cir. 2013)—and in particular, the “long- and well-settled proposition of substantial-evidence review that the NLRB cannot build its decision on a foundational error of fact.” Op. 7-8. The panel further determined that, because the Board’s constructive discharge finding rested on its determination that DISH’s unilateral implementation of its final offer had been unlawful, the panel’s rejection of that finding likewise invalidated the constructive discharge finding. Op. 16-17.

## ARGUMENT AND AUTHORITIES

### **I. The panel’s application of substantial evidence review to the facts of this case does not warrant rehearing en banc.**

A. When the panel determined that the Board’s no-impasse finding was unsupported by substantial evidence, it applied long-established, uncontested legal standards. The panel began its analysis with the “well-settled proposition” that a factual finding is not supported by substantial evidence where it is grounded in a “foundational error of fact.” Op. 8. And, the panel concluded, the Board’s decision was grounded in just such an error: The Board’s decision “rested on its determination that the Union’s ... counterproposal was a ‘white flag’ of surrender,” Op. 8, which in turn was predicated on the ALJ’s erroneous assessment of “Dish’s high attrition rates ... ranging from 116% to 13%.” ROA.2176.

But—as the panel recognized—the ALJ flubbed the analysis: The ALJ relied on a chart showing *low* (and steadily declining) attrition rates at the unionized locations, ROA.1803, but the ALJ misread the chart as showing *high* attrition rates at those locations. The “tell” is the ALJ’s reference to an attrition rate of 116%. That rate, the panel noted, “occurred at a *nonunionized, non-QPC* branch.” Op. 8 (emphasis

original). Because the Board’s no-impasse finding rested on its adoption of the ALJ’s erroneous characterization of the Union’s counteroffer as a “white flag,” it “flow[ed] straight from the ALJ’s misreading of the record.” Op. 9. The Board’s decision accordingly failed substantial evidence review.

The Union does not contest the panel’s articulation of the key legal principle here: that a Board decision is unsupported by substantial evidence when it rests on a foundational error of fact. Op. 8; *see* NLRB Resp. 6 (“The Union does not dispute the principle that the Board cannot base its analysis on a factual error.”). Instead, the Union takes issue with the panel’s *application* of that standard. As the Board notes in responding to the petition for rehearing, “[t]he Union’s claims of legal error essentially amount to challenges to the panel’s factual findings regarding the Union’s counterproposal.” NLRB Resp. 8. But even if there were any merit to the Union’s argument, such a challenge to the “application of correct precedent to the facts of the case” does not warrant rehearing en banc. 5th Cir. I.O.P. 35. And certainly rehearing is not warranted to review the numerous purely factual arguments that are the heart of the Union’s argument. *See, e.g.*, Pet. 1 (in the Petition’s

very first sentence, arguing how a “reasonable person” would interpret “the facts”); *id.* at 7-8 (arguing about the weight that should be given to various facts purportedly showing impasse); *id.* at 9 (arguing about what constitutes “sufficient evidence”).

**B.** In any event, the panel got it right. The Union defends the ALJ’s reference to the 116% attrition rate on the theory that the ALJ “was arguably not referring to the Union facilities specifically, but the Company’s attrition rates in general.” Pet. 9. That makes no sense. In assessing whether the Board was right to characterize the Union’s counteroffer as a “white flag” on QPC, the attrition rates that matter are the ones where QPC still existed and where the Union would be empowered to accept or reject it, i.e., at the unionized locations. The existence of high attrition at nonunionized, non-QPC locations is irrelevant to the analysis.

The ALJ’s discussion confirms that he mistakenly thought he was talking about attrition at the unionized locations. Immediately after citing the 116% figure, he continued: “Given this attrition, the Union’s willingness to abandon QPC for new hires[] meant that in a short time, the majority of the [Farmers Branch] and [North Richland Hills] units

would have likely have turned over and no longer earn QPC wages.” ROA.2176. Since the 116% attrition rate did not come from either of those units, it does not support the ALJ’s bare speculation that, under the Union’s counterproposal, QPC would soon be eliminated.<sup>1</sup>

C. Elsewhere, the Union cites various decisions of this Court that, it insists, the panel did “not observe[],” or with which it claims the panel’s decision is “inconsistent.” Pet. 8, 11. But it does not identify any way in which the decision below articulated a different legal standard than those cases. Indeed, several of these decisions do not even involve impasse findings; the Union seems to cite them simply for the principle that courts conducting substantial evidence review should not reweigh the evidence or substitute their judgment for the Board’s. *See Flex Frac Logistics, L.L.C. v. NLRB*, 746 F.3d 205, 207-08 (5th Cir. 2014); *NLRB v. Thermon Heat Tracing Servs., Inc.*, 143 F.3d 181, 185

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<sup>1</sup> Relatedly, the Union cites *Entergy Mississippi, Inc. v. NLRB*, 810 F.3d 287 (5th Cir. 2015), in support of the assertion that “a lack of clarity” in a Board decision “does not warrant denying enforcement[.]” Pet. 11. But *Entergy did* deny enforcement of the Board’s order. 810 F.3d at 299. Moreover, the panel’s decision here did not rest on a “lack of clarity” in the Board’s decision; the panel found that the Board’s decision was not supported by substantial evidence because it rested on a foundational error of fact. Op. 7-10.

(5th Cir. 1998). But nowhere did the panel say that it was doing so here.

The other decisions cited by the Board simply support the general proposition that substantial-evidence review is deferential. *See In-N-Out Burger, Inc. v. NLRB*, 894 F.3d 707, 714 (5th Cir. 2018); *Standard Fittings Co. v. NLRB*, 845 F.2d 1311, 1317 (5th Cir. 1988); *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1181 (5th Cir. 1982). But again, the panel didn't say otherwise, nor does the Union claim that it did. Nor, of course, does such deference mean that a court cannot overturn the Board; the "deference" involved in substantial evidence review "has limits." *Carey Salt*, 736 F.3d at 410. And, directly relevant here, this Court has held that a no-impasse finding rooted in "flawed factual findings" cannot survive substantial-evidence review as a matter of law. *Id.* at 421. The panel correctly articulated and undisputedly applied that very rule, Op. 7-9, and on that basis found that the Board's decision could not be upheld. *See NLRB Resp. 5* (explaining that "no aspect of the panel's decision conflicts with in-circuit precedent or otherwise warrants en banc review" and that "[t]he Union fails to identify any conflict with controlling caselaw").

**II. The Union’s disagreement with how the panel read the Board’s decision does not warrant rehearing en banc.**

The Union also challenges (Pet. 2, 13) the panel’s reading of the underlying Board decision. Specifically, the Union says, the ALJ found various factors that caused impasse, the Board adopted those findings, and the panel erred in disagreeing with those findings or finding that the Board in fact did not adopt them. Pet. 13. Nothing about this argument merits en banc review.

First, the Union points to the Board’s indication that DISH’s refusal to meet and confer after rejecting the Union’s December 2014 counteroffer, and DISH’s request that the Union allow its members to vote on its final offer, showed “bad faith.” Pet. 12. But the panel addressed this contention and correctly rejected it. Op. 12. As the panel explained, these actions cannot support the no-impasse finding because they occurred *after* the impasse: To “*preclude* impasse, bad faith must *precede* impasse.” *Id.* Furthermore, even if the Union were correct, and it is not, a dispute about the chronology of events is no basis for rehearing. 5th Cir. I.O.P. 35 (“alleged errors in the facts of the case” do not warrant rehearing en banc).

Next, the Union contends that the Board’s decision should have been affirmed based on various other factors that the ALJ thought detracted from an impasse—specifically, contemporaneous communications between the parties, the long hiatus in communication from December 2014 to January 2016, and the replacement of DISH’s lead negotiator. *See* Pet. 2 (articulating the Union’s second argument for rehearing in terms of this supposed evidence of impasse). This Court properly rejected relying on those factors because they formed no part of the Board’s decision. Op. 13-15. As the Court explained, “a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.” *Chenery*, 332 U.S. at 196. Applying that settled rule, the panel rejected these justifications because, although they were offered by the Board’s appellate counsel, they were never adopted by the Board itself. Op. 13-15. Nowhere does the Union argue that the panel got this legal standard wrong, nor could it.

Thus, this just amounts to a disagreement between the Union and the panel about whether the Board in fact “approv[ed] and adopt[ed] all

[of the ALJ's] findings,” such that *Chenery* does not apply. Pet. 3; see *also id.* at 13. Rehearing en banc is not warranted to address a dispute about the findings in the underlying Board decision, as this Court's Internal Operating Procedures make clear. *Supra* 13.

In any event, the Union's reading of the Board's decision is incorrect. In reviewing a Board decision, this Court reviews an ALJ's factual findings only “[t]o the extent the Board affirms and adopts” them. *In-N-Out Burger*, 894 F.3d at 714. But the Board did not adopt the ALJ's ruling wholesale. It “adopt[ed] the [ALJ]'s recommended Order,” not the entirety of the ALJ's analysis. NOA.2168 (emphasis added).<sup>2</sup> On the contrary, the Board went out of its way to note errors in the ALJ's analysis. ROA.2168 (explaining that “the judge failed to explicitly apply the analysis set forth in *Taft Broadcasting Co.*”). And the Board explicitly disagreed with the ALJ's assessment of certain factors. The ALJ, for instance, thought “the lengthy hiatus between the November 2014 bargaining session and the April 2016 implementation

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<sup>2</sup> This stands in marked contrast to the Board's treatment of the ALJ's constructive discharge finding. ROA.2170 n.8 (stating that the Board “adopt[s], for the reasons stated by the judge, his finding that the Respondent violated Sec. 8(a)(3) and (1) by constructively discharging 17 employees”).

of the final offer weighs heavily against an impasse finding.”

ROA.2176. As the panel noted (Op. 15), however, the Board thought that the lengthy hiatus *supported* an impasse finding—the Board observed that “the parties were not at impasse *even considering* the year-long hiatus in bargaining.” ROA.2170 (emphasis added). It could not have done so if, as the Union now argues, the Board had adopted the Union’s factual findings in their entirety.

But most fundamentally, at no point does the Union identify any conflict in this Court’s decisions, or any issue of exceptional importance, that could merit rehearing en banc. Instead, it argues at length about the underlying facts. Pet. 13-14, 16. That is no basis for rehearing.

## CONCLUSION

For the foregoing reasons, the petition for rehearing en banc should be denied.

June 16, 2020

Respectfully submitted,

/s/ Eric A. Shumsky

Eric A. Shumsky

Randall C. Smith

Benjamin F. Aiken

ORRICK, HERRINGTON &

SUTCLIFFE LLP

1152 15th Street NW

Washington, DC 20005

(202) 339-8400

*Counsel for Petitioner Cross-Respondent*

## 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 June 16, 2020

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

ORRICK, HERRINGTON & SUTCLIFFE LLP

*/s/ Eric A. Shumsky*

Eric A. Shumsky

*Counsel for Petitioner Cross-Respondent*

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2) because this brief contains 3107 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Century Schoolbook 14-point font.

ORRICK, HERRINGTON & SUTCLIFFE LLP

*/s/ Eric A. Shumsky*

Eric A. Shumsky

*Counsel for Petitioner Cross-Respondent*