No. 16-

IN THE

Supreme Court of the United States

MASTEC ADVANCED TECHNOLOGIES,
A DIVISION OF MASTEC, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DC CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

For more than fifty years, Supreme Court and circuit court authority have recognized that the National Labor Relations Act ("NLRA") protects an employer's right to "suspend[] or discharge[]" an employee "for cause." This authority has also recognized that such "cause" includes an employee's disloyalty to his or her employer. Yet, contrary to this well-settled authority, the United Stated Circuit Court for the District of Columbia's interpreted the Supreme Court's decision in *NLRB v. Local Union No. 1229, Int'l Bhd. Of Elec. Workers (Jefferson Standard)*, 364 U.S. 464 (1953) to allow it and the National Labor Relations Board to determine whether an employee **subjectively intends to be disloyal** when considering whether an employer has "cause" to discharge the employee. In doing so, the United Stated Circuit Court for the District of Columbia has disregarded the Supreme Court's standard for assessing such situations and has created a conflict with other circuits that have determined that the standard for evaluating disloyal conduct is objective, not subjective.

This case presents two questions:

1. Whether, under *Jefferson Standard*, an employer may discharge an employee for his or her disloyalty when that employee makes disparaging and disloyal public statements about the employer's only customer?

2. Whether, in such cases, the employee's disloyalty is measured under an objective or subjective standard?

PARTIES TO THE PROCEEDING

Petitioner MasTec Advanced Technologies, A Division of MasTec, Inc., was the Petitioner and Cross-Respondent in the D.C. Circuit Court of Appeals, along with its customer, DirecTV. Respondent National Labor Relations Board was the Respondent and Cross-Petitioner in the Fifth Circuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Circuit Rule 26.1, Petitioner MasTec Advanced Technologies, a division of MasTec, Inc., provides, among other services, installation and maintenance services for satellite television equipment under contract with various satellite television providers, including DirecTV, Inc., which recently merged with AT&T. MasTec Advanced Technologies is a division of MasTec, Inc. MasTec, Inc. is a publicly-traded Florida corporation.

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PETITION FOR A WRIT OF CERTIORARI

This case arises from proceedings before the National Labor Relations Board ("Board" or "NLRB"), but involves broad legal issues of significance, including the Circuit Court's modification of the Supreme Court's standard relating to an employer's ability to discharge an employee for disloyalty.

After learning that its employees had made disparaging, disloyal and untruthful public statements on television against its only customer at its Orlando location, MasTec Advanced Technologies, a division of MasTec, Inc. ("MasTec"), investigated these statements and their truthfulness and terminated the employees' employment. After the employees filed unfair labor practice charges with the Board against MasTec and DirecTV, Region 12 of the Board issued a complaint with respect to those charges. An administrative law judge ("ALJ") held a hearing with respect to the underlying unfair labor practice charges. In his decision following the hearing, the ALJ determined that the employees' statements on the news broadcast were related to an ongoing labor dispute but concluded that their statements were so "disloyal, reckless, and maliciously untrue" so as to lose the Act's protections. (App'x D 158-159). In so holding, the ALJ determined that the employees' statements were unprotected by the Act and, as a result, MasTec's termination of the employees did not violate the Act. (*Id.*).

The Board disagreed and reversed the ALJ's decision, holding that while the ALJ correctly found the employee communications were related to an ongoing labor dispute, the ALJ "clearly erred in finding that the employee

communications . . . were either maliciously untrue or so disloyal and reckless as to warrant removal of the Act's protections." (App'x C 93). The Board ostensibly applied this Court's two-prong test from *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953) and incorrectly found that the employees' participation in the local news broadcast was protected, concerted activity and, therefore, that the employees were discharged in violation of the National Labor Relations Act. (App'x C 98).

Affirming the decision of the NLRB, the D.C. Circuit panel improperly rejected the arguments that the Board misapplied the *Jefferson Standard* decision. Specifically, the panel's split decision modified and severely narrowed the definition of disloyalty for which an employer may terminate an employee under Section 7 of the NLRA. (App'x B 23-35). The panel's decision also ignored Supreme Court precedent and decisions from other circuits by permitting the NLRB to apply a subjective, rather than objective, standard to evaluating employee disloyalty. (*Id.*). By applying a subjective standard of disloyalty in which the employer must demonstrate an employee's intent to harm the employer, the majority's decision eviscerates the right of an employer to terminate an employee who is disloyal under *Jefferson Standard*. (*Id.*). In doing so, the D.C. Circuit improperly altered the Supreme Court's precedent and gave protection to employees who engaged in disloyal speech in attacking MasTec's sole customer at the location in question. (*Id.*).

In addition to this plain error concerning an important principle of federal law, the D.C. Circuit's opinion created a circuit split concerning the appropriate test

for determining whether an employee's intent should be evaluated on subjective or objective grounds with respect to whether his or her actions are appropriate under *Jefferson Standard*. (*Id.* at 28-30). This Court's review is necessary to resolve the split in authority created by the D.C. Circuit's erroneous holding and affirm the appropriate test is an objective one.

The net result of the D.C. Circuit's decision is an impermissible modification of the proper standard for determining whether an employee remains protected by the Act. The D.C. Circuit sanctioned the Board's improper application of *Jefferson Standard*. The decision of the Circuit Court for the District of Columbia, therefore, warrants this Court's review.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the District of Columbia is reported at 837 F.3d 25. The District of Columbia Circuit Court of Appeals' denial of Petitioner's Petition for Panel Rehearing is unreported.

The Decision and Order of the National Labor Relations Board is reported at 357 NLRB 103.

JURISDICTION

The judgment of the Court of Appeals was entered on September 16, 2016. A Petition for Panel Rehearing was denied on February 10, 2017. A Petition for Rehearing En Banc was denied on February 10, 2017. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 157 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [29 U.S.C. §158(a)(3)].

29 U.S.C. § 158(a) provides, in relevant part:

> It shall be an unfair labor practice for an employer--
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 U.S.C. § 157] ….

STATEMENT OF THE CASE

A. MasTec's Business and Relationship with DirecTV

MasTec is a utilities and telecommunications infrastructure company. (App'x D 122). MasTec technicians

were responsible for installing, servicing and upgrading DirecTV systems in customers' homes. (*Id.*). They were paid on a piece rate system—the more jobs they completed, the higher their wages. (*Id.* 125)

Part of MasTec's business involves installing, upgrading and servicing DirecTV television satellite systems through its Advanced Technologies Division. (*Id.* 122). MasTec is a DirecTV home service provider or "HSP." (*Id.*). DirecTV subcontracts much of its satellite system installation work to HSPs throughout the country. The MasTec-DirecTV relationship is governed by a contract which, in March 2006, was entitled the "DirecTV, Inc. 2005 Home Service Provider Agreement." (*Id.* 122). Under the HSP Agreement, DirecTV paid MasTec by the job. (*Id.* 123). The Agreement gave DirecTV the right to take a service territory away from MasTec if DirecTV was unsatisfied with MasTec's performance. (*Id.*).

When the factual situation related to this case arose, DirecTV work comprised 100% of MasTec's business at its Orlando, Florida facility. (*Id.* 122). In 2006, MasTec employed over 100 technicians in Orlando. (*Id.*). Herbert Villa ("Villa") supervised technicians at the Orlando facility. (*Id.*). Villa reported to Christopher Brown ("Brown"), Operations Manager for North Florida. (*Id.*). Brown reported to Regional Vice President, Gus Rey, who reported to Senior Vice President Mark Retherford ("Retherford"). (*Id.* 123).

B. DirecTV Requires Connection of Telephone Lines to Satellite Receivers

In 2006, DirecTV required MasTec to connect a telephone line to every satellite receiver it installed. (*See id.* 127). Phone connections were required by DirecTV for reasons directly related to improving and enhancing services to customers. (*Id.* 126). Receivers that are connected to an active telephone line are known as "responders," meaning that they respond to a signal sent by DirecTV via telephone line. (*Id.* 125). When the telephone line is connected to the receiver, the customer can order pay-per-view programs with the use of a remote control. (*Id.* 126). Additionally, customers must have a telephone line connected to the receiver to use the receiver's caller ID function, which displays a caller's phone number on the television screen. (*Id.*). Finally, the receivers require an active telephone line to download updates to its operating system. (*Id.*).

C. MasTec Institutes a New "Non-Responder" Policy

MasTec had problems getting technicians to install telephone lines—that installation took time, cutting into installers' piece rate pay expectations. (*Id.* 127; Tr. 137). As a result, in 2006, DirecTV informed MasTec that it was going to begin charging MasTec when its responder rate dipped below 47% (though the actual contractual requirement remained at 100%). (Tr. 138). In response to DirecTV's direction, MasTec instituted a new payment policy to encourage its technicians to connect the telephone lines. (App'x D 127; Tr. 138–39).

On January 17, 2006, MasTec issued a written communication to technicians and explained the terms of the new pay policy during employee meetings. (App'x D 127; GC Ex. 8; *see also* Tr. 216–17, 303, 451). Technicians would be financially penalized if they did not connect enough telephone lines and rewarded if they connected a certain percentage of lines. The technicians were in an "uproar" at the meetings and "went crazy" over the new policy. (Tr. 325, 485). They complained that connecting 50% of responders was difficult because some customers had only cell phones, or that customers would take the telephone line out after it was installed. (App'x D 128-29; Tr. 176, 193, 304, 326). In response to technicians' concerns, supervisors took considerable time to address the issues in the meetings and told technicians what to do to respond to customer objections. (App'x D 128-29; Tr. 177, 219, 321-22, 597–98, 177).

Notwithstanding management's guidance, the technicians voiced strong opposition to the new non-responder policy. (App'x D 128-29). This opposition continued through additional meetings on March 27-28, 2006. (*Id.* 131-33). MasTec did not discipline any of the technicians for comments made relating to the new Non-Responder Policy.

D. The Technicians Publicly Protest MasTec's Non-Responder Policy

Technicians Joseph Guest, Frank Martinez, Hugh Fowler, Delroy Harrison and James Hehmann contacted the media about MasTec's pay policy. (*Id.* 134-35; Tr. 226, 412). Channel 6 reporter Nancy Alvarez ("Alvarez") responded to the technicians' pleas for a media spokesperson and agreed to meet with them. (Tr. 309).

The technicians decided to obtain the names and telephone numbers of all of their Orlando coworkers and to encourage them to attend an on-camera meeting at the television station. (Tr. 353). The on-camera meeting with reporter Nancy Alvarez aired several times during the first week of May 2006, approximately one month after the taping. (App'x D 143). The broadcast to the public included the following allegations, some of which are true and some of which are false:

- MasTec and DirecTV charge customers for features they may never use.
- Technicians get back-charged if they do not lie to customers.
- Telephone lines are not necessary for a DirecTV system.
- Telephone line connections only enhance service by allowing customers to order pay-per-view movies through the remote control.
- Telephone line connections are only a "convenience" to the customer.
- DirecTV and MasTec profit from every telephone line that is connected to a receiver.
- MasTec supervisors deduct $5 from technicians' paychecks for every receiver that is installed without a telephone line connection.

- Technicians were told to tell customers that the receivers would blow up if the telephone lines are not connected.

- Technicians have to lie to the customers or they will lose money.

(GC Ex. 3(a); RM Ex. 8(b)). MasTec's Technicians acknowledged at trial that the broadcast contained false information, including:

- It is not true that customers are charged for services "they may never use." There is no charge to connect a telephone line that does not involve custom work. (Tr. 258-59, 417–18). The majority of telephone connections are free and do not involve custom work. (Tr. 280).

- It is not true that technicians get back-charged if they "don't lie to customers." Guest, Fowler and Harrison all testified that telephone lines could be connected without lying to customers. (Tr. 259, 345, 418).

- It is not true that telephone line connections are only used for ordering pay-per-view movies. (Tr. 260).

- It is not true that technicians are charged back for "every" receiver not connected to a telephone line (they are charged only if they connect less than 50%). (Tr. 259–60, 345–46).

- It is not true that the technicians were told to lie to customers. (Tr. 259, 415).

E. WKMG Channel 6 Airs DirecTV's "Dirty Little Secret"

MasTec was aware of a television "investigative report" prior to its airing on Friday, April 28, 2006, as the television station contacted MasTec about its view of the situation, but it did not know when the story would air. (App'x D 137). Chris Brown saw a "teaser" on Channel 6 advertising a story slated to air on May 1. (App'x D 143; Tr. 566; RM Ex. 8(a), 8(b)). Brown testified that the information on the teaser "looked deadly wrong," and that he was "concerned for what customers might see." (Tr. 566). Brown called his supervisor, Gus Rey, as well as Vice President Mark Retherford, and they directed him to start recording Channel 6 news broadcasts. (App'x D 143; Tr. 148, 566–67).

Retherford saw the MasTec/DirecTV story on a May 1 broadcast,[1] as well as broadcasts on May 2 and 3. (App'x D 143; Tr. 149). Retherford provided Steve Crawford and others at DirecTV with the Channel 6 website link. (App'x D 143; Tr. 98). Retherford testified that he was "shocked" at the story, particularly because "they were pretty flippant about, you know, lying to customers . . .". (App'x D 143; Tr. 157–58).

At the hearing before the ALJ, Crawford, Retherford, Brown and Villa testified as to the specific lies contained in the broadcast. Crawford testified that he believed the

1. A transcript of the May 1 broadcast is at App'x D 138-43.

broadcast was a "slam on DirecTV." (Tr. 74). Crawford spoke with Retherford after the broadcast aired, and told him that he did not want the technicians who appeared in the broadcasts representing DirecTV. (App'x D 144; Tr. 63, 76).

Following the initial May 1 broadcast, Retherford investigated whether the technicians were properly taught the appropriate reasons for connecting the telephone lines, and confirmed that they were. (Tr. 159–60). On May 2, Retherford asked Brown to identify all of the technicians appearing in the broadcasts (App'x D 144; Tr. 98) and spoke with DirecTV management. (Tr. 148). They discussed the scope of the HSP contract – specifically that DirecTV has the right to determine who will represent their product. (Tr. 99–101). Crawford was clear that DirecTV no longer wanted the technicians who appeared in the broadcasts to represent their product. (App'x 144; Tr. 101).

On Wednesday, May 3, Retherford spoke with his boss, Gus Rey, and Chris Brown. (Tr. 148). Retherford decided to terminate the technicians' employment. (Tr. 101). He reached his decision based on a number of considerations:

> It was very shocking to me to watch them disparage the customer and to mislead that way. And ultimately, I think I analyzed lots of reasons why it was shocking to me, but they did what they did, and that, you know, threatened my relationship with my client and what else was I going to do with them? I could no longer send them in people's homes representing DirecTV, and they had showed up in this, disparaging the product in their uniforms, in

> their DirecTV marked van. That whole event made them – really gave them no option to properly represent the product anymore, you know, and go into people's homes. What else am I going to do with them?

(Tr. 160–61). Retherford instructed Brown to discharge the technicians who appeared in the television broadcasts and he did. (App'x D 145; Tr. 148–49, 610).

As a result of the broadcasts, MasTec and DirecTV received telephone calls from customers seeking to cancel their DirecTV service. (App'x D 145; Tr. 162). Also, DirecTV brought in an alternative service provider to perform installations, service and upgrades in the Orlando market because MasTec did not have enough technicians left to adequately complete contractually required work. (Tr. 162). In addition, the Florida Attorney General initiated an investigation into DirecTV's practices. (RM Ex. 8(a), 8(b)).

F. Proceedings Before the NLRB and D.C. Circuit

Multiple unfair labor practice charges underlie the instant matter. First, on May 5, 2006, Joseph Guest, one of the fired installers, filed an unfair labor practice charge against MasTec in Case No. 12-CA-24979, which was later amended twice. Mr. Guest also filed a charge against DirecTV on June 29, 2006, which was amended once. In short, the unfair labor practice charges alleged that MasTec and DirecTV violated the Act in connection with the termination of 26 individuals who were employed by MasTec to perform services pursuant to a contract between MasTec and DirecTV.

On April 30, 2007, a consolidated complaint was issued by the Board, alleging that the 26 named employees engaged in protected concerted activities during the period of January through March 2006, including by making public appeals by virtue of their participation in the production of a television news report that aired on May 1 and 2, 2006. It was further alleged that DirecTV attempted to cause, and did cause, MasTec to terminate the individuals participating in this activity and that MasTec terminated these individuals by virtue of their participation in this activity. The consolidated complaint further alleged that certain MasTec supervisors threatened employees with discharge and other, unspecified repercussions resulting from their activity.

MasTec and DirecTV filed their separate answers to the consolidated complaint on May 14, 2007 and denied committing the unfair labor practices alleged, including because the employees were engaged in activities which were not protected by the Act.

A hearing was held before an Administrative Law Judge (the "ALJ") on July 23-25, 2007. During the hearing held by the ALJ, the principal issue was whether the former service technicians lost the protection of the NLRA by appearing on television and making false statements that disparaged MasTec and DirecTV, and were disloyal to their employer and its sole Orlando customer. (App'x D 115). In his decision of January 4, 2008, the ALJ found that the technicians' statements on the news broadcast were related to an ongoing labor dispute but concluded that their statements were so "disloyal, reckless, and maliciously untrue" so as to lose the Act's protections. (*Id.* 153-58). The ALJ found that the statements were "highly

inflammatory and damaging to Respondents' reputation," and that the story's emphasis on lies translating to higher costs was "inaccurate and misleading." (*Id.* 156). The ALJ concluded that the technicians lost the protection of the Act and, therefore, their termination did not violate the law. (*Id.* 159).

On July 21, 2011, following the filing of exceptions to the ALJ's decision, the Board issued a Decision and Order in this matter. (App'x C 77). In sum, the Board overruled the ALJ's decision and determined that MasTec and DirecTV violated Section 8(a)(1) and Sections 2(6) and (7) of the National Labor Relations Act. (*Id.* 77-78). The Board ostensibly applied the two-prong test set forth in *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953) and found that while the ALJ correctly found the employee communications were related to an ongoing labor dispute, the ALJ "clearly erred in finding that the employee communications . . . were either maliciously untrue or so disloyal and reckless as to warrant removal of the Act's protections." (*Id.* 93). The Board then found that MasTec had told the technicians to lie to customers and that the technicians' statements to the media were "accurate representations of what [MasTec] had instructed the technicians to tell customers." (*Id.*).

Member Becker concurred with the Board's Decision and Order. (*Id.* 107). He departed from the Board's reliance on *Jefferson Standard*, however, concluding that the technicians' statements in the news broadcast were "expressly and directly" related to an ongoing labor dispute, and it was that critical fact which took the case outside the scope of the unprotected conduct defined in *Jefferson Standard*. (*Id.* 111). Member Becker opined

that statements expressly and directly related to a labor dispute are protected under the Act unless made with actual malice. (*Id.* 110).

On August 8, 2011, MasTec and DirecTV timely filed petitions for review of the Board's Decision and Order with the D.C. Circuit. On September 16, 2016, a divided panel from the D.C. Circuit issued its Decision, denying MasTec and DirecTV's Petition for Review and granting the NLRB's Cross-Application for Enforcement. (App'x B 3).

In its decision, the D.C. Circuit majority affirmed the Board's decision and rejected MasTec and DirecTV's arguments that the employees' conduct was not protected by the Act. According to the panel majority, "there is no dispute that the technicians' statements in the interview segment indicated a relationship 'to an ongoing dispute between the employees and the employers,' satisfying the first prong of the *Mountain Shadows Golf* test." (*Id.* 21). Thus, it held, this case "solely concerns the second prong of the … test: whether the employees' statements in the interview were 'so disloyal, reckless or maliciously untrue as to lose the Act's protection.'" (*Id.* 22). In upholding the Board's conclusion that they were not, the majority held that *Jefferson Standard* was not controlling, because the Supreme Court "had no occasion" to address this second prong, (*id.*), and, then, proceeded to apply a subjective analysis through which to evaluate the nature of the employees' conduct. (*Id.* 31-32).

D.C. Circuit Judge Brown dissented. In her view, this is "not a close case" (*id.* at 46) but was instead "the paradigmatic case" in which termination of an

employee for disloyalty is permissible. (*Id.* 60). In holding otherwise, she explained, the panel majority subjected *Jefferson Standard* to "death by incorrect and irrelevant distinction" and "severely weakened the important protections afforded to employers through the second prong of the *Jefferson Standard*-inspired test." (*Id.* 57).

A Petition for Rehearing En Banc was denied on February 10, 2017. (App'x A 1). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

REASONS FOR GRANTING THE PETITION

MasTec's Petition for Writ of Certiorari should be granted for three reasons.

First, the D.C. Circuit's opinion misapplied the *Jefferson Standard* test and adopted an analysis that is contrary to this Court's precedent.

Second, the D.C. Circuit's opinion created a split in circuit authority regarding the proper legal standards to analyze employee misconduct and determine whether it loses the protection of the National Labor Relations Act.

Third, the D.C. Circuit's opinion essentially allows the technicians to target third parties, like DirecTV, as a way to further their dispute with their primary employer. Allowing this is contrary to the purposes of the Act, which is designed to protect non-primary employers and to promote industrial peace.

A. The D.C. Circuit's Interpretation of *Jefferson Standard* Contravenes this Court's Precedent

1. The D.C. Circuit's application of *Jefferson Standard* is contrary to authority and precedent because it improperly creates a subjective standard for determining whether an employee was appropriately terminated for disloyal actions

This Court's review is imperative because the D.C. Circuit adopted an erroneous interpretation of the Supreme Court's decision in *Jefferson Standard*. The D.C. Circuit's application of *Jefferson Standard* should be rejected. Further, this Court should affirm the appropriate, objective standard applicable to the determination of whether an employee's publication of a labor dispute is disloyal such that the employee loses the protection of the National Labor Relations Act.

Section 7 of the NLRA grants employees the right to "engage in … concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]" of the Act. *Id.* § 158(a)(1). Notwithstanding that prohibition, the Act expressly preserves the employer's right to "suspend[] or discharge[]" an employee "for cause," including disloyalty to the employer. *Jefferson Standard*, 346 U.S. at 472 (quoting 29 U.S.C. § 160(c)).

In *Jefferson Standard*, this Court stated it has "been clear" that the Act "does not interfere with the normal

exercise of the right of the employer to select its employees or to discharge them." 346 U.S. at 474 (quoting *Labor Board v. Jones & Laughlin*, 301 U.S. 1, 45-46 (1937)). "The legal principle that insubordination, disobedience or disloyalty is adequate cause for discharge is plain enough." *Id.* at 475. The Supreme Court expressly ruled in *Jefferson Standard* that the Board may not restrict "the right of discharge when that right is exercised for reasons other than intimidation and coercion." *Id.* Furthermore, this Court has also determined that it is "plain" that "disloyalty is adequate cause for discharge." *Id.* at 475. Thus, this Court has determined that an employee's disloyalty can be sufficient reason for an employer to lawfully terminate the employee.

To give effect to these provisions, the Board and courts must often determine the reason for an employee's discharge: whether it was because of "concerted activities engaged in for the purpose of collective bargaining or other mutual aid or protection," or because of a "separable cause"—such as disloyalty—that provides an employer with a legitimate reason for the decision. 346 U.S. at 475. Indeed, in recognizing the need to make this determination in *Jefferson Standard*, the Supreme Court held that a television broadcaster lawfully discharged nine technicians who, during a labor dispute, distributed a handbill that criticized the quality of the station's services. *Id.* at 465, 468. The technicians' actions demonstrated "such detrimental disloyalty as to provide 'cause' for" their dismissal. *Id.* at 472. Although the handbills did not refer to the labor dispute, the Court ruled that, even if the employees' actions had referred to a labor dispute (and, therefore, would have more clearly delineated activity protected by Section 7 of the Act), the

technicians' conduct was not protected by the Act: "Even if the attack were to be treated … as a concerted activity" and, therefore, protected by Section 7, "the means used … in conducting the attack have deprived the attackers of the protection of that section, when read in the light and context of the purpose of the Act." *Id.* at 477-78. Thus, pursuant to *Jefferson Standard*, an employee's actions can be sufficient to remove them from the protections of the Act, ***regardless of whether they would otherwise be considered protected by Section 7***. Tellingly, the Supreme Court's test in *Jefferson Standard* makes no examination into—or consideration of—the subjective motivation of the employees who distributed the handbills in reaching the determination that the conduct in question was beyond the protections of Section 7.

Applying this standard, the *Jefferson Standard* Court also determined that the employees made "a vitriolic attack on the quality of the company's television broadcasts." *Id.* As such, the terminations were upheld and the broadcaster was determined to have violated the Act.

Following this Court's decision in *Jefferson Standard*, the Board adopted a two-part test to determine whether an employee's appeal to a third party is protected by the Act. *See In re Am. Golf Corp.*, 330 NLRB 1238, 1240 (2000) ("*Mountain Shadows Golf*"). Ostensibly, the *Mountain Shadows Golf* test is designed to comply with this Court's decision in *Jefferson Standard* and to provide guidance to determine whether the employee's conduct has lost the protections of the Act. Under *Mountain Shadows Golf*, "employee communications to third parties in an effort to obtain their support" for a labor dispute are protected if the communication (1) "indicated it is related to an ongoing

dispute between the employees and the employers," and (2) "is not so disloyal, reckless or maliciously untrue as to lose the Act's protection." *Id.* Consistent with the *Jefferson Standard* test announced by this Court, the Board's *Mountain Shadows Golf* analysis did not evaluate an employee's subjective intent in determining whether the employee's conduct was so disloyal as to lose the protections of the Act.

Despite this history, the Board and the D.C. Circuit have now discarded this clear precedent. There is no question that the facts here closely track those in *Jefferson Standard*: In reality, the actions were worse. MasTec employees were discharged not only because of disloyalty to their employer, they also accused DirecTV, the employer's only customer in Orlando, of deceptive business practices. Under the directive of *Jefferson Standard*, this conduct was clearly a "separable attack purporting to be made in the interest of the public rather than in that of the employees." *Id.* at 477. Thus, MasTec's technicians lost the protection of the Act by publicizing false allegations of business practices of DirecTV—MasTec's customer—which went well beyond their dispute with MasTec over its revised pay practices.

Further, the by permitting use of a subjective, intent-driven standard rather than the existing objective test, the D.C. Circuit panel majority not only ignored established precedent, it also substantially undercut the right to terminate disloyal employees that was articulated in *Jefferson Standard*. Under the analysis conducted below, disloyal employee conduct—no matter how severe or disruptive and regardless of whether it targeted an employer's customers—can now be rendered legitimate

simply by the employee testifying that he did not intend any significant or long-lasting harm to the company. That is clearly not the intent of the Supreme Court in *Jefferson Standard*. As noted by the dissent to the D.C. Circuit's panel decision, "[h]ow can the employer's right to discharge for disloyalty be 'elemental' and 'plain' when it hinges on an employee's subjective intent? The answer is self-evident: It cannot." (App'x B 54).

The panel majority's adoption of a new and excessively narrow construction of *Jefferson Standard* arose from its undue emphasis on a factual distinction between this case and *Jefferson Standard*. Unlike the statements at issue here, the disparaging communications in *Jefferson Standard* did not refer to the pending labor dispute. *See* 346 U.S. at 468. Because those *Jefferson Standard* communications thus "failed at what would become the first step of the *Mountain Shadows Golf* test," the panel majority opined that the Supreme Court "had no occasion to address" in *Jefferson Standard* the second part of the test—i.e., to decide whether the communications were "'so disloyal, reckless, or maliciously untrue' as to fall outside the Act's protections" (App'x B 22).

This analysis is plainly incorrect. First, the D.C. Circuit panel failed to appreciate that *Mountain Shadows Golf* and its test was adopted so that the Board could comply with this Court's directives in *Jefferson Standard*. Thus, the Board was fitting *Mountain Shadows Golf* to the considerations made by this Court in *Jefferson Standard*, not the other way around.

Second, contrary to the D.C. Circuit panel's decision below, the Supreme Court did, in fact, address whether

the employees' communications were so disloyal as to fall outside of the Act's protections. Indeed, "not only did *Jefferson Standard* have 'occasion' to address the second prong" of the *Mountain Shadows Golf* test, "it said the employees' disloyalty rendered irrelevant any satisfaction of the first prong." *Id.* In *Jefferson Standard*, this Court clearly noted that "[e]ven if the attack were to be treated … as a concerted activity wholly or partly within the scope of those mentioned within § 7 [of the NLRA], the means used by the technicians in conducting the attack have deprived the attackers of the protection of that section." 346 U.S. at 477-78. Thus, there is no question that this Court considered employee disloyalty as part of the *Jefferson Standard* test. Moreover, it is also plain that the second prong of the *Mountain Shadows Golf* test was clearly designed to embody this latter portion of the *Jefferson Standard* test.

Despite this, the D.C. Circuit panel majority mistakenly read the above-quoted sentence "to pertain to the first-step inquiry, not the second step." (App'x B at 22). In its view, "the Court there confirmed that, even if the Board had found the employees' handbill to be protected activity connected to the ongoing labor dispute, the Court would have disagreed because the 'means used by the technicians' in the handbill had omitted any reference to … that dispute." (*Id.* 23). That this analysis is incorrect is clear from prior precedent interpreting and applying *Jefferson Standard* and *Mountain Shadows Golf*. Indeed, the D.C. Circuit, sitting *en banc*, expressly rejected that view. *See Diamond Walnut Growers, Inc. v. NLRB*, 113 F.3d 1259 (D.C. Cir. 1997). In that opinion, the *Diamond Walnut Growers* Court interpreted *Jefferson Standard* to mean that "a product disparagement campaign" may

qualify as a "separable attack purporting to be made in the interest of the public," as opposed to a protected "appeal for support for the union," "whether or not it references the labor dispute." *Id.* There can be no question that the D.C. Circuit panel decision is based upon an erroneous interpretation of *Jefferson Standard* and, indeed, a discarding of D.C. Circuit precedent as well.

2. The application of this test is an important and recurring issue that merits this Court's immediate review

Whether an employee engaged in disloyal conduct such that their actions are sufficient to remove them from the protections of the Act is a crucial factor in determining whether an employee has acted in a manner that removes him or him from the protection of the Act.

Relying upon an employee's subjective intent would eviscerate an employer's ability to terminate employees for disloyal conduct. Indeed, as previously determined by the D.C. Circuit in *George A. Hormel & Co. v. NLRB*, 962 F.2d 1061 (D.C. Cir. 1992), a "subjective approach … is inconsistent with the statutory policy of preserving the employer's right to discharge an employee for disloyalty." *Id.* at 1065; *see also id.* ("[A] subjective test is inconsistent with the Act."). As the Circuit Court explained, to measure loyalty based on evidence of the employee's subjective motivation "would so circumscribe as to defeat the employer's right to discharge an employee who is working against the employer's business interest." *Id.* "The Act requires an objective test of disloyalty." *Id.*

Yet, despite this, the D.C. Circuit's panel decision below determined that the Board correctly held that the technicians' discharge based on disloyalty was unlawful because, "[w]hile the technicians may have been aware that some consumers might cancel the Respondents' services after listening to the newscast, there is no evidence that they intended to inflict such harm" to the companies' businesses. (App'x B 51 (quoting 357 NLRB at 108)). Such reasoning would require that an employer investigate into the subjective reasoning of the employee. If, in that investigation, the employee then claims that he or she meant no harm, the employer is left with no ability to protect its interests.

Absent resolution from this Court, the Board's and D.C. Circuit's unclear, subjective "standard" will continue unhindered. Certiorari is necessary to rectify the D.C. Circuit's erroneous decision and to affirm the correct principles regarding an employer's ability to terminate employees as a result of disloyal actions and to stop the NLRB's continued non-acquiescence to proper authority on this important legal issue.

B. The D.C. Circuit's Opinion Highlighted a Circuit Split on the Legal Standards for Analysis of Employee Conduct Following *Jefferson Standard*

The D.C. Circuit panel's erroneous application of *Jefferson Standard* and its use of a subjective motivation to determine whether an employer could terminate the employee for disloyal actions directly contradicts Second, Third, Seventh and Ninth Circuit authority.

Second Circuit: In *Misericordia Hosp. Med. Ctr. v. NLRB*, 623 F.2d 808 (2d Cir. 1980), a head nurse over one of a hospital's patient-care units voiced serious deficiencies in the quality of care at the hospital in a survey performed by a body that accredits hospitals for purposes of federal funding. *Id.* at 810. In fact, the nurse played a part in creating an Ad Hoc Committee report about concerns. *Id.* at 810-11. The hospital responded with a rebuttal report and told nurses who helped create the report to resign or other action would be taken. *Id.* at 811. Subsequently, the hospital discharged the head nurse who engaged in these actions. *Id.* In analyzing the nurse's actions, the Second Circuit used an objective test and determined that the employee's actions were a "necessary" part of the employee's protected activity. *Id.* at 814-15.

Third Circuit: In *Texaco, Inc. v. NLRB*, 462 F.2d 812 (3d Cir. 1972), an employer prohibited employees from distributing a particular leaflet on company property because of undesirable content. *Id.* at 813. In considering whether the employees' actions were protected by the Act, the Third Circuit applied an objective test, which looked at the substance of the leaflets themselves and not at the employees' intent in distributing the leaflets. *Id.* at 814-15.

Seventh Circuit: In *NLRB v. Nat'l Furniture Mfg. Co.*, 315 F.2d 280 (7th Cir. 1963), a number of truck drivers went to Chicago for an exposition known as Furniture Mart, where their furniture-company employer was an exhibitor, to distribute handbills about a labor dispute with the employer. *Id.* at 281-82. The employer took adverse employment action against several drivers who participated. *Id.* at 282-83. In determining whether the employees' actions were outside the protections of the Act,

the Seventh Circuit relied upon an objective analysis, not a subjective one like that employed by the D.C. Circuit panel here. *Id.* at 285-86.

Likewise, in *NLRB v. Parr Lance Ambulance Service*, 723 F.2d 575 (7th Cir. 1983), the Seventh Circuit considered whether an employer's discharge of an employee for refusing to operate an ambulance lacking certain emergency equipment required by state law. In considering these facts, the Seventh Circuit found that an employee's motive is irrelevant in determining whether his or her actions constitute protective activity. *Id.* at 578. "**The motives of an employee who takes an action related to working conditions is irrelevant in determining whether the action is protected.**" *Id.* (citing *Dreis and Krump Manufacturing Co. v. NLRB*, 544 F.2d 320, 328 n. 10 (7th Cir. 1976) (emphasis added).

Furthermore, in *NLRB v. Knuth Bros.*, 537 F.2d 950 (7th Cir. 1976), the Seventh Circuit rejected the subjective intent of employees in determining whether their actions remain protected by the Act. In that case, the court determined that the Board and administrative law judge had failed to adequately consider the employer's interest in preserving confidentiality in discharging an employee, and that the employee acted recklessly in contacting a customer— outside the scope of his duties and instead of contacting his employer for labor-related information he sought—as well as needlessly revealing confidential information harmful to his employer. *Id.* 955-57. "The analysis of the ALJ and the Board majority is deficient in assessing the potentially denigrating impact upon his company's business, ***even though not intended***, of the temerarious tenor of" the employee's communication.

Id. at 956 (emphasis added). The Seventh Circuit ruled that the employee acted disloyally and with "reckless disregard" for the employer's interests, and that the employer "had the right to expect its employees to use greater care in using information acquired in the course of their employment. Failure to use such care was an act of disloyalty to respondent. His avowed purpose of aiding the organizational campaign was insufficient to protect him from the effects of his misconduct and constituted cause for discharge." *Id.*

Ninth Circuit: In *Sierra Pub. Co. v. NLRB*, 889 F.2d 210 (9th Cir. 1989), four newspaper employees were discharged for mailing a letter to the newspaper's advertisers about a labor dispute and asking for support for the union and to save the newspaper from plummeting circulation. *Id.* at 213-14. In considering whether the employer's suspension of these employees violated the Act, the Ninth Circuit applied an objective standard under the second prong of the *Jefferson Standard* and *Mountain Shadows Golf* tests. Specifically, the Ninth Circuit noted: "the disloyalty standard is at base a question of whether the employees' efforts to improve their wages or working conditions through influencing strangers to the labor dispute were pursued in a reasonable manner under the circumstances. Product disparagement unconnected to the labor dispute, breach of important confidences, and threats of violence are clearly unreasonable ways to pursue a labor dispute…. The mere fact that economic pressure may be brought to bear on one side or the other is not determinative, even if some economic harm actually is suffered. The proper focus must be the manner by which that harm is brought about." *Id.* at 220.

Similarly, the Ninth Circuit also noted that the proper test is an objective one in *Golden Day Sch., Inc. v. NLRB*, 644 F.2d 834 (9th Cir. 1981). In *Golden Day School*, employees of a child-care facility picketed and distributed leaflets about unionization; the employer questioned several participants and discharged many of them. *Id.* at 836. In analyzing the alleged disparaging and malicious nature of the leaflets at issue, the court looked to the leaflet's substance and what triggered their distribution—not the subjective motive of the employees who distributed them. *Id.* at 841-42.

Thus, the D.C. Circuit's reliance upon the subjective motivation of the employee engaged in the conduct in question contradicts the above-referenced authority and is inconsistent with both Supreme Court authority and the law of many other circuits. This Court's review is imperative to resolve this split and affirm the objective standard anticipated by the Supreme Court in *Jefferson Standard* and adopted by the Second, Third, Seventh and Ninth Circuits.

C. The D.C. Circuit's Decision is also contrary to authority and precedent because it improperly allows the targeting of non-employers to be protected Section 7 activity

The D.C. Circuit panel's decision permitted the MasTec employee-technicians to appeal for support by virtue of what was essentially a secondary boycott and, then, interpreted this action—of targeting a non-employer as part of a labor dispute—to be protected Section 7 activity. In doing so, the Board and the D.C. Circuit expanded the scope of labor disputes beyond

the immediate employer-employee relationship in a way which violates long-established rules governing the use of economic force in labor disputes. Indeed, the D.C. Circuit's decision sanctions public attacks on the products and business policies of the employer's customers, clients and business partners and the products and business policies of the employer's customers, clients and business partners. Such allowance is clearly contrary to the purposes of the Act and its prohibition of secondary boycotts.

Importantly, just six years prior to *Jefferson Standard*, Congress enacted the Act's secondary boycott provisions in order to protect neutral or "secondary" businesses from picketing or false or misleading publicity that grows out of a union's dispute with another employer. *See NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (1951) (holding that the Act's prohibition against secondary boycotts is designed to shield "unoffending employers and others from pressures in controversies not their own").

Here, the D.C. Circuit's decision essentially allows employees to engage in a secondary boycott. That is, the employees have been allowed to publicize their dispute with MasTec by targeting its larger, more well-known customer, DirecTV, and permit an appeal to the public for support in its dispute with MasTec by falsely accusing DirecTV of certain business practices. The result of this activity was that the public engage in a boycott of DirecTV. Indeed, that DirecTV, not MasTec, was the overwhelming focus of the broadcasts which triggered the employees' termination clearly demonstrates that the employees intended to publicize a dispute with DirecTV, a company that was not their employer. Given this, the employees *could not have been publicizing a labor dispute—or*

otherwise been engaging in protected activity—vis-à-vis DirecTV.

Yet, DirecTV was determined to have violated the Act by informing MasTec that it did not want the employee-technicians—who had publicized a non-protected dispute with them—to represent them represent DirecTV in its customers' homes. That is, the Board found, and the D.C. Circuit agreed, that DirecTV had committed an unfair labor practice by "causing" MasTec to terminate these employees. 357 NLRB No. 17, slip op. at 7. This finding sets aside that the employees had no labor dispute with DirecTV and that DirecTV could have terminated the contract with MasTec (which likely would have also "caused" the termination of the technicians). A company does not commit an unfair labor practice by refusing to do business with a contractor whose employees engage in union or Section 7 activity. *See Plumbers Local 447 (Malbaff Landscape Constr.)*, 172 NLRB 128, 129 (1968) ("an employer does not discriminate against employees within the meaning of Section 8(a)(3) by ceasing to do business with another employer because of the union or nonunion activity of the latter's employees").

Despite this legal background, the D.C. Circuit validated the employees' targeting of DirecTV. This liability greatly expands employee rights under the Act to allow employees to target their employer's customers under the guise of publicizing a labor dispute. The purposes underlying the Act—fostering industrial peace—are not furthered by allowing individual employees to target third parties as part of a primary labor dispute.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED FEBRUARY 10, 2017

IN THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT

No. 11-1273

DIRECTV, INC.

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

Filed
February 10, 2017

Before: ROGERS, BROWN, and SRINIVASAN, Circuit Judges

Upon consideration of the petition of petitioner DirecTV, Inc. for panel rehearing filed on November 14, 2016, it is **ORDERED** that the petition be denied.

Per Curiam

Appendix A

FOR THE COURT:
Mark J. Langer, Clerk

BY: */s/*
Ken R. Meadows
Deputy Clerk

APPENDIX B – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, DECIDED SEPTEMBER 16, 2016

IN THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT

No. 11-1273

DIRECTV, INC.

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

Filed
September 16, 2016

On Petition for Review and Cross-Application
for Enforcement of an Order of the
National Labor Relations Board

Before ROGERS, BROWN, and SRINIVASAN, Circuit Judges.

Dissenting opinion filed by Circuit Judge BROWN.

Appendix B

SRINIVASAN, Circuit Judge:

The National Labor Relations Act protects employees' right to engage in concerted activities. That right encompasses protesting an employer's actions or policies through an appeal to the public for support. But while the Act protects employees' right to engage in such third-party appeals, the Act also recognizes the prerogative of employers to discharge employees "for cause." Those two principles can come into tension. That can happen, for instance, when employees publicly criticize their company in an attempt to draw support in an ongoing labor dispute, and the company then fires the employees for disloyalty.

The National Labor Relations Board bears responsibility for balancing the right of employees to engage in concerted activity against the right of employers to discharge disloyal workers. Under the Board's approach, an appeal to third parties in connection with an employment-related dispute can qualify as protected concerted activity even if the appeal is disloyal and disparaging of the employer in some measure. But if the employees' appeal rises to the level of flagrant disloyalty, wholly incommensurate with any employment-related grievance, or if the employees make maliciously untrue statements about their employer, their conduct is no longer protected and their employer can discharge them for cause.

In this case, a group of employees, frustrated by a new pay policy at work and unable to make headway in direct discussions with their employer, aired their grievances publicly in an interview with a reporter for a

local television news station. The company responded by firing the employees. The Board found that the company's termination of the employees was an unfair labor practice. In the Board's view, the employees' participation in the interview in furtherance of their employment-related grievances was protected concerted activity, and their statements were neither so disloyal nor so maliciously untrue as to fall outside the Act's protection. The Board therefore ordered the employees' reinstatement.

The employer, together with another company involved in the employees' termination, seeks review of the Board's decision. In the companies' view, the employees' statements in the television interview did not fall within the bounds of protected concerted activity because the statements were both maliciously untrue and flagrantly disloyal, wholly out of step with the employees' objections to the pay policy. The question for this court is not where we think the line between protected and unprotected activity should be drawn. Instead, we must determine whether the Board's finding that the employees' third-party appeal falls on the protected side of the line is in accordance with the law and supported by substantial evidence. We answer those questions in the affirmative and thus enforce the Board's order.

I.

A.

This case involves two companies, DirecTV, which sells satellite television services to consumers, and MasTec, one of DirecTV's contractors. DirectTV relies

on contractors such as MasTec to install satellite television receivers in subscribers' homes.

The events in question began to unfold in early 2006. At the time, DirecTV wanted each of its television receivers connected to a working (landline) phone line in customers' homes. A phone connection enabled customers to take advantage of certain features such as ordering pay-per-view movies using a remote control (without needing to make a phone call), downloading software upgrades, and viewing phone caller-ID on their television screens. A phone connection also benefitted DirecTV by allowing the company to track customers' viewing habits and thus to make more effective programming decisions.

In furtherance of DirecTV's aim to connect its receivers to a phone line, the company required its contractors to include connecting (and installing if necessary) a phone line as part of the standard receiver installation package, at no additional charge. DirecTV tracked the number of receivers each contractor successfully connected to phone lines.

In January 2006, MasTec's Orlando, Florida, office had the lowest connection rate of any DirecTV contractor nationwide. Concerned with MasTec's poor performance, DirecTV took action: it began charging MasTec $5 for each receiver installed without a connection to a phone line, and it informed MasTec that it would continue to do so as long as MasTec's connection rate remained below 50%. MasTec passed along the monetary incentive to its installation technicians in the form of a new pay policy. First,

technicians generally would be paid $2 less for each receiver they installed, but would receive an additional $3.35 if they connected the receiver to a phone line. Second, technicians who connected receivers to phone lines in fewer than half of their installations in a thirty-day period would be "back-charged" $5 for each unconnected receiver.

Although DirecTV wanted its receivers connected to phone lines, a phone connection was unnecessary for a receiver to work: it is undisputed that customers could receive the full range of television programming through a receiver regardless of any connection to a phone line. In the absence of a phone connection, however, DirecTV could not track customers' viewing preferences, and customers could not take advantage of the aforementioned features such as ordering pay-per-view movies through their remote control.

Still, many customers resisted making a phone connection. Some customers relied exclusively on cellular phone service and thus had no landline phone; others sought to maintain privacy by preventing DirecTV from knowing about their viewing preferences; and others wished to avoid giving their children ready access to pay-per-view movies. In addition, some customers disliked the sight of a phone cord running along the wall or across a room to connect the receiver to a phone line. For those customers, MasTec offered two premium installation options, under which, for an additional charge of roughly $50, there would be no visible cord.

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Whatever the customers' reasons for resisting a phone connection, MasTec technicians—as evidenced by their low connection rate—struggled to connect receivers to phone lines. Perhaps unsurprisingly, then, the technicians strongly disfavored MasTec's new pay policy. In meetings with management, technicians complained about the fairness of the policy and the effect on their compensation.

Both MasTec and DirecTV responded to the technicians' concerns with advice for connecting more receivers. Some of the advice consisted of run-of-the-mill sales tactics such as persuading customers of the benefits of a phone connection. Some of the advice plainly was not meant to be taken literally, such as when a MasTec manager jokingly told technicians they should tell customers the DirecTV system would "blow up" without a phone connection.

But some of the advice was understood by technicians to suggest that they mislead or lie to customers about the necessity of a phone connection to receive television programming. For instance, the same MasTec manager who joked that technicians should tell customers the system would "blow up" without a phone connection also said that technicians should tell customers "whatever you have to tell them" and "whatever it takes" to gain approval to connect a phone line. MasTec supervisors also instructed technicians simply to connect a phone line without notifying customers. At least one supervisor said that technicians should advise customers that a receiver would not work without a phone connection. MasTec also showed technicians a video in which two DirecTV officials

recommended telling customers that the phone line was a "mandatory part of the installation" and was "need[ed] ... for the equipment to function correctly." *See MasTec Advanced Techs.*, 357 NLRB 103, 104 (2011); ALJ Op. 7–9 (J.A. 7–9); Training Video Tr. 2 (J.A. 431). The officials further suggested that technicians connect a phone line without telling the customer they were doing so.

In the face of that advice, technicians continued to voice their concerns and frustration. MasTec refused to change the pay policy. And neither company rescinded or modified its advice that technicians should do "whatever it takes" to make phone connections.

When the technicians received their first paychecks under the new pay policy, they revolted. They protested in the MasTec parking lot for two days, demanding more transparency and an end to the policy. In response, MasTec management offered to review the data affecting pay and to help technicians keep track of their connection rate during the month. But MasTec still refused to change the policy.

Getting nowhere with protests and direct talks with their employer, a group of MasTec technicians contacted a local television news station, which agreed to air a story. The technicians arrived at the station in their DirecTV vans and wearing DirecTV uniforms. A reporter from the station interviewed the technicians as a group. The station showed the resulting interview segment several times on the local news.

The segment addressed the technicians' grievances concerning the pay policy and their belief that they were being told to lie to customers; it also

conveyed the reporter's understanding that the emphasis on a phone connection could ultimately cost customers money (in the form of the additional charge for a premium installation under which there would be no visible phone cord). The news story proceeded as follows (and, as edited by the news station, contained statements from four technicians, reproduced in italics for demarcation).

> News Anchor: Yeah ... technicians who have installed hundreds of DirecTV satellite systems across Central Florida ... they're talking about a company policy that charges you for something you may not ever use. And as problem solver Nancy Alvarez found, if you don't pay for it, the workers do.
>
> Reporter Alvarez: They arrived at our Local 6 studios in droves. DirecTV trucks packed the parking lot and inside the technicians spoke their minds. (Accompanying video showed more than 16 DirecTV vans in the parking lot followed by a shot panning a group of technicians wearing shirts bearing the DirecTV logo.)
>
> (The scene shifts to a room where more than 20 technicians were seated, facing Alvarez.)
>
> Technician Lee Selby: *We're just asking to be treated fairly*.

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Alvarez: These men have installed hundreds of DirecTV systems in homes across Central Florida but now they admit they've lied to customers along the way.

Technician Hugh Fowler: *If we don't lie to the customers, we get back charged for it. And you can't make money.*

Alvarez: We'll explain the lies later but first the truth. Phone lines are not necessary for a DirecTV system; having them only enhances the service allowing customers to order movies through a remote control instead of through the phone or over the internet.

Technician Frank Martinez: *It's more of a convenience than anything else....*

Alvarez: But every phone line connected to a receiver means more money for DirecTV and MasTec, the contractor these men work for. So the techs say their supervisors have been putting pressure on them. Deducting five bucks from their paychecks for every DirecTV receiver that's not connected to a phone line.

Martinez: *We go to a home that ... needs three ... three receivers that's ... fifteen dollars.*

Alvarez: Throw in dozens of homes every week and the losses are adding up fast.

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Alvarez (questioning a room full of technicians): How many of you here by a show of hands have had $200 taken out of your paycheck? (Most technicians raise hands.)

Martinez: *More*.

Alvarez: Want to avoid a deduction on your paycheck? Well, according to this group, supervisors have ordered them to do or say whatever it takes.

Martinez: *Tell the customer whatever you have to tell them. Tell them if these phone lines are not connected the receiver will blow up.*

Alvarez: You've been told to tell customers that ...

Martinez: *We've been told to say that. Whatever it takes to get that phone line into that receiver.*

Alvarez (reporting): The lie could cost customers big money ... the fee to have a phone line installed could be as high as $52.00 per room ... want a wireless phone jack? That will cost you another 50 bucks.

(Alvarez shown attempting unsuccessfully to obtain comment from MasTec at its offices.)

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Alvarez (reporting): But statements from their corporate office and from DirecTV make it clear the policy of deducting money from employees' paychecks will continue. A DirecTV spokesman said techs who don't hook up phone lines are quote 'denying customers the full benefit and function of their DirecTV system.' These men disagree and say the policy has done nothing but create an environment where lying to customers is part of the job.

Alvarez (interviewing): It's either lie or lose money.

Technician Sebastian Eriste: *We don't have a choice.*

Alvarez (reporting): Now ... during our investigation, MasTec decided to reimburse money to some techs who had met a certain quota but the policy continues and one reason could be that DirecTV does keep track of their customers' viewing habits through those phone lines. Now just last year, DirecTV paid out a $5 million settlement with Florida and 21 other states for deceptive practices and now, because of our story, the attorney general's office is looking into this newest issue so we'll, of course, keep you posted.

News Anchor: You think they would have learned the first time.

> Alvarez: You think so. We'll see what happens.
>
> News Anchor: Thank you, Nancy.

MasTec, 357 NLRB at 104–06; Broadcast Tr. (J.A. 434–36). Neither Selby nor Martinez is one of the alleged subjects of discrimination in this case, as both men resigned before the terminations at issue here.

When the segment aired, MasTec informed its contacts at DirecTV. DirecTV, in turn, told MasTec it did not want the technicians in the broadcast representing DirecTV in customers' homes. MasTec then fired nearly all of the technicians who participated in the broadcast, including those who did not speak on air.

B.

In an unfair labor practice proceeding against MasTec and DirecTV, the companies initially prevailed before an administrative law judge (ALJ). The ALJ first found that the technicians' appeal to the public through the news story related to an ongoing labor dispute with their employer, as was necessary for their conduct to qualify as protected concerted activity. The ALJ then turned to the "more difficult issue" of whether the technicians' statements in the segment nonetheless fell outside the Act's protection because they were "so disloyal, disparaging and malicious as to be unprotected." ALJ Op. 18 (J.A. 18). The ALJ concluded that the technicians' statements met that standard and thus were unprotected.

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The Board disagreed with the ALJ. The Board explained that, under its decisions, "employee communications to third parties in an effort to obtain their support are protected where" (i) "the communication indicate[s] it is related to an ongoing dispute" and (ii) it "is not so disloyal, reckless or maliciously untrue as to lose the Act's protection." *MasTec*, 357 NLRB at 107. As to the first prong, the Board agreed with the ALJ "that the employee communications here were clearly related to their pay dispute." *Id.* As to the second prong, the Board found that the ALJ "clearly erred in finding that the employee communications and/or participation in the Channel 6 newscast were either maliciously untrue or so disloyal and reckless as to warrant removal of the Act's protection." *Id.*

With regard to whether the technicians' statements were "maliciously untrue," the Board determined "that almost all of the statements ... were truthful representations of what the [companies] told them to do," and any "arguable departures from the truth were no more than good-faith misstatements or incomplete statements, not malicious falsehoods." *Id.* at 107–08. With regard to whether the statements amounted to "unprotected disloyalty or reckless disparagement," the Board explained that "it will not find a public statement unprotected unless it is flagrantly disloyal, wholly incommensurate with any grievances which [the employees] might have." *Id.* (quoting *Five Star Transp., Inc.*, 349 NLRB 42, 45 (2007)). Here, the Board found, the technicians' statements did not meet that standard. As a result, the Board held that the companies had committed an unfair

labor practice by firing the technicians for participating in the interview.

The companies filed petitions for review in this court, and the Board filed a cross-application for enforcement. *See* 29 U.S.C. § 160(e), (f). The Board also moved for summary enforcement of the portions of its order relating to issues that are unchallenged here—threats made by MasTec to its employees in violation of the Act and two of MasTec's workplace policies found to violate the Act. *See* Board Br. 27–28. Because MasTec brings no challenge to those portions of the order, we grant the Board's request for summary enforcement as to those issues. *See Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 765 (D.C. Cir. 2012).

II.

This court "must uphold the judgment of the Board unless, upon reviewing the record as a whole, we conclude that the Board's findings are not supported by substantial evidence, or that the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case." *Tenneco Auto., Inc. v. NLRB*, 716 F.3d 640, 646–47 (D.C. Cir. 2013) (quoting *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011)). "Determining whether activity is concerted and protected within the meaning of Section 7 [of the Act] is a task that implicates the Board's expertise in labor relations," so the "Board's determination that an employee has engaged in protected concerted activity is entitled to considerable deference if it is reasonable." *Citizens Inv. Servs. Corp. v. NLRB*, 430 F.3d 1195, 1198 (D.C. Cir. 2005) (quoting *NLRB v. City Disposal Sys.,*

Inc., 465 U.S. 822, 829, 104 S.Ct. 1505, 79 L.Ed.2d 839 (1984)). Even "as to matters not requiring [the Board's] expertise," we may not "displace the Board's choice between two fairly conflicting views," regardless of whether we "would justifiably have made a different choice had the matter been before" us in the first instance. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

Applying those deferential standards here, we uphold the Board's decision. The Board held that the technicians' participation in the news segment was protected concerted activity relating to their ongoing dispute about the new pay policy. In the Board's view, the technicians' statements in the interview were neither so disloyal and incommensurate with their labor grievances, nor so maliciously untrue, as to fall outside the Act's protection. The companies do not dispute the correctness of the legal standards applied by the Board. They instead argue that the Board applied those standards in a manner contrary to law or reached conclusions unsupported by substantial evidence. We conclude that the Board acted within its discretion.

A.

The National Labor Relations Act protects the right of employees to "engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. That protection encompasses efforts by employees "to improve terms and conditions of employment" through appeals to third parties standing "outside the immediate employee-employer relationship." *Eastex, Inc. v NLRB*, 437 U.S.

556, 565, 98 S.Ct. 2505, 57 L.Ed.2d 428 (1978). For instance, this court has recognized the right of employees to support a consumer boycott of their employer's products in connection with a labor dispute (as long as they do not go beyond the dispute to disparage the employer's product itself). *George A. Hormel & Co. v. NLRB*, 962 F.2d 1061, 1064 (D.C. Cir. 1992). Employees may not be discharged for engaging in such protected conduct. *Id.*; *see* 29 U.S.C. § 158(a)(1).

While the Act protects the right of employees to engage in third-party appeals, the Act also establishes that an employer may not be required to reinstate an employee who has been "suspended or discharged for cause." 29 U.S.C. § 160(c). And "[t]here is no more elemental cause for discharge of an employee than disloyalty to his employer." *NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers*, 346 U.S. 464, 472, 74 S.Ct. 172, 98 L.Ed. 195 (1953) (*Jefferson Standard*).

Of course, some third-party appeals by employees, even in the context of a labor dispute, could fairly be considered disloyal. An "employee who supports a boycott of his employer's product," for instance, "violates his duty of loyalty to the employer." *Hormel*, 962 F.2d at 1064. Nonetheless, we have held that an employee has a protected entitlement to support a boycott of his employer's product if it arises in connection with an ongoing employment dispute. *Id.* at 1065.

The Act therefore recognizes two potentially competing interests. On one hand, the Act gives an employee a protected right to engage in (and thus to

avoid discharge for engaging in) third-party appeals in furtherance of an employment grievance, even if the employee's conduct amounts to disloyalty. On the other hand, the Act recognizes an employer's latitude to discharge an employee for cause, including for disloyalty. So where is the line between protected third-party appeals, for which employees are immune from discharge for disloyalty, and unprotected third-party appeals, for which employees are subject to discharge for disloyalty?

The Supreme Court's decision in *Jefferson Standard*, 346 U.S. 464, 74 S.Ct. 172, gives some guidance. The case arose out of a television station's contract dispute with its employees. The principal point of disagreement concerned the union's efforts to secure renewal of a contract provision subjecting employee discharges to arbitration. *Id.* at 467, 74 S.Ct. 172. Employees picketed outside the station's offices, displaying placards and distributing handbills criticizing the station for refusing to renew the arbitration provision. The employer took no exception to any of that conduct. *Id.* at 467, 74 S.Ct. 172.

About a month and a half into the dispute, however, a group of employees began distributing a new handbill. Unlike the original handbills, the new handbill "made no reference to the union, to a labor controversy or to collective bargaining." *Id.* at 468, 74 S.Ct. 172. It instead criticized the company's product and business policies in the form of "a vitriolic attack on the quality of the company's television broadcasts." *Id.* The station terminated the technicians associated with the new handbill, and the Board sustained the company's action.

Appendix B

The Supreme Court upheld the Board's decision. The Court emphasized that the new handbill "related itself to no labor practice of the company," and "made no reference to wages, hours or working conditions." *Id.* at 476, 74 S.Ct. 172. "The attack asked for no public sympathy or support," and the "policies attacked were those of finance and public relations for which management, not technicians, must be responsible." *Id.* In those circumstances, the Court explained, the "fortuity of the coexistence of a labor dispute affords these technicians no substantial defense." *Id.* That was because the new handbill "omitted all reference to," and "had no discernible relation to," the ongoing labor controversy. *Id.* Rather, the handbill simply made "a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income." *Id.* at 471, 74 S.Ct. 172. In that context, the handbill amounted to "a demonstration of such detrimental disloyalty as to provide 'cause'" for the employees' discharge. *Id.* at 472, 74 S.Ct. 172.

In the years since *Jefferson Standard*, the Board has formulated a two-prong test for assessing whether employees' third-party appeals constitute protected concerted activity or instead amount to "such detrimental disloyalty" as to permit the employees' termination for cause. Under the Board's test, "employee communications to third parties in an effort to obtain their support are protected where [i] the communication indicate[s] it is related to an ongoing dispute between the employees and the employers and [ii] the communication is not so disloyal, reckless or maliciously untrue as to lose the Act's protection."

American Golf Corp., 330 NLRB 1238, 1240 (2000) (*Mountain Shadows Golf*); *see Emarco, Inc.*, 284 NLRB 832, 833 (1987). This court has upheld the Mountain Shadows Golf test as "accurately reflect[ing] the holding in *Jefferson Standard*." *Endicott Interconnect Technologies, Inc. v. NLRB*, 453 F.3d 532, 537 (D.C. Cir. 2006).

The first prong of the test—whether "the communication indicate[s] it is related to an ongoing dispute between the employees and the employers"—focuses on whether it would be apparent to the target audience that the communication arises out of an ongoing labor dispute. *Mountain Shadows Golf*, 330 NLRB at 1240. "[T]hird parties who receive appeals for support in a labor dispute will filter the information critically so long as they are aware it is generated out of that context." *Sierra Publ'g Co. v. NLRB*, 889 F.2d 210, 217 (9th Cir. 1989). In *Jefferson Standard*, the handbill in question fell outside the Act's protection because it simply attacked the quality of the company's product without indicating any connection to the ongoing labor controversy.

In this case, by contrast, there is no dispute that the technicians' statements in the interview segment indicated a relationship "to an ongoing dispute between the employees and the employers," satisfying the first prong of the *Mountain Shadows Golf* test. 330 NLRB at 1240. The companies thus do not challenge the Board's finding "that the employee communications here were clearly related to their pay dispute." *MasTec*, 357 NLRB at 107.

Appendix B

The issue in this case solely concerns the second prong of the *Mountain Shadows Golf* test: whether the employees' statements in the interview were "so disloyal, reckless or maliciously untrue as to lose the Act's protection." 330 NLRB at 1240. The second prong does independent work, in that an employee's third-party appeal, to be protected, not only must relate to an ongoing labor dispute (the first prong) but also cannot be "so disloyal, reckless, or maliciously untrue" as to fall outside the Act's protections (the second prong). *Id.* *Jefferson Standard* had no occasion to address the latter issue because the employees' disparaging communication giving rise to their discharge in that case "omitted all reference to" the ongoing labor dispute—it thus failed at what would become the first step of the *Mountain Shadows Golf* test. 346 U.S. at 476, 74 S.Ct. 172.

Our dissenting colleague believes that *Jefferson Standard* in fact engaged with what would become the second step of that test because the Court, in the penultimate sentence of its opinion, said: "Even if the [employees'] attack were to be treated, as the Board has not treated it, as a concerted activity wholly or partly within the scope of those mentioned in § 7 [of the Act], the means used by the technicians in conducting the act have deprived the attackers of the protections of that section, when read in the light and context of the purpose of the Act." *Id.* at 477–78, 74 S.Ct. 172. We read that sentence to pertain to the first-step inquiry, not the second step. Specifically, the Court there confirmed that, even if the Board had found the employees' handbill to be protected activity connected to the ongoing labor dispute, the Court would have disagreed because the

"means used by the technicians" in the handbill had omitted any reference to—and had made no purported connection to—that dispute (a fact emphasized by the Court throughout its opinion, *see id.* at 468, 472, 476–77, 74 S.Ct. 172). And because a third-party appeal must indicate a connection to an ongoing labor dispute in order to satisfy the first step (mere contemporaneousness with a dispute is not itself enough), *see Mountain Shadows*, 330 NLRB at 1240, the handbill in *Jefferson Standard* would have been deemed unprotected even if the Board had found otherwise. The handbill thus was unprotected conduct for which the employees could be discharged, as had also been true of the unprotected activity in several cases referenced by the Court in a footnote appended to the above-quoted sentence. *See* 346 U.S. at 478 n.13, 74 S.Ct. 172.

In this case, unlike *Jefferson Standard*, the employees' third-party appeal indicated its connection to the ongoing labor dispute. We therefore must proceed to the second step to assess whether the employees' statements in the television segment were so disloyal or maliciously untrue as to relinquish the Act's protection.

B.

The Board concluded that the employees' communications in the news segment were neither "so disloyal" nor so "maliciously untrue" as to fall outside the Act's protection. *See MasTec*, 357 NLRB at 107–08. The companies challenge the Board's decision both as to disloyalty and as to malicious untruth. We find no basis to overturn the Board on either score under the governing standards of review. (We note that, while the

Mountain Shadows Golf test refers not only to "disloyal" or "maliciously untrue" statements but also to "reckless" statements, the Board considered the latter category in conjunction with disloyalty, *see id.* at 108, and neither company takes issue with the Board's approach in that respect.)

1.

We first consider the Board's conclusion that the technicians' statements in the interview segment were not "so disloyal ... as to lose the Act's protection." *Id.* at 107. As we have explained, it is well-established that third-party appeals can fall within the zone of protected activity even if indisputably disloyal. *See Hormel*, 962 F.2d at 1064–65. The question therefore is: when does an employee's participation in efforts to obtain third-party support become so disloyal that it ceases to fit within the Act's protection? And on the facts here, were the employees' statements in the interview about the new pay policy, and about the companies' urging them to mislead customers, so disloyal as to be unprotected?

Under the Board's decision, third-party appeals cross the line from protected to unprotected disloyalty when they become "flagrantly disloyal, wholly incommensurate with any grievances which [the employees] might have." *MasTec*, 357 NLRB at 108 (quoting *Five Star Transp., Inc.*, 349 NLRB at 45); *see also, e.g., Manor Care of Easton, Pa.*, 356 NLRB No. 39 (Dec. 1, 2010); *Valley Hosp. Med. Ctr., Inc.*, 351 NLRB 1250, 1260 (2007); *Sacramento Union*, 291 NLRB 540, 546 (1988); *Richboro Cmty. Mental Health Council*, 242 NLRB 1267, 1268 (1979); *Veeder–Root Co.*, 237 NLRB

1175, 1177 (1978). Neither company contends that the "flagrantly disloyal"/"wholly incommensurate" standard applied by the Board in this case is improper or otherwise contrary to law.

Our dissenting colleague nonetheless takes issue with that formulation on the ground that "the NLRA doesn't immunize disloyal behavior" in a third-party appeal at all, regardless of the degree of disloyalty. Dissenting Op. 53. That is incorrect, and is inconsistent with our precedent. In *Jefferson Standard* itself, the Court spoke in terms, not of whether the employees' third-party appeal was disloyal, but instead of whether it exhibited "*such detrimental disloyalty* as to provide 'cause' for" dismissal. 346 U.S. at 472, 74 S.Ct. 172 (emphasis added). Accordingly, when we later applied *Jefferson Standard* in our decision in *Hormel*, we specifically rejected the employer's argument that the Act posed no obstacle to its discharge of an employee for engaging in the disloyal conduct of supporting a boycott against the company. Although we deemed the employee's conduct in that regard to constitute disloyalty "[a]s a rule," we held that the Act still "protects [the employee] from discharge on that account" insofar as his actions "arose out of the ongoing labor dispute." *Hormel*, 962 F.2d at 1064–65. Under *Hormel*, that is, the Act *does* immunize disloyalty in a third-party appeal when it is related to an ongoing employment dispute.

Our court therefore subsequently accepted the Board's conclusion that, to afford valid grounds for discharge under *Jefferson Standard*, an employee's third-party appeal in connection with an ongoing labor

dispute must be more than just disloyal: it must be "*so disloyal* ... as to lose the Act's protection." *Endicott*, 453 F.3d at 537 (emphasis added) (quotation omitted). And once we accept, as our precedent compels, that disloyalty alone is not enough to remove the Act's protections in the context of a third-party appeal, we see no facial invalidity in the Board's general description of the requisite nature and degree of disloyalty as "flagrant[ ] disloyal[ty], wholly incommensurate with any grievances which [the employee] might have." *MasTec*, 357 NLRB at 108 (quoting *Five Star Transp., Inc.*, 349 NLRB at 45). The Board of course might have used various formulations to capture a third-party appeal that is unprotected because it is disloyal to an extent going sufficiently beyond the seeking of public support in connection with an ongoing labor dispute. Asking whether a public appeal is "wholly incommensurate" with the ongoing grievance, and is "flagrantly disloyal" in that sense, is one such formulation. Petitioners evidently agree: neither company, as noted, challenges that formulation.

In finding that the technicians' conduct qualifies as a protected third-party appeal under that standard, the Board explained that the technicians went to the television station "only after repeated unsuccessful attempts to resolve" their dispute through direct discussions with MasTec. *MasTe*c, 357 NLRB at 108. The Board further noted that, although the "newscast shed unwelcome light" on the companies' business practices, the segment "directly related to the technicians' grievance about what they considered to be an unfair pay policy that they believed forced them to mislead customers" about the need for a phone

connection to receive television programming. *Id.* In those respects, the technicians' conduct was not "wholly incommensurate with [their] grievances" about the pay policy and their being encouraged to mislead customers to avoid losing pay under that policy. *See id.*

The Board additionally observed that, while the technicians might have been aware that the newscast could lead some consumers to cancel their service, there was no evidence the technicians specifically "intended to inflict such harm on the" companies in their statements in the segment "or that they acted recklessly without regard for the financial consequences to" the companies (as opposed to an intent to garner public support for their own position in the ongoing pay dispute). *Id.* (citing *Community Hosp. of Roanoke Valley*, 220 NLRB 217, 223 (1975), *enf'd* 538 F.2d 607 (4th Cir. 1976); *NLRB v. Circle Bindery, Inc.*, 536 F.2d 447, 452 (1st Cir. 1976)). In that sense, the technicians' third-party appeal was no more disloyal (or more "flagrantly" so) than employees' efforts to obtain public support for a boycott of their company's products in an ongoing labor dispute, which, as noted, we held in *Hormel* is protected activity even though a breach of their duty of loyalty. *See* 962 F.2d at 1064–65.

The companies, joined by our dissenting colleague, see an inconsistency with *Hormel* in the Board's noting (as one consideration) the lack of evidence that the employees participated in the newscast with the intention to cause subscribers to cancel their service rather than the intention to gain public support in the pay dispute. In *Hormel*, we addressed three episodes in which an employee sought public support for

a national boycott of Hormel's products. *See id.* at 1062–63, 1065. The first two episodes occurred during, and in relation to, a labor dispute between the employee's union and the company. The Act thus "protect[ed] [the employee] from discharge on that account" even though the conduct constituted disloyalty. *Id.* at 1065. But the third episode took place after the labor dispute had ended. *See id.* at 1063, 1064. We found that support of a consumer boycott against one's own company at that point in time—"after the end of the labor dispute," *id.* at 1064—necessarily presents grounds for discharging the employee for disloyalty, because, by definition, it bears no relation to an ongoing labor dispute. The sole issue in *Hormel* with respect to the employee's *post*-dispute conduct therefore was whether he in fact "support[ed] the consumer boycott of Hormel products"—if he did, his actions "were not protected" and he could be "lawfully discharged" for disloyalty. *Id.*; *see id.* at 1065–66.

The companies' argument here focuses on our analysis of that issue in *Hormel*, i.e., whether the employee's post-dispute actions constituted support of the boycott, in which case it was unprotected disloyalty. The conduct in question consisted of driving a truck in a parade leading to a rally for the boycott and then attending the rally. *See id.* at 1063, 1065–66. The employee's actions, to any observer, would have appeared to constitute support of the boycott. The Board nonetheless concluded otherwise, on the rationale that, no matter how his actions may have appeared, the company failed to prove that he in fact intended to support the boycott. *See id.* at 1064–65. We explained that the Board erred in assessing the employee's

support for the boycott based solely on his actual intent (i.e., what he "believed in his heart of hearts"), rather than asking whether a "reasonable observer" would infer that the employee "acted in furtherance of the boycott." *Id.* at 1065–66. Here, the companies argue that the Board similarly erred by taking into account as one consideration whether the technicians, in participating in the newscast, "intended" to cause consumers to cancel their service. *MasTec*, 357 NLRB at 108.

The companies' argument is unpersuasive. The relevant discussion in *Hormel* addressed a different question than the one at issue here. In this case, the Board took note of whether the technicians intended to cause subscribers to cancel their service when assessing whether the technicians' participation in the news interview was "so disloyal" as to fall outside the Act's protection. In *Hormel*, by contrast, the discussion of employee intent pertained to the question of whether the employee had engaged in disloyal conduct in the first place—viz., whether he had acted in support of the boycott. In other words, the question in *Hormel* was, "did he do it?," whereas the question here is, assuming he did it, "does what he did rise to the level of flagrant disloyalty?" While *Hormel* bars any consideration of intent as to the former question, the decision does not address, and thus does not prohibit, the consideration of intent when assessing whether an employee's third-party appeal rises to the level of flagrant disloyalty.

Our dissenting colleague agrees that *Hormel* involved a different question, but believes that the difference is immaterial. *See* Dissenting Op. at 49. We disagree. *Hormel* establishes that an employee of course

cannot disclaim an action that rings out as disloyal to all the world by contending that he in fact did not intend to act disloyally. The employee had "violated his duty of loyalty to Hormel" by "driving in the parade and attending the rally to which it led"—he "clearly communicated to every observer that he was a member of the group supporting the boycott," regardless of whether the company showed what he "believed in his heart of hearts." *Hormel*, 962 F.2d at 1066. That is a meaningful limitation in circumstances like those in *Hormel*, in which the employee could not have been engaged in a protected third-party appeal because the labor dispute had already ended. As we explained, "extending protection to such conduct would so circumscribe as to defeat the employer's right to discharge an employee" for disloyalty. *Id.* at 1065. That understanding applies in any situation involving a discharge for disloyalty, not just in a third-party appeal to the public: whenever the ground for discharge is disloyalty, *Hormel* precludes insulating the employee from discharge on a theory that, however much it may appear that he engaged in disloyal conduct, he might not have intended to do so. Under *Hormel*, the appearance is enough to establish that the employee engaged in disloyal conduct.

The dissent believes that, although *Hormel* involved the question whether the employee engaged in disloyal conduct for which he could be discharged (because it was unconnected to any ongoing dispute), the decision's bar against considering employee intent as to that question necessarily also extends to the determination whether, when an employee's third-party appeal *is* connected to an ongoing dispute and thus may

be protected, it is so disloyal as to lose the Act's protections. *Hormel* itself did not think it was reaching the latter issue: we said that the case "turn[e]d upon the question whether the Board properly determined that [the employee] did not support the consumer boycott of Hormel products after the end of the labor dispute," when his conduct by definition would be grounds for discharge if disloyal. *Id.* at 1064. To be sure, in answering that question, we observed that "the Act requires an objective test of disloyalty." *Id.* at 1065. But that statement must be read in context, not in an expansive manner reaching even questions not before the court. Indeed, our dissenting colleague allows that intent can continue to play at least some role in connection with disloyalty after *Hormel*. *See* Dissenting Op. 51 n.4. And when read in context, it is apparent that *Hormel*'s mandate for an "objective test" pertained to the question whether the employee had engaged in the disloyal act of supporting a boycott against his company, *see* 962 F.2d at 1064–65, in which event he could be discharged for unprotected disloyalty having no connection to an ongoing dispute.

The Board could reasonably conclude that, even if an employee's subjective intent cannot bear on that question under *Hormel*, an employee's intentions can still shed meaningful light on whether, when a third-party appeal is related to an ongoing grievance, it is protected—in particular, on whether the employee primarily aimed to draw the public's support in the dispute or instead intended to go further by gratuitously causing harm to the company (i.e., "wholly incommensurate" with the grievance). The Board thus could consider an actor's state of mind to bear on

whether the degree and nature of his disloyalty warrants denying him the Act's protections even though his appeal relates to an ongoing grievance. *See Sierra Publ'g Co.*, 889 F.2d at 218–19 n.13 ("motive, if discernible, may illuminate loyalty or disloyalty"); *cf. Morissette v. United States*, 342 U.S. 246, 249 n.21, 72 S.Ct. 240, 96 L.Ed. 288 (1952) ("intent is of the very essence of [criminal] offenses based on disloyalty"). Here, accordingly, the Board permissibly considered whether the employees' statements in the news segment sought to draw public support for their grievance or instead aimed gratuitously to harm their employer by causing consumers to cancel services. *Hormel* does not bar consideration of an employee's motivations in that fashion to assess if a third-party appeal connected to an ongoing dispute is so disloyal as to be unprotected.

The companies get no further in their reliance on our decision in *Endicott Interconnect Technologies, Inc. v. NLRB*, 453 F.3d 532. There, an employee, in the aftermath of layoffs at his company, strongly criticized the company's management in statements to a reporter and in an internet posting. *Id.* at 534–35. He told the reporter that the layoffs left "gaping holes in th[e] business" and resulted in "voids in the [company's] critical knowledge base." *Id.* at 534. After the company warned him against making such statements, he nonetheless posted a message on a public internet forum saying, among other things: "This business is being tanked by a group of people that have no good ability to manage it. They will put it into the dirt just like the companies of the past...." *Id.* at 535. The company fired him, but the Board found that he had engaged in protected activity and ordered his reinstatement. *Id.*

Upon review, we set aside the Board's decision. We noted that the Board had invoked its *Mountain Shadows Golf* test for identifying protected third-party appeals, and held that the test was an accurate statement of the law. *Id.* at 537. We explained, though, that while the test calls for assessing whether an employee's statements were "so disloyal, reckless, or maliciously untrue as to lose the Act's protection," the Board had disregarded the "disloyalty" aspect of the standard altogether, instead focusing exclusively on whether the statements were maliciously untrue or reckless. *Id.* Examining the question of disloyalty in the first instance, we held that the employee's statements were so disloyal as to fall outside the Act's protection. We emphasized that the offending statements had been made by an "experienced insider," and endangered the viability of the company at a critical time when it "was struggling to get up and running under new management." *Id.*

Our decision in *Endicott* did not compel the Board in this case to conclude that the technicians' participation in the television interview amounted to flagrant disloyalty. *Endicott* of course did not establish that all conduct amounting to disloyalty automatically affords grounds for discharge: *Endicott* came after *Hormel*, in which we had already established that third-party appeals, even if amounting to disloyalty, can be protected concerted activity when connected to an ongoing labor dispute. *See id.* at 536 (citing *Hormel*).

The question of whether a third-party appeal is *so* disloyal as to fall outside the Act's protection is an inherently fact-intensive, context-dependent one. *See,*

e.g., Sierra Pub. Co., 889 F.2d at 217; *see also Jefferson Standard*, 346 U.S. at 475–76, 74 S.Ct. 172. In concluding in *Endicott* that the employee's statements crossed the line from protected to unprotected disloyalty, we thus focused on case-specific considerations such as the employee's status as an experienced insider, the particular vulnerability of the company as it was coming under new management, and the "caustic[ ]" nature of the employee's attacks claiming that the new management would "tank[ ]" the company and "put it into the dirt." 453 F.3d at 537. This case involves differently situated employees and companies. It also involves different types of statements, in that the technicians made no assertions about management decisions or management's running of the company outside the specific context of their grievances about the pay policy.

Significantly, moreover, we decided *Endicott* in circumstances in which the Board had failed to apply the "disloyalty" aspect of the *Mountain Shadows Golf* test altogether. *See id.* Considering the issue in a vacuum, we concluded that the employee's statements rose to the level of unprotected disloyalty. Here, by contrast, the Board specifically examined the question of disloyalty on the facts of this case, concluding that the technicians' statements were not so disloyal as to lose the Act's protection. In that setting, we do not reexamine the issue as if we were deciding it on a blank slate. Rather, we assess only whether there is "substantial evidence in the record to support the Board's conclusion." *Hormel*, 962 F.2d at 1066.

Appendix B

Substantial evidence supports the Board's determination that the technicians' statements in the news segment were not "flagrantly disloyal, wholly incommensurate" with their grievances against the pay policy. Neither of the companies argues otherwise. To prevail in any such argument, the companies would need to demonstrate that no reasonable mind could find the evidence adequate to support the Board's finding. *Universal Camera*, 340 U.S. at 477, 71 S.Ct. 456. They could not do so on the record before the Board.

The Board explained that: the technicians participated in the newscast only after unsuccessfully attempting to resolve their grievance directly with their employer; the news segment directly related to their objections to a pay policy viewed by them to be unfair and to call for them to mislead customers; and their statements sought to bring attention to the nature of their grievances rather than to unnecessarily tarnish their employer. *MasTec*, 357 NLRB at 108. In those circumstances, it was reasonable for the Board to conclude that the technicians' statements in the interview were not "flagrantly disloyal, wholly incommensurate with any grievances which they might have." *Id.*

2.

We turn next to the Board's finding that the technicians' statements in the interview were not "maliciously untrue." For a third-party appeal to fall outside the Act's protection on grounds of malicious untruth, it is not enough for employee statements to be false, inaccurate, or misleading. Such statements may be

"untrue," but they would not be "maliciously untrue." For statements to be "maliciously untrue and unprotected," they must be "made with knowledge of their falsity or with reckless disregard for their truth or falsity." *MasTec*, 357 NLRB at 107 (citing *TNT Logistics North America, Inc.*, 347 NLRB 568, 569 (2006), *rev'd. sub nom. Jolliff v. NLRB*, 513 F.3d 600 (6th Cir. 2008)); *see Sprint/United Mgmt. Co.*, 339 NLRB 1012, 1018 (2003); *Senior Citizens Coordinating Council of Riverbay Cmty. Inc.*, 330 NLRB 1100, 1107 n.17 (2000); *Delta Health Ctr., Inc.*, 310 NLRB 26, 36 (1993); *see also Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 64–65, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966) (adopting actual malice standard from *New York Times Co. v. Sullivan*, 376 U.S. 254, 280, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) for libel actions under state law arising out of labor disputes). And while our dissenting colleague questions whether the malicious-untruth inquiry should have any independent office, *see* Dissenting Op. 57, our decision in *Endicott* validated the Board's standard under which it examines whether a communication is "maliciously untrue" so "as to lose the Act's protection." 453 F.3d at 537. We have no occasion to revisit the matter here.

The companies do not challenge the Board's legal understanding of the malicious-untruth standard. Instead, they argue that certain statements in the news segment rose to the level of malicious untruth, and that the Board erred in finding otherwise. We review those arguments under the substantial evidence standard. We ask, that is, whether the Board could reasonably find the evidence adequate to support its conclusion that the technicians' statements were not maliciously untrue. *See*

Universal Camera, 340 U.S. at 477, 71 S.Ct. 456. Moreover, when applying the substantial evidence standard to the Board's decisions about protected versus unprotected conduct, we give "considerable deference" to the Board's "reasonable" conclusions because of the Board's particular expertise in the area. *Citizens Inv. Servs.*, 430 F.3d at 1198.

The Board concluded that, "for the most part," the technicians' statements in the news segment "were accurate representations of what [the companies] had instructed the technicians to tell customers" about the need to connect a phone line for the receiver to work. *MasTec*, 357 NLRB at 107. "Any arguable departures from the truth," the Board found, "were no more than good-faith misstatements or incomplete statements, not malicious falsehoods justifying removal of the Act's protection." *Id.* at 108. We hold that the Board could reasonably consider the evidence adequate to support its findings.

a.

The first statements at issue are those in which the technicians said that they were told to lie to customers about the need for a phone connection and that their pay would be reduced if they did not lie. In particular, one technician observed, "If we don't lie to the customers, we get back charged for it"; and another said, "We don't have a choice," after the reporter remarked, "It's either lie or lose money." *MasTec*, 357 NLRB at 105–06.

The companies argue that the Board improperly disregarded the ALJ's finding that the employees were

"never explicitly told to lie." ALJ Op. 19 (J.A. 19). In fact, the Board agreed that the technicians were not explicitly told to lie; it simply found that they were "*essentially* told to lie." *MasTec*, 357 NLRB at 107 (*emphasis* added). Substantial evidence supports the Board's conclusion. For instance, in a DirecTV training video—which the ALJ, Board, and this court all had the same opportunity to review—two DirecTV Vice Presidents advised the technicians to tell customers (falsely) that connecting a phone line "is a mandatory part of the installation and [needed] for the equipment to function correctly." Training Video Tr. 2 (J.A. 431). Neither company claims that statement was true.

Additionally, the Board explained, even if the companies "may have avoided expressly using the word 'lie' when suggesting ways to overcome obstacles to making receiver-phone line connections," the technicians were instructed to do "'whatever it takes' to make the connection" and to "tell customers 'whatever you have to tell them.'" *MasTec*, 357 NLRB at 107. In the Board's view, the "technicians would readily understand these instructions to include 'lie if you have to.' " *Id.* That is at least a reasonable conclusion to draw from the evidence. As a result, substantial evidence supports the Board's conclusion that there was no malicious untruth in the technicians' statements that they were told to lie.

Even so, the companies argue, it was maliciously untruthful for the technicians to say that they would lose money if they did not lie. The companies do not dispute that technicians were subject to a back-charge of $5 for each receiver they did not connect to a phone line. The companies see a malicious untruth, though, in the lack of

specificity in the interview segment that the per-receiver back-charge applied only if a technician failed to connect at least half of his receivers to a phone line over a 30-day period.

Substantial evidence supports the Board's conclusion that the absence of a fully elaborated explanation of the pay policy was not so maliciously untruthful as to lose the Act's protection. As an initial matter, the technicians had little, if any, control over the editing of their interview or the content of the final segment. *See id.* at 107 n.12. At any rate, as the Board observed, the technicians' statements in the edited segment "fairly reflected their personal experiences under the new pay scheme," in that "[a]lmost all of them ... had failed to achieve at least a 50 percent connection rate." *Id.* Indeed, some technicians may have lacked a full understanding that the back-charge applied only if their connection rate fell below the threshold. *See* Hearing Tr. 391 (J.A. 299). In that context, the Board reasonably concluded, "the failure to fully explain the 50 percent connection rule was at most an inaccuracy," and there "is no basis in the record to find that that technicians knowingly and maliciously withheld that information in order to mislead the viewing public." *MasTec*, 357 NLRB at 107.

Our dissenting colleague opines that, in a separate respect, the employees made maliciously untruthful statements by indicating that they would lose money if they did not lie to customers about the need for a phone connection. *See* Dissenting Op. at 55. The dissent agrees that the companies told the technicians to mislead customers into believing that the receivers

would not work without a phone connection. *Id.* at 56. But, our colleague reasons, the technicians still could have avoided any back-charge without lying to customers if the technicians disregarded the direction to lie and instead found other ways to improve their connection rates beyond the 50% threshold. Again, however, almost all of the technicians in fact had been unable to achieve that connection rate as a matter of their own actual experience. From their perspective, misleading customers into thinking there was no choice about a phone connection would have materially improved connection rates (and thus eliminated back-charges)—indeed, that is presumably why the companies essentially told the technicians to lie.

Considered in that light, the Board was not required to find a malicious falsehood in the technicians' indication that they faced continued back-charges if they did not lie. That was exactly their experience. We cannot set aside the Board's findings on this issue as unsupported by substantial evidence.

b.

The next statement at issue concerns a MasTec supervisor's suggestion that technicians should tell customers that a receiver would "blow up" if not connected to a phone line. In the interview segment, a technician referenced that comment by saying: "Tell the customer whatever you have to tell them. Tell them if these phone lines are not connected the receiver will blow up." *MasTec*, 357 NLRB at 105. And when the reporter queried, "You've been told to tell customers that," the technician responded, "We've been told to say

that. Whatever it takes to get the phone line into that receiver." *Id.*

The companies contend that the Board ignored the ALJ's credibility-based determination that the "blow up" comment was made in jest. In fact, however, the Board expressly characterized the comment as a "joking suggestion." *Id.* at 107. But the Board determined that, even as a joke, the supervisor's comment "underscored th[e] message" that the technicians should mislead customers if necessary, "as it undoubtedly was meant to do." *Id.* That is at least a reasonable conclusion about the comment given the context in which it was made. Indeed, the MasTec supervisor made the "blow up" comment in the course of advising technicians to tell customers "whatever you have to tell them" and do "whatever it takes" to connect a phone line. *Id.* at 104. The technician's statements in the interview segment reinforced that context in expressly tying the "blow up" comment to the mandate to tell customers "whatever you have to tell them" and "[w]hatever it takes." *Id.* at 105.

Insofar as the companies argue that the technician's statement rose to the level of being maliciously untrue simply because he did not expressly explain that the "blow up" comment was originally made in jest, we find no reversible error in the Board's decision. To the extent the comment was not self-evidently hyperbolic, the technician's failure to spell that out did not necessarily render his repetition of the comment maliciously untrue. It is undisputed that a MasTec supervisor made the comment, so the technician's repetition of it was not untruthful on its

face. Accepting that the comment was originally uttered as a joke, and that the technicians who heard it seem to have understood it that way, it was still part of the companies' telling technicians to do "whatever it takes," including lying to customers, to get receivers connected to phone lines. And because the technician's recounting of the "blow up" comment in the news segment specifically (and accurately) tied the comment to the further direction to say "whatever it takes," he conveyed a sense of the general context in which the comment was originally made.

In those circumstances, the absence of express specification that this particular way of being told to do "whatever it takes" was meant hyperbolically (as opposed to literally) did not require the Board to find that the technician's repetition of the comment was maliciously untrue. Indeed, to the extent the hyperbolic nature of the "blow up" comment would not have been immediately apparent to a listener, it is hard to see how the comment could have been understood in any other way upon reflection. After all, to believe that the supervisor in fact wanted technicians to tell customers a receiver would blow up without a phone connection, one would have to think that the companies, for some reason, wanted to promote the (false) belief that their product was so dangerous that it was susceptible to exploding in customers' homes. Why, a customer presumably would think, would any credible company sell me a product that might blow up inside my home, much less do so and then supposedly give me a *choice* to eliminate the danger at no cost? A listener to the interview in all likelihood thus would have understood—accurately—that the suggestion to tell customers the receiver might blow up

had been made in jest, and that the companies did not in fact want the technicians to propagate the false belief that their product could explode inside a family's home.

That is not to say that the Board necessarily would have been unjustified had it found that the failure to specify the joking nature of the "blow up" comment rendered the statement's repetition a malicious falsehood. But we do not approach that factual inquiry with fresh eyes; rather, under the governing standard, we affirm the Board as long as it could reasonably find the evidence for its conclusions to be adequate. The Board reasonably found that, as with the technicians' failure to explain all the details of the pay policy, the recounting of the "blow up" comment without fully elaborating its context amounted, at most, to an "incomplete statement[ ]," not a "malicious falsehood [ ] justifying removal of the Act's protection." *Id.* at 108.

c.

Finally, the companies argue that statements in the broadcast linking the technicians' grievances to extra fees for customers were maliciously untrue. In introducing the story at the outset of the segment, a news anchor in the studio said the technicians would be "talking about a company policy that charges you for something you may not ever use." *Id.* at 105. And subsequently, the reporter who interviewed the technicians said that the "lie"—i.e., that a phone connection is necessary to receive a signal—"could cost customers big money ... the fee to have a phone line installed could be as high as $52.00 per room ... want a wireless phone jack? That will cost you another 50

bucks." *Id.* The companies contend that those statements were maliciously untrue because the extra charges would apply, not for a standard phone connection, but only for a premium installation in which there would be no visible phone cord.

The reporter, however, stated only that the misleading suggestion about the need for a phone connection "could" result in an added installation cost for customers, not that it necessarily would do so. At any rate, the Board acknowledged that the way the segment described the issue "may have been misleading." *Id.* at 107 n.12. But the Board explained that all of the relevant statements were made by the reporter or other news personnel, not by the technicians themselves. *Id.* And the technicians "testified without contradiction that their only input was in responding to [the reporter's] questions on the day of the interview," and that they had no opportunity to see the segment before it aired. *Id.* The companies note that none of the technicians later disavowed the reporter's statements, and some even characterized the reporter as their "spokesperson" after the broadcast. *See* Hearing Tr. 292–93 (J.A. 255–56). Even so, given that statements are unprotected only when "made with knowledge of their falsity or with reckless disregard for their truth or falsity," *MasTec*, 357 NLRB at 107 (citing *TNT Logistics N. Am., Inc.*, 347 NLRB 568, 569 (2006)), we will not disturb the Board's finding that the statements by third parties do not meet that standard.

C.

DirecTV also argues that, even if the technicians had a protected right to criticize their direct employer (MasTec) in connection with their grievances, they had no protected rights vis-à-vis their employer's customer (DirecTV). That argument affords no basis for granting relief to DirecTV. The Act makes clear that, if nothing else, DirecTV committed an unfair labor practice by causing MasTec to terminate its employees. *See* ALJ Op. 17 (J.A. 17). DirecTV is an employer under the Act (and does not argue otherwise). And "[a]n employer violates the Act when it directs, instructs, or orders another employer with whom it has business dealings to discharge, layoff, transfer, or otherwise affect[ ] the working conditions of the latter's employees" for an unprotected reason. *Dews Constr. Corp.*, 231 NLRB 182, 182 n.4 (1977); *see also Int'l Shipping Ass'n*, 297 NLRB 1059, 1059 (1990) (An employer "may violate Section 8(a) not only with respect to its own employees but also by actions affecting employees who do not stand in such an immediate employer/employee relationship.").

* * * * *

For the foregoing reasons, we deny the companies' petitions for review and grant the Board's cross-application for enforcement.

So ordered.

BROWN, Circuit Judge, dissenting:

Twenty-six technicians objected to their employer's new, exacting compensation terms. When their employer refused to relent, they pitched their story

to a local news station's consumer watchdog reporter. These employees then appeared on television in an effort to curry public sympathy for their demands. So far, no problem. The NLRA has always blessed organized efforts like these aimed at gaining advantage in a labor dispute.

But when these technicians falsely accused their employer during a television broadcast of certain outrageous business practices, they crossed a line—from labor dispute to public disparagement; from concern about wages and working conditions to a vendetta aimed at undermining the Companies' reputation. True, the NLRA aggressively protects organizing efforts, but the core of the Act is the balance it strikes between employees' and employers' legitimate, conflicting interests. There are limits to how far employees may go in pursuit of bargaining advantage. Those who work within these limits are protected, but those who ignore them, who pursue their ends through inappropriate means, are stripped of the Act's protections.

This is not a close case. Had the MasTec technicians honestly and fairly discussed their labor dispute with the news station, their aggressive tactics could be sustained as a proper appeal to outside parties. *See Eastex, Inc. v. NLRB*, 437 U.S. 556, 565, 98 S.Ct. 2505, 57 L.Ed.2d 428 (1978). But these technicians chose instead to feed the station a false, disparaging story they knew would trigger public outrage. The two most damning lies they told the viewers of WKMG–TV Channel 6 were that their employer (1) required them to lie (it did not), and (2) seriously encouraged them to scare customers into accepting an unnecessary—and

excessively expensive—service by warning that the product would "blow up." To be sure, a MasTec supervisor did *jokingly* suggest that, but everyone present understood it to be in jest. By soberly repeating that joke to a public audience without its context and as though it were a serious instruction, these technicians left the NLRA and its protections behind. As "[t]here is no more elemental cause for discharge of an employee than disloyalty to his employer," *NLRB v. Local Union No. 1229, Int'l Broth. of Elec. Workers*, 346 U.S. 464, 472, 74 S.Ct. 172, 98 L.Ed. 195 (1953) (*Jefferson Standard*), I can't blame MasTec for showing them the door. And frankly, neither can the NLRA.

It's not hard to see why the technicians resorted to these manipulative gambits: an ordinary labor dispute would not be newsworthy, but tales of corporate perfidy and consumer fraud would undoubtedly pique the interest of Channel 6 and the viewing public. Still, self-interest does not excuse mendacity, and MasTec acted well within its rights when it fired these disloyal technicians.

* * *

Of course, as I write in dissent, I'm alone in my view of this case. The court upholds the Board's determination that the NLRA requires employers to suffer insubordination and damaging falsehoods in silence unless they can prove the employees' vindictive mental state. "Common sense sometimes matters in resolving legal disputes." *Southern New England Telephone Co. v. NLRB*, 793 F.3d 93, 94 (D.C. Cir. 2015). Here, however, neither common sense nor the ordinary rules of statutory construction are in evidence—a lacuna

that indicts the unconstitutionally generous standards of review through which federal courts routinely cede statutory interpretation to biased administrative tribunals. This case, for example, demonstrates the lengths to which the Board will go to contort an evenhanded Act into an anti-employer manifesto. Instead of attempting to balance conflicting interests, the NLRB reacts like a pinball machine stuck on tilt; reflexively ensuring employers always lose a turn.[1]

I.

The NLRA prohibits employers from discharging employees for engaging in certain kinds of protected conduct. *See* 29 U.S.C. § 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations ... and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection...."). This provision doesn't lend employees unconditional cover, however.

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[1] The Board's analysis hinges on hedges. *See, e.g.,* Op. 37 (quoting the Board finding "the technicians' conduct was not '*wholly incommensurate* with [their] grievances' "); *id.* 42 ("The Board concluded that, '*for the most part*,' the technicians' statements in the news segment 'were accurate....'"); *id.* ("'Any *arguable departures* from the truth,' the Board found, 'were no more than good-faith misstatements....'"); *id.* ("In fact, the Board agreed that the technicians were not *explicitly* told to lie; it simply found that they were '*essentially* told to lie.'"); *id.* 43 ("[T]he Board reasonably concluded, 'the failure to *fully explain* the 50 percent connection rule was at most an inaccuracy'"); *id.* 45 ("[T]he Board acknowledged that the way the segment described the issue '*may have been misleading*.'") (emphasis added). Do not be misled—the Board's overuse of adverbs and qualifiers is a sign of evasion, not precision. *See* Stephen King, ON WRITING 117–22 (2002).

Instead, they are only protected to the extent their conduct is (1) "related to an ongoing [labor] dispute" *and* (2) "not so disloyal, reckless, or maliciously untrue as to lose the Act's protection." *In re American Golf Corp.*, 330 NLRB 1238, 1240 (2000); *see also Jefferson Standard*, 346 U.S. at 477, 74 S.Ct. 172. This has been the Board's rule for dischargeable disloyalty—until today.

Much like the NLRA itself, this rule mediates the conflicting rights of employers and employees. On one hand, "there is no more elemental cause for discharge of an employee than disloyalty to his employer." *Id.* at 472, 74 S.Ct. 172; *see also* 29 U.S.C. § 160(c) ("No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."). On the other, employees enjoy a right to engage in concerted activity, which can include public criticism of an employer's labor policies. When employees are fired for their conduct during a labor dispute, a "difficulty arises." *Jefferson Standard*, 346 U.S. at 475, 74 S.Ct. 172. Were they fired for disloyalty, or for protected conduct their employer happened to dislike? This case involves precisely that difficulty.

Because in my view the technicians seized a public opportunity to sharply attack the Companies' business policies and harm their reputation with false statements, I would grant the Companies' petition. The Board's two determinations—that the technicians' actions and statements were not "so disloyal" or "maliciously untrue"—violated circuit precedent and

were unsupported by substantial evidence. More fundamentally, the frameworks underpinning both of the Board's determinations are themselves unfaithful to the NLRA and Supreme Court precedent.

A.

The court majority upholds a Board determination that excused a series of disparaging, false remarks several employees made during a television broadcast to a journalist whose only interest was in exposing and publicizing corporate wrongdoing harmful to consumers. In reaching that conclusion, the Board ignored binding circuit precedent; by accepting the Board's action, the majority eviscerates that precedent. But, we are not the only court to have construed the NLRA. Even if the Board could excuse itself from our precedents (an option I do not concede) and a panel of this court could rewrite an inconvenient case (an alternative ordinarily available only with the acquiescence of the full court), the text of the NLRA and the Supreme Court's interpretation of it *still* preclude the Board's result.

1.

Our controlling decision in *George A. Hormel & Co. v. NLRB*, 962 F.2d 1061, 1065 (D.C. Cir. 1992), requires we grant the Companies' petition. To see why, let's examine what the Board determined. As to whether the technicians' conduct was sufficiently disloyal to lose NLRA protection, the Board concluded:

> While the technicians may have been aware that some consumers might cancel

> the [Companies'] services after listening to the newscast, *there is no evidence that they intended to inflict such harm* on the [Companies] or that they acted recklessly without regard for the financial consequences to the [Companies'] businesses. *We therefore find* that the technicians did not engage in unprotected disloyal or reckless conduct.

Mastec Advanced Techs, 357 NLRB 103, 108 (2011) (emphasis added). Note this paragraph's animating logic: because there was no evidence of intent to harm their employer, the employees' harmful statements were not sufficiently disloyal. There's one small problem with this subjective approach to disloyalty: we expressly—and unequivocally—rejected it. *See Hormel*, 962 F.2d at 1065.

In *Hormel*, an employee was fired for attending a rally supporting a boycott of his employer. The Board purported to examine the employee's subjective intent and concluded he did not intend any disloyalty. We reversed. Differing views on the relevance of employee intent accounted for these opposing conclusions. The Board required the employer to show it reasonably believed (from the "ostensible evidence") that the employee "personally embraced" the boycott. *See George A. Hormel & Co. and Robert W. Langemeier United Food and Commercial Workers International Union, Local Union No. 22*, 301 NLRB 47, 87 (1991). We disagreed, explaining such a "subjective test" couldn't be squared with the NLRA's "statutory policy of preserving the employer's right to discharge an

employee for disloyalty." *Hormel*, 962 F.2d at 1065. The question should have been whether "any reasonable observer" would infer the employee acted in furtherance of disloyal behavior (the boycott), not whether the employee intended to be disloyal. *Id.* at 1066.

Hormel's holding was quite clear: the NLRA "requires an *objective* test of disloyalty." *Id.* at 1065 (emphasis added). In our view, requiring employers to assess intent "would so circumscribe as to defeat the employer's right to discharge an employee who is working against the employer's business interest." *Id.* An employee may wear a pro-boycott t-shirt because he "likes the colors" or to fit in with friends, but "[w]hatever his reason, that employee is unquestionably promoting the boycott. Anyone who sees him gets that message." *Id.* The employer has a right to fire that disloyal employee no matter what he intended, but "under the Board's subjective test, the employer could not lawfully discharge him without showing" the employee wore the shirt "to actually encourage or support the boycott." *Id.*

Today's majority excuses the Board's obvious circumvention of *Hormel*, rather than apply its clear holding. According to the Board, what protected these technicians wasn't a lack of evidence that they disparaged the companies, but a lack of evidence they *intended* to do so. *See Mastec*, 357 NLRB at 108. This decision is *id*entical to the analysis reversed in *Hormel*, requiring employers to assess intent before punishing objectively disloyal behavior. That approach violates the NLRA. 962 F.2d at 1065.

Appendix B

The court's rewriting of *Hormel* renders this once-vibrant precedent a mere rain shadow to the mountain the majority would have employers climb. The majority rescues the Board by distinguishing *Hormel* in two ways, one irrelevant and the other incorrect.

First, the majority insists *Hormel* "addressed a different question than the one at issue here," Op. 38, that is, addressing the propriety of subjective tests *only* as to whether an act of disloyalty occurred, not as to whether that act was "flagrantly disloyal." *Id.* Consequently, the majority claims *Hormel* poses no obstacle to considering "an employee's [subjective] intentions" to "shed meaningful light on" "the degree and nature of his disloyalty," i.e., to determine "flagrant" disloyalty. Op. 39. The result is unintelligible. *Hormel* now precludes reliance on the employee's subjective intent to determine whether the employee's conduct was disloyal, but permits the employee's subjective intent to determine the "degree and nature" of disloyalty. Tellingly, the majority attempts to reassure us *Hormel* retains precedential value—to its own facts. *See* Op. 39 ("That is a meaningful limitation [on the use of subjective intent], especially in circumstances like those in *Hormel*....").

The majority is of course correct that the specific question in *Hormel* ("did he do it?") is different from the one at issue here ("was it flagrantly disloyal?"). But, remember, *Hormel* rejected the subjective approach in order to vindicate "the statutory policy of preserving the employer's right to discharge an employee for disloyalty," 962 F.2d at 1065, a right the Supreme Court described as "elemental" and "plain," *Jefferson*

Standard, 346 U.S. at 472, 475, 74 S.Ct. 172. How can a statutory policy be threatened by the use of subjective intent to determine disloyal conduct, but *not* be threatened by using subjective intent to determine the "degree" of disloyalty? How can an employer's right to discharge for disloyalty be "elemental" and "plain" when it hinges on an employee's subjective intent? The answer is self-evident: It cannot. Only by adding an unwarranted gloss to the meaning of disloyalty and subtracting from the law as articulated by the Court can the majority fashion its purported distinction. This is revealed in the majority's *sub silentio* reversal of *Hormel*'s holding that the disloyalty inquiry is "a matter of law." *Compare* 962 F.2d at 1066 with Op. 40 ("The question of whether employee conduct is so disloyal as to fall outside the Act's protection is an inherently fact-intensive, context-dependent one."). Such an outcome does a disservice to the rule of law. *Hormel*'s broad rationale vindicated a clear statutory policy against using subjective intent to determine disloyal behavior. Its logic applies with equal force to preclude subjective intent from determining the degree of disloyalty. And it must, otherwise its insistence on an objective test would be pointless.

Second, the majority incorrectly argues it was the Board's reliance on subjective *evidence* of intent that offended the *Hormel* court, rather than reliance on intent altogether. To the court majority, *Hormel* prohibits measuring employee intent by reference to a purely subjective standard (what's in the employee's "heart of hearts"), but not through objective evidence. Op. 39. Because the Board used subjective intent to "shed meaningful light on" "the degree and nature of his

disloyalty," Op. 39, the court majority believes the Board's analysis was consistent with *Hormel*, which the majority characterizes as "establish[ing] that an employee of course cannot disclaim an action that rings out as disloyal to all the world by contending that he in fact did not intend to act disloyally." Op. 38–39.[2]

But, *Hormel* cannot be read, as the majority does, to permit consideration of employee intent through objective evidence. *Hormel* reversed a Board decision *that took precisely that approach*. *See* 301 NLRB at 87 (finding a lack of "any ostensible evidence of their support of a boycott") (emphasis added). The *Hormel* ALJ gauged the employee's "actual boycott motivation" (intent) by marshalling a litany of objective evidence on both sides, *see id.* at 84, which was adopted in full by the Board, along with the rest of the ALJ's recommended Order. Our opinion in *Hormel* recited the ALJ's consideration of this evidence. *See* 962 F.2d at 1065–66. Based on these *objective* indicia of intent, the ALJ concluded "the evidence is actually very weak that [the employee] ever personally embraced a boycott."[3] 301

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[2] The majority attempts to cabin *Hormel* factually too, claiming that its "sole" disloyalty analysis dealt with "post-dispute conduct." Op. 38. One of the Board's many hedges describes this characterization—it is not "wholly incommensurate" with the facts, but it is not the full story. *Hormel* is clear that the post-dispute consumer boycott of Hormel's products was an "exten[sion]" of labor dispute activity. *See* 962 F.2d at 1063.

[3] Among this serial accounting of objective evidence, the ALJ listed one "purely subjective" indication of the employee's intent. He observed: "[The employee] has testified relatedly, and I find credibly, that he didn't believe in the effectiveness of the boycott." 301 NLRB at 84. However, the *Hormel* court never cited this; the

NLRB at 87. Put differently, the evidence didn't show the employee intended to disparage Hormel, and thus his discharge was unlawful. We rejected that conclusion. To us, *the mere fact of the employee's presence at the boycott* was enough to justify his termination.

Significantly, the *Hormel* court didn't reverse merely because it disagreed with the Board's weighing of competing indicia of intent, a result that would have justified the majority's view that *Hormel* blessed examination of intent through objective evidence. If so, we simply could have said the Board downplayed what we saw as the most obvious indicia of intent: Langemeier's presence at the rally. No, our rationale was more fundamental. We rejected the Board's entire *approach*, concluding it was not "a permissible construction of the NLRA" because it "circumscribe[d]" the employer's right to fire disloyal employees. *Hormel*, 962 F.2d at 1065; *see also id.* ("The Board's subjective approach does not, however, entail a permissible construction of the NLRA because it is inconsistent with the statutory policy of preserving the employer's right to discharge an employee for disloyalty."). *Where the Board sought objective evidence of intent, we sought objective evidence of disparagement. Intent was irrelevant*. All that mattered was that the employee attended the boycott (without expressly disclaiming support for it). The discharge was lawful because "any reasonable observer would have to infer" that conduct furthered a disloyal action (the boycott). *Id.* at 1066. It

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opinion instead seems to encompass all of the evidence bearing on whether the employee "personally embraced" the boycott.

did not matter why Langemeier participated; only that he did in fact participate.[4]

Thus, the *Mastec* Board's opinion is virtually indistinguishable from the one we reversed in *Hormel*. Just as the Board claims it relied on "objective criteria" to gauge whether MasTec technicians "intended to inflict ... harm" on the companies or "withheld information in order to mislead the viewing public," the *Hormel* ALJ sought to gauge the employee's "actual boycott motivation" by examining "ostensible evidence." In each case, the Board found the termination unlawful due to a lack of evidence that the employees intended to disparage or harm their employers. Assuring us that its examination drew on objective rather than subjective indicia doesn't magically sanitize an inquiry that should have disregarded intent in the first place. No matter how objective the indicia, they are by the Board's admission still probative of the technicians' *subjective* intent. That inquiry is, according to our binding opinion in *Hormel*, barred by the NLRA.

By dismissing *Hormel* based on irrelevant and incorrect distinctions, the majority has, inappropriately, confined *Hormel* to its specific facts, and severely weakened the important protections afforded to employers through the second prong of the *Jefferson Standard*-inspired test. Unfortunately, sacrificing circuit precedent is not enough to save the Board's result—the

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[4] Perhaps there is some intent component to acting in furtherance of the boycott. Hormel may not have been able to fire the employee if he was sleepwalking or totally unaware of the purpose of the event.

majority must also ensure that not even the Supreme Court is allowed to stand in the way of the Fourth Branch.

Nothing in *Jefferson Standard* supports an analysis of "flagrant" disloyalty contingent upon subjective intent. Indeed, nothing in *Jefferson Standard* suggests terminable disloyalty must be "flagrant." Yet, the majority gives *Jefferson Standard* a dress-down similar to the one *Hormel* received: death by incorrect and irrelevant distinction.

First, the incorrect distinction: After citing the two-part test for dischargeable disloyalty inspired by *Jefferson Standard* (protecting employees from discharge when their conduct is (1) related to an ongoing labor dispute and (2) not sufficiently disloyal), the majority claims *Jefferson Standard* is in "contrast" with this case because it only dealt with the first prong. Op. 35 ("In *Jefferson Standard*, the handbill in question fell outside the Act's protection because it simply attacked the quality of the company's product without indicating any connection to the ongoing employment controversy."). This is mistaken.

Jefferson Standard "agree[d]" the employees did not satisfy the second prong. *See* 346 U.S. at 472, 74 S.Ct. 172 ("[T]he handbill [w]as a demonstration of such detrimental disloyalty as to provide 'cause' for" termination). Still, the majority insists "*Jefferson Standard* had no occasion to address the [second prong]." Op. 35. But not only did *Jefferson Standard* have "occasion" to address the second prong (see above), it said the employees' disloyalty rendered irrelevant any

satisfaction of the first prong. *See* 346 U.S. at 477–78, 74 S.Ct. 172 ("Even if the attack were to be treated, as the Board has not treated it, as a concerted activity wholly or partly within the scope of those mentioned within § 7 [of the NLRA], *the means used by the technicians in conducting the attack have deprived the attackers of the protection of that section*, when read in the light and context of the purpose of the Act.") (emphasis added). The majority "reads that sentence to pertain to the first-step inquiry, not the second step." Op. 35. By this, I take the majority to mean, since the handbill failed to "indicate a connection to an ongoing labor dispute ... the handbill ... would have been deemed unprotected [by the Court] even if the Board had found otherwise," *id* (emphasis omitted). This makes no sense. If the handbill did not "indicate a connection" to the ongoing labor dispute, then how could the Board have possibly concluded it satisfied the first prong? The majority provides no answer.

The logical conclusions from *Jefferson Standard* are: (1) the handbill was sufficiently disloyal to merit termination; (2) the Board did not decide whether satisfying the first prong would affect the employer's right to terminate; and (3) even if the Board found the first prong satisfied, the "means," i.e., the handbill's disparaging contents, were sufficiently disloyal to merit termination. Sadly, none of these conclusions are clear after today's decision (tellingly, the majority cites the Board's subsequent precedent to justify its reading, not *Jefferson Standard*, *see* Op. 35).

The framework endorsed by the incorrect distinctions with *Jefferson Standard* and *Hormel* makes

it impossible for disloyal and disparaging employee behavior to be the basis for termination, so long as it is connected to an ongoing labor dispute. Indeed, in endorsing the Board's examination of the technicians' subjective intent, the majority goes so far as to accept the "relat[ion]" itself as valid evidence undermining any finding of disloyalty.[5] *See* Op. 36–37, 33–34. Going forward, it is difficult to see how employee behavior could satisfy the test's first prong and nonetheless still fail the second. This is the paradigmatic case, but the court sides with the employees anyway.

2.

Now, the majority's irrelevant distinction with *Jefferson Standard*: The court accepts the Board's rule that only "flagrantly disloyal" and "wholly incommensurate" behavior is unprotected. The majority claims this rule follows from *Jefferson Standard*. In

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[5] The majority attempts to also relegate *Hormel* and another of our precedents, *Endicott Interconnect Techs., Inc. v. NLRB*, 453 F.3d 532 (D.C. Cir. 2006), into the same first prong box it places *Jefferson Standard*. *See* Op. 38–40. But it beggars belief to conclude that *Hormel* and *Endicott* do not bear upon dischargeable disloyalty because the relationship with an ongoing labor dispute was not met. The test contains two prongs that must *both* be met for the employee to be protected—failing to meet *either* one means the employee does not enjoy NLRA protection (making the majority's frequent characterizations of these prongs as "steps" inappropriate). There is no need, therefore, to establish a relationship between the employee's activity and an ongoing labor dispute if disloyalty is proved. In fact, *Endicott* expressly did not decide the first prong and nevertheless found disloyalty justifying discharge. *See* 453 F.3d at 537 n.5; *id.* at 538 (Henderson, J., concurring).

reality, however, the majority transforms the *recounting* of terminable disloyalty in some cases into a *requirement* for terminable disloyalty in all cases.[6] The net result is an artificial narrowing of terminable disloyalty.

Even before the pro-employer Taft-Hartley amendments were added to the NLRA, the Supreme Court recognized the Act protected an employer's right of discharge. Writing for the Court in 1937, Chief Justice Hughes admonished the Board not to use its authority as "a pretext for interference with the right of discharge when that right is exercised for other reasons than [ ] intimidation and coercion." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46, 57 S.Ct. 615, 81 L.Ed. 893 (1937). Quoting this language, the *Jefferson Standard* Court declared that the principle that "disloyalty is adequate cause for discharge is plain enough," 346 U.S. at 475, 74 S.Ct. 172, and that "[t]here is no more elemental cause for discharge ... than disloyalty," *id.* at 472, 74 S.Ct. 172.[7] That right doesn't dissolve as soon as

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[6] In fact, this is the first time any circuit court in the country has commented on, let alone accepted, this language. Our previous opinions cite only the Board's original formulation of the rule, that the conduct is "not so disloyal, reckless, or maliciously untrue as to lose the Act's protection." *See, e.g., Endicott*, 453 F.3d at 537.

[7] The Court's "plain" and "elemental" descriptors for "the right of discharge" for disloyalty, and its treatment of the right as pre-dating the NLRA, evince that Act's harmony with the longstanding common law duty of loyalty from which the right to discharge for disloyalty follows. Our insistence in *Hormel* on "an objective test of disloyalty" under the NLRA confirms the same. *See* 962 F.2d at 1065 (citing THE COMMON LAW to say that "[a]cts should be judged by their tendency under the known

a labor dispute arises. *See id.* at 477–78, 74 S.Ct. 172 ("Even if the attack were to be treated ... as a concerted activity ... the means used ... have deprived the attackers of the protection of [the Act]."). Employees may engage in concerted activity; however, the NLRA doesn't immunize disloyal behavior. *But see* Op. 36. *Jefferson Standard* itself confirms this point. When commenting that the *nature* of the employees' disloyalty would be terminable even if it were connected to an ongoing labor dispute, the Court cites a wide range of behavior. *See* 346 U.S. at 478 n.13, 74 S.Ct. 172. From assault to failing to make deliveries to avoid crossing a picket line, *see id.* the varying forms of disloyalty cited by *Jefferson Standard* debunk the notion that only "flagrant" disloyalty can trigger the "plain" right of discharge.[8]

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circumstances, *not by the actual intent which accompanies them*") (emphasis added).

[8] To be sure, the Court didn't explain why the particular means used by these employees deprived them of the Act's protection. But that does not mean we must infer their means were therefore "flagrant." The Board's prior statement of the disloyalty analysis, as we approved in *Endicott*, strikes me as quite reasonable. *See* 453 F.3d at 537 (approving that the concerted activity be "not *so* disloyal ... as to lose the Act's protection") (emphasis added). There seems to be a significant difference between "flagrant" disloyalty and conduct that is "so" disloyal it is unprotected. The majority concludes otherwise, equating them as "various formulations." *See* Op. 37. But if that is true, and "flagrant" disloyalty is thus a requirement stemming from *Jefferson Standard*, then the majority should explain, for example, how, in light of today's decision, an employee's failure to make obliged deliveries to avoid crossing a picket line constitutes "flagrant" disloyalty. *See Jefferson Standard*, 346 U.S. at 478 n.13, 74 S.Ct. 172.

But, something very strange happened after *Jefferson Standard*. The Board gradually weakened the very right the Court went out of its way to vindicate. Presently, employers may only fire "*flagrantly* disloyal" employees whose behavior is "*wholly incommensurate* with *any* grievances they might have." *See Mastec*, 357 NLRB at 108 (emphasis added). Anything less than flagrant disloyalty must be taken on the chin.

This rule is "wholly incompatible" with *Jefferson Standard*'s insistence that an employer's right to fire disloyal employees is "elemental" and "plain." Twenty-two years after *Jefferson Standard*, the gloss that would ultimately swallow the plain text made its first appearance—*not as a rule, but as a description* of a specific employee's conduct toward his employer. *Firehouse Restaurant*, 220 NLRB 818, 825 (1975). Three years later, the language re-appeared, *again not as a rule but this time as an observation* about the kinds of cases in which the Board had found concerted but disloyal activity lost NLRA protection. *See Veeder–Root Co.*, 237 NLRB 1175, 1177 (1978) (observing that in cases of flagrant, wholly incommensurate disloyalty, "the Board has held disciplinary action to be justified"). The language was more explicitly adopted as a guiding standard one year later in *Richboro Community Mental Health Council*, when the Board rejected an employer's disloyalty argument for not meeting the historical standard described in *Veeder–Root*. 242 NLRB 1267, 1267–68 (1979) (holding that while "flagrantly disloyal, wholly incommensurate" conduct can forfeit NLRA protection, "such is hardly the case here"). From description to observation to standard, the Board slowly,

surely chipped away at a right of employers the Supreme Court had made a deliberate effort to protect.

Finally, in the decision we're reviewing today, the Board's gradual, decades-long evisceration of the employer's discharge right culminated in its strongest invocation of this language yet. For the first time, the Board made its requirement of flagrant and wholly incommensurate disloyalty explicit by framing it in conditional terms: "The Board has stated that it will not find a public statement unprotected unless it is 'flagrantly disloyal, wholly incommensurate with any grievances which they might have.'" *Mastec*, 357 NLRB at 108.[9]

What we are confronted with, then, are two incompatible propositions. On the one hand, the Supreme Court insists that an employer's right to discharge an employee for acts of disloyalty is "elemental" and "plain enough." On the other, the NLRB cautions that where concerted activity is concerned, the employers' right extends only to acts of *flagrant* disloyalty. The NLRB's modifier is wholly

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[9] For what it's worth, I find no support in the NLRB's decision for that statement. Prior to *Mastec*, the Board had never "stated that it will not find a public statement unprotected unless" it is "flagrantly disloyal" and "wholly incommensurate." The decision it cites for this proposition, *Five Star Transportation, Inc.*, stated only that it will consider whether "the attitude of the employees is flagrantly disloyal [and] wholly incommensurate...." 349 NLRB 42, 45 (2007). Not a single NLRB decision characterizes the "flagrantly disloyal"/"wholly incommensurate" language in the conditional language employed in *Mastec*. The Board's statement that it had stated the rule in conditional terms is incorrect.

absent from, and incompatible with, *Jefferson Standard*. While I recognize the Board's special authority to "appl[y] the general provisions of the Act to the complexities of industrial life," *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236, 83 S.Ct. 1139, 10 L.Ed.2d 308 (1963), that authority should not permit it to erode Supreme Court precedent—especially when that precedent interprets the agency's authorizing statutes.

B.

The majority also upholds the Board's determination that the technicians' statements were not "maliciously untrue." The "maliciously untrue" standard is another invention of the Board, designed especially to deal with a particular subspecies of disloyalty: false statements. Under this standard, false statements are unprotected if "made with knowledge of their falsity or with reckless disregard for their truth or falsity." *Mastec*, 357 NLRB at 107.

The Companies charge the technicians with conveying at least three maliciously untrue sentiments: (1) the technicians were required to lie; (2) they were seriously encouraged to tell customers their receivers would "blow up" if not connected; and (3) customers are charged per connection. The Board rejected the Companies' claims, and the majority now concludes substantial evidence supported that determination.

I disagree. In my view, the Board's determinations with respect to at least the first two sets of statements are unsupported by substantial evidence.

Appendix B

1.

In their interview, the technicians falsely stated they were required to lie to customers. One technician said, "If we don't lie to the customers, we get back charged for it." Following the reporter's observation that "It's either lie or lose money," another said, "We don't have a choice." Even if one accepts the court's conclusion that the technicians were "essentially told to lie," that fact does not justify their additional assertions either that they had no "choice" but to lie or that if they didn't "lie to the customers [they'd] get back charged for it." The technicians who made this assertion knew it was false, their response validated the reporter's characterization—"[i]t's either lie or lose money"—and it unquestionably disparaged the reputation of the Companies.

The key fact, that *at no point in any of the training did MasTec threaten back charges for technicians who refused to lie*, is one the technicians must have known. That, of course, would have been absurd. It is not "lying" that triggers back charges, but rather the failure to convince a customer to connect. Even if lying might be *one* way to sell a connection, it is obviously not the *only* way. An improved sales pitch alone could do the trick. After all, customers receive certain benefits from connecting, such as remote control pay-per-view, caller-ID integration, and access to system updates.

Sure, as the majority suggests, had the technicians explained that getting a 50% connection rate is difficult and that sometimes they *felt* as though lying

was the only way to avoid back charges, this would be a very different story. That (truthful) description would have fairly and still sympathetically illuminated the nature of their grievance, which was that complying with MasTec's policies was so difficult that lying seemed an inescapable temptation, one MasTec even encouraged. *But what they actually said paints a far more damning picture of the Companies*. The fact that they chose to tell a blatant lie, particularly where the truth was more than adequate to the task, suggests to me their decision was "reasonably calculated to harm the compan[ies' respective] reputation[s]." *Jefferson Standard*, 346 U.S. at 471, 74 S.Ct. 172.

Hedging, the Board retreated to what has become its favorite haven; one the majority has ensured will remain safe. "In any event," the Board explains, any inaccuracies are excusable since "[t]here is no basis in the record to find that the technicians knowingly and maliciously withheld that information *in order to mislead the viewing public*." *Mastec*, 357 NLRB at 107 (emphasis added). The majority says it "cannot set aside the Board's findings on this issue as unsupported by substantial evidence." Op. 43. But there is an obvious reason to set aside that finding: it is not in accordance with the law as established by Hormel's explicit rejection of a subjective disloyalty test. The purpose for which these technicians withheld information hardly matters at all. Whether it was to mislead the viewing public, or merely for kicks and giggles, all that matters is whether they knowingly conveyed disparaging information they knew was false. Because they clearly did, I respectfully dissent.

Appendix B

2.

Moreover, I would also conclude the Board erred in concluding the technicians' repetition of a joking suggestion as though it were serious was not problematic. In training, a MasTec supervisor jokingly suggested the technicians should tell the customers their receiver will blow up if it is not connected to a phone line. Martinez, a former technician, repeated the joke on the newscast as though it were a serious suggestion. The exchange proceeded as follows:

> Journalist: Want to avoid a deduction on your paycheck? Well, according to this group, supervisors have ordered them to do or say whatever it takes.
>
> Martinez: Tell the customer whatever you have to tell them. Tell them if these phone lines are not connected the receiver will blow up.
>
> Journalist: You've been told to tell customers that ...
>
> Martinez: We've been told to say that. Whatever it takes to get that phone line into that receiver.

The specific question before the Board was whether it was maliciously untrue to relay these statements without also revealing they were made in jest. The answer should have been plain enough: omitting the context communicated the false impression that the technicians were, in fact, told to tell an

outrageous lie to customers. Because it was obvious to all present that the MasTec supervisor's suggestion wasn't serious, Martinez knowingly conveyed false information to the viewing public.

To be sure, while MasTec technicians were not told to mislead customers in *this* way, they were told to mislead them in another way. They were encouraged to tell customers that the receiver wouldn't work unless it was connected to the phone line, which was untrue. In the Board's view, this fact sanitizes the lie Martinez told the viewers of Channel 6. MasTec may not have actually encouraged technicians to warn about receivers blowing up, but because they did encourage them to lie in other ways his statements "underscored that message" and were therefore not maliciously untrue. *See Mastec*, 357 NLRB at 107.

But just because the technicians were encouraged to mislead customers in one way doesn't justify Martinez's false assertion that the technicians were encouraged to mislead customers in this *particular* way. This "give an inch, take a mile" approach assumes (incorrectly) that the effect of the two statements would have been the same. For obvious reasons, that wouldn't be so.

From Martinez's actual assertion, viewers were left with an impression that MasTec and DirecTV are so profit-hungry that they instructed their technicians to tell outrageous, fear-mongering lies. Indeed, to understand that fear mongering was the interview's purpose we need look no further than the segment's summation. *See* Op. 31 (quoting Alvarez (reporting) to

say "*the attorney general's office is looking into this newest issue* so we'll, of course, keep you posted") (emphasis added).

If evidence of subjective intent did have any relevance here, the reporter's sensationalizing points us to the smoking gun (which the *MasTec* Board assiduously ignored): *the fact that the technicians purposely chose a media forum that focused almost exclusively on consumer fraud*. Absent an intention to harm the reputation of the Companies and warn consumers not to do business with them, the Channel 6 program would have no interest in airing this segment. This is exactly what the ALJ—the initial fact finder—concluded, *even when applying the Board's own "flagrantly disloyal" standard*:[10] that employees' desire to undermine the Companies' reputation "overshadowed the labor dispute." *See* APPX019 ("[T]hese statements [that the technicians were instructed or encouraged to lie to customers] ... apparently enticed the TV station to even do a story about Respondents' business.").

Had Martinez chosen instead to tell the truth, the viewers would still have been presented with a damning picture of these companies, but one far less worthy of outrage. To be sure, deceptive business practices may

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[10] The majority repeatedly notes the Companies do not challenge the Board's standard. *See, e.g.*, Op. 32–33, 34–35, 37, 41–42. Why should they? *Applying* Hormel's *objective standard, the ALJ found for the Companies even under the Board's stringent standard*. Perhaps the majority is suggesting any judicial questioning of the Board's standard is beyond the pale. I hope not. Judicial review should mean more than batting cleanup for the administrative state.

aggravate consumers. But the more brazen and glaring the deception, the more contempt it earns.

Here again, as with the first set, the truth was all the technicians needed to achieve their goal of currying public sympathy. Choosing instead to hedge their bets with a few malicious falsehoods, Martinez launched "a sharp, public, disparaging attack upon ... the companies' ... business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income." *See Jefferson Standard*, 346 U.S. at 471, 74 S.Ct. 172.

3.

More fundamental than my disagreement over what the record demonstrates, I question both the relevance and propriety of the Board's "maliciously untrue" framework.

Indeed, it is unclear why the Board is concerned with a statement's malicious falsity at all. *Jefferson Standard*, the supposed inspiration behind this framework, established an employer's right to punish employees for "disloyalty"—or, "disparaging attack[s] upon the quality of [their employer's] product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income." 346 U.S. at 471, 74 S.Ct. 172. Determining that a statement is "maliciously untrue" is an unnecessary detour, at least as far as *Jefferson Standard* is concerned, because we'd still need to decide whether the maliciously untrue statement is sufficiently disloyal.

The only way to make sense of this framework is to assume the Board treats maliciously false statements

as *per se* disloyal. Otherwise, there is no need for this separate analysis, especially since any time a false statement is something less than malicious—which is typical given how high a bar that is—the Board nonetheless still must examine whether it was "not so disloyal." But the majority and the Board disclaim a *per se* approach to determining disloyalty. *See, e.g.*, Op. 39. In sum, the majority's approach cannot even claim internal logic.

II.

In a future case where we hopefully restore the precedent we gut today, we should require more faithful adherence to the equipoise envisioned by the Court in *Jefferson Standard*. A proper view of the NLRA, according to the Court, requires proper attention both to the employees' right to air grievances and the employer's right to punish disloyalty. Thus, restoring the original spirit of *Jefferson Standard* requires carefully defining the hallmarks of disloyalty. Fortunately, decisions by various courts of appeals and even the NLRB provide some useful suggestions.

For instance, we have held employee conduct is disloyal when it disparages "the quality of the company's products and its business policies." *Endicott*, 453 F.3d at 536. There, the employee was terminated for commenting publicly that his employer lacked "good ability to manage," was causing the business to "tank[ ]," and was going to "put it in the dirt," and we upheld the termination as consistent with *Jefferson Standard*. *Id.* at 537. Conversely, where employee conduct did not contain "any remarks or materials disparaging the

quality of products of the employer," we concluded such conduct did not "bring the case within the rationale of [*Jefferson Standard*]." *Allied Indus. Workers, AFL–CIO Local Union No. 289 v. NLRB*, 476 F.2d 868, 879 (D.C. Cir. 1973). Thus, where there's no disparagement of the employer's product or practices, there's no cause for termination.[11]

Other courts of appeals, as well as the NLRB, have also examined the following two factors: (1) "whether the appeal to the public concerned primarily working conditions," and (2) "whether it avoided needlessly tarnishing the company's image." *NLRB v. Mount Desert Island Hosp.*, 695 F.2d 634, 640 (1st Cir. 1982); *see also Technicolor Gov't Serv's, Inc.*, 276 NLRB 383, 388 (1985) (holding that "disloyalty" turns on whether, in context, "it was necessary to legitimate employee ends"). As public, concerted activity will inherently cause some harm to an employer's image, this approach suggests that, to avoid acting disloyally, employees must be cautious not to harm the employer's image more than is necessary or appropriate.

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[11] An important note: nearly every public, concerted activity by employees or unions will cause some harm to employers, but that "does not alone render them disloyal." *Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1189 (D.C. Cir. 2000); *see also Five Star Transp., Inc. v. NLRB*, 522 F.3d 46, 53–54 (1st Cir. 2008) ("Indeed, were harm or potential harm to the employer to be the determining factor in the Court's [ ] protection analysis, it is doubtful that the legislative purposes of the Act would ever be realized."). What matters, it seems, is disparagement of the employer's products or business practices, not its labor practices.

Appendix B

Another possible test for disloyalty finds expression in our en banc decision in *Diamond Walnut Growers, Inc. v. NLRB*, 113 F.3d 1259 (D.C. Cir. 1997) (en banc). Though technically implicating a different line of Supreme Court precedent (*NLRB v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 88 S.Ct. 543, 19 L.Ed.2d 614 (1967), not *Jefferson Standard*), the court's analysis resonates in both. There, an employee was terminated for participating in a strike and international boycott of his employer's product. That boycott referred to the employer's workforce as "'scabs' who packaged walnuts contaminated with 'mold, dirt, oil, worms and debris.'" *Id.* at 1261. And in determining whether the employer had "substantial justification" for terminating the employee, the court considered whether the resolution of the underlying labor dispute would remove the taint brought on by the employee's conduct. The court concluded:

> The company's ability to sell the product, even if the strike is subsequently settled, could well be destroyed. If a customer becomes apprehensive to bite into Diamond's walnuts because of a concern at finding an impurity (even part of a worm), it is unlikely that a strike settlement will eliminate that visceral fear.

Id. at 1267. Because a strike settlement would not likely reassure prospective buyers that they can safely snack on these walnuts without fear of also chewing into a worm, the employer justifiably terminated the employee.

Each of the foregoing examples suggests that determining disloyalty demands investigation into how the labor dispute and the disloyal activity fit together. Activities focused on working conditions that avoid needlessly tarnishing the company's image will not be deemed "so disloyal" even if they cause some harm to the employer's reputation. But when employees get carried away, lose sight of the labor dispute, and cross the Rubicon into disparaging their employers' products or business practices or inflicting needless or irredeemable damage to their reputation, they forfeit the NLRA's protection.

In my view, that's what happened here. The technicians' disloyalty stems from their statements accusing MasTec and DirecTV of deceptive business practices. These statements display all the hallmark attributes of disloyalty discussed above. As in *Endicott*, what these technicians alleged constitutes disparagement of the "quality" of the companies' "business policies." 453 F.3d at 537. And consistent with *Diamond Walnut*, it is hard to imagine that a resolution of this labor dispute would remove the distaste local customers (and potential customers) likely have toward these allegedly crooked companies. 113 F.3d at 1268. Finally, unlike in *Mount Desert*, the false allegations they hurled at MasTec and DirecTV were not "intertwined inextricably with complaints of working conditions," nor were they "necessary to effectuate employees' lawful aims." 695 F.2d at 640–41. To be sure, the employees' discomfort about lying to customers is certainly related to the labor dispute. *Again, had their public complaints actually focused on what MasTec encouraged them to say, there may have been a strong*

case that these statements were necessary to effectuate their lawful aims. But they said none of these things. Rather, their statements on the broadcast were confined to false allegations that they were required to lie and that they were seriously encouraged to tell customers their receivers would blow up if they didn't connect a phone line. By falsely suggesting they were required to lie, and to lie so preposterously, they "needlessly tarnish[ed]" MasTec and DirecTV's image. Consequently, their termination was justified.

As things stand now under this court's imprimatur, the Board will continue to force employers to endure—and even finance—employees who are "working against [their] business interest," *Hormel*, 962 F.2d at 1065, either because the conduct isn't flagrantly disloyal or the intent behind it isn't objectively discernible. If I'm ever in Orlando, I half expect I'd see a commercial along these lines:

> Hi, I'm Rob Lowe, and I have DirecTV.
>
> And I'm 'Channel 6-watching Rob Lowe,' and well, now I have cable.

I just hope my receiver doesn't blow up.

APPENDIX C – DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, DATED JULY 21, 2011

NATIONAL LABOR RELATIONS BOARD

Case Nos. 12-CA-24979 and 12-CA-25055

JOSEPH GUEST

Petitioner

v.

MASTEC ADVANCED TECHNOLOGIES,
a division of MASTEC, INC.

and

DIRECTV, INC.

Respondents

Filed
July 20, 2011

DECISION AND ORDER

BY CHAIRMAN WILMA LIEBMAN AND
MEMBERS CRAIG BECKER AND BRIAN HAYES

This case presents the question of whether 26 former service technicians employed by Respondent Advanced Technologies, a Division of MasTec, Inc.

(MasTec), lost the protection of the Act by appearing on a television news broadcast in which statements were made about their employer and Respondent DirecTV, Inc., for which MasTec provides installation services.[1] The technicians' participation in the newscast grew out of their opposition to a new compensation formula that MasTec implemented in response to DirecTV's dissatisfaction with MasTec's performance.[2]

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[1] On January 4, 2008, Administrative Law Judge Michael A. Marcionese issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondents MasTec, Inc. and DirecTV, Inc. filed answering briefs, and the General Counsel filed a reply brief.

The National Labor Relations Board has considered the judge's decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

[2] No exceptions were filed to the judge's dismissal of the 8(a)(1) complaint allegation that Respondent MasTec's Operations Manager, Chris Brown, threatened to discharge employees if they complained about their wages.

Respondent MasTec asserts in its answering brief that the judge erred by granting WKMG-TV-6's petition to revoke MasTec's subpoena, which sought information concerning the preparation of the news broadcast on which MasTec's technicians appeared. No party raised this issue through exceptions or cross-exceptions, and therefore it has been waived. *See* Sec. 102.46(b)(2) and (g) of the Board's Rules and Regulations. We shall therefore grant the General Counsel's request to strike that portion of MasTec's brief.

Respondent MasTec does not except to the judge's finding that Supervisor Muniz violated Sec. 8(a)(1) by threatening employee Perlaza that the company would close because employees publicly complained about their wages. Respondent MasTec also does not except to the judge's finding that the rules set forth in its March

Appendix C

Applying the principles set forth by the Supreme Court in Jefferson Standard,[3] regarding the extent to which employees' disparaging statements to third parties about their employer's product or service enjoy the Act's protection, the judge concluded that the technicians' statements were unprotected and thus that neither MasTec, by terminating its employees, nor DirecTV, by causing their termination, violated Section 8(a)(1).

In his exceptions, the General Counsel challenges the judge's finding that the employees' statements were unprotected. As explained below, we find merit in the General Counsel's position.

Factual Background

MasTec operates as a home service provider (HSP), installing and maintaining satellite television equipment under contract with satellite television providers. In the Orlando, Florida area MasTec's only client is DirecTV. The HSP contract agreement requires DirecTV to pay MasTec a fee for every installation, and allows for penalties to be imposed if MasTec fails to meet performance standards.

2006 employee handbook pertaining to confidentiality, solicitation, and distribution violated Sec. 8(a)(1). As discussed in the remedy section of this decision, because these unlawful handbook rules were maintained at all of MasTec's facilities, nationwide, we shall revise the recommended Order to require notice posting by MasTec at all of its facilities.

[3] *NLRB v. Electrical Workers Local 1229* (*Jefferson Standard*), 346 U.S. 464 (1953).

Appendix C

The Respondents consider connecting the satellite receiver to an active telephone land line to be part of a standard installation. Such connections allow customers (1) to order pay-per-view by using the remote control; (2) to have caller ID information displayed on their television screen; and (3) to receive downloads of DirecTV software upgrades. In addition, phone line connections provide a record of what customers are viewing, thereby assisting DirecTV in making programming decisions.

Although these features may be attractive to many consumers, and have potential benefits for DirecTV's business, telephone line connections are not essential for the system to function. The record establishes that a satellite receiver will properly transmit the signal to a television set without a telephone connection. Many customers resist having the telephone connection made, even though there is no extra charge for a standard connection.[4] Receivers that are connected to phone lines are referred to as "responders" because they respond to a verification signal; unconnected receivers are called "non-responders."

Because of the business importance of telephone connections, the Respondents have emphasized to

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[4] If a customer wants a connection but does not wish to have the connecting wires exposed, the wires may be hidden through a custom installation at an additional charge. A custom installation may be accomplished either by threading the wires inside a wall (a "wall fish") at a charge of $52.50, or by using a wireless telephone jack, priced at $49.

technicians the need to make as many connections as possible.

Despite the Respondents' efforts, however, it is undisputed that connections were often not made. In early 2006,[5] therefore, DirecTV informed MasTec that if it did not improve its responder installation rates, it would be penalized. Specifically, if technicians did not connect at least 50 percent of newly installed receivers to phone lines during the course of a month, DirecTV was going to charge MasTec $5 for each non-responder.

By memo of January 17, MasTec, in turn, informed technicians that their piece work pay structure would be modified to reflect the increased emphasis on improving responder installation rates. Beginning February 1, technicians would be paid $2 less for basic and additional outlet installations, but would earn $3.35 for each receiver they connected to a phone line. In addition, technicians would incur a backcharge of $5 for every new non-responding receiver installed during a 30-day period if they failed to connect at least 50 percent to phone lines. Technicians failing to meet the 50-percent threshold for 60 consecutive days would be subject to termination. Technicians voiced strong opposition to the new pay formula at several team meetings, arguing that reaching the 50-percent responder rate threshold would be problematic. They pointed out that making the phone connection was not always possible, because of customer resistance or other circumstances beyond their control.

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[5] Dates refer to 2006.

Among the obstacles they encountered were: (1) customer concerns about children ordering pay-per-view from the remote; (2) customers wanting neither exposed wires nor to pay for custom installation to hide wires; (3) privacy concerns; and (4) the absence of a land line phone on the premises. Technicians also pointed out that even if they connected the receiver to a phone line during installation, customers could themselves later simply unplug it, leading to the same "non-responder" result.

In response to the technicians' arguments, MasTec supervisors suggested ways around these problems, including making the connection without telling customers they were doing so or telling customers, falsely, that the receiver would not work without it. At one meeting, after hearing a group of technicians repeating the arguments about why the new target percentage rate was unattainable, Regional Operations Manager Chris Brown told them to tell customers anything, "whatever you have to tell them" and "whatever it takes" to make the connection, even jokingly suggesting that technicians tell customers that the receiver would "blow up" if it was not connected.[6]

In addition, MasTec showed the technicians a DirecTV-produced video addressing the importance of making the receiver-phone line connection. In the video, DirecTV's vice president for field operations, Stephen Crawford, said MasTec was not to blame for the

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[6] The judge credited Brown's testimony that he intended the "blow up" statement to be a joke and found that most of the technicians understood that Brown was not serious.

increased emphasis on improving responder rates and that the pressure was coming instead from DirecTV. He and another DirecTV vice president, Scott Brown, suggested that technicians might have greater success in connecting receivers to phone lines if they did not tell customers they were doing so or simply told them—again, falsely— that the connection was "mandatory" and necessary "for the equipment to function correctly." They also suggested that the technicians tell customers, "I can either run the phone line for you or you can purchase a wireless phone jack from me," thereby "put[ting] it right back on the customer."[7]

Technicians received their first paychecks under the new compensation system in late March. Many had been backcharged for failing to reach the target responder installation rate. A number of technicians assembled at the Orlando facility parking lot on the mornings of March 27 and 28 and expressed their dissatisfaction to Brown and Facility Supervisor Herbert Villa, reiterating many of the same complaints they had raised with them in previous meetings. Despite their protestations, they were unable to persuade MasTec to rescind the new policy.

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[7] MasTec also introduced into evidence a DirecTV installation checklist that technicians were instructed to follow and a copy of which was to be provided to every customer. Among the listed items that customers were to acknowledge were that the technician "Explained the importance of the telephone hook-up" and "Explained that I must maintain a working telephone line connected to all my DIRECTV System receivers." The second statement would predictably mislead customers to believe that the connection is required for the receiver to function.

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Frustrated by their failed efforts, a group of technicians decided that management might reconsider its adherence to the pay system if they took their complaints public. Technician Frank Martinez contacted a local television reporter, Nancy Alvarez from WKMG-TV Channel 6, and set up a meeting. On the morning of March 30, Martinez and 27 fellow technicians, dressed in their work uniforms, drove from the MasTec facility to Channel 6 in their company vans.[8] Alvarez met the technicians in the station's parking lot and invited them into Channel 6's studio where she interviewed them on film as a group. What occurred during this taped interview session, described below, was the basis for their discharge.

The Broadcast

On Friday, April 28, Channel 6 aired a "teaser" promoting the story. It began with a reporter asking, "Why did over 30 employees of a major company show up at [Channel] 6?" A video of this exchange followed:

> INTERVIEWER: "So you've basically been told to lie to customers?"
>
> TECHNICIAN: "Yeah."

A voiceover by a reporter says, "to tell the Problem Solvers about a dirty little secret." This is followed by a video of a technician saying, "Tell the customer whatever you have to tell them." The teaser

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[8] Although employed by MasTec, the technicians wear uniforms and drive vehicles bearing the DirecTV logo.

ends with a reporter saying, "that may be costing you money."

After seeing the teaser, MasTec's Chris Brown alerted its vice president for DirecTV business, Mark Retherford, and regional vice president, Gus Rey, who instructed Brown to record it and any broadcasts about the Respondents.

The full news story first aired during Channel 6's 5 p.m. newscast on Monday, May 1. The story begins with the following exchange among the anchors and reporter:

> NEWS ANCHOR 1: Only on 6 . . . a problem solver investigation with a bit of a twist . . . this time they came to us.
>
> NEWS ANCHOR 2: Yeah . . . technicians who have installed hundreds of DirecTV satellite systems across Central Florida . . . they're talking about a company policy that charges you for something you may not ever use. And as problem solver Nancy Alvarez found, if you don't pay for it, the workers do.
>
> REPORTER ALVAREZ: They arrived at our Local 6 studios in droves. DirecTV trucks packed the parking lot and inside the technicians spoke their minds. (accompanying video showed more than 16 DirecTV vans in the parking lot followed by a shot panning a group of technicians wearing shirts bearing the DirecTV logo).

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The scene shifts to a room where more than 20 technicians were seated, facing Alvarez.

TECHNICIAN LEE SELBY: We're just asking to be treated fairly.

ALVAREZ: These men have installed hundreds of DirecTV systems in homes across Central Florida but now they admit they've lied to customers along the way.

TECHNICIAN HUGH FOWLER: If we don't lie to the customers, we get back charged for it. And you can't make money.

ALVAREZ: We'll explain the lies later but first the truth. Phone lines are not necessary for a DirecTV system; having them only enhances the service allowing customers to order movies through a remote control instead of through the phone or over the internet.

ALVAREZ: So it's a convenience. . . .

TECHNICIAN FRANK MARTINEZ: It's more of a convenience than anything else. . . .

ALVAREZ: But every phone line connected to a receiver means more money for DirecTV and MasTec, the contractor these men work for. So the techs say their supervisors have been

putting pressure on them. Deducting five bucks from their paychecks for every DirecTV receiver that's not connected to a phone line.

MARTINEZ: We go to a home that . . . needs three . . . three receivers that's . . . fifteen dollars.

ALVAREZ: Throw in dozens of homes every week and the losses are adding up fast.

ALVAREZ (questioning a room full of technicians): How many of you here by a show of hands have had $200 taken out of your paycheck? (Accompanying video shows virtually every technician in the room raising his hand.)

MARTINEZ: More.

ALVAREZ (reporting): Want to avoid a deduction on your paycheck? Well, according to this group, supervisors have ordered them to do or say whatever it takes.

MARTINEZ: Tell the customer whatever you have to tell them. Tell them if these phone lines are not connected the receiver will blow up.

ALVAREZ (interviewing): You've been told to tell customers that . . .

MARTINEZ: We've been told to say that. Whatever it takes to get the phone line into that receiver.

ALVAREZ (reporting): That lie could cost customers big money . . . the fee to have a phone line installed could be as high as $52.00 per room . . . want a wireless phone jack? That will cost you another 50 bucks.

ALVAREZ (shown outside Respondent's Orlando office attempting to speak to Villa): We're hoping to talk to you guys about some concerns raised by your employees.

VILLA: Sorry . . . guys, I need you to walk out of the office; this is a private office.

ALVAREZ (reporting): The bosses at MasTec's Orlando office did not want to comment.

ALVAREZ (seen attempting to interview Villa): We have employees saying that you asked them to lie. . . .

VILLA: Please . . . thank you. . . .

ALVAREZ: . . . to customers. Is that true? (This exchange while video shows Alvarez and camera crew being ushered out of the office.)

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ALVAREZ (again in reporting mode): But statements from their corporate office and from DirecTV make it clear the policy of deducting money from employees' paychecks will continue. A DirecTV spokesman said techs who don't hook up phone lines are quote 'denying customers the full benefit and function of their DirecTV system.' These men disagree and say the policy has done nothing but create an environment where lying to customers is part of the job.

ALVAREZ (interviewing): It's either lie or lose money.

TECHNICIAN SEBASTIAN ERISTE: We don't have a choice.

ALVAREZ (reporting): Now . . . during our investigation, MasTec decided to reimburse money to some techs who had met a certain quota but the policy continues and one reason could be that DirecTV does keep track of their customers' viewing habits through those phone lines. Now just last year, DirecTV paid out a $5 million settlement with Florida and 21 other states for deceptive practices and now, because of our story, the attorney general's office is looking into this newest issue so we'll, of course, keep you posted.

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> NEWS ANCHOR 2: You think they would have learned the first time.
>
> ALVAREZ: You think so. We'll see what happens.
>
> NEWS ANCHOR 2: Thank you, Nancy.

This report reaired, in slightly different versions, over a 2-day period. Chris Brown sent the recorded broadcasts to his superiors, who, in turn, forwarded them to DirecTV. After discussing their mutual concerns, DirecTV's Crawford told MasTec's Retherford that he did not want any of the technicians who appeared on the broadcast to represent his company in customers' homes. Thereafter, Retherford directed Chris Brown to identify the technicians who appeared in the newscast. After receiving the list of names, on May 2, Retherford instructed Brown to tell Villa to notify each of the identified technicians that he was being terminated "at will." Following Retherford's directions, Villa informed the technicians of their terminations at the end of the workday on May 3.

The Judge's Decision

The judge initially found that the technicians' statements related to an ongoing labor dispute. He stated that the content of the news report establishes that "[a]ny reasonable viewer would understand . . . that the technicians . . . were concerned about their wages" and the underlying labor dispute remained evident alongside the "consumer protection aspect" of the story.

The judge found, however, that the statements broadcast by Channel 6 "were so 'disloyal, reckless, and maliciously untrue' as to lose the Act's protection." Although he found Selby's opening remark, that the technicians were "asking to be treated fairly" was, "standing alone, clearly protected," he described statements by Martinez, Fowler, and Eriste, indicating they were instructed or encouraged to lie to customers, as "highly inflammatory and damaging to Respondents' reputation." The judge also found the story's emphasis on technicians' "lies" translating into higher costs for customers to be "inaccurate and misleading," observing that extra charges are not incurred with standard connections, but only with custom installations. In addition, because technicians were subject to backcharges only if they failed to connect at least half of the newly-installed receivers to phone lines, the judge found that their claim that they "had to lie to customers to avoid" financial penalties was not true. Further, despite the technicians' representations, he found the Respondents had "never explicitly told [them] to lie" and had even suggested other ways for them to meet the connection requirement. Moreover, because the judge found that MasTec's supervisor Brown was joking and did not actually expect technicians to tell customers that an unconnected receiver would "blow up," he concluded that Martinez' reference to Brown's statement was "deliberately misleading" and intended to harm his employer's reputation. Finally, because technician Guest had incurred pay deductions for reasons other than the new wage policy, the judge concluded that by raising his hand in response to Alvarez' question about backcharges, Guest "demonstrated a willingness to mislead the public."

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The judge also concluded that the newscast's focus on the Respondents' business practices overshadowed the labor dispute and that the technicians' attitude during the broadcast was, as stated in *Veeder-Root Co.*, 237 NLRB 1175, 1177 (1978), "flagrantly disloyal, wholly incommensurate with any grievances they had, and manifested by public disparagement of [the Respondents'] product and undermining of their reputation." The judge further concluded that although only two of the alleged discriminatees—Fowler and Eriste—made unprotected remarks, the appearance of the other technicians lent tacit support to their statements. He therefore found that all of the technicians lost the protection of the Act. For the reasons discussed below, we disagree.

Analysis

Section 7 of the Act provides, in part, that "[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection." However, that right is not without limitation. In *Jefferson Standard*, the Court upheld the employer's discharge of employees who publicly criticized both the quality of the employer's product and its business practices without the employees relating their complaints to any labor controversy. The Court found that the employees' conduct amounted to disloyal disparagement of their employer and was outside the Act's protection.

In cases decided since *Jefferson Standard*, "the Board has held that employee communications to third parties in an effort to obtain their support are protected

where the communication indicated it is related to an ongoing dispute between the employees and the employers and the communication is not so disloyal, reckless or maliciously untrue as to lose the Act's protection."[9]

The first prong of this test is not at issue here. The Respondents do not contest the judge's finding, with which we agree, that the employee communications here were clearly related to their pay dispute. As to the second prong of the test, we find that the judge clearly erred in finding that the employee communications and/or participation in the Channel 6 newscast were either maliciously untrue or so disloyal and reckless as to warrant removal of the Act's protection.

Statements are maliciously untrue and unprotected, "if they are made with knowledge of their falsity or with reckless disregard for their truth or falsity. *See, e.g., TNT Logistics North America, Inc.*, 347 NLRB 568, 569 (2006), revd. sub nom. *Jolliff v. NLRB*, 513 F.3d 600 (6th Cir. 2008). The mere fact that statements are false, misleading or inaccurate is insufficient to demonstrate that they are maliciously untrue. *See, e.g., Sprint/United Management Co.*, 339 NLRB 1012, 1018 (2003)."[10]

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[9] *Mountain Shadows Golf Resort*, 330 NLRB 1238, 1240 (2000) (footnote omitted).

[10] *Valley Hospital Medical Center*, 351 NLRB 1250, 1252–1253 (2007), enfd. sub nom. *Nevada Service Employees Local 1107 v. NLRB*, 358 Fed. Appx. 783 (9th Cir. 2009). *See generally Linn v. United Plant Guard Workers of America, Local 113*, 383 U.S. 53 (1966).

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None of the statements made by the technicians were maliciously untrue under these well-established legal principles. Indeed, for the most part, the statements were accurate representations of what the Respondents had instructed the technicians to tell customers. Contrary to the judge, the technicians *were* essentially told to lie, as certain technicians stated during the telecast. The record clearly establishes that although the Respondents may have avoided expressly using the word "lie" when suggesting ways to overcome obstacles to making receiver-phone line connections, both Respondents affirmatively encouraged the technicians to do just that. Thus, a MasTec supervisor told the technicians to say "the receiver would not work" without the connection. Similarly, DirecTV Vice President Brown advised technicians to say that the hookup to the phone was "a mandatory part of the installation" and needed "for the equipment to function correctly." Indeed, Brown instructed technicians to tell customers "whatever you have to tell them" and "whatever it takes" to make the connection. The technicians would readily understand these instructions to include "lie if you have to." Brown's joking suggestion to tell customers that an unconnected receiver would "blow up" underscored that message, as it undoubtedly was meant to do. Thus, whether the Respondents' officials expressly told the technicians to lie is immaterial. They expressly encouraged technicians to make statements known by the Respondents' managers to be false and intended to deceive customers into believing, erroneously, that their satellite receivers would not work if they were not connected to a land line telephone.

Similarly, the technicians did not make maliciously false statements by failing to specify that they would be back charged only if they failed to connect 50 percent of the receivers they installed. The statements the technicians did make fairly reflected their personal experiences under the new pay scheme. Almost all of them indicated that they had failed to achieve at least a 50-percent connection rate, and some had incurred significant backcharges as a result. In any event, the failure to fully explain the 50-percent connection rule was at most an inaccuracy.[11] There is no basis in the record to find that the technicians knowingly and maliciously withheld that information in order to mislead the viewing public.[12]

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[11] The judge opined that the 50-percent connection threshold was "not impossible to meet, despite the employees [sic] excuses." This, of course, proves nothing, because the record does not show how many employees had to lie or engage in other deceptive practices in order to meet the threshold.

[12] There is likewise no basis for finding that technician Guest individually engaged in maliciously false conduct by raising his hand in response to Alvarez' question about how many people had $200 deducted from their pay. Guest's response was in fact an accurate answer to the question posed. He had experienced deductions in that amount, although not all due to the failure to achieve a 50-percent connection rate. We cannot find that Guest must have understood Alvarez' question as intended to address only such deductions (he specifically testified to the contrary) and that he maliciously sought to mislead the public by raising his hand.

As noted, the judge also referred to statements implying that lying to customers about the need for telephone connections would lead to higher costs as misleading and inaccurate because extra charges would be imposed only for a custom connection. While those statements may have been misleading, there is no showing that they were made with knowledge that they were only partially

In sum, we find that almost all of the statements made by the technicians during the Channel 6 newscast were truthful representations of what the Respondents told them to do. Any arguable departures from the truth were no more than good-faith misstatements or incomplete statements, not malicious falsehoods justifying removal of the Act's protection.

We also find that none of the technicians' statements constituted unprotected disloyalty or reckless disparagement of the Respondents' services. Statements have been found unprotected where they constitute "a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income."[13] The

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true or with reckless disregard for their truth or falsity. In any event, those statements were made by Alvarez and other Channel 6 personnel in voiceovers or on the day of the telecast, not by the technicians. Technicians Guest and Fowler testified without contradiction that their only input was in responding to Alvarez' questions on the day of the interview; that Alvarez did not review the content of the report with them; and that they did not see the telecast before May 1, when it initially aired. Thus, there is no basis in the record for imputing responsibility for those statements to the technicians.

[13] *NLRB v. Electrical Workers Local 1229* (*Jefferson Standard*), 346 U.S. 464, 472 (1953), quoted with approval in *Valley Hospital Medical Center*, 351 NLRB at 1252. While Member Hayes agrees with Chairman Liebman that it is unnecessary to reconsider this precedent in the circumstances of this case, he would in any event not join Member Becker in abandoning consideration of whether nondefamatory disparagement or disloyal remarks related to an ongoing labor dispute warrant forfeiture of the Act's protection. Further, inasmuch as the Board finds that none of the technicians made unprotected statements during the newscast,

Board has stated that it will not find a public statement unprotected unless it is "flagrantly disloyal, wholly incommensurate with any grievances which they might have."[14] Further, "[i]n determining whether an employee's communication to a third party constitutes disparagement of the employer or its product, great care must be taken to distinguish between disparagement and the airing of what may be highly sensitive issues."[15]

In this case, the technicians participated in the Channel 6 newscast only after repeated unsuccessful attempts to resolve their pay dispute in direct communications with the Respondents. The newscast shed unwelcome light on certain deceptive business practices, but it was nevertheless directly related to the technicians' grievance about what they considered to be an unfair pay policy that they believed forced them to mislead customers. While the technicians may have been aware that some consumers might cancel the Respondents' services after listening to the newscast, there is no evidence that they intended to inflict such harm on the Respondents, or that they acted recklessly without regard for the financial consequences to the

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Member Hayes does not address whether, if such statements had been made, they would be a basis for finding that employees who participated in the newscast but did not speak or raise their hands would also forfeit the Act's protection.

[14] *Five Star Transportation, Inc.*, 349 NLRB 42, 45 (2007), enfd. 522 F.3d 46 (1st Cir. 2008), quoting *Veeder-Root Co.*, 237 NLRB 1175, 1177 (1978).

[15] *Allied Aviation Service Co. of New Jersey, Inc.*, 248 NLRB 229, 231 (1980), enfd. 636 F.2d 1210 (3d Cir. 1980).

Respondents' businesses.[16] We therefore find that the technicians did not engage in unprotected disloyal or reckless conduct, as previously defined by Board and court precedent.

Based on the foregoing, we find that the technicians' participation in the Channel 6 newscast was protected concerted activity directly and expressly related to and in furtherance of an ongoing labor dispute. Accordingly, we reverse the judge and find that by causing the discharge of the technicians for their participation in the newscast, and by discharging them, Respondents DirecTV and MasTec, respectively, violated Section 8(a)(1) of the Act.[17]

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[16] *See Community Hospital of Roanoke Valley*, 220 NLRB 217, 223 (1975), enfd. 538 F.2d 607 (4th Cir. 1976) (employee's comments on television program were protected where they were specifically related to employees' efforts to improve wages and working conditions and where there was no deliberate intent to impugn employer). Accord: *NLRB v. Circle Bindery, Inc.*, 536 F.2d 447, 452 (1st Cir. 1976) (explaining that "concerted activity that is otherwise proper does not lose its protected status simply because prejudicial to the employer").

[17] We find no merit in DirecTV's alternative argument that the technicians' conduct was unprotected because they engaged in a partial strike or intermittent strikes. The record does not support finding that the technicians engaged in either alleged action. In any event, it is undisputed that MasTec fired the technicians, at DirecTV's behest, solely because their statements on the telecast were assertedly "disloyal, reckless, and maliciously untrue" and disparaging of the Respondents' businesses. MasTec does not argue that it fired them for any other reason or that it would have done so even if they had not participated in the telecast. *Cf. Wright Line*, 251 NLRB 1083 (1980), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Appendix C

CONCLUSIONS OF LAW

1. By terminating employees Jouvani Alicea, Marlon Binet, Christopher Creary, Leroy Davis, Donovan Edwards, Sebastian Eriste, Hugh Fowler, Joseph Guest, Delroy Harrison, James Hehmann, Mark Hemann, Michael Hermitt, Federico Hoy, Fernando Hoy, Ariel Kelly, Shervoy Lopez, Ricardo Perlaza, Sergio Pitta, Noel Rodriguez, Rudy Rodriguez, Fernando Sando, Olmy Talent, Diego Velez, Nerio Vera, Ralph Wilson, and Carlos Zambrano for engaging in protected concerted activities, Respondent MasTec Advanced Technologies, a division of MasTec, Inc. has engaged in unfair labor practices within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By causing the termination of the above employees of Respondent MasTec Advanced Technologies, a Division of MasTec, Inc., Respondent DirecTV, Inc. has engaged in unfair labor practices within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. By maintaining a confidentiality policy that interferes with, restrains, and coerces employees in the discussion of their wages, hours, and terms and conditions of employment, and by maintaining an overly

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DirecTV also argues that Hugh Fowler's discharge was lawful because he obtained the names and telephone numbers of other technicians from company files under false pretenses. Again, however, MasTec does not assert that this conduct played any part in Fowler's discharge. *Wright Line*, supra. Accordingly, Fowler's other conduct does not furnish the Respondents with a defense to his discharge.

broad solicitation and distribution rule that also required employees to obtain permission to engage in protected concerted activity, Respondent MasTec Advanced Technologies, a division of MasTec, Inc. has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

4. By threatening employees with facility closure and other unspecified reprisals for engaging in protected concerted activity, Respondent MasTec Advanced Technologies, a Division of MasTec, Inc. has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent MasTec Advanced Technologies, a Division of MasTec, Inc. has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain actions designed to effectuate the policies of the Act. We shall order Respondent MasTec Advanced Technologies, a Division of MasTec, Inc. to offer the unlawfully discharged employees immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings and other benefits, jointly and severally with Respondent DirecTV, Inc., computed on a quarterly basis from the date of termination to the date of a proper offer of reinstatement, less any net interim earnings, as

prescribed in *F.W. Woolworth Co*., 90 NLRB 289 (1959), plus interest as computed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

To the extent that it has not already done so, Respondent MasTec Advanced Technologies, a Division of MasTec, Inc. shall be required to rescind the confidentiality, solicitation, and distribution rules that appeared in its handbook in effect in March 2006, and to notify all employees who were issued the handbook containing the unlawful rules that those rules have been rescinded and will no longer be enforced.

We agree with the General Counsel that because the handbook containing the unlawful rules was in effect at all of MasTec's locations nationwide, the judge erred in failing to order MasTec to post the notice to employees at all its facilities. As the Board stated in *Guardsmark, LLC*,[18] "we have consistently held that, where an employer's overbroad rule is maintained as a companywide policy, we will generally order the employer to post an appropriate notice at all of its facilities where the unlawful policy has been or is in effect."[19] Accordingly, Respondent MasTec Advanced Technologies, a division of MasTec, Inc. shall be required to post the attached notice marked "Appendix A" at its Orlando, Florida facility, and to post the notice marked "Appendix B" at all its other facilities. MasTec shall also be required to post at its Orlando, Florida

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[18] 344 NLRB 809 (2005).

[19] *Id*. at 812.

facility the attached notice marked "Appendix C" after being signed by Respondent DirecTV, Inc.

Having found that Respondent DirecTV, Inc., interfered with, restrained, and coerced employees in the exercise of their Section 7 rights by causing Respondent MasTec Advanced Technologies, a Division of MasTec, Inc. to discharge certain employees working at its Orlando, Florida facility on May 3, 2006, we shall order it to cease and desist and to take certain actions intended to effectuate the policies of the Act. We shall order Respondent DirecTV, Inc. to make the unlawfully discharged employees whole, jointly and severally with Respondent MasTec Advanced Technologies, a Division of MasTec, Inc., in the manner set forth above. Respondent DirecTV shall also be required to mail a signed copy of the attached notice to employees marked "Appendix C" to Respondent MasTec for posting at the Orlando, Florida facility of MasTec.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that

A. Respondent MasTec Advanced Technologies, a Division of MasTec, Inc., Orlando, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating any employee for engaging in protected concerted activities.

(b) Maintaining any rules, including confidentiality rules, that unlawfully restrict employees' ability to discuss their wages, hours, and other terms and conditions of employment with anyone.

(c) Maintaining any overly broad solicitation and distribution rules or other rules that require employees to obtain permission before engaging in protected concerted activities.

(d) Threatening employees with facility closure and other unspecified reprisals because they engage in protected concerted activities.

(e) In any like or related manner interfering with, restraining, or coercing 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 Jouvani Alicea, Marlon Binet, Christopher Creary, Leroy Davis, Donovan Edwards, Sebastian Eriste, Hugh Fowler, Joseph Guest, Delroy Harrison, James Hehmann, Mark Hemann, Michael Hermitt, Federico Hoy, Fernando Hoy, Ariel Kelly, Shervoy Lopez, Ricardo Perlaza, Sergio Pitta, Noel Rodriguez, Rudy Rodriguez, Fernando Sando, Olmy Talent, Diego Velez, Nerio Vera, Ralph Wilson, and Carlos Zambrano full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make the above-named employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, jointly and severally with Respondent DirecTV, Inc., in the manner set forth in the remedy section of this decision.

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

(d) 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 back pay due under the terms of this Order.

(e) Rescind the confidentiality policy and the solicitation and distribution rules as they existed in March 2006.

(f) Notify all employees who received the employee handbook that existed in March 2006 that these rules have been rescinded and will no longer be enforced.

(g) Within 14 days after service by the Region, post at its facility in Orlando, Florida, copies of the attached notices marked "Appendix A" and "Appendix C" and within that same time period post at

all its other facilities, nationwide, copies of the attached notice marked "Appendix B."[20] Copies of the notices, on forms provided by the Regional Director for Region 12, after being signed by the Respondents' authorized representatives, shall be posted by Respondent MasTec and maintained for 60 consecutive days in conspicuous places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by 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 by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notices to all current employees and former employees employed by the Respondent at any time since March 2006.

(h) Within 21 days after the 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 the Respondent has taken to comply.

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[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices 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."

Appendix C

B. The Respondent, DirecTV, Inc., El Segundo, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining any rules, including confidentiality rules, that restrict your ability to discuss your wages, hours, and terms and conditions of employment with anyone.

(b) Causing the termination of or otherwise discriminating against any employee for engaging in protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing 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) Make Jouvani Alicea, Marlon Binet, Christopher Creary, Leroy Davis, Donovan Edwards, Sebastian Eriste, Hugh Fowler, Joseph Guest, Delroy Harrison, James Hehmann, Mark Hemann, Michael Hermitt, Federico Hoy, Fernando Hoy, Ariel Kelly, Shervoy Lopez, Ricardo Perlaza, Sergio Pitta, Noel Rodriguez, Rudy Rodriguez, Fernando Sando, Olmy Talent, Diego Velez, Nerio Vera, Ralph Wilson, and Carlos Zambrano whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, jointly and severally with Respondent MasTec, Inc., in the manner set forth in the remedy section of this decision.

(b) Within 14 days after service by the Region, mail a singed copy of the attached notice marked "Appendix C"[21] to Respondent MasTec for posting at MasTec's Orlando, Florida facility.

(c) Within 21 days after the 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 the Respondent has taken to comply.

MEMBER BECKER, concurring.

I concur with the result reached by my colleagues. I write separately because I believe the Supreme Court's decisions in *NLRB v. Electrical Workers Local 1229* (*Jefferson Standard*), 346 U.S. 464 (1953), *Linn v. Plant Guards*, 383 U.S. 53 (1966), and *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), require us to apply *Jefferson Standard* in a less expansive manner consistent with the facts of that case.[22]

The critical fact here, as my colleagues recognize, is that the statements at issue were expressly and directly related to the labor dispute. The statements

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[21] *See* fn. 20, supra.

[22] I also write separately to make clear that the majority opinion should not be read to in any way endorse the judge's view that the employees who attended the taping but said nothing could, nevertheless, be found to have engaged in unprotected disparagement. As has been found in all prior cases, unprotected disparagement requires individual, affirmative conduct. The employees who did not speak or raise their hands during the broadcast did not engage in even arguably unprotected conduct.

concerned what the Respondent had asked the employees to do and the resulting implications for their wages. That critical fact takes this case outside the scope of the unprotected conduct defined in *Jefferson Standard*. The Court in that seminal case repeatedly emphasized that the speech at issue was not expressly tied to a labor dispute, and that was why it could constitute cause for discharge as product disparagement or disloyalty. The Court made clear that the employees' "attack related itself to no labor practice of the company. It made no reference to wages, hours or working conditions. The policies attacked were those of finance and public relations for which management, not technicians, must be responsible. The attack asked for no public sympathy or support." 346 U.S. at 476. The Court reiterated, "While they were also union men and leaders in the labor controversy, they took pains to separate those categories. In contrast to their claims on the picket line as to the labor controversy, their handbill of August 24 omitted all reference to it. The handbill diverted attention from the labor controversy. It attacked public policies of the company which had no discernible relation to that controversy." *Id.* at 476. The Court concluded: "the findings of the Board effectively separate the attack from the labor controversy and treat it solely as one made by the company's technical experts upon the quality of the company's product. As such, it was as adequate a cause for the discharge of its sponsors as if the labor controversy had not been pending. The technicians, themselves, so handled their attack as thus to bring their discharge under § 10(c)." *Id.* at 477.

Here, in contrast, the employees' statements were expressly and intimately linked to the labor

dispute. The line of product disparagement and disloyalty cases running from *Jefferson Standard* has no application. Thus, because the employees' speech was clearly concerted activity for mutual aid and protection, it was protected unless it was uttered with actual malice. That standard is consistent with Congress' intent to protect concerted activity for mutual aid and protection even if the conduct—a strike, for example—inflicts economic injury on the employer. That standard also makes sense as a matter of policy, because so long as the statements are expressly linked to the labor dispute, the public will evaluate them within that context. As the Supreme Court recognized in *Linn*, and as the consuming public understands, "Labor disputes are ordinarily heated affairs . . . . Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language." 383 U.S. at 58. In other words, when the statements are expressly linked to a labor dispute, the public will take them with a grain of salt. The Court's holding in *Linn* further supports the proposition that otherwise protected statements do not lose protection simply because they "are erroneous and defame one of the parties to the dispute." 383 U.S. at 61. Such statements are protected unless they are made with actual malice. This standard is clear and has been elaborated by the courts under both *Linn* and *New York Times v. Sullivan*, 376 U.S. 254 (1964). Thus, I would end the majority opinion after finding, as my colleagues do, that the statements were not made with actual malice.

My colleagues go on to analyze whether the technicians' statements here are "so disloyal . . . as to

lose the Act's protection." Not only is that standard so vague as to chill the exercise of Section 7 rights, it is in tension with the central purpose of Section 7, which is to grant employees a right to engage in concerted activity for mutual aid and protection *even when* the exercise of that right might otherwise be considered disloyalty. Employees have a right to strike despite the disloyalty involved in refusing to work. Employees have a right to ask consumers to boycott their employer in support of the employees' position in a labor dispute despite the disloyalty involved in seeking to reduce their employer's business.[23] Similarly, employees have the right to criticize their employer's product or services so long as the criticism is expressly and directly tied to a labor dispute and is not made with actual malice.

My colleagues find that the statements were not reckless, but instead a last resort to resolve a legitimate grievance. While I agree with their finding, the Supreme Court made clear in Washington Aluminum that concerted activity for mutual aid and protection need not be measured or proportional in order to be protected.

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[23] As Judge Learned Hand stated many years ago in *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 506 (2d Cir. 1942):

> Such [protected] activities may be highly prejudicial to [the] employer; his customers may refuse to deal with him, he may incur the enmity of many in the community whose disfavor will bear hard upon him; but the statute forbids him by a discharge to rid himself of those who lay such burdens upon him. Congress has weighed the conflict of his interest with theirs, and has pro tanto shorn him of his powers.

Even if such activity is "unnecessary and unwise," it remains protected. 370 U.S. at 16. As in Washington Aluminum, the employees here "were part of a small group of employees who were wholly unorganized. They had no bargaining representative and, in fact, no representative of any kind to present their grievances to their employer. Under these circumstances, they had to speak for themselves as best they could." Id. at 14.

Finally, my colleagues draw the applicable standard from *Mountain Shadow Golf Resort*, 330 NLRB 1238 (2000), but there, as in *Jefferson Standard*, the handbill at issue "did not mention the problems the employees' union was having negotiating with the Respondent, and bore no indication that it was written by or on behalf of any employee of the Respondent." *Id.* at 1241. In other words, the statements, like those in *Jefferson Standard*, but unlike those in the instant case, were not expressly and directly tied to any labor dispute. *Mountain Shadow* is thus distinguishable on its facts and the standard it articulates is overbroad for the reasons explained above.[24]

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[24] Similarly, the majority cites *Five Star Transportation, Inc.*, 349 NLRB 42 (2007), but the statements found to be unprotected disparagement in that case related to "incidents that had occurred approximately 7 years prior to the instant labor dispute and that, significantly, had no relation to the drivers' concern that the Respondent would not maintain the terms and conditions of employment that the drivers had negotiated with their predecessor employer]." *Id.* at 46. *Five Star* is thus similarly inapposite.

Appendix C

Because the majority, based on *Mountain Shadow*, reads *Jefferson Standard* and its progeny too broadly, I concur only in the result.

CHAIRMAN LIEBMAN, concurring.

I join fully in the Board's opinion. In his concurrence, Member Becker argues—and he may well be correct— that the Board's case law since *Jefferson Standard* has too expansively applied that decision. But no party here has asked us to revisit this long established jurisprudence, and even under the Board's precedent as it has evolved, the employee statements at issue in this case did not lose the protection of the Act. As he acknowledges, the outcome in this case would be the same under Member Becker's view of the law. Our decision today does nothing to further broaden the Board's reading of *Jefferson Standard*, nor does it foreclose a future reexamination of our doctrine, in an appropriate case.

Dated Washington D.C., July 11, 2011.

Wilma Liebman, Chairman

Craig Becker, Member

Brian Hayes, Member

[APPENDIX INTENTIONALLY OMITTED]

APPENDIX D – DECISION OF THE ADMINISTRATIVE LAW JUDGE FOR THE NATIONAL LABOR RELATIONS BOARD, DATED JANUARY 4, 2008

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

Case Nos. 12-CA-24979 and 12-CA-25055

JOSEPH GUEST

Petitioner

v.

MASTEC ADVANCED TECHNOLOGIES,
a division of MASTEC, INC.

and

DIRECTV, INC.

Respondents

Filed
January 4, 2008

Before MICHAEL A. MARCIONESE, Administrative Law Judge:

Appendix D

I heard this case in Orlando, Florida, on July 23-25, 2007. Joseph Guest, an Individual, filed the charge in Case No. 12-CA-24979 on May 5, 2006[1] and amended it on June 29 and August 21. Guest filed the charge in Case No. 12-CA-25055 on June 29, and amended it on August 21. Based upon these charges, the consolidated complaint issued on April 30, 2007, alleging that Respondents MasTec Advanced Technologies, a division of MasTec, Inc. (Respondent MasTec), and DirecTV, Inc. (Respondent DirecTV), violated Section 8(a)(1) of the Act in connection with the termination of 26 individuals employed by MasTec to perform services under a contract between MasTec and DirecTV.[2] Specifically, the consolidated complaint alleges that the named employees engaged in protected concerted activities during the period January through March, 2006, including appealing to the public by participating in the production of a television news report that aired on May 1 and 2. It is further alleged that DirecTV attempted to cause and caused MasTec to terminate the 27 employees, and that MasTec terminated these employees, because of their participation in this protected concerted activity. The consolidated complaint also alleges that Christopher Brown and Noel Muniz, alleged supervisors of Respondent MasTec, threatened employees with discharge and other unspecified reprisals because of their protected concerted activity. Finally, the consolidated complaint alleges that

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[1] All dates are in 2006 unless otherwise indicated.

[2] The consolidated complaint originally named 27 alleged discriminates. At the hearing, the General Counsel amended the complaint to delete one individual, James Tuckfield, after evidence was presented showing that he had not been discharged.

Respondent MasTec violated Section 8(a)(1) of the Act by maintaining confidentiality, solicitation and distribution rules that allegedly infringed employees' exercise of their Section 7 rights.

Respondent MasTec filed its answer to the consolidated complaint on May 14, 2007, denying that it committed the alleged unfair labor practices and asserting several affirmative defenses. Specifically, Respondent MasTec asserted that the allegedly unlawful rules had been rescinded and that the employees who were terminated had been engaged in activities that were not protected under the Act and/or were terminated for cause unrelated to any concerted activity. Respondent DirecTV also filed its answer to the consolidated complaint on May 14, 2007, denying the alleged unfair labor practices and raising similar affirmative defenses. At the hearing, Respondents amended their answers to withdraw those affirmative defenses suggesting that the employees were terminated for reasons other than their participation in the television broadcast.

As framed by the amended pleadings, the principal issue in this case is whether the 26 employees who participated in the news report, as broadcast several times on the local television station, lost the protection of the Act because several employees made statements during the broadcast that allegedly disparaged the Respondents and their products and services or were otherwise disloyal to their employer. Resolution of this issue is governed by the Supreme Court's decision in *NLRB v. Electrical Workers Local 1229* (*Jefferson Standard*), 346 U.S. 464 (1953) and its

progeny. The pleadings also raise other issues, including whether Respondent DirecTV caused Respondent MasTec to terminate the employees and whether the two supervisors alleged in the complaint made statements that constitute unlawful threats under the Act. The legality of Respondent MasTec's rules is a separate issue unrelated to the allegedly unlawful terminations.

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent MasTec and Respondent DirecTV, I make the following

Findings of Fact

I. Jurisdiction

Respondent MasTec, a corporation, provides television satellite installation and maintenance services for Respondent DirecTV from several facilities in Florida and other states, including the facility in Orlando, Florida that is involved in this proceeding. In conducting its business operations, Respondent MasTec annually purchases and receives at its Florida facilities materials valued in excess of $50,000 directly from points outside the State of Florida. Respondent MasTec 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.

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[3] The General Counsel's unopposed motion to correct the transcript is granted, as is Respondent DirecTV's unopposed Motion to Substitute Hearing Exhibit. The respective motions are received in evidence as ALJ Exhibits 1 and 2.

Appendix D

Respondent DirecTV, a corporation, with its principal office and a place of business in El Segundo, California, is engaged in the business of providing television programming via satellite throughout the United States, including in the State of Florida. In conducting its business operations, Respondent DirecTV derived gross revenues in excess of $500,000 and provided services valued in excess of $50,000 in states other than the State of California. Respondent DirecTV 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.

II. Alleged Unfair Labor Practices

A. Respondent MasTec's Rules

There is no dispute that the Employee Handbook in effect in March 2006 covering Respondent MasTec's employees contained the following provisions:

> **CONFIDENTIALITY POLICY**
>
> No team member may use Confidential Information (as defined below) to personally benefit himself, herself, or others. In the handling of all Confidential Information, team members must not communicate such information to anyone, inside or outside the Company (including to family members), except on a strict "need-to-know" basis and under circumstances that make it reasonable to believe that the information will not be used or misused or improperly disclosed

by the recipient. Team members must be careful to avoid discussing Confidential Information in any place (for instance, in restaurants, on public transportation, in elevators) where such information may be heard or seen by others....

"Confidential Information" includes, but is not limited to, any documents, knowledge, data or other information relating to ... (6) the identity of and compensation paid to the Company's team members, consultants and other agents: ...

SOLICITATION

Contributions may not be solicited on company property without the permission of the supervisor or Division manager.

DISCIPLINE

EXAMPLES OF VIOLATIONS CAUSING IMMEDIATE TERMINATION …

- Unauthorized distribution of written or printed matter;
- Unauthorized solicitations or collections; …

In Respondent MasTec's vernacular, an employee is referred to as a Team Member. Respondent acknowledged that the same handbook applied at all of

its facilities nationwide. There is no evidence of any employee being disciplined under these rules.

Mark Retherford, Respondent MasTec's Senior Vice President, testified that the handbook had been updated "recently" and that the new handbook was being distributed in the field at the time of the hearing. No other evidence was offered by Respondent MasTec regarding when the handbook was revised or exactly how the revision was communicated to the employees. The confidentiality rule in the new handbook does not include employee compensation in the definition of confidential information and contains the following new language:

> Of course, the Company recognizes that employees have the right to discuss work-related matters and concerns, including those related to terms and conditions of work.

The updated handbook also contains a new provision governing solicitations, distributions, and use of bulletin boards which appears on its face to comply with Board precedent regarding such rules. In any event, the General Counsel does not allege that the new provision is unlawful.

In determining whether an employer's mere maintenance of a work rule violates the Act, the Board considers whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. In making this determination, the Board gives the rule a reasonable reading and refrains from reading particular phrases in isolation. *Albertson's, Inc.*, 351 NLRB No. 21,

slip op. at 6 (Sept. 29, 2007) and cases cited therein. Under the test adopted by the Board in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board first asks "whether the rule *explicitly* restricts activities protected by Section 7." (Emphasis in original.) If so, the rule is unlawful. If it does not explicitly restrict protected activities,

> The violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Id. at 647. Accord: *Albertson's, Inc.*, supra.

Respondent MasTec's confidentiality rule, at least as it existed in March 2006, clearly violates the Act under this test. The rule explicitly includes information such as employee names and compensation within the definition of confidential information. The Board has long held that an employer may not restrict employees in sharing such information as such discussions among employees are usually a precursor to protected organizational activity. *See Jeannette Corporation*, 217 NLRB 653 (1975) enfd. 532 F.2d 916 (3rd Cir. 1976). Accord: *Fredericksburg Glass & Mirror, Inc.*, 323 NLRB 165 (1997). It is immaterial that Respondent MasTec may not have disciplined any employee under this rule for disclosing such information. The mere maintenance of such a rule would reasonably tend to chill employees in the exercise of their right to discuss

their wages and working conditions. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998).

Respondent MasTec's solicitation and distribution rules are overly broad under current Board law because they would restrict employees from engaging in protected solicitation anywhere on company property, regardless of whether the employee was on work-time or in a work area, and would subject employees to possible termination if they engaged in solicitation without permission. Similarly, employees would be subject to possible termination if they engaged in distribution of protected material without permission regardless of the site of the distribution and their work status. These rules, as they existed in March 2006, clearly violate Section 8(a)(1) of the Act. *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Our Way, Inc.*, 268 NLRB 394 (1983); *See also Tele Tech Holdings, Inc.*, 333 NLRB 402, 403 (2001) (any rule that requires employees to secure permission from their employer before engaging in protected concerted activity at an appropriate time and place is unlawful).

Respondent MasTec essentially concedes that the above-quoted rules were unlawful. It failed to make any argument in its brief in opposition to the General Counsel other than to rely upon the putative revision of the rules and the apparent legality of the current rules. However, in the absence of specific evidence showing that the new rule was in fact communicated to the affected employees, or that they were informed that the old rules were being rescinded and that employees would now be free to engage in protected activity at the appropriate times and places, I cannot find that

Respondent MasTec has effectively repudiated the unlawful rules. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). *See also Claremont Resort & Spa*, 344 NLRB 832 (2005). Accordingly, I find that Respondent MasTec violated Section 8(a)(1) of the Act, as alleged in the complaint, by maintaining the confidentiality rule and the overly broad solicitation and distribution rules in its employee handbook.

B. The Termination of the 26 Employees

1. *The Evidence*

Respondent MasTec is an "infrastructure company" in the utility, telecommunications and power energy fields. Its Advanced Technologies Division, involved in this proceeding, is focused on installing, upgrading and servicing satellite television systems sold by entities such as Respondent DirecTV. Respondent MasTec is one of Respondent DirecTV's "home service providers", or HSPs, and accounts for approximately 30% of DirecTV's installations and upgrades. Each HSP is assigned a geographic territory where it performs installation and service exclusively for DirecTV. The HSP involved in this proceeding is in the Orlando, Florida area. In 2006, Respondent MasTec employed over 100 technicians in the Orlando facility who worked exclusively on DirecTV products. Herbert Villa, Respondent MasTec's Senior Technical Supervisor, was responsible for day-to-day supervision of these technicians. He reported to Christopher Brown, who was Respondent MasTec's operations manager for North Florida. Brown in turn reported to Mark Retherford, Respondent MasTec's Senior Vice President responsible

for the DirecTV business. Steven Crawford is Respondent DirecTV's Vice President of Field Operations responsible for overseeing the activities of the HSPs, including Respondent MasTec.

The relationship between the Respondents is governed by a contract, or Home Service Provider Agreement. The 2005 Agreement, which was in effect during the relevant period here, prohibits Respondent MasTec from working for any other satellite television provider. Under this agreement, Respondent MasTec is paid by Respondent DirecTV for each satellite TV installation in its territory, regardless of whether the service was ordered through Respondent DirecTV or through a third party retailer, such as Direct Star TV. The initial installation includes, per contract, connection of an active telephone line from the customer's home to the satellite TV receiver and part of the fee paid by Respondent DirecTV to Respondent MasTec is for this connection. The customer is not charged for a routine telephone line connection. The 2005 HSP Agreement also contains penalties if MasTec or any other HSP fails to meet performance standards, including removal of territory. The record contains evidence that Respondent DirecTV in fact exercised this option in 2004 by removing territory from MasTec in New Jersey. The contract requires Respondent MasTec employees to wear DirecTV uniforms and drive vehicles bearing the DirecTV logo. However, Respondent MasTec is not involved in the hiring or day-to-day supervision of Respondent MasTec's employees. Respondent MasTec is solely responsible for determining the wages and benefits provided to technicians it hires to service this contract.

Appendix D

The 100 or so technicians who worked out of Respondent MasTec's Orlando office were divided into seven teams, each reporting to a supervisor, who held weekly team meetings. As noted above, Villa was in charge of the Orlando office. In addition to the weekly team meetings, Respondent MasTec conducted training, both initially when a technician was hired, and periodically thereafter, to remind employees of the requirements of the job or to introduce new methods or procedures. All employees were also given training materials when hired and throughout their employment, including periodic "Tech Tips" prepared by Respondent DirecTV, and each technician carried in his or her vehicle Respondent DirecTV's "Standard Professional Installation Guidelines". It is undisputed that all of the training and the materials distributed to the technicians regularly reminded them of the importance of connecting phone lines to receivers as part of the installation process.[4]

Respondent MasTec's Orlando technicians typically report to the Orlando facility each day at 7:00 am to pick up their route assignments for the day and any equipment they will need to complete the assignments on the schedule.[5] The assignments are

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[4] In fact, virtually all of the training materials in evidence refer to connection of telephone lines as a mandatory part of the technician's installation procedures.

[5] Some of Respondent MasTec's technicians, such as Rudy Rodriguez who testified at the hearing, receive their assignments via fax at home because of the distance they live from the office. These technicians still are required to come in for the weekly team meetings and also, from time to time, to replenish equipment they carry in their vans.

designated as either "A.M." or "P.M." based on when the customer has been told the technician would be there. The A.M. assignments are expected to be done between 8:00am and 12:00 noon. The P.M. assignments are to be done between 1:00 pm and 5:00 pm. When a technician arrives at the customer's home, he or she will review the order with the customer, determine with the customer where is the best place to locate the satellite dish, and discuss the location of the televisions to be connected to the receiver. The technician is also expected to review the installation procedure, including the telephone line connection, answering any questions the customer has regarding this. Once the installation is complete and the receiver is connected, the technician calls DirecTV to activate the receiver and verify the signal. He or she will then educate the customer on how to use the product. These procedures are spelled out in the "Statement of Work" contained in the HSP Agreement. Technicians are paid piecemeal by the job, based on the type and size of the job. As a result, the more installations a technician is able to complete in a day, the higher his pay.

There was a great deal of testimony regarding the telephone connection part of an installation. It is clear that this is vitally important to Respondent DirecTV and, by extension Respondent MasTec. A receiver that is connected to an active telephone line is called a "responder" while those that are not connected are called "non-responders". There is no dispute that a receiver does not need to be connected to an active telephone line in order for a customer to receive a satellite signal. Rather, according to the Respondents' witnesses, it is a convenience feature which allows a customer to order pay-per-view broadcasts via remote

control, to have caller ID displayed on the television screen, and to receive downloads from DirecTV of software upgrades. Of course the telephone connection also allows DirecTV to track the programs that its customers watch, information which DirecTV may use to determine programming, etc.

As previously noted above, there is no separate charge to the customer for a standard telephone line connection. However, if a customer does not want exposed telephone lines running across the room or along the baseboard, they can opt for a custom installation, such as a "wall fish", in which the technician will "fish" behind the wall to run the telephone wire to the satellite receiver. Another option is a wireless telephone jack. Customers who choose these options are charged $52.50 for a "wall fish" and $49.00 for a wireless jack. These charges are determined by Respondent MasTec, not Respondent DirecTV.

There is no dispute that technicians are not always able to connect a receiver to an active telephone line. For example, some customers have opted to forego a land line for their telephone service, relying exclusively on cell phones for their telecommunications. In these situations, there are no live telephone lines in the home to connect. In other situations, customers will refuse to have telephone lines connected because they do not want the exposed lines and are unwilling to pay extra for a "wall fish" or wireless jack. There are also customers who will refuse to connect a telephone line to the receiver because they do not want to enable their children to order pay-per-view via the remote. Finally, there are some customers who simply do not want to

give DirecTV access to the information that could be conveyed via their telephone lines. There is also undisputed evidence that some customers who allow the technician to connect the telephone line will unplug it after the technician leaves the home. In all of these situations, the receiver will be counted as a "non-responder".

In early 2006, Respondent MasTec was Respondent DirecTV's worst-performing HSP in terms of active responder rates on telephone lines. According to witnesses for the Respondents, Respondent DirecTV decided to penalize Respondent MasTec in an effort to get it to improve its responder rate. Beginning in the first quarter of 2006, Respondent DirecTV back-charged Respondent MasTec at the rate of $5.00 for each non-responder if its non-responder rate exceeded 47% in a month. In order to avoid this penalty, Respondent MasTec had to connect at least 53% of the receivers it installed to active telephone lines. It was in response to this move by Respondent DirecTV that Respondent MasTec implemented the policy that became the subject of controversy among its employees in Orlando.

On January 17, Respondent MasTec informed its technicians, by memo, that it was changing its pay structure in order to encourage employees to improve their performance in terms of telephone connections. Under the new pay structure, which was to be effective February 1, Respondent MasTec would reduce the amount paid on each installation by $2.00 and the amount paid on each additional outlet by $2.00 and would instead pay $3.35 for each responding, i.e. connected, receiver. The memo also informed employees

that Respondent MasTec was establishing a minimum threshold of 50% responders per 30-day period. If a technician failed to meet this threshold, i.e. failed to connect active telephone lines to receivers in 50% of his installations, then his pay would be reduced by $5.00 per non-responding receiver bi-weekly. If a technician failed to meet the 50% threshold for a consecutive 60-day period, he would be subject to termination. The memo concluded by illustrating through several hypothetical employees how, under the new pay structure, a technician could earn more than he was currently making if he increased his responder rate.

There is no dispute that Respondent MasTec communicated this policy not only in the January 17 memo but by having its supervisors discuss it with the employees at weekly team meetings after the memo came out. Christopher Brown, the Operations Manager for North Florida, also spoke to employees at the team meetings about the new policy. Several technicians testified as witnesses for the General Counsel about these meetings. Their testimony establishes that the technicians resisted the change from the start, speaking up at each meeting about the difficulty in achieving the 50% threshold due to factors beyond the technician's control. Frequently cited by the employees was the problem with customers who did not have land line telephones and customers who adamantly refused a telephone connection. Some technicians complained that even after connecting the phone line, the customer could disconnect it. According to these witnesses, Respondent MasTec's supervisors brushed off the employees' concerns, advising the technicians to tell the customer whatever was necessary to make a connection, even if

that meant lying to a customer. Several witnesses recalled supervisors instructing them to simply connect the phone line without telling the customer, or to hardwire the telephone jack into the wall so the customer could not disconnect it after they left. At least one supervisor told the technicians to tell the customer the receiver wouldn't work without the phone line connected. Respondent's witnesses conceded that this latter statement was not true. Several witnesses testified that, at one meeting, Operations Manager Christopher Brown told the technicians to do whatever they could to convince the customer, to say anything, even that the box (receiver) would blow up if not connected to the phone line. Several of General Counsel's witnesses admitted they laughed at this statement and believed Brown was joking.

Christopher Brown admitted making the statement about the box blowing up if not connected to a phone line but claims he said this in order to add some "comic relief" during a tense meeting which appeared to be going nowhere. According to Brown, at every meeting the technicians brought up the same excuses why they could not make the 50% threshold and at each meeting he, Villa and the supervisors attempted to explain how they could. Brown and Villa both testified that they offered suggestions to the employees about ways to convince a customer of the benefits of a telephone connection but continued to hear the same complaints. Brown resorted to his "comic relief" only out of frustration with the lack of progress in convincing the employees of the need to improve their responder rates. While not disputing much of the testimony of General Counsel's witnesses, Brown and Villa insisted that they

never told the technicians to "lie" to a customer, or to do "whatever it takes", to accomplish the goal of connecting phone lines.[6]

Although there is no evidence that Respondent DirecTV required Respondent MasTec to adopt the new pay structure, it participated in the effort to get the technicians to increase their responder rates by distributing a training video on the subject of phone lines. This video, which Respondent MasTec showed to its Orlando employees in February or March, after the change in pay structure was announced, featured Respondent DirecTV vice presidents Steven Crawford and Scott Brown. In the video, Crawford states that technicians should not blame their manager, supervisor or employer for the increased emphasis on phone lines because he was the one putting pressure on them to get it done. Crawford also offered suggestions to technicians on how to get the phone lines connected, including doing so without telling the customer, or by telling the customer such a connection was "mandatory". There is no dispute that, while a telephone connection is mandatory for HSPs and the technicians employed by them, it is not mandatory for the customer.

On March 17, Respondent MasTec informed the technicians, by memo, that the new pay structure, including the $5.00 per non-responder charge-back, was going into effect and that the first pay checks reflecting

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[6] Delroy Harrison, one of General Counsel's witnesses, conceded on cross-examination that none of Respondent MasTec's supervisors ever specifically told the technicians to "lie" to a customer.

this would be issued on March 24. The Monday after employees received their first paychecks reflecting charge-backs, i.e. March 27, a large group of technicians gathered in the parking lot outside the Orlando facility before work to complain about the new pay structure. Senior Supervisor Villa came outside to talk to them. There is no dispute that the technicians were upset and angry and voiced many of the same concerns they had expressed in team meetings and individually in the weeks preceding implementation of the new pay structure. Villa testified that he was subjected to name-calling and profanity. Nevertheless he tried for about an hour to calm the group and get then to return to work. After about an hour, Chris Brown, who had been called by Villa and informed of the uprising, arrived at the facility and also spoke to the technicians in the parking lot. Both Brown and Villa tried to point out to the technicians that some of the them had actually earned more money under the new system, suggesting that if all of them worked at connecting more telephone lines they would not have to worry about losing money. One employee who testified, Delroy Harrison, had been back-charged $405.00 and demanded that Brown reimburse him. Harrison was with another technician, Hugh Fowler, who had made money and Brown pointed this out to Harrison.

After getting nowhere with the technicians, Brown went into the office and spoke to his boss, Gus Rey. He returned to the parking lot and told several of the technicians that he would look into their complaints. According to Brown, when he looked at the pay stubs of some of the complaining technicians, they "looked kind of weird". Brown promised to investigate and make sure

that the new structure had been applied properly. He promised to have an answer the following day. Brown also promised the technicians that he would devise a way to track the technicians' responder rate in the field to help them in meeting the threshold. All witnesses agree that, at some point, Brown climbed on top of a van and told the technicians it was time to get back to work. After this, the technicians began to disperse and leave for their morning appointments. Brown testified that it was about 11:00 am when this happened, three hours after technicians are supposed to be at their first appointment?[7]

Harrison testified that, before leaving, he spoke individually with Chris Brown. According to Harrison, he told Brown that what the company was doing was not right. Brown responded by telling Harrison that he had replacements for all of them. Harrison ended the conversation by telling Brown that things were going to change because what they, i.e. the company, was doing was not right. According to Harrison, no one else witnessed this conversation.[8] Brown's version of this conversation is more detailed. According to Brown, Harrison showed him his work orders for the day and said that if he went to a job with five receivers and he couldn't connect the phone lines, he would cancel the job. Brown testified that he expressed surprise that

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[7] General Counsel's witnesses did not dispute the testimony that many of the technicians did not leave to begin their routes until 11:00 am.

[8] Harrison's testimony is the basis for the complaint allegation that Respondent MasTec threatened employees with discharge if they concertedly complained about their wages.

Harrison would throw away what he could earn on such a job simply because it would count against him on his responder rate. Later in the conversation, Brown said to Harrison

> You know what? If there's a part of my job I don't want to do, and I just refuse to do, there's someone else, there's a replacement ready to take my job, and will gladly do everything that needs to be done for my job. I can be replaced, you can be replaced [referring to the tech], we can all be replaced if we don't want to do our jobs.

There is no dispute that Harrison did his route that day and did not refuse to do any installations.

The technicians gathered in the parking lot again the next day, i.e. March 28. As promised, Brown met with the technicians and distributed the "tracking" sheet he had developed. He also provided answers to some of the individual complaints he had investigated. All of the witnesses who testified about this second day agreed that the exchange was much the same as the day before, i.e., the technicians still complaining, essentially, that they should not be held responsible for non-responders because of circumstances beyond their control and Brown telling them that this is the way it's going to be and to just do it. It was also agreed that this gathering did not last as long as the previous day. After a while, Brown told the employees it was time to get to work and they began to disperse. Harrison alone testified that Brown told the technicians that, if they did not want to work, they could leave and if they did not leave it would

force him to do what he didn't want to do. Harrison recalled that Brown then turned to one of the supervisors, Mike Cuzon, and told him not to let this happen again, that if any technicians had a complaint, they should see him individually. Harrison spoke up, telling Brown that the employees wanted to speak as a group, not individually.[9] Guest, who also testified about the Tuesday gathering, did not corroborate this testimony. Fowler testified that Brown told the employees if they did not want to do their jobs he had replacements for them. According to Fowler, Brown went on to say that "this is a business, not a family." Brown denied saying, "don't make me do what I don't want to do." Rather, he claims he told the technicians that they needed to get to their jobs before they started missing appointments and worse things happened. There is no dispute that none of the technicians who gathered in the parking lot on Monday and Tuesday were disciplined for their participation in this group protest.

After the two parking lot protests, still unhappy with Respondent MasTec's new pay structure and believing that their concerns were not being addressed, several of the technicians began discussing ways to go public with their dispute. Guest testified that it was technician Frank Martinez who suggested they contact the media.[10] Guest was corroborated by Fowler and

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[9] This testimony by Harrison is also relied upon by the General Counsel as the basis for the allegation that Respondent MasTec threatened employees with discharge.

[10] Martinez, who resigned and was not named as a discriminatee, did not testify at the hearing.

Harrison. According to Harrison, the employees hoped the media spotlight might put pressure on Respondent MasTec to abandon the new policy of charging back employees for non-responders. Although several media outlets were contacted, only one expressed an interest in their story, WKMG-TV Local 6 (referred to here as Channel 6). According to General Counsel's witnesses, it was Martinez who set up the appointment with Nancy Alvarez, a reporter from Channel 6, so employees could tell her about the new policy. There is no dispute that, on March 30, the 27 technicians named in the original complaint, along with Martinez, went to the TV station to meet with Alvarez. There is also no dispute that the technicians drove to the station in their DirecTV vans, wearing their DirecTV uniforms. Most of the technicians drove to the station from Respondent MasTec's offices before starting their assignments for the day.

The General Counsel's witnesses testified that no specific plan to wear their uniforms and drive together in their work vans had been discussed before the meeting at the TV station. According to these witnesses, the apparent caravan and similarity in appearance were merely coincidental. The employee witnesses also denied that they had agreed in advance to designate anyone as their spokesperson, or that they had planned what to say. However, once they got to the TV station, Martinez assumed the role of spokesperson and did most of the talking with Alvarez. After initially talking to Martinez and a few others, Alvarez invited all the technicians who were there into the station where she interviewed them as a group while filming the exchange. According to the General Counsel's witnesses, it was Alvarez who determined which technicians to interview and what

statements to highlight in her report. The employees left the TV station at approximately 9:45 am, at which point they resumed their work assignments.

Christopher Brown testified that he was informed that technicians were in the parking lot of Channel 6. He admitted that he and Villa drove by the TV station and confirmed this. When they arrived, the technicians were leaving in their vans. There is no evidence, nor allegation, that either Brown, or any other Respondent MasTec supervisor, questioned any of the technicians about their visit to the TV station or took any action against them before the broadcast of the report made from these interviews. Both Respondents were contacted by Alvarez after she met with the technicians and asked for a response to accusations made by the technicians, including a claim that they had been told to lie to customers. Rather than agreeing to be interviewed, each Respondent submitted a written statement to the TV station. Respondent DirecTV's Director of Public Relations Robert Mercer, sent the following statement to Alvarez on April 21 via e-mail:

> We fully endorse MasTec's plan to provide incentives for technicians to install the required phone line connections so our customers can enjoy the full complement of DlRECTV services. We believe it's fair and offers technicians, who properly perform their installation work, an opportunity to make more money. DIRECTV pays for the installation of a phone line and we advertise it as part of our service. Technicians who don't make

> that connection are denying our customers the full benefit and function of their DIRECTV System, and as a result, we're not fulfilling our promise to the customer, and that's an issue we take quite seriously.

Respondent MasTec's written statement, while also emphasizing the benefit of a telephone connection to the customer, also explained in detail how the charge-back policy worked and how a technician could benefit from it.

Channel 6 first aired its broadcast of the technicians' complaints on May 1, during the 5:00 pm newscast.[11] The broadcast was preceded by an advertisement, called a "teaser", about the upcoming news report, which appeared on Friday, April 28. The teaser opened with a reporter asking, "Why did over 30 employees of a major company show up at Local 6?", followed by video of the following exchange between the reporter and one of the technicians:

> Interviewer: So you've basically been told to lie to customers?
>
> Technician: Yeah.

A voice over then intones, in response to the first question, "to tell the Problem Solvers about a dirty little secret." This is followed by video of the technician saying, 'Tell the customer whatever you have to tell

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[11] Video of all of the broadcasts and teaser ads are in evidence along with transcripts prepared by the parties.

them." The teaser continues with the reporter saying, 'That may be costing you money."

The full news story which aired on May 1, is as follows:

> News Anchor 1: Only on 6 ... a problem solver investigation with a bit of a twist ... this time they came to us.
>
> New Anchor 2: Yeah ... technicians who have installed hundreds of DirecTV satellite systems across Central Florida ... they're talking about a company policy that charges you for something you may not ever use. And as problem solver Nancy Alvarez found, if you don't pay for it, the workers do.
>
> Reporter Alvarez: They arrived at our Local 6 studios in droves. DirecTV trucks packed the parking lot and inside the technicians spoke their minds. (accompanying video showed more than 16 DirecTV vans in the parking lot followed by a shot panning a group of technicians wearing shirts bearing the DirecTV logo).
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> Technician Lee Selby:[12] We're just asking to be treated fairly.

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[12] Selby is not an alleged discriminatee in this case, having resigned before the terminations at issue.

Appendix D

Alvarez: These men have installed hundreds of DirecTV systems in homes across Central Florida but now they admit they've lied to customers along the way.

Hugh Fowler:[13] If we don't lie to the customers, we get back charged for it. And you can't make money.

Alvarez: We'll explain the lies later but first the truth. Phone lines are not necessary for a DirecTV system; having them only enhances the service allowing customers to order movies through a remote control instead of through the phone or over the internet.

Alvarez: So it's a convenience ...

Technician Martinez:[14] It's more of a convenience than anything else...

Alvarez: But every phone line connected to a receiver means more money for DirecTV and MasTec, the contractor these men work for. So the techs say their supervisors have been putting pressure on them. Deducting five bucks from their

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[13] Fowler is one of the alleged discriminatees who testified at the hearing.

[14] As previously noted, Martinez resigned before the broadcast.

paychecks for every DirecTV receiver that's not connected to a phone line.

Martinez: We go to a home that...that needs three...three receivers that's... fifteen dollars.

Alvarez: Throw in dozens of homes every week and the losses are adding up fast.

Alvarez (questioning a room full of technicians): How many of you here by a show of hands have had $200.00 taken out of you paycheck? (accompanying video showed virtually every technician in the room raising his hand).

Martinez: More.

Alvarez (reporting): Want to avoid a deduction on your paycheck? Well, according to this group, supervisors have ordered them to do or say whatever it takes.

Martinez: Tell the customer whatever you have to tell them. Tell them if these phone lines are not connected the receiver will blow up.

Alvarez (interviewing): You've been told to tell customers that...

Martinez: We've been told to say that. Whatever it takes to get the phone line into that receiver.

Alvarez (reporting): That lie could cost customers big money...the fee to have a phone line installed could be as high as $52.00 per room...want a wireless phone jack? That will cost you another 50 bucks.

Alvarez (shown outside Respondent's Orlando office attempting to speak to Villa): We're hoping to talk to you guys about some concerns raised by your employees...

Villa: Sorry ... guys, I need you to walk out of the office; this is a private office.

Alvarez (reporting): The bosses at MasTec's Orlando office did not want to comment.

Alvarez (seen attempting to interview Villa): We have employees saying that you asked them to lie...

Villa: Please…thank you...

Alvarez: ... to customers. Is that true? (this exchange while video shows Alvarez and camera crew being ushered out of the office).

Alvarez (again in reporting mode): But statements from their corporate office and from DirecTV make it clear the policy of deducting money from employees' paychecks will continue. A DirecTV spokesman said techs who don't hook up phone lines are quote 'denying customers the full benefit and function of their DirecTV system.' These men disagree and say the policy has done nothing but create an environment where lying to customers is part of the job.

Alvarez (interviewing): It's either lie or lose money.

Technician Sebastian Eriste:[15] We don't have a choice.

Alvarez (reporting): Now .... During our investigation, MasTec decided to reimburse money to some techs who had met a certain quota but the policy continues and one reason could be that DirecTV does keep track of their customers' viewing habits through those phone lines. Now just last year, DirecTV paid out a $5 million settlement with Florida and 21 other states for deceptive practices and now, because of our story, the attorney general's office is looking into

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[15] Eriste is one of the alleged discriminatees.

> this newest issue so we'll, of course, keep you posted.
>
> News Anchor 2: You think they would have learned the first time.
>
> Alvarez: You think so. We'll see what happens.
>
> News Anchor 2: Thank you, Nancy.

This report aired several more times over a two-day period, in slightly different versions but with the same theme. Employees Guest and Fowler testified that they did not see the broadcast before it was aired, that Alvarez did not review with them the content of the report and that the only input they had was their appearance at the station and the responses to Alvarez' questions.

Christopher Brown, Respondent MasTec's Operations Manager, testified he first became aware of the broadcast when he saw a "teaser ad" for the upcoming newscast. He called his boss, Rey, and Respondent MasTec's Vice President Retherford to alert them about the news story. According to Brown, he was instructed to record the teaser and any broadcast about Respondents. Brown did so and converted the recordings to computer files which he e-mailed to his superiors. Retherford testified that he saw the initial broadcast, as well as subsequent reports aired on May 2 and 3. Retherford provided Respondent DirecTV's Vice President Crawford and Public Relations Director Mercer web links to the broadcast. Retherford admitted being "shocked" by the report, especially by what he

characterized as the "flippant" attitude of the technicians about lying to customers. Retherford and Crawford admitted that they discussed the broadcast and their concerns about the negative light it casts on DirecTV. It is undisputed that Crawford told Retherford that he did not want any of the technicians who appeared in the broadcast representing DirecTV in customers' homes. A series of e-mails between Crawford and Retherford on May 1 and 2 establishes that Respondent DirecTV was concerned about these technicians continuing to work on DirecTV installations after they were shown on TV saying they had been lying to customers and refusing to do phone lines. It is apparent that Respondent DirecTV was eager to have Respondent MasTec take action against the technicians involved in the broadcast.[16]

Following his conversations with Crawford, Retherford directed Christopher Brown to determine which technicians appeared in the broadcast. Brown and Villa reviewed the broadcast several times to identify all of the technicians. Brown then sent Retherford a list of the technicians. Retherford testified that, on the afternoon of May 2, he made the decision to terminate all the technicians who were shown in the broadcast after receiving the information from Brown and discussing it with Brown and Rey. It is undisputed that this decision was made without any further investigation and without interviewing the employees involved. It is clear that Retherford, in reaching this decision, did not seek to differentiate the technicians based on whether they were

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[16] For example, in one e-mail, Crawford asks Retherford, "of the 30 or so techs on the show are they still employed?"

quoted on the broadcast. Nor did he consider each technicians individual degree of participation in the report. Retherford testified that he made this decision because he believed the technicians who had appeared on television had impaired Respondent MasTec's relationship with respondent DirecTV. He testified that the technicians had misrepresented the product by stating that telephone lines were only a convenience and by saying they had been told to lie to customers. Retherford testified further that statements indicating that every technician had been back-charged for failing to connect phone lines was a misrepresentation. Other misrepresentations identified by Retherford were statements that technicians were being charged $5.00 for every receiver not connected and that Respondent MasTec made money on telephone connections. Respondents offered evidence at the hearing that, after the news story aired, they each received telephone calls from customers asking to cancel their DirecTV service.

After making his decision, Retherford called Christopher Brown and told him that all of the technicians who appeared in the broadcast were to be discharged. Retherford instructed Brown to have Villa tell the technicians they were being discharged "at will". Villa was not to give any other reason for the discharge. On Wednesday morning, May 3, Villa instructed the supervisors to call the technicians who were to be terminated and tell them to come into the office after they finished their routes. As each technician came in, Villa told him he was being terminated "at will" and asked him to return the keys to his vehicle, gas card and cell phone. If an employee asked why he was being terminated, Villa would only repeat that they were being

terminated "at will." Even when some technicians asked if they were being terminated because of the broadcast, Villa responded only that they were terminated "at will." The only technicians not terminated on May 3 were those who were on vacation. Those technicians who were on vacation, with one exception, were terminated before they returned. Tuckfield who was also on vacation was not terminated. Instead, according to Brown, he was retained because of concerns about getting the work done with so much of the workforce terminated. Brown and Rey made the decision not to terminate Tuckfield without consulting with Retherford.[17]

Ricardo Perlaza, one of the technicians who appeared in the Channel 6 broadcast, testified that he received a telephone call from his supervisor, Noel Muniz, on May 2, before anyone was terminated. Perlaza testified that Muniz asked him if he had anything to do with the news story. When Perlaza said he had, Muniz asked him why. Perlaza explained that he did not agree with what was going on and did not like the charge-back policy. According to Perlaza, Muniz responded by telling Perlaza that he "was not supposed to do that." Muniz then asked Perlaza if he knew what had happened in New Jersey. When Perlaza said he did not, Muniz told

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[17] Fowler was on a three-week assignment working in the Atlanta area when he was called and told to return to Orlando. Although his supervisor would not give him a reason, Fowler learned from other technicians while driving back from Atlanta that they had been terminated. By the time he got to Gainesville, his company cell-phone had been turned off. Fowler did not report to the office when he returned to Orlando and learned that all the other technicians had been fired. Respondent MasTec eventually picked up the truck from his home.

him the employees there tried the same thing and Respondent MasTec closed the facility. At the end of the conversation, Muniz told Perlaza he should call Chris Brown and apologize and tell Brown he did not know the consequences of going to the TV station. Muniz said if Perlaza did not do this, there would be a lot of trouble for everybody. Muniz, while not specifically denying that he had a conversation with Perlaza on May 2, denied ever speaking to Perlaza about a MasTec facility in New Jersey. In fact, Muniz denied having any knowledge of such a facility at the time he spoke to Perlaza, and specifically denied telling Perlaza that the facility in New Jersey had closed because employees there complained about working conditions.[18]

2. *Alleged Section 8(a)(1) Threats*

The complaint alleges, at paragraph 8, that Respondent MasTec, through Christopher Brown, violated Section 8(a)(1) of the Act in late March by threatening to discharge employees if they concertedly complained about their wages. As noted above, the General Counsel relies upon the testimony of Harrison and Fowler regarding two statements allegedly made by Brown during the two group protests in the parking lot on March 27 and 28. The first involves Harrison's testimony that Brown told him that he had replacements for all of them. This statement was made after Harrison

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[18] In a pre-trial affidavit Muniz gave to the Board's Regional Office, he admitted having a conversation with another former employee who told him that the New Jersey facility had closed. Muniz explained at the hearing that this conversation occurred after he spoke to Perlaza.

told Brown that what Respondent MasTec was doing to the technicians wasn't right. Although Brown admitted telling Harrison that he could be replaced, he placed this comment in the context of a conversation with Harrison over Harrison's refusing to do any installation where he could not connect the phone lines. As described by Brown, this attempt at self-help by Harrison amounted to a refusal to perform assigned work. Thus, in his version of the conversation, he was simply telling Harrison that if he refused to do the work, someone else could be hired to replace him who would do whatever was asked.

Because there are no other witnesses to this conversation, I must first determine which of these two witnesses is more credible. As between Harrison and Brown, I find that Brown's more detailed recollection of the conversation is more credible than the isolated comment in Harrison's version. I reaching this conclusion, I note that Harrison's testimony in general was marked by inconsistencies both internally and as between his testimony and his pre-trial affidavit. His demeanor also conveyed hostility toward Respondents which may have colored his recollection of the events. In addition, the alleged threat to replace all the technicians makes no sense out of context. I note that this threat was allegedly made after Brown and Villa had spent several hours listening to the employees' complaints and attempting to answer their questions, and after Brown had asked the employees several times to return to work. Rather than a threat to discharge the employees for exercising their right to engage in concerted activity, I find that Brown was simply telling Harrison that, if he did not want to do his job, there were others who would

be willing to do it and he, Harrison, could be replaced. This statement was made only after Harrison told Brown that he would not do an installation if he went to a job where he could not connect the phone lines.[19]

The General Counsel also cites Fowler's testimony that Brown told the employees in the parking lot on the second day that if they did not want to do their jobs, he had replacements for them. Although Fowler testified that Brown made this statement to a group of employees, no one corroborated his testimony. In the absence of corroboration, I cannot credit this testimony. Even assuming Brown made this statement, I would not find that it was a threat to discharge employees for engaging in protected activity. At most, it was a statement that employees who refused to do their jobs could be replaced.

Based on my credibility resolutions, I find that General Counsel has not met his burden of proving that Respondent violated Section 8(a)(1) through any statements made by Brown on March 27 and 28. Accordingly, I shall recommend dismissal of paragraph 8 of the complaint.

The complaint alleges at paragraph 9(b) that Respondent violated Section 8(a)(1) of the Act, during Muniz' telephone conversation with Perlaza on May 2, by

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[19] I also do not credit Harrison's uncorroborated testimony that Brown told the employees the following day, when they refused to leave the parking lot to start their assignments, "don't make me do what I don't want to do." Even assuming Brown made this statement, it was in response to the employees' refusal to work, not their protected concerted activity.

threatening employees with facility closure and unspecified reprisals because they concertedly complained about their wages and appealed to third parties.[20] This allegation also turns on credibility. As to this allegation, Perlaza gave the more detailed account of the conversation. Muniz simply denied, in response to leading questions, that he had a conversation with Perlaza about the New Jersey facility and that he made the alleged threat. Yet, on cross-examination, he conceded that he was aware of Respondent MasTec closing a facility in New Jersey. His explanation for this discrepancy, that he did not learn about the New Jersey facility until after speaking to Perlaza, is dubious. I thus credit Perlaza's testimony. Based on that testimony, I find that Muniz told Perlaza that Respondent MasTec had closed a facility in New Jersey when employees "tried the same thing", referring to the Orlando employees participation in the news story. The implication in this statement is that Respondent MasTec would do the same thing in Orlando. That is why Muniz suggested to Perlaza that he apologize to Brown because, if he didn't, "there would be a lot of trouble for everybody." Because these statements, under all the circumstances, would reasonably tend to interfere with, restrain, and coerce employees in the exercise of their Section 7 rights, I find that Respondent violated Section 8(a)(1) of the Act, as alleged in paragraph 9(b) of the complaint. *Grouse Mountain Lodge*, 333 NLRB 1322, 1324-1325 (2001), quoting from *American Freightways Co.*, 124 NLRB 146 (1959).

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[20] General Counsel withdrew complaint paragraph 9(a).

Appendix D

3. *Alleged Termination of Employees for Engaging in Protected Concerted Activities*

The complaint alleges that the technicians employed by Respondent MasTec were engaged in concerted activities protected by Section 7 of the Act during the period from January through March when they protested their employer's new pay structure, which included the charge-back provision for non-responding receivers. This protected activity is alleged to include objections to the new policy voiced by technicians at team meetings as well as the group protests in the parking lot on March 27 and 28 when they confronted Villa and Chris Brown after the first paychecks with charge-backs had been issued. The complaint alleges that the employees' protected concerted activity continued on March 30 when a number of them went to the studios of Channel 6 to air their dispute publicly and enlist the support of the local news program. The General Counsel further alleges that Respondent DirecTV caused Respondent MasTec to discharge 26 of the employees and that MasTec in fact discharged them in early May because they engaged in this protected concerted activity.

Respondents do not dispute the concerted nature of the employees activity. It also appears that, with the exception of the visit to the TV station, the Respondents also do not challenge the protected nature of this concerted activity. Although Respondent MasTec, in a footnote in its brief, appears to suggest that those employees who used profanity during the parking lot protests or refused to go to work when requested to do so by Chris Brown during that protest, may have

exceeded the bounds of protected conduct, it does not argue for dismissal of the complaint on that basis. In any event, there is no evidence here that Respondent MasTec discharged any of the employees who participated in the parking lot protest for using profanity or being insubordinate. In fact, both Respondents argue that Respondent MasTec's choice not to discipline any of the employees after these incidents establishes that it was not motivated by any "protected" concerted activity in terminating the twenty-six employees whose status is in dispute. It is clear from the evidence in the record that the sole reason Respondent MasTec terminated the employees was their appearance in the Channel 6 news report that aired on May 1 and that, had the employees not gone to the media with their complaints, they would not have been terminated for the other conduct they engaged in before March 30.

With respect to the allegation that Respondent DirecTV caused Respondent MasTec to terminate the 26 employees, I agree with the General Counsel that the evidence in the record clearly supports this allegation. Although Respondent DirecTV may not have any contractual right to determine whether Respondent MasTec should hire or fire an employee, here the conversations between Retherford and Crawford, as well as the e-mails exchanged within a day of the first broadcast on May 1, show that Respondent DirecTV expected Respondent MasTec to terminate these employees. Crawford clearly informed Retherford that he did not want any of the employees who appeared in the broadcast to represent DirecTV. Because Respondent MasTec only performed work for

Respondent DirecTV, it had no choice but to terminate the employees in response to this statement. Accordingly, I find as alleged in the complaint that Respondent DirecTV attempted to cause and did cause Respondent MasTec to terminate the 26 employees named in the complaint. *Dews Construction Corp.*, 231 NLRB 182 (1977), enfd. 578 F.2d 1374 (3rd Cir. 1978).

The only issue remaining is whether, in terminating these employees, Respondents violated Section 8(a)(1) of the Act. Resolution of this issue turns on whether the employees who appeared in the news story broadcast by Channel 6 on May 1 were entitled to the protection of Section 7 of the Act. In the *Jefferson Standard* case, the Supreme Court held that employees engaged in concerted activity lose the Act's protection when they engage in disloyalty to their employer by making disparaging attacks on the quality of the employer's products and services that are unconnected to a labor dispute.[21] Since *Jefferson Standard* was decided, the Board and the courts have recognized that employees have a right to seek support from outside parties, including the media, as long as their communication with such parties relates to an ongoing labor dispute and is not disloyal, reckless, or maliciously false. *Five Star Transportation, Inc.*, 349 NLRB No. 8, slip op. at pp 4-5 (January 22, 2007), and cases cited therein. *See also, Endicott Interconnect Technologies, Inc.*, 345 NLRB 448 (2005), enf. denied 453 F.3d 532 (D.C. Cir. 2006); *St. Luke's Episcopal-Presbyterian Hospitals, Inc.*, 331 NLRB 761 (2000), enf. denied 268

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[21] *NLRB v. Electrical Workers (IBEW) Local1229*, 346 U.S. 464 (1953).

F.3d 575 (8th Cir. 2001); *Allied Aviation Service*, 248 NLRB 229 (1980), enfd. 636 F.2d 1210 (3rd Cir. 1980). In *Five Star Transportation*, supra, the Board recently described its approach to these cases as follows:

> In determining whether employee conduct falls outside the realm of conduct protected by Section 7, we consider whether 'the attitude of the employees is flagrantly disloyal, wholly incommensurate with any grievances which they might have, and manifested by public disparagement of the employer's product or undermining its reputation ... ' [citation omitted]. A critical further determination is whether the conduct bears a 'sufficient relation to [employee] wages, hours, and conditions of employment' [citations omitted].

Finally, in *Jefferson Standard*, supra, the Court warned that it is often necessary in these types of cases to identify and recognize those employees engaged in such disloyal conduct separate and apart from other employees who, while engaged in simultaneous protected activity, refrained from joining others who engaged in acts of insubordination, disobedience, or disloyalty. 346 U.S. supra, at 474-475.

Applying the law to the facts here, I find initially that the technicians' appeal to the public, through the Channel 6 news story, did relate to an ongoing labor dispute with their employer. The contact with reporter Nancy Alvarez and the visit to the TV station was the

culmination of the employees' efforts to get Respondent MasTec to rescind the charge-back policy which had just gone into effect. As broadcast on TV, the first employee to appear in the report expressed what the employees were looking for when he said, "We're just asking to be treated fairly." The reporter, in her story, referred to the $5.00 charge for non-responders that Respondent MasTec was deducting from the employee's wages and its impact on the employees. At other points in the story she and the employees addressed this particular policy. Any reasonable viewer would understand, watching the story, that the technicians who appeared were concerned about their wages. While the anchors and reporters highlighted the consumer protection aspect of the story, the underlying labor dispute was evident throughout the report. *See Endicott Interconnect Technologies*, supra.[22]

The more difficult issue here is whether the remarks broadcast were so disloyal, disparaging and malicious as to be unprotected, and whether all 26 employees who appeared in the broadcast can be held accountable for these remarks. It is true, as General Counsel argues, that only four employees spoke in the video and that most of the statements which Respondents characterize as false and disparaging were made by Alvarez, the reporter. Three of the four employees quoted, i.e., Fowler, Martinez and Eriste, made statements indicating that they were instructed to,

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[22] Although the Court of Appeals denied enforcement to the Board's order in Endicott, it did so based on its disagreement with the Board regarding the disparaging nature of the statements in the media, not because they were unrelated to a labor dispute. 453 F.3d, supra at 537, fn. 5.

or encouraged, to lie to customers.[23] Clearly, such statements are highly inflammatory and damaging to Respondents' reputation. Moreover, it is these statements which apparently enticed the TV station to even do a story about Respondents' business. The teaser ad which preceded the news report included an excerpt in which a technician claims he'd been told to lie to customers and the reporter telling the audience "that may be costing you money." The story itself highlighted the technicians' claims suggesting they were forced to lie to customers and linked those "lies" to higher costs to the customer. This aspect of the story was clearly inaccurate and misleading. While it is true that it was important to both Respondents that they connect phone lines, such connections cost the average customer nothing. Only in those cases where a customer opted to hide the phone line was there a charge. This was never pointed out in the story.

The evidence also does not support the claims expressed in the story that employees had to lie to customers to avoid being subjected to the $5.00 charge-back. While it is true that employees were subject to this penalty, it would only be applied if they failed to connect at least 50% of the receivers they installed.[24] Similarly,

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[23] The fourth employee, Selby, is the one who said the technicians just wanted to be treated fairly. Standing alone, this statement is clearly protected.

[24] While it is not necessary for me to determine the reasonableness of the company policy and the employees' reaction to it, it certainly appears from the evidence in the record that the 50% threshold was not impossible to meet, despite the employees excuses.

although Respondent's supervisors made statements at employee meetings that employees needed to connect the phone lines and had to do whatever was necessary to convince a customer of the benefits of doing so, they were never explicitly told to lie and, certainly, they were provided with other ways of accomplishing this part of their jobs without resort to lying. Yet the comments by the technicians that were broadcast and the statements by Alvarez in the news story made it appear that the employees only recourse was to lie to the customers, "or we can't make money", as Fowler claimed. Even Martinez statement that technicians were told to tell customers that the receiver would blow up if not connected to a phone line, while accurate, was deliberately misleading. I credit Christopher Brown's testimony that he made this statement at a meeting as a joke and did not intend or expect any technician to say that to a customer. The testimony of most of General Counsel's witnesses also makes clear that the employees who heard Brown say this understood he was not being serious. Yet Martinez chose to publicize this comment for no apparent reason other than to harm the reputation of his employer. I also note that Guest admitted that he raised his hand when Alvarez asked which employees had more than $200 in charge-backs even though he had not had any. Although Guest testified that he raised his hand because he had more than $200 deducted for other reasons, he clearly was aware when Alvarez asked the question that she was talking about the non-responder charge-backs. Guest's willingness to mislead the public in this manner in support of the employees' position in the labor dispute is troubling.

Based on the above, I find that the statements broadcast in the Channel 6 news story were so "disloyal, reckless, and maliciously untrue" as to lose the Act's protection. A review of the broadcast convinces me that the employees' attitude during the broadcast was "flagrantly disloyal, wholly incommensurate with any grievances they had, and manifested by public disparagement of [the Respondents'] product and undermining of their reputation." *Five Star Transportation*, 349 NLRB supra, at p. 4, quoting from *Veeder-Root Co*., 237 NLRB 1175, 1177 (1978). The focus of the news report and the employees' comments on apparently fraudulent and deceptive business practices overshadowed the labor dispute that led the employees to seek media support in the first place and were necessarily injurious to Respondents' business.

Although only two of employees named in the complaint made disparaging comments in the broadcast (Fowler and Eriste), I find that the others who participated and were shown in the broadcast, are equally culpable. Their appearance lent tacit support to the disloyal, disparaging and malicious statements made by the technicians who spoke. A reasonable person viewing the broadcast would perceive the employees as being in agreement since no one spoke up to clarify the damaging statements. The employees' mere presence is no different from the conduct of the employees in *Jefferson Standard* who distributed the disloyal handbill that was prepared by someone else, or the employees who did not sign a disparaging letter but authorized another employee to send it. *TNT Logistics North America, Inc*., 347 NLRB No. 55 (July 24, 2006).

Accordingly, based on the above, and the record as a whole, I find that the employees who participated in the Channel 6 news story that was broadcast on May 1 were engaged in activity that was not protected by Section 7 of the Act. Therefore, Respondent DirecTV's attempt to cause their discharge by Respondent MasTec, and Respondent MasTec's discharge of them did not violate the Act.

Conclusions of Law

1. By maintaining a confidentiality policy that interferes with, restrains and coerces employees in the discussion of their wages, hours, and terms and conditions of employment, and by maintaining an overly broad solicitation and distribution rule that also required employees to obtain permission to engage in protected concerted activity, Respondent MasTec has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By threatening employees with facility closure and other unspecified reprisals for engaging in protected concerted activity, Respondent MasTec has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. Respondent MasTec did not engage in any other unfair labor practices alleged in the complaint.

4. Respondent DirecTV has not violated the Act in any manner as alleged in the complaint.

Appendix D

Remedy

Having found that Respondent MasTec has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. To the extent it has not already done so, Respondent MasTec shall rescind the confidentiality, solicitation and distribution rules that appeared in the employee handbook in March 2006. Respondent MasTec shall also be ordered to notify all employees who were issued the handbook containing the unlawful rules that the rules have been rescinded and will no longer be enforced. Such notification is to extend to employees at all MasTec facilities who were covered by the unlawful rules. Respondent MasTec shall also be required to post a Notice to Employees at the Orlando facility involved in this proceeding.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[25]

ORDER

The Respondent, MasTec Advanced Technologies, a division of MasTec, Inc., Orlando, Florida, its officers, agents, successors, and assigns, shall

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[25] 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.

Appendix D

1. Cease and desist from

(a) Maintaining any rules, including confidentiality rules, that restrict employees ability to discuss their wages, hours, and terms and conditions of employment with anyone.

(b) Maintaining any overly broad solicitation and distribution rules or other rules that require employees to obtain permission before engaging in protected concerted activities.

(c) Threatening employees with facility closure and other unspecified reprisals because they engaged in protected concerted activities.

(d) In any like or related manner interfering with, restraining, or coercing 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) Rescind the confidentiality policy and the solicitation and distribution rules as they existed in March 2006.

(b) Notify all employees who received the employee handbook that existed in March 2006 that these rules have been rescinded and will no longer be enforced.

(c) Within 14 days after service by the Region, post at its facility in Orlando, Florida, copies of

the attached notice marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region 12, 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 2006.

(d) 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 the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., January 4, 2008

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[26] 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."

Appendix D

/s/ Michael A. Marcionese
Michael A. Marcionese
Administrative Law Judge

Appendix D

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 maintain any rules, including confidentiality rules, that restrict your ability to discuss your wages, hours, and terms and conditions of employment with anyone.

WE WILL NOT maintain any overly broad solicitation and distribution rules or other rules that require you to obtain permission before engaging in protected concerted activities.

Appendix D

WE WILL NOT threaten to close the facility or engage in other unspecified reprisals because you engage in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, to the extent we haven't already, rescind and no longer enforce the confidentiality, solicitation and distribution rules that existed in March 2006, which have been found to interfere with, restrain and coerce you in the exercise of your statutory rights.

WE WILL notify all our employees who were subject to these rules that they are no longer in effect and will not be enforced.

MASTEC ADVANCED TECHNOLOGIES, A DIVISION OF MASTEC, INC.

_____

(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.

201 East Kennedy Boulevard, South Trust Plaza, Suite 530
Tampa, Florida 33602-5824
Hours: 8 a.m. to 4:30p.m.
813-228-2641.

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, 813-228-2662.

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