Oncor Electric Delivery Company, L.L.C. *and* International Brotherhood of Electrical Workers, Local Union No. 69, Affiliated With International Brotherhood of Electrical Workers. Cases 16–CA–103387 and 16–CA–112404

July 26, 2024

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND PROUTY

This case is on remand from the United States Court of Appeals for the District of Columbia Circuit.

On July 29, 2016, the National Labor Relations Board issued a Decision and Order in this proceeding.[1] The Board found that Oncor Electric Delivery Company, L.L.C. (the Respondent) violated Section 8(a)(3) and (1) of the Act by discharging employee Bobby Reed for his protected concerted union activity of testifying on behalf of the International Brotherhood of Electrical Workers, Local Union No. 69 (the Union) before a Texas state legislative committee concerning the safety of smart electric meters. The Board further found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to provide requested information on three dates.

Subsequently, the Respondent petitioned the District of Columbia Circuit for review of the Board's Order, and the Board filed a cross-application for enforcement. On April 13, 2018, the court issued its decision, in which it granted in part and denied in part enforcement of the Board's Order and remanded the case for further proceedings.[2] The court enforced the Board's Order with respect to the information requests,[3] but vacated and remanded the Board's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Reed for his testimony. The court instructed the Board to engage in further analysis of whether Reed's testimony satisfied the conditions for protection under *NLRB v. Electrical Workers Local 1228*, 346 U.S. 464 (1953) (*Jefferson Standard*), and its progeny.

On March 18, 2022, the Board advised the parties that it had accepted the court's remand and invited the parties to file statements of position. The Respondent and General Counsel filed statements.

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

The Board has reviewed the entire record, including the parties' statements of position, in light of the court's decision, which is the law of the case. For the reasons explained below, we reaffirm the Board's conclusion that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Reed for his protected concerted union activity of testifying at the Texas senate committee hearing on behalf of the Union.

Facts

The facts are not in dispute. Employee Reed worked for the Respondent as a "trouble man" who completed repair jobs and responded to power outages, and, since 2011, has also been the business manager and financial secretary for the Union. Prior to 2012, Reed had a number of conversations with Edward (Rick) Childers, a union official, about problems with smart meters–devices that can report customers' electricity usage remotely, thereby eliminating the need for personal inspection and the associated labor costs. Reed also voiced safety concerns about the smart meters in an April 14, 2011 email to the staff contact person for a state representative. Reed subsequently volunteered to testify on October 9, 2012, in front of a Texas senate committee studying whether smart meters have harmful effects on public health. By the time of this testimony, Oncor had installed over 3 million smart meters.

The day before his testimony, Reed met with the Respondent's officials in his capacity as union representative to renegotiate the collective-bargaining agreement that was set to expire later in the month. Negotiations between the parties had stalled over the term of the collective-bargaining agreement's extension. Reed announced that if a deal was not made, he would testify before the senate committee about smart meters. The parties did not reach a deal; the Respondent offered only a one-year extension of the collective-bargaining agreement, in part due to uncertainty over how the legislature would respond to smart meters.

On the day of his testimony, Reed signed the committee's witness list indicating that he was representing the Union and that he would testify "on" smart meters. He was allotted two minutes. During his testimony, Reed identified his relationship with the Respondent and stated that he was "a representative for our local union there in Dallas, or all over the state, for Oncor employees." Reed testified that he had received an increase in work orders relating to "the [smart] meters burning up and burning up the meter bases." He spoke of his experience with an

[1] *Oncor Electric Delivery Co*., 364 NLRB 677.

[2] *Oncor Electric Delivery Co. v. NLRB*, 887 F.3d 488.

[3] The court granted the Board's "petition to enforce its order on the requests for information." Id. at 501. Accordingly, we shall not repeat those court-enforced provisions of the Board's original order here. See *Fluor Daniel, Inc.,* 350 NLRB 702, 702 fn. 5 (2007); *Bryan Adair Construction Co*., 341 NLRB 247, 247 fn. 4 (2004).

elderly woman, who had been told by the Respondent that she would have to pay for the damage herself before her power could be turned back on. When asked by a senator whether the fires were caused by the smart meters or the age of the boxes, Reed responded that the fires were caused by the smart meters. He further testified that once he noticed the issues with the smart meters, he contacted the local union in Houston to confirm whether their employees were experiencing the same problems, which they were.

The day after Reed's testimony, the Respondent initiated an investigation to verify whether the company had received complaints of smart meters causing fires and damaging consumers' homes. Finding no records of such complaints, the Respondent concluded that Reed's testimony was false and terminated his employment on January 14, 2013.

Board and Court Proceedings

The Board adopted the judge's decision that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Reed. The Board found that "Reed's senate testimony was union activity and therefore concerted," and that it was "'for the purpose of collective bargaining or other mutual aid and protection' within the meaning of Section 7 of the Act." *Oncor*, 364 NLRB at 678. Citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978), the Board observed that "the 'mutual aid or protection clause' protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums, and that employees' appeals to legislators to protect their interests as employees are within the scope of this clause." *Oncor*, above at 679. The Board also noted that it has "consistently held that a union official's testimony before a governmental body is protected under Sec. 7." Id. at 679 fn. 9 (citing *GHR Energy*, 294 NLRB 1011, 1014 (1989) (employee/union official's testimony before a state agency and a U.S. Senate committee about employer's violations of environmental law was union and concerted activity)). In *Eastex*, the Supreme Court upheld the Board's finding that employees were engaged in protected concerted activity when they distributed a union newsletter that urged employees to write their legislators to oppose a right-to-work law and criticized the President's veto of a minimum wage increase. 437 U.S. at 569. Comparing those facts to Reed's conduct, the Board reasoned that *Oncor* was an easier case than *Eastex* because "the Respondent exercises control over the installation of the smart meters," and therefore "Reed's testimony before the Texas Senate about the safety of smart meters bears a more 'immediate relationship to employees' interests' in seeking to improve their own working conditions than was the case in *Eastex*." *Oncor*, above at 679. Further, the Board found that Reed's testimony was not maliciously untrue and therefore did not lose protection of the Act. Id. at 680-681.

On review, the District of Columbia Circuit read Board precedent, in light of *Jefferson Standard*, as applying a two-step test to assess whether employees' third-party appeals constitute protected concerted activity. Specifically, "even disparaging statements can enjoy the Act's protection '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.'" *Oncor*, 887 F.3d at 492 (quoting *DirecTV, Inc. v. NLRB*, 837 F.3d 25, 34 (D.C. Cir. 2016)). The court indicated that its decision in *DirecTV* had relied on the Board's decision in *American Golf Corp.*, 330 NLRB 1238, 1240 (2000) (*Mountain Shadows*), in which the Board found an employee's distribution of a flyer was unprotected under the first prong of *Jefferson Standard*. Id.[4]

The court found that substantial evidence supported the Board's determination on the second step: Reed's testimony did not lose protection of the act for being disloyal, reckless, or maliciously untrue. However, the court found that the Board did not adequately analyze the first step. To begin, the court stated that "[n]either the Board's practice—nor court precedents—make clear who has the burden of proof on the two conditions for employee protection under *Jefferson Standard*," and directed the Board on remand to articulate its position, at least as to the first step. *Oncor*, above at 495, 498. The court then directed the Board to substantively analyze whether Reed's testimony satisfied the first requirement. The court noted that neither the judge's decision nor the underlying Board decision contained such an analysis, and cast doubt on the Board's argument that Reed's testimony was protected in part due to the Union's longstanding concern over smart meters' effect on employment. Id. at 496. The court further stated, "there is no finding by the Board in this case either that Reed disclosed his subjective motive to pressure [the Respondent] into concessions during labor negotiations or that the subject matter of Reed's statements was connected to the ongoing labor dispute." Id. at 497 (internal

[4] The Mountain Shadows Board cited as illustrative decisions *Cincinnati Suburban Press*, 289 NLRB 966, 967–968 (1988); *Emarco, Inc*., 284 NLRB 832, 833 (1987); and *Richboro Community Mental Health Council,* 242 NLRB 1267 (1979). In each of those decisions, the Board found a sufficient relationship between the employee communication and a labor dispute. Thus, none of the decisions—except for Mountain Shadows itself—illustrates when the Board will find that such a relationship has not been established.

omissions and quotation marks omitted). The court also noted that Reed's testimony made "no mention of worker hazards" and that the Board subsequently "pivoted from the worker-hazard assertion to a claim that Reed illustrated the effect on employees' working conditions of the increase both in the number of service calls and the frequency with which they had to deal with disgruntled customers," but that the Board failed to make clear how a reference to an employer practice that may generate disgruntled customers could indicate a link to a labor dispute. Id. at 498 (internal quotation marks omitted).

Discussion

In remanding this case to the Board for further proceedings, the District of Columbia Circuit first asked for clarification on which party bears the burden of proof under the analytical framework set out by the court, which we accept as the law of the case. That is, the court applied a "two-prong test" under which disparaging statements are protected where (1) the communication indicates a relationship to an ongoing employee-employer dispute and (2) the communication is not so disloyal, reckless or maliciously untrue so as to lose the Act's protection. *Oncor*, 887 F.3d at 492. We find that the General Counsel bears the burden of proof under step one of the framework, while the employer bears the burden of proof under step two. More specifically, the General Counsel bears the burden of showing that the employee's communication indicated a relationship to an ongoing dispute between the employees and the employers.

This is consistent with the well-settled principle that the General Counsel has the burden to prove that the activity was "for mutual aid or protection" under Section 7 of the Act. See *Five Star Transportation*, 349 NLRB 42, 46 (2007) ("[T]he General Counsel had the burden of establishing that the activity was protected, and we have the obligation to decide whether he has met that burden."), enfd. 522 F.3d 46 (1st Cir. 2008). If the General Counsel has met this burden, the employer then must prove that the communication lost protection of the Act because it was "so disloyal, reckless, or maliciously untrue." See, e.g., *Triple Play Sports Bar & Grille*, 361 NLRB 308, 312–313 (2014), affd. 629 Fed. Appx. 33 (2d Cir. 2015) (employer failed to carry burden to prove that employee's statement was maliciously untrue).

With the burden of proof allocated as directed by the court, we turn now to the first prong of the test articulated in *Jefferson Standard*: whether the General Counsel has met the burden of proving that Reed's testimony sufficiently indicated a relationship to an ongoing labor dispute. "The Board evaluates the protected character of an assertedly disloyal communication 'in its entirety and in context.'" *Endicott Interconnect Technologies*, 345 NLRB 448, 450 (2005), enf. denied on other grounds 453 F.3d 532 (D.C. Cir. 2006), quoting *Sierra Publishing Co. v. NLRB,* 889 F.2d. 210, 217 (9th Cir. 1989).[5] Moreover, "in applying the *Jefferson Standard* doctrine, the Board relies on the definition of a 'labor dispute' in Section 2(9) of the Act." *Endicott Interconnect*, above at 450. Section 2(9) states:

> The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

See id. As the Board has recently observed, the requirement to indicate a connection to a labor dispute "is not onerous and does not require employees to use particular words or phrases." *Xcel Protective Services*, 371 NLRB No. 134, slip op. at 5 fn. 13 (2022), enfd. per curiam 2023 WL 4146253 (D.C. Cir. June 23, 2023). Employees need only provide enough information about the existence of a labor dispute to allow third parties to "filter the information critically" when they appeal to those third parties for support. Id. Relevant factors may include the contents of the communication, its intended audience, and the means through which the communication was distributed. Compare *Jefferson Standard*, above at 468 (finding unprotected employee handbills that were distributed to the public and made no reference to the union, to a labor controversy, or to collective bargaining), and *Endicott Interconnect Technologies*, above at 450–451 (2005) (finding an employee's contributions to a newspaper article protected, despite the absence of a reference to a union, because "[t]he most casual reader of the article would recognize that the layoff involved a controversy between management and employees concerning employment conditions"). Case precedent thus makes clear that, when analyzing under *Jefferson Standard* whether an appeal to third parties adequately indicates the existence of a labor dispute, the Board has rejected a formalistic approach that would require employees to articulate an explicit, precise, or detailed

[5] The dissent asserts that we err in relying on Endicott Interconnect, above, because the D.C. Circuit vacated and denied enforcement of the Board's order in that case. We disagree and observe, contrary to our colleague's claim, that the Board's nonacquiesence policy has nothing to do with the matter. In Endicott, as our colleague acknowledges, the court majority expressly did not pass on the Board's application of the first prong of Jefferson Standard, the point for which we cite the case. Rather, the court's denial of enforcement in Endicott was based solely on its rejection of the Board's application of the second prong of Jefferson Standard, a matter not at issue in this remand. Thus, there is no reason we should not rely on Endicott for its analysis of the first prong, and it is not an application of the Board's nonacquiesence policy to do so.

connection between their statements and a labor dispute as a condition of exercising their Section 7 rights. See *Xcel Protective Services*, above, slip op. at 5 fn. 13 ("Our [dissenting] colleague's formalistic view of the first prong of *Mountain Shadows* runs the risk of impairing employees' ability to exercise their Sec. 7 rights, because if employees 'are not permitted to address matters that are of direct interest to third parties in addition to complaining about their own working conditions, it is unlikely that workers' undisputed right to make third party appeals in pursuit of better working conditions would be anything but an empty provision.'") (quoting *Sierra Publishing Co. v. NLRB,* above at 217).[6] The key question, as our precedent does make clear, is whether the union representative here provided enough information during his testimony to enable the governmental body to "filter the information critically." *Sierra Publishing Co. v. NLRB*, above at 217.

Thus, the full context of the employee's statement is critically important to the Board's analysis. Here, Reed testified for two minutes on a topic chosen by the senate committee, and his testimony was presented directly to the committee itself. In contrast, the employees in *Jefferson Standard* printed 5000 handbills and distributed them broadly in the neighborhood surrounding the employer's premises, while the employee in *Mountain Shadows* left 24 copies of a flyer on a table outside of a city council meeting. See *Jefferson Standard*, above at 468, and *Mountain Shadows*, above at 1241. These employee appeals, written and distributed on paper, were likely to, and could be anticipated to, reach a broad undifferentiated audience and extend beyond the initial reader, whereas Reed's oral testimony was directly presented to the senate committee and attending public specifically interested in the issue and was not likely to be generally distributed to the public at large. Second, when compared with the general public, the intended audience here—the legislators serving on the senate committee—would be much more likely to filter information presented to them critically. Legislators expect that they will be lobbied—certainly in the context of a legislative hearing—and they understand that petitioners such as hearing witnesses, and specifically one, as here, who identifies himself as a union representative, have particular interests that they seek to advance. In this case, too, legislators presumably had more background knowledge—both on the topic itself (smart meters) and on the Union's relationship with the Respondent – than, for example, members of the general public who might have through happenstance received a leaflet anonymously authored by the union, as in *Jefferson Standard* or *Mountain Shadows.* Finally, the Respondent here had, and indeed took advantage of, an opportunity to have a witness testify in favor of smart meters to the same audience that heard Reed's testimony. See *Endicott Interconnect Technologies*, above at 450–451 (finding an employee's contribution to a newspaper article protected, in part because the employer's chief executive officer also contributed to the article by expressing the employer's point of view). Thus, many of the concerns raised by the Court in *Jefferson Standard*, regarding the impact of a public attack on employer policies, are not present here, as the senate committee would understand from the content of Reed's testimony that the Union was involved in an ongoing labor dispute with the Respondent over smart meters.

In short, it is in the nature of a state legislator's role to critically filter information, and this is particularly true in the context of a legislative hearing with dueling witnesses. A legislator, then, reasonably could be expected to infer that a self-identified union representative was testifying to advance the union's interests and that when the representative's testimony conflicted with the public position of the employer, a labor dispute between the union and the employer was likely implicated, and, therefore, the legislator would be able to critically filter the information presented.

In addition, the content of Reed's testimony itself gave the senate committee sufficient indication that it was related to an ongoing labor dispute for the legislators to filter it critically. First, Reed identified himself on the senate's witness list as representing the Union, and further discussed his relationship with both the Union and the Respondent in his initial remarks, stating, "I work for Oncor Electric Delivery and have for about 34 years. I was a lineman and now trouble man. As of last April, I became a representative for our local union there in Dallas, or all over the state, for Oncor employees." Second, Reed limited his testimony to his direct knowledge of smart meters and his significant experience working with them. He specifically addressed how working conditions had changed since the installation of the new meters, as his work orders increased significantly concerning meters that were burning up. The senate committee, in hearing this testimony from an identified union representative, reasonably would understand it to mean that the smart meters were impacting employees' working conditions and posed a risk to workers, as well as customers.[7] Finally, Reed testified that

[6] Indeed, the Board does not usually apply the "indication" prong when an employee testifies to a governmental body on express behalf of a union. We do so here as a matter of the law of the case.

[7] In contrast, the handbills and flyers in Jefferson Standard and Mountain Shadows, respectively, were not similarly tailored. See Jefferson Standard, above at 476 ("Their attack related itself to no labor practice of the company. . . [t]he policies attacked were those of finance and

he had reached out to the Houston local to determine if their employees were experiencing similar problems. Reed would have no reason to confer with other locals about smart meters if his own Union local was not concerned about their impact on working conditions. Thus, for purposes of the Act, Reed sufficiently indicated the existence of an ongoing labor dispute by identifying himself as testifying on behalf of the Union, specifically mentioning the safety hazards and changes in working conditions he had experienced as a result of the new meters, and describing how his local union was not the only one experiencing these issues.[8] His testimony, considered in its entirety and in context, provided ample information for the senate committee to "filter the information critically." *Xcel Protective Services*, above, slip op. at 5 fn. 13

We do not believe that more was required for Reed's testimony to amount to concerted activity for the "mutual aid or protection" of employees under Section 7 of the Act, consistent with the Supreme Court's decisions in both *Eastex* and *Jefferson Standard*. Reed did not offer his testimony as a neutral expert or some other disinterested person, but as a union representative who sought the help of the senate committee. In this context, the Act does not require fuller disclosure, to the point of sharing the details of the dispute or the Union's strategy in seeking help from a third party.[9] As the Board has previously explained, citing the Ninth Circuit, such a requirement could unnecessarily frustrate the exercise of statutory rights. See *Xcel Protective Services*, above, slip op. at 5 fn. 13.[10]

Our dissenting colleague suggests that the Board's holding in *Xcel* is inapposite, because the communications "at issue [there] were related to an actual ongoing labor dispute," while Reed's testimony here "made no reference whatsoever to a labor policy or practice of the Respondent, let alone an ongoing labor dispute." We reject our colleague's contention, which, if accepted, would narrow the Board's traditionally broad interpretation of the statutory phrase "labor dispute." See *Emarco, Inc.*, 284 NLRB at 833 ("[W]e believe our dissenting colleague's conclusion . . . results from an overly restrictive view of what constitutes a 'labor dispute.'"). Reed's testimony indicated that it was related to an "ongoing labor dispute" under the first prong of *Jefferson Standard* because it addressed "a controversy that relate[d] to terms or conditions of employment." *Endicott Interconnect*, 345 NLRB at 450; see also *Emarco, Inc.*, above at 833 ("The definition of labor dispute under Section 2(9) of the Act includes '*any* controversy concerning terms, tenure or conditions of employment.'"). As explained above, Reed's testimony clearly conveyed how smart meters negatively impacted his terms and conditions of employment. Reed specifically identified himself as a union representative, directly addressed the increase in work orders relating to smart meters, and described how these changes in working conditions had

public relations for which management, not technicians, must be responsible."), and Mountain Shadows, above at 1241 (flyer "bore no indication that it was written by or on behalf of any employee"). Even though some of the handbills in Jefferson Standard may have been distributed on a picket line, the Court emphasized the various neutral locations from which the handbills, which did not disclose their union origination, would have reached the array of potential readers who would have no way of otherwise assessing their source.

[8] We emphasize that the labor dispute between the Union and the Respondent over smart meters was both genuine and based on actual experience. The Union had an ongoing concern about the safety of the meters, and the Union's attorney informed Reed of the senate hearing in part due to these safety concerns. A supervisor of the Respondent admitted that, since the Respondent began using smart meters, several trouble men had informed him that smart meters were heating up and that the meter base lugs were melting or burning. As recounted in the court's decision, the Respondent offered only a one-year extension of the collective-bargaining agreement, in part, the judge found, "because of uncertainty over how the legislature would respond to smart meters." Thus, both the Respondent and the Union were aware that smart meters were actively impacting working conditions and preventing progress on bargaining.

[9] Our dissenting colleague cites no authority for his assertion that disclosure of the labor dispute without reliance on "inference[s]" is required.

[10] Our dissenting colleague challenges our analysis of the first prong of Jefferson Standard as contrary to the court's remand instructions, urges that our "analysis is dependent upon an implicit assumption that the first prong . . . as written, requires too much," We disagree with and reject these contentions. To be clear, consistent with the court's remand instructions, we have applied Jefferson Standard's two-prong test while following the court's instructions with respect to the first prong to "spell out the conditions under which a reference to an employer practice that may generate 'disgruntled' consumers could 'indicate' a link to a labor dispute." Oncor, 887 F.3d at 498. This is simply a situation in which we and our colleague have looked at the same caselaw and disagree as to its application.

Our dissenting colleague further contends that the court has already rejected the position we are advancing here – that Reed's testimony to the senate committee sufficiently indicated a labor dispute so as to satisfy the first prong of Jefferson Standard. We disagree. We are not arguing the point that the court questioned: "that employee disparagement of any feature of an innovation is an adequate signal to listeners that the speaker's position is driven by workers' anxiety about the innovation's possible job-killing effects." Oncor, above at 496. Indeed, we agree that Reed's testimony did not indicate any active concerns about the "job-killing effects" of smart meters. However, we find that his testimony adequately indicated that it related to an ongoing labor dispute, as defined in Sec. 2(9) of the Act, because it conveyed other negative impacts of smart meters on terms and conditions of employment. As instructed by the court, we thus have described the conditions "under which a reference to an employer practice . . . could 'indicate' a link to a labor dispute" by finding that where an employee identifies himself as a longtime employee and union representative, speaks directly on the negative impact of a product on his day-to-day working conditions, and further indicates that he has discussed these changes to working conditions with another union local, the "indication" prong clearly has been met. Id. at 498.

prompted him to contact the local union in Houston to see if employees there were experiencing the same issues.[11]

Relatedly, we also reject the dissent's characterization of our opinion as changing Board law so that the first prong of the *Jefferson Standard* test is satisfied "so long as the disparaging comments contain any reference whatsoever to employees' terms and conditions of employment" or "when one employee *neutrally* discusses his terms and conditions of employment in the context of disparaging his employer's product, without any reference to any objection to the employer's labor policies or practices" (emphasis added). We believe that the facts and context here demonstrate that Reed's reference to employer practices was not "neutral," and thus we disagree with the dissent that Reed's testimony was "neutral" or that it did not "suggest that his terms and conditions of employment had been *negatively* affected." Reed first identified himself as a 34-year employee of the Respondent and as a representative of the Union, and the audience thus would have understood Reed's comments to be in the context of employer-employee and union-employer relationships. When viewed in that context, Reed's comments clearly conveyed to his audience that the smart meters were negatively impacting his and his colleagues' working conditions.

We further disagree with our colleague's assertion that we are, in effect, watering down the *Jefferson Standard* test to require only "a nexus between the communication and employees' general terms and conditions of employment," rather than "a connection to either a 'labor dispute,' or . . . a labor 'controversy.'" The dissent's error is rooted in its overly circumscribed understanding of a "labor dispute" under the Act. As we have previously discussed, the subject matter of Reed's testimony, taken in context, easily falls within the statutory definition of a labor dispute in Section 2(9) of the Act. And we emphasize, again, that this ongoing disagreement between the Respondent and the Union over smart meters was both genuine and based on actual experience. See above at fn. 8. Moreover, Reed, in his union capacity, raised issues, including an increase in work orders relating to smart meters and customer complaints directed to workers, that negatively impacted employees' terms and conditions of employment (and further stated that he had contacted another union local to discuss the impact of smart meters); this is, as we found in our initial decision in this case (and which finding the court did not disturb), quintessential Section 7 activity. See e.g., *Gross Electric, Inc.*, 366 NLRB No. 81, slip op. at 2 (2018) (union officer's statement made in official capacity and "related to union members' employment concerns" protected). Declining to find that the workplace concerns raised here reflected a labor dispute would deny protection to what is clear Section 7 activity.

Finally, we emphasize that Reed's testimony was limited to two minutes, and that, during this time, a senator also asked him two questions. Thus, we note that Reed did not have complete control over the subject matter discussed during his two minutes of allotted time. While he was briefly permitted to speak freely, he was then constrained to answering the senator's questions. See *Endicott Technologies*, above at 451 fn. 12 (employee "could not control what portion of his interview would be quoted" in the newspaper). Nonetheless, in Reed's limited time testifying, he took multiple steps to identify himself and his affiliation with the Union, and to reference the negative impact of smart meters on his working conditions. Reed explicitly acknowledged his union connection twice—both when he identified himself as a union representative and when he discussed how he had contacted another union local to discuss the impact of smart meters. Further, the senate committee not only heard Reed's testimony, but it also heard from a representative for the Respondent, who took an opposing view. In this context, the committee would have been able to "identify the interests of the parties to the dispute." See *Endicott Technologies*, above at 451. Thus, contrary to the dissent's assertions, our analysis aligns directly with *Jefferson Standard* and its progeny. Cf. *Jefferson Standard*, above at 468, 477 (discussing how the employees' handbills constituted "a concerted separable attack purporting to be made in the interest of the public rather than in that of the employees," in part because they "made no reference to the union, to a labor controversy or to collective bargaining").[12]

[11] We note that our colleague's speculation that the Houston local did not understand Reed's inquiry to be referencing a labor dispute is beside the point. The relevant issue is whether Reed's testimony to the senate committee, which included, inter alia, his account of contacting the Houston local about the issues with smart meters, adequately indicated a relationship to a labor dispute.

[12] Tellingly, our colleague offers no response to our showing that the facts here simply do not raise the same concerns as those underlying the Court's Jefferson Standard decision. Unlike in Jefferson Standard, here Reed did not take "pains" to separate himself from the Union or union leadership, launch a "continuing attack" on a topic unrelated to his job duties, or purport to represent "the interest of the public rather than [] that of the employees." Id. at 476–477; see also Mountain Shadows, above at 1241 (comparing the flyer at issue to the handbill in Jefferson Standard in that it "made no reference to a labor controversy or to collective bargaining," "made a sharp, public, disparaging attack upon the quality of the company's product and its business policies," and "purport[ed] to be made in the interest of the public rather than in that of the employees") (internal quotation marks omitted). To the contrary, Reed did the opposite of the employees in Jefferson Standard and Mountain Shadows by aligning himself with the Union and testifying openly to a specifically designated audience, on a topic with which he had direct

The Board has found that the first prong of *Jefferson Standard* was not satisfied in only two cases, each involving employees who were not forthcoming about their union affiliation.[13] That is clearly not the case here. In *all* other cases analyzing the first prong of the *Jefferson Standard* test, including the three cases cited by our dissenting colleague, the Board has found that the communication at issue adequately indicated a labor dispute.[14] Thus, it is our dissenting colleague who advocates for a novel approach to analysis under *Jefferson Standard*, as he would force the square peg of Reed's overtly union-identified testimony about a workplace issue into the round hole of a covert attack on the employer of unidentifiable origin directed to the general public and facially unrelated to a labor controversy.

In sum, applying the court's framework as the law of the case on remand, we find that Reed's testimony to the senate committee sufficiently indicated an ongoing labor dispute so as to satisfy the first step of the applicable test here. As a result, because the court enforced the Board's finding that Reed's testimony did not lose protection of the Act under step two of the test, we affirm our conclusion that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Reed for his protected concerted activities.

AMENDED REMEDY

In accordance with our decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), the Respondent shall be ordered to compensate Reed for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful termination, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons,* supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

ORDER

The Respondent, Oncore Electric Delivery Company, LLC, Dallas, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for supporting the International Brotherhood of Electrical Workers, Local Union No. 61, or any other labor organization.

(b) 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 Bobby Reed full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Bobby Reed whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful termination, in the manner set forth in the remedy section of the underlying decision, as amended in this decision.

(c) Compensate Bobby Reed for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either

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experience. While ignoring the dramatic differences between Jefferson Standard and this case, our colleague argues that "the Jefferson Standard test has never merely required that the listener might be able to conclude the existence of a labor dispute by virtue of the fact that the employee disparaging the employer was a union representative" and that "sophistication—or lack thereof—of the audience has never been considered in determining whether the first prong . . . has been satisfied." Of course, that is not our position. Rather, our decision finds Reed's testimony protected based on his identification as a union representative and the content of his testimony; it is inaccurate to imply that we have found the first prong to be met merely because Reed was a union representative. To the extent our colleague argues that the characteristics of the audience should not be considered, we note that the first prong of the Jefferson Standard test has been described as "focus[ing] on whether it would be apparent to the target audience that the communication arises out of an ongoing labor dispute." *DirecTV*, 837 F.3d at 35 (emphasis added).

[13] See *Jefferson Standard*, above at 476 (finding flyers did not indicate a connection to a labor dispute where the employees "took pains" to separate themselves from their union affiliation and leadership positions); *Mountain Shadows*, above at 1241 (language in handbill "omitted all reference to the labor controversy" and "made no mention of the labor dispute, the [u]nion, management's treatment of the employees, or any issue having anything discernibly to do with employees' terms and conditions of employees").

[14] See *MikLin Enter., Inc. v. NLRB*, 861 F.3d 812, 824 (2017) ("Substantial evidence supports the Board's findings that the employees' Sick Day posters and press releases were related to their protected concerted effort to improve the terms and conditions of their employ by obtaining paid sick leave."); *DirecTV*, 837 F.3d at 35 ("In this case . . . 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.") (internal quotation marks omitted); *Emarco, Inc*., above at 832–833 ("[T]he [c]harging [p]arties' remarks were an extension of a legitimate and ongoing labor dispute which predated the strike and of which the strike proper was only one manifestation."); *Endicott Technologies*, above at 450 (finding that a newspaper article, which did not reference a union, nonetheless "provide[d] more than enough information for an ordinary reader to understand that a controversy involving employment [was] at issue"); *Xcel Protective Services*, above, slip op. at 5 (finding sufficient indication of labor dispute where employee "describe[d] the negative effect the [r]espondent's weapons-qualification practices had on the officers' safety on the job").

by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) File with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of backpay recipient's corresponding W-2 form reflecting the backpay award.

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

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

(g) Within 14 days after service by the Region, post at its Dallas, Texas facility, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by 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. If 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 December 18, 2012.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 16 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.

Dated, Washington, D.C. July 26, 2024

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Lauren McFerran, Chairman

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David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, dissenting in part.

As the Supreme Court recognized more than 70 years ago in *NLRB v. Local Union No. 1229, Int'l Brotherhood of Elec. Workers (Jefferson Standard)*, 346 U.S. 464 (1953), Board cases in which employers discharge employees based on disparaging, or disloyal, statements about their employer implicate two different aspects of the Act: Section 7 and Section 10(c). In reconciling those two sections, the Court found that "[t]here is no more elemental cause for discharge of an employee than disloyalty to his employer." Id. at 476. Accordingly, noting that the Act did not "weaken the underlying contractual bonds and loyalties of employer and employee," the Court found that the employer lawfully discharged several employees who had "sponsor[ed] or distribut[ed" handbills to the public—some of which had been handed out on a lawful picket line protesting the breakdown of collective-bargaining negotiations—that disparaged the respondent's television station. The Court found that because the disparaging handbills did not contain any reference to the parties' labor controversy but, rather, "had no discernable relation to that controversy," the "means" used by the employees deprived them of the protections of the Act. Id. at 476-478.

In 2000, the Board created a two-prong test, consistent with the holding in *Jefferson Standard*, for analyzing such

[15] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." 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."

disparaging communications made to third parties. *American Golf Corp.*, 330 NLRB 1238 (2000) (*Mountain Shadows)*. Under that framework, employees' disparagement of their employer or their employer's products lose the protection of the Act unless two requirements are met: 1) the communication must indicate that it is related to an ongoing dispute between the employees and the employer, and 2) the communication is not so disloyal, reckless, or maliciously untrue as to lose the Act's protection. Id. at 1250.[1]

Today, my colleagues take the unprecedented step of finding that the language in the first prong of the *Jefferson Standard* test does not mean what it says, concluding that the express requirements of that prong need not be satisfied in determining whether an employee's disparaging communications retain the protection of the Act. Instead, they create a new standard, drastically expanding the concept of concerted activity under the Act and undermining the Supreme Court's recognition that employers should be permitted to discipline employees for non-protected statements disparaging their product. Because my colleagues' decision is not only contrary to the court's remand instructions establishing the *Jefferson Standard* test as the law of the case, but is also inconsistent with Board and judicial precedent, including the Supreme Court's analysis in *Jefferson Standard*, I must dissent.[2]

I. BACKGROUND

The question presented in this case, which is back before the Board upon remand from the United States Court of Appeals for the District of Columbia Circuit ("the D.C. Circuit" or "the court"), is whether the Respondent violated the National Labor Relations Act by terminating employee Bobby Reed in response to his testimony to a state committee in which he disparaged the Respondent's product by making claims that the Respondent concluded were false. In its initial decision finding that the Respondent violated the Act by terminating Reed, the Board chose not to apply the two-prong *Jefferson Standard* test. The Board found that test did not apply because Reed's statements "did not attack the Respondent, its operations, or its product but rather raised legitimate, employment-related concerns . . . ." *Oncor Electrical Delivery Co.*, 364 NLRB 677, 681 fn. 15 (2016) ("*Oncor I"*).

Upon review, the D.C. Circuit rejected the Board's decision, finding that Reed's testimony did disparage the Respondent's product and that, therefore, the Board was required to apply the *Jefferson Standard* 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." *Oncor Electric Delivery Co. v. NLRB*, 887 F.3d 488, 492 (D.C. Cir. 2018) ("*Oncor II*") (quoting *DirecTV, Inc. v. NLRB*, 837 F.3d 25, 34 (D.C. Cir. 2016)). The court then found that the Board had failed to consider whether Reed's testimony satisfied the first requirement of that test—that "the communication indicate[s] it is related to an ongoing dispute between the employees and the employers . . . . ." Id. at 492 (quoting *DirecTV, Inc.* 837 F.3d at 34 (citing *American Golf Corp.*, 330 NLRB 1238, 1240 (2000) ("*Mountain Shadows*")) (additional citations omitted). Accordingly, the court remanded the case to the Board with instructions to "clarify the burdens of proof in cases under *Jefferson Standard* and articulate whether and how *those burdens* were met here. Id. at 501 (emphasis added).

My colleagues successfully answered the court's first question, clarifying that the General Counsel has the initial burden to establish that the first prong is satisfied: i.e., that "the communication indicate[s] it is related to an ongoing dispute between the employees and the employer . . . . ." *Oncor II*, 887 F.3d at 492 (quoting *DirecTV, Inc.,* 837 F.3d at 34 (internal citations omitted)). As my colleagues explain, if the General Counsel meets that burden, then the burden shifts to the Respondent to establish that the communication is so disloyal, reckless, or maliciously untrue that it loses the protection of the Act. I agree with this allocation of burdens.

Unfortunately, having established that the General Counsel has the burden to establish that the requirements of the first prong of the *Jefferson Standard* test are met, my colleagues erroneously concluded that the General Counsel met this burden. As I will explain, nothing in Reed's testimony indicated that his disparagement of the Respondent's smart meters was related in any way to a labor dispute, as required under the first prong of the *Jefferson Standard* test.

In their decision, my colleagues fail to identify any specific language in Reed's testimony that indicates to the listener that his testimony is connected to an ongoing dispute between the employees and the Respondent. Accordingly,

[1] Although this test was not established by the Supreme Court, it is often referred to as the Jefferson Standard test, and I will follow that practice here.

[2] In their decision, my colleagues find it "telling" that I "[offer] no response" to their position that "the facts here simply do not raise the same concerns as those underlying the court's Jefferson Standard decision." To the contrary, I have responded to that position. But in case I was not sufficiently clear: It cannot be disputed that the court, in denying enforcement of the Board's initial decision, specifically found that the Board had erred by not applying Jefferson Standard to this case. Accordingly, whether or not my colleagues believe that the Supreme Court's decision and analysis in Jefferson Standard is applicable here is of no moment. The law of the case establishes that it is.

even though my colleagues protest that they are applying the Jefferson Standard test, as required by the court's remand, they are not. Instead, their analysis is dependent upon an implicit assumption that the first prong of the Jefferson Standard test, as written, requires too much. One can only conclude from my colleagues' decision that, in their view, all that should be required in order to satisfy the first prong is that the audience hearing an employee's disparaging statement about the employer should be able to "filter the information critically" and glean, from the context, that the disparaging statement bears some relation to employees' terms and conditions of employment.

This, of course, is not what the *Jefferson Standard* test requires.

Perhaps in some future appropriate case, my colleagues could seek to revise the *Jefferson Standard* test and leave it up to the courts to determine whether or not that broader test would be consistent with the Supreme Court's *Jefferson Standard* decision.[3] Here, however, my colleagues do not have that option.

Unlike my colleagues, I choose to follow the court's instructions, which requires applying the *Jefferson Standard* test as written. Because I find that Reed's testimony disparaging the Respondent's smart meters failed to inform the audience of any connection to an ongoing labor dispute, I find that his testimony did not satisfy the first prong of *Jefferson Standard*. Accordingly, I would dismiss the complaint allegation that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Bobby Reed.

II. RELEVANT FACTS

The Respondent provides electrical service to customers in the Dallas area, and the Union represents field employees of the Respondent. Bobby Reed, a long-term employee of the Respondent who was an employee at all relevant times, served as the Union's chief spokesperson in bargaining for a successor to the parties' agreement set to expire on October 25, 2012. Beginning in 2008 and through the end of 2012, the Respondent replaced analog meters with smart meters at over 3 million of its customers' homes. As the court found, smart meters were not an issue in the parties' bargaining over a successor agreement.[4]

After the first day of negotiations, Reed volunteered to testify at a public hearing before a Texas state committee "tasked with 'study[ing] whether advanced meters, or smart meters, that have been, and will be, installed in Texas have harmful effects on [public] health.'" *Oncor II*, 887 F.3d at 493. At the hearing, Reed signed the committee's witness list as representing both himself and the union and wrote that "he would testify 'on' smart meters, rather than 'for' or 'against.'" Id. As the court found:

> During his brief testimony, Reed said that he represented the local union in Dallas and had consulted its equivalent in Houston. He testified that "the work orders that I went out on were beginning to be increasingly of the meters burning up and burning up the meter bases." Reed reiterated that this occurrence was becoming more frequent, and had begun "when they started installing [the smart meters]." When asked by a senator whether the burning could be attributed to the power line, Reed was emphatic, "No, it's the meter." Reed made two arguable references to working conditions. First, he testified to receiving repair orders or damaged boxes after the meters had burned. There was no mention of employees' encountering [hazardous conditions] while servicing the meters. Second, his testimony focused on his experience with disgruntled customers. He spoke of an "elderly woman" . . . who had been told by [the Respondent] that she would have to pay for the damage herself before her power could be turned back on. Reed concluded that he did not "know much about [radio] frequency . . . [but did] know a little bit about fire and heat, and these things are causing damage to people's homes."

Id. at 494–495 (internal record citations omitted).

The Respondent investigated Reed's assertions that its smart meters had been starting fires and damaging customers' homes and concluded that his testimony was false. Thereafter, the Respondent terminated Reed.

III. THE BOARD'S DECISION

In finding that the Respondent unlawfully terminated Reed, the Board relied on the following findings. First, the Board found that Reed's testimony "related to (and was spurred by) an ongoing and legitimate concern of the Union about the safety of represented [bargaining-unit] employees working with the meters . . . ." *Oncor I,* 364 NLRB at 679. Next, the Board found that, "in his senate testimony, Reed illustrated the effect on employees' working conditions of the increase both in the number of service calls and the frequency with which they had to deal with disgruntled customers when explaining to them that they must pay to repair or replace their burned up meter bases." Id. at 679–680. Accordingly, the Board concluded that Reed's testimony was protected by Section 7

[3] Of course, given Board tradition, that case would require a three-member majority.

[4] The court found that the only role that smart meters played in the parties' negotiations was "as a partial explanation for the parties' differing preferences as to contract duration." Oncor II, 887 F.3d at 498. The court noted that the issue of smart meters was, at most, "a deep background dispute" between the parties. Id. at 498.

"unless the Respondent can prove that some aspect of the testimony warrants forfeiture of protection." Id. at 680. Because the Board found that the testimony was not maliciously false, it concluded that Reed was unlawfully terminated for engaging in protected concerted union activity. Id. at 681. Importantly, as noted above, the Board rejected the Respondent's argument that Reed's testimony lost the Act's protection because it was disloyal to the Respondent because it disparaged the Respondent's products. Id. at 681 fn.15.

IV. THE COURT'S DECISION

The court squarely rejected the Board's finding that the two-prong test established in *Jefferson Standard* was not the appropriate standard to apply to this case. The court cited the specific requirements of that standard: "Under the test, even disparaging statements can enjoy the Act's protection '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.'" *Oncor II*, 887 F.3d at 492 (quoting *DirecTV,* 837 F.3d at 34 (citing *Mountain Shadows,* 330 NLRB at 1240)) (additional citations omitted). The court made clear that, in *Jefferson Standard*, the Supreme Court held that a "disparaging attack . . . does not qualify as a protected [Section] 7 collective bargaining activity when *the subject matter* 'ha[s] no discernable relation to [the labor] controversy." *Id*. at 497 (emphasis added) (quoting *Jefferson Standard*, 346 U.S. at 476–477); see also *DirecTV*, 837 F.3d at 35. Accordingly, the court remanded the case back to the Board to apply the *Jefferson Standard* test as the correct legal standard.

The court decision did not end there, however. The court noted that "[b]ecause at least one of the reasons [proffered in the Board's brief before the court]—reliance on an undisclosed attempt to gain leverage in bargaining—rests on a legal error, we comment on the Board's reasoning as guidance for the remand." *Oncor II,* 887 F.3d at 495.

In addition to concluding that "the testimony made no detectible reference to worker risks," id. at 498, the court expressed doubt that the Board's theory that a "years-long dispute between Oncor and the union over the deployment of smart meters" and "the union's previous lobbying of the Texas legislature for a bill that would allow customers to opt out of smart meters" would be sufficient to establish that the first prong of the *Jefferson Standard* test had been met. The court specifically expressed doubt that the Board's position that "the legislators would recognize that the Union and Oncor were engaged in a labor dispute regarding smart-meter deployment, and that Reed was at the hearing to represent the Union's side of that dispute" was persuasive.

As the court explained:

> The record gives very little indication of significant union lobbying on smart meters in the years before Reed's testimony. Reed had e-mailed legislative staff about smart meters in April 2011, but that e-mail was sent to a different committee from the one he testified before, in regard to a bill that was no longer pending when he testified (and the e-mail itself contained no overt nexus to employee interests). While we recognize that Reed could be expected to offer only so many caveats in his two-minute testimony, and while a legislative audience may be especially sophisticated at spotting embedded special interest claims, Reed did not sign up to speak "for" or "against" smart meters, but "on" the topic. It seems clear enough that the union opposed smart meters because automation threatened a decline in the workforce, but that was *not a topic of Reed's testimony*. If on remand it appears that the union's longstanding concern over smart meters' effect on employment is the only relevant "labor dispute," we seriously question . . . the implicit assumption that employee disparagement of *any feature* of an innovation is an adequate signal to listeners that the speaker's position is driven by workers' anxiety about the innovation's possible job-killing effects (and thus possibly subject to some discount). Of course it is for the Board to determine, on remand, what *other indication*—if any—the audience had of a connection between Reed's testimony and an *ongoing labor dispute*.

Oncor II, 887 F.3d at 496 (internal citations and parentheticals omitted) (first, third, and fourth emphases added).

Thus, in remanding the matter to the Board, the court expressed "serious" doubt that Reed's testimony satisfied the first prong of the *Jefferson Standard* test either as a result of any special sophistication on the part of the legislators or the fact that Reed identified himself as a union member. Instead, it directed the Board to determine if any "other indication" in Reed's testimony created a connection with an ongoing labor dispute between the Respondent and its employees, as required under the first prong.

V. REED'S TESTIMONY DID NOT SATISFY THE FIRST PRONG OF THE *JEFFERSON STANDARD* TEST

The task currently before the Board is to apply the first prong of the *Jefferson Standard* test to determine whether Reed's testimony in a public hearing before the Texas senate committee satisfied this standard. I believe it is clear that it did not. I note that, as the court found, the hearing took place before "a Texas state committee tasked with [s]tudy[ing] whether advanced meters, or smart meters, that have been, and will be, installed in Texas have

harmful effects on [public] health." *Oncor II, 887* F.3d at 493 (internal quotation marks omitted). In other words, the sole purpose for the committee's existence was to explore the effects of smart meters on *the public*. No one listening to Reed's testimony would have had reason to believe that his testimony—as someone who installs smart meters—that smart meters had been starting fires at customers' homes was related to an ongoing labor dispute rather than the effects of smart meters on public health and safety, *unless he indicated that it did.*

Reed's testimony, however, contained no such indication. The testimony made no reference whatsoever to a labor policy or practice of the Respondent, let alone an ongoing labor dispute. Nor did it contain any explanation of a nexus between his testimony regarding the fact that the Respondent's smart meters had been catching fire and damaging customers' homes and an ongoing labor dispute.[5] Because Reed's testimony does not satisfy the requirements of the first prong of the *Jefferson Standard* test, the Respondent did not violate the Act for terminating him for disparaging—in its view, falsely—the Respondent's products.

My colleagues assert that, by requiring some mention of an ongoing labor dispute, I am "narrow[ing] the Board's traditionally broad interpretation of the statutory phrase "labor dispute." Indeed, citing *Endicott Interconnect Technologies*, 345 NLRB 448, 450 (2005), enf. denied, 453 F.3d 532 (D.C. Cir. 2006), they suggest that I err because I should be interpreting "labor dispute" to mean "a controversy that relate[s] to terms or conditions of employment." This makes no sense. Certainly, there is nothing in *Jefferson Standard* and its progeny, federal law, or my dissent that suggests that there is a material difference between "dispute" and "controversy."[6] So what are my colleagues saying? They are asserting that the *Jefferson Standard* test is satisfied when one employee neutrally discusses his terms and conditions of employment in the context of disparaging his employer's product, without any reference to any objection to the employer's labor policies or practices, let alone any reference to an actual labor dispute. This, in a nutshell, summarizes the fatal flaw in my colleagues' decision today. In their view, the *Jefferson Standard* test is satisfied by a nexus between the communication and employees' general terms and conditions of employment and does not require that the disparaging communication indicate a connection to either a "labor dispute," or, if you will, a labor "controversy." Unfortunately for their position, that is precisely what the test requires.

Finally, my colleagues assert that I am "advocat[ing] for a novel approach" and that I "[cite] no authority" for that approach. Again, I do not understand my colleagues' point.[7] I am not advocating for any approach. Objective facts establish that the Board and the courts are bound by the Supreme Court's 1953 decision in *Jefferson Standard* and that, for nearly a quarter century, the Board has applied a two-prong test that requires, in part, that the disparaging communication at issue indicate a nexus to a labor dispute.[8] See, e.g., *Oncor II*, 887 F.3d at 497 (finding *Jefferson Standard* standard requires that "testimony indicate[s] a nexus to an ongoing labor dispute"); *MikLin Enter., Inc. v. NLRB*, 861 F.3d 812, 822 (2017) ("[T]he

[5] I note that, even if first prong of Jefferson Standard did not require that the communication inform the audience of a nexus to an "ongoing labor dispute"—which interpretation would be contrary both to the language of the test and to the remand directions of the court—but merely to inform the audience of a nexus to employees' terms and conditions of employment, Reed's testimony would still fail to satisfy the test. As the court found, only two statements during the testimony were even arguably related to terms and conditions of employment. The first was Reed's testimony that "the work orders that [he] went out on were beginning to be increasingly of the meters burning up and burning up the meter bases." *Oncor II,* 887 F.3d at 493-494. This testimony, however, is entirely neutral. Reed does not testify that this shift in work orders had any negative repercussions whatsoever on employees' terms and conditions of employment, and my colleagues do not explain how a neutral statement about terms and conditions of employment could be attempting to generate support from third parties about a labor issue. The second statement is that he had experience with disgruntled customers because the smart meters were causing damage to people's homes and customers were being required to pay for that damage. Reed did not indicate that there had been any increase in disgruntled customers on the job, or that the customers were more disgruntled than usual; rather, he testified that he had encountered customers who were disgruntled about having to pay for damage to their homes caused by the smart meters. Again, I do not believe that any reasonable reading of Jefferson Standard and its progeny would lead to the conclusion that an employee's statement that they have encountered disgruntled customers, standing alone, is sufficient to satisfy the first prong of that test. Nor can my colleagues identify any such case.

[6] My colleagues assert that "the subject matter of Reed's testimony, taken in context, easily falls within the statutory definition of a labor dispute in Section 2(9) of the Act." That section defines "labor dispute" as follows:

> The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

It is not clear to me why my colleagues believe that this definition "easily" demonstrates why Reed's testimony indicated that it was related to a labor dispute, as required under Jefferson Standard. Sec. 2(9) defines "labor dispute" as including "any controversy" concerning terms and conditions of employment. Either way, the standard definitions of both "dispute" and "controversy" are disagreement between two (or more) entities. No such disagreement was identified in Reed's testimony.

[7] My colleagues attack in this regard is particularly strange given that they cannot cite a single case that supports their decision to find a violation in the circumstances presented.

[8] I note that, insofar as courts are interpreting the requirements of Jefferson Standard, the Board's interpretation of what is required is not entitled to deference.

critical question in the *Jefferson Standard* disloyalty inquiry is whether employee public communications reasonably targeted the employer's labor practices, or indefensibly disparaged the quality of the employer's product or services. The former furthers the policy of the NLRA; the latter does not."); *DirecTV,* 837 F.3d at 35 (2016) ("The first prong of the test—whether the communication indicates 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. . . . 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.") (internal citations, and accompanying quotation marks and revisions, omitted); *Emarco, Inc*., 284 NLRB 832, 832–833 (1987) (finding disparaging comment protected when the conversation referenced the employees' strike based on the employer's delinquency in making pension plan payments as well as the employer's failure to timely recall employees following the strike).

VI. MY COLLEAGUES' DECISION RESTS ON MISREPRESENTATIONS OF REED'S TESTIMONY

My colleagues assert that they are correctly applying the *Jefferson Standard* test because, in their view, Reed's testimony adequately indicated that it was related to a labor dispute because Reed "raised issues . . . that negatively impacted employees' terms and conditions of employment." Even if my colleagues are correct in their interpretation of the requirements of the first prong of the test, the General Counsel failed to meet her burden to establish that Reed's testimony raised any such issues.

As the court found, only two statements during the testimony were even arguably related to terms and conditions of employment. The first was Reed's testimony that "the work orders that [he] went out on were beginning to be increasingly of the meters burning up and burning up the meter bases." *Oncor II*, 887 F.3d at 493–494. In relying on this part of Reed's testimony, my colleagues assert that it raised the issues of "an increase in work orders relating to smart meters and customer complaints directed to workers." But, to the extent that my colleagues are asserting that there was an actual increase in Reed's work orders, that assertion is not an accurate representation of Reed's actual testimony. The testimony relevant to this issue was:

> Reed: What I came to testify about today is, when they started installing the [smart] meters, I noticed that the tickets that I worked on or the work orders that I went out on were beginning to be increasingly of the meters burning up and burning up the meter basis.

Reed's testimony only established that Reed noticed that a higher percentage of his service calls were related to meters burning up after the installation of the smart meters. His testimony in no way stated that he was responding to more numerous service calls.

Further, Reed did not testify that this shift in the nature of the work orders to which he responded had any negative repercussions whatsoever on his terms and conditions of employment. He did not testify, for example, that service calls pertaining to meters burning up were more onerous than other types of service calls. Nor did he testify that, because more of his service calls were dealing with smart meters burning up, he was having to work longer hours. Although my colleagues dispute my contention that this testimony was "neutral" as regards Reed's terms and conditions of employment, that is exactly what it was.

Next, my colleagues assert that Reed's testimony raised the issue of "customer complaints directed to workers." The testimony on which they rely is:

> Reed: And when I go to a low income house where this lady comes out, this elderly woman that's a widow woman and she says, you know, "What's the problem?" And I said, "Well, your meter burnt up, and it's your equipment and you have to pay for the repairs before you can get your lights back on." And she tells me, "Well, I've been living here for 45 years, and I've never had a problem until they installed that meter." And that just has happened a lot.

Again, nothing in this testimony suggests that Reed received customer complaints "directed to workers." It is clear that his testimony indicated that customers had told Reed that they were facing a new problem--their electrical meters burning up--that they had not faced before. But Reed's testimony in no way established that customers were unhappy with employees or otherwise taking out any frustrations on employees. Reed did not testify, for example, that any customer had raised their voice or otherwise become combative with him as a result of the smart meters burning up. Rather, at most, Reed's testimony established that, in the presence of employees, customers were complaining about the smart meters burning up and possibly about having to pay for repairs to their properties themselves. Nothing in his testimony indicated that Reed's terms and conditions of employment had been negatively affected by the smart meters failing, let alone that he was referring to an ongoing labor dispute.[9]

[9] Although my colleagues also mention that Reed's testimony indicated that the smart meters "posed a risk to workers," the court expressly found that Reed's "testimony [made] no mention of worker hazards." In addition to being true, the court's finding in this regard is the law of the case.

Finally, my colleagues assert that Reed "stated [in his testimony] that he had contacted another union local to discuss the impact of smart meters." That, however, is not an accurate characterization of Reed's hearing testimony:

> Reed: [W]hen I started noticing [the increase of service calls involving smart meters burning and customers indicating that they had not experienced that before][10] I called the union there in Houston and asked them if they were experiencing the same thing. And he told me he would go by the meter shop that next day and then call me. And he called me the next day and said that they are experiencing a significant increase in the meters being turned in that are burnt up from the old analog meters to now, the AMS meter.

Reed's testimony did not indicate that he contacted the union in Houston "to discuss the impact of smart meters." Rather, Reed testified that, in light of what he had been experiencing with regard to smart meters failing, he contacted the union in Houston to inquire whether they were "experiencing the same thing" in Dallas. Further, Reed's testimony did not indicate that any discussion about the "impact" of smart meters actually took place; his testimony did not reference any discussion of the "impact" of smart meters on customers' homes, nor did it reference any discussion of the "impact" of smart meters on employees' terms and conditions of employment. Finally, and notably, Reed's testimony established that the Houston local *itself* did not understand Reed's inquiry to be raising the issues that my colleagues suggest.[11] The local union's response did not contain any reference whatsoever to employees' terms and conditions of employment or any ongoing labor dispute. Rather, according to Reed's testimony, the local union only reported that, according to the "parts shop" in Houston, there had been an increase in burned meters being turned in.[12]

Accordingly, in finding that the Respondent violated the Act by discharging Reed as a result of his disparagement of its products, my colleagues are in effect finding that, so long as the disparaging comments contain any reference whatsoever to employees' terms and conditions of employment or inter-local communications or, really, any reference to the union, the first prong of the *Jefferson Standard* test is satisfied. Because I vehemently disagree with this interpretation of the test, my colleagues do not accurately represent my position when they assert that this is "simply a situation in which [the majority members and the dissenting member] have looked at the same caselaw and disagree as to its application."

VII. MY COLLEAGUES' INTERPRETATION OF THE *JEFFERSON STANDARD* TEST IS FATALLY FLAWED

It is not difficult to summarize my colleagues' position: they do not believe that the first prong of the *Jefferson Standard* test adequately protects employees' ability to disparage their employer to third parties without fear of repercussion.[13] As a result, they implicitly take the novel position that the *Jefferson Standard* requirements need not be interpreted literally, thereby in effect eviscerating that standard and replacing it with a new standard.

To begin, in finding a violation here, my colleagues appear to change Board law so that the General Counsel does not need to find that Reed's testimony was linked to a particular ongoing labor dispute in order to find that the testimony was protected.[14] Given the court's decision as well as the scant record evidence of any ongoing labor dispute regarding smart meters, my colleagues opt for vague explanations such as that the committee would have understood that Reed had "particular interests that [he sought] to advance." But "particular interests" are not a labor dispute. They further state that "when [a union] representative's testimony conflicted with the public position of the employer, a labor dispute between the union and the employer was likely implicated." Beyond the fact that I question the veracity of that assumption, the *Jefferson Standard* test has never merely required that the listener might be able to conclude the existence of a labor dispute by virtue of the fact that the employee disparaging the

[10] Reed's testimony merely referred to "this" here, and it is not clear from the context in which the statement was made what he meant by "this." Based on my reading, I believe that Reed was referring to his prior testimony that he had experienced an increased percentage of service calls related to smart meters burning at which customers often expressed that it had never happened before.

[11] And if the local union did not understand Reed's inquiry to be referencing an ongoing labor dispute, it is not clear to me how attendees of a hearing addressing whether smart meters pose a "public health" threat would interpret his testimony that way.

[12] Any speculation that the Houston local failed to mention an ongoing labor dispute because the representative there assumed that Reed was making the inquiry in the context of an ongoing labor dispute is neither supported by record evidence nor suggested by Reed in his testimony.

[13] I do not question the motivation behind this view; it seems likely that my colleagues believe that the Act should allow employees to put economic—and public—pressure upon employers to the greatest degree possible. The problem, however, is that the Supreme Court decided this issue in Jefferson Standard, establishing that employees do not engage in concerted activity protected by the Act when they make disparaging comments about their employer without adequately informing the listener of the relationship between those comments and a labor dispute.

[14] Although my colleagues' note that a labor dispute existed, their reasoning does not support that conclusion. For example, my colleagues assert that "the Union had an ongoing concern about the safety of the meters." They do not, however, explain how this "concern" manifested into an ongoing labor dispute. Their suggestions that a supervisor was "aware that the smart meters were [heating up and burning]" and that the Respondent was aware that the legislature had concerns about the safety of smart meters does not establish that this issue had become a dispute between the Respondent and its employees with regard to terms and conditions of employment.

employer was a union representative. This is new law, and my colleagues cannot cite a single case in which the Board has so held. Nor can they cite to any suggestion in the *Jefferson Standard* decision that would support that view. In fact, as noted above, some of the flyers at issue in *Jefferson Standard* were handed out *on a picket line*, but the Court did not give any indication that the act of handing out the offending flyers on a picket line was in any way different from handing them out to businesses in the community. The Court's decision clearly focused on the *subject matter* of the flyer, not on who had handed out the flyers at issue.

Next, they take the position that, in analyzing disparaging comments under *Jefferson Standard* and its progeny, the Board should not require a connection to an ongoing labor dispute but, rather, any connection to an employees' terms and conditions of employment. In that vein, they assert that "Reed limited his testimony to his direct knowledge of smart meters and his significant experience working with them" and that "[h]e specifically addressed how working conditions had changed since the installation of the new meters." This, of course, fails to identify any ongoing labor dispute.[15] However, even if we assume that Reed's testimony that smart meters had been damaging customers' homes at a hearing *specifically pertaining* to the safety of smart meters to the general public was raising concerns about his terms and conditions of employment, this is not, nor ever has been, sufficient to satisfy the first prong of the *Jefferson Standard* test. My colleagues cannot cite to a single case where the Board has found that the *Jefferson Standard* test was satisfied simply because the communications at issue referenced terms and conditions of employment.[16]

I note that my colleagues cite to *Xcel Protective Services*, 371 NLRB No. 134 (2022), in support of their view that the first prong's requirement that the communication indicate a connection to a labor dispute "is not onerous" and that "[e]mployees need only provide enough information about the existence of a labor dispute to allow third parties to 'filter the information critically' when they appeal to those third parties for support." My colleagues, however, fail to note that, in *Xcel,* the communications at issue were related to an actual ongoing labor dispute.[17] In that case, the employees had collectively discussed their workplace safety concerns arising from their employer's failure to follow Navy protocols in administering and certifying weapons testing. One of the employees then directly informed their employer of their workplace safety concerns. For instance, the employer was informed that "someone [in the workplace] could have gotten hurt from a ricochet . . . [or an] accidental discharge [of the firearms]." After failing to obtain a satisfactory response from the employer, employees collectively raised their concerns with the commanding officer at the naval base at which the Respondent was a contractor.

Thus, the communication at issue in *Xcel* arose from a collective action by a group of employees who were involved in a clear dispute with their employer regarding concerns about their personal safety as employees working at the naval base. The Board specifically found that the communication referenced this specific dispute when it "*directly and explicitly informed* Navy leadership . . . that [employees] believed that the [r]espondent's failure] to comply with [safety regulations] . . . *compromised [employees'] safety both at the range and while on guard duty*." *Xcel,* 371 NLRB No. 134, slip op. at 4; see also id*.,* slip op. at 5 (finding that the communication established a "nexus" to employees "dispute with the Respondent"). Accordingly, *Xcel* does *not* support my colleagues' novel position that communications can satisfy the first prong of the *Jefferson Standard* test without establishing a nexus between the *subject matter* of those comments and an *actual* ongoing labor dispute.[18]

[15] In fact, as discussed above, Reed's testimony did not even suggest that his terms and conditions of employment had been negatively affected by the fact that smart meters had caused damage to customers' homes. For example, he did not testify that he was being sent on more service calls, or that the service calls were more difficult or required him to work a longer day. Rather, he testified that a greater number of his service calls were based on smart meter problems. Similarly, although he testified about a disgruntled customer, he did not testify that he was experiencing a greater number of disgruntled customers than usual as a result of the smart meter problems.

This fact has no bearing on the analysis of this case—the Board has never found that the Jefferson Standard test was met simply because an employee's disparaging remarks included the negative effects on his terms and conditions of employment—but rather is meant to demonstrate how broad and unprecedented my colleagues' position is.

[16] In fact, my colleagues do not even attempt to proffer cases that actually support the novel legal standard they promulgate today. Rather, they engage in an analytical fallacy to reach their conclusion that Reed's testimony should be viewed as protected by the Act. Specifically, my colleagues cite (some) relevant cases to our inquiry but then, rather than apply the actual facts of those cases, they draw vague conclusions from them. They then decide that, based on those vague conclusions, extant caselaw supports their position. As I'm sure my colleagues understand, just because one could categorize doughnuts as a round breakfast item does not mean that all round breakfast items are doughnuts.

[17] I note that in distinguishing Xcel from the instant case, I am not taking a position regarding whether the Board's decision in that case was correctly decided. I also note that no court has enforced Xcel, nor has any court issued a case in which the application of Jefferson Standard considers whether the communication references "terms and conditions of employment" rather than, as expressly stated in the Jefferson Standard test, "an ongoing dispute between the employee and the employers . . . ." *Mountain Shadows*, 330 NLRB at 1240 (emphasis added).

[18] The court found that the Union had a "longstanding concern over smart meters' effect on employment." *Oncor II*, 887 F.3d at 496. This concern apparently had to do with the fact that the smart meters had led

My colleagues also cite the Board's decision in *Endicott Interconnect Technologies*, 345 NLRB 448, 450 (2005), enf. denied, 453 F.3d 532 (D.C. Cir. 2006). To begin, because the case before us is on remand from the D.C. Circuit, I do not believe that the Board can ignore the fact that the D.C. Circuit vacated and denied enforcement in *Endicott* in full, both finding that the Board had erroneously found that the second prong of the *Jefferson Standard* test had been met and, by a majority, declining to reach the issue of whether the Board's correctly found that the first prong of the test was satisfied.[19] Put another way, the court did not express agreement with any aspect of the Board's application of the *Jefferson Standard* test. Although the Board generally applies the principle of nonacquiescence in deciding cases, because the Board does not know what circuit law will be applicable to most cases that it issues, here the Board knows that this case will end up back before the D.C. Circuit.[20] Accordingly, I believe that my colleagues err in relying on that case.

Regardless, *Endicott* is clearly distinguishable from this case.[21] One of the communications at issue in *Endicott* was a newspaper article written about the employer's acquisition of a local manufacturing facility and its subsequent permanent layoff of 200 employees, about ten percent of the facility's workforce. The employee communication at issue was published in a newspaper article presenting opposing employee and management positions regarding the permanent layoffs. Accordingly, at the time the employee answered the reporter's questions about the layoffs, he was unquestionably making statements connected to the layoffs, which were a labor dispute between the parties. The way in which the reporter chose to include the employee's comments in the published article was not within the employee's control, nor is it clear whether the employee's statements—if they had been included in full along with the reporter's questions—would have specifically referenced the layoffs. The second communication, made on a website maintained for discussing the effects of the respondent's acquisition, similarly involved the respondent's permanent layoffs and the union's role—or lack thereof—in protecting employees' jobs.[22]

My colleagues raise additional bases for their analysis that are hardly worth addressing. They assert that because Reed had reached out to the Houston local, that establishes the existence of a labor dispute. It does not; the dispute must be between the employer and the employees. The fact that two locals may have been talking about an issue does not establish that the employer was involved in any dispute. My colleagues also assert that, because Reed was testifying before a committee, those state legislators could "reasonably . . . be expected to infer that a self-identified union representative was testifying to advance the union's interests . . . ." But the sophistication—or lack thereof—of the audience has *never* been considered in determining whether the first prong of the *Jefferson Standard* test has been satisfied; the focus is, and always has been, on what is *actually said* in the disparaging communications at issue. Therefore, by finding that this is a relevant consideration, my colleagues are applying a new standard. However, my colleagues' application of that consideration to this case fails to support their finding. The record establishes that the hearing at which Reed spoke was a *public* hearing. Therefore, it would have been the General Counsel's burden to establish that the only persons hearing Reed's testimony were similarly "sophisticated" with regard to interpreting that testimony. The General Counsel did not establish that here. Finally, my colleagues assert that the fact that "Reed's testimony was limited to two minutes, and that, during this time, a senator also asked him two questions," supports their finding that his disparaging comments were protected by the Act. With all due respect, even assuming that, given more time, Reed would have made reference to an as yet unidentified ongoing labor dispute, that is entirely irrelevant for determining

to layoffs in the past. If I am reading the court's decision correctly, I accept that finding as the law of the case. Nevertheless, as the court found, nothing in Reed's testimony could be viewed as referencing the fact that smart meters could lead to job loss.

[19] In fact, the only judge to reach the issue, Judge Henderson, found that the communications at issue failed to satisfy the first prong as well. *Endicott*, 453 F.3d at 538 (J. Henderson, concurring). Given the fact that the court vacated the Board decision in full, and that there is nothing in the decision to suggest that the court in any way approved of the Board's analysis or determination that the first prong was met, I do not see how my colleagues' assertion that "there is no reason" not to rely on Endicott can be taken seriously.

[20] Numerous circuit courts of appeal have, over the years, addressed the Board's nonacquiescence policy. See *Ayuda v. Thornburgh*, 880 F.2d 1325, 1330 fn. 4 (D.C. Cir. 1989) (discussing but not deciding among conflicting views in the courts of "intracircuit nonacquiescence" policies adopted by some federal agencies, with emphasis on NLRB decisions) (collecting cases and secondary sources); *NLRB v. A. Duie Pyle, Inc*., 730 F.2d 119, 128 (3d Cir. 1984) (criticizing the Board's nonacquiescence where, "[r]ather than follow our [controlling precedent], the Board attempted to distinguish it"); *Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980) (calling Board's "consistent practice of refusing to follow the law of the circuit unless it coincides with the Board's views. . . . "intolerable"), cert. denied, 449 U.S. 975 (1980).

[21] I note that in distinguishing Endicott Interconnect from the instant case, I am not taking a position regarding whether the Board's decision in that case was correctly decided.

[22] Another case upon which my colleagues rely, *Gross Electric, Inc.,* 366 NLRB No. 81 (2018), was not a Jefferson Standard case and involved no public disparagement. In that case, the union president engaged in protected criticisms of management and its hiring practices during a grievance meeting. It is not at all clear how that case has any relevance whatsoever to the issue before us.

whether the first prong of the *Jefferson Standard* test was met. Precedent, as well as the language of the test itself, clearly establishes that analysis of the first prong turns on how an audience would interpret the disparaging comments in light of *what was said*, not what the speaker might have said.

Finally, I note that my colleagues' position that the overall context of Reed's testimony should be sufficient to satisfy the requirements of *Jefferson Standard* has already been implicitly rejected by the court, which was cognizant of the overall context of Reed's testimony in deciding to remand the case. The court noted that "[t]he Board suggests [in its brief] that in [the context of a "years-long" labor dispute over the deployment of smart meters], plus Reed's identifying himself with the union and his testifying about smart meters, the legislators would recognize that the Union and [the Respondent] were engaged in a labor dispute regarding smart-meter deployment, and that Reed was at the hearing to represent the Union's side of the dispute." Id. at 496. This, of course, is basically the same rationale being presented by my colleagues today. However, in its decision, the court found "very little indication of significant union lobbying on smart meters" that would have put the committee on notice of this alleged labor dispute, and expressed serious doubt that the argument that Reed's self-identification and the subject matter of his testimony were sufficient to meet the first prong of the *Jefferson Standard* test. Id.

VIII. CONCLUSION

The court has directed us on remand to address the first prong of *Jefferson Standard* by explaining whether and how Bobby Reed indicated to the senate committee that he was disparaging his employer's product *in the context of a labor dispute*—that is, a "dispute between the employees and the employer[]." 887 F.3d at 492. In response to the remand order, my colleagues attempt to redefine the terms of *Jefferson Standard* so that a labor dispute may be inferred when an employee disparages the employer and makes any reference to working conditions and/or the union, even a reference as oblique as a customer stating that she had been living at her home for 45 years and "never had a problem until they installed that meter." I do not believe that by proposing and applying a new interpretation of *Jefferson Standard* my colleagues have either acted consistently with that decision or satisfied the court's order on remand. First, as explained above, my colleagues' redefining of *Jefferson Standard* as an inference-based test that does not require the speaker to directly indicate a labor dispute is without support in that decision or subsequent case law applying it. Second, my colleagues' analysis relies on characterizations of Reed's testimony that simply do not reflect his actual testimony. Third, the factors that my colleagues rely on to contend that Reed did in fact provide sufficient information for the committee to infer a dispute are the same factors that the court rejected; the only difference is that now, under my colleagues' version of the standard, these factors should establish that Reed's testimony was indeed protected. Fourth, I do not believe that the inference-based analysis that my colleagues propose comes anywhere near the clarity the Supreme Court contemplated in *Jefferson Standard*. As the Court there emphasized, "[t]here is no more elemental cause for discharge of an employee than disloyalty to [a person's] employer," 346 U.S. at 472. I do not believe that it contemplated requiring an employer to tolerate disparaging attacks on its services from the very employees it entrusts to provide them, absent an indication *in the remarks themselves* sufficient to notify the listener that the disparagement was made in the context of a labor dispute. To my colleagues, however, such clarity is unnecessary. Rather, they find that those present at the hearing before a committee specifically tasked with considering the effects of smart meters *on the public* would have been able to infer some sort of dispute between employees and the employer based on how Reed identified himself and the fact that his testimony mentioned the effect of smart meters on customers. As I explain above, I do not believe that such an inference, or my colleagues' reinterpretation of *Jefferson Standard* to permit it, satisfies the requirements of that standard or the court's direction on remand.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. July 26, 2024

Marvin E. Kaplan, Member

NATIONAL LABOR RELATIONS BOARD

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 discharge or otherwise discriminate against you for supporting the International Brotherhood of Electrical Workers, Local Union No. 61, or any other labor organization.

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

WE WILL, within 14 days from the date of this Order, offer Bobby Reed full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Bobby Reed whole for any loss of earnings and other benefits resulting from his unlawful termination, less any net interim earnings, plus interest, and WE WILL also make him whole for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful termination, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL make affected employees whole for any loss of earnings, including a decrease in extra-room bonus earnings, and other benefits suffered as a result of our unlawful unilateral changes, plus interest.

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

WE WILL file the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 forms reflecting the backpay awards.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge, and within 3 days thereafter, notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

ONCOR ELECTRIC DELIVERY COMPANY, LLC

The Board's decision can be found at https://www.nlrb.gov/case/16-CA-103387 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.