

**UNITED STATES OF AMERICA
THE NATIONAL LABOR RELATIONS BOARD**

DISH NETWORK CORPORATION	§		
	§	CASES	16-CA-27316
Respondent,	§		16-CA-27331
	§		16-CA-27514
and	§		16-CA-27700
	§		16-CA-27701
COMMUNICATIONS WORKERS OF AMERICA LOCAL 6171	§		16-RC-10919
	§		
Charging Party.	§		

**CHARGING PARTY COMMUNICATIONS WORKERS OF AMERICA LOCAL 6171'S
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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Charging Party.	§		

**CHARGING PARTY COMMUNICATIONS WORKERS OF AMERICA LOCAL 6171'S
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

COMES NOW Charging Party Communications Workers of America Local 6171 (“Charging Party” or “Local 6171” or “the Union”) and files these exceptions to the August 11, 2011 decision of the Administrative Law Judge (“ALJ”) pursuant to Section 102.46 of the National Labor Relations Board (“NLRB” or “the Board”) and excepts to the following portions of the ALJ’s Decision (“the Decision”) in the above-referenced cases:

I. Summary of Exceptions.

- a. Local 6171 Excepts to the Recommendation to Dismiss the Allegation that Dish Violated Section 8(a)(1) of the Act by informing employees that “they would be limited in bringing concerns to management if they selected the Union as their exclusive bargaining representative.”

The recommendation in the decision (See Decision, p. 2, ln. 30 – p. 3, ln. 15) to dismiss subparagraphs 7(d) and 7(i) of the complaint that allege Respondent Dish Network Corporation (“Dish” or “Respondent” or “the Company”) violated 29 U.S.C. § 158(a)(1), Section 8(a)(1) of the National Labor Relations Act (“the Act” or “NLRA”), by informing employees that “they would be limited in bringing concerns to management if they selected the Union as their exclusive bargaining representative.” The ALJ’s decision as a matter of law fails to give weight

to the language of 29 U.S.C. § 159(a)(1), Section 9(a) of the Act, which states in relevant part “any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative,” as applied to the statements in question by Dish.

b. Local 6171 Expects to the Recommendation to Dismiss the Allegation that Dish Discharged Charles Cook in Violation of Section 8(a)(3).

The recommendation in the decision (See Decision, p. 8, ln. 30 – p. 9, ln 43[“Facts”], p. 9, ln. 45 - p. 10, ln. 20 [“Analysis and Concluding Findings”]) to dismiss the allegation in paragraph 8 of the complaint that Dish violated 29 U.S.C. § 158(a)(3), Section 8(a)(3) of the Act, by terminating Charles Cook. The ALJ’s decision, as a matter of law, does not correctly apply Board precedent under Section 8(a)(3) to the facts as found by the ALJ.

II. Introduction and Summary of the Facts and Allegations.

a. Respondent’s Operations at Farmers Branch and North Richland Hills.

Dish provides nationwide installation and maintenance of residential and commercial satellite dishes. The above-referenced cases concern two facilities operated by Dish in Texas, one in Farmers Branch, Texas and the other in North Richland Hills, Texas, both of which are located in the Dallas-Fort Worth metropolitan area. Relevant to the organizing campaigns that arose at these facilities, Dish employees technicians, called Field Service Specialists, and warehouse employees at these two locations.

b. Employees at the Locations Begin Organizing and Dish Responds.

In November 2009, employees at Farmers Branch and North Richland Hills contacted Local 6171 about organizing their respective locations and Sandy Rusher, a union organizer, assisted both locations in organizing. (Tr. p. 55, ln. 18 – p. 56, ln. 11; p. 234, ln. 20 – p. 235, ln. 5). The employees at each location selected members of the organizing committee of that

respective location, and Charles Cook was one of the Union leaders at North Richland Hills. (Tr. p. 138, lns. 15-18). By the end of 2009, Dish learned of the organizing drives and began its union avoidance campaign by meeting with managers. (Tr. p. 392, ln. 25 – p. 394, ln. 6). The Union filed election petitions for both of these locations simultaneously on or about January 15, 2010 (See Exhibit GC 1(a)); the petitioned-for units at both locations were for the Field Service Specialists and warehouse employees. Dish responded by holding weekly meetings at both locations trying to persuade employees not to vote for the union at the coming respective representation elections and distributing various documents attacking the Union.

One of these documents was an undated memorandum entitled “9 Points You Should Know Before You Sign This Petition & 9 More Points You Should Know Before You Vote.” (Exhibit GC 15). In relevant part, the document states “If a workplace is Union, you have to go to Steward with your complaints” and that the steward, not the employee, decides if they are brought to management and therefore the steward “controls your fate, not you.” (Exhibit GC 15, p. 3, ¶ 9). This document was presented to employees at both Farmers Branch and North Richland Hills during the course of Dish’ union avoidance campaign. (See Exhibit GC 53; Tr. p. 42, lns. 1-22).

Following the filing of the election petitions, simultaneous elections at both locations were scheduled for February 23, 2010 and February 25, 2010. In relevant part, the voting time for North Richland Hills, the only voting place where events giving rise to the cases before the Board occurred, on both February 23rd and February 25th was from 5:00 p.m. to 7:00 p.m. The second voting session (at each location) was conducted on February 25, from 5:00 p.m. to 7:00 p.m. (Exhibit GC 1(c), (g), (f), (ee)). The only two voting sessions relevant to this proceeding are those conducted at NRH on February 23 and 25.

c. Charles Cook's Discipline Immediately Prior to His Discharge.

On February 17, 2010, Cook was installing satellite television service when he was visited in the field by a supervisor. Cook was observed by the manager using a drill not approved by Dish for the installation work; the manager did not instruct Cook to put the tool away, but rather noted that management had been trying to get tools like that drill approved for use in the field without success. (Tr. p. 90, ln. 9 – p. 92, ln. 2). Cook was not told to put the tool away and the drill was not confiscated.

However, on February 18th, Cook received a final warning for violating Dish's tool policy. (See Exhibit GC 24). Cook stated in response to the warning that it was "part of another agenda" of management against him. (Tr. p. 95, lns. 18-21). The managers did not respond to his comment regarding "another agenda." (Tr. p. 96, lns. 18-21). Cook also stated on February 18th that one of the managers had observed him a few weeks prior using his hand drill on a job and had not taken any action against Cook; and again, the managers did not respond to Cook's point. (Tr. p. 96, lns. 9-13). Ultimately, the ALJ found this discipline to violate Section 8(a)(3) of the Act. (See Decision, p. 7, ln. 10 – p. 8, ln. 26).

d. The Incident on February 23, 2010.

The Board held the first voting session at North Richland Hills on Tuesday, February 23rd. Voting began at approximately 5:00 p.m. and Charles Cook entered the voting place between 6:30 p.m. and 7:00 p.m. Upon entering the room, made a joke asking the people in the room, Union observer Thomas Allen, Dish observer Rex Leslie, and the two Board agents, if Cook was at the "National Republican Conference." (Tr. p. 77, lns. 3-6). Cook proceeded across the room, tapping Thomas Allen on the shoulder as he passed him. Cook voted, and as he

was leaving, tapped Rex Leslie on the ear without saying anything and continued walking out of the voting place. (Tr., p. 76, lns. 11-20).

e. Dish's Investigation of Charles Cook.

After the voting on February 23rd, Leslie met with Human Resources Manager Barbara Ward and, according to Ward, Leslie reported to her what happened at the voting session. (Tr., p. 285, ln. 20 – p. 286, ln. 6). After Leslie told Ward what occurred, Ward told Leslie to be quiet and not to tell anyone about the incident so that she could investigate. (Id., lns. 7-8).

The next day, February 24th, Leslie provided the statement to Ward. Leslie's statement highlights that Cook's comments in the voting area were "short and in good humor," and that Leslie asserts stated "you could make me go deaf" after Cook made contact with him to make a joke about the incident. (See Exhibit R 7). Ward continued her investigation for approximately five hours on February 24th before she made the decision to terminate Cook for the incident with Leslie. (Tr. p. 312, lns. 11-23). Cook's case was not the only matter that Ward had to deal with on February 24th and she testified that she had "ten things going on, investigations going on at the same time," including a disciplinary incident involving Thomas Allen (Tr. p. 311, lns. 1-2).

Later that day, Ward consulted with South Central region Director Chris Liegl, Regional Operations Manager Karen Steinbeck, and Dish's counsel concerning Cook's conduct. Ward testified that it was "not typical; however, not rare," for her and she consulted with Dish's legal counsel for "probably one out of every ten terminations." (Tr. p. 313, lns. 8-11). Ward, Steinbeck, Liegl, and Respondent's counsel made the decision to terminate Cook exclusively because of Cook's physical contact with Leslie, irregardless of Cook's prior discipline. (Tr. p. 282, lns. 18-25; p. 314, lns. 9-10). Ward described Cook's termination as based on "gross misconduct by striking" Leslie on February 23rd. (Tr. p. 281, ln. 6).

On February 24th, Cook reported for work, but went home because there was no work available. (Tr. p. 83, Ins. 1-5). Respondent had the opportunity to discuss the matter with Cook, but did not do so. A letter was sent to Cook informing of his discharge that stated:

We called you at home yesterday intending to discuss your actions on the evening of February 23, 2010. Since your next scheduled workday is not until Sunday, February 28th we have decided to notify you by mail of our decision to terminate your employment for physically striking another employee in the workplace. Please refrain from entering on to DISH property in the future. (See Exhibit GC 26 (emphasis added)).

The letter therefore purports to show that Respondent contemplated at one point in the decision-making process to provide Cook with the opportunity to explain his actions when it sought to “discuss” with him the events of February 23rd. However, as testified to by Ward, Dish intentionally decided to deny Cook such an opportunity. (Tr. p. 298, Ins. 8-13). Cook did not receive the referenced letter prior to his next regularly scheduled workday, Sunday, February 28th. On that day, Cook reported to work and was told of his termination. (Tr. p. 83, Ins. 5-8). The notice of termination for Cook stated that he was discharged for the incident with Leslie, but also noted, contrary to Ward’s testimony recounted above, that Cook had to prior final warnings. (Exhibit GC 25).

III. Dish Violated Section 8(a)(1) by Stating to Employees at Farmers Branch and North Richland Hills That They Would be Prohibited from Bringing Concerns to Management if the Union Won the Election.

Charging Party excepts to the recommendation of the ALJ to dismiss subparagraphs 7(d) and 7(i) of the complaint that allege Respondent violated Section 8(a)(1) of the Act by informing employees that “they would be limited in bringing concerns to management if they selected the Union as their exclusive bargaining representative.” (See Decision, p. 2, ln. 30 – p. 3, ln. 15). The ALJ’s decision as a matter of law fails to give weight to the language of 29 U.S.C. § 159(a)(1), Section 9(a) of the Act, which states in relevant part “any individual employee or a

group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative.” As such, the statements made by Dish at issue in allegations 7(d) and 7(i) violate Section 8(a)(1) of the Act.

a. *Dish’s Statements Conflict With Section 9(a) of the Act.*

An employer violates Section 8(a)(1) of the Act when it interferes with, restrains, or coerces employees in the exercise of their rights guaranteed in Section 7. 29 U.S.C. § 158(a)(1). The test for whether an employer's statement violates Section 8(a)(1) is whether it would “reasonably tend to interfere with the employees' exercise of their Section 7 rights. The test does not turn on the employer's motive or on actual effect.” *Kentucky Fried Chicken*, 341 NLRB 69, 78 (2004)(citing *Lee Lumber & Building Material*, 306 NLRB 408, 409 (1992)). In regards to allegations 7(d) and 7(i), Dish informed employees at Farmers Branch and North Richland Hills that selecting the Union as their representative through a NLRB election would prohibit them from bringing concerns directly to management. (Exhibit GC 15, p. 3, ¶ 9). This statement would tend to reasonably interfere with employees’ exercise of their Section 7 right to select a collective bargaining representative through a Board election because the statement implies contrary to Section 9(a) of the Act that selecting Local 6171 as their representative for the purpose of collective bargaining would prohibit employees from presenting issues and concerns to Dish.

Section 9(a) of the Act states, in relevant part:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: **Provided, That any individual employee or a group of employees shall have the right at any time to present**

grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment. 29 U.S.C. § 159(a)(emphasis added).

Dish distributed to employees at both Farmers Branch and North Richland Hills a document entitled “9 Points You Should Know Before You Sign This Petition & 9 More Points You Should Know Before You Vote” that states “If a workplace is Union, you have to go to Steward with your complaints” and that the steward, not the employee, decides if they are brought to management and therefore the steward “controls your fate, not you.” (Exhibit GC 15, p. 3, ¶ 9). Charles Cook testified that during the election campaign Respondent’s representatives stated, “You won't be able to come to us with any complaints, you know, because we can't do anything without the union.” (Tr., p. 64, lns. 17-19). These statements are contrary to the proviso of Section 9(a) that expressly permits employees to present grievances to management “without the intervention of the bargaining representative.” 29 U.S.C. § 159(a).

Accordingly, on its face, Respondent’s statements to employees at North Richland Hills and Farmers Branch would reasonably interfere with employee free choice of a representative for the purpose of collective bargaining. Dish was telling its employees that selecting Local 617 as their representative would diminish their working conditions, and such speech constitutes a threat to withdraw rights guaranteed by Section 9(a) in violation of Section 8(a)(1) of the Act. *Greensboro News Co.*, 257 NLRB 701 (1981); *Armstrong Cork Co.*, 250 NLRB 1282 (1980); *LOF Glass, Inc.*, 249 NLRB 428 (1980).

These cases were overruled by the Board in *Tri-Cast, Inc.*, 274 NLRB 377 (1985), when the Board held that an employer telling employees that it would no longer be able to work with them “on an informal and person-to-person basis” because “there is no threat, either explicit or

implicit, in a statement which explains to employees that, when they select a union to represent them, the relationship that existed between the employees and the employer will not be as before.” *Tri-Cast*, 274 NLRB at 377. *Tri-Cast*’s holding should not be applied to Respondent’s speech because respondent’s speech, as argued below, expressly conflicts with employee rights under Section 9(a).

b. *Respondent’s Violations of Section 8(a)(1) Can Be Distinguished From Tri-Cast.*

Alternately, the Board can find The ALJ relied on *United Rentals, Inc.*, 349 NLRB 190 (2007), which held that an employer does not violate Section 8(a)(1) by telling employees that selecting a union will “change in the manner in which employer and employee deal with each other.” *United Rentals*, 349 NLRB at 191. In *United Rentals*, a branch manager of the employer responded to an employee inquiry about his classification by telling the employee that “the ‘company had some activities at the time,’ so he could not give an answer ‘right then,’” and went on to tell the employee that “‘If . . . there was nothing in between, you could come see me and we could talk about any problems with your classification.’” *United Rentals* at 190.

In *Tri-Cast*, the employer stated in a letter to employees that “We have been able to work on an informal and person-to-person basis. If the union comes in this will change. We will have to run things by the book, with a stranger, and will not be able to handle personal requests as we have been doing.” *Tri-Cast*, 274 NLRB at 377. The Board proceeded to hold that the statement did not violate the Act because “The Employer’s statement, crafted in layman’s terms, simply explicates one of the changes which occur between employers and employees when a statutory representative is selected. There is no threat, either explicit or implicit, in a statement which explains to employees that, when they select a union to represent them, the relationship that existed between the employees and the employer will not be as before.” *Id.*

Tri-Cast and *United Rental* thus stand for the proposition that an employer can tell its employees in the course of a union election campaign that the relationship between the employer and the employees will change if the employees select through the election a representative for the purpose of collective bargaining. The type of statements held not to violate Section 8(a)(1) in *Tri-Cast* and *United Rentals* are different from the one at issue in this case. Here, Respondent told employees at both Farmers Branch and North Richland Hills in the “9 Points You Should Know Before You Sign This Petition & 9 More Points You Should Know Before You Vote” document that “If a workplace is Union, you have to go to Steward with your complaints” and that the steward would determine if the issue was raised to management, and that therefore the steward “controls your fate, not you.” (Exhibit GC 15, p. 3, ¶ 9). Cook also testified that during the election campaign Respondent’s representatives stated, “You won't be able to come to us with any complaints, you know, because we can't do anything without the union.” (Tr., p. 64, lns. 17-19). Respondents’ statement that employee complaints would have to come to management through the Union is an incorrect statement of the law because it is expressly contrary to the proviso of Section 9(a).

Respondents statement is unlawful because it directly contradicts Section 9(a)’s proviso in a way that the statements in *Tri-Cast* and *United Rental* did not because Respondent was specifically telling employees complaints could not be brought to it if they selected the Union. *Tri-Cast* and *United Rental*, however, involved general statements along the lines of “things will change with a union.” Section 9(a) of the Act is not offended by such statement because Section 9(a) does not say anything to the contrary. Section 9(a) does grant employees the right to bring grievances to the employer and Respondents’ statements are to the contrary.

Section 9(a) expressly allows employees to bring grievances to management. A grievance is defined as “a wrong considered as grounds for **complaint**, or something believed to cause distress: *Inequitable taxation is the chief grievance,*” or “**a complaint** or resentment, as against an unjust or unfair act: *to have a grievance against someone.*”¹ The Company’s use of the word complaint in its “9 Points You Should Know Before You Sign This Petition & 9 More Points You Should Know Before You Vote” document and in statements to employees such as Cook is a synonym for the word “grievance.” Since Section 9(a) permits grievances to be brought by employees without the intervention of a bargaining representative, it also must be read as permitting complaints to be brought to an employer without interference from a bargaining representative.

As such, Respondents’ statements to the contrary constitute an unlawful threat to restrict employee rights under Section 9(a) if the employees selected a bargaining representative through the Board election. Accordingly, the Board should reject the ALJ’s recommendation as to these two allegations and find Dish to have violated Section 8(a)(1) of the Act by making the statements at issue in its “9 Points You Should Know Before You Sign This Petition & 9 More Points You Should Know Before You Vote.” (Exhibit GC 15, p. 3, ¶ 9).

IV. Dish Violated Section 8(a)(3) By Discharging Charles Cook.

CWA Local 6171 also excepts from the portion of the Decision wherein the ALJ recommended that the allegation in paragraph 8 of the Complaint that Respondent terminated Charles Cook in violation of Section 8(a)(3) be dismissed. (See Decision, p. 8, ln. 30 – p. 9, ln. 43[“Facts”], p. 9, ln. 45 - p. 10, ln. 20 [“Analysis and Concluding Findings”]). The ALJ’s decision, as a matter of law, does not correctly apply Board precedent under Section 8(a)(3) to

¹ See <http://dictionary.reference.com/browse/grievance>, visited on September 8, 2011 (italics in original, underline and bold typeface added).

the facts as found by the ALJ, especially in light of the fact that the ALJ found Cook to have been unlawfully issued a final warning in violation of Section 8(a)(3) immediately prior to his discharge.

a. *The Standard for 8(a)(3) Violations Under Wright Line.*

In order to prove a violation of Section 8(a)(3), the Board established an analytical method for assessing an employer's motive for disciplinary action in *Wright Line*, 251 NLRB 1083 (1980), *enfd* 662 F.2d 899 (1st Cir.1981), cert. denied 455 U.S. 989 (1982); see also *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983) (Noting with approval the Board's approach adopted in *Wright Line*). Under *Wright Line*, the General Counsel carries the burden of persuading by a preponderance of the evidence that employee protected conduct was a motivating factor, in whole or in part, for the employer's adverse employment action. Proof of unlawful motivation can be established by direct evidence or inferred from circumstantial evidence based on the whole of the record. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

The Board under *Wright Line* has looked at numerous factors to establish that a violation of Section 8(a)(3) has occurred. The Board has found that suspicious timing of a disciplinary action supports finding a violation. *Electronic Data Systems Corp.*, 305 NLRB 219 (1991). The Board has also held that an employer's failure to conduct a meaningful investigation and to accord an employee the opportunity to explain her or his conduct. *K & M Electronics*, 283 NLRB 279, 291 (1987). The Board recognized that a Section 8(a)(3) violation can be predicated on a finding that the employer's reason for discipline were pretextual. *Rood Trucking Co.*, 342 NLRB 895, 897-898 (2004); *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *La Gloria Oil and Gas Co.*, 337 NLRB 1120, 1124 (2002).

For an employer to be found to have violated Section 8(a)(3) under *Wright Line*, the evidence must show that the employees' union activity was a motivating factor in the employer's decision to take action against an employee. *T. Steele Constr., Inc.*, 348 NLRB 1173, 1183 (2006); *Willamette Industries*, 341 NLRB 560, 562 (2004). The respondent's unlawful motivation can be established by showing union activity by the employee, employer knowledge of that activity, and antiunion animus by the employer. *T. Steele*, 348 NLRB at 1183; *Willamette Industries*, 341 NLRB at 562; *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999).

Once a discriminatory motive under *Wright Line* has been established, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *T. Steele* at 1183; *Senior Citizens*, 330 NLRB at 1105. This burden is not met by showing that a legitimate reason factored into its decision; rather, the employer Respondent must show that the legitimate reason would have resulted in the same action even in the absence of the employee's union and protected activities. *T. Steele* at 1183; *Monroe Manufacturing*, 323 NLRB 24, 27 (1997).

Under *Wright Line*, it need not be proven that the unlawful union animus was the sole reason animating a disciplinary decision; only that anti-union animus was a motivating factor. *Wright Line*, 251 NLRB at 1089. Accordingly, it need not be proven that the improper motive was the sole motive of Respondent in disciplining Cook, but only that the improper motive contributed to the discipline. *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 137 (2d Cir.1990). The Supreme Court noted in its endorsement of *Wright Line* that it need only be proven "by a preponderance of the evidence only that a discharge is in any way motivated by a desire to frustrate union activity." *Transportation Management Corp.*, 462 US at 393.

b. Facts Relevant to Cook's Discharge.

In assessing the ALJ's recommendation as to Cook's discharge, it is imperative to revisit in detail the circumstances leading to his discharge, including specifically the final warning that the ALJ found to have violated Section 8(a)(3) because that instance of discipline supports finding that discharging Cook was motivated by unlawful animus against Cook *himself* as a Union supporter. See *Bally's Park Place, Inc.*, 355 NLRB No. 218, 2010 NLRB LEXIS 384, *12-13 (2010).

Cook's disciplinary troubles began on February 17, 2010 with the visit from supervisor Chase Parkey while Cook was working. Parkey observed Cook using an unauthorized tool, a hand drill. (Tr., p. 87, ln. 1 – p. 88, ln. 13). Parkey indicated to Cook that the drill Cook was using was not authorized by Dish. (Id., p. 88, lns. 23-24). Cook admitted it was an unauthorized drill. (Id., ln. 25). Cook preferred to use his personal drill because it was lighter and easier to use for jobs where he was working over his head. (Id., p. 89, lns. 9-22). Parkey stated to Cook that

We have been trying for the last couple of years to get this approved, because we understand how helpful it is, but we just haven't made any progress, but, you know, it is what it is, and it's not an authorized tool. (Id., p. 90, lns. 11-15).

Cook told Parkey he understood if Parkey needed to note the unauthorized tool in his report, but did not expect to be accused of insubordination as a result of using an unauthorized tool. (Id., lns. 16-18; p. 134, ln. 24 - p. 135, ln. 2). Parkey had observed Cook using that drill on an earlier job several weeks prior to February 17th, when Parkey arrived on a jobsite where Cook was working and had his personal drill out in the open. (Tr., p. 91, ln. 3 – p. 92, ln. 2; p. 92, lns. 13-18). Cook had also witnessed other employees using their own tools in the presence of supervisors. (Tr., p. 92, ln. 25 – p. 93, ln. 4).

Cook was disciplined the following day on February 18th for being insubordinate because he was using an unauthorized tool. (Exhibit GC 24, p. 1). Cook believed that the final warning for insubordination was too severe to redress his tool infraction. (Tr., p. 94, Ins. 20-15). Cook stated in the disciplinary meeting on February 18th to both Parkey and Installation Manager Wes Crow that Cook thought this discipline served another agenda. (Tr., p. 95, Ins. 18-21). Cook pointed out the earlier incident where Parkey had seen the drill but did nothing and Parkey did not respond to that point. (Tr., p. 96, Ins. 9-13). Most importantly, Cook's conduct on February 17th was not insubordinate because Parkey gave him no instruction to stop using the drill or to otherwise take any action concerning the drill. (Tr., p. 110, Ins. 13-15; p. 134, Ins. 17-19). The only statement Parkey made about the drill on February 17th was that it was not approved by Dish. (Id., Ins. 20-21).

On February 23rd, Cook arrived at the North Richland Hills facility to vote in the election. Cook went up the polling place and as he entered made a joking comment about whether he had just entered the Republican Convention. (Tr., p. 76, ln. 21 –p. 77, ln. 6). As Cook entered the polling place, he patted union observer Thomas Allen on the shoulder and as he left he reached out to tap Respondent's observer, Rex Leslie and made contact with the side of Leslie's head in the area of Leslie's ear. (Tr., p. 75, Ins. 6-17; p. 76, Ins. 11-20; p. 115, Ins. 18-21). Cook did not say anything to Leslie or otherwise harass or verbally antagonize Leslie as the event transpired. (Tr., p. 76, Ins. 21-22). Cook did not intend to make contact with Leslie's head, but just reached out towards Leslie as an afterthought and inadvertently made contact with Leslie's head. (Tr., p. 147, Ins. 3-7). Cook reported for work the next day, but was not routed and therefore took a paid day off. (Tr., p. 80, ln. 21 – p. 81, ln. 18).

Leslie's account of the incident mirrors Cook's substantially, Cook did not say anything and there was no larger altercation or confrontation during this incident. Leslie, however, describes the contact with Cook as a slap. (Tr., p. 446, Ins. 11-14). This difference is semantics; Cook subsequently stated in an email that he struck Leslie. (Tr., p. 115, Ins. 22-25). The ALJ placed great weight on Cook's subsequent description of his contact with Leslie as a "strike." However, the word "tap" is defined as "**to strike** with a light but audible blow or blows; hit with repeated, slight blows: *He tapped the door twice,*" and "**to strike** (the fingers, a foot, a pencil, etc.) upon or against something, especially with repeated light blows: *Stop tapping your feet!*"² Furthermore, the word "strike" is a synonym for the word "tap" when used as a verb.³ As such, Cook was not contradicting himself, let alone impeaching himself, by saying he "struck" Leslie.

Leslie also testified that the incident was more insulting to him than injurious. (Id., Ins. 19-24). This is consistent with what Leslie told Ward after the incident. (Tr., p. 293, Ins. 13-19). Leslie even told Ward that the redness on his face following the incident was as likely a result of how he felt as of the contact itself. (Tr., p. 292, Ins. 13-16). Further, Leslie did not feel threatened by the incident because he made a joke about it afterwards, as noted in the statement he provided Respondent, that it could cause him to go deaf. (See Exhibit R 5; see also Tr., p. 415, Ins. 3-8). Additionally, the Board agents observing the election joked about it. (Tr., p. 403, Ins. 4-15; see also Exhibit R 5 and Tr., p. 415, Ins. 9-14 (wherein Leslie states the Board agents might have been joking)).

Ward commenced investigating the incident after Leslie informed her of what had happened. She intentionally decided not to talk to Cook or otherwise get his side of the story because she did not deem Cook's side of the story to be necessary. (Tr., p. 298, Ins. 11-13).

² See <http://dictionary.reference.com/browse/tap>, visited on September 8, 2011 (italics in original, bold and underline added).

³ See <http://thesaurus.com/browse/tap>, visited on September 8, 2011.

Ward testified that in addition to Leslie's statement, she talked to Thomas Allen, Carl Austin Miles, and Alex Niebert about the incident and Miles and Niebert provided statements. Miles' statement indicates that he learned of the incident from Allen after the election. (Exhibit R 5). Niebert's statement indicates that he learned of the incident from Miles while they were talking to Leslie the next day. (Id.). Allen also stated during the Workforce Commission hearing that he told coworkers about the incident after the voting on February 23rd because it was "the only thing that happened all night." (Tr., p. 383, Ins. 15-16). Miles indicated in his statement two coworkers were present with him when Thomas told them of the incident. (Exhibit R 5).

Ward testified that the decision to terminate Cook for the incident with Leslie was made at 3:00 p.m. on February 24th. (Tr., 300, Ins. 3-16). Decisions to terminate employees are usually made installation managers, general managers, and Ward or another human resources representative. (Tr., p. 268, Ins. 17-23). In Cook's case, the decision to terminate him was made with input from, Chris Liegl, Respondent's Director of Operations, his subordinate Karen Steinbeck, and Respondent's legal counsel and corporate counsel. (Tr., p. 280, Ins. 18-23). Cook was not provided an opportunity to respond to the allegations. (Tr. p. 298, Ins. 8-13). Additionally, Ward testified that Cook was terminated irrespective of prior discipline. (Tr., p. 282, Ins. 21-25). That testimony contradicts, however, Ward's prior testimony to the Workforce Commission that Cook's prior discipline did play a role based on the fact that Ward offered it as "additional documentation" concerning Cook. (Tr., p. 327, ln. 3 – p. 330, ln. 1). Despite sending a letter, Respondent made no additional efforts to contact Cook about the incident. Cook's termination notice was dated February 25th, but did not learn of his discharge until he reported for his next regular work shift the following Sunday. (Tr., p. 83, Ins. 5-13; see also Exhibit GC 25).

c. Evidence of Cook's Union Activity and Respondent's Knowledge of that Activity.

The ALJ found that “It is undisputed that Cook engaged in protected union activity and that the Respondent was aware of that activity.” (Decision, p. 7, Ins. 3-5). Respondent was aware of Cook's Union activity based on the objection that it filed to the North Richland Hills election. (See Exhibit GC 1(f)). That document describes Cook as “viewed by his fellow employees and others as a spokesperson for the Communications Workers of America.” (Id., p.1, Objection No. 1). As such, Respondent essentially admitted to Cook's union activity and to its own knowledge of that activity, thus satisfying the first two evidentiary requirements under *Wright Line*.

d. Respondent's Anti-Union Animus.

The ALJ also found that “The 8(a)(1) violations found herein establish the animus of the Respondent towards union activity.” (Decision, p. 7, Ins. 5-6). The unlawful discipline of Cook on February 18th shows not only anti-union animus, but also specific animus against Cook as a representative of the Union. See *Bally's Park Place, Inc.*, 355 NLRB No. 218, 2010 NLRB LEXIS 384 (2010). Evidence of Respondent's anti-union animus predates the organizing campaigns at Farmers Branch and North Richland Hills and begins with two prior cases involving Respondent and a local of the Communications Workers of America, *Dish Network Service Corp.*, 339 NLRB 1126 (2003), and *Dish Network Service Corp.*, 347 NLRB No. 69 (2006). (See Tr., p. 8, Ins. 4-7). While prior proceedings alone does not establish animus, when presented, as here, in conjunction with other evidence of animus, prior proceedings do buttress and support a finding of animus. *Viracon, Inc. v. NLRB*, 736 F.2d 1188 (7th Cir.1984); *J.P. Stevens Co. v. NLRB*, 638 F.2d 676 (4th Cir. 1980).

Respondent's own conduct supply's evidence of anti-union animus. Respondent engages in union avoidance training. (Tr. p. 394, lns. 2-3; p. 407, lns. 12-14). Most important, however, in establishing Respondent's anti-union animus in its actions against Cook is the evidence of disparate treatment, discussed below, in both his final warning and his discharge that supports a finding of anti-union animus. *Watkins Eng'rs & Constructors, Inc.*, 333 NLRB 818 (2001) (Finding an employer's exclusion of all union adherents from hiring list, while inclusion of all other applicants supplies evidence of union animus); *Rahn Sonoma Limited*, 322 NLRB 898 (1997) (Holding suspension and discharge of union adherents for harassing fellow employees unlawful where other employees only received warnings for same conduct). Accordingly, there can be no serious contention as to Dish's anti-union animus.

e. Cook's Termination Violates Section 8(a)(3).

The ALJ erred in concluding that Cook's discharge did not violate Section 8(a)(3). There is strong evidence in this case of discriminatory motive in the discharge of Cook. Respondent disciplined Cook, an outspoken union supporter, in the midst of the election campaign and less than two weeks before Cook was fired. Cook's discipline under the pretext of the tool policy demonstrates not only animus towards the union, but specific animus towards Cook as a Union supporter. Such specific animus against Cook requires respondent to show in its rebuttal case substantial evidence of a non-discriminatory reason for Cook's discharge and Respondent cannot meet that burden based on the facts in evidence in this case. *Bally's*, 2010 NLRB LEXIS at *13 (citing *Eddyleon Chocolate Co.*, 301 NLRB 887, 890 (1991)).

1. The Board's Holding In *Bally's Park Place, Inc.* Supports Finding Cook's Termination Violated Section 8(a)(3).

In *Bally's*, the Board confronted an employer who had allegedly discharged an employee for abuse of leave under the Family Medical Leave Act when the employee, while on FMLA leave. The employee, like Cook, had been the target of prior unlawful conduct by the employer in the form of warnings against discussing the union with coworkers. *Bally's* at *12-13. The Board in *Bally's* found that the prior animus towards the discharged employee raised the threshold that the employer had to meet under *Wright Line* and that the employer failed to meet that burden. *Bally's* at *13.

The employer's rebuttal in *Bally's* was based on its asserted "zero-tolerance policy" towards FMLA misuse and abuse. *Id.* This was no a written policy and there was no evidence of such a policy being announced to its employees. *Id.* at *14. As such, the employer only had "the purported existence of a past practice of discharging employees for misuse of FMLA leave." *Id.* The Board found that the employer's evidence did "not show that the Respondent had an established past practice of discharging employees for conduct parallel to or even similar to that engaged in by" the employee. *Id.* The employer presented evidence that it had previously terminated nine employees who used FMLA leave for an improper purpose; in eight of those cases, the entirety of the FMLA leave was used for an improper purpose and in the ninth case, the leave was initially used for a proper purpose but the last month of the leave was improper. *Id.*

The Board found that the employer's evidence, at best established, established that the employer in *Bally's* "had a practice of terminating employees who fraudulently requested or extended FMLA leave, i.e., telling [the employer] that they required leave to fulfill family responsibilities or out of medical necessity and then using the leave for a completely different

purpose. *Id.* *14-15. The Board found these cases completely dissimilar to the discharge before it in *Bally's* because the unlawfully discharged employee

used his requested leave for a proper purpose after leaving a union rally that extended 20 minutes into his shift in order to meet his daughter at the time when she needed care. The evidence does not establish a "zero tolerance policy" reaching conduct such as that engaged in by [the employee] and thus does little to rebut the strong evidence of discriminatory motive. *Id.* at *15.

In the case at bar, Respondent does not have in its employee handbook a zero tolerance policy against violence in its workplace. Barbara Ward attempted to characterize Dish as having a zero tolerance policy against violence in the workplace. (Tr., p. 365, lns. 8-10). However, under cross examination, Ward conceded that Dish's Employee handbook, which contained Dish's disciplinary policy, did not contain a policy expressing zero tolerance for violence in the workplace. (*Id.*, p. 366, lns. 6-8). In fact, Ward conceded that Respondent uses discretion in determining how to discipline employees for perceived infraction. (*Id.*, lns. 15-17). This evidence fails to establish any purported zero tolerance policy towards violence in the workplace. As such, all Respondent can rely on to justify terminating Cook is its past practice, and its past instances of discipline for violence in the workplace are completely dissimilar to the incident involving Cook and Leslie and, in accord with *Bally's*, that evidence is insufficient to overcome the strong evidence of discriminatory motive noted by the ALJ (Decision, p., lns. 3-6), but also found by the ALJ when he ruled Cook's final warning for violating the tool policy violated Section 8(a)(3). (Decision, p. 8, lns. 35-26).

2. Prior Instances of Discipline Relief on By Respondent Are Not Analogous to Cook's Conduct.

The evidence of past discipline for violence in the workplace did not involve discipline of an employee for one instance of physical contact with a coworker such as Cook's contact with Leslie. Respondent fired employees for physical conduct during an altercation. (See Exhibits

GC 29, GC 30). Respondent has also discharged employees who have made threats of physical violence in the context of a racist tirade. (See Exhibit GC 31). Respondent has also previously discharged employees for making threats and physically intimidating other employees. (See Exhibit GC 32). The ALJ correctly found that there was no fight between Cook and Leslie (Decision, p. 10, ln. 18). However, the ALJ erred as a matter of law to the extent that he found Respondent's proffered instances of past discipline to support Cook's discharge. The lack of a zero tolerance policy and the distinctions between Cook's conduct and the conduct in the prior instances of discipline does not establish that every instance of physical contact between employees would result in discharge. *Bally's* at *15.

Dish does have a section in its handbook entitled "Protection from Threats and Violence," which, as noted earlier, does not contain a zero tolerance for violence in workplace. (See Exhibits U 1, p. 14; R 1, p. 14). Ward testified that Respondent applied the following section from the handbook to Cook's conduct in deciding to discipline him:

The Company will not tolerate prohibited activities—which include, but are not necessarily limited to threats of violence to other employees, customers or facilities, as well as threatening, intimidating or hostile behaviors, physical assault, vandalism, arson, sabotage, use of weapons, carrying weapons of any kind onto company property, and/or any act which the company deems inappropriate for the workplace. (See *Id.*; see also Tr., p. 385, ln. 24 to p. 386, ln. 7).

It should be noted that the prior instances of discipline for violence in the workplace are completely consistent with this prohibition. Employees threatening one another or physically fighting with one another are clearly in violation of this policy. However, the policy does not identify a single isolated incident of physical contact as a violation of the policy, let alone a basis for terminating an employee. All Cook did was make contact once with Leslie in passing as Cook left the voting place. Cook did not threaten Leslie and not fight followed the incident. As

such, Cook's conduct is not consistent with a violation of the express terms of the handbook and it is not consistent with other instances of discipline by Respondent for violence in the workplace. Respondent thus not only has no written policy on which to rely on to support its termination of Cook, but it also has no past practice as well.

Additionally, it should be noted that the incident with Leslie is qualitatively different from other incidents of violence in the workplace used by employers to defeat 8(a)(3) prosecutions. Cook's contact with Leslie was one discrete incident. Cook tapped or struck Leslie on his way out of the voting place. There was no confrontation between the two. There were no harsh words, no threats and no altercation. See National Steel Products, 252 NLRB 833, 844 (1980)(Rejecting an employer's reason for discharging an employee as a pretext in a case that involved alleged threats and harassment because, in part, there was no evidence of fisticuffs, immediate threat of injury, or escalation). Again, there was no fight. (Decision, p. 10, ln. 18). Cook's contact was not the product of an employee attempting to use violence as a form of self-help to resolve a dispute. There was no dispute between Leslie and Cook. Cook had an excellent working relationship with Leslie. (Tr., p. 85, lns. 20-25). Cook even went so far as to talk to Leslie once to make sure he understood that Cook's differences with Dish's policies did not impact how he thought of Leslie. (Tr., p. 85, lns. 14-23).

3. Cook's Intention Behind His Actions Distinguishes His Conduct From Respondent's Comparator Evidence.

The Board's holding in *Bally's* stands for the proposition that an employer's comparative evidence to justify a disciplinary action must be an apple to apples comparison and not a comparison of apples to another fruit. See Bally's, 2010 NLRB LEXIS at *15. Such comparisons require an examination of Dish's proffered comparators. In assessing comparator evidence under the burden-shifting framework for gender discrimination, the United States Court

of Appeals for the Sixth Circuit in *Gray v. Toshiba Am. Consumer Prods.*, 263 F.3d 595 (6th Cir.2001) held that a plaintiff's case failed because her action of premeditated assault was different than instances where men were treated less severely because the cases involving men "erupted spontaneously." *Gray*, 263 F.3d at 601. In this case, Cook testified that he did not intend to make contact with Leslie's head, but that he just reached out towards Leslie as an afterthought and inadvertently made contact with Leslie's head. (Tr., p. 147, Ins. 3-7).

These facts distinguish Cook's conduct from the comparator evidence proffered by Dish. These prior acts were all altercations between employees. (See Exhibits GC 29-32; Decision, p. 10, Ins. 13-17). Cook did not say anything to Leslie or otherwise harass or verbally antagonize Leslie as the event transpired. (Tr., p. 76, Ins. 21-22). The Board has found that acts of violence and threats of violence can support dismissing an 8(a)(3) allegation. *J.J. Cassone Bakery, Inc.*, 350 NLRB 86, 87 (2006); *Great Western Coca-Cola Bottling Co.*, 256 NLRB 520, 528-29 (1981); *Magnesium Casting Company, Inc.*, 250 NLRB 692, 712 (1980). However, these cases all involved a violent context wholly absent from Cook's contact with Leslie. Cook, unlike the discriminatee in *Great Western Coca-Cola Bottling Co.*, did not curse and strike Leslie with a closed fist. Cook did not strike Leslie with a metal pipe and continue assaulting him until being restrained, as was the case in *Magnesium Casting Company*. Further, unlike *J.J. Cassone*, there was no intervening law enforcement action or judicial restraining order to underscore the severity of the conduct.

It should also be noted again in concluding the discussion of this point that Cook's subsequent description of his contact with Leslie as a "strike" rather than a "tap" does not impair his case contrary to the legal conclusions of the ALJ. The word "tap" is defined as "**to strike** with a light but audible blow or blows; hit with repeated, slight blows," and "**to strike** (the

fingers, a foot, a pencil, etc.) upon or against something, especially with repeated light blows.”⁴ “Strike” is also a synonym for the word “tap.”⁵ As such, Cook was not contradicting himself, let alone impeaching himself, by saying he “struck” Leslie.

f. *The Employer Has Only Shown that It Could, but Not Would, Have Disciplined Cook for the Leslie Incident.*

The ALJ’s recommendation to dismiss Cook’s discharge case should also be rejected because it fails to take into account the fact that The Board has consistently held that an employer does not meet its burden under *Wright Line* by showing that it could have disciplined an employee for the alleged infraction; it must show that it would have disciplined an employee. *Yellow Enterprise Systems, Inc.*, 342 NLRB 804, 805 (2004)(holding that “an employer must establish not merely that it could have discharged the employee for legitimate reasons, but also that it actually would have done so, even in the absence of the employee’s protected activity.”); *Structural Component Industries*, 304 NLRB 729, 730 (1991)(Rejecting the respondent’s *Wright Line* defense because “In short, the Respondent has shown, at most, that it could have discharged Delgado for his alleged misconduct. It has not established, through credible testimony, that it would have discharged Delgado in the absence of union activities.”); see also *Teledyne Advanced Materials*, 332 NLRB 539 (2000)(Recognizing that where employer policies do not require discharge for every species of offense, employer cannot establish that employee would be terminated for that conduct alone absent protected union conduct).

As to Cook’s discharge, the only evidence adduced by Respondent in support of a past practice and written policy was discussed above. Respondent might have established that it could discharge employees for committing acts of violence in the workplace, it did not establish as necessary under its *Wright Line* burden that it would have terminated Cook for the incident

⁴ See *supra* Note 2.

⁵ See *supra* Note 3.

involving Leslie absent Cook's protected activity. *Yellow Enterprise Systems*, 342 NLRB at 805 (noting that an employer does not meet its *Wright Line* burden when it presents "no evidence that it had consistently discharged employees for similar offenses."). Dish does not have a zero tolerance policy towards workplace violence. Cook's conduct did not occur in the context of a threat or fight and was intended to be playful in nature. Aside from Cook's contact with Leslie, no other incident took place between the two. There were no harsh or threatening statements exchanged between the two. As such, Cook's conduct is not analogous to prior instances of Respondent terminating employees for violence in the workplace. Respondent therefore cannot rebut the *Wright Line* case established by the record because, at best, it could have fired Cook, but would not have done so absent his protected activity.

g. *Respondent's Failure to Provide Cook An Opportunity To Tell His Side Supports Finding a Violation of Section 8(a)(3).*

The ALJ rejected the argument Cook's termination violated Section 8(a)(3) because Cook was afforded no opportunity to provide his side of the story. (Decision, p. 10, lns. 1-3). The Board, however, has also held that an employer's failure to conduct a meaningful investigation and to accord an employee the opportunity to explain her or his conduct supports finding discriminatory intent behind a disciplinary action. *K & M Electronics*, 283 NLRB at 291, n. 45. (Decision, p. 10, lns. 1-3). "An employer's failure to permit an employee to defend himself before imposing discipline supports an inference that the Respondent's [*68] motive was unlawful." *Embassy Vacation Resorts*, 340 NLRB 846, 849 (2003). The ALJ excuses Respondent's failure to question Cook by noting the contact was "not incidental" and that Cook did strike Leslie on the ear. (Id., lns. 3-4). The ALJ's position on this issue is not only contrary to Board law as noted above, but is in error also because it assumes that the investigation would be limited to only what happened, not why it happened and what Cook intended when he made

contact with Leslie. Respondent does not have a zero tolerance policy towards workplace violence, as discussed above, (Tr., p. 366, Ins. 6-8), and Respondent uses discretion in determining how to discipline employees for perceived infractions. (Id., Ins. 15-17). Therefore, there is no reason why Respondent should not have questioned Cook as to why the incident occurred. The absence of a full and complete investigation therefore supports a finding of discriminatory intent as to the discharge of Charles Cook.

V. Conclusion and Prayer.

For all of the above and foregoing reasons, Charging Party Communications Workers of America Local 6171 prays the National Labor Relations Board grant these exceptions and overrule the recommendations of the Administrative Law Judge and that the National Labor Relations Board therefore hold that Dish Network Corporation violated Section 8(a)(1) by stating to employees at Farmers Branch and North Richland Hills that they would be prohibited from bringing concerns to Dish if Local 6171 won the elections and that Dish violated Section 8(a)(3) by discharging Charles Cook.

Respectfully Submitted,

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Certificate of Service

I hereby certify that a copy of the above and foregoing document was served on Counsel for the General Counsel and Counsel for Respondent by electronic mail on this 8th day of September 2011:

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