UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 16

DISH NETWORK CORPORATION,	)	
	)	
Respondent	)	
	)	Case Nos. 16-CA-27316
and	)	16-CA-27331
	)	16-CA-27514
COMMUNICATION WORKERS OF	)	16-CA-27700
AMERICA, LOCAL 6171,	)	16-CA-27701
	)	16-RC-10919
Charging Party.	)	

DISH NETWORK CORPORATION'S ANSWERING BRIEF TO CHARGING PARTY'S EXCEPTIONS

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DISH NETWORK CORPORATION'S ANSWERING BRIEF TO CHARGING PARTY'S EXCEPTIONS

DISH Network Corporation ("Respondent") hereby files the following Answering Brief to Charging Party's Exceptions as follows:

I. Respondent Did Not Tell Employees That They Would Be Prohibited From Bringing Their Concerns to Management And Did Not Violate Section 8(a)(1).

Paragraphs 7(d) and 7(i) of the original Complaint assert that Respondent told employees in writing that "they would not be allowed to bring their work place concerns to management if they selected the Union as their collective bargaining representative." At the hearing in this matter, Exhibit 15 was introduced as the letter which supports these particular allegations.

Local 6171 contends that Administrative Law Judge George Carson, II ("ALJ Carson") erred in finding that the following statement by Respondent in GC Exhibit 15, did *not* violate Section 8(a)(1):

> "If a workplace is Union, you have to go to your Steward with your complaints, and he decides whether to bring them to the Company's attention, not you."

(G.C. Ex. 15.)

A review of Exhibit 15 reveals that the Union had initially made the claim that once the Union was voted in, employees were entitled to have a co-worker present during meetings which could lead to discipline (Weingarten Rights). Respondent's response was to inform their technicians that once the Union was voted in, they would have to direct their complaints (a/k/a grievances) to the Union Steward, who, in turn, makes a decision regarding how that complaint (a/k/a grievance) will be handled. This statement is one of fact. That is, it simply explains to employees how the complaint process typically works in the Union environment. ALJ Carson agreed with Respondent and rightly determined that the above-statement did not rise to the level of a threat, but instead merely "points out that the Union decides which grievances to pursue." (ALJ Decision, p. 2, lines 47-50.)

Respondent's argument that the statement constitutes a threat <u>because</u> it contradicts the language of Section 9(a) also makes little sense. Just because the above statement may misstate the law (which it does not), does not mean that the statement rises to the level of an unlawful threat under 8(a)(1). All that Respondent did was to state the obvious by telling employees that if they vote in the union, the union will become their agent for purposes of registering grievances with the Company. This is hardly a threat, and certainly does not violate Section 8(a)(1). See *Tri-Cast, Inc.*, 274 NLRB 377 (1985) and *United Rentals, Inc.*, 349 NLRB 190 (2007).

II. DISH Did Not Violation Section 8(a)(3) By Discharging Charles Cook

The National Labor Relations Board's ("Board") established procedure is not to overrule an Administrative Law Judge's credibility findings unless the clear preponderance of all the relevant evidence convinces the Board that these findings are not correct. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enf'd*, 188 F.2d 362 (3d Cir. 1951).

Here, ALJ Carson found that Mr. Cook did not "tap" Mr. Leslie on the ear, as asserted in the Union's Exceptions. (Union Brief, p. 5.) He instead found that the overwhelming evidence supported a finding that Mr. Cook "slapped Leslie," and that this constituted an "unprovoked physical assault" rather than "incidental conduct." (ALJ Decision, p. 9, lines 45-50; p. 10, lines 1-5.)

ALJ Carson based his decision, in part, upon the following substantial evidence:

1. Mr. Cook admitted on cross examination that there is a difference between "tapping" an individual on the ear and "striking" an individual on the ear. He further admitted to ***striking*** Mr. Leslie in an e-mail that he provided to the Regional Director ("RD") as part of the RD's investigation, which e-mail was produced at the hearing pursuant to *Jencks*. His e-mail to the Communication Workers of America ("CWA") stated the following fact:

> **"FACTS" I did strike Rex on the ear on the way out of the voting area."** (Tr. p. 115, lines 22-25.)

This is a clear admission by Mr. Cook. (ALJ Decision, p. 9, lines 10-15.)

2. Thomas Allen ("Mr. Allen"), the Union's observer during the election, verbally admitted to Barbara Ward ("Ms. Ward"), the Regional Human Resources Director for DISH, that he observed Mr. Cook strike Ms. Leslie. Ms. Ward testified that Mr. Allen told her "For the record, he did not agree with it (the striking of Leslie), but he was advised by counsel not to say anymore." (Tr. p. 288, lines 14-18; ALJ Decision, p. 9, lines 6-8.)

3. Ms. Ward obtained verbal and written statements from technicians Alex Niebert and Austin Miles indicating that they had been told of the assault by Mr. Allen,

who was a witness to the event. (Tr. p. 297, lines 7-12; pp. 371-373; R-5.; ALJ Decision, p. 9, lines 10-15.)

4. Mr. Leslie testified that he was struck by Mr. Cook and that a Board agent who was present in the room referred to it as a "battery".

Given the substantial evidence relied upon by ALJ Carson, this Board cannot overturn his finding that Mr. Cook assaulted Mr. Leslie in the voting area.

In terminating Mr. Cook, Ms. Ward relied upon Respondent's written policy against violence in the work place. (Tr. p. 291, lines 9-11; p. 293, lines 10-25; p. 317, lines 11-15.) The final "Employee Consultation" provided to Mr. Cook identifies that he was terminated for physically slapping Mr. Leslie "on the right side of his face." (GC Ex. 25.) Ms. Ward testified that Mr. Cook's action violated the policy set forth in the Company Handbook at page 14 which states:

> 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 . . ."

Emphasis added. (GC Ex. 28, pp. 14 and 16; Tr. pp.385-386) The above-quoted language comes directly from page 14 of Respondent's Handbook.

Ms. Ward also testified that Mr. Cook was treated consistently with other employees who engaged in violence conduct whether by act <u>or</u> by word. (Tr. pp. 345-347; GC Exs. 29, 30, 31, 32, 33, 38 and 39.) Ms. Ward also offered that although DISH has a published progressive discipline policy, that same policy allows DISH to look at each case on its own merits to determine the level of discipline for a particular incident. (Tr. p. 282, lines 8-12.) Mr. Cook testified that he was aware of DISH's policy. (Tr. p. 121, lines 7-13.)

Local 6171 contends that Respondent did not meet its burden under *Wright Line*. Nothing could be further from the truth. ALJ Carson correctly determined that Respondent had implemented a specific policy stating that it "will not tolerate . . . physical assault." (ALJ Decision, p. 9, lines 47-50.) He further found that Respondent acted consistently with its past practice of terminating employees who engaged in physical altercation in the workplace. (ALJ Decision, p. 10, lines 14-17.)

Local 6171's argument that Respondent did not have a "zero tolerance" policy is unpersuasive as there is no requirement that such a policy exist in order to terminate an employee for physical assault in the workplace. The only thing required is that Respondent show that it would have terminated Mr. Cook even absent his protected conduct. The fact that Respondent has a stated policy against physical assaults and terminated at least two other employees for engaging in a physical altercation in the workplace, is more than sufficient to meets its burden under *Wright Line*.[1]

Local 6171's claim that Respondent's failure to ask Cook his version of the events is evidence of discriminatory intent, is also not persuasive. The evidence that Cook slapped Mr. Leslie across the side of the head was substantial, as even the Union's own observer and the NLRB Agent who was present during the election recognized the assault. Thus, even if Mr. Cook denied engaging in such conduct, he would not have been believed by Respondent. Hence, obtaining his statement was an unnecessary step in the investigative process. ALJ Carson agreed, stating that there was no need to give Cook an opportunity to explain. (ALJ Decision, p. 10, lines 4-6.)

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[1] Local 6171's argument that Respondent's policy does not "identify a single incident of physical conduct as a violation of the policy," is not supported by the language of the policy which makes it quite clear that physical assault is a prohibited activity that "the Company will not tolerate . . .".

WHEREFORE, the Charging Party's Exceptions should be dismissed in their entirety.

Dated: September 21, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Answering Brief to Charging Party's Exceptions** was served to the following, via electronic mail and by regular mail on this 21st day of September, 2011. Also filed and served at http://www.nlrb.gov/e-filing system.

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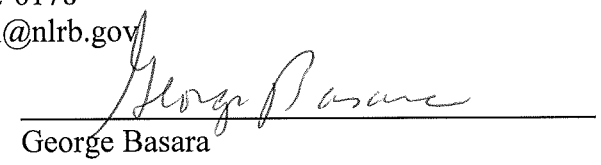

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