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

**Region 21**

DIRECTV U.S. DIRECTV HOLDINGS )  
LLC )  
 )  
Respondent, )  
 )  
and )  
 )  
INTERNATIONAL ASSOCIATION OF )  
MACHINISTS AND AEROSPACE )  
WORKERS, DISTRICT LODGE 947 )  
AFL-CIO )  
 )  
Charging Party. )  
\_\_\_\_\_ )

**Case 21-CA-39546**

**RESPONDENT'S BRIEF IN  
SUPPORT OF EXCEPTIONS TO  
THE FINDINGS AND DECISION OF  
THE ADMINISTRATIVE LAW  
JUDGE**

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## **I. SUMMARY OF ARGUMENT**

The Administrative Law Judge, Gerald A. Wacknov (“ALJ”) in his Decision issued December 13, 2011, concluded that the Respondent DIRECTV U.S. DIRECTV HOLDINGS LLC (“DIRECTV”) violated the Act when it: (1) terminated Greg Edmonds (“Edmonds”) because on May 22, 2010, several months prior to his termination, Edmonds had spoken out favorably in support of unions at an employee meeting at Respondent’s Riverside facility; and (2) Respondent maintained certain policies in its Employee Handbook and elsewhere which violated Section 8(a)(1) of the Act. The ALJ’s Decision on both counts is wholly unsupported by the record evidence and contrary to relevant case law.

**First**, the ALJ improperly concluded that the General Counsel had established a *prima facie* case of retaliation under *Wright Line*. The record and the ALJ’s Decision are void of any evidence to suggest that the decision maker in Edmond’s termination, Site Manager Zambrano, harbored any anti union animus to satisfy *Wright Line* thereby legally defeating the General Counsel’s case. Subsequent to May 22, 2010 Edmonds had been involved in at least 2 serious work infractions, an automobile accident and a complaint from a customer to the President of the Company, either of which standing alone would have under normal practices resulted in Edmonds’ immediate termination but for the intervention of Site Manager Zambrano. Zambrano, who conducted the investigations into these 2 incidents, declined to hold Edmonds responsible and gave him the benefit of the doubt in both cases and refused to terminate Edmonds. This hardly would support a finding of “animus” by Zambrano.

**Second**, the ALJ improperly concluded that DIRECTV failed to rebut the General Counsel’s *prima facie* case and/or to establish that Edmonds would have been terminated

regardless of his protected conduct. To the contrary, the uncontroverted record evidence established that:

- Edmonds had been disciplined at least 7 times prior to his termination, including at least 2 suspensions, a demotion and 2 final warnings for repeated violations of Company rule
- All of this discipline had been issued prior to May 22, 2010 when Edmonds spoke out favorably on behalf of Union representation.
- The unrebutted evidence establishes that other employees had spoken out in favor of the Union on May 22<sup>nd</sup> and none of them was subject to discipline or terminated.
- Edmonds was terminated on July 28, 2010 for swearing at Zambrano in front of 40 or so other employees and telling Zambrano to do something about the “fucking line” and that it was “bullshit” that Edmonds had to wait in line to get equipment. Even the ALJ concluded this conduct was not protected and violated company policy.
- At least five (5) other employees had been terminated for swearing at their supervisor in a similar fashion.

**Finally**, the ALJ’s conclusion that someone else must have terminated Edmonds (someone other than Zambrano) and that that person, whoever they are, had anti union animus is based on nothing more than speculation and such speculation legally requires the ALJ’s Decision to be set aside.

As to the ALJ’s findings regarding the policies at issue, the ALJ’s conclusion that any of these policies could be interpreted by an employee as prohibiting him or her from engaging in protected activity is simply nonsense. None of the rules at issue explicitly restricts activity protected by Section 7 nor have any of these rules ever been enforced in a way as to restrict the exercise of Section 7 Rights nor was any such evidence adduced in the course of the hearing.

Hence, the ALJ's conclusion that the policies are unlawful is both factually and legally unsupported and in the absence of evidence to support his findings, the ALJ's ruling in this regard must also be set aside.

Notwithstanding the foregoing, DIRECTV, out of an abundance of caution posted a disclaimer in advance of the hearing advising employees that the policies in question would not be used to prohibit, discourage or otherwise retaliate against employees who engage in or conduct communications protected by Section 7 of the Act. The posting was made online where the policies appear and was also posted at the Riverside facility where the issues regarding the alleged policies arose. The ALJ concluded that the corrective action taken by DIRECTV was not sufficient but unfortunately, could not say how or why nor could he identify what would be sufficient again demonstrating that his conclusion is nothing more than speculation unsupported by the evidence and contrary to established case law.

For all these reasons Respondent respectfully request that for these reasons and the reasons identified in the Exceptions filed hereto concurrently that the ALJ's Decision be reversed on both counts and that the underlying Complaint be dismissed in its entirety.

## **II. RELEVANT BACKGROUND**

### *DIRECTV Home Services*

The Respondent, DIRECTV, provides satellite television to consumers and businesses across the United States. Respondent operates DIRECTV Home Services ("DTVHS") which in turn is responsible for:

- (i) The installation of satellite TV services in retail or commercial settings performed by Installers; and

- (ii) Responding to calls from customers regarding service problems that require an onsite visit by a Service Technician. (Tr. pp. 43-44 )<sup>1</sup>

DTVHS operates 11 facilities in Southern California which are responsible for providing installation services and responding to customer service inquiries. (GC Exhibit 3). One of these facilities is located in Riverside, California and is commonly referred to as the “Riverside Facility” (GC Exhibit 3).

Edmonds began his employment with DTVHS on October 15, 2007 working as an Installer in the company’s Riverside Facility (Tr.p. 29:14).<sup>2</sup>

Edmonds was originally hired as an Installer where he was responsible for the initial installation of satellite dishes and service for new retail and commercial customers (Tr. p.44). As an Installer, Edmonds was paid on a piece meal basis based on the daily work he performed.

#### *DTVHS Riverside Facility*

The DTVHS Facility located in Riverside, California is one of 11 installation and service facilities located throughout Southern California (Tr. p. 287:6). The Riverside Facility of DTVHS employees on average approximately 82 Installers and Technicians along with a small number of clerical support staff, managers and supervisors (Tr. p.338:23).

The highest ranking management official at the Riverside Facility is the Site Manager, a position that was held by Zambrano during the relevant period of time (Tr.p.337:24- 338:5). The Installation and Service Technicians are divided into teams of between 10 and 15 employees supervised by Field Supervisors (Tr.pp.38-39). The Field Supervisors overseeing installation report to a Service Manager and the Service Technicians report to a Technical Manager. Both of

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<sup>1</sup> Transcript cites reference the official Transcript page and line numbers.

<sup>2</sup> The Riverside facility of DTVHS was originally owned and operated by 180 Connect Ironwood Communications and later merged and became part of DIRECTV in approximately December of 2009.

the Service Manager and Technical Manager in turn report to Zambrano as the Operations Manager (Tr.pp.39-40).

On or about July 5, 2010, the Riverside Facility moved to its current location at 2290 Myer Street, in Riverside (Tr. p. 350:21). The previous Riverside facility was approximately 8,000 square feet and the new Riverside facility was much larger, approximately 30,000 square feet (Tr.p 350:4-8).

There was no overt union organizing activities occurring at any relevant time at the Riverside Facility of DTVHS that would have come to the attention of management (Tr. pp 348:16-349:10). While there had been some meetings in employees' homes regarding possible union representation, management never became aware of these meetings at any relevant period of time and there is no evidence of overt union organizing occurring at the Riverside Facility (Tr. pp. 348-349). The Riverside employees met secretly to discuss the possibility of union representation but those meetings were confidential and kept from management (Tr. pp. 181:19-182:1).

*The Rancho Dominguez Facility of DTVHS*

DTVHS participated in an election with IAM Local Lodge 947 covering the DTVHS facility located in Rancho Dominguez, California. The petition was filed by the Union on March 8, 2010 and a secret ballot election was conducted on April 16, 2010. The tally of ballots showed that of the 204 eligible voters 85 voted in favor of the Union and 80 against. The Employer timely filed objections to the conduct of the election and the matter proceeded to a hearing on June 8 and 9, 2010. Eventually, the Hearing Officer sustained the Employer's objections and recommended that the results of the election be set aside and a new election be conducted. The Hearing Officer's recommendations are presently on appeal (GC Exhibit 2).

Edmonds' Extensive Disciplinary History

Edmonds had a large number of documented performance problems for which he was disciplined during his brief tenure with DTVHS. These include:

1. **March 20, 2008:** Edmonds went to a service call and failed to bring the job up to the standards required by DTVHS procedures. In particular, Edmonds had left crimped fittings and old corroded fittings in the system which should have been removed and replaced. Prior to this incident, Edmonds had 10 jobs that had come back as repeat service calls during the first 14 days of March 2008. Given such, Edmonds received a 3 day suspension for violation of company policy and a final written warning (GC Exhibit 3 (exhibit 3 thereto); GC Exhibit 8).
2. **February 3, 2009:** Edmonds received a written warning for failing to properly ground the system and for failing to meet quality work standards for which Edmonds received a written warning (GC Exhibit 9).
3. **March 3, 2009:** Edmonds received a written warning for using existing cable on a new installation and for failing to properly replace and route the cable on the new installation. For this infraction, Edmonds received a final written warning by his then supervisor, Zambrano (GC Exhibit 10).
4. **October 23, 2009:** Edmonds received a written warning for failing to replace all unapproved connectors on a job he had been assigned to thus creating a repeat service call. In addition, Edmonds had failed to properly ground the system. For this infraction he received a written warning (GC Exhibit 11).
5. **November 4, 2009:** Edmonds received a verbal warning for tailgating in operating a company vehicle. DTVHS had received a complaint from a member of the public

regarding Edmonds' driving. The complaint was filed through the company's driver alert system (GC Exhibit 12).

6. **November 9, 2009:** Given this poor disciplinary history, Edmonds was demoted from his position as a Service Technician to that of an Installer (Tr. p.346:6-18)
7. **January 8, 2010:** Edmonds failed to complete the installation of a satellite system pursuant to the expectations of DTVHS. Edmonds' failure to comply with these standards resulted in a 2 day suspension and a final warning advising him that further infractions will result in a disciplinary action up to and including termination (GC Exhibit 13).
8. **January 21, 2010:** Edmonds was placed on a suspension while the company investigated his failure to pre-call customers and give them accurate estimates of arrival times, a standard procedure expected of all Installers including Edmonds.(GC Exhibit 14)
9. **March 12, 2010:** Edmonds received a verbal warning for failing to follow proper time reporting procedures. Under the company's established policies, he is required to sign and verify the information on his time sheet and verify the time taken for meal periods. He failed to do so for the time records in question and received a verbal warning for this infraction (GC Exhibit 15).

*The May 22, 2010 Meeting At Riverside with Adrian Dimech, VP of Operations*

On Saturday, May 22, 2010, the Vice President of Operations, Adrian Dimech ("Dimech") held a brief meeting at the Riverside Facility to update employees on events regarding the Union election at the Rancho Dominguez facility and to discuss other operational issues and concerns of the employees. (Tr.p.290:8-20). Dimech regularly conducted such meetings from time to time as a part of his normal job duties (Tr. pp. 289-290). In the course of

this meeting, Dimech took questions from employees. During the course of this meeting, several employees, including Edmonds, spoke favorably about their experience with union representation with previous employers and expressed their belief that unions were a positive influence (Tr. pp. 291-292). Edmonds also expressed significant frustration with the fact that he had been asked recently to travel to Northern San Diego County (from Riverside) to provide support and that he objected to the long driving distance (Tr. p 87:1-20).

At the conclusion of the May 22, 2010, Dimech went and spoke with Edmonds to follow up and make sure his questions had been fully addressed by Dimech (Tr. p. 294:1-16).

*Edmonds' Disciplinary History Subsequent to May 22, 2010 Meeting*

Subsequent to the May 22, 2010 meeting at the Riverside Facility with Dimech, two significant events occurred either of which could have resulted in the immediate discharge of Edmonds.

On May 30, 2010, Edmonds was involved in an automobile accident resulting in a scratched front bumper and dent in his company vehicle. (GC Exhibit 17). The investigation into the matter was concluded on June 11, 2010. Typically, an accident in the company vehicle which is the result of the fault of the company technician results in "automatic" termination (Tr. p.361:14-17). Zambrano reviewed the paperwork and Edmonds statement regarding the accident and, credited Edmonds' version of how the accident had occurred and concluded that Edmonds was not at fault and therefore no disciplinary action was taken (Tr. pp. 361-362)

On June 14, 2010, DTVHS received a complaint that had been filed with the Office of the President "OOP". The customer complaining was very upset and contended that he had waiting for Edmonds for his expected service call at 2:00 p.m. The customer alleged that he had heard nothing from Edmonds by 3:55 p.m. (almost 2 hours later) at which time Edmonds called and said he would be there by 4:30 p.m. The customer complained that no one reported to his service

call by 5:00 p.m. at which time the customer, who was very angry, called to reschedule the appointment (GC Exhibit 16A). Edmonds was placed on a suspension for the event while DTVHS investigated (Tr.p. 356:7-11). This complaint would have resulted in Edmonds termination if found to be credible. (Tr. pp. 358:24-359:4).

The investigation was again conducted by Zambrano (Tr.p.356:8-14). Zambrano, after interviewing the customer, reviewing the file for several days concluded that the customer was not being honest and supported Edmonds in concluding that there had been no violation of company policy by Edmonds based on the incident in question (Tr.pp.357-358). As a result, Edmonds was called back from his suspension and paid for the time on suspension in accordance with standard procedure (Tr. p. 360:11-17).

The ALJ properly noted that there was a dispute as to the date of the meeting conducted by Dimech in which Edmonds expressed his support for union representation (ALJ Decision p. 4 fn. 4). The timing of this meeting is important for 2 major reasons. *First*, Edmonds' infractions of May 30<sup>th</sup> and July 21<sup>st</sup> were both excused by Zambrano and strongly suggested he had no animus against Edmonds for voicing his support of the union during Dimech's meeting. The fact that these events would have occurred after Edmonds had spoken up at the meeting with Dimech is critical from a timing stand point. Edmonds claimed that the meeting with Dimech occurred close in time to Edmonds' termination in July 2010 but the evidence established otherwise. *Secondly*, the date of the meeting is important because Edmonds testified that the meeting had definitely occurred in early July and he was adamant about it (Tr.p. 148:13-17). The fact that the meeting occurred on May 22<sup>nd</sup> would significantly impeach Edmonds and his credibility. All of the Respondent's witnesses uniformly testified that the meeting took place on May 22<sup>nd</sup> (Tr. p288: 49).

In support of this contention, Respondent introduced Exhibit 7, an e-mail between Scott Thomas, the Regional Director and Zambrano dated Saturday, May 22, 2010. The email reflects a chain of communications in which Scott Thomas inquires as to whether Adrian had left the Riverside facility and how the meeting with employees went. Clearly, this email is independent evidence confirming that the meeting with Dimech took place on May 22, 2010 and not in July as the General Counsel would argue and as Edmonds testified.

The parties agreed on the record (Tr. p.452) that the General Counsel would be permitted to obtain an electronic version of the e-mail reflected in Respondent Exhibit 7 to verify its accuracy and to conduct a forensic review of the electronic record and submit any results to the ALJ in an effort to undermine Respondent's Exhibit 7 and its authenticity. Subsequent to the hearing, Respondent did in fact provide an electronic version of the e-mail in question which was examined by the General Counsel. The General Counsel has made no motion to reopen the record nor submitted any supplemental brief, as the parties agreed General Counsel would be permitted to do, undermining the authenticity of Respondent's Exhibit 7. Hence, under the adverse inference rule, the ALJ must conclude that General Counsel was unable to find any forensic evidence to suggest that the email reflected in Respondent's Exhibit 7 is not reliable or was fabricated or otherwise altered. Given such, there can be little question but that the meeting Dimech held with the employees, in which Edmonds first announced his support for union representation, occurred on May 22, 2010, not in July of 2010 as both Edmonds and the General Counsel would argue.

*Triggering Event*

On July 21, 2010, Zambrano arrived at work and was conducting his rounds of the facility at approximately 7:00 a.m. (Tr. 364). DTVHS had just recently relocated to its new and larger facility in Riverside on July 5, 2010. Upon entering the warehouse, Zambrano approached

the cage where inventory was distributed to Installers and Service Technicians. Edmonds was in line. Edmonds, upon seeing Zambrano approaching yelled at Zambrano and told him he need to “fucking do something about this fucking line” and that it was “bullshit” that he had “to wait for like 10 hours” while other tech’s cut in front of him (GC Exhibit 19;Tr. pp.264:21-265-17). Zambrano responded by stating Edmonds had not been waiting in line for 10 hours and that the lockers<sup>3</sup> would be ready for use in only a few days. Edmonds continued to curse at Zambrano in front of the other Technicians and Zambrano left. (GC Exhibit 19).

Zambrano met with Edmonds to discuss the incident. Edmonds said he was “sorry” (Tr. p.367: 7-18). Edmonds was suspended the next day pending investigation of the incident (Tr.p.368:9-12). Following appropriate investigation and review with Human Resources and his Supervisor Thomas, Zambrano concluded that Edmonds should be terminated given his long history of disciplinary problems, the fact that he had been on a final warning, and the fact that his conduct was inappropriate and insubordinate. As a result, Edmonds was terminated on July 28, 2010 (Tr. p.371; GC Exhibit 20)

*Handbook and Company Policies Allegedly Violating the Act*

The General Counsel, in paragraphs 7 and 8 of its Complaint, contends that the following policies, which were admittedly maintained during the relevant period of time by Respondent, violate Section 8(a) (1) and 8(a) (3) of the Act.

**1.4 Use of Company Systems, Equipment, and Resources**

Occasional and reasonable personal use of company property is permitted. Examples of reasonable use include use that is moderate and appropriate in duration and frequency, use that does not involve obscene or questionable subject matter, use that does not conflict with the company’s Anti-discrimination/Harassment and/or conflict of interest policies, and use that is not in support of any religious, political, or outside organization activity.

**1.5 Communications and Representing DIRECTV**

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<sup>3</sup> Each employee was soon after given a private locker in which their inventory was placed for pick-up. This eliminated any lines. (Tr.pp.174-175)

To ensure the company presents a united, consistent voice to a variety of audiences, these are some of your responsibilities related to communications:

- Do not contact the media, and direct all media inquiries to the Home Services Communications department.
- If law enforcement wants to interview or obtain information regarding a DIRECTV employee, whether in person or by telephone/email, the employee should contact the Security department in El Segundo, Calif., who will handle contact with law enforcement agencies and any needed coordination with DIRECTV departments.

#### **4.3.1 Confidentiality**

- Never discuss details about your job, company business or work projects with anyone outside the company, especially in public venues, such as seminars and conferences, or via online posting or information-sharing forums, such as mailing lists, websites, blogs, and chat rooms.
- Never give out information about customers or DIRECTV employees. In particular, customer information must never be transmitted through regular unencrypted email, even internally within DIRECT. If you have additional questions regarding data transmission guidelines, check with the IT department.

#### **Employees**

Employees may not blog, enter chat rooms, post messages on public websites or otherwise disclose company information that is not already disclosed as a public record.

#### **Public Relations**

Employees must direct all media inquiries to a member of the Public Relations team, without exception. Employees should not contact or comment to any media about the company unless pre-authorized by Public Relations. These rules are in place to ensure that the company communications [sic] a consistent message and to ensure that proprietary information is not released.

Upon receiving the Complaint in the instant matter, Respondent while denying that such policies violated the Act, took steps to mitigate any potential misunderstanding by employees of the language contained in the policies.

1. Posted a notice on the intranet site immediately preceding these policies which provides in relevant part:

The policies that follow will not be used to prohibit, discourage or otherwise retaliate against employees who engage in, conduct or communications protected by Section 7 of the National Labor Relations Act (such a lawful discussions whether with co- workers or third parties about wages, hours or working conditions).(Respondent Exhibit 5)

2. Posted a memo at the Riverside Facility to all employees reiterating this message (Respondent Exhibit 4).

### III. ARGUMENT

#### 1. The ALJ Improperly Concluded That the General Counsel Met Its Initial Burden Pursuant to *Wright Line*. (ALJ Decision p.14: lines 10-25)

In evaluating the termination of Edmonds, the ALJ applied the test set forth by the Board in *Wright Line*, 251 NLRB 1083, 1089 (1980), enforced. at 662 F.2d 899 (1st Cir. 1981), Cert. denied 455 U.S. 989 (1982) approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983).

Under *Wright Line*, the General Counsel must first establish by a preponderance of the **credible evidence** that *anti-union sentiment* was a “motivating factor” for the discipline or discharge. Hence, the General Counsel must prove:

- (1) That Edmonds was engaged in protected activities;
- (2) That DIRECTV knew that Edmonds was engaged in protected activity; and
- (3) That the protected activity was a motivating reason for DIRECTV’s termination of Edmonds. *Wright Line, Supra*, 251 NLRB at 1090.

The ALJ improperly concluded that the general Counsel had met this burden as the record is void of any evidence to show the requisite anti union animus required of *Wright Line*.

*(a) No Direct Evidence of Anti-Union Sentiment*

The ALJ's findings that the General Counsel met its initial burden to establish these *Wright Line* factors is unsupported by any substantial evidence and is contrary to the evidence introduced at the hearing. In particular, the ALJ identified no evidence of anti union sentiment.

**First**, there is no finding by the ALJ or any evidence in the record that any of the agents of DIRECTV ever made any negative comments about union representation or Edmond's conduct that would support such a finding of animus. Nothing. Nor is there any evidence that anyone in management made any negative comments regarding Edmonds or the comments that he made on May 22<sup>nd</sup> during the employee meeting where he spoke out in favor of union representation.

**Second**, even reading the ALJ's Decision broadly, the alleged evidence that he relies upon to infer anti union animus on the part of DIRECTV legally is insufficient to do so:

- (ALJ Decision p.5:26-30) The ALJ found that after Edmonds made his pro union comments at the May 22<sup>nd</sup> meeting that the Vice President, Adrian Dimech, "just kind of turned red and did not have much of a response at all" and that Dimech seemed a little dumbfounded because he was not prepared for the conversation that he was having that day. The bald contention that Dimech turned red certainly does not infer any animus on the part of Dimech or anyone else at DIRECTV.
- (ALJ Decision p.5, Fn. 7) The ALJ notes the testimony of Brandon Ojeda and the Affidavit of Ojeda that stated "The gist of what Dimech said was that the union was bad for us and DirectTV would not allow it" and the ALJ goes on to find that during his testimony Ojeda confirmed that this was the understanding he took away from Dimech's remarks. But this is nothing more than a characterization by Ojeda of what he understood Dimech's testimony to be, **not** what Dimech's testimony actually was. Nothing in this

testimony warrants any finding of anti union animus. The ALJ found that Ojeda confirmed his affidavit testimony (ALJ Decision p.5, Fn.7) but this is not true. The General Counsel tried to establish animus through Ojeda by urging him to characterize Dimech's comments at the May 22<sup>nd</sup> meeting as being anti-union. But Ojeda could not recall any such anti-union comments by Dimech on his own (Tr. p.184:18) and asked the General Counsel to refresh his recollection which General Counsel did by reading from Ojeda's statement previously given to the Board (Tr. pp.:9-17). But on cross-examination Ojeda testified that he signed that affidavit while he was intoxicated and under the influence of alcohol (Tr. p.195). Hence, the ALJ's reliance on the Ojeda's testimony, which is based in turn on Ojeda's declaration which he admittedly signed while under the influence of alcohol, cannot factually or legally support any finding of animus.

- (ALJ Decision p.4, Fn. 6) The ALJ attempted to infer animus from the testimony of one Noe Gallegos who testified that Dimech, during course of union organizing at the Rancho Dominguez facility, had asked Gallegos to identify employees and supervisors who were supporting the Union and offered to grant Gallegos immunity from discharge in exchange for his assistance. But the ALJ's finding in this regard is also contrary to the evidence. Gallegos himself testified that he had no firsthand knowledge of Union activity at the Riverside facility (Tr. pg. 269) and, while on direct he inferred that he had been interrogated by Dimech at some point about who was involved in union organizing, on cross-examination Gallegos clarified his testimony that Dimech had offered him immunity if Gallegos identified any other "Field Supervisors" who had been involved in union organizing activity (Tr. p.271:5-21) and it was the unlawful activity of such Field Supervisors that was the basis for the Rancho Dominguez election being overturned by

the Hearing Officer (GC Exhibit 2). Gallegos confirmed that Dimech did not ask him for the names of any rank and file employees involved in the union organizing at Rancho Dominguez (Tr. pg. 272: 11-15). Hence, Gallegos's testimony does not establish any anti union animus nor is it even consistent with the ALJ's findings as to what Gallegos testified to.

*(b) No Evidence of Anti Union Animus By the Decision Maker*

The ALJ's finding that the General Counsel established a *prima facie* case under *Wright Line* is legally and factually flawed for yet another reason. Again, the General Counsel must establish by preponderance of the credible evidence that Edmonds' comments in favor of union representation on May 22, 2010 was a "motivating factor" for the discharge, *Wright Line, Supra*, 251 NLRB at 1090; *DTG Operations, Inc.*, 357 NLRB p. 6.

The uncontroverted testimony, in fact the only evidence introduced at the hearing, establishes that it was Zambrano who was the decision maker in terminating Edmonds, not Dimech. Dimech played no role nor was there any evidence anywhere in this record that Dimech was consulted or otherwise involved in the decision to terminate Edmonds. Yet the ALJ's finding with regards to anti union animus are completely based upon evidence related to Dimech (see part (a) above) and there is no evidence to suggest that Zambrano had any animus against Edmonds because of the comments Edmond's made at the May 22, 2010 employee meeting. To the contrary, the evidence establishes that Zambrano and Edmonds liked each other and got along well and even the ALJ observed such when he observed "Edmonds testified that he would stop by Zambrano's office on a daily basis just to say hi" (ALJ Decision p.11:13). Furthermore, the evidence shows that Zambrano, on not one but two occasions after May 22<sup>nd</sup> (the day Edmonds made his pro union comments) gave Edmonds the benefit of the doubt with regards to infractions which would have resulted in Edmonds' immediate termination.

The first occurred on May 30, 2010 and involved an automobile accident resulting in damage to the front bumper and a dent in the company vehicle (GC Exhibit 17). The investigation into the matter dragged on for some time and it was concluded on or about June 11, 2010. Typically, an accident in the company vehicle which is the result of the fault of the Company technician results in “automatic” termination (Tr. p.361:14-18). Of course, as is true in most automobile accident there is always a question regarding fault and who was responsible for the consequences. In fact, General Counsel Exhibit 17, the letter from Mercury Insurance, (which insured the driver of the other vehicle) specifically concluded:

*“Specifically, our investigation determined our insured’s vehicle was stopped to exit a driveway when your driver entered the same driveway and struck our insured’s vehicle” (GC Exhibit 17)*

Incredibly, the ALJ at Page 14, Footnote 30 concluded that this was a minor auto accident for which it was determined that Edmonds clearly was not at fault as the other driver admitted fault. **But that is not the evidence at all.** In fact the other driver clearly denied responsibility, as did her insurance carrier and claimed that she was stopped in a driveway and was hit by Edmonds (GC Exhibit 17). The ALJ’s finding that the other driver admitted fault is contrary to any evidence in the record. As is evident, Zambrano reviewed conflicting testimony and found in favor of Edmonds on this incident. If Zambrano was looking for a reason to fire Edmonds, the car accident provided a perfect opportunity to do so. Zambrano instead weighed the conflicting evidence in favor of Edmonds, and refused to terminate Edmonds. All of this occurred within weeks of the May 22, 2010 meeting in which Edmonds made his pro-union comments.

The second incident involved a complaint on June 14, 2010 that had been filed with the Office of the President (“OOP”). The customer complained that he had been waiting for

Edmonds for his expected service call since 2:00 p.m. The customer claimed that he heard nothing from Edmonds by 3:55 p.m. (almost 2 hours later) at which time Edmonds called and said he would be there by 4:30 p.m. The customer complained that no one reported to him or called by 5:00 p.m. at which time the customer became very angry and called to reschedule the appointment (GC Exhibit 16A). Edmonds was placed on a suspension for the event while DIRECTV investigated (Tr. p.356:7-11). This single complaint would have resulted in Edmonds' termination if Zambrano found and credited the customers' story (Tr. p.358:24 – 349:4). Zambrano conducted the investigation (Tr. p.356:8-14). It was Zambrano who, after interviewing the customer and reviewing the file concluded that he believed Edmonds over the customer (Tr. p.357-358). As a result, Edmonds was not disciplined for the event (Tr. p.360:11-17).

Here again, incredibly, in Footnote 30 at Page 14 of the Decision, the ALJ made it sound like the customer's complaint was unwarranted and that there was no basis to discipline Edmonds. But as is all too evident, this is a credibility issue. Zambrano could have easily found that the customer was being truthful and again seized this as an opportunity to fire Edmonds had in fact Zambrano been motivated by anti union animus as the ALJ ultimately found. The ALJ's conclusion that neither of these events demonstrates a lack of anti union animus is contrary to the record evidence.

It is well established, that where, as here, an employer does not take advantage of an employee's violation of work place rules after protected activity, such facts **weight against the** finding of animus, *Vermeer Manufacturing Company*, 187 NLRB 888, 892, *Farmers Insurance Group*, 174 NLRB 1294, Pg. 1300, *Merle Lindsey Chevrolet, Inc.* 231 NLRB 478, 485; *Jenkins Manufacturing Company*, 209 NLRB 439, Pg. 443 and *Clate Holt Company*, 161 NLRB 1606, Pg. 1661. Where a certain ground for discharge is claimed to be pretextuous and availed of by

an employer to conceal a proscribed motive, the employer's failure to take advantage of an earlier opportunity to obtain the same result weakens the basis for the Board's attributing an anti union motive to the discharge, *General Motors Corp.* 243 NLRB 614, p. 618 (1979).

In the case at hand, Zambrano found in favor of Edmonds not once, but twice, and in both cases declined to terminate Edmonds. Both of these incidents occurred within weeks of Edmonds' protected conduct on May 22, 2010. Such facts weigh squarely against the ALJ's finding that the General Counsel had met its burden to establish that anti union sentiment was a motivating factor in his discharge or that Edmonds comments of May 22, 2010 in any way motivated Edmonds' termination.

*(c) Lawful Opposition to Union Organizing Does Not Establish Anti Union Animus*

At most the record evidence that the ALJ spent a lot of time covering in his Decision does nothing more than establish that DIRECTV might have some opposition to unions and wanted to keep its employees informed about what was going on at the Rancho Dominguez facility. But such opposition to union organizing or even general hostility is not enough to establish animus *GSX Corp. v. NLRB*, 918 Fd.2d 1351. 1356 (8th Cir. 1990), *Carlton Coll v. NLRB*, 230 Fd.3rd 1075 (8th Cir. 2000). "While hostility to a union is a proper and highly significant factor for the Board to consider when assessing whether the employers motive was discriminatory... general hostility towards the union does not itself supply the element of unlawful motive" *GSX Corp. Supra* at 1365. Similarly, anti union animus cannot be inferred from the employer's statement of oppositions to unions or its challenge to Board proceedings or rulings, *NLRB v. Lamp LLC*, 240 Fd.3rd 931 (11th Cir. 2001) denying enforcement to 372 NLRB 222 (1998). Hence, the mere opposition to union organizing the ALJ references does not legally

support a finding of animus or that anti union sentiment was a motivating factor for Edmonds eventual discharge. Hence, contrary to the ALJ's finding, the General Counsel did not establish the *Wright Line* factors and hence the General Counsel did not establish even a *prima facie* case and on this basis alone the ALJ's Decision must be reversed and the Complaint dismissed to the extent that it alleges any violation by DIRECTV for its termination of Edmonds.

*(d) No Circumstantial Evidence of Discriminatory Motivation*

Again, the General Counsel's initial burden is to establish by preponderance of the credible evidence that anti union sentiment was a "motivating factor" for the discipline or discharge of Edmonds in this present case. (*Wright Line, Supra*, 251 NLRB at 1090). As discussed above, there is no direct evidence that DIRECTV had anti union animus towards Edmonds or his protected activity. Alternatively, this discriminatory motivation can be based on circumstantial evidence, *Roberto or/Sysco Food Service*, 343 NLRB 1183, 1184 (2004). To support an inference of unlawful anti union motivation, the Board as historically looked to such factors as:

- Inconsistencies between a proffered reason for the discipline and other actions of the employer,
- Desperate treatment,
- Deviation from past practice,
- Proximity in time of the discipline to the union activity (*Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003)).

The record in the present case is void of any evidence to suggest that there was any inconsistency between DIRECTV's proffered reason for Edmonds' termination (Edmonds' swearing tirade at Site Manager Zambrano in front of 40 or 50 other

employees) and his termination. DIRECTV has, at all times, asserted that the events of May 22nd, along with Edmonds' poor disciplinary history all resulted in the decision to discharge him and there have been no inconsistent statements.

Similarly, the record is bare of any evidence of desperate treatment under these circumstances. The ALJ was unable to identify (nor was any evidence introduced at the hearing) to establish a single instance where another employee of DIRECTV had used profanity towards his supervisor in front of subordinates and was not terminated. (As discussed below *infra*, there are at least 5 examples of other DIRECTV employees terminated for the exact reason.)

Nor does the ALJ identify any evidence that the termination of Edmonds or the handling of this matter deviated from past practices in any way. Hence, none of these traditional methods that the Board relies upon in establishing anti union motivation are present in the current case. Hence, again, the ALJ's finding that the General Counsel had met its initial burden under *Wright Line* is unsupported by the record.

*(e) Other Employees Spoke in Favor of Union Representation at the May 22 Meeting and Were Not Discharged*

Furthermore, the evidence establishes that Edmonds was not the only employee who spoke out at the May 22<sup>nd</sup> meeting in support of unions. To the contrary, Brandon Ojeda testified that he and others spoke favorably about their experiences with the unions in previous jobs during the meeting on May 22<sup>nd</sup> (Tr.p.185). However, Ojeda is still employed by DIRECTV (Tr.p.166). And neither the General Counsel nor the ALJ offer any reason why Edmonds would have been singled out for his comments while others suffered no retaliation for making similar comments. This evidence also weighs against the ALJ's finding that the General Counsel met its

burden under *Wright Line* to establish that that Edmonds' comments on May 22 were a motivating factor in his termination.

*(f) The Timing Of Edmonds Termination Does Not Support a Finding of Animus*

(ALJ Decision p.13, Fn.28) Of course, the timing of Edmonds' termination in relation to his protected activity is critical to the Board in determining whether the General Counsel has met its *prima facie* case. *Embassy Vacation Resorts 340 NLRB 846, p. 848 (20030) Transportation, Inc. v. NLRB*, 282 Fd.3d 972 (7th Cir. 2002); *NLRB v. Warren L. Rose Castings, Inc.*, 587 Fd.2d 1005 (9<sup>th</sup> Cir. 1978). In the present case, the ALJ noted that the date of Dimech's meeting with the Riverside employees was in contention (Decision p.4, Fn.4). Respondent maintained that the Dimech meeting, in which Edmonds spoke out in favor of union representation, took place on May 22<sup>nd</sup> although the General Counsel placed the meeting at sometime in June (ALJ Decision p.12, Fn. 28). The ALJ in his Decision concluded that the date of the meeting is unclear and there is evidence to support either position but further found "I conclude that under the circumstances it is unnecessary to determine whether the Dimech meeting took place in May or June" (ALJ Decision p.13, Fn.28).

Of course, whether the meeting took place in late June, less than a month before Edmonds' termination or on May 22<sup>nd</sup> significantly impacts the General Counsels *prima facie* case as to whether Edmonds' protected activity was a "motivating factor" in his termination. Hence, the ALJ's finding in this regard is contrary to Board law and the great weight of the evidence introduced at the hearing.

**First**, Edmonds himself testified that the meeting had definitely occurred in early July and he was adamant about it (Tr.p.148:13-17).

**Second,** Respondent's witnesses uniformly testified that the meeting took place on May 22 (Tr.p.288:4-9). In support of this, Respondent introduced Exhibit 7 which is an e-mail between Scott Thomas, the Regional Director and Zambrano dated Saturday, May 22, 2010. The e-mail reflects a chain of communications in which Scott Thomas inquires as to whether Dimech had left the Riverside facility and how the meeting with employees went. Clearly, the email is independent evidence and confirms that the meeting with Dimech took place on May 22<sup>nd</sup> not in July as Edmonds testified. Hence, more than two months passed between Edmonds' protected comments on May 22<sup>nd</sup> and his termination on July 28<sup>nd</sup>. Such passage of time significantly dissipates, if not precludes a finding that the discharge was discriminatorily motivated, *NLRB v. Florida Med Center*, 576 F.2d 666 (5<sup>th</sup> Cir. 1978), *Main Medical Center*, 248 NLRB 707 (1980), *Rockland-Bamberg Print works*, 231 NLRB 305 (1977).

**2. DIRECTV Has Shown that Edmonds Would Have Been Terminated Even in the Absence of His Protected Activity**

Even assuming that there is substantial evidence on the record to support the ALJ's finding that the General Counsel met its burden to establish a *prima facie* case under *Wright Line*, DIRECTV has established that Edmonds would have been terminated even in the absence of this protected activity, *Peter Vitale Company*, 310 NLRB 865, 871 (1993), *Wright Line, Supra* 251 NLRB at 1088. Ultimately, the General Counsel retains the burden of providing discrimination, *Wright Line, Supra* 251 NLRB at 1088, Fn.11.

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*(a) Edmonds Had an Extensive Disciplinary History Prior to May 22, 2010*

Both the General Counsel and the ALJ's acknowledge that Edmonds had an extensive history of discipline prior to the May 22 meeting in Riverside (ALJ Decision p.10:37 - p.11:11). This included 7 separate incidents of discipline including 2 suspensions, a demotion and 2 final warnings all for various violations of company rules. In 2010 alone, Edmonds received discipline on three (3) separate occasions prior to the May 22, 2010 employee meeting in which he spoke out in favor of union representation: (i) January 8<sup>th</sup> (GC Exhibit 13) when Edmonds received a 2 day suspension and a final warning for failing to install a satellite system pursuant to the Company's expectations; (ii) a 2 day suspension on January 21, 2010 for failing to keep customers apprised of his arrival time and the third; and (iii) on March 12, 2010 for failing to follow proper time reporting procedures. Each of these warnings specifically advised Edmonds: *"immediate satisfactory and improvement must be shown or further disciplinary action may be take up to and including termination"* (GC Exhibits 13-15). This would hardly be the record of a stellar employee.

Each of these disciplinary actions occurred before the May 22, 2010, meeting in which Edmonds made his pro-union comments and the record is void of any evidence to suggest that Edmonds had engaged in any other protected activity prior to May 22, 2010. Hence, as a matter of law, none of these seven (7) previous disciplinary actions had any causal connection to Edmonds protected conduct. This clearly establishes that Edmonds was a marginal employee who had repeatedly been subject to discipline and was on a final warning prior to May 22, 2010.

*(b) The Triggering Event was a violation of DIRECTV Policy*

Similarly, there is not dispute here that Zambrano's conduct on July 21, 2010 was a violation of Company policy that was not protected (ALJ Decision p.13:15-20). In fact, the ALJ found that Edmonds himself recognized that his conduct on July 21<sup>st</sup> was "a bit inappropriate and was out of line" (ALJ Decision p.14:26-28). Hence, there is no factual dispute but that Edmonds in swearing at Zambrano on July 21, 2010, had again violated company conduct standards. On at least three previous occasions in 2010 Edmonds had received discipline placing him on notice that further disciplinary action would result in his termination (GC Exhibits 13-15). Hence, Edmonds termination as a result of his outburst on July 21, 2010 cannot have come as a surprise.

*(c) Other Employees Have Been Terminated for Similar Conduct*

The evidence established that at least five (5) other DIRECTV employees had been terminated for swearing at their supervisor. In this regard, Teresa Cox was terminated for yelling at a dispatcher and saying "fuck you" (Respondent Ext. 10), Ricky Hammers was terminated for telling his Field Supervisor "you better get your shit straight" and "I think Alex is a fucking coward" (Respondent Ext. 11), Mark Flores was terminated for swearing at this supervisor in regards to his route (Respondent Exh. 12), and Tony Cannarella was terminated when he interrupted a training session repeatedly using the words "fucking" when speaking to the manager and told the manager "this is bullshit" (Respondent Exh. 13) and James Vogt was terminated for leaving a voice message on the phone of the Operations Manager in which he used foul language (Respondent Exh. 14). There is no evidence that any of these five (5) employees had engaged in protected activity or that their termination was in retaliation for such.

The ALJ ignored this evidence and instead only focused on a single incident involving John Barrios (ALJ Decision p.12:1-20) in which Zambrano was directly involved. In that

incident Barrios had repeatedly used profanity in responding to his supervisor's request to put on a reflective vest while fueling his vehicle. While the ALJ found that the circumstances surrounding the Barrios incident were distinguishable from Edmonds case, the ALJ made no reference nor any finding regarding the five other terminations identified above. Accordingly the only conclusion reached on this evidence is that Edmonds termination for swearing at his supervisor was consistent with past practice, again supporting a finding that Edmonds would have been terminated regardless of his protected activity. The ALJ's finding to the contrary ignores this critical evidence of DIRECTV's past practice to terminate employees for swearing at a supervisor.

*(d) The ALJ's Finding that Zambrano Only Suspended Edmonds for his July 21 Outburst is contrary to the Evidence.*

The ALJ concluded that when Zambrano suspended Edmonds on July 22, 2010 and sent Edmonds home, Zambrano told Edmonds that he would not be terminated and that he could return to work at the end of his suspension (ALJ Decision p.14:26-32). Hence, it was the ALJ's conclusion that Zambrano had decided that the only discipline to be taken against Edmonds for his July 21 outburst was a suspension. From that, the ALJ speculated "that someone intervened between July 22<sup>nd</sup> and 28<sup>th</sup> to cause Zambrano to change his mind and to convert the suspension to termination" (ALJ Decision p.15:14-20). To all of these findings, DIRECTV takes Exception.

Zambrano testified that he spoke with his boss, Mr. Thomas about what to do with Edmonds (Tr. p. 370:12-17). Mr. Thomas told Zambrano that he needed to check with HR as to whether Edmonds should be terminated for the event (Tr. p.370:15-17) and Zambrano did talk to Human Resources and in that regard testified as follows:

**Question by Wolflick:** And did you consult with Marianne Amada?

**Answer by Zambrano:** Yes.

**Question:** And what was her recommendation?

**Answer:** That I was correct, that we should definitely suspend him pending investigation (Tr. p.370).

Clearly, that is contrary to the ALJ's finding that Zambrano had concluded that suspension was all that was warranted and that he would have told Edmonds that he was coming back to work. The ALJ has simply ignored Zambrano's testimony with regards to what occurred in this conversation. As is all too apparent, the normal protocol for any employer in this day and age is to suspend pending investigation and to consult with appropriate internal resources to make sure the decision is consistent with company policy and otherwise lawfully sustainable. Interestingly, an employer's failure to investigate the incident upon which the employer relied as grounds for discharge may reflect an employer's discriminatory motive, *WW Granger v. NLRB* 582 F.2d 1118, 1121 (7th Cir. 1978), *Beverly Health and Rehabilitation Services*, 325 NLRB 106 (1998). Here, Zambrano did suspend pending investigation for the very purpose of permitting him time to conduct the investigation. Hence, contrary to the ALJ's conclusions, such investigation establishes a lack of anti union animus.

In fact, the ALJ himself questioned Mr. Zambrano regarding this very issue. Again, we point out that the incident in question took place on July 21<sup>st</sup> and Edmonds was suspended on July 22<sup>nd</sup>.

**Judge Wacknov:** – so by the morning of the 22<sup>nd</sup>, you had determined that you were going to terminate Mr. Edmonds?

**Zambrano:** No, I had – didn't make that determination until the 23<sup>rd</sup>.

**Judge Wacknov:** 23<sup>rd</sup>?

**The Witness:** Correct.

**Judge Wacknov:** Okay and so why didn't you terminate Mr. Edmonds on the 23<sup>rd</sup>?

**The Witness:** We had to submit a check request and the check did not come out until the 27<sup>th</sup> or the 28<sup>th</sup> I think.

**Judge Wacknov:** So in other words you had to get a check prepared for him?

**The Witness:** Correct (Tr.p.408:1-15)

The Board can take judicial notice that California Labor Code § 201 requires a California employer to issue a terminated employee his or her final check at the time of termination. In order to comply with this requirement, Zambrano would have necessarily had to have suspended Edmonds in order to get a final check. The Board can also take judicial notice that July 23, 2010, (the day Zambrano testified he made the decision to terminate Edmonds) was a Friday and the check in question had to be processed by the Company's Denver office. Hence, if the check was prepared the following Monday, July 26, 2010, and overnighted, it would not have been received by the Riverside office until the 27<sup>th</sup> and, there is no dispute that Zambrano met with Edmonds and terminated him on July 28<sup>th</sup> (GC Exhibit 20, Tr. p. 371).

Hence, the ALJ's conclusion that Zambrano had simply suspended Edmonds on the 22<sup>nd</sup> is contrary to the testimony that the Judge himself adduced from the witness. Furthermore, the only rational reading of the evidence is that Zambrano, once he made the decision to terminate on July 23, 2010, had to request a final check so as to comply with California Labor Code section 201. The resulting delay was not because, as the ALJ speculates, because someone intervened to change the suspension to a termination, but to allow the final check to be issued from the Denver office.

For these reasons, the ALJ's conclusion that Zambrano had decided to only suspend Edmonds is clearly contrary to the record evidence.

*(e) The ALJ's Conclusion that "Someone Intervened" to Terminate Edmonds is Speculation.*

The ALJ went on to conclude that "someone intervened between July 22<sup>nd</sup> and 28<sup>th</sup> to cause Zambrano to change his mind and convert the suspension to a termination". (ALJ Decision p.15:12-15). But there is no evidence to support his conclusion. There is not a single bit of evidence that anyone other than Zambrano, his supervisor Thomas and Hamada, the Human Resource Representative, were involved in this decision. Zambrano was the one who made the decision. There is no testimony that anyone else was involved in making the decisions or that anyone else influenced it. And a finding by the ALJ to the contrary is nothing more than speculation. And it's speculation on two fronts: *First*, that someone other than Zambrano made the decision to terminate Edmonds and *second*, that whoever that person was, was motivated by Edmonds protected activity on May 22, 2010. An ALJ's finding based on speculation cannot be sustained on review. Sheer speculation cannot be upheld as substantial evidence in support of a finding, *Medeco Security Locks v. NLRB*, 142 Fd.3d 733, 742 (4th Cir. 1998). The fact that the ALJ's finding that someone else was intervened between July 22 and July 28 to change Zambrano's decision, and that unknown individual was motivated by Edmonds May 22 remarks, is mere speculation that requires overturning the ALJ's finding on the termination claim. *Medeco Security Locks v. NLRB, supra*, pp. 742-743.

*(f) The ALJ's Credibility Finding in Favor of Edmonds Testimony is Against the Preponderance of the Evidence.*

The ALJ makes a credibility finding by concluding "I do not credit Zambrano's testimony to the extent that he suggests or implies that he did not have his mind made up not to discharge Edmonds when he issued the July 21 counseling form" (ALJ Decision p.15:15-18).

Instead, it appears that the ALJ somehow credits Edmonds who testified that Zambrano told him he would return after his suspension for the July 21<sup>st</sup> incident. But this, credibility finding ignores the preponderance of the evidence and must be reversed. Consider the following:

- On direct examination Edmonds testified that his friend, Eber, told Edmonds that Zambrano had asked him for the names of people who were trying to get the union thing installed (Tr. p.103:5-18). However, on direct examination, Eber Urrutia denied: (i) ever making such a statement to Edmonds; and (ii) testified that Zambrano had never made any such inquiry of him (Tr.p.227:9-18). Hence, the General Counsel's own witness refutes Edmonds' testimony.
- At the time of the hearing Edmonds testified that when he was terminated by Zambrano on July 28<sup>th</sup> he was told the reason was insubordination (Tr.p.139:10-25). But in the sworn statement he gave to the NLRB and the Union, Edmonds said he was given no reason by Zambrano for his termination (Respondent's Exh.2).
- Similarly, in his sworn statement to the Union and the Board, Edmonds said that he had only been disciplined 3 times prior to his termination. As the evidence here, and as Edmonds himself testified, he was disciplined at least seven (7) times prior to his termination (GC Exhibits 12-20). Hence, as is all too evident, it is Edmonds' whose testimony is unbelievable. Hence, if there is any credibility determination to be made, it is that Edmonds is not credible.
- Finally, contrary to the ALJ's finding, Zambrano did not "suggest" or "infer" that he did not have his mind made up when he suspended Edmonds on July 22, 2010. No, Zambrano had flatly denied this accusation when the ALJ himself questioned Zambrano on this very issue. (Tr.p.408:1-15)

The clear preponderance of the evidence establishes that it was Zambrano who was credible and whose version of the termination meeting must be credited based on the record evidence.

*(g) The ALJ's Findings That Zambrano asked Edmonds to Apply for A Supervisor Job and Evidence Regarding Edmonds Most Recent Customer Service Rankings*

The ALJ attempts to further support his speculation that Edmonds was discharged for speaking favorably regarding union representation during the May 22<sup>nd</sup> meeting by observing that Zambrano had asked Edmonds to apply for a job as a Field Supervisor (ALJ Decision p.15 Fn.31) and that Edmonds had received good customer satisfaction ratings prior to his termination (ALJ Decision p.15:fn 31). These considerations are irrelevant and simply a desperate attempt to justify an otherwise speculative conclusion.

Edmonds was not terminated because his customer service ratings were poor or because his productivity was below standards or because his overall job performance had been declining. He was terminated because he used foul language repeatedly at a supervisor in front of other employees in a fashion that even the ALJ had to admit was unprotected by the Act. Furthermore, this is a "single incident" case resulting in termination. While Edmonds' poor work history certainly weighed in favor of discharge, it was the single incident on July 21 that resulted in his discharge.

In this regard, Zambrano testified that the incident on July 21, by itself, would have been substantial enough to result in the termination of Edmonds (Tr.p 372:14). And there is no doubt that in fact Edmonds did swear at his supervisor in front of other employees on July 21, 2010. Hence, the only issue is whether the level of discipline, termination, was consistent with past practice. As discussed above, at least five (5) other employees had been terminated for

swearing at their supervisor (Respondent Exhibits 7- 12) and there is no evidence of disparate treatment or that any other employee engaged in similar conduct and was not terminated.

As to the allegation that Zambrano asked Edmonds to apply for a position as a Field Supervisor, Zambrano testified that he never asked Edmonds to apply for a job as a Field Supervisor and that Edmonds would not have been eligible given his work record (Tr. pp 374-375). But neither of these factors is relevant in the present case because Zambrano would have been terminated for this single event, as other had been.

### **3. The ALJ's Finding Regarding the Alleged Unlawful Policies of DIRECV**

The ALJ concluded that the policies in question were unlawful on their faces in that they tend to inhibit union or protected concerted activity by precluding employees from discussing wages, hours or working conditions (ALJ Decision p.18:50 – p. 19:5). None of these rules explicitly restricts activities protected by Section 7. Certainly not on their face. Hence, a finding that the rules are unlawful would be dependent upon a showing of one of the following:

1. Employees would reasonably construe the language to prohibit Section 7 activities;
2. The rule was promulgated in response to union activity; or
3. The rule has been applied to restrict the exercise of Section 7 rights.

*(Lutheran Heritage Village-Livonia, 343 NLRB at 646-647 (2004)).*

The General Counsel failed to carry its burden to make such a showing on any of these issues nor did the ALJ make any such finding in connection with declaring these policies unlawful.

We can easily dispense with the second and third factor because the General Counsel introduced virtually no evidence whatsoever regarding the application of these rules under any circumstances at any time nor did the ALJ make any related finding. Hence, there is no evidence

that these rules were *promulgated in response to union activity* or that they have been *applied* to restrict to the exercise of Section 7 rights.

Hence, the only way these policies could be declared unlawful is for the ALJ to set forth some evidence or basis to support his conclusion that employees would reasonably construe the language in these rules to prohibit Section 7 activity. He failed to do so and accordingly, his findings declaring these rules unlawful must be reversed.

Again, Respondent respectfully submits that none of these rules would be reasonably construed by an employee to prohibit Section 7 activity. Notwithstanding the foregoing, and in an effort to ensure there was no misunderstanding by employees, the record reflects that Respondent, upon receipt of the Complaint, took certain corrective action which included:

1. A posting at the Riverside Facility addressed to all employees (Respondent Exhibit 4a), which provides in relevant part:

Employee Handbook:

The Policies contained in the DTVHS Employee Handbook previously distributed to you (including but not limited to Confidentiality, Using Social Media) will not be used to prohibit, discourage, or otherwise retaliate against employees who engage in conduct or communications protected by Section 7 of the National Labor Relations Act (such as lawful discussions whether with co-workers or third parties about wages, hours or working conditions).

Company Policies

The Company polices on the DEN (including but not limited to Confidentiality, Using Social Media) will not be used to prohibit, discourage, or otherwise retaliate against employees who engage in conduct or communications protected by Section 7 of the National Labor Relations Act (such as lawful discussions whether with co-workers or third parties about wages, hours or working conditions).

These same disclaimers were posted on the company's intranet (Respondent Exhibit 5).

Hence, even assuming that the policies in question can be reasonably construed to prohibit Section 7 activity, the disclaimers clearly correct any such misunderstanding. Read in

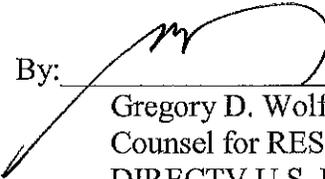
concert the Disclaimers and Policies clearly would not reasonably be construed to prohibit any Section 7 activities and therefore, do not violate the Act. The failure of the ALJ to identify any basis for his conclusion that the disclaimer was not sufficient or how, the policies read in conjunction with the disclaimer, could still be reasonably construed to prohibit Section 7 activities requires the Board to reverse the ALJ's finding.

#### **IV. CONCLUSION**

For all the reasons stated herein, and as noted in Respondent's Exception to the ALJ's Decision, Respondent DIRECTV urges the Board to enter an Order finding that the General Counsel failed to make out a *prima facie* case and that DIRECTV did establish that Edmonds' discharge would have occurred absent his participation in the May 22, 2010 work site meeting. Respondent further urges the Board to find that the policies in question cannot reasonably be construed to prohibit Section 7 activity and/or that the disclaimers adopted by Respondent, and posted both on the intranet and at the Riverside facility, were sufficient to correct any such misunderstanding.

Dated: February 6, 2012

WOLFLICK & SIMPSON

By: 

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Gregory D. Wolflick, Esq.  
Counsel for RESPONDENT,  
DIRECTV U.S. DIRECTV  
HOLDINGS LLC

**PROOF OF SERVICE**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 130 N. Brand Boulevard, Suite 410, Glendale, California 91203.

On February 6, 2012, I served the foregoing document(s) described as:  
**RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE FINDINGS AND DECISION OF THE ADMINISTRATIVE LAW JUDGE** on the interested parties in this action by placing a true copy thereon enclosed in sealed envelope(s) addressed as follows:

**Jean C. Libby, Counsel for General Counsel**  
**National Labor Relations Board, Region 21**  
**888 South Figueroa Street, Ninth Floor**  
**Los Angeles, California 90017-5449**  
**Jean.libby@nlrb.gov**

**David A. Rosenfeld, Esq.**  
**WEINBER, ROGER & ROSENFELD**  
**1001 Marina Village Parkway, Suite**  
**200 Alameda, California 94501-1091**  
**Drosenfeld@unioncounsel.net**

**XXX** **(BY ELECTRONIC SERVICE)** Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed above. I did not receive, within a reasonable time after the transmission, any electronic message, or other indication that the transmission was unsuccessful.

**XXX** **(BY STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on February 6, 2012, at Glendale, California

**MARGO KAZARYAN**

