UNITED STATES OF AMERICA
THE NATIONAL LABOR RELATIONS BOARD

DISH NETWORK CORPORATION,	§		
	§	**Case Nos.**	**16-CA-062433**
Respondent,	§		**16-CA-066142**
	§		**16-CA-068261**
and	§		
	§		
COMMUNICATIONS WORKERS OF AMERICA LOCAL 6171	§		
	§		
	§		
Charging Party.	§		

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

DAVID VAN OS & ASSOCIATES, P.C.
1016 La Posada, Suite 145
Austin, TX 78752
(Tel.) 512-452-8683
(Fax) 512-452-8684

Matt Holder
Texas State Bar No. 24026937
Email: matt@vanoslaw.com

COUNSEL FOR CHARGING PARTY CWA LOCAL 6171

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Code

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

DISH NETWORK CORPORATION,	§	
	§	**Case Nos. 16-CA-062433**
Respondent,	§	**16-CA-066142**
	§	**16-CA-068261**
and	§	
	§	
COMMUNICATIONS WORKERS OF	§	
AMERICA LOCAL 6171,	§	
	§	
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 ("CWA" or "the Union") and files these Exceptions to the November 14, 2012 decision ("Decision") by Administrative Law Judge ("ALJ") Robert Ringler as to the violations of Section 8(a)(1) of the National Labor Relations Act ("the Act" or "NLRA"), 29 U.S.C. § 158(a)(1), Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), and Section 8(a)(4) of the Act, 29 U.S.C. § 158(a)(4) committed by Respondent Dish Network Corporation ("Dish" or "Respondent") that were tried before the ALJ on May 14-15, 2012 in Fort Worth, Texas and would respectfully show the following:

I. INTRODUCTION

These exceptions concern the unlawful discipline and discharge of Jorge Tavares in violation of Sections 8(a)(1), 8(a)(3), and 8(a)(4), 29 U.S.C. § 158(a)(1), (a)(3), and (a)(4), of the National Labor Relations Act ("the Act"). (Decision, pp. 10, Ln. 10 - 12, Ln. 3; *see also*

Complaint, as amended, GC[1] 1(i), pp. 5-6). Tavares' discipline and discharge case, along with the 8(a)(1) violations found by the ALJ for Dish's media, social media, and contact with government representatives policies (Decision, p. 12, lns. 10-24) were the second trial of unfair labor practice ("ULP") charges against Dish concerning its operations in Farmers Branch, Texas.

The evidence in this established that Dish unlawfully disciplined and discharged Tavares because of his support of the Union, specifically because he was a member of the bargaining committee negotiating the first contract for Farmers Branch and that Dish unlawfully disciplined and discharged Tavares because of his testimony against Dish in the May 2011. Dish succeeded before the ALJ in masking its unlawful action against Tavares under the guise of the ostensible legitimate business reason of enforcing safety rules. These safety rules, however, were never enforced through discipline until the spring and summer of 2011 and Tavares was also the only employee fired solely for not following safety rules.

II. SUMMARY OF EXCEPTIONS

CWA files the following exceptions to the determinations by the ALJ:

a. The ALJ erred in as a matter of law in finding that Respondent did not violate Sections 8(a)(1) and 8(a)(3) of the Act by disciplining and subsequently terminating Jorge Tavares ("Tavares") as the result of the ALJ's errors as a matter of law concerning Respondent's alleged affirmative defense to Tavares' discharge. (See Decision, p. 10, lns. 5-7; p. 11, lns. 5-26).

(1) The ALJ erred as a matter of law in finding "limited" Union animus in this case, despite his finding that the proximity of Tavares' Section 7 activity to his discipline and discharge established a *prima facie* case under Wright Line, 251 N.L.R.B. 1083 (1980).

[1] Exhibits will be cited to in this brief as "GC" for Counsel for the General Counsel's exhibits, "R" for Respondent Dish's exhibits, and "U" for Charging Party CWA's exhibits, followed by the appropriate exhibit number.

(Decision, p. 11, lns. 1-4). This error led to the ALJ failing to find as a matter of law that Tavares was the only person terminated solely for a safety infraction and the evidence of specific animus against Tavares. (Id., p. 11, fn. 29). The substantial quantity and quality of this animus, including the specific animus against Tavares, raised Respondent's rebuttal burden to a level that was not met in this case as required by Bally's Park Place, Inc., 355 N.L.R.B. 1319 (2010).

(2) The ALJ erred as a matter of law in not finding that the safety rules were applied in a discriminatory manner to discipline and discharge Tavares because of his Union activity.

(3) The ALJ erred as a matter of law in not finding Tavares' discipline and discharge for alleged safety violations to be pretexts. (Decision, p.3, Ln. 25-p. 5, Ln. 14 (Finding that Dish had haphazardly enforced safety rules and only recently begun to enforce them through discipline prior to Tavares' discipline discharge)).

b. The ALJ erred in finding Respondent did not violate Sections 8(a)(1) and 8(a)(4) of the Act by disciplining and subsequently terminating Tavares as the result of the ALJ's errors as a matter of law concerning Respondent's alleged affirmative defense to Tavares' discharge. (Id., p. 11, Ln. 30-p. 12, Ln. 2).

III. STATEMENT OF THE FACTS

a. The Organizing of Farmers Branch

CWA organized Farmers Branch and a sibling location in North Richland Hills, Texas in the February 2010 through an election conducted by the National Labor Relations Board at each respective location. (Decision, p. 2, lns. 25-29; *see also* Dish Network Corp., 358 N.L.R.B. No. 29 (2012)). Tavares was a Field Service Specialist ("FSS") employee at Dish. (Decision, p. 3,

Ln. 37; see also Tr.[2] 136, Ln. 14-15). Tavares was involved in CWA's organizing effort by collecting signatures for the election petition as well as attending organizing meetings. (Decision, p. 10, Ln. 43-44; Tr. 137, Ln. 6-12). During this time, Tavares was questioned by Field Service Manager Rodney Hodge about Tavares' support for the Union. (Tr. 138, lns. 1-15). Immediately after CWA won the election at Farmers Branch, management informed employees, including Tavares, that rules would be interpreted and applied as "black and white" and there would be no gray areas; as such all the rules would be strictly enforced. (Tr. 139, Ln. 1-6). This campaign by Dish was the beginning of the discriminatory enforcement of rules that would lead to unlawful discipline and discharge of Tavares that are at issue in this trial.

Tavares was not the only witness to testify about the threat of discriminatory enforcement of rules under the rubric of "black and white" and "no shades of gray." Ryan Theiss, a former Dish employee who testified at trial, heard the exact same phrases almost a year and a half later from Installation Manager Michael Durham; all rules would be enforced as black and white and there would be no gray areas. (Tr. 83, Ln. 21- Tr. 84, Ln. 12). Michael Thompson, a former Field Service Manager at Farmers Branch, testified that he and Durham often discussed how rules at Farmers Branch had to be read as black and white because of the Union. (Tr. 375, Ln. 9-17). The euphemisms of "black and white" and "no gray areas" were used to describe management's crackdowns at Farmers Branch and management attributed the need for the draconian policies to the Union's presence at Farmer's Branch.

b. PPE and Fall Protection

Dish employees are trained to use Personal Protective Equipment ("PPE") that consists of safety goggles, a hardhat or bump cap, and gloves that employees are to wear while performing installation and repair work. (Tr. 141, Ln. 13-19; 142, Ln. 21-23). Dish employees are also

[2] The record in this case will be cited as "Tr." followed by the page number and line number.

trained to use fall protection when employees climb onto a customer's roof. Both Tavares and Theiss testified to receiving such training, including the fact that failure to follow these policies could lead to discipline or discharge. (Tr. 152, Ln. 4-7; *see also* GC 31, GC 32, and R 1). At Farmers Branch, however, discipline had never been used to enforce these rules prior to the spring and summer of 2011 with the arrival of General Manager Gabriel Gonzalez and Durham. (Tr. 61, Ln. 15-17; 83, Ln. 21-84, Ln. 12; 145, Ln. 1-9; 147, Ln. 5-18; 148, Ln. 14-25, 161, Ln. 8-21; 352, Ln. 5-6). Gonzalez testified at length that enforcement of Dish policies varies from location to location. (Tr. 466-68). As Thompson testified, the rules were in place but not enforced. (Tr. 359, Ln. 20-24). "Safety," according to Thompson, "was never a priority before the union started coming around." (Tr. 377, Ln. 7-8).

Theiss testified about numerous incidents where he observed employees not wearing PPE or he himself did not wear PPE and being observed by management. Theiss began with Dish in January 2011 and during his probationary period shadowed other employees and observed one trainer not wearing PPE. (Tr. 32, Ln. 11-12; 58, Ln. 11-16). Theiss observed another employee during this period never wearing PPE. (Id., Ln. 17-20). Another employee was observed by Theiss wearing his hardhat, but not his goggles or gloves. (Tr. 59, Ln. 11-24). Theiss was working with an employee named Dustin Keller on a commercial job when Michael Byrd, then the General Manager at Farmers Branch, arrived and stopped the job because Theiss and Keller were not wearing PPE, but did not discipline them for not wearing PPE. (Tr. 61).

Theiss himself rarely wore his hardhat when he worked. (Tr. 61, Ln. 23-62, Ln. 4). Theiss also generally did not wear his gloves and goggles. (Tr. 62, Ln. 5-6, 9-10). Thompson frequently visited Theiss on the job and would observe him not wearing PPE, but Thompson did not discipline Theiss. (Tr. 62, Ln. 14-16, Ln. 21-63, Ln. 7). Durham himself observed Theiss on

three or four occasions not wearing PPE and did not discipline Theiss. (Tr. 64, 11-25). Durham, as noted above, said that policies would be "black and white" and management would no longer be lax in enforcing safety rules. (Tr. 83, Ln. 21-84, Ln. 12). Theiss testified that Durham said policies would be "more strictly enforced than had previously done." (Tr. 102, Ln. 16). However, Durham found Theiss in the field without PPE after these pronouncements and still did not discipline Theiss. (Tr. 106, Ln. 16-23).

Theiss also noticed employees did not wear fall protection during his training period. (Tr. 72, Ln. 6-11). Theiss as an employee did not wear fall protection all the time. (Tr. 75, Ln. 3-5). Durham was aware that employees did not wear fall protection and asked Theiss to give a presentation on the use of fall protection for other employees in April 2011. (Tr. 76, Ln. 1-21; 77, Ln. 1-22; 78, Ln. 4-6; 84, Ln. 19-25).

Evidence was also introduced at trial that another opponent of the Union, Jose Rodriguez, failed to use fall protection and was not disciplined for it. Rodriguez brought up decertification of the Union with Tavares. (Tr. 158, Ln. 23-25). Theiss was aware that Rodriguez signed the decertification petition. (Tr. 89, Ln. 5-8). Rodriguez was the subject of a safety survey on March 26, 2011 in Coppell, Texas. (GC 8). Rodriguez passed the survey despite the owner of the home, Wesley Mays, testifying that Rodriguez went onto the roof to install the dish and did not use fall protection. (Tr. 128, Ln. 23-25; 130, Ln. 7-9). Rodriguez's failure to use fall protection should have been apparent because the patch used after the fall protection is removed is visible on the roof. (Tr. 362, Ln. 16-22).

When Tavares began his career at Dish in 2007, managers observed him working without his PPE and did not discipline him. (Tr. 143, Ln. 2-7). In 2008, managers observed Tavares without PPE and fall protection and did not discipline him. (Tr. 145, Ln. 1-9). Likewise in

2009, in fact, Tavares failed a safety survey on November 9, 2009 for not wearing PPE, but did not receive any discipline for that safety infraction. (Tr. 147, Ln. 5-18; 148, Ln. 14-25; 149, Ln. 1-3; see also GC 25). Tavares passed safety surveys in 2010 despite not wearing PPE. (Tr. 150, Ln. 7-151, Ln. 24; see also GC 26 and GC 27).

Thompson testified that he only disciplined for PPE during the last months of his career at Dish, which ended in October 2011. (Tr. 329, Ln. 3-9). Most of the Techs that Thompson observed prior to the last six months of his tenure did not wear PPE "most of the time." (Tr. 337, Ln. 13-338, Ln., 1). Durham also witnessed employees not wearing fall protection, but did not impose discipline. (Tr. 357, Ln. 25-358, Ln. 7). Thompson observed that other managers were similarly lax in enforcing safety rules. (Tr. 366, Ln. 2-11, 14-17). Thompson testified, as noted earlier, that "safety was never a priority before the union started coming around." (Tr. 377, Ln. 7-8). Additionally, while safety was always encouraged at Farmers Branch, according to Thompson "it was never made near as big a deal before" the union. (Tr. 388, Ln. 24-25).

c. Evidence of Specific Animus Against Tavares; The Bathroom and Receiver Incidents

Thompson testified that he believed Durham more strictly enforced rules against Tavares "because of the receiver thing . . . and because of the bathroom incident." (Tr. 419, Ln. 8-9). Before examining these incidents, it should be noted that Dish was aware of Tavares support for the Union. Tavares testified at the May 2011 trial. (Tr. 157, Ln. 24-158, Ln. 6). In that proceeding, Tavares testimony was credited concerning a threat for "black and white" enforcement of work rules. Dish, 358 N.L.R.B. No. 29, at slip 7. Tavares became a member of the Union's bargaining committee in March 2011 when Juan Zamarron, his predecessor, resigned because he feared for his job. (Tr. 155, Ln. 20-25). Tavares participated in two bargaining sessions as a member of the committee. (Tr. 156, Ln. 10-11). Gonzalez was aware of

Tavares' role on the Union's bargaining committee because Tavares needed to request time off from work to participate in bargaining. (Tr. 439, Ln. 22-23). Management identified Tavares to Theiss as the Union representative. (Tr. 88, Ln. 16-22).

Thompson testified that he observed Durham express particular interest in Tavares. (Tr. 330, Ln. 23-25). In the spring of 2011, Tavares moved to another apartment and put in a work order to transfer his Dish satellite television service to the new location. (Tr. 331, Ln. 3-15; 333, Ln. 8). Durham expressed an unusual level of interest in the order such that Thompson commented "I'd never seen anyone show interest in this one work order like that before, but he [Durham] really wanted to see George's apartment and George's equipment." (Tr. 331, Ln. 4-6). Durham wanted to know why Tavares had six receivers in his apartment and sent a Quality Assurance Specialist ("QAS") to Tavares' apartment not to inspect the quality of the service relocation, but because Durham "wanted to know why there were six receivers in an apartment." (Tr. 332, Ln. 10-11). Thompson had never observed an Installation Manager express any interest in an employee's work order prior to this incident. (Id., Ln. 14-17). Durham attempted to downplay the incident by claiming he was just interested in how satellite receivers were setup and wanted to observe an employee's home rather than a customer's home. (Tr. 529, Ln. 14-23). This explanation is implausible given that the one employee he was interested in was the one known remaining Union supporter and the fact that he wanted to send a QAS to Tavares' premises to perform the inspection.

The bathroom incident referred to by Thompson occurred prior to the incident concerning Tavares' receivers. The bathroom incident began when Tavares returned to the Farmers Branch office to pick up a piece of equipment. (Tr. 389, Ln. 13). Thompson approved Tavares coming to the office during work hours to get the equipment. (Tr. 405, Ln. 14-18). Tavares went to the

restroom while he was at the office. Durham saw Tavares enter the building and sent Thompson to investigate what Tavares was doing. Thompson found Tavares in the bathroom and told Durham as much. Durham sent to the restroom and wanted to know what Tavares was doing. Durham told Thompson "to go in there with him [Tavares]." (Tr. 334, Ln. 12). Thompson complied, and asked Tavares what was wrong and Tavares indicated he had an upset stomach and would be out soon. (Id., Ln. 23-24). Thompson reported this information to Durham and Durham wanted to know why Thompson was back

> And he wanted to know what I was doing. I told him, George is in the bathroom; he's using the bathroom. Well, I told you to stay in there with him. I don't want to stay in there with him. If you can't stay in there with him, then I don't need you here. And I told him again, *I'm not going back in there. He said, well, how are you going to hear sounds and smell smells? I don't want to hear sounds and smell smells, you know*. And he finally let it go. (Tr. 335, Ln. 4-11)(emphasis added).

This incident was extreme even if Durham did not want technicians in the office. Theiss, however, used the restroom at the office in the mornings without Durham sending Thompson into the restroom. (Tr. 421, Ln. 8-12). This incident so disturbed Thompson that he filed a complaint with Dish Human Resources. (Id., Ln. 22-23). Durham did not recall this incident, but recalled a different incident where he inquired about Tavares in the bathroom. (Tr. 529, Ln. 8-11). This testimony would seem to corroborate that Durham had significant interest in Tavares' activities and movements that Durham did not have in other employees' activities.

d. <u>Tavares' Final Warning</u>

Tavares received a final warning on June 3, 2011 encompassing three incidents. (GC 21). During an installation on May 21st, Durham visited Tavares. Tavares had installed the dish on a chimney and Durham asked Tavares if he had used fall protection and Tavares indicated he had not used it. (Tr. 165, Ln. 17-20). Durham asked why, and Tavares indicated it was too time consuming. (Id., Ln. 22-25). Durham did not indicate to Tavares he would be disciplined for

failing to use fall protection. (Tr. 166, Ln. 3-7). Later while working on that same job, Field Service Manager Rodney Hodge visited Tavares and performed a safety survey. (GC 28). Tavares failed the safety survey because he failed to use fall protection, use safety glasses and a hardhat, and for his uniform; Hodge gave him no indication that discipline would result from incident. (Tr. 169, Ln. 22-24; *see also* GC 28). Tavares received the failed safety survey at the end of that day. (Tr. 169, Ln. 25-170, Ln. 8).

Oddly, Durham claimed he was not present during this incident (Tr. 521, Ln. 11-14), but this is inconsistent with the notation on the final warning that states "Installation Manager visited Jorge Tavares in the field . . . and the Installation Manager asked how the dish was accessed. Jorge replied that he had accessed the roof and admitted not using fall protection.' (GC 21, p. 1). Durham was the only Installation Manager at Farmers Branch at this time. (Tr. 543, Ln. 19-22). Durham's effort at evasion could be tied to the fact that Tavares had never been visited by both an Installation Manager and Field Service Manager on the same job. (Tr. 168, Ln. 6-10). In fact, Hodge had previously only visited Tavares on the job about once a month (Tr. 163, Ln. 17-20); however, after Tavares became a member of the bargaining committee, management began visiting him on the job once a week. (Tr. 1219, Ln. 14-220, Ln. 8).

The second incident referenced on the June final warning occurred on May 26th. Tavares was observed by Hodge not wearing his gloves, hardhat, or goggles. (Tr. 172, Ln. 3-5). Hodge asked where the PPE was and why Tavares was not wearing it and Tavares stated he had left it in the van because it slowed him down and he was behind with two more jobs to complete that day. (Id., Ln. 7-11). Hodge nodded his head and left Tavares working for an additional thirty minutes without his PPE. (Id., Ln. 15-24). Nothing in Hodge's manner indicated that Tavares would face discipline for this incident. Tavares believed the only thing at stake was a safety survey,

which is why he stated that Hodge could go ahead and fail him. (Tr. 238, Ln. 21-25). Tavares did not anticipate discipline because of the incident. (Tr. 239, Ln. 1-3).

The third incident occurred on June 2nd and resulted from a jobsite visit from Durham where he observed Tavares not wearing PPE. (Tr. 174, Ln. 1-8). Durham checked the dish mount and asked Tavares about his PPE. (Tr. 175, Ln. 2-5). Tavares told him the bump cap was in the truck because it had gotten sweaty. (Id., 7-11). Durham reminded Tavares he had to wear PPE. (Id., Ln. 13). Tavares grabbed his PPE as he and Durham went to connect the receivers. Id., 17-19). Durham's manner on June 2nd was no more severe than when he reminded Tavares to tuck-in his shirt. (Tr. 176, Ln. 25-177, Ln. 11). Durham did not indicate to Tavares anything would happen if he was found again without PPE or tell Tavares he was being warned. (Id., 20-25).

Tavares received his final warning disciplining him for the three incidents on June 3rd, about a week after he testified at the NLRB trial. (Tr. 177, Ln. 25; 179, Ln. 14-18). Despite Dish's contention that safety violations did not need to follow progressive discipline, the final warning notes that Tavares had previously been counseled about an unexcused absence on May 13th. (GC 21, p. 1; *see also* U 16). That previous counseling, however, was a final warning under the attendance policy maintained by Dish. (U 16; U 4, p. 1). Tavares was upset because the final warning gave him little chance to improve. (Tr. 178, Ln. 16-22). Tavares was scarred by the final warning and did not contact the Union or the Board because he feared such action would threaten his employment. (Tr. 180, Ln. 10-12). Tavares began wearing PPE so as to preserve his job. (Id., Ln. 13-15). A safety survey Tavares passed following the final warning indicates he was fully compliant with Dish's PPE and fall protection rules. (GC 29). Tavares

wore his headgear, safety goggles, and gloves in response to the final warning because he did not want to get fired. (Tr. 181, Ln. 11-18).

e. Tavares' Termination

Tavares participated in bargaining on July 28, 2011. (Tr. 182, Ln. 3-4; 183, Ln. 5). Tavares requested time for the bargaining from Durham a day or two before July 28th. (Tr. 183, Ln. 10-12). Tavares was terminated on July 29th when he received his termination notice dated July 27th. (GC 23). Tavares was terminated for an incident on July 23rd while he was installing a dish. Tavares was wearing his PPE and heard Durham approach. He raised his goggles onto the brim of his bump cap and titled his head to get a better look. As he tilted his head, his bump cap and goggles fell off. (Tr. 186, Ln. 1-2, 15-18). Durham testified that he handed Tavares the bump cap, but did not see it fall. (Tr. 523, Ln. 4). Tavares explained to Durham what happened, and his statement concerning the fallen bump cap was memorialized on the termination notice. (GC 23, p. 1). Tavares supplemented this statement in his own handwriting by adding he had on his gloves and the goggles were on the bump cap. (Id., p. 3).

IV. ARGUMENTS AND AUTHORITIES

***a. Tavares' Final Warning and Discharge Violate Sections 8(a)(1) and 8(a)(3) Under* Wright Line**

The evidence in this case establishes that the final warning and discharge of Tavares violate Section 8(a)(3) of the Act. In this case, the ALJ correctly found that a *prima facie* violation of Section 8(a)(3), but erred as a matter of law in finding that Dish had met its burden rebutting the *prima facie* case.

1. The Wright Line *Framework*

The Board analyzes an employer's motive for discipline or discharge under Wright Line, 251 N.L.R.B. 1083 (1980), *enf'd* 662 F.2d 899 (1st Cir.1981), cert. denied 455 U.S. 989 (1982);

see also NLRB v. Transp. Mgmt. 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 N.L.R.B. 1183, 1184 (2004); Embassy Vacation Resorts, 340 N.L.R.B. 846, 848 (2003).

Under the dual motive analysis of Wright Line, an employer violates Section 8(a)(3) if the evidence shows that the employee's union activity was a motivating factor in the employer's decision to discipline or discharge. T. Steele Constr., Inc., 348 N.L.R.B. 1173, 1183 (2006); Willamette Indus., 341 N.L.R.B. 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 N.L.R.B. at 1183; Willamette Indus., 341 N.L.R.B. at 562; Senior Citizens Coordinating Council, 330 N.L.R.B. 1100, 1105 (2000); Regal Recycling, Inc., 329 N.L.R.B. 355, 356 (1999).

To support an inference of unlawful motivation, the Board looks at factors such as "inconsistencies between the proffered reasons for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviations from past practice, and proximity in time of the discipline to the union activity." Robert Orr/Sysco, 343 N.L.R.B. at 1184. In this case, the timing of Tavares' discipline approximately one week after he testified at the Board trial and one day after he participated in bargaining supports finding an unlawful motive. McClendon Electrical Services, 340 N.L.R.B. 613, 613 n.6 (2003) (finding that the fact that a worker was fired the day after he

picketed supported the inference that he was fired for picketing); La Gloria Oil & Gas Co., 337 N.L.R.B. 1120, 1124 (2002)(finding that discipline imposed shortly after employer learned of concerted activity supported finding unlawful motive); Celotex Corp., 259 N.L.R.B. 1186 (1982) (discipline imposed soon after employee told supervisor that he planned to vote for union supported finding of unlawful motivation).

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 N.L.R.B. at 1105. Under this dual motive framework, an employer's burden is not met by showing that a legitimate reason factored into its decision; rather, the employer 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 Mfg., 323 N.L.R.B. 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 N.L.R.B. at 1089. Accordingly, it need not be proven that the improper motive was the sole motive of Respondent in disciplining Tavares, 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 stated 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." Transp. Mgmt. Corp., 462 U.S. at 393.

2. The ALJ Found a Prima Facie *Case under* Wright Line

In this case, the ALJ correctly found that a *prima facie* case was established under Wright Line. Tavares' significant Union activity was established by his role as the only bargaining unit

employee on the bargaining committee, his attendance of bargaining meetings March 29, 2011 and July 28, 2011, *immediately before Tavares was fired*, his testimony before a previous ALJ trial on May 23, 2011, *immediately before Tavares was placed on a final warning*, and Tavares' role in organizing Farmers Branch. (Decision, p. 10, lns. 41-44 (emphasis added)). The ALJ also found Dish was aware of participation in the bargaining and ULP trial, but in *dicta* described awareness of such significant Section 7 activity as "minimal." (Id., pp. 10, Ln. 45 – 11, Ln. 1). The ALJ then correctly inferred animus on the part of Dish based on the proximity of Tavares' service on the bargaining committee and participation in the ULP trial and his respective termination and discipline. (Id., p. 11, lns. 1-4). The ALJ erred in his Wright Line analysis by finding that Dish established its rebuttal burden under Wright Line and established it would have disciplined and discharged Tavares absent his protected activity.

3. Respondent's Anti-Union Animus Was Substantial

The ALJ correctly found that the animus present in this case met the Wright Line burden, but then erroneously characterized this animus as minimal. The animus in this case was not minimal, but substantial, based on the proximity of Tavares' discipline and discharge to his Section 7 activities, the evidence of specific animus against Tavares, and the fact that Tavares was the only employee disciplined for solely committing safety infractions.

A. The Nexus between Tavares' Section 7 Activities and his Discipline and Discharge Demonstrates Animus

Animus for purposes of Wright Line can be inferred, as the ALJ found, from the nexus between protected activity and the disciplinary action taken against an employee. (Decision, p. 11, lns. 1-4). The Board has found terminations that occur the day following the exercise of protected rights to be especially troubling and raising an inference of unlawful motive. McClendon, 340 N.L.R.B. at 613, n.6; La Gloria Oil, 337 N.L.R.B. at 1124. The Board has also

found discipline occurring two weeks after protected activities to create the requisite nexus to infer unlawful motive. St. Thomas Gas, 336 N.L.R.B. 711, 717 (2001); Metalite Corp., 308 N.L.R.B. 266, 272 (1992). Tavares' participation in the bargaining is a core Section 7 right protected under Section 8. Tavares' testimony in May 2011 was acting in concert with CWA and his coworker, Zamarron, when he testified about Dish's unlawful election campaign, and thus constituted protected, concerted activity under Section 7. U-Haul, 347 N.L.R.B. 375 (2006)(recognizing the Section 7 right of employees to participate in N.L.R.B. proceedings). Tavares also served on the bargaining committee the day before Dish discharged him. In this case, Tavares was disciplined approximately one week after he testified against Dish. Tavares was then terminated the day after he participated in bargaining. The proximity between his two steps of discipline and his testimony before the N.L.R.B. two weeks prior demonstrates an unlawful motive animating the imposition of Tavares' first and final warnings. As to Tavares' termination, Dish fired him the say after what was his last bargaining session. This vice-like evidence of animus is wholly contrary to the ALJ's conclusion that the animus in this case and that conclusion should therefore be overturned.

The nexus between Tavares' concerted activity and each incident of discipline leaves little to the imagination as to the motive of Dish. It might be plausible to think of this as coincidence if only one incident of discipline had coincided with Tavares' concerted activity. In this case, however, Dish cannot avail itself of such charity because both the discipline and the discharge follow on the heels of Tavares engaging in protected concerted activity.

B. The Fact that only Tavares was Terminated Solely for Safety Issues Demonstrates Animus

Tavares, as noted above and will also be argued below, was the only employee fired solely for safety issues. All other employees discharged during Gonzalez's tenure were fired in

part for safety issues and also because of other conduct such as customer property damage. Tavares' status as the employee member of the Union's bargaining committee and the only employee fired solely for failing to wear PPE demonstrates animus behind his termination. Rahn Sonoma Ltd., 322 N.L.R.B. 898 (1997) (suspension and discharge of union adherents for harassing fellow employees unlawful where other employees only received warnings for same conduct). The ALJ erred as a matter of law in discounting this evidence when he concluded that there was evidence of minimal animus in this case and that holding should be overturned.

C. Evidence of Specific Animus against Tavares

The evidence of a discriminatory motive is strong in the discipline and discharge of Tavares because of the prior conduct of Dish towards Tavares prior to the final warning and prior to Tavares' termination. Respondent disciplined Tavares on June 3rd, approximately one week after Tavares testified in the May 2011 trial. This prior discipline not only violates Section 8(a)(3), but also demonstrates specific animus towards Tavares as a supporter of CWA. Such specific animus against Tavares requires Respondent to show in its rebuttal case substantial evidence of a non-discriminatory reason for Tavares' discharge and Respondent cannot meet that burden based on the facts in evidence in this case. Bally's Park Place, Inc., 355 N.L.R.B. 1319, 1321 (2010)(citing Eddyleon Chocolate Co., 301 N.L.R.B. 887, 890 (1991)).

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 Tavares, had been the target of prior unlawful conduct by the employer in the form of warnings against discussing the union with coworkers. Bally's, 355 N.L.R.B. at 1321. In Tavares' case, the three prior PPE and fall protection warnings that he received simultaneously serve as the unlawful conduct he was subjected to prior to his discharge.

Additionally, Durham's peculiar interest in Tavares' bathroom habits and Tavares' satellite receivers, as recounted above, further illustrates specific animus against Tavares. 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 1321. Accordingly, the Board in this case should hold that Dish, in accordance with Bally's, had to meet a higher rebuttal burden because of the evidence of specific animus against Tavares. Dish cannot meet that heightened burden because of the proximity of Tavares protected conduct to his discipline and discharge and the fact that Tavares, the lone open Union supporter, was the only employee fired solely for safety issues. As will be argued below, that burden was not met in this case and the ALJ's decision as to the Section 8(a)(3) violation should be reversed.

4. Dish Applied the Safety Rules in a Discriminatory Manner to Discipline and Discharge Tavares

The ALJ erred in not finding that the safety rules were applied to Tavares in a discriminatory manner. Thompson testified that "safety was never a priority before the union started coming around." (Tr. 377, Ln. 7-8). Safety was encouraged, but it was never made near as big a deal before the union." (Tr. 388, Ln. 24-25). This testimony by a former manager reveals the specter of discriminatory enforcement of the PPE and fall protection rules by Dish. Discriminatory enforcement of a work rule can be the foundation for an unfair labor practice under Section 8(a)(3). NLRB v. Thermon Heat Tracing Servs., 143 F.3d 181, 186–87 (5th Cir. 1998). Such conduct constitutes the quintessential dual-motive case under Wright Line. Along the lines of that reasoning, prior imposition of more lenient discipline will also raise an inference of discriminatory motive. Consec. Sec., *325 N.L.R.B. 453 (1998)*.

Theiss' opposition to the Union was established by his testimony that he attributed the compensation system, the Quality Performance Compensation or "QPC", where employees are

paid by the job, to the presence of the Union. (Tr. 53, Ln. 15-17; 112, Ln. 18-24). Theiss' opposition to the QPC in the presence of Thompson and the implication it would cease with the removal of CWA led him to sign the decertification petition, (Tr. 53, 18-24; 56, Ln. 2-7), because Theiss believed the only way to go to a different pay scheme was to be nonunion. (Tr. 112, Ln. 23-24). Theiss' frequent criticism of the QPC to supervisors such as Thompson, including their discussion of a "revote" on the Union because of the QPC (Tr. 53, Ln. 18-24), identified Theiss to management as an opponent of the Union because of the association between the Union and the QPC at Farmers Branch. Rodriguez brought up decertification of the Union with Tavares, thereby establishing his opposition to the Union. (Tr. 158, Ln. 23-25). Thus, Theiss did not wear PPE and was observed by Durham not wearing PPE and Theiss was not disciplined; Rodriguez received a passing safety survey when he did not wear fall protection. These incidents occurred at the time Dish claimed it was beginning to impose discipline over safety issues and at the approximate time of Tavares' discipline and discharge and the more favorable treatment of Theiss and Rodriguez raises the inference that these rules were applied to Tavares in a discriminatory manner.

A. Dish Did Not Discipline Prior Failures to Wear PPE

Significant in regards to analyzing the discipline under the PPE policy is the fact that the evidence cited above shows that there was never any discipline for failing to wear PPE until Knightstep's April 20, 2011 final warning. (R 5). This suggests potential discriminatory enforcement of the rule as grounds to discharge Tavares. The only employee other than Tavares discharged for alleged violations of the PPE policy, Zack Hodges, was also terminated for damaging a customer's premises. (U 17). This distinction is significant because its shows that Zack Hodges is an inappropriate comparator for Tavares; it also shows that Tavares, a known

union supporter, is the only person to be solely fired for violating only the PPE policy. These facts create the inference that Dish took advantage of Tavares' belief that PPE and fall protection would not be used to discipline employees in order to issue the final warning. Dish then seized upon the happenstance of Durham catching Tavares working without his bump cap and goggles falling in order to justify his termination. Such policy violations were not used extensively to discipline employees in light of the significant testimony that PPE and fall protection were not used routinely at Farmers Branch. Dish seized on these instances as an opportunity to rid itself of the Union's bargaining representative and applied to PPE and fall protection rules in a discriminatory manner to discipline and discharge Tavares.

In conclusion, the ALJ's credibility finding as the circumstances of Tavares' bump cap and goggles falling should be addressed. The ALJ credited Durham's testimony that he believed Tavares' bump cap could not have fallen off, and thus the ALJ concluded that Tavares was intentionally working without his safety gear on July 23, 2011. (Decision, p. 7, lns. 10-22). This credibility determination is immaterial to the issues in this case. Tavares was the only person fired for solely not wearing safety equipment. That fact singles him out among the myriad of employees who failed to follow Dish safety rules before and after Tavares' termination without incident. The circumstances of July 23rd, like the May 26th statement by Tavares to fail him on a safety survey[3], were used by Dish to distract the ALJ from the simple, clear fact of this case that Dish singled-out Tavares for safety issues, and only safety issues, because of his union activities and participation in N.L.R.B. trial.

[3] As noted previously, Dish did not discipline employees for failing safety surveys and therefore Tavares did not expect discipline when he made the statement on May 26th.

B. The PPE Policy is "More Honored in the Breach than the Observance"

The Fifth Circuit has noted that employment action based on ostensibly legitimate work rules can violate the Act if the rule asserted by the employer is "more honored in the breach than in the observance." NLRB v. Turner Tool & Joint Rebuilders Corp., 670 F.2d 637, 639 (5th Cir. 1982). This principle addresses the phenomenon of employers selectively applying work rules in a discriminatory manner to persecute union sympathizers. This reasoning has bearing on Tavares' case because Tavares was solely terminated for (and the final warning and suspension were based in part on) allegedly violating the Dish's PPE policy.

The Fifth Circuit addressed the illegal employer tactic of selective, discriminatory enforcement of work rules in Thermon Heat. In that case, an employer applied a safety rule that prohibited employees from going to parts of the jobsite where they were not assigned to work in order to further the union's organizing campaign. The court noted that the lack of application of the rule to non-union employees and the inability of the employer to explain specifically how the rule was applied led the court to conclude that the application was discriminatory in nature and the employer had not met his burden under Wright Line. Thermon Heat, 143 F.3d at 187.

In this case, "more honored in the breach than in the observance" completely captures Dish's use of the PPE and fall protection Rules. Thompson testified that he often fabricated safety surveys to reflect an employee passing when the employee was out of compliance. (Tr. 349, Ln. 13-350, Ln. 18). Upwards of 25% of the time, Thompson would indicate that an employee was wearing PPE when the employee in fact was not wearing PPE. (Tr. 351, Ln. 14-22). Prior to April 2011, there is no evidence of prior discipline for not wearing PPE. Also, as previously noted, Tavares is the only employee to be fired solely for not wearing PPE. This

fact creates an inference that the PPE rule was applied in a discriminatory fashion to Tavares and supports finding that his discipline and discharge violated Sections 8(a)(1) and 8(a)(3) of the Act.

C. Respondent's Comparators Committed Dissimilar Acts from those of Tavares

The specific animus against Tavares that is present in this case requires Dish to meet the heightened rebuttal burden established by the Board in Bally's and Dish failed to meet that burden because its proffered comparators to show that it uniformly disciplined for safety violations committed acts of a nature different from those of Tavares. The employer's rebuttal in Bally's was based on its asserted "zero-tolerance policy" towards FMLA misuse and abuse. Bally's at 1321. This was no a written policy and there was no evidence of such a policy being announced to its employees. Id. 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 evidence, at best, 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. at 1322. 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.

In the case at bar, Respondent does not have in its employee handbook a specific policy stating that violations of the PPE would result in discipline (see GC 42, p. 16); rather, in order to justify Tavares' discharge, Dish's sole recourse in its handbook was to the catch-all provision stating employees could be disciplined for any violation of a Dish rule. (See GC 23, p. 1; GC 42, p. 16). Further, the comparator evidence presented by Dish does not provide any appropriate analogs to Tavares' conduct. As noted above, no other employee has been solely fired for violating the PPE policy. Zack Hodge was fired not only for not using fall protection, but also because he damaged a customer's roof, specifically causing the roof "to separate and raise part of the roof." (U 17, p. 1; *see also* Tr. 385, Ln. 6-7; 385, Ln. 24-386, Ln. 4). Zack Hodge had been given a final warning for safety issues, but that involved a ladder infraction not at issue in Tavares' case. (R 4). Eric Sutton was not even terminated for an issue related to PPE or fall protection; Sutton was terminated for not meeting a coaching plan, failed QAS inspections, having the incorrect tools, and, like Zack Hodge, causing customer damage. R 6, p. 1. Rylan Knightstep was issued a final warning for not wearing PPE, but he was not discharged for that conduct. (R 5).

This evidence shows that the one other person who was fired for failure to wear safety equipment, Zach Hodges for failing to wear fall protection, was not fired solely for that reason; there was also damage to the customer's property. The other discharge evidence offered by Respondent, the termination of Eric Sutton, did not even involve PPE or fall protection. Dish

cannot credibly argue that Knightstep's and Zack Hodge's final warnings show that it would have terminated Tavares. The history of Farmers Branch is that discipline was not used to enforce safety rules until the spring of 2011. The lax history that predates, and in the case of Sandone, postdates, Tavares' discharge casts doubt on whether Tavares would have been disciplined in the absence of his protected actions.

Dish's policies and comparators in this case are similar to those in Bally's in that Dish has failed to establish another case where it discharged an employee solely for violating the PPE policy. Dish also has not produced evidence of disciplining employees for failing to wear PPE prior to April 2011. Additionally, Dish has no policy expressly stating PPE violations *would* result in discipline, only, as discussed below, that they *could* result in discipline. As to fall protection, Dish's policy is to issue a final warning for violating that policy (see GC 37, p. 2, ¶ 7.2.2.3), but that rule is undermined by the practice at Farmers Branch that allowed safety infractions to go without disciplinary action. Further, any reliance on these rules is undermined by the evidence discriminatory enforcement, as discussed above.

D. The Employer Has Only Shown that It Could, but Not Would, Have Disciplined Tavares and Therefore Tavares' Discipline and Discharge Are Discriminatory

The ALJ further erred by not finding discrimination against Tavares because the evidence established as a matter of law only that Dish could, but not would, discipline for safety infractions. In a dual motive case, as discussed above, Wright Line requires proof that the employees' union activity was a motivating factor in the Employer's action against the employee. Once this initial showing is made, the burden then shifts to the employer to prove as an affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. Willamette Indus., 341 N.L.R.B. 560, 563 (2004); Avondale

Indus., 329 N.L.R.B. 1064, 1066 (1999). The Board's precedents recognize that it is insufficient for an employer to show that it could have disciplined an employee; it must show that it would have disciplined an employee. Yellow Enter. Sys., Inc., 342 N.L.R.B. 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 Indus., 304 N.L.R.B. 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."). In this case, the long history of not enforcing PPE and fall protection rules at Farmers Branch through discipline and the disparate treatment vis-à-vis Theiss and Rodriguez shows that Dish could have disciplined and discharged Tavares based on its policies, but it would not have done so but for Tavares' concerted actions.

Respondent has not historically disciplined or discharged employees for failing to wear PPE or use fall protection. The evidence shows that it first issued discipline for PPE violations in April 2011 and Tavares was first written up for violating the policy on June 3, 2011. Respondent might have established that it could discharge employees for failing to wear PPE, but it did not establish as required under Wright Line that it would have terminated Tavares for failing to wear PPE. Yellow Enter. Sys., 342 N.L.R.B. at 805 (noting that an employer does not meet it Wright Line burden when it presents "no evidence that it had consistently discharged employees for similar offenses."). No other employee has been solely fired solely for not wearing PPE. Further, Dish management did not discipline Theiss for failing to wear PPE or Rodriguez for not using fall protection, which supports finding that Dish could, but not would

have, disciplined Tavares. Dish proving only that it could but not would have disciplined and discharged Tavares does not meet its burden under Wright Line.

E. Tavares Was Subject to Disparate Treatment, and Thus Discrimination, because No Other Employee has been Terminated Solely for Not Wearing PPE

Disparate treatment of employees can also be used to show an employee was discriminated against because for her or his support for the Union. New Haven Register, 346 N.L.R.B. 1131, 143 (2006)(inconsistent treatment of disciplinary infractions supports finding a violation of Section 8(a)(3)); Watkins Eng'rs & Constructors, Inc., 333 N.L.R.B. 818 (2001) (employer's exclusion of all union adherents from hiring list, while inclusion of all other applicants evidence of union animus); Rahn Sonoma Ltd., 322 N.L.R.B. 898 (1997) (suspension and discharge of union adherents for harassing fellow employees unlawful where other employees only received warnings for same conduct); Pikeville United Methodist Hosp. v. NLRB, 109 F.3d 1146 (6th Cir. 1997) (suspension and discharge of union supporter for leaving premises to run an errand without clocking out was unlawful where other employees not disciplined for same conduct); Nursing Center at Vineland, 314 N.L.R.B. 947(1994) (warning issued to union activist LPN for soda can on cart, violation, where other LPNs had not received warnings for same conduct); Int'l Metal Co., 286 N.L.R.B. 1106 (1987) (employer unlawfully discharged employee who engaged in protected activity for reckless driving where others with reckless driving records had been retained); Justak Bros. & Co. v. NLRB, 664 F.2d 1074 (7th Cir. 1981) (discharge for failure to answer electronic page quickly enough pretextual because there was no evidence that the employer had ever treated this infraction as a dischargeable offense); Galar Indus., Inc., 239 N.L.R.B. 28 (1978) (violation for discharges for poor work when other poor workers had not been discharged).

The evidence shows that Tavares was fired solely for violating the PPE policy and he was the only employee fired for just violating the PPE policy. Theiss and Rodriguez were both did not wear PPE and fall protection, respectively, were observed doing so by management, and neither of them received any discipline. The other safety policy termination, Zack Hodge for failing to use fall protection, caused damage to a customer's property and is therefore, as discussed above, not an appropriate comparator for Tavares. The evidence of disparate treatment in the enforcement of PPE and fall protection rules in this case leads to the conclusion that Tavares' discipline and discharge violate Sections 8(a)(1) and 8(a)(3).

F. Dish Did Not Attempt to Rehabilitate Tavares

The ALJ characterized the final warning as an effort at rehabilitating Tavares because it afforded him a warning and opportunity to correct his behavior rather than disciplining him three separate times for three separate incidents. (Decision, p. 11, lns.. 14-19). The ALJ's reasoning on this issue loses the forest for the trees. Dish had previously never applied positive discipline to Tavares for safety infractions. Discipline, as the ALJ found, had been lax at Farmers Branch until Gonzalez began rigidly enforcing safety policies. (Decision, pp. 3, Ln. 25 – 5, Ln. 14). Tavares had no knowledge that he could be subject to positive discipline such as a final warning until he was given the June 3. The imposition of the final warning in this manner deprived Tavares of a first warning and the traditional two opportunities under Dish's progressive discipline policy for employees to correct their behavior. Thus, rather than affording Tavares an opportunity to improve his behavior, Dish's June 3rd final warning actual cost Tavares a bite a the proverbial rehabilitation apple.

Dish's decision on June 3, 2011 to discipline Tavares for three instances of misconduct that occurred over an approximate two week period also demonstrates that Dish building a case

to support Tavares' termination rather than correct unsatisfactory employee. The Board has previously recognized that such conduct demonstrates an unlawful motive on the part of an employer because an employer motivated by a desire to correct and improve employee conduct would promptly discipline rather than allow an employee the opportunity to improve his conduct. Bus.Prods.-Div. of Kidde, Inc., 294 N.L.R.B. 840, 850-51 (1989).

Finally, as argued above, Dish's sole reason for disciplining Tavares for the alleged safety infraction was because of his union support. Therefore, for purposes of determining whether Section 8(a)(3) was violated, the fact that Dish could have acted in a more blatant manner, as the ALJ noted in his decision, does not mean that Dish did not violate the Act as a matter of law based on the facts found by the ALJ. Dish did not take serious remedial action to benefit Tavares, it simply violated the NLRA.

b. Respondent's Discipline of Tavares is Unlawful under Sections 8(a)(1) and 8(a)(3) because Respondent's Proffered Reason is a Pretext

The ALJ erred as a matter of law by failing to find Dish's proffered reason for disciplining Tavares, enforcement of safety rules, was a pretext. An employer's proffered reason for discipline is a pretext and violation of the Act for purposes of Section 8(a)(3) when the proffered reason for discipline does not in fact exist or was not in actuality the reason for an employer's actions. Rood Trucking Co. 342 N.L.R.B. 895, 897-98 (2004); Golden State Foods Corp., 340 N.L.R.B. 382, 385 (2003); La Gloria Oil, 337 N.L.R.B. at 1124. The Board has held that when an employer's proffered lawful reason does not exist or was not relied on by an employer, this alleged reason is deemed a pretext, the dual motive analysis is unnecessary, and the discipline imposed is unlawful because "If no legitimate business justification for the discharge exists, there is no dual motive, only pretext." La Gloria Oil, 337 N.L.R.B. at 1124 (citing Talwanda Springs, Inc., 280 N.L.R.B. 1353, 1355 (1986)). In La Gloria Oil, the

employer claimed it fired union supporters because of their driving violations, yet it had never done so in the past. Id. Also, the employer had only disciplined one other employee and did not permit the discriminatees the opportunity to explain their conduct. Id.

In this case, the evidence shows that at the approximate time of Tavares' discipline and discharge, Theiss and Rodriguez, both known union opponents, were not disciplined for failing to wear PPE and using fall protection, respectively, despite being observed by management as discussed above. These facts were noted by the ALJ in reaching his decision. (Decision, p. 3, lns. 27-35). The ALJ further found that Tavares credibly testified that safety rules were not enforced and not followed. (Id., lns. 37-39). Further, Dish had a long history of not disciplining PPE and fall protection violations prior to Tavares' discharge as recounted above by Thompson, Gonzalez, Durham, Tavares, and Theiss.

The ALJ proceeded to err as a matter of law in his discussion of Gonzalez's renewed enforcement of safety rules. (Id., p. 4, Ln. 6-p. 5, Ln. 14). The totality of these facts suggest as a matter of law that the safety rules advanced by Dish to justify Tavares' discipline and discharge are pretexts. The ALJ's table depicting the increase in terminations from the first quarter of 2011 to the first quarter of 2012 sweeps too broadly and misses the fine point that, as discussed above, Tavares was alone among all the discharges in this period as the only person terminated solely for safety infractions.

Dish's return to not disciplining safety infractions after Tavares' discharge also supports finding that enforcement of safety rules was a pretext for Tavares' termination. Farmers Branch returned to its old practice of not disciplining PPE infractions in 2012. Arthur Sandone failed to wear his protective eyewear on March 16, 2012. (See U 18, March 16, 2012 Sandone Field Engagement Review). Sandone was advised in that document on wearing PPE equipment. (Id.).

Sandone again failed to wear protective eyewear on March 21, 2012, and was again advised that he "must . . . wear all PPE. Not wearing safety goggles while using tools." (Id., March 21, 2012 Sandone Field Engagement Review). Sandone was once again observed without protective eyewear on March 31, 2012. (Id., Sandone March 31, 2012 Field Engagement Review). Gonzalez testified that Sandone has never been disciplined for any of these instances of failing to wear PPE. (Tr. 509, Ln. 14-510, Ln. 18; 514, Ln. 24-515, Ln. 6).

If safety was such a concern as Gonzalez and Durham testified, why did it apparently become lax in 2012? Why were safety infractions subject to discipline in 2011, but not 2012? Why was Sandone's conduct excused while Tavares' conduct resulted in his discharge? The treatment of Sandone suggests that Dish has reverted to its prior posture of not disciplining safety violations. As such, its proffered reasons for Tavares' final warning and termination, the enforcement of safety rules, is a pretext in light of Dish's not disciplining safety rules in the past, at the approximate time of Tavares' discipline and discharge, and after Tavares' was gone. There is no dual motive in this case, merely Dish's pretext that its concern for safety motivated its discipline and discharge of Tavares. The evidence in this case established as a matter of law that safety was merely a pretext for disciplining and discharging Tavares because safety was not a concern before Tavares testified before the Board, and was subsequently disciplined, and it was not a concern after Tavares was fired the day after he attended what was to be his last bargaining session. The ALJ erred in not finding as a matter of law that Dish's proffered safety concerns were a pretext and, as such, failed to meet its burden under *Wright Line.* Approved Electric Corp., 356 N.L.R.B. No. 45 (slip op.) at 3 (2010); Austal USA, LLC, 356 N.L.R.B. No. 65 (slip op.) at 2 (2010). Tavares' discipline and discharge for safety infractions are thus unlawful under Sections 8(a)(1) and 8(a)(3) of the Act because Dish has no legitimate business justification for

such actions. Accordingly, the Board should reverse the ALJ on this issue and find Dish's safety concern a pretext and Tavares' discipline and discharge unlawful under the Act.

c. Tavares' Discipline and Discharge Violate Section 8(a)(4)

In the alternative or in addition to the reasons advanced above, the ALJ also erred by not finding Tavares's discipline and discharge to violate Section 8(a)(4). (Decision, pp. 11, Ln. 30 – 12, Ln. 2). Section 8(a)(4) protects the right of an employee to participate in Board investigations. Caterpillar, Inc., 322 N.L.R.B. 674 (1996) (discharge for assisting union in Board proceeding violates Section 8(a)(4)); Yenkin-Majestic Paint Corp., 321 N.L.R.B. 387 (1996) (written reprimand to employee for leaving work without permission, where employee left work because he was under subpoena to attend hearing in federal district court on general counsel's action seeking injunctive relief against employer's alleged unfair labor practices violates Section 8(a)(4)); Vasaturo Bros., Inc., 321 N.L.R.B. 328 (1996) (transfer to undesirable shift because employee served as union's election observer, violates 8(a)(4)); Nat'l Surface Cleaning v. NLRB, 54 F.3d 35 (1st Cir. 1995) (discharge because of employer's belief that employees would provide corroborative testimony before Board violated the Act); Pillsbury Chem. & Oil Co., 317 N.L.R.B. 261 (1995) (discharge for furnishing affidavits to N.L.R.B. unlawful); Sportsman's Service Center, 317 N.L.R.B. 195 (1995) (discharge for calling N.L.R.B. unlawful); Vokas Provision Co., 271 N.L.R.B. 1010 (1985) (discharge of employees for leaving work early to attend a Board hearing without being served with subpoenas violated Section 8(a)(4) since subpoenas were waiting for the employees at the Board's regional office).

The Board applies the elements established in Wright Line to determine if conduct violates Section 8(a)(4). Intermet Stevensville, 350 N.L.R.B. 1270, 1324 (2007); Verizon, 350 N.L.R.B. 542 (2007); American gardens Management Co., 338 N.L.R.B. 644, 645 (2002);

Taylor & Gaskin, Inc., 277 N.L.R.B. 563, fn. 2 (1985). Accordingly, CWA hereby incorporates all of its above arguments concerning Section 8(a)(3) in support of proving that Dish's discipline and discharge of Tavares violated Section 8(a)(4) as well as, or in the alternative, violated Section 8(a)(3). In regards to the application of Wright Line in 8(a)(4) charges, the Board has noted that its

> [A]pproach to this provision 'has been a liberal one in order to fully effectuate the section's remedial purpose.' General Seervices, 229 N.L.R.B. 940, 941 (1977), relying on NLRB v. Scrivener, 405 U.S. 117, 124 (1972). Such an approach is consistent with the Court's acknowledgement that the initiation of a Board proceeding effectuates public policy and, therefore, through Section 8(a)(4), 'Congress has made it clear that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board.' Metro Networks, 336 N.L.R.B. 63, 66 (2001)(quoting Nash v. Florida Industrial Commission, 389 U.S. 235, 238 (1967)).

Tavares testified in the May 2011 trial and his testimony was relied on to find Dish had violated Section 8(a)(1). Dish, 358 N.L.R.B. No. 29, at slip 7. Most important to the Section 8(a)(4) analysis of the nexus between his activities in aid of Board processes and his discipline, Tavares was not disciplined for the May 2011 PPE incidents until June 3rd, after he testified at the Board trial. This proximity between his testimony and being placed on a final warning, coupled with the disparate use of the PPE policy in his case to discipline and terminate him buttresses the burden-shifting analysis under Section 8(a)(4) that Tavares was disciplined and terminated because he sought to exercise his rights under the Act to participate in an unfair labor practice trial. Dish should be found to have violated Section 8(a)(4) by disciplining and discharging Tavares. The ALJ concluded otherwise by relying on his reasoning as to why Tavares' discharge did not violate Section 8(a)(3). That decision should be overturned and Dish should be held to have violated Sections 8(a)(1) and 8(a)(4) of the Act by disciplining and discharging Tavares for participating in Board proceedings.

V. CONCLUSION AND PRAYER

For all of the above and foregoing reasons, Charging Party Communications Workers of America Local 6171 prays that the National Labor Relations Board grant these exceptions to the November 14, 2012 decision by Administrative Law Judge Robert Ringler and hold that Respondent Dish Network violated Sections 8(a)(1), 8(a)(3), and 8(a)(4) of the National Labor Relations Act by disciplining and discharging Jorge Tavares, that Respondent be ordered to reinstate and make Tavares whole for any losses he suffered as a result of the unlawful discipline and discharge, and that Tavares and Charging Party CWA Local 6171 be granted all other relief that they are entitled to at law or in equity for the violations of law raised in these exceptions.

Respectfully Submitted,

DAVID VAN OS & ASSOCIATES, P.C.
1016 La Posada, Suite 145
Austin, TX 78752
(Tel.) 512-452-8683
(Fax) 512-452-8684

/s/ Matt Holder
Matt Holder
Texas State Bar No. 24026937
Email: matt@vanoslaw.com

COUNSEL FOR CHARGING PARTY CWA LOCAL 6171

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was served on Counsels for the General Counsel and Counsel for Respondent by electronic mail on this 28th day of December 2012:

Mr. Art Laurel
Mr. David Foley
Attorneys, National Labor Relations Board, Region 16
819 Taylor Street, Room 8A24
Ft. Worth, TX 76102-6178
Email: Arturo.Laurel@nlrb.gov
David.Foley@nlrb.gov

Mr. George Basara
Buchanan Ingersoll & Rooney, P.C.
One Oxford Centre
301 Grant Street, 20th Floor
Pittsburgh, PA 15219-1410
Email: george.basara@bipc.com

/s/ Matt Holder
Matt Holder