

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

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

**CHARGING PARTY COMMUNICATIONS WORKERS OF AMERICA LOCAL 6171'S
REPLY TO DISH NETWORK CORPORATION'S ANSWERING BRIEF**

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COMES NOW Charging Party Communications Workers of America Local 6171 (“Charging Party” or “Local 6171” or “the Union”) and files pursuant to Section 102.46(h) of the Rules and Regulations of the National Labor Relations Board (“NLRB” or “the Board”) this Reply to Answering Brief filed by Respondent Dish Network Corporation (“Dish” or “Respondent”), and would respectfully show the Board the following:

I. Dish Threatened Employees with the loss of Their Rights Provided by 29 U.S.C. § 159(a), Section 9(a) of the Act.

It is undisputed that Dish distributed to employees at both Farmers Branch, Texas and North Richland Hills, Texas a document entitled “9 Points You Should Know Before You Sign This Petition & 9 More Points You Should Know Before You Vote.” (Exhibit GC 15). That document states “If a workplace is Union, you have to go to Steward with your complaints” and that the steward, not the employee, decides if they are brought to management and therefore the steward “controls your fate, not you.” (Id., p. 3, ¶ 9). That document was admitted into the record of this case with “no issue with regard to authenticity.” (Tr. 42, Ins. 15-16, 21). Further, Charles Cook testified that during the election campaign Respondent’s representatives stated,

“You won't be able to come to us with any complaints, you know, because we can't do anything without the union.” (Tr., p. 64, lns. 17-19). The statements in Exhibit GC 15 and Cook's testimony plainly contradict Respondent's assertion that it “did not tell employees that they would be prohibited from bringing their concerns to management.” (Respondent's Answering Brief (“Answer”), p. 1). Moreover, the Administrative law Judge (“ALJ”) made no factual findings contrary to Charging Party's position regarding this exception.

The ALJ identified the language at issue (ALJ Decision (“Decision”), p. 2, lns. 44-45) and then made the legal conclusions, in relevant part, that the statement contained no threat and “correctly points out that the Union decides which grievances **it** wishes to pursue.” (Id., lns. 47-50)(emphasis added). The critical failing of the ALJ's legal analysis on this issue is that the Respondent's statement asserted that “If a workplace is Union, you have to go to your Steward with your complaints.” (Exhibit GC 15, p. 3, ¶ 9). The issue being communicated was not, as the ALJ concluded, that the union would decide what issues the union would bring to the employer; rather, what was communicated to employees, is that they would be required to go to a steward to seek redress for any workplace issue. This statement completely circumvents Section 9(a)'s proviso that permits employees to bring grievances to their employer “without intervention of the bargaining representative.” 29 U.S.C. ¶ 159(a).

If Exhibit GC 15 stated language along the lines of “the union decides what grievances the union will bring to the company,” then the ALJ's reasoning and legal conclusions would be arguably correct. That hypothetical language, however, is not present in Exhibit GC 15, or in Cook's testimony; instead, employees are told that a vote for Local 6171 would mean they would lose a statutory right guaranteed by the Act. An employer statement “constitutes **a threat** to employees that selection of the union would result in the loss of an existing benefit, namely the

right under the Section 9(a) proviso,” when an employer tells its employees they will lose the ability to bring complaints directly to management if they select a labor organization as a representative for the purpose of collective bargaining. *Armstrong Cork Co.*, 250 NLRB 1282 (1980)(emphasis added).

The Board subsequently overruled *Armstrong Cork* in *Tri-Cast, Inc.*, 274 NLRB 377 (1985) when it held “There is no threat, either explicit or implicit, in a statement which explains to employees that, when they select a union to represent them, the relationship that existed between the employees and the employer will not be as before.” *Tri-Cast*, 274 NLRB at 377. However, the simplicity of *Tri-Cast*’s logic overlooks the policy reasons noted by the Board in *Armstrong Cork* that are as relevant today as they were when Board decided *Armstrong Cork*. Section 9(a) expressly imbues employees with the right to present grievances to an employer without interference from their collective bargaining representative. 29 U.S.C. § 159(a). “Employees thus retain the right with certain limitations to present grievances to their employer.” *Armstrong Cork*, 250 NLRB at 1282. The Board in *Armstrong Cork* went on to state, “The extent to which the Act has preserved this right in the collective bargaining process **is a matter of great concern to employees.**” *Armstrong Cork* at 1282. The concern noted by the Board, that employees retain autonomy when they have selected a union to represent them for purposes of collective bargaining is salient in today’s labor and political climate where unions are derided as a vestige of a nanny state that inhibits employee free choice rather than effectuates it.

Employer statements that underscore a loss of individual autonomy where in fact there is no such loss thus constitute a threat to deprive employees of rights guaranteed by the Act under Section 9(a). Such statements are both misleading as to the effect of unionization and a threat to deprive employees of Section 7 rights too collectively as a group present a grievance without the

intervention of a union as well as the right to refrain from presenting a grievance through a union. Such threats of the loss of employee rights, specifically those under Section 9(a), are as likely to interfere with employee exercise of Section 7 rights as well as interfere with employee union activities as other threats concerning changes to working conditions if a union is selected, such as threats that an employer would not longer be able to permit shift switching if employees voted for a union. *Flagstaff Medical Center, Inc.*, 357 NLRB No. 65, 2011 NLRB LEXIS 477, *25-26 (2011).

In conclusion, the Board should sustain Charging Party's exception on this issue and either distinguish or overturn *Tri-Cast*. The exception to the general rule that threats of deprivations of employee rights violate Section 8(a)(1) created by *Tri-Cast* should be narrowed or overturned so as to prevent employer interference with employee free choice as to a collective bargaining representative by misleading employees as to their rights in a unionized workplace. Dish crossed the line created by Section 8(a)(1) when it threatened employees with the loss of the ability to bring grievances and complaints to management if the employees voted for Local 6171. Accordingly, the Board should find Respondent's conduct in this regard violated Section 8(a)(1) of the Act.

II. The Discharge of Charles Cook Violated Section 8(a)(3).

Contrary to the assertion of Respondent in its Answer, Local 6171's exception concerning the discharge of Cook does not seek to overturn the factual findings by the ALJ concerning Cook's discharge. The issue raised by CWA in its exception on this issue is the legal conclusion reached by the ALJ that Cook's discharge did not violate the Act and would have occurred "not with standing his union activity." (Decision, p. 10, lns. 19-20). This holding by the ALJ is especially problematic in light of Cook's earlier discipline for allegedly violating

Respondent's tool policy; discipline that the ALJ found to violate Section 8(a)(3) and under Board precedent supports finding a violation of Section 8(a)(3) because it shows specific animus against Cook *himself* as a Union supporter. See *Bally's Park Place, Inc.*, 355 NLRB No. 218, 2010 NLRB LEXIS 384, *12-13 (2010).

a. *The Board's Decision in Bally's.*

In *Bally's*, an employee had been the target of prior unlawful conduct by the employer in the form of warnings against discussing the union with coworkers. *Bally's* at *12-13. This fact pattern is analogous to Cook's unlawful discipline for allegedly violating Respondent's tool policy. 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*¹ to show that it would have disciplined the employee absent his prior, protected conduct and that the employer failed to meet that burden. *Bally's* at *13.

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

¹ *Wright Line*, 251 NLRB 1083, 105 LRRM 1169 (1980), *enf'd* 662 F.2d 899 (1st Cir. 1981)

The employer's evidence in *Bally's* only established that it "had a practice of terminating employees who fraudulently requested or extended FMLA leave, i.e., telling [the employer] that they required leave to fulfill family responsibilities or out of medical necessity and then using the leave for a completely different purpose. *Id.* *14-15. The Board found these cases completely dissimilar to the discharge before it in *Bally's* because the unlawfully discharged employee

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

As shown below, the facts in this case concerning Cook's discharge are analogous and likewise support finding that Cook's discharge violated Section 8(a)(3).

b. Cook's Case is Analogous to Bally's and Distinct from past Incidents.

There are numerous similarities between Cook's the discharge and the discharge in *Bally's*. Respondent, like the employer in *Bally's*, does not have in its employee handbook a zero tolerance policy against violence in the workplace. While Dish contends otherwise in its Answer, the facts established at the hearing show otherwise. Barbara Ward, Dish's Human Resources representative, testified at one point in the trial that Dish had a zero tolerance policy against violence in the workplace. (Tr., p. 365, lns. 8-10). However, under cross examination, Ward conceded that Dish's Employee Handbook, which contained Dish's disciplinary policy, did not contain a policy expressing zero tolerance for violence in the workplace. (Id., p. 366, lns. 6-8). In fact, Ward conceded that Respondent uses discretion in determining how to discipline employees for perceived infraction. (Id., lns. 15-17).

Further, the comparator discharge cases relied on by Respondent to show it would have discharged Cook in the absence of his protected activity can be distinguished from the facts of

Cook's case. Respondent fired employees for altercations. (See Exhibits GC 29, GC 30). Respondent has also discharged employees who have made threats of physical violence in the context of a racist tirade. (See Exhibit GC 31). Respondent has also previously discharged employees for making threats and physically intimidating other employees. (See Exhibit GC 32). These comparators, like those relied on by the employer in *Bally's* concerning FMLA abuse, can be distinguished from Cook's conduct. The ALJ found that there was no fight or altercation between Cook and Leslie (Decision, p. 10, ln. 18). There was no animosity between Leslie and Cook. Cook had an excellent working relationship with Leslie. (Tr., p. 85, lns. 20-25). Cook even went so far as to talk to Leslie once to make sure he understood that Cook's differences with Dish's policies did not impact how he thought of Leslie. (Tr., p. 85, lns. 14-23).

Rex Leslie testified that the incident was more insulting to him than injurious. (Tr. 446, lns. 19-24). This is consistent with what Leslie told Ward after the incident. (Tr. 293, lns. 13-19). Ward's testimony recounted that Leslie's written statement recounted that the redness on his face following the incident was as likely a result of embarrassment rather than the physical contact itself. (Tr. 292, lns. 13-16). Further, Leslie did not feel threatened by the incident because he made a joke about it afterwards, as noted in the statement he provided Respondent, that it could cause him to go deaf. (See Exhibit Respondent 5; see also Tr. 415, lns. 3-8). Additionally, the Board agents observing the election joked about it. (Tr. 403, lns. 4-15; see also Exhibit R 5 and Tr. 415, lns. 9-14 (wherein Ward recounts that Leslie's written statement concedes the Board agents might have been joking)).

As a matter of law, however, the ALJ failed to properly weigh the significance of these distinctions from the comparator cases and the particulars of Cook's conduct. The lack of a zero tolerance policy and the distinctions between Cook's conduct and the conduct in the prior

instances of discipline does not establish that every instance of physical contact between employees would result in discharge. *Bally's* at *15. As such, Respondent failed to carry its burden under *Wright Line*.

c. *The Absence of a Zero Tolerance Policy is Relevant to Cook's Case.*

The absence of a credible zero tolerance policy towards violence in this case is critical to the *Wright Line* analysis for Cook's discharge. Under the *Wright Line*, Counsel for the General Counsel must establish that the employees' union activity was a motivating factor in the Employer's action against the employee. That burden is met by proving union activity on the part of employees, employer knowledge of that activity, and antiunion animus on the part of the employer. *Willamette Industries*, 341 NLRB 560, 562 (2004). 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*, 341 NLRB at 563.

The Board has held that an employer's failure to discipline prior infractions, See *La Gloria Oil and Gas Co.*, 337 NLRB 1120, 1124 (2002), or provide notice of the possibility of discipline in its handbook, supports finding a discharge to be discriminatory under Section 8(a)(3) of the Act. See *Yellow Enterprise Systems, Inc.*, 342 NLRB 804, 805 (2004)(noting that an employer does not meet its *Wright Line* burden when it presents "no evidence that it had consistently discharged employees for similar offenses. The evidence consists solely of the Respondent's after-the-fact, self-serving assertion that it would have discharged McKinney for a reason that it knew about at the time, but never mentioned. This is insufficient to establish the Respondent's affirmative defense."). Here, the evidence does not establish that every violation

of respondent's policy against violence results in discharge, which subjects employees so accused to the possibility caprice at the hands of Respondent

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 Enterprise Systems, Inc.*, 342 NLRB at 805 (holding that "an employer must establish not merely that it could have discharged the employee for legitimate reasons, but also that it actually would have done so, even in the absence of the employee's protected activity."); *Structural Component Industries*, 304 NLRB 729, 730 (1991)(Rejecting the respondent's *Wright Line* defense because "In short, the Respondent has shown, at most, that it could have discharged Delgado for his alleged misconduct. It has not established, through credible testimony, that it would have discharged Delgado in the absence of union activities."). In this case, the absence of a zero tolerance policy and the distinctions between Cook's one act of physical contact and the altercations present in the comparator cases presented by Respondent establish only that Dish could have fired Cook, not that it would have fired Cook.

Additionally, the distinctions between Cook's conduct and the comparator cases shows that Cook's discharge was disproportionate to the offense he committed by making physical contact once with Leslie. The Board has held that punishment disproportionate to the offense raises an inference that the employee was disciplined in violation of Section 8(a)(1). *Optica Lee Borinquen, Inc.*, 307 NLRB 705, 714 (1992). Further, a violation of the tool policy itself does not necessitate discipline or termination, which renders the Employer's decision to discharge Laird on this ground suspect. *Teledyne Advanced Materials*, 332 NLRB 539, 540 (2000)(Recognizing that where employer policies do not require discharge for every species of offense, employer cannot establish that employee would be terminated for that conduct alone

absent protected union conduct). In this case, Cook's physical contact was distinct from prior instances relied on by Respondent in that it did not involve a fight between employees or threats of escalating violence. Further, the policy in question only states that "certain types of employee behavior s cannot be tolerated and may be serious enough to warrant either a suspension or termination of employment." (Exhibit Union 1, p. 16)(emphasis added). That fact is analogous to *Teledyne Advanced Materials*, where the Board found that a an employer policy stating insubordination may lead to discipline did not satisfy the employer's burden under *Wright Line*. *Teledyne Advanced Materials*, 332 NLRB at 540. Accordingly, contrary to the assertions of Respondent in its answer, Cook would not have been fired in the absence of his union activity and the judge erred in recommending dismissal of the 8(a)(3) allegation concerning Cook's discharge.

III. Conclusion.

For all of the above and foregoing reasons, Charging Party Communications Workers of America Local 6171 prays the National Labor Relations Board sustain its exceptions and find Respondent Dish Network Corporation to have violated Section 8(a)(1) of the National Labor Relations Act by threatening employees with the loss of their ability to bring grievances to the employer if they unionized and violated Section 8(a)(3) by discharging Charles Cook.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was served on Counsel for the General Counsel and Counsel for Respondent by electronic mail on this 5th day of October 2011:

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