UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 29

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| DISH NETWORK CORPORATION, | ) | |
| | ) | |
| Respondent | ) | |
| | ) | Case No. 29-CA-30578 |
| and | ) | 29-CA-30583 |
| | ) | |
| COMMUNICATION WORKERS OF AMERICA, LOCAL 1108, | ) | |
| | ) | |
| | ) | |
| Charging Party. | ) | |

**DISH NETWORK CORPORATION'S**
**REPLY TO GENERAL COUNSEL'S EXCEPTIONS**

DISH Network Corporation ("DISH") hereby files the following Reply to the General Counsel's Exceptions, and states the following:

## RESPONSE TO EXCEPTION A

### The Administrative Law Judge ("ALJ") Gave Proper Consideration to Prior Cases Against Respondent.

Counsel for General Counsel ("CGC") maintains that ALJ Raymond P. Green ("ALJ Green") erred by failing to discuss prior cases in the context of Union animus. (CGC Brief at p. 21; Exception A.) It is important to note that CGC fails to cite any case law which requires an ALJ to engage in such a discussion as part of his decision-making process.

Further, it is clear that ALJ Green considered the prior cases against Respondent as he specifically referenced those cases at the beginning of his Decision. (ALJ Decision ("ALJD") 2.) He also took judicial notice of these decisions during the hearing for the purpose of the establishment of Union animus (Hearing Transcript ("H.T.") p. 13, line 2), and admitted that CGC established "some degree" of animus based on the previous Board decisions. (H.T.) p. 96, lines 18-24.)

The fact is that ALJ Green did consider CGC's "animus" argument, but simply did not agree that a couple of old decisions dating back to 2003 and 2006 justified the conclusion that anti-union animus played any part in Respondent's decisions regarding Mr. Ryals' termination or stack rank bonuses in 2010. Thus, ALJ Green acted well within his right as a decision-maker when he did not credit CGC's argument. Indeed, if CGC believed this argument to be a lynch-pin of her case, she should have made that point at trial. She did not. All that she requested at the hearing was that judicial notice be taken. ALJ Green agreed to do so. She offered no evidence at trial that actually tied the prior conduct to the instant case. Thus, it should have come as no surprise to CGC that ALJ Green did not find that union animus was a factor in Respondent's decision-making process. ALJ Green did not commit a reversible error.

## RESPONSE TO EXCEPTION B

### ALJ Green Correctly Concluded That Certain Statements Were Made Well Outside the 10(b) Period. The ALJ Also Has No Legal Obligation To Consider Such Statements As Evidence Of Union Animus.

ALJ Green properly found that certain statements allegedly made by John Shaw fell outside the 10(b) period, and that unfair labor practice allegations regarding these statements had been withdrawn by the Union prior to the hearing in this matter. (ALJD 7:43-47; 8:1-8.) These facts were admitted by CGC at trial and it is disingenuous for CGC to now claim that these allegations are not barred by 10(b). (H.T. p. 93 lines, 18-19; p. 95, lines 1-2.)

CGC also argues that ALJ Green erred by failing to consider Shaw's alleged statements as evidence of Union animus and cites to *Jack in the Box Distribution Center Systems*, 339 NLRB 42, 52 (2003) as supportive of her proposition. The problem with CGC's analysis is that *Jack in the Box* does not "require" an ALJ to opine on whether statements made outside of the 10(b) period are evidence of union animus. Rather, *Jack in the Box* holds that such evidence

"***may*** be considered as background evidence of animus toward employees' union support." (Emphasis added.)

Thus, it is clear from *Jack in the Box* and other Board cases that it is within an ALJ's discretion to consider such evidence in rendering such a decision. The fact that an ALJ chooses not to rely upon such evidence when rendering a decision is hardly reversible error.

## RESPONSE TO EXCEPTION C

### The ALJ Correctly Concluded That Ryals Did Not Engage In Union Activities.

CGC maintains that ALJ Green erred in finding that other than being a union member, Mr. Ryals did not engage in union activities. (CGC Brief, p. 22.)

First and foremost, CGC's claims regarding Ryals' "union activities" at page 22 of her Brief are wholly irrelevant to these proceedings. Respondent was never charged with discriminating against Mr. Ryals for engaging in "union activities." Rather, the Complaint alleges that Respondent violated the Act by disciplining Ryals for engaging in a specific concerted activity, *i.e.*, complaining about safety issues. (Complaint, par. 11, 12 and 13.) Indeed, ALJ Green recognized the difference between a claim relating to "union activities" and one that relates to "concerted activities," when he stated:

> And frankly, I don't even think its sufficient grounds sufficiently related to the allegation that he was allegedly discharged for concerted activity, which has nothing to do with necessarily union activity.

(H.T. 96, lines 407.)

Second, the conduct referred to by CGC in her Brief does not rise to the level of "union activity." At best, the examples cited are evidence of concerted activity. Other than the fact that Ryals joined the union, there is ***no evidence of record*** that he held any position with the union or

acted as a union agent in any respect. Thus, ALJ Green did not err in finding that Ryals "did not engage in any other union activities." (ALJD 3:10-11.)

## RESPONSE TO EXCEPTION D

### The ALJ Correctly Determined That Ryals May Have Engaged In Union Activities During The January 3, 2010 Meeting.

CGC contends that ALJ Green "incorrectly" failed to find that Ryals was engaged in "union activity" during the January 3, 2010 meeting with Mr. Savino. Again, CGC fails to recognize the difference between "union activity" and "concerted activity."

This particular meeting was held for the purpose of investigating Mr. Ryals' failure to appear for work after having specifically been denied his request for additional time off. CWA Union representatives attended and participated in this meeting at the request of Mr. Ryals. There is no evidence whatsoever that Mr. Ryals was engaged in any "union activities" during said meeting. He only attended the meeting as a member of the bargaining unit in order to offer his side of the story to Mr. Savino.

ALJ Green recognized that the CGC could have possibly made an argument that Ryals was terminated for engaging in "concerted activity" by participating in said meeting. However, ALJ Green properly rejected this claim because it was never included in the Complaint. ALJ Green stated:

> In light of the above and even though it seems more likely that Savino decided to discharge Ryals because of Ryals' statements at the January 3 meeting: a meeting that could be reasonable construed as concerted, I cannot conclude that this violated the Act because it is not based on any theory argued by the General Counsel. *See New York Post*, 353 NLRB 343 (2008).

ALJ Green did not commit reversible error because he acted in accordance with the Board's reasoning in *New York Post*, where the Board specifically held that a respondent cannot

be expected to defend against other theories that are not part of the GC's case. *New York Post*, 353 NLRB 343, 344 (2008).

## RESPONSE TO EXCEPTION E

### The ALJ Did Not "Ignore" Evidence That Ryals Was Outspoken In Meetings.

CGC contends that ALJ Green "ignored" unrebutted testimony. Respondent finds such an allegation fascinating for a couple of reasons.

First, there is no way for CGC to know whether certain evidence was "ignored" by ALJ Green. Indeed, one would assume that ALJ Green, who is an experienced and much respected ALJ, would have reviewed the entire record prior to issuing his decision. To accuse him of "ignoring" evidence without any real basis to do so is highly inappropriate.[1]

Second, there is no allegation in the Complaint that Mr. Ryals was terminated for being outspoken at meetings, so ALJ Green would have no reason to even address this issue in his opinion. An ALJ has no obligation to address every argument made by a party in the post-hearing brief, especially when the argument is not supported by the allegations set forth in the Complaint.

Finally, CGC misstates the facts by claiming that ALJ Green found that Ryals "was not more outspoken then other employees." (CGC Brief at page 23(E)). That is not what ALJ Green stated. Rather, ALJ Green decided that "according to Ryals, there were many employees who brought up different issues and that no one acted as a spokesperson for the group." (ALJD 4:2-8.) ALJ Green reached this conclusion based upon his own questioning of Mr. Ryals, who

[1] CGC consistently claims throughout her Brief that ALJ Green "ignored" evidence. It appears that CGC makes such claims, not because ALJ Green actually ignored the evidence, but rather because ALJ Green did not agree with CGC's position. Respondent believes it is highly improper for CGC to assert that an ALJ "ignored" evidence, without a very sound basis to make such a claim. No such basis exists here in any respect whatsoever. Further, the mere fact that some evidence is ignored, is not a basis for overturning a decision, unless accompanied by proof that such evidence was material to the outcome of the case. CGC has not put forth any case for materiality.

testified that he was not acting as a spokesperson for other technicians when he spoke up at the September, 2010 meeting between technicians and supervisors. (H.T., p. 122, lines 9-25 and p. 123, lines 1-13.) As a result of this testimony, ALJ Green correctly found that Mr. Ryals was not acting as a Union agent, when he registered a complaint about the safety of his van.

## RESPONSE TO EXCEPTION F

### ALJ Green Did Not Ignore Evidence That Ryals Had Received Approval to Take Time Off On December 26th and 27th.

Once again, CGC misleads this Board when she states that:

> The Administrative Law Judge found that Ryals did not make any requests for paid time off until December 22 when he advised Anderson and Knipschild that he would not be coming to work on December 26 and 27.

(CGC Brief at page 5, lines 2-5).

That is not what ALJ Green stated. ALJ Green found that in November of 2010, GM John Shaw posted a notice near the time clock stating that request for unpaid days off would not be approved. ALJ Green then goes on to state the following:

> It seems that *when the notice was posted*, Ryals filled out a form asking for unpaid days off in December and this was declined by Shaw. *After the notice was posted, Ryals did not make any other requests for unpaid time off* and made no attempt to change his airline tickets. Instead, he waited until December 22 when he advised Anderson and Knipschild that he would not be coming to work on December 26 and 27. Claiming that they approved or at least didn't object, Ryals went to Colorado and while there, had his return flight cancelled because of a big snowstorm in New York.

(ALJD 5:1-7. Emphasis added.)

Further, it is clear from GC Ex. 12 that Ryals formally requested time off in November and that request was "declined" by GM John Shaw. ALJ Green's recitation of the facts is also

supported by Mr. Ryals' own testimony. (H.T. pp. 131-133.) Hence, it is quite clear that ALJ Green did not commit a reversible error.

**RESPONSE TO EXCEPTION G**

**ALJ Green Correctly Determined That The Safety Complaint Had Nothing To Do With Ryals' Discharge And Was Not Pretextual.**

**RESPONSE TO EXCEPTION H**

**ALJ Green Was Not Required To Analyze This Case Pursuant To Wright Line.**

**RESPONSE TO EXCEPTION I**

**ALJ Green's Conjecture Is Drawn From His Observation Of Mr. Savino At Trial.**

CGC contends that ALJ Green failed "to address evidence of pretext and disparate treatment in the context of a *Wright Line* analysis." The fact is that ALJ Green did not have to engage in such analysis as he did not find any evidence of pretext or disparate treatment. That is, he found that the alleged concerted activity (one safety complaint made at an all-employee meeting on September 13, 2010) occurring some four months before Ryals' termination was a one-time event which was so remote in time to the termination that it could not have possibly been a factor in DISH's decision to terminate Ryals. (ALJD 4:20-32.) Since no pretext was found, there was no reason for ALJ Green to conduct a *Wright Line* analysis.

Likewise, there was no need for ALJ Green to analyze pretext because he did not find that the reason listed on the termination notice was not true. He simply stated that the termination notice "did not fully explain the reason for the discharge." He then credited the testimony of Mr. Savino, who explained that he made the final decision to terminate Ryals after Ryals became loud and aggressive, accusing his supervisor of lying at their meeting. (ALJD 6:5-11.)

Since, ALJ Green did not find the termination notice to be untrue (just not complete), he had no reason to engage in a "pretext analysis." There is also no legal requirement that an ALJ must follow the dictates of the CGC when writing his opinion. If the ALJ does not believe that pretext or disparate treatment occurred, he has no obligation to explain why he did not engage in a legal analysis of these theories. Given ALJ Green's long history with the Board and his years spent adjudicating cases, it is unlikely that he failed to recognize either pretext or disparate treatment, had such proof has been properly offered at the hearing. In this case, the proof was sorely lacking.

CGC's claim that DISH utilized a "shifting defense" is absurd. The evidence indicates that Ryals was terminated for failing to follow his supervisor's directive by taking days off work after being told that his request had been "declined". (GC Ex. 12). Mr. Savino conducted an investigation of this incident with union representatives present in the room. After hearing from both sides, Mr. Savino made an informed decision. It is not at all unusual that a company form used to document a termination might differ in some respects from testimony of a witness. A short form rarely carries all the details of a termination, and the ALJ is entitled to reach such a conclusion based upon the credibility of the witnesses. In this case, ALJ credited DISH's witnesses over Mr. Ryals. That is his right as a judge.

Finally, ALJ Green's comments on what might have happened had Ryals taken a different tact than being overly loud and aggressive at the last meeting were based upon his observations of the witnesses, which is certainly within his purview as a fact finder. This finding is actually not very relevant to the outcome as ALJ Green decided the case not based on this conclusion, but rather the fact that CGC simply could not prove that Ryals safety complaint was the actual reason for his discharge. (ALJD 6:26-33.)

## RESPONSE TO EXCEPTION II

### ALJ Green Properly Found That Technicians Were Not Entitled To Stack Rank Bonuses.

ALJ Green correctly found that Respondent's Farmingdale employees have operated under a different wage and benefit structure than Respondent's non-union locations since voting in the CWA union in 2001. (ALJD 7:9-12.) Testimony indicates that Farmingdale's union technicians had actually received a "point's bonus" since 2001, while Respondent's non-union technicians did not enjoy *any* bonus program until 2008 when the "stack rank" bonus program was introduced at the non-union locations. Likewise, Farmingdale technicians have enjoyed a "more robust" benefits plan than the non-union technicians since 2001. (H.T. pp. 142-144; 208-212.)

Respondent did not automatically replace Farmingdale's "points" bonus plan that had been in place since 2001, with the "stack rank" plan because such a replacement would have to be negotiated with the union before implementation. (H.T. p. 209, lines 14-15.)

During the hearing, CGC admitted that Farmingdale technicians did not ever receive "stack rank" bonuses and admitted that Respondent had merely kept the "status quo" since 2001, as is required by law. (H.T. p. 98, lines 4-8.)

CGC asserted in her Complaint, and at trial that the reason that Respondent did not provide Farmingdale technicians with the "stack rank" bonus was because they belonged to a union, and to discourage them from engaging in union activities. (Complaint, par. 10 and 14.) However, CGC offered no evidence whatsoever to support her position.

The only evidence offered was an alleged statement by John Shaw to Mr. Ryals wherein he offered that if the union ceased to exist, that the Farmingdale technicians would be paid

similarly to the non-union technicians. (H.T. pp. 103-104.) As ALJ Green noted, this statement is a true statement of fact because it stands to reason that if the Farmingdale facility was not unionized, it would be treated the same as Respondent's non-union operations. He also properly found that, at best, this statement was a promise of a future benefit, which CGC did not allege as part of her Complaint. (H.T. p. 100, lines 6-13.) ALJ Green also found that virtually all of the "evidence" offered in support of CGC's case fell outside the 10(b) period. (H.T. p. 98, lines 7-25; p. 99, lines 1-10; p. 106, lines 12-22.)

The fact is that since 2001, Farmingdale employees enjoyed a "point's bonus" that non-union employees did not receive. It was not until 2008, that the "stack rank" bonus came into existence at non-union facilities. Given that the Farmingdale facility had always been treated differently from the non-union location, there was absolutely no legal reason why Respondent should have implemented the "stack rank" bonus in Farmingdale. Indeed, had it done so without bargaining, Respondent would have committed an unfair labor practice. The stack rank bonus had been in effect at non-union facilities for at least two (2) years prior to the issuance of the Complaint. For CGC to now claim that it was withheld for unlawful reasons based upon one comment by one lower-lever supervisor is simply absurd.

## CONCLUSION

Respondent remains mystified as to why the Regional Director issued a Complaint in this case in the first place. It is abundantly clear that there were no unfair labor practices committed, yet the RD took Respondent to trial anyway. Now CGC has the audacity to file an appeal that has absolutely no merit whatsoever.

What evidence did they have? Mr. Ryals complained about driving a van in September. He was not required by Respondent to drive the alleged unsafe van. He was not disciplined

when he refused to drive the alleged unsafe van. Respondent even had the van checked out by a mechanic, who deemed it safe to drive. Thus, it is apparent that Respondent, at all times, acted in a most reasonable fashion in dealing with Mr. Ryals when it came to his safety complaint.

Sure, Ryals was eventually terminated, but that did not occur until four (4) months after the safety complaint was made. The reason for the termination was abundantly clear. Ryals had taken substantial time off from work earlier in the year, and he had exhausted his paid time off. When he requested more time off in December to go on a ski trip to Colorado, he was "declined" in writing by his General Manager. Yet, he disobeyed his supervisor and took the time off anyway. This was reason enough to terminate, but Mr. Ryals actually found a way to make it even easier to fire him from his job. He called his Union representatives and asked for a meeting with Respondent's Regional Director Bill Savino, who until that day, was not aware of the facts surrounding Mr. Ryals' termination. Mr. Savino met with Ryals and his Union representatives in order to give Mr. Ryals an opportunity to plead his version of the story. Mr. Savino called in key managers and asked them what had happened. Instead of listening and letting the process play out, Mr. Ryals became loud, obnoxious and belligerent, even going so far as to call his supervisor a "liar". At that point, Mr. Savino had heard enough and upheld the decision to terminate Ryals. It is important to note that Mr. Ryals never once brought up the subject of his "safety complaint" at the meeting. Had he truly believed he was being terminated for making a safety complaint, one would think that either Ryals or his Union representatives would have mentioned it at some point. They did not.

ALJ Green also made certain findings that Respondent's witnesses were more believable than Mr. Ryals. He was certainly entitled to believe Respondent's managers who testified that

they *never* gave Mr. Ryals permission to take the days off after he had been "declined" by Mr. Shaw.

The CGC's argument regarding the "stack rank" bonus is equally ridiculous. Farmingdale employees have received a different wage rate, a different bonus plan and different benefits than Respondent's non-union employees since 2001. The CWA union has never negotiated, or even requested to negotiate, a "stack rank" bonus for their members. No Union representative bothered to testify at the hearing as to their desire to change the bonus structure. Obviously, the Union is satisfied that with the old bonus program. Otherwise, they would seek to change it.

Nonetheless, the CGC would like Respondent to unilaterally implement a "stack rank" bonus, even though doing so would be a clear violation of Federal labor law.

For all of the foregoing reasons, Respondent respectfully requests that CGC's exceptions be denied in their entirety.

Dated: December 20, 2010

Respectfully submitted,

BUCHANAN INGERSOLL & ROONEY P.C.

By _____

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Reply to General Counsel's Exceptions** was served to the following, via first-class U.S. mail, postage prepaid on this 20th day of December, 2011. Also filed and served at http://www.nlrb.gov/e-filing system.

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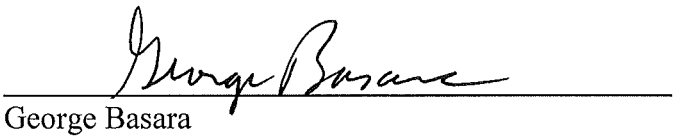

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