

**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
REPLY TO DISH'S ANSWERING BRIEF TO CHARGING PARTY'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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COMES NOW Charging Party Communications Workers of America Local 6171 (“CWA” or “the Union”) and files this Reply to Respondent Dish Network Corporation’s Answering Brief to Charging Party’s Exceptions, styled Dish Network Corporation’s Reply to The Union’s Exceptions to the Decision Issued by ALJ Ringler, and would respectfully show the following:

I. THE CASE FOR SUBSTANTIAL ANIMUS

Respondent Dish Network Corporation (“Dish” or “Respondent”) first argues in its answering brief, that there is no evidence in the record of substantial animus, with the notable exception of the timing of the discipline. (See Answering Brief, p. 1). The concession by Dish concerning the timing is in reference to the nexus between discriminate Jorge Tavares (“Tavares”) testifying against Dish on May 23, 2011 (Tr.¹ 157, Ln. 24-158, Ln. 6) and the two simultaneous steps of discipline Tavares received approximately on June 3, 2011 (GC 21) and

¹ Citations to the transcript from the hearing will be cited as “Tr.” for the page of the transcript followed where appropriate by “Ln.” or “Lns.” for the line number on the page. 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.

the fact that Tavares served on the Union's bargaining committee on July 28, 2011 (Tr. 182, Ln. 3-4; 183, Ln. 5) and was discharged by Dish on July 29, 2011. (GC 23).

This evidence of animus led Administrative law Judge Robert Ringler to conclude there was evidence animus (ALJ Decision, p. 11, Lns. 1-4) because under the framework used by the National Labor Relations Board ("NLRB" or "the Board") to analyze terminations in violation of the National Labor Relations Act ("NLRA" or "the Act") adopted in 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) the proximity of discipline and discharge to the exercise of rights protected by the Act creates an inference of unlawful motive. McClendon Electrical Services, 340 N.L.R.B. 613, n. 6 (2003) (holding that terminations one day after the exercise of protected activity raise an inference of unlawful motive); La Gloria Oil & Gas Co., 337 N.L.R.B. 1120, 1124 (2002) (same); St. Thomas Gas, 336 N.L.R.B. 711, 717 (2001) (holding that discipline occurring two weeks after the exercise of rights protected by the Act raises an inference of unlawful motive); Metalite Corp., 308 N.L.R.B. 266, 272 (1992) (same). Where ALJ Ringler erred was failing to connect this evidence of animus with the other evidence of animus against Tavares to find substantial animus under Bally's Park Place, Inc., 355 N.L.R.B. 1319, 1321 (2010).

Dish's answering brief fails to address the bizarre and outlandish conduct of Installation Manager Michael Durham ("Durham") towards Tavares. Former Dish manager Michael Thompson testified that he observed Durham express a strong interest in Tavares' activities (Tr. 330, Ln. 23-25) and Thompson believed Durham more strictly enforced rules against Tavares based on his personal observation of Durham's conduct towards Tavares concerning receivers Tavares had at his apartment and an incident when Tavares went to the bathroom. (Tr. 419, Ln. 8-9).

The receiver incident occurred during the spring of 2011 when 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 Tavares' order for receivers 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 happened one day when Tavares returned to the Farmers Branch office to pick up a piece of equipment. (Tr. 389, Ln. 13). Durham saw Tavares enter the building and sent Thompson to investigate, Thompson found Tavares in the bathroom, and Durham sent Thompson into the restroom to find out what Tavares was doing. (Tr. 334, Ln. 12). Thompson entered the restroom and asked Tavares if anything was wrong and Tavares stated he had an upset stomach. (Id., Ln. 23-24). Thompson reported this information to Durham and Durham wanted more information, including that he wanted Thompson to "hear sounds and smell smells" and report back to Durham. (Tr. 335, Lns. 4-11).

Durham's peculiar interest in Tavares that was manifested by harassing Tavares about the receivers and having Thompson follow him to the bathroom when compelled with the evidence of animus rom nexus between Tavares' protected activities and discipline and subsequent discharge provide strong evidence of animus. 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. This evidence is further augmented by the fact that Tavares was the sole person terminated solely for committing a safety infraction because the comparators identified by Dish committed other violations in addition to the safety infractions. (Tr. 385, Lns. 6-7, Ln. 24-p.386, Ln. 4; U 17; R 4; R 6). This evidence of animus weighs in favor of reversing the ALJ's finding not only as to limited animus, but also as to whether Dish met its Wright Line rebuttal burden because Dish's history of inconsistently enforcing safety rules (ALJ Decision, p. 3, Lns. 37-39) such that safety infractions were not subject to enforcement by discipline until spring 2011 (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) undermines it's the credibility of its argument that it would have disciplined Tavares but for his protected activities.

II. DISH'S HISTORY OF NOT DISCIPLINING FOR SAFETY ISSUES AND TAVARES' PRIOR SAFETY INFRACTIONS

As noted in the preceding paragraph, Dish's history at Farmers Branch demonstrated inconsistent disciplining of employees for safety infractions. This is starting point for addressing Dish's argument in its answering brief that Tavares was a repeat offender as to safety infractions. (See Answering Brief, p. 4). Thompson testified that safety "was never a priority until the Union started coming around." (Tr. 377, Lns. 7-8). This testimony by a former manager underscores the fact that safety only became a priority for Dish to the extent it could be used to eliminate Union supporters such as Tavares.

The record abounds with examples of employee failure to follow safety rules that do not result in employee discipline. Ryan Theiss, a former Dish employee who was not a supporter of the Union, testified that he observed a coworker during Theiss' probationary period who did not wear PPE in the presence of management. (Tr. 32, Lns. 17-20). 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). 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 observed Theiss on three or four occasions not wearing PPE and did not discipline Theiss. (Tr. 64, 11-25). Theiss also 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).

This backdrop established by this history is, as the ALJ noted, that safety was not disciplined prior to 2011. Tavares cannot be labeled a repeat offender because there is no history of discipline prior to 2011. Tavares did fail to follow safety rules and failed to safety surveys, but he was never disciplined for those infractions. (Tr. 147, Ln. 5-18; 148, Ln. 14-25; 149, Ln. 1-3; see also GC 25). Tavares never knew his job was at risk for not following safety rules until he received the final warning in June 2011. Dish's argument that the final warning afforded Tavares a chance to correct his behavior overlooks the fact that the final warning disciplines Tavares for three incidents between May 21, 2011 and June 2, 2011. (GC 21). Dish's final warning was Tavares' first notice that discipline would be used to enforce safety rules and it was also his notice that his next infraction would result in termination. Tavares thus cannot truly be

thought of as a repeat offender because he only allegedly repeated the violation once more, which resulted in his July 2011 termination.

Tavares' history of safety violations must be assessed in tandem with Dish's vacillation on the subject of safety. When Tavares began at Dish, safety was not enforced. Around the time of Tavares' termination, safety resulted in the discipline of several employees, but only Tavares was terminated solely for not following safety rules. The importance that Dish places on safety is ultimately illustrated by the fact that after Tavares, the last open Union supporter is terminated, Dish returned to its prior policy of not disciplining employees for safety violations. Under General Manager Gabriel Gonzalez, the same manager who stepped-up safety enforcement when Tavares was terminated, 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). Sandone's three safety failures in a two-week period undermine any argument that safety is a concern for Dish because of the conspicuous absence of discipline for these violations.

Dish's decision to let safety violations slide after Tavares' termination suggests that even if Tavares, for the sake of argument, was a repeat offender, a neutral environment it would not matter because Dish has let repeat offenders slide on safety issues before Tavares' termination

and since. The very question of repeat offenders at Dish support's the Union's contention in its exceptions that concern for safety was a pretext relied on by Dish to terminate Tavares. A pretext for purposes of Section 8(a)(3) exists when an employer's asserted legitimate 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. Dish's history of not disciplining for safety for years, using it briefly as grounds for discipline around the time of Tavares' termination, and then returning to its old practice of not disciplining for safety after Tavares' termination supports the Union's argument that safety is a pretext and Tavares' termination is unlawful under the Act.

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 the December 28, 2012 exceptions 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,

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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 25th day of January 2013:

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