

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DISH NETWORK SERVICE, LLC

and

Case Nos. 29-CA-30578  
29-CA-30583

COMMUNICATION WORKERS OF  
AMERICA, LOCAL 1108

COUNSEL FOR THE GENERAL COUNSEL'S  
EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF  
THE ADMINISTRATIVE LAW JUDGE

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this 23<sup>rd</sup> day of November, 2011

TABLE OF CONTENTS

STATEMENT OF THE CASE .....4

ISSUES PRESENTED .....6

EXCEPTIONS, FACTS, AND DISCUSSION .....7

    I.    THE ADMINISTRATIVE LAW JUDGE ERRED BY FINDING THAT RESPONDENT DID  
    NOT VIOLATE SECTION 8(A)(1) AND (3) OF THE ACT WHEN IT DISCHARGED RYALS ON  
    OR ABOUT JANUARY 3, 2011 .....7

        EXCEPTIONS .....7

        FACTS .....8

        DISCUSSION .....21

    II.   THE ADMINISTRATIVE LAW JUDGE ERRED BY FINDING THAT RESPONDENT DID  
    NOT VIOLATE SECTION 8(A)(3) OF THE ACT WHEN IT FAILED TO PROVIDE STACK  
    RANKING BONUSES TO EMPLOYEES EMPLOYED IN THE UNIT .....25

        EXCEPTIONS .....25

        DISCUSSION .....26

CONCLUSION .....28

**TABLE OF AUTHORITIES**

*All Pro Vending*, 350 NLRB 503, 508 (2007) ----- 24  
*Dish Network Corporation*, 2011 WL 3510207 (N.L.R.B. Div. of Judges August 11, 2011)----- 9  
*Dish Network Service Corp.*, 339 NLRB 1126 (2003) ----- 8  
*Dish Network Service Corp.*, 347 NLRB No. 69, 1 (2006)----- 9  
*Hanes Hosiery, Inc.*, 219 NLRB 338 (1975) ----- 27  
*Jack in the Box Distribution Center Systems*, 339 NLRB 40, 52 (2003) ----- 22  
*Kentucky River Medical Center*, 355 NLRB No. 129, slip op. at 3-4 (2010) ----- 24  
*Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995) ----- 24  
*Rood Trucking Co.*, 342 NLRB 895, 897-898 (2004)----- 24  
*Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966)----- 24  
*Taft Broadcasting Co.*, 238 NLRB 588, 589 (1978)----- 24  
*TCB Systems, Inc.*, 355 NLRB No. 162, slip op. at 3 (2010) ----- 24  
*Whitesville Mill Service, Co.*, 307 NLRB 937 (1992)----- 24  
*Wright Line*, 251 NLRB 1083 (1980), *enf.* 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982) ----- 24

## STATEMENT OF THE CASE

On January 5, 2011, the Communication Workers of America, Local 1108 (**“the Union”**) filed a charge in Case No. 29-CA-30578 against Dish Network Service, LLC (**“the Respondent”**). This charge alleged that the Respondent failed to provide Stack Ranking bonuses to qualified employees at Respondent’s facility located at 85 Schmitt Boulevard, Farmingdale, New York (**“the Farmingdale facility”**) because they were members of the Union.<sup>1</sup> On January 13, 2011, the Union filed a charge in Case No. 29-CA-30583 against the Respondent alleging certain violations of Section 8(a)(3) and (4) of the Act.

On February 3, 2011, the Regional Director for Region 29 issued a Complaint and Notice of Hearing (**“the Complaint”**) in Case No. 29-CA-30578. On February 11, 2011, George Basara, counsel for Respondent, filed an answer to the Complaint and Notice of Hearing.

On April 25, 2011, the Union filed a first amended charge in Case No. 29-CA-30583 alleging that the Respondent terminated Shawn Ryals because of his protected concerted and union activities. On May 10, 2011, the Regional Director for Region 29 issued an Order Consolidating Cases, Consolidated Amended Complaint and Notice of Hearing (**“the Consolidated Amended Complaint”**) in Case Nos. 29-CA-30578 and 29-CA-30583 alleging, *inter alia*, that Respondent has engaged in, and is engaging in violations of Section 8(a)(1) and (3) of the Act. On May 17, 2011, Basara filed an answer to the Consolidated Amended Complaint (**“the Answer”**). A hearing before Administrative Law Judge Raymond P. Green was conducted on July 12, 2011. On October 12, 2011, the Administrative Law Judge issued a Decision and Recommended

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<sup>1</sup> The last sentence of the charge alleging that the Respondent disciplined and held employees responsible for Stack Rankings was withdrawn by the Union on January 18, 2011.

Order in this matter, in which he found that the Respondent did not violate the National Labor Relations Act (“**the Act**”) in any manner.

## ISSUES PRESENTED

- I. Whether the Administrative Law Judge erred by finding that Respondent did not violate Section 8(a)(1) and (3) of the Act when it discharged Ryals on or about January 3, 2011.
- II. Whether the Administrative Law Judge erred by finding that Respondent did not violate Section 8(a)(3) of the Act when, since on or about July 11, 2010<sup>2</sup>, it failed to provide Stack Ranking bonuses to employees employed in the Unit described in paragraph 5 of the Consolidated Amended Complaint.

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<sup>2</sup> All dates are in 2010 unless otherwise indicated.

## EXCEPTIONS, FACTS, AND DISCUSSION

Counsel for the General Counsel submits this combined Exceptions and Brief in Support seeking the necessary corrections to the decision of the Administrative Law Judge. The violations discussed below were demonstrated at hearing and are well-established in the record evidence. The Administrative Law Judge in his decision inappropriately disregards relevant facts and misapplies the law for each of the allegations discussed below. On each of the allegations below, reversal of the Administrative Law Judge is warranted.

I. **THE ADMINISTRATIVE LAW JUDGE ERRED BY FINDING THAT RESPONDENT DID NOT VIOLATE SECTION 8(a)(1) AND (3) OF THE ACT WHEN IT DISCHARGED RYALS ON OR ABOUT JANUARY 3, 2011**

### EXCEPTIONS

Page	Lines	Decision
2	9-15	The Administrative Law Judge incorrectly fails to discuss prior cases against Respondent as evidence of anti-union animus.
3 4	11-12 18-19	The Administrative Law Judge incorrectly ignores the evidence in the record and claims that "apart from joining the Union, [Ryals] did not engage in any other union activities."
4	7-8	The Administrative Law Judge incorrectly ignores the evidence in the record that Ryals was outspoken during safety meetings.
5	1-5	The Administrative Law Judge incorrectly ignores the evidence in the record that since in or about early November, but after November 7, multiple times Ryals received approval from Field Service Supervisor Milton Anderson and Installation Manager Keith Knipschild regarding taking December 26 and 27 off of work, and received conflicting instructions regarding doing so from the Respondent.
6	10-17	The Administrative Law Judge incorrectly fails to conclude that the Respondent's stated reason for discharging Ryals was a pretext.
6	14-17	The Administrative Law Judge incorrectly ignores and fails to analyze the evidence of disparate treatment in the record in a <i>Wright Line</i> analysis.
6	13-14	The Administrative Law Judge incorrectly conjectures that "[h]ad Ryals simply explained his situation at the meeting on January 3, I think that Savino would probably have given him some form of discipline short of termination."

6 7 11	44-46 1-7 31-32	The Administrative Law Judge incorrectly concludes that Respondent General Manager John Shaw's interrogation of Ryals and statements "that if the employees decertified the Union they would receive the bonus plan that was applicable to employees in other parts of the country" are barred by Section 10(b) of the Act as evidence of union activity and an unlawful union animus.
6	19-25	The Administrative Law Judge incorrectly fails to find that Ryals engaged in union activity during the January 3, 2011 meeting

### FACTS<sup>3</sup>

#### **A. There are Prior Cases against Respondent**

The Respondent has a long history of animus toward the Union. Shortly after the Farmingdale facility became unionized, in December 2001, the Respondent at the Farmingdale facility violated Section 8(a)(1) of the Act by telling employees that the Respondent did not recognize the Union's shop stewards as the employees' collective bargaining representative; and violated Section 8(a)(1) and (5) by refusing to provide a copy of a disciplinary consultation sheet to the Union's shop steward. *Dish Network Service Corp.*, 339 NLRB 1126 (2003).

The Board found that in 2004, some of the same Farmingdale facility agents and/or supervisors at issue in the instant case including Respondent General Manager John Shaw, Northeast Regional Director Bill Savino, and the Respondent's attorney, George Basara, the attorney for the Respondent in the instant case, were involved in engaging in the following unfair labor practices:

. . . bypassing Communications Workers Local 1108 and dealing directly with employees by promising them promotions to managerial positions so they would no longer be part of the unit, and informing employees that their transfer requests were denied because they were shop stewards; urging employees to sign a petition to decertify the Union, and bypassing the Union and dealing directly with employees by promising them wage increases if they decertified the Union; bypassing the Union and dealing directly with employees by promising them wage increases, commissions and job security if they abandoned their Union support or

<sup>3</sup> Inasmuch as the Judge correctly outlined the relevant facts with respect to the background and events leading up to the incident, those facts are not repeated herein. See ALJD II.a and II.b.

membership, and informing employees that it would be futile for them to support the Union because it could not assist employees who were discharged; bypassing the Union and dealing directly with employees by promising them wage increases and other benefits if they decertified the Union; and engaging in surface bargaining and bad-faith bargaining with the Union.

The Board further found that the Respondent violated Section 8(a)(3) by discharging and failing and refusing to reinstate its employees because of their membership in, or support for, the Union, or any labor organization.

*Dish Network Service Corp.*, 347 NLRB No. 69, 1 (2006).

Most recently, Administrative Law Judge George Carson II found that the Respondent, during a union organizing campaign, violated Section 8(a)(1) of the Act by:

. . . threatening employees with more stringent enforcement of company rules if they selected the Union as their collective-bargaining representative, informing employees that they would be paid differently than employees at other locations, informing employees that they would remain on the same pay plan because of their union activities, informing employees that selection of the Union as their collective bargaining representative was futile, threatening stricter enforcement of the dress code and absentee policies because employees selected the Union as their collective-bargaining representative, and by requiring that employees sign an arbitration agreement from which the employees reasonably could conclude that they were precluded from filing charges with the NLRB . . .

*Dish Network Corporation*, 2011 WL 3510207 (N.L.R.B. Div. of Judges August 11, 2011). Administrative Law Judge Carson also ruled that the Respondent violated 8(a)(1) and (3) of the Act by issuing a final warning to an employee because of his union activities. *Id.*

**B. Shaw Had Conversations with Ryals Regarding the Union** (August or September 2009)

In or about August or September 2009, early in the morning, outside at a job site at a customer's private residence, Shaw had a conversation with Ryals. (Tr.<sup>4</sup> at 101-03;

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<sup>4</sup> References to the official record of the Hearing are abbreviated as follows: "Jt Ex." denotes Joint Exhibits. "Resp. Ex." denotes Respondent's exhibits. "CP Ex." denotes Union's exhibits. "GC Ex." denotes General

GC Exs. 1(o), (q).) He asked Ryals how he felt about the Union. (Tr. at 103.) Ryals answered that being a new employee, he did not really know much about the Union and that there was no union where he worked in the south. Shaw said that if the Farmingdale employees dropped the Union, that Ryals's hourly pay would increase to match other non-union shops' hourly pay, which was about twenty dollars an hour. (*Id.*)

Then, Shaw said that Ryals would also start receiving the Stack Ranking bonuses that he received in North Carolina. Regarding other technicians who had never received Stack Ranking bonuses, Shaw said that the Respondent would provide back Stack Ranking bonuses to them. Shaw also said that he would try to get the Farmingdale employees level up incentive bonuses that the Respondent provides to employees at the non-unionized facilities. (*Id.*)

Since the first conversation between Shaw and Ryals above, the two had more than five more conversations regarding the Farmingdale employees' support of the Union. (Tr. at 104.) During these conversations, Shaw would ask Ryals how the Farmingdale employees were feeling about the Union and asked Ryals whether he had a chance to talk to any of the technicians. (Tr. at 105.)

Only once, sometime earlier in the day during the month of January, but after January 22, was someone else, Respondent's Installation Manager Keith Knipschild, present during these conversations. (Tr. at 105, 108.) This conversation took place at a job site, which was a church where the elderly couple who ran the church lived in a separate apartment. Shaw and Knipschild had gone to Ryals's job site together. (*Id.*) Shaw gave Ryals a copy of GC Ex. 15. (Tr. at 106-07.) Shaw said to Ryals that GC Ex. 15 was a list of the Farmingdale facility's current technicians, and Shaw asked Ryals to go to each of the technicians on the list and take a count of who was for and against the

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Counsel's exhibits. "Tr." denotes references to the official transcript of the Hearing. "ALJD" denotes references to the Decision of the Administrative Law Judge.

Union. (*Id.*) This was the last conversation between Shaw and Ryals regarding the Farmingdale employees' union support. (Tr. at 107.)

**C. Ryals Stated in a Meeting with Respondent that It Provided an Employee with Other Employees' Telephone Numbers so that Respondent Could Interrogate Them** (in or about September, but after September 13, 2010)

In or about September, but after September 13, the Respondent held a safety meeting at the Farmingdale facility in the conference room earlier in the morning. (Tr. at 119-20.) Shaw's supervisor, Bob Malta and Savino were present for the Respondent, and technicians Keith Hill, Andrew Murray, Hollis Griffith, Macarthur/Malik Morin, Jaime Bosque and Ryals were present. Many of the technicians spoke at the meeting, including Ryals. (*Id.*; Tr. at 206.) Ryals said to the group that the Respondent gave out the technicians' personal cell phone numbers to technician Tom Grosso for the sole purpose of getting the employees to drop the Union. (Tr. at 123-24.)

**D. Witnesses Testified that Ryals was Outspoken**

Savino testified that Ryals ". . . kept talking about the van<sup>5</sup> and talking about the van. I heard him, you know, he kept going on. And Shawn has a way about him, like if he's bent on something, he's just going to continue to drive that point."<sup>6</sup> (Tr. at 206.) Bosque testified that during safety meetings held by the Respondent, Ryals<sup>7</sup> would be one of the more outspoken technicians and would bring up certain safety issues three or four more times more than other technicians. (Tr. at 174.)

**E. Ryals Inquires about Taking December 26 and 27 Off of Work** (in or about early November, but after November 7)

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<sup>5</sup> The transcript reads "fan" but this is an error by court reporter.

<sup>6</sup> It is not clear from the transcript whether Ryals "going on" about the van occurred during the meeting or afterwards.

<sup>7</sup> In the record the court reporter misspells Ryals's name as "Roz".

In or about early November, but after November 7, Ryals approached Field Service Supervisor Milton Anderson in the evening after he had finished his route. Ryals was unloading his van and Anderson was at his van. Ryals asked Anderson which days Ryals had missed of work since he came back from approved unpaid personal leave for his sister's death, which ran from June 15 through August 13 or 15. (*Id.*; Tr. at 145, 147; Resp't Ex. 1.) Ryals had used any remaining Paid Days Off for the year during his personal leave. (Tr. at 154.)

Anderson gave Ryals a yellow note on which he wrote down September 12 and November 7. (Tr. at 129.) Anderson said that September 12 would not count against Ryals since he clocked into work that day. (*Id.*) Ryals took November 7 off of work because it was his birthday. (Tr. at 130.) On November 7, he called into work and told Anderson that he was not going to make it into work. Ryals did not provide any other reason. Anderson said okay on the telephone. Ryals did not receive any disciplinary actions for taking that unpaid day off. (*Id.*)

Ryals said to Anderson that like he mentioned earlier in the year in January and February, he needs to take off a few days of work in December. (Tr. at 129; 153.) Ryals said that since September 12 did not count against him, he still had three unpaid days off left. (*Id.*) Anderson replied that in order to use those unpaid days off, Ryals should call into work and cover himself. (Tr. at 130.)

On or about November 14, Ryals filled out GC Ex. 12 and put it in Knipschild's slot outside of his office. (GC Ex. 12; Tr. at 130-31.) In or about November, but after November 14, Ryals saw GC Ex. 12 on a blue desk in the back of the Farmingdale facility where technicians turn into their equipment. (Tr. at 131.) When Anderson arrived at the Farmingdale facility, Ryals asked him why the Respondent declined his requested

days off. (*Id.*) In all of his time working for the Respondent, it had never declined Ryals a requested day off of work. (Tr. at 137.)

Anderson answered that the Respondent does not approve unpaid days off with that document. (Tr. at 137; 162.) Anderson said to call in on the day that Ryals wanted to take the day off, and to take that day off. (Tr. at 132.) Anderson stressed that Ryals should call and cover himself. Ryals testified that Anderson did not say that Ryals could not take those days off and he did not say that Ryals would be disciplined if he took those days off of work. (*Id.*) In contrast, Anderson testified that he told Ryals that if he took those days off, “consultation will be probably forthcoming”. (Tr. at 214.)

**F. The Respondent Posted a Sign that Requested Unpaid Days Off Would Not Be Approved** (in or about late November)

Around Thanksgiving, the Respondent posted a sign near the time clock at the Farmingdale facility that stated, “**ATTENTION ALL EMPLOYEES/ REQUESTED UNPAID DAYS OFF WILL NOT BE APPROVED**”. (GC Ex. 11; Tr. at 68.) The Respondent never explained the sign to the employees. (Tr. at 171.) The Respondent posted this sign because although its workload was heavy that time of the year because it was migrating customers, it was getting many requests for days off from employees. (Tr. at 69, 203.) Starting from Thanksgiving Day and going forward until the end of 2010, the following Farmingdale employees took the unpaid days off indicated next to their names:

Jaime Bosque	11/26 NA; 12/25NA; 12/15; 12/17
Ed Gaffney	12/8; 12/22
Thomas Grosso	12/18; 12/25
Keith Hill	12/27; 12/28
Morin Macarthur	12/27
Shawn Ryals	12/26 Not Approved; 12/27 Not Approved; 12/28; 12/29

(GC Ex. 7.) There is no evidence that the Respondent disciplined any of the employees above for taking unpaid days off after the Respondent posted GC Ex. 11 other than

Ryals. No evidence was presented reflecting extenuating circumstances of the employees other than the blizzard.

Around the time that the Respondent put up GC Ex. 11, Bosque submitted a day off form to the Respondent requesting Thanksgiving Day, November 25; the day after Thanksgiving Day, November 26; and Christmas Day, December 25. (Tr. at 176-77.) The Respondent returned the form to Bosque with "Declined" written on it. (Tr. at 177.) Bosque took neither November 25 nor 26 off, contrary to GC Ex. 7, which indicates that he took November 26 off of work. (*Id*; GC Ex. 7.) Although the Respondent indicated that Bosque took November 26 off, there is no evidence that the Respondent disciplined Bosque for doing so. (GC Ex. 7.)

Bosque did, however, take December 25 off of work, which was one of the days that the Respondent declined. (Tr. at 177.) Even though the Respondent declined his requested day off, a Field Service Manager Hugh (last name unknown) told Bosque he could take that day off of work. He told Bosque this on December 24. (*Id*; Tr. at 192.) Hugh told Bosque that the Respondent did not need everyone at work and that he could take December 25 off of work. (Tr. at 192.) Bosque did not speak to an Installation Manager, a General Manager, or Bill Savino before he did so. Bosque did not re-submit another form to get it approved before he took the day off. The Respondent did not discipline Bosque for taking December 25 off of work. (Tr. at 177.) In fact, Bosque did not hear about the Respondent disciplining any employees other than Ryals for taking unpaid days off after the Respondent put up GC Ex. 7. (Tr. at 179.)

**G. Ryals Confirms with Knipschild and Anderson that He Is Allowed to Take December 26 and 27 Off of Work** (on or about December 22)

On or about December 22, Ryals arrived at the Farmingdale facility at 6:30 A.M. Ryals approached Knipschild and took his temperature in front of him and Bosque. Ryals showed them that his temperature was above 100 degrees and told them that he

was very sick. (*Id.*) Knipschild denied this happened. (Tr. at 219.) Ryals said that the only reason why he was at work is because he needed December 26 and 27 off, so he did not want to use up his unpaid days. Knipschild said okay, and said that he would not route Ryals for those two days. (Tr. at 179.) Then, Knipschild instructed Ryals to make sure that he calls Anderson to cover himself and to follow protocol. (Tr. at 133, 180, 218.) Knipschild did not say that Ryals could not take those days off, or that he would be disciplined if he did so. (Tr. at 181.)

That night, when Anderson arrived back at the Farmingdale facility, Ryals went to the side of Anderson's van and told him about the conversation he had with Knipschild earlier that day. Ryals told him that Knipschild said he was not going to route Ryals for those days and that he should call Anderson to tell him he was not going to be at work that day. Anderson said okay, and said that when Ryals takes the unpaid day off to call him to cover himself. Anderson did not tell Ryals he had to go to work on those days. (*Id.*)

#### **H. The Respondent Terminated Ryals (January 3, 2011)**

On the night of Sunday, January 1, 2011, Anderson called Ryals and told him not to go into work the next day. (Tr. at 137-38.) Ryals asked Anderson why not. (Tr. at 138.) Anderson told Ryals that the Respondent suspended him. (Tr. at 138, 215.) Ryals asked Anderson for what he was suspended. Anderson answered that the Respondent suspended him for being out of Paid Days Off and taking time off of work. (Tr. at 138.)

Ryals told Anderson this was not right, that he knew he had the unpaid days off to use, and that there were technicians who missed way more days than he had missed.

Anderson kept repeating that he knew, but he is just a messenger. Ryals said okay, and Anderson said that he should not go into work the next day. (*Id.*)

The next day, Monday, January 2, 2011, Ryals went to the Farmingdale facility with Union Representatives Ivan Million and John Howe. Anderson spoke with someone on the telephone and when he hung up, he told Ryals, Million and Howe that he spoke to Shaw and that they should leave the premises and return the next day<sup>8</sup>. (*Id.*)

On January 3, 2011, the next day, Ryals went back to the Farmingdale facility with Million and Howe. (*Id.*) Shaw was at the Farmingdale facility, but the Respondent asked them to leave and come back later because Savino was not there yet. (Tr. at 139.) Then, Savino arrived at the facility. Savino was unfamiliar with the situation. (Tr. at 200.) Everyone went into the conference room in the Farmingdale facility. Ryals told his side of the story first, and then the Respondent called Knipschild on the speaker phone. Knipschild said that he told Ryals to follow the procedure or protocol. (*Id.*; Tr. at 183.) Knipschild testified that he could hear Ryals yelling on the other end and cutting him off while he was talking. (Tr. at 219.)

Then, Ryals and the Union said that there were more people involved in the situation. Savino called Anderson to the meeting. When Anderson arrived, he and Savino spoke separately in Savino's office. Then, Anderson joined the meeting. (*Id.*) Anderson denied telling Ryals that he could take the days off of work. (Tr. at 140.) Rather, he said he told Ryals that the Respondent would give him a write-up if he took those days off of work. (Tr. at 170.) The evidence conflicts as to whether Ryals called Anderson a liar. (Tr. at 169, 202.) Savino brought up GC Ex. 12, and Ryals responded that Anderson said that the Respondent does not use forms for unpaid days off. (*Id.*)

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<sup>8</sup> The record states that Anderson asked Ryals to come back to the facility on Monday. However, Ryals testified that day was Monday. This is either an error in the transcript, or an insignificant error Ryals made in recalling the precise day of the week.

Savino said that Ryals knew that he was denied the days off, but he took them anyway. (Tr. at 168.)

Savino brought up the fact that Ryals had used sixty days of unpaid personal leave, and Ryals responded that he was not the only person who had used leave. (*Id.*; Tr. at 140, 169.) Although Ryals admits that he became upset, Bosque testified that Ryals was not aggressive toward Savino. (Tr. at 169, 183.) Ryals said that his leave had nothing to do with the situation. Savino testified that, at this point, Ryals had started “getting loud”. (Tr. at 204.) Then, Savino cut Ryals off and told him that he was terminated. (Tr. at 140, 169.)

Ryals’s termination notice states that Ryals committed “an attendance violation” and from December 26 through 29 he was “ABSENT” to work. (GC Ex. 6.) It also states that:

1. On or about December 1, 2010, You requested off 2 days without pay for a Ski Trip to Denver (due to having No PDO Time available) for December 26 and 27, 2010 and were denied by GM John Shaw
2. You called your FSM Milton Anderson on Sunday Morning 12/26 @ 6:40am and told him you Would not be in, Sunday
3. You called your FSM Milton Anderson on Monday Morning 12/27 @ 7:00am and told him you Would not be in, Monday
4. You called your FSM Milton Anderson on Monday Evening 12/27 @ 8pm and told him you Would not be in Tuesday & Wednesday, due to having an airline flight cancellations & delays.

The notice had Anderson’s name printed on top, and it was signed by Shaw and Savino. (*Id.*) Since that day, the Respondent has failed and refused to reinstate, or offer to reinstate Ryals to his former position of employment. (GC Exs. 1(o), (q).)

**I. The Employees at the Farmingdale Facility are Subject to the Respondent’s Attendance Policy**

The employees at the Farmingdale facility are subject to the Respondent's attendance policy which applies to all of the Respondent's employees. (Tr. at 28.) According to the Respondent's attendance policy, an "unexcused absence" is any day off of work, other than sick time, not pre-approved by the employee's supervisor with at least twenty-four hours advanced notice. (GC Ex. 8.) The policy states that the following progressive discipline will be enforced regarding unexcused absences:

- 1<sup>st</sup> Occurrence – employee will receive a verbal warning that is documented
- 2<sup>nd</sup> Occurrence – employee will receive a written warning
- 3<sup>rd</sup> Occurrence – disciplinary action up to and including termination

Should there be 3 occurrences within a 90 day period, it will result in immediate termination.

If an employee does not call in or show up to work on their scheduled day, it is considered a "No Call/No Show" and counts as an unexcused absence. In the event that there are 3 "No Call/No Shows" in a row, it will be considered job abandonment and the employee will be immediately terminated.

(*Id.*)

At the Farmingdale facility, Anderson generally prepares disciplinary documents, which are then presented to the Installation Manager, and then the General Manager. (Tr. at 45, 48.) Anderson drafts the numbers, dates, and the kind of warning to issue on the disciplinary document. (Tr. at 48.) One unexcused absence constitutes one occurrence. (Tr. 49.)

**J. The Respondent Applies Its Attendance Policy Loosely at the Farmingdale Facility**

Although the Attendance Policy states that any absence, other than sick time, not pre-approved by the employee's supervisor with at least twenty-four hours advanced notice is an unexcused absence, no pre-approval forms were presented during the Hearing to establish that the Respondent pre-approved any of the Farmingdale

employees' absences in 2010. (GC Ex. 8.) However, the Respondent did not come close to disciplining every absence by the Farmingdale employees. (GC Ex. 7.)

On June 10, the Respondent issued Abraham Agosto, a technician at the Farmingdale facility, only a verbal warning after five unexcused absences. (Tr. at 30; GC Ex. 10.) After this verbal warning, he did not report to work as scheduled on three days, from July 23 through 25. (GC Exs. 10, 13.) Those three days were called "no call, no show" days. (Tr. at 86.) On July 26, Respondent's Human Resources Representative Emily Feugill issued a termination letter to Agosto effective that date. (GC Ex. 13.) Although Agosto worked for the Respondent in 2010 at Farmingdale, he is not included in GC Ex. 7. (GC Ex. 7.)

On June 23, the Respondent issued Hill only a verbal warning after using two unpaid days off on June 20 and 22 over the maximum of four. (GC Ex. 9.) According to Anderson, who is Hill's direct supervisor, Hill's two unexcused absences referred to in his June 23 warning constituted one occurrence because Hill's girlfriend left the state with his child, which, to him, was an extenuating circumstance. (GC Ex. 9; Tr. at 50, 53.) After that verbal warning, Hill took seven more unpaid days off. (GC Ex. 7.) There is no evidence that Hill received any further disciplinary actions other than his June 23 warning. When questioned why Hill was allowed to take a total of nine unpaid days off over his allotted four, Anderson testified that "[h]e was having a pretty tough time with it back then. Some days, he's pretty upset with his situation." (Tr. at 53.)

Other than that, Anderson did not recall why Hill was allowed to take nine additional unpaid days off than Ryals (for a total of thirteen). (Tr. at 54; GC Ex. 7.) When questioned further, Anderson testified that he did not recommend that the Respondent issue Hill additional discipline because:

. . . I have children of my own. It's pretty simple. You're concerned. Sometimes your mind is not where it should be at certain times. And again, it was obvious, his mood when he comes in, frustrated. I wouldn't say angry but not the Keith Hill I've known all the years that I've managed [him].

(Tr. at 61.) No documentary evidence was presented to reflect any extenuating circumstances to excuse Hill's seven additional unpaid days off after his verbal warning.

Thomas Grosso took none total unpaid days off in 2010. (GC Ex. 7.) There is no evidence that the Respondent disciplined Grosso for taking over the four maximum unpaid days off a year. Knipschild testified that had the Respondent done so, documentation of such disciplinary measures would exist. (Tr. at 78.) No evidence was presented to reflect any extenuating circumstances to excuse Grosso's five additional unpaid days off over the maximum.

#### **K. The Respondent Treated Ryals Disparately**

Initially, Savino testified that Ryals did not receive any progressive discipline because he had four unexcused absences prior to his termination, and the Respondent counted each absence as an "occurrence". (Tr. at 29.) When presented with Agosto's verbal warning for five unexcused absences which were all treated as one occurrence, Savino testified that the Respondent treated Ryals differently because he had previously taken sixty days off, even though he had permission to do so. (Tr. at 32, 35.) Savino did not know why this sixty-day off issue was not mentioned in Ryals's termination notice. (Tr. at 41.) When further questioned about the Respondent's disparate treatment of Ryals, Savino replied, "To be honest with you, I really couldn't answer your question. How they handle these day to day matters wasn't really part of what I do." (Tr. at 33.) Then, Savino testified that the Respondent did not issue Ryals a written warning because the Respondent told him to go to work, but he did not do so. (Tr. at 36.)

On December 27 and 28, technicians at the Farmingdale facility who called into work to inform the Respondent that they could not make it into work because of the snow were not disciplined by the Respondent. (Tr. at 39.) Ryals was absent on December 28 and 29 because his flight was cancelled due to the snow in New York. (*Id.*) When questioned why the Respondent chose to discipline Ryals for missing December 27 and 28 because of the blizzard and not any other employees, Savino testified that it was because he took days off that he was denied, and consequently missed work on December 28 and 29. (Tr. at 40.)

## DISCUSSION

### **A. The Administrative Law Judge Fails to Discuss Prior Cases against Respondent as Evidence of Anti-Union Animus**

Although the Administrative Law Judge acknowledges several of the prior cases against Respondent, he incorrectly fails to discuss the prior cases in the context of evidence of anti-union animus and does not discuss why he does not include them in his analysis. (ALJD at 2:9-32.)

### **B. The Administrative Law Judge Incorrectly Concludes that Shaw's Interrogation of Ryals and Statements "that if the employees decertified the Union they would receive the bonus plan that was applicable to employees in other parts of the country" are Barred by Section 10(b) of the Act as Evidence of Unlawful Anti-Union Animus**

### **C. The Administrative Law Judge Ignores the Evidence in the Record and Finds that "apart from joining the Union, [Ryals] did not engage in any other union activities"; and**

### **D. The Administrative Law Judge Incorrectly Fails to Find that Ryals Engaged in Union Activity during the January 3, 2011 Meeting**

The Administrative Law Judge stated that the evidence of Shaw's interrogation and offers of benefits were "almost a year before any of the instant charges were filed and [are] therefore outside the 10(b) period". (ALJD at 7:6-7.) However, it is well-established that evidence outside of the 10(b) period may be used as evidence of

animus toward union and concerted activity. *Jack in the Box Distribution Center Systems*, 339 NLRB 40, 52 (2003). The Administrative Law Judge errs by failing to analyze Shaw's interrogation and offers of benefits to Ryals as evidence of anti-union animus although the evidence was unrebutted.

The Administrative Law Judge ignores other evidence of Ryals's union activity: during a telephone call on September 14, Ryals informed Bowen that he believed that the Farmingdale facility was being treated differently from the other facilities because it was a Union shop; and, during the safety meeting in September described above, Ryals mentioned that the Respondent provided Grosso with employees' telephone numbers so that he could question their Union support.

In addition, on January 3, 2011, Ryals participated in his disciplinary meeting with his union representatives. The Administrative Law Judge stated that if the General Counsel had alleged that Respondent had discharged Ryals because of his participation in this meeting, an argument could be made that it consisted of concerted activity and Respondent discharged him for it. (ALJD at 6:19-25.) Ryals attended this disciplinary meeting with union representatives. Rather than concerted activity, this meeting should have been found to be further evidence of Ryals's union activity. Therefore, the Administrative Law Judge erred in not finding that Ryals's participation in this meeting consisted of union activity and he erred in not analyzing whether Ryals was terminated because of his participation in this meeting.

The Respondent did not provide any evidence to rebut Ryals's testimony regarding any of his union activity to which he testified. Without discussion, the Administrative Law Judge ruled that Ryals did not engage in any activity other than his union membership, even though the above union activity by Ryals was unrebutted. Therefore, the Administrative Law Judge's ruling that Ryals did not engage in any union activity, other than joining the Union, should be reversed.

**E. The Administrative Law Judge Ignores the Evidence in the Record that Ryals was Outspoken during Safety Meetings**

Regarding Ryals's concerted activity, the Administrative Law Judge found that no one was a spokesperson during the September 2010 meeting. (ALJD at 4:7-8.) However, the Administrative Law Judge ignored the un rebutted testimony of Bosque that Ryals brought up certain safety issues three or four more times than other technicians and Savino's testimony that Ryals was very outspoken regarding van safety and that he was very persistent. Therefore, reversal of the Administrative Law Judge's ruling, that Ryals was not more outspoken than other employees, is warranted.

**F. The Administrative Law Judge Ignores the Evidence in the Record that Since in or about Early November, but after November 7, Multiple Times Ryals Received Approval from Anderson and Knipschild Regarding taking December 26 and 27 Off of Work, and Received Conflicting Instructions Regarding Doing So from The Respondent**

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". (ALJD at 5:2-5.) However, the Administrative Law Judge ignores all of the evidence of Ryals asking and attaining permission from Anderson and Knipschild since in or about early November, but after November 7, in the record.

**G. The Administrative Law Judge Incorrectly Fails to Conclude that The Respondent's Stated Reason for Discharging Ryals was a Pretext;**

**H. The Administrative Law Judge Incorrectly Ignores and Fails to Analyze The Evidence of Disparate Treatment in The Record in a *Wright Line* Analysis; and**

**I. The Administrative Law Judge Incorrectly Conjectures that "[h]ad Ryals simply explained his situation at the meeting on January 3, I think that Savino would probably have given him some form of discipline short of termination."**

The Administrative Law Judge failed to address evidence of pretext and disparate treatment in the context of a *Wright Line* analysis. 251 NLRB 1083 (1980),

*enf.* 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). “[A] pretextual explanation of the employer’s action will support an inference of discriminatory motivation.” *Kentucky River Medical Center*, 355 NLRB No. 129, slip op. at 3-4 (2010); *All Pro Vending*, 350 NLRB 503, 508 (2007); *Rood Trucking Co.*, 342 NLRB 895, 897-898 (2004) citing *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995) (“When the employer presents a legitimate basis for its actions which the factfinder concludes is pretextual . . . . the factfinder may not only properly infer that there is some other motive, but that the motive is one that the employer desires to conceal--an unlawful motive.”) (internal quotation omitted); *Whitesville Mill Service, Co.*, 307 NLRB 937 (1992) (“we infer from the pretextual nature of the reasons for the discharge advanced by the Respondent that the Respondent was motivated by union hostility”), citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). Indeed, even something short of a pretext: merely the failure to “substantiate [an] asserted rationale for not hiring [alleged discriminatees], coupled with evidence undercutting th[e] rationale,” will support a finding of unlawful motivation. *TCB Systems, Inc.*, 355 NLRB No. 162, slip op. at 3 (2010). In addition, as the Board has held, the articulation of “shifting defenses” is evidence of, or, at the least, supports an inference of unlawful motive. *Taft Broadcasting Co.*, 238 NLRB 588, 589 (1978).

While the Administrative Law Judge writes that the termination notice “does not . . . fully explain the reason for his discharge,” he fails to conclude that this is evidence of pretext and does not explain why he does not do so. (ALJD at 6:10-11.) In addition, the Administrative Law Judge, although acknowledging the disparate treatment evidence, does not analyze the evidence in a *Wright Line* framework. (ALJD at 6:14-17.)

Instead of analyzing the evidence of pretext and disparate treatment in a *Wright Line* analysis, the Administrative Law Judge suggests that the Respondent did not terminate other employees in similar and more egregious situations because they

explained their situations to the Respondent, and if only Ryals did so as well, “I think that Savino would probably have given him some form of discipline short of termination.” (ALJD at 6:13-14.) There is no evidence to support this conjecture by the Administrative Law Judge, and the Respondent did not offer any such defense. Therefore, this portion of the Decision should be reversed and a finding be made that Respondent’s asserted reason for discharging Ryals is pretextual as inconsistent with the documentary evidence setting forth yet a different reason. Essentially, the evidence shows a shifting defense. In addition, to the extent the Administrative Law Judge found that Respondent discharged Ryals because he failed to explain his situation at the disciplinary meeting, this is never mentioned in the termination notice, and, thus, represents a shifting defense warranting an inference of an unlawful motive. Given the above, the Administrative Law Judge’s ruling that Respondent did not violate Section 8(a)(1) and (3) of the Act by terminating Ryals should be overturned.

**II. THE ADMINISTRATIVE LAW JUDGE ERRED BY FINDING THAT RESPONDENT DID NOT VIOLATE SECTION 8(A)(3) OF THE ACT WHEN IT FAILED TO PROVIDE STACK RANKING BONUSSES TO EMPLOYEES EMPLOYED IN THE UNIT**

**EXCEPTIONS**

Page	Lines	Decision
2	9-15	The Administrative Law Judge incorrectly fails to discuss prior cases against Respondent has evidence of anti-union animus. <sup>9</sup>
6 7 11	44-46 1-7 31-32	The Administrative Law Judge incorrectly concludes that Respondent General Manager John Shaw’s interrogation of Ryals and statements “that if the employees decertified the Union they would receive the bonus plan that was applicable to employees in other parts of the country” are barred by Section 10(b) of the Act as evidence of union activity and an unlawful motive. <sup>10</sup>
11	44-48	The Administrative Law Judge incorrectly distinguishes the instant case from <i>Chevron</i> because of the wording of the agent of the Respondent.

<sup>9</sup> Please see the discussion above regarding this exception.

<sup>10</sup> Please see the discussion above regarding this exception.

11	46-47	The Administrative Law Judge incorrectly distinguishes the instant case from <i>Chevron</i> because the agent at issue was higher-ranked in <i>Chevron</i> .
11 12	50-51 1-2	The Administrative Law Judge incorrectly distinguishes the instant case from <i>Chevron</i> because what was said to Ryals was a "true statement of fact".

### DISCUSSION

The Administrative Law Judge found that the facts in this case most closely resembled those in *Chevron Oil Company*, 182 NLRB 445 (1979). (ALJD at 11:24-25.) In *Chevron*, the Board found that the employer violated Section 8(a)(1) and (3) when it withheld wage increases in order to discourage union membership or activity. *Chevron*, 182 NLRB at 449. The Board found that the employer had been engaging in bad faith bargaining, and that it additionally violated the Act by telling employees they had not received certain benefits because of their representation by the union and promised them the prompt receipt of benefits if they abandoned the union. *Id.* at 445.

The Board stated, "Were it not for the unfair labor practice setting in which the withholding action occurred, we would have had no hesitancy in adopting the Trial Examiner's finding" that it did not violate Section 8(a)(3) when it withheld wage increases. *Id.* at 449. However, because of the evidence of bad faith bargaining and Section 8(a)(1) statements, the Board found that the withholding of wage increases was for an unlawful motive, and therefore in violation of Section 8(a)(3) of the Act.

The Administrative Law Judge ruled that Shaw telling employees that "the Farmingdale employees would receive the stack ranking bonus system if they were not represented by the Union is not quite the same as the statements made by a higher ranking manager of *Chevron*, who stated that the employees were not getting the benefit *because they were represented by a union*". (ALJD at 11:45-48.) Judge Green also ruled that the promises of benefits by Shaw were "true statement[s] of fact and do not

necessarily prove that the reason this new bonus system was withheld was in order to punish employees because they selected the Union.” (ALJD at 11:50-51; 11:1-2.)

The difference between telling employees that they would receive a benefit if they were no longer represented by a union, as opposed to that they would not receive it *because* they were represented by a union is a distinction without a legal difference. The analysis here centers upon whether such a remark would reasonably tend to interfere with the free exercise of employee rights under the Act. *See Hanes Hosiery, Inc.*, 219 NLRB 338 (1975). Here, it did, and, as such, it evinced an unlawful motive. Second, that Shaw is not as high-ranked in his employer’s hierarchy as the supervisor in *Chevron* is of no legal significance, since Shaw is clearly an agent of Respondent. Third, even if the promise of a benefit is a true statement, it does not cease to be evidence of animus. Therefore, the Administrative Law Judge’s ruling that Respondent did not violate Section 8(a)(1) and (3) of the Act by not providing Stack Ranking bonuses to the Unit employees should be overruled.

## CONCLUSION

The General Counsel respectfully submits that the evidence shows Respondent committed multiple additional violations of the Act. While the Administrative Law Judge fails to find these violations, as discussed above, the Administrative Law Judge misapplies the law and ignores significant and relevant facts in the record. The General Counsel requests that the Administrative Law Judge's Decision and Order be amended consistent with the General Counsel's exceptions.

Respectfully submitted November 23, 2011.



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UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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DISH NETWORK SERVICE, LLC

and

Case Nos. 29-CA-30578  
29-CA-30583

COMMUNICATION WORKERS OF  
AMERICA, LOCAL 1108

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Date of E-Filing/E-mailing: November 23, 2011

**STATEMENT OF SERVICE OF: COUNSEL FOR THE GENERAL COUNSEL'S  
EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF  
THE ADMINISTRATIVE LAW JUDGE**

I, the undersigned employee of the National Labor Relations Board, hereby state, under penalty of perjury that, in according with NLRB Rules & Regulations § 102.114(i), a copy of the foregoing was sent to each party at the addresses listed below and on the date indicated above:

By E-File

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