Dish Network Corporation *and* Communications Workers of America Local 6171. Cases 16–CA–027316, 16–CA–027331, 16–CA–027514, 16–CA–027700, 16–CA–027701, and 16–RC–010919

April 11, 2012

DECISION, ORDER, AND ORDER REMANDING

BY MEMBERS HAYES, FLYNN AND BLOCK

On August 11, 2011, Administrative Law Judge George Carson II issued the attached decision. The Charging Party filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Charging Party filed a reply to the Respondent's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Dish Network Corporation, North Richland Hills, Texas, and Farmers Branch, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. April 11, 2012

Brian E. Hayes, Member

Terence F. Flynn, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER BLOCK, concurring in part.

The judge found that the Respondent did not violate Section 8(a)(1) of the Act when it told employees that if they selected union representation they would no longer be able to bring their complaints directly to the Respondent. Although I agree with my colleagues that the result here is compelled by the Board's decision in *Tri-Cast, Inc.*, 274 NLRB 377 (1985), and its progeny, I believe that the Board should reexamine the *Tri-Cast* doctrine in a case where the issue is squarely presented.[1] *Tri-Cast* has come to stand for the proposition that almost any employer statement involving the impact of unionization on employees' ability to individually pursue grievances is permissible. Thus, in this case, we allow an employer to implicitly misstate the law in order to tell employees that if they choose to be represented by a union they necessarily will lose the right to bring complaints to management individually. That result is in tension with the rights accorded employees in the Act and with the Board's approach in analogous kinds of cases. Moreover, it serves no clear statutory purpose.

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Charging Party excepted to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(1) by informing employees that (in the words of the complaint) "they would be limited in bringing concerns to management if they selected the Union as their exclusive bargaining representative," and Sec. 8(a)(3) by dismissing employee Charles Cook. No exceptions were otherwise filed.

In finding that the above-quoted statement did not violate Sec. 8(a)(1), the judge applied *Tri-Cast, Inc.*, 274 NLRB 377 (1985). Our concurring colleague acknowledges that the merits of *Tri-Cast* are not before us; we emphasize why. First, the issue is outside our purview by rule. In its exceptions brief, the Union argued only that *Tri-Cast* is distinguishable. In its answering brief, the Respondent cited *Tri-Cast* as controlling precedent, implicitly rejecting the Union's attempt to distinguish it. For the first time in its *reply* brief, the Union urged us to revisit *Tri-Cast*. Our Rules state, however, that a reply brief "shall be limited to matters raised in the brief to which it is replying." Board's Rules and Regulations Sec. 102.46(h). Accordingly, the Union's suggestion that *Tri-Cast* be revisited is not properly before us. See *Security Walls, LLC*, 356 NLRB No. 87, slip op. at 1 fn. 1 (2011). Second, the Acting General Counsel controls the theory of the case, not the Charging Party Union. See, e.g., *Zurn/N.E.P.C.O.*, 329 NLRB 484, 484 (1999); *Kimtruss Corp.*, 305 NLRB 710, 711 (1991). At no point in this case has the Acting General Counsel sought the overruling of *Tri-Cast*. Indeed, he filed no exceptions to the judge's decision. For each of these independently sufficient reasons, the issue that Member Block discusses is not before the Board for consideration and we need not address it.

[1] The judge noted a discrepancy between the initial and corrected tally of ballots. The initial tally reflected 17 challenged ballots, a potentially determinative number. The corrected tallies, without explanation, reflect no challenged ballots. Accordingly, the judge ordered that Case 16–RC–10919 be severed and remanded to the Regional Director for appropriate action. We adopt the judge's recommended Order Remanding.

[1] Here, the Charging Party did not argue until its reply brief that *Tri-Cast* should be overruled. As a result, neither the Respondent nor the General Counsel has had the opportunity to brief the issue.

I join my colleagues in adopting the judge's finding that the Respondent did not unlawfully discharge employee Charles Cook.

I.

Under Section 9(a) of the Act, a union selected by a majority of employees in a bargaining unit is granted exclusive representative status; accordingly, the employer has a duty to bargain with the union under Section 8(a)(5) and may not deal directly with employees. However, the proviso to Section 9(a) makes clear that the union's exclusive representative status does *not* prevent individual employees from bringing grievances to management on their own or foreclose employers from entertaining those grievances.[2] See *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 61 fn. 12 (1975) ("The intendment of the proviso is to permit employees to present grievances and to authorize the employer to entertain them without opening itself to liability for dealing directly with employees in derogation of the duty to bargain only with the exclusive bargaining representative, a violation of §8(a)(5)."). See also *Black-Clawson Co. v. Machinists Lodge 355*, 313 F.2d 179, 184–186 (2d Cir. 1962) (examining legislative history of Sec. 9(a) proviso; cited with approval in *Emporium Capwell*, supra).

In this case, in the context of an organizing campaign, the Union distributed a flyer entitled "9 Point Pledge." The Union's flyer explained that:

> I understand that once our workplace is union, we will have the right to have a coworker come with us in meetings we have with management that might result in discipline. We will not have to be all on our own anymore in those situations with management, unless that is what we choose.

The Respondent reprinted the flyer with an answer to each of the Union's nine points. In response to the foregoing point, the Respondent stated as follows:

> If a workplace is Union, you have to go to your Steward with your complaints, and he decides whether to bring them to the Company's attention, not you. He controls your fate, not you.

In analyzing the Respondent's statement, the judge acknowledged that it made no mention of employees' ability under Section 9(a) to pursue grievances individually. Nonetheless, relying on *Tri-Cast*, the judge found that the Respondent's statement was lawful because "it correctly points out that the Union decides which grievances it wishes to pursue."

II.

Prior to *Tri-Cast*, and in line with what Section 9(a) actually provides, the Board consistently held that employer statements indicating that if the employees selected union representation, they would lose their right to speak directly with management violated Section 8(a)(1), and constituted objectionable conduct as a threat to take away an existing benefit if employees chose union representation.[3] In *Tri-Cast*, the Board departed from this principle with minimal analysis. Although the *Tri-Cast* Board specifically overruled three contrary cases, it made no mention of the numerous other cases with similar holdings.[4] Nor did the Board in *Tri-Cast* directly address the rationale of those cases. Rather, the Board summarily concluded that "there is no threat, either explicit or

[2] Sec. 9(a) provides as follows:

> Representatives designated or selected for the purposes of collective bargaining by a majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

[3] See, e.g., *Graber Mfg. Co.*, 158 NLRB 244, 247 (1966), enfd. 382 F.2d 990 (7th Cir. 1967) ("[T]he employees' statutorily protected right to present their own grievances and thus speak for themselves is undoubtedly a right cherished by many employees and Respondent's statement that if the Union became their representative it would talk to the employer about their own job affairs to their exclusion amounted to a threat that they would lose a substantial benefit."). See also *Reidbord Bros. Co*., 189 NLRB 158, 162 (1971) (employer violated Sec. 8(a)(1) by telling employees that they could not "go directly to the supervisor and register a complaint" once a union became employees' representative); *Colony Printing & Labeling*, 249 NLRB 223, 224–225 (1980), enfd. 651 F.2d 502 (7th Cir. 1981) (violation of Sec. 8(a)(1) to tell employees "when you sign, you give away your right to talk to us about your pay, your benefits, the hours you work, and about your job"); *LOF Glass, Inc.*, 249 NLRB 428, 428 (1980) (employer engaged in objectionable conduct by telling employees that "the right and freedom of each of you to come in and settle matters personally would be gone [if they chose to unionize]"); *Armstrong Cork Co.*, 250 NLRB 1282, 1282 (1980) (objectionable conduct to tell employees that by voting, they will "decide whether you want to give up your right to have any say about your job, and to deal directly with me or your supervisor as you have in the past"); *Joe & Dodie's Tavern*, 254 NLRB 401, 411 (1981), enfd. 666 F.2d 383 (9th Cir. 1982) (employer's statement violated Sec. 8(a)(1) by communicating an "erroneous statement of the law and by portend[ing] a clear threat of loss of benefit, i.e. employees being able to make their own decisions and communicate directly with management"); *Greensboro News Co.*, 257 NLRB 701, 701 (1981) (objectionable to tell employees that "if the Union comes in, the Union will be your representative and we must deal with them, not you"); *Associated Roofing & Sheet Metal Co.,* 255 NLRB 1349, 1350 (1981) (employer's statement that "the right and freedom of each employee to settle matters personally would be gone" constitutes "an objectionable threat to withdraw unilaterally an existing benefit").

[4] See *Tri-Cast*, 274 NLRB at 377 fn. 5 (expressly overruling *Greensboro News Co.*, supra; *Armstrong Cork Co.*, supra; and *LOF Glass, Inc.*, supra).

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 employer will not be as before." *Tri-Cast*, 274 NLRB at 377.

III.

Although an employer's statement that does no more than explain that unionization will change the employer/employee relationship may be lawful, it simply does not follow that *any* statement–even an inaccurate statement–by an employer about the changes to the relationship brought by unionization is necessarily permissible. Under *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), if an employer makes statements to employees concerning the effects that unionization will have on its operations, those statements "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." Where an employer makes a statement ostensibly based on what the Act allows or requires, that statement must be measured against what the Act actually allows or requires. See, e.g., *Eagle Comtronics, Inc.*, 263 NLRB 515, 516 (1982) (explaining that an employer's statements about job status after a strike must be "consistent with the law"). In line with that principle, when the Board reviews the lawfulness of an employer's predictions about the adverse consequences of unionization based on collective-bargaining agreements that assertedly would apply to employees, it requires that employers' statements be objectively based, i.e., accurately represent the facts.[5]

Consistent with *Gissel*, in *Eagle Comtronics*, supra, the Board held that an employer "may address the subject of striker replacements without fully detailing the protections enumerated in *Laidlaw Corp.,* [171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969)], so long as it does not threaten that, as a result of a strike, employees will be deprived of their rights in a manner inconsistent with *Laidlaw*." Id. at 516. The *Tri-Cast* Board relied on *Eagle Comtronics*, implicitly recognizing that an employer's misstatement of the law may constitute an unlawful threat.[6] Indeed, the two cases are similar in that both involve employer statements to employees that refer, directly or indirectly, to the provisions of the Act. However, while *Eagle Comtronics* permits employers to make statements about striker replacements without fully detailing the protections provided by the law, it also provides an important qualification: the employer may not threaten to deprive employees of existing rights as a consequence for striking. I believe that the *Tri-Cast* Board erred in not applying a similar qualification. I see no reason why employers should not be prohibited from threatening to deny employees the individual ability to pursue grievances.[7]

Notably, *Eagle Comtronics* has proven to be a useful tool for making meaningful distinctions about employer statements. In some cases, the Board has found employer statements about strike replacement rights to be lawful under the articulated standard.[8] However, in many other cases, the Board has found employer statements to be impermissibly threatening.[9] In contrast, *Tri-Cast* has proven to be a blunt instrument, applied in such a broad fashion that almost any statement involving employees' ability to pursue grievances individually is permissible.[10]

[5] See *Systems West LLC*, 342 NLRB 851, 851–852 (2004) (employer's statement was not based on objective fact when it predicted, based on existing master labor agreement, that current employees would not be hired if the union were selected because they would not qualify for the union's hiring hall; whether or not the contract applied to employees would have to be negotiated). Accord: *Schaumburg Hyundai, Inc.*, 318 NLRB 449, 450 (1995). See also *More Truck Lines*, 336 NLRB 772, 773 (2001), enfd. 324 F.3d 735 (D.C. Cir. 2003) (where two rival unions were competing to represent employees, employer unlawfully threatened employees by telling them that contract with incumbent union would be "null and void" if new union was selected because the statement did not accurately explain the employer's legal obligations).

[6] See *Tri-Cast*, 274 NLRB at 377 fn. 5.

[7] When applying *Gissel* to an employer's statement concerning the effects of unionization, the Board pays particular attention to "the context of [the employer's] labor relations setting." *Mediplex of Danbury*, 314 NLRB 470, 471 (1994) (quoting *Gissel*, 395 U.S. at 617). The Board has specifically recognized the importance of this context when the issue involves a statement about striker replacements. See *Sygma Network Corp.*, 317 NLRB 411, 411 (1995). Thus, in *Sygma*, the Board affirmed the administrative law judge's finding of a violation based on an employer's statement regarding its right to hire permanent replacements for strikers, noting that the finding was supported by the employer's additional unlawful threats made to employees by a supervisor. Id. However, under *Tri-Cast*, that context appears to play no role in determining the existence of a violation. Indeed, in applying *Tri-Cast* to this case, we do not take into account the fact that the Respondent's statement was made in the context of a forceful antiunion campaign, in which the Respondent committed numerous unfair labor practices.

[8] See, e.g., *River's Bend Health & Rehabilitation Services*, 350 NLRB 184, 184–185 (2007) (and cases cited therein) (not unlawful to tell employees that hiring of replacements "puts each striker's job in jeopardy," because statement is consistent with *Laidlaw* and does not constitute a threat).

[9] See, e.g., *Wild Oats Markets, Inc.*, 344 NLRB 717, 718 (2005) (unlawful threat of job loss to tell employees that "when unions go on strike, wages can be lost and many have lost their jobs because striking workers are replaced"). See also *Gelita USA, Inc.*, 352 NLRB 406, 407 (2008), adopted by 356 NLRB No. 70 (2011) (statement that strikers would have "no job protection if replaced" unlawful because it incorrectly states the law under *Laidlaw*).

[10] See, e.g., *United Artists Theatre*, 277 NLRB 115, 115 (1985) (no 8(a)(1) violation where employer stated that by voting for the union, employees would vote away their right to deal with management directly); *Ben Venue Laboratories*, 317 NLRB 900, 900 (1995), enfd. 121

As a result, the cases applying *Tri-Cast* seem at odds with the Board's overall treatment of employer predictions about the outcome of unionization. For example, in *United Artists*, supra, the Board held that an employer's statement–"[Y]ou have always had the right to deal directly with management of our company. Should the union get in, you will have voted away that right and you will have placed a group of outsiders who know nothing about our business between yourself and your company"–was *not* unlawful. 277 NLRB at 115. There is little doubt that this statement conveys to employees that the consequence of unionization will be the loss of an important benefit, the ability to approach management directly. Therefore, it is dubious to characterize such a statement as merely "explaining a change in the manner in which employees and employers deal with each other when a union is elected." Rather, the statement relies on a misrepresentation of the law to suggest that employees will inevitably lose an existing benefit as a consequence of unionization.

Similarly, in this case, the Respondent's assertion that if the employees chose union representation they would lose the ability to bring their complaints to the Respondent without going through the Union is not a mere explanation of the law. It is a misrepresentation and, as such, could be considered a threat. The Board's decision in *Tri-Cast*, however, precludes such an inquiry and dictates that an employer's statements about employees' ability to pursue grievances individually after a union is selected are treated differently from other statements involving the impact of unionization on employee rights. Accordingly, I would favor reexamining *Tri-Cast* in an appropriate future case.

Dated, Washington, D.C. April 11, 2012

Sharon Block, Member

NATIONAL LABOR RELATIONS BOARD

F.3d 709 (6th Cir. 1997) (no 8(a)(1) violation where employer told employees that its "open door" policy would no longer exist if the employees voted to unionize). See also *Koons Ford of Annapolis*, 282 NLRB 506, 506 (1986), enfd. 833 F.3d 310 (4th Cir. 1987) (no violation where employer stated that unionization would result in a loss of access to management); *SMI Steel*, 286 NLRB 274, 274 (1987) (no violation where employer threatened employees that its "open-door policy" would no longer apply if the employees chose to unionize); and *FGI Fibers*, 280 NLRB 473, 473 (1986) (not unlawful to tell employees that "there would not be any more open door policy if the Union was voted in because they'd have to go through union procedures, like grievances").

Arturo A. Laurel, Esq., for the General Counsel.
George Basara, Esq., for the Respondent.
Matt Holder, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Fort Worth, Texas, on May 23, 24, and 25, 2011, pursuant to an amended consolidated complaint that issued on January 7, 2011.[1] The complaint, as amended at the hearing, alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) in various respects and violated Section 8(a)(3) of the Act by warning and discharging employee Charles Cook.[2] The representation case relates to an objection to the election filed by the Employer predicated upon the conduct of Cook.[3] The answer of the Respondent denies any violation of the Act. I find that the Respondent violated the Act in certain respects and that the objection to the election has no merit.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Dish Network Corporation (the Respondent, the Company, or the Employer) is a Colorado corporation engaged in the business of providing satellite television installation and service throughout the United States including its facilities in North Richland Hills and Farmers Branch, Texas. The Company annually purchases and receives at its Texas facilities goods valued in excess of $50,000 directly from points located outside the State of Texas. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that Communications Workers of America, Local 6171, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview

This case arises as a result of a union organizational campaign at the Company's North Richland Hills and Farmers Branch, Texas locations. The Union filed petitions for elections

[1] All dates are in 2010 unless otherwise indicated. The charge in Case 16–CA–27316 was filed on February 26 and amended on March 10 and 24. The charge in Case 16–CA–27331 was filed on March 10 and amended on April 7. The charge in Case 16–CA–27514 was filed on June 25. The charges in Cases 16–CA–27700 and 16–CA–27701 were filed on October 19 and amended on December 22.

[2] Counsel for the General Counsel amended the complaint by withdrawing subpars. 7(a), (b), (c) (l), and (m) and 8(c) and (d).

[3] Timely objections to the election in Case 16–RC–10919 were filed on March 3, and an order directing hearing on objections issued on January 7, 2011. At the hearing, the Employer withdrew Objections 2 and 3 and stated that it would proceed only on Objection 1.

at each location. The Union won the election at the Farmers Branch location. The election at the North Richland Hills location is before me as a result of objections to the election filed by the Employer.

The complaint contains various 8(a)(1) allegations predicated upon alleged unlawful communications made by the Company during the campaign. It also alleges that Charles Cook, an outspoken advocate for the Union, was unlawfully warned and discharged. As hereinafter discussed, I find that the warning issued to Cook did violate the Act. I find that his discharge did not.

A major issue in the organizational campaign was an alteration of the manner in which employees were paid. Prior to September or October 2009, employees had been paid an hourly wage. Thereafter the Company instituted a new system, referred to as Pay for Points or QPC. The record does not establish the basis for the QPC acronym. Pursuant to the new system, employees were paid a lower hourly wage but earned additional money based upon points accumulated for the actual work that they performed. Bonuses were also able to be earned. Employee Charles Cook explained that he experienced multiple problems with the new system. If a job did not get properly recorded, the employee would have to provide the documentation establishing that the job was performed. Although Cook testified that some employees liked the QPC system and others did not, no employee who liked the system testified, and the Company's communications regarding QPC confirm that it was not popular. The Company contends that none of its communications regarding QPC violated the Act. The General Counsel and Charging Party contend that several of the communications did violate the Act.

B. The 8(a)(1) Allegations

The complaint, in subparagraphs 7(d) and (i), alleges that the Respondent violated the Act by informing its employees in writing at Farmers Branch and North Richland Hills that "they would be limited in bringing concerns to management if they selected the Union as their exclusive bargaining representative."

The foregoing allegations are predicated upon the Company's response to a "9 Point Pledge" distributed by the Union in the campaign. Item number 9 states:

> I understand that when once our workplace is union, we will have the right to have a co-worker come with us in meetings we have with management that might result in discipline. We will not have to be all on our own anymore in those situations with management, unless that is what we choose.

The Company's response states:

> If a workplace is Union, you have to go to your Steward with your complaints, and he decides whether to bring them to the Company's attention, not you. He controls your fate, not you.

The foregoing statement contains no threat. It does not contradict the Union's correct statement regarding an employee's right to a witness at an investigatory interview. Although the response does not cite the 9(a) right of employees to individually present grievances, it correctly points out that the Union decides which grievances it wishes to pursue.

Board precedent, reiterated in *United Rentals, Inc*., 349 NLRB 190, 191 (2007), establishes that:

> An employer does not violate the Act by informing employees that unionization will bring about "a change in the manner in which employer and employee deal with each other." To the contrary, truthful statements that identify for employees the changes unionization will bring inform employee free choice which is protected by Section 7 and the statements themselves are protected by Section 8(c). See *Tri-Cast, Inc*., 274 NLRB 377, (1985), citing *NLRB v. Sacramento Clinical Laboratory,* 623 F.2d 110, 112 (9th Cir., 1980). (the court, citing with approval *Textron Inc.*, 176 NLRB 377 (1969). The Board there said that "'[I]t is a fact of industrial life' that when a union represents employees, they will deal with an employer indirectly, through a shop steward.")

The Charging Party argues that *Tri-Cast, Inc*., supra, "fails to give any meaning to the proviso of Section 9(a)" of the Act and "should rightly be questioned." The Board's recent reliance upon *Tri-Cast, Inc.*, in the *United Rentals, Inc*., decision confirms its current viability as Board precedent, and I am bound by Board precedent.

I shall recommend that this allegation be dismissed.

The complaint, subparagraph 7(e), alleges that on or about January 19 General Manager Bradley Stives, at the Farmers Branch facility, "promised its employees that they would go back to hourly pay if the employees did not select the Union as their exclusive bargaining representative." Employee Juan Zamarron recalled that Regional Operations Manager Karen Steinbeck, not Stives, was asked "if we voted no," how long it would take "for us to get back on regular pay." Steinbeck answered that "she couldn't make any promises, because she didn't want to influence the election . . . but generally it would take two weeks."

The foregoing time estimate, given in response to a specific question relating to time and coupled with Steinbeck's comment that she "couldn't make any promises," did not constitute a promise and did not violate the Act. I shall recommend that this allegation be dismissed.

Subparagraph 7(f) alleges that, on or about January 26 at North Richland Hills, General Manager Lance Higgins, "threatened employees with unspecified reprisals because of their Union activities."

Charles Cook recalled that employees at North Richland Hills were told repeatedly by Higgins and Human Resources Manager Barbara Ward that "if you guys organize . . . all your benefits will be frozen; you won't be able to come to us with any complaints, . . . [and] [w]e're going to have to get . . . more stringent on the policies that we've been lax on in the past."

I am mindful that Cook was unable to attribute the comments that he recalled to a specific speaker; however, Higgins did not testify and Ward did not deny making the comment relative to more stringent enforcement of company policies. Insofar as the comments were made repeatedly I find it understandable that Cook was unable to make a specific attribution. Rather than unspecified reprisals, Cook's testimony, which I credit, establishes that the Respondent 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.

Subparagraph 7(g) alleges that, on or about January 26 or in early February at North Richland Hills, Human Resources Manager Barbara Ward told employees that their wages and benefits were frozen and that they were not getting any changes in their wages and benefits that were given to other employees employed by the Respondent in other locations because of their union activities.

Subparagraph 7(k) alleges that Ward, on or about February 2 and/or February 9 at North Richland Hills, "told employees that their wages and benefits were frozen because of their union activities."

Although Cook recalled that comments relative to the employees' benefits being frozen were made, he was, as already noted, unable to specify whether it was Higgins or Ward who made the comment. Ward credibly denied using the word frozen explaining that, in training, she was taught to use the term "status quo." Higgins is not included or named in these allegations. I shall recommend that these allegations be dismissed.

Subparagraph 7(h) alleges that, from January 15 through February 24, the Respondent, in writing at North Richland Hills, "threatened its employees that they would be paid differently than other employees employed by Respondent in other locations because of their union activities."

This allegation is predicated upon two documents distributed at both North Richland Hills and Farmers Branch, although the complaint allegation relates only to North Richland Hills.

Prior to the distribution of the two documents, the Company had, in a PowerPoint presentation made the last week of January (GC Exh. 49, pp. 8–9), informed employees that in bargaining it could reject proposals with which it did not agree and gave, as the first example, a union proposal of "No QPC," to which the "DISH Response" is "QPC stays."

It appears that, during that same week, or the following week, the Company terminated QPC. A PowerPoint presentation made to employees in the second week of February (GC Exh. 51, p. 5) states:

> QPC is an example of what can happen in bargaining.
> Some of you do not like QPC, and some do.
> DISH discontinued QPC across the country last week.
> This does not apply here. DISH is obligated by law to keep QPC in place until either (1) the Union is voted out, or (2) it is removed through negotiations.
> All employees here will continue under QPC until one of these two things happens.

The Company also distributed a document titled "Questions and Answers about Union Issues" that, among other matters, discussed QPC. The relevant portion states:

> DISH is required by law to maintain the "status quo."
>
> > For example, QPC was just recently terminated as a test pilot program across the U.S., but it will remain in place at the FB [Farmers Branch] and NBH [sic] [North Richland Hills] locations until such time as the Union is voted out, or changes are negotiated between the CWA and DISH.

The Company presented no evidence of any employee who liked QPC. The Company's awareness of the unpopularity of QPC is confirmed by the implied promise to discontinue QPC at Farmers Branch and North Richland Hills, just as it had "across the country" if the "Union is voted out."

Notwithstanding the corporate abolition of QPC, the Respondent did not modify its previously stated position that, if the Union proposed "No QPC," it would reject that proposal, "QPC stays."

There can be no question that the abolition of QPC would have occurred at Farmers Branch and North Richland Hills in the absence of the union organizational activity. The abolition was system wide. See *Associated Milk Producers*, 255 NLRB 750 (1981). Thus the issue is whether the Respondent's comments were lawful. Board precedent, as set out in *Atlantic Forest Products*, 282 NLRB 855, 858 (1987), is clear.

> It is well established that an employer is required to proceed with an expected wage or benefit adjustment as if the union was not on the scene. . . . An exception to this rule, however, is that an employer may postpone such a wage or benefit adjustment so long as it "makes clear" to employees that the adjustment would occur whether or not they select a union, and that the "sole purpose" of the adjustment's postponement is to avoid the appearance of influencing the election's outcome. . . . In making such announcements, however, an employer must avoid attributing to the union "the onus for the postponement of adjustments in wages and benefits," or "disparag[ing] and undermin[ing] the [union] by creating the impression that it stood in the way of their getting planned wage increases and benefits." [Citations omitted.]

Abolition of QPC was a benefit adjustment. The Respondent made no statement relative to postponement of the adjustment. The onus for the continuation of QPC was upon the Union. QPC "will remain in place . . . until such time as the Union is voted out, or changes are negotiated between the CWA and DISH." Rather than informing employees, consistent with the corporate abolition of QPC, that QPC would be abolished following the election regardless of the outcome, the employees were told that, if they voted for the Union, abolition of QPC would be dependent upon bargaining. Respondent never modified its stated bargaining position that, if the Union proposed abolition of QPC, "QPC stays." The way for the employees to get rid of QPC was to defeat the Union in the upcoming election.

The Respondent, by informing employees at North Richland Hills that they would be paid differently than employees at other locations because of their union activities, violated Section 8(a)(1) of the Act.

Subparagraph 7(j) of the complaint alleges that, on or about February 9 at Farmers Branch, General Manager Stives and Regional Operations Manager Steinbeck threatened employees that they would remain on the same pay plan if they selected the Union as their exclusive bargaining representative and told employees it would be futile to select the Union as their exclusive bargaining representative.

Employee Juan Zamarron recalled that company representatives at Farmers Branch addressed the QPC and the status quo

explaining that the employees had "jumped the gun," that the Company was "going to make some adjustments to it, but since we petitioned, there wasn't going to be none, because we were status quo." The record does not establish whether the "adjustments" were the same as the corporate abolition of QPC. Regardless of the nature of the "adjustments" that the Respondent "was going to make," the Respondent informed its employees that there would be no adjustments because the employees had "petitioned." By informing its employees that they would remain on the same pay plan because of their union activities, the Respondent violated Section 8(a)(1) of the Act.

The evidence in support of the allegation relating to futility was testimony by Zamarron who recalled that, at a meeting on February 2 rather than February 9, General Manager Bradley Stives told the employees that the Company would bargain to impasse. "They didn't say, you know, [']We could bargain to impasse.[‘] It's, [']We will bargain to an impasse.[‘]" Stives did not testify, and I credit Zamarron.

The Company's PowerPoint presentation the last week of January referred to bargaining and noted that at Farmingdale, New York, the Company had not reached an agreement with the Union after 8 years. The foregoing factual representation is not a violation of the Act. Stives' statement the following week, that the Respondent "would," not could, "bargain to an impasse," is inimical to the concept of bargaining in good faith. An employer's statement to employees that the employer intends to bargain to impasse before the employees select a union as their collective-bargaining representative and before receiving proposals and responding to them conveys the unmistakable message that their selection of the Union will be a futile act. The Respondent, by informing its employees that selection of the Union as their collective-bargaining representative was futile, violated Section 8(a)(1) of the Act.

Subparagraphs 7(n) and (o) allege that Farmers Branch Installation Manager Chris Vega, on or about March 2 threatened employees that they would fail quality assurance checks and that company rules, including the Respondent's dress code, absenteeism/sick day policies, and safety procedures, would be more strictly enforced because of their union activities.

Employee Zamarron recalled that, on March 2, Vega addressed the employees. He began by stating that his comments were "in response to what happened last week," which is when the election took place. He then read out various company policies including the dress code and attendance policies, noting that employees with tattoos needed to cover them and that, if an employee was out of vacation time and missed a day, the employee would be "written up . . . even if we call in." Employee Jorge Tavares corroborated Zamarron. He recalled that Vega told the employees that "everything's going to be black and white . . . [e]verything's going to be enforced." He mentioned the dress code, stating that tattoos "were going to have to be covered up." He stated that if an employee was out of sick days, even if the employee called in, "you get written up." An employee asked Vega why the Company was "doing that." Vega answered, "Because the Union is voted in now."

Vega, in his testimony, pointed out that he had meetings each week, that it had been over a year since the meeting in question, and that he did not "recall anything." He did not deny making the statements attributed to him by Zamarron and Tavares. I credit their testimony.

There is no evidence relating to failing quality assurance checks or safety procedures, and I shall recommend that those aspects of the foregoing allegations be dismissed.

The Respondent, by threatening more strict enforcement of its dress code and absentee policies because the employees selected the Union as their collective-bargaining representative, violated Section 8(a)(1) of the Act.

The complaint, in subparagraph 7(p), alleges that the Respondent unlawfully maintained "a mandatory arbitration policy as a condition of employment."

Board precedent, *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), establishes that arbitration agreements that "would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board" violate the Act.

The arbitration agreement herein provides, in pertinent part, that the Company and employee agree to arbitration of "any claim, controversy and /or dispute between them arising out of and/or in any way related to Employee's . . . employment or termination of employment."

A further provision states:

> Notwithstanding the foregoing, this agreement to arbitrate all claims shall not apply to Employee claims for statutory unemployment compensation benefits, statutory worker's compensation benefits, and claims for benefits from an [sic] DISH Network-sponsored "employee benefit plan," as that term is defined in 29 U.S.C, § 1002(3). Further, and notwithstanding the foregoing, DISH Network shall have the right to seek any temporary restraining orders, preliminary and/or permanent injunctions in a court of competent jurisdiction based on DISH Network's claims that the Employee is violating DISH Network's rights regarding (I) non-competition agreements or obligations and/or (2) intellectual property, including but not limited to copyrights, patent rights, trade secrets and/or know-how and or (3) confidential information.

The Respondent's argument that the Charging Party Union has no standing to file the charge herein alleging that the arbitration agreement is unlawful misses the mark. "[A]nyone can file a charge." *Frank L. Sample, Inc*., 118 NLRB 1496, 1498 (1957).

The arbitration agreement to which the employees were required to agree is a legal agreement that restricts the rights of employees. The fact that this Respondent has not invoked the arbitration agreement is irrelevant. All the charges herein were filed by the Union, not individual employees. As the brief of the Charging Party correctly notes, "Dish could have added to the list of exclusions claims under the NLRA [National Labor Relations Act], but did not do so." Insofar as claims under the National Labor Relations Act are not excluded, whereas unemployment and worker compensation benefits are excluded, I find that the agreement "would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board."

The Respondent, by requiring that employees sign an arbitration agreement from which the employees reasonably could conclude that they was were precluded from filing charges with

the NLRB, violated Section 8(a)(1) of the Act.

C. The 8(a)(3) Allegations

The complaint alleges that Charles Cook was warned and discharged in violation of Section 8(a)(3) of the Act. Pursuant to the analytical framework prescribed in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). cert. denied 455 U.S. 989 (1982), the General Counsel must show (1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that the activity was a substantial or motivating reason for the employer's action. It is undisputed that Cook engaged in protected union activity and that the Respondent was aware of that activity. The 8(a)(1) violations found herein establish the animus of the Respondent towards union activity. I find that the protected union activity of Cook was a motivating factor in the issuance of the warning and in his discharge. Thus, it was incumbent upon the Respondent to establish that the same action would have been taken against Cook in the absence of his union activity.

1. The final warning

a. Facts

The Company provides employees with the tools they need to perform their job. A company work rule requires employees to use only company equipment. Despite this, many employees used their own tools, particularly hand drills, when working over their heads. Cook explained that "running line on the eaves of people's homes" required lifting his arm over his head for "extended periods of time to screw these ties in." His personal hand drill weighed less than half of what the Company-issued drill weighed, and he used it to "make the work go faster" because it was less strenuous on overhead installations. Other employees, just as Cook did, carried and used their personal hand drills. Employees had been trying for the "last couple of years" to get approval for the use of their smaller and lighter drills, but they had not "made any progress." Notwithstanding the absence of approval, prior to February, no employee had been disciplined for using his personal hand drill.

In early February, Cook had experienced a problem when performing an installation and requested assistance. His supervisor, Chase Parkey, and another supervisor came to where Cook was working and helped him figure out what needed to be done. Cook had his personal drill, "as I always did," and neither Parkey nor the other supervisor "made any comment about it."

On February 17 Cook was performing an installation when his supervisor, Parkey, came out on an unannounced visit, which was not unusual. Parkey was there for about half an hour observing Cook. They talked about dogs and the weather as Cook worked. Just before Parkey left, he commented upon Cook's hand drill, stating, "You know that's not an authorized drill; right?" Cook acknowledged, "Yes, I do know that." Cook commented that, if Parkey needed "to generate a report reflecting that you did your job," he would understand because "it's your job to do that." Parkey never directed Cook to cease using his personal drill.

On February 22, Cook was called to the office of Installation Manager Wes Crow. Parkey was present. Cook was presented with a final warning for insubordination because he had used his personal drill. When presented the warning, Cook commented, "I don't get this," but he then revised his reaction, stating, "I guess I do. I think that, you know, that this goes to another part of an agenda that you're working, and you're using this as an excuse, you know, to work that agenda." Neither Parkey nor Crow responded to the foregoing comment. Cook reminded Parkey of the occasion in early February when Parkey had come to assist him and made no comment about his personal drill. Parkey did not respond. Cook refused to sign the warning.

Contrary to the statement in the warning that Cook did not cease using his personal drill "when confronted by his supervisor," Cook did not use his personal drill in defiance of any directive by Parkey. Parkey never directed Cook to cease using his personal drill. Parkey's comment regarding Cook using a drill that was not authorized was made as Parkey was leaving. Neither Installation Manager Crow nor Parkey testified.

b. Analysis and concluding findings

The warning issued to Cook was for insubordination. The Respondent's brief asserts that Cook was warned for insubordination because, after his supervisor "appeared at the job site and asked him about using unauthorized tools," Cook responded, "Go ahead, write me up." The record reflects that those were the words of Respondent's counsel, not Cook. Counsel asked, "[T]o which you replied, 'Go ahead, write me up.'" Cook answered, "That's an abbreviation of what I said. Yes." As set out above, Cook responded that, if Parkey needed "to generate a report reflecting that you did your job," he would understand because "it's your job to do that."

If, as the brief of the Respondent implies, Parkey appeared at the jobsite and asked Cook about his use of unauthorized tools, and Cook had continued to use his personal tool, a warning for insubordination might well have been appropriate. But there is no evidence that anything other than that to which Cook credibly testified occurred. Parkey never directed Cook to cease using his personal drill. Parkey's comment regarding Cook using a drill that was not authorized was made as Parkey was leaving. Parkey did not testify.

Contrary to the assertion in the brief of the Respondent that an employee was "warned verbally" on February 9 regarding use of unauthorized tools, the May 5 warning to employee John Taylor reports that Taylor had been told on February 9 to remove his personal tools. That was a verbal directive. There was no verbal warning.

On January 26, employees at North Richland Hills were threatened with more stringent enforcement of company rules if they selected the Union as their collective-bargaining representative. There is no evidence that, prior to February 22, any employee had been disciplined, much less issued a final warning, for using a personal tool. When the discipline for insubordination was issued, Cook commented that he believed that the warning was "another part of an agenda that you're working." Neither Crow nor Parkey responded to that statement. Cook was not insubordinate. The absence of testimony by Crow and Parkey is compelling evidence that, if they had testified and done so truthfully, their testimony would have confirmed that

the warning issued to Cook was "part of an agenda" related to his union activity.

The Respondent, by issuing a final warning to Charles Cook because of his union activity, violated Section 8(a)(3) of the Act.

2. The discharge

a. Facts

On February 23 and 25, all full time and part time technicians at the North Richland Hills facility voted to determine whether they desired to be represented by the Union. The split sessions occurred because, pursuant to the work schedule, there was no one day that all employees would be present.

Near the end of the voting session on February 23, about 6:30 p.m., prounion employee Charles Cook voted. He went upstairs to the voting area and entered the room. Company observer Rex Leslie, a nonunit employee, and Union observer Thomas Allen were sitting at a long table. Cook went behind the table to get to the voting booth. As he passed Union observer Thomas Allen, he patted him on the shoulder. He voted and put his ballot in the ballot box. As he left the voting area he testified that he "tapped Leslie on what has become known as the ear and just left, you know."

Cook explained that he was "one of the last people to vote," and that he walked behind the observers' table because it was the "shortest distance between two points." Cook's testimony regarding his physical contact with Company observer Rex Leslie was inconsistent. He initially testified that he "tapped" Leslie on the ear. He then claimed that he "patted him on the way out," presumably on the ear. In an email to the Union, Cook stated that he "did strike Rex [Leslie] on the ear."

Leslie described the physical contact as a slap, "[H]e slapped me on the side of the face." Leslie explained that the slap was not hard enough to knock him down but it did "sting . . . [and] caused my ear to ring quite a bit." Leslie commented, "You're going to make me go deaf." He recalled that one of the Board agents stated, "That's battery." I credit Leslie.

Leslie recalled that "some" employees voted after the foregoing incident, but there is no evidence that the incident was mentioned.

Immediately after the voting session, which ended at 7 p.m., Leslie reported what had occurred to Human Resources Manager Barbara Ward. Ward requested that Leslie "remain quiet" about the incident until she could investigate. The following day he provided a written statement to Ward.

Ward spoke with Union observer Thomas Allen who stated that he "was a witness to Charles' [Cook's] action," that he "did not agree with it," and that he had been advised by counsel not to say anything more.

On the morning of February 24, employees Alex Niebert, Robert Thompson, and Austin Miles came into Leslie's office. One of the three, Leslie did not recall who, stated that he had heard that "you got slapped, or something." Leslie reported the encounter with the three employees to Ward. Regional Operations Manager Steinbeck obtained statements from Miles and Niebert. Miles' statement reports that he learned of the incident from Union observer Thomas Allen. "Thomas told Steve [Laird] and Michael about him doing that and asking why he would do that. He said that when the vote was over."

Niebert knew nothing about the incident until the conversation in Leslie's office. His statement reports that, as they were talking in Leslie's office, something was mentioned "about Rex being slapped," and Niebert asked who had done it.

Ward, on the afternoon of February 24, in consultation with Steinbeck, Director of the South Central Region Chris Liegl, and legal counsel determined that Cook should be terminated for engaging in violence in the workplace, "striking another employee."

Cook went to the North Richland Hills facility on Wednesday, February 24, but there was insufficient work, and he returned home. His next scheduled workday was Sunday. When he came to the faculty on Sunday he was met by General Manager Lance Higgins and Installation Manager Wes Crow. They presented Cook with a termination notice that states that he was terminated for a "physical assault upon another employee."

On Monday, Cook received a letter dated February 25 from Higgins stating that the Company had attempted to reach him by telephone on February 24 "to discuss your actions on the evening of February 23." The letter continues stating that the Company had decided to terminate Cook "for physically striking another employee in the workplace."

Ward testified that the reference to "discuss your actions" was to inform Cook that he was terminated. On the basis of the statement of Leslie, verbal confirmation by Union observer Allen, and the statements of the employees regarding what Allen had told them, Ward determined that further investigation was unnecessary.

At the second voting session, which occurred on Thursday, February 25, Leslie, at the direction of Regional Operations Manager Steinbeck, challenged every voter. District Organizing Director Sandra Rusher was the official representative of the Union at the election. She testified without contradiction that there were no challenged ballots on the first day of the election. She understood that every ballot cast on February 25 was challenged, and Leslie confirmed that fact. The initial tally of ballots reflects that there were 17 challenged ballots at the second session.

b. Analysis and concluding findings

The probative evidence establishes that Cook slapped Leslie. Cook's testimony, that he "tapped" Leslie on the ear or "patted him on the way out," is contradicted by his admission to the Union that he "did strike Rex [Leslie] on the ear." That admission is confirmed by the testimony of Leslie. The Respondent investigated, determined what had occurred, and discharged Cook pursuant to the Company Handbook which, on page 14, provides that the Company "will not tolerate prohibited activities" which include "physical assault."

Counsel for the General Counsel argues that Cook was not given an opportunity to "explain what happened" and that the physical contact "may have been inappropriate" but that it "hardly amounts to 'violence' or a 'threat' that merits termination." I disagree. Cook's slap was not incidental contact. Cook admitted to the Union that he "did strike Rex [Leslie] on the ear." An unprovoked physical assault is violent. Consistent

with the testimony of Ward, I agree that there was no need to give Cook an opportunity to explain. Leslie reported that Cook had slapped him. Union observer Allen, having spoken with counsel for the Union, confirmed to Ward that he "was a witness to Charles' [Cook's] action," and that he "did not agree with it." The Respondent's investigation revealed that Allen had spoken with Austin Miles and two other employees after the voting session. Miles reported that Allen informed them about "Cook slapping Rex [Leslie] in the face" and asked why "he would do that."

Contrary to the argument of the Charging Party, citing *Raley's*, 348 NLRB 382, 426, 429 (2006), the physical contact between Cook and Leslie was not incidental. Cook slapped Leslie.

Documentary evidence establishes that the Respondent does not countenance physical altercations. On December 22, 2009, Aundre Evans and Chad McNellie engaged in a physical altercation. McNellie had held a door, preventing Evans from exiting. When Evans succeeded in exiting, he struck McNellie. A physical struggle ensued. On December 23, 2009, both were discharged. When slapped by Cook, Leslie did not respond in kind; thus there was no fight.

The Respondent has established that Cook would have been discharged notwithstanding his union activity. I shall recommend that this allegation be dismissed.

D. The Objection to the Election at North Richland Hills

The Employer filed timely objections to the election. At the hearing, counsel advised that the Employer was withdrawing Objections 2 and 3. Objection 1 relates to the conduct of Cook which the objection alleges was disseminated to other employees.

On February 23 and 25, all full time and part time technicians at the North Richland Hills facility voted to determine whether they desired to be represented by the Union. The split sessions occurred because, pursuant to the work schedule, there was no one day that all employees would be present.

Near the end of the voting session on February 23, Charles Cook voted. As he was leaving the voting place, Cook slapped company observer Rex Leslie on the right side of his face. The remainder of the session went without incident. Leslie recalled that "some" employees voted after Cook, but there is no evidence that the incident was mentioned. There is no evidence that anyone other than Leslie, Cook, Union observer Thomas Allen, and the Board agents conducting the election were aware of what had occurred. Leslie was not in the unit.

The Employer, in its brief, speculates that employees "probably . . . learned about the assault directly from Mr. Cook." There is not a scintilla of evidence supporting that speculation. Cook spoke with other employees after he voted, but there is no evidence that he mentioned the incident involving Leslie. Leslie reported what had occurred to Human Resources Manager Ward. At her direction, he did not mention the incident to any employees, although, as already noted, Austin Miles mentioned the incident to Leslie on the morning of February 24.

Following the voting session on February 23, Thomas Allen mentioned what had occurred to Austin Miles. Miles gave a statement to the Employer in which he reported that "Thomas told Steve [Laird] and me and Michael [last name unknown] about him doing that and asking why he would do that. He said that when the vote was over."

The employer cites testimony by union observer Thomas Allen at an unemployment compensation hearing in which he acknowledged that, following the voting session on February 23, he "talked about it [the incident] with a few other coworkers." That is consistent with the statement that Austin Miles provided to the Employer. There is no evidence that Allen spoke about the incident with anyone other than Miles, "Steve" and "Michael."

The burden of proof is upon the party "seeking to have a Board-supervised election set aside," and that burden is a "heavy one." *Crown Bolt, Inc.,* 343 NLRB 776, 779 (2005). In *Crown Bolt*, the Board overruled *Spring Industries*, 332 NLRB 40 (2000), in which the Board had "presumed dissemination of plant-closure threats or other kinds of coercive statements." The Board held that "[w]here proof of dissemination of coercive statements, including threats of plant closure, is required, the objecting party will have the burden of proving it and its impact on the election by direct and circumstantial evidence." *Crown Bolt, Inc*., supra at 779.

I find the foregoing principle applicable to the situation herein in which information involving a physical altercation rather than a threat is the issue. There is no evidence that the incident between Cook and Leslie created "a general atmosphere of fear and reprisal" that would render a fair election impossible. See *Accubuilt, Inc*., 340 NLRB 1337 (2003). The only unit employees shown to have been aware of the incident involving Cook and Leslie were Cook, Union observer Allen, who told Austin Miles, "Steve," and "Michael" about it "after the vote" on February 23, and Alex Niebert and Robert Thompson who were present in Leslie's office the following morning when Miles mentioned the incident. Insofar as those employees were present on Tuesday and Wednesday, they presumably voted on Tuesday, prior to hearing about the incident. The Employer presented no evidence to the contrary. Neither Miles nor Allen testified.

The Employer, in its brief, asserts that "technicians who voted on the 25th would also have heard about" the incident. There is no probative evidence supporting that assertion. The Employer presented no evidence that any employee who voted on February 25 was aware of or had heard about the February 23 incident involving Cook and Leslie. The split voting sessions occurred because of the employees' work schedules; thus, employees who worked on Tuesday would not be present on Thursday and employees who worked on Thursday would not be present on Tuesday. No employee who voted on February 25 testified. There is no evidence that any employee who voted on Thursday, February 25, knew about the incident.

The Employer's Objection to the election is overruled.

E. The Challenged Ballots

I am mindful that only the objection to the election is before me; however, I note that there appears to be a discrepancy in the tallies of ballots. Undisputed testimony establishes that every ballot cast on February 25 was challenged, and the initial

Tally of Ballots reflects that there were 17 such ballots. Regional Operations Manager Steinbeck directed Company observer Leslie to challenge every voter who appeared on February 25, and he did so. In reviewing the formal papers, I am perplexed by the two Corrected Tallies of Ballots issued by Region 16 as well as the Order Directing Hearing on Objections, all of which reflect no challenged ballots. The corrected tallies contain no explanation for the absence of the 17 challenged ballots.

The initial tally of ballots reflects that there were 2 void ballots, 33 votes cast for the Petitioner, 16 votes against representation and 17 challenged ballots, which would give a total of 68 eligible voters. All of the tallies reflect a total of approximately 53 eligible voters. The initial tally states that the challenged ballots were not sufficient to affect the results of the election. As the Employer, in its brief, correctly points out, the challenges are sufficient to affect the results of the election. If every challenged ballot was against representation, the final total would be 33 for the Petitioner and 33 against representation The Petitioner would not have received a majority of the valid votes.

The record reflects that there were 17 challenged ballots. If the challenges to those ballots have not been resolved in some manner not reflected in this record, those challenges need to be resolved.

Having overruled the Objection to the election, I shall recommend that the representation case be remanded to the Regional Director for appropriate action.

CONCLUSIONS OF LAW

1. 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, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By issuing a final warning to employee Charles Cook because of his union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having discriminatorily warned Charles Cook, the Respondent must rescind that warning and inform Cook that it has done so.

The Respondent will be ordered to post and email appropriate notices addressing the violations found at the separate locations.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

A. The Respondent, Dish Network Corporation, North Richland Hills, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with more stringent enforcement of Company rules if they selected the Union as their collective-bargaining representative.

(b) Informing employees that they would be paid differently than employees at other locations because of their union activities.

(c) Requiring employees to sign an arbitration agreement from which the employees reasonably could conclude that they were precluded from filing charges with the NLRB.

(d) Issuing warnings to employees because of their union activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, rescind the unlawful warning issued to Charles Cook on February 22, 2010, remove from its files any reference to the unlawful warning, and within 3 days thereafter notify him in writing that this has been done and that the warning will not be used against him in any way.

(b) Within 14 days after service by the Region, post at its facilities in North Richland Hills copies of the attached notice marked Appendix A.[5] Copies of the notice, on forms provided by the Regional Director for Region 16 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 26, 2010.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. The Respondent, Dish Network Corporation, Farmers Branch, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing employees that they would remain on the same pay plan because of their union activities.

(b) Informing employees that selection of the union as their collective-bargaining representative was futile.

(c) Threatening employees with stricter enforcement of the dress code and absentee policies because employees selected the Union as their collective-bargaining representative.

(d) Requiring employees to sign an arbitration agreement from which the employees reasonably could conclude that they were precluded from filing charges with the NLRB.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facilities in Farmers Branch, Texas, copies of the attached notice marked Appendix B.[6] Copies of the notice, on forms provided by the Regional Director for Region 16 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 2, 2010.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS ALSO ORDERED that the Employer's Objection to the Election in Case 16–RC–10919 be overruled and that Case 16–RC–10919 be severed and remanded to the Regional Director for action, if any, necessary with regard to the challenged ballots and issuing an appropriate Certification.

Dated, Washington, D.C., August 11, 2011

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT threaten you with more stringent enforcement of Company rules if you select the Union as your collective bargaining representative.

WE WILL NOT inform you that you will be paid differently than employees at other locations because of your union activities.

WE WILL NOT require you to sign an arbitration agreement from which you reasonably could conclude that you were precluded from filing charges with the NLRB.

WE WILL NOT issue warnings to you because of your union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, rescind the unlawful warning issued Charles Cook on February 22, 2010, remove from our files any reference to the unlawful warning and, within 3 days thereafter notify, him in writing that this has been done and that the warning will not be used against him in any way.

DISH NETWORK CORPORATION

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT inform you that you will remain on the same pay plan because of your union activities.

WE WILL NOT inform you that selection of the Union as your collective bargaining representative was futile.

WE WILL NOT threaten you with stricter enforcement of the dress code and absentee policies because you selected the Union as your collective bargaining representative.

WE WILL NOT require you to sign an arbitration agreement from which you reasonably could conclude that you were precluded from filing charges with the NLRB.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

DISH NETWORK CORPORATION