JD(ATL)–30–12
Farmers Branch, TX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

DISH NETWORK CORPORATION

and **CASES 16-CA-62433**
16-CA-66142
COMMUNICATION WORKERS OF AMERICA, LOCAL 6171 **16-CA-68261**

and

ERIC SUTTON, An Individual

Arturo A. Laurel* and *David A. Foley, Esqs.,
for the Acting General Counsel.
George Basara, Esq. (Buchanan, Ingersoll & Rooney P.C.), for the Respondent.
Matthew Holder, Esq. (David Van Os & Associates, P.C.), for the Charging Party.

DECISION

Statement of the Case

ROBERT A. RINGLER, Administrative Law Judge. On May 14 and 15, 2012, this case was heard in Fort Worth, Texas. The underlying charges were filed by the Communication Workers of America, Local 6171 (the Union) and Eric Sutton, an individual. The resulting complaint alleged that Dish Network Corporation (Dish Network or the Respondent) violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act) by, inter alia: maintaining various policies in its Employee Handbook, which violated employees' Section 7 rights; and disciplining and subsequently firing Jorge Tavares because of his Union activities and testimony at a National Labor Relations Board (the Board) hearing.[1]

On the entire record, including my observation of the demeanor of the witnesses, and after thoroughly considering the parties' briefs, I make the following.

---

[1] The complaint also alleged that Dish Network unlawfully denied Sutton's request for a Union representative at a disciplinary interview. This allegation was withdrawn at the hearing. (Tr. 431–32).

Findings of Fact

I. Jurisdiction

At all material times, Dish Network, a Colorado corporation, with a corporate office in Englewood, Colorado, and multiple national offices, including its office and place of business in Farmers Branch, Texas (the facility), has provided satellite television services to residential and commercial customers. Annually, it purchases and receives at the facility goods valued in excess of $50,000 directly from points located outside of the State of Texas. Based upon the foregoing, it admits, and I find, that it is an employer engaged in commerce, within the meaning of Section 2(2), (6), and (7) of the Act. It further admits, and I find, that the Union is a labor organization, within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Introduction

Dish Network operates roughly 160 offices throughout the United States, including the facility, which services the north Dallas area. The facility is supervised by Installation Manager (IM) Michael Durham, who reports to General Manager (GM) Gabriel Gonzales.[2] Installation and service calls are performed by technicians,[3] who are directly supervised by Field Service Managers (FSM).[4]

B. Election and the Union's Certification[5]

In February 2010, the following employees at the facility (the unit) selected the Union as their collective-bargaining representative:[6]

> All regular full-time technicians and warehouse employees . . . , excluding all other employees, including quality assurance employees, marketing and sales employees, commercial technicians, managers, office clerical, guards and supervisors as defined in the Act.[7]

---

2 GM Gonzales also supervises Dish Network's McKinney and Denton, Texas offices.

3 Technicians are also identified by their formal title, Residential Field Service Specialists. See (GC Exh. 61).

4 FSMs are directly supervised by IMs.

5 I take judicial notice of the underlying representation case information from the Board's website, which contains the *Regional Director's Report on Objections and Recommendations* in Case 16–RC–10920, and connected *Docket Activity Report*. See http://www.nlrb.gov/case/16–RC–10920; http://www.nlrb.gov/cases-decisions/case-decisions/regional-election-decisions.

6 On May 19, 2010, the Board certified the Union as the exclusive representative of the unit.

7 There are approximately 50 employees in the unit.

C. Safety Rules

Technicians must wear personal protective equipment (PPE) at jobsites, which includes: a hard hat or bump cap;[8] safety glasses; and gloves. (GC Exhs. 31, 39, 42). They must follow fall protection procedures, when scaling rooftops. (GC Exh. 32; R. Exhs. 1, 12). These procedures include: notifying supervision; and wearing a five-point harness anchored to a D-ring. (Id.). Technicians receive consistent safety training. (GC Exhs. 31–32; R. Exh. 1).

Management makes unannounced jobsite visits, in order to confirm compliance with safety protocol.[9] These visits generate a safety survey, which evaluates: PPE usage and fall protection practices. (GC Exhs. 37, 55, 58). Safety survey grades below 90% are deemed failing and trigger these consequences:

> Any employee receiving a failing score will receive a written consultation indicating what caused the failing score, the impact to business and the necessary corrective action (e.g. training, disciplinary action, termination) . . . .
>
> [D]isciplinary policy should be followed for failing safety surveys . . . .
>
> Employees [not using] . . . fall protection will be issued a final consultation. Terminations may be approved if other serious violations occur simultaneously.

(GC Exh. 37).

1. Haphazard Historical Enforcement of Safety Rules

Ryan Theiss, a former technician, credibly testified that, during his tenure, he neglected the safety rules, without disciplinary consequences.[10] He stated that he was mainly supervised by FSM Michael Thompson. He reported that, during safety surveys, FSM Thompson ignored safety violations and passed him.[11] See (GC Exh. 19). He indicated that, during his probation, he observed other technicians openly disregarding safety rules, without consequence.

Wesley Mays, a customer, credibly testified that Dish Network installed satellite service at his home in March 2011. See (GC Exhs. 8, 44). He stated that the technician, Jose Rodriguez, installed a satellite dish on his roof, without wearing a safety harness or protective eyewear.

Technician Tavares, who was eventually fired for not following safety rules, credibly stated that, during his tenure, management frequently ignored safety violations. He added that he and his coworkers, as a result, routinely failed to wear PPE, or employ fall protection procedures.

---

8 A bump cap is a baseball cap that contains a hard plastic insert.

9 Management is required to conduct at least two safety surveys per technician per month.

10 Although it is unclear when his tenure ended, he started in early 2011.

11 He estimated that FSM Thompson visited his jobsites and observed him without PPE at least 10 times.

FSM Thompson, who was employed from 2005 through October 2011, credibly acknowledged that he often overlooked many safety lapses. He brazenly admitted that he created phony safety surveys, which awarded passing grades at jobsites that were never visited.

2. Renewed Enforcement of Safety Rules

GM Gonzales credibly testified that he began supervising the facility in February 2011.[12] He stated that, when he took it over, the facility was nationally ranked as one of Dish Network's worst performing offices.[13] The performance factors that contributed to this abysmal ranking included: job completion, production, trouble calls, customer satisfaction, safety, attrition, and cost ratings. He stated that he responded to this dilemma by commencing a multipronged campaign designed to improve performance, which stressed stricter adherence to rules and policy. Concerning safety, he averred that he decided to remedy this issue via re-education and, if needed, disciplinary action. His safety campaign included meetings, newsletters, and one-on-one discussions. He indicated that, in February, he told IM Durham that safety was a top priority.[14] He stated that his concentration on safety prompted the firing of FSM Rodney Hodge, resignation of FSM Thompson, and termination of several technicians, including Tavares, for safety, attendance, and other reasons. This chart demonstrates the notable rise in separations during the initial months of GM Gonzales' tenure:

Quarter	Separations of Technicians[15]	% Increase in Comparison to 1st Quarter 2011
1st Quarter 2011	4	
2nd Quarter 2011	9[16]	125%
3rd Quarter 2011	9[17]	125%
4th Quarter 2011	4	0%
1st Quarter 2012	5	25%

(GC Exh. 61).

Former technician Theiss credibly testified that, in February, IM Durham announced that safety policies were now "black and white" and would be rigidly enforced. He recalled IM Durham telling technicians that they needed to change their safety practices.[18]

---

12 All dates herein are in 2011, unless otherwise stated.

13 The facility placed 160 out of 163 offices.

14 The facility is now nationally ranked at 64 and morale has sharply improved.

15 Terminations include voluntary resignations.

16 On May 10, 2011, Zach Hodges was fired for not following fall protection procedures. (U. Exh. 17). On April 20, 2011, Rylan Knightstep received a final written warning for, inter alia, failing to wear PPE. (R. Exh. 5). He was later terminated for attendance issues.

17 On July 20, 2011, Eric Sutton was fired for, inter alia, damaging a customer's home, and poor workmanship. (R. Exh. 6). He had previously received a written warning, and was under a performance coaching plan. (Id.).

18 He stated that, in spite of this proclamation, IM Durham later caught him without PPE, and failed to take action. He added that, in mid-January 2012, FSM Michael Byrd observed him and technician Dustin Keller without PPE and failed to take disciplinary action.

Former FSM Thompson credibly stated that he resigned from his position because he was unable to get along with IM Durham, and that this conflict was partially prompted by the magnified focus on safety policy. Regarding this matter, he stated:

> The guys needed to be safe . . . . It's just to go . . . with it not being a big deal to talking about it for a few days and then, wham, I'm going to fire you, I thought that was a little too abrupt.

(Tr. 418). He indicated that, at the end of his tenure, he began enforcing safety policy more rigorously. He acknowledged that the safety culture eventually changed, and technicians began wearing PPE and employing fall protection measures. He agreed that GM Gonzales and IM Durham were universally rigid with everyone. He said that IM Durham, a former U.S. Marine, ran the facility inflexibly and that GM Gonzales triggered a "bunch of terminations." (Tr. 413).

D. Tavares' Discharge

1. Union Activity and Knowledge

Tavares credibly testified that he supported the Union's 2010 campaign. He stated that, at that time, former FSM Hodge asked him whether he supported the Union, which he denied. He indicated that he volunteered to serve on the Union's bargaining committee in March, after technician Juan Zamarron relinquished his position.[19] He stated that he attended 2 bargaining sessions before being fired; the first was on March 29, and the second was on July 28. He added that he testified for the Union at a May unfair labor practice (ULP) hearing. He stated that, by that point, Union support had plummeted and employees were seeking to decertify the Union.

2. Safety Rules

Tavares conceded that he was aware that Dish Network had PPE and fall protection rules. He signed acknowledgments, which certified that he attended various safety training sessions. See (GC Exhs. 30-32). He stated that he, nevertheless, routinely failed to wear PPE or follow fall protection policy.

3. June 3 Final Warning

On June 3, Tavares received the following final written warning:

> On 5/21 . . . [t]he Installation Manager visited . . . Tavares in the field . . . . [who,] accessed the roof and admitted not using fall protection.
>
> On 5/26 . . . Tavares was . . . working with a little giant . . . without PPE . . . . When [he] . . . was asked to put on his PPE . . . , he [said] . . . "that it was slowing me down" . . . and to "go ahead and fail me" . . . .

[19] He averred that Zamarron, who had been issued a final warning, resigned because he thought that his job was being jeopardized by his Union activity.

> On 6/2 . . . Tavares was . . . working on . . . [an] extension ladder without . . . PPE . . . . Jorge said that he had just removed his PPE before climbing up . . . .
>
> These are serious safety infractions and Jorge cannot ignore . . . safety rules.

(GC Exh. 21). The final warning proclaimed that, "further violations of policy will result in termination." Tavares did not dispute violating safety policy on these dates,[20] or insubordinately inviting management to, "go ahead and fail me."[21] Regarding his failure to wear protective headwear, he dismissively said, "I can't, the bump cap gets sweaty and stinky, and I took it off." (Tr. 175). He related, however, that this warning caused him to begin following safety policy.

4. July 29 Discharge

On July 29, Tavares was fired for the following incident:

> On 7/23 . . . Tavares was observed working with the Little Giant ladder without PPE (no hard/bump cap, no safety glasses, no gloves) and he left the drivers side door of the van unlocked. When . . . asked where the PPE was he replied that his bump cap had just fallen off; however, . . . [he] was observed on the second rung of the Little Giant with no safety glasses or gloves on. . . . .

(GC Exh. 23).

a. Tavares' Account Regarding July 29

Tavares testified that, while on a ladder, he heard IM Durham's voice and abruptly turned, which caused his bump cap and safety glasses to fall. (Tr. 186). He insisted, however, that he was wearing gloves. He contended that he perspires profusely, which causes his bump cap to become slippery and apt to fall off.

b. Further Disciplinary and Performance Issues

On February 21 and May 11, he received performance coaching plans, which raised several serious deficiencies in his installation work, customer service and productivity, and warned that ongoing issues could result in his termination. (R. Exh. 3; U. Exh. 15). On May 18, he received a final written warning for poor attendance. (U. Exh. 16).

c. Dish Network's Position

GM Gonzales testified that he decided to terminate Tavares on the basis of the following reasons: (1) he received a final written warning for 3 serious safety violations shortly before his firing; (2) he received extensive prior training about safety rules and was aware that safety had been elevated to a top priority; and (3) he committed the underlying offense, and responded by fabricating an incredible story about his bump cap falling off.

---

[20] He recognized that he had contradictorily stated in a sworn affidavit that he was wearing PPE. (Tr. 198–99).

[21] See (Tr. 239).

IM Durham stated that, on July 23, he observed Tavares working without PPE and witnessed that his van was left unlocked. He stated that he did not believe Tavares' claim that his bump cap had innocently fallen off, and that, even if it had, he was obligated to promptly replace it, which was not attempted. At the hearing, he tried on a bump cap, bent over, and demonstrated that the bump cap remained on his head while bending.

d. Credibility Resolution

Inasmuch as Tavares testified that he was wearing PPE before it became innocently dislodged, and IM Durham stated otherwise, I must make a credibility resolution. For several reasons, I credit IM Durham. First, concerning demeanor, IM Durham was straightforward, honest, and equally helpful on direct and cross-examination. Second, Tavares' assertion that his PPE fell off is inconsistent and implausible for several reasons: (1) it is improbable that he turned his head with such torque that his PPE rocketed off; (2) his claim is inconsistent with IM Durham's hearing demonstration, which showed his bump cap staying affixed, while bending over; (3) his claim is inconsistent with former FSM Thompson's credible testimony that bump caps are not easily dislodged; and (4) Tavares' claim that his bump cap innocently fell off his head is undercut by his subsequent failure to make any effort to retrieve it (i.e. if he was genuinely committed to following the PPE rule, he would have promptly retrieved and replaced his PPE). Lastly, I find Tavares' actions to be consistent with his brazen invitation to management to "go ahead and fail me" for not wearing PPE on May 26.

E. Employee Handbook Policies

The Employee Handbook is nationally disseminated to employees,[22] and electronically posted on Dish Network's intranet site, Starbase.[23] (GC Exh. 42). Employees, who violate the Handbook, are subject to discipline. (Id. at 16). The Handbook's *Social Media*, *Contact with Media*, and *Contact with Government Agencies* policies are at issue herein.

1. Social Media

> DISH Network regards Social Media—blogs, forums, wikis, social and professional networks, . . . as a form of communication . . . . When the company wishes to communicate publicly . . . it has well-established means to do so. Only those officially designated by DISH Network have the authorization to speak on behalf of the Company through such media . . . .
>
> You may not make disparaging or defamatory comments about DISH Network, its employees, officers, directors, vendors, customers, partners, affiliates or our, or

[22] Counsel for Dish Network represented that the Employee Handbook governs its "facilities nationwide." See (GC Exh. 54; Tr. 283-85). Former FSM Thompson, Tavares and GM Gonzales (Tr. 504) credibly testified about the national dissemination of this document.

[23] At the hearing, Counsel for the Acting General Counsel amended the Complaint to aver that the Employee Handbook is disseminated to Dish Network's employees on a national basis. (Tr. 432–34).

their, products/services. . . .

Unless you are specifically authorized to do so, you may not

- Participate in these activities with DISH Network resources and/or on Company time . . . .

(GC Exh. 42 at 13).

2. Contact with the Media

The Corporate Communications Department is responsible for any disclosure of information, to the media regarding DISH Network . . . . Unless you receive prior authorization . . . you must direct inquiries to the Corporate Communications Department. Similarly, you have the obligation to obtain the written authorization of the Corporate Communications Department before engaging in public communications regarding DISH Network or its business activities. . . .

(GC Exh. 42 at 12).

3. Contact with Government Agencies

Phone calls or letters from government agencies may occasionally be received . . . . The General Counsel must be notified . . . of any communication . . . concerning the Company . . . .

If written correspondence is received, notify your manager immediately and forward the correspondence to the General Counsel . . . . The correspondence should not be responded to unless directed [to do so] . . . .

If phone contact is made, ...

- Provide the individual with the General Counsel's name and number . . . if requested, but do not engage in any further discussion . . . .

- Immediately . . . . notify a supervisor . . . .

(GC Exh. 42 at 13).

III. Analysis

A. Employee Handbook Policies

The Employee Handbook policies at issue violated the Act.[24] In analyzing whether a work rule violates Section 8(a)(1), the Board has held that:

[24] These allegations are listed under pars. 7 and 11 of the complaint.

> [T]he appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. If the rule explicitly restricts Section 7 rights, it is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights."

Costco Wholesale Corp., 358 NLRB No. 106, slip op. at 2 (2012) (citations omitted).

1. Social Media

The *Social Media* policy is unlawful on two grounds. First, it banned employees from making "disparaging or defamatory comments about DISH Network." The Board has held that analogous electronic limitations on negative commentary violated the Act. See, e.g., *Costco Wholesale Corp.*, 358 NLRB No. 106, slip op. at 2 ("statements posted electronically . . . that damage the Company."); *Knauz BMW*, 358 NLRB No. 164 (2012) ("courtesy rule," which prohibited "disrespectful" conduct and "language which injures the image or reputation of the Dealership.").[25] Second, the policy banned employees from engaging in negative electronic discussion during "Company time." The Board has found that equivalent rules, which ban union activities during "Company time" are presumptively invalid because they fail to clearly convey that solicitation can still occur during breaks and other non-working hours at the enterprise. See *Laidlaw Transit, Inc.*, 315 NLRB 79, 82 (1994); *Hyundai America Shipping Agency*, 357 NLRB No. 80 (2011) (rule threatening discipline for "[p]erforming activities other than Company work during working hours"); *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992).

2. Contact with the Media

The *Contact with the Media* policy violates the Act because it requires employees to obtain prior authorization from management before speaking about Dish Network to the media or at public meetings. See *Trump Marina Associates*, 355 NLRB 585 (2010). The Board has held that pre-authorization requirements unduly interfere with employees' Section 7 rights to "improve terms and conditions of employment" by seeking assistance "outside the immediate employee-employer relationship." See *Eastex, Inc., v. NLRB*, 437 U.S. 556, 565–566, 569–570 (1978); *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007); *Handicabs, Inc.*, 318 NLRB 890, 896 (1995), enfd., 95 F.3d 681 (8th Cir. 1996).

3. Contact with Government Agencies

The *Contact with Government Agencies* policy is unlawful, inasmuch as it bans unauthorized communication with government agencies concerning Dish Network. The Board has found that analogous policies, which could be rationally construed by workers as limiting

[25] See also *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989), enfd. in relevant part 916 F.2d 932, 940 (4th Cir. 1990) ("derogatory attacks on . . . hospital representative[s]"); *Claremont Resort & Spa*, 344 NLRB 832 (2005) ("negative conversations about associates and/or managers").

independent communications with Board agents, were unlawful. See *Knauz BMW*, 358 NLRB No. 164, supra.

B. Tavares' Final Written Warning and Termination

Dish Network lawfully disciplined and fired Tavares. The complaint alleged that these personnel actions violated Section 8(a)(3) and (4). [26]

1. Section 8(a)(3)

a. Legal Framework

The framework described in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), sets forth the appropriate standard:

> Under that test, the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the adverse employment action. The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and union animus on the part of the employer.
>
> If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union activity. To establish this affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity."

Consolidated Bus Transit, 350 NLRB 1064, 1065–1066 (2007) (citations omitted).

If the employer's proffered defenses are found to be a pretext, i.e., the reasons given for its actions are either false or not relied upon, it fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. However, further analysis is required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in its motivation, it would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

b. Prima Facie Case

Counsel for the Acting General Counsel made a prima facie *Wright Line* showing. Tavares had significant Union activity: he was the only unit employee serving on the Union's collective bargaining team, when he was fired; he attended negotiations on March 29 and July 28; he testified on behalf of the Union at a May 23 ULP hearing; and aided the initial organizing drive. Concerning knowledge, Dish Network was minimally aware that he was serving on the

[26] These allegations are listed under pars. 9, 10, 12 and 13 of the complaint.

bargaining team and appeared at the ULP hearing. Animus can be inferred from the relatively close timing between Tavares' service on the bargaining team and ULP hearing appearance, and his discipline and firing (i.e. roughly 4 months). See *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002), enfd. 71 Fed. Appx. 441 (5th Cir. 2003).

c. Affirmative Defense

Dish Network established that it would have taken the same personnel actions against Tavares, even absent his protected activity. First, GM Gonzales credibly testified that, beginning in February, he abruptly changed the facility's safety culture via education, monitoring and, if needed, discipline.[27] This drastic change prompted the separations of several technicians, including Tavares,[28] FSM Hodge's firing, and FSM Thompson's resignation. Tavares, a Union adherent, was swept up in this safety transition, which affected Union and non-Union supporters, and even management. Second, concerning the final warning, which was based upon 3 distinct and admitted safety violations, it is noteworthy that Dish Network opted to discipline him only once for all 3 violations, instead of 3 times for each incident. If it were truly focused on eradicating a Union adherent, it would have generated 3 distinct disciplines and effected an immediate removal. This willingness to offer rehabilitation by subjecting him to a less onerous penalty contradicts an invidious intent.[29] Finally, concerning the termination, Tavares committed the misconduct, failed to admit culpability and concocted his defense, had just received a final warning for 3 other safety violations, responded to that warning insubordinately,[30] and had a deficient performance and attendance record. These factors, which would universally trigger virtually anyone's firing, demonstrate that Tavares would have received the same treatment, even absent his protected activity. Under such circumstances, GM Gonzales logically determined that continued rehabilitative efforts would prove fruitless and termination was warranted.

2. Section 8(a)(4)

For the same reasons described under the Section 8(a)(3) analysis above, the Section 8(a)(4) allegations should be dismissed. An employer violates Section 8(a)(4), when it fires an employee for filing charges, or for testifying, or for being subpoenaed to testify, at a Board proceeding. See 29 U.S.C. 158; *Grand Rapids Die Casting Corp.*, 279 NLRB 662, 664 (1986). Such violations are analyzed under the *Wright Line* framework. See *Syracuse Scenery & Stage*

---

27 Although Theiss was caught violating safety policy after this transition and was not disciplined, I am persuaded that Dish Network substantially tightened its intolerance for safety violations in a non-discriminatory manner following GM Gonzales' takeover, even though some outliers continue to exist. I do not find, however, that the existence of such outliers exculpate Tavares. Moreover, even assuming arguendo that the Theiss incident demonstrated disparate treatment, I remain convinced that Tavares would still have been terminated, absent his protected activity for the reasons described in the affirmative defense analysis above.

28 As stated, during the 2nd and 3rd quarters of 2011, the number of technicians separated climbed by 125%.

29 In making this finding, I note that the record almost completely lacks Union animus, beyond the limited animus that can be gleaned from the unlawful Employee Handbook policies.

30 As stated, Tavares insubordinately told management to "go ahead and fail me," at that time.

Lighting Co., 342 NLRB 672 (2004). Dish Network, as stated, would have warned and fired Tavares absent his protected activity.[31]

Conclusions of Law

1. Dish Network is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Dish Network violated Section 8(a)(1) of the Act by maintaining a *Social Media* policy in its Employee Handbook, which prohibited employees from electronically posting critical commentary about Dish Network on or outside of "Company time."

4. Dish Network violated Section 8(a)(1) of the Act by a maintaining a *Contact with the Media* policy in its Employee Handbook, which required employees to obtain prior authorization from management before speaking about it to news media outlets or at public meetings.

5. Dish Network violated Section 8(a)(1) of the Act by a maintaining a *Contact with Government Agencies* policy in its Employee Handbook, which banned employees from communicating with government agencies about it, without first obtaining management's approval.

6. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that Dish Network committed unfair labor practices, it is ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Given that its policies are maintained on a companywide basis, it shall be ordered to post a notice at all of its facilities where the unlawful policies have been, or are, in effect. See *Longs Drug Stores California*, 347 NLRB 500, 501 (2006); *Guardsmark, LLC*, 344 NLRB 809, 812 (2005).

---

[31] Counsel for the Acting General Counsel requested sanctions against Dish Network under *Bannon Mills*, 146 NLRB 611 (1964). The request was based upon his contention that Dish Network failed to fully respond to a subpoena request concerning employee safety surveys. He argued that the number of safety surveys that were received paled in comparison to the number of surveys that should have existed, if Dish Network had performed the requisite 2 surveys per technician per month required by its rules. His request is denied for several reasons. First, Dish Network's counsel credibly represented that he produced all safety surveys in his possession. Second, beyond mathematical inference (i.e. 2 surveys per month x number of technicians x number of months), Counsel for the Acting General Counsel failed to concretely show that Dish Network possessed or destroyed additional surveys. Third, given that it is undisputed that, before GM Gonzalez's takeover, safety surveys were inaccurate and even invented, it follows that the preservation of such surveys would be equally haphazard. Moreover, even if these surveys existed, they would so unreliable, given their fraudulent history, that one would be hard-pressed to demonstrate being prejudiced by their absence.

Its duty to rescind or modify the unlawful policies is governed by *Guardsmark LLC*, supra.[32] It shall also nationally distribute remedial notices electronically via email, intranet, internet, or other appropriate electronic means to its employees, in addition to the traditional physical posting of paper notices, if it customarily communicates with workers in this manner. See *J Picini Flooring*, 356 NLRB No. 9 (2010).[33]

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[34]

ORDER

Dish Network Corporation, Englewood, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Maintaining a *Social Media* policy in its Employee Handbook, which prohibited employees from electronically posting critical comments about DISH Network on or outside of "Company time."

b. Maintaining a *Contact with the Media* policy in its Employee Handbook, which required employees to obtain authorization from management before speaking about its organization to news media outlets or at public meetings.

c. Maintaining a *Contact with Government Agencies* policy in its Employee Handbook, which banned employees from communicating with government agencies about its organization, without first obtaining management's approval.

d. 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

---

[32] "The Respondent may comply with our Order by rescinding the unlawful provisions and republishing its employee handbook without them. We recognize, however, that republishing the handbook could entail significant costs. Accordingly, the Respondent may supply the employees either with handbook inserts stating that the unlawful rules have been rescinded, or with new and lawfully worded rules on adhesive backing which will cover the old and unlawfully broad rules, until it republishes the handbook without the unlawful provisions. Thereafter, any copies of the handbook that are printed with the unlawful rules must include the new inserts before being distributed to employees." *Guardsmark,* supra at 812 fn. 8.

[33] Although Counsel for the Acting General Counsel has requested a notice reading remedy, such relief is unwarranted. Standard remedial relief will adequately remedy the unfair labor practices at issue herein.

[34] 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.

a. Rescind or modify the language in the following provisions of its Employee Handbook

1. The *Social Media* policy to the extent that it prohibited employees from electronically posting critical comments about its organization on or off "Company time."

2. The *Contact with the Media* policy to the extent that it required employees to obtain prior authorization from management before speaking about its organization to news media outlets or at public meetings.

3. The *Contact with Government Agencies* policy to the extent that it bans employees from communicating with government agencies about its organization, without first obtaining management's approval.

b. Furnish all current employees with inserts for the Employee Handbook that

1. Advise that the unlawful rules have been rescinded, or

2. Provide the language of lawful rules or publish and distribute a revised Employee Handbook that

i. Does not contain the unlawful rules, or
ii. Provides the language of lawful rules.

c. Within 14 days after service by the Region, post at each of its facilities in the United States, where its Employee Handbook is in effect, copies of the attached notice, marked "Appendix."[35] 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, 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. If the Respondent has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed it at any time since August 29, 2011.

d. 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 it has taken to comply.

---

[35] 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."

Dated Washington, D.C. November 14, 2012

5

Robert A. Ringler
Administrative Law Judge

APPENDIX

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 maintain provisions in our Employee Handbook, which ban employees from electronically posting negative comments about our organization on or off "Company time."

WE WILL NOT maintain provisions in our Employee Handbook, which require employees to obtain prior authorization from us before speaking about our organization to news media outlets or at public meetings.

WE WILL NOT maintain provisions in our Employee Handbook, which bar employees from communicating with government agencies about our organization, without first obtaining our consent.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL rescind or modify the language in the following provisions of our Employee Handbook:

1. The *Social Media* policy to the extent that it prohibits you from electronically posting negative comments about our organization on or off "Company time."

2. The *Contact with the Media* policy to the extent that it requires you to obtain prior authorization from us before speaking about our organization to news media outlets or at public meetings.

3. The *Contact with Government Agencies* policy to the extent that it bars you from speaking to government agencies about our organization, without first obtaining our approval.

WE WILL furnish all of you with inserts for the current Employee Handbook that:

1. Advise that the unlawful provisions, above have been rescinded, or

2. Provide the language of lawful provisions, or publish and distribute revised Employee Handbooks that:

   a. Do not contain the unlawful provisions, or
   b. Provide the language of lawful provisions.

DISH NETWORK CORPORATION
(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

819 Taylor Street, Room 8A24, Fort Worth, TX 76102-6178
(817) 978-2921, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (713) 209-4885.