

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIRECTSAT USA, LLC,

Employer

and

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION 21,
AFL-CIO,

Union

and

DIRECTV, LLC

Intervenor

CASE NO. 13-CA-176621

**DIRECTV, LLC'S MOTION TO INTERVENE, RE-OPEN THE RECORD
AND FOR RECONSIDERATION**

Pursuant to Section 102.29 of the Board's Rules and Regulations, DIRECTV, LLC, ("DIRECTV") moves to intervene in the above-captioned case, requests that the Board re-open the record and requests that the Board reconsider its decision issued March 20, 2017, in *DirectSat USA, LLC*, 366 NLRB No. 40.¹

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

DIRECTV provides broadcast satellite television services to consumers in the United

¹ DIRECTV contacted each of the parties regarding this motion. Counsel for Respondent DirectSat USA, LLC does not oppose this motion, Counsel for the General Counsel opposes this motion, and Counsel for Charging Party International Brotherhood of Electrical Workers, Local Union 21, AFL-CIO, responded to DIRECTV that he would check with the Union regarding its position.

States. (Sellers Dec., ¶ 3.)² It is wholly owned by AT&T, Inc. (*Id.*) DIRECTV is a party to a Home Service Provider (“HSP”) agreement with DirectSat USA, LLC (“DirectSat”)—the employer in the above-captioned case—through which DirectSat provides installation and repair services to DIRECTV subscribers. (*Id.*)

A. Proceedings Below.

On February 11, 2014, International Brotherhood of Electrical Workers Local 21 (“Union”) was certified as the bargaining representative of some of DirectSat’s employees in Mokena, Illinois.³ Thereafter, DirectSat began bargaining with the Union. During the course of bargaining, the Union requested that DirectSat provide a copy of the HSP agreement between DirectSat and DIRECTV to the Union. DirectSat provided what it believed to be the relevant portions of the agreement but refused to provide other portions. Thereafter, the Union filed an unfair labor practice charge alleging that DirectSat violated section 8(a)(5) of the Act by failing to provide the entire, un-redacted HSP agreement.

The General Counsel contended that the Union needed to review the full, unredacted HSP agreement between DirectSat and DIRECTV “in order to determine whether those entities were joint employers for the purposes of collective bargaining, or alternately to verify [DirectSat’s] claims about the nature of their relationship.” *DirectSat, LLC*, 366 NLRB No. 40, slip op. at 1 (March 20, 2018). The ALJ rejected both of these arguments but found that the Union was entitled to see the full HSP “to verify [DirectSat’s] claim that it had furnished all portions of that document relative to the scope of bargaining-unit work.” *Id.* DirectSat filed exceptions to the ALJ’s decision, but the Board affirmed the decision on another basis, namely that the HSP is

² Attached hereto as Exhibit A is the declaration of Jon Sellers, Assistant Vice President – Network Services (“Sellers Dec.”), who is familiar with the HSP agreement.

³ The facts of this case are set forth in the ALJ’s decision. *DirectSat USA, LLC*, 366 NLRB No. 40, slip op. at 3-5 (March 20, 2018).

relevant to negotiations because DirectSat's proposal regarding new product lines amounted to having the scope of bargaining-unit work defined by the HSP. *Id.* at 2.

B. The HSP Agreement Contains DIRECTV's Confidential and Proprietary Information.

Critically, in reaching its conclusion, the Board observed that DirectSat did not object to disclosing the full HSP agreement on the grounds that doing so could reveal confidential, proprietary or trade-secret information. *Id.* at 2, n.4.⁴ Regardless of whether the HSP agreement contains DirectSat's confidential and proprietary information, it contains DIRECTV's confidential and proprietary information. The HSP agreement contains non-public information about DIRECTV's pricing, commission rates, service territories, service and installation processes, quality standards, sales processes, and incentive structure, as well as links to internal documents, all of which if disclosed could provide an advantage to DIRECTV's competitors. (Sellers Dec., ¶ 4.) For this reason, DIRECTV views multiple terms and provisions of HSP agreement as confidential and proprietary. (*Id.*) Indeed, the bottom of each page of the HSP agreement states:

Proprietary and Confidential

This Agreement and Information contained therein is not for use or disclosure outside of AT&T, its Affiliates, and third party representatives, and Contractor except under written agreement by the contracting parties.

(*Id.*) Thus, DirectSat may not disclose the HSP agreement or the information it contains without DIRECTV's consent. (*Id.*) Moreover, Section 3.14(d) of the HSP agreement states:

If a receiving Party is required to provide Information of a disclosing Party to any court or government agency pursuant to a written court order, subpoena, regulatory demand, request under the National Labor Relations Act (an "NLRA Request"), or process of law, the

⁴ Specifically, the Board stated, "We further note that the Respondent did not, at any point, object to disclosing the full HSP on grounds that doing so could reveal information of a confidential, proprietary, or trade-secret nature. In addition, Member Emanuel observes that the Respondent did not assert a confidentiality interest in its exceptions." *Id.* at 2, n.4.

receiving Party must, unless prohibited by applicable law, first provide the disclosing Party with prompt written notice of such requirement and reasonable cooperation to the disclosing Party should it seek protective arrangements for the production of such Information. The receiving Party will (i) take reasonable steps to limit any such provision of Information to the specific Information required by such court or agency, and (ii) continue to otherwise protect all Information disclosed in response to such order, subpoena, regulation, NLRA Request, or process of law.

(*Id.* at ¶ 5.)

Further, under Section 3.36(c)(x), it would be a non-curable breach of the agreement for DirectSat to fail to meet its obligations regarding the use or disclosure of DIRECTV's confidential information. (*Id.* at ¶ 6.) In short, the HSP agreement contains DIRECTV's confidential and proprietary information, and its terms require such information to be protected from disclosure.

C. DIRECTV Did Not Receive Notice of the Potential Disclosure of Its Confidential Information Until After the Board Issued Its Order.

In November 2016, DIRECTV had discussions with DirectSat about producing a redacted copy of the HSP agreement to the Union, which DIRECTV believed arose in the context of DirectSat's negotiations with the Union. (*Id.* at ¶ 7.) DIRECTV did not hear anything further from DirectSat on the issue after those discussions, and, until recently, believed the issue had been resolved. (*Id.*) Indeed, DIRECTV had no knowledge of this case, or the proceedings before the ALJ and the Board until DirectSat informed DIRECTV of the Board's March 20, 2018 decision. (*Id.*) Therefore, DIRECTV has had no opportunity to protect its confidential information. Accordingly, DIRECTV now files this motion. Moreover, DIRECTV's request to reopen the record and for the Board to reconsider its decision is timely, because it is being filed within 28 days of the Board's March 20 decision and order, and before this matter has been transferred to a court of appeals. *See* R&R § 102.48(c)(2).

II. ARGUMENTS AND AUTHORITIES

There is good cause to grant DIRECTV's Motion to Intervene, Reopen the Record and for Reconsideration of the Board's decision for several reasons.

First, although allowing intervention is discretionary with the Board, 29 U.S.C. § 160(b), third parties are routinely allowed to intervene in judicial proceedings to protect their confidential and proprietary information under Federal Rule of Civil Procedure 24. *See e.g.*, *Formulabs, Inc. v. Hartley Pen Co.*, 275 F.2d 52, 56-57 (9th Cir. 1960) (trade secret licensor has right to intervene where its trade secrets may be disclosed in the pending litigation); *FTC v. Advocate Health Care Network*, 162 F. Supp. 3d 666, 673-74 (N.D. Ill. 2016) (granting motions to amend confidentiality order by intervenors, *i.e.*, the third parties who "lined up to intervene in this matter and protect their confidential information from defendants' perusal"); *J.D. Fields & Co., Inc. v. Nucor Yamamoto Steel Co.*, No. 4:12-cv-00754-KGB, 2015 WL 12696208, *4 (E.D. Ark. June 15, 2015) (granting non-party's motion to intervene for the limited purpose of protecting its confidential pricing information); *Shire Dev. LLC v. Mylan Pharm., Inc.*, No. 8:12-CV-1190-T-30AEP, 2013 WL 6858319, *1 (M.D. Fla. Dec. 30, 2013) (finding that non-parties' interest in protecting disclosure of their confidential, proprietary business information is sufficient to justify intervention under Rule 24); *Thurmond v. Compaq Computer Corp.*, No. 1:99-CV-711, 2000 U.S. Dist. LEXIS 20893, *9 (E.D. Tex. June 26, 2000) (granting non-party's motion to intervene to the extent necessary to argue its motion for protective order to protect its confidential information); *Patt v. Family Health Sys., Inc.*, 189 F.R.D. 518, 520 (E.D. Wis. 1999) (noting that doctor was granted leave to intervene in motion for a protective order to prevent disclosure of confidential information); *Nelson v. Greenspoon*, 103 F.R.D. 118 (S.D.N.Y. 1984) (granting third party's motion to intervene to protect potentially privileged documents, but finding the documents themselves not privileged); *Int'l Truck & Engine Corp. v. Caterpillar*,

Inc., 814 N.E. 2d 182 (Ill. App. 2004) (noting that in the underlying case, the court granted non-party's petition to intervene and request protective order to prevent plaintiff from disclosing confidential information in lawsuit).

Courts have found that a non-party seeking to protect its confidential information has a recognized interest in the underlying action, which may be impaired absent intervention. *See e.g., J.D. Fields*, 2015 WL 12696208, at *3. Moreover, as seen in this case, having an aligned interest with one of the parties does not mean that the non-party's interest will be adequately represented. *Id.* at *4.

Second, the Board has repeatedly recognized the need to balance employers' legitimate confidentiality interests with unions' need for information. *See e.g., Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *Detroit Newspaper Agency*, 317 NLRB 1071 (1995). Therefore, when an employer asserts a confidentiality interest, the employer and the union must seek a mutually acceptable accommodation of their respective interests. *Detroit Newspaper Agency*, 317 NLRB at 1072. These principles should apply with equal weight to situations involving the confidential information of a third party. *See U.S. Postal Service*, 364 NLRB No. 27, slip op. at 3 (2016) (Member Miscimarra noting that the majority's decision to order the immediate, unredacted production of requested documents gave no consideration to the confidentiality interests of "an innocent third party," whose business interests also deserved protection). Here, unless DIRECTV is permitted to intervene, it will have no opportunity to assert its confidentiality interest or attempt to find a mutually acceptable approach that will accommodate its interest and the obligations and needs of the parties.

Third, DIRECTV will present evidence regarding the HSP agreement and the confidential and proprietary nature of DIRECTV's information contained therein, which is

evidence that has not been previously presented. The Board noted that DirectSat raised no issue regarding the confidential nature of the HSP agreement. *DirectSat, LLC*, 366 NLRB No. 40, slip op. at 2, n.4. DIRECTV seeks to intervene to protect its own confidential information, not DirectSat's confidential information. Because the confidential and proprietary nature of the HSP agreement as to DIRECTV has not been presented in these proceedings, it is thus information not previously available to or considered by the ALJ or the Board.

Fourth, failure to allow DIRECTV to intervene and protect its confidential information will leave DIRECTV vulnerable and without a meaningful remedy. Although DirectSat failed to assert a confidentiality argument, it is DIRECTV that will be harmed when its confidential information is disclosed if the Board's order is ultimately enforced by a court or complied with by DirectSat. Thus, DIRECTV should be allowed to intervene and present the necessary evidence so the Board can adequately assess DIRECTV's interests in reconsidering this case. The normal course in judicial proceedings is to allow a third party to intervene to protect its confidential information. *See e.g., Advocate Health Care Network*, 162 F. Supp. 3d at 673-74 (granting motions to amend confidentiality order by intervenors, *i.e.*, the third parties who "lined up to intervene in this matter and protect their confidential information from defendants' perusal"); *Thurmond*, 2000 U.S. Dist LEXIS 20893, at *9 (granting non-party's motion to intervene to the extent necessary to argue its motion for protective order to protect its confidential information).

Finally, DIRECTV's Motion is timely. There is no time limit in section 10(b) as to when a motion to intervene must be filed. 29 U.S.C. § 160(b). DIRECTV was not aware of the risk that its confidential information may be disclosed until DirectSat informed DIRECTV of the Board's decision and order. And DIRECTV has promptly taken action upon its receipt of this

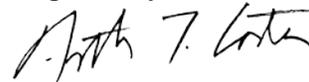
information. The Board's rules state that motions for reconsideration must be filed within 28 days of the order at issue, and thus, this motion is filed within 28 days of the Board's March 20 order. *See* R&R § 102.48(c)(2).

III. CONCLUSION

In conclusion, the Board's decision and order in this case requires DirectSat to disclose DIRECTV's confidential and proprietary information without adequately protecting DIRECTV's interests. As soon as DIRECTV learned of the Board's decision and order, it took steps to request intervention and an opportunity to present evidence of its confidentiality interests so the Board can consider those interests in deciding this case. Therefore, DIRECTV respectfully requests that the Board grant this motion, allow DIRECTV to intervene in these proceedings, re-open the record so DIRECTV can present evidence of the confidential and propriety nature of the HSP contract, and reconsider this case, given that new information. DIRECTV further requests that the Board grant DIRECTV any other relief, legal or equitable, to which it is entitled.

Dated: April 4, 2018

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned affirms that on April 4, 2018, the foregoing Motion to Intervene, Re-Open the Record and For Reconsideration was filed with the National Labor Relations Board using the e-filing system at www.nlr.gov, and that copies were served on the following individuals by electronic mail and FedEx Delivery:

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CASE NO. 13-CA-176621

DECLARATION OF JOHN SELLERS

I, John Sellers, declare as follows:

1. I am over the age of eighteen (18) and am competent to testify to the matters contained herein. This declaration is based upon my personal knowledge.
2. I am currently employed by AT&T, Inc. as the Assistant Vice President – Network Services. I have held this position or a substantially-similar one since 2012. In this position, I am responsible for managing Intervenor DIRECTV, LLC’s (“DIRECTV”) Home Service Provider (“HSP”) agreement with DirectSat USA, LLC (“DirectSat”) - the employer in the above-captioned case.
3. DIRECTV provides broadcast satellite television services to consumers in the United States. It is wholly owned by AT&T, Inc. Under the HSP agreement, DirectSat employees provide installation and repair services to DIRECTV subscribers.

EXHIBIT

A

4. The HSP agreement contains multiple terms and provisions that DIRECTV views as confidential and proprietary, including DIRECTV's pricing, commission rates, service territories, service and installation processes, quality standards, sales processes, and incentive structure, as well as links to internal documents. The bottom of each page of the HSP agreement states:

Proprietary and Confidential

This Agreement and Information contained therein is not for use or disclosure outside of AT&T, its Affiliates, and third party representatives, and Contractor except under written agreement by the contracting parties.

Thus, DirectSat may not disclose the HSP agreement or the information it contains without DIRECTV's consent.

5. The HSP specifically establishes a procedure for handling court or government agency directives to disclose confidential information provided pursuant to the agreement.

Section 3.14(d) of the HSP agreement states:

If a receiving Party is required to provide Information of a disclosing Party to any court or government agency pursuant to a written court order, subpoena, regulatory demand, request under the National Labor Relations Act (an "NLRA Request"), or process of law, the receiving Party must, unless prohibited by applicable law, first provide the disclosing Party with prompt written notice of such requirement and reasonable cooperation to the disclosing Party should it seek protective arrangements for the production of such Information. The receiving Party will (i) take reasonable steps to limit any such provision of Information to the specific Information required by such court or agency, and (ii) continue to otherwise protect all Information disclosed in response to such order, subpoena, regulation, NLRA Request, or process of law.

6. Further, under Section 3.36(c)(x), it would be a non-curable breach of the agreement for DirectSat to fail to meet its obligations regarding the use or disclosure of DIRECTV's confidential information.

7. In November 2016, DIRECTV had discussions with DirectSat about producing a redacted copy of the HSP agreement to the International Brotherhood of Electrical Workers

Local 21 (“Union”), which DIRECTV believed arose in the context of DirectSat’s negotiations with the Union. DIRECTV did not hear anything further from DirectSat on the issue after those discussions, and, until recently, believed the issue had been resolved. DIRECTV did not receive formal notice of this case as required under the HSP and had no knowledge of it, or the proceedings before the Administrative Law Judge and National Labor Relations Board (“Board”), until DirectSat informed DIRECTV of the Board’s March 20, 2018 decision.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct and this this declaration was executed on April 4, 2018.



John Sellers
Assistant Vice President – Network Services
AT&T, Inc.