

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

DirectSat USA, LLC and International Brotherhood of Electrical Workers, Local Union 21, AFL-CIO. Case 13-CA-176621

July 25, 2018

ORDER DENYING MOTION

BY CHAIRMAN RING AND MEMBERS PEARCE
AND MCFERRAN

On March 20, 2018, the Board issued its Decision and Order in this proceeding, in which it found that the Respondent, DirectSat USA, LLC, violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Charging Party Union with a full, unredacted copy of the Charging Party Union with a full, unredacted copy of the Home Services Provider agreement (HSP) between the Respondent and DirecTV, LLC. *DirectSat USA, LLC*, 366 NLRB No. 40 (2018). On April 4, 2018, DirecTV, LLC (DirecTV), which is not a party to this proceeding, filed a motion to intervene, to reopen the record, and for reconsideration of the Board's decision. The General Counsel and the Charging Party filed a joint opposition and DirecTV filed a reply. For the reasons set forth below, DirecTV's motion is denied.¹

I.

The Respondent installs and services satellite television equipment for DirecTV. This dispute arose while the Respondent and the Charging Party were bargaining over their first collective-bargaining agreement. The Respondent submitted a scope-of-work proposal containing the following provision: "In the event [the Respondent] is engaged with respect to products or services other than *those provided pursuant to its Home Service Provider agreement with DirecTV* . . . , such work shall not be deemed bargaining unit work." *DirectSat*, 366 NLRB No. 40, slip op. at 4 (emphasis in original). The Charging Party requested to see the full HSP; the Respondent refused and provided only a few redacted excerpts. *Id.*, slip op. at 4-5.

The Charging Party filed an unfair-labor-practice charge on May 20, 2016, and on September 23 the General Counsel issued a complaint alleging that the Respondent had violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the full, unredacted HSP to the Charging Party. On April 10, 2017, the case was submitted on a stipulated record to Administrative

¹ The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. Member Emanuel is recused and took no part in the consideration of this case.

Law Judge Charles J. Muhl. Before the judge, the Respondent argued that the full HSP was irrelevant to the Union's function as collective-bargaining representative. The Respondent did not argue that it was privileged to withhold the full HSP on the ground that it contained confidential information. On July 20, 2017, the judge issued a decision and recommended Order finding the violation as alleged.

On March 20, 2018, the Board issued a Decision and Order affirming the judge's decision, although on different grounds. The Board found that the Respondent's proposal "effectively amounted to having the scope of bargaining-unit work defined by the HSP," and thus rendered "the entire HSP relevant to the negotiation, giving rise to a duty to provide the full, unredacted document to the Union." *Id.*, slip op. at 2. The Board also noted 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." *Id.*, slip op. at 2 fn. 4. The Board thus ordered the Respondent to furnish the full, unredacted HSP to the Charging Party. *Id.*, slip op. at 2.

II.

In its motion, DirecTV submits that it should be allowed to intervene now in this proceeding and that the Board should reopen the record and reconsider its decision because DirecTV did not have a chance to defend its interest in maintaining the HSP's confidentiality. DirecTV contends that the HSP contains non-public information that DirecTV views as confidential and proprietary. In support, DirecTV has supplied a declaration and an amended declaration by Assistant Vice President John Sellers. Specifically, Sellers represents that the following notice appears at the bottom of each page of the HSP:²

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.^[3]

According to Sellers, Section 3.14(d) of the HSP also contains the following provision:⁴

² Sellers Decl. ¶ 4.

³ AT&T is DirecTV's parent company. We note that although the Respondent provided redacted copies of certain pages of the HSP to the Union, the "Proprietary and Confidential" notice did not appear on those copies.

⁴ Sellers Decl. ¶ 5.

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.

Sellers also asserts that Section 3.36(c)(x) of the HSP makes it a non-curable breach of contract for the Respondent to fail to meet its obligations regarding the disclosure of confidential information.⁵ Finally, Sellers represents that, in November or December 2016, DirecTV had discussions with the Respondent about the latter producing portions of the HSP to the Charging Party, which DirecTV believed arose in the context of the Respondent’s negotiations to resolve a Board charge. According to Sellers, DirecTV did not hear anything further and assumed the matter had been resolved.⁶

III.

“Sec[ti]on 10(b) of the Act expressly provides that intervention in unfair labor practice proceedings is discretionary with the Board, and not a matter of right.” *Medi-Center of America*, 301 NLRB 680, 680 fn. 1 (1991). We find no reason to exercise our discretion to grant DirecTV intervention in the present case. Initially, we note the belated nature of DirecTV’s effort to intervene. DirecTV filed its motion long after it knew or reasonably should have known that this proceeding could result, and indeed had resulted, in an order requiring full disclosure of the HSP. Its motion was filed over 8 months after the judge ruled that the HSP should be disclosed unredacted and in full. DirecTV argues that it did not learn the HSP might be disclosed in unredacted form until after the Board issued its Order. Yet DirecTV admits that, as early as November or December 2016, it discussed with the Respondent the possibility that the latter would produce information contained in the HSP in order to resolve a Board charge. And while DirecTV claims it assumed the matter had been resolved, it cannot and does not dispute

that, months before this case was submitted to the judge, it was aware that a proceeding was underway that could affect its confidentiality interest in the HSP. Nor does it matter whether DirecTV’s omission stemmed from the Respondent’s failure to keep DirecTV apprised of developments in this case or from DirecTV’s failure to exercise due diligence. The fact remains that DirecTV had ample notice and opportunity to seek intervention much earlier in this proceeding, but did not. Moreover, DirecTV cites no case in which the Board has allowed a party who had such notice to intervene after the Board had already issued its decision. We therefore deny DirecTV’s motion to intervene as untimely.

Even if its motion were timely, DirecTV has not established that it was a necessary party to this case.⁷ Assuming without deciding that DirecTV has a confidentiality interest in the HSP, the Respondent shared that interest and could have adequately defended that interest before the Board. Under the terms of the HSP, DirecTV and the Respondent share a community of interest in protecting the HSP’s confidentiality. First, the “Proprietary and Confidential” notice prohibits disclosing the HSP outside of “AT&T, its Affiliates, and third party representatives, and [the Respondent],” thus treating the Respondent and DirecTV as equals with regard to its confidential nature. Second, the HSP requires the Respondent to defend its confidentiality in Board proceedings by notifying DirecTV of any disclosure request, cooperating with DirecTV in seeking protective arrangements, limiting any disclosure beyond what must be produced, and continuing otherwise to protect all disclosed information. And third, the HSP makes noncompliance with those requirements an incurable breach of contract. Together, those provisions establish that the Respondent’s confidentiality interest in the HSP is commensurate with, if not defined by, DirecTV’s.

In addition, the Respondent was fully capable of representing DirecTV’s interests in this case. The HSP recognizes as much by delegating to the Respondent the responsibility of protecting DirecTV’s confidentiality interests in Board proceedings. More importantly, the Respondent had available the same panoply of defenses as DirecTV would have had DirecTV intervened earlier in the proceeding. In these circumstances, the Respond-

⁵ Sellers Decl. ¶ 6.

⁶ Sellers Am. Decl. ¶ 7.

⁷ Member Pearce would deny DirecTV’s motion to intervene based solely on its unjustified delay in filing the motion. As explained above, DirecTV does not dispute that, months before this case was submitted to the judge, it was aware that a proceeding was underway that could result in an order requiring full disclosure of the HSP. DirecTV nevertheless did not seek to intervene until after the Board had issued its decision, and it has failed to provide an adequate explanation for its failure to intervene at an earlier stage.

ent's failure to assert confidentiality as a defense may be a matter for resolution between the Respondent and DirecTV, but it is not a basis for granting DirecTV intervention in this case.⁸

For all of these reasons, DirecTV's motion to intervene is denied. Consequently, DirecTV's requests to reopen the record and reconsider the Board's decision are moot.

Dated, Washington, D.C. July 25, 2018

John F. Ring, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

⁸ The Respondent did assert other defenses that as a practical matter would have addressed DirecTV's confidentiality concerns. Thus, DirecTV's confidentiality interest would have been entirely preserved if the Respondent had prevailed on its lack-of-relevance defense.