UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIRECTSAT USA, LLC, Petitioner v. NATIONAL LABOR RELATIONS BOARD, Respondent	18-1092

DirectSat USA LLC hereby petitions the Court for review of the Decision and Order of the National Labor Relations Board entered on March 20, 2018, in the matter of DirectSat USA, LLC and International Brotherhood of Electrical Workers, Local Union 21, AFL-CIO, Case No. 13-CA-176621, reported at 366 NLRB No. 40, a copy of which is attached as Exhibit "A."

Dated: April 3, 2018
New York, New York

Respectfully submitted,

Daniel D. Schudroff
JACKSON LEWIS P.C.
666 Third Avenue, 29th Floor
New York, New York 10017
(212) 545-4020

Attorneys for Petitioner

EXHIBIT A

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

March 20, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

On July 20, 2017, Administrative Law Judge Charles J. Muhl issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party Union filed answering briefs, and the Respondent filed a reply.

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,[1] findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

To begin, we disagree with the Respondent's claim that the judge violated its due process rights by deciding this case on a legal theory that was not advanced by the General Counsel. Before the judge, the General Counsel argued that the Union needed to review the full, unredacted Home Services Provider (HSP) subcontracting agreement between DirecTV and the Respondent in order to determine whether those entities were joint employers for purposes of collective bargaining, or alternately to verify the Respondent's claims about the nature of their relationship. The judge rejected both arguments and found instead that the Union was entitled to see the full HSP to verify the Respondent's claim that it had furnished all portions of that document relative to the scope of bargaining-unit work.

"The Board, with court approval, has repeatedly found violations for different reasons and on different *theories* from those of administrative law judges or the General Counsel, even in the absence of exceptions, where the unlawful conduct was alleged in the complaint." *Local 58, Int'l Brotherhood of Electrical Workers (IBEW), AFL–CIO* (*Paramount Industries, Inc.*), 365 NLRB No. 30, slip op. at 4 fn. 17 (2017) (emphasis in original) (citing cases); accord, e.g., *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1169 (D.C. Cir. 1993), cert. denied 511 U.S. 1003 (1994). When analyzing whether a judge's finding of a violation on a theory that was not clearly articulated by the General Counsel violates a respondent's due process rights, the Board considers (1) whether the language of the complaint encompasses the legal theory upon which the violation was found; (2) whether the factual record is complete, or, in other words, whether the facts necessary to find a violation under the theory in question were litigated; (3) whether the law is well established; and (4) the General Counsel's representations about the theory of violation, and the differences between the litigated theory and the theory upon which the judge relied in finding the violation. See, e.g., *Paramount Industries*, supra (factors (1), (2), and (3)); *Sierra Bullets, LLC*, 340 NLRB 242, 242–243 (2003) (factor (4)). We agree, for the reasons stated by the judge, that the first two factors were satisfied in this case. Furthermore, although the judge omitted the other two factors from his analysis, on this record we are satisfied that both are met as well. As to the third factor, it is well settled that unions have a legal right to assess and verify for themselves the accuracy of employers' claims in bargaining. See, e.g., *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152–153 (1956); *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006); *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994). And as to the fourth factor, the Respondent does not, and cannot, claim to have relied on the General Counsel's representations of the case in preparing its defense. Indeed, the case was submitted on a stipulated record and the parties' briefs to the judge were due on the same day. Moreover, we note that the Respondent has not identified any evidence it would have produced, or any specific defense it would have

[1] The Respondent excepts to the judge's partial denial of its motion to strike portions of the Union's brief to the judge, which allegedly offered factual assertions and conclusions based on evidence not contained in the stipulated record. We find it unnecessary to pass on that exception because the judge did not rely on those portions of the Union's brief and, in any event, those allegedly extraneous facts would not affect the result in this case.

[2] The Board does not rely on the judge's statement that, in cases where a union requests information relative to matters outside the bargaining unit, "the standard is somewhat narrower and relevance is required to be somewhat more precise." The Board has found that a union satisfies its burden to establish the relevance of non-unit information if it demonstrates either "a reasonable belief, supported by objective evidence, that the requested information is relevant," *Disneyland Park*, 350 NLRB 1256, 1257–1258 (2007) (citation omitted), or "a 'probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities,'" *Kraft Foods North America, Inc.*, 355 NLRB 753, 754 (2010) (quoting *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967)). Either way, the Board has consistently emphasized that the required showing is subject to the same broad, "discovery-type standard" applicable to other information requests, and that the union's burden is therefore "not an exceptionally heavy one." *Kraft Foods*, supra (internal quotation marks and citations omitted); accord, e.g., *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011); *Public Service Electric & Gas Co.*, 323 NLRB 1182, 1186 (1997); *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994).

[3] We shall modify the judge's recommended Order and remedial notice to conform to the Board's standard remedial language.

otherwise put forth, if it had known the judge would decide the case as he did.

As to the merits of the judge's finding, we agree that the Respondent was obligated to provide the full, unredacted HSP to the Union in order for the Union to evaluate the extent of work covered by the Respondent's proposal. We observe that the Respondent's proposal with regard to new product lines effectively amounted to having the scope of bargaining-unit work defined by the HSP. A union cannot be reasonably expected to integrate another agreement between the employer and a third party into its own collective-bargaining agreement without having a complete understanding of the contents of the incorporated document and the context of the relevant portions within the document as a whole. The Respondent thus rendered the entire HSP relevant to the negotiation, giving rise to a duty to provide the full, unredacted document to the Union.[4]

ORDER

The Respondent, DirectSat USA, LLC, South Holland, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with the International Brotherhood of Electrical Workers, Local Union 21, AFL–CIO, by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(b) 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 this Order, provide the Union with a full, unredacted copy of the Home Service Provider agreement between the Respondent and DirecTV.

(b) Within 14 days after service by the Region, post at its facility in South Holland, Illinois, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 13, 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 the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or 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, 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 March 18, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 13 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.

Dated, Washington, D.C. March 20, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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

[4] 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.

[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."

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the International Brotherhood of Electrical Workers, Local Union 21, AFL–CIO (the Union), by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the exclusive collective-bargaining representative of employees in the following appropriate bargaining unit:

> All full-time and regular part-time Installation/Service Technicians employed by the Employer at its facility located in South Holland, Illinois, but excluding all other employees, confidential employees, guards, and supervisors as defined in the National Labor Relations Act.

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

WE WILL furnish to the Union in a timely manner the information requested by the Union on March 18 and May 19, 2016.

DIRECTSAT USA, LLC

The Board's decision can be found at www.nlrb.gov/case/13-CA-176621 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Elizabeth S. Cortez, Esq., for the General Counsel.
Eric P. Simon, Esq. and *Douglas J. Klein, Esq. (Jackson Lewis P.C.)*, of New York, New York, for the Respondent.
Gilbert Cornfield, Esq. (Cornfield and Feldman LLP), of Chicago, Illinois, for the Charging Party.

DECISION

CHARLES J. MUHL, Administrative Law Judge. The General Counsel's complaint in this case alleges that DirectSat USA, LLC (the Respondent) unlawfully refused to provide information to Local Union 21 of the International Brotherhood of Electrical Workers, AFL–CIO (the Union). That Union represents the Respondent's installation and service technicians, who perform work for DirecTV, Inc. under a subcontract. The information at issue is a full and unredacted copy of the Respondent's contract—the "Home Service Provider" agreement—with DirecTV. The situation arose in the context of negotiations for a first contract covering the Respondent's technicians.

On April 10, 2017, the parties filed a joint motion and stipulation of facts requesting that the case be decided without a hearing and based on the stipulated record. On April 14, 2017, I granted the motion and approved the stipulation of facts via written order. Thereafter, the parties filed briefs on May 26, 2017. Based upon those briefs and the entire stipulated record, I find that the Respondent violated the Act as alleged in the complaint.[1]

FINDINGS OF FACT

I. JURISDICTION

The Respondent is engaged in the installation and service of satellite television equipment for DirecTV, from its facility in South Holland, Illinois. In conducting its business operations during the past 12 months, the Respondent has performed services in excess of $50,000 in States other than the State of Illinois. Accordingly, I find that, at all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, as the Respondent admits in its answer to the complaint. I also find, and the Respondent admits, that the Union is a labor organization within the meaning of Section 2(5) of the Act.[2]

II. ALLEGED UNFAIR LABOR PRACTICES

On February 11, 2014, the Union was certified as the exclusive collective-bargaining representative of the Respondent's technicians, pursuant to Section 9(a) of the Act.[3] The Respondent and the Union began negotiations for a first contract on September 4, 2014. Eric Simon, an attorney, represented the

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[1] On May 20, 2016, the Union initiated this case by filing the original unfair labor practice charge against the Respondent. Region 13 of the National Labor Relations Board (the Board) docketed the charge as Case 13–CA–176621. On June 13, 2016, the Union filed a first amended charge and, on September 14, 2016, the Union filed a second amended charge. On September 23, 2016, the General Counsel issued a complaint, alleging that the Respondent violated Section 8(a)(5) of the National Labor Relations Act (the Act). On October 5, 2016, the Respondent filed a timely answer to the complaint. Therein, it asserted an affirmative defense, based upon Section 10(b) of the Act.

[2] Stipulation of facts, pars. 7–10.

[3] The full description of this appropriate unit (the Unit) is:

> All full-time and regular part-time Installation/Service Technicians employed by the Employer at its facility located at 9951 W 190th St., Mokena, Illinois, 60448, but excluding all other employees, confidential employees, guards, and supervisors as defined in the Act.

The Respondent relocated the Mokena facility to South Holland in or around May 2015.

Respondent in these negotiations.[4]

One of the matters the parties addressed in bargaining was whether new products or services offered by the Respondent would be deemed bargaining unit work. On various dates from November 12, 2014 through September 16, 2015, the Respondent and the Union exchanged written proposals on this topic. The Respondent proposed that such work would be outside the unit. However, at its sole discretion, the Company could assign the new work to unit employees, set their wage rates, and later remove the work without any challenge through the grievance and arbitration procedure. The Union, in turn, proposed having this work assigned to bargaining unit employees. It also sought to retain the right to negotiate the terms and conditions of employment related to this work. Finally, the Union proposed that it be able to submit any disagreements over the new work to the grievance procedure.[5]

The material events regarding the Union's information request at issue in this case took place from November 2015 to May 2016. First, on November 4, 2015, the Respondent submitted a revised proposal on new product lines.[6] The first sentence of that proposal stated: "In the event the Employer 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." (Emphasis in the original.)

Then on November 23, 2015, Dave Webster, a business representative for the Union, sent an email to Lauren Dudley, the Respondent's human resources director.[7] Webster stated in relevant part: "[O]ne of the company proposals references the HSP agreement with DTV. We'd like a copy of the agreement referenced in the proposal." Dudley responded via email dated December 4, 2015.[8] As to the Home Service Provider (HSP) agreement with DirecTV, Dudley stated: "See attached, relevant to scope of work." She provided a portion of the agreement, with redactions. In the "Recitals," the unredacted provisions described the businesses of DirecTV and the Respondent. Then the "Agreement" section included an "Appointment of Contractor" provision, which stated:

> Authority. DIRECTV hereby engages [the Respondent] to provide services in the installation and maintenance of DIRECTV System Hardware (the "Services," or "Fulfillment Services" when referring specifically to initial customer installation services only) as defined herein and as identified in **Exhibit 1.a.i.** attached hereto for DIRECTV customers located in areas specified in **Exhibit I.a.ii..** attached hereto. . . .(Emphasis in the original.)

Dudley also provided the two exhibits referenced in this provision. The first gave a description of the work tasks the Respondent would perform for DirecTV under the agreement. The second contained a list of cities in which the Respondent would perform the work.

On February 16, 2016,[9] Webster sent an email to Simon, which stated:

> I have heard that AT&T has extended the DirecTV contract with DirectSat for another 3 years. With AT&T & DirectSat both installing the DirecTV Dish we need to understand the relationship between AT&T & DirectSat and the shared work. Please send a copy of the current agreement between DirectSat & AT&T/DTV for use in bargaining.[10]

Simon responded via email dated February 20.[11] Simon stated therein:

> We have no idea what you have heard or whom you have heard it from, but your "information" is erroneous. DirectSat has entered into no new agreements with AT&T. In early 2015, DirecTV extended its contract with DirectSat through 2018, but there has been nothing further.
>
> As to the substance of your request, you seem to assert is relevant (sic) because you believe DirecTV (I assume you refer to AT&T because of the recent acquisition of DirecTV by AT&T) and DirectSat have "shared" work. Again, you are mistaken. There is no "shared" work. As far as DirectSat is concerned, all of the work is DirecTV's. DirecTV currently has, and always has had, the right to contract as much or as little or none of its satellite TV system installation and service work to DirectSat as it, in its sole discretion, may decide. DirectSat only performs the work that DirecTV authorizes it to perform. DirectSat has never had an exclusive right to install/service DirecTV systems. Just as DirecTV had the ability to decide to whom it would contract with or if it would contract out installation/service work at all prior to the AT&T-DirecTV merger, DirecTV (even as a subsidiary of AT&T) continues to determine what and how much work to contract out. This is not an issue DirectSat has any control over or ever had any control over, and as such is not a mandatory subject of bargaining. Bargaining unit work has been and will continue to be the installation and service of DirecTV systems to the extent and degree DirecTV authorizes DirectSat to perform such work. While Local 21 may have an issue with DirecTV's subcontracting of such work, it is not relevant to our negotiations.

On March 18, Webster resent the original information request to Simon, asking for a full copy of the HSP agreement.[12] Once again, Webster noted the reference to the agreement in

[4] The parties agree that, in that capacity, Simon was a Sec. 2(13) agent of the Respondent.

[5] Stipulation of facts, pars. 16–19; Jt. Exhs. 7–10.

[6] Stipulation of facts, par. 20; Jt. Exh. 11.

[7] Stipulation of facts, par. 21; Jt. Exh. 12.

[8] Stipulation of facts, par. 22; Jt. Exh. 13.

[9] All dates hereinafter are in 2016, unless otherwise specified.

[10] Stipulation of facts, par. 23; Jt. Exh. 14. AT&T acquired DirecTV on or about July 24, 2015.

[11] Stipulation of facts, par. 24; Jt. Exh. 15.

[12] Stipulation of facts, par. 25; Jt. Exh. 16. In this communication, Webster also requested information concerning "how the technician's scorecard is determined. Not only the metrics, but how the metrics are determined and by whom." On April 6, Simon responded with a different, redacted portion of the HSP agreement. (Stipulation of facts, par. 28; Jt. Exh. 19.) This portion listed the categories of performance standards DirecTV set for the Respondent, as well as the definition of each category. The General Counsel does not allege or argue that the Respondent's conduct as to this Union request for information was unlawful.

the Respondent's new product lines proposal. At a bargaining session on March 22, Simon acknowledged the Union's renewed information request. Simon stated that the Respondent already provided the Union with the relevant portions of the HSP agreement. The Union also submitted a revised proposal regarding new product lines. That proposal retained the Respondent's earlier language referencing the HSP agreement, except that the new work was deemed bargaining unit work.

On April 5, the Union again reiterated its request for a full copy of the HSP agreement, based upon the Respondent referencing the agreement in its new product lines proposal.[13]

On May 19, Webster sent the following email to Simon:

> In connection with DirectSat negotiations I renew my request for a FULL copy of the HSP agreement between DirectSat and DirecTV/AT&T in addition to all current agreements with sub contractors, to evaluate the extent of control of DirectSat by DirecTV/AT&T.[14]

Simon responded via email the same day.[15] He said: "We have already provided you with all relevant information regarding this request. We see no reason to supplement our response."

The Union filed the original unfair labor practice charge in this case on May 20. Then on May 22, Simon sent a letter[16] to Webster to "further explicate DirectSat's rational (sic) for declining to provide a complete copy of the HSP Agreement. . . ." Simon stated in relevant part:

> The request for the full copy of the HSP agreement to evaluate DirecTV's control over DirectSat is irrelevant to negotiations between DirectSat and Local 21 regarding terms and conditions of employment of DirectSat employees. The "extent of control" of DirecTV over DirectSat has no bearing on negotiations over wages, hours, or other terms and conditions of employment which are exclusively controlled by DirectSat. As previously explained to you at the table, DirecTV does not, and has no control over the wages paid to DirectSat employees or the metrics used to evaluate the performance of unit employees. These decisions are vested exclusively in DirectSat. For the last 2+ years since Local 21 was certified as the representative of employees of DirectSat's Chicago South (now South Holland location), DirectSat has bargained in good faith over the wages, hours and other terms and conditions of employment of unit employees. DirecTV has no role in these negotiations. DirectSat has never asserted that it cannot agree to a proposal on any issue because DirecTV might disapprove. Nor is the ability of DirectSat to enter into a collective bargaining agreement with Local 21 subject to approval by DirecTV.
>
> DirectSat has provided Local 21 with those portions of its contract with DirecTV which may have some relevance to our negotiations - the scope of work covered by the HSP agreement and the metrics used by DirecTV to evaluate the performance of DirectSat under the HSP agreement. (DirectSat did not object to providing this information on the basis that while DirectSat has full authority to set performance metrics for unit technicians, DirectSat has stated that the metrics established by DirecTV to evaluate DirectSat help inform DirectSat in establishing performance metrics for technicians.)
>
> For all the foregoing reasons, the Union's request for the full HSP contract is not relevant to any issue in negotiations and DirectSat declines to provide it.

ANALYSIS

The General Counsel's complaint alleges that the Respondent violated Section 8(a)(5) by refusing to provide the Union with a full, unredacted copy of its HSP Agreement with DirecTV. The only issue in dispute is the relevance of the agreement to the Union's duties as the bargaining representative of the Respondent's technicians.[17]

I. LEGAL STANDARD

An employer has a statutory obligation to provide to a union that represents its employees, on request, information that is relevant and necessary to the union's performance of its duties as the exclusive collective-bargaining representative. *Piggly Wiggly Midwest, LLC*, 357 NLRB 2344, 2355 (2012); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956). When the union's request deals with information pertaining to employees in the unit that goes to the core of the employer-employee relationship, the information is "presumptively relevant." *National Broadcasting Co., Inc.*, 318 NLRB 1166, 1169 (1995), citing to *Shell Development Co. v. NLRB*, 441 F.2d 880 (9th Cir. 1971). However, an employer's contracts with customers are not presumptively relevant. *F.A. Bartlett Tree Expert Co., Inc.*, 316 NRLB 1312, 1313 (1995). Thus, the Union here must establish the relevance of the information. *Sheraton Hartford Hotel*, 289 NLRB 463, 463–464 (1988). To demonstrate relevancy, a liberal, discovery-type standard applies and the union's initial showing is not a burdensome or overwhelming one. *NLRB v. Acme Industrial Co.*, 385 U.S. at 437; *The New York Times Co.*, 270 NLRB 1267, 1275 (1984). Nonetheless, where the request is for information with respect to matters outside the unit, the standard is somewhat narrower and relevance is required to be somewhat more precise. *Island Creek Coal Co.*, 292 NLRB

[13] Stipulation of facts, par. 27; Jt. Exh. 18.

[14] The General Counsel's complaint only alleges and relies upon the Union's requests for the full HSP agreement dated March 16 and May 19. It does not include the Union's requests dated November 23, 2015, February 16, and April 5.

[15] Stipulation of facts, par. 30; Jt. Exh. 21.

[16] Stipulation of facts, par. 31; Jt. Exh. 22.

[17] In its answer to the complaint, the Respondent asserted a 10(b) defense. It makes no argument in this regard in its brief. In any event, the facts do not support this defense. The Union's first request for the HSP agreement occurred on November 23, 2015. The Respondent provided its partial response on December 4, 2015. The Union again requested the full agreement on February 16. The Respondent's first refusal to provide the full agreement occurred on February 20. Thus, the 10(b) period began to run as of February 20, when the Respondent clearly and unequivocally denied the Union's request for the full agreement. *Quality Building Contractors, Inc.*, 342 NLRB 429, 431 (2004). The Union filed its initial unfair labor practice charge on May 20 and it was served on the Respondent on that same date. (Stipulation of facts, par.1.) Thus, the charge filing occurred well within the required 6-month period from when the alleged unfair labor practice occurred.

480, 487 (1989), citing to *Ohio Power Co.*, 216 NLRB 987, 991 (1975).

II. DID THE UNION HAVE AN OBJECTIVE, FACTUAL BASIS TO SUSPECT THE RESPONDENT AND DIRECTV WERE JOINT EMPLOYERS?

To demonstrate relevance, the General Counsel first argues that the Union needed to determine if DirecTV and the Respondent were joint employers for purposes of collective bargaining.[18] Information concerning the existence of a joint employer relationship also is not presumptively relevant and a union has the burden of demonstrating its relevancy. *Connecticut Yankee Atomic Power Co.*, 317 NLRB 1266, 1267 (1995); *Knappton Maritime Corp.*, 292 NLRB 236, 239 (1988). A union cannot meet its burden based on a mere suspicion that a joint employer relationship exists. It must have an objective, factual basis for so believing. *Kranz Heating & Cooling*, 328 NLRB 401, 402–403 (1999). However, a union is not obligated to disclose those facts to the employer at the time of the information request. *Baldwin Shop 'N Save*, 314 NLRB 114, 121 (1994). It is sufficient if the General Counsel demonstrates at the hearing that the union had, at the relevant time, a reasonable belief.[19] *Cannelton Industries, Inc.*, 339 NLRB 996, 997 (2003).

Both *Connecticut Yankee Atomic Power* and *Kranz Heating & Cooling*, supra, involved situations where unions demonstrated a reasonable belief that two entities were joint employers. In *Connecticut Yankee*, the union investigated the working conditions of subcontracted employees at a plant where it represented permanent employees. The union obtained facts indicating the employer with whom it had the collective-bargaining relationship played a role in the hiring, work scheduling, and supervision of the subcontracted employees. In addition, a union representative became aware of prior Board cases where similar claims of joint employer status were made. In *Kranz Heating*, the union discovered a variety of objective facts suggesting joint employer status. The union there represented employees in a business that allegedly closed. Following the closure, the union determined that a newly formed company was operating the same or similar business from the same location. The new company also was using the same equipment and telephone number. In these cases, the unions formed a reasonable belief of joint employer status based upon their collection of objective facts, before making their information requests. See also *Piggly Wiggly Midwest*, 357 NLRB at 2357–2358; *Knappton Maritime Corp.*, 292 NLRB at 239; *Cannelton Industries, Inc.*, 339 NLRB at 997.

In contrast in this case, the stipulated facts do not establish the Union had an objective basis for believing the Respondent and DirecTV were joint employers, at the time it made the information requests. Prior to its March 16th request, the Union only knew that DirecTV and the Respondent had a contractual relationship, under which the Respondent provided installation and maintenance services to DirecTV. The mere existence of a service contract between two companies is not a sufficient basis to reasonably believe they might be joint employers. If it were, then every agreement between an employer and a subcontractor would be deemed relevant to the question of joint employer status, based upon nothing more than the contract's existence. The Union also knew that both DirecTV and the Respondent installed and serviced DirecTV equipment. But the fact that both companies performed the work, standing alone, is not an objective basis for concluding DirecTV possessed control over how the Respondent did so. When the Union made its May 19th request, the only new information it had obtained were DirecTV's performance standards for DirectSat contained in the HSP agreement. However, nothing therein suggested DirecTV had any control over how the Respondent went about meeting those standards. Finally, the stipulated record contains no additional, contemporaneous facts relied upon by the Union for believing a joint employer relationship existed. Taken together, these minimal facts fall into the category of mere suspicion. The Union needed more here.[20]

III. DID THE UNION NEED THE REQUESTED INFORMATION TO VERIFY CLAIMS MADE BY THE RESPONDENT?

The General Counsel also contends the Union was entitled to the full HSP agreement to verify the accuracy of claims made by the Respondent concerning the relationship between the two entities. Relevance can be established in this fashion. *Caldwell Manufacturing Co.*, 346 NLRB 1159, 1160 (2006) (relevance established where employer made specific factual assertions in bargaining concerning need to improve competitiveness and, thereafter, union requested cost and productivity information in part to evaluate the accuracy of the claims); *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994) (union was not required to accept at face value an employer's assertion that two entities were separate operations). The U.S. Supreme Court itself stated in *Truitt Mfg. Co.* that if "an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." 351 U.S. at 152–153.

In this case, the stipulated facts likewise fail to establish that the Respondent claimed it and DirecTV were not joint employers. Prior to the Union's information requests, the only conceivable assertions Simon made in this regard were in his February 20 letter. Simon said there was no "shared work" between the companies. He also stated repeatedly that DirecTV had the exclusive right to contract out all or none of its work to

[18] In *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015), the Board instituted a revised standard for determining joint employer status. Under that standard, two or more entities are joint employers if they share or codetermine those matters governing the essential terms and conditions of employment. Possessing authority over those terms is sufficient to establish joint employer status. Such terms include the direction of the work force, dictating the number of workers to be supplied, and determining the manner and method of work performance.

[19] Of course, in this case, no hearing occurred. Accordingly, the objective facts relied upon by the Union either must have been disclosed at the time of the requests or included in the stipulation of facts.

[20] Although Webster also stated the Union needed the HSP agreement "for use in bargaining" and "in connection with DirectSat negotiations," such statements are too general and conclusory to establish relevance. *F.A. Bartlett Tree Expert Co.*, 316 NLRB at 1313; *Island Creek Coal Co.*, 292 NLRB at 490 fn. 19.

the Respondent. In evaluating joint employer status, the Board looks to whether the employers share control over terms and conditions of employment, not whether they share work. *Browning-Ferris*, supra. Those terms and conditions include determining the manner and method of employees' work performance, not the amount of work one employer subcontracts to another. The General Counsel has overstated the significance of Simon's statements. See *F.A. Bartlett Tree Expert Co.*, 316 NLRB at 1313. The closest Simon came to putting joint employer status at issue was in his May 22 letter to the Union, after the Union filed its unfair labor practice charge. Therein, Simon stated DirecTV had no control over the wages paid to DirectSat employees or the metrics used to evaluate the performance of unit employees. Simon also stated that DirecTV had no role in the negotiations and could not require that the Respondent seek its approval to enter into a collective bargaining agreement. However, these statements all came after the Union submitted its information requests for the full HSP agreement. Thus, those requests could not test the accuracy of claims that had not yet been made. In sum, the Respondent never denied that it and DirecTV were joint employers. It also did not deny any of the specific factors used to evaluate joint employer status. Therefore, the Union cannot establish the relevance of the full, unredacted HSP agreement on this basis either.

However, the Union is entitled to verify the Respondent's repeated claim that it furnished all the relevant portions of the HSP agreement on the scope-of-unit-work issue. First, no question exists, and the Respondent concedes, that information in the HSP agreement on the scope of unit work is relevant to the Union's representational functions.[21] This conclusion is supported by the stipulated facts. The dispute over the HSP agreement only arose because the Respondent itself included a reference to the agreement in its November 23, 2015 scope-of-unit-work bargaining proposal. The Respondent thereby put into play what services it furnished to DirecTV pursuant to the agreement. The Company was seeking in bargaining to classify any work performed outside of the agreement as nonbargaining unit work. The Union certainly is entitled to know the universe of bargaining unit work as defined in the agreement, in evaluating the Respondent's proposal. Moreover, the Respondent repeatedly told the Union it had provided all relevant parts of the HSP agreement in this regard. In its initial, three-page response dated December 4, 2015, the Respondent provided only a portion of the agreement it alone deemed "relevant to scope of work." Thereafter, on March 16, the Union asked for a full copy of the HSP agreement and reiterated that the Respondent referenced the agreement in its new product lines proposal. At the bargaining session on March 22, Simon again stated the Company already had provided all the relevant portions of the agreement. The Union then resubmitted its request for the full agreement on both April 5 and May 19.

Thus, the question presented is whether the Respondent unilaterally could decide what portions of the HSP agreement were relevant, only turn over those portions, and then refuse to provide the remainder of the agreement when the Union requested it. Board precedent is clear that the Respondent was not entitled to do so. In this regard, the factual situation here is similar to that in *Piggly Wiggly*, supra. In that case, a union requested sales and franchise agreements from an employer, whom it suspected had an alter-ego relationship with certain franchisees. The employer argued, in part, that the requested information was unnecessary, because its attorney had provided one paragraph of an agreement to the union and later told the union that the documents requested contained no other relevant information. The judge rejected the employer's argument that the response was sufficient and it did not have to provide the full agreements. The judge stated: "The [u]nion is not required to take the [employer's] word for it, but has the right to assess and verify for itself the accuracy of the [employer's] claims in bargaining." The Board adopted the judge's conclusion that the employer violated the Act, by delaying in providing the agreements. See also *Knappton Maritime Corp.*, 292 NLRB at 239–240 (providing an excised copy of a sales agreement, but not the full, original copy, violated the Act); *Southern Ohio Coal Co.*, 315 NLRB 836, 844–845 (1994) (an employer telling a union its version of what was in, and not in, a sales agreement did not satisfy the union's right to have access to an unexcised copy of that agreement).

Furthermore, the Union's inability to identify other specific relevant information in the HSP agreement cannot be held against it, since it has never seen the agreement. *Olean General Hospital*, 363 NLRB No. 62, slip op. at 7 (2015). In *Olean General*, a union requested a copy of a patient care survey conducted by a third party. Staffing had been an issue in contract negotiations. The Union wanted to determine if staffing was addressed in the report, even though it had no knowledge the survey contained such information. The Board rejected the employer's claim that the union failed to demonstrate a specific need for the patient care survey. The Board noted that, since the employer had seen the report and knew what was in it, the employer had ample opportunity to show that the information in it would be of no benefit to the union. The same principle applies in this case. Although it did provide a partial response to the Union, the Respondent never made an attempt to show the Union that the remainder of the HSP agreement lacked information relevant to the scope of unit work.

Finally, the Respondent contends the Union never objected to its providing only three pages of the HSP agreement. It is true that the Union never stated the partial response was inadequate. It also did not provide much in the way of an explanation as to why it needed the full HSP agreement. Nonetheless, what the Union did do was submit a request for the full agreement, on three occasions, after receiving the Company's initial response. The Union's conclusion that the initial response was not sufficient obviously can be inferred from its subsequent requests for the full agreement.

For all these reasons, I conclude that relevance is established here, because the Union is entitled to verify the Respondent's claim that it has provided all portions of the HSP agreement relevant to the scope of unit work. By failing to provide the full, unredacted HSP agreement, the Respondent violated Sec-

[21] R. Br., p. 10, fn. 5.

tion 8(a)(5).[22]

CONCLUSIONS OF LAW

1. The Respondent 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. The Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with information it requested on March 18 and May 19, 2016, specifically a full, unredacted copy of the Home Service Provider agreement between the Respondent and DirecTV. The HSP agreement is necessary and relevant to the Union's performance of its duties as the collective-bargaining representative of unit employees.[23]

4. The above unfair labor practice affects commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent 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. Specifically, the Respondent must cease and desist from refusing to provide the Union with requested information that is necessary and relevant to the performance of its duties as the exclusive collective-bargaining representative of the Respondent's installation and service technicians. The Respondent also must provide the Union with a full, unredacted copy of the HSP agreement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

The Respondent, DirectSat USA, LLC, South Holland, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with the International Brotherhood of Electrical Workers, Local Union 21, AFL–CIO, by failing to provide information requested by the Union that is necessary and relevant for the Union's performance of its duties as the collective-bargaining representative of the employees in the Unit.

(b) 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, provide the Union with a full, unredact-

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[22] The General Counsel did not advance the legal theory upon which I am finding a violation. Nonetheless, under the circumstances of this case, I find it appropriate to exercise my discretion in this manner. See, e.g., *Local 58, International Brotherhood of Electrical Workers (Paramount Industries, Inc.)*, 365 NLRB No. 30, slip op. at 4 fn. 17 (2017) (where the violation was alleged in the complaint, the factual basis for the violation was clear from the record, the law was well established, and no due process concerns were implicated, the Board found a violation on a different legal theory than that pursued by the General Counsel); *Riverside Produce Co.*, 242 NLRB 615, 615 fn. 2 (1979) (where the allegations were generally encompassed in the complaint, the issues were fully litigated, and the record fully supported the conclusions, the Board approved of a judge's finding of violations not specifically alleged in the complaint). Because this case was submitted pursuant to a stipulated record, no factual disputes exist. The complaint contained an allegation of unlawful conduct by the Respondent, specifically its refusal to provide the Union with a full copy of the HSP agreement. The parties similarly agreed that the issue in this case was "Whether the Respondent has violated Section 8(a)(5) of the Act by failing and refusing to provide the Union with a full unredacted copy of the [HSP agreement] between DirecTV and DirectSat." (Stipulation of facts, p. 2.) The complaint allegation and statement of the issue are sufficiently broad to encompass this legal theory. As a result, the Respondent has not been denied due process. Indeed, the Respondent addressed this theory in its brief. It repeatedly argued that the Union did not object to its initial response. In doing so, the Respondent advanced the contention that its initial response was adequate under the law. Finally, the stipulated facts fully support finding a violation on this basis.

[23] After the parties submitted their briefs, the Respondent filed a motion to strike portions of the Union's brief, because they were not a part of the stipulated record. The first section at issue is entitled: "The Possible Joint Employer Status of DirectSat and DirecTV." In this section, the Union contends that, during the time period when it requested the full HSP agreement, it became aware that the issue of whether the Respondent and DirecTV were joint employers was being litigated in a Fair Labor Standards Act case in Federal court. However, this fact is not in the stipulated record. Thus, I agree with the Respondent that, in this regard, the Union is inappropriately seeking to introduce new facts that are not properly before me for consideration. The Union also attached a decision of the Fourth Circuit Court of Appeals from January 2017, well after the material dates in this case, concerning the joint employer status of the two companies. The Union requested that I take judicial notice of the decision, as well as the Union's reliance on the decision as part of the reason for its information request. Of course, a judge can take judicial notice of an appellate court's decision on a material legal issue. But the Union's claimed reliance on this decision is a factual, not a legal, matter. Any such reliance to substantiate its information request had to be presented either at the time the request was made or in the stipulated factual record. Neither occurred. Thus, I grant the Respondent's motion to strike this portion of the Union's brief and have not considered that section in reaching this conclusion of law.

The second brief section at issue is entitled: "How A Technician's Earnings Are Determined." Therein, the Union addresses the concurrent information requests it submitted to the Respondent concerning DirecTV's performance standards, as well as the technicians' scorecards and performance metrics. Contrary to the Respondent's contention, the stipulated record does contain facts regarding the performance standards information requests. (Stipulation of facts, par. 28; Jt. Exh. 19.) Thus, I deny the Respondent's motion to strike this section. Nonetheless, as previously discussed, the General Counsel's complaint in this case alleges only the Respondent's failure to provide the full HSP agreement, not any information concerning performance standards. The General Counsel's brief contains no argument concerning performance standards, including their relation, if any, to the requests for the full HSP agreement. That issue simply is not before me. Accordingly, I find the Union's performance standards argument has no bearing on the complaint allegation here and I do not rely upon that section of the Union's brief in reaching this conclusion of law.

[24] 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.

ed copy of the Home Service Provider agreement between the Respondent and DirecTV.

(b) Within 14 days after service by the Region, post at its facility in South Holland, Illinois, copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 days in conspicuous places including all places were notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or 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 March 18, 2016.

(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 Regional Director attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C., July 20, 2017.

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 fail and refuse to bargain in good faith with the International Brotherhood of Electrical Workers, Local Union 21, AFL-CIO (the Union), by failing to provide the Union with information that is necessary and relevant to the performance of its duties as the exclusive collective-bargaining representative of employees in the following, appropriate bargaining unit:

All full-time and regular part-time Installation/Service Technicians employed by the Employer at its facility located in South Holland, Illinois, but excluding all other employees, confidential employees, guards, and supervisors as defined in the National Labor Relations Act.

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 of this order, provide the Union with a full, unredacted copy of the Home Service Provider agreement between us and DirecTV. The Union requested this information on March 18 and May 19, 2016 and the information is relevant to the Union's duties as your collective-bargaining representative.

DIRECTSAT USA, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/13-CA-176621 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

[25] 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."

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIRECTSAT USA, LLC,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 3, 2018, a true and correct copy of the above and foregoing *Petition for Review* was served by UPS overnight, postage prepaid, upon the following:

Elizabeth Cortez, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 13
219 S. Dearborn St., Suite 808
Chicago, IL 60604

John H. Ferguson, Esq.
Associate General Counsel
Appellate and Supreme Court Litigation Branch
Office of General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

Peter Sung Ohr
Regional Director
National Labor Relations Board
National Labor Relations Board, Region 13
219 S. Dearborn St., Suite 808
Chicago, IL 60604

Gilbert A. Cornfield, Esq.
Cornfield and Feldman LLP
25 East Washington Street, Suite 1400
Chicago, IL 60602-1708

Daniel D. Schudroff

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