

Nos. 18-1092, 18-1156 & 18-1228

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

DIRECTSAT USA, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

DIRECTV, LLC

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

**ON PETITIONS FOR REVIEW AND CROSS-
APPLICATION FOR ENFORCEMENT OF TWO ORDERS OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIRECTSAT USA, LLC,)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD,)	
	)	Nos. 18-1092
Respondent/Cross-Petitioner	)	18-1156
	)	18-1228
DIRECTV, LLC,)	
	)	Board Case No.
Petitioner	)	13-CA-176621
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD,)	
)	
Respondent)	
)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certifies the following:

A. Parties and Amici

DirectSat USA, LLC (“DirectSat”) is the Petitioner in case No. 18-1092, and the Cross-Respondent in case No. 18-1156. DirecTV, LLC (“DirecTV”) is the Petitioner in case No. 18-1228. The Board is the Respondent in case No. 18-1092, the Cross-Petitioner in case No. 18-1156, and the Respondent in case No. 18-1228.

International Brotherhood of Electrical Workers, Local Union 21, AFL-CIO was the charging party before the Board in unfair-labor practice case No. 13-CA-176621.

B. Rulings under Review

This case involves two separate Board orders, both of which arise from the same administrative proceeding, Board Case No. 13-CA-176621.

1. *DirectSat USA, LLC*, 366 NLRB No. 40, 2018 WL 1409574 (Mar. 20, 2018).

This is a Board Decision and Order finding that DirectSat violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) and (1).

DirectSat has petitioned for review of that Order (No. 18-1092), and the Board has cross-petitioned for enforcement (No. 18-1156).

2. *DirectSat USA, LLC*, 366 NLRB No. 141, 2018 WL 3608309 (July 25, 2018).

This is a Board Order denying DirecTV's motion to intervene in Board Case No. 13-CA-176621. DirecTV has petitioned for review of that Order (No. 18-1228).

C. Related Cases

The rulings under review were not previously before this or any other court, and Board counsel is not aware of any related case currently pending or about to be presented in this or any other court.

s/ David Habenstreit
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Dated at Washington, DC
this 1st day of February 2019

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GLOSSARY

The Act	National Labor Relations Act, 29 U.S.C. § 151 et seq.
The Board	National Labor Relations Board
DirectSat	DirectSat USA, LLC
DirecTV	DirecTV, LLC
DS Br.	Opening brief of DirectSat USA, LLC
DTV Br.	Opening brief of DirecTV, LLC
General Counsel	Counsel for the Board's General Counsel
HSP	Home Service Provider subcontracting agreement between DirecTV and DirectSat
The Union	International Brotherhood of Electrical Workers, Local Union 21, AFL-CIO

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JURISDICTIONAL STATEMENT

This case is before the Court on the petition for review of DirectSat USA, LLC (“DirectSat”), and the cross-application for enforcement of the National Labor Relations Board (“the Board”), of a Board Order against DirectSat (“the Order”) reported at 366 NLRB No. 40 (Mar. 20, 2018). Also before the Court is the petition for review of DirecTV, LLC (“DirecTV”) of the Board’s Order Denying Motion reported at 366 NLRB No. 141 (July 25, 2018). Both orders are final. The Board had jurisdiction over the proceeding below pursuant to Section 10(a) of the National Labor Relations Act (“the Act”), as amended, 29 U.S.C. § 151 et seq., § 160(a). All filings with the Court are timely. This Court has jurisdiction under Section 10(e) and (f) of the Act. *Id.* § 160(e), (f).

STATEMENT OF ISSUES

1. Whether substantial evidence supports the Board’s finding that DirectSat violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), by failing and refusing to provide the full, unredacted subcontracting agreement with DirecTV, which was referenced in a proposal during collective bargaining, to International Brotherhood of Electrical Workers, Local Union 21, AFL-CIO.
2. Whether the Board acted within its discretion by denying DirecTV’s motion to intervene, reopen the record, and for reconsideration of the Board’s Order.

RELEVANT STATUTORY PROVISIONS

Relevant sections of the National Labor Relations Act and the Board's Rules and Regulations are reproduced in the Addendum to this brief.

STATEMENT OF THE CASE

During negotiations over its first collective-bargaining agreement with DirectSat, International Brotherhood of Electrical Workers, Local Union 21, AFL-CIO ("the Union") requested a copy of DirectSat's subcontracting agreement with DirecTV. DirectSat refused and provided only redacted excerpts. The Board found that DirectSat's actions violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1), and issued an Order requiring it to produce the full, unredacted document. Subsequently, DirecTV filed a motion to intervene in the proceeding, which the Board denied. DirectSat petitioned to review the Board's Order, and DirecTV petitioned to review the denial of its motion to intervene. The Board seeks full enforcement of its Order against DirectSat.

I. STATEMENT OF RELEVANT FINDINGS OF FACT

DirectSat installs and services satellite television equipment for DirecTV pursuant to a Home Service Provider subcontracting agreement ("HSP"). (JA260; JA56 ¶ 7.)¹ In February 2014, the Union was certified as the exclusive collective-

¹ Record abbreviations in this brief are explained in the Glossary. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

bargaining representative for DirectSat’s installation-and-service technicians. (JA260; JA56 ¶ 13.) The parties began negotiations over their first contract in September 2014. (JA260; JA57 ¶ 15.)

During negotiations, the issue arose whether new products or services offered by DirectSat would be deemed bargaining-unit work. (JA261.) On November 4, 2015, DirectSat submitted a “New Product Lines” proposal providing that, “[i]n 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.” (JA261; JA57 ¶ 20, JA83.)²

On November 23, 2015, the Union’s Business Representative, Dave Webster, e-mailed DirectSat’s Human Resources Director, Lauren Dudley, to request “a copy of the agreement referenced” in DirectSat’s proposal. (JA261; JA57 ¶ 21, JA84.) On December 4, Dudley sent Webster copies of three redacted pages of the HSP with the message, “See attached, relevant to scope of work.” (JA261; JA58 ¶ 22, JA87.) In relevant part, the unredacted portions of the HSP provide: “DIRECTV hereby engages [DirectSat] to provide services in the installation and maintenance of DIRECTV System Hardware . . . as defined herein

² The judge’s reference to DirectSat’s “November 23, 2015 scope-of-unit-work bargaining proposal” (JA264) is in error; as the judge correctly noted elsewhere (JA261), the actual date was November 4.

and as identified in **Exhibit 1.a.i.** attached hereto for DIRECTV customers located in areas specified in **Exhibit 1.a.ii.**, attached hereto.” (JA261; JA89.) Dudley also provided the two referenced exhibits: the first described the work DirectSat would perform under the agreement and the second listed the cities where the work would be done. (JA261; JA90-91.)

On February 16, 2016, Webster sent Eric Simon, the attorney representing DirectSat in bargaining, the following e-mail message:

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.

(JA261; JA58 ¶ 23, JA92.) On February 20, Simon responded that Webster’s request was irrelevant to bargaining because there was “no ‘shared’ work” between DirectSat and DirecTV. (JA261; JA58 ¶ 24, JA93.)

On March 18, 2016, Webster sent Simon an e-mail in which he identified wages, benefits, and new product lines as the “key unresolved issues” between the parties.³ Webster again requested “a FULL copy of the HSP agreement between DirectSat & DirecTV particularly because of the reference [i]n the New Product Lines proposal.” (JA261-62; JA59 ¶ 25, JA94.) At a bargaining session on

³ On a few occasions, the judge erroneously stated that this request was dated March 16, instead of March 18. (JA262 n.14, 263, 264.)

March 22, Simon acknowledged the Union's request for the full HSP, but stated that DirectSat had already provided the relevant portions of that document. (JA262; JA59 ¶ 26.) At that same bargaining session, the Union presented its counterproposal to DirectSat's New Product Lines proposal. (JA262; JA59 ¶ 26, JA95.)

On April 5, Webster re-sent his March 18 e-mail to Simon, again referencing the New Product Lines Proposal and asking "when to expect" the requested information. (JA262; JA59 ¶ 27, JA96.) In that message, Webster also requested information about the metrics DirectSat used to evaluate its technicians' performance. On April 6, Simon provided another redacted portion of the HSP in response to Webster's requests for metrics. (JA261 n.12; JA59 ¶ 28, JA98-102.)

On May 19, 2016, Webster renewed his "request for a FULL copy of the HSP agreement between DirectSat and DirecTV/AT&T in addition to all current agreements with subcontractors, to evaluate the extent of control of DirectSat by DirecTV/AT&T." (JA262; JA59 ¶ 29, JA103.) Simon responded on the same day, stating, "We have already provided you with all relevant information regarding this request. We see no reason to supplement our response." (JA262; JA60 ¶ 30, JA104.)

On May 23, 2016, after the Union filed the original unfair-labor-practice charge in this case, Simon sent Webster a letter to "further explicate DirectSat's

rational[e] for declining to provide a complete copy of the HSP Agreement.”

(JA262; JA60 ¶ 31, JA105.) In that letter, Simon represented that “DirectSat ha[d] provided [the Union] 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.” (JA262; JA106.)

II. PROCEDURAL HISTORY

On May 20, 2016, the Union filed an unfair-labor-practice charge against DirectSat, which was later twice amended. (JA64, 66, 68.) On September 23, the Board’s General Counsel issued a complaint alleging that DirectSat’s refusal to provide the Union with a full copy of the HSP violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). (JA260 n.1; JA70-72.) On April 14, 2017, Administrative Law Judge Charles J. Muhl granted the parties’ motion to decide the case on a stipulated record without a hearing. (JA260.)

On July 20, 2017, the judge issued a decision finding that DirectSat violated the Act as alleged. (JA260-66.) The judge noted that the only issue before him was whether the information requested by the Union was relevant to the fulfillment of its duties as collective-bargaining representative, and that the General Counsel had put forth two theories of relevance. (JA262-63.) The judge rejected the first theory, that the Union needed a full copy of the HSP to determine if DirectSat and

DirecTV were joint employers for purposes of collective bargaining.⁴ (JA263.)

The judge also rejected the General Counsel's second argument, that a full copy of the HSP was necessary to verify the accuracy of DirectSat's claims regarding the nature of its relationship with DirecTV.⁵ (JA263-64.) However, the judge found that the Union was entitled see the full HSP to verify DirectSat's claim that it had produced all information relative to scope-of-work issues. The judge recognized that the General Counsel had not advanced that legal theory, but found that the issue was presented by the stipulated record and that making a finding on that basis would not violate DirectSat's due-process rights. (JA264-65 & n.22.)

Accordingly, the judge recommended that the Board order DirectSat to provide a full, unredacted copy of the HSP to the Union. (JA265-66.)

⁴ Under Board law, information about joint-employer relationships is not presumptively relevant to bargaining; therefore, a union seeking to obtain such information must show that it has an objective, factual basis for believing that a joint-employer relationship exists. The judge found that the facts of this case did not support believing that DirectSat and DirecTV were joint employers. (JA263.)

⁵ Board law allows unions to obtain information necessary to verify specific factual assertions made by employers during bargaining. However, the judge found that DirectSat had not made any claim regarding its relationship with DirecTV, and thus there was no specific factual assertion for the Union to verify. (JA263-64.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On March 20, 2018, the Board (Members Pearce, McFerran, and Emanuel) issued a Decision and Order affirming the judge's decision, but on different grounds. (JA258-60.) The Board first found that the judge did not violate DirectSat's due-process rights by deciding the case on a legal theory that had not been advanced by the General Counsel. (JA258-59.) Then, turning to the merits, the Board found that by proposing to have the HSP define the scope of bargaining-unit work, DirectSat had rendered the entire document relevant to the negotiation, thus giving rise to a duty to provide the full, unredacted document to the Union. (JA259.)

The Board's Order requires DirectSat to cease and desist from the unfair labor practices found and from in any like or related manner interfering with, restraining, or coercing employees in their exercise of the rights guaranteed them by Section 7 of the Act, 29 U.S.C. § 157. Affirmatively, the Order requires DirectSat to provide the Union with a full, unredacted copy of the HSP, post paper copies of a remedial notice, and distribute that notice electronically to employees, if DirectSat customarily communicates with them by such means. (JA259.)

IV. THE BOARD DENIES DIRECTV'S POST-DECISION MOTION TO INTERVENE

On April 4, 2018, DirecTV filed a motion to intervene, to reopen the record, and for reconsideration of the Board's decision, arguing that it had not previously had a chance to defend its interest in maintaining the confidentiality of the HSP.⁶ (JA297; JA267-79.) On July 25, the Board (Chairman Ring, Members Pearce and McFerran)⁷ issued an order denying DirecTV's motion on two separate grounds: first, the motion was untimely filed, and second, even if the motion had been timely, DirecTV failed to establish that it was a necessary party to the case. As to the second point, the Board assumed without deciding that DirecTV had a confidentiality interest in the HSP and found that DirectSat not only shared that interest, but was fully capable of defending it before the Board.⁸ (JA298.) Accordingly, the Board denied the motion to intervene and dismissed as moot DirecTV's requests to reopen the record and reconsider the Board's decision. (JA299.)

⁶ The facts relative to DirecTV's motion to intervene are set forth in full in part II of the argument, below.

⁷ Member Emanuel was recused and took no part in the consideration of DirecTV's motion to intervene. (JA297 n.1.)

⁸ Member Pearce would have denied the motion solely based on DirecTV's unjustified delay in filing it.

SUMMARY OF ARGUMENT

1. Substantial evidence supports the Board's finding that DirectSat violated the Act by failing and refusing to provide the full, unredacted HSP to the Union. Under established Board law, an employer must provide information that is relevant and necessary to a union's fulfillment of its collective-bargaining duties. Here, DirectSat's bargaining proposal defined the scope of bargaining-unit work by the terms of the HSP, which the Union had never seen. Significantly, the proposal referred to the HSP as a whole, not to any section or provision thereof. Thus, to understand how DirectSat defined the unit's work, the Union needed to see the full HSP as referenced by the proposal. That is substantial evidence to support the Board's finding that, by its proposal, DirectSat rendered the full, unredacted HSP relevant to bargaining. DirectSat's refusal to provide the full HSP violated its statutory duty to bargain in good faith. Contrary to DirectSat's claim, the Board did not pass on the judge's finding that the Union had a right to obtain the HSP in order to verify that DirectSat had provided all portions relevant to scope of work.

In claiming that the Union failed to establish the relevance of the full HSP, DirectSat mischaracterizes the Union's burden, which is simply to show a reasonable belief, or a probability, that the full HSP is relevant to fulfilling its collective-bargaining responsibilities. DirectSat's proposal, which effectively

shoehorns the entire HSP into the parties' collective-bargaining agreement, itself establishes relevance. And because the Board did not pass on the judge's finding that the Union had a right to verify DirectSat's claim that it had furnished all relevant portions of the HSP, DirectSat's attacks on that theory, including its due-process claims, are misplaced. In sum, the Board reasonably found that the Union was entitled to see the full contents of the third-party contract that DirectSat proposed to inject into their collective-bargaining agreement.

2. The Board properly exercised its discretion by denying DirecTV's motion to intervene and dismissing as moot its requests to reopen the record and reconsider the Board's decision. The Board found that DirecTV's motion to intervene was untimely and that, in any event, DirectSat was fully capable of representing DirecTV's interests in this case. As to the first finding, DirecTV admitted it knew of the Union's charge 4 to 6 months before the stipulated record was submitted to the judge, yet it did not seek to intervene until 8 months after the judge's ruling, and 2 weeks after the Board's Order. A non-party to a case cannot simply sit on the sidelines and intervene after the fact if it deems the result unsatisfactory.

DirecTV's insistence that it had no idea its confidentiality interest was at stake is simply not credible. Equally absurd is DirecTV's portrayal of itself as naïve and uninformed about the Board's processes. The record demonstrates that DirecTV is a sophisticated actor so well versed in court and agency-mandated

disclosures that its HSP included a detailed contingency plan for safeguarding its confidentiality interests when dealing with information requests.

The Board also acted within its discretion in finding, as an alternative, that DirectSat was not a necessary party to the administrative proceeding. DirecTV does not dispute that the HSP creates a community of interest between it and DirectSat in preserving the HSP's confidentiality. And DirecTV does not dispute either that the HSP charged DirectSat with representing DirecTV's interests before the Board, or that DirectSat was fully capable of adequately doing so.

DirecTV argues, with the benefit of hindsight, that DirectSat did not adequately represent its interests, and therefore DirecTV should be permitted to turn back time and defend them itself. There is no support for this notion, which would essentially allow interested non-parties to wait until after the last minute, when the results are in, before deciding whether to intervene and relitigate the merits of a case. There is no more support for DirecTV's claim that it was more motivated than DirectSat to protect the HSP's confidentiality; to the contrary, the record shows that DirectSat fought against fully disclosing the HSP at every step of this case. Finally, DirecTV does not dispute that, if the Board had found for DirectSat, DirecTV would not currently be seeking to intervene.

ARGUMENT

I. DIRECTSAT VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY FAILING TO PROVIDE THE FULL, UNREDACTED HSP TO THE UNION

A. General Standard of Review

This Court's "role in reviewing an NLRB decision is limited." *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011). The Court will uphold the Board's judgment unless it finds, upon reviewing the record as a whole, that "the Board's findings are not supported by substantial evidence, or that the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case." *Oberthur Techs. of Am. Corp. v. NLRB*, 865 F.3d 719, 723-24 (D.C. Cir. 2017) (internal quotation marks and citation omitted); *see also* 29 U.S.C. § 160(e) (Board's findings of fact are "conclusive" if "supported by substantial evidence on the record considered as a whole"). Evidence is substantial when "a reasonable mind might accept [it] as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). Under that standard, "the Board is to be reversed only when the record is so compelling that no reasonable fact finder could fail to find to the contrary." *Bally's Park Place, Inc. v. NLRB*, 646 F.3d 929, 935 (D.C. Cir. 2011); *see also Universal Camera*, 340 U.S. at 488 (reviewing court may not "displace the Board's choice between two fairly conflicting views, even

though the court [may] justifiably have made a different choice had the matter been before it *de novo*”).

B. DirectSat Violated the Act by Failing to Provide Relevant and Necessary Information Requested by the Union

Section 8(a)(5) of the Act makes it unlawful “for an employer . . . to refuse to bargain collectively with the representatives of his employees.” 29 U.S.C. § 158(a)(5). For its part, Section 8(d) of the Act requires employers to bargain “in good faith with respect to wages, hours, and other terms and conditions of employment” with unions representing their employees. 29 U.S.C. § 158(d). Together, these provisions outline an employer’s duty to bargain, which entails an obligation to provide, on request, “relevant information needed by a labor union for the proper performance of its duties as the employees’ bargaining representative.” *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *KLB Indus., Inc. v. NLRB*, 700 F.3d 551, 556 (D.C. Cir. 2012). An employer can oppose a union’s request by asserting a legitimate countervailing interest, but it retains an obligation to promptly offer an accommodation that will meet the needs of both parties. *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 20-21 (D.C. Cir. 1998). Failure to do so is tantamount to bad-faith bargaining and violates Section 8(a)(5) and (1) of the Act.⁹ *Id.* at 21.

⁹ Section 8(a)(1) makes it unlawful for an employer to “interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7 [of the Act],”

1. The HSP is relevant and necessary to the Union's fulfillment of its representational duties

DirectSat does not dispute that the Union requested the complete, unredacted HSP and that it refused to provide it. Instead, it challenges the Board's finding that the entire HSP was relevant to bargaining. (DS Br. 22-31.) Therefore, if substantial evidence supports the Board's finding that the full HSP was relevant to the Union's fulfillment of its collective-bargaining responsibilities, it follows that DirectSat violated the Act by refusing to provide the complete, unredacted document to the Union.

The determination of relevance "is, in the first instance, a matter for the NLRB, and the Board's conclusions are given great weight by the courts." *Oil, Chem. & Atomic Workers Local Union No. 6-418 v. NLRB*, 711 F.2d 348, 360 (D.C. Cir. 1983) (footnote omitted). The Board has held that information pertaining to bargaining-unit employees is presumptively relevant and must be provided on request, without further explanation. *Disneyland Park*, 350 NLRB 1256, 1257 (2007); *accord Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1191 (D.C. Cir. 2000). Non-unit information, on the other hand, requires a

29 U.S.C. § 158(a)(1), which includes "the right . . . to bargain collectively through representatives of their own choosing," *id.* § 157. A violation of Section 8(a)(5) produces a derivative violation of Section 8(a)(1). *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983); *accord Pac. Coast Supply, LLC v. NLRB*, 801 F.3d 321, 325 n.2 (D.C. Cir. 2015).

showing of relevance, or alternately that relevance should have been apparent to the employer under the circumstances. *Disneyland Park*, 350 NLRB at 1258; *accord N.Y. & Presbyterian Hosp. v. NLRB*, 649 F.3d 723, 730 (D.C. Cir. 2011). The Board has specifically held that information about subcontracting agreements is not presumptively relevant, even when it relates to a bargaining unit's terms and conditions of employment. *Disneyland Park*, 350 NLRB at 1258. Therefore, the Union was required to establish the HSP's relevance in order to obtain a copy.

The Board and this Court apply “a broad, discovery-type standard” to determine relevance. *Id.*; *accord KLB Indus.*, 700 F.3d at 556. Under that standard, a union satisfies its burden if it demonstrates either “a reasonable belief, supported by objective evidence, that the requested information is relevant,” *Disneyland Park*, 350 NLRB at 1257-58 (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 N. Am., Inc.*, 355 NLRB 753, 754 (2010) (quoting *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 437 (1967)). Either way, “the threshold for relevance is low.” *N.Y. & Presbyterian Hosp.*, 649 F.3d at 730 (internal quotation marks and citation omitted); *see also Kraft Foods*, 355 NLRB at 754 (union's burden is “not an exceptionally heavy one”) (citation omitted)).

Substantial evidence supports the Board’s finding that DirectSat’s New Product Lines proposal rendered the full HSP relevant to bargaining. The proposal provided that any work performed by DirectSat “with respect to products or services other than those provided pursuant to its [HSP] agreement with DirecTV” would be deemed non-bargaining-unit work. (JA261; JA57 ¶ 20, JA83 (emphasis omitted).) As the Board found, that language effectively amounts to having the HSP define the scope of bargaining-unit work, a topic that is undisputedly relevant to the Union’s representational duties.¹⁰ (JA259.) Thus, the New Product Lines proposal rendered the full HSP relevant and necessary to the Union for purposes of evaluating that proposal and making informed bargaining decisions. After all, the Board explained, “[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.” (JA259.)¹¹ Thus, the Board reasonably concluded that by

¹⁰ See *Caldwell Mfg. Co.*, 346 NLRB 1159, 1159 (2006) (information pertaining to bargaining-unit employees’ terms and conditions of employment is presumptively relevant). Before the judge, and in communications with the Union, DirectSat recognized the relevance of scope-of-work information. (JA262 & n.21; JA106.)

¹¹ The Board’s reference to context is consistent with the generally accepted rules of contractual interpretation, which provide that a contract “is interpreted as a whole.” *United States v. Hunt*, 843 F.3d 1022, 1028 (D.C. Cir. 2016) (quoting Restatement (Second) of Contracts § 202(2) (1981) (“A writing is interpreted as a

proposing to inject the HSP into the parties' collective-bargaining agreement, DirectSat rendered the entire HSP relevant and necessary to the Union's fulfillment of its collective-bargaining responsibilities. (JA259.)

Thus, contrary to DirectSat's claims (DS Br. 27), the Union showed that the full, unredacted HSP was relevant to bargaining. Indeed, the record demonstrates unambiguously that the Union informed DirectSat on three separate occasions that it needed a copy of the full HSP because it was mentioned in DirectSat's New Product Lines proposal. The first request was made on November 23, 2015, and DirectSat responded by providing copies of three redacted pages. (JA261; JA57-58 ¶¶ 21-22, JA84-91.) The Union then renewed its request on March 18 and April 5, 2016, each time citing "the reference in the New Product Lines proposal." (JA59 ¶¶ 25, 27, JA94, 96.) By highlighting the fact that the New Product Lines proposal explicitly referenced the HSP, the Union established the relevance of the entire document, and communicated that relevance to DirectSat.

DirectSat incorrectly asserts that the Union failed to offer objective evidence that the *entire* HSP was relevant and necessary to bargaining. (DS Br. 26-27.) To do so, DirectSat argues, the Union should have shown "what specific information

whole, and all writings that are part of the same transaction are interpreted together."); *see also* 11 Richard A. Lord, *Williston on Contracts* § 32:5 (rev. 4th ed. Nov. 2018) ("A contract will be read as a whole and every part will be read with reference to the whole." (footnote omitted)).

in the HSP” might be relevant, aside from the information it already received. (DS Br. 27.) Of course, DirectSat does not explain how the Union could prove the relevance of specific HSP provisions without having seen them in the first place—and that is the point. In addition, DirectSat overstates the Union’s burden and deliberately overlooks the facts of this case.

First, DirectSat mischaracterizes the Union’s burden. As explained above, and as recognized by this Court, the standard for relevance is “a liberal one, much akin to that applied in discovery proceedings” under the federal rules, where “relevancy is synonymous with germane . . . and a party must disclose information if it has any bearing on the subject matter of the case.” *Local 13, Detroit Newspaper Printing & Graphic Commc’ns Union v. NLRB*, 598 F.2d 267, 271-72 (D.C. Cir. 1979) (internal quotation marks, footnotes and citations omitted).

Therefore, and contrary to DirectSat’s claims, the Union was not required to prove that the rest of the HSP contained “information directly related” to the unit’s terms and conditions of employment (DS Br. 29), much less “identify a . . . substantive provision” relevant to the negotiations (DS Br. 27). Rather, the Union needed only show “a reasonable belief,” *Disneyland Park*, 350 NLRB at 1257-58, or “a probability,” *Kraft Foods*, 355 NLRB at 754, that the rest of the HSP was relevant to the fulfillment of its responsibilities as collective-bargaining representative. The

Union's repeated invocations of DirectSat's reference to the HSP in its New Product Lines proposal amply sufficed to carry its low burden.

Second, and more significantly, DirectSat ignores the language of its own proposal, which plainly stated that the scope of bargaining-unit work will be determined by "[DirectSat's] Home Service Provider agreement with DirecTV." (JA57 ¶ 20, JA83.) As the Board explained (JA258-59), the proposal unambiguously refers to the HSP *as a whole*, not to any particular provision contained therein. And DirectSat never modified its New Product Lines proposal to limit it to certain specified provisions of the HSP, even after the Union requested the full HSP. The simple fact that DirectSat was proposing to incorporate the full HSP into their collective-bargaining agreement was all the objective evidence the Union needed to show a probability that the entire document was relevant to the negotiation.¹²

DirectSat also exaggerates the significance of the Union's counterproposal on March 22, 2016. (DS Br. 30.) The fact that the counterproposal included DirectSat's reference to the HSP does not prove the Union had all the information needed to evaluate the potential consequences of injecting the entire HSP into the parties' collective-bargaining agreement. At most, it shows that the Union kept

¹² DirectSat does not dispute that it waived any confidentiality defense by failing to raise it before the judge or the Board. (*See* DS Br. 35 ("DirectSat never asserted a confidentiality defense."))

negotiations moving while it waited for DirectSat to provide the complete document. And in fact, on April 5, the Union repeated its request for the full HSP “because of the reference [i]n the New Product Lines proposal.” (JA96.)¹³

In sum, the Board reasonably found that a union negotiating a collective-bargaining agreement is entitled to fully know and understand its contents, including any third-party contracts that portend to define its terms. In this case, by proposing to shoehorn the HSP into their agreement, DirectSat rendered that entire document relevant to the Union’s fulfillment of its collective-bargaining responsibilities, and obligated itself to furnish a full, unredacted copy to the Union.

2. DirectSat was required to furnish the HSP in unredacted form to the Union

DirectSat argues that it should be able to redact information it considers irrelevant from its submissions to the Union, relying on the Board’s decision in *DIRECTV U.S. DIRECTV Holdings LLC*, 361 NLRB No. 124, 2014 WL 6853886 (Dec. 4, 2014). DirectSat appears to be claiming that the Board’s decision is flawed because it has elsewhere recognized that employers may redact irrelevant information from otherwise relevant documents.¹⁴ (DS Br. 28-29.) The exact

¹³ Thus, to the extent DirectSat would suggest that the Union changed its rationale for requesting the full HSP after submitting its counterproposal (DS Br. 30), that is untrue.

¹⁴ *DIRECTV U.S. DIRECTV Holdings LLC* has no relationship to this case.

thrust of DirectSat's argument is unclear, but it fails regardless of how it is construed.

If DirectSat is suggesting that the employer's redactions in *DIRECTV* are analogous to DirectSat's own refusal to provide more than a few pages of the HSP, it ignores that the key word once again is *relevance*. In *DIRECTV*, the Board found that the employer could redact information relative to non-unit employees because its relevance had not been shown. 2014 WL 6853886, at *2 n.3. Here, by contrast, the relevance of the full, unredacted HSP was established by the fact that the New Product Lines proposal references it as a whole, and therefore DirectSat's disclosure obligation extends to the entire document, without redaction. Stated differently, under the terms of the New Product Lines proposal, any redacted portions would still be part of the resulting collective-bargaining agreement, and thus relevant to the Union's fulfillment of its representational responsibilities.

Alternately, if DirectSat is arguing that it should be allowed to redact certain portions of the HSP even if it must provide the entire document, the Court lacks jurisdiction to hear that claim because it was not raised to the Board.¹⁵ *See*

¹⁵ DirectSat excepted in general to providing the Union with a full and unredacted copy of the HSP. (JA223 ¶ 12.) However, in its supporting briefs (JA249-56, 300-16), DirectSat only challenged the portion of the Order requiring it to furnish the full HSP. *See Nova Se. Univ. v. NLRB*, 807 F.3d 308, 313 (D.C. Cir. 2015) (generalized objection did not put Board on notice of specific grounds); *Spectrum Health-Kent Cmty. Campus v. NLRB*, 647 F.3d 341, 349 (D.C. Cir. 2011)

29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (court is jurisdictionally barred from hearing objections not raised to Board during initial proceeding or on motion for reconsideration). In any event, the New Product Lines proposal clearly identifies the HSP as a single document, without any reference to its contents, and therefore the Board was well within its broad remedial discretion to order the HSP’s disclosure without redaction. *See Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964) (Board’s remedial power is “a broad discretionary one, subject to limited judicial review.” (citation omitted)); *accord Fallbrook Hosp. Corp. v. NLRB*, 785 F.3d 729, 738 (D.C. Cir. 2015) (“The [Board’s] choice of remedies is entitled to a high degree of deference by a reviewing court.” (internal quotation marks and citation omitted)).

C. The Board Did Not Violate DirectSat’s Due-Process Rights

DirectSat’s due-process claim is based on the assumption that the Board adopted the judge’s finding that it was required to turn over the full HSP to allow the Union to verify DirectSat’s claim that it had furnished all relevant portions of

(exceptions to remedial orders must be formulated with sufficient specificity to be preserved).

the HSP. (DS Br. 31 n.9, 39-42.) That is incorrect. As discussed above, the Board found that DirectSat’s proposal to have the HSP define the scope of bargaining-unit work rendered the entire HSP relevant to the negotiation, and thus gave rise to a duty to provide the full, unredacted document to the Union. (JA259.) In so doing, the Board affirmed the judge’s finding that, by including a reference to the HSP in its New Product Lines proposal, DirectSat “put into play what services it furnished to DirecTV pursuant to the agreement.” (JA264.) The Board also agreed with the judge that, in evaluating DirectSat’s proposal, the Union was “entitled to know the universe of bargaining unit work as defined in the [HSP].” (JA264.) However, the Board did not pass on the judge’s finding that the Union had a right to verify DirectSat’s claim that it had provided all portions of the HSP relevant to scope of work. (See JA297 (noting that the Board’s Order “affirm[ed] the judge’s decision, although on different grounds”).)¹⁶ Therefore, that aspect of the judge’s ruling is not before the Court.¹⁷

¹⁶ Unlike DirectSat, DirecTV understood that the Board’s analysis differed from that of the judge. (DTV Br. 6.)

¹⁷ For this reason, DirectSat’s reliance (DS Br. 24-26) on *Southern Ohio Coal Co.*, 315 NLRB 836 (1994), *enforcement denied*, 87 F.3d 1309 (4th Cir. 1996) (unpublished table decision), is misplaced. Moreover, though *Southern Ohio Coal* involved a contract between an employer and a third party, the similarities end there. That agreement—a contract to sell a mining property—was not integrated into, or otherwise referenced by, the union’s collective-bargaining agreement with the employer. In addition, the union conceded that apart from one specific provision, most of the contract was irrelevant to its concerns. 87 F.3d 1309, at *3.

Furthermore, DirectSat does not claim that its due-process rights were violated by the Board's finding of a violation under a legal theory not raised by either the General Counsel or the judge, *i.e.*, that the New Product Lines proposal rendered the entire HSP relevant by integrating it into the parties' collective-bargaining agreement. To the extent that DirectSat would do so in its reply brief, that argument is now waived. *See N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (issues not raised in opening brief are waived). Moreover, the Court would lack jurisdiction to hear that argument because DirectSat did not challenge the Board's ruling in a motion for reconsideration.¹⁸

In any event, the Board did not violate DirectSat's due-process rights. As the Board explained (JA258), and as recognized by this Court, the Board can find a violation for a different reason and under a different legal theory than articulated by the judge. *See Local 58, Int'l Bhd. of Elec. Workers (IBEW), AFL-CIO*, 365 NLRB No. 30, 2017 WL 680502, at *5 n.17 (Feb. 10, 2017) (citing cases); *accord, e.g., Davis Supermks., Inc. v. NLRB*, 2 F.3d 1162, 1169 (D.C. Cir. 1993).

Ultimately, there is no prejudice to DirectSat inasmuch as the Union had asserted

¹⁸ As discussed at pp. 23-24, above, Section 10(e) precludes appellate courts from considering arguments that were not raised before the Board in the first instance. That bar also applies when the Board modifies a judge's recommended order or decides a particular issue in the first instance. *See Woelke & Romero*, 456 U.S. at 665-66 (failure to seek reconsideration of an issue the Board raised *sua sponte* prevents its consideration by courts); *accord Lee Lumber & Bldg. Material Corp. v. NLRB*, 310 F.3d 209, 216-17 (D.C. Cir. 2015).

from the start that it was requesting the full HSP because it was referenced in DirectSat's own proposal; that basis for the request remained in the case and the supporting evidence was presented at trial. The Board's finding in that regard cannot have been a surprise. *Davis Supermks.*, 2 F.3d at 1169 ("When an employer is not prejudiced by the Board's reliance on a theory not specifically addressed in the complaint or at the hearing, the employer's due process rights are not violated").

II. THE BOARD ACTED WITHIN ITS DISCRETION IN DENYING DIRECTV'S MOTION TO INTERVENE AND DISMISSING ITS OTHER MOTIONS AS MOOT

A. Relevant Findings of Fact and Procedural History

Two weeks after the Board issued its Order requiring DirectSat to furnish the full, unredacted HSP to the Union, DirecTV filed a motion to intervene, reopen the record, and for the Board to reconsider its decision, arguing that it should be given the opportunity to defend its interest in maintaining the HSP's confidentiality. (JA297.) The Board denied DirecTV's motion to intervene and denied the remaining requests as moot. (JA299.)

Attached to DirecTV's motion and reply in support were two declarations by John Sellers, DirecTV's assistant vice president. Sellers represented that the following notice appears on each page of the HSP:

Proprietary and Confidential

This Agreement and Information contained therein is not for use or disclosure outside of AT&T,^[19] its Affiliates, and third party representatives, and Contractor [*i.e.*, DirectSat] except under written agreement by the contracting parties.

(JA297; JA278 ¶ 4.) This Proprietary and Confidential notice did not appear on any of the redacted pages that DirectSat provided to the Union. (JA297 n.3; JA89-91, 99-102.)

According to Sellers, the HSP also contains the following provision, section 3.14(d):

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.

(JA297-98; JA278 ¶ 5.) Finally, Sellers stated that Section 3.36 of the HSP makes it a non-curable breach of contract for DirectSat to fail to meet its obligations regarding the use or disclosure of confidential information. (JA298; JA278 ¶ 6.)

¹⁹ AT&T is DirecTV’s parent company. (JA297 n.3.)

According to Sellers, in “November/December 2016,” DirectSat and DirecTV had discussions about producing a redacted copy of the HSP to the Union, which DirecTV believed arose in the context of DirectSat’s negotiations to resolve a Board charge. DirecTV did not hear anything further and assumed the matter had been resolved. (JA298; JA295-96 ¶ 7.)

B. Standard of Review

Section 10(b) of the Act and the corresponding regulation provide that intervention in an unfair-labor-practice case is “[i]n the discretion of the [judge] conducting the hearing or the Board,” 29 U.S.C. § 160(b), and may be allowed “to such extent and upon such terms as [they] may deem proper,” 29 C.F.R. § 102.29. The Board’s denial of a motion to intervene is reviewed for abuse of discretion. *See Veritas Health Servs., Inc. v. NLRB*, 895 F.3d 69, 87 (D.C. Cir. 2018) (citing cases); *Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW-AFL-CIO v. NLRB*, 392 F.2d 801, 809-10 (D.C. Cir. 1967) (“intervention is a matter of discretion for the [judge] or the Board”).

The Board denied DirecTV’s motion to intervene on two separate grounds: first, the Board found that the motion was untimely filed; alternately, the Board found that DirecTV was not a necessary party to the proceeding because its interests were aligned with, and could be adequately represented by, DirectSat.

Both rationales are within the Board's discretion and consistent with existing precedent.

C. The Board Acted Within its Discretion in Finding DirecTV's Motion to Intervene Untimely

The Board found that DirecTV's motion was untimely because DirecTV filed it "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." (JA298.) The record amply bears out that finding. According to DirecTV Assistant Vice President Sellers, DirecTV and DirectSat discussed producing a redacted copy of the HSP in November/December 2016, when the Board proceeding was already well under way.²⁰ Significantly, Sellers admitted that DirecTV knew at the time that those discussions stemmed from DirectSat's efforts to resolve a pending Board charge. (JA295-96 ¶ 7.) Despite this, DirecTV did not seek to intervene until April 2018, over 8 months after the judge ruled that DirectSat should produce the full, unredacted HSP, and 2 weeks after the Board adopted the judge's recommended order. On this record, the Board was well within its discretion to find that DirecTV's motion was untimely.

²⁰ The Union filed its unfair-labor-practice charge in May 2016 (JA64), and the complaint against DirectSat issued on September 23, 2016 (JA72); however, it would still be months before the case was submitted to the judge, in April 2017 (JA260).

DirecTV's attempt to impugn the evidence supporting the Board's untimeliness finding (DTV Br. 18-20) is an exercise in futility. The HSP contains what DirecTV describes as "a procedure for handling court or government agency directives to disclose confidential information provided pursuant to the agreement." (JA278 ¶ 5.) That procedure requires DirectSat to promptly notify DirecTV of any information request and to cooperate with DirecTV in seeking protective arrangements to produce the information. (JA297-98; JA278 ¶ 5.) By itself, the mere existence of this contingency plan would support finding that DirecTV reasonably should have known its confidentiality interest was at stake. But in addition, DirecTV admits, it actually knew of the Union's charge as early as November 2016, and discussed how to resolve it with DirectSat. (JA295-96 ¶ 7.) In those circumstances, DirecTV's professions of ignorance are simply not credible.

By the same token, it is preposterous for DirecTV to claim it was unaware that an unfair-labor-practice charge, the first step in Board proceedings, could result in disclosure of the HSP. (DTV Br. 19-20.) DirecTV is clearly a sophisticated actor—certainly experienced enough to include a contingency plan for handling legally mandated information disclosures in its subcontracting agreement. And yet, DirecTV would have this Court believe it had no inkling that the filing of a charge, which specifically alleged that DirectSat unlawfully failed to

furnish the full HSP, could culminate in a Board order to produce that entire document.²¹ Similarly, it defies credulity for DirecTV to imply that because most Board charges are withdrawn, dismissed, or settled, it had no reason to believe its confidentiality interest might be at risk.²² (DTV Br. 19 & n.8.) Despite what DirecTV might claim, it was no “logical leap” (DTV Br. 19) for the Board to conclude that, once informed that the Union had initiated a proceeding to obtain the full HSP, a sophisticated actor like DirecTV would have known that its confidentiality interests were at stake.²³

Equally unavailing is DirecTV’s claim that the Board’s decision creates an “impossible burden” to monitor its subcontractors. (DTV Br. 20.) The HSP evidences not only that DirecTV was quite familiar with the risks involved in

²¹ The Union’s charge was filed in May 2016 and amended in June and September. Every version alleged that DirectSat “refused to provide the Union a full copy of the contract between DirectSat and DirecTV.” (JA64, 66, 68.) The complaint against DirectSat issued on September 23, 2016 and detailed the same allegation. (JA71 ¶¶ VI-VII.) All these filings occurred before DirecTV’s discussions with DirectSat in November/December 2016.

²² In fact, the page of the Board’s website cited by DirecTV (DTV Br. 19 n.8) explicitly states that failure to settle a charge with probable merit results in the issuance of a complaint. NLRB, *Charges & Complaints*, <https://www.nlr.gov/news-outreach/graphs-data/charges-and-complaints/charges-and-complaints> (last visited Feb. 1, 2019).

²³ Indeed, given everything DirecTV knew about the Union’s charge and DirectSat’s efforts to resolve it, it was even more rational for the Board to conclude that DirecTV reasonably *should* have known this proceeding could result in the HSP’s full disclosure. (JA298.)

sharing information with subcontractors, but also that it had devised a system to mitigate its oversight “burden” by placing the onus on them to report any information requests and setting a prohibitively high price for non-compliance. Moreover, by Sellers’s own admission, the system worked: DirecTV received notice of the Union’s request and the related charge with plenty of time to intervene and defend its interests in the Board proceeding. Whatever happened thereafter—whether DirecTV failed to exercise due diligence in following up with DirectSat or DirectSat failed to keep DirecTV apprised of developments in the case—does not excuse DirecTV’s failure to timely intervene.

DirecTV’s apparent suggestion that Federal Rule of Civil Procedure 24 requires weighing the nature of an intervenor’s interest as part of the timeliness analysis (DTV Br. 16-17) is incorrect. As an initial matter, and as DirecTV rightly concedes (DTV Br. 14), Rule 24 is not directly applicable to Board proceedings.²⁴ But even if it was, DirecTV’s argument puts the cart before the horse. Under Rule 24, a court must ascertain that a motion to intervene is timely before considering its merit. *See Amador Cty. v. U.S. Dep’t of the Interior*, 772 F.3d 901, 903 (D.C. Cir. 2014) (“If the motion is untimely, the explicit language of the rule

²⁴ *Cf. Lone Mountain Processing, Inc. v. Sec’y of Labor*, 709 F.3d 1161, 1162-63 (D.C. Cir. 2013) (noting that Congress did not make federal civil-procedure rules apply to the Federal Mine Safety and Health Review Commission, even though it applied those rules to adjudications conducted by the Occupational Safety and Health Review Commission).

dictates that ‘intervention must be denied.’” (quoting *NAACP v. New York*, 413 U.S. 345, 365 (1973)); *United States v. British Am. Tobacco Austl. Servs., Ltd.*, 437 F.3d 1235, 1239 (D.C. Cir. 2006) (“Courts reach the other elements of Rule 24(a) only after the threshold question of timeliness.” (citation omitted)). It should come as no surprise, therefore, that under Rule 24 “[a] motion for ‘intervention after judgment will usually be denied where a clear opportunity for pre-judgment intervention was not taken.’” *Associated Builders & Contractors, Inc. v. Herman*, 166 F.3d 1248, 1257 (D.C. Cir. 1999) (quoting *Dimond v. District of Columbia*, 792 F.2d 179, 193 (D.C. Cir. 1986)).

Predictably, most of the cases on which DirecTV relies do not consider the nature of the would-be intervenor’s interest as part of the timeliness analysis. That is true even of *United States v. American Telephone & Telegraph Co.*, 642 F.2d 1285 (D.C. Cir. 1980), despite DirecTV’s suggestion to the contrary (DTV Br. 16-17). In that case, the Court granted intervention for the sole purpose of appealing the district court’s judgment in favor of AT&T. The Court explained that this was the only way to preserve the intervenor’s rights because the government had decided not to appeal. *Id.* at 1295. Significantly, the Court noted that if the intervenor’s purpose had been to present additional evidence or argument in the proceeding below—the very purpose DirecTV pursues here—“such intervention would be untimely.” *Id.* at 1294. Indeed, in *Associated*

Builders, this Court denied intervention where the purpose was simply to advance an argument on appeal that had not been made below, and there was no reason intervention could not have been sought prior to judgment. 166 F.3d at 1257. Therefore, even if Rule 24 applied to Board proceedings, which it does not, the nature of DirecTV's interest would not factor into the timeliness analysis.

DirecTV's claim that the Board's timeliness holding is contrary to precedent (DTV Br. 21-25) is equally unfounded. DirecTV appears to believe that because the Board has occasionally granted motions to intervene that were filed after the administrative hearing, the Board's finding of untimeliness in this case is improper. But the Board has also denied post-hearing motions purely on untimeliness grounds. *See, e.g., U.S. Postal Serv.*, No. 05-CA-122166, 2015 WL 3932157, at *1 (NLRB June 25, 2015) (denying motion filed 3 months after issuance of Board decision as untimely); *Oak Harbor Freight Lines, Inc.*, 361 NLRB 884, 884 n.1 (2014) (finding motion untimely where would-be intervenor offered no explanation for failing to intervene at hearing or while case was pending on exceptions, and did not show any changed circumstance warranting late intervention), *enforced*, 855 F.3d 436 (D.C. Cir. 2017). Moreover, in those rare instances where the Board granted post-hearing intervention, the would-be intervenors possessed interests that were different from, and could not be adequately protected by, the existing parties.

See *The Boeing Co.*, 366 NLRB No. 128, 2018 WL 3456226, at *2 n.3 (July 17, 2018), and cases cited therein (also listed at DTV Br. 22 n.10).

The Board’s practice, as reflected in *Boeing* and the cases cited therein, accords with the prevailing view among federal courts that “post-judgment intervention . . . is generally disfavored because it usually creates delay and prejudice to existing parties . . . and undermines the orderly administration of justice.” *Floyd v. City of New York*, 770 F.3d 1051, 1059-60 (2d Cir. 2014) (second ellipsis in original) (internal quotation marks and footnote omitted).²⁵

Thus, exceptions to the timeliness requirement are rare in the federal courts, as they are before the Board.²⁶

Of all the cases cited by DirecTV, only *Acree v. Republic of Iraq*—where this Court reversed the denial of a post-judgment motion deemed untimely by the

²⁵ *Accord, e.g., Bond v. Utreras*, 585 F.3d 1061, 1071 (7th Cir. 2009); *United States ex rel. McGough v. Covington Techs. Co.*, 967 F.2d 1391, 1394 (9th Cir. 1992); *United States v. Jefferson Cty.*, 720 F.2d 1511, 1519 (11th Cir. 1983); *United States v. U.S. Steel Corp.*, 548 F.2d 1232, 1235 (5th Cir. 1977).

²⁶ Federal courts will allow intervention for appeals purposes only, *e.g., Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001), or if the would-be intervenor’s interests are not adequately represented by the existing parties to the case. As shown in section B.2 below, neither is true here. Indeed, DirecTV itself acknowledges that cases where federal courts allow post-judgment intervention typically involve a third-party seeking to defend a right that “cannot otherwise be protected.” (DTV Br. 22.) And, unsurprisingly, each one of the cases cited by DirecTV (DTV Br. 22 n.11) includes a finding that the would-be intervenor’s interest was not adequately represented by the existing parties.

district court, vacated the underlying judgment, and dismissed the case—is remotely on-point. 370 F.3d 41 (D.C. Cir. 2004), *abrogated on other grounds*, *Republic of Iraq v. Beatty*, 556 U.S. 848 (2009). However, the would-be intervenor in *Acree* was the United States Government, whose purpose was to “raise a highly tenable challenge to the District Court’s subject matter jurisdiction in a case with undeniable impact on the Government’s conduct of foreign policy and to preserve that issue for appellate review.” *Id.* at 50; *see also id.* at 49 (“[I]n any appeal, the first and fundamental question is that of jurisdiction, first, of the appellate court, and then of the court from which the record comes.” (internal quotation marks, brackets and citation omitted)). The Court found that by denying intervention, the district court effectively declined to consider the Government’s jurisdictional challenge, thereby violating its independent obligation to assure itself of its own jurisdiction. *Id.* at 50. Not only does DirecTV’s concern for maintaining the HSP’s confidentiality pale before the foreign-policy interests of the United States, but its purpose is not to challenge the Board’s jurisdiction over this case, only to assert a defense to the Board’s decision—and one DirectSat could have raised in the first place.

D. Even if DirecTV's Motion was Timely Filed, the Board Acted Within its Discretion in Finding That DirecTV Was Not a Necessary Party to the Administrative Proceeding

DirectSat disputes the Board's finding that, even if its motion to intervene was timely, it was not a necessary party to this case. (JA298.) Specifically, DirecTV attempts to invoke what even it recognizes as a "rare" exception to the timeliness requirement, whereby the Board will allow third parties to intervene if their interests are not adequately represented by one of the existing parties to a case.²⁷ (DTV Br. 22.) The Court need not consider this argument if it agrees with the Board's finding of untimeliness. Nevertheless, should the Court choose to reach this issue, the Board did not abuse its discretion in finding that DirectSat not only shared DirecTV's confidentiality interest, but was also fully capable of defending that interest in the administrative proceeding.

²⁷ Compare *Drukker Commc'ns*, 299 NLRB 856, 856-57 (1990) (granting intervention by company that purchased respondent employer's assets for limited purpose of defending against potential successor liability), *Premier Cablevision*, 293 NLRB 931, 931 n.1 (1989) (same), *U.S. Postal Serv.*, 275 NLRB 360, 360 nn.1 & 3 (1985) (allowing intervention by non-party union to determine who actually represented bargaining unit), and *William Penn Broad. Co.*, 94 NLRB 1175, 1175-76 (1951) (same), with *Int'l Bhd. of Elec. Workers*, 358 NLRB 903, 904 n.4 (2012) (affirming judge who denied intervention on finding that would-be intervenor's interests would be adequately represented by existing parties), *Consol. Papers*, 274 NLRB 1356, 1356 n.1 (1985) (noting that judge denied employees' motion to intervene because they lacked standing and employer adequately represented their position), and *Teamsters Local No. 542*, 223 NLRB 533 (1976) (finding that employee-grievants do not have a right to intervene in arbitration if their interests are adequately represented by existing parties).

1. DirectTV and DirectSat share a community of interest in maintaining the HSP's confidentiality

The Board found that, by its own terms, the HSP creates a community of interest between DirectSat and DirecTV in protecting its confidentiality. (JA298.) DirecTV does not challenge this finding in its opening brief, and therefore the Court should deem the issue waived.²⁸ *See N.Y. Rehab. Care Mgmt.*, 506 F.3d at 1076 (issues not raised in opening brief are waived); Fed. R. App. P. 28(a)(8)(A) (argument section of a brief must contain “appellant’s contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies”).

Although DirecTV does not directly challenge this finding of the Board, it is important to understand how three of the HSP’s provisions combined to create a community of interest between DirectSat and DirecTV, such that DirectSat was able to protect the HSP from disclosure and therefore DirecTV’s interest. (JA298.) First, the “Proprietary and Confidential” notice—which, according to Sellers, appears on each page of the document—provides that the HSP and the information contained therein are “not for use or disclosure outside of AT&T, its Affiliates, and third party representatives, and [DirectSat]” without prior written agreement.

²⁸ DirecTV argues only that having a shared community of interest does not guarantee adequate representation (DTV Br. 25-27), and that DirectSat’s representation of its confidentiality interest was inadequate (DTV Br. 27-31). Those arguments are addressed below in section B.2.

(JA297; JA278.) This language effectively puts DirectSat on equal footing with DirecTV and its AT&T parent with respect to the confidentiality of the document. Accordingly, as the Board found, the HSP treats DirectSat and DirecTV “as equals with regard to its confidential nature.” (JA298.)

Second, the HSP delegates to DirectSat the principal responsibility for protecting its confidentiality in Board proceedings. Specifically, section 3.14(d) of the HSP provides that, if DirectSat receives an information request pursuant to the Act, DirectSat must: (1) promptly notify DirecTV of the request; (2) cooperate with DirecTV in seeking protective arrangements for producing the information; (3) take action to limit any disclosure to the minimum required under Board law; and (4) continue to otherwise protect all disclosed information. (JA297-98; JA278 ¶ 5.) Perhaps most significant, the third point puts DirectSat squarely in charge of preventing disclosures beyond those required by law, a responsibility that plainly includes defending against unfair-labor-practice claims like this one.

Third, the HSP makes it an incurable breach of contract for DirectSat to “fail to meet its obligations regarding the use or disclosure of” the information contained therein. (JA298; JA278 ¶ 6.) Therefore, properly handling information requests and preserving the HSP’s confidentiality is critical to DirectSat’s business relationship with DirecTV. Indeed, the terms of the HSP expose DirectSat to

breach-of-contract liability for failing to protect the document’s confidentiality, and therefore incentivize DirectSat to do so.

Taken together, these provisions identify certain information—the HSP—to which DirectSat and DirecTV are equally privy, entrust DirectSat with preserving the confidentiality of that information with the attendant liability for not doing so, and stake their business relationship on the fulfillment of that trust. In these circumstances, the Board did not abuse its discretion in finding that “[DirectSat]’s confidentiality interest in the HSP is commensurate with, if not defined by, DirecTV’s.” (JA298.)

As noted, DirecTV does not contest this finding of the Board. However, DirecTV argues that even if they shared a community of interest in maintaining the HSP’s confidentiality, DirectSat had “a competing interest in fulfilling its obligation to bargain in good faith with the Union.” (DTV Br. 27.) That is simply untrue. To the contrary, Board law allows employers to dispute the relevance of requested information in good faith—as DirectSat did here—and also to refuse to divulge information based on a valid countervailing interest. *See, e.g., N. Ind. Pub. Serv. Co.*, 347 NLRB 210, 211 (2006); *accord Prime Healthcare Servs.-Encino LLC v. NLRB*, 890 F.3d 286, 295-96 (D.C. Cir. 2018). Thus, DirectSat was fully capable of preserving the HSP’s confidentiality and satisfying its obligation to bargain in good faith at the same time.

DirecTV also argues that the Board’s analysis is flawed because it did not properly weigh its confidentiality interest. (DTV Br. 13-17.) However, the Board made clear its assumption, for purposes of its analysis, that DirecTV had a confidentiality interest in the HSP. (JA298.) The Board was not required to do any more under Board law.²⁹ *See* 29 C.F.R. § 102.29 (requiring would-be intervenor to “state the grounds upon which [s/he] claims an interest” in the proceeding). Similarly, under Rule 24, intervention as of right requires finding that the would-be intervenor has “a legally protected interest . . . that the action, as a practical matter, impairs or impedes.” *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 320 (D.C. Cir. 2015). By assuming DirecTV’s confidentiality interest in this case, the Board did just that.

2. DirectSat was fully capable of defending DirecTV’s confidentiality interest before the Board

The Board found, and DirecTV does not dispute, that in addition to sharing DirecTV’s interest in maintaining the HSP’s confidentiality, DirectSat was entirely capable of representing that interest in the administrative proceeding. (JA298.)

²⁹ *Detroit Edison Co. v. NLRB*, on which DirecTV relies (DTV Br. 13-14), deals strictly with the case of a party to a Board proceeding, who objects to disclosing information because of a legitimate and substantial confidentiality interest. 440 U.S. 301, 314-17 (1979). In that instance, the Supreme Court found, the Board must weigh the objecting party’s interest against the requesting party’s need for the information. *N. Ind. Pub. Serv.*, 347 NLRB at 211. *Detroit Edison* does not address the rights of non-parties, let alone in the context of an untimely motion to intervene.

Specifically, the Board found that DirectSat had the same assortment of defenses available as DirecTV would have had, if DirecTV had timely sought to intervene. The Board also found that the HSP delegates to DirectSat the responsibility of protecting the confidentiality of its information in agency proceedings—an implicit recognition of DirectSat’s capacity to represent DirecTV’s confidentiality interest before the Board. (JA298.) Finally, the Board noted that DirecTV’s confidentiality interest would have been entirely preserved if DirectSat had prevailed on its lack-of-relevance defense. (JA299 n.8.)

DirecTV does not dispute the Board’s finding that DirectSat was fully capable of defending its confidentiality interest but, instead, argues that even if they shared a confidentiality interest in the HSP, DirecTV had a stronger motivation to protect it from disclosure.³⁰ (DTV Br. 26-27.) As an initial matter, it

³⁰ DirecTV relies on two unpublished district-court decisions for this point. *See J.D. Fields & Co., Inc. v. Nucor Yamamoto Steel Co.*, No. 4:12-cv-00754-KGB, 2015 WL 12696208, at *4 (E.D. Ark. June 15, 2015) (finding that, although intervenor’s interests were aligned with existing party’s, intervenor had better understanding of its information’s value and stronger motivation to protect it); *Thurmond v. Compaq Comput. Corp.*, No. 1:99-CV-711, 2000 U.S. Dist. LEXIS 20893, at *8 (E.D. Tex. June 26, 2000) (summarily finding it “self-evident” that intervenor had greatest incentive to protect its information, without considering alignment of interests). Both decisions originate from other circuits and were not reviewed by their respective courts of appeals. Moreover, in neither case was the existing party charged with defending the would-be intervenor’s interests in administrative or judicial proceedings. Also, both cases involved timely motions to intervene, unlike here. The other cases cited by DirecTV all involve diverging interests between intervenors and existing parties. (DTV Br. 26-27 & n.12.)

is questionable whether a subjective factor like motivational strength has any place in the intervention analysis. Certainly, Board intervention law does not accord it any weight, and this Court does not mention it as part of its Rule 24 analysis. *See, e.g., United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1146 (D.C. Cir. 2009); *see also* 7C Charles Alan Wright, Arthur R. Miller, et al., *Fed. Prac. & Proc. Civ.* § 1909 (3d ed. 1998) (“The most important factor in determining adequacy of representation [under Fed. R. Civ. P. 24(a)] is how the interest of the absentee compares with the interests of the present parties.” (footnote omitted)). But regardless, DirecTV offers no evidence that DirectSat lacked motivation to protect the HSP from disclosure.³¹ The Second Circuit found that “[s]o long as the [existing] party has demonstrated sufficient motivation to litigate vigorously and to present all colorable contentions,” it is no abuse of discretion to find that a would-be intervenor’s interests are adequately represented. *Nat. Res. Def. Council, Inc. v. N.Y. State Dep’t of Env’tl. Conservation*, 834 F.2d 60, 62 (2d Cir. 1987). In this case, the record shows that DirectSat fought every step of the way against the Union’s request, up to and including by petitioning this Court to review the Board’s Order. DirectSat’s ongoing defense of this case is further evidence of its determination to protect the HSP from disclosure.

³¹ Nor is there any reason to claim that DirectSat was not motivated to defend the HSP’s confidentiality, given that failing to do so would jeopardize its business relationship with DirecTV and expose it to liability for breach of contract.

DirecTV also argues that the Court should reverse the Board’s ruling because, regardless of whether DirectSat *could* have raised the confidentiality defense, there is no question in retrospect that it did not *actually* do so. (DTV Br. 28-29.) In other words, although the HSP’s procedure for handling information requests makes DirectSat primarily responsible for defending its confidentiality, and although DirecTV followed that procedure and relied on DirectSat to protect that shared interest, in retrospect DirecTV views that strategy as less than satisfactory and believes it would do better defending its interests on its own. Or, more concisely yet, DirecTV wants its own bite at the apple.

There is no legal support for DirecTV’s argument—hardly a surprise since it would allow any interested non-party to second-guess the performance of existing parties and, if they deem the results wanting, intervene to relitigate the merits of the case themselves.³² To paraphrase the Second Circuit, “[i]f [dissatisfaction] with an existing party over trial [results] qualified as inadequate representation, the requirement of Rule 24 would have no meaning.” *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 181 (2d Cir. 2001) (citation omitted). That is especially true in this case because DirecTV had notice of the Board proceeding

³² DirecTV is correct (DTV Br. 29) that *Acree* and *Smoke* also involved post-judgment motions to intervene, but the similarities end there. As discussed above, pp. 36-37, *Acree*’s “unique circumstances” preclude its application to this case, 370 F.3d at 50, and in *Smoke*, 252 F.3d at 471, intervention was allowed solely to challenge an unfavorable decision that the existing party did not plan to appeal.

and could have intervened before the judge rendered his decision. A would-be intervenor cannot simply sit on the sidelines and intervene after the fact if it is not satisfied with the existing party's performance and the result. To allow otherwise would not only call into question the finality of administrative and judicial orders, but also impair the existing parties' interest in the prompt, final adjudication of their disputes. *See Floyd*, 770 F.3d at 1059-60 (post-judgment intervention undermines the orderly administration of justice); *Bond v. Utreras*, 585 F.3d 1061, 1071 (7th Cir. 2009) (“[I]ntervention postjudgment . . . necessarily disturbs the final adjudication of the parties’ rights [and] should generally be disfavored.”).

DirecTV fares no better with its final argument, that DirectSat's relevance defense was not sufficient to protect its confidentiality interest. (DTV Br. 30-31.) Despite what DirecTV may claim, the Board did not find that relevance and confidentiality are interchangeable considerations, or that DirectSat could not have won on a confidentiality defense. The Board simply explained that if DirectSat had prevailed in its relevance argument, thereby limiting disclosure of the HSP to the redacted excerpts it had already provided, DirecTV's confidentiality interest would have been fully preserved. (JA299 n.8.) DirecTV cannot argue to the contrary, given that it was involved in the discussion to provide the redacted excerpts to the Union. Nor can DirecTV deny that, if the Board had found the

balance of the HSP irrelevant to the Union's bargaining needs, there would have been no reason for DirecTV to intervene in this case.

Long before this case was referred to the judge, DirecTV knew of its existence and that its confidentiality interest in the HSP was at stake. Despite that, DirecTV did not seek to intervene until over 8 months after the judge ruled that DirectSat should produce the full, unredacted HSP, and 2 weeks after the Board adopted the judge's recommended order. Now DirecTV claims it should get to relitigate the merits of this case because DirectSat, its designated representative in Board proceedings under the HSP, did not in retrospect adequately protect its confidentiality interest. As this Court once observed, "representation is [not] inadequate just because a would-be intervenor is unable to free-ride as far as it might wish—a well-nigh universal complaint." *Mass. Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 781 (D.C. Cir. 1997). The same observation applies here: DirecTV's subcontracting agreement included a procedure specifically designed to protect its confidentiality interests, and which charged DirectSat with defending those interests in agency proceedings. DirecTV cannot invoke the failure of those safeguards after the fact to justify its post-decisional attempt to intervene. Accordingly, the Court should affirm the Board's Order denying DirecTV's motion to intervene and dismissing as moot its requests to reopen the record and reconsider the Board's decision.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the petitions for review filed by DirectSat and DirecTV, and enforcing in full the Board's Order against DirectSat.

Respectfully submitted,

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February 2019

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

_____ DIRECTSAT USA, LLC,)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD,)	
	)	Nos. 18-1092
Respondent/Cross-Petitioner	)	18-1156
_____ DIRECTV, LLC,	)	18-1228
)	
Petitioner	)	Board Case No.
	)	13-CA-176621
v.)	
)	
NATIONAL LABOR RELATIONS BOARD,)	
)	
Respondent)	
_____)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(B) and 32(g)(1), the Board certifies that its final brief contains 11,254 words of proportionally spaced, 14-point type, and the word-processing software used was Microsoft Word 2016. The Board further certifies that the electronic version of the Board's brief filed with the Court in PDF form is identical to the hard copy of the brief that has been filed with the Court, and that the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

s/ David Habenstreit
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Dated at Washington, DC
this 1st day of February 2019

STATUTORY ADDENDUM

STATUTORY AND REGULATORY ADDENDUM
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THE NATIONAL LABOR RELATIONS ACT

Section 7 of the Act (29 U.S.C. § 157):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a) of the Act (29 U.S.C. § 158(a)) provides in relevant part:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)

Section 8(d) of the Act (29 U.S.C. § 158(d)):

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, . . .

Section 10 of the Act (29 U.S.C. § 160) provides in relevant part:

(a) The Board is empowered . . . to prevent any person from engaging in any unfair labor practice affecting commerce.

(b) . . . In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be

conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of title 28, United States Code.

* * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

THE BOARD'S RULES AND REGULATIONS

29 C.F.R. § 102.29 Intervention; requisite; rulings on motions to intervene.

Any person desiring to intervene in any proceeding must file a motion in writing or, if made at the hearing, may move orally on the record, stating the grounds upon which such person claims an interest. Prior to the hearing, such a motion must be filed with the Regional Director issuing the complaint; during the hearing, such motion must be made to the Administrative Law Judge. Immediately upon filing a written motion, the moving party must serve a copy on the other parties. The Regional Director will rule upon all such motions filed prior to the hearing, and will serve a copy of the rulings on the other parties, or may refer the motion to the Administrative Law Judge for ruling. The Administrative Law Judge will rule upon all such motions made at the hearing or referred to the Judge by the Regional Director, in the manner set forth in §102.25. The Regional Director or the Administrative Law Judge, as the case may be, may, by order, permit intervention in person, or by counsel or other representative, to such extent and upon such terms as may be deemed proper.

THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 24. Intervention

(a) **Intervention of Right.** On timely motion, the court must permit anyone to intervene who:

- (1) is given an unconditional right to intervene by a federal statute; or
- (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) **Permissive Intervention.**

(1) *In General.* On timely motion, the court may permit anyone to intervene who:

- (A) is given a conditional right to intervene by a federal statute; or
- (B) has a claim or defense that shares with the main action a common question of law or fact.

(2) *By a Government Officer or Agency.* On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

- (A) a statute or executive order administered by the officer or agency; or
- (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) *Delay or Prejudice.* In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) **Notice and Pleading Required.** A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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DIRECTSAT USA, LLC,)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD,)	
	)	Nos. 18-1092
Respondent/Cross-Petitioner	)	18-1156
	)	18-1228
<hr/>)	
DIRECTV, LLC,)	
)	Board Case No.
Petitioner)	13-CA-176621
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD,)	
)	
Respondent)	
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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2019, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

s/ David Habenstreit
David Habenstreit
Assistant General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
(202) 273-2960

Dated at Washington, DC
this 1st day of February 2019