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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

DIRECTV U.S. DIRECTV HOLDINGS)
LLC)
Respondent,)
and)
INTERNATIONAL ASSOCIATION OF)
MACHINISTS AND AEROSPACE)
WORKERS, DISTRICT LODGE 947)
AFL-CIO)
Charging Party.)
_____)

Case 21-CA-39546

**RESPONDENT'S ANSWERING
BRIEF IN OPPOSITION TO CROSS
EXCEPTIONS TO DECISION OF
THE ADMINISTRATIVE LAW
JUDGE**

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I. INTRODUCTION

This Answering Brief is submitted on behalf of Respondent, DIRECTV U.S. DIRECTV HOLDINGS LLC (“DIRECTV”) pursuant to Section 102.46(d)(1) of the Board’s Rules and Regulations in opposition to the Cross Exceptions filed by Charging Party and the Acting General Counsel to the Decision of the Administrative Law Judge in the above referenced matter.

Contrary to the contentions set forth in the Cross Exceptions, the ALJ properly concluded that Edmonds’ repeated use of profanity at his supervisor in front of 40-50 other employees was not protected under the standard set forth by the Board in *Atlantic Steel*, 245 NLRB 814 (1979).

Similarly, the ALJ properly concluded that Respondent’s policy regarding the use of company systems, equipment and resources is not unlawful because it restricts all personal use of company systems, under the rule established by the Board in *Register Guard*, 351 NLRB 1110 (2007). The Acting General Counsel and Charging Party both fail to identify any authority nor any basis for reversing the Board’s rule in *Register Guard*.

Finally, the ALJ properly deferred a determination on the proper remedial action for the alleged unlawful rules and policy provisions in Respondent’s Employee Handbook and Policy Guide to the Compliance stage of the proceeding. Both the Acting General Counsel and Charging Party ignore the fact that Respondent has already implemented corrective action by posting a disclaimer with the policies in question and fail to identify how or why such disclaimer is inadequate.

II. ARGUMENT

A. The ALJ Properly Concluded that Edmonds' Lost the Protection of the Act When He Repeatedly Used Profanity to His Supervisor

Both the Charging Party and Acting General Counsel agree that whether Edmonds' conduct on the day in question was protected is determined pursuant to the standard adopted by the Board in *Atlantic Steel Company*, 245 NLRB 814 (1979).

There is no question that Edmonds on the day in question, May 22, 2010 yelled at Site Manager Zambrano that he “needed to fucking do something about this fucking line” and that “it was bullshit that he had to wait for like 10 hours while other techs cut in front of him”. Edmonds then continued to curse at Zambrano in front of other technicians creating an uncomfortable and hostile work environment (General Counsel Exh. 20, Tr.p.365:15-20). The General Counsel's own witness, Mr. Urrutia, confirmed this version of the events and that Mr. Edmonds continued swearing and cussing at Mr. Zambrano after these remarks (Tr.p.220:9-13).

Hence there is no question that the comments were directed at Zambrano in the presence of numerous other employees, that Edmonds was demanding that Zambrano “do something about the fucking line” and that Edmonds continued swearing at Zambrano during the course of the event.

In determining whether the conduct in question is protected by the Act the Board applies the four (4) part test adopted in *Atlantic Steel*:

1. The place of discussions;
2. The subject matter of the discussions;
3. The nature of the employee outburst; and
4. Whether the outburst was in any way by an employer's unfair labor practice, *Supra* at 816.

The ALJ concluded that all of these factors weighed in favor of the Respondent's argument that Edmonds' comments were not protected (ALJ Decision, Pg.13:15-20). Clearly, the unrefuted evidence is that the ALJ properly weighed each of these factors in concluding that each factor weighed in favor of Respondent's contention that Edmonds' remarks removed him from protections of the Act (ALJ Decision Pg. 13:15-20).

(1) The Place of the Discussion

The Acting General Counsel and Charging Party contend that because the comments by Edmonds took place in the warehouse (where all of the employees were waiting in line to get equipment) it was not an actual production area and therefore this factor weighs in Edmonds' favor that his comments were protected. But of course this argument is nonsense.

The 40 -50 employees in the warehouse were all getting equipment they needed to do their work and were all on the clock. The warehouse is the main work area for Technicians at the Riverside location where they report to work each day, get equipment, sign timecards, receive their route assignments, meet with their supervisors and attend meetings (Tr. pp.167-168; 324:1-24). The confrontation did not take place during an off the clock lunch break or a social hour. The Technicians were all there for a business reason, to get equipment they needed to do their job, receive their job assignments for the day and meet with their supervisors.

In *Stanford Hotel*, 344 NLRB 558 (2005), cited by the Acting General Counsel in its Exceptions, the Board found the location of the comments weighed in favor of protection where the conversation in question took place in an employee lunch room. Edmonds' comments did not take place in the lunchroom or during a lunch break. They were made in the middle of the warehouse where 40-50 other employees were present and working.¹

¹ Edmonds himself admits that his conduct toward Zambrano on the day in question was wrong and that he apologized for his comments (Tr. p. 158:9-14;p.331:20-25)

The Acting General Counsel also cites *Keiwit Power Construction Co.* 355 NLRB No. 150 (2010) where the Board found that comments made in the course of a grievance meeting were protected. But there was no grievance meeting occurring when Edmonds made his outburst. Nor were Edmonds' comments made during an all-employee meeting as in *Correction Corporation of America* 347 NLRB 632 (2006) where the Board found the location to be protected because the purpose of the employee meetings were to provide a forum for employee grievances. There was no employee meeting occurring when Edmonds directed his profanity at Zambrano.

Finally the Acting General Counsel argues that *Plaza Auto Center, Inc.* 664 F.3d 286 (9th Cir 2011) where the outburst occurred in the privacy of the supervisor's office. Edmonds' comments were not made in Zambrano's office. They were made in the middle of the warehouse while 40-50 employees were on the clock and waiting to get equipment. Hence, none of the cases cited by the Acting General Counsel are similar to those of the present case nor in any way suggests that the ALJ improperly concluded that the location of Edmonds' remarks weigh against protection.

(2) The Subject Matter of the Discussion

The Acting General Counsel argues that Edmonds' comments are protected because they deal with not concerted activity. But Edmonds' comments to Zambrano were not brought on behalf of anyone other Edmonds himself. Even Edmonds' own testimony establishes this:

Freddie can't you do something about this fucking line? Everyone cuts in front of me. I said that I stand here every fucking day for 10 hours and everyone cuts in front of me. (Respondent's Exh. 3, Pg. 7:18-23).

Edmonds was not complaining about the lines because he was concerned about his fellow workers. He was complaining about his fellow workers who were cutting in front of him and making him wait. There is nothing concerted about his conducted. While lines might have been

an issue that all employees were concerned about, Edmonds' complaints had nothing to do with the lines of his fellow workers, they had to do with the line that he was in and that people were cutting in front of him and that he was fed up. Again, the ALJ's conclusion that the content of Edmonds outburst is unprotected is correct.

(3) The Nature of Edmonds' Outburst

Here, both the Charging Party and Acting General Counsel repeatedly refer to the fact that profanity was regularly used in the workplace. However, the ALJ properly observed from the record evidence that:

The record shows that employees, supervisors and managers and the like use profanity in the workplace. The record does not show, however, any prior instances of employees cussing out supervisors or managers in the workplace, in the presence of other employees, for failing to do the job that employees expected them to do. Accordingly, why there is precedent for the Respondent's acceptance of profanity in the workplace, there is no precedent for the Respondent's acceptance of profane outburst in the workplace towards management (ALJ Decision, Pg. 13, Fn.25).

This is exactly the point the Board made in *Atlantic Steel* when it observed:

The Administrative Law Judge cited no decisions, however, and we know of none, where the Board has held that an employees' use of obscenity to a supervisor on the production floor following a question concerning working conditions is protected as would be a spontaneous outburst during the heat of a formal grievance proceeding or in contract negotiations. To the contrary, the Board and the courts have recognized.....that even an employee who is engaged in protected activity can, by opprobrious conduct, lose the protection of the Act. 245 NRLB at 816

It was not the use of the profanity by Edmonds that triggered his termination. It was his profanity laced tirade directed at Zambrano in front of numerous other employees that caused it to fall outside of the protection the Act, *Atlantic Steel, supra*.

Furthermore, both Zambrano and the General Counsel's own witness, Urrutia confirmed that Edmonds continued swearing after he said "What are you going to do about this fucking line?" (General Counsel Exh. 20, Tr.p.365:15-20;Tr.p.220:9-13). Hence, contrary to the

contentions of the Acting General Counsel and Charging Party, Edmonds' vulgarity was sustained and repeated during his attack on Zambrano. Such conduct has always been found to lose the protection of the Act. *Piper Realty Co.*, 313 NLRB 1289, 1290 (1994); *Verizon Wireless* 349 NLRB 640,642 (2007). "Among the specific types of conduct that could exceed the protection of the Act are vulgar, profane and obscene language directed a supervisor or employer, even though uttered in the course of protected concerted activity" *Care Initiatives, Inc.* 321 NLRB 144 at 151(1996). *See also Daimler Chrysler Corp.*, 344 NLRB 1324, 1328(2005) where the Board concluded that the employees single outburst in which he called his supervisor an asshole and stated "Bullshit, I want this meeting now" and "fuck this shit" and he did not "have to put up with this bullshit" was insubordinate and profane and weighed against protection. The ALJ in the present case reached this same conclusion on almost identical evidence.

(4) Whether the Outburst was Provoked by Unfair Labor Practices

Even the Acting General Counsel concedes that Zambrano committed no unfair labor practice that provoked the outburst by Edmonds. (Acting General Counsel's Exceptions p. 32) Here again, there can be no question that Zambrano did nothing to provoke Edmonds' tirade. By everyone's description of the event, Zambrano was doing nothing more than walking across the warehouse floor when Edmonds laid it into him with his profanity laced tirade demanding that he do something about the "fucking line" and complaining that he stands here every "fucking day for 10 hours" and that this was "bullshit" and then went on to continue to use profanity (Tr. Pg. 365:15-20; GC Exhibit 20; Respondent's Exh.3, Pg. 7:18-23). There is no evidence to suggest in any way that Zambrano did anything that would have provoked Edmonds to bring about this tirade and, again the ALJ properly concluded that this fourth and final factor also weighed against his comments being protected.

For all these reasons, Respondent respectfully submits that the ALJ properly concluded that Edmonds' conduct was not protected under the *Atlantic Steel* factors.

B. The ALJ's Conclusion that Respondent's Rule Banning Employee Use of Company Systems Does Not Violate the Act

The ALJ concluded that, because Respondent's policy on company systems, equipment and resources prohibited personal use of such equipment for all purpose, that it did not violate the Act, citing *Register Guard*, 351 NLRB 1110 (2007).

The Acting General Counsel and Charging Party take the position that where a policy prohibits use of company property by all outside organizations that it is a per se violation of Section 8(a)(1) of the Act. However, neither the Acting General Counsel nor the Charging Party cite a single Board decision or any other precedent in support of this contention or any basis for such a contention. Therefore, there is simply no legal or factual basis to reverse the ALJ's finding or the Board's standing rule in *Register Guard, supra*.

C. The ALJ Properly Relegated the Appropriate Remedy to the Compliance Stage of the Proceeding and in Declining to Order a Nationwide Posting.²

The ALJ concluded that certain policies of Respondent, contained in the Employee Handbook and elsewhere, were unlawful because they could reasonably be interpreted as prohibiting employees from engaging in protected activity. The ALJ relegated a decision on such to the compliance stage of the process to afford the parties an opportunity to discuss this issue.

The Exceptions filed by the Acting General Counsel and by Charging Party ignore one important fact. Respondent DIRECTV has already taken corrective action as to these policies by posting, on its intranet site where the policies in question appear, a disclaimer which provides:

² Respondent argues in its Exceptions that the ALJ's conclusion with regards to these policies is improper based on the lack of evidence introduced at the hearing. Respondent does not waive this argument in addressing this issue.

The Company polices in the DEN, including but not limited to Confidentiality, Using Social Media, will not be used to prohibit, discourage, or otherwise retaliate against employees who engage in conduct or communications protected by Section 7 of the National Labor Relations Act (such as lawful discussions whether with co-workers or third parties about wages, hours, or working conditions). (Respondent Exh. 5).

Hence, the appropriate disclaimers had already been issued and has already been distributed nationwide to all of DIRECTV's employees who are subject to such policies.

The Acting General Counsel and the Charging Party have been unable to formulate any evidence nor any facts to reflect why this disclaimer is not adequate or to identify the type of disclaimer that would be better suited. The ALJ, as frustrated apparently as Respondent, also could not formulate an opinion as to why the Respondent's disclaimer is inadequate nor what remedy would be more effective, and therefore, deferred a determination on the appropriate remedy to the compliance stage of the proceedings.

The Acting General Counsel and the Charging Party contend that the only appropriate remedy for the ALJ in these circumstances is to require Respondent to rescind the unlawful provisions and to republish the Handbook and Policy provisions without them. In support of this contention, the Acting General Counsel cites *Two Sisters Food Group*, 357 NLRB 168 (2011). But the facts in *Two Sisters Food Group* are not analogous to the present case.

First, there is virtually no evidence in the present case that DIRECTV has at any time enforced the policies in question in some manner as to discriminate against employees from exercising Section 7 rights. There is simply none.

Second, neither the Acting General Counsel nor the Charging Party has indicated how the corrective action taken by DIRECTV almost a year ago is not adequate to remedy the problems with the policies in question. The policies in question do not, on their face prohibit protected

activity. Rather, they simply can be “interpreted” in a way that might limit Section 7 rights. The disclaimer adopted by DIRECT addresses this concern and adequately remedies the problem.

Third, the corrective action taken by DIRECTV has been posted on its intranet available to employees across the country that have access to the policies in question. Hence, the scope of the publication is more than adequate.

In the absence of any evidence that any of these rules has ever been enforced in some discriminatory way, there is no question but that DIRECTV’s self imposed remedy is more than adequate.

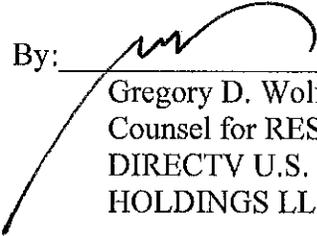
III. CONCLUSION

For all these reasons, Respondent respectfully submits that the Cross-Exceptions by Charging Party and the Acting General Counsel be dismissed in their entirety.

Dated: February 21, 2012

WOLFLICK & SIMPSON

By: _____


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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 130 N. Brand Boulevard, Suite 410, Glendale, California 91203.

On February 21, 2011, I served the foregoing document(s) described as:
RESPONDENT'S ANSWERING BRIEF IN OPPOSITION TO CROSS EXCEPTIONS TO DECISION OF THE ADMINISTRATIVE LAW JUDGE on the interested parties in this action by placing a true copy thereon enclosed in sealed envelope(s) addressed as follows:

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XXX **(BY ELECTRONIC SERVICE)** Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed above. I did not receive, within a reasonable time after the transmission, any electronic message, or other indication that the transmission was unsuccessful.

XXX **(BY STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on February 21, 2012, at Glendale, California

MARGO KAZARYAN

A handwritten signature in black ink, appearing to read 'MARGO KAZARYAN', is written over a horizontal line.