JD(SF)–44–12
Englewood, CO

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

ECHOSTAR TECHNOLOGIES, L.L.C.

and **Case 27-CA-066726**

GINA M. LEIGH, AN INDIVIDUAL

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DECISION

Statement of the Case

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard this case in Denver, Colorado, on June 5, 2012. Ms. Gina M. Leigh, an individual (the Charging Party), filed the charge on October 13, 2011 and amended that charge on November 18, 2011, and again on December 8, 2011. The General Counsel issued the complaint on April 6, 2012, and the Respondent filed an answer on April 18, 2012. Timely posthearing briefs were submitted by the General Counsel and the Respondent and the Respondent submitted a timely reply brief[1].

The complaint alleges, inter alia, that the Respondent at relevant times maintained certain rules in its employee handbook which it distributed to its employees. The complaint further alleges that by its dissemination of these rules, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent does not contest its dissemination of the challenged rules to its employees, but denies that this conduct violates the Act or that the rules are in anyway improper.

1 The Respondent moved at the hearing that I allow the parties to file reply briefs. I granted the motion. There is no provision in the Board's Rules for the filing of reply or answering briefs to the administrative law judge. However, the trial judge has the discretion to grant a motion for leave to file reply briefs in an appropriate case. See *Gallup, Inc.,* 349 NLRB 1213, 1217 (2007), and cases cited therein.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

The complaint alleges, the answer admits, and I find that at all material times, the Respondent has been a Colorado corporation with an office and place of business in Englewood, Colorado (the Respondent's facility), and has been engaged in designing, manufacturing and selling satellite and cable boxes, and furnishing satellite services. In conducting its operations during the 12-month period ending February 29, 2012, the Respondent purchased and received at its Englewood, Colorado facility goods valued in excess of $50,000 directly from points located outside the State of Colorado. At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

A. The Specific Language of the Portions of the Respondent's Employee Handbook under Challenge[2]

Paragraph 4 of the complaint, as subnumbered, sets forth the entries in the Respondent's employee handbook which the General Counsel alleges violate the Act:

1. Complaint paragraph 4(a):

> Since about April 14, 2011, the Respondent, through its employee handbook, has maintained the following "Social Media" rule:
>
> > (i) You may not make disparaging or defamatory comments about EchoStar, its employees, officers, directors, vendors, customers, partners, affiliates, or our, or their, products/services; and
> >
> > (ii) Unless you are specifically authorized to do so, you may not: Participate in these activities with EchoStar resources and/or on Company time . . . .

2. Complaint paragraph 4(b):

> Since about April 14, 2011, the Respondent, through its employee handbook, has maintained the following "Contact with the Media" rule:

[2] Some of the complaint portions quoted here are excerpts from longer rules which appear in the Respondent's employee handbook. The relevant complete rule, where an excerpt is used in the complaint, will be quoted in full in the portions of this decision in which the individual complaint allegations are considered.

The Corporate Communications Department is responsible for any disclosure of information to the media regarding EchoStar and its activities so that accurate, timely and consistent information is released after proper approval. Unless you receive prior authorization from the Corporate Communications Department to correspond, with members of the media or press regarding EchoStar or its business activities, you must direct inquiries to the Corporate Communications Department. Similarly, you have the obligation to obtain the written authorization of the Corporate Communications Department before engaging in public communications regarding EchoStar or its business activities.

You may not engage in any of the following activities unless you have prior authorization from the Corporate Communications Department:

- All public communication including, but not limited to, any contact with media and members of the press: print (for example newspapers or magazines), broadcast (for example television or radio) and their respective electronic versions and associated web sites. Certain blogs, forums and message boards are also considered media. If you have any questions about what is considered media, please contact the Corporate Communications Department.

- Any presentations, speeches or appearances, whether at conferences, seminars, panels or any public or private forums; company publications, advertising, video releases, photo releases, news releases, opinion articles and technical articles; any advertisements or any type of public communication regarding EchoStar by the Company's business partners or any third parties including consultants.

3. Complaint paragraph 4(c):

Since about April 14, 2011, the Respondent, through its employee handbook, has maintained the following "Confidential Information" rule:

> [E]mployee information . . .
>
> . . . You must not discuss it with or disclose it to outsiders without the prior written authorization of duly authorized Company personnel, both during and after employment with the Company. Similarly, you are responsible for the internal security of confidential information; you must not discuss it with or disclose it to another employee unless he or she has a specific need to know and only when you are authorized to discuss or disclose it. . . .

4. Complaint paragraph 4(d):

Since about April 14, 2011, the Respondent, through its employee handbook, has maintained the following "Contact with Government Agencies" rule:

Phone calls or letters from government agencies may, occasionally be - received. The identity of the individual contacting you should be verified. Additionally, the communication may concern matters involving the . corporate office. The General Counsel must be notified immediately of any communication involving federal, state or local agencies that contact any employee concerning the Company and/or relating to matters outside the scope of normal job responsibilities.

If written correspondence is received, notify your manager immediately and forward the correspondence to the General Counsel by PDF or facsimile and promptly forward any original documents. The General Counsel, if deemed necessary, may investigate and respond accordingly. The correspondence should not be responded to unless directed by an officer of the Company or the General Counsel.

If phone contact is made:

- Take the individual's name and telephone number, the name of the agency involved, as well as any other identifying information offered;

- Explain that all communications of this type are forwarded to the Company's General Counsel for a response;

- Provide the individual with the General Counsel's name and number. .. if requested, but do not engage in any further discussion. An employee cannot be required to provide information, and any response may be forthcoming after the General Counsel has reviewed the situation; and

- Immediately following the conversation, notify a supervisor who should promptly contact the General Counsel.

5. Complaint paragraph 4(e):

Since about April 14, 2011, the Respondent, through its employee handbook has maintained the following "Investigations" rule:

. . . You are also expected to maintain confidentiality. . . .

6. Complaint paragraph 4(f):

(f) Since about April 14, 2011, the Respondent, through its employee handbook, has maintained the following "Disciplinary Action" rule:

Examples of conduct that is unacceptable and subject to disciplinary action up to and including termination of employment include, but are not necessarily limited to:

- • . . . undermining the Company, management or employees)

. . . .

B. The Respondent's Handbook

1. General background

The Respondent is a technology company engaged in designing, manufacturing and selling satellite and cable boxes, and furnishing satellite services. It had, as of the time of the hearing, approximately 3500 employees employed at 17 locations in the United States. The employees are tech savvy and the Respondent provides computers to its employees and maintains a companywide intranet communication system, titled E-Source, and provides email accounts for its employees.

The Respondent had maintained an earlier employee handbook from 2009,[3] but replaced it in May 2011. That newer handbook is the current employee handbook for all employees nationwide. The handbook is available on the Respondent's intranet system in electronic format and is also issued to the new employees in hard copy. The Respondent issues updates to the handbook on its intranet system. There is no dispute that employees have at all times material been explicitly informed that they should be familiar with the handbook's contents and with any issuing updates on the intranet.

The handbook by its own terms makes it clear that employees are expected to adhere to the handbook's procedures, rules**,** regulations, systems, standards, or guidelines, and "may be subject to disciplinary action for non-compliance." The handbook asserts under its disciplinary actions portion:

Disciplinary Actions

Examples of conduct that is unacceptable and subject to disciplinary action up to and including termination of employment include, but are not necessarily limited to:

. . . .

Violation of or failure to adhere to any EchoStar procedure, rule **,** regulation, system, standard or guideline whether in this Handbook, posted or

[3] The 2009 handbook was maintained in parallel with the newer handbook, but the language relevant to the issues is identical.

communicated in training material, verbally, in memo form or observed in practice.

2. The Respondent's employee handbook savings clause

The current handbook contains a general savings clause paragraph which is here quoted in full.

> The information contained in this Handbook is for general information only. No employee Handbook can address every circumstance or question. Should you have questions about the Handbook, please contact the Human Resources Department. EchoStar may change the guidelines described in this Handbook to adapt to changing business conditions or for other reasons. The Company, therefore, reserves the right to make the final decision, interpret, apply, change or discontinue any guideline at any point with or without prior notices. The Company reserves the right to deviate from the guidelines set forth in this Handbook or in guidelines or practices as may be necessary or appropriate in the opinion of the Company. The position of the Company in one situation does not bind or restrict the Company in other situations. Should a conflict arise between an EchoStar policy and the law, the appropriate law shall be applied and interpreted so as to make the policy lawful in that particular jurisdiction.

C. Analysis and Conclusions

1. Threshold issues

a. The Respondent's statue of limitations arguments

Counsel for the Respondent argued at trial and on brief that portions of the General Counsel's complaint are precluded by virtue of Section 10(b) of the Act which establishes a 6-month limitation between the commission of an unfair labor practice and the filing of a charge properly encompassing it.

The Respondent's statute of limitations argument is essentially as follows. First, the Respondent notes the Charging Party's initial charge was filed on October 13, 2011, and addressed her discharge. She amended her charge (the first amended charge) on November 18, 2011, to additionally allege that the Respondent had maintained, and continued to maintain, an overbroad social media policy. On December 7, 2011, the Charging Party further amended her charge (the second amended charge) to add the following allegedly overbroad rules and policies as forth in the Respondent's employee handbook in the following sections that were alleged in the amended charge to interfere with and restrain employee Section 7 rights of the Act:

Contact with Media, Confidential Information, Contact with Government Agencies, Investigations, Threats and Violence, Protection from Harassment, Disciplinary Action, Conflict of Interest, Volunteer Political Activity, Workplace Relationships, Gifts to Public Officials and Political Activity and Insider Trading Information.

The Respondent does not dispute that the original charge and the first amended charge, described above, are timely and not limited by operation of Section 10(b) of the Act. The Respondent addresses the Charging Party's second amended charge on brief at 2:

> What EchoStar does dispute is the timeliness of the second amended charge. It is clear from the face of that charge that the new allegations have nothing at all to do with Ms. Leigh's termination, or the Social Media policy. Instead, the second amended charge is nothing more than an attack on thirteen (13) different Handbook policies that were unrelated to the issues raised in the prior charges. EchoStar maintains that the second amended charge, which serves as the basis for the allegations set forth at Paragraphs [4](b)-(f) in the Complaint, was filed outside of the six-month 10(b) period.

As noted supra, the Respondent's rules challenged in the complaint were without exception challenged from the period starting on April 14, 2011, which date is essentially 6 months before the filing and service of the original charge but which is a date more than 6 months before the filing of the Charging Party's second amended charge which first challenged the rules noted above.

The General Counsel makes two arguments in response. First it notes on brief at 30:

> [T]he Board does not bar complaint allegations that are based on amended charges filed outside the 10(b) period. Rather, the timely filing of a charge tolls the 10(b) period for the allegations in the amended charge that are similar to, and arise out of, the same conduct as those in the timely charge. *Pankratz Forest Indus.,* 269 NLRB 33, 36-37 (1984). These amended charges are deemed, for 10(b) purposes, to relate back to the original charge. Id.

Thus, the General Counsel contends the instant charges final amendment is closely related to the earlier timely original and initial amendment.

In *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988, the Board enunciated the factors to be considered in making the determination of whether allegations are "closely related" for purposes of evaluating amended charges filed outside the 10(b) period:

> First, we shall look at whether the otherwise untimely allegations are of the same class as the violation alleged in the pending timely charge. This means that the allegations must all involve the same legal theory and usually the same section of the Act. . . .
>
> Second, we shall look at whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge. This means that the allegations must involve similar conduct, usually during the same time period with a similar object. . . .
>
> Finally, we may look at whether a respondent would raise the same or similar defenses to both allegations, and thus whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the otherwise untimely allegations as it would in defending against the allegations in the timely pending charge.

See also *Peerless Pump, Co.,* 345 NLRB 371 (2005).

Starting with the initial charge and first amended charge, which are not under challenge under this argument, the Charging Party disputes the legality of the Respondent's social media rule and that element of the charge is in the complaint as paragraph 4(a). The General Counsel argues that the legal theories relevant to resolving the validity of the social media rule are the same legal theories dealing with the other handbook based rules at issue and involve the same section of the Act. Thus the counsel for the General Counsel argue on brief at 31:

> The Second Amended Charge's allegations involve precisely the same section of the Act and precisely the same legal theory as would be applied to the allegations in the First Amended Charge: that the Respondent's rules would reasonably tend to chill employees' exercise of their Section 7 rights. *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998).

The General Counsel notes the rules are factually related in that they are contained in a single document—the handbook—and are communicated to employees simultaneously in an identical manner in the handbook. The General Counsel argues further:

> Lastly, the Respondent would raise exactly the same defense to both the First and the Second Amended Charge allegations: employees would not reasonably construe a particular rule to prohibit Section 7-protected activity, and/or that the rules are not unlawfully broad. *See Cooper Health Sys[tems].,* 327 NLRB 1159, 1162-[11]63 (1999) (adopting ALJ's holding that there were no 10(b) issues where initial charge alleged discriminatory prohibition of union literature, and an untimely amended charge added allegations regarding an unlawfully broad no-solicitation rule, under *Redd-I* test).

The Respondent emphasizes that the handbook policies added in the second amended charge are substantively unrelated to the Charging Party's discharge or the social media policy named in the first amended charge. And the Respondent emphasizes that the Charging Party was an employee under the 2009 handbook and never saw the 2011 handbook as an employee of the Respondent. I find this argument immaterial, however, because the languages of the two handbooks' material are identical.

The General Counsel advances a second argument that the contentions of the complaint are timely because the rules are continuing violations of the Act. Counsel for the General Counsel argues this is so because the handbook, at all relevant time to the present, remained in effect and is and has been used and referred to by employees. The Respondent opposes this argument noting the fact that there were two handbooks.

(1) The relatedness theory of the General Counsel

Based on the record as a whole and the post-hearing filings of the parties, I find the General Counsel's arguments set forth above persuasive. The handbook rules in their delivery to employees and enforcement by the Respondent are as one. The *Redd-I, Inc.*, 290 NLRB 1115 (1988), elements of closely related factors of similar class of violation, same legal theory, same section of the Act, as well as the similar factual situation or sequence of events described above sustains the General Counsel. I am not persuaded by the Respondent's argument that the two

handbooks, even if identical in relevant part, create a degree of independence or separation that defeats the General Counsel's argument here. Finding the *Redd-I, Inc.* test met I, find the charges in their entirety are timely and unrestricted by Section 10(b) of the Act.

(2) The continuing violations theory of the General Counsel

The Board specifically holds that rules remaining in place within the 10(b) period may be challenged under a continuing violation theory even if the original institution of the rules is not within that period. *Carney Hospital,* 350 NLRB 627, 627–628 (2007). *Teamsters Local 293 (Lipton Distributing)*, 311 NLRB 538, 539 (1993). In the instant case the handbook policies or rules themselves are under attack herein without reference to any application of those rules either in or out of the 6-month period preceding the second amended charge. Thus a violation and remedy would not turn or be different as a result of considering the rules before the 6-month period before the second amended charge. I have earlier rejected the Respondent's argument that the 2009 and 2011 handbooks are importantly different even though identical in content and use in all relevant aspects. Section 10(b) of the Act does not apply to the violations alleged or the remedy sought.

Thus, based on the record as a whole, I reach the same conclusion on the General Counsel's continuing violation theory as I did regarding the General Counsel's relatedness theory sustained above. Based on the record as a whole and the posthearing filings of the parties, I find the General Counsel's continuing violation theory arguments set forth above persuasive. Therefore the Respondent's 10(b) argument is rejected for the additional continuing violation reasons advanced by the General Counsel.

b. The Respondent's argument the second amended charge was not initiated by the Charging Party and is therefore invalid and the complaint allegations based on that amended charge must therefore be dismissed

The Charging Party testified that she filed the initial charge over her discharge and in discussions with the regional staff during the charge's investigation asserted that, the Respondent's "Social media policy specifically, but also the open door policy" were overbroad. She specifically named the social policy in her first amended charge and was thereafter contacted by the regional staff and as part of that process she testified she signed the second amended charge essentially at the request of the Region.

The Respondent argues on brief at 4:

> It is also a well settled position that while a Board agent can provide assistance in filing a charge, a Board agent cannot file a charge. The limit of a Board agent's assistance is set forth at Section 10012.2 of the Boards ULP Case Handling Manual. That language makes it clear that although a Board agent can offer assistance in identifying the section of the Act that was violated and the basic theory of the allegations, such assistance must be based upon the circumstances raised by the charging party. In this case, the Charging Party did not in any way raise the issue of the illegality of any of the policies cited in the Complaint, except for the Social Media policy. Indeed, she indicated that she never had any discussions with the Board agent relating to the policies referenced in the amended charge. [References to transcript omitted.] Those allegations were raised solely by the

> Board agent, who called the Charging Party *sua sponte* and asked that she amend the complaint to include the new allegations. [References to transcript omitted.]
>
> It is clear that the Board agent managed to circumvent Board's own rule against filing the charge by asking the Charging Party to sign off on allegations that she simply never made. In essence, the Board agent did by proxy an act that is clearly prohibited by the Board's own rules. Such conduct should not be condoned and the allegations set forth in Paragraph [4](b)-(f) should be dismissed in their entirety.

I have earlier found the handbook contents under challenge in the complaint are related. The Respondent does not appear to be challenging the Charging Party's standing to file the charge or amended charge, nor would such a contention have merit. The Respondent argues rather that the solicitation of the Charging Party by a Board agent during the course of the earlier charges investigation to file an amended charge alleging a more specific allegation is impermissible because the Charging Party did not intend to go so far in her original allegations and was only doing so at the initiation and behest of the Board agent.

The record makes clear that the Charging Party, a layman not possessing a labor lawyer's technical understanding of the substantive law of employer conduct rules under the Act, could not have known what technical charge inclusion should be undertaken as part of her original charge allegations which initially addressed her discharge, then challenged the social media rule in her first amended charge and finally, in her second amended charge, challenged the other rules the investigation had determined were invalid. The Charging Party's testimony makes it clear she did not agree with some of the rules at issue and being asked by the Region to amend her charge to support a more specific allegation that the rules were invalid was not viewed by her as improper.

As with the relatedness analysis above, I find the evolution of the charge through its amendments was sufficiently a seamless whole so that no finding may lie that the Board agent initiated more than a technical specification charge that fully addressed the handbook allegations uncovered in the investigation and which were ultimately set forth in the complaint. I further find the technical specification of the final amendment to the charge for purposes of this analysis was related to the allegations of the charge that had gone before.

Based on all the above, and on the record as a whole, I specifically find the General Counsel did not engage in misconduct in soliciting the Charging Party's filing of the second amended charge herein. Further I find the second amended charge is not diminished or tainted in anyway nor rendered invalid or legally insufficient to serve as an amended charge and support the procedural vitality of the relevant allegations of the complaint.

2. General Board law on employer rules of employee conduct

Counsel for the Respondent cites the test set forth in *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004), in which the Board described its employer rule inquiry as follows:

> If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in

response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

5 There is no contention in the instant case that the rules at issue were promulgated in response to protected activity or that the rules had been applied to particular employees to restrict their exercise of Section 7 rights. It follows then that the dispute between the parties involves to a large degree whether or not employees would reasonably construe the challenged handbook language to prohibit Section 7 activity.

10 A leading Board case on consideration of employer conduct rules is *Lafayette Park Hotel,* 326 NLRB 824, 825, 827 (1998), enfd. mem.203 F.3d 52 (D.C. Cir. 1999). The Board set forth the proper standard for addressing such issues at 326 NLRB 824:

15 Resolution of the issue presented by the contested rules of conduct involves "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally un-disputed right of employers to maintain discipline in their establishments. . . . Opportunity to organize and proper discipline are both essential elements in a balanced society." *Republic Aviation* v. *NLRB*, 324 U.S. 793, 20 797–798 (1945). In determining whether the mere maintenance of rules such as those at issue here violates Section 8(a)(1), the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that 25 their maintenance is an unfair labor practice, even absent evidence of enforcement. See *NLRB* v. *Vanguard Tours*, 981 F.2d 62, 67 (2d Cir. 1992), citing *Republic Aviation*, supra, 324 U.S. at 803 fn. 10.

30 The Board has long held that the determination of chilling effect is a reasonable one and does not turn on subjective impact evidence from particular employees. *Waco, Inc.,* 273 NLRB 746, 748 (1984).

In *Lutheran Heritage Village-Livonia,* supra at 646–647, the Board explained the 35 *Lafayette Park Hotel* analytical process:

The Board has held that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). In determining whether a 40 challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. Id. at 825, 827. Consistent with the foregoing, our inquiry into whether the maintenance of a challenged rule is unlawful 45 begins with the issue of whether the rule *explicitly* restricts activities protected by Section 7. If it does, we will find the rule unlawful. [Footnote omitted.]

If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably 50 construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

The General Counsel notes on brief at 14:

> Any ambiguity in a rule must be construed against the employer who promulgated the rule. *Lafayette Park,* 326 NLRB at 828 (citing *NorrislO'Bannon, 307* NLRB 1236, 1245 (1992)). Accord: *Ark Las Vegas Restaurant,* 343 NLRB 1281, 1282 (2004). Further, any clarification or narrowed interpretation of an ambiguous or overbroad rule must be "effectively communicated to an employer's workers" in order to cure the impact of a facially illegal rule. *Laidlaw Transit, Inc.,* 315 NLRB 79, 83 (1994).

3. Deconstructing the standard test: "reasonably tends to chill employees in the exercise of their Section 7 rights."

Several elements may be identified within the concept that an improper rule will reasonably tend to chill employees in the exercise of their Section 7 rights. These parsed elements may be considered individually.

a. Section 7 rights

The recitation of individual elements comprising Section 7 rights or activities may be taken from the language of the Act:

> Section 7
> 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 . . .

While specific examples will be considered below, the definition of activities under Section 7 encompasses union activities but also actions and conduct of employees coming together for purposes of mutual aid or protection. An important part of the concept of self-organization for mutual aid and protection is the ability for employees to discuss and complain about their individual circumstances including their wages, hours, and working conditions with other employees and to disclose, discuss and complain respecting those matters to labor organizations and to the public.

b. Chilling

The use in law of the term "chilling" or the variant "chill" goes back at least to Justice Frankfurter's concurrence in *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952). There, in a loyalty oath challenge case, Justice Frankfurter noted the oath requirement at issue involved:

> [I]nhibition of freedom of thought, and of action upon thought, ... Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to *chill* [emphasis added] that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers. [344 U.S. at 195].

The Board, perhaps with less eloquence, applies that same approach to the concept of "chilling effect." It is clear that the term does not simply encompass prohibition of an activity. To chill is to induce "caution and timidity" and also to retard, diminish, and make uncomfortable, the acts and conduct that would take place, but for the cold or chill climate. Importantly, the protected activities or rights whose exercise is to be protected need not be frozen in place and/or come to a halt to ripen the malum. Rather the test is whether or not those rights suffered a reduction or inhibition. Thus, to chill activity, the rule or other requirement under scrutiny need not be effective in stopping protected activity. Again, protected employee activities may be chilled without being frozen; it may be reduced without being ended. Some individuals feel a chill where others do not. Some feel a greater chill than others. As to that difference, the reasonable test is described below.

c. The reasonable employee

The Board has long held, with Supreme Court approval in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, (1969), that the test of whether or not an employee or employees were threatened respecting Section 7 rights and activities was objective rather than subjective. Thus, the employees actually involved in the contested events are not asked if they felt threatened by particular conduct, but rather the test applied is whether or not a generic or typical employee would be threatened by the conduct. The generic or typical employee is implicitly a reasonable employee as that term is used in the cases.

Where a large group of employees is involved, in the instant case the Respondent employs approximately 3500 employees who have been issued and are covered by the handbook language at issue, the test remains the same. That same test appears in the quoted Board cases supra. The rules under challenge herein are tested by resolving the question, would a reasonable employee or employees in relevant circumstances have their Section 7 rights chilled. Adding a larger sample makes the reasonable employee test, which as noted above involves gradients, an abstraction of some subtlety. These problems however run through the wide range of law applying reasonable employee or reasonable individual tests.

d. The context question

Throughout the argument, analysis, and case law set forth herein runs the important consideration: the rules under challenge must be read in context. Hardly a controversial assertion, but the questions remain: what context, how broad, how far afield?

Clearly one may not select portions or fragments of text on which to base a decision about the effect on an employee when it is reasonable that an employee considering the text at issue would inevitably read more. There are limits however to proposing as part of such context other portions of the handbook or other writings that would not reasonably be considered by employees reading the challenged portions of the rules.

The 2011 handbook contains some 22 pages of text totaling in excess of 10,000 words. Its table of contents recites eight major topics[4] which have over -40 subcategories. The portions of the handbook alleged as violative of the Act are set forth in the complaint and quoted above. Those alleged portions are not the entirety of every rule alleged in the complaint. The entire rules have also been quoted below as part of the analysis of the individual allegations.

The Respondent argues the entire rule should be considered as part of the employee reader's context in evaluating the challenged portions of any given rule. The implicit basis for the request is that the reasonable employee or employees would read an entire rule to derive its meaning and therefore the analysis should be mindful of that fact. I agree and will do so below.

The Respondent further argues as to various allegations that other portions of the handbook beyond the rule under attack should also be considered as part of the reasonable employees' context in evaluating the allegations. I find no simple generalization will lie as to this argument. Initially, I reject the proposition that it is reasonable to assume that any and all employees reading the rules under attack would be reading them as part of a full read of the handbook from beginning to end. Such a read may occur when the new employee first gets physical possession or electronic access to the handbook, but that initial piece of information forms but a minute part of the rush of information overwhelming new employees in their initial period employment. The memory of the handbook formed in that period is not a likely basis for employee evaluation of the rules. Rather I believe that handbook rules to the extent that consideration is relevant here, are consulted by employees after their first exposure to the handbook and it is that experience that must be evaluated and which provides the context for determining if the complaint allegations have merit.

I find therefore that the test of the reasonable employee reading the rules at issue, contrary to the Respondent's arguments in part as discussed below, should address the whole rules, and the topics covered in the handbook in which the rules in question are covered, but that context is not automatically the entirety of the handbook. Where there is a basis for considering more that an entire rule as it appears in a wider section, it will be considered as per below.

With these initial teachings in mind, it is appropriate to turn to the complaint allegations and the individual rules in contest.

4. The Respondent's social media policy - complaint paragraph 4(a)

The complaint allegation addressing certain language from the social media portion of the handbook has been quoted supra. Here the entire social media policy from the employee handbook is here quoted in full.

> Social Media Policy
>
> EchoStar regards Social Media-blogs, forums, wikis, social and professional networks, virtual worlds, user-generated video or audio - as a form of

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[4] These topics comprise: Employment, Compensation & Benefits, Code of Business Ethics, Employee Conduct, Information Systems, Safety, General Information, Conclusion.

communication and relationship among individuals. When the company wishes to communicate publicly-whether to the marketplace or to the general public-it has well-established means to do so. Only those officially designated by EchoStar have the authorization to speak on behalf of the Company through such media.

We recognize the increasing prevalence of Social Media in everyone's daily lives. Whether or not you choose to create or participate in them is your decision. You are accountable for any publication or posting if you identify yourself, or you are easily identifiable, as working for or representing EchoStar.

You need to be familiar with all EchoStar policies involving confidential or proprietary information or information found in this Employee Handbook and others available on eSource. Any comment directly or indirectly relating to EchoStar must include the following disclaimer: "The postings on this site are my own and do not represent EchoStar's positions, strategies or opinions."

You may not make disparaging or defamatory comments about EchoStar, its employees, officers, directors, vendors, customers, partners, affiliates, or our, or their, products/services. Remember to use good judgment.

Unless you are specifically authorized to do so, you may not:

> Participate in these activities with EchoStar resources and/or on Company time; or
> Represent any opinion or statement as the policy or view of EchoStar or of any individual in their capacity as an employee or otherwise on behalf of EchoStar.

Should you have questions regarding what is appropriate conduct under this policy or other related policies, contact your Human Resources representative or the EchoStar Corporate Communications Department at [contact information deleted].

a. The arguments of the parties

The General Counsel argues that although the various "social media" represent,

> [A] cutting-edge vehicle for employee communication with the public and third parties, the standards governing permissible limits on employee statements are time-tested and settled. An employer can no more infringe on protected activity engaged in over social media than it could prohibit protected water-cooler conversation or handbills. [G C' Br. at 14.]

The General Counsel independently challenges two elements of the quoted rule: the disparaging comments prohibition and the prohibition against use of social media on the Respondent's equipment or on Company time. It is well to address the two elements separately below.

(1) The Prohibition against disparaging comments about EchoStar, its employees, officers, directors, vendors, customers, partners, affiliates, or our, or their, products/services

The General Counsel argues that the handbook's "blanket" prohibition of employee "disparaging comments" against the Respondent, its employees officers, directors, vendors, customers, partners, affiliates, or the Respondent's or the others', products and services "fails to make exception for statements and comments that, although critical or harsh, may enjoy the 'Act's protection" (GC' Br. at 15).

Illustrating the range of statements protected under the Act, the General Counsel argues,

> [S]tatements to the public or other third parties that criticize an employer remain protected as long as they are: (1) related to an ongoing labor dispute; and (2) "not so disloyal, reckless, or maliciously untrue as to lose the Act's protection." *Am. Golf Corp.,* 330 NLRB 1238, 1240 (2000), affirmed sub nom *Jensen v. NLRB,* 86 Fed Appx. 305 (9th Cir. 2004). The Board will even tolerate "intemperate, abusive, or inaccurate" statements made about an employer in the course of organizing, so long as there is no intention to circulate information "known to be false." *Great Lakes Steel,* 236 NLRB 1033, 1036 (1978) (citing *William C. Linn v. United Plant Guard Workers, Local 114,* 383 U.S. 53, 61 (1966). [G C' Br. at 15–16]

The General Counsel argues that under established Board law, the rule is overbroad in its language.

> [T]he Board has found that an employer violates Section 8(a)(1) of the Act by maintaining rules that are so broad that they would reasonably be construed to limit protected criticism of the employer. See *Lafayette Park Hotel,* 326 NLRB at 828 (rule against "false, vicious, profane, or malicious" statements about the employer was overbroad) (citing *Cincinnati Suburban Press,* 289 NLRB 966, 966 n.2, 975 (1988); *Southern Maryland Hosp. Ctr.,* 293 NLRB 1209, 1221 (1989) (rule against "derogatory attacks" was unlawful), enfd in rel. part, 916 F.2d 932 (4th Cir. 1990). See also, *Great Lakes Steel,* 236 NLRB at 1037 (rule against distributing "libelous, defamatory, scurrilous, abusive, or insulting" literature was unlawfully overbroad).
>
> Indeed, in *Southern Maryland Hosp.,* the Board explicitly noted that one of the definitions of "derogatory" is "expressive of low estimation of reproach . . . *disparaging*" 293 NLRB at 1222 (emphasis added). Therefore, a rule prohibiting "disparagement" of the company is equally overbroad. (G C' Br. at 16.)

While the General Counsel does not argue that the prohibition of "defamatory" comments is improper, the government emphasizes that the language of the rule—"disparaging or defamatory comments"— makes it clear that the prohibition applies to both types of comments and not only to comments which are disparaging and defamatory.

The Respondent argues that in the instant case the rules under attack must be tested by the narrow proposition of whether or not an employee would reasonably construe the language to prohibit or chill Section 7 activity and that in each instance the answer is no. The Respondent on brief at 9 turns to the specific language here at issue:

First, the phrase "disparaging or defamatory comments about EchoStar, its employees . . , "is not materially different from the language the Court of Appeals for the District of Columbia found to be lawful in *University Medical Center* v. *NLRB,* 335 F.3d 1079, 1088–1089 (D.C. Cir. 2003) ("insubordination, refusing to follow directions, obey legitimate requests or orders, or other disrespectful conduct") and *Adtranz ABB Daimler-Benz Transportation* v. *NLRB,* 253 F.3d 19, 22–23 (D.C. Cir. 2001) ("using abusive or threatening language to anyone on Company premises"). As in those cases, EchoStar's policy simply directs employees to "comply with generally accepted notions of civility." Id. at 323.

Further the Respondent urges that the language under attack is but a small part of a larger rule and the larger handbook as a whole. In such a context, argues the Respondent,

> a reasonable EchoStar employee would not view the phrase, "disparaging or defamatory comments," as preventing the employee from engaging in activity protected by Section 7. [R. Br.' at 9.]

The Respondent in the instant analysis and in others addressed below emphasizes the handbook's savings clause quoted supra. Thus counsel for the Respondent argues on brief at 11–12:

> [T]he disputed phrase also must be read along with the introductory language found on the second page of the Handbook which states: "[o]ne or more of the polices set forth in this Handbook may be affected by the application of law. Should a conflict arise between a EchoStar policy and the law, *the appropriate law shall be applied and interpreted so as to make the policy lawful* in that particular jurisdiction." [Emphasis added.]
>
> GC cannot reasonably ignore this directive, or assume that a reasonable employee would ignore, or would not understand the import of the directive.
>
> . . . .
>
> The question is not whether an "unlawful" rule is "saved" by such a provision. Instead, the question is whether a "reasonable" employee, who had a question regarding the interpretation of a policy, would be influenced by such a provision. EchoStar submits that the answer must be "yes"—that a reasonable employee would read the introduction to the handbook and understand that EchoStar's intends for its policies to be interpreted in a lawful manner, rather than simply declare the introductory language as meaningless drivel.

(2) The Prohibition against use of social media on the Respondent's equipment or on Company time

The General Counsel argues that the new forum of social media combined with the "incredible mobility" of smart phones allow employees to engage in social media activities without resorting to the use of the employer's computers or employer internet connections. Thus, argues the General Counsel, employees are entitled to engage in social media use during

breaks and after work in nonwork areas just as they may engage in any other Section 7 activities citing *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 803 fn. 10 (1945). See also *UPS Supply Chain Solutions, Inc.,* 357 NLRB No. 106, slip op. at 2 (2011). *Our Way,* 268 NLRB 394 (1983).

5 The General Counsel proceeds to argue on brief at 18:

The Board has delineated that "[t]he expression 'company time' does not clearly convey to employees that they may solicit on breaks, lunch, and before and after work." *Winkle Bus Company, Inc.,* 347 NLRB 1203, 1215 (2006) (citing *Laidlaw Transit, Inc.,* 315 NLRB 79, 82 (1994). Therefore, the Board has found that bans on employees engaging in protected activity during "company time" are presumptively invalid. Id Again, the Respondent's Handbook provides no clarification or narrowing interpretations of "Company time" and there is no indication that any lawful limits were otherwise communicated to employees. Therefore, this portion of the Respondent's Social Media policy is also facially overbroad and unlawful under longstanding Board precedent.

The Respondent counters in its reply brief at 10:

Unlike solicitation, which plainly involves the exercise of rights protected by Section 7, the vast majority of social media activity that occurs during the work day involves personal matters unrelated to the exercise of rights protected by Section 7 that takes place during working time. Therefore, while a solicitation ban that encompasses all "company time" necessarily goes too far and infringes on an employee's rights to engage in protected solicitation activity during non-working times, a similar ban on social media activity is not necessarily overbroad. Instead, given the pervasive use of social media for personal matters unrelated to Section 7 during working time, a ban against social media on "company time" reasonably would be construed as nothing more than prohibiting employees from engaging in personal activities during working time.

The Respondent argues further on brief at 15:

. . .[W]hile an employer cannot lawfully restrict employees from soliciting on "company time" - and EchoStar's Solicitation in the Workplace Policy, found on page 21 of the Handbook, lawfully prohibits solicitation only during "working time" - the reference to "Company time" in the Social Media policy is not unlawfully broad. When the phrase is read in context, it is apparent that the phrase refers back to the use of EchoStar's equipment to access social media sites while working—a permissible restriction since an employee should only be using EchoStar's equipment if he or she is performing work for the company.

Moreover, as discussed above, the cited language from the Social Media policy must be read in conjunction with the statement that, if there is any conflict, the Handbook should not be read as prohibiting any lawful conduct, and if an employee has a question, he or she should contact Human Resources for more information. Also, the fact that no one has actually interpreted or applied this language as prohibiting conduct protected by Section 7, weighs in favor of Echo Star, as well.

b. Analysis and conclusions

The facts are not in dispute and the parties clearly understand the law and have made scholarly arguments respecting the issue presented. Initially, the narrow question is whether the term "disparaging" in the handbook's admonition: **"**You may not make disparaging or defamatory comments about EchoStar, its employees, officers, directors, vendors, customers, partners, affiliates, or our, or their, products/services," improperly limits employee Section 7 rights. The parties have presented cases finding stronger language permissibly prohibited and other cases finding the prohibition of other characterized conduct to be impermissible. Where does "disparaging" fall within this range?

The Oxford English Dictionary (1933) defines "disparaging" in part as: "That disparages; that speaks of or treats slightingly, that brings reproach or discredit." The Board's adoption of Judge Marvin Roth's analysis in *Southern Maryland Hospital Center,* 293 NLRB 1209 (1989), is informative. Judge Roth considered an employer rule at 293 NLRB 1222:

> The General Counsel contends, and I agree, that rule 25 of the revised policy 4 is overly broad because it combines a lawful prohibition of "malicious gossip" with an unlawful prohibition of "derogatory attacks" on hospital representatives. "Malicious" has been defined as given to or marked by malice, i.e., "intention or desire to harm another usually seriously, through doing something unlawful or otherwise unjustified; willfulness in the commission of a wrong; evil intention." In contrast "derogatory"means "expressive of low estimation or reproach . . . disparaging, detracting, degrading, depreciatory." *Webster's Third New International Dictionary* (1981). Thus for example, an assertion that an employer overworks or underpays its employees, which would constitute the most elementary kind of union propaganda, could fairly be regarded as "derogatory" toward the employer, but would not, absent unusual circumstances, be "malicious." In *Linn v. Plant Guards, Local 114,* 383 U.S. 53, 61–63 (1966), the Court held that:
>
> > [A]lthough the Board tolerates intemperate, abusive and inaccurate statements made by the union during attempts to organize employees, it does not interpret the Act as giving either party license to injure the other intentionally by circulating defamatory or insulting material known to be false . . . . [T]he most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth.
>
> Thus the Board with Court approval has consistently held that an employer may lawfully maintain a rule that prohibits "malicious"statements, i.e., statements "deliberately and maliciously made, with knowledge of their falsity or with reckless disregard of the truth," but may not prohibit "merely false" union propaganda. *Radisson Muehlebach Hotel,* 273 NLRB 1464 (1985); *Stanley Furniture Co., 271* NLRB 703, 704 (1984); *American Cast Iron Pipe Co.,* 234 NLRB 1126, 1131 (1978), enfd. 600 F.2d132, 136–137 (8th Cir. 1979). In the present case, Rule 25 goes beyond even a prohibition against "merely false" propaganda to prohibit even truthful union propaganda, which may be regarded as "derogatory" because it places the Hospital or its representatives, including Dr. Chiaramonte, in an unfavorable light. Therefore the rule is unlawful.

I make the threshold finding that the term "disparaging" like the term "derogatory," and as analyzed in *Southern Maryland Hospital,* 293 NLRB 1209 (1989), goes beyond proper

employer prohibition and intrudes on employees Section 7 activities. Thus, I find that a reasonable employee—who I also find will take the English language at its fair and correct meaning, would read the prohibited action "disparaging" to intrude on that employees protected activity and the employee's Section 7 activities would be impermissibly chilled thereby. See also the Board's recent decision in *Costco Wholesale Corp.,* 358 NLRB No. 106 (August 27, 2012*).*

This finding, however, is not determinative of the result herein. The Respondent argues as noted above that the broader context of the rule and the handbook saves any possible violation that might be possible, if the rule were standing in isolation. This argument has several levels. First, does the rule which provides a broader context than the single word in isolation negate the finding that a reasonable employee would have his or her Section 7 activities chilled?

The rule is:

> You may not make disparaging or defamatory comments about EchoStar, its employees, officers, directors, vendors, customers, partners, affiliates, or our, or their, products/services. Remember to use good judgment.

I find that neither the conjoined restriction: disparaging or defamatory comments nor the rule ending admonition: "Remember to use good judgment," provides saving context which renders the rule permissible. I find the rule when read as quoted by a reasonable employee would still chill such an employee's exercise of his or her Section 7 rights.

The Respondent further argues that the handbooks "saving clause," which has been quoted in full supra, saves the instant rule from invalidity. Two separate elements of the clause are relevant here:

> Should you have questions about the Handbook, please contact the Human Resources Department.
>
> Should a conflict arise between an EchoStar policy and the law, the appropriate law shall be applied and interpreted so as to make the policy lawful in that particular jurisdiction.

I find that the "savings clause" which appears on page two of the 2011 handbook does not save the rule, which appears on page 13 of the handbook, under challenge here. First, a general admonition that if an employee has questions to talk to human resources does not create a legal loop that an employee must jump through before the force of the rules may be tested. Doubt, worry, the various restricting cautions an employee may feel in noting a rules possible reach do not require that employee to voice his or her fears and trepidations to the restricting institutions agents of authority.

Similarly a general clause or other language asserting that a document should be applied and interpreted in such a manner that it is legal proper does not save an otherwise invalid rule under the Act. I specifically find that a reasonable employee would not react to these clauses by losing the chill that the rule under challenge causes.

Finally, I am aware of the subtlety of the analysis—with dictionaries in hand – that this analysis has required. It is correct to assert that a reasonable employee would not resort to

multiple dictionaries to understand the employer's rules. First, that is of course an element of the chill that arises when an employee is in doubt. And, second, and importantly, when an argument is presented by the drafter of the rules at issue, it is the author of the rules who should have avoided the lack of simplicity, clarity, and its ambiguity. Only the employer could fix the problem at the drafting stage. The rules are rules of adhesion, issued to employees, not negotiated with each employee. As Chief Justice Warren stated in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 at 620 (1969):

> But an employer, who has control over that relationship and therefore knows it best, cannot be heard to complain that he is without an adequate guide for his behavior. He can easily make his views known without engaging in "brinkmanship'" when it becomes all too easy to "overstep and tumble [over] the brink," *Wausau Steel Corp. v. NLRB,* 377 F.2d 369, 372 (C.A. 7th Cir.1967). At the least, he can avoid coercive speech simply by avoiding conscious overstatements he has reason to believe will mislead his employees.

Based on all the above and the record as a whole, including the testimony of the witnesses considered in light of my evaluation of their credibility, I find the General Counsel has sustained his burden in this aspect of the case: paragraph 4(a) of the complaint. The Respondent's maintenance of the rule in question in the context and circumstances described chills employees Section 7 rights and therefore violates Section 8(a)(1) of the Act.

5. The Respondent's contact with media section - complaint paragraph 4(b)

The handbook rule challenged in complaint paragraph 4(b) states:

> Contact with Media
>
> The Corporate Communications Department is responsible for any disclosure of information to the media regarding EchoStar and its activities so that accurate, timely and consistent information is released after proper approval. Unless you receive prior authorization from the Corporate Communications Department to correspond, with members of the media or press regarding EchoStar or its business activities, you must direct inquiries to the Corporate Communications Department. Similarly, you have the obligation to obtain the written authorization of the Corporate Communications Department before engaging in public communications regarding EchoStar or its business activities.
>
> You may not engage in any of the following activities unless you have prior authorization from the Corporate Communications Department:
>
> • All public communication including, but not limited to, any contact with media and members of the press: print (for example newspapers or magazines), broadcast (for example television or radio) and their respective electronic versions and associated web sites. Certain blogs, forums and message boards are also considered media. If you have any questions about what is considered media, please contact the Corporate Communications Department.

• Any presentations, speeches or appearances, whether at conferences, seminars, panels or any public or private forums; company publications, advertising, video releases, photo releases, news releases, opinion articles and technical articles; any advertisements or any type of public communication regarding EchoStar by the Company's business partners or any third parties including consultants.

If you have any questions about the contact with media policy, please contact the EchoStar Corporate Communications Department . . . [contact references deleted].

a. The arguments of the parties

The General Counsel contends the handbook's "Contact with Media" policy is unlawful in its entirety. Counsel for the General Counsel argues that the rule prohibits employees from all correspondence or communication with the media or the press and further prohibits all employee "public communications" about the Respondent, including all speeches or appearances, whether in a public or private forum, in-person, on broadcast media, or in print. The policies, argues the General Counsel, directly contravene established Board law protecting precisely these specific types of communications by employees.

The General Counsel argues on brief at 19:

> It has long been settled that employees seeking to "improve terms and conditions of employment or otherwise improve their lot" have the Section 7 right to seek the support for their cause "outside the immediate employee-employer relationship." *Eastex, Inc.,* v. NLRB, 437 U.S. 556, 565-66, 569-70 (1978) (finding that employee petitions to legislators on labor issues are protected activity). This protection extends to a variety of communications with third parties, including appeals to the press, the public at large, and even an employer's clients. See, e.g*., Misericordia Hosp. Medical. Ctr. v. NLRB,* 623 F.2d 808, 813 (2d. Cir. 1980) (employee submission of critical report to an accreditation committee); *Valley Hosp. Med. Ctr.,* 351 NLRB 1250, 1252 (2007) (employee's appeals for public support made in a newspaper article); *Handicabs, Inc.,* 318 NLRB 890, 896 (1995) (employees discussing complaints and unionization problems with clients), *enforced,* 95 F.3d 681 (8th Cir. 1996). An employer may not require employees to seek prior authorization for such activities. *Trump Marina Assoc.,* 355 NLRB No. 107[] (2010)*, incorporating by reference,* 354 NLRB No. 123 [], slip op. at 3 (2009 (requiring prior authorization before speaking to the news media is an unlawful policy), and enforced*,* 435 Fed Appx. 1 (D.C. Cir. 2011).
>
> The Handbook's broad prohibition of all public, private, and media communications about the Respondent without the company's prior approval clearly runs afoul of these rights. Certainly, the Respondent has a legitimate interest in controlling the content and timing of the release of certain business information. But instead of tailoring a communications policy to meet that legitimate need, this rule broadly prohibits all disclosures about the Respondent "or its business activities"without prior approval. Then it specifically and exhaustively lists and forecloses avenues of communication normally open to employees for publicizing workplace issues and disputes. Everything from national TV appearances to speeches in private forums is prohibited. An employee hardly

needs to "reasonably construe" this rule in order to understand that many Section 7 activities are prohibited, because the unlawful restrictions are clear on the face of the rule. Indeed, a plain reading of the rule would prohibit appearances or speeches about the Respondent at Union rallies and pickets. The only portion of this rule that could arguably withstand scrutiny would be the instruction to employees to generally direct media inquiries to the Corporate Communications Department. But even that provision is overbroad insofar as it does not clarify that employees may also choose to speak to the inquiring media about labor disputes on their own behalf. Thus, the Respondent's entire policy regarding Contact with Media is overbroad in violation of Section 8(a)(1) of the Act.

The Respondent argues vociferously that an employee reading the handbook's contact with media policy would not reasonably construe the policy as prohibiting Section 7 activities. This is so the Respondent asserts because the policy must be viewed in context and "nothing in the policy states, or even suggests that employees cannot seek out the media to make public statements regarding their wages, benefits or terms and conditions of employment." (R.' Br. at 17.) The Respondent notes there are many and varied legal and other restrictions on publicly traded, media based companies and would be evident to employees, the policy at issue only limits employee communications with "members of the media or press regarding EchoStar or its business activities." And, this rule, like the handbook's code of business ethics financial reporting section, addresses the responsibilities of a public company. The Respondent summarized on brief at 18:

> In short, when viewed in context, is clear that the Contact with Media policy is lawfully directed at controlling communications that are intended or may appear to be made on behalf of EchoStar regarding EchoStar or its business, or communications that may violate EchoStar's financial disclosure restrictions.

Further the Respondent is at pains to distinguish the Board and Court cases finding impermissible restriction where rules could be reasonably interpreted to restrict employee communication respecting a labor dispute. Thus at 19 of the Respondent's brief:

> EchoStar's policy applies only to media communications regarding "EchoStar or its business activities." Read together, and in the broader context of the Handbook as a whole, these terms could not reasonably be interpreted as encompassing a labor dispute. Instead, these terms reasonably would be viewed as relating to disclosures' regarding EchoStar's business, such as communications about upcoming program changes, new technology like the recently advertised "Hopper", and communications that could violate FCC and SEC regulations.

In its reply brief at 11 the Respondent again urges that the policy be read in context:

> The policy restricts only the disclosure of information regarding "Echo Star or its business activities." When read in context, the policy does not restrict the exercise of rights protected by Section 7.

The Respondent asserts that the General Counsel ignores the fact that the Respondent is a public company subject to information restriction. It notes that the policy is confined to information regarding “EchoStar and its business activities” and that nothing in the policy suggests that the restrictions encompass disclosures regarding wages, hours, terms and conditions or employment, or labor disputes. Thus, the Respondent urges, the instant case is different from cases such as *Trump Marina Associates, LLC,* 354 NLRB 1027 (2009), enfd. 435 Fed. Appx. 1 (D.C. Cir. 2011) which restrict any contact with the media.

Finally the Respondent again urges that the handbook directs employees to construe any ambiguous provisions as being consistent with the applicable law, and to ask for more information if employees have any questions.

b. Analysis and conclusions

The parties’ arguments present the issues that in this case, as in the prior instance, require focus on the challenged language in context. The stark prohibition of communication with the media by employees is impermissible. It is not impermissible to prohibit employees speaking on behalf of the Respondent without actually obtaining such authority prior to the employee’s purported official communication. The Respondent argues a reasonable employee reading the rule in the context of the entire rule and the entire handbook would realize the limitation is the permissible one of limiting official employee contact with the media to those employees who have the authority to do so.

I am sympathetic to the type of context argument the Respondent makes herein. Employees, including the construct “the reasonable employee, are not stupid and will take the fair meaning from the entirety of a rule or document where appropriate. Here, however, I simply differ with the argument of the Respondent on the facts. I do not find the larger context saves the prohibition. Put another way, having found the narrow rule improper, I do not find that a reasonable employee would have perceived the rule to be benign as the Respondent argues it would be perceived. I make this finding even given that the General Counsel bears the burden of establishing the violation alleged.

First, I find the rule does not to a reasonable employee limit its reach to official acts or communications. Second, I do not find considering the entire handbook as a single context changes a reasonable employee’s understanding of the rule. Finally, as in the previous allegation, I do not find the “savings clause language” of the handbook effective to save the otherwise violative rule here.

Based on all the above and the record as a whole, including the testimony of the witnesses considered in light of my evaluation of their credibility, I find the General Counsel has sustained his burden in this aspect of the case: paragraph 4(b) of the complaint. The Respondent’s maintenance of the rule in question in the context and circumstances described chills employees Section 7 rights and therefore violates Section 8(a)(1) of the Act.

6. The Respondent’s confidential information section - complaint paragraph 4(c)

The complaint allegation at paragraph 4(c) is quoted supra. Here the entire confidential information section from the employee handbook is quoted in full.

Confidential Information

During the course of employment, you may have access to, or acquire confidential or proprietary information about, EchoStar, its affiliates or its customers. Some of our most valuable assets are not in a tangible form; rather they are intellectual property, which includes trademarks, service marks, patents and copyrighted material. Also included is confidential, proprietary information such as trade secrets, satellite technology, customer lists, vendor lists, pricing lists, computer systems technology, employee information, sales and profit data, and strategic and business plans (for instance, possible mergers and acquisitions).

This information is the exclusive property of EchoStar. You must handle it in strict confidence. You must not discuss it with or disclose it to outsiders without the prior written authorization of duly authorized Company personnel, both during and after employment with the Company. Similarly, you are responsible for the internal security of confidential information; you must not discuss it with or disclose it to another employee unless he or she has a specific need to know and only when you are authorized to discuss or disclose it.

Confidential information may not be used for your own benefit during or after employment with the Company. You may not use recording devices in the workplace to capture, record or otherwise copy confidential information unless duly authorized to do so. Examples of recording devices include but are not limited to copiers, computers, computer equipment, facsimile machines, cameras, camera/video cellular phones and video/audio recorders.

In addition, you must not engage in securities transactions on the basis of information that is unavailable to the general public and which, if known to outsiders, might affect investment decisions.

Employees who improperly use or disclose trade secrets or confidential business information, may be subject to disciplinary action, up to and including termination of employment and civil and/or criminal penalties for violations of, among other things, applicable securities laws.

a. The arguments of the parties

The General Counsel argues the rule is impermissibly overboard because it includes "employee information" in the list of proprietary information that the Respondent considers confidential and commands that employees may neither discuss nor disclose confidential information "to outsiders without prior written authorization" or "to another employee unless he or she has a specific need to know and only when you are authorized to discuss or disclose it," citing *Cintas Corp.,* 344 NLRB 943, 943 (2005); *Iris USA, Inc.,* 336 NLRB 1013, 1013, fn.1, 1018 (2001); *Flamingo Hilton-Laughlin,* 330 NLRB 287, 288 fn.3 (1999).

While the counsel for the General Counsel notes some cases permit employers to define "employee information" as confidential, they emphasize such a rule must be limited by context or language to alert employees that the rule does not restrict Section 7 activities. In re *Mediaone of Greater Florida, Inc.* 340 NLRB 277, 278 (2003). The General Counsel concludes on brief at 2:

> Finally, the rule is unlawful because an employer may not require employees to seek its permission as a precondition to engaging in protected activities. *Lutheran Heritage,* 343 NLRB at 655 (citing *Brunswick Corp,* 282 NLRB 794 (1987). The Respondent's Confidential Information rule requires employees to seek permission before disclosing any "employee information." This aspect of the rule is clearly unlawful as well. When the confidentiality rule is read in its entirety, therefore, employees would reasonably understand it to mean that they are not allowed to talk among themselves, let alone share information about their terms and conditions of employment with a Union representative or other third party, without first receiving permission from the Respondent. Board law is clear that such a rule is overbroad and a violation of Section 8(a)(1) of the Act.

The Respondent argues on brief at 23:

> It is sun-clear that this policy is legitimately meant to protect only proprietary or confidential information relating to EchoStar's business, and confidential information relating to EchoStar's employees. For example, the policy lawfully would prohibit one employee from divulging confidential information learned about another employee during the course of his/her work at EchoStar, such as the other employee's social security number, date of birth, medical condition, the medical condition of the employee's family members, the content of employee's disability application, information about wage garnishments, employee credit reports, criminal conviction reports, etc. EchoStar has a legal obligation to make sure that this kind of information is limited to those on a "need-to-know" basis, so that it is not misused in any respect.
>
> Significantly, the policy does not prohibit an employee from disclosing *his or her own* [emphasis in original] confidential information with another employee, much less prohibit an employee from discussing his or her wages or other terms and condition of employment with another employee. Such information is clearly not considered "confidential" under well-established Board law and, therefore, would not be prohibited by this policy.

The Respondent also argues that the identical rule was not challenged in an earlier case involving a related Respondent company.

In his reply brief counsel for the Respondent argues at 13–14:

> GC wrongly argues that EchoStar's Confidential Information policy violates the Act simply because it includes "employee information" among a summary of the things that constitute confidential information. In *Mediaone of Greater Florida, Inc.,* supra, the Board upheld a policy that similarly included "employee information" among a list of things that constituted confidential intellectual property. The Board reasoned in pertinent part as follows:

> . . .[W]e do not believe that employees would reasonably read this rule as prohibiting discussion of wages and working conditions among employees or with a union. Although the phrase "customer and employee information, including organization charts and databases" is not specifically defined in the rule, it appears within the larger provision prohibiting disclosure of "proprietary information, including *information assets and intellectual property*" and is listed as an example of "intellectual property." Other examples include "business plans," marketing plans, "trade secrets," "financial information," "patents, "and"copyrights." Thus, we find, contrary to our dissenting colleague, that employees reading the rule as a whole, would reasonably understand that it was designed to protect the confidentiality of Respondent's proprietary business information rather than to prohibit discussion of employee wages.[Footnote omitted.] 340 NLRB at 279.

> The same is true here. The reference to "employee information" in EchoStar's policy is simply part of a list of "proprietary information" and "valuable assets" that are not in tangible form. The list includes "trade secrets," "satellite technology," "customer lists," "vendor lists," "pricing lists," "computer systems technology," "sales and profit data," and "strategic and business plans." Thus, when read in context, the reference to "employee information" plainly refers to proprietary business information and would not reasonably be construed as prohibiting the disclosure of wages or terms and conditions of employment. [Footnote omitted.]

b. Analysis and conclusions

Once again the focus of this element of the case is not whether or not an employer may restrict employees' use of employee information, but rather whether or not a reasonable employee reading this rule would consider the rule as doing so. The focus of the analysis is consideration of the language in context. The Respondent again argues that a reasonable employee reading the entire rule would correctly perceive that the rule is directed to propriety information or confidential information about other employees.

The cases have been well laid out by the parties and quoted in part above. Most relevant, in my view, is the earlier quoted language from *Mediaone of Greater Florida, Inc.,* supra, quoted by the Respondent. It concludes, and I find applicable here, that the entire rule "*as a whole, would reasonably understand that it was designed to protect the confidentiality of Respondent's proprietary business information rather than to prohibit discussion of employee wages*." 340 NLRB at 279.

Here as in *Mediaone* the clear purpose and direction of the rule taken as a whole, which I find would be evident to a reasonable employee, addresses proprietary and business confidential information. I further find a reasonable employee reading the rule would understand that the rule did not cover or address the personal employee information that must be disclosable if Section 7 activities are to be allowed without improper fetter.

Accordingly, based on all the above and the record as a whole, including the testimony of the witnesses considered in light of my evaluation of their credibility, I find the General Counsel

has failed to sustain his burden in this aspect of the case: paragraph 4(c) of the complaint. The Respondent's rule in question when read by a reasonable employee in the context and circumstances described does not address and therefore does not chill employees Section 7 rights and therefore does not violate Section 8(a)(1) of the Act. Paragraph 4(c) of the complaint will be dismissed.

7. The Respondent's contact with government agencies – complaint paragraph 4(d)

The complaint allegation is quoted supra. The "Contact with Government Agencies" from the employee handbook is repeated below.

> Contact with Government Agencies
>
> Phone calls or letters from government agencies may occasionally be received. The identity of the individual contacting you should be verified. Additionally, the communication may concern matters involving the corporate office. The [Respondent's] General Counsel must be notified immediately of any communication involving federal, state or local agencies that contact any employee concerning the Company and/or relating to matters outside the scope of normal job responsibilities.
>
> If written correspondence is received, notify your manager immediately and forward the correspondence to the [Respondent's] General Counsel by PDF or facsimile and promptly forward any original documents. The General Counsel, if deemed necessary, may investigate and respond accordingly. The correspondence should not be responded to unless directed by an officer of the Company or the [Respondent's] General Counsel.
>
> If phone contact is made:
>
>> Take the individual's name and telephone number, the name of the agency involved, as well as any other identifying information offered; Explain that all communications of this type are forwarded to the Company's General Counsel for a response;
>>
>> Provide the individual with the [Respondent's] General Counsel's name and number … if requested, but do not engage in any further discussion. An employee cannot be required to provide information, and any response may be forthcoming after the [Respondent's] General Counsel has reviewed the situation; and
>>
>> Immediately following the conversation, notify a supervisor who should promptly contact the [Respondent's] General Counsel.

a. The arguments of the parties

The counsel for the General Counsel argues on brief at 22-–23:

The Handbook's comprehensive restrictions on employee contact with government agencies would reasonably be construed by employees to restrict their Section 7 rights. The rule limits the Respondent's employees' ability to participate in the Board's processes and would also be read to limit employees' ability to concertedly seek the assistance of other government agencies to improve working conditions. The rule instructs employees to immediately notify the Respondent's General Counsel of "any communication involving federal, state or local agencies that contact any employee" about the Respondent. If written correspondence is received, employees are instructed to forward it to the Respondent's General Counsel. If phone contact is made, employees are instructed to explain to the government agent that all communications are forwarded to the Respondent's General Counsel, and to provide that contact information, if asked. But the Handbook contains the following explicit instruction: "[D]o not engage in any further discussion. An employee cannot be required to provide information, and any response may be forthcoming after the General Counsel has reviewed the situation." Read together, these instructions convey the clear message that employees are not at liberty to independently discuss the Respondent or its business with any government agent. Although the Respondent may have a legitimate interest in coordinating its responses to government investigations or other actions, it may not do so through a policy that sacrifices its employees' rights to participate in those proceedings of their own accord or on a co-workers' behalf. Thus, the Acting General Counsel submits that this rule is unlawfully overbroad in violation of Section 8(a)(1).

The Respondent makes several arguments on brief at 21–22:

First, the policy only applies when governmental agencies contact EchoStar, at one of its business offices, with respect to EchoStar business matters. In other words, the policy only applies when a governmental agency is seeking an official response of some sort from EchoStar. Clearly, employees have no Section 7 rights to speak on behalf of Echo Star in this context.

Second, the policy only applies *to matters outside the scope of an employee's normal job responsibilities.* [Emphasis in original.] Presumably, a governmental agency such as the Board generally calls an employee at work on a limited basis, and then only to discuss matters relating to their job. This policy would not preclude such discussions.

Third, nothing in the policy states or suggests that it prohibits employees from contacting the Board or the Department of Labor, or any other government agency to discuss their terms and conditions of employment. They are free to do so during non-work time and in non-work areas, as is stated in EchoStar's solicitation policy. Also, if the employee is actually working on behalf of Echo Star when contacted by the Board or the Department of Labor, the individuals employed by those agencies will generally advise the employee as to his/her rights to speak to a government official about personal issues that the employee has experienced in the workplace.

When viewed in proper context, an employee would not reasonably construe the Contact with Government Agencies' policy as prohibiting the employee from engaging in activity protected by Section 7. The policy is clearly meant to manage statements employees make to governmental agencies that could be treated as admissions and bind the

company. There is also no evidence of record which indicates that EchoStar has ever enforced this policy against an employee who chose to exercise his right to speak to a Board agent, or any other governmental agency about an issue that affects the employee in his workplace, and the Handbook itself states that it is to be construed so as to comply with applicable law. Under these circumstances, an employee would not reasonably construe the policy as prohibiting the employee from engaging in protected conduct.

b. Analysis and conclusions

Once again the dispute between the parities is not the permissibility of an employer to prevent or restrict employee contact and communication with regulatory and other governmental agencies of all kinds; that is an undisputed unfair labor practice. Nor is the dispute whether or not an employer may restrict or control an employee's actions as a representative or agent of the Respondent in the employee's contacts and communication with regulatory and other governmental agencies; that is undisputedly permissible. The issue here is whether or not a reasonable employee reading the challenged rule would perceive the rule to be imposing the above-described narrow and permissible limitation on official contacts or the impermissible and overbroad general all purpose limitation and restriction on the employee's contacts including personal contacts with the Government. The complaint allegation encompasses the entire rule quoted above so, at the very minimum, the employee must be assumed to have read the entire rule as quoted.

The Respondent advances the same argument that prevailed in the immediately previous complaint allegation: the rule make it obvious to a reasonable employee that the limitations apply only to official contracts directed to the Respondent and not to the employee as an individual with individual information or questions.

I find the rule does not in its totality restrict its reach as the Respondent suggests. The rules reach respecting governmental contacts could have been easily defined or limited by explanation or example: the employees' rights to personal privacy and right to communicate respecting their own matters could have been reserved by the rule. The rule is not so clarified. There is no fair meaning to be taken from the context as in the consideration of the previous rule. I specifically find, as alleged, a reasonable employee would have been left in doubt about what the employee could or could not do under the rule and that doubt would chill that employees unfettered exercise of Section 7 rights.

Based on all the above and the record as a whole, including the testimony of the witnesses considered in light of my evaluation of their credibility, I find the General Counsel has sustained his burden in this aspect of the case: paragraph 4(d) of the complaint. The Respondent's maintenance of the rule in question in the context and circumstances described chills employees Section 7 rights and therefore violates Section 8(a)(1) of the Act.

8. The Respondent's investigations section – complaint paragraph 4(e)

The complaint allegation is quoted supra. Here the entire investigations section from the employee handbook is quoted in full.

Investigations

> EchoStar has the right, at any time, to investigate matters involving suspected or alleged violations of EchoStar policies, practices, expectations, any applicable law or any other behavior deemed relevant to employment with EchoStar. You are expected to cooperate fully with EchoStar investigations. You are also expected to maintain confidentiality and answer questions truthfully, completely and to the best of your ability.
>
> If you have any doubts as to the appropriateness of specific communications, you must seek guidance from your Human Resources representative of the Legal Department. If you fail to cooperate fully with an investigation you may be subject to disciplinary action, up to and including termination of employment.

a. The arguments of the parties

The General Counsel argues that the investigations section of the handbook which asserts that employees are "expected to maintain confidentiality" with regard to the Respondent's internal investigations of suspected violations of "policies, practices, expectations, or any applicable law" by employees is facially overbroad. Counsel for the General Counsel argue on brief at 26:

> The confidentiality policy contains no limiting language, and therefore appears to apply to all investigations and to all employees, whether the employee is herself under investigation, is cooperating with the investigation, or simply becomes aware of it. The rule contains no temporal restrictions either, so it appears to apply equally to ongoing investigations and closed matters. Yet, employees have the right to discuss disciplinary investigations involving themselves or fellow employees. *See Caesar's Palace,* 336 NLRB 271, **[272]s**lip op at 2 (2001) This rule would, therefore, tend to limit or chill those discussions, in violation of Section 8(a)(1) of the Act.

The General Counsel argues that the Board recently in *Hyundai America Shipping Agency, Inc.,* 357 NLRB No. 80 (2011), found an oral restriction that employees should not disclose any matters under investigation by the employer was unlawful. *Hyundai* holds an employer may have a legitimate interest in maintaining employee confidentiality during investigations in some circumstances, but in any given investigation it must balance this with the employees' right to discuss their terms and conditions of employment. The Board adopted the findings of Judge Gregory Z. Meyerson as to this rule who held it was necessary

> [T]o strike a balance between the employees' Section 7 right to discuss among themselves their terms and conditions of employment, and the right of an employer, under certain circumstances, to demand confidentiality. The burden is clearly with an employer to demonstrate that a legitimate and substantial justification exists for a rule that adversely impacts on employee Section 7 rights.
>
> I am of the view that in the matter at hand, the Respondent has failed to meet its burden. It is undisputed that the Respondent's managers and human resource supervisors routinely instruct employees involved in investigations not to talk with other employees about the substance of those investigations. Such admonitions are apparently given in

every case, without any individual review to determine whether such confidentiality is truly necessary. Under the Board's balancing test, it is the Respondent's responsibility to first determine whether in any give investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, and there is a need to prevent a cover up. Only if the Respondent determines that such a corruption of its investigation would likely occur without confidentiality is the Respondent then free to prohibit its employees from discussing these matters among themselves. There is no evidence that the Respondent conducts any such preliminary analysis. To the contrary, it seems that the Respondent merely routinely orders its employees not to talk about these matters with each other. 357 NLRB No. 80 (2011), at 15.

The General Counsel argues that the instant rule, as in *Hyundai,* is an unconditional prohibition without conditionality even as to the type of investigation or if an investigation is closed or on going. As such, the General Counsel argues:

[E]mployees would reasonably understand this rule to be a complete prohibition on discussing or disclosing information about the Respondent's internal investigations, including discussions that would otherwise be protected. This rule would, therefore, tend to interfere with or chill employees' Section **7** activities in violation of Section 8(a)(1) of the Act.

The Respondent argues on brief at 25:

Employers, like EchoStar, ask for confidentiality because they need to be able to conduct a fair and unbiased investigation into matters of importance, such as insider trading, theft, sexual harassment, etc. It is wholly unreasonable to find such a policy to be unlawful, as without it, no employer could ever conduct a proper investigation of serious matters. This is a clear over-reach by the GC, as it would invalidate almost every single sexual harassment and investigation policy and practice that exists at virtually every public company (and most non-public companies) throughout the United States.

. . . .

It is also important to note that in a case involving a related company, DISH, the GC did ***not*** take the position that this very same Investigations policy violated Section 7. [Emphasis in original, citation to record omitted.] The fact that the GC did not pursue this same argument in the DISH case is either direct evidence of an admission that this policy does not violate the Act, or it makes clear the fact that this policy was drafted in a way that even the GC is unable to tell whether or not it violates the Act.

b. Analysis and conclusions

The General Counsels cited case, *Hyundai America Shipping Agency, Inc.,* 357 NLRB No. 80 (2011), controls the result herein. As in *Hyundai,* there is no balancing under the Respondents rule. Applying *Hyundai,* the rule improperly restricts employee Section rights and therefore violates Section 8(a)(1) of the Act. The Boards even more recent holdings in *Flex Frac Logistics, LLC,* 358 NLRB No. 127 (2012), and *Banner Estrella Medical Center*, 358 NLRB No. 93 (July 30, 2012), further supports this finding.

Based on all the above and the record as a whole, including the testimony of the witnesses considered in light of my evaluation of their credibility, I find the General Counsel has sustained his burden in this aspect of the case: paragraph 4(e) of the complaint. The Respondent's maintenance of the rule in question in the context and circumstances described chills employees Section 7 rights and therefore violates Section 8(a)(1) of the Act.

9. The Respondent's disciplinary actions section – complaint paragraph 4(f)

The complaint allegation is quoted supra. Here the entire disciplinary actions section from the employee handbook is quoted in full.

> Disciplinary Actions
>
> Examples of conduct that is unacceptable and subject to disciplinary action up to and including termination of employment include, but are not necessarily limited to:
>
> > Carrying weapons of any kind into EchoStar facilities or onto EchoStar property, subject to state or local law;
> >
> > Making threats to or about other employees, customers or EchoStar property or facilities;
> >
> > Accessing confidential, proprietary or customer information or otherwise attempting to copy, record or remove such information from Company premises or systems without proper authorization;
> >
> > Theft or attempted theft of property or service from coworkers, customers or the Company – whether such theft or attempted theft is for you own personal benefit of for the benefit of someone else;
> >
> > Falsification of Company records (e.g., omitting facts or giving wrong or misleading information on an employment application, falsifying timecards or sheets or attempting to sign or punch a timecard or sheet other than one's own);
> >
> > Possession, distribution, sale or use of illegal drugs on Company premises;
> >
> > Unauthorized possession or use of alcoholic beverages on Company premises;
> >
> > Acts in violation of the law;
> >
> > Excessive absenteeism or tardiness;
> >
> > Insubordination (The refusal to follow a reasonable work directive or undermining the Company, management or employees);
> >
> > Refusal to work overtime when required;

> Sexual or other prohibited forms of harassment of employees, visitors and customers; or
>
> Violation of or failure to adhere to any EchoStar procedure, rule **,** regulation, system, standard or guideline whether in this Handbook, posted or communicated in training material, verbally, in memo form or observed in practice.

a. The arguments of the parties

The General Counsel challenges a single item in the above list of examples of "conduct that is unacceptable and subject to disciplinary action up to and including termination of employment." The item is "Insubordination" and the attack includes its conjoined parenthetical definition: "(The refusal to follow a reasonable work directive or undermining the Company, management or employees)." The General Counsel argues on brief at 28;

> This is unlawfully ambiguous and overbroad because the phrase "undermining the Company" is vague and the conduct that might be included in this category is highly subjective. It could reasonably be read to include many forms of conduct employees might engage in to improve working conditions, but that have the effect of undermining the Respondent's interests, from the Respondent's point of view. For example, such clearly protected activities as striking, picketing, or petitioning an employer's clients could be viewed as "undermining" the Respondent. The rule is not tailored or clarified in any way. Because this rule would have the tendency to chill employees who would be uncertain about whether it covered their protected activities, it is unlawful.

The General Counsel argues that in those cases in which the Board has declined to find violative similar "prohibited conduct" rules such as, for example: conduct that "does not support [the employer's] goals and objectives." *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), *enfd mem,* 203 F.3d 52 (D.C. Cir. 1999), the rules have contained language clarifying or limiting the rule and alerting employees to the type of "negative" or "damaging" conduct targeted by the rule. Counsel for the General Counsel argue on brief at 28–29:

> These [permitted] rules, on their face, characterize the scope of detrimental conduct (i.e. "unprofessional," "unethical," damaging to reputation, or "adversely affect[ing] job performance") that will not be tolerated. By contrast, the Respondent's Handbook provides no clarifying language. And the Respondent provided no evidence that it separately communicated clarifications so that employees would not construe the rule to limit protected activities.

> The Respondent argues on brief at 26:
>
> … Any employee who reads the entirety of the Disciplinary Action policy would clearly understand that EchoStar is merely prohibiting insubordinate conduct, which is certainly a lawful exercise of its right to manage the workforce.
>
> Further, the policy must be viewed in context the Handbook language stating that it is to be construed as being consistent with applicable law.

Finally, it is also important to note that in a case involving a related company, DISH, the GC did ***not*** take the position that this very same sentence fragment violated Section 7.

b. Analysis and conclusions

It is well to keep the disciplinary rule, and its list of examples, especially the single example with its included definition under challenge, in mind. The single example is noted:

> Insubordination (The refusal to follow a reasonable work directive or undermining the Company, management or employees);

Once again the reasonable employee test must be used. Would a reasonable employee reading the prohibition backed by its explicit potential of discipline read the phrase "undermining the Company, management or employees" as including elements of that employee's Section 7 rights as the General Counsel argues or would that employee read the rule as only applying "insubordinate conduct" as defined by common usage as the Respondent urges?

I find that as to this allegation, the General Counsel is clearly correct, a reasonable employee would read the rule, in its fragmentary form or in its larger complete form as explicitly prohibiting "undermining" activities. The Respondent cannot successfully argue that the rule's language is self limiting to the term insubordination. The rule in its parenthetical definition of the term "insubordination" broadens the term beyond its meaning in the English language by adding the words: "or undermining the Company, management or employees." The definitional inclusion leaves the correct meaning of the word insubordination behind and freights the word and the rule with the impermissibly overbroad limitation of no "undermining". The Respondent may find no shelter in the cases addressing the term "insubordination." The Respondent, the rule's creator, has created a Frankenstein definition within the rule that creates a new word form perhaps, but that parenthetically expanded form retains the violative overreach of the grafted term "undermining." There is no doubt and I find that a reasonable employee seeing the prohibition, under threat of discipline, of engaging in "undermining" would be cautioned in raising matters or grievances which might be perceived by the Respondent as undermining the Company, management,or employees. This is the classic example of a rules chilling employee protected activities.

The Respondent has argued that in an earlier case, the General Counsel did not challenge the rules in question to the extent undertaken herein. I find that fact immaterial. The General Counsel, as the prosecutor under the Act, may change his mind and prosecute more broadly or more narrowly. The task of the Board and its administrative law judges is to determine if the prosecution in any given case is sustainable under the law and the evidence. The General Counsel's evolving, changing, expanding or narrowing view of violations of the Act, absent allegations and evidence of specific bad faith independent of simple changes of position among cases, is simply not my concern.

Based on all the above and the record as a whole, including the testimony of the witnesses considered in light of my evaluation of their credibility, I find the General Counsel has sustained his burden in this aspect of the case: paragraph 4(f) of the complaint. The

Respondent's maintenance of the rule in question in the context and circumstances described chills employees Section 7 rights and therefore violates Section 8(a)(1) of the Act.

5 On the basis of the above findings of fact and on the entire record herein, I make the following conclusions of law.

Conclusions of Law

10 1. The Respondent, EchoStar Technologies, L.L.C., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by maintaining, publishing and distributing to employees by hardcopy and intranet availability an employee handbook which 15 contains the following rules:

(a) A rule prohibiting employees from making disparaging comments about EchoStar, its employees, officers, directors, vendors, customers, partners, affiliates, or our, or their, 20 products/services.

(b) A rule prohibiting employees from use of personal social media – blogs, forums, wikis, social and professional networks, virtual worlds, user generated video or audio – with EchoStar resources and/or on company time.

25

(c) A rule prohibiting disclosure of information to the media including the press, print, broadcast and their electronic versions and associated websites regarding EchoStar and its activities without the prior approval of the Company.

30 (d) A rule prohibiting employee contact with government agencies and employee disclosure of governmental agency initiated communications to the Company.

(e) A rule prohibiting employee disclosure of Company investigations involving 35 EchoStar policies, practices, expectations, any applicable law or any other behavior deemed relevant to employment with EchoStar.

(f) A rule prohibiting insubordination to the extent the rule defines insubordination as undermining the Company, management, or employees.

40

3. The unfair labor practices described above are unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

45 **REMEDY**

I found that the Respondent violated Section 8(a)(1) of the Act by maintaining overbroad rules which would chill a reasonable employee's Section 7 activities. The proper remedy in such cases is an order commanding the employer to cease and desist from maintaining the rules, 50 directing the employer to remove and expunge the rules from the employee handbook or comparable published materials, to inform employees of the withdrawal of the rules, and to post a remedial notice. E.g., *Taylor Made Transportation Services*, 358 NLRB No. 53 (2012);

Double Eagle Hotel & Casino, 341 NLRB 112, 115–116 (2004), enfd. as modified 414 F.3d 1249 (10th Cir. 2005). Accordingly, I shall recommend that the Respondent be ordered to cease and desist from maintaining the rules found violative, and any other similar rules, to remove the rules from its employee handbook, notify employees in writing of the rules' rescission, and to post the attached remedial Board notice.

In addition to physical correction or republishing of the employee handbook with the violative rules removed and the physical posting of paper notices, the revised or corrected handbook and notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent still customarily communicates with its members and/or employees by such means. *J. Picini Flooring*, 356 NLRB No. 9 (2010). The posting of the paper notice by the Respondent shall occur at all facilities where employees subject to the handbook are employed and at those facilities at places where notices to employees are customarily posted.[5]

Based upon the above findings of fact and conclusions of law, and on the basis of the entire record herein, I issue the following recommended Order.[6]

ORDER

The Respondent, EchoStar Technologies, LLC, of Englewood, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a rule in its employee handbook prohibiting employees from making disparaging comments about EchoStar, its employees, officers, directors, vendors, customers, partners, affiliates, or our, or their, products/services;

(b) Maintaining a rule in its employee handbook prohibiting employees from use of personal social media —blogs, forums, wikis, social and professional networks, virtual worlds, user generated video or audio—with EchoStar resources and/or on Company time.

(c) Maintaining a rule in its employee handbook prohibiting disclosure of information to the media including the press, print, broadcast and their electronic versions and associated web sites regarding EchoStar and its activities without the prior approval of the Company.

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[5] The General Counsel notes on brief at 34:

> When an employer maintains company-wide rules that are found to be unlawful, the Board will generally order a remedy coextensive with the maintenance of the rules. *Long Drug Stores of Calif.,* 347 NLRB 500, 501 (2006). So, if the employer has facilities nationwide, then the appropriate remedy will likewise be nationwide. *Guardsmark, LLC,* 344 NLRB 809, 812 (2005), (remedy nationwide), enfd in rel. part, 475 F.3d 369, 380-81 (noting that "only a company-wide remedy extending as far as the company-wide violation can remedy the damage").
>
> The case citations are on point and controlling.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Maintaining a rule in its employee handbook prohibiting employee contact with government agencies and employee disclosure of governmental agency initiated communications to the Company.

5

(e) Maintaining a rule in its employee handbook prohibiting employee disclosure of company investigations involving EchoStar policies, practices, expectations, any applicable law or any other behavior deemed relevant to employment with EchoStar.

10

(f) Maintaining a rule in its employee handbook prohibiting Insubordination to the extent the rule defines insubordination as undermining the Company, management, or employees.

15

(g) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

20

(a) Remove and discontinue the rule in our employee handbook prohibiting employees from making disparaging comments about EchoStar, its employees, officers, directors, vendors, customers, partners, affiliates, or our, or their, products/services and notify employees in writing of the rules rescission and notify employees in writing of the rules' rescission.

25

(b) Remove and discontinue the rule in our employee handbook prohibiting employees from use of personal Social Media—blogs, forums, wikis, social and professional networks, virtual worlds, user generated video or audio—with EchoStar resources and/or on Company time and notify employees in writing of the rules rescission and notify employees in writing of the rules' rescission.

30

(c) Remove and discontinue the rule in our employee handbook prohibiting disclosure of information to the media including the press, print, broadcast and their electronic versions and associated web sites regarding EchoStar and its activities without the prior approval of the Company and notify employees in writing of the rules rescission.

35

(d) Remove and discontinue the rule in our employee handbook prohibiting employee contact with government agencies and employee disclosure of governmental agency initiated communications to the Company and notify employees in writing of the rules rescission.

40

(e) Remove and discontinue the rule in our employee handbook prohibiting employee disclosure of company investigations involving EchoStar policies, practices, expectations, any applicable law or any other behavior deemed relevant to employment with EchoStar and notify employees in writing of the rules rescission.

45

(f) Remove and discontinue the rule in our employee handbook prohibiting Insubordination to the extent the rule defines insubordination as undermining the Company, management or employees and notify employees in writing of the rules rescission.

50

(g) Within 14 days after service by the Region, post copies of the attached notice at all of its facilities in which employees covered by the employee handbook are employed, which notice is set forth in the "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 27, in English and such other languages as are determined necessary by the Regional Director, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure the notices are not altered, defaced or covered by other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on the companies intranet and internet sites if then in use, and/or other electronic means, if the Respondent customarily communicates with its members and/or employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the closed facility at any time after October 13, 2011.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

3. Paragraph 4(c) of the complaint is without merit and is hereby dismissed.

Dated, Washington, D.C. September 20, 2012

____
Clifford H. Anderson
Administrative Law Judge

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7. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board (the NLRB) has found that we violated Federal labor law by maintaining and applying improper rules restricting employee rights in our employee handbook and has ordered us to remove and rescind those rules and notify employees that this has been done.

The NLRB has also has ordered us to post and obey this notice.

We give you the following assurances.

WE WILL NOT maintain, publish, and distribute to employees a rule in our employee handbook prohibiting employees from making disparaging comments about EchoStar, its employees, officers, directors, vendors, customers, partners, affiliates, or our, or their, products/services;

WE WILL NOT maintain, publish, and distribute to employees a rule in our employee handbook prohibiting employees from use of personal Social Media - blogs, forums, wikis, social and professional networks, virtual worlds, user generated video or audio - with EchoStar resources and/or on company time.

WE WILL NOT maintain, publish, and distribute to employees a rule in our employee handbook prohibiting disclosure of information to the media including the press, print, broadcast and their electronic versions and associated web sites regarding EchoStar and its activities without the prior approval of the Company.

WE WILL NOT maintain, publish, and distribute to employees a rule in our employee handbook prohibiting employee contact with Government Agencies and employee disclosure of governmental agency initiated communications to the Company.

WE WILL NOT maintain, publish, and distribute to employees a rule in our employee handbook prohibiting employee disclosure of company investigations involving EchoStar policies, practices, expectations, any applicable law or any other behavior deemed relevant to employment with EchoStar.

WE WILL NOT maintain, publish, and distribute to employees a rule in our employee handbook prohibiting insubordination to the extent the rule defines insubordination as undermining the Company, management or employees.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL remove and discontinue the above rules, deleting them from our employee handbook or withdraw the handbook, issuing a new replacement handbook and WE WILL notify employees in writing of the rules' rescission.

EchoStar Technologies, L.L.C.
(Employer)

Dated ____________________ By ____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

600 17th Street, 7th Floor, North Tower
Denver, Colorado 80202-5433
Hours: 8:30 a.m. to 5 p.m.
303-844-3551.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 303-844-6647.