

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

_____)	
T-MOBILE USA, INC.)	
)	
and)	Case 14-CA-106906
)	
COMMUNICATIONS WORKERS OF)	
AMERICA)	
_____)	
T-MOBILE USA, INC.)	
)	
and)	Cases 28-CA-106758
)	28-CA-117479
COMMUNICATIONS WORKERS OF)	
AMERICA, LOCAL 7011, AFL-CIO)	
_____)	
METROPCS COMMUNICATIONS, INC.)	
)	
and)	Case 02-CA-115949
)	
COMMUNICATIONS WORKERS OF)	
AMERICA)	
_____)	
T-MOBILE USA, INC.)	
)	
and)	Cases 28-CA-128653
)	28-CA-129125
COMMUNICATIONS WORKERS OF)	10-CA-128492
AMERICA, AFL-CIO)	
_____)	

**RESPONDENT'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Mark Theodore, Esq.
Irina Constantin, Esq.
PROSKAUER ROSE LLP
2049 Century Park East, Ste. 3200
Los Angeles, CA 90067
Tel. 310.557.2900

T-Mobile's work rule prohibiting "arguing or fighting," "failing to treat others with respect," and "failing to demonstrate appropriate teamwork," and its policy restricting unauthorized use of its information technology resources are lawful. Administrative Law Judge Dibble's¹ findings and conclusions that these policies are unlawful are erroneous. The arguments advanced by Counsel for the General Counsel ("General Counsel") in support of these conclusions likewise depart from the Board's governing analysis and the objective, reasonable interpretations of the language at issue.² A proper interpretation of the language at issue compels the conclusion that reasonable employees would not understand the policies to speak to or restrict their ability to engage in activities protected by the National Labor Relations Act, as amended (the "Act"). To reach a different result, the General Counsel urges the Board to engage in speculation about the potential effects of the policies and depart from the framework the Board has adopted to assess the legality of similar rules. This framework requires consideration of the context within which the challenged workplace rule is found, prohibits reading separate provisions in isolation, and focuses on whether the rule has a legitimate purpose and – in the absence of evidence that it was promulgated in response to concerted activity – whether the employer has given its employees reason to conclude that the rule would reach such activity.

¹ Hereafter, the Administrative Law Judge would be referred to as "ALJ."

² Counsel for the Communications Workers of America ("Union") filed and then indicated to the Respondent that it did not wish to rely upon its brief titled "Charging Party's Opposition to Respondent's Exceptions to the Decision of the Administrative Law Judge." Accordingly, the Respondent does not address that brief here. Respondent submits that, although that brief appears on the National Labor Relations Board's ("Board")'s e-filing system as formally filed, it should not be considered by the Board in reaching a decision.

Union counsel served this brief upon the Respondent via email on May 6, 2015. Minutes later on the same date, Union counsel sent a second email attaching a different brief, titled "Charging Party's Brief in Support of Counsel for the General Counsel's Exceptions to the Decision of the Administrative Law Judge" and stating: "CORRECTION: The correct brief is attached to this email. Please replace the previously sent attachment with this." As the Union thus revoked service of its first brief and indicated that it should be disregarded, the Respondent asks that the Board do just that. Should the Union dispute the relevancy of its brief titled "Charging Party's Opposition to Respondent's Exceptions to the Decision of the Administrative Law Judge" and the Board deems it necessary, the Respondent is willing to submit the emails at issue to the Board.

The General Counsel's arguments advocate an approach that gives little weight to these established considerations and, instead, contends workplace rules, including those at issue here, should be deemed unlawful unless their provisions are expressly defined to exclude Section 7 activity. Yet, the Board has explicitly stated that such a requirement goes too far. Cognizant of the fact that requiring an express exclusion of Section 7 activity under every policy provision would not be "reflective of the realities of the workplace," the Board has explained that it "will not require employers to anticipate and catalogue in their work rules every instance in which, for example, the use of abusive or profane language might conceivably be protected" by the Act. *Lafayette Park Hotel*, 326 NLRB 824, 826 (1998). The law established by the Board in this area does not require a definition for everything. For this reason, and because it is simply lawful and appropriate for employers to maintain rules that promote collaboration and respect in carrying out business activities and that protect the company, employees and customers from financial harm and privacy violations, the Board should reject the arguments advanced by the General Counsel and sustain the Respondent's exceptions.

I. The Administrative Law Judge Incorrectly Concluded that the Respondent Cannot Maintain a Policy Requiring Teamwork and Respect

While the General Counsel acknowledges, in broad-brush fashion, that employers have legitimate and vital interests in establishing basic civility and collaboration in the workplace, it suggests that these interests cannot be promoted through policies that prohibit "arguing or fighting" or require employees to treat their colleagues with respect in the course of their business dealings, because behavior that contravenes these basic guideposts for civility, such as "rancor" and "quarrel," are necessary components of any exercise of Section 7 conduct. (*See* Counsel for the General Counsel's Answering Brief to Respondent's Exceptions, hereafter "General Counsel Answering Br.," at 11-15). This line of argument is based on two premises

that have been rejected by the Board and the courts – that that the right to engage in protected, concerted activity deprives employers of the privilege to promote workplace civility, and that employees are incapable of exercising their Section 7 rights within acceptable norms of civil behavior. Both the Board and the courts have recognized that neither of these two notions is true.

The Board has acknowledged that employers are not obliged to license concerted speech or activity simply because it comes about in the context of protected conduct. In *Southwestern Bell Telephone Co.*, 200 NLRB 667 (1972), for example, the Board held that the employer lawfully prohibited its employees from wearing shirts bearing the slogan “Ma Bell is a Cheap Mother” during contract negotiations despite the fact that the slogan referenced employees’ view of the company’s bargaining position with respect to wages. *Id.* 668-70. It did so “[i]n view of the controversial nature of the language used and its admitted susceptibility to derisive and profane construction,” and upon the determination that the employer could “legitimately ban the . . . slogan as a reasonable precaution against discord and bitterness between employees and management to assure decorum and discipline in the plant.” *Id.* The United States Supreme Court and the Board similarly have recognized that actions and statements that are characterized as “disloyal” to the employer, such as remarks that “disparage[]” the employer's product, lose protection under the Act. *See National Labor Relations Bd. v. Local Union No. 1229 (Jefferson Standard)*, 346 U.S. 464 (1953) (criticism of television station’s programming was not protected under the Act); *Patterson Sargent*, 115 NLRB 1627 (No. 255) (1956) (observing that even if employee statements were considered “a concerted activity of the kind intended to be embraced in Section 7, the means . . . used . . . [may] deprive[] the attacker[] of the protection of that section, when read in the light and context of the purpose of the Act.”);

Five Star Transportation, Inc., 349 NLRB 42, 44-47 (2007), *enfd.* 522 F.3d 46 (1st Cir. 2008) (employees lose the Act's protection if their means of protest are “flagrantly disloyal”).

Therefore, the contention that employers cannot regulate employee conduct that is considered detrimental to civility in the workplace through rules that may, by some chance, reach Section 7 activity of that nature is unsupported.

Furthermore, courts have recognized that employees are quite capable of discussing their working conditions and advocating for their interests without engaging in harmful speech or behavior and, in fact, have rejected the notion that because “union campaigns are heated affairs, often spawning intemperate language,” employees cannot be expected “to comport themselves with general notions of civility and decorum” when engaging in protected conduct. *See Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. N.L.R.B.*, 253 F.3d 19, 27 (D.C. Cir. 2001). In *Adtranz*, the Court of Appeals for the District of Columbia expressly rebuffed such assertions, which are similar to those made by the General Counsel here. The court concluded that the “abusive or hostile nature” of Section 7-related speech can “strip such language of its protected status,” and that “it is not unlawful for a company to threaten punishment for the use of . . . language” of this kind. *Id.* As the court observed, it cannot be acceptable “to use the most offensive and derogatory racial or sexual epithets, so long as those using such language are engaged in union organizing or efforts to vindicate protected labor activity.” *Id.* A contrary conclusion necessitates too “low [an] opinion of the working people [the unions] purport[] to represent.” *Id.* Certainly, “America’s working men and women are as capable of discussing labor matters in intelligent and generally acceptable language as those lawyers and government employees who . . . condescend them.” *Id.* In other words, the notion that because union activity might be passionate on occasion does not mean an employer cannot expect its employees generally to act

in a civil manner; the existence of Section 7 rights simply do not replace all other workplace standards.

There is nothing in the record in this case to indicate that reasonable employees would feel incapable of or restrained in exercising the Section 7 statutory rights within the lawful, basic civility guidelines set forth in the Respondent's *Commitment to Integrity* policy. The obvious purpose of this policy is to foster a work setting in which employees feel they are treated with respect, as well as collaboration, and effective communication. These are vital interests of employees and employers alike, and the workplace rule that promotes them here does not unlawfully infringe upon the exercise of other protected conduct.

II. The Administrative Law Judge Incorrectly Concluded that the Respondent's Policy Providing that Users of Information Technology Resources May Not Permit Non-Approved Individuals Unauthorized Access to those Resources and the Information Stored on Them Is Unlawful

In arguing that language in T-Mobile's *Acceptable Use* policy providing that "[u]sers may not permit non-approved individuals access to information or information resources, or . . . information transmitted via . . . or stored in these resources" is unlawful, the General Counsel again urges the Board to entirely ignore the context within which this restriction is found, and speculates about its potential impact on employees' ability to use the email system for purposes of organizing or engaging in other concerted conduct. The General Counsel does so despite the Board's clear guidance that workplace rules are not to be read in isolation, and notwithstanding that the Respondent's rules, found within the same *Acceptable Use Policy*, permit incidental use of T-Mobile's email systems beyond business purposes and are thus compliant with the Board's holding in *Purple Communications*, 361 NLRB No. 126 (Dec. 11, 2014).

The General Counsel argues that "[i]t is of no moment that the rule . . . exists within a security provision," as the "relevant inquiry" concerns how the rule would reasonably be

interpret[ed].” (General Counsel Answering Br. at 5). As the Board has recognized, however, the location of a rule – that is, the context within which it is placed – naturally informs its reasonable interpretation. This context, which the General Counsel urges the Board to ignore and which focuses on the security of computing resources, establishes that a reasonable employee would not, in any way, interpret the challenged language to encompass the exercise of Section 7 rights.

As set forth in the Respondent’s Brief in Support of Exceptions, the rule at issue is found in sub-section 4.4 of the Security Section of the *Acceptable Use Policy*. (See Respondent’s Brief in Support of Exceptions at 17-19). This Section primarily addresses topics such as the protection of User IDs and passwords used to access information technology networks, attempts to disable or defeat security controls, improper uploading or distribution of pirated software, and the propagation of viruses. (*Id.*). While the General Counsel discounts all of this surrounding language and goes as far as arguing that it is irrelevant, in its context, sub-section 4.4 clearly speaks to legitimate and significant security-related concerns about the Respondent’s information technology systems and does not address or reasonably encompass Section 7 activity of any kind. A different conclusion requires a strained interpretation of a workplace rule that serves a very obvious and limited purpose.

Further, while the General Counsel acknowledges the legitimacy of that purpose and the Respondent’s “interest in maintaining [the] security of its information technology resources, sensitive customer information or trade secrets,” it suggests that the Respondent may protect that interest without a policy altogether, because “[e]mployees would clearly know that it is unethical conduct, whether a specific rule exists or not, to turn over sensitive resources and information to outside third parties.” (General Counsel Answering Br. at 5). Thus, the General Counsel

imputes knowledge to employees about what is “unethical,” yet asserts these same employees would also interpret the language at issue in an illogical and irrationally restrictive manner absent explicit definitions and/or exclusions. The General Counsel cannot have it both ways, where hypothetical employees “know” certain things without a policy but are somehow not smart enough to discern others by reading a rule in its proper context. Nevertheless, it would be both legally and morally irresponsible for the Respondent to rely on a simple assumption of what employees might deem unethical in attempting to safeguard the vast amounts of data stored on its systems, including customers’ financial and personally identifying information, employees’ personal information, and information pertaining to the Company’s products, finances or business strategies. Furthermore, the General Counsel’s position that employees would understand the work-related obligations related to protecting this information without being advised of them is inconsistent with the position that when it comes to the ability to communicate amongst each other or with their union representatives about terms and conditions of employment, employees need explicit directives informing them that they are permitted to do so. (*See, e.g.,* General Counsel Answering Br. at 9).

The General Counsel’s assertion that Security sub-section 4.4 “focuses more on information than information resources” is irrelevant and entirely unexplained. The sub-section’s provisions do not unlawfully restrict employees’ ability to share information about wages or terms and conditions of employment that they and other third parties are rightfully entitled to access. The sub-section focuses on *unauthorized* use of Company systems, and the Respondent has a right to prohibit use of its systems, including email, to employees who do not have any need for them. The same concept applies to the information stored and transmitted by the Company via these systems.

The Respondent is authorized to restrict access to any information that is not necessary to employees' ability to function in the work environment and perform their daily duties, including, for example, information acquired or maintained by the Company for business purposes unrelated to employees' terms of employment. The Respondent's exercise of discretion in determining the scope of an employee's access to its systems and the data stored on them does not, in any way, lead to the conclusion that the Respondent attempts to "cloak information about wages, hours, [and] terms and conditions of employment by storing them . . . on its information technology systems," as the General Counsel suggests. (General Counsel's Answering Brief at 5-6). There is no evidence, or even an allegation, that the Respondent has been unlawfully restrictive in setting systems access parameters for its employees. Indeed, the General Counsel acknowledges that the wide majority of employees have equal access to information pertaining to work rules, requirements and guidelines on the Company's Intranet systems. (General Counsel's Answering Br. at 4).

The General Counsel engages in nothing other than rank speculation in arguing that the "practical impact" of sub-section 4.4 is to prevent the employees from the sharing this information with each other or their union representatives. There is zero evidence of such impact in the record. (General Counsel's Answering Br. at 6). There is also zero evidence that this rule has discouraged any employees from cooperating with the Board; the notion that this particular provision of the information technology systems *Security* policy might have such impact is far-fetched. (*Id.*).

Furthermore, the Board's decision in *Purple Communications* does not, as the General Counsel contends and as the ALJ found, invalidate the Respondent's rule. That decision held that employees who have access to an employer's email system as part of their job generally

may, during non-working time, use the email system to communicate about wages, hours, working conditions and union issues. In allowing for incidental, non-business related use of the Company's technology systems, the *Acceptable Use* policy comports with this requirement. See (Respondent's Brief in Support of Exceptions at 19).

Moreover, the Board's holding in *Purple Communications* is limited in nature, applies to employees only, and does not govern employers' exercise of discretion in determining how, to whom and to what extent they will grant access to their information technology systems. (Id. at 20-22). As such, the decision does not invalidate a legitimate workplace rule requiring employees to refrain from granting non-employees and others unapproved access to those systems and, consequently, to sensitive information that they would otherwise not be permitted to have. The rule speaks to unauthorized access, not to the sharing of information that recipients are entitled to obtain. Furthermore, the notion that anything in sub-section 4.4 might lead reasonable employees to believe that they must forego use of the email system for purposes of undertaking Section 7 activity and, instead, engage in "face-to-face" communication, has no relationship to the obvious intent of the policy. (General Counsel's Answering Br. at 6). As discussed above, there is no evidence, and certainly no allegation that the Company has unlawfully restricted use of its email system to prohibit non-working time discussions about wages, hours, working conditions or union issues.

CONCLUSION

The rules at issue in the Company's *Commitment to Integrity* and *Acceptable Use* policies are lawful. The Board should sustain the Company's exceptions and dismiss the Complaint with respect to these rules.

PROSKAUER ROSE LLP

By:



Mark Theodore, Esq.
Irina Constantin, Esq.
Attorneys for Respondent,
T-MOBILE USA, INC.

49478835v3

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I declare that: I am employed in the county of Los Angeles, California. I am over the age of eighteen years and not a party to the within cause; my business address is 2049 Century Park East, Suite 3200, Los Angeles, California 90067-3206.

On May 20, 2015, I served the following document, described as:

**RESPONDENT'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE**

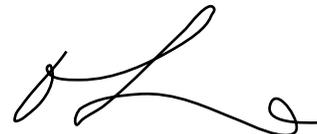
- by placing the original and a true copy thereof enclosed in sealed envelopes addressed as follows:
- (By Electronic Filing) By transmitting a true and correct copy thereof via electronic filing through the National Labor Relations Board's website, filed with the Board's Office of Executive Secretary.
- (By Email) By transmitting a true and correct copy thereof via electronic transmission to the above/below listed email address.

SEE ATTACHED SERVICE LIST

- (By Fax) By transmitting a true and correct copy thereof via facsimile transmission to the addressee.
- (By Mail) I am "readily familiar" with the Firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- By causing such envelope to be delivered by the office of the addressee by **OVERNIGHT DELIVERY** via Federal Express or by other similar overnight delivery service.
- (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on May 20, 2015 at Los Angeles, California.

Olia A. Golinder
Type or Print Name



Signature

SERVICE LIST

Olurotimi Solanke, Esq.
Counsel for the General Counsel
National Labor Relations Board
Region 14
1222 Spruce Street, Room 8.302
St. Louis, MO 63103-2829
Tel: (314) 539-7770
Email: Olurotimi.Solanke@nlrb.gov

Via E-mail

Richard Rosenblatt, Esq.
and
Stanley M. Gosch, Esq.
Rosenblatt & Gosch, PLLC
8085 E. Prentice Avenue
Greenwood Village, CO 80111-2705
Email: rrosenblatt@cwa-union.org
sgosch@cwa-union.org

Via E-mail

Glenda L. Pittman, Esq.
Glenda Pittman & Associates, P.C.
4807 Spicewood Springs Rd., Ste 1140
Austin, TX 78759-8479
Email: gpittman@pittmanfink.com

Via E-mail

Gabrielle Semel, District Counsel
and
Atul Talwar, Esq
Communication Workers of America
District 1 – Legal Department
350 Seventh Avenue
18th Floor
New York, NY 10001-5013
Email: gsemel@cwa-union.org
atalwar@cwa-union.org

Via E-mail