

Oral Argument Not Yet Scheduled

**Nos. 16-60284, 16-60497**

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**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**T-MOBILE USA, INC.**

**Petitioner/Cross-Respondent**

v.

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

and

**COMMUNICATIONS WORKERS OF AMERICA**

**Intervenor**

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**NATIONAL LABOR RELATIONS BOARD**

**Petitioner**

v.

**METROPCS COMMUNICATIONS, INC.**

**Respondent**

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**ON PETITION FOR REVIEW, CROSS-APPLICATION FOR  
ENFORCEMENT, AND APPLICATION FOR ENFORCEMENT OF AN  
ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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## **STATEMENT REGARDING ORAL ARGUMENT**

The National Labor Relations Board submits that this case involves the application of well-established legal principles to a stipulated factual record, and that the case may accordingly be decided without oral argument. However, if the Court believes that oral argument would be of assistance, the Board respectfully requests the opportunity to participate.

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**BRIEF FOR  
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**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of T-Mobile USA, Inc. (“the Company”) for review, the cross-application of the National Labor Relations Board (“the Board”) for enforcement against the Company, and the application of

the Board for enforcement against MetroPCS Communications, Inc., of a Board Decision and Order issued against the Company and MetroPCS Communications on April 29, 2016, and reported at 363 NLRB No. 171. The Board had jurisdiction over the unfair-labor-practice proceeding below pursuant to Section 10(a) of the National Labor Relations Act, 29 U.S.C. §§ 151 et seq., as amended (“the Act”). 29 U.S.C. § 160(a). The Board’s Order is final with respect to all parties and this Court has jurisdiction pursuant to Section 10(e) and (f) of the Act, as the nationwide unfair labor practices occurred in part within this Circuit. 29 U.S.C. § 160(e), (f). The petition and applications are timely, as the Act provides no time limit for such filings. The Communications Workers of America intervened in support of the Board.

### **STATEMENT OF THE ISSUES**

1. Whether the Board is entitled to summary enforcement of its uncontested findings that the Company and MetroPCS Communications have maintained eleven written workplace rules that violate Section 8(a)(1) of the Act.

2. Whether substantial evidence supports the Board’s findings that employees would reasonably construe the language in four additional written workplace rules maintained by the Company as prohibiting protected activities, in violation of Section 8(a)(1) of the Act.

## STATEMENT OF THE CASE

The present case concerns the maintenance of workplace rules that would unlawfully tend to chill employees in the exercise of rights guaranteed by Section 7 of the Act. The case arises from the issuance of three unfair-labor-practice complaints by the Board General Counsel between March and August 2014 alleging, in relevant part, that fifteen workplace rules maintained by MetroPCS Communications and/or the Company violated Section 8(a)(1) of the Act. (ROA.696-97.)<sup>1</sup> The complaints were consolidated for hearing and the parties agreed to proceed on a stipulated record. (ROA.696; ROA.410-15.) An administrative law judge concluded that thirteen provisions in the Company's written rules violated the Act, and concluded that two additional provisions did not violate the Act. (ROA.710-11.) The Company filed exceptions before the Board with respect to two of the provisions found unlawful by the judge, and the Board General Counsel filed exceptions with respect to the two allegations dismissed by the judge. (ROA.687.) MetroPCS Communications filed no exceptions to the judge's findings that it maintained four unlawful provisions. (ROA.687 n.5.)

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<sup>1</sup> "ROA" references are to the record on appeal. "Br." references are to the Company's opening brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

## **I. THE STIPULATED FACTS**

The Company provides telecommunications services and operates retail stores throughout the United States and Puerto Rico. (ROA.696; ROA.411.)<sup>2</sup> In the relevant period covered by the unfair-labor-practice complaints, the Company maintained a number of documents containing written rules and policies effective at all of the Company’s locations in the United States and Puerto Rico. (ROA.697; ROA.414.) The documents include an “Employee Handbook,” a “Code of Business Conduct,” and an “Acceptable Use Policy for Information and Communication Resources.” (ROA.687 & n.4; ROA.340, 378, 400.)<sup>3</sup>

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<sup>2</sup> The Board’s Order and this case involve both the Company and MetroPCS Communications, two entities described as being “affiliated” (ROA.411, Br. 6), or having “merged” (ROA.696; ROA.382). However, with respect to MetroPCS Communications the Board’s Order extends to just four unlawful rules, none of which was contested before the Board. (ROA.687 n.5, 692-93.)

<sup>3</sup> The Company also maintained: (i) a “Restrictive Covenant and Confidentiality Agreement,” effective May 2010 through August 2013, which contained a provision stating, in part, that employees must acknowledge that certain information related to the Company’s business, including “wage and salary information,” constitutes “confidential information” entitled to all protections given by law to trade secrets (ROA.697-99; ROA.369); and (ii) an “Employee Acknowledgement Form,” made effective in October 2010, which contains a provision stating, in part, that employees are required to report any violations of company rules, and to cooperate and participate in any investigation conducted by the Company or its designees. (ROA.697, 710; ROA.375.)

## **A. The Company’s Employee Handbook**

Relevant provisions in the Company’s Employee Handbook were made effective in January 2014. (ROA.697; ROA.415.)<sup>4</sup> The Employee Handbook defines its purpose as providing employees “with policies, guidelines, benefits and other information that is important to your success as a [T-Mobile US] employee.” (ROA.382.) Under the umbrella heading “Standards of Conduct,” the Employee Handbook contains a section stating:

### **Workplace Conduct**

[T-Mobile US] expects all employees to behave in a professional manner that promotes efficiency, productivity, and cooperation. Employees are expected to maintain a positive work environment by communicating in a manner that is conducive to effective working relationships with internal and external customers, clients, co-workers, and management.

(ROA.688; ROA.386.) Under the umbrella heading “Workplace Expectations,” the Employee Handbook contains an additional section stating:

### **Recording in the Workplace – Audio, Video, and Photography**

To prevent harassment, maintain individual privacy, encourage open communication, and protect confidential information employees are prohibited from recording people or confidential information using cameras, camera phones/devices, or recording devices (audio or video) in the workplace. Apart from customer calls that are recorded

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<sup>4</sup> A previous version of the Employee Handbook, effective August 2012 through May 2013, contained additional provisions stating, in part: (i) that the Employee Handbook “is a confidential and proprietary Company document, and must not be disclosed to or used by any third party without the prior written consent of the Company” (ROA.697-98; ROA.261); and (ii) that employees “must maintain the confidentiality of the names of the employees involved in [internal] investigations, whether as complainants, subjects or witnesses.” (ROA.702; ROA.296.)

for quality purposes, employees may not tape or otherwise make sound recordings of work-related or workplace discussions. Exceptions may be granted when participating in an authorized [T-Mobile US] activity or with permission from an employee's Manager, HR Business Partner, or the Legal Department. If an exception is granted, employees may not take a picture, audiotape, or videotape others in the workplace without the prior notification of all participants.

(ROA.689; ROA.393.)<sup>5</sup>

### **B. The Company's Code of Business Conduct**

The Company's Code of Business Conduct was made effective in May 2013. (ROA.697; ROA.414.) The Code of Business Conduct states that it is intended to help "clarify what's expected of [employees]," in order for employees to "act with integrity, treat each other with respect and take the appropriate actions to preserve T-Mobile's reputation." (ROA.344.) Under the umbrella heading "Conducting Business," the Code of Business Conduct contains a section stating, in part:

#### **Commitment to Integrity**

At T-Mobile, we expect all employees, officers and directors to exercise integrity, common sense, good judgment, and to act in a professional manner. We do not tolerate inconsistent conduct. While

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<sup>5</sup> The version of the Employee Handbook made effective in January 2014 also contains provisions stating, in part: (i) that "[e]mployees who feel they have not been paid all wages or pay owed to them, who believe that an improper deduction was made from their salary, or who feel they have been required to miss meal or rest periods, must immediately notify a Manager or HR Business Partner, or contact the Integrity Line" (ROA.705; ROA.389); and (ii) that "[a]ll inquiries from the media must be referred without comment to the Corporate Communications Department." (ROA.703; ROA.394.)

we cannot anticipate every situation that might arise or list all possible violations, the acts listed below are unacceptable.

...

- Making slanderous or detrimental comments about the Company, its customers, the Company's products or services, or Company employees

...

- Arguing or fighting with co-workers, subordinates or supervisors; failing to treat others with respect; or failing to demonstrate appropriate teamwork

(ROA.709; ROA.352.)<sup>6</sup>

### **C. The Company's Acceptable-Use Policy**

The Company's Acceptable-Use Policy was made effective in May 2011.

(ROA.697; ROA.415.) In defining its purpose, the Acceptable-Use Policy states that it "governs the ownership of T-Mobile information and sets forth rules and requirements for the use of T-Mobile information and communication resources."

(ROA.400.) The Acceptable-Use Policy defines the scope of "information and/or communication resources" as including, in part: "Information stored, transmitted or processed by the communications resources. Information may be in any form

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<sup>6</sup> The Code of Business Conduct also contains provisions stating, in part: (i) that "confidential information" includes certain employee information such as "addresses," "telephone numbers," and "contact information," and that the unauthorized use, access, or disclosure of such information is prohibited (ROA.699-800; ROA.361); and (ii) that "[p]ersonal information about employees, including for example, home addresses, must not be disclosed or used by employees except in the proper performance of their duties," and that unauthorized disclosure of such "confidential information" may subject employees to legal liability or discipline. (ROA.701; ROA.351.)

including paper (physical) or electronic format.” (ROA.400.) Under the section heading “4 SECURITY,” the Acceptable-Use Policy contains a provision stating:

4. Users may not permit non-approved individuals access to information or information resources, or any information transmitted by, received from, printed from, or stored in these resources, without prior written approval from an authorized T-Mobile representative.

(ROA.709; ROA.401-02.)<sup>7</sup>

## **II. THE BOARD’S CONCLUSIONS AND ORDER**

The Board (Chairman Pearce and Members Hirozawa and McFerran), in the absence of exceptions, adopted the administrative law judge’s recommended findings that the Company unlawfully maintained eleven workplace rules in violation of Section 8(a)(1) of the Act, and that MetroPCS Communications unlawfully maintained four of the same rules. (ROA.687 n.5, 691-93.) On the contested issues, the Board denied the Company’s exceptions and found that two rules restricting employee communications and employee disclosures violated the Act, and granted the Board General Counsel’s exceptions to find that two rules

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<sup>7</sup> The Acceptable-Use Policy also contains provisions stating, in part: (i) that using the Company’s “information or communication resources in ways that could reasonably be considered disruptive, offensive, or harmful to morale is prohibited” (ROA.706-07; ROA.400); and (ii) that prohibited uses of the Company’s information and communication resources include “[a]ny use that advocates, disparages, or solicits for . . . political causes, or non-company related outside organizations.” (ROA.707; ROA.401.)

restricting employee communications and workplace recording violated the Act. (ROA.687-88.)<sup>8</sup>

The Board's Order requires the Company and MetroPCS Communications to cease and desist from the unfair labor practices found, and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights. (ROA.692-93.) Affirmatively, the Board's Order requires the Company and MetroPCS Communications to rescind or revise the provisions at issue; furnish employees with written notice that the relevant unlawful provisions have been rescinded; and post a remedial notice. (ROA.692-93.)

### **SUMMARY OF ARGUMENT**

It is well settled that workplace rules violate the Act when they would tend to discourage employees from engaging in statutorily-protected conduct. This case involves a litany of unlawful written rules maintained by the Company and MetroPCS Communications with respect to their entire nationwide workforces, and most of those rules are not contested as being violations of the Act. In finding the four contested rules unlawful, the Board applied its well-established legal framework for analyzing workplace rules. The Board expressly considered each of

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<sup>8</sup> The Company's January 2014 Employee Handbook was made effective within six months of the unfair-labor-practice charges being filed, and thus the Board found or adopted the judge's findings that the Company violated the Act by both maintaining and promulgating the relevant provisions contained in that document. (ROA.687 n.4, 691-92.)

the four rules in context, and expressly found that employees *would* reasonably construe all four rules as restricting protected conduct. The Board's sensible findings are supported by substantial evidence and are entitled to deference given the Board's unique expertise in assessing the impact of purported unfair labor practices in the context of the employer-employee relationship.

The Company's "Workplace Conduct" policy and "Commitment to Integrity" policy both contain broad, ambiguous language that employees would reasonably interpret as prohibiting protected communications that they fear would be characterized as negative or divisive. Meanwhile, the Company's "Recording in the Workplace" rule and Section 4.4 of its Acceptable-Use Policy contain expansive bans on workplace recording and on the disclosure of information which are overbroad and which employees would reasonably construe as prohibiting, at least in part, protected recording and disclosures. The Board emphasized that the ambiguities in these rules would chill employees in the exercise of their statutory rights, and that such ambiguities must be construed against the Company as the promulgator of the rules. The Board's Order specifically permits the Company to simply revise its rules, and the Company could easily do so to accomplish its asserted interests without also infringing on its employees' rights.

In response to the Board's findings that these rules as presently written violate the Act, the Company attempts to defend hypothetical rules not actually

before the Court by focusing on unprotected conduct that is not enumerated in any of the rules, and by focusing on employer interests in restricting or banning *some* employee conduct while ignoring the Board's finding that such interests do not justify the breadth of the rules at issue. The Board's Decision and Order does not call into question an employer's potential interests in prohibiting abuse or harassment, the disclosure of confidential customer data, or other unprotected conduct. The only issue before the Court is whether substantial evidence supports the Board's findings that, as presently written, the Company's rules are unlawfully ambiguous or overbroad such that employees would reasonably construe them as restricting some protected conduct.

### **STANDARD OF REVIEW**

Based on its "cumulative experience" and "special competence" in the field of labor relations, the Board has the primary responsibility for "applying the general provisions of the Act to the complexities of industrial life," and the balance struck by the Board in reconciling the interests of labor and management "is subject to limited judicial review." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266-67 (1975) (internal quotation marks omitted); see *United Supermarkets, Inc. v. NLRB*, 862 F.2d 549, 552 (5th Cir. 1989). Thus, for example, reviewing courts "must recognize the Board's competence in the first instance" to judge the impact

on employees of language used in the context of the employer-employee relationship. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 620 (1969).

The Court will uphold the Board’s decision if it is reasonable and supported by substantial evidence on the record as a whole. *Strand Theatre of Shreveport Corp. v. NLRB*, 493 F.3d 515, 518 (5th Cir. 2007); *see* 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Substantial evidence means the degree of evidence which “*could* satisfy a reasonable factfinder.” *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 377 (1998) (emphasis in original); *see El Paso Elec. Co. v. NLRB*, 681 F.3d 651, 656 (5th Cir. 2012). Reasonable inferences drawn by the Board from its findings of fact may not be displaced by a reviewing court, even if the court might have reached a different conclusion had the matter been before it *de novo*. *United Supermarkets*, 862 F.2d at 551-52; *see Universal Camera*, 340 U.S. at 488.

## ARGUMENT

### **I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS THAT THE COMPANY AND METROPCS COMMUNICATIONS HAVE MAINTAINED ELEVEN WRITTEN RULES THAT VIOLATE SECTION 8(a)(1) OF THE ACT**

Before the Board, the Company filed exceptions with respect to only two of the rules found unlawful by the administrative law judge, and the Board adopted the judge’s findings that the Company violated Section 8(a)(1) by maintaining eleven additional rules. (ROA.687 n.5.) MetroPCS Communications filed no

exceptions to the judge's findings that it unlawfully maintained four of the same rules. (ROA.687 n.5, 692-93.) Thus, in the absence of exceptions, MetroPCS Communications and/or the Company violated the Act by unlawfully maintaining eleven written workplace rules:

- (i) Labeling the Employee Handbook a "confidential and proprietary" document that must not be disclosed to third parties, *supra* note 4;
- (ii) Requiring employees to maintain the "confidentiality" of the names of all employees involved in internal investigations, *supra* note 4;
- (iii) Requiring employees who feel they have not received proper wages or rest periods to contact a manager or human resources staff member, *supra* note 5;
- (iv) Requiring employees to refer all media inquiries to the Company without comment, *supra* note 5;
- (v) Prohibiting employees from using information or communications resources in ways that could be considered disruptive, offensive, or harmful to morale, *supra* note 7;
- (vi) Prohibiting employees from using information or communications resources to advocate, disparage, or solicit for outside organizations, *supra* note 7;
- (vii) Requiring employees to sign a Restrictive Covenant and Confidentiality Agreement defining "wage and salary information" as "confidential, secret and proprietary" information not subject to disclosure, *supra* note 3;
- (viii) Prohibiting employees from disclosing "confidential" information such as employee addresses, telephone numbers, and contact information, *supra* note 6;
- (ix) Prohibiting employees from disclosing employee addresses or other contact information, and threatening employees with discipline or legal liability for disclosing such "confidential information," *supra* note 6;
- (x) Prohibiting employees from making detrimental comments about the Company, *supra* p. 6; and
- (xi) Requiring employees to sign an Employee Acknowledgement Form stating that they will comply with such unlawful work rules and report others who do not comply, *supra* note 3.

(ROA.687-88 n.5.) The Board is entitled to summary enforcement of the portions of its Order relating to those eleven uncontested rules, including full summary enforcement against MetroPCS Communications. *Sara Lee Bakery Grp., Inc.*, 514 F.3d 422, 429 (5th Cir. 2008); *see* 29 U.S.C. § 160(e); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982).

The Company asserts that it has subsequently “modified” or “dropped” some of these unlawful rules, and contends that those rules are therefore “no longer at issue.” (Br. 9 n.4, 11 n.5, 32.) However, none of the Company’s assertions is supported by evidence in the record indicating when or how the Company purportedly removed the rules at issue, or what “modifications” it made to them. Even if there were record evidence that the Company had substantially complied with portions of the Board’s Order without a judicial mandate to do so, full enforcement of the Board’s Order by this Court would still be necessary in order to “provide an incentive for continued compliance through the possible sanction of contempt proceedings for violations.” *Paceco v. NLRB*, 601 F.2d 180, 184 (5th Cir. 1979) (quoting *NLRB v. S. Household Prods. Co.*, 449 F.2d 749, 750 (5th Cir. 1971)). Moreover, any unilateral rescission of the unlawful rules is immaterial insofar as the Company did not establish that it has satisfied the Board’s standard for the effective repudiation of unlawful conduct. That standard requires, for example, adequately publicizing the repudiation to the affected employees, and

assuring employees that in the future the Company will not interfere with the exercise of their Section 7 rights. *Passavant Mem'l Area Hosp.*, 237 NLRB 138, 138-39 (1978).<sup>9</sup> As such, the Board is entitled to full summary enforcement against MetroPCS Communications, and summary enforcement of the relevant portions of its Order against the Company.

**II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDINGS THAT FOUR ADDITIONAL WRITTEN RULES MAINTAINED BY THE COMPANY VIOLATE SECTION 8(a)(1) OF THE ACT**

**A. An Employer's Workplace Rule Is Unlawful if Employees Would Reasonably Construe Its Language as Prohibiting Conduct Protected by Section 7 of the Act**

Section 7 of the Act grants employees the “right to self-organization, to form, join, or assist labor organizations, . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and . . . to refrain from any or all of such activities . . . .” 29 U.S.C. § 157. In turn, Section 8(a)(1) makes it an unfair labor practice for employers to “interfere with, restrain, or coerce employees” in the exercise of such rights. 29 U.S.C. § 158(a)(1).

An employer thus violates Section 8(a)(1) by maintaining a workplace rule that would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.*, 203

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<sup>9</sup> The administrative law judge rejected the Company's argument that it had sufficiently repudiated one of the other uncontested unlawful rules (ROA.699), and the Company filed no exceptions to that finding, which was adopted by the Board.

F.3d 52 (D.C. Cir. 1999). Under the Board’s governing framework, a rule is unlawful if it explicitly restricts activities protected by Section 7. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). If the rule does not explicitly restrict protected activities, it is nonetheless unlawful if: “(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.” *Id.* at 647; *Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 208-09 (5th Cir. 2014). With respect to the four rules being contested before the Court, only the first prong of this latter analysis is at issue.

Under the first prong, in determining whether employees would reasonably construe a given rule as prohibiting protected activities, the Board will “give the rule a reasonable reading” and will “refrain from reading particular phrases in isolation.” *Lutheran Heritage Village-Livonia*, 343 NLRB at 646. The Board’s analysis turns on whether a reasonable employee “would” be chilled in the exercise of his or her statutory rights by the language in a given rule, not whether the rule “could be interpreted that way.” *Id.* at 647. However, if language would be considered ambiguous, any ambiguity in the rule must be construed against the employer as the promulgator of the rule. *Lafayette Park Hotel*, 326 NLRB at 828; *cf. NLRB v. Fla. Med. Ctr., Inc.*, 576 F.2d 666, 670 (5th Cir. 1978) (construing no-solicitation rule’s ambiguity against employer); *Fla. Steel Corp. v. NLRB*, 529 F.2d

1225, 1231 (5th Cir. 1976) (“At best, the [no-solicitation] rule is ambiguous, ‘and the risk of ambiguity must be held against the promulgator of the rule rather than against the employees who are supposed to abide by it.’” (citation omitted)).

**B. The Board Reasonably Found that Employees Would Construe Language in the Company’s “Workplace Conduct” Policy as Restricting Protected Conduct**

As shown below, well-established legal principles support the Board’s conclusion that employees would reasonably construe language in the Company’s “Workplace Conduct” policy as restricting potentially controversial or contentious communications that are protected by Section 7. (ROA.688-89.) The “Workplace Conduct” policy states, in full:

[T-Mobile US] expects all employees to behave in a professional manner that promotes efficiency, productivity, and cooperation. Employees are expected to maintain a positive work environment by communicating in a manner that is conducive to effective working relationships with internal and external customers, clients, co-workers, and management.

(ROA.688; ROA.386.) Specifically, the Board found that the second sentence in this policy violates the Act based on its vague, overbroad admonition that employees maintain a “positive work environment” by “communicating in a manner that is conducive to effective working relationships with . . . co-workers, and management.” (ROA.689.) Read in context, such ambiguous requirements would lead reasonable employees to refrain from engaging in the type of discussions, at times divisive, which are central to the rights protected by the Act.

**1. The Act guarantees employees the right to engage in free and frank discussions of often controversial or divisive subjects that are nonetheless protected by Section 7**

The Supreme Court has recognized a “congressional intent to encourage free debate on issues dividing labor and management.” *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 62 (1966). This congressional policy judgment “suffuses [the Act] as a whole” by favoring “uninhibited, robust, and wide-open debate in labor disputes,” and the “freewheeling use of the written and spoken word.” *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 68 (2008) (quoting *Old Dominion Branch 496, Nat’l Ass’n of Letter Carriers v. Austin*, 418 U.S. 264, 272-73 (1974)). The Board has observed in various contexts that the rights guaranteed by Section 7 are premised on the free and frank exchange of views concerning workplace grievances, the advantages and disadvantages of unionization, collective bargaining disputes, and other topics of mutual aid or protection. *See, e.g., Cement Transp., Inc.*, 200 NLRB 841, 845-46 (1972) (noting necessity of speech that might lead to “unrest and dissatisfaction” in context of union organizing campaign), *enforced*, 490 F.2d 1024 (6th Cir. 1974); *Bay Standard Prods. Mfg. Co.*, 167 NLRB 340, 346 (1967) (noting necessity of “frank, provocative, and not always complementary exchange of views” in context of initial demand for union recognition); *Bettcher Mfg. Corp.*, 76 NLRB 526, 527

(1948) (noting necessity of “natural rather than stilted” exchange of views in context of collective bargaining).

As a result, labor disputes are frequently “heated affairs” in which both “labor and management speak bluntly and recklessly, embellishing their respective positions with imprecatory language.” *Linn*, 383 U.S. at 58. A meeting between employees and management to discuss grievances, for example, “by its very nature requires a free and frank exchange of views . . . where bruised sensibilities may be the price exacted for industrial peace.” *Crown Cent. Petroleum Corp. v. NLRB*, 430 F.2d 724, 731 (5th Cir. 1970). Similarly, protected concerted activity often depends upon preliminary discussions involving employees with a wide range of views and opinions, and such discussions remain protected under the Act despite the inevitable consequence that some coworkers may feel “annoyed or otherwise upset.” *Blue Chip Casino, LLC*, 341 NLRB 548, 555 (2004). The mere possibility of disagreements among employees resulting in “discord” or “strife” is a necessary feature of the Act, not a permissible justification for an employer to restrict protected discussions. *Fredericksburg Glass & Mirror, Inc.*, 323 NLRB 165, 173-74 (1997) (quoting *Jeannette Corp. v. NLRB*, 532 F.2d 916, 919 (3d Cir. 1976)).

**2. Employees would reasonably construe maintaining a “positive work environment” by communicating in a manner “conducive to effective working relationships” as preventing potentially controversial or divisive discussions**

Applying the principles of *Lafayette Park Hotel* and *Lutheran Heritage Village-Livonia*, the Board found that employees would reasonably interpret the language at issue as “prohibiting disagreements or conflicts, including protected discussions that [the Company] subjectively deems to not be conducive to ‘a positive work environment.’” (ROA.689.) In accordance with the above-cited precedent and the realities of the workplace, the Board noted that labor disputes and union campaigns frequently involve “controversy, criticism of the employer, arguments, and less-than-‘positive’ statements about terms and conditions of employment.” (ROA.689.) Such communications are nonetheless protected by the Act, and indeed the proper functioning of the Act requires free and open discussions between coworkers or between employees and management. *See Brown*, 554 U.S. at 68; *supra* pp. 18-19. The Board thus found that the Company’s ambiguous rule would chill employees’ willingness to engage in potentially controversial, albeit protected, discussions that they fear would be characterized as negative or divisive. (ROA.689.)

Substantial evidence supports the Board’s reading of the language at issue. The terms “positive work environment” and “conducive to effective working relationships” are left undefined, and employees would have every reason to take

them at face value as prohibiting communications that are nominally negative, divisive, or disharmonious. The Board has consistently found similar language— involving vague invocations of “positivity” or “harmonious” working relationships without making any reference to unprotected conduct—to be unlawfully overbroad.<sup>10</sup> It is entirely rational and far from unprecedented for employees to fear that their employer would classify protected communications that are divisive as contrary to a “positive work environment.” *Cf. NLRB v. S. Md. Hosp. Ctr.*, 916 F.2d 932, 940 (4th Cir. 1990) (rejecting employer’s defense that protected employee criticisms might destroy “the positive work atmosphere,” and noting that “values of free speech and union expression outweigh employer tranquility in this instance”); *Teletech Holdings, Inc.*, 342 NLRB 924, 932 (2004) (finding supervisor violated the Act by orally admonishing employees to foster a “positive work environment” by refraining from speaking negatively about their jobs or the employer).

In addition, the Board considered the context of the language at issue in finding it unlawful. *See Flex Frac Logistics*, 746 F.3d at 209 (noting that the

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<sup>10</sup> *William Beaumont Hosp.*, 363 NLRB No. 162, 2016 WL 1461576, at \*2 (Apr. 13, 2016) (rule against “impeding harmonious interactions and relationships”); *Hills & Dales Gen. Hosp.*, 360 NLRB No. 70, 2014 WL 1309713, at \*1 (Apr. 1, 2014) (rules prohibiting “negative comments” and engaging in “negativity”); *2 Sisters Food Grp., Inc.*, 357 NLRB 1816, 1817 (2011) (rule requiring employees to “work harmoniously” with coworkers); *Claremont Resort & Spa*, 344 NLRB 832, 832 (2005) (rule prohibiting “negative conversations” about coworkers or managers).

Board “must refrain from reading particular phrases in isolation” (quoting *Lutheran Heritage Village-Livonia*, 343 NLRB at 646)). Given the ambiguity of the terms “positive work environment” and “conducive to effective working relationships,” employees would naturally look to other provisions in the Company’s written rules for guidance. The Board therefore concluded that employees would read the language at issue in the context of the Company’s other unlawful rules restricting employee communications, including prohibitions against “arguing” with coworkers and making “detrimental comments” about the Company. (ROA.352, 689.) Indeed, the sentence immediately preceding the “Workplace Conduct” policy expressly directs employees to the document containing those other unlawful rules, the Code of Business Conduct, for “more information on How We Play.” (ROA.386.)

The Board then considered the context provided by the first sentence in the “Workplace Conduct” policy, and concluded that it would not lead reasonable employees to construe the second sentence as being directed solely at unprotected conduct. (ROA.689.) The Company’s policy sets forth two distinct requirements that are related only by their appearance under the shared heading “Workplace Conduct.” The first sentence states that the Company expects employees to *behave* in a “professional manner that promotes efficiency, productivity, and cooperation.” (ROA.386.) The second sentence then places a restriction on the manner in which

employees may *communicate* with coworkers and management, with the vague objective of maintaining a “positive” work environment. (ROA.386.) As the Board noted, the behavioral expectations listed in the first sentence do nothing to clarify the universe of communications which would be perceived as interfering with a “positive work environment” or “effective working relationships.”

(ROA.689.) Moreover, although the first sentence was not alleged to be unlawful by the Board General Counsel,<sup>11</sup> that does not mean the terms listed in the first sentence provide sufficient context to render the broad language used in the second sentence any less vague. *See Hills & Dales Gen. Hosp.*, 360 NLRB No. 70, 2014 WL 1309713, at \*2 (noting that the word “professional” denotes a “broad and flexible concept”).

Even if employees would ultimately find the language at issue ambiguous, the Board emphasized that any such ambiguities must be construed against the Company as the promulgator of the rule. (ROA.689.) This Court has construed such ambiguities against employers in similar contexts. *See Fla. Med. Ctr.*, 576 F.2d at 670; *Fla. Steel Corp.*, 529 F.2d at 1231. As the Board has noted, when “reasonable employees are uncertain as to whether a rule restricts activity protected by the Act,” they are just as likely to be chilled in their willingness to engage in

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<sup>11</sup> Contrary to the Company’s contention (Br. 23), the Board did not make an express finding as to whether the first sentence is lawful or unlawful, because such allegation was not before it. (ROA.689.)

such activity. *Whole Foods Mkt. Grp., Inc.*, 363 NLRB No. 87, 2015 WL 9460031, at \*4 n.11 (Dec. 24, 2015), *petition for review filed*, No. 16-0002 (2d Cir. Jan. 4, 2016). Employees are not as free as lawyers or courts to disinterestedly assess the meaning of an ambiguous rule—under threat of discipline or discharge, employees are likely to avoid taking any chances. *Id.*; *see Gissel Packing*, 395 U.S. at 617.

### **3. The Company’s arguments are unavailing**

The Company’s contends that it was free to proscribe the “manner” in which employees communicate regarding protected subjects so long as it did not proscribe the “content.” (Br. 20-22.) That contention is contrary to law, and, in any event, is irrelevant to this case. As an initial matter, it is incorrect to suggest that the Act gives employers carte blanche to restrict the “manner” in which employees communicate if employees would nonetheless interpret such restrictions as infringing on protected conduct. The correct inquiry is whether employees would construe a given rule as directed solely at unprotected conduct, as in the cases cited by the Company, or whether the rule is so overbroad or ambiguous that it would chill reasonable employees’ willingness to engage in certain protected activities. *Lutheran Heritage Village-Livonia*, 343 NLRB at 647-48; *see Flex Frac Logistics*, 746 F.3d at 209. The language at issue here violates the Act *not* because negativity or strained relationships are per se protected by Section 7, but because

the rule's vague and overbroad language would reasonably be construed as prohibiting less-than-"positive" aspects of protected concerted activity.

Consequently, the Company's attempt to distinguish past Board cases along a manner-content divide is both mistaken and unworkable. As the Board noted here, cases in which it has upheld the lawfulness of workplace rules turned on a finding that those rules were "directed at unprotected conduct that employees would have understood to lack the Act's protection," based on context and the specific language used. (ROA.688-89.)<sup>12</sup> In contrast, the Board will find violations of the Act in cases where employer rules might have legitimate objectives, but the rules are sufficiently ambiguous or overbroad such that reasonable employees would be chilled in the exercise of their statutory rights. *See supra* note 10. The Board's findings in such cases have nothing to do with a manner-content distinction, and instead involve straightforward applications of the well-established *Lafayette Park Hotel* and *Lutheran Heritage Village-Livonia*

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<sup>12</sup> *Copper River of Boiling Springs, LLC*, 360 NLRB No. 60, 2014 WL 808076, at \*1 n.3 (Feb. 28, 2014) (rule prohibiting "a negative attitude *that is disruptive to other staff or has a negative impact on guests*" (emphasis added)); *Lutheran Heritage Village-Livonia*, 343 NLRB at 647 (rules prohibiting "abusive or profane language" and "verbal, mental and physical abuse"); *Lafayette Park Hotel*, 326 NLRB at 826-27 (rule prohibiting "*unlawful or improper conduct*" (emphasis added) in context suggesting serious off-duty misconduct).

framework. As such, the Board’s findings in the cases cited by the Company are entirely consistent with its findings in the present case.<sup>13</sup>

Moreover, the Company’s manner-content argument is irrelevant to this case. Here, the Board found that the language at issue *would* be construed as proscribing specific content; that is, the discussion of “controversial or contentious” subjects that might be perceived as negative or divisive. (ROA.688-89.) The Board noted that employees would interpret the language as proscribing, for example, “criticism of the employer” and negative statements about terms and conditions of employment. (ROA.689.) The Company’s argument is thus a red herring that does not address the question before the Court, which is whether substantial evidence supports the Board’s finding that the language at issue would

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<sup>13</sup> In *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999), the Board upheld a rule requiring hotel employees to maintain a “satisfactory attitude” in the judgment of management. *Id.* at 294. However, the Company’s own brief notes a distinction between lawful rules restricting “attitude” versus unlawful rules restricting employee *communications*, like the rule at issue here. (Br. 21 (citing *Copper River of Boiling Springs*, 360 NLRB No. 60, 2014 WL 808076, at \*25).) Furthermore, *Flamingo Hilton-Laughlin* involved employees in an industry which ensures that they work in constant proximity to guests, and in context the rule would have been read solely as a restriction on unprotected interference with the hotel’s service-oriented operations. In contrast, the rule at issue here more broadly refers to a “positive work environment,” and is maintained with respect to all of the Company’s employees nationwide. The Company’s assertions that its employees are also in a service industry (Br. 20) and that “many” deal directly with customers (Br. 31) are not developed in the stipulated factual record. In any event, it is unlikely that all of the Company’s employees work in constant proximity to customers, and moreover there is an obvious distinction between the retail service industry and the hotel industry.

cause employees to “steer clear of a range of potentially controversial but protected communications” for fear of running afoul of the rule. (ROA.689.)

Finally, the Company’s numerous citations to the D.C. Circuit’s decision in *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001), are inapposite. That case involved a narrow rule prohibiting “abusive or threatening language,” and portions of the court’s opinion quoted by the Company were referencing employee speech involving “the most offensive and derogatory racial or sexual epithets.” *Id.* at 25-26. Board precedent is entirely consistent with the notion that employers may attempt to create a civil workplace by promulgating appropriately-tailored prophylactic rules against abuse and threats. *Palms Hotel & Casino*, 344 NLRB 1363, 1367-68 (2005); *Lutheran Heritage Village-Livonia*, 343 NLRB at 647. However, such issues are again irrelevant in the present case. The Company’s rule simply demands that employees maintain a “positive work environment” and “effective working relationships,” and any suggestion that employees would interpret those ambiguous phrases as limiting solely unprotected abuse, threats, or harassment is patently unreasonable.

The Board’s decision here does not call into question the Company’s presumably good-faith desire to establish a civil workplace, and enforcement of the Board’s Order in this case would not prevent the Company from simply redrafting its ambiguous policy to achieve its purported goals without also infringing on

employees' statutory rights. *Flex Frac Logistics*, 746 F.3d at 210 n.4 (noting that enforcement would not prevent employer from redrafting policy to achieve lawful aims); *see Cintas Corp. v. NLRB*, 482 F.3d 463, 470 (D.C. Cir. 2007) (“A more narrowly tailored rule that does not interfere with protected employee activity would be sufficient to accomplish the Company’s presumed interest.”); *Am. Cast Iron Pipe Co. v. NLRB*, 600 F.2d 132, 137 (8th Cir. 1979) (“If [unprotected conduct] is the problem petitioner seeks to address, it must do so directly rather than through an impermissibly broad rule.”).

**C. The Board Reasonably Found that Employees Would Construe Language in the Company’s “Commitment to Integrity” Policy as Restricting Protected Conduct**

Well-established legal principles also support the Board’s conclusion that employees would reasonably construe language in the Company’s “Commitment to Integrity” policy as again restricting certain protected communications.

(ROA.688, 710.) The “Commitment to Integrity” policy states, in relevant part:

At T-Mobile, we expect all employees, officers and directors to exercise integrity, common sense, good judgment, and to act in a professional manner. We do not tolerate inconsistent conduct. While we cannot anticipate every situation that might arise or list all possible violations, the acts listed below are unacceptable.

...

- Making slanderous or detrimental comments about the Company, its customers, the Company’s products or services, or Company employees

...

- Arguing or fighting with co-workers, subordinates or supervisors; failing to treat others with respect; or failing to demonstrate appropriate teamwork

(ROA.352.) It is uncontested that the first bullet point violates the Act by prohibiting “detrimental comments about the Company.” (ROA.710, Br. 9 n.4.)

The Board found that the second bullet point also violates the Act based on its vague, overbroad prohibitions against “arguing . . . with co-workers, subordinates or supervisors,” “failing to treat others with respect,” and “failing to demonstrate appropriate teamwork.” (ROA.688, 710.) As shown below, such prohibitions would be reasonably read as preventing a range of protected arguments, disagreements, or criticisms.

**1. The Act guarantees employees the right to argue, disagree, or criticize coworkers and supervisors when discussing subjects protected by Section 7**

As previously noted, the Supreme Court, this Court, and the Board have all recognized that the Act grants employees the right to engage in a free and frank exchange of views concerning the subjects of collective bargaining and other mutual aid or protection. *Brown*, 554 U.S. at 68; *Crown Cent. Petroleum*, 430 F.2d at 731; *Bettcher Mfg.*, 76 NLRB at 527. The principles of industrial democracy enshrined in the Act have the necessary consequence that union campaigns, collective bargaining, and other labor disputes may become “heated affairs” in which parties speak candidly when arguing their positions. *Linn*, 383 U.S. at 58.

Thus, in order to exercise their rights without interference, employees must be free to a certain extent to disagree, argue, or even criticize coworkers and managers who may feel subjectively annoyed or disrespected. *See, e.g., Monongahela Power Co.*, 314 NLRB 65, 69-70 (1994) (finding employee unlawfully discharged for annoying managers by persistently arguing about contractual provision), *enforced mem.*, 62 F.3d 1415 (4th Cir. 1995); *see also Quicken Loans, Inc.*, 361 NLRB No. 94, 2014 WL 5590503, at \*1 n.1 (Nov. 3, 2014) (affirming discussion of unlawful “non-disparagement” rule), *enforced*, 830 F.3d 542 (D.C. Cir. 2016).

**2. Employees would reasonably construe prohibitions on “arguing,” “failing to treat others with respect,” and “failing to demonstrate appropriate teamwork” as preventing protected disagreements or criticisms**

The Board found that the rule at issue would be interpreted as prohibiting “heated discussions and arguments about terms and conditions of employment, arguments in support of or against unionization, or a myriad of other protected subjects.” (ROA.688 n.6, 710.) The rule’s plain language prohibits any and all arguments or other conduct not deemed respectful or not demonstrating “appropriate teamwork,” without providing any context for employees to discern limitations on those broad commands. Nothing in the rule itself or the surrounding context suggests that it is limited to unprotected conduct, such as abuse or harassment. Although the rule references “arguing *or fighting* with co-workers,” the rule considered as a whole suggests that “fighting” would be read in the sense

of disagreeing or arguing. *See Lutheran Heritage Village-Livonia*, 343 NLRB at 646 (noting that Board will “give the rule a reasonable reading” and consider particular phrases in context).

Substantial evidence and settled principles support the Board’s reasonable conclusion, given that employees would have cause to fear that broad prohibitions against arguing, disrespect, or a lack of teamwork would be applied to protected conduct that is divisive. The Board has noted, for example, that there is “no shortage of Board cases” where employers have classified protected conduct as disrespectful when it involved concertedly objecting to working conditions imposed by a supervisor or collectively complaining about a supervisor’s arbitrary conduct. *Casino San Pablo*, 361 NLRB No. 148, 2014 WL 7330998, at \*3 (Dec. 16, 2014) (discussing unlawful rule against “disrespectful conduct”); *see, e.g., Teletech Holdings*, 342 NLRB at 932 (finding supervisor violated Act by urging employees not to criticize their jobs or the employer on the grounds that “it is disrespectful to those people who take pride and enjoy working for [the employer]”). Likewise, facially blanket prohibitions against “arguing” or failing to demonstrate “appropriate teamwork” would be read to encompass, at least in part, *protected* arguments and criticisms concerning Section 7-related subjects. *2 Sisters Food Grp.*, 357 NLRB at 1817 (unlawful rule requiring employees to “work harmoniously” with coworkers); *Burlington Indus., Inc.*, 257 NLRB 712, 725

(1981) (finding supervisor’s oral admonition that employee “quit bickering and arguing” with coworkers about union campaign was unlawfully overbroad and would be construed as forbidding protected discussions), *enforced in relevant part*, 680 F.2d 974 (4th Cir. 1982).

### **3. The Company’s arguments are unavailing**

The Company mischaracterizes the rule at issue by discussing unprotected abuse or other extreme speech outside the protection of the Act. (Br. 26-27.) The Company’s rule here is far broader, and instead would reasonably be read as prohibiting any arguments, disagreements, or criticisms that might be labeled disrespectful or divisive. Although the “Commitment to Integrity” subsection contains numerous other bullet points—covering a wide range of conduct such as sleeping on the job, unauthorized use of company vehicles, and violating the law (ROA.352)—those disparate provisions would not give employees context to discern lawful limitations on a broad rule against arguing, disrespect, or failure to show appropriate teamwork. Moreover, the Company concedes (Br. 9 n.4) that the prohibition at issue was listed alongside another unlawful prohibition against “detrimental comments” concerning the Company.

Meanwhile, the Company is incorrect in suggesting (Br. 26) that an employer may lawfully impose its subjective beliefs about how employees should conduct themselves when engaging in Section 7-related discussions or other

*protected* conduct. Cf. *Crown Cent. Petroleum*, 430 F.2d at 731 (cautioning that interests of collective bargaining are not served “by the external imposition of a rigid standard of proper and civilized behavior”). In contrast, an employer *may* lawfully restrict unprotected speech or conduct by promulgating appropriately-tailored rules that do not exhibit the type of unlawful overbreadth at issue in the present case. *William Beaumont Hosp.*, 363 NLRB No. 162, 2016 WL 1461576, at \*2 (lawful rules against threats, abusive language, and disruptive behavior); *Lutheran Heritage Village-Livonia*, 343 NLRB at 647; accord *Adtranz ABB Daimler-Benz Transp.*, 253 F.3d at 25-26. However, prophylactic rules directly prohibiting conduct such as abuse or threats are lawful because reasonable employees would construe them as encompassing only unprotected conduct, not because an employer may limit categories of protected conduct it deems unacceptable. *Lutheran Heritage Village-Livonia*, 343 NLRB at 647-48; see *Flex Frac Logistics*, 746 F.3d at 209 (applying appropriate standard for evaluating workplace rules). The rule at issue here is not so tailored, and there is no context that would give employees cause to second-guess its plain language. The rule as presently written is ambiguous, overbroad, and therefore unlawful.

**D. The Board Reasonably Found that Employees Would Construe the Company’s Workplace Recording Rule as Restricting Protected Conduct**

The Board next concluded that employees would reasonably construe the Company’s “Recording in the Workplace” rule as restricting employees’ Section 7 right to engage in protected workplace recording. (ROA.689-91.) The “Recording in the Workplace” rule states, in full:

To prevent harassment, maintain individual privacy, encourage open communication, and protect confidential information employees are prohibited from recording people or confidential information using cameras, camera phones/devices, or recording devices (audio or video) in the workplace. Apart from customer calls that are recorded for quality purposes, employees may not tape or otherwise make sound recordings of work-related or workplace discussions. Exceptions may be granted when participating in an authorized [T-Mobile US] activity or with permission from an employee’s Manager, HR Business Partner, or the Legal Department. If an exception is granted, employees may not take a picture, audiotape, or videotape others in the workplace without the prior notification of all participants.

(ROA.689; ROA.393.) The Board observed that employees have a Section 7 right to engage in certain types of workplace recording—which the Company does not meaningfully contest—and, as shown in full below, found that the Company’s rule is therefore unlawfully overbroad and not sufficiently tailored to any legitimate interests the Company might have in prohibiting unprotected types of workplace recording. (ROA.690.)

**1. The Act guarantees employees the right to engage in photography and audio or visual recording as part of concerted activity for mutual aid or protection**

In the modern workplace, photography and audio or video recording have frequently served as an “essential element” of employees’ ability to vindicate their statutory rights in an administrative or judicial forum. *Whole Foods Mkt. Grp.*, 363 NLRB No. 87, 2015 WL 9460031, at \*3 nn.7-8 (collecting cases). Likewise, employees have frequently utilized photography and audio or video recording to assist in protected concerted activities such as documenting working conditions, documenting or publicizing protected communications between employees about terms and conditions of employment, and assisting investigations into labor and employment violations. *Id.* Consequently, the Board has recognized that Section 7 grants employees the right to engage in photography and audio or video recording when acting in concert for mutual aid or protection, and when there is no overriding employer interest in prohibiting the recording in question. *Id.* at \*3; *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, 2015 WL 5113232, at \*4 (Aug. 27, 2015). The Company does not contest such right. (Br. 39-40.)

**2. Employees would reasonably construe a broad ban on workplace recording, including “work-related or workplace discussions,” as preventing protected recording**

Having established that employees enjoy a Section 7 right to engage in workplace recording in certain situations, the Board found that the Company’s rule

unlawfully “prohibits all recording and makes no exception for protected concerted activity.” (ROA.690.) The plain language of the Company’s rule states that employees are prohibited from making any recordings of “people or confidential information” including “work-related and workplace discussions.” (ROA.393.) Although the Company’s rule lists certain justifications for its workplace recording ban, in context such justifications do nothing to indicate that the scope of the ban is more limited than its plain language implies. Thus, employees would reasonably construe the Company’s rule as prohibiting in an overbroad manner at least some statutorily-protected workplace recording, in violation of the Act. *Whole Foods Mkt. Grp.*, 363 NLRB No. 87, 2015 WL 9460031, at \*4; *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, 2015 WL 5113232, at \*4-5.

Before the Board, the Company did not deny that its rule prohibits all recording without exception, and instead the Company argued that such a broad rule is nonetheless justified by legitimate employer interests. (ROA.690.) The Board found that the general interests proffered by the Company are insufficient to warrant such an expansive ban, which would prohibit protected recording bearing little or no relation to the interests identified by the Company. Employers undoubtedly have a legitimate interest in preventing harassment or protecting genuine confidential information so as to justify restrictions on *some* workplace recording, but the Board emphasized that the Company’s rule is not tailored to

meet those objectives in any way. (ROA.690.) Although the rule makes reference to “confidential information,” the Board noted that elsewhere in its written rules the Company has unlawfully defined “confidential information” to include a range of Section 7-related information such as employee contact information and wages. (ROA.690; ROA.351, 361, 369.)

As a result, the Board reasonably concluded that the general interests proffered by the Company are insufficient to justify the scope of the Company’s rule against workplace recording. (ROA.690-91.) Since employees would reasonably construe the Company’s overbroad rule as restricting at least some protected recording, the Company’s rule as presently written therefore violates the Act. Once again, however, enforcement of the Board’s Order would not prevent the Company from simply redrafting the rule and more appropriately tailoring its language to reach any legitimate objectives the Company might have in restricting certain types of unprotected workplace recording. *Flex Frac Logistics*, 746 F.3d at 210 n.4; *Cintas Corp.*, 482 F.3d at 470; *Am. Cast Iron Pipe*, 600 F.2d at 137

### **3. The Company’s arguments are unavailing**

The Company devotes a substantial portion of its brief to defending its asserted interests in prohibiting various types of workplace recording (Br. 31-40), but does not squarely address the crux of the Board’s finding that such interests do

not justify the unlawful *breadth* of the recording ban at issue.<sup>14</sup> The question before the Court is not whether the Company has a legitimate interest in preserving confidential customer data or preventing harassment, but whether such general interests necessitate an overbroad ban on all workplace recording.

For example, employers have an obvious interest in maintaining the confidentiality of business-related information such as customer data (Br. 31-34), but the mere recitation of a lawful objective does not justify an overbroad rule that also restricts employees' Section 7 rights. The Company's rule is not tailored to the protection of customer data, and makes no reference to customer data or business-related information. To the contrary, the rule broadly prohibits the recording of any person and any workplace discussions. The rule makes no exception for protected recording, and does not distinguish recording on nonwork

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<sup>14</sup> For the first time, the Company suggests that the "rationales and the text of the rule provide a context for reasonable employees to understand that [the rule] does not infringe on their Section 7 rights." (Br. 30-31, 34, 39-40.) This Court lacks jurisdiction to entertain such argument. 29 U.S.C. § 160(e); *NLRB v. Hous. Bldg. Servs., Inc.*, 128 F.3d 860, 863 (5th Cir. 1997). Before the Board, the Company never argued that employees would reasonably construe the workplace recording rule as permitting, contrary to its plain language, protected recording of people or workplace discussions. (ROA.690 ("The Respondent does not deny that the rule prohibits all recording and makes no exception for protected concerted activity.")) Nor did the Company file a motion for reconsideration with the Board. *Int'l Ladies' Garment Workers' Union v. Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975). In any event, the rule unambiguously prohibits *any* recording of people or discussions, and states that even with permission from management, "employees may not take a picture, audiotape, or videotape others in the workplace without the prior notification of all participants." (ROA.393.)

time or in nonwork areas of the workplace. (ROA.690.) Moreover, while the Company's rule prohibits *in part* the "recording [of] confidential information," the Board noted that the Company has simultaneously maintained a raft of unlawful rules, which are not contested, defining "confidential" information as including: wage and salary information, employee contact information, the names of employees involved in internal investigations, and handbook policies. (ROA.690; ROA.261, 296, 351, 361, 369.) The Company's request that the Court simply ignore these other rules (Br. 32) is contrary to the Board's framework, which requires rules to be considered in context. *Flex Frac Logistics*, 746 F.3d at 209.<sup>15</sup>

Similarly, nothing in the Board's decision calls into question the Company's potentially legitimate interest in preventing unprotected recording that constitutes "harassing, abusive, and offensive behavior" (Br. 35), preventing violations of state or federal law (Br. 36-37), or restricting the recording of certain "sensitive and confidential business topics" (Br. 38), but the overbroad rule at issue here goes far beyond such objectives. The Company does not articulate why such interests require a rule prohibiting *any* recording of people or workplace discussions, including protected recording that constitutes concerted activity for mutual aid or

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<sup>15</sup> As previously discussed, the Company's unsupported assertion that it has subsequently "dropped" certain unlawful rules (Br. 33) is not controlling. There is no evidence or even an assertion that the Company has, for example, adequately publicized any such rescission to its nationwide workforce, and thus other rules would still be tainted by the unlawful definitions of "confidential information" discussed by the Board. *Passavant Mem'l Area Hosp.*, 237 NLRB at 138-39.

protection.<sup>16</sup> The suggestion that a rule more narrowly tailored to meet these objectives would be unduly cumbersome or fragmentary (Br. 36-37) is both implausible and irrelevant: first, because the Company could easily revise its rule to make clear that it only restricts recording involving private customer data, harassment, illegal acts, or other unprotected recording; and second, because employer convenience does not trump the employee rights contained in the Act.

The Company's arguments lose sight of the fact that the Board does not deny employers the ability to prohibit recording in appropriate circumstances, pursuant to lawful rules that would not be construed as restricting protected recording or that are narrowly tailored to meet overriding employer interests. For example, the Board has upheld the lawfulness of an appropriately-tailored rule prohibiting the use of cameras “for recording images of patients and/or hospital equipment, property, or facilities,” noting that the rule was limited to ensuring the privacy of “patients and their hospital surroundings” and that employers in the healthcare industry have a unique overriding interest in maintaining patient

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<sup>16</sup> Broad, generalized interests in employee privacy or “open communications” are by themselves not narrowly tailored enough to justify overriding employees’ statutory rights under the Act. *Cf. Associated Builders & Contractors of Tex., Inc. v. NLRB*, 826 F.3d 215, 223-26 (5th Cir. 2016) (upholding Board rule requiring pre-election disclosure of employee contact information in order to encourage informed employee electorate, despite countervailing privacy interests); *Whole Foods Mkt. Grp.*, 363 NLRB No. 87, 2015 WL 9460031, at \*4 (noting that valid employer interest in ensuring open communications would arise in “relatively narrow circumstances,” and would not justify expansive ban on workplace recording).

privacy. *Flagstaff Med. Ctr., Inc.*, 357 NLRB 659, 662-63 (2011); *cf. Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, 2015 WL 5113232, at \*5. In contrast, the Company's rule is not narrowly tailored, the general interests it proffers do not warrant an expansive ban on all recording, and the rule as written violates the Act.

**E. The Board Reasonably Found that Employees Would Construe Section 4.4 of the Company's Acceptable-Use Policy as Restricting Protected Conduct**

Finally, the Board concluded that employees would reasonably construe Section 4.4 of the Company's Acceptable-Use Policy as prohibiting the protected disclosure of certain employee-related information. (ROA.688, 706-09.) Section 4.4 of the Acceptable-Use Policy states, in full:

4. Users may not permit non-approved individuals access to information or information resources, or any information transmitted by, received from, printed from, or stored in these resources, without prior written approval from an authorized T-Mobile representative.

(ROA.709; ROA.402.) The Board found that such rule violates the Act by restricting employees' right to disclose documents or information concerning working conditions, wages, benefits, and other terms and conditions of employment, as well as Section 7-protected communications exchanged on the Company's email system, in electronic or print form. (ROA.688 & n.6, 709.)

**1. The Act guarantees employees the right to disclose information concerning terms and conditions of employment with coworkers and outside parties**

It is well established that the Act grants employees the right to discuss working conditions and other terms and conditions of employment with coworkers or outside parties such as union representatives. *Victory Casino Cruises II*, 363 NLRB No. 167, 2016 WL 1624048, at \*4 (Apr. 22, 2016) (collecting cases), *application for enforcement filed*, No. 16-15966 (11th Cir. Sept. 9, 2016); *Flex Frac Logistics*, 746 F.3d at 208-09; *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359, 363 (5th Cir. 1990). Similarly, employees enjoy a limited Section 7 right to use an employer’s email system for protected communications regarding terms and conditions of employment—as well as the right to disclose such communications to others. *Purple Commc’ns, Inc.*, 361 NLRB No. 126, 2014 WL 6989135, at \*6 (Dec. 11, 2014); *see Hyundai Am. Shipping Agency, Inc.*, 357 NLRB 860, 860, 871 (2011), *enforced in relevant part*, 805 F.3d 309, 314-15 (D.C. Cir. 2015).

**2. Employees would reasonably construe a rule against disclosing “any information” from the Company’s information resources as preventing the protected disclosure of employee-related information and documents**

Reviewing the plain language of Section 4.4, the Board found that employees would interpret the rule as applying to the disclosure of “documents that employees want to share with their union representatives about working conditions, wages, benefits, or other terms and conditions of employment.”

(ROA.709.) Section 4.4 broadly refers to “any information” that is “transmitted by, received from, printed from, or stored in” the Company’s information resources, and nowhere indicates that employee-related information is excluded. The Board found that this prohibition would be construed as applying to Section 7-related information in both electronic and print form (ROA.688 n.6), given that Section 4.4 refers to “printed” information (ROA.402) and the Acceptable-Use Policy expressly defines “information” as including information “in any form including paper (physical) or electronic format.” (ROA.400.) In addition, the Board noted that Section 4.4 would be construed as prohibiting the disclosure of protected email discussions concerning “wage and salary information, disciplinary actions, performance evaluations,” and similar subjects. (ROA.709.)

Substantial evidence supports the Board’s analysis of the far-reaching language contained in the Company’s rule. By its own terms, the rule at issue is applicable to “any information” that is transmitted by, received from, printed from, or stored in the Company’s technology systems. Employees would reasonably construe such broad language as encompassing information or documents pertaining to wages and other terms and conditions of employment. *See Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, 2015 WL 5113232, at \*2 (finding “sweeping provision” against disclosure of “any information” not shared with public would be unlawful even without more context); *Hyundai Am. Shipping*

*Agency*, 357 NLRB at 871 (finding rule against disclosing “information or messages on [the employer’s] systems” unlawful, and noting that employer made no effort to limit rule “to those matters that are truly ‘confidential’”); *see Flex Frac Logistics*, 746 F.3d at 209 (“The confidentiality clause gives no indication that some personnel information, such as wages, is not included within its scope.”); *Cintas Corp.*, 482 F.3d at 468-69. Likewise, employees would reasonably construe the rule as prohibiting the disclosure of protected email communications between employees, which by definition are “transmitted by, received from, printed from, or stored in” the Company’s systems. *Hyundai Am. Shipping Agency*, 357 NLRB at 871. As presently written, Section 4.4 thus violates the Act.

### **3. The Company’s arguments are unavailing**

The Company first contends that Section 4.4 is lawful because “the context of the rule makes clear that it is directed against *unauthorized access* of Company systems,” and that *Purple Communications* is inapposite because that decision did not involve granting external access to technology systems. (Br. 41-43.) The Company’s argument misconstrues the Board’s holding in the present case. Nothing in the plain language of Section 4.4 or the surrounding context indicates that it is limited to prohibiting unauthorized access to the Company’s technology systems. To the contrary, the Company’s rule explicitly states otherwise: it prohibits employees from providing non-authorized individuals access to

“*information . . . or any information* transmitted by, received from, printed from, or stored in” the Company’s systems. (ROA.402 (emphasis added).) Meanwhile, the Company’s policy defines “information” in extraordinarily broad terms.

(ROA.400.) The lawfulness of a rule solely restricting access to technology *systems* is not before the Court, and if the Company’s intention is to only reach such systems, it is perfectly free to clarify such intent by amending its rule. *Flex Frac Logistics*, 746 F.3d at 210 n.4; *see Purple Commc’ns*, 361 NLRB No. 126, 2014 WL 6989135, at \*14 (“[W]e do not find that nonemployees have rights to access an employer’s email *system*.” (emphasis added)).

The cases cited by the Company involving lawful confidentiality rules are inapposite. None of those cases involved such a broad prohibition on the disclosure of *any* “information” transmitted by, received from, printed from, or stored in an employer’s information resources, with no additional context suggesting limitations or exceptions. The cited cases involved rules which, in context, would not be construed as encompassing Section 7-related information.<sup>17</sup>

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<sup>17</sup> For example, in *Minteq International, Inc.*, cited by the Company (Br. 44), the Board noted that absent the context in that case specifically referencing proprietary information and trade secrets, “a prohibition on releasing ‘any . . . information which is identified as confidential by the Company’ *would clearly be overbroad.*” 364 NLRB No. 63, 2016 WL 4087601, at \*7 (July 29, 2016) (emphasis added), *petition for review filed*, No. 16-1276 (D.C. Cir. Aug. 5, 2016). The other cases involved similar context limiting the rules’ scope. *Mediaone of Greater Fla., Inc.*, 340 NLRB 277, 279 (2003) (rule addressing “proprietary information” such as “intellectual property”); *K-Mart*, 330 NLRB 263, 263 (1999) (rule against

Moreover, it is uncontested that elsewhere in its written rules the Company has unlawfully directed employees not to disclose “confidential” information such as wage and salary information, employee contact information, and the Employee Handbook itself. (ROA.690; ROA.261, 296, 351, 361, 369.) Thus, the rule is unlawful as written because reasonable employees, in an attempt to adhere to Section 4.4’s broad prohibition against the disclosure of “any information,” would feel restrained in making certain protected disclosures about terms and conditions of employment.

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disclosing “company business and documents”); *Lafayette Park Hotel*, 326 NLRB at 826 (rule against divulging “Hotel-private information to employees or other individuals”); *see Flex Frac Logistics*, 746 F.3d at 210 (discussing cases).

## CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

Respectfully submitted,

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National Labor Relations Board  
October 2016

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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T-MOBILE USA, INC.	)	
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Petitioner/Cross-Respondent	)	
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	No. 16-60284
Respondent/Cross-Petitioner	)	
	)	
and	)	
	)	
COMMUNICATIONS WORKERS OF	)	
AMERICA	)	
	)	
Intervenor	)	
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NATIONAL LABOR RELATIONS BOARD	)	
	)	
Petitioner	)	
	)	No. 16-60497
v.	)	
	)	Board Case Nos.
METROPCS COMMUNICATIONS, INC.	)	02-CA-115949 et al.
	)	
Respondent	)	
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**CERTIFICATE OF SERVICE**

I hereby certify that on October 24, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC  
this 24th day of October, 2016

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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T-MOBILE USA, INC.	)	
	)	
Petitioner/Cross-Respondent	)	
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NATIONAL LABOR RELATIONS BOARD	)	
	)	No. 16-60284
Respondent/Cross-Petitioner	)	
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and	)	
	)	
COMMUNICATIONS WORKERS OF AMERICA	)	
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NATIONAL LABOR RELATIONS BOARD	)	
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	)	
Respondent	)	
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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 10,775 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file

submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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