NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

T-Mobile USA, Inc., *and* Communications Workers of America, Local 7011, AFL–CIO. Case 28–CA–148865

January 23, 2017

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On December 10, 2015, Administrative Law Judge Amita Baman Tracy issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief. In addition, the Respondent filed a cross-exception and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

[1] There are no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(1) by promulgating and maintaining a rule prohibiting senior representatives from talking to other employees about the Union while working without also prohibiting them from talking about other nonwork-related subjects.

We affirm the judge's dismissal of the allegations that the Respondent violated Sec. 8(a)(3) and (1) of the Act by isolating employees Eddie Aranda and Caroline Figueroa and discharging Aranda. Even assuming the General Counsel met his initial *Wright Line* burden to show that the employees' union activity was a motivating factor in the seating rearrangement, the judge properly found that the Respondent met its burden to show that it would have taken the same actions even absent their union activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied, 455 U.S. 989 (1982). In doing so, we note that "proving that an employee's protected activity was a motivating factor in the employer's action does *not* require the General Counsel to make some additional showing of particularized motivating animus towards the employee's own protected activity or to further demonstrate some additional, undefined 'nexus' between the employee's protected activity and the adverse action." *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 4 fn. 10 (2014) (emphasis in original), enfd. 801 F.3d 767 (7th Cir. 2015). Member Miscimarra disagrees with the latter statement. In his view, making a particularized showing that links an employee's protected activity to the adverse employment action taken against that employee is exactly what *Wright Line* requires. In *Wright Line*, the Board stated that the General Counsel must make "a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." 251 NLRB at 1089. In other words, the General Counsel must establish a link or nexus between the employee's protected activity and the particular decision alleged to be unlawful. See *Libertyville Toyota*, supra, slip op. at 9 fn. 5 (2014) (Member Miscimarra, concurring in part and dissenting in part); *Starbucks Coffee Co.*, 360 NLRB No. 134, slip op. at 6 fn. 1 (2014) (Member Miscimarra, concurring). Member Miscimarra agrees, however, that even assuming the General Counsel made the required showing, the Respondent demonstrated that it would have rearranged Aranda's and Figueroa's seating even in the absence of their union activity.

With respect to Aranda's discharge, even assuming the General Counsel met his initial *Wright Line* burden to prove that Aranda's union activity was a motivating factor in his discharge, the Respondent met its rebuttal burden and showed that it terminated him for repeatedly hanging up on customers (also known as "releasing calls"). As a customer service representative, Aranda was tasked with handling customer complaints and inquiries. That was the core function of his job. The Respondent cited at least eight examples in a 1-month period of Aranda releasing calls while the customers were still talking. Further, we find that the Respondent's examples of employees who were terminated for releasing calls are sufficiently similar to Aranda to demonstrate that the Respondent would have discharged Aranda for his released calls regardless of his union activity. Among other things, the evidence shows that since the current human resources manager joined the Respondent (2 months before Aranda's discharge), every employee who was found to have released even one call has been discharged. Accordingly, the Respondent established that Aranda would have been discharged absent his protected activity.

Chairman Pearce would find that the General Counsel proved that Aranda's protected activity was a motivating factor in his discharge. Animus has been established by the Respondent's unexcepted-to violation of Sec. 8(a)(1) by prohibiting discussions of the Union, the third-party activity reports showing that the Respondent documented union activity outside the Respondent's facility, and the closeness in time between Aranda's increased union activity and his termination. See, e.g., *Metro-West Ambulance Services*, 360 NLRB No. 124 (2014) (finding close timing between protected activity and discipline indicative of animus). Chairman Pearce agrees, however, that the Respondent met its rebuttal burden to demonstrate that Aranda would have been discharged absent union activity.

Member Miscimarra agrees with the judge, for the reasons she states, that the General Counsel failed to prove that Aranda's union activity was a motivating factor in his discharge. But even assuming otherwise, he agrees with his colleagues that the Respondent demonstrated it would have discharged Aranda for his released calls regardless of his union activity.

[2] We shall modify the judge's recommended Order to conform to the violations found and to the Board's standard remedial language. In particular, and contrary to our colleague, we shall include standard language requiring the Respondent to immediately rescind its unlawfully promulgated and maintained "rule" prohibiting senior representatives from talking to other employees about the Union while working. See *Guardsmark, LLC,* 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007). As our colleague acknowledges, the Respondent did not except to the judge's finding that this prohibition was a "rule." Thus, the judge's characterization of the prohibition is not before us and it is appropriate to remedy the violation accordingly, notwithstanding our colleague's apparent frustration with the Respondent's omission. We shall substitute a new notice to conform to the Order as modified.

Member Miscimarra would not modify the Order to add a paragraph requiring the Respondent to rescind what has been erroneously characterized as a "rule" that ostensibly prohibited senior representatives from talking to other employees about the Union while working without also prohibiting them from talking about other nonwork-related subjects. Member Miscimarra agrees that Senior Human Resources Manager Mona Otero violated Sec. 8(a)(1) when she told employee Luis Castaneda that he could only discuss the Union off the clock, and Member Miscimarra acknowledges that the Respondent did not file an exception

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, T-Mobile USA, Inc., Albuquerque, New Mexico, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(a) and reletter the subsequent paragraphs.

"(a) Rescind the rule prohibiting senior representatives from talking to other employees about the Communications Workers of America, Local 7011, AFL–CIO or any other labor organization while working but not prohibiting them from talking about other subjects."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. January 23, 2017

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT promulgate and maintain a rule prohibiting senior representatives from talking to other employees about the Communications Workers of America, Local 7011, AFL–CIO or any other labor organization while working but not prohibiting them from talking about other subjects.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL rescind the rule prohibiting senior representatives from talking to other employees about the Communications Workers of America, Local 7011, AFL–CIO or any other labor organization while working but not prohibiting them from talking about other subjects.

T-MOBILE USA, INC.

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to the judge's finding that this violation constituted the unlawful promulgation and maintenance of a "rule." However, a statement made to a single employee—even though it violates the Act—is not the promulgation of a "rule" for the entire workplace, as the Board has repeatedly held. See *Flamingo Las Vegas Operating Co., LLC*, 361 NLRB No. 130 (2014), affirming and incorporating by reference 359 NLRB 873 (2013); *Food Services of America, Inc.*, 360 NLRB No. 123, slip op. at 5 fn. 11 (2014); *Teachers AFT New Mexico*, 360 NLRB No. 59, slip op. at 1 fn. 3 (2014); *Flamingo Las Vegas Operating Co.*, 360 NLRB No. 41, slip op. at 1 & fn. 5 (2014); *St. Mary's Hospital of Blue Springs*, 346 NLRB 776, 776–777 (2006). Again, Member Miscimarra agrees with the finding that the Respondent violated Sec. 8(a)(1) based on this statement. However, he believes it is absurd to characterize this violation as the unlawful promulgation of a "rule," and for that reason, Member Miscimarra believes the Board should not modify the judge's Order to require that the Respondent rescind a nonexistent rule.

The Respondent has excepted to the judge's recommended Order, which requires the Respondent to cease and desist from preventing senior representatives from speaking about the Union "while working" but at the same time allowing other topics of conversation. The Respondent argues that the Order should reflect the general rule that an employer may prohibit employees from talking about nonwork matters, including a union, while employees are actively working, provided that this prohibition extends to all other subjects unrelated to work. We agree with the Respondent that this is the rule. See, e.g., *Jensen Enterprises, Inc.*, 339 NLRB 877, 878 (2003), where the Board stated: "It is settled law that an employer may forbid employees from talking about a union during periods when the employees are supposed to be actively working, if that prohibition also extends to other subjects not associated or connected with their work tasks." However, the Board went on to state that "an employer violates the Act when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work . . . ." Id. Here, Respondent violated Sec. 8(a)(1) by allowing other nonwork-related conversations during work time, but prohibiting union-related conversations. The judge's remedy is therefore appropriate. See *Fresh & Easy Neighborhood Market, Inc.*, 356 NLRB 588, 593 (2011), enfd. 459 Fed. Appx. 1 (D.C. Cir. 2012). In connection with this violation, the Respondent also refers to Board doctrine concerning no-solicitation rules. See, e.g., *Essex International, Inc.*, 211 NLRB 749 (1974). To be clear, this case does not involve a no-solicitation rule.

The Board's decision can be found at www.nlrb.gov/case/28–CA–148865 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

David Garza, Esq., for the General Counsel.
Mark Theodore, Esq., Irina Constantin, Esq., for the Respondent.
Stanley M. Gosch, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

AMITA BAMAN TRACY, Administrative Law Judge. This case was tried in Albuquerque, New Mexico, on August 25–26, 2015. The Communications Workers of America, Local 7011, AFL–CIO (the Charging Party or the Union or CWA) filed the charge on March 25, 2015, and the General Counsel issued the complaint on June 8, 2015. T-Mobile USA, Inc. (Respondent or T-Mobile) filed a timely answer.

The complaint specifically alleges the following violations of the National Labor Relations Act (the Act): (1) on or about October 2014, Respondent isolated employees Carolina Figueroa (Figueroa) and Eddie Aranda (Aranda) thereby violating Section 8(a)(3) and (1) of the Act; (2) on or about January 30, 2015, Respondent discharged Aranda thereby violating Section 8(a)(3) and (1) of the Act; and (3) on or about April 9, 2015, Respondent by Mona Otero (Otero) disallowed its senior representative employees from discussing the Union while allowing them to discuss non-work topics during work time thereby violating Section 8(a)(1) of the Act.

As set forth below, I find that Respondent did not violate the Act when it "isolated" Figueroa and Aranda and when it terminated Aranda. Thus, those portions of the complaint are dismissed. However, I do find that Respondent violated the Act when it disallowed senior representatives from discussing the Union while allowing them to discuss nonwork topics during work time thereby violating Section 8(a)(1) of the Act.

On the entire record,[1] including my observation of the demeanor of the witnesses,[2] and after considering the briefs filed by the General Counsel, the Charging Party and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with offices and places of business throughout the United States, operates a call center for its cellular mobile phone service at its facility at 1201 Menaul Boulevard, NE, Albuquerque, New Mexico, 87107 (Menaul Call Center), where it annually performs services valued in excess of $50,000 in states other than the State of New Mexico. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background and Respondent's Operations

A majority of the relevant facts are not in dispute. Respondent operates two customer service call centers in Albuquerque, New Mexico. The events at issue in this complaint took place at the Menaul Call Center. Respondent admits, and I find, that the following individuals are supervisors within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act: Nikki Kozlowski (Kozlowski), Respondent's senior manager, customer service; Cesar Ortiz (Ortiz), Respondent's team manager, closed loop customer service team; Eliana Lugo (Lugo), Respondent's coach, closed loop customer service team; Joel Guerrero (Guerrero), Respondent's bilingual retention coach; Jason Lachioma (Lachioma), Respondent's manager, general care; Karen Viola (Viola), Respondent's director, customer service; and Otero, Respondent's

[1] The transcripts in this case are generally accurate, but I make the following correction to the record: Transcript (Tr.) 107, Line (L.) 7: "interview" should be "intermittent"; Tr. 130, L. 5 and Tr. 131, L. 1: "parameter" should be "perimeter"; Tr. 184, L. 11: "pot" should be "pod"; Tr. 190, L. 23: "J-O-E-K" should be "J-O-E-L"; Tr. 197, L. 11: "is" should be "us"; "Tr. 207, L. 1: "doing" should be "going"; Tr. 212, L. 12: "are" should be "our"; Tr. 258, L. 7: "san" should be "an"; Tr. 259, L. 8: "talk" should be "walk"; Tr. 302, L. 2: "the" should be "they"; Tr. 315, L. 13: "art" should be "at"; Tr. 343, L. 13: "Kelly" should be "Lugo"; Tr. 419, L. 17: "it's" should be "it"; Tr. 451, L. 24: "cause" should be "calls"; and Tr. 464, L. 6: "our" should be "are". In addition, throughout the transcript, Aranda's first name is misspelled as "Eddy" but should actually be spelled "Eddie".

[2] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations but rather on my review and consideration of the entire record for this case. I further note that my findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom. A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622.

senior human resources manager (GC Exh. 1(c), 1(e)).[3]

With respect to the Menaul Call Center, Respondent operates several departments including the bilingual retention department. The role of the bilingual retention department is to attempt to save Spanish-speaking customers from cancelling their cellular phone service with Respondent (Tr. 249). Due to the nature of the employees' job duties in the bilingual retention department, many, if not all, of the calls may not be easy to handle due to upset customers (Tr. 50–51, 311). Within the bilingual retention department, Respondent groups employees in 6 to 7 teams consisting of 15 customer service representatives II (CSR), 1 senior representative (SR), and 1 coach.

The employees are grouped in pods which are rectangular shaped areas with the CSRs' cubicles around the perimeter and the SR and coach's desk in the middle of the cubicles (R. Exh. 54).[4] The coach supervises the CSRs in the pod and reports to the Team Manager who reports to Call Center Manager. The SR provides assistance to the CSRs and the coach and also takes escalated calls (Tr. 20–21).[5] Ninety percent of the workday of a SR is spent talking to the CSRs, including both work and non-work topics such as current events and politics (Tr. 147). Management encourages SRs to talk with CSRs to develop a rapport and team work (Tr. 147–149, 184). In between calls, CSRs would talk with one another about work and non-work related topics.

Lugo was the coach of the bilingual retention department from the end of 2013 until June 2015.[6] As the coach, Lugo employed a variety of coaching and feedback methods including listening to recorded calls and scoring six customer calls per month (known as calibration calls) and providing feedback to the CSRs. Lugo assessed the calls by the metrics of courtesy, concern, and resolution with a numerical score for each category of 2, 3, or 4 (GC Exh. 5; Tr. 33–34). A national call team also reviewed 2 of the CSRs' monthly customer calls and provided feedback and scores to the CSRs via Lugo. Lugo also had the ability to listen to live customer calls either from her desk or from the desk of the CSR (known as a "side-by-side") (Tr. 44). Lugo would send the CSR emails with feedback and scores, and would provide verbal feedback, often in the coaching room (known as a "one-on-one") (Tr. 45).[7] Lugo constantly coached her employees, including Aranda, on how to improve their performance (Tr. 252–253, 320). For example, she noted in a November 29, 2014 email to Aranda to let him know that his performance was his responsibility but that she was available to help him and he should let her know what he needed from her (R. Exh. 9; Tr. 321–322).

Several types of disciplinary options exist at Respondent but the disciplinary steps are not automatically progressive (GC Exh. 7; Tr. 39).[8] The disciplinary process is described as performance improvement planning with various options along with termination.

- Clarifying Discussion: A supervisor may have a clarifying discussion with an employee, which is a conversation concerning behavior observed and expectation monitored thereafter (Tr. 40, 95).
- Review of Expectations: A review of expectations is similar to a clarifying discussion where a supervisor reviews expectations with a CSR (Tr. 97–99).
- Formal Reminder: A supervisor may issue a formal reminder in which a CSR is taken out of "good standing" whereby the employee is not eligible for a bonus or incentive and cannot apply for another internal position during the same month (Tr. 41, 95–96).
- Decision Time: In decision time, a supervisor may suspend a CSR. When the CSR returns to work after the suspension, the supervisor and employee may discuss what occurred, and often, Respondent asks the CSR to prepare a commitment for how the behavior will change (Tr. 42). The CSR may also incur a loss of good standing (Tr. 96).

and

- Termination: A CSR may be discharged but this decision remains with human resources, not the coach or manager (Tr. 96).

Lugo testified that coaching or feedback was not considered a disciplinary action. Furthermore, as bilingual retention coach, Lugo could not terminate an employee but could issue other disciplinary actions.

B. Union Organizing Campaign

The Union has been organizing at Respondent since at least 2013 (Tr. 112, 191). Luis Casteneda (Casteneda), a SR, and Caroline Figueroa (Figueroa), a CSR, are current employees at Respondent and active, open union supporters (Tr. 164, 191). Figueroa speaks to employees on a daily basis while on duty about the benefits of a labor organization (Tr. 192–193).

While on duty, Figueroa spoke to Aranda about the Union, and in September or October 2014, he joined her in supporting the Union (Tr. 254).[9] Aranda helped Figueroa by talking about the Union with other employees and giving employees cards to sign (Tr. 202). In late October 2014 or early November 2014, Aranda also joined other union supporters by wearing a red union T-shirt or union pin on the same coordinated day (Tr. 217, 257, 260–261). Aranda testified that Lugo would have been aware of his prounion activities because once while asking her a question he adjusted his union pin and Lugo gave a short

[3] Some of the job titles for Respondent's supervisors and agents differed at the time of the events that led to this complaint. The job titles during the relevant time period will be clarified within the decision.

[4] The witnesses consistently described the pod as a small area but the exact size of the pod is unclear from the record.

[5] Calls may be "escalated" to a SR or coach when a customer feels as though his issue is not being resolved by the CSR (Tr. 139).

[6] Lugo testified in a direct and forthright manner. Her testimony did not waver on cross-examination, and she recalled details thoroughly and consistently. I found her testimony to be generally credible.

[7] Respondent also used the coaching rooms to discuss disciplinary issues with employees (Tr. 39).

[8] The testimony of General Counsel's witnesses implied that Respondent's disciplinary process is progressive but I reject this implication as it is not supported by Respondent's description of its disciplinary process (GC Exh. 7; Tr. 210–211).

[9] I find Figueroa testified generally credibly although at times her testimony was based on conjecture which I do not credit.

response and turned away (Tr. 255, 257). He also testified that Lugo should have known about the union activity in the pod because Figueroa would talk in normal tones about various union activities and meetings, and Figueroa and he were the most vocal union supporters in the pod (Tr. 255–256).

On October 31, 2014, for 10 minutes, Figueroa and Aranda assisted 2 union officials passing out union goody bags marked with a large red colored CWA sticker and filled with candy and union brochures to celebrate Halloween and publicize the Union (GC Exh. 26; Tr. 193, 258). Figueroa and Aranda passed out the bags during a portion of their break outside of Respondent's facilities. They then went back to their pod, began logging into the computer system and handed out the remaining bags to their pod teammates who wanted a bag (Tr. 194–196, 259). Figueroa offered a goody bag to a CSR sitting next to her, and the employee yelled out, perhaps jokingly, either that he did not want her "union propaganda" or did not want a bribe to join the Union (Tr. 197, 260).[10] Figueroa testified that upon hearing the employee yell out loud, Lugo turned around and looked straight at her (Tr. 197, 260). Aranda testified that Lugo looked at him as well (Tr. 260).

Aranda also spoke up during Lugo's five to six team meetings about a variety of matters including a cockroach outbreak in the break room where he said to everyone that they needed to unionize (Tr. 266, 302). In late December 2014 Aranda hung a union calendar on his cubicle wall with extras on his desk for other employees (GC Exh. 15; Tr. 267). Aranda testified that human resources employee Larissa Johnson (Johnson) should have been aware of his union activity since she saw the calendar when she came to his cubicle on January 23, 2015, to evaluate his ergonomics after he requested an ergonomic desk (GC Exh. 14; Tr. 269). Lugo likely also would have seen the union calendar (Tr. 273).

When Otero began working at Respondent on November 10, 2014, Amanda Armento, a senior human resources manager at the other Albuquerque Call Center, told Otero to complete third party activity (TPA) reports on any activities occurring on the perimeter of the facilities (Tr. 130). Along with Otero preparing and sending the TPA reports, Johnson did the same. To prepare the TPA report, Otero gathered information from the security team who completed an incident report (Tr. 112). The TPA reports submitted into evidence concerned only the Union's activities but did not name any individuals involved. These TPA reports were emailed to an unidentified email group and sometimes carbon copied to Respondent's officials Viola and Kozlowski along with a few other individuals (GC Exh. 21–35). Significantly, Johnson completed a TPA report for the Halloween goody bags Aranda and Figueroa distributed on October 31, 2014 (GC Exh. 26). This TPA report, sent to Viola and Kozlowski along with other officials on November 1, 2014, noted the nature of the activity as "two individuals with fliers and candy" and the length of the activity as 1 hour. Again this TPA report did not name any participants.[11]

C. Aranda's employment with Respondent

Aranda began working as a CSR at Respondent in January 2014. Aranda attended orientation, and was informed that releasing calls could result in termination (R. Exh. 4; Tr. 309). Specifically, Aranda learned that Respondent may terminate a CSR for any of the following: releasing calls with a customer before a call is completed, releasing calls when you are close to your lunch or break time, dead air calls, and call avoidance when releasing calls due to difficult and escalated customers (R. Exh. 4).

Lugo became Aranda's supervisor in September 2014. The work schedule for the employees in Lugo's pod was that they worked 10-hour shifts on Sunday, Monday, Friday, and Saturday (Tr. 425). Aranda performed generally well throughout his tenure with Respondent with no prior disciplinary actions taken against him until his termination (R. Exh. 2; GC Exh. 5, 10, 16; Tr. 30).

Prior to becoming Aranda's supervisor, on August 28, 2014, Lugo sent a message to the pod employees she would be supervising, introducing herself and motivating her new team. Lugo included a seating assignment chart in her email, and also noted, "I like to change things up so we may change desks every couple months☺" (GC Exh. 2a, 2b; Tr. 25). Lugo also became Figueroa's supervisor at this time. Per Lugo's August 2014 seating chart, Figueroa and Aranda sat close to one another, with only one CSR between them in one corner of the pod (Tr. 199). They spoke frequently during the work shift about the Union as well as other personal matters (Tr. 202).

Change in Seating Assignments

In October 2014, Lugo changed seating assignments in the pod. Ultimately, most employees shifted over by two cubicle spaces while Aranda was moved to a cubicle across the pod from his original seating assignment (GC Exh. 13; Tr. 28, 201).[12] Lugo testified that she could not recall specifically why she moved the CSRs, and did not recall giving Aranda a reason for the reassignment (Tr. 365). Lugo testified that since she began coaching at Respondent she always reassigned cubicles to build camaraderie (Tr. 364). She denied reassigning cubicles due to Union activity.[13] After the cubicle move, Aranda and Figueroa continued to speak during breaks and would send one another text messages but they could no longer speak in between customer calls unless they raised the volume of their voices (Tr. 202, 264, 318–319).

December 2014 to January 2015

On December 8, 2014, Aranda failed to meet a specific metric (CTS) during his prior shift, and explained via email and in

[10] Aranda and Figueroa's testimony differ as to what the CSR said out loud, but this difference is irrelevant.

[11] Figueroa and Aranda testified that they assisted two union officials for only 10 minutes since their break was 15 minutes long. Thus, the TPA, listing only two participants, logically concerned only the participation of the two union officials, and not Aranda and Figueroa.

[12] This was the only time while Aranda was employed by Respondent that Lugo changed seating assignments (Tr. 297).

[13] Aranda testified that Lugo told him she moved him so she could give him closer feedback, listen to his calls more, and help him succeed (Tr. 264). I do not credit Aranda's testimony. Aranda performed generally well with high metrics; Lugo admitted that Aranda performed well during his tenure. It seems unlikely that given Aranda's adequate performance Lugo would tell him she moved him to help him succeed.

person to Lugo that he needed to log off a couple times during the day to go to the restroom for which he was seeing a doctor (GC Exh. 8; Tr. 53). Aranda did not mention in his email that medications affected his increased need to use the restroom. [14] Lugo observed Aranda log off to use the restroom, and she testified that she "was okay with that" (Tr. 53, 384). Lugo testified that she told him he could go the bathroom when needed, but before he did so, he would need to log out (Tr. 404). In contrast, Aranda testified that Lugo did not reach out to help him with regard to his need to use the restroom (Tr. 353).

On December 12, 2014, Lugo sent Aranda an email reminding him of not taking a lunch longer than the allocated time of 30 minutes (previously, he took a long lunch break in November 2014), which affected his ability to achieve CTS (R. Exh. 9). Lugo asked Aranda, "What do you need from us?" and provided Aranda an opportunity to provide a commitment as to what he would do to prevent the long lunch period from occurring again.

On December 14, 2014, Lugo sent Aranda an email congratulating him for achieving CTS and stating that he was "one step closer" to reaching month to date (MTD) target goals for the amount of time he spent on the phone with customers (Tr. 31; GC Exh. 3).

On January 3, 2015, Lugo sent Aranda a congratulatory email for reaching his 1-year anniversary with Respondent, and wrote that he was a great person to have on the team (GC Exh. 4, Tr. 32).

On January 8, 2015, Aranda applied for intermittent leave under the Family Medical Leave Act (FMLA) (GC Exh. 11). The form, dated January 8, 2015, stated that Aranda's health condition began in April 2014, and was anticipated to continue until June 2015. Aranda would be unable to perform "timely resolution of problems, ability to focus" due to migraines, headaches, depression, and loss of appetite which led to loss of energy due to anxiety at work. Aranda would need intermittent leave of 2 days per week up to 10 hours per day. He would also need to be absent from work during flare-ups for migraines, headaches, and acute anxiety which prevented him from work duties. The doctor indicated that Aranda was not prescribed medications (R. Exh. 51).

On January 15, 2015, Respondent's benefits center approved Aranda's intermittent FMLA request of up to 2 absences per week, each lasting 10 hours, from January 9 through July 9, 2015 (GC Exh. 12). Aranda receive further instructions from the benefits center that it was his responsibility to confirm and follow his department's call-out procedures (GC Exh. 12). The benefits center informed Lugo of the parameters of the leave approval but not the basis for the approval which remained confidential (Tr. 383). Other than a request for FMLA, Aranda did not request a reasonable accommodation for any medical issue he suffered (Tr. 105, 128). Aranda used leave under FMLA five times in January 2015 including 3 full days (R. Exh. 2).

[14] At the hearing, Aranda produced a health record indicating that he had been prescribed medications on December 16, 2014.

Aranda's Termination

Respondent terminated Aranda on January 30, 2015, for releasing customer calls in the middle of a call without warning. The events leading to his termination are as follows: In early January 2015, Lugo opened a trace report for remote monitoring of Aranda's calls because there were some released calls the national team and she scored (R. Exh. 2; Tr. 365, 393).[15] Lugo testified, "When a call is incomplete, that's just a red flag for myself. It's not normal to listen to a call and have it cut off at the end unless there's a system issue or there's something wrong" (Tr. 393).

There was a significant amount of testimony on when released calls (also referred to as incomplete calls) or hanging up on customers, occur, and which are appropriate released calls and which are not (Tr. 150, 174–177, 203). One type of released call occurs when the CSR and customer end their call but the customer does not disconnect immediately; the CSR then releases the call which is appropriate conduct. Another appropriate released call occurs when a customer acts abusive towards the CSR, the CSR provides a few warnings, and then the CSR releases the call (Tr. 382). Managers may also instruct CSRs to release a call and call back a customer due to statistical reasons (Tr. 154). An inappropriate released call occurs when a CSR hangs up on a customer without warning during a conversation. Respondent terminated Aranda for releasing these types of calls.

Lugo does not recall whether she spoke to Aranda about what she noticed because there could be many reasons for a released call (Tr. 393). However, Aranda's personnel records show that in January 2015 Lugo continued to coach Aranda when she spoke to him on January 12 after she observed that he "shuts down" when he has a difficult customer (R. Exh. 2).

Later on January 25, 2015, Lugo conducted a side-by-side observation on Aranda, listening to a call remotely (R. Exh. 2; Tr. 366). Aranda began his greeting, and as soon as the customer came on the line, the call dropped. Lugo began to walk towards Aranda when she overheard Aranda tell a coworker about the dropped call and how it would affect his performance metrics.

This incident triggered her memory to ask for the trace reports she previously requested.[16] She received two reports (R. Exh. 22, 45), where she noticed at least 15 released calls since the beginning of the month including the call on January 25. Lugo documented nine of these findings in a chart she made (R. Exh. 21). Between January 25 and 30, 2015, she listened to many of the recordings of the released calls (Tr. 372, 378, 413–414). Prior to listening to the calls, essentially prior to conducting her investigation of the trace reports' results, Lugo testified that she did not inform her supervisor, Ortiz, or any other management official including human resources of her call review (Tr. 415). Lugo discovered some "appropriate" released calls

[15] Lugo rarely ran trace reports (Tr. 417–418).

[16] Figueroa testified that she "would think" management could run reports to become aware of released calls and other than a report, she speculated that management would not know why a call was released (Tr. 213–214). Figueroa's testimony was based on speculation, and I do not credit her testimony.

where Aranda released the phone call after resolution for the customer but also discovered many calls where Aranda hung up on the customer without warning (Tr. 378, 413). Examples discovered by Lugo include Aranda releasing a call on January 5, 2015, while a customer was speaking: the customer stated that he had some questions, and rather than allowing the customer to speak, Aranda recapped the conversation and then released the call. Also during a call where the customer was "escalated" and wanted to speak to someone else, Aranda released the call instead of seeking assistance from the SR or coach (R. Exh. 22). Lugo did not hear any calls where a customer mistreated or was abusive toward Aranda (Tr. 381). In contrast, Aranda could not recall how many released calls he had but could recall a conversation with a customer who was derogatory and abusive towards him (Tr. 305–306).

Lugo testified that in her experience she had not seen anything like this in terms of released calls (Tr. 379). She then spoke to Otero because she felt Aranda's actions were "blatant mistreatment" (Tr. 379, 417).

On January 30, 2015, Lugo, along with Lachioma, who attended the meeting instead of Ortiz who was on paid time off, met with Aranda in a conference room used for coaching (R. Exh. 57).[17] Lachioma reviewed the trace reports and Lugo's summary before the meeting with Aranda but did not listen to the actual phone calls (Tr. 464; R. Exh. 21, 22, and 25). Lugo began by telling Aranda that they noticed an "alarming rate" of released customer calls by him (Tr. 275). Lugo generally discussed with Aranda how she investigated these released calls but did not go over each call detail with Aranda (Tr. 64–65).

Aranda readily admitted that he released calls (Tr. 325). It is undisputed that Aranda never brought the released calls (i.e., the calls where the customer became "beyond irate" and the times he needed to release calls to use the restroom) to Lugo, the SR, Ortiz, human resources, or any other member of management (Tr. 329, 384). Lachioma asked him what these released calls concerned.

Aranda provided several reasons why he released calls (Tr. 80, 276–280). Aranda explained that he had released calls due to his medical condition from a couple of prescription medications that he took as well as due to anxiety and stress (Tr. 276). Aranda further explained that he was under new medication after teeth extraction surgery on January 6, 2015. This medication caused him to go to the restroom more often because of the need to drink water; sometimes due to urgency to the use the restroom, he would disconnect with a customer but said he would try to call the customer back immediately if the customer's issue was unresolved (Tr. 276–278, 328). Aranda testified that he told Lugo in early January 2015 about the issue with not feeling well due to his teeth extraction, and his desire to use FMLA leave which she could not approve (Tr. 294). The first time Aranda raised an issue that his medications affected his ability to work was during the January 30, 2015 meeting with Lugo and Lachioma. He also never requested an accommodation for the side effects from medications that he was taking (Tr. 345). He testified that he told Lugo and Lachioma the names of the medications he took (Tr. 276–277).[18]

Aranda also explained that he released calls when customers were "beyond irate" which caused him anxiety (Tr. 284–285). In his Board affidavit, Aranda told Lugo and Lachioma that sometimes customers were upset and were not going to listen to what he had to say, so in order to avoid wasted time, Aranda would hang up on the customer (Tr. 326–328).

When customers become irate on the phone including the use of abusive language, Figueroa and Casteneda testified uncontradicted that a CSR may release the call with the customer after giving at least 1 warning (Tr. 157, 220). The CSR should also note in the customer's file if they needed to hang up the call due to irate behavior. Figueroa admitted to releasing a call with a customer when she felt ill, but later told her supervisor about her actions because she "didn't want to get in trouble" (Tr. 204–205). Figueroa was not disciplined (Tr. 206). Casteneda also testified about an incident in January 2015 when he hung up on a customer after the customer had been abusive to his coach and him (Tr. 157, 177). Casteneda promptly informed his coach, and was not disciplined.

After Aranda's explanation, Lachioma and Lugo told Aranda that his released calls disturbed customers' experiences, and put pressure on his coworkers (Tr. 280—282). Neither supervisor asked follow-up questions concerning Aranda's medications nor how they affected him (Tr. 81). They did not discuss specific calls with Aranda or review any recordings with him (Tr. 281, 413). But Lugo brought the trace reports and her summary to the meeting (Tr. 380). Lugo stated that they had not played the recordings for Lugo because he readily admitted to releasing calls (Tr. 380).

Lachioma and Lugo asked Aranda to prepare a statement documenting their discussion, and they both prepared their own statements, all of which were given to human resources (GC Exh. 6; R. Exh. 24; Tr. 281–284).[19] Lachioma and Lugo asked Aranda for his statement to obtain his version of events (Tr. 327).[20] Aranda wrote, "I have released calls due to high anxie-

[17] Lachioma provided consistent testimony which was generally uncontradicted. In preparation for the Board hearing, Lachioma prepared another summary of the trace reports and Lugo's summary (R. Exh. 23). Because Respondent did not rely on this evidence when terminating Aranda and is duplicative of evidence already entered into the record, I give it little weight.

[18] Neither of the medications mentioned by Aranda as causing him to release calls was noted by Aranda's doctor on his FMLA form to affect his ability to work (Tr. 333).

[19] All three statements are consistent with the testimony provided at the hearing.

[20] Curiously, Aranda testified that Lachioma and Lugo asked him to write the statement so he could put it in his personnel file so human resources "can know that we touched base on this" (Tr. 285). Aranda also stated that Lachioma and Lugo said that their discussion was not official and simply to touch base to see what was going on with Aranda (Tr. 282). Aranda also testified that they told him that he would receive a phone call later informing him the status of his employment. Aranda's varying testimony gave the impression that Lachioma and Lugo were not forthcoming in the gravity of the situation. Ultimately, I accept Aranda's testimony from his Board affidavit as a more accurate version of events since the statement was given closer in time to the events at issue. Overall, although Aranda provided sincere testimony, his testimony at times appeared exaggerated and embellished, and

ty, stress & needing to go to the restroom. Sometimes when a customer is beyond irate & I have been having to take ownership of call & find a resolution for the customer & still unable to help customer due to customer being irate [sic] I have released those type of call due to high anxiety. Sometimes I need to go to the restroom due to a new medication & feel like I need to go right then & there. Forget to put myself in after call to log out & another call comes in." He also noted, "[H]ave not reached to HR regarding medications nor my coach for this" (GC Exh. 6). Lachioma and Lugo then sent Aranda home with pay, essentially on a decision time (Tr. 285), and hand-delivered Aranda's statement to human resources (Tr. 84).

Later that same day, Lachioma and Lugo each followed up with an email to Otero summarizing the discussion with Aranda (R. Exh. 24; Tr. 86, 385).[21] Lachioma wrote at 10:20 a.m.,

> Today myself, Eliana Lugo and Eddie Aranda had a discussion surrounding reporting, recorded calls and experiences that display Eddie releasing calls before and during conversations with customers. Eddie admitted that he released calls for a couple of different reasons. He advised that he released calls by accidently hitting the headset button instead of the mute button, forgetting to go into ACW and releasing the call that came in so he could, that he had to use the bathroom for some new medication that he was taking and that he would release calls if they were escalated or if he felt he couldn't help a customer due to high anxiety of the customer being upset.
>
> [. . .] We inquired if Eddie had ever inquired for help from his coach or senior to assist with high anxiety calls and he explained that he didn't and didn't feel the outcome would be different. [. . .].
>
> Eddie explained that he did not make Human Resources aware of the medication that he was on that required him to use the bathroom more frequently. We explained that seeking a solution from HR for any medical condition is a means to find a solution instead of driving a customer impacting behavior to solve for it.
>
> Eddie agreed that he released calls and that he did not call some of the customers back and that he did not notify the customer why the call was being released.
>
> We asked Eddie to write a statement of what he explained to us and agreed to have him to go home paid until a conclusion and discussion could be made.

[R. Exh. 25.]

Lugo wrote at 1 p.m.,

> Jason Lachioma and I spoke with Eddie about releasing calls. The first thing he said he said was "yeah I release calls."
> He stated that he does release calls due to customers being irate and him not wanting to "lose it". He said that he gets anxiety and feels that he needs to hang up on his customers.
>
> When we spoke about the effects that this has on the site, his peers and most importantly the customer he did not show any remorse for doing it and just continued to give reasons on why he is doing it. Main reason was that he becomes anxious with customers so just needs to hang up on them. He did state he never reached out to coach or senior for help. In our conversation he was focused on a lot on what he could not do for customers as well as blaming actions on others. He also spoke about the fact that he has to take calls that make him feel anxious for example: store did not do what they were supposed to or previous offers that make customers upset. He said that he does release calls but feels that it is also T-Mobile's fault because we let these actions happen that cause him to become anxious. We let Eddie know that we are all T-Mobile and we have to own every customer experience, that is part of our job. He said he understood but that he knows that customers will not calm down so he feels that hanging up is what needs to be done. He seems to assume what will happen and is not focusing on what HE can do to help the customer.
>
> He also mentioned that he does have to log off to use the restroom and if he forgets to place himself into ACW he will just immediately hang up on the customer. He said that he did not speak to HR about this due to it is a side effect from his medication and that it should go away.
>
> This is extremely concerning. We have details of numerous customer impacts. We had him write a statement of why he is releasing calls and let him know that due to the severity of the situation would be sending him home until further notice. Let me know if you need anything else from me.
>
> Thank you,
>
> Eliana

[R. Exh. 24, emphasis in original.]

Meanwhile, Aranda sent a text message to Figueroa and expressed concern that he would be terminated due to releasing calls. Figueroa wrote, "I know you did something wrong but they are watching us and I have sent calls up about other people hanging up and they don't ever do anything" (R. Exh. 52). The text messages also indicate that Figueroa spoke to Lugo while Aranda was suspended; Figueroa told Aranda that Lugo "made it seem like you were coming back" and said he could get his inner circle points "when he comes back." Aranda doubted that he would be coming back to work at Respondent. Aranda further wrote to Figueroa that he told Lugo and Lachioma at the morning meeting that "my management doesn't want to take escalations which causes me to suffer from further anxiety because I don't feel supported." However, Aranda, Lugo, and Lachioma's contemporaneous notes do not reflect this statement. Aranda stated to Figueroa when asked what he wrote in his statement to Respondent, "I have released calls due to medical reasons and high anxiety due to stress caused by customers. Jason L [Lachioma] made me write that I never reached out to management or hr."

Later that same day, Otero along with Kozlowski and Viola decided to terminate Aranda for hanging up on customers (Tr.

inconsistent. I credit Aranda's testimony only to the extent it is corroborated by contemporaneous statements and his Board affidavit.

[21] Lugo also summarized the event in Aranda's coaching log (R. Exh. 2; Tr. 388).

92).[22] They relied upon the evidence Lugo gathered in her investigation that Aranda released customer calls, as well as the statements of Aranda, Lugo, and Lachioma (GC Exh. 6; R. Exh. 21, 25, and 49; Tr. 93, 436). The three managers also looked at comparable disciplinary actions and the coaching logs (known as "PMT") to ensure that Aranda was treated consistently (Tr. 93, 436).[23] Otero testified that since she has been employed at Respondent, November 10, 2014, no employee who has hung up on multiple customers has remained employed at Respondent; these employees have been terminated (Tr. 442).

Thereafter, Lugo and Otero spoke with Aranda via telephone at 4:40 p.m. (R. Exh. 2).[24] Otero informed Aranda that he was terminated for having several released calls which impacted Respondent's values (Tr. 67, 101, 286–287). Respondent did not provide any paperwork to Aranda documenting his discharge.

It is uncontested that Respondent did not investigate the medical excuses asserted by Aranda during the in-person meeting with Lugo and Lachioma (Tr. 59). Otero and Lugo acknowledged that Aranda generally maintained good metrics by which his performance was measured, and had no prior discipline, including released calls (Tr. 93–94, 287). Furthermore, Respondent did not provide any feedback or counseling to Aranda for the released calls nor did they give him an opportunity to provide a commitment prior to his termination (Tr. 455–456).

Figueroa testified that after Aranda was terminated, she reported incidents of alleged CSR misconduct of dropped calls to Lugo, but neither of these CSRs she reported was terminated unlike Aranda (GC Exh. 42–43; Tr. 208–209, 243, 245). The examples provided by Figueroa included a customer who complained of a dropped call by a CSR when the customer sought to cancel four phone lines. In another example, a customer complained to Figueroa that a CSR refused to honor a request to cancel phone lines. Before Respondent terminated Aranda, Figueroa would also report incidents of alleged CSR misconduct to Lugo but none of these incidents concerned similar types of released calls Aranda allegedly conducted (Tr. 246–247). Lugo testified that she would have investigated the complaints if the employees were on her team (GC Exh. 43), but could not recall any specific examples brought forth by Figueroa to her (Tr. 423–425).

Respondent's Discipline of Other Employees

Respondent considered the following comparators when determining the disciplinary action to take against Aranda:

- CSR Christian Rodriguez (Rodriguez): In May 2014, Rodriguez also released calls, and was suspended and then terminated based on her responses to the commitment and lack of accountability (R. Exh. 35). Prior to termination, Respondent played the released calls for Rodriguez. Rodriguez indicated that she did not regret her actions because the customer was abusive towards her but committed to not engaging in that conduct again.
- CSR Niurka Delgado (Delgado): On October 11, 2014, Respondent, who was supervised by Lugo, immediately terminated Delgado as a final incident for customer mistreatment after she cursed at a customer (R. Exh. 46; Tr. 390). In her investigation, Lugo listened to the call to verify that Delgado cursed at the customer (Tr. 419). Delgado said that the customer "said some things and [I] just reacted" (R. Exh. 46). Prior to her termination, Delgado had been given a decision time by Respondent for her poor attendance.[25]
- CSR Janae Ashley Javis (Javis): In December 2014, Javis was terminated after Respondent discovered that she released 17 phone calls, many which occurred after the customer asked to cancel a phone line (R. Exh. 32). Respondent asked Javis to write a statement but she refused (Tr. 437). Javis had prior discipline for customer mistreat and cancel avoidance (Tr. 452–453).
- CSR Stokey Pearson (Pearson): In January 2015 Respondent terminated Pearson after he was observed using profanity with a telephone dealer (R. Exh. 39). Pearson admitted using profanity when he thought that the phone was on mute.

The General Counsel sought to distinguish Respondent's decision to terminate Aranda with the decision it made in other disciplinary actions. For example, in December 2012, Respondent gave employee Anthony Rael (Rael), who was not in good standing at the time, an opportunity to write a commitment after decision time for releasing calls without warning customers. A SR observed Rael release a call and slam his headset. When the SR approached Rael, he said that he needed to cool down so he would not get fired for "taking it out on the next customer" (GC Exh. 39). Respondent listened to the call, and decided to send Rael home and come back with a commitment on how he would handle "escalated" situations in the future. Rael returned to work providing an inadequate commitment, and only when his second commitment opportunity was deemed inadequate, did Respondent discharge him (GC Exh. 39; Tr. 118–120).

In another example brought forth by the General Counsel, in June 2013, Michael A. Sanchez (Sanchez) released several calls in one day according to a trace report (GC Exh. 40; Tr. 120–122). Respondent played three released calls for Sanchez, which all ended abruptly. Sanchez responded that he had called the customers back but the evidence showed that he had not called the customers again. Sanchez responded that the trace report must be incorrect. Respondent sent Sanchez home and

[22] Kozlowski and Viola did not testify.

[23] Otero testified that Aranda's action of hanging up on customers was considered by Respondent to be a "mistreat" (Tr. 439). Thus, Otero, Kozlowski and Viola reviewed other cases of mistreats. For example, Respondent terminated one employee for a single incident of using profanity against a telephone dealer (R. Exh. 39; Tr. 443–445).

[24] Otero's testimony was credible, and corroborated by her contemporaneous notes.

[25] Delgado worked in the same pod as Aranda and Figueroa. It seems likely that Lugo reassigned the cubicles in the pod after October 11, 2014, when Delgado was terminated.

asked him to provide a commitment about the behavior occurring again. Sanchez would not admit that he released calls.[26]

In a final example presented by the General Counsel, in August 2014, Benjamin Black (Black) also released calls when he was not sure how to handle a customer's issues (GC Exh. 41; Tr. 124–125). Black provided a commitment for immediate improvement, and Respondent stated that he would not be in good standing for 90 days.

After Aranda's termination, Respondent terminated another employee Jayce Lynne Kelly (Kelly) for similar misconduct (R. Exh. 33). Before her termination, Respondent reviewed the released calls with Kelly (R. Exh. 34; Tr. 448–449).

D. Casteneda's Complaints

Casteneda testified that he filed an internal complaint with Respondent regarding Ortiz, his second line supervisor, on March 18, 2015 (GC Exh. 37). One of the complaint allegations included an incident which occurred in the summer of 2014 between Casteneda and Ortiz, where Ortiz accused Casteneda of being pro-Union due to the red shirt he was wearing (Tr. 142). Other allegations included Ortiz's favoritism, and requirement to Casteneda that he track union activity and name employees who participated in union activities. Casteneda met with Otero and Johnson on March 23, 2015, and with Otero and another supervisor from human resources again on April 9, 2015, to discuss these issues (GC Exh. 36; Tr. 141–142, 163).

In anticipation of her April 9, 2015, meeting with Casteneda, Otero prepared points of discussion she wanted to cover (R. Exh. 49; Tr. 428). Otero wrote, in part, "Follow-up: with respect to your conversations with others regarding the Union—while at work you may have such conversations during appropriate times—not when you are working or when other EE [employee] is working." Otero did not read these notes to Casteneda verbatim (Tr. 432, 457).

During this meeting, Casteneda expressed his discomfort with Ortiz due to Ortiz' antiunion sentiment (Tr. 142–143). Otero understood Casteneda's passion for the Union but also explained that other people might feel uncomfortable by his union advocacy (Tr. 143). This discussion segued into Casteneda interrupting Otero, and telling her that he knew "where you're going with this" (Tr. 143). Casteneda testified:

> There's a girl, a CSR, who had come to my attention who had complained about me for signing her up. And she said that she felt tricked by me into signing a Union card, that I had been deceiving. And I proactively brought this up and said, you know what, she was lying. She said that I had signed her up while she was on the phone and she couldn't understand what I was really giving her or handing her, and that she felt tricked by me. So the incident was not as she had laid it down. She was actually on lunch, and she was in my pod, and she was on her cell phone maybe playing on an application, but not on a call with a customer.

[Tr. 143.]

Casteneda then told Otero that he was simply trying to organize based on the Board notice posting from a prior settled case, and based on his interpretation of the notice, he had not "done anything wrong because she was not on a call" (GC Exh. 9; Tr. 143–144, 183). Specifically, the notice section to which Casteneda referred states, "**WE WILL NOT** discriminatorily disallow employees who wear **Union** T-shirts to remain at our facility after their shift and talk to fellow employees who are not on phone calls" (GC Exh. 9, emphasis in original; Tr. 145). Casteneda explained that he felt he spoke to the employee during the permitted time since he and she were not on the phone.

Casteneda testified that Otero told him that since he does not regularly take incoming calls due to his job duties, the definition of being on a call for him is that he could organize before or after work or during lunch, but not while on the clock (Tr. 145–146, 149, 183). Later, on cross-examination, Casteneda testified that he could not recall the exact words Otero used when she conveyed information to him on when he could discuss the Union but that he "had to be off the clock or on break and the other employee did as well" (Tr. 173). Casteneda further testified regarding Otero's statement, "[S]he definitely made it clear that I can organize while I'm not working [. . .] but I don't remember the term, whether it was on the clock, off the clock. I don't remember those specific details" (Tr. 174).[27]

Otero testified that she told Casteneda regarding conversations about the Union, "[I]t was appropriate for him to have—such conversations when he—when he's not expected to be working. When he is supposed to be working or the other employee is supposed to be working, he shouldn't have some conversation" (Tr. 432). Casteneda responded that he understood. Otero further testified that Casteneda asked a clarifying question about discussing the Union and customer calls because he does not take phone calls on a continuous basis (Tr. 433). Otero told Casteneda, "No. But when you're supposed to be supporting your team as a senior rep would be considered when you're supposed to be working" (Tr. 433). Otero denied telling Casteneda that he could not speak about the Union while on the clock or during working hours (Tr. 434). Otero acknowledged that as a SR, Casteneda would be talking about a wide variety of topics throughout the workday to develop rapport with the CSRs (Tr. 457–458).

One month after the April 2015 meeting, Otero followed up Casteneda to check if he had any other issues or concerns (Tr. 188). Casteneda said everything was fine (Tr. 434).

III. DISCUSSION AND ANALYSIS

A. 8(a)(3) and (1) Allegations

The complaint alleges that Respondent violated Section 8(a)(3) and (1) of the Act when (1) on or about October 2014, T-Mobile isolated employees Figueroa and Aranda, and (2) in

[26] Exhibit 40 does not indicate what, if any, discipline Respondent imposed on Sanchez other than following up on the decision time conversation. Otero also was unclear as to what discipline was imposed on Sanchez because she did not work for Respondent at that time.

[27] Casteneda testified general credibly but I do not credit this portion of his testimony regarding what exactly Otero told him about when he could discuss the Union. Casteneda could not recall the exact terminology used by Otero which is significant; Casteneda's testimony changed on this point multiple times. Instead, I credit Otero's testimony as to what she told Casteneda about when he could discuss the Union.

January 2015, T-Mobile terminated Aranda. The General Counsel contends that Lugo separated Figueroa and Aranda to "impede their union activities" (GC Br. at 34–35). The General Counsel also alleges Respondent terminated Aranda because of his union activities and sentiments (GC Br. at 31). Respondent contends that its move of Figueroa and Aranda's cubicle seats was based on a legitimate business reason, and that it terminated Aranda for releasing customer calls (R. Br. at 22, 33).

Under the Board's *Wright Line* decision, in cases alleging discrimination in violations of Section 8(a)(3) and (1), where motivation is at issue, the General Counsel bears the initial burden of showing that Respondent's decision to take adverse action against an employee was motivated, at least in part, by antiunion considerations. 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *American Red Cross Missouri-Illinois Blood Services Region*, 347 NLRB 347 (2006). To prove a violation under *Wright Line*, the General Counsel must establish that: (1) the employee engaged in union and/or protected activity, (2) the employer knew about the union activity, and (3) the employer harbored animosity towards the union activity. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182–1185 (2011); *ADB Utility Contractors*, 353 NLRB 166, 166–167 (2008), enf. denied on other grounds 383 Fed. Appx. 594 (8th Cir. 2010). Animus may be inferred from the record as a whole, including timing and disparate treatment. *Brink's, Inc.*, 360 NLRB No. 136, slip op. at 1 fn. 3 (2014); *Camaco Lorain Mfg. Plant*, supra.

For the first prong of *Wright Line*, there is no question that Figueroa and Aranda engaged in Union activity by expressing support for the Union. Since at least 2013 Figueroa has been organizing on behalf of the Union, and eventually recruited Aranda to join her in either September or October 2014. In late October or early November 2014, Aranda also began wearing a union pin or a red union shirt on a specific day of the week in solidarity with other employee union supporters. In addition, Aranda engaged in protected activity at unspecified times when he spoke up at his pod's meetings, and raised issues about health conditions. Aranda and Figueroa also handed out Halloween goody bags provided by the Union to employees. Thus, Aranda and Figueroa engaged in Union and protected activity, during all times relevant to these proceedings.

The next question turns to the second prong of *Wright Line*, whether the employer knew of such activities. It is reasonable to infer that Lugo was aware of Figueroa and Aranda's union activities. *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 983 fn. 36 (2007), enfd. in relevant part 570 F.3d 354 (D.C. Cir. 2009) (knowledge of an employee's union activity may be established by reasonable inference). Working within their pod of approximately 15 CSRs, Lugo likely would have seen them wear their red union t-shirt on the same day as other union supporters. Lugo also would have observed Figueroa and Lugo come back to the pod after their break on October 31, 2014, passing out remaining union goody bags. Due to the relatively small physical size of the pod, Lugo likely heard them talking to one another about the Union. Although it is uncontested that Lugo never made any statements or comments to Aranda or Figueroa regarding their Union activity, Lugo also never denied having knowledge of Figueroa and Aranda's union and protected activity. Thus, Lugo was presumably aware of such activities.

Lugo, who made the decision to reassign cubicles, however, did not make the recommendation or decision to terminate Aranda. The decision to terminate Aranda came from human resources. The evidence is scant as to whether Otero, Kozlowski, and Viola were actually aware of Aranda's union activity. The primary evidence presented by the General Counsel as to knowledge on the part of human resources is the TPA reports. The TPA reports concerned only union activity, and were sent by Otero and Johnson to named and unnamed recipients including Kozlowski and Viola. However, these TPA reports did not include the names of the employees who participated in union activities. The General Counsel also postulated that Johnson knew of Aranda's union support because on January 23, 2015, she came to perform an ergonomic evaluation at his desk, and would have likely seen his union calendar. Johnson, though, did not make the decision to terminate Aranda. Under Board law, supervisory knowledge of union activity is imputed to Respondent's human resources in the absence of credible evidence to the contrary. See *State Plaza Hotel*, 347 NLRB 755, 757 (2006); *Dobbs International Services*, 335 NLRB 972, 972–973 (2001). Otero never denied knowledge of Aranda's Union and protected activity, and Kozlowski and Viola did not testify. Thus, absent credible evidence to the contrary, I find that Lugo's knowledge of Aranda's union and protected activity imputed to Otero, Kozlowski, and Viola.

The General Counsel and the Charging Party also argue that Respondent has created an atmosphere of animus towards union activity by engaging in surveillance of employees with the TPA reports, and by a recent informal settlement agreement with the Board (GC Br. at 1, 13–14; CP Br. at 2–6). I disagree. First, the allegation of surveillance is not before me, but Respondent does not dispute that it has admitted to using TPA reports to document outside their premise's activity which consists primarily, if not entirely, of union activity. Nevertheless, the reports contain no names or identifiers. Furthermore, a settlement agreement with a non-admissions clause "may not itself be used to establish anti-union animus" unless Respondent has failed to comply with the settlement agreement or engaged in independent unfair labor practices. *Steves Sash & Door Co.,* 164 NLRB 468 (1967), enfd. in pertinent part 401 F.2d 676, 678 (5th Cir. 1968). Here, the settlement agreement contains a nonadmissions clause, stating that the employer "does not admit that it violated the National Labor Relations Act." There is no evidence that Respondent has failed to comply with the settlement agreement or engaged in independent unfair labor practices. Thus, the settlement agreement cannot be used to establish antiunion animus.

The remaining question, the third prong of the *Wright Line* analysis, turns on Respondent's motivation for reassigning cubicles to Figueroa and Aranda, and for terminating Aranda. If an unlawful motive cannot be established, even if an employer's reason for the adverse action is poor, nonexistent, or violates a law other than the Act, a violation cannot be found.

A discriminatory motive or animus may be established by circumstantial evidence, inferred from several factors, includ-

ing pretextual and shifting reasons given for the adverse action, the timing between the employees' protected activities and the adverse employment action, inconsistent treatment of employees, and the failure to adequately investigate alleged misconduct. *Temp Masters, Inc.*, 344 NLRB 1188, 1193 (2005); *Promedica Health Systems, Inc.*, 343 NLRB 1351, 1361 (2004); *Flour Daniel, Inc.* 311 NLRB 498 (1993). Discriminatory motive may also be established by showing departure from past practice or disparate treatment. See *JAMCO*, 294 NLRB 896, 905 (1989), affd. mem. 927 F.2d 614 (11th Cir. 1991), cert. denied 502 U.S. 814 (1991); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999).

If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *Camaco Lorain Mfg. Plant*, supra; *ADB Utility*, supra. Respondent cannot meet this burden merely by showing that misconduct factored into the decision. Rather, Respondent's burden is to show that the misconduct would have resulted in the same action even in the absence of the employees' union and protected activity. *Monroe Mfg.*, 323 NLRB 24, 27 (1997).

(1) Respondent's Isolation of Aranda and Figueroa

Turning first to the General Counsel's allegation that Lugo isolated Aranda and Figueroa, I find that the General Counsel failed to show the requisite animus. The timing of events is crucial. First, Lugo announced in late August 2014, before she began supervising Figueroa and Aranda, that she liked "to change things up so we may change desks every couple months☺". Two months later, sometime in October 2014, Lugo announced a change in seating assignments. Lugo made the decision alone. Although all the CSRs moved over approximately 2 cubicles, Aranda moved to the opposite side of the pod.

At first glance, this move seems suspicious since Aranda also did not move over 2 cubicle spaces which could infer animus as suggested by the General Counsel and the Charging Party. However, the direct and circumstantial evidence does not point to any Union animus on the part of Lugo due the timing of events. Most, if not all, of Aranda's Union activity occurred in late October or early November 2014, *after* Lugo rearranged the seating assignments in the cubicle. At the time of the reassignment, Aranda had only agreed to join Figueroa in Union organizing, but had not yet made any proactive, outwards steps such as wearing a red Union t-shirt, wearing his Union pin, and handing out the Union goody bags. Aranda had spoken up during pod meetings regarding a health issue of cockroaches in the break room but Aranda's testimony did not clarify when he made this statement. Furthermore, before any knowledge of Figueroa or Aranda's Union activity, Lugo informed the entire pod that she would likely reassign seats. Lugo did not arbitrarily depart from a past practice which may support an inference of unlawful motive. See *Corliss Resources, Inc.*, 362 NLRB No. 21 (2015) (arbitrary departure from past practice may support inference of unlawful motive).

The fact that Lugo could not recall why she decided to reassign seats in October 2014 is insignificant; I find it more likely than not that she reassigned the seats because she has always done so as a coach to build camaraderie. Thus, I find that the General Counsel failed to prove that Lugo's decision to reassign the seats in the pod was even partially motivated by anti-Union animus.

In addition, Lugo did not separate Aranda and Figueroa by assigning them to different pods or different shifts. Figueroa and Aranda admitted that they continued to talk and send text messages during the work shift and away from work but they could no longer speak between customers and needed to raise their voices to hear one another across the pod. Unlike the employer in *Fabric Mart Draperies, Inc.*, 182 NLRB No. 55, slip op. at 10 (1970), cited by the General Counsel, Respondent did not isolate Figueroa and Aranda from other employees. In *Fabric Mart Draperies*, the employer violated the Act when it punished an employee who participated in a prior Board proceeding by assigning her to a "remote and essentially isolated work station." Supra, slip op. at 1. The General Counsel also cites to *Hall of Mississippi, Inc.*, 249 NLRB 775 (1980), to support its argument that Respondent illegally isolated Figueroa and Aranda. In *Hall of Mississippi*, the employer violated the Act when it physically isolated a union organizer from other employees by reassigning her to another department which was inoperative. In contrast, Lugo merely reassigned cubicles as she said she would, and did not isolate Figueroa and Aranda from other employees. The only "isolation" faced by Figueroa and Aranda was their inability to talk in between customers as easily as they could before the reassignment.

In *American Red Cross Missouri-Illinois Blood Services Region*, cited by the Charging Party, the Board held that the employer violated the Act when a supervisor instructed a scheduler to schedule all four union supporters together and apart from other employees "to keep them from infecting others." Supra, slip op. at 2. Eventually these employees did work with other employees but on a less frequent basis than before thereby limiting their contact with other employees. Again as set forth above, the fact pattern presented here differs considerably. The Charging Party also argues that a strong inference for animus towards Aranda and Figueroa can be made due to the "intense union animus at the Call Center" especially due to Ortiz's alleged demanding of the names of Union supporters (CP Br. at 35). However, this "intense union animus" has not been established in this record, and even assuming such animus existed, the General Counsel and the Charging Party have not proven that this animus improperly motivated Lugo to reassign cubicles in October 2014.

Even if one assumes, contrary to the weight of the evidence here, that the General Counsel met its required initial showing under *Wright Line*, Respondent has shown that it would have reassigned the cubicles of Aranda and Figueroa, absent protected concerted and Union activity. Lugo announced at the beginning of her tenure as coach that she would reassign seats every couple of months. She credibly explained that she reassigns cubicles to promote camaraderie. In August 2014, when Lugo announced the anticipated reassignments, there is no evidence to show that she was aware of Figueroa's Union support, and clearly Aranda had not yet joined the Union organizing campaign.

Accordingly, I find that the General Counsel failed to prove

that Respondent violated Section 8(a)(3) and (1) of the Act when it reassigned Aranda and Figueroa's cubicles, and recommend that this allegation be dismissed.

(2) Respondent's Termination of Aranda

Now turning to Respondent's termination of Aranda, I also find that the General Counsel failed to show that Aranda's termination was motivated by union animus, the third prong of *Wright Line*. Again, the timing is suspect. It is well settled that an adverse employment action occurring at a time proximate to an employee's protected activity constitutes evidence of unlawful motivation. See, e.g., *Relco Locomotives, Inc.*, 358 NLRB 298, 311 (2012) (timing of employee discipline, less than 2 months after employer learned of protected activities and 2 weeks following union election, evinces unlawful motivation); *Sears Roebuck & Co.*, 337 NLRB 443, 451 (2002) (timing of discharge, "several weeks" after employer learned of protected concerted activities, indicative of retaliatory motive). Aranda began to be more outwardly vocal regarding his support of the Union in late October and early November 2014. At that time, Aranda participated in handing out Union goody bags, and began wearing a red union T-shirt and a union pin on certain days of the week. Aranda's performance had been generally good but in December 2014 it is undisputed that he encountered some difficulties with maintaining a specific performance metric. Lugo and the SR questioned Aranda, and Aranda mentioned his need to log off and use the restroom for which he was seeing a doctor. Lugo kept reminding Aranda about his need to improve this metric, and when he began to achieve these targets, she congratulated him.

Thereafter, Aranda's only outward Union activity occurred in late December 2014, when he placed a Union calendar in his cubicle. Then in January 2015, Lugo and the national call team noticed incomplete or released calls which were unusual. Without informing her supervisor or human resources, Lugo initiated a trace report to discover what happened. Only after she encountered a similar issue of released calls with Aranda, did Lugo remember to check the trace reports. Her investigation revealed many inappropriately released calls. When confronted, Aranda did not deny releasing the calls, and instead laid blame on his medications and anxiety. Presumably Aranda continued to wear his union pin and red union t-shirt on designated days of the week, but the General Counsel presented no other evidence of union or protected activity near the time of his termination. Protected or union activity need not necessarily occur near or at the time of an adverse action but in this instance there is no direct or circumstantial evidence supporting animus for union activity directed at Aranda. Thus, the timing of the termination does not demonstrate or infer animus to Aranda's union or protected activity.

The General Counsel argues that Respondent failed to investigate adequately Aranda's released calls, and instead the meeting on January 30, 2015, was a fait accompli (GC Br. at 37–40). The evidence shows otherwise. First, Lugo credibly testified that she made the decision to investigate the released calls after suspicions were raised. Lugo explained that she does not recall talking with Aranda about the released calls because there could be a number of reasons for why the released calls took place such as a systems' error. Lugo's explanation seems reasonable in light of the circumstances at the time. Even during the month of January 2015 Lugo continued to coach Aranda on issues she observed; on January 12, 2015, Lugo spoke with Aranda about his trouble with handling calls with difficult claimants. At the end of January 2015, it took Lugo a few days to review some of the released calls and create a spreadsheet to document her findings. Even though Lugo did not listen to every single released call by Aranda, she compiled a significant number of released calls in her summary. She went to human resources only after she determined that Aranda hung up on a number of customers which she felt was "blatant mistreatment." Thereafter, Lugo and Lachioma held a meeting with Aranda to discuss the released calls, and submitted their written summaries along with Aranda's statement to human resources.[28] Human resources then made the decision to terminate Aranda. Overall, Respondent's investigation was not inadequate.

The General Counsel elicited a considerable amount of testimony on Aranda's medical conditions and argued that Respondent failed to consider and investigate his condition which demonstrates animus. However, before the January 30, 2015 meeting, Respondent's benefits team had already approved Aranda's FMLA leave for his inability to perform "timely resolution of problems, ability to focus" due to his migraines, headaches, depression, and loss of appetite due to anxiety at work. In fact, Aranda used FMLA five times in the month of January, including 3 full workdays. Thus, contrary to the General Counsel's argument, Respondent clearly provided instructions and guidance to Aranda on how to use his FMLA leave which is evident by his usage. Furthermore, Aranda admitted that he had not told anyone at Respondent about the effects of his medication on his ability to perform his job such that he would release customer calls. I do not detect animus on the part of Lugo and Lachioma for asking Aranda to note on his written statement the same. In addition, the General Counsel provided no comparable CSRs who released calls and had medical issues and who were treated differently than Aranda.

[28] The General Counsel argues that Otero's solicitation of statements from Lugo and Lachioma "demonstrates this documentation activity was not standard operating procedure for addressing potential employee discipline" (GC Br. at 39 fn. 23). It is unclear to which "documentation activity" the General Counsel refers but the record is devoid of any evidence that Respondent solicited statements from Lugo and Lachioma after their meeting with Aranda for merely "setting the framework for Aranda's termination" (GC Br. at 39). Similarly, there is no evidence that Respondent's disciplinary investigation of Aranda strayed in any way from its investigation of other disciplinary matter.

The General Counsel argues that Respondent rushed to terminate Aranda by having Lachioma attend the January 30, 2015, meeting rather than Ortiz who was on paid time off. It is unclear from the record how Ortiz's presence would have made a difference especially since under the General Counsel's theory of anti-Union animus at Respondent, Ortiz is the antagonist. Again Lugo investigated the actual released calls the week of January 25, without informing anyone including Ortiz, and the meeting on January 30, 2015, was to discuss why those calls occurred, not Aranda's day-to-day performance as the General Counsel argues Ortiz could have provided.

Contrary to the General Counsel and the Charging Party's assertion (GC Br. at 40–41; CP Br. at 29), Respondent does not have a progressive discipline policy. I do not find that Respondent has a progressive discipline process as asserted by the General Counsel and the Charging Party. None of Respondent's witnesses agreed that Respondent had a progressive discipline process, and its own orientation materials did not indicate as such. The orientation material compared T-Mobile's program to other companies which use a "typical progressive discipline model" where an employee is given sequentially a verbal warning, written warning, and final warning, and ultimately terminated. In contrast, Respondent permits its supervisors to use a variety of techniques for disciplining its employees (clarifying discussion, formal reminder, review of expectations, and decision time) along with termination. One need not come before the other. In addition, during his new employee orientation, Aranda was informed that releasing calls could be cause for termination.

The comparable disciplinary actions raised by the General Counsel and set forth by Respondent also do not necessarily support a legitimate argument for disparate treatment. The General Counsel and the Charging Party argue that other employees were given "chances to correct their conduct" (GC Br. at 2, 41–43; CP Br. at 28). Arguably, this is the General Counsel's strongest argument. It is true that Respondent gave Rodriguez, Javis, Rael, Sanchez, and Black an opportunity to provide a commitment prior to terminating them all but Black. However, Respondent also immediately terminated Delgado and Pearson, without providing an opportunity to provide a commitment, for customer mistreats. In contrast to Aranda, and the other comparable employees, Respondent did not terminate Black. Furthermore, an opportunity to provide a commitment is not an option as part of the disciplinary process, but is rather appears to be an option while Respondent considers what further disciplinary action to implement, if any. Overall, it appears that Respondent handled released call situations differently for the CSRs depending on the specific circumstances.

The General Counsel and the Charging Party argue that Respondent should have played the released calls for Aranda during the January 30, 2015 meeting. However, it was realistic for Lugo and Lachioma not to play the released calls for Aranda because he admitted that he released the calls which left most of the focus of the meeting on why he released the calls. Unlike CSRs Rodriguez, Delgado, Sanchez, and Kelly (who were disciplined or terminated for released calls or customer mistreats), Aranda admitted that he released the calls and explained why he did so. Thus, I do not find that Respondent departed from past practice when it made the decision to terminate Aranda.

In sum, I find that the General Counsel failed to establish animus on Respondent's part towards Aranda for his union and protected activity. As found above, Respondent likely became aware of Aranda's activities but there is no indication here that Lugo's investigation and human resources' termination of Aranda were at all connected to Aranda's union and protected activity. Lugo discovered the released calls but sought to investigate the matter to see what happened. Only after Lugo conducted her investigation did she go to human resources since the released calls were numerous. Aranda also admitted to releasing the calls. Human resources, after reviewing Aranda and its two managers' statements as well as comparable disciplinary actions, decided to terminate Aranda. While it is true that the three human resources officials who made the decision to terminate Aranda received the TPA reports which included the October 31, 2014 union event, the names of the participants were not on the reports. The evidence, even circumstantial, cannot establish that Aranda's union and protected activity was a motivating factor in Respondent's decision to terminate him.

Assuming that the General Counsel met its initial burden of proof, the evidence shows that Respondent would have discharged Aranda even in the absence of his prounion actions. As set forth at Aranda's orientation, releasing customer phone calls is immediate grounds for termination. Furthermore, it is undisputed that Aranda admittedly released calls and never informed Lugo or any other management official of this. In contrast, Figueroa and Casteneda, who are vocal union supporters, both admitted that when they have released calls they have immediately informed their coaches of their actions.

Accordingly, I find that the General Counsel has failed to prove that Respondent violated Section 8(a)(3) and (1) of the Act when it terminated Aranda, and recommend that this allegation be dismissed.

B. 8(a)(1) Allegation

The complaint alleges on or about April 9, 2015, Respondent by Otero disallowed its senior representative employees from discussing the Union while allowing them to discuss non-work topics during work time thereby violating Section 8(a)(1) of the Act.

Section 8(a)(1) of the Act provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and

to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Furthermore, an employer violates Section 8(a)(1) when employees are forbidden to discuss unionization while working, but are free to discuss other subjects unrelated to work, particularly when the prohibition is announced in response to employees' activities in regard to the union organizational campaign. *Fresh & Easy Neighborhood Market, Inc.*, 356 NLRB 588 (2011), enfd. 459 Fed. Appx. 1 (D.C. Cir. 2012); *Orval Kent Food Co.*, 278 NLRB 402, 407 (1986); *Teledyne Advanced Materials*, 332 NLRB 539 (2000).

As an initial matter, the record is undisputed that Respondent permits its employees to discuss non-work related matters when they are not taking customer calls. As for the discussions regarding the Union, based upon the credited testimony, I conclude that Otero told Casteneda on April 9, 2015, that he could not discuss the Union when "he is supposed to be working or the other employee is supposed to be working" (Tr. 432). Upon clarification as to the definition of "working" for Casteneda since he does not routinely take customer calls, Otero told Casteneda that he could not discuss the Union "when you're supposed to be supporting your team as a senior rep" (Tr. 432).

Respondent argues that because Otero did not bar Casteneda from talking about the Union during work hours, or when on the clock, that she essentially informed him that he could talk about the Union during work hours (R. Br at 35–37). In *Essex International*, 211 NLRB 749, 750 (1974), the Board held that "a rule prohibiting solicitation during "working hours" is prima facie susceptible of the interpretation that solicitation is prohibited during business hours, and thus invalid." The burden falls on the employer to show by extrinsic evidence that the "working hours" rules was communicated in such a way as to convey clearly to permit solicitation to periods when employees are not actively working. *Essex International*, supra; see also *Our Way Inc.*, 268 NLRB 394 (1983) (discussion of the term "working hours"); *Alert Medical Transport*, 276 NLRB 631, 663–664 (1985) (employer's use of the term "company time"); *BJ's Wholesale Club*, 297 NLRB 611 (1990). While it is true that I credited Otero's testimony that she did not tell Casteneda that he could only discuss the Union while off the clock, her own testimony confirms that she restricted Casteneda's union speech to times when he was not working supporting CSRs. The problem with this argument is that as a SR, other than his two 15-minute breaks and a lunch break, Casteneda is always "working" supporting the CSRs. Casteneda does not take customer calls but constantly works with the CSRs building rapport and helps them when needed. Furthermore, even though Otero reached out to Casteneda to see if he had any further issues or concerns to which he had none, I find that Otero's definition of working as applied to Casteneda unlawfully placed restrictions on when he could discuss the Union. Otero failed to clarify with Casteneda when he could speak about the Union, and instead told him when he could not, leaving an ambiguity as to when he could speak about the Union. See *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999) (any ambiguities are construed against the promulgator of the rule). Moreover, the issue regarding when Casteneda could speak about the Union arose during a meeting concerning a complaint he had about his supervisor and his own Union activity.

Thus for the above reasons, I find that by promulgating and maintaining a rule unlawfully restricting senior representative's ability to discuss the Union while working but not prohibiting them from talking about other subjections, Respondent violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.
3. By disallowing its senior representatives from discussing the Union while allowing them to discuss non-work topics during work time, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2) (6), and (7) of the Act and violated Section 8(a)(1) of the Act.
4. All other allegations are dismissed.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

I will order that Respondent post a notice in the usual manner, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB 11, at 15–16 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[29]

ORDER

The Respondent, T-Mobile, USA, Inc., Albuquerque, New Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Promulgating and maintaining a rule prohibiting senior representatives from talking to other employees about the Communications Workers of America, Local 7011, AFL–CIO or any other labor organization while working but not prohibiting them from talking about other subjects.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Within 14 days after service by the Region, post at its facility in Albuquerque, New Mexico, copies of the attached notice marked "Appendix."[30] Copies of the notice, on forms provided by the Regional Director for Region 28, after being

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

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

signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since April 9, 2015.

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

Dated, Washington, D.C. December 10, 2015

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT promulgate and maintain a rule prohibiting senior representatives from talking to other employees about the Communications Workers of America, Local 7011, AFL–CIO or any other labor organization while working but not prohibiting them from talking about other subjects.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

T-MOBILE USA, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-148865 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.