

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AT&T MOBILITY, LLC

and

Case 05-CA-178637

MARCUS DAVIS,
An Individual

Paul J. Veneziano, Esq., for the General Counsel.
Stephen J. Sferra and Jeffrey A. Seidle, Esqs. (Littler Mendelson, P.C., Cleveland, Ohio)
for the Respondent.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in Washington, D.C. on February 10, 2017. Marcus Davis filed the charge on June 20, 2016 and the General Counsel issued the complaint on October 14, 2106.

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by maintaining an overly broad Privacy of Communications rule and by threatening employees with discharge if they violate this rule.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent is a limited liability company which has facilities nation-wide, including retail stores in the District of Columbia, where it annually provides wireless telecommunications devices and services. Respondent derives gross revenues in excess of \$100,000 annually and purchases and receives goods and materials in excess of \$5,000 from outside the District of Columbia. 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 Communications Workers of America, (of which the Charging Party is a member) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

5 Marcus Davis is a retail sales associate at Respondent's store at Dupont Circle in
 Washington, D.C. He is also the union steward for CWA Local 2336 for five stores in the
 Washington, D.C. area. On or about May 19, 2016, Davis attended a meeting in the store
 manager's office at Respondent's Chevy Chase, D.C. store. The purpose of the meeting was for
 Respondent to present a termination notice to a sales associate who worked at the Chevy Chase
 store. Davis recorded the meeting, which lasted approximately 20 minutes, on his company
 10 owned phone and his personal cell phone. without telling management.

The Chevy Chase store manager, Richard Belot, suspected that Davis might have
 recorded the meeting. He called his supervisor, Area Sales Manager Andrew Collings, for
 instructions. Collings consulted with Respondent's human resources department. When
 15 Collings returned Belot's call, Davis had returned to the Dupont Circle Store. Collings then
 called Jason Yu, the manager of that store. He instructed Yu to retrieve the phone, delete the
 recording and counsel Davis. Yu complied with Collings' instructions. He called Davis into his
 office, first to delete the recording and a second time to administer the coaching.¹

20 The next day Collings conducted a routine visit to the Dupont Circle store, which he did
 about once a week. Collings spoke to Davis in the backroom of the store. Collings told Davis
 that recording conversations inside any of Respondent's stores violated company policy. He
 then said that Davis should not encourage other employees to record in-store conversations and
 that "he did not want anyone held accountable for not following policy," Tr. 65.²

25 The policy in question is found on Respondent's intranet site, as part of Respondent's
 Privacy in the Workplace Policy, and provides:

30 **Privacy of Communications**

Employees may not record telephone or other conversations they have with their co-
 workers, managers or third parties unless such recordings are approved in advance by the
 Legal Department, required by the needs of the business, and fully comply with the law
 and any applicable company policy.

35 G.C. Exh. 2; R. Exh. 1.

On May 27, 2016, Collings sent an email to Davis and Local Union Vice President Robin
 Jones reiterating Respondent's policy that employees are not permitted to record conversations
 inside any of Respondent's stores, citing the policy set forth above.

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¹ The Dupont store has public and non-public areas. The non-public areas are in the back of the store
 and include restrooms, a break area and the store manager's office. There is a computer in the non-public
 back of the store where employees can access emails and process products and services.

² Davis' account of this conversation is that Collings said, "I've fired people for that." I credit
 Collings but do not regard the difference in their versions of the conversation to be significant. Either one
 communicated to Davis that employees might be disciplined for violation of Respondent's rule.

Respondent's rule does not address conversations with customers. The protection of customer information and data is covered by other policies not at issue in this case, Exhs. R-5, 6, 7 and 8. AT& T Mobility has gone to great lengths to protect customer data. The legal and business consequences of a breach of customer data for Respondent are very significant, Tr. 70-100.

Analysis

Relevant Case Law

The Board has held that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights, *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). A rule is unlawful if it explicitly restricts activities protected by Section 7. If this is not true, a violation is established by a showing that 1) employees would reasonably construe the language to prohibit Section 7 activity; 2) that the rule was promulgated in response to protected activity or 3) that the rule has been applied to restrict the exercise of Section 7 rights, *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). The Board stated that a rule would not violate the Act merely because it *could* be read to prohibit protected activity.

Several recent decisions have addressed photographing and recording by employees on company property. In *Flagstaff Medical Center*, 357 NLRB 659 (2011) the Board found that a hospital's rule prohibiting the use of cameras for recording images of patients and/or hospital equipment, property, or facilities, did not violate the Act.³

In *Rio All-States Hotel & Casino*, 362 NLRB No. 190 (2015) the Board found a rule that prohibited the use of any type of audio visual recording equipment and/or recording device unless authorized for business purposes, to be illegal. The Board distinguished the case from *Flagstaff Medical Center* by concluding that the Casino's rules included no indication that they were designed to protect privacy or other legitimate interests.

In *Whole Foods Market, Inc.* 363 NLRB No. 87 (2015) the Board found illegal two company rules. One prohibited the recording of phone calls, images or company meetings with any recording device unless prior approval is received from management, or all parties to the conversation consent to its recording. Violation of this rule could lead to discipline up to and including discharge.

The second rule was similar. Whole Foods stated as its purpose the elimination of a chilling effect on the expression of views if one person is concerned that the conversation is being secretly recorded. The Board found both rules illegal. The Board citing *Rio All-States Hotel & Casino* stated that photography and audio or video recording in the workplace...are protected by Section 7 if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present. The Board distinguished *Flagstaff Medical Center* by concluding that Whole Foods' business justification is not nearly as pervasive or compelling as the patient privacy interest in *Flagstaff*.

³ I need not consider whether photography and audio recording can be distinguished with regard to their impact of an employer's confidentiality concerns.

The Board, relying on *Rio All-States Hotel* and *Whole Foods*, reversed the Judge’s finding that an employer’s rule was not violative in *T-Mobile, Inc.*, 363 NLRB No. 171 (2016). In *T-Mobile*, while tacitly acknowledging the employer’s interest in maintaining employee privacy, confidential information and promoting open communication, the Board found the rule to be violative because it was not narrowly tailored to promote its legitimate interests and would reasonably be construed to restrict employees’ Section 7 rights.

Further in both the *Whole Foods* and *T-Mobile* decisions, the Board noted that protected conduct may include a number of things including recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions. As the Board has stated, “moreover, our case law is replete with examples, when photographs or recording, often covert was an essential element in vindicating the underlying Section 7 right.” 363 NLRB No. 87, slip op. 3 at fn. 8. My experience as an NLRB judge for 20 years confirms that assessment.

The law as applied to this case

Respondent’s rule prohibiting recordings is illegal

In this case I find that Respondent has a pervasive and compelling interest in the privacy of customer information (Customer Proprietary Network Information (CPNI)⁴, the content of customer communications and Sensitive Personal Information (SPI).⁵ The issue is whether its rule is overly broad when balancing this compelling interest against employees’ Section 7 rights.

Respondent’s rule is overbroad and thus illegal. First of all, it is not limited to work time and/or conversations in work areas, or even conversations on Respondent’s premises. Secondly, Respondent could protect its substantial interests with a much narrower rule, e.g., that makes it a violation of company policy to record in any manner customer information or data. I would note that Respondent prohibits accessing any such data and considers it a breach of its duty if such data is accessed even inadvertently. Employees are trained to understand what constitutes CPNI and SPI, so that they do not even inadvertently access such information. Respondent does so because, as its brief sets out in great detail, there are potential draconian consequences for unauthorized access to CPNI and other customer data, as well as its disclosure.

Since employees are so thoroughly trained not to access CPNI and SPI, it should not be particularly burdensome to promulgate and enforce a rule that prevents the audio and visual recording of such data, just as it prohibits the unauthorized viewing of such data.

Respondent notes that workplace discussions routinely involve CPNI, R. brief at 8. However, the company maintains a “rule of least privilege” that limits access to customer information only to those who need to access such information to perform their job. Thus, an employee who is not authorized to access such information should not be involved in any conversation that included such information. Therefore, the danger of an employee recording

⁴ CPNI includes such things as the number of lines a customer has, call patterns and usage, services on an account and billing information.

⁵ SPI includes social security numbers, date of birth and credit card payment information.

CPNI or SPI is materially diminished. Moreover, an employee who is authorized to access CPNI is trained to recognize it. Thus, a rule forbidding the recording of conversations including a discussion of CPNI or SPI should be sufficient to protect Respondent's pervasive and compelling interest in the privacy of customer information.⁶

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Indeed, the facts of this case establish the overbreadth of Respondent's rule. There is no indication that customer information was discussed at the meeting at the Chevy Chase store that Davis recorded. Neither Collings nor Yu would have been allowed to discuss information with Davis that Davis was not authorized to access. On the other hand, the discussion did involve an issue of employees' Section 7 rights.⁷ Furthermore, if the issue of whether Davis or other employees were threatened with discharge required a credibility determination, a recording would most likely have been determinative.

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Even in the absence of the rule, however, the threat to Davis amounted to restraint and coercion in the face of Davis' protected activity—recording a disciplinary meeting concerning a potential grievance.

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Respondent illegally threatened Davis and other employees

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Andrew Collings statement to Marcus Davis, that he did not want anyone held accountable for not following Respondent's Privacy of Communications policy, is a threat that violates Section 8(a)(1). The statement obviously implies that future violations of the rule may be grounds for discipline and maybe even discharge. The threat was made in response to Davis' violation of Respondent's rule in the course of his protected activities as union steward, *Thor Power Tool Co.*, 148 NLRB 1379, enfd. 351 F.2d 584 (7th Cir. 1965).

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Conclusions of Law

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1. Respondent's Privacy of Communications policy is overbroad and therefore its maintenance and enforcement as written violates Section 8(a)(1) of the Act.
2. Respondent violated Section 8(a)(1) by impliedly threatening Marcus Davis and others with discipline if they violated the rule again while engaged in protected activity.

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⁶ Without deciding this issue, a rule banning the recording of all conversations with customers, unless previously authorized, might be legal. Also, protection of SPI strikes me as irrelevant to this case. It is hard to image a situation in which two employees or an employee and a manager would have a conversation which would include discussion of somebody else's social security number or credit card payment information. It is also hard to image a situation in which an employee would record a conversation in which one participant divulged his or her birthday.

⁷ In evaluating the legality of Respondent's rule, consideration must be given to the fact that the rule has been applied to restrict the exercise of Section 7 rights, *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). Davis' activities in the grievance meeting constituted protected activity, protection which was not forfeited by flagrant misconduct, *Thor Power Tool Co.*, 148 NLRB 1379, enfd. 351 F.2d 584 (7th Cir. 1965).

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.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The Respondent, AT & T mobility, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Maintaining a Privacy of Communications rule, which prohibits employees from recording all conversations they have with coworkers, managers or third parties unless such recordings are approved in advance by the Legal Department, required by the needs of the business, and fully comply with the law and any applicable policy.
- (b) Impliedly threatening employees with discipline if they do not comply with the Privacy of Communications rule.
- (c) In any like or related manner 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) Rescind its Privacy of Communications Rule.
- (b) Notify employees that the Privacy of Communications rule has been rescinded
- (c) Within 14 days after service by the Region, post at its District of Columbia stores copies of the attached notice marked "Appendix. I"⁹ Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. 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 the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the 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

⁸ 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.

⁹ 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."

proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 19, 2016.

- 5 (d) Within 14 days after service by the Region, post at its stores nationwide copies of the attached notice marked “Appendix II.”¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, 10 the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the 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, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 19, 2016.
- 15 (e) 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.
- 20

25 Dated, Washington, D.C. April 25, 2017



30 Arthur J. Amchan
Administrative Law Judge

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

APPENDIX I

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 maintain or enforce the Privacy of Communications rule included in our Privacy in the Workplace policy published on our intranet webpage that prohibits employees from recording telephone or other conversation they have with their co-workers, managers, or third-parties unless approved by our legal department, required for our business, and in compliance with the law and our policies.

WE WILL NOT threaten you with discipline or discharge for violating our Privacy of Communications rule.

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

WE WILL rescind our Privacy of Communications rule and effectively notify you of the rescission and that the rule will no longer be enforced.

AT&T MOBILITY LLC

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.
Bank of America Center, Tower II, 100 S. Charles Street, Ste 600, Baltimore, MD 21201-4061
(410) 962-2822, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/0-CA- 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.



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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (410) 962-2880.

APPENDIX II

NOTICE TO EMPLOYEES

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