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

MICHIGAN BELL TELEPHONE COMPANY
AND AT&T SERVICES, INC.

and Case 07–CA–182505

LOCAL 4034, COMMUNICATIONS WORKERS
OF AMERICA, AFL–CIO

Robert A. Drzyzga, Esq., for the General Counsel.

Stephen J. Sferra, Esq. and *Jeffrey A. Seidle, Esq.*
(Littler Mendelson, P.C.), of Cleveland,
Ohio, for the Respondent.

DECISION

CHARLES J. MUHL, Administrative Law Judge. This case involves the discharge of an employee pursuant to an allegedly unlawful employer rule. The Respondents, Michigan Bell Telephone Company and AT&T Services, Inc., maintain a "privacy of communications" rule, which prohibits employees from recording all conversations with coworkers, managers, or third parties, absent supervisory approval. The General Counsel's complaint alleges the rule violates Section 8(a)(1) of the National Labor Relations Act, because it reasonably would be construed by employees to encompass the Section 7 right to engage in protected concerted activity. The complaint also alleges the Respondents unlawfully suspended and discharged employee Scott Stewart for violating this rule. The violation occurred when Stewart inadvertently made a recording of a conversation between him and his supervisor; played the recording during a subsequent investigatory meeting; and later refused the Respondents' requests that he delete the recording. As to the rule's legality, I conclude the Respondents, as providers of telecommunications services to the public, have a legitimate and substantial interest in protecting their customers' sensitive information. However, that interest is not sufficiently weighty to justify the rule's total ban on recordings, including those protected by the Act. In

addition, I find Stewart's conduct which violated the rule was either protected concerted activity or conduct that touches the concerns animating Section 7. As a result, the Respondents' suspension and discharge of Stewart violates Section 8(a)(1), under the Board's framework in *Continental Group, Inc.*, 357 NLRB 409 (2011).

STATEMENT OF THE CASE

On August 18, 2016, Local 4034 of the Communications Workers of America, AFL–CIO (the Union or Charging Party) initiated this case, by filing the original unfair labor practice charge against Respondent Michigan Bell Telephone Company (Michigan Bell).[1] Region 7 of the National Labor Relations Board (the Board) docketed the charge as Case 07–CA–182505. On September 8, September 23, October 6, October 21, and November 23, the Union filed amended charges. Its fourth amended charge and amended charges thereafter also named AT&T Services, Inc. (AT&T Services) as a charged party. The Union claimed that Michigan Bell and AT&T Services were joint employers. On November 28, the General Counsel issued a complaint against the Respondents. The complaint alleged that the Respondents violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining two unlawful rules. The complaint also alleged that the Respondents violated Section 8(a)(3) of the Act when, in March 2016, they suspended, then discharged employee Scott Stewart, due to his union and protected concerted activity. On December 12, the Respondents filed a timely answer to the complaint, denying the substantive allegations and asserting numerous affirmative defenses. On March 15 and March 21, 2017, the Respondents filed amended answers to the complaint. On March 22 and 23 in Detroit, Michigan, I conducted a trial on the complaint. At the hearing, the General Counsel amended the complaint, to add an allegation that the suspension and discharge of Stewart also independently violated Section 8(a)(1).[2] The General Counsel contends those adverse actions also were unlawful under *Continental Group, Inc.*, 357 NLRB 409, 410–413 (2011), because they were premised on Stewart's violation of one of the alleged unlawful rules. The Respondents likewise deny that allegation.

---

[1] All dates hereinafter are in 2016, unless otherwise noted.

[2] At the hearing, I granted the General Counsel's motion to amend the complaint in this fashion. I reaffirm that ruling here. Section 102.17 of the Board's Rules and Regulations gives a judge wide discretion to grant or deny motions to amend complaints. *Rogan Bros. Sanitation, Inc.*, 362 NLRB No. 61, slip op. at 3 fn. 8 (2015). The factors to be evaluated in determining whether an amendment should be allowed are (1) whether there was surprise or lack of notice, (2) whether there was a valid excuse for the delay in moving to amend, and (3) whether the matter was fully litigated. *Stagehands Referral Service, LLC*, 347 NLRB 1167, 1171–1172 (2006). Here, counsel for the General Counsel set forth this theory of a violation in his opening statement. Thereafter, the Respondent had a full opportunity to present evidence on this legal issue. Indeed, prior to the motion being made, the bulk of the evidence introduced by both the General Counsel and the Respondent went to this theory. Thus, factors 1 and 3 favor granting the amendment. As to the second factor, it is not clear why the original complaint did not include the independent Section 8(a)(1) allegation as to the suspension and discharge. It only alleged those actions violated Section 8(a)(3). However, the Respondent was not prejudiced in any fashion with its evidence presentation by the delayed amendment. Thus, I find this factor insufficient to warrant denying the motion.

On the entire record and after considering the briefs filed by the General Counsel and the Respondents on May 25, 2017, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondents provide retail and nonretail telecommunications services for AT&T from a facility located in Lansing, Michigan. In conducting their business operations in the calendar year ending December 31, 2015, Respondent Michigan Bell and Respondent AT&T Services each derived gross revenues in excess of $100,000. In the same time period, both respondents also provided services from the Lansing facility valued in excess of $5000 directly to points outside the State of Michigan. Accordingly, and at all material times, I find that the Respondents have been employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and are subject to the Board's jurisdiction, as the Respondents admit in their answer to the complaint. I also find, as the Respondents admit, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

In addition and at times material to this case, Respondent Michigan Bell and Respondent AT&T Services have been parties to a contract, which provides that AT&T Services is an agent for Michigan Bell in connection with joint management of communication services. AT&T Services also has exercised control over the labor relations policy of Michigan Bell, and administered a common labor policy with Michigan Bell, for the employees of Michigan Bell. As a result, I find, as the Respondents admit for purposes of this case, that Respondent Michigan Bell and Respondent AT&T Services were joint employers of the employees of Michigan Bell.[3]

II. ALLEGED UNFAIR LABOR PRACTICES

Scott Stewart began working for AT&T in April 1993. At times material to this case, he was employed as a customer service specialist, working from the Lansing, Michigan facility. Stewart's job duties were to install and repair telephone lines for business and residential customers. His position is included in a bargaining unit the Union represents. Stewart was a member of the Union for the entirety of his employment. The current collective-bargaining agreement between the Respondent and the Union covers certain employees working in Indiana, Illinois, Michigan, Ohio, and Wisconsin. The contract runs from April 12, 2015 through April 14, 2018.

[3] Hereinafter, Michigan Bell and AT&T Services collectively will be referred to as "the Respondent."

A. The Respondent's Privacy of Communications Policy

AT&T maintains a Code of Business Conduct (CBC), an 11-page document setting forth the general principles and values that its employees must adhere to in their jobs.[4] The Respondent's employees are required, on an annual basis, to acknowledge that they have reviewed the CBC. Employees do so using "C2IT," the Company's intranet. The CBC contains a section describing the Respondent's "Commitment to Our Customers." Included in that section is the following language:

> We guard the privacy of our customers' communications.
>
> We protect the privacy of our customers' communications. Not only do our customers demand this, but the law requires it. Consistent with this principle, although we comply with government requests for customer communications, we do so only to the extent required by law. Maintaining the confidentiality of communications is, and always has been, a crucial part of our business.
>
> We protect the information about our customers that they entrust to us.
>
> AT&T possesses sensitive, detailed information about our customers, who rely on AT&T to safeguard that information. Laws and regulations tell us how to treat such data. Any inappropriate use of confidential customer information violates our customers' trust and may also violate a law or regulation. Preserving our customers' trust by safeguarding their private data is essential to our reputation.

The CBC includes a link on its last page to the "AT&T Policies and Guidelines Web site." Among the guidance available there is AT&T's "Privacy in the Workplace" policy.[5] The language of that policy includes:

> 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 with any applicable company policy.

[4] R. Exh. 3.

[5] GC Exh. 7; R. Exh. 1.

The remainder of this policy details privacy protections for employee records. It also advises employees they have no expectation of privacy when using company premises and equipment.

B. The February 8 Recorded Phone Call Between Stewart and His Supervisor

The road to the Respondent's discharge of Stewart began with a lost company cell phone. Stewart's job duties as a customer service specialist included a requirement that he pre-call a customer, prior to arriving at a jobsite. The purpose of the pre-call was for Stewart to introduce himself and give an estimate concerning when he would arrive on the job. Stewart typically made such calls using a cell phone provided by the Respondent. After returning from a vacation on January 25, Stewart reported to his direct supervisor, Crew Manager Jeffrey Osterberg, that he had lost his company cell phone. Osterberg initially told Stewart to make pre-calls using his personal phone, which Stewart did from January 25 to 28. Then on January 29, Osterberg provided Stewart with the first of two replacement phones. However, Stewart preferred his personal cell phone to the replacement phones and continued to use the former for his work calls.[6]

A few months prior to this, Stewart installed an application on his phone that automatically recorded all calls, if the application was on. Stewart did this to record conversations he was having with a representative from his credit union concerning a mortgage on his house. When using his personal cell phone thereafter, Stewart had the application on at some, but not all, times.[7]

---

[6] I credit Stewart's uncontroverted testimony that Osterberg gave him permission to temporarily use his personal cell phone to make customer pre-calls. (Tr. 53–55.) Osterberg testified in this regard, but did not deny Stewart's assertion or otherwise contradict his testimony. (Tr. 291–294.) Moreover, Stewart exhibited a sincere, forthright demeanor when providing this testimony. That genuine demeanor was particularly noticeable when Stewart described his difficulty using the replacement phones provided by Osterberg, due to the size of his hands. Finally, Ralph Prince, the Union's secretary/treasurer, provided further testimony corroborating the fact the Respondent did not have an issue with technicians using their personal cell phones for work calls on a temporary basis. Prince described a March conversation he had with admitted supervisor Don Stanley, the Respondent's labor relations manager. Stanley told him that employees were allowed to use their personal phones and it happened from time to time. (Tr. 198, 204–205.)

[7] On this question, I credit Stewart's testimony. (Tr. 56–57, 117–120.) His testimony was consistent on both direct and cross examination. Stewart was confident and believable when describing his use of this application. Moreover, as any user of a smart phone knows, a person rarely is aware of all the applications that are running in the background of the phone at any given point in time. In addition, it would be unusual for an application to always be on. Stewart downloaded this application for the specific purpose of recording conversations with his mortgage banker, not to record all conversations. For these reasons, I reject the Respondent's contention that Stewart recorded all conversations, including those with customers, after he downloaded the application. The record evidence does not establish that Stewart recorded calls with customers from January 25 to 28.

On the morning of February 8, Osterberg assigned Stewart to a job to repair a residential customer's phone line. At the jobsite, Stewart observed a "terminal" box located in the middle of an airborne phone wire attached to two poles. The front of the terminal box had phone lines running to the customer's home. The back of the box had the main cable to provide service to the entire neighborhood. Stewart called Osterberg and left him a voice message saying he was going to conduct some testing at the site.

Thereafter, Osterberg and Stewart had a phone conversation concerning alleged problems Stewart was having on the job. Stewart used his personal cell phone for the call. Unbeknownst to Stewart at the time, he had his recording application on and inadvertently recorded the entire phone conversation with Osterberg on his cell phone.[8] During the call with Osterberg, Stewart reported that he needed to access the rear of the terminal located in the middle of the telephone line some 89 feet in the air. Stewart said the back of the terminal was blocked by big trees and he needed a chainsaw, plus an hour's time, to cut the branches. He also expressed concern the job might require him to splice aerial cable, a task he had not performed in 15 years. Osterberg asked Stewart to see what he could come up with.[9]

Osterberg then visited the jobsite. When he arrived there, Osterberg observed minimal tree branches near the terminal, which were the "size of [his] index finger" and could be snapped off.[10] Stewart told him he had "trouble stressing at 80" feet, indicating the problem was with the terminal box. Stewart said he already put his ladder on the strand, meaning he attached the ladder to the phone lines so that he could access the terminal. Stewart told Osterberg he needed to test the poles. Such testing is done to insure the poles are not damaged and will securely hold a technician working aloft. Stewart then went to examine the poles, while Osterberg waited at the ladder. When Stewart returned, he told Osterberg he could not

---

[8] GC Exh. 8 is a transcript of the recorded phone call. At the hearing, corrections to the transcript were made, based upon the testimony of Stewart and Osterberg. (Tr. 61–65, 343–345.) I hand wrote the corrections into the exhibit at the hearing. On page 4, line 19, "Self-Seal" was replaced with "South C.O." On page 5, lines, 4, 18, and 24, "struck an 80" was replaced with "stressing 80." On page 6, lines 13–14, "an install" was replaced with "a call." (Tr. 401–402.)

[9] In this call, Stewart also discussed a statement Osterberg allegedly made some months before about Stewart. (GC Exh. 8, p. 3, LL 19–22.) One of Stewart's coworkers, Troy Cooper, told Stewart that Osterberg said to Cooper he was going to assign Stewart a job in a bad section of phone lines in the wintertime when it was freezing cold, have Stewart splice it from his ladder, and then sit there and laugh at Stewart while he does it. (Tr. 47, LL 3–10; 48, LL 19–25; 49, LL 1-6.) Although agreeing with the Respondent that this testimony was hearsay, I conditionally permitted it, subject to later corroboration through evidence from the General Counsel. (Tr. 47–50.) Subsequently, Cooper did not testify at the hearing and no corroborating evidence was introduced. Having now reviewed the record, I find the testimony only admissible as background evidence. The testimony is allowable for the purpose of explaining Stewart's comments in this regard both in his February 8 conversation with Osterberg and in subsequent events in this case. However, I do not admit the testimony for the truth of the matter asserted. Thus, I cannot find that Osterberg actually made the statements about Stewart that Cooper claimed he did.

[10] Tr. 308. At the hearing, Stewart conceded he exaggerated when he told Osterberg on the phone that the tree cutting would take an hour and he would need a chainsaw. (Tr. 126, 131.)

get to one of the poles to test it. Osterberg asked him if it looked safe. Stewart said it did, but that did not mean it was safe. Osterberg told Stewart the job had to be completed. Osterberg then left and Stewart finished the job. Stewart ended up only needing to access the front of the terminal. He did not have to splice aerial cable or cut any tree branches.[11]

Having concerns about what transpired that morning, Osterberg revisited the jobsite that day. Osterberg confirmed that the repair was made to the terminal. He also verified that neither the splicing of cable nor the cutting of trees with a chainsaw was necessary. Subsequently, Osterberg investigated how long it took Stewart to complete the job. He determined Stewart was on the jobsite for a little over 3 hours, an amount of time Osterberg deemed excessive. Osterberg also discovered that Stewart took almost a half an hour to drive to the jobsite. He examined the route using Google maps, which indicated it should have taken Stewart only 8 minutes to reach the jobsite. As a result, Osterberg decided to conduct an investigatory interview with Stewart regarding what happened the morning of February 8.

C. The February 11 Investigatory Interview of Stewart

On February 11, Osterberg conducted that investigatory interview of Stewart. Multiple management and union representatives also attended, including Prince.[12] Osterberg began by telling Stewart they were there to discuss what happened between 9 a.m. and 12 p.m. on February 8, in relation to technician expectations and doing work in a timely manner. As the discussion proceeded, Osterberg played the voicemail Stewart left him the morning of February 8. Then, a dispute of some kind arose over what Stewart and Osterberg said to one another in their subsequent conversation. At that point, Stewart told everyone he thought he had a recording of the call. He explained about the application on his cell phone and how it recorded all calls when it was on. He said he thought he might still have the call. Stewart asked if they wanted to hear it. Osterberg said yes. Stewart went out to his work truck and retrieved his personal cell phone. He returned to the meeting and played the recording. Thereafter, the union representatives complained to Osterberg about him making Stewart climb without testing the poles. They referenced earlier discipline Stewart received for his failure to follow safety protocols. Osterberg also discussed his claim that Stewart had not driven straight to the

---

[11] By and large, the testimony of Stewart and Osterberg concerning their discussion at the jobsite on February 8 is not contradictory. (Tr. 66–70, 307–312.) The only disputed fact was whether the job Stewart was working on was an "SLA," or a high priority one that had to be completed on an expedited basis. (Tr. 69, 124, 158, 304.) Whether or not the job was classified as an SLA is irrelevant to this case. Thus, no credibility determination is required in this regard.

[12] Article 12.04 of the parties' contract, entitled "Union Representation & Notification," states: "At any investigatory interview between a representative of the Company and an employee, wherein the employee reasonably believes that the information obtained may be used as the basis for disciplinary action against the interviewed employee, a Union Representative must be present if requested." This is the only contract provision that mentions investigatory interviews. In addition, Article 12.03 requires the Respondent to have "just cause" when taking any disciplinary action.

job. Osterberg took everyone through Stewart's route, as recorded by the work vehicle's GPS.[13]

After the meeting concluded, Osterberg met with his superior, Area Manager Ted Brash, and told him what occurred. Osterberg specifically mentioned that Stewart played a recorded conversation between him and Osterberg. Brash responded that the recorded conversation violated company policy, so he would have to inform his boss and the human resources department. Brash subsequently did so. Jo Maniscalco, a human resources representative, told Brash that she would contact "asset protection" to open a case and determine if they wished to proceed with an investigation.

On February 15, Osterberg gave Stewart a written warning and 3-day suspension, citing a violation of tech expectations.[14] The warning stated that, on February 8, Stewart drove out of route to his first job and reported a heavy tree obstruction there that was not present. The bottom of the warning stated:

> AT&T Proprietary (Restricted) Only for use by authorized individuals or any above-designated team(s) within the AT&T companies and not for general distribution.[15]

---

[13] At the hearing, Stewart, Prince, and Osterberg testified concerning this meeting. (Tr. 83–88, 169–177, 315–317.) I credit Stewart's testimony in all respects, except as to the claim that Osterberg specifically stated Stewart refused to do work on February 8. As to the part I credit, Stewart's testimony was detailed and thorough. In contrast, Osterberg's testimony was brief, focused solely on whether he stated Stewart refused to do work, and was elicited largely through leading questions. Moreover, Prince corroborated most of Stewart's testimony about the meeting with similarly specific testimony. However, I credit Osterberg's testimony that he never said Stewart refused to do work during the meeting. I find that Prince's testimony fails to corroborate Stewart's in this regard. Prince admitted to not being able to remember the "exact verbiage" that led to the playing of the recording. He said instead that "to the best of his recollection," the conversation was "to the effect" of Stewart refusing to do the work. Given the qualifiers and the hesitant demeanor Prince displayed when testifying in this manner, I find the testimony unreliable. Moreover, had Osterberg repeatedly claimed, as Stewart testified, that Stewart refused to do the work, Prince should have remembered it specifically. Nonetheless, I also cannot credit Osterberg's testimony that Stewart played the recording only as a result of Osterberg asking Stewart if he remembered the conversation. I find the inherent probability of that being the case to be extremely low. The purpose of these meeting, as Osterberg later documented in an email, was to investigate Stewart's possible misuse of time and making false statements. (R. Exh. 3.) Thus, the logical explanation for Stewart playing the recording was to refute some contention that Osterberg made concerning his performance or what he said in the conversation. Prince's testimony is sufficient to establish that fact. Whatever the specific reason, I find Stewart played the voicemail in the meeting as part of his defense to Osterberg's claim of performance deficiencies.

[14] GC Exh. 3. The General Counsel's complaint does not allege the Respondent's issuance of this written warning and 3-day suspension to Stewart was unlawful.

[15] From March to August 2016, the Respondent issued a number of other written warnings to employees with this language at the end of the form. (GC Exh. 12.) Some of those forms contained a variant on this language, which stated: "AT&T Proprietary (Internal Use Only) Not for use or disclosure outside the AT&T companies except under written agreement." (GC Exhs. 12(e), 12(j), 12(k), 12(l).)

D. The Respondent's Subsequent Suspension and Discharge of Stewart

The Respondent's asset protection department did, in fact, begin an investigation into Stewart's recording of his phone conversation with Osterberg. On February 26, Stewart met with Jim Saidla, a representative from that department. Brash and a union representative also attended the meeting. Saidla told Stewart he was there because of the recording Stewart made of the conversation between him and his supervisor on February 8. Saidla asked him if he knew it was illegal to record a conversation in Michigan. Stewart told him he thought Michigan was a single consent state. Saidla then asked Stewart if he knew he broke the CBC. Stewart responded that he did not even know the CBC existed, until Saidla told him. Stewart told Saidla that he did not make the recording intentionally. Stewart also brought up the Board's then recent decision in *Whole Foods*, which issued roughly 2 months earlier.[16] In that case, the Board found unlawful a rule prohibiting the recording of conversations, phone calls, images, or company meetings with a camera or recording device, without prior approval of management. Saidla said that case did not pertain to Stewart's situation at all. Saidla asked Stewart about the recording application on his cell phone. He asked Stewart several times to destroy the recording. After the first couple of times, Stewart told Saidla he would not destroy the recording, because it was the only thing to "cover his ass" against falsehoods.[17] Stewart also refused to play the recording for Saidla. Saidla drafted up a statement of what Stewart told him. He allowed Stewart to review the statement, telling him he wanted it to be true and accurate. Saidla made a few changes at Stewart's request. Stewart read the statement, initialed all of the pages, but refused to sign it.[18]

On March 7, Saidla completed his "Asset Protection Report on Investigation" and provided it to local management in Lansing.[19] The report set forth Saidla's findings regarding the allegation that Stewart recorded the phone conversation between him and Osterberg on February 8. Those findings included that Stewart admitted to recording the phone conversation and saving the recording, even after his meeting with Saidla. The findings also included that Stewart denied being aware of the policy banning the recording of conversations and denied recording any additional conversations between him and other employees.[20]

---

[16] *Whole Foods Market Group, Inc.*, 363 NLRB No. 87, slip op. at 3 (2015), enfd. mem. 691 Fed.Appx. 49 (2d Cir. June 1, 2017).

[17] Tr. 94–95.

[18] I credit Stewart's uncontradicted testimony concerning this meeting. (Tr. 90–95, 141–148.) Saidla did not testify at the hearing. Although Brash did, he did not dispute any aspect of Stewart's testimony. (Tr. 355–358.)

[19] R. Exh. 12.

[20] At the hearing, I admitted the Respondent's asset protection investigation report over the General Counsel's objection. (Tr. 372–373.) The General Counsel renews this objection in his brief. Counsel argues the report should be excluded, because it is the equivalent of an affidavit or employer position statement. I reaffirm my ruling, with a limitation. The investigative report itself is an admissible business record. The Respondent created it contemporaneously with the investigation and prior to the Union filing any Board charge. It is a record of regularly conducted business activity—investigations—by the asset protection department. The circumstances of its creation do not raise any reliability concerns.

After receiving the report, Brash met with Maniscalco and George Mrla, the Respondent's director of technical field services for the midwest east. Brash recommended that they suspend Stewart pending termination for violating the CBC and the privacy in the workplace policy. On March 9, Brash informed Stewart of that discipline. The written disciplinary form Brash provided Stewart stated that the CBC violation was Stewart's recording of his phone conversation with Osterberg on February 8. Brash read the form to Stewart and asked if he had anything to say. Stewart responded that this happened because he raised numerous safety violation issues.

On March 23, the Respondent and the Union held a "Review Board" meeting concerning Stewart's potential discharge. Pursuant to the contract, the board consisted of two company and two union representatives, with Stewart in attendance. Don Stanley, the Respondent's labor relations manager, spoke for the Company. Stanley told Stewart he was suspended pending termination for violating the CBC and the privacy in the workplace policy, by recording the conversation between himself and Osterberg. Stanley told him it was against state law to record the conversation. Stanley then asked Stewart if he knew it was against the CBC and where he heard about the *Whole Foods* decision. Stewart responded that he heard about *Whole Foods* from the chief union steward. Stanley said the Respondent reviewed *Whole Foods* and did not feel it was relevant. Stewart also confirmed during the meeting that he was covered by the CBC. However, he added that he only saw the abridged version of the CBC and did not know that the CBC prohibited recording the conversation. Stewart said he never would have played the recording if he knew that. He stated his statement to asset protection was accurate. Stewart said he used his personal phone on the job, because the company phone was worn out and he did not like it. The Respondent then made two different offers to Stewart, pursuant to which he could get his job back if he agreed to certain conditions. Stewart declined the Respondent's offers.

On March 29, the Respondent discharged Stewart. The Union filed a grievance to contest the discharge. The grievance is pending arbitration.

E. The Respondent's Business Justifications for the Privacy of Communications Policy

At the hearing, Gary Smith testified concerning the Respondent's business justifications for the privacy of communications rule. He is the assistant vice president in compliance operations for AT&T Services. Smith identified three interests the Respondent has in protecting

---

In that regard, I specifically note that the Respondent used an outside department to conduct the investigation, not local management. However, although the investigative report is admissible, Stewart's statement therein is inadmissible hearsay. Stewart is the discriminatee, not the Charging Party, so the statement cannot be considered an admission of a party opponent. Thus, I do not rely on the contents of the statement in reaching any of my findings of fact herein, except to the extent Stewart confirmed them during his testimony.

against breaches of customer information and data. Those interests are its legal obligations, privacy policies, and consumer trust in the brand. As to legal obligations, the Respondent is required by both Federal and Michigan State law to protect customer proprietary information.[21] In particular, the Federal telecommunications act imposes a duty on the Company to take reasonable measures to protect customer proprietary network information (CPNI) and sensitive personal information (SPI). CPNI includes the number of phone lines on an account, services and features on those lines, and billing and usage information. SPI includes an individual's social security number, date of birth, credit card information, and authentication credentials. Any breaches of customer information must be reported to the Federal government, under the telecommunications act, or the customer, under Michigan State law. In 2015, the Respondent entered into a consent decree with the Federal Communications Commission, as a result of significant data breaches at subcontracted call centers in Mexico, Columbia, and the Philippines.[22] The Respondent agreed to pay a $25 million fine.

The Respondent also maintains a number of policies, in addition to its privacy in the workplace policy, designed to insure the privacy of customer information.[23] First, the Company provides a lengthy privacy policy to its customers. The policy sets forth in great detail the Respondent's commitment to keep customer information safe. The measures used to do so include maintaining the security of the Respondent's network; encrypting sensitive personal information; and requiring authentication before an account is accessed. A separate privacy of customer information policy applies to employees. It requires them to adhere to all legal requirements and company policies related to privacy of communications and the security and privacy of customer records. The information security breaches policy requires employees to report to asset protection any breach of information security. Finally, the access to customer accounts policy, or rule of least privilege, prohibits employees from accessing or disclosing customer account information, unless authorized for a valid business purpose.

Finally, the Respondent views consumer trust in the AT&T brand to be essential to its success as a business. Smith cited a recent survey in which some 89 percent of customers indicated they would avoid doing business with a company, if they did not believe the company was trying to protect their data.

In performing their job duties, customer service specialists like Stewart have access to CPNI on their work tickets. For example, an installation order has the products and services being installed and a customer's account number. Their access to SPI is far more limited. A technician may be involved in a customer's creation of authentication information. Under the least privilege rule, they would not have access to a customer's social security number, credit card information, or date of birth.

[21] R. Exhs. 5, 6, and 8.

[22] R. Exh. 4.

[23] R. Exhs. 2, 9–11.

ANALYSIS

I. DOES THE RESPONDENT'S PRIVACY OF COMMUNICATIONS RULE VIOLATE SECTION 8(A)(1)?

The General Counsel's complaint alleges that, since at least February 18, 2016, the Respondent's maintenance of its privacy of communications rule violates Section 8(a)(1).

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. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). Where the rule is likely to have a chilling effect on Section 7 rights, the maintenance of the rule is an unfair labor practice, even absent evidence of enforcement. In determining whether a challenged rule is unlawful, the rule must be given a reasonable reading, particular phrases must not be read in isolation, and improper interference with employee rights must not be presumed. Where, as here, a rule does not explicitly restrict activities protected by Section 7, the rule is unlawful only upon the showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to protected activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. In this case, the General Counsel does not allege that the privacy of communications rule was promulgated in response to protected activity or has been applied to restrict the exercise of Section 7 rights. Thus, the legal question presented is whether employees would reasonably understand the privacy of communications rule to restrict Section 7 activity. In evaluating rules that prohibit recordings, the Board has held that photography and audio or video recording in the workplace are protected by Section 7 of the Act, if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present. *Rio All-Suites Hotel and Casino*, 362 NLRB No. 190 (2015); *Whole Foods Market Group, Inc.*, 363 NLRB No. 87 (2015), enfd. mem. 691 Fed. Appx. 49 (2d Cir. June 1, 2017).

The Respondent's rule bans all recordings, absent company approval. A recent Board decision addressed a similar, all-encompassing recording ban, involving a different employer operating in the telecommunications industry. In *T-Mobile USA, Inc.*, 363 NLRB No. 171 (2016), enfd. in relevant part 865 F.3d 265, 274–275 (5th Cir. July 25, 2017), the Board found unlawful a rule that prohibited employees from recording "people or confidential information using cameras, camera phones/devices, or recording devices (audio or video) in the workplace." The rule also banned employees from making "sound recordings of work-related or workplace discussions." In finding the rule violated Section 8(a)(1), the Board relied upon four factors. First, the rule contained a broad ban on all recordings. Second, the ban included recordings made during non-work time and in non-work areas. Third, the rule failed to differentiate between recordings that were protected by Section 7 and those that were not. Finally, the Board noted the rule unlawfully required employees to obtain permission from management, before engaging in any recording activity on non-work time. T-Mobile argued that the recording restriction was justified by its general interest in maintaining employee privacy, protecting confidential information, and promoting open communications. None were deemed overriding

interests permitting the wholesale ban. The Board concluded the employer had not narrowly tailored its rule to protect its legitimate interests or to reasonably exclude Section 7 activity from the ban's reach. In a decision issued after the hearing and briefing in this case, the U.S. Court of Appeals for the 5th Circuit enforced the Board's finding. In doing so, the appeals court stated it was "primarily concerned with the broad reach of the recording ban." 865 F.3d at 274. The appeals court also noted that the company's asserted justifications for the ban did not alter the fact that its breadth encompassed Section 7 activity unrelated to those interests.

Moreover, the legality of the very rule at issue in this case already has been litigated in a Board proceeding. In *AT&T Mobility, LLC*, Case 05–CA–178637, JD–27–17, 2017 WL 1488998 (2017), NLRB Deputy Chief Administrative Law Judge Arthur Amchan concluded that the privacy of communications rule was overbroad and thus illegal. The judge found that AT&T Mobility had a "pervasive and compelling" interest in the privacy of its customers' information, include CPNI and SPI. However, that interest did not justify the breadth of the recording ban. Judge Amchan noted that the prohibition was not restricted to conversations on work time or in work areas. He also reasoned the employer could protect its substantial interest with a much narrower rule, such as one that prohibited the recording of any customer information or data.

In light of these decisions, I conclude the Respondent's total ban on recordings is overly broad and unlawful.[24] As a preliminary matter, no question exists that the Respondent has a legitimate and substantial interest in keeping its customer information secure. The Respondent is mandated to do so by both Federal and State law. When it once breached those legal obligations, the Company agreed to pay a $25 million fine to the Federal government. In addition, the protection of customer information is a part of the Respondent's business culture, as evidenced by the numerous policies and procedures it has adopted that collectively work to achieve that goal. The need for a business to protect customers' social security numbers, dates of birth, credit card information, and authentication credentials is obvious.

However, the Respondent's rule, as written, goes well beyond what is necessary to protect the Respondent's interest in securing customers' private information. *T-Mobile USA, Inc.*, 363 NLRB No. 171, slip op at 4; *Whole Foods*, 363 NLRB No. 87, slip op. at 4; *Rio All-Suites Hotel*, 362 NLRB No. 190, slip op. at 4. The rule prohibits all recordings of telephone conversations with employees, managers, and third parties, absent supervisory approval. However, the recording ban does not mention even one of the laws, policies, or procedures in place that address the requirement to protect the privacy of customer information. In fact, the rule appears in a broader policy that discusses the security of employee records and employees' lack of privacy in the Respondent's equipment. Thus, the rule does not link the prohibition to the Respondent's legitimate interest. Furthermore, the rule does not differentiate between

[24] The *AT&T Mobility* case is pending at the Board, on the employer's exceptions to Judge Amchan's decision. A judge's decision that is pending before the Board on exceptions is not binding precedent. *Long Ridge of Stamford*, 362 NLRB No. 33, slip op. at 1 fn. 3 (2015), citing *St. Vincent Medical Center*, 338 NLRB 888, 888 (2003). Nonetheless, although I am not bound by Judge Amchan's decision, I agree with his legal conclusions.

recordings protected by Section 7 and those that are not. The Respondent concedes the recording ban applies to all conversations, even those that would be protected by Section 7. The admission as to the rule's scope supports the finding that employees would reasonably read the rule as prohibiting protected recordings. In addition, the prohibition applies to recordings made during non-work time and in non-work areas. Finally, the rule requires employees to obtain supervisory permission to record conversations during non-work time. All of the factors relied upon by the Board in *T-Mobile* to find violations likewise are present here. Thus, the Respondent's rule also is unlawful. Without question, the Respondent can more narrowly tailor its rule to prohibit recordings that infringe on the Company's legitimate business interest, while permitting those protected by the Act.

The Respondent argues that its wholesale recording ban is lawful, pursuant to the Board's decision in *Flagstaff Medical Center, Inc.*, 357 NLRB 659, 662–663 (2011). In that case, the Board, with limited discussion, found lawful a rule stating "[t]he use of cameras for recording images of patients and/or hospital equipment, property, or facilities is prohibited." This broad ban was justifiable because of the "weighty" privacy interest of hospital patients, as well as a Federal law (HIPAA) prohibiting the wrongful disclosure of individually identifiable health information. I do not agree that *Flagstaff Medical* controls the outcome here. Although the Respondent has a legitimate business interest in protecting customers' privacy, that interest is not as weighty or significant as the one in *Flagstaff Medical*. A medical condition is among the most personal pieces of information an individual possesses. The disclosure of such sensitive information to anyone is a choice only that person should be making. The recording of a patient being treated with a certain type of hospital equipment or residing in a particular wing of a hospital plainly could permit others to determine the person's medical conditions. A customer's number of phone lines, the services and features of their phone service, and their phone usage cannot plausibly be said to rise to the same level of sensitivity as individually identifiable health information. Even though an individual's social security number, date of birth, credit card information, and authentication credentials are of greater sensitivity, they remain pieces of information that are not as weighty as a medical condition. A credit card can be reissued, a password can be reset, and an individual's identity can be protected in any number of ways after disclosure of a social security number and birth date. The same cannot be said after a medical condition has become public.

The Respondent also argues its business interest is more significant than the one in *Flagstaff Medical*, because the Company is subject to harsher monetary penalties under Federal law for the disclosure of customer information than a hospital is for disclosing individually identifiable health information under HIPAA. I do not agree. A customer's or patient's desire that a business keep their private information protected is unlikely to be affected by the degree of financial penalties imposed on the business for disclosing that information.

Accordingly, I conclude the Respondent's privacy of communications rule violates Section 8(a)(1), because a reasonable employee would construe its broad recording ban to encompass protected Section 7 activity.

II. IS THE RESPONDENT'S SUSPENSION AND DISCHARGE OF STEWART UNLAWFUL PURSUANT TO THE BOARD'S *CONTINENTAL GROUP* DOCTRINE?

The General Counsel's complaint alleges that the Respondent's suspension and discharge of Stewart violates Section 8(a)(1), because these adverse actions were based upon Stewart's violation of the unlawful privacy of communications rule.

Discipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act. *Continental Group, Inc.*, 357 NLRB 409, 410–413 (2011); *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 fn. 3 (2004). An employer can avoid liability for discipline imposed pursuant to an overbroad rule, if it can establish that the employee's conduct actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations, and that the interference, rather than the violation of the rule, was the reason for the discipline. The employer bears the burden of asserting this affirmative defense and establishing that the employee's interference with production was the actual reason for the discipline. That burden only can be met when an employer demonstrates that it contemporaneously cited the employee's interference with production as a reason for the discipline, not simply the violation of the overbroad rule. The Board recently reaffirmed its adherence to the *Continental Group* legal framework in *Butler Medical Transport, LLC*, 365 NLRB No. 112 (2017).

In this case, the first question that needs to be addressed in applying this standard is how, exactly, Stewart violated the privacy of communications rule. On first glance, the answer appears obvious: by recording his conversation with Osterberg on February 8. But the rule violation encompasses more than just that. Stewart subsequently played the recording during the Respondent's investigatory meeting on February 11. It was in this meeting that the Respondent first learned of the recording's existence. Then on February 26, Stewart refused to delete the recording, despite Saidla asking him multiple times to do so. The Respondent's investigatory findings that led to his discharge included Stewart's admission to Saidla that he saved the recording. Therefore, I conclude Stewart violated the rule by recording the conversation on February 8, subsequently playing the recording at the investigatory meeting on February 11, and then saving the recording after the meeting despite being asked to delete it.

The next issue to be resolved is whether Stewart's conduct constitutes protected concerted activity. In order to find an employee's activity to be "concerted," the Board requires the conduct be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. *Meyers Industries, Inc.*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 971 (1985), supplemented 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Concerted activity includes those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well

as individual employees bringing truly group complaints to the attention of management. 281 NLRB at 887. In addition, an individual's assertion of a right grounded in a collective-bargaining agreement is protected concerted activity, even where the individual is acting alone. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984): *Interboro Contractors, Inc.*, 157 NLRB 1295, 1298 (1966), enfd. 388 F.2d 495 (2d Cir. 1967). When asserting the right, an employee need not explicitly refer to the collective-bargaining agreement.

Applying these principles, I conclude Stewart's playing and saving his phone conversation with Osterberg is protected concerted activity under *Interboro*. The parties' collective-bargaining agreement contains a provision requiring the Respondent to have "just cause" to issue any discipline against an employee. The entire purpose of the February 11 investigatory meeting was for the Respondent to determine if just cause existed to discipline Stewart. Osterberg accused Stewart of failing to meet tech expectations and not performing his job in a timely manner. As part of his defense against Osterberg's accusations, Stewart played the recording. Thereafter, Stewart saved the recording to "cover his ass" or, in more concrete terms, to preserve the recording for later use, including in the pending arbitration of his discharge grievance. That Stewart did not specifically invoke the just cause provision is irrelevant. It goes without saying that an employee defending himself in an investigatory meeting is contending that no just cause exists for discipline. By defending himself, Stewart was invoking the right in the collective-bargaining agreement that any disciplinary action must be for just cause.

Accordingly, I conclude that the conduct by which Stewart violated the privacy of communications rule was protected concerted activity.[25]

---

[25] The General Counsel also contends Stewart was engaged in protected concerted and union activity when, on February 8, he made complaints about his work assignment and working conditions to Osterberg. However, under the *Continental Group* standard, the inquiry is whether the employee's conduct which is alleged to have violated the unlawful rule was protected concerted activity. As I have held, Stewart's recording, playing, and saving his conversation with Osterberg violated the privacy of communications rule. This other conduct relied upon by the General Counsel did not. Thus, the conduct is irrelevant in evaluating whether Stewart's discharge was unlawful under *Continental Group*.

For the same reasons, I repeatedly sustained the Respondent's objections to the General Counsel attempting to introduce evidence of Stewart engaging in other protected concerted or union activity prior to his discharge. (Tr. 76–82, 179–187, 237–240, 282–286, 339–343.) These evidentiary rulings require further explanation. In his opening statement, counsel for the General Counsel only advanced the theory that Stewart was discharged under the overly broad privacy of communications rule. (Tr. 17–24.) There was no mention of a *Wright Line* theory, alleging the Respondent discharged Stewart for other union and protected concerted activity. Thereafter, when the General Counsel was presenting his case-in-chief, the Respondent objected to questions eliciting testimony about Stewart's other conduct. In discussing and sustaining these objections, I repeatedly asked the General Counsel whether a *Wright Line* theory was being advanced. He never asserted that it was. However, after resting his case-in-chief, the General Counsel then changed course and advised me, in an off-the-record discussion, that the Region was, in fact, pursuing a *Wright Line* theory. Because the General Counsel confirmed the alternate *Wright Line* theory only after closing the case-in-chief, I denied any additional attempt to introduce evidence that went to that theory. To allow the General Counsel to present evidence on a new legal theory after resting

Even if Stewart's conduct was not found to be protected concerted activity, it still touches the concerns animating Section 7. The Board has not yet precisely defined the conduct falling into this category. However, the Board suggested in *Continental Group* that it would include activity that was not concerted, but was for mutual aid and protection. 357 NLRB at 412. The example given there was an employee who complained about his individual compensation. If individual complaints about wages are sufficient to touch upon the concerns of Section 7, an individual's defense of himself in an investigatory meeting that could, and in fact did, result in discipline likewise does so. Beyond that, in *Whole Foods*, 363 NLRB No. 87, slip op. at 3, the Board's examples of recordings that were protected included one that is made in order to preserve the conversation for later use in administrative or judicial forums in employment-related actions. Here, Stewart saved the recording for later use, including in this case where it was introduced into evidence. Thus, at a minimum, his activity was for mutual aid and protection.

The Board noted in *Continental Group* that cases where Section 7 rights are fairly implicated, but an employee's conduct was not protected concerted activity, create a "much greater risk that employees would be chilled in the exercise of their Section 7 rights." 357 NLRB at 412. That is exactly what would occur here, were Stewart's discharge upheld. A reasonable employee made aware of that result would inevitably be reluctant to record any conversation with a supervisor or to use such a recording, despite such conduct being protected concerted activity under certain circumstances.

For all these reasons, I conclude Stewart's conduct which violated the unlawful privacy of communications rule is either protected concerted activity or conduct which implicates the concerns underlying Section 7. Therefore, the Respondent's suspension and discharge of Stewart violated Section 8(a)(1), pursuant to *Continental Group*.[26]

---

he case-in-chief would have denied the Respondent due process. However, in an effort to protect the record, I allowed the General Counsel to make offers of proof in this regard. This included actual witness testimony from Prince, where the Respondent also cross-examined the witness. (Tr. 385–400; GC Exh. 15.) Having reviewed these rulings following the hearing, I conclude they were proper and I reaffirm them. The offer of proof testimony and exhibit are not admissible. In addition, I now sustain the Respondent's relevance objection to GC Exh. 13 and exclude it from the record. That exhibit was a grievance filed on February 26 alleging that Osterberg harassed Stewart, based on the comments he allegedly made to Cooper about Stewart some 6 months earlier.

[26] In its brief, the Respondent argued only that Stewart's recording was not protected concerted activity, without addressing the other elements of the *Continental Group* doctrine. In its answer to the General Counsel's complaint, the Respondent did not assert an affirmative defense that Stewart's recording or playing of his conversation with Osterberg actually interfered with his own or other employees' work, or with the Company's operations. Indeed, from the factual record, it is obvious that the conduct had no such effect. The Company did not contemporaneously cite any interference with production as the reason for Stewart's discharge. Thus, the Respondent did not establish a valid *Continental Group* defense.

III. IS THE RESPONDENT'S SUSPENSION AND DISCHARGE OF STEWART UNLAWFUL UNDER *WRIGHT LINE*?

In the alternative, the General Counsel's complaint alleges that the Respondent suspended and discharged Stewart due to his union and protected concerted activity, in violation of Section 8(a)(3).

To determine if an employee's suspension or discharge violates Section 8(a)(3), the well-known *Wright Line* standard applies. *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must demonstrate by a preponderance of the evidence that Stewart's protected conduct was a motivating factor for his suspension and discharge. The General Counsel satisfies this initial burden by showing (1) the employee's protected activity; (2) the employer's knowledge of that activity; and (3) the employer's animus. If the General Counsel meets this initial burden, the burden shifts to the Respondent to prove it would have suspended and discharged Stewart, even absent his protected activity. *Mesker Door, Inc.*, 357 NLRB 591, 592 (2011).

This allegation can be dispensed with in short order. The record contains absolutely no direct or circumstantial evidence to establish the Respondent's hostility towards any protected activity by Stewart. The General Counsel's arguments on animus are limited and thin. The first is the illogical contention that the Respondent brought Stewart into the February 11 investigatory meeting under pretextual reasons. The complaint in this case does not allege that the Respondent's February 15th suspension of Stewart related to his work performance on February 8 violated the Act. If the Company's discipline in that regard was lawful, its preceding investigation into Stewart's conduct likewise was legitimate. The second animus argument rests upon Osterberg's alleged statement to Stewart's coworker Cooper many months before his discharge, in which Osterberg said he would assign Stewart to a difficult job when it was cold out. As previously discussed, I have excluded that hearsay statement from the record, insofar as the truth of the matter is concerned. Thus, Osterberg's alleged comments cannot be used to establish animus. Even if they could, though, Osterberg's statements had nothing to do with Stewart's union or protected concerted activity. Furthermore, they would have been made months before that activity occurred. The evidence here falls well short of establishing animus. As a result, I conclude the General Counsel has not met the initial *Wright Line* burden. Thus, the Respondent's suspension and discharge of Stewart does not violate Section 8(a)(3).

IV. DOES THE RESPONDENT'S LANGUAGE AT THE BOTTOM OF WRITTEN WARNINGS VIOLATE SECTION 8(A)(1)?

Finally, the General Counsel's complaint alleges that the Respondent maintains an unlawful rule in violation of Section 8(a)(1), which prohibits employees from distributing and discussing any discipline issued against them (the "no distribution" rule). The allegation is

based on the inclusion of the following statement at the bottom of certain disciplinary warnings issued by the Respondent from March to August 2016, as previously discussed:

> AT&T Proprietary (Restricted)
> Only for use by authorized individuals or any above-designated team(s) within the AT&T companies and not for general distribution.

A prohibition on the discussion of discipline reasonably tends to interfere with employees' exercise of protected Section 7 rights and is unlawful unless outweighed by a legitimate and substantial business justification. *Aliante Casino and Hotel*, 364 NLRB No. 80, slip op. at 1 (2016), citing to *Central States Southeast and Southwest Areas, Health & Welfare and Pension Funds*, 362 NLRB No. 155, slip op. at 2 (2015) and *Inova Health System*, 360 NLRB 1223, 1228–1229 (2014), enfd. 795 F.3d 68 (D.C. Cir. 2015). It is important that employees be permitted to communicate the circumstances of their discipline to their coworkers, so that their colleagues are aware of the discipline being imposed, how they might avoid such discipline, and matters which could be raised in their own defense. *Verizon Wireless*, 349 NLRB 640, 658 (2007).

I conclude that this language on disciplinary warnings would reasonably be construed by employees to prohibit distribution of the discipline to coworkers, union representatives, attorneys, family members, the NLRB, and other individuals. The rule is ambiguous, in that it does not define who "authorized individuals" are. Such ambiguity must be construed against the promulgator, here the Respondent. *Lafayette Park Hotel*, 326 NLRB at 828. Moreover, none of the forms contain designated teams to specifically identify to whom they may be distributed. Employees should not have to decide at their own peril what distribution is and is not lawfully subject to this prohibition. *Hyundai America Shipping Agency, Inc.*, 357 NLRB 860, 871 (2011). The Respondent argues that the disciplinary warnings are standard forms and the language only limits the use of those forms. I do not agree. The language specifically states the warnings are "not for general distribution." This objectively would include other categories of people with whom employees may show and discuss their discipline. In addition, it is irrelevant that this language was not adopted as a formal rule and is only contained on some disciplinary forms. Whether an employer has promulgated a formal rule is not a requirement to showing a violation. It is sufficient if an employer's written or oral statements demonstrate the existence of a rule or if an employer's actions otherwise had a reasonable tendency to interfere with, restrain, or coerce employees. *Philips Electronics North America Corp.*, 361 NLRB No. 16, slip op. at 2–3 (2014); *Galion Pointe, LLC*, 359 NLRB 699, 699 (2013), reaffd. 361 NLRB No. 135 (2014). The record evidence is sufficient in both respects. The fact that the parties' collective-bargaining agreement guarantees employees the right to a union representative when discipline is issued and the Respondent provides the Union with copies of issued discipline does not cure the unlawfulness of the language. Employees are not limited to discussing discipline only with their union representatives. Finally, Stewart's and Brash's subjective testimony regarding employees feeling free to discuss discipline with one another cannot be weighed under the Board's objective standard.

Therefore, I find that the Respondent's inclusion of the cited language on disciplinary forms violates Section 8(a)(1).[27]

CONCLUSIONS OF LAW

1. Respondent Michigan Bell Telephone Company and Respondent AT&T Services, Inc. are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. For purposes of this case, the two respondents are joint employers of the employees of Michigan Bell Telephone Company.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by:

   (a) Since at least February 18, 2016, maintaining its overly broad privacy of communications rule prohibiting employees from recording conversations with coworkers, managers, or third parties absent supervisory approval;

   (b) Since at least February 18, 2016, maintaining a rule prohibiting employees from distributing or discussing disciplinary actions with persons other than those approved by the Respondent; and

   (c) Suspending Scott Stewart on March 9, 2016, and discharging Scott Stewart on March 29, 2016, for violating its overly broad and unlawful privacy of communications rule.

4. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

5. The Respondent has not violated the Act in the other manners alleged in the 30ccomplaint.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In particular and to remedy the unlawful discharge of Scott Stewart, I

[27] As noted above in footnote 15, certain of the disciplinary forms contained in the record contain slightly different language at the bottom that reads: "AT&T Proprietary (Internal Use Only) Not for use or disclosure outside the AT&T companies except under written agreement." Neither the General Counsel nor the Respondent addresses this alternative language in their briefs. Nonetheless, I conclude this language likewise violates Section 8(a)(1), for the same reasons discussed in this section.

shall order the Respondent to offer Stewart full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.[28] Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall compensate Stewart for search-for-work and interim employment expenses, regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra., compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB No. 10 (2014), the Respondent shall compensate Stewart for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and, in accordance with *AdvoServ of New Jersey, Inc.,* 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 7 a report allocating Stewart's backpay to the appropriate calendar year. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. I also shall order the Respondent to remove from its files any references to Stewart's unlawful suspension and discharge and to notify him in writing that this has been done and that the unlawful suspension and discharge will not be used against him in any way.[29]

---

[28] In its March 15, 2017, first amended answer to the General Counsel's complaint, the Respondent added an 11th affirmative defense. That defense asserted Stewart was not entitled to the remedies of reinstatement and backpay due to the "after acquired evidence" doctrine. In its brief, the Respondent argues that Stewart recorded calls with customers from January 25 to 28, thereby violating the privacy of communications rule and federal law. I find no merit to this argument. If an employer satisfies its burden of establishing that a discriminatee engaged in unprotected conduct for which the employer would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date the employer first acquired knowledge of the misconduct. *Tel Data Corp.*, 315 NLRB 364, 367 (1994), reversed in part on other grounds, 90 F.3d 1195 (6th Cir. 1996); *John Cuneo, Inc.*, 298 NLRB 856, 856–857 (1990). First, the Respondent did not meet its burden of establishing Stewart engaged in misconduct. Based upon my credibility determination in footnote 7, the evidence is insufficient to establish that Stewart's phone application was on the entire time from January 25 to 28. Thus, even though he made pre-calls to customers using his personal phone, the record does not establish he recorded the calls. Second, the Respondent offered no evidence demonstrating that it terminated any other employees for recording conversations with customers. Third, I have concluded the privacy of communications rule was overly broad and unlawful. Thus, any violation of that policy cannot be deemed misconduct. For all these reasons, Stewart remains entitled to reinstatement and backpay.

[29] The General Counsel's complaint sought a requirement that Stewart be reimbursed for "consequential damages," as part of the remedy. However, the General Counsel makes no argument in the post-hearing brief as to why I should award this remedy. I am aware that, in this case and others, the General Counsel is seeking a change in Board law. *Seeking Reimbursement for Consequential Economic Harm*, OM 16-24 (July 28, 2016), available at http://apps.nlrb.gov/link/document.aspx/09031d458219114a.

With respect to the unlawful rules, I shall order the Respondent to rescind or revise the privacy of communications and no distribution rules. The Respondent also must advise its employees that the rules have been rescinded or revised. Because AT&T Services maintained and utilized the privacy of communications rule on its corporate-wide intranet site, a nationwide revision or rescission of the rule is appropriate. *MasTec Advanced Technologies*, 357 NLRB 103, 109 (2011). The Respondent also must post a notice nationwide at all locations where the privacy of communications rule was in effect. However, the record evidence is insufficient to establish anything more than that the Respondent maintained the no distribution rule at its Lansing, Michigan facility. Thus, the notice posting for that rule is limited to the Lansing facility.[30]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[31]

ORDER

The Respondents, Michigan Bell Telephone Company and AT&T Services, Inc., Lansing, Michigan, their officers, agents, successors, and assigns, shall

1. Cease and desist from

   (a) Maintaining the privacy of communications and no distribution rules.

   (b) Suspending and discharging employees based upon the unlawful privacy of communications rule.

   (c) 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.

Such a change must come from the Board, not an administrative law judge. Accordingly, I decline to include the requested remedy in my recommended order.

[30] The General Counsel also seeks, as part of the remedy, an order requiring the Respondent to make whole all employees who were adversely affected by the unlawful privacy of communications and no distribution rules. The General Counsel offers no argument or legal basis for doing so. In any event, I find such a broad remedy unsupported by the record evidence in this case. As *Continental Group* makes clear, employee discipline pursuant to an overly broad rule is not per se unlawful. The record contains no evidence from which a proper assessment under *Continental Group* can be made with respect to employees other than Scott Stewart. Thus, I decline to include this requested remedy in my order.

[31] 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.

(a) Within 14 days from the date of this Order, offer Scott Stewart full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he previously enjoyed.

(b) Make Scott Stewart whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Compensate Scott Stewart for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Regional Director of Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Within 14 days from the date of this Order, remove from its files any references to the unlawful suspension and discharge of Scott Stewart, and, within 3 days thereafter, notify him in writing that this has been done and that his unlawful suspension and discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Rescind or revise the privacy of communications and no distribution rules.

(g) Advise employees that the privacy of communications and no distribution rules have been revised or rescinded.[32]

(h) Within 14 days after service by the Region, post at its Lansing, Michigan facility

[32] The Board's standard remedy for unlawful rules requires the offending party to: furnish employees with inserts for the current employee handbook that (1) advise that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or publish and distribute to employees revised employee handbooks that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions. In this case, the privacy of communications rule only is maintained electronically, rendering this standard remedy inapplicable. (Tr. 256-257, 264.) Thus, the Respondent must rescind or revise this rule on its intranet and advise employees that it has been done.

copies of the attached notice marked "Appendix I."[33] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents 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 Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents 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 Respondents have gone out of business or closed the facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since February 18, 2016.

(i) Within 14 days after service by the Region, post at their facilities nationwide copies of the attached notice marked "Appendix II."[34] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents 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 Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents 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 Respondents have gone out of business or closed the facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since February 18, 2016.

(j) Within 21 days after service by the Region, file with the Regional Director a

[33] 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."

[34] 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."

sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C., September 27, 2017.

Charles J. Muhl
Administrative Law Judge

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 discipline you, including suspending or discharging you, because you violate our unlawful rules.

WE WILL NOT maintain the privacy of communications rule, which states:

> 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 with any applicable company policy.

WE WILL NOT maintain the no distribution rule by placing either of the following provisions at the bottom of employee discipline letters:

> AT&T Proprietary (Restricted) Only for use by authorized individuals or any above-designated team(s) within the AT&T companies and not for general distribution
>
> AT&T Proprietary (Internal Use Only) Not for use or disclosure outside the AT&T companies except under written agreement

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, within 14 days from the date of this Order, offer Scott Stewart full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he previously enjoyed.

WE WILL make Scott Stewart whole for any loss of earnings and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Scott Stewart for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of this Order, remove from our files any references to the unlawful suspension and discharge of Scott Stewart, and WE WILL, within 3 days thereafter, notify him in writing that this had been done and that his unlawful suspension and discharge will not be used against him in any way.

WE WILL rescind or revise our unlawful privacy of communications and no distribution rules and advise you that this has been done.

MICHIGAN BELL TELEPHONE COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

AT&T SERVICES, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

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

477 Michigan Avenue, Room 300, Detroit, MI 48226-2543
(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

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

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07-CA-182505 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 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, (313) 335-8042.

APPENDIX II

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 the privacy of communications rule, which states:

> 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 with any applicable company policy.

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 or revise our unlawful privacy of communications and advise you that this has been done.

MICHIGAN BELL TELEPHONE COMPANY
(Employer)

Dated _____ By _____
(Representative) (Title)

AT&T SERVICES, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

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

477 Michigan Avenue, Room 300, Detroit, MI 48226-2543

(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/07-CA-182505 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, (313) 335-8042.