

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**MICHIGAN BELL TELEPHONE  
COMPANY and AT&T SERVICES,  
INC.,**

**and**

**LOCAL 4034, COMMUNICATIONS  
WORKERS OF AMERICA (CWA),  
AFL-CIO**

**CASE NO. 07-CA-182505**

**RESPONDENTS' BRIEF IN OPPOSITION TO GENERAL COUNSEL'S  
MOTION TO REMAND UNDER RULE 102.6**

Respondents, Michigan Bell Telephone Company and AT&T Services, Inc. (collectively “AT&T” or “Company”), through counsel and pursuant to §§ 102.6 and 102.24 of the Rules and Regulations of the National Labor Relations Board, files this Brief in Opposition to General Counsel's Motion to Remand Proceedings to Region 7 under Rules and Regulations Section 102.6. General Counsel's Motion admits the allegations at issue are meritless, but seeks to allow an erroneous ALJ decision to stand and seeks to deny the Company due process by allowing the Board to review the ALJ's decision.

Pursuant to its legal and ethical obligations to protect the privacy of confidential and sensitive customer information, AT&T maintains various work rules, including its “Privacy in the Workplace” policy at issue in this case.<sup>1</sup> In a decision issued September 27, 2017, Administrative Law Judge Muhl held the Company violated Section 8(a)(1) of the Act by “maintaining its overly broad privacy of communications rule prohibiting employees from recording conversations with coworkers, managers, or third parties.” On January 31, 2018, the

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<sup>1</sup> The rule is also referred as “Privacy of Communications” policy, which specifically refers to one section of the Privacy in the Workplace policy.

Company filed Exceptions to the Decision of the Administrative Law Judge and a Brief in Support of Exceptions. General Counsel has not yet submitted an Answering Brief to the Exceptions, which is due to be filed by March 19, 2018.

On February 15, 2018, all parties filed a Joint Motion to Vacate the Decision of the ALJ and Remand Proceedings to Region 7 ("Joint Motion"). On February 21, 2018, just six days after filing the Joint Motion, General Counsel reneged on the agreement within the Joint Motion to seek to vacate the decision of the ALJ, and filed an improper Motion to Remand Proceedings under Rule 102.6, *without* seeking to vacate the ALJ's decision.

Perhaps even more appalling than reneging on its previous agreement set forth in the Joint Motion, General Counsel's Motion for Remand under Rule 102.6 unambiguously admits that the allegations against Respondent are without merit under *Boeing Co.*, 365 NLRB No. 154 (December 14, 2017). The General Counsel's request is simply an abuse of Board processes. If granted, it would leave the Company in the untenable position of presumably being bound by an adverse ALJ decision on a critically important policy issue with no recourse for Board review of that decision. The General Counsel's due process end run is particularly indefensible given its admission that the allegations at issue are meritless.

In addition, General Counsel's Motion is procedurally improper and simply a ruse to force the Company to comply with the wrongly decided ALJ decision. Rule 102.6 says nothing about Motions practice or Remand. Rule 102.6 simply provides a mechanism for a party to notify the Board of supplemental authority *after briefing*, in a letter that "may not exceed 350 words." 29 CFR § 102.6. General Counsel has not yet submitted an Answer Brief to Respondent's Exceptions, and the Motion far exceeds the 350-word limit. Further, General Counsel cannot sincerely claim that it was not aware of the *Boeing* decision when it filed the

Joint Motion on February 15, because Respondents cited the *Boeing Co.* decision 36 times in its exceptions filed on January 31. By filing this Motion under Rule 102.6, General Counsel is improperly manipulating the Board's procedures to deprive Respondents of due process.

AT&T has litigated this dispute earnestly for over 15 months, to protect the privacy of its customers' information and comply with its legal obligations. The ALJ has issued his decision, and the Company has filed Exceptions in reliance on the Board's now governing case law. AT&T and its employees are entitled to the certainty of knowing whether or not its Privacy in the Workplace policy is lawful under extant Board law. The General Counsel cannot be permitted to avoid a final determination of the policy's propriety through the artifice of seeking dismissal of the entire case under the guise of a partial non-Board settlement. For these reasons, the Company opposes General Counsel's Motion to Remand under Rule 102.6.

## **I. BACKGROUND FACTS**

On November 28, 2016, General Counsel filed the Complaint in this matter. A hearing was held before Administrative Law Judge Charles Muhl ("ALJ") in Detroit, Michigan on March 22 and 23, 2017. On September 27, 2017, the ALJ issued his decision, finding the Company violated Section 8(a)(1) of the Act by maintaining the Privacy of Communications policy and then suspending and discharging Scott Stewart, a member of CWA Local 4034 ("Charging Party" or "Local 4034") under that policy. The ALJ also found the Company violated Section 8(a)(1) of the Act by including certain language at the bottom of certain disciplinary letters, which the ALJ referred to as a "no distribution" rule.

On December 15, 2017, the Charging Party, the Company and alleged discriminatee Stewart reached agreement for a non-Board settlement dealing with the allegations of Stewart's suspension and discharge. On December 20, 2017, the General Counsel filed a Motion to Remand Proceedings in Part to Region 7, moving to remand to the Region only the allegations in

the Complaint relating to the suspension and termination of Mr. Stewart (i.e., Complaint paragraphs 8, 9 and 11, and Complaint paragraph 10 with regard to the suspension and discharge of Mr. Stewart only), so that the Regional Director could take appropriate action regarding Charging Party's request to withdraw the Complaint allegations relating to the suspension and termination of Mr. Stewart only.

On January 17, 2018, without notice to or discussion with the Company, the Charging Party submitted to Region 7 a request to withdraw all operative Complaint allegations, including those which relate to the Respondent's Privacy in the Workplace policy and the footer on the bottom of the disciplinary forms at issue prohibiting general distribution of the forms. On January 18, 2018, the General Counsel filed a modified Motion to Remand Proceedings, moving to remand this case in its entirety to Region 7, ostensibly so that the Regional Director "can take appropriate action regarding Charging Party's request to withdraw all of the Complaint allegations."

On February 8, Respondents filed a Motion in Opposition to General Counsel's Amended Motion to Remand, on the basis that the issues related to the Privacy in the Workplace policy would not be resolved by remanding the case, and those issues have been fully litigated and are ripe for a final resolution. The ALJ's finding that the Privacy in the Workplace policy is unlawful, creates uncertainty for the Company, confusion for its employees, and would inevitably result in re-litigating the issue.

On February 15, 2018, after reaching an agreement that addressed the Charging Party's request to withdraw all charges, General Counsel's request to remand the case in its entirety, and the Company's concern over the outstanding ALJ's decision, all parties filed a Joint Motion to Vacate the Decision of the ALJ and Remand the Case in its Entirety to Region 7.

On February 21, 2018, without notice to or discussion with the Company, General Counsel filed a Motion to Remand Proceedings to Region 7 Union Rules and Regulations Section 102.6, ostensibly reneging on its agreement, set forth in the Joint Motion to Vacate the Decision of the ALJ and Remand the Case to Region 7, that vacating the ALJ decision is a precondition to the parties' Joint Motion. Nothing in Section 102.6 entitles General Counsel to simply change its mind and renege on its agreement to pursue remand of the case without the precondition of vacating the ALJ decision, a necessary element of the Joint Motion to Vacate the ALJ's Decision.

## **II. DISCUSSION**

### **A. General Counsel's Motion to Remand under Rule 102.6 is Improper and Must be Stricken**

Just seven days after reaching an agreement with all parties and filing a Joint Motion to Vacate the Decision of the ALJ and Remand Proceedings to Region 7, General Counsel reneged on the agreement and filed a Motion to Remand Proceedings under Rule 102.6 without vacating the decision of the ALJ. Rule 102.6 does not give General Counsel a license to change its position seeking to vacate the decision of the ALJ, which it filed in a Joint Motion just one week earlier. Rule 102.6 simply allows a party to send a letter "to call to the Board's attention pertinent and significant authorities that come to a party's attention after the party's brief has been filed." *Reliant Energy*, 339 NLRB 66, 66 (2003). In addition, Rule 102.6 is inapplicable to the present case because General Counsel has not yet submitted his Answering Brief to Respondents' Exceptions to the Decision of the ALJ. Finally, illustrating the limited purpose of Rule 102.6, the letter issued "must not exceed 350 words." General Counsel's motion doubled that. General Counsel's motion for remand is not proper under Rule 102.6 motion is must be stricken.

Rule 102.6 codifies the holding of *Reliant Energy*. In that case, a party sought to file supplemental briefing in light of a decision by a United States court of appeals that was issued after the parties completed briefing, but before the Board issued its decision. Announcing a new procedural rule modeled after Rule 28(j) of the Federal Rules of Appellate Procedure "Citation of Supplemental Authority," the Board held:

we will permit parties in unfair labor practice cases and in representation cases to call to the Board's attention pertinent and significant authorities that come to a party's attention after the party's brief has been filed. A party may promptly advise the Executive Secretary by letter, with a copy to all other parties. The letter should set forth the case citations and state the reasons for them, and refer to the pages, paragraphs, and lines of the brief to which the citations apply. The body of the letter must not exceed 350 words.

*Reliant Energy*, 339 NLRB 66, 66 (2003).

Rule 102.6 does not govern Motions or Remand, and it does not give General Counsel an opportunity to reverse the position it asserted in the Joint Motion filed just 7 days earlier. Rule 102.6 allows a party to make the Board aware of a case of which it became aware after briefing. General Counsel has not submitted a brief to the Board in this matter. Further, General Counsel cannot reasonably take the position that it was unaware of the decision in *Boeing Co.* when it filed the Joint Motion to Vacate the Decision of the ALJ on February 15, because (1) General Counsel filed a Motion to Remand the case in its entirety on January 18, 2018, before filing the Joint Motion, and (2) Respondents cited *Boeing Co.* **36 times** in its Exceptions brief, which was served on General Counsel on January 31.

By filing this Motion under Rule 102.6, General Counsel is improperly manipulating the Board's procedures to deprive Respondents of due process. For the reasons stated above, the Board must strike General Counsel's Motion for Remand under Rule 102.6.

**B. If Not Stricken, General Counsel's Motion Must Be Denied On Its Merits**

The Company opposes General Counsel's Motion to Remand under Rule 102.6 with respect to the allegations relating to the Privacy in the Workplace policy.<sup>2</sup> Without a ruling by the Board, the ALJ's finding that the Privacy in the Workplace policy is unlawful creates uncertainty for the Company, confusion for its employees, and will likely result in re-litigating the very same issue in the future. This is particularly disturbing in light of General Counsel's admission that it believes the Privacy in the Workplace policy is lawful under *Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017).

One of the Board's primary responsibilities is "to promote certainty, predictability, and stability." *Boeing Co.*, 365 NLRB at slip op. 9. Remanding this issue to Region 7 to be withdrawn by General Counsel robs the Company and its employees of a final resolution and clarity on the important policy issues in this case. Without a clear resolution, there will be significant uncertainty as to the propriety of the Privacy in the Workplace policy. Employees will not know if they are permitted to make audio recordings at work, and the Company will be uncertain if it may lawfully enforce its restrictions on workplace recordings. Despite the fact that General Counsel has asserted its belief that the policy is lawful, the ALJ's decision will likely cause at least some employees to mistakenly believe that the Company cannot enforce the policy.

The ability to protect sensitive and confidential customer information is of paramount importance to AT&T, its millions of customers, and the Federal Communications Commission. In litigating the Privacy in the Workplace policy, witnesses travelled many hours to testify about the Company's obligations to prevent identity theft and data breaches, and about a \$25 million

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<sup>2</sup> AT&T does not object to the General Counsel's original Motion to Remand, filed December 20, 2017, requesting to remand only the allegations relating to the suspension and termination of alleged discriminate Scott Stewart (i.e., Complaint paragraphs 8, 9 and 11, and Complaint paragraph 10 with regard to the suspension and discharge of Mr. Stewart only), nor does AT&T oppose the parties' Joint Motion to Vacate the Decision of the ALJ and Remand the Case to Region 7.

fine the FCC imposed under a Consent Decree resulting from a data breach. AT&T has litigated this issue for more than 15 months; the ALJ has issued his decision; and the Company has a right to have its exceptions determined under governing Board law. The General Counsel cannot be permitted to avoid a final determination of whether the Privacy in the Workplace policy is lawful simply by saying “never mind” and having the case dismissed. The important policy issues implicated by the ALJ’s decision deserve to be resolved, and must be resolved by the Board. At the least, an ALJ decision resolving them contrary to extant Board law cannot be permitted to stand in this context.

Accordingly, and for all of the above reasons, the Company strenuously opposes General Counsel's Motion to Remand Proceedings to Region 7 Under Rules and Regulations Section 102.6., with respect to the allegations relating to the Privacy in the Workplace policy only.

Respectfully submitted,

*/s/ Stephen J. Sferra*

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Stephen J. Sferra  
Jeffrey A. Seidle  
LITTLER MENDELSON, P.C.  
1100 Superior Avenue, 20th Floor  
Cleveland, OH 44114  
Telephone: 216.696.7600  
Facsimile: 216.696.2038  
[ssferra@littler.com](mailto:ssferra@littler.com)  
[jseidle@littler.com](mailto:jseidle@littler.com)

Attorneys for Respondents,  
*Michigan Bell Telephone Company and AT&T  
Services, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 2nd day of March 2018, a copy of the foregoing was electronically filed and served via email upon the following:

Ryan Letts, President  
Local 4034, CWA  
3281 Kentland Court, S.E.  
Wyoming, MI 49508  
[ryanletts@gmail.com](mailto:ryanletts@gmail.com)

Robert Drzyzga  
Counsel for the General Counsel  
National Labor Relations Board, Region 7  
477 Michigan Avenue  
Room 300  
Detroit, MI 48226-2569  
[Robert.Drzyzga@nrlb.gov](mailto:Robert.Drzyzga@nrlb.gov)

*/s/ Stephen J. Sferra*  
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One of the Attorneys for Respondents,  
*Michigan Bell Telephone Company and AT&T  
Services, Inc.*

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