

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

AT&T MOBILITY LLC,

and

MARCUS DAVIS, an Individual

CASE NO. 05-CA-178637

**RESPONDENT'S SUPPLEMENTAL BRIEF TO ADDRESS IMPLICATIONS OF THE
BOARD'S DECISION IN *BOEING CO.***

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

ATTORNEYS FOR RESPONDENT
AT&T Mobility LLC

I. INTRODUCTION

Since the Administrative Law Judge's initial decision in this case on April 25, 2017, the National Labor Relations Board issued its decision in *Boeing Co.*, 365 NLRB No. 154 (2017), which fundamentally altered the Board's review of facially neutral work rules and requires the present case to be dismissed. In *Boeing Co.*, the Board adopted a balancing test to be applied when evaluating facially neutral work rules, and specifically found rules prohibiting photography in the workplace to be lawful. The *Boeing Co.* decision not only reversed the Board law relied on by General Counsel in this case, but it is strikingly on-point, both factually and legally, and mandates full and complete dismissal of the Complaint.

This case involves AT&T Mobility LLC's ("Mobility" or "Company") legal and ethical obligations to protect the privacy of confidential and sensitive customer information. Mobility lawfully limits unauthorized workplace recordings as part of strategic initiatives designed to safeguard customer information in accordance with its obligations under the Telecommunications Act and related federal regulations. The Complaint alleged two Section 8(a)(1) violations, both of which should be summarily dismissed in light of the Board's decision in *Boeing Co.*: (1) the maintenance of an allegedly overbroad work rule, and (2) an alleged "threat" to enforce the work rule. Because the maintenance of the work rule must be found lawful under *Boeing Co.*, then the alleged "threat" to enforce the rule also must be lawful. The alleged "threat" merely involved a manager telling an employee not to encourage others to violate the rule because "he did not want anyone held accountable for not following" the work rule. (D 5:20-21).¹

Your Honor's April 25, 2017, decision found that Mobility "has a pervasive and compelling interest in the privacy of customer information (Customer Proprietary Network

¹ The decision of the ALJ is cited (D __:__). The first number is the page number and the second number is the relevant lines.

Information, or “CPNI”), the content of customer communications and Sensitive Personal Information (SPI)” (D 3:3-4). The ALJ also acknowledged Mobility had “gone to great lengths to protect customer data,” and “[t]he legal and business consequences of a breach of customer data for [Mobility] are very significant.” (D 4:20-21). Nonetheless, applying the standards set forth in the now-overturned standard of *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), the ALJ found Mobility’s Privacy in the Workplace Policy to be unlawfully overbroad, and the alleged “threat” to enforce the work rule also violated the Act.

Subsequent to the ALJ’s decision, the Board issued its decision in *Boeing Co.*, overturning *Lutheran Heritage*, which fundamentally altered the applicable standards to assess whether the maintenance of a work rule violates Section 8(a)(1). In *Boeing Co.*, the Board adopted a balancing test to be applied when evaluating all facially neutral work rules. Even if a rule may be interpreted to prohibit Section 7 activity, it will not violate Section 8(a)(1) where "the potential adverse impact on protected rights is outweighed by justifications associated with the rule." *Id.* at 3. *Boeing Co.* established that where a sufficient business justification is present, an employer may restrict the use of recording devices in the workplace without violating Section 8(a)(1). Given that *Boeing Co.* drastically altered the governing legal principles on which the ALJ based his decision, the Board remanded the case to the ALJ. In response to the General Counsel’s request, the ALJ agreed to allow for this supplemental briefing.

Both Complaint allegations must be dismissed under the legal standards set forth in *Boeing Co.*, which demonstrates that recording policies, such as the Respondent’s Privacy in the Workplace policy, are generally lawful and undeniably lawful where, as here, the employer indisputably has a “pervasive and compelling interest” in maintaining the policy. The alleged "threat" allegation also must be dismissed, as it is wholly dependent on the policy’s lawfulness.

Because the Privacy in the Workplace policy is lawful under *Boeing Co.*, it is equally lawful to inform employees that they may be "held accountable for not following policy." (D 2:23-24).

II. LAW AND ARGUMENT

A. Mobility's Privacy in the Workplace Policy is Lawful

The body of case law underlying the ALJ's decision has been overturned² by *Boeing Co.*, 365 NLRB No. 154 (2017), which renders clear that an employer may lawfully maintain a policy broadly prohibiting employees from recording in the workplace where that ban is warranted by compelling business interests. Mobility's Privacy in the Workplace policy is lawful under this standard.

In *Boeing Co.*, the Board adopted a balancing test to be applied when evaluating all facially neutral work rules. Even if a rule may be interpreted to prohibit Section 7 activity, it will not violate Section 8(a)(1) where "the potential adverse impact on protected rights is outweighed by justifications associated with the rule." *Id.* at 3. As a result of the balancing, the Board will place the policy, rule or handbook provision in one of three categories:

Category 1 includes "rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule."

Category 2 includes "rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications."

Category 3 includes "rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected

² Specifically, the ALJ relied on the standards set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), which was expressly overturned by *Boeing Co.*, *supra*. In addition, the Board overturned *Rio All-States Hotel & Casino*, 362 NLRB No. 190 (2015), which erroneously found a Casino violated the Act by maintaining a policy that prohibited all audio and video recordings.

conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule."

Boeing Co., *supra*, at 3-4 and 15. As in *Boeing Co.*, Mobility's Privacy in the Workplace policy is a Category 1 rule because, reasonably interpreted, it does not prohibit or interfere with the exercise of Section 7 activity. *Boeing Co.*, *supra*, at 17. The Privacy in the Workplace policy provides, in relevant part:

Employees may not record telephone or other conversations they have with their coworkers, managers or third parties unless such recordings are approved in advance by the Legal Department, required by the needs of the business, and fully comply with the law and any applicable company policy. (D 2:29-33).

Under the *Boeing Co.* standard, it is clear that Mobility may lawfully restrict employees from recording conversations, and thus, its Privacy in the Workplace policy is lawful. In *Boeing Co.*, the Board held that the employer's broad prohibition on photography to be lawful even though the rule "in some circumstances may potentially affect the exercise of Section 7 rights," because the adverse impact was "relatively slight" and outweighed by the employer's interest in protecting confidential and proprietary information. *Id.* at 17. The Board explained that the vast majority of photography is not protected by Section 7, and when evaluating work rules, the Board must differentiate between types of protected activity that are "central to the Act" from those activities that are "more peripheral." This analysis is directly applicable in this case, and although workplace recordings may be protected in very limited circumstances (just like photography), it is not the type of activity that is "central to the Act" because it "would not prevent employees from engaging in the group protest, thereby exercising their Section 7 right to do so, notwithstanding their inability to [record] the event." *Id.* at 19. As such, the Board held "[a]lthough the justifications associated with Boeing's no-camera rule are especially compelling, we believe that no-camera rules, in

general, fall into Category 1, types of rules that the Board will find lawful based on the considerations described above." *Id.* at 17.

The *Boeing Co.* decision is controlling and remarkably similar to the present case. The ALJ found, like in *Boeing Co.*, Mobility has “a pervasive and compelling interest in the privacy of customer information (Customer Proprietary Network Information (CPNI), the content of customer communications and Sensitive Personal Information (SPI).” (D 4:20-23). The ALJ recognized that “Mobility has gone to great lengths to protect customer data. The legal and business consequences of a breach of customer data for Respondent are very significant.” (D 3:3-4). General Counsel has not disputed Mobility’s justification for the Privacy in the Workplace policy, and for good reason, as Mobility’s interest in protecting the privacy of customer information is simply beyond dispute. That said, the Board made clear that no-recording policies fall into Category 1 and are generally lawful, without being subject to individualized scrutiny like Category 2 work rules.³

The *Boeing Co.* decision is directly applicable to policies that restrict workplace recordings. In *Boeing Co.*, the Board expressly reversed *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190 (2015), which erroneously found a work rule was unlawful because it prohibited the use of any type of recording device. In overturning *Rio All-Suites Hotel & Casino*, the Board found:

Also, we overrule the Board’s finding in *Caesar’s Entertainment d/b/a Rio All- Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 3–5 (2015), that a similar rule was unlawful. In this regard, we agree with dissenting Board Member Johnson in that case that the Board majority in *Rio All-Suites Hotel* improperly limited *Flagstaff* to the facts of that case and failed to give appropriate weight to the

³ Mobility’s Post-Hearing Brief, filed April 19, 2017, demonstrates in detail Mobility’s substantial and legitimate business and legal reasons for maintaining the Privacy in the Workplace Policy. Brief at 3-17, 21-29. The Board’s decision in *Boeing Co.*, *supra*, makes clear that the Privacy in the Workplace policy falls into Category 1, and therefore it should no longer be necessary to weigh the policy’s impact on Section 7 rights against Mobility’s legitimate justification for the policy. However, to the extent the ALJ finds it necessary to scrutinize business justifications for the policy, Mobility incorporates the facts and arguments from its Post-Hearing Brief.

casino operator's interests in "safeguarding guest privacy and the integrity of the Respondent's gaming operations." *Id.*, slip op. at 5 fn. 12. **As with the *Boeing* no-camera rule, based on the balancing of considerations similar to those described in the text above, we find that the rules in *Flagstaff* and *Rio All-Suites Hotel* fall within Category 1.**

Boeing Co. supra at fn. 89. (emphasis added). By expressly overturning *Rio All-Suites Hotel & Casino*, the Board made clear that it views recording policies in the same manner it views photography policies: each fall into Category 1 and are plainly lawful. Therefore, the Privacy in the Workplace policy is lawful.

B. Mobility Did Not Violate the Act when it Informed Charging Party of the Privacy in the Workplace Policy

The Complaint alleges Mobility violated the Act by allegedly threatening Charging Party when he violated the Privacy in the Workplace Policy. The ALJ found Charging Party recorded a meeting in the store manager's office on his Company owned cell phone and his personal cell phone. The purpose of the meeting was for the manager to present a termination notice to another sales associate. After the meeting, Mobility's Area Retail Sales Manager Andrew Collings told Charging Party that he "should not encourage other employees to record in-store conversations and that he did not want anyone held accountable for not following policy." (D 2:23-24). Charging Party did not receive discipline for the incident. There is nothing unlawful about informing Charging Party about a lawful policy. If the policy is lawful (which it clearly is), then non-discriminatory enforcement of the policy must also be lawful.

Collings' statement could not have violated the Act – he simply informed Charging Party why he should not encourage others to violate the Privacy in the Workplace policy. Collings' statement merely conveyed the fact that others, if they violate the policy, may be held accountable for violating a lawful work rule. That is not a threat and it has absolutely nothing to do with protected activity. It is simply a manager explaining a work rule.

Even if Collings' statement were a threat (which it wasn't), it would not have violated the Act because recording the meeting was not protected concerted activity. In *Boeing Co.*, the Board expressly endorsed Member Johnson's dissent when overturning *Rio All-Suites Hotel*. *Boeing Co.* supra at fn. 89. In Johnson's dissent, he made clear "there is no Sec. 7 right to possession of a camera or other recording device by employees on an employer's property, nor is there an inherent right to use a camera or other recording device in the course of Sec. 7 activity. Thus, the question is whether employees would reasonably view the rule in dispute as implicitly including and interfering with Sec. 7 activities." *Rio All-Suites Hotel*, supra, fn. 12. If an employee does not have an inherent right to use a recording device in the course of Section 7 activity, there can be no question that Collings' statement to Charging Party was lawful.

Moreover, the *Boeing Co.* decision demonstrates that an employer can enforce a lawful prohibition on workplace recording, even when the recording takes place in the course of protected activity. Recording a termination meeting is not the type of activity that is "central to the Act" because it "would not prevent employees from engaging in the group protest, thereby exercising their Section 7 right to do so, **notwithstanding their inability to [record] the event.**" *Boeing Co.* at 19 (emphasis added). Under *Boeing Co.*, employers may lawfully prohibit employees from recording conversations, even if they are in the course of protected concerted activity. Here, however, Collings never threatened Charging Party with discipline for recording the termination meeting – he simply told Charging Party not to encourage others to record conversations because it violated the Privacy in the Workplace policy. Collings' statement was 100% true and the Privacy in the Workplace policy is 100% lawful.

III. CONCLUSION

For all of the above reasons, the Complaint allegations in Case No. 05- CA-178637 are without merit and must be dismissed.

Respectfully submitted,

/s/ Stephen J. Sferra

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

jseidle@littler.com

Attorneys for Respondent,

AT&T Mobility LLC

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June, 2019, a copy of the foregoing was electronically filed and served via email upon the following:

Marcus Davis
4017 Clark Street
Capitol Heights, MD 20743
mldnc@yahoo.com

Paul J. Veneziano, Attorney
National Labor Relations Board, Region 5
Bank of America Center, Tower II
100 S. Charles Street. 6th Floor
Baltimore, MD 21201
Paul.Veneziano@NLRB.gov

/s/ Stephen J. Sferra

Stephen J. Sferra