

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

AT&T MOBILITY, LLC  
Respondent

and

Case 05-CA-178637

MARCUS DAVIS, an Individual  
Charging Party

**COUNSEL FOR THE GENERAL COUNSEL'S  
REPLY TO CHARGING PARTY'S ANSWERING BRIEF**

Paul J. Veneziano  
Counsel for the General Counsel  
National Labor Relations Board, Region Five  
Washington Resident Office  
1015 Half Street, S.E.  
Suite 6020  
Washington, D.C. 20570  
Telephone: (202) 273-1709  
Fax: (202) 208-3013  
paul.veneziano@nlrb.gov

Dated: September 9, 2019

Pursuant to Section 102.46(e) of the National Labor Relations Board’s Rules and Regulations, the General Counsel files the following Reply Brief to the Charging Party’s Answering Brief<sup>1</sup> to the General Counsel’s Exceptions to the Supplemental Decision of the Honorable Deputy Chief Administrative Law Judge Arthur J. Amchan (the ALJ).

## **I. STATEMENT OF THE CASE**

On July 1, 2019, the ALJ issued his decision in this case. On August 12, 2019, the General Counsel and AT&T Mobility, LLC (Respondent or Company) each filed exceptions to the ALJ’s supplemental decision, along with briefs in support of their exceptions. On August 26, 2019, Marcus Davis (Davis or Charging Party) filed an Answering Brief to the General Counsel’s and Respondent’s exceptions.

## **II. INTRODUCTION**

The General Counsel’s three exceptions in this case are as straightforward as the Board’s decision in *The Boeing Company*, 365 NLRB No. 154 (2017). First, the General Counsel has argued that the Complaint and Notice of Hearing’s (Complaint) rule allegation should be dismissed in view of the Board’s conclusion in *Boeing* that an employer may generally maintain no-camera rules prohibiting audio and video recording where the employer’s legitimate business interests outweigh a comparatively slight impact on Section 7 rights. Second, the lawfulness of Respondent’s rule under *Boeing*, the General Counsel has also argued that Respondent’s Area

---

<sup>1</sup> Citations to the Charging Party’s Answering Brief appear as “Answering Brief [page numbers].” Citations to the ALJ’s initial decision appear as “ALJD [page numbers],” and citations to the ALJ’s supplemental decision appear as “Suppl. ALJD [page numbers].” Citations to the transcript appear as “Tr. [page numbers].” Citations to the General Counsel’s exhibits will appear as “GC Exh.[exhibit number],” and citations to Respondent’s exhibits appear as “R Exh. [exhibit number].” Finally, citations to joint exhibits appear as “Jt. Exh. [exhibit number].”

Retail Sale Manager Andrew Collings (Collings) unlawfully threatened Communication Workers of America, Local 2336 (Union) steward Davis with discipline for recording a bargaining-unit employee's grievance and termination meeting. Third, the General Counsel requested that the Board ensure any remedy in this case be consistent with its findings and conclusions.

Despite the General Counsel's straightforward analysis, the Charging Party's Answering Brief misconstrues the Board's decision in *Boeing* to conclude that Respondent may not generally maintain a no-camera rule because Collings unlawfully interfered with Section 7 rights when he threatened employees with discipline if they recorded grievance and termination meetings in the future. (Answering Brief at 2–4.) Specifically, the Charging Party conflates the Complaint allegations and ignores the Board's repeated distinction between the lawful maintenance of a rule and rule's unlawful application (Id. at 2–3). The Charging Party's Answering Brief then unsuccessfully attempts to differentiate the impact of Respondent's Privacy of Communications rule and Respondent's business justifications from the impact and justifications at issue in *Boeing*.<sup>2</sup> (Id. at 3–4.)

Nevertheless, the Board's decision in *Boeing* and the record in this case demonstrate that Respondent may lawfully maintain its Privacy of Communication rule. Accordingly, the Board should dismiss the Complaint's first allegation.

### **III. ARGUMENT**

The Charging Party's argument starts on the right path. The Charging Party correctly identifies *Boeing*'s new analytical framework for facially neutral rules that, when reasonably

---

<sup>2</sup> Although the Charging Party's Answering Brief also addresses the General Counsel's second and third exceptions in this matter, the Charging Party agrees with the General Counsel's exceptions. (Answering Brief at 5–8.) Accordingly, this reply brief will not address the Charging Party's response to the General Counsel's second and third exceptions in this matter.

construed, potentially interfere with Section 7 rights: weighing the employer’s legitimate business justifications against the potential impact on protected activity. (Answering Brief at 2.) The Charging Party’s brief also concedes—as it must—that the Board concluded in *Boeing* that no-camera rules generally constitute Category 1-type rules that an employer may lawfully maintain. (Id at 3.)

But from there, the Charging Party’s argument takes several wrong turns. Rather than applying the Board’s *Boeing* analysis to determine whether Respondent may generally *maintain* its Privacy of Communications rule, the Charging Party contrasts the record in *Boeing*—which include no allegations or evidence that the rule had prevented employees from engaging in protected activity—with Collings’ statement that employees could be held accountable if they violated Respondent’s Privacy of Communications rule in the future.<sup>3</sup> (Ibid.) Thus, the Charging Party asserts the ALJ appropriately drew a reasonable distinction between different work settings in weighing the impact Respondent’s rule had on Section 7 activity and correctly concluded that the impact outweighed Respondent’s legitimate business interests in maintaining its no-camera rule. (Ibid.)

Nevertheless, the Charging Party conflates the Complaint allegations in this case. The Complaint’s rule allegation contends that Respondent unlawfully interfered with Section 7 rights simply by maintaining its Privacy of Communications rule. (GC Exh. 1–C at ¶4, 6.) The

---

<sup>3</sup> The Charging Party’s also highlights Board dicta noting that the Board’s categorical scheme “is not part of its new test.” (Answering Brief at 3). Yet regardless of whether the categorical scheme is part of the Board’s new analytical framework for facially neutral rules, the Board explicitly explained that the purpose of the providing categories: providing “greater clarity and certainty to employees, employers, and unions regarding whether and to what extent different rules may be lawfully maintained.” *Boeing*, supra, at 15. Further, the Board emphasized that instances where it “re-designate[d] particular types of rules from one category to another” will be “relatively rare.” Ibid.) In this regard, the Charging Party repeats the ALJ’s analytical oversight.

Complaint’s threat allegation contends that Respondent unlawfully interfered with Section 7 rights when Collings threatened employees with discipline. (GC Exh. 1–C at ¶5, 6.) Thus, the rule allegation turns on whether the Employer unlawfully maintained its rule, not whether Collings later unlawfully threatened employees with future enforcement of the rule.

In this regard, the Charging Party’s argument is a mirror image of the ALJ’s erroneous conclusion that the threat allegation turns on the lawfulness of the rule. (*See* Suppl. ALJD at 7:17–20.). Like the ALJ, the Charging Party overlooks the Board’s repeated and explicit distinction between the lawful maintenance of a rule from the application of an otherwise lawful rule to employees engaged in protected conduct. *Boeing*, *supra*, at fns. 15, 76, 84; *see also id.* at 16 (citing *Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209, 213 (D.C. Cir. 1996) and *Adtranz ABB Daimler-Benz Transportation, N.A. v. NLRB*, 253 F.3d 19, 28 (D.C. Cir. 2001)). As an example, the Board stated that an employer’s decision to impose discipline, pursuant to an otherwise lawful rule, on employees who engage in protected activity may constitute “unlawful interference with the exercise of protected rights in violation of Section 8(a)(1).” *Id.* at 16. Accordingly, the Board’s observation that *Boeing* includes no allegations or evidence that the no-camera rule in question prevented employees from in engaging in protected conduct, *id.* at 19, simply reinforces the Board’s distinction between lawful *maintenance* and an unlawful *threat* that employees would be disciplined if they recorded grievance and termination meetings in the future.

The Charging Party’s analytical missteps do not stop there. The Charging Party next unsuccessfully attempts to differentiate Respondent’s no-camera rule from the rule in *Rio All-Suites Hotel & Casino*, 362 NLRB 1690 (2015). (Answering Brief at 4.) The Charging Party claims—without citation—that the employer’s rule in *Rio All-Suites Hotel* was “aimed at

photography and videography.” (Ibid.) The Charging Party also contends that Respondent’s Privacy of Communications rule is designed to protect employee data, rather than customer data. (Ibid.) Thus, the Charging Party claims that the “justifications that should be considered in determining whether [Respondent’s] rule impermissibly restricts Section 7 activity should be limited to [those] for which the rule was obviously written—employee privacy.” (Ibid.)

But in fact, the employer’s rule in *Rio All-Suites Hotel* prohibited the use of *any* type of audio/visual recording device without employer permission. 362 NLRB at 1692. If anything, the employer’s rule in *Rio All-Suites* is therefore *more* restrictive than Respondent’s rule prohibiting recording telephone or other conversations. Further, the employer in *Rio All-Suites Hotel* had not linked its “generalized” interest in “guest privacy” and the “integrity” of gaming operations to its no-camera rule. 362 NLRB at 1693. Nevertheless, the Board in *Boeing* concluded that the employer’s no-camera rule in *Rio All-Suites Hotel* was lawful. Regardless of the Charging Party’s eleventh-hour attempt to differentiate this case, Respondent’s “pervasive and compelling interest in the privacy of customer information (Customer and Proprietary Network Information (CPNI), the content of customer communications[,] and Sensitive Personal Information (SPI)[])” and the “very significant” legal and business “consequences of a breach of customer data for Respondent” (Suppl. ALJD at 3:17–20; 6:13–15 (footnotes omitted)) therefore justify the Respondent’s no-camera rule in this case.

#### IV. CONCLUSION

For the foregoing reasons, counsel for the General Counsel respectfully requests that the Board grant the General Counsel's first exception over the Charging Party's Answering Brief and dismiss the Complaint's first allegation.

Dated at Washington, D.C., on September 9, 2019, and respectfully submitted by:

/s/ Paul J. Veneziano

Paul J. Veneziano

Counsel for the General Counsel

National Labor Relations Board, Region Five

Washington Resident Office

1015 Half Street, S.E.

Suite 6020

Washington, D.C. 20570

Telephone: (202) 273-1709

Fax: (202) 208-3013

paul.veneziano@nlrb.gov

## CERTIFICATE OF SERVICE

I hereby certify that Counsel for the General Counsel's Reply to Charging Party's Answering Brief was filed electronically on September 9, 2019, and, on the same day, copies were electronically served on the following individuals by e-mail:

Stephen J. Sferra & Jeffrey A. Seidle, Esqs.  
Littler Mendelson, PC  
1100 Superior Avenue, 20th Floor  
Cleveland, OH 44114  
[ssferra@littler.com](mailto:ssferra@littler.com)  
[jseidle@littler.com](mailto:jseidle@littler.com)

Judith R. Kramer, Esq.  
AT&T Services, Inc.  
1 AT&T Way, Room 3A253  
Bedminster, NJ 07921-2693  
[jk2741@att.com](mailto:jk2741@att.com)

Katherine Alexandra Roe, Esq.  
Communications Workers of America  
501 3rd Street, NW  
Washington, DC 20001  
[aroe@cwa-union.org](mailto:aroe@cwa-union.org)

Marcus Davis  
5000 A Street, SE  
Apt. 301  
Washington, DC 20019  
[mldndc@yahoo.com](mailto:mldndc@yahoo.com)

/s/ Stephen P. Kopstein  
Stephen P. Kopstein  
Counsel for the General Counsel  
National Labor Relations Board, Region Five  
Washington Resident Office  
1015 Half Street, S.E.  
Suite 6020  
Washington, D.C. 20570  
Telephone: (202) 273-1994  
Fax: (202) 208-3013  
[stephen.kopstein@nlrb.gov](mailto:stephen.kopstein@nlrb.gov)