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**

AT&T MOBILITY LLC's REPLY TO GENERAL COUNSEL'S ANSWERING BRIEF

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I. INTRODUCTION

For the reasons asserted in its Exceptions and Brief in Support thereof filed by Respondent AT&T Mobility LLC ("Mobility" or "Company") on August 12, 2019, Mobility requests that the National Labor Relations Board reverse the decision of Administrative Law Judge Amchan ("ALJ") dated July 1, 2019. The Answering Brief submitted by General Counsel raises no legal or factual arguments not already comprehensively addressed in Respondent's Brief in Support of Exceptions. Mobility did not violate Section 8(a)(1) by maintaining its Privacy in the Workplace policy or when a manager discussed the policy with an employee.

This is a simple case about whether Mobility's Privacy in the Workplace policy, which restricts unauthorized workplace recordings, is lawful under *Boeing*, 365 NLRB No. 154 (2017), and whether a manager acted lawfully when he instructed Charging Party Marcus Davis not to encourage others to violate the policy. General Counsel concedes that the Privacy in the Workplace policy is lawful.

The Communications Workers of America ("CWA" or "Union"), who is not even a party to this action, contends the policy is unlawful, despite the policy's striking similarities to the lawful policy in *Rio All- Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 3–5 (2015), and the Company's "pervasive and compelling" interests in maintaining the policy, akin to the interests found in *Flagstaff Medical Center* and *Boeing*. Likewise, the Union and General Counsel contend the Company violated the Act by "impliedly threatening" Charging Party, when he was told not to encourage others to violate the Privacy in the Workplace policy.

Mobility's legal and ethical obligations to protect the privacy of confidential and sensitive customer information necessitate the Company's maintenance of the Privacy in the Workplace policy and its restrictions on workplace recordings. The ALJ wrongly ignored Mobility's pervasive

and compelling interest when he found the Privacy in the Workplace policy to be overbroad. Established precedent demonstrates that an employer may restrict workplace recording, espicially when an overriding interest is present. Under *Flagstaff Medical Center* and *Boeing*, the Board must conclude that Mobility's policy is lawful, particularly as Mobility's overriding interest in protecting the privacy of sensitive customer information justifies its restrictions on workplace recordings. The Board should further conclude that Mobility did not violate the Act by telling a union representative not to encourage others to violate the Privacy in the Workplace policy.

II. LAW AND ARGUMENT

A. Contrary to the Union's Assertions, the Privacy in the Workplace Policy is a Lawful, Category 1 Work Rule

General Counsel correctly asserts the Board should reverse the ALJ's decision to find that the Privacy in the Workplace policy is lawful under the Board's straightforward analysis in *Boeing*. (GC Answer Brief 7). The Union, on the other hand, distorts the applicable legal principles, and claims that the Privacy in the Workplace policy is unlawful because the Company's interests in maintaining the policy are outweighed by its impact on Section 7 rights. However, the Privacy in the Workplace policy falls into *Boeing's* Category 1 and therefore it is unnecessary to assess the Company's interests in maintaining the policy, because it does not impact Section 7 rights. In *Boeing*, 365 NLRB No. 154 (2017), the Board established that facially neutral work rules in one of the following 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 conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule."

Boeing, *supra*, at 3-4 and 15. As in *Boeing*, 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. Recording conversations in the workplace is not protected by Section 7 and therefore, the Privacy in the Workplace policy falls under the first prong of Category 1.

Even if the Privacy in the Workplace policy had a potential adverse impact on protected rights, the policy would still be lawful under prong 2 of Category 1, because it is far outweighed by Mobility's justifications for the rule. *Boeing*, 365 NLRB No. 154 (2017), plainly establishes that an employer may lawfully maintain a policy broadly prohibiting employees from recording in the workplace, especially where that ban is warranted by compelling business interests. Mobility's Privacy in the Workplace policy is lawful under this standard. In *Boeing*, 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.

Under the *Boeing* 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*, 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 Union erroneously conflates Charging Party recording the termination meeting with an employee's right to have a union representative present during an investigatory interview under *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 261, (1975).[1] The Union's analysis misses the critical distinction between recording the meeting and the right to a Weingarten representative. While the right to a Weingarten representative may be "central to the Act," recording the meeting is "more peripheral." Moreover, the recorded meeting at issue was not an investigatory interview, thus the employee did not have the right to a Weingarten representative.

The *Boeing* decision is directly applicable to policies that restrict workplace recordings. In *Boeing*, the Board expressly reversed *Rio All-Suites Hotel & Casino,* 362 NLRB No. 190 (2015),

[1] The Union even concedes that the meeting was not investigatory and was not a grievance meeting. Therefore, Charging Party was not in the meeting as a *Weingarten* representative.

which erroneously found a work rule unlawful because it prohibited use of any type of recording device. In *Boeing*, the Board expressly found the rule from *Rio All-Suites Hotel & Casino,* to be a lawful Category 1 work rule. That work rule stated: "Cameras, any type of audio visual recording equipment and/or **recording devices may not be used unless specifically authorized for business purposes** (e.g. events)." *Rio All-Suites Hotel & Casino,* 362 NLRB No. 190, at slip op. 12 (2015) (emphasis added).

General Counsel correctly notes that the Privacy in the Workplace policy is strikingly similar to the policy found in *Rio All-Suites Hotel & Casino*. The Union's attempt to distinguish the rules, claiming that the rule in *Rio All-Suites Hotel & Casino* "was specifically aimed at photography and videography," is entirely meritless. (Union Brief 4). The rule expressly prohibits the unauthorized use of recording devices, which is identical to the aspect of the Privacy in the Workplace policy that the Union claims to be unlawful. 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.

The Union also erroneously contends that the maintenance of the Privacy in the Workplace policy is unlawful because it was used to restrict Charging Party's Section 7 rights. However, the Board noted in *Boeing*, "[a]lthough the *maintenance* of Category 1 rules (and certain Category 2 rules) will be lawful, the *application* of such rules to employees who have engaged in NLRA-protected conduct may violate the Act, depending on the particular circumstances presented in a given case." *Boeing* supra at fn 15, 76. Even if Mobility violated the Act when a manger instructed Davis not to encourage others to violate the policy (which it did not), it is still a lawful policy. Under the Union's analysis, every case involving unlawful discipline would inherently include the

maintenance of an unlawful policy. *Boeing* clearly established that a policy does not transform from lawful to unlawful when it is applied in an unlawful manner. The Privacy in the Workplace policy is a Category 1 rule and therefore it is lawful, regardless of how it was applied.

B. The Privacy in the Workplace Policy is Necessary to Protect Mobility's Pervasive and Compelling Interest In Protecting Sensitive Customer Information

Without any support in the evidentiary record, the Union contends the Privacy in the Workplace policy is not designed to protect sensitive and confidential customer information, but instead designed for the purpose of "curtailing employee rights under the NLRA." (Union Brief 5). In contrast, the ALJ correctly found, like in *Boeing*, 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 6:13-15). 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 3:19-20). Mobility's interest in protecting the privacy of customer information is simply beyond dispute.

Mobility's interest in protecting customer information is not only "pervasive and compelling," but strikingly similar to the interests found in *Flagstaff Medical Center*. Mobility's legal obligations to protect customer information mirror the obligations of healthcare providers to protect patient health information under HIPAA, and the penalties under the Telecommunications Act can be far more severe than those under HIPAA. The Union does not address these issues, but instead simply offers a conclusory and blatantly incorrect assumption that the Privacy in the Workplace policy is unrelated to the privacy of Mobility's customers.

As in the healthcare industry, telecommunications carriers are subject to broad regulation concerning privacy of customer information. “Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to… customers.” 47 U.S.C. §222(a). Federal law places substantial limits on use and disclosure of CPNI, which includes “information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier …” 47 U.S.C. § 222(h)(1)(A). As a matter of policy and procedure, and to comply with the Consent Decree, Mobility applies the CPNI Regulations to protect SPI and content of communications.

Employers covered by HIPAA are similarly obligated to keep sensitive patient information secure. Under HIPAA, covered employers must comply with regulations governing the “use” and “disclosure” of Protected Health Information (“PHI”). 45 CFR § 164.502(a). Similar to CPNI, PHI is defined broadly and includes information held by the covered employer concerning a patient’s health status, the services received, or billing and payment information. 45 CFR § 160.103. Mirroring the CPNI Regulations, employers subject to HIPAA are restricted from disclosing PHI without a patient’s express authorization. 45 CFR § 160.524. Further, like Mobility’s “rule of least privilege” policy described above, when an employer subject to HIPAA discloses any PHI, it must make a reasonable effort to disclose only the minimum necessary information required to achieve its purpose. (45 CFR 160.502; Smith 93).

Also, under HIPAA’s “Security Rule” covered employers must conduct risk assessments, and then implement administrative, technical, and physical safeguards to protect PHI. 45 CFR §§ 164.308, 164.310, 164.312. These obligations mirror the obligations set forth in the CPNI Regulations and the Consent Decree, which require Mobility to conduct a risk assessment and then

implement "administrative, technical, and physical safeguards reasonably designed to protect the security and confidentiality of Personal Information and CPNI." (RX 3, at p. 7).

Potential penalties for noncompliance are a major difference between HIPAA and the Telecom Act. The civil penalties for violating HIPAA are set forth in a tiered system and range from $100 to $50,000 per violation. 45 CFR 160.404. Notably, though, monetary penalties for multiple violations are capped at $1.5 million during a calendar year. In contrast, as illustrated by the $25M fine that AT&T paid in 2015 under the Consent Decree, penalties for violating the Telecommunications Act are not capped and can be substantial.

As demonstrated by the Telecommunications Act, the CPNI Regulations, and the FCC's aggressive enforcement of consumer privacy protections, Mobility plainly has an overriding interest in protecting the privacy of customer CPNI and SPI and to implement and enforce workplace rules that protect customer data. The Privacy in the Workplace policy is an essential component of the Company's comprehensive strategy to protect sensitive customer information. Accordingly, the potential adverse impact of Mobility's Privacy in the Workplace policy on protected rights is outweighed by the pervasive and compelling justifications associated with the rule.

C. Mobility Did Not Unlawfully Threaten Marcus Davis and Did Not Restrict Section 7 Activity

Contrary to the Union's assertions, the Privacy in the Workplace Rule was not applied to "actually impact" Section 7 rights. Even if recording the meeting were protected activity (which it is not), no one stopped Davis from recording the meeting. Davis did not receive discipline for recording the meeting and was not threatened with discipline for recording the meeting. Davis was simply instructed that he should not encourage others to violate the Privacy in the Workplace

policy. 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.

The Union erroneously conflates recording the termination meeting with an employee's right to have a *Weingarten* representative. To be clear, no one stopped Charging Party from representing the employee in the termination meeting. In direct conflict with the Union's assertion, the Board made clear that 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* at 19 (emphasis added). Under *Boeing*, employers may lawfully prohibit employees from recording conversations, even if they are in the course of protected concerted activity.

Even if recording workplace conversations may be protected in certain situations, Mobility's "pervasive and compelling" interest in protecting customer information requires that Mobility prohibit unauthorized recordings. In *Boeing*, the Board found that although photography in the workplace may be protected by Section 7, the employer could prohibit all photography because of its overriding privacy interests. The same is true here, the policy is lawful because Mobility has an overriding interest in protecting customer information, and therefore it must be permitted to enforce this lawful policy, even in termination meetings. An employee who is secretly recording conversations would not be able to determine if and when confidential customer information will be disclosed by others being recorded. Mobility's interest in protecting customer information remains "pervasive and compelling" in termination meetings and therefore Mobility must be permitted to prohibit unauthorized recordings.

III. CONCLUSION

The threshold inquiry in this case is whether Mobility has an overriding interest in protecting the privacy of sensitive customer information. The ALJ's findings that Mobility's interests are "pervasive and compelling" as well as the overwhelming weight of the evidence demonstrate that the overriding interest is present. With this overriding interest, workplace recordings are not protected by Section 7, and therefore Mobility may lawfully restrict such recordings.

Accordingly, and for all of the above reasons and the reasons asserted in Respondent's *Brief in Support of Exceptions*, the ALJ's findings and conclusions are without merit and must be reversed, and the Complaint dismissed in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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