

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

AT&T MOBILITY LLC, Respondent

and

Case No. 05-CA-178637

MARCUS DAVIS, An Individual, Charging Party

CHARGING PARTY'S REPLY BRIEF TO RESPONDENT'S ASWERING BRIEF

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Introduction

Under Section 102.46(e) of the National Labor Relations Board's Rules and Regulations, the Charging Party submits the following Brief in Reply to the Answering Brief that Respondent filed on September 11, 2019, as a response to the Charging Party's Cross-Exceptions. These briefs arose from the Supplemental Decision of Administrative Law Judge Arthur J. Amchan, issued on July 1, 2019.

We argue that the Respondent applied its Privacy of Communications Rule ("rule") to interfere with protected activity that is central to Section 7 of the National Labor Relations Act ("Act"). We also argue that the rule's application was both a violation of the Act and a factor supporting a finding that the rule is itself unlawful. Additionally, even if the Board deems the rule lawful, its application in this manner still violates the Act.

Argument

Davis' Role as Union Representative at the Meeting was Central to the Act.

The Respondent argues that the meeting Marcus Davis attended with his coworker was not investigatory and therefore the Supreme Court's characterization of *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 261 (1975) as involving the "most fundamental purposes of the Act" is inapplicable. However, the Court used that phrase when discussing a concept relevant to both the *Weingarten* case and the case here: how a union representative's presence at a meeting serves the collective interest even if that meeting is related to the discipline of only a single worker.

When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a 'concerted activity' for 'mutual aid or protection,' although the

aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts." The Board's construction plainly effectuates the most fundamental purposes of the Act.

Id. (internal citations omitted). The Respondent also argues that even if Davis' presence at the meeting here was central to the Act, his recording the meeting was peripheral. This erroneously implies that Davis' role in the meeting was to merely offer dumb consolation. Fortunately, Davis recognized his duty to use this process provided by the collective bargaining agreement so that he could vigorously defend the rights of his coworker. A crucial aspect of his role was to record the statements made in the meeting, whether using pen and paper, a keyboard, or a cell phone. As discussed in our earlier brief, an example of why this is so important is where the employer later changes its reasons for the discipline, which can cause an arbitrator to find the company lacked just cause. (See Charging Party's Cross-Exceptions Brief at 3.) Thus, in recording the meeting, Davis fulfilled a core duty in his role as union steward. He used the one tool at his disposal that would ensure he had an accurate record of the employer's reasons for the discipline and any other relevant statements. In doing so, he engaged in protected, concerted activity that is central to the purposes of the National Labor Relations Act. And, as discussed below, this is a relevant factor in determining the lawfulness of the rule.

Unlawful Application of a Rule is a Factor in Determining the Rule's Lawfulness.

Contrary to the Respondent's implications, in *The Boeing Co.*, 365 NLRB No. 154 (2017), the Board did not hold that all facially neutral no-camera rules are *per se* lawful. Rather, it stated that "the legality of some rules will turn on the particular facts in a given case." *Boeing*, 365 NLRB at 16. It went on to recommend that parties "introduce evidence regarding a particular rule's impact on protected rights," promising that the Board would "take into

consideration particular events that may shed light . . . on the impact of its maintenance on protected rights.” *Id.* Thus, the Respondent’s application of the rule to restrict Section 7 rights is not only a separate 8(a)(1) violation; it is also relevant evidence for determining whether the rule is lawful to maintain.

In *Boeing*, the Board criticized *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) prong one for requiring just what Respondent advocates here: “a one-size-fits-all analysis that gives equal weight to every potential intrusion on Section 7 rights, however slight it might be and however remote the possibility that employees would actually engage in that type of protected activity.” *Boeing* 365 NLRB at 11. Here, the rule’s intrusion on Section 7 rights is significant and real. Moreover, the decision to apply the rule here appears to have been made by the Respondent’s own human resources department, implying that this was the intended purpose of the rule. (ALJ Supplemental Decision at 2.) In performing the balancing test required under *Boeing*, after considering all of the facts of this specific case—the actual application of the rule, its attenuated relationship to customer data protection, and the relative ease of amending the rule to avoid this kind of Section 7 interference—the inescapable conclusion is that maintenance of this particular rule in this particular case is unlawful.

Submitted with respect,

/s/ Katherine Alexandra Roe

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CERTIFICATE OF SERVICE

I hereby affirm that this Reply Brief was served on the parties listed below via email on

September 23, 2019.

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