AT&T Mobility, LLC *and* Marcus Davis. Case 05–CA–178637

May 3, 2021

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN, EMANUEL, AND RING

On April 25, 2017, Administrative Law Judge Arthur J. Amchan issued the attached initial decision in this proceeding, finding that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by maintaining an unlawful work rule and threatening an employee with discipline for violating the rule while engaged in protected activity. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

In finding that the Respondent violated Section 8(a)(1) by maintaining the work rule, the judge applied, among other cases, *Lutheran Heritage Village–Livonia*, 343 NLRB 646 (2004). While the exceptions to the judge's decision were pending, the Board issued *Boeing Co*., 365 NLRB No. 154 (2017), overruling *Lutheran Heritage* in relevant part, setting forth a new standard for analyzing rules-maintenance allegations, and applying the new standard retroactively to all pending cases. On September 28, 2018, the Board issued a Notice to Show Cause why this case should not be remanded to the judge for further proceedings in light of *Boeing*, and on March 15, 2019, the Board issued an Order Remanding.

On July 1, 2019, Judge Amchan issued the attached supplemental decision, in which he reaffirmed his prior findings with some modifications to his previous analysis. The Respondent filed exceptions and a supporting brief, the General Counsel and Charging Party filed answering briefs, and the Respondent filed reply briefs. The General Counsel also filed exceptions and a brief in support, the Charging Party filed an answering brief, and the General Counsel filed a reply. In addition, the Charging Party filed cross-exceptions, the General Counsel and Respondent filed answering briefs, and the Charging Party filed a reply brief.

The National Labor Relations Board has considered the decision, the supplemental decision, and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

I. BACKGROUND

The Respondent maintains a Privacy in the Workplace Policy. The Privacy in the Workplace Policy includes a subpart entitled "Privacy of Communications" (hereinafter "no-recording Policy" or "Policy"), which states: "Employees may not record telephone or other conversations they have with their co-workers, 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."

Marcus Davis, an employee at the Respondent's Dupont Circle store in Washington, D.C., serves as a union steward for the Communications Workers of America, Local 2336 (the Union) at five of the Respondent's D.C.-area stores. An employee of the Chevy Chase store sought Davis's assistance to file a grievance alleging that the Respondent had targeted him for discipline or termination. At the employee's request, Davis accompanied the employee to a meeting, where the Respondent presented the employee with a termination notice. Davis recorded this meeting on both his company and personal cell phones.

The manager of the Chevy Chase store suspected that Davis had recorded the meeting and contacted Area Sales Manager Andrew Collings. Collings directed Dupont Circle Store Manager Jason Yu to retrieve Davis's company phone, delete the recording, and administer a coaching. After Davis returned to the Dupont Circle store, Yu met with Davis twice, first to delete the recording and later that day to administer the coaching. The next day, Collings met with Davis and told him that recording conversations violated the Respondent's Policy and that Collings "did not want anyone held accountable for not following policy."

In his Supplemental Decision, Judge Amchan found that the Policy was unlawful under *Boeing*, above. The judge acknowledged that the Policy served "pervasive and compelling" employer interests in safeguarding customers' personal information and the content of customer communications, but he found those interests were outweighed by the Policy's potential to interfere with

[1] We shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language, and in accordance with our decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020). We shall substitute a new notice to conform to the Order as modified.

Because we find that the Respondent may lawfully maintain its Privacy of Communications policy and that the Respondent's application of the policy via a threat of unspecified reprisals was communicated solely to one employee at a single store, we decline the Charging Party's request for nationwide notice posting, and we will confine notice posting to that one store.

important Section 7 rights to record and preserve evidence of unfair labor practices. The judge further found that the Respondent could protect its privacy interests through a narrower rule, given that employees receive extensive training on safeguarding customer information. Finally, the judge found that the Respondent violated Section 8(a)(1) of the Act by threatening Davis with discipline or discharge under the unlawful Policy.[2]

For the reasons set forth below in Section II.A, we find that the Policy is a lawful Category 1(b) rule under *Boeing*. We further find, in Section II.B, that the Respondent, by Manager Collings, violated Section 8(a)(1) of the Act by unlawfully applying that rule by threatening Davis that a refusal to comply with the rule would result in unspecified reprisals. When Collings threatened Davis, he said that he "did not want anyone held accountable for not following policy." The only "policy" Davis did not follow was the lawful Category 1(b) Policy. This raises a further question: must the otherwise-lawful Policy be found unlawful to maintain after all under prong three of *Lutheran Heritage*, 343 NLRB at 647, on the basis that the Respondent applied it to restrict Davis in the exercise of his Section 7 rights? We answer that question in the negative. For the reasons set forth below in Section II.C, we believe that applying a rule or policy to restrict the exercise of Section 7 rights is an unfair labor practice, but it should not make the rule thus applied unlawful to maintain. Accordingly, we will overrule *Lutheran Heritage* in relevant part.

II. DISCUSSION

A. The Policy is Lawful Under Boeing.

In *Boeing*, the Board held that "when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule." *Boeing*, above, slip op. at 3 (emphasis omitted). In conducting this evaluation, the Board balances the employer's business justifications against the extent to which the rule or policy, viewed from the perspective of reasonable employees, interferes with employee rights under the Act. Id. Ultimately, the Board places challenged rules into one of three categories:

- *Category 1* will include 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* will include rules that warrant individualized scrutiny in each case as to whether the rule, when reasonably interpreted, would prohibit or interfere with the exercise of NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
- *Category 3* will include 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.

Id., slip. op. at 3–4 (emphasis in original).[3] These categories are not part of the *Boeing* standard. Except for rules designated Category 1(a), as to which no balancing is required, the categories represent the results of the Board's balancing of interests and are intended to "provide . . . greater clarity and certainty to employees, employers and unions." *Boeing*, 365 NLRB No. 154, slip op. at 4.

In *Boeing,* the Board considered a no-camera rule that prohibited employees from using camera-enabled devices to capture photos and video without a valid business need and an approved camera permit. Applying the new framework, the Board found that Boeing's no-camera rule "may potentially affect the exercise of Section 7 rights, but this adverse impact is comparatively slight." Id., slip op. at 17. The Board then found the rule served compelling employer interests in safeguarding proprietary secrets and classified information stemming from Boeing's federal defense contracts. Id., slip op. at 17–18. The Board concluded that Boeing's legitimate interests served by the no-camera rule far outweighed the adverse impact of the rule on employees' exercise of their Section 7 rights. Id., slip op. at 17. It then stated: "Although the justifications associated with Boeing's no-camera rule are especially compelling, we believe that no-camera rules, in general, fall into Category 1. . . ." Id. More precisely, since rules that, when reasonably interpreted, do not potentially interfere with the exercise of Section 7 rights belong in Category 1(a), and since the Board found that Boeing's no-camera rule *does* potentially interfere with the exercise of those rights, the Board in *Boeing* necessarily placed no-camera rules in Category 1(b).

[2] Although the General Counsel did not allege, and the judge did not find, that the threat made to Davis constituted an unlawful application of the rule, in our view this is an unavoidable conclusion, insofar as the threat expressly referenced the rule.

[3] In *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2–3 (2019), the Board redesignated the subdivisions of *Boeing* Category 1 as (a) and (b).

The Board then addressed two other cases involving similar rules: *Flagstaff Medical Center*, 357 NLRB 659 (2011),[4] and *Rio All-Suites Hotel & Casino*, 362 NLRB 1690 (2015). The rule in *Flagstaff* prohibited the use of cameras to record images of patients or hospital equipment, property, or facilities; and a panel majority found that rule lawful. 357 NLRB at 662–663. The Board in *Boeing* reaffirmed that finding, explaining that the hospital's "substantial patient confidentiality interests" outweighed the "comparatively slight" potential interference with Section 7 rights. 365 NLRB No. 154, slip op. at 19 fn. 89. *Rio All-Suites* involved two closely related rules: a no-camera rule and a no-recording rule. Specifically, the rules in *Rio All-Suites* provided that "[c]amera phones may not be used to take photos on property without permission from a Director or above," and "[c]ameras, any type of audio visual recording equipment and/or recording devices may not be used unless specifically authorized for business purposes (e.g. events)." 362 NLRB at 1692. Analyzing these rules together, the *Rio All-Suites* majority found them unlawful. Id. at 1692–1694. Then-Member Johnson dissented, citing the employer's legitimate interests in "safeguarding guest privacy and the integrity of [its] gaming operations." Id. at 1694 fn. 12. The Board in *Boeing* overruled *Rio All-Suites* in relevant part, again applying a balancing analysis and criticizing the *Rio All-Suites* majority for failing to give the interests cited by Member Johnson "appropriate weight." 365 NLRB No. 154, slip op. at 19 fn. 89.

Most importantly, the Board in *Boeing* then placed the rules in *Flagstaff* and *Rio All-Suites* in Category 1, id.—i.e., Category 1(b), as with the rule in *Boeing* itself. Category 1 consists of rules that are categorically lawful to maintain, as opposed to Category 2 rules, which "warrant individualized scrutiny in each case." Id., slip op. at 3–4. And as the Board made clear in *Boeing* and subsequently reiterated, the classification *Boeing* contemplates is a "classification of *types* of rules." *LA Specialty Produce*, 368 NLRB No. 93, slip op. at 2 (emphasis added); see *Boeing*, 365 NLRB No. 154, slip op. at 15. Thus, *Boeing* held not merely that the specific no-camera and no-recording rules in *Boeing*, *Flagstaff*, and *Rio All-Suites* were lawful Category 1(b) rules, but that no-camera rules *as a type* and no-recording rules *as a type* belong in Category 1(b). Accordingly, as a matter of law under *Boeing* and *LA Specialty Produce*, the no-recording Policy at issue here is a lawful Category 1(b) rule.

We would reach the same result even if *Boeing* required a fresh analysis of the Respondent's Policy. Like the lawful rules in *Boeing*, *Flagstaff*, and *Rio All-Suites*, the Policy has a comparatively slight impact on employees' Section 7 rights. Although the Policy may prevent recording of some protected conversations, the vast majority of conversations covered by the Policy bear no relation to Section 7 activity. And employees remain free to speak to each other about working conditions or other protected Section 7 topics, despite the Respondent's prohibition on recording those conversations.[5] See *Boeing*, 365 NLRB No. 154, slip op. at 19.

On the other side of the balance, the Respondent has strong business justifications for maintaining the Policy that outweigh its potential adverse impact on employees' Section 7 rights. The Respondent has a duty under federal law to safeguard customer information and the content of customer communications. See 47 U.S.C. § 222; 47 C.F.R. §§ 64.2001–64.2012. The judge accurately described the Respondent's interests in maintaining the Policy as "pervasive and compelling." These interests are comparable to those arising from the employer's duty in *Flagstaff* under 42 U.S.C. § 1320d-6 to protect patient privacy, and to the important customer privacy interests in *Rio All-Suites*. On this basis as well, we find that the Policy is a lawful work rule, appropriately placed into *Boeing*

[4] Petition for review granted in part on other grounds 715 F.3d 928 (D.C. Cir. 2013).

[5] We disagree with the judge and our dissenting colleague that the Policy should be deemed unlawful to maintain because the Respondent could have drafted a narrower rule. The *Boeing* decision rejected such reasoning, explaining that employers should not be required to anticipate and exempt every conceivable Sec. 7 activity when drafting general work rules. *Boeing*, 365 NLRB No. 154, slip op. at 9 fn. 41. Indeed, *Boeing* challenged the notion that employers *can* do so, noting the likelihood that "one can 'reasonably construe' even the most carefully crafted rules in a manner that prohibits some hypothetical type of Section 7 activity." Id., slip op. at 9. Accordingly, we reject the dissent's declaration that "[a] narrow-tailoring requirement imposes a minimal burden on employers"—and we observe that she cites no case in which the Board has offered acceptably tailored alternatives. Moreover, it cannot be the case that Sec. 7 rights outweigh employer justifications whenever the employer could have drafted a narrower rule. For all Category 1(b) rules, it is a given that the rule interferes, to some extent, with the exercise of Sec. 7 rights. Put differently, a Category 1(b) rule is overbroad, and an overbroad rule always could have been drafted more narrowly. If finding that an overbroad rule could have been more narrowly tailored defeats the employer's justification, then the justification could never outweigh the interference with Sec. 7 rights, and *Boeing* Category 1(b) would have no content. See *Nicholson Terminal & Dock Co.*, 369 NLRB No. 147, slip op. at 3 fn. 6 (2020). In our dissenting colleague's view, no employer interest can ever outweigh the possibility that an overbroad rule may chill some type of Sec. 7 activity. That means employers are free to maintain rules that serve their legitimate interests only if those rules cannot be read to overlap with Sec. 7 activity in any conceivable way—in short, provided they are perfect. Since perfection is rarely if ever attained, the standard the dissent favors could turn even the most well-intentioned employers into lawbreakers. More generally, our colleague devotes most of her dissent to repeating her criticisms of *Boeing*. For the reasons fully set forth in that decision, we remain convinced that the standard set forth in *Boeing* represents a balanced and commonsense alternative to *Lutheran*'s one-sided focus, and we adhere to it.

Category 1(b). Accordingly, we dismiss this complaint allegation.

B. The Respondent Unlawfully Applied the Policy by Threatening Davis with Unspecified Reprisals for Future Violations of the Policy.

Having found that the Respondent lawfully maintained the Policy under *Boeing*, we now consider whether union steward Davis was engaged in protected union activity when he recorded the termination meeting of a bargaining unit employee, and if so, whether the Respondent unlawfully applied the Policy by threatening Davis with being "held accountable" for any future violations of the rule.

The Respondent contends that the lawfulness of the Policy forecloses this inquiry. It argues that because the Policy is lawfully maintained under *Boeing,* its enforcement, even to restrict Davis's union activity, is also lawful. And although he found the Policy unlawful, the judge agreed that "[e]nforcement of a legal rule cannot be a violation of the NLRA, unless, for example, it is enforced disparately." We disagree. See *Valley Hospital Medical Center*, 351 NLRB 1250, 1254 (2007) ("[E]mployees engaged in [protected concerted] activity generally do not lose the protection of the Act simply because their activity contravenes an employer's rule or policies."), enfd. sub nom. *Nevada Service Employees Union, Local 1107, SEIU v. NLRB*, 358 Fed. Appx. 783 (9th Cir. 2009).

Whether an employee engages in protected activity by making a workplace recording depends on the facts and circumstances of the particular case. *ADT, LLC*, 369 NLRB No. 23, slip op. at 1 fn. 3 (2020). In *ADT*, we found that employee Patrick Cuff engaged in protected union activity when, acting in his role as union steward, he made an audio-visual recording of a preelection captive-audience meeting. Id. In finding that Cuff was protected under the Act, we relied in part on the judge's determination that Cuff made his recording in support of efforts to collect and compare information the union needed. Id., slip op. at 8.

It is clear that Davis was similarly acting in his capacity as union steward when he attended and recorded the termination meeting of a bargaining unit employee; he was policing the parties' collective-bargaining agreement and preserving evidence for use in a possible grievance. Moreover, although the Respondent's no-recording Policy was soundly based on statutory and regulatory duties to safeguard customer information, the meeting Davis recorded was held for the sole purpose of effecting a discharge decision that had already been made, and the Respondent does not contend that private customer information—such as names, addresses, account numbers, credit information, Social Security numbers, call patterns or usage—was or was likely to be mentioned in the course of that meeting. Accordingly, there is no evidence that the recording at issue here implicated the statutory or regulatory requirements on which the no-recording Policy was based.[6] Under these particular circumstances, we find that Davis was engaged in protected union activity when he recorded the termination meeting, notwithstanding that his act of recording contravened a lawful workplace rule.

We further find that the Respondent unlawfully applied the Policy when Area Sales Manager Collings told Davis that he "did not want anyone held accountable for not following policy." Typically, of course, an employer is perfectly entitled to warn employees that they will be held accountable if they fail to adhere to a lawful policy, including a lawful no-recording policy. Here, however, because Davis's sole act of "not following policy" was protected by Section 7, Collings's application of the rule amounted to a threat that some unspecified adverse action would be taken against Davis if he were again to engage in protected union recording activity. We do not suggest that Collings intended as much, but he did not need to for the violation to take place. See, e.g., *American Freightways Co.,* 124 NLRB 146, 147 (1959) ("It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act."). Moreover, the Board has consistently recognized that statements similar to that made to Davis constitute threats. See *EF International Language Schools, Inc.*, 363 NLRB 199, 209 (2015) ("I would caution you from speaking on behalf of colleagues."), enfd. mem. per curiam 673 Fed. Appx. 1 (D.C. Cir. 2017); *Chinese Daily News*, 346 NLRB 906, 926–927 (2006) (stating that employee will be "held accountable" for any damage her statements cause), enfd. mem. 224 Fed. Appx. 6 (D.C. Cir. 2007); *Connecticut Hospice, Inc*., 342 NLRB 23, 23 fn. 1 (2004) ("be careful" about disseminating booklet detailing nurses' rights). This is consistent with the Supreme Court's instruction that in evaluating an employer's statements, the Board "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily

[6] We do not decide whether Davis's act of recording would have retained the Act's protection had private customer information been mentioned during the meeting Davis recorded.

dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

C. The Lawful Policy Should Not Become Unlawful to Maintain on the Basis that it was "applied to restrict" Davis's Union Activity.

Having found the no-recording Policy lawful under *Boeing*, but also having found that the Respondent applied the Policy when it unlawfully threatened Davis, we must now consider whether the Policy became unlawful to maintain based on its application.[7] We do not question that it is generally an unfair labor practice to apply a rule to interfere with the exercise of Section 7 rights. Rather, we must determine whether an otherwise-lawful rule should become unlawful *to maintain* under the "applied to restrict" prong of *Lutheran Heritage* because the rule has been applied to restrict those rights.

In *Lutheran Heritage*, the Board set forth the following framework for determining whether an employer violates Section 8(a)(1) of the Act by maintaining a particular rule or policy:

> [O]ur inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule *explicitly* restricts activities protected by Section 7. If it does, we will find the rule unlawful. If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

343 NLRB at 647. *Lutheran Heritage* prong three says a rule that has been applied to restrict the exercise of Section 7 rights cannot be lawfully maintained, and subsequent cases applying prong three have consistently taken a categorical approach: if a rule has been applied to restrict Section 7 activity, maintenance of that rule is unlawful, period.[8] The *Lutheran* Board did not explain why any instance of unlawful application of a facially lawful rule *automatically* warrants a finding that the rule can no longer be lawfully maintained.[9] For the reasons that follow, we conclude that it should not. Accordingly, we overrule *Lutheran Heritage* in relevant part.

First, the "applied to restrict" standard ignores the legitimate and often compelling interests an employer has in being able to continue to maintain a lawful rule. Depending upon the rule at issue, those interests may include maintaining production,[10] securing the employer's premises,[11] preventing workplace harassment,[12] promoting workplace civility and protecting employees from rumormongering and bullying,[13] and protecting the employer's reputation and business from improper threats.[14] As with most lawful workplace rules, the rule in this case, the judge found, served "pervasive and compelling" purposes. A blanket prohibition on the continued maintenance of such rules, simply because of a single instance of unlawful

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[7] In his cross-exceptions to the judge's supplemental decision, the Charging Party points out that the Respondent applied its no-recording Policy to restrict the exercise of Sec. 7 rights. He does not specifically argue that the Board should find the Policy unlawfully maintained on this basis. And even if the Charging Party had advanced that argument, the General Counsel does not, and the Charging Party may not enlarge upon or change the General Counsel's theory of the case. See, e.g., *Kimtruss Corp.*, 305 NLRB 710, 711 (1991). Nevertheless, the Charging Party is correct. The facts of this case require that we address *Lutheran* prong three. In any event, the Board is not limited to the legal theories the parties present. See *Kamen v. Kemper Financial Services*, 500 U.S. 90, 99 (1991) (stating that "the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law").

[8] See, e.g., *Cayuga Medical Center at Ithaca, Inc.*, 365 NLRB No. 170, slip op. at 2 (2017), enfd. mem. per curiam 748 Fed. Appx. 341 (D.C. Cir. 2018); *Medco Health Solutions of Las Vegas, Inc.*, 364 NLRB No. 115, slip op. at 7–8 (2016); *Philmar Care, LLC d/b/a San Fernando Post Acute Hospital*, 363 NLRB 551, 551 (2015) (finding arbitration agreement unlawful on "applied to restrict" grounds), vacated by *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612 (2018); *Countrywide Financial Corp.*, 362 NLRB 1331, 1333–1334 (2015) (same, and similarly vacated); *Leslie's Poolmart, Inc.*, 362 NLRB 1509, 1509 fn. 3 (2015) (same, and similarly vacated); *Hitachi Capital America Corp.*, 361 NLRB 123, 124–125 (2014), appeal dismissed 2015 WL 653271 (D.C. Cir. 2015); *Albertson's*, 351 NLRB 254, 259 (2007).

[9] As the rationale underlying the entire *Lutheran* framework, the Board cited *Lafayette Park Hotel*, 326 NLRB 824 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999), for the proposition that an employer violates Sec. 8(a)(1) by maintaining a rule if the rule "'would reasonably tend to chill employees in the exercise of their Section 7 rights.'" 343 NLRB at 646 (quoting *Lafayette Park Hotel*, 326 NLRB at 825). But in *Lafayette Park Hotel*, the Board determined how employees would reasonably construe the rules at issue in that case. Thus, the chilling effect that concerned the Board in that case arose from the way the rules were worded, not the way they were applied. Moreover, the Board in *Lafayette Park Hotel* also emphasized the Board's duty in rules cases to "'work[] out an adjustment'" between employee rights and legitimate employer interests. 326 NLRB at 825 (quoting *Republic Aviation v. NLRB*, 324 U.S. 793, 797–798 (1945)). As discussed below, the one-sided "applied to restrict" prong disregards this duty by failing to accord any weight to legitimate employer interests.

[10] *Peyton Packing,* 49 NLRB 828, 843 (1943) (because "working time is for work," employer rules prohibiting solicitation during working time are presumptively lawful), enfd. 142 F.2d 1009 (5th Cir. 1944), cert. denied 323 U.S. 730 (1944).

[11] *Verizon Wireless*, 369 NLRB No. 108, slip op. at 4–5 (2020) (rule notifying employees that personal property was subject to search); *Tri-County Medical Center*, 222 NLRB 1089 (1976) (stating criteria for no-access rules concerning off-duty employees).

[12] *Lutheran Heritage*, 343 NLRB at 648–649 (upholding rule prohibiting harassment).

[13] *Motor City Pawn Brokers Inc.*, 369 NLRB No. 132, slip op. at 3, 5 (2020) (upholding rules prohibiting obscene or otherwise inappropriate language, badmouthing or spreading rumors, and bullying).

[14] Id., slip op. at 5–7 (prohibiting disparagement of employer).

application—even if that single instance is carried out by a misguided low- or mid-level supervisor whose action does not reflect corporate policy—fails to give proper weight to those legitimate interests. Indeed, it fails to give them any weight at all.

Failure to consider the employer's justification for a rule is precisely the concern about the *Lutheran Heritage* framework that was addressed in *Boeing*. The Board in *Boeing* held, consistent with Supreme Court precedent, that determining whether a rule may be lawfully maintained requires consideration of the legitimate justifications associated with the rule as well as its potential to interfere with Section 7 rights.[15] Although the *Boeing* Board was addressing only prong one of the *Lutheran* framework, the "reasonably construe" prong, its requirement that weight be given to both employee rights and employer interests is equally applicable to the "applied to restrict" prong. It simply does not make sense that, under *Boeing*, a rule can be found unlawful to maintain, based on its *wording*, only after consideration of both employee rights and employer interests, but the same rule may be found unlawful to maintain, based on its *application*, solely because it was applied in a way that restricted an employee in the exercise of his or her Section 7 rights, without any consideration of countervailing employer interests. *Boeing* instructs that interference with Section 7 rights *may* make a rule unlawful to maintain, but only if the interference outweighs the legitimate interests served by the rule. Such interference does not by itself establish that a challenged rule is unlawful to maintain on its face, and it ought not by itself establish that a rule is unlawful to maintain because of how someone applied it.

Second, Board precedent contains numerous cases that support our view that a rule may remain lawful to maintain notwithstanding that its application restricted the exercise of Section 7 rights. For example, a rule that prohibits employees from engaging in solicitation on working time is lawful,[16] and it *remains* lawful after it has been applied to discipline an employee for engaging in union solicitation on working time, which indisputably restricts that employee in exercising his or her rights under Section 7.[17] A lawful no-distribution rule remains lawful after it has been applied to discipline an employee for distributing union literature in a working area.[18] A lawful off-duty access rule remains lawful after it has been applied to exclude an off-duty employee seeking access to the interior of the employer's facility to meet with union representatives.[19] A lawful rule that prohibits employees from using company-provided information-technology resources for nonbusiness purposes remains lawful after it has been applied to discipline an employee for using a company-provided email system to send her coworkers an email encouraging them to join a union.[20]

Third, the affirmative remedy for an "applied to restrict" violation is, in practical terms, largely meaningless. When a rule is found unlawful to maintain on "applied to restrict" grounds, the affirmative remedy is an order to revise or rescind the rule. See *Desert Cab, Inc. d/b/a ODS Chauffeured Transportation*, 367 NLRB No. 87, slip op. at 1 fn. 1 (2019) (citing cases). For a rule that has been found unlawful solely on "applied to restrict" grounds, revising the rule is not a meaningful option. The rule is *already* lawful on its face, so it cannot very well be revised to *make* it lawful. Under the affirmative remedy, the employer will still be required to rescind the rule. But because the rule is lawful on its face, there is no good reason why the employer cannot reinstate it once the notice-posting period—typically 60 days—has expired. The result, if the employer so chooses, is merely a temporary suspension of the rule.

Such reinstatement of the original rule would not support Board policy of creating stability in the workplace; to

[15] The Supreme Court stated 75 years ago that, in applying the provisions of the Act, the Board must

> work[] out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society.

Republic Aviation Corp. v. NLRB, 324 U.S. 793, 797–798 (1945). *Republic Aviation* is one of several decisions in which the Court has instructed the Board to balance employee rights and employer interests. In *NLRB v. Great Dane Trailers, Inc.*, the Court stated that it is the Board's "duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy." 388 U.S. 26, 33–34 (1967). And in *NLRB v. Erie Resistor Corp.*, the Court spoke of the "delicate task" of "weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner. . . ." 373 U.S. 221, 229 (1963).

[16] See *Peyton Packing*, supra. There, the Board said: "It is . . . within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during *working hours*." Id. at 843 (emphasis added). In *Essex International, Inc.*, 211 NLRB 749 (1974), the Board drew a distinction between "working hours" and "working time," observing that the former "connotes the period of time from the beginning to the end of a workshift," whereas the latter "connotes the period of time that is spent in the performance of actual job duties, which would not include time allotted for lunch and break periods." Id. at 750. Thus, the rule of *Peyton Packing* as clarified in *Essex International* is that a rule prohibiting solicitation during "working time" or "work time" is presumptively lawful.

[17] See, e.g., *Wynn Las Vegas, LLC*, 369 NLRB No. 91 (2020).

[18] *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962).

[19] *Marina Del Rey Hospital*, 363 NLRB 231 (2015).

[20] *T-Mobile USA, Inc.*, 369 NLRB No. 50 (2020), supplemented 369 NLRB No. 90 (2020).

the contrary, it is likely to create confusion. To rectify the violation found, the employer must post notices stating that the National Labor Relations Board, an Agency of the United States Government, has found that the employer *has violated federal labor law* and has ordered it to obey the provisions of the notice, and the notice also lists the rights protected under Section 7 of the Act. One of the provisions of the notice will say that the employer will stop applying its rules to restrict its employees from exercising the rights "listed above"—i.e., Section 7 rights. In other words, the posted notices inform employees that their employer has violated federal law by applying a rule in a way that restricted their federally protected rights. Another provision of the notice will tell them that, in order to remedy this violation, their employer will rescind the rule—and of course, the employer must do so. Then, 60 days later, down come the notices, and without other notice or further explanation, the employer may, if it wishes, simply reissue the exact same rule, since it is, after all, perfectly lawful on its face. It certainly does not take much imagination to foresee that such an about face would be likely to leave employees befuddled, at best, and cynical about the ability of the NLRB to vindicate their rights, at worst. These insidious effects are avoided by limiting the remedy for an "applied to restrict" violation to one that will stick: an order commanding the employer to cease and desist from *applying* its rules to restrict employees from exercising their Section 7 rights.

Fourth, the "applied to restrict" standard undermines the certainty and predictability of Board policy that the Board sought to foster in *Boeing* and *LA Specialty Produce*, consistent with Supreme Court precedent. See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 678–679 (1981) (stating that management "must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct an unfair labor practice"). Citing *First National Maintenance*, the Board in *Boeing* emphasized its "special responsibility to give parties certainty and clarity" regarding what rules are, and what rules are not, lawful to maintain. 365 NLRB No. 154, slip op. at 14–15 & fn. 74. To fulfill this responsibility, the Board established a systematic framework for analyzing challenged rules, under which it first determines whether a rule, reasonably interpreted, would potentially interfere with Section 7 rights, and then, if so, whether legitimate justifications associated with the rule outweigh the potential interference, or vice versa. Id. And to provide further "clarity and certainty . . . regarding whether . . . different *types* of rules may be lawfully maintained," *Boeing* also established the by-now-familiar three-category framework, designating rules that are lawful to maintain in Category 1 and rules that are not in Category 3. Id., slip op. at 15 (emphasis added). In *LA Specialty*, we reiterated that the categories represent *types* of rules and that the purpose of the categories is "to provide the certainty and predictability that the Supreme Court in *First National Maintenance* required." 368 NLRB No. 93, slip op. at 2. Together, *Boeing* and *LA Specialty* provide a framework under which the endless uncertainty that pervaded rules-maintenance questions under *Lutheran Heritage* can come to an end—progressively over time, as more and more types of rules are designated into categories. But the "applied to restrict" standard operates at cross-purposes to *Boeing*. Under that standard, any certainty or predictability as to the lawful status of a rule can be undone by a single, isolated unlawful application of that rule. And needlessly undone: to mitigate the chilling effect of an "applied to restrict" violation, it is not necessary (and, as explained, it's remedially pointless) to make the rule unlawful *to maintain*. That chilling effect will be fully dissipated by an appropriately worded cease-and-desist remedy.

As stated above, not requiring a lawful rule to be revised or rescinded based on an "applied to restrict" violation does not mean there is no violation. Unlawfully applying a lawful rule to interfere with Section 7 rights remains a violation of Section 8(a)(1) of the Act and should be enforced as such. For all the foregoing reasons, however, applying an otherwise-lawful rule to restrict the exercise of Section 7 rights ought not render such a rule unlawful to maintain, and we hold that it does not do so. To the extent that *Lutheran Heritage* and cases applying prong three of the *Lutheran* framework are to the contrary, they are overruled. But to address the chilling effect of applying a rule in this way, we also hold that "applied to restrict" violations should be remedied by an order requiring the offending employer to cease and desist from applying its rule to interfere with Section 7 rights and to post a corresponding remedial notice.[21]

[21] Instances may arise where an employer, having once been found to have violated the Act by applying a rule to restrict the exercise of Sec. 7 rights, and having posted a remedial notice promising not to do so again, nevertheless does so again. That scenario is not presented here, and we leave it for another day. However, we recognize that under those circumstances, the promise would ring hollow, and employees would reasonably view with skepticism the repetition of that promise in a second remedial notice. Employers are therefore on notice that a second unlawful application of an otherwise lawful rule could result in loss of the right to maintain the rule.

The dissent suggests a different approach: order the employer to rescind the rule, and condition its reinstatement on the addition of a disclaimer that the rule will not be applied to Sec. 7 activity. In other words, leave the status quo as is, except *add* to it a requirement that any employer wishing to reinstate a lawful rule must brand it with a permanent reminder of the one time the rule was unlawfully applied. This "modest

It remains to determine whether to apply the new standard for "applied to restrict" violations retroactively or prospectively only. "The Board's usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever stage.'" *SNE Enterprises*, 344 NLRB 673, 673 (2005) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958)). Under Supreme Court precedent, "the propriety of retroactive application is determined by balancing any ill effects of retroactivity against 'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'" Id. (quoting *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947)). Pursuant to this principle, the Board will apply a new standard retroactively unless doing so would work a manifest injustice.

No manifest injustice will result from applying today's holding retroactively; the General Counsel never contended that the Policy was unlawful to maintain under *Lutheran* prong three. Moreover, applying our holding retroactively does not undermine the purposes of the Act. It remains an unfair labor practice to apply a rule or policy to restrict the exercise of Section 7 rights. The only difference is that now, applying a rule this way does not make it unlawful to continue to maintain the rule. This is a comparatively minor change, given that, under *Lutheran*, the rule could be reimplemented after the notice-posting period expired. Moreover, by preserving both the unfair labor practice finding *and* the rule, today's holding—unlike *Lutheran* prong three—protects both "opportunity to organize" and "proper discipline," in accordance with the Supreme Court's instruction in *Republic Aviation*, supra. Thus, failing to apply our holding retroactively would produce a result that is contrary to legal and equitable principles. *SEC v. Chenery Corp.*, supra. This argues decisively in favor of retroactivity.

CONCLUSION

The Respondent's no-recording Policy is a lawful Category 1(b) policy under *Boeing*. However, Charging Party Davis engaged in protected union activity when, acting in his capacity as union steward, he recorded a meeting at which a bargaining unit employee was discharged. And the Respondent violated Section 8(a)(1) of the Act when Manager Collings threatened Davis with unspecified reprisals if he were again to engage in protected union recording activity in violation of the Policy. In making this threat, Collings applied the no-recording Policy to restrict Davis in the exercise of his Section 7 rights. We have concluded, however, that so applying a rule or policy ought not make it unlawful to continue to maintain the policy, and we have overruled *Lutheran Heritage* in relevant part. But we have also held that it continues to be an unfair labor practice to apply a lawful rule to restrict the exercise of Section 7 rights, and the proper remedy for that violation is an order to cease and desist from doing so and to post an appropriate notice. Exercising our remedial discretion under Section 10(c) of the Act,[22] we shall so order here.

ORDER

The National Labor Relations Board orders that the Respondent, AT&T Mobility, LLC, Washington, D.C., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Applying its no-recording policy to restrict employees in the exercise of their Section 7 rights.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Dupont Circle facility in Washington, District of Columbia, copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where

requirement," as the dissent characterizes it, would be tantamount to a *perpetual* notice-posting, and we reject it as such. The dissent also says that the remedies we adopt "do nothing to reassure employees who come to the workplace after the 60-day notice-posting period or who are otherwise unaware of the Board's remedial measures." Her first criticism disregards that employees who come to the workplace after the notice-posting period expires were not in the workplace when the rule was unlawfully applied and thus could not have been chilled by its application. Her second criticism is directed less at our decision than at the adequacy of the notice-posting remedy in general. We decline her implicit invitation to take up that issue, but the fact that an employee may not read the notice or might have been on leave throughout the notice-posting period does not outweigh the compelling reasons we have set forth above for overruling *Lutheran* prong three.

[22] See, e.g., *Indian Hills Care Center*, 321 NLRB 144, 144 fn. 3 (1996).

[23] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 19, 2016.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 5 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 3, 2021

Marvin E. Kaplan, Member

William J. Emanuel, Member

John F. Ring, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN MCFERRAN, dissenting in part and concurring in part.

With judicial approval, the Board repeatedly has found that a variety of broad no-recording rules violated the National Labor Relations Act, because they clearly encompassed statutorily-protected activity and were not narrowly tailored to address articulated employer interests.[1] Today, a Board majority upholds a broad no-recording rule, reaffirming that such rules are, in fact, *always* lawful. What is the difference between this case and the prior cases? In the interim, a divided Board decided *Boeing*,[2] overruling precedent and adopting an approach to work rules so forgiving to employers that it cannot be reconciled with the Act's guarantees to employees.[3]

The majority follows *Boeing* today, reaffirming that the no-recording rule at issue here is lawful because *every* employer is *always* free to maintain *any* no-recording rule, no matter how broad and no matter what justifications the employer does (or does not) offer for the rule. Correctly, however, the majority finds that the no-recording rule was unlawfully applied here. The majority nevertheless concludes—overruling precedent—that the rule was *not* unlawful to maintain and therefore the Board should not order the employer to rescind the rule, despite its unlawful application.

I agree that the employer unlawfully applied its no-recording rule. But, contrary to the majority, I would find that the rule was unlawfully overbroad. The Board should reject the analytical framework of *Boeing*. No federal appellate court had ever questioned the Board's pre-*Boeing* approach,[4] and *Boeing* itself is based on demonstrably false premises, not least the claim—reiterated repeatedly in the decision today—that the traditional approach somehow excluded consideration of an employer's legitimate interests.[5]

Boeing's fundamental flaw is that it permits employers to maintain rules that reasonably tend to chill employees in the exercise of their rights under the Act, while failing to require that employers narrowly tailor their rules to serve demonstrated, legitimate interests. This simply is not a reasonable interpretation of our statute, particularly when it results in a determination that certain types of

[1] *T-Mobile USA, Inc.*, 363 NLRB 1638, 1640–1642 (2016), enfd. in relevant part 865 F.23d 265 (5th Cir. 2017); *Whole Foods Market Group, Inc.*, 363 NLRB 800, 802–804 (2015), enfd. mem. 691 Fed. Appx. 49, 2017 WL 2374843, (2d Cir. 2017); *Caesars Entertainment d/b/a Rio All-Suites Hotel & Casino*, 362 NLRB 1690, 1692–1693 (2015).

[2] *Boeing Co.*, 365 NLRB No. 154 (2017). I dissented. Id., slip op. at 29.

[3] *Boeing* not only announced a new legal standard (without notice and an opportunity for public participation), it also held that no-recording rules were categorically lawful, expressly overruling a prior decision then pending on appeal, in a violation of due process. Id, slip op. at 19 fn. 89, overruling *Rio All-Suites*, supra. The rule at issue in *Boeing* was a no-camera rule, not a no-recording rule. I explained the due-process violation in my dissent (with Member Pearce) in *Boeing Co.*, 366 NLRB No. 128 (2018), where a divided Board denied a motion to intervene filed by charging party union in *Rio All-Suites*.

[4] See *Boeing*, supra, 365 NLRB No. 154, slip op. at 30–31 (dissenting opinion) (discussing federal appellate decisions involving Board's pre-*Boeing* standard). For example, the District of Columbia Circuit, where this case arises, regularly applied the Board's pre-*Boeing* standard without difficulty. See, e.g., *Midwest Division-MMC, LLC v. NLRB*, 867 F.3d 1288 (D.C. Cir. 2017); *Hyundai America Shipping Agency, Inc.*, *v. NLRB*, 805 F.3d 309 (D.C. Cir. 2015); *Quicken Loans, Inc. v. NLRB*, 830 F.3d 542 (D.C. Cir. 2016); *Cintas Corp. v. NLRB*, 482 F.3d 467 (D.C. Cir. 2007); *Guardsmark, LLC v. NLRB*, 475 F.3d 369 (D.C. Cir. 2007).

[5] *Boeing*, supra, 365 NLRB No. 154, slip op. at 35 (dissenting opinion).

rules—regardless of their specific language and justification—are always lawful. The categorical approach to work rules represents a failure to engage in reasoned decision-making every time it is applied.[6]

Moreover, the majority's awkwardly juxtaposed findings in this case illustrate the fundamental practical problem with *Boeing*—and its manifest inconsistency with the goals of the Act. The majority finds that that the employee involved in this case, a union steward, "was engaged in protected union activity when he recorded [a co-worker's] termination meeting, notwithstanding that his act of recording contravened a lawful workplace rule." Until *Boeing*, an employer was required to tailor workplace rules so that workers would understand that they were free to engage in activity protected by the NLRA without subjecting themselves to discipline or discharge. After *Boeing*, workers must not only be brave enough to engage in protected activity, but they must *also* be brave enough to *knowingly violate workplace rules and so subject themselves to the threat of discipline*. A clearer recipe for stifling protected activity is hard to imagine.

The majority also errs here, of course, in overruling precedent to find that the employer is free to maintain the no-recording rule, despite having unlawfully applied it. Because I would find the rule facially unlawful, I would order the employer to rescind the rule, the standard remedy. But (as prior cases, now overruled, reflect) rescission is also independently appropriate because the employer unlawfully applied the rule to statutorily-protected activity. That application definitively demonstrated to employees that the rule covers protected activity. This means that the unlawful chilling effect of the rule cannot be dispelled as long as the employer maintains the rule. Once applied unlawfully, the rule cannot be maintained lawfully. As I will explain, the majority's reasons for not ordering rescission are unpersuasive. If anything, the Board should take a stronger remedial approach in cases like this, not a weaker one.

I.

A brief review of the facts here is helpful. The rule at issue, titled "Privacy of Communications," reads:

> Employees may not record telephone or other conversations they have with their co-workers, 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.

The employer's cell phone store employees are represented by a union. One employee, believing that he had been targeted for discharge or discipline, asked a union steward to file a grievance. At the employee's request, the union steward accompanied the employee to a meeting with the employer, where the employee was discharged. The steward recorded the meeting on his company cell phone, as well as on his personal cell phone. Suspecting as much, the store manager contacted a higher official, an area sales manager, who directed him to take the steward's company phone, delete the recording, and administer a "coaching." The store manager did so. Later, the area sales manager met with the union steward, told him that his recording of the meeting violated the employer's no-recording rule, and stated that he "did not want anyone held accountable for not following policy."

II.

Before the Board's wrong turn in *Boeing*, the outcome of this case would have been different. Under the pre-*Boeing* framework, the Board would have determined that the challenged no-recording rule was unlawfully overbroad, distinguishing it from a rule that the Board previously had upheld. A federal appellate court would likely have upheld the Board's determination. The Board's case law demonstrates as much.

Before *Boeing*, the Board had found three no-recording rules unlawful, beginning with *Rio All-Suites*, supra, in 2015. In that case, the Board applied the standard that governed then: "[a]n employer violates Section 8(a)(1) of the Act if it maintains workplace rules that would reasonably tend to chill employees in the exercise of their Section 7 rights."[7] The Board explained that it would follow the "analytical framework for assessing whether

[6] I have made this point before, most recently with respect to the Board's *Boeing*-based determination that employers' non-disparagement rules are always lawful, no matter how broadly they are written or what employer interests are invoked to justify them. See *Medic Ambulance Service, Inc.*, 370 NLRB No. 65, slip op. at 7 (2021); *BMW Mfg. Co.*, 370 NLRB No. 56, slip op. at 6 (2020) (dissenting opinion). In *BMW*, I explained that the "Board's new approach is simply to label a rule . . . and then put each type of rule into the appropriate box, insulating all future rules with the same label from further scrutiny, regardless of their exact language or context." Id., slip op. at 8. This approach "treats decision making as categorization." Id. at 10. It has already resulted in a growing number of rule categories deemed always-lawful. Id. at fn. 52 (collecting cases). See also *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 11 (2019) (dissenting opinion) (observing that "categorical approach flies in the face of the long-established principle, applied by the Board and by the federal courts, that a rule restricting employees' protected concerted activity must be narrowly tailored to serve an employer's legitimate interests—and not worded more broadly than necessary to do so").

[7] *Rio All-Suites*, supra, 362 NLRB at 1690, citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). Sec. 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7" of the Act, 29 U.S.C. §158(a)(1), including

maintenance of rules violates the Act [a]s set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004):

> If the work rule does not explicitly restrict protected activities, it nonetheless will violate Section 8(a)(1) if "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights."

362 NLRB at 1690, quoting *Lutheran Heritage Village*, 343 NLRB at 647. Turning to the no-recording rule at issue, the Board found that it was unlawfully overbroad. 362 NLRB at 1693. The rule was broad enough to cover statutorily-protected activity.[8] "Employee photographing and videotaping is protected by Section 7 when employees are acting in concert for their mutual aid and protection and no overriding employer interest is present." Id.[9] In turn, the employer, a hotel and casino, had not "tied [the rule] . . . to any particularized interest, such as the privacy of its patrons." Id. "Without such a limiting principle, the Board explained, "employees are left to draw the reasonable conclusion that . . . [the rule] would prohibit their use of audio-visual devices in furtherance of their protected concerted activities." Id. Finally, the Board noted that the case was distinguishable from *Flagstaff Medical Center*,[10] a prior case involving a hospital's no-camera rule, where the Board, citing the language of the rule, had concluded that employees would reasonably interpret the rule as protecting patient privacy in the hospital setting, as opposed to prohibiting employees' protected activity. Id. *Rio All-Suites* was not reviewed by a federal appellate court. As I will discuss, it was reversed by the Board in *Boeing*.

The Board soon followed *Rio All-Suites* in *Whole Foods*, supra, again finding a no-recording rule unlawful.[11] On appeal, the U.S. Court of Appeals for the Second Circuit enforced the Board's decision, endorsing its analysis of the no-recording rule in every respect.[12] Next, in *T-Mobile*, supra, the Board again found a no-recording rule unlawful, following the approach of *Rio-All Suites* and *Whole Foods*, supra. On appeal, the U.S. Court of Appeals for the Fifth Circuit enforced this aspect of the Board's decision, citing the Second Circuit's decision in *Whole Foods*.[13]

In sum, before *Boeing*, the Board had found three broad no-recording rules unlawful. Each of the rules plainly covered employee conduct protected by the National Labor Relations Act, and none of the rules was narrowly tailored to serve legitimate employer interests. All of the rules were distinguishable from a hospital's no-recording rule that the Board had found lawful in an earlier decision. Two federal courts of appeals had endorsed the Board's decisions on review, including the narrow-tailoring requirement they applied.

Here, the Board should follow its pre-*Boeing* decisions and invalidate the challenged no-recording rule. Like the

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the right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 28 U.S.C. §157. The Board has long held that the

> [T]he test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. *The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.*

American Freightways Co., 124 NLRB 146, 147 (1959) (emphasis added). It is also long established that under this test, the mere maintenance of an unlawful rule violates Sec. 8(a)(1), given its potential coercion of employees. See *Farah Mfg. Co.,* 187 NLRB 601 (1970). See also *Quicken Loans*, supra, 830 F.3d at 546, citing *Lafayette Park Hotel*, supra, 326 NLRB at 825.

[8] The rule provided that "[c]ameras, any type of audio visual recording equipment and/or recording devices may not be used unless specifically authorized for business purposes (e.g. events)."

[9] Citing earlier decisions, the Board observed that "[s]uch protected conduct may include, for example, employees recording images of employee picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, or documenting inconsistent application of employer rules." 362 NLRB at 1693.

[10] 357 NLRB 659, 662–663 (2011), review granted in part and enfd. in part 715 F.3d 928 (D.C. Cir. 2013). The rule there prohibited "[t]he use of cameras for recording images of patients and/or hospital equipment, property, or facilities." The Board's holding that the rule was lawful was not challenged on judicial review.

[11] The rule in *Whole Foods*, supra, provided in part that "[i]t is a violation of . . . policy to record conversations with a tape recorder or other recording device (including a cell phone or any electronic device) unless prior approval is received from your store or facility leadership." 363 NLRB 800, 800.

[12] *Whole Foods Markets Group., Inc. v. NLRB*, 691 Fed. Appx. 49, 2017 WL 2374843, at *2 (2d Cir. 2017). The court observed:

> The Board's finding that recording, in certain instances, can be a protected Section 7 activity was reasonable. . . . So too was its finding that, because Whole Foods' no-recording policies prohibited all recording without management approval, "employees would reasonably construe the language to prohibit" recording protected by Section 7. . . .
>
> [D]espite the stated purpose of Whole Foods' policies—to promote employee communication in the workplace—the Board reasonably concluded that the policies' overbroad language could "chill" an employee's exercise of her Section 7 rights because the policies as written are not limited to controlling those activities in which employees are not acting in concert.

Id. at 51.

[13] *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 274 (5th Cir. 2017). The court, referring to the no-recording rule, observed that "[t]his ban is, by its own terms alone, stated so broadly that a reasonable employee, generally aware of employee rights, would interpret it to discourage protected concerted activity. . . ." 865 F.3d at 274. As for the employer's asserted business interests, the court stated that "merely reciting such justifications does not alter the fact that the operative language of the rule on its face prohibits protected Section 7 activity, including Section 7 activity wholly unrelated to those stated interests." Id. at 275.

rules struck down in *Rio All-Suites*, *Whole Foods*, and *T-Mobile*, the rule at issue is overly broad, a flat prohibition on recording "conversations [employees] have with their co-workers, managers or third parties," absent approval by the employer's legal department and unless "required by the needs of the business" (among other restrictions). We all agree that some recordings by employees are protected by the National Labor Relations Act.[14] By its terms, the rule does not differentiate between recordings protected by the National Labor Relations Act and those that are not. It has no discernible limiting principle that might guide employees in recognizing when the rule applies. Indeed, as written, the rule applies even to conversations on nonwork time and in nonwork areas: an employee could not record a union meeting held in a breakroom at lunch. The rule is in no sense narrowly tailored to serve any particular legitimate employer interest, and it is clearly distinguishable from the hospital no-recording rule framed in terms of patient-privacy concerns that the Board upheld in *Flagstaff Medical Center*. Finally, here the challenged rule was actually applied to statutorily-protected activity, confirming both its scope and its potential chilling effect on the exercise of statutory rights by employees. In short, this should be an easy case.

III.

Boeing, of course, radically changed the legal landscape surrounding work rules, and it is *Boeing* that the majority applies today. The Board's primary aim under *Boeing* is to preserve employer prerogatives, not to protect employee rights. In that case, a divided Board effectively shifted the inquiry away from asking whether a workplace rule, as written, had a reasonable tendency to coerce employees in the exercise of their statutory rights. Instead, the Board's focus is now on whether any employer interest that can be ascribed to the rule, by the Board, outweighs the rule's impact on employee rights.[15] This framework eliminates the long-fundamental concept of an overbroad rule. No matter how broad the rule is, a sufficient employer interest may justify it. (There is no duty, then, for an employer to narrowly tailor its rules to minimize the impact on employee rights—even if such tailoring would fully preserve employer interests.) It follows, as the *Boeing* Board made explicit, that certain *types* of rules will always be lawful—no matter how they are drafted or the justifications offered for them—because the employer interests that can be ascribed to such a rule outweigh the impact on employee rights.[16] *Boeing* itself identified certain rules as categorically lawful, including no-recording rules like the one at issue here, explicitly overruling the first Board to decision to invalidate a no-recording rule, *Rio All-Suites*, and effectively overruling its progeny, *Whole Foods* and *T-Mobile*, the cases already discussed.[17]

As I will explain, the majority here errs in applying both aspects of *Boeing*: (1) its categorical holding with respect to no-recording rules and (2) assuming that this holding is not in fact applicable here, the general standard adopted in *Boeing*.

A.

Certainly, the majority is correct in its interpretation of *Boeing* on the subject of no-recording rules. That decision did, indeed, find no-recording rules to be always-lawful, and applying *Boeing* here means upholding the no-recording rule in this case—the opposite of the result reached by the Board in the three, overruled cases involving very similar no-recording rules (including the two decisions enforced on appeal by the Second Circuit and the Fifth Circuit). But *Boeing*'s categorical holding with respect to no-recording rules is contrary to the National Labor Relations Act and to the Administrative Procedure Act, which applies to the Board's adjudications.[18]

The *Boeing* Board did not have a no-recording rule before it. The challenged rule there was a no-camera rule.[19]

[14] In finding that the challenged rule here was applied unlawfully, the majority cites a recent decision, *ADT, LLC*, 369 NLRB No. 23, slip op. at 1 fn. 3 (2020), and correctly concludes that the union steward in this case was engaged in protected activity when he recorded the discharge meeting with management on his cell phones. The Board in *ADT* adopted the administrative law judge's finding that a union steward was engaged in protected activity when he recorded the employer's captive-audience meeting, but "emphasiz[ed] . . . the unique facts and circumstances presented." Id.

[15] *Boeing*, supra, 365 NLRB No. 154, slip op. at 3. The *Boeing* Board stated that:

> [W]hen evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on [National Labor Relations Act] rights, and (ii) legitimate justifications associated with the rule.

Id. *Boeing*, above, slip op. at 3 (emphasis omitted). The majority here observes that "[i]n conducting this evaluation, the Board balances the employer's business justifications against the extent to which the rule or policy, viewed from the perspective of reasonable employees, interferes with employee rights under the Act."

[16] 365 NLRB No. 154, slip op. at 3–4.

[17] Id. at 19 & fn. 89.

[18] See *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998).

[19] The rule provided in relevant part:

> Possession of the following camera-enabled devices is permitted on all company property and locations, except as restricted by government regulation, contract requirements or by increased local security requirements. However, use of these devices to capture images or video is prohibited without a valid business need and an approved Camera Permit that has been reviewed and approved by Security:
>
> 1. Personal Digital Assistants (PDAs)
> 2. Cellular telephones and Blackberrys and iPod/MP3 devices
> 3. Laptop or personal computers with web cameras for desktop video conferencing, including external webcams.

The *Boeing* Board majority examined, in detail, the highly-specific justifications for the rule advanced by the employer (an aircraft manufacturer that performed security-classified work for the federal government), which included security protocols, the federal duty to protect certain information, and the need to protect proprietary information[20] The majority found that these "purposes constitute[d] legitimate and compelling justifications for th[e] restrictions" imposed by the no-camera rule and that the "adverse impact of Boeing's no-camera rule on NLRA-protected activity [was] comparatively slight," since the vast majority of images or videos blocked by the [rule] d[id] not implicate any NLRA rights." But the *Boeing* majority did more than uphold Boeing's no-camera rule. It determined that the "[a]lthough the justifications associated with Boeing's no-camera rule [were] especially compelling," "no-camera rules, in general," were *always lawful*.[21] And, crucial here, it included no-recording rules in the always-lawful "no-camera" category by overruling *Rio All-Suites*, as explained.

Whether or not the narrow holding of *Boeing*—that the no-camera rule at issue was lawful under the NLRA, as newly interpreted—was permissible, it should be clear that the broader holding went farther than permitted by the Administrative Procedure Act. There was no factual or legal basis for the *Boeing* majority to conclude that *all* no-camera rules, in every workplace setting covered by the NLRA, were equivalent to the no-camera rule before the Board, much less for extending the categorical holding with respect to no-camera rules to all *no-recording* rules. I was correct when, in dissent, I referred to *Boeing* as "secret rulemaking in the guise of adjudication."[22] The justifications offered by Boeing for its no-camera rule have no obvious bearing in other American workplaces, either for no-camera rules or for no-recording rules. It is arbitrary and capricious to conclude that because an aircraft manufacturer performing security-classified work for the federal government may prohibit cameras without violating the National Labor Relations Act, a hotel-casino (as in *Rio All-Suites*), a grocery store (as in *Whole Foods*), a cellphone store (as in *T-Mobile* and this case), and, indeed, every other employer subject to the statute may prohibit not only camera use, but also recordings by employees.

In addition to arbitrarily maximizing employer interests, the *Boeing* Board arbitrarily minimized employee rights. As explained, *Boeing* deemed the impact of the employer's no-camera rule—and the impact of *every* no-camera rule and *every* no-recording rule—to be "comparatively slight" because the "vast majority" of instances in which the rule would apply would not implicate any NLRA right. That conclusion is irrational from the perspective of the Act, which aims to protect employees in the exercise of their statutory rights. First, as suggested, the balancing of interests and rights inherent in the "comparatively slight" conclusion necessarily depends on the particular interests of a particular employer. The interests of every employer subject to the Act cannot be assumed to be identical to Boeing's interests. Second, it is likely true for many, perhaps most, work rules that the "vast majority" of instances in which they apply will *not* involve employees engaged in statutorily protected activity. Indeed, before a rule is challenged under the Act, employees might never have engaged in protected activity at all or even contemplated doing so. But this does not mean that the rule—if, by its terms, it covers protected activity—lacks a reasonable tendency to chill employees who *do* wish to engage in protected activity, even for the first time. The National Labor Relations Act exists to ensure that all statutory employees are free to exercise certain rights, whether they do so often, occasionally, or rarely.

In short, the *Boeing* approach to work rules, with its focus on categorization, is no substitute for reasoned decision-making, either as a general matter or, as reflected here, with respect to no-recording rules in particular. The majority errs in applying *Boeing*'s categorization of no-recording rules as always-lawful in this case.

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4. Bar code scanners and bar code readers, or such devices for manufacturing, inventory, or other work, if those devices are capable of capturing images.

365 NLRB No. 154, slip op. at 17.

[20] The majority found (1) that the rule was "an integral component of Boeing's security protocols;" (2) that the rule "play[ed] a key role in ensuring that Boeing complies with its federally mandated duty to prevent the disclosure of export-controlled information or the exposure of export-controlled materials to unauthorized persons; (3) that the rule "help[ed] prevent the disclosure of Boeing's proprietary information;" (4) that the rule "limit[ed] the risk that employees' personally identifiable information will be released;" and (5) that the rule "limit[ed] the risk of Boeing becoming a target of terrorist attack." Id. at 18.

[21] Id. at 17.

[22] Recall that the *Boeing* Board overruled precedent sua sponte and adopted a new standard for evaluating work rules without first providing notice and an opportunity for public participation. In dissent, I observed that:

> No party and no participant in this case—which involves a single, no-photography rule—has asked the Board to overrule *Lutheran Heritage*. Nor has the Board asked anyone whether it should. Over the minority's objection, the Board majority has refused to notify the public that it was contemplating a break with established precedent. It has refused to invite amicus briefing from interested persons, even though this has become the Board's wise norm in the years following *Lutheran Heritage*. Without the benefit of briefs from the parties or the public, the majority invents a comprehensive new approach to work rules that goes far beyond any issue presented in this case and, indeed, beyond the scope of *Lutheran Heritage* itself. This is *secret rulemaking in the guise of adjudication*, an abuse of the administrative process. . . .

Id., slip op. at 30 (emphasis added; footnote omitted).

B.

The grave flaws of the *Boeing* framework go even deeper, however. By rejecting the principle of overbreadth, and the corresponding duty of employers to narrowly tailor their rules to avoid infringing on employee rights, *Boeing* impermissibly privileges employer prerogatives. A narrow-tailoring requirement imposes a minimal burden on employers.[23] They must simply draft their rules in light of the National Labor Relations Act—a federal statute with broad and clear coverage, enacted more than 85 years ago, in 1935. Ignorance of the Act at this late date is surely no excuse. When the Board enforced a narrow-tailoring requirement, the result was not to prohibit an employer from maintaining a rule that addressed a particular subject and that served legitimate interests, but only to require that such a rule be drafted appropriately—i.e., with recognition of its potential to infringe on employees' statutory rights. Federal appellate courts, including the Supreme Court, have pointed out this fact repeatedly, as the Second Circuit notably did in *Whole Foods*, supra.[24]

Nothing in the National Labor Relations Act or its policies suggests that in drafting rules, employers are somehow free to prohibit statutorily-protected conduct by employees even when that is *unnecessary* to serve a legitimate employer interest that might outweigh employees' rights under the Act in particular circumstances. As the Board has observed:

> [T]he Board and the courts have long held that the existence of an overbroad rule violates the Act based on its potential chilling effect on employees' exercise of their Section 7 rights. . . . [T]he mere maintenance of an overbroad rule tends to inhibit employees who are considering engaging in legally protected activities by convincing them to refrain from doing so rather than risk discipline.

Continental Group, Inc., 357 NLRB 409, 411 (2011) (citations omitted).[25] Neither the *Boeing* Board, nor any Board decision applying *Boeing* has articulated a reasonable interpretation of the Act that justifies abandoning this long-established principle. The failure to narrowly tailor a rule does not defeat the employer's justification for *a* rule, only the justification for the rule as drafted: the employer may cure the defect. But it *must* cure the defect, in order to prevent the rule from chilling employees in the exercise of their statutory rights.

For this reason, too, the Board should abandon the *Boeing* framework and the majority errs in applying the framework here.

C.

But even assuming that the *Boeing* framework is statutorily permissible, the majority's "fresh analysis" under *Boeing* here—an alternative holding to simply applying the categorical determination in *Boeing* that no-recording rules are always lawful—is erroneous, as well. In ostensibly balancing the statutory rights of employees and the interests of the employer here, the majority relies on a series of incorrect or immaterial propositions.

First, the majority concludes that the no-recording rule here "has a comparatively slight impact on employees' Section 7 rights" because "the vast majority of conversation covered by the [rule] bear no relation to Section 7 activity" and because "employees remain free to speak to each other about working conditions or other protected Section 7 topics," even if they cannot record these conversations. As already suggested, from the Act's perspective—focusing on the Congressional goal of protecting employees' exercise of statutory rights—what matters is that the rule undeniably *does* cover and prohibit Section 7 activity (as the majority acknowledges and as illustrated by the facts here). Similarly, that the no-recording rule does not reach *other* types of Section 7 activity is also immaterial. There is no support in the Act, in the Supreme Court's decisions, on in Board precedent for the proposition that an employer is entitled to restrict certain Section 7 activity by employees at work simply because it permits other such activity. And, in any case, there is no effective substitute for protected recording activity. Where an employee wishes to document an investigatory interview, an unsafe working condition, a captive-audience meeting to exercise or vindicate his rights under the Act, making a

[23] Embracing *Boeing*, my colleagues disagree, insisting that a narrow-tailoring requirement is virtually impossible to meet. To justify eliminating the requirement, of course, that is the position that must be taken: employers cannot narrowly tailor their rules; therefore, they must not be required to do so. I reject that proposition, and, as I explain below, the courts have effectively rejected it, too.

[24] See *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 503 (1978) (observing that in invalidating a hospital's work rule, the "Board ha[d] not foreclosed the hospital from imposing less restrictive means of regulating organizational activity more nearly directed toward the harm to be avoided"); *Whole Foods*, supra, 691 Fed. Appx. at 51 fn. 1; *Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 210 fn. 4 (5th Cir. 2014); *NLRB v. Northeastern Land Services, Ltd.,* 645 F.3d 475, 483 (1st Cir. 2011); *Cintas Corp.*, supra, 482 F.3d at 470. In *Whole Foods*, the Second Circuit took care to point out that its decision was "not to say that every no-recording policy will infringe on employees' Section 7 rights." 691 Fed. Appx. at 51 fn. 1. Rather, "[i]t should be possible to craft a policy that places some limits on recording audio and video in the work place that does not violate the Act," and the employer's " interests in maintaining such policies can be accommodated simply by their narrowing the policies' scope." Id.

[25] As the Board pointed out in *Continental Group*, the Board's overbreadth doctrine with respect to employer work rules is analogous to the First Amendment overbreadth doctrine applies to statutes. 357 NLRB at 411, citing *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249, 1258 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006).

recording is uniquely effective—and a prohibition on recording has more than a "comparatively slight" impact on Section 7 rights.

Second, after giving too little weight to employees' statutory rights, the majority give far too much weight to the employer's interests. The majority (citing 47 U.S.C. §222) asserts that the "Respondent has a duty under federal law to safeguard customer information and the content of customer communication" and that this obligation suffices to justify the no-recording rule, despite its impact on Section 7 rights. But, by its terms, the rule is not linked to this duty at all. Nor is there any apparent connection between the rule and the employer's interest in "safeguarding customer information and the content of customer communication." Quite clearly, the rule prohibits employee recordings that have nothing to do with customers at all—and everything to do with protected activity under the Act. The majority tellingly provides no actual examples of a situation where Section 7-protected recording by employees might interfere with the employer's duty to safeguard customer information and communication.[26] Any such situation, of course, could be addressed by a narrowly-tailored rule—although *Boeing* views that fact as immaterial.

In short, even under *Boeing*'s employer-friendly analytical framework, the no-recording rule in this case should be found unlawful. The balance between employee rights and employer interests tips clearly in favor of the former. The majority's contrary conclusion is unreasonable.

IV.

Although the majority finds (incorrectly) that the no-recording rule was facially valid, it also finds that the rule was unlawfully applied in this case. I agree with that second finding, essentially for the reasons that the majority gives. But I draw a different conclusion than the majority does from the unlawful-application finding. In my view, because the no-recording rule was unlawfully applied, it cannot be lawfully maintained (whatever the facial validity of the rule) and the Board must order the employer to rescind it. Invoking *Boeing*, the majority concludes that because the rule is facially valid (in its incorrect view), the Board must permit it to be maintained—even after its unlawful application[27]—given the legitimate employer interests served by the rule (as opposed to its illegitimate interest in being able to invoke a rule to squelch and chill statutorily-protected activity).

According to the majority, any chilling effect on Section 7 activity caused by the unlawful application of the rule is fully remedied by ordering the employer to cease-and-desist from applying the rule unlawfully and by requiring the employer to post a notice to employees stating that will not apply the rule unlawfully. This conclusion is incorrect. Once a rule is unlawfully applied to Section 7 activity, employees will continue to be chilled by it, so long as the rule is maintained in its original form. By its actions, the employer has conclusively demonstrated to employees that the rule can and does apply to Section 7 activity. A Board order and notice do nothing to reassure employees who come to the workplace after the 60-day notice-posting period or who are otherwise unaware of the Board's remedial measures. None of the other rationales for the majority's approach mitigate its fundamental shortcoming.

First, the majority argues that the "'applied to restrict' standard ignores the legitimate and often compelling interests an employer has in being able to continue to maintain a lawful rule." This argument misses the mark. Once an employer has unlawfully applied a rule, the employers' interests in maintaining the rule must become secondary to the need to protect employees' Section 7 rights. The rule has been used by the employer as the instrument to commit an unfair labor practice. An order to rescind the rule effectively takes that particular instrument away from the employer, going forward, so that employees need not fear that it will be used against them.

Second, the majority cites decisions—separate, of course, from the precedent overruled today—that assertedly "support [the] view that a rule may remain lawful to maintain notwithstanding that its application restricted the exercise of Section 7 rights." But none of the decisions cited specifically address the issue posed in this case: whether ordering rescission of a rule that has been unlawfully applied is an appropriate remedy under the Act.

Third, the majority asserts that the "affirmative remedy for an 'applied to restrict' violation is, in practical terms, largely meaningless." According to the majority:

> For a rule that has been found unlawful solely on "applied to restrict" grounds, revising the rule is not a meaningful option. The rule is *already* lawful on its face, so it cannot very well be revised to *make* it lawful. Under the affirmative remedy, the employer will still be required to rescind the rule. But because the rule is lawful

[26] Contrary to the majority, the contrast between this case and *Flagstaff*, supra—where the Board upheld a no-camera rule in a hospital, framed in terms of patient privacy—is clear, as the Board pointed out in *T-Mobile*, supra, a case also involving a cell phone company. 363 NLRB 1638, 1642 fn. 13 (observing that rules in *Flagstaff* "reasonably conveyed that they concerned the hospital's obligation to protect patient privacy interests and prevent wrongful disclosure of individually identifiable health information").

[27] In a fn., the majority suggests that a rule-rescission requirement might be appropriate if the employer, having applied the rule unlawfully once, does so again, despite the Board's original order.

> on its face, there is no good reason why the employer cannot reinstate it once the notice-posting period—typically 60 days—has expired. The result, if the employer so chooses, is merely a temporary suspension of the rule.

There are two answers to this argument. To begin, even if "merely a temporary suspension of the rule" is the likely result of a rescission order, that suspension is nevertheless meaningful. It imposes a consequence on the employer for its unlawful application of the rule that tends to deter future unlawful conduct, and it mitigates, even if to a limited extent, the chilling effect of continuing to main a rule that was used to commit an unfair labor practice. Next, with respect to revision of the rule, if a change in the Board's remedial approach is warranted, then it is not the step the majority takes here. Rather, the Board should require employers who wish to reinstate an unlawfully-applied rule to include an affirmative disclaimer in the rule that it will not be applied to statutorily-protected activity.[28] This modest requirement would impose a minimal burden on employers, would do no harm to any legitimate employer interest, and would address the need to protect employees against the reinstated rules potential chilling effect.[29]

Fourth, the majority the argues that the "'applied to restrict' standard undermines the certainty and predictability of Board policy that the Board sought to foster in *Boeing* and *LA Specialty Produce*," because "the lawful status of a rule can be undone by a single, isolated unlawful application of that rule." As I have explained in dissent, however, the "certainty and predictability" sought by *Boeing* reflects little more than a desire to broaden employer prerogatives at the expense of employee rights, by finding more and more rules to be lawful for employers to maintain.[30] If employers who unlawfully apply a rule can no longer be certain that they can maintain the same rule afterwards, then they have only themselves to blame. They have forfeited a prerogative by abusing it.

V.

This case illustrates the broad and harmful reach of the Board's decision in *Boeing* and its misguided approach to employer work rules. The majority errs in upholding the no-recording rule at issue in this case, which was clearly unlawful under pre-*Boeing*, judicially-endorsed Board precedent. But this case also demonstrates that there are limits to how employers may use work rules: even if the rule is facially lawful (as the majority finds here), it may not be applied to stifle employees' protected concerted activity under Section 7 of the National Labor Relations Act. There is a final twist, however. Despite finding that the no-recording rule was unlawfully applied, the majority reverses precedent and refuses to order the employer to rescind the rule, leaving it in place to chill employees' exercise of their statutory rights in the future. What the majority gives with one hand, then, it takes away with the other. Where the majority has chosen to protect employees, I agree with it. Where it has failed to do so, I dissent.

Dated, Washington, D.C. May 3, 2021

_____

Lauren McFerran, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

[28] The majority rejects my proposal as a "perpetual notice-posting" requirement. But requiring a disclaimer simply permits the employer to keep its rule—despite its prior, unlawful application—while reassuring employees that they have nothing to fear from the rule if they exercise their Sec. 7 rights. Maintaining the disclaimer is no more burdensome to the employer than maintaining the rule. Nor can the employer have any legitimate objection to the disclaimer itself, which does not require the employer to acknowledge its own wrongdoing, but only the statutory rights of employees subject to the rule.

[29] Remarkably, the majority seems to argue that the shortcomings of the Board's existing rescission remedy are justification for today's decision to do even *less* to protect employees. According to the majority, permitting an employer to reinstate a rule that it has been ordered to rescind "would be likely to leave employees befuddled, at best, and cynical about the ability of the NLRB to vindicate their rights, at worst." "These insidious effects are avoided," the majority says, by no longer requiring employer to rescind the rule. As I suggest, a better way to avoid employee befuddlement and cynicism is to *strengthen* the Board's remedy in this situation, by requiring an employer who wishes reinstate a rescinded rule to include a disclaimer of any intention to apply the rule to Sec. 7 activity. It is decisions like this one, unfortunately, that must breed cynicism among employees about the Board's ability to vindicate their rights.

[30] *Medic Ambulance*, supra, 370 NLRB No. 65, slip op. at 13 (dissenting opinion); *LA Specialty*, supra, 368 NLRB No. 93, slip op. at 8, 13 (dissenting opinion); *Boeing*, supra, 365 NLRB No. 154, slip op. at 37–38 (dissenting opinion).

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT apply our no-recording policy to restrict you in the exercise of the rights listed above.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

AT&T MOBILITY, LLC

The Board's decision can be found at https://www.nlrb.gov/case/05-CA-178637 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Paul J. Veneziano, Esq., for the General Counsel.
Stephen J. Sferra and *Jeffrey A. Seidle, Esqs. (Littler Mendelson, P.C., Cleveland, Ohio),* for the Respondent.
Katherine A. Roe, Esq., (Communication Workers of America, Washington, D.C.), for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. I issued a decision in this matter on April 25, 2017. On September 28, 2018, the Board issued a Notice to Show Cause as to why the complaint allegations involving the maintenance of an allegedly unlawful work rule should not be severed and remanded for further proceedings consistent with the standards set forth in the Board's decision in *Boeing,* 365 NLRB No. 154, slip op. at 14–17 (2017). On March 19, 2019, the Board issued an Order remanding this matter to me for preparation of a supplemental decision addressing the complaint allegations in light of *Boeing*.

This case was tried in Washington, D.C. on February 10, 2017. Marcus Davis filed the charge on June 20, 2016 and the General Counsel issued the complaint on October 14, 2106. The General Counsel alleged that Respondent violated Section 8(a)(1) of the Act by maintaining an overly broad Privacy of Communications rule and by threatening employees with discharge if they violate this rule. In response to the Notice to Show Cause, the General Counsel requested that the Board dismiss the allegation regarding Respondent's maintenance of its Privacy of Communications policy. The Board denied that request and remanded the entire case to me for further consideration. The General Counsel in its brief on remand renews its request that this complaint allegation be dismissed, while requesting that I find that Respondent violated Section 8(a)(1) by threatening to discharge employees for violating the rule.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and the Charging Party Union I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a limited liability company which has facilities nation-wide, including retail stores in the District of Columbia, where it annually provides wireless telecommunications devices and services. Respondent derives gross revenues in excess of $100,000 annually and purchases and receives goods and materials in excess of $5000 from outside the District of Columbia. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Communications Workers of America, (of which the Charging Party is a member) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Marcus Davis is a retail sales associate at Respondent's store at Dupont Circle in Washington, D.C. He is also the union steward for CWA Local 2336 for five stores in the Washington, D.C. area. On or about May 19, 2016, Davis attended a meeting in the store manager's office at Respondent's Chevy Chase, D.C. store. The purpose of the meeting was for Respondent to present a termination notice to a sales associate who worked at the Chevy Chase store. Davis recorded the meeting, which lasted approximately 20 minutes, on his company owned phone and his personal cell phone, without telling management.

The Chevy Chase store manager, Richard Belot, suspected that Davis might have recorded the meeting. He called his supervisor, Area Sales Manager Andrew Collings, for instructions. Collings consulted with Respondent's human resources department. When Collings returned Belot's call, Davis had returned to the Dupont Circle Store. Collings then called Jason Yu, the manager of that store. He instructed Yu to retrieve the phone, delete the recording and counsel Davis. Yu complied with Collings' instructions. He called Davis into his office, first to delete the recording and a second time to administer the coaching.[1]

The next day Collings conducted a routine visit to the Dupont Circle store, which he did about once a week. Collings spoke to Davis in the backroom of the store. Collings told Davis that

[1] The Dupont store has public and non-public areas. The non-public areas are in the back of the store and include restrooms, a break area and the store manager's office. There is a computer in the non-public back of the store where employees can access emails and process products and services.

recording conversations inside any of Respondent's stores violated company policy. He then said that Davis should not encourage other employees to record in-store conversations and that "he did not want anyone held accountable for not following policy," Tr. 65.[2]

The policy in question is found on Respondent's intranet site, as part of Respondent's Privacy in the Workplace Policy, and provides:

> **Privacy of Communications**
>
> Employees may not record telephone or other conversations they have with their co-workers, 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.

G.C. Exh. 2; R. Exh. 1.

On May 27, 2016, Collings sent an email to Davis and Local Union Vice President Robin Jones reiterating that employees are not permitted to record conversations inside any of Respondent's stores, citing the policy set forth above.

The protection of customer information and data is covered by other policies not at issue in this case, Exhs. R–5, 6, 7, and 8. AT&T 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, Tr. 70–100.

Analysis

Relevant case law

The Board has held that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights, *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998). In *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004).the Board held that a rule is unlawful if it explicitly restricts activities protected by Section 7. If this is not true a violation is established by a showing that 1) employees would reasonably construe the language to prohibit Section 7 activity; or 2) that the rule was promulgated in response to protected activity or 3) that the rule has been applied to restrict the exercise of Section 7 rights. In *Boeing,* 365 NLRB No. 154, slip op. at 14–17 (2017), the Board overruled *Lutheran Heritage* and held that in cases in which one or more facially neutral policies, rules or handbook provisions when reasonably interpreted would potentially interfere with Section 7 rights, the Board will evaluate two things: (1) the nature and extent of the potential impact on NLRA rights and (2) the legitimate justification associated with the requirement. The Board further stated that it is its duty was to strike a proper balance between these considerations.

Several relatively recent decisions have addressed photographing and recording by employees on company property. In *Flagstaff Medical Center,* 357 NLRB 659 (2011) the Board found that a hospital's rule prohibiting the use of cameras for recording images of patients and/or hospital equipment, property, or facilities, did not violate the Act.

In *Rio All-States Hotel & Casino,* 362 NLRB 1690 (2015) the Board found a rule that prohibited the use of any type of audio-visual recording equipment and/or recording device unless authorized for business purposes, to be illegal. The Board distinguished the case from *Flagstaff Medical Center* by concluding that the Casino's rules included no indication that they were designed to protect privacy or other legitimate interests. The *Boeing* decision explicitly overruled *Rio All-States Hotel & Casino.*

Neither *Flagstaff Medical Center* nor *Boeing* are necessarily dispositive of the instant case. In the *Boeing* decision, the Board stated that it may draw reasonable distinctions between or among different industries and work settings, *slip opinion* at 15. Respondent has not established that its security concerns, that are not otherwise protected by its policies on customer data and information, are comparable to the security concerns present in a hospital, i.e., patient medical information under HIPPA (*Flagstaff*) or a military/civilian aircraft manufacturing plant (*Boeing*). Also a general matter, audio recording is far less likely to disclose confidential information than photography.

In *Whole Foods Market, Inc.* 363 NLRB 800 (2015) enfd. 691 Fed. Appx.(2d Cir. 2017) the Board found illegal two company rules. One prohibited the recording of phone calls, images, or company meetings with any recording device unless prior approval is received from management, or all parties to the conversation consent to its recording. Violation of this rule could lead to discipline up to and including discharge.

The second rule was similar. Whole Foods stated as its purpose the elimination of a chilling effect on the expression of views if one person is concerned that the conversation is being secretly recorded. The Board found both rules illegal. The Board citing *Rio All-States Hotel & Casino* stated that photography and audio or video recording in the workplace…are protected by Section 7 if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present. The Board distinguished *Flagstaff Medical Center* by concluding that Whole Foods' business justification is not nearly as pervasive or compelling as the patient privacy interest in *Flagstaff*.

The Board, relying on *Rio All-States Hotel* and *Whole Foods,* reversed the Judge's finding that an employer's rule was not violative in *T-Mobile, Inc.,* 363 NLRB 1638 (2016), enf. denied 865 F. 3d 265 (5th Cir. 2017). In *T-Mobile,* while tacitly acknowledging the employer's interest in maintaining employee privacy, confidential information and promoting open communication, the Board found the rule to be violative because it was not narrowly tailored to promote its legitimate interests and would reasonably be construed to restrict employees' Section 7 rights.

Further in both the *Whole Foods* and *T-Mobile* decisions, the Board noted that protected conduct may include a number of things including recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions. The Board has stated, "moreover, our case law is replete with

[2] Davis' account of this conversation is that Collings said, "I've fired people for that." I credit Collings but do not regard the difference in their versions of the conversation to be significant. Either one communicated to Davis that employees might be disciplined for violation of Respondent's rule.

examples, when photographs or recording, often covert was an essential element in vindicating the underlying Section 7 right," 363 NLRB 800, 802 fn. 8.

My experience as an NLRB judge for over 20 years confirms that assessment, e.g. *Spirit Construction Services,* 351 NLRB 1042, 1042–43 (2007)[audio recording of an on-site threat of business closure by a supervisor in response to a union organizing drive]; *Valmet, Inc.,* 367 NLRB No. 84 (February 4, 2019), slip opinion pp. 7–9 [employee audio recording of company's mandatory meeting during an organizing drive]. *Kumho Tires,* JD–42–19, 2019 WL 2106674 (2019). Without the recording in these cases, it may have been impossible to determine that the employee's version of events was more credible than that of the Respondent. Thus, the complaint may well have been dismissed and the employer would have successfully interfered with employee's Section 7 rights.[3]

Moreover, there will be situations in which pro-union employees concertedly agree to record an employer's captive audience address based upon the employer's prior campaign activities. These employees would be protecting their Section 7 rights and the act of recording would thus be protected. A blanket rule, such as Respondent's, would clearly impact Section 7 rights in such a context. A rule like Respondent's might also interfere with an employee's ability to prove that his or her conduct was concerted by recording a conversation with co-workers. Conversely, an employer may wish to record workplace disputes in support of its discipline. In grievance or arbitration proceedings, such evidence would be admissible and persuasive.

The law as applied to this case

Respondent's rule prohibiting recordings is illegal

Pursuant to Boeing, the first issue to be addressed is whether Respondent's facially neutral rule has any impact of employees' Section 7 rights. As the Union points out, the very fact that the rule was applied to protected activity establishes its impact of employee rights.[4]

Moreover, the rule in allowing Respondent's legal department unfettered discretion as to when to allow conversations to be recorded is an open invitation to disparate treatment of employees engaged in protected activity. Generally, a rule that requires preapproval by the employer to engage in protected activity violates the Act, *Brunswick Corp.,* 282 NLRB 794, 795 (1987).

In addition, the rule has a material impact in preventing employees from preserving evidence of employer unfair practices as an employee did in *Sprit Construction* and *Valmet.* There would be little reason for an employee will go to the trouble of recording a conversation or speech by a manager, supervisor, or agent unless he suspects that conversation will touch upon wages, hours and other conditions of employment. The employee in *Valmet* recorded the manager's speech precisely because he knew it involved the Union's organizing drive. The same is true of the employee recording a captive audience speech in *Kumho Tires,* JD–42–19, 2019 WL 2106674 (2019).

As to the second prong of *Boeing,* Respondent has a pervasive and compelling interest in the privacy of customer information (Customer Proprietary Network Information (CPNI),[5] the content of customer communications and Sensitive Personal Information (SPI).[6] The issue in this matter is whether the business justification for Respondent's rule outweighs its impact on employees' Section 7 rights.

On balance, the adverse impact of Respondent's privacy of communications rule on employee rights outweighs its justifications. First of all, it is not limited to work time and/or conversations in work areas, or even conversations on Respondent's premises. Secondly, Respondent could protect its substantial interests with a much narrower rule, e.g., that makes it a violation of company policy to record in any manner customer information or data. I would note that Respondent prohibits accessing any such data and considers it a breach of its duty if such data is accessed even inadvertently. Employees are trained to understand what constitutes CPNI and SPI, so that they do not even inadvertently access such information. Respondent does so because, as its brief sets out in great detail, there are potential draconian consequences for unauthorized access to CPNI and other customer data, as well as its disclosure.

Since employees are so thoroughly trained not to access CPNI and SPI, it should not be particularly burdensome to promulgate and enforce a rule that prevents the audio and visual recording of such data, just as it prohibits the unauthorized viewing of such data. Indeed, Respondent's Code of Business Conduct, R. Exh. 5, requires each of its employees to guard the privacy of customer communications. It also states that employees must protect information that customers entrust to AT&T Mobility. Respondent warns employees that improper access to customer accounts can lead to discipline, R. Exh. 7. Indeed, it has fired employees for such improper access and prevailed in an arbitration over such a termination, R. Exh. 9.

Respondent notes that workplace discussions routinely

[3] It may be impossible to get a sufficient number of employees to accurately testify as to what they heard for a variety of reasons, including inattention, coercion and poor or conflicting memories.
Also, it is often very difficult to make credibility determinations in cases in which the only evidence is conflicting versions of events, particularly when the conflict is between only two witnesses, e.g., *Loudon Steel, Inc.* 340 NLRB 307 (2003). Witnesses' demeanor is more often than not a very unreliable way to make such determinations.

[4] In *Boeing,* the Board delineated 3 categories of "rules." Category 1 rules are those which are lawful because they either (1) do not prohibit or interfere with employee Sec. 7 rights when reasonably interpreted, or (2) the employer's justification for the rule outweighs the potential adverse impact on protected rights. Category 2 rules are those which warrant individualized scrutiny as to whether they prohibit or interfere with Sec. 7 rights and whether legitimate justifications outweigh any adverse impact on these employee rights. Category 3 rules are those which are unlawful because the justification for their maintenance does not outweigh their adverse impact on employee Sec. 7 rights. A rule which is not unlawful to maintain, may be unlawful as applied. However, the Board also stated that the categorization of rules is not part of its new test. However, I would place Respondent's rule in Category 2 because as reasonably interpreted it would prohibit or interfere the exercise of Sec. 7 rights.

[5] CPNI includes such things as the number of lines a customer has, call patterns and usage, services on an account and billing information.

[6] SPI includes social security numbers, date of birth and credit card payment information.

involve CPNI, R. brief at 8. However, the company maintains a "rule of least privilege" that limits access to customer information only to those who need to access such information to perform their job. Thus, an employee who is not authorized to access such information should not be involved in any conversation that included such information. Therefore, the danger of an employee recording CPNI or SPI is materially diminished. Moreover, an employee who is authorized to access CPNI is trained to recognize it. Thus, a rule forbidding the recording of conversations including a discussion of CPNI or SPI should be sufficient to protect Respondent's pervasive and compelling interest in the privacy of customer information.

Indeed, the facts of this case establish Respondent's business justification for its Privacy of Communications rule is outweighed by its impact on employees' Section 7 rights. There is no indication that customer information was discussed at the meeting at the Chevy Chase store that Davis recorded. Neither Collings nor Yu would have been allowed to discuss information with Davis that Davis was not authorized to access. On the other hand, the discussion did involve an issue of employees' Section 7 rights.[7] Furthermore, if the issue of whether Davis or other employees were threatened with discharge required a credibility determination, a recording would most likely have been determinative.

Respondent illegally threatened Davis and other employees

I completely agree with Respondent that, in this case, if its rule is legal, Collings statement to Marcus Davis must also be legal. The threat allegation in this case is wholly dependent on the policy's lawfulness or unlawfulness. Enforcement of a legal rule cannot be a violation of the NLRA, unless, for example, it is enforced disparately.

However, since I find that Respondent's policy infringes on Section 7 rights and is not sustained by valid and relevant business reasons. Andrew Collings' statement to Marcus Davis, that he did not want anyone held accountable for not following Respondent's Privacy of Communications policy, is a threat that violates Section 8(a)(1). The statement obviously implies that future violations of the rule may be grounds for discipline and maybe even discharge. The threat was made in response to Davis' violation of Respondent's rule in the course of his protected activities as union steward, *Thor Power Tool Co.*, 148 NLRB 1379, enfd. 351 F.2d 584 (7th Cir. 1965).

CONCLUSIONS OF LAW

1. The business justifications for Respondent's Privacy of Communications policy do not outweigh its adverse impact on employees' Section 7 rights and therefore its maintenance and enforcement as written violates Section 8(a)(1) of the Act.

2. Respondent violated Section 8(a)(1) by impliedly threatening Marcus Davis and others with discipline if they violated the rule again while engaged in protected activity.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, AT&T Mobility, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a Privacy of Communications rule, which prohibits employees from recording all conversations they have with coworkers, managers or third parties unless such recordings are approved in advance by the legald, required by the needs of the business, and fully comply with the law and any applicable policy.

(b) Impliedly threatening employees with discipline if they do not comply with the Privacy of Communications rule.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind it Privacy of Communications rule.

(b) Notify employees that the Privacy of Communications rule has been rescinded.

(c) Within 14 days after service by the Region, post at its District of Columbia stores copies of the attached notice marked "Appendix"[9] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of

[7] In evaluating the legality of Respondent's rule, consideration must be given to the fact that the rule has been applied to restrict the exercise of Sec. 7 rights, *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004). Davis' activities in the grievance meeting constituted protected activity, which was not forfeited by flagrant misconduct, *Thor Power Tool Co.*, 148 NLRB 1379 (1964), enfd. 351 F.2d 584 (7th Cir. 1965); *Union Fork & Hoe Co.,* 241 NLRB 907 (1979).

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the notice to all current employees and former employees employed by the Respondent at any time since May 19, 2016.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 1, 2019

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce the Privacy of Communications rule included in our Privacy in the Workplace policy published on our intranet webpage that prohibits employees from recording telephone or other conversations they have with their coworkers, managers, or third-parties unless approved by our legal department, required for our business, and in compliance with the law and our policies.

WE WILL NOT threaten you with discipline for violating our Privacy of Communications rule.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind our Privacy of Communications rule and effectively notify you of the rescission and that the rule will no longer be enforced.

AT&T MOBILITY LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-178637 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Paul J. Veneziano, Esq., for the General Counsel.
Stephen J. Sferra and *Jeffrey A. Seidle, Esqs. (Littler Mendelson, P.C., Cleveland, Ohio),* for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Washington, D.C. on February 10, 2017. Marcus Davis filed the charge on June 20, 2016 and the General Counsel issued the complaint on October 14, 2106.

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by maintaining an overly broad Privacy of Communications rule and by threatening employees with discharge if they violate this rule.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a limited liability company which has facilities nation-wide, including retail stores in the District of Columbia, where it annually provides wireless telecommunications devices and services. Respondent derives gross revenues in excess of $100,000 annually and purchases and receives goods and materials in excess of $5000 from outside the District of Columbia. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Communications Workers of America, (of which the Charging Party is a member) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Marcus Davis is a retail sales associate at Respondent's store at Dupont Circle in Washington, D.C. He is also the union steward for CWA Local 2336 for five stores in the Washington, D.C. area. On or about May 19, 2016, Davis attended a meeting in the store manager's office at Respondent's Chevy Chase, D.C. store. The purpose of the meeting was for Respondent to present a termination notice to a sales associate who worked at the Chevy Chase store. Davis recorded the meeting, which lasted approximately 20 minutes, on his company owned phone and his personal cell phone without telling management.

The Chevy Chase store manager, Richard Belot, suspected that Davis might have recorded the meeting. He called his supervisor, Area Sales Manager Andrew Collings, for instructions. Collings consulted with Respondent's human resources department. When Collings returned Belot's call, Davis had returned to the Dupont Circle Store. Collings then called Jason Yu, the manager of that store. He instructed Yu to retrieve the phone, delete the recording and counsel Davis. Yu complied with Collings' instructions. He called Davis into his office, first to delete

the recording and a second time to administer the coaching.[1]

The next day Collings conducted a routine visit to the Dupont Circle store, which he did about once a week. Collings spoke to Davis in the backroom of the store. Collings told Davis that recording conversations inside any of Respondent's stores violated company policy. He then said that Davis should not encourage other employees to record in-store conversations and that "he did not want anyone held accountable for not following policy," Tr. 65.[2]

The policy in question is found on Respondent's intranet site, as part of Respondent's Privacy in the Workplace Policy, and provides:

> **Privacy of Communications**
>
> Employees may not record telephone or other conversations they have with their co-workers, 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.

G.C. Exh. 2; R. Exh. 1.

On May 27, 2016, Collings sent an email to Davis and Local Union Vice President Robin Jones reiterating Respondent's policy that employees are not permitted to record conversations inside any of Respondent's stores, citing the policy set forth above.

Respondent's rule does not address conversations with customers. The protection of customer information and data is covered by other policies not at issue in this case, Exhs. R–5, 6, 7, and 8. AT&T 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, Tr. 70–100.

Analysis

Relevant case law

The Board has held that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights, *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998). A rule is unlawful if it explicitly restricts activities protected by Section 7. If this is not true, a violation is established by a showing that 1) employees would reasonably construe the language to prohibit Section 7 activity; 2) that the rule was promulgated in response to protected activity or 3) that the rule has been applied to restrict the exercise of Section 7 rights, *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004). The Board stated that a rule would not violate the Act merely because it *could* be read to prohibit protected activity.

Several recent decisions have addressed photographing and recording by employees on company property. In *Flagstaff Medical Center,* 357 NLRB 659 (2011) the Board found that a hospital's rule prohibiting the use of cameras for recording images of patients and/or hospital equipment, property, or facilities, did not violate the Act.[3]

In *Rio All-States Hotel & Casino,* 362 NLRB 1690 (2015) the Board found a rule that prohibited the use of any type of audiovisual recording equipment and/or recording device unless authorized for business purposes, to be illegal. The Board distinguished the case from *Flagstaff Medical Center* by concluding that the Casino's rules included no indication that they were designed to protect privacy or other legitimate interests.

In *Whole Foods Market, Inc.* 363 NLRB 800 (2015) the Board found illegal two company rules. One prohibited the recording of phone calls, images, or company meetings with any recording device unless prior approval is received from management, or all parties to the conversation consent to its recording. Violation of this rule could lead to discipline up to and including discharge.

The second rule was similar. Whole Foods stated as its purpose the elimination of a chilling effect on the expression of views if one person is concerned that the conversation is being secretly recorded. The Board found both rules illegal. The Board citing *Rio All-States Hotel & Casino* stated that photography and audio or video recording in the workplace…are protected by Section 7 if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present. The Board distinguished *Flagstaff Medical Center* by concluding that Whole Foods' business justification is not nearly as pervasive or compelling as the patient privacy interest in *Flagstaff*.

The Board, relying on *Rio All-States Hotel* and *Whole Foods,* reversed the Judge's finding that an employer's rule was not violative in *T-Mobile, Inc.,* 363 NLRB 1638 (2016). In *T-Mobile,* while tacitly acknowledging the employer's interest in maintaining employee privacy, confidential information and promoting open communication, the Board found the rule to be violative because it was not narrowly tailored to promote its legitimate interests and would reasonably be construed to restrict employees' Section 7 rights.

Further in both the *Whole Foods* and *T-Mobile* decisions, the Board noted that protected conduct may include a number of things including recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions. As the Board has stated, "moreover, our case law is replete with examples, when photographs or recording, often covert was an essential element in vindicating the underlying Section 7 right." 363 NLRB 800, 802 fn. 8. My experience as an NLRB judge for 20 years confirms that assessment.

The law as applied to this case

Respondent's rule prohibiting recordings is illegal

In this case I find that Respondent has a pervasive and compelling interest in the privacy of customer information

[1] The Dupont store has public and non-public areas. The non-public areas are in the back of the store and include restrooms, a break area and the store manager's office. There is a computer in the non-public back of the store where employees can access emails and process products and services.

[2] Davis' account of this conversation is that Collings said, "I've fired people for that." I credit Collings but do not regard the difference in their versions of the conversation to be significant. Either one communicated to Davis that employees might be disciplined for violation of Respondent's rule.

[3] I need not consider whether photography and audio recording can be distinguished with regard to their impact of an employer's confidentiality concerns.

(Customer Proprietary Network Information (CPNI)[4], the content of customer communications and Sensitive Personal Information (SPI).[5] The issue is whether its rule is overly broad when balancing this compelling interest against employees' Section 7 rights.

Respondent's rule is overbroad and thus illegal. First of all, it is not limited to work time and/or conversations in work areas, or even conversations on Respondent's premises. Secondly, Respondent could protect its substantial interests with a much narrower rule, e.g., that makes it a violation of company policy to record in any manner customer information or data. I would note that Respondent prohibits accessing any such data and considers it a breach of its duty if such data is accessed even inadvertently. Employees are trained to understand what constitutes CPNI and SPI, so that they do not even inadvertently access such information. Respondent does so because, as its brief sets out in great detail, there are potential draconian consequences for unauthorized access to CPNI and other customer data, as well as its disclosure.

Since employees are so thoroughly trained not to access CPNI and SPI, it should not be particularly burdensome to promulgate and enforce a rule that prevents the audio and visual recording of such data, just as it prohibits the unauthorized viewing of such data.

Respondent notes that workplace discussions routinely involve CPNI, R. brief at 8. However, the company maintains a "rule of least privilege" that limits access to customer information only to those who need to access such information to perform their job. Thus, an employee who is not authorized to access such information should not be involved in any conversation that included such information. Therefore, the danger of an employee recording CPNI or SPI is materially diminished. Moreover, an employee who is authorized to access CPNI is trained to recognize it. Thus, a rule forbidding the recording of conversations including a discussion of CPNI or SPI should be sufficient to protect Respondent's pervasive and compelling interest in the privacy of customer information.[6]

Indeed, the facts of this case establish the overbreadth of Respondent's rule. There is no indication that customer information was discussed at the meeting at the Chevy Chase store that Davis recorded. Neither Collings nor Yu would have been allowed to discuss information with Davis that Davis was not authorized to access. On the other hand, the discussion did involve an issue of employees' Section 7 rights.[7] Furthermore, if the issue of whether Davis or other employees were threatened with discharge required a credibility determination, a recording would most likely have been determinative.

Even in the absence of the rule, however, the threat to Davis amounted to restraint and coercion in the face of Davis' protected activity—recording a disciplinary meeting concerning a potential grievance.

Respondent illegally threatened Davis and other employees

Andrew Collings statement to Marcus Davis, that he did not want anyone held accountable for not following Respondent's Privacy of Communications policy, is a threat that violates Section 8(a)(1). The statement obviously implies that future violations of the rule may be grounds for discipline and maybe even discharge. The threat was made in response to Davis' violation of Respondent's rule in the course of his protected activities as union steward, *Thor Power Tool Co.*, 148 NLRB 1379, enfd. 351 F.2d 584 (7th Cir. 1965).

CONCLUSIONS OF LAW

1. Respondent's Privacy of Communications policy is overbroad and therefore its maintenance and enforcement as written violates Section 8(a)(1) of the Act.

2. Respondent violated Section 8(a)(1) by impliedly threatening Marcus Davis and others with discipline if they violated the rule again while engaged in protected activity.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, AT&T Mobility, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a Privacy of Communications rule, which prohibits employees from recording all conversations they have with 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 policy.

(b) Impliedly threatening employees with discipline if they do not comply with the Privacy of Communications rule.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section

[4] CPNI includes such things as the number of lines a customer has, call patterns and usage, services on an account and billing information.

[5] SPI includes social security numbers, date of birth and credit card payment information.

[6] Without deciding this issue, a rule banning the recording of all conversations with customers, unless previously authorized, might be legal. Also, protection of SPI strikes me as irrelevant to this case. It is hard to image a situation in which two employees or an employee and a manager would have a conversation which would include discussion of somebody else's social security number or credit card payment information. It is also hard to image a situation in which an employee would record a conversation in which one participant divulged his or her birthday.

[7] In evaluating the legality of Respondent's rule, consideration must be given to the fact that the rule has been applied to restrict the exercise of Sec. 7 rights, *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004). Davis' activities in the grievance meeting constituted protected activity, protection which was not forfeited by flagrant misconduct, *Thor Power Tool Co.*, 148 NLRB 1379, enfd. 351 F.2d 584 (7th Cir. 1965).

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind it Privacy of Communications Rule.

(b) Notify employees that the Privacy of Communications rule has been rescinded

(c) Within 14 days after service by the Region, post at its District of Columbia stores copies of the attached notice marked "Appendix I"[9] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 19, 2016.

(d) Within 14 days after service by the Region, post at its stores nationwide copies of the attached notice marked "Appendix II."[10] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 19, 2016.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 25, 2017

APPENDIX I

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce the Privacy of Communications rule included in our Privacy in the Workplace policy published on our intranet webpage that prohibits employees from recording telephone or other conversation they have with their coworkers, managers, or third-parties unless approved by our legal department, required for our business, and in compliance with the law and our policies.

WE WILL NOT threaten you with discipline or discharge for violating our Privacy of Communications rule.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind our Privacy of Communications rule and effectively notify you of the rescission and that the rule will no longer be enforced.

AT&T MOBILITY LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-178637 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

APPENDIX II

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

NATIONAL LABOR RELATIONS BOARD
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The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

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