JD(NY)–34–15
Augusta, ME

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

MOBILE USA, INC.

and

Cases 01–CA–142030
10–CA–133833

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

Ashley Banks, Esq. and Scott Thompson, Esq.,
for the General Counsel.
Mark Theodore, Esq. (Proskauer Rose LLP),
for the Respondent.
Glenda Pittman, Esq. (Glenda Pittman & Associates, P. C.),
for Charging Party.

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: This case was heard by me on June 22, 2015, in Augusta, Maine. The consolidated complaint which issued on March 30, 2015, and was amended on June 19, 2015, by an amendment to consolidated complaint, was based upon unfair labor practice charges and amendments to these charges that were filed on July 31, 2014[1], December 2, October 31, and March 20, 2015, by Communications Workers of America, AFL–CIO (the Union). The amended complaint alleges that T- Mobile USA, Inc. (the Respondent), at its South Carolina and Maine facilities, during investigations of alleged misconduct, interviewed employees and presented them with a "Notice and Acknowledgement of Duty to Cooperate and Confidentiality" which stated that they could not disclose information about investigations. The complaint further alleges that on about August 5 the Respondent, by Karen Estes, the human resources business partner of Respondent at its Maine facility, and an admitted agent of the Respondent, threatened employees with discipline if they discussed complaints regarding their conditions of employment with other employees. It is alleged that by these actions the Respondent violated Section 8(a)(1) of the Act.

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2014.

I. Jurisdiction and Labor Organization Status

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. The Facts

The Notice and Acknowledgement of Duty to Cooperate and Confidentiality in the South Carolina facility (the South Carolina Notice), states:

> You have been asked to provide information in connection with an investigation being conducted by T-Mobile Human Resources. We are meeting with you because an allegation of inappropriate conduct has been received by our team and we believe you have information that is relevant to the investigation. We are required to investigate this allegation, and it may be reportable to the Compliance Committee, the TMUS Audit Committee, the VP of Legal Affairs and Compliance, and/or TMUS management.
>
> Employees must fully cooperate in internal investigations, including providing complete, truthful, and accurate information and written statements upon request. An employee's refusal to cooperate in any investigation may result in forfeiture of good standing, and/or may result in performance improvement action up to and including dismissal.
>
> Employees should maintain the confidentiality of the names of the employees involved in the investigations, whether as complainants, subjects or witnesses, throughout the pendency of the investigation, and you should only disclose such information to T-Mobile Corporate Investigators, Human Resources personnel or counsel forT-Mobile, unless permitted by law. You should keep confidential all communications between you and the lnvestigator(s) concerning this matter throughout the pendency of this investigation unless permitted by law. This includes all questions and answers during this interview, any written statement that you provide to the investigator(s), and all other information or documents provided to the investigator(s) in connection with this matter.
>
> Conduct that interferes with, undermines, impedes or is otherwise detrimental to any internal investigation is prohibited.
>
> Additionally, T-Mobile policy prohibits retaliation against any employee who brings a complaint in good faith or against any employee who participated in an investigation. Please note that nothing in this Notice and Acknowledgement impacts your rights to discuss terms and conditions of employment as protected by law or as otherwise provided in T-Mobile's Employee Handbook and Code of Conduct. By signing below, you acknowledge that you have read this document, understand it, and agree to adhere to it; and (2) failure to adhere to the duties set forth above may cause harm toT-Mobile and subject you to performance improvement action up to and including dismissal.
>
> You will be provided with a signed copy of this document.

The "Notice and Acknowledgement of Duty to Cooperate and Confidentiality" at the Maine facility(the Maine notice), states:

> You have been asked to provide information in connection with an investigation being conducted by the Corporate Investigations Department of T-Mobile. The Corporate Investigations Department is part of the Legal Department and is charged with investigating certain types of matters. Our job is to be a fact finder. We are unbiased and objective. We are not the decision makers with regard to the outcomes of an investigation.
>
> We are meeting with you because an allegation of inappropriate conduct has been received by our team and we believe you have information that is relevant to the investigation. We are required to investigate this allegation, and it may be reportable to DT, The Compliance Committee, the TMUS Audit Committee, the VP of Legal Affairs and Compliance and/or TMUS management. In some cases, we are required by law to investigate these matters.
>
> Employees must fully cooperate in internal investigations, including providing complete, truthful and accurate information and written statements upon request. An employee's refusal to cooperate in any investigation may result in forfeiture of good standing, and/or may result in performance improvement action up to and including dismissal.
>
> To ensure the integrity of investigations, employees should maintain the confidentiality of the names of the employees involved in the investigations, whether as complainants, subjects or witnesses, throughout the pendency of this investigation, and you should only disclose such information to T-Mobile Corporate Investigators, Human Resources personnel or counsel for T-Mobile, unless permitted by law. You should keep confidential all communications between you and the Corporate Investigator(s) concerning this matter throughout the pendency of this investigation unless permitted by law. This includes all questions and answers during this interview, any written statement that you provide to the investigator(s), and all other information or documents provided to the investigator(s) in connection with this matter.
>
> You should provide all documents, data and other information requested by the Corporate Investigator(s) and should not attempt to destroy, alter or conceal any such information.
>
> Conduct that interferes with, undermines, impedes or is otherwise detrimental to any internal investigation is prohibited. Additionally, T-Mobile policy prohibits retaliation against any employee who brings a complaint in good faith or against any employee who participated in an investigation. Please note that nothing in this Notice and Acknowledgement impacts your rights to discuss terms and conditions of employments as protected by law or as otherwise provided in T-Mobile's Employee Handbook and Code of Business Conduct. By signing below, you acknowledge that (1) you have read this document, understand it and agree to adhere to it; and (2) failure to adhere to the

> duties set forth above may cause harm to T-Mobile and subject you to performance improvement action up to and including dismissal.
>
> You will be provided with a signed copy of this document.

Counsel for the General Counsel alleges that these rules violate Section 8(a)(1.) of the Act because they prohibit employees from discussing their terms and conditions of employment with others, including their coworkers. Counsel for the Respondent denies that these notices violate the Act and further defends that as these rules specifically state that they do not impact employees' rights to discuss terms and conditions of employment protected by law, they do not violate the Act.

Additionally, it is alleged that on about August 5 Estes threatened employees with discipline if they discussed complaints regarding their terms and conditions of employment with other employees. This allegation was supported by the testimony of Angela Agganis, who was employed by the Respondent as a customer service representative at the Respondent's facility in Oakland, Maine, from 2006 to August 2014. She testified that during orientation the employees were told to go to the human resources department for sexual harassment allegations or if there were conflicts with other employees, and she went to see Estes on August 5 to report a sexual harassment allegation against her coach. She described the situation to Estes as the two of them were in Estes' office. After she concluded telling Estes about the incident, Estes told her that she would have to file an incident report about it, and she gave Agganis the Maine Notice and said, "I need you to sign and date this form. This is something we need to do whenever we have an incident report." After reading the form she told Estes that it said that if she discussed the situation with her coworkers she could be subject to discipline up to and including termination, and she asked, "is that correct?" Estes said that it was, Agganis signed the form and told Estes that she wanted to resign. Estes then gave her an incident report form, on which she wrote a description of the incident, and Estes told her that she would investigate her allegation. Agganis told her that she wanted her coach suspended, and Estes said that she couldn't do that until she investigated the complaint. Estes also told her that she should take some time to think about it before resigning and offered to let her stay off work with pay while she investigated the allegation.

Estes testified that Agganis came to her office on about August 5 and told her of an incident that occurred with her coach. Estes asked her to read and sign the Maine Notice and asked her if she had any questions about it. She testified that she does not recall whether Agganis had any questions or if she asked whether the form meant that she could be terminated or disciplined for violating its terms and does not recall telling her that she could be terminated or disciplined for violating the provisions of the Maine Notice. Estes then put her in a private room to write out a statement about the incident, which she did.

III. Analysis

It is alleged that the offending language of the Maine and South Carolina notices is as follows:

> Employees should maintain the confidentiality of the names of the employees involved in the investigations, whether as complainants, subjects or witnesses, throughout the pendency of the investigation, and you should only disclose such information to T-Mobile Corporate Investigators, Human Resources personnel or counsel for T-Mobile, unless permitted by law. You should keep confidential all

> communications between you and the Investigator(s) concerning this matter throughout the pendency of this investigation unless permitted by law.
>
> Conduct that interferes with, undermines, impedes or is otherwise detrimental to any internal investigation is prohibited.

In determining whether these provisions violate the Act, the initial inquiry is to *Lutheran Heritage Village- Livonia,* 343 NLRB 646 (2004). Under that test, the initial inquiry is whether the rule at issue explicitly restricts activities that are protected by Section 7 of the Act; if so, it is unlawful. If not, a finding of a violation is dependent upon a showing of one of the following: employees would reasonably construe the rule to prohibit protected activity, or the rule has been applied to restrict the exercise of that activity. As the rule does not explicitly restrict Section 7 rights, and as there is no evidence that the rule has been applied to restrict the exercise of those rights, the test is whether employees would reasonably construe the rules to prohibit protected activity. It should initially be noted that this case does not concern the confidentiality of the employer's products, customers, employees, assets, or business partners. The confidential restrictions herein relate to the names of employees involved in investigations being conducted by the Respondent as well as communications between the employee and the Respondent's investigators concerning the investigation. As Agganis alleged that she had been sexually harassed by her coach, pursuant to the Respondent's rule, she was prohibited from disclosing the name of the employee who allegedly harassed her, all communications with the investigators, as well as the names of her witnesses to anyone other than Respondent's representatives who were investigating the allegation. Although the loss of the employee's right to discuss pending investigations with others is not as obvious as it is where employees are prohibited from disclosing information about other employees, or the employees conditions of employment, Agganis and the other employees were still restricted from discussing issues related to their terms and conditions of employment, in this situation, freedom from harassment. In *Desert Palace, Inc.,* 336 NLRB 271, 272 (2001), the Board stated:

> We agree with the judge that employees have a Section 7 right to discuss discipline or disciplinary investigations involving fellow employees. We also agree that the Respondent's rule prohibiting discussion of the ongoing drug investigation adversely affected employees' exercise of that right. It does not follow however that the Respondent's rule is unlawful and cannot be enforced. The issue is whether the interests of the Respondent's employees in discussing this aspect of their terms and conditions of employment outweighs the Respondent's asserted legitimate and substantial business justifications.
>
> In *Banner Health System,* 362 NLRB No. 137(2015), the Board found that the human resources consultant unlawfully requested employees who were involved in workplace investigations not to discuss the matter with coworkers while the investigation was pending. In finding that this violated Section 8(a)(1) of the Act, the Board, citing *Fresh* & *Easy Neighborhood Market,* 361 NLRB No. 12 (2014), stated at slip op. at 2:
>
> Employees have a Section 7 right to discuss disciplinary investigations involving themselves or coworkers. Such discussions are vital to employees' ability to aid one another in addressing employment terms and conditions with their employer. Accordingly, an employer may restrict these discussions only where the employer shows that it has a legitimate and substantial business justification that outweighs employees' Section 7 rights.

The Board then cited *Desert Palace,* supra*,* and *Hyundai American Shipping Agency,* 357 NLRB No. 80 (2011), and further stated:

> ..these cases make clear that it is the employer's burden to justify a prohibition on employees discussing a particular ongoing investigation. In addition ..the employer's burden comprises two related components. First, the employer must proceed on a case by case-by-case basis. The employer cannot reflexively impose confidential requirements in all cases or in all cases of a particular type. Second, a determination that confidentiality *is* necessary in a particular case must be based on objectively reasonable grounds for believing that the integrity of the investigation will be compromised without confidentiality.

Unlike the situation in *Desert Palace,* supra*,* which was an investigation of alleged drug sales on the employer's premises, stolen property and threats on the lives of fellow employees, the investigation herein related to sexual harassment that, while serious, comes nowhere near the seriousness and possible danger inherent in the *Desert Palace* investigation. The Respondent has not met the burden described in *Banner Health System,* supra*, and* the employees' loss clearly outweighs the Respondent's right to prevent its employees from disclosing information about the investigation. I therefore find that the Maine and South Carolina notices violate Section 8(a)(1) of the Act.

The Respondent defends that the notices have a *caveat* with the words: "unless permitted by law," and state in the final paragraph: "Please note that nothing in this Notice and Acknowledgement impacts your rights to discuss terms and conditions of employment as protected by law." While these exceptions to the general rules sound good at first reading, they presume that the employees understand the legal term: "terms and conditions of employment," when, clearly, it is a difficult term to define, especially for lay people. In *Tower Industries,* 349 NLRB 1077, 1084 (2007), cited by counsel for the General Counsel in her brief, the employees were asked to sign forms agreeing not to file or maintain certain claims, with the stated exception: "unless required by a court order or valid subpoena or otherwise permitted by Federal or State law including but not limited to the National Labor Relations Board." In finding that this did not negate the unlawful language of the release, the administrative law judge stated:

> Viewed from an employee's perspective, there is an obvious difference between the two conflicting portions of the release. The plain language of the first portion directly prohibits the signatory employee from assisting other employees in pursuing wage claims; the second portion cancels the first but only if the signatory employee is knowledgeable enough to understand that the Act permits the very thing prohibited in the first portion.

I find that these phrases do not negate the unlawful provisions of the Maine and South Carolina notices.

The remaining allegation is that on about August 5 Estes threatened Agganis with discipline if she discussed complaints regarding her terms and conditions of employment with other employees. Agganis testified clearly and credibly about her August 5 conversation with Estes that when she read that the rule stated that if she discussed the situation with her coworkers she could be subject to discipline up to, and including

termination, she asked her if that was correct, and Estes replied that it was. Estes testified that she does not recall whether Agganis had any questions or whether she specifically asked whether she could be disciplined or terminated for discussing the situation with other employees. Although I did not find Estes to be an incredible witness, there is no doubt in my mind that Agganis' testimony is correct. The rule specifically states that if the employee does not maintain the confidentiality required by the rule, he/she is subject to discipline up to, and including, dismissal. Estes, the HR representative at the facility, therefore had had no alternative but to agree with Agganis' statement. As I have found that the rule violates Section 8(a)(1) of the Act, I find that Estes' statement to Agganis, confirming the rule, likewise violates Section 8(a)(1) of the Act.

Conclusions of Law

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. The "Notice and Acknowledgement of Duty to Cooperate and Confidentiality" at the Respondent's South Carolina and Maine facilities violate Section 8(a)(1) of the Act.

4. The Respondent further violated Section 8(a)(1) of the Act when Estes confirmed that employees could be disciplined up to, and including termination, for discussing complaints that were filed with the Respondent.

Remedy

Having found that the "Notice and Acknowledgement of Duty to Cooperate" and Confidentiality at its South Carolina and Maine facilities violates Section 8(a)(1) because its confidentiality provisions restrains employees in the exercise of their Section 7 rights, I recommend that the Respondent be ordered to rescind and/or revise these rules and notify all of its employees employed in Maine and South Carolina, by email, that these rules are no longer in force, in addition to posting the Board notice to that effect. As the complaint only alleged that the South Carolina and Maine notices were unlawful, I agree with counsel for the Respondent that the remedy should be limited to the facilities in these two states.

Upon the foregoing findings of facts, conclusions of law and based upon the entire record, I hereby issue the following recommended[2]

ORDER

The Respondent, T-Mobile USA, Inc., its officers, agents, successors and assigns, shall

1. Cease and desist from

[2] 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.

(a) Maintaining "Notices and Acknowledgements of Duty to Cooperate and Confidentiality" at its facilities in Maine and South Carolina that unlawfully restricts its employees in the exercise of their Section 7 rights, by prohibiting them disclosing information about pending investigations to fellow employees or anybody else other than the Respondent's investigators.

(b) Threatening employees that pursuant to the "Notice and Acknowledgement of Duty to Cooperate and Confidentiality," they are subject to discipline up to, and including termination, if they disclose information about pending investigations in violation of the Notice.

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

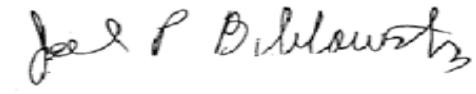
2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days rescind and/or revise the Maine and South Carolina notices in a manner that the employees are not prohibited from disclosing information about pending investigations, and notify all employees at its facilities in Maine and South Carolina by email, that it has done so and that the prior rule will no longer be enforced.

(b) Within 14 days after service by the Region, post at each of its facilities in the States of Maine and South Carolina, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Regions 1 or 10, 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. 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 August 5, 2014.

(c) 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. August 3, 2015



Joel P. Biblowitz
Administrative Law Judge

[3] 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."

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 prohibit you from discussing disciplinary investigations with your coworkers and

WE WILL NOT threaten you with discipline up to, and including dismissal, for disclosing such information.

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 within 14 days rescind and/or revise the rules contained in the Notice and "Acknowledgement of Duty to Cooperate and Confidentiality" at our South Carolina and Maine facilities that prohibit you from disclosing information about pending investigations, and **WE WILL** notify you, by email, that we have done so.

T-MOBILE USA, INC.
(Employer)

Dated: _____ By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret–ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: ww.nlrb.gov.

233 Peachtree Street NE, Harris Tower, Suite 1000, Atlanta, Georgia 30303-1531
(404) 331–2896 Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/01-CA-142030 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.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (205)933–3013