



United States Government

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

May 14, 2018

Mark J. Langer, Esq.
Clerk, United States Court of Appeals
for the District of Columbia Circuit
E. Barrett Prettyman U.S. Courthouse
333 Constitution Avenue, N.W. Room 5423
Washington, D.C. 20001-2866

Re: *Cellco Partnership d/b/a Verizon Wireless v. National Labor Relations Board*
D.C. Cir. Case Nos. 17-1158 and 17-1165

Dear Mr. Langer:

Under Fed.R.App.P.28(j), the Board responds to Cellco's submission of *David Saxe Productions, LLC v. NLRB*, ___ F.3d ___, 2018 WL 2070569 (May 4, 2018), as supplemental authority. In that case, the Court determined that it was "unclear" how the Board reconciled its pretext finding with a credibility determination by the administrative law judge, which it seemed to have "functionally rejected." *Id.* at *1.

David Saxe does not advance Cellco's argument that its petition should be granted because the Board erred when it "declined to disturb the [administrative law judge's] credibility determinations, yet . . . rejected the [judge's] reliance on a privileged document, despite that the document was the basis for the [judge's] credibility determinations." Preliminarily, the Court lacks jurisdiction to consider Cellco's argument, which it failed to raise before the Board. (Board brief p. 55.) In any event, as explained in the Board's brief (pp. 54-56), each element of the Board's *Wright Line* analysis is supported by substantial evidence and no element hinges on contested Exhibit 49. Thus, unlike *David Saxe*, the credibility

determinations that Cellco complains of are of no consequence to the Board's ultimate *Wright Line* analysis before the Court.

Respectfully,

/s/ Linda Dreeben
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cc: all counsel (via CM/ECF)