

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

CELLCO PARTNERSHIP d/b/a
VERIZON WIRELESS

and

Cases 21-CA-075867
21-CA-098442

COMMUNICATIONS WORKERS OF
AMERICA DISTRICT 9, AFL-CIO;
COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO

AIRTOUCH CELLULAR

and

Case 21-CA-115223

COMMUNICATIONS WORKERS OF
AMERICA DISTRICT 9, AFL-CIO;
COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO

NOTICE TO SHOW CAUSE

On July 25, 2014, Administrative Law Judge William Nelson Cates issued a decision addressing complaint allegations that the Respondents violated Section 8(a)(1) by maintaining certain work rules or policies.¹ In addressing several of the work rules

¹ The Respondents contend that Regional Director Olivia Garcia was without authority to issue the complaint in this case because the Board appointed her as Regional Director for Region 21 on January 6, 2012, when the Board lacked a quorum after the expiration of former Board Member Craig Becker's term. This contention is without merit. Although Regional Director Garcia's appointment was announced on January 6, 2012, the Board approved the appointment on December 22, 2011, at which time it had a valid quorum. See, e.g., *Covenant Care California, LLC*, 363 NLRB No. 80, slip op. at 1 fn. 2 (2015).

In addition, we note that on March 21, 2017, the Supreme Court held in *NLRB v. SW General, Inc. d/b/a Southwest Ambulance*, 137 S. Ct. 929 (2017) that, under the Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345 et seq., former Acting General Counsel Lafe Solomon's authority to take action as Acting General Counsel ceased on January 5, 2011, when President Obama nominated him to be General Counsel. On August 13, 2015, pursuant to *Reliant Energy*, 339 NLRB 66 (2003), the Respondents filed a postbrief letter calling the Board's attention to *S.W. General Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015), and, for the first time, contesting the validity of Lafe Solomon's appointment as the Board's Acting General Counsel. The Respondents did not raise any question about the authority of the Acting General Counsel in their answers to the complaint or the amended complaint, during the hearing before the administrative law judge, in their posthearing brief, or in exceptions to the Board. Under these circumstances, any challenge to Lafe Solomon's authority as Acting General Counsel was untimely. See *Comau, Inc.*, 364 NLRB No. 48, slip op. at 1 fn.1 (2016). However, even if the Respondents had timely raised the issue, events subsequent to the issuance of the initial complaint on June 28, 2013, rendered moot any potential argument that Solomon's lack of authority after his nomination precludes further litigation in this matter. Specifically, here, the original complaint issued June 28, 2013, during the period in question, but an amended complaint issued on January 31, 2014, at a time when Richard F. Griffin was General Counsel. Moreover, on October 13, 2015, General Counsel Richard F. Griffin, Jr. issued a Notice of Ratification in this case that states, in relevant part, as follows:

The prosecution of this case commenced under the authority of Acting General Counsel Lafe E. Solomon during the period after his nomination on January 5, 2011, while his nomination was pending with the Senate, and before my confirmation on November 4, 2013.

The United States Court of Appeals for District of Columbia Circuit recently held that Acting General Counsel Solomon's authority under the Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345 et seq., ceased on January 5, 2011, when the President nominated Mr. Solomon for the position of General Counsel. *SW General, Inc. v. NLRB*, ___ F.3d ___, 2015 WL 4666487 (D.C. Cir. Aug. 7, 2015). The Court found that complaints issued while Mr. Solomon's nomination was pending were unauthorized and that it was uncertain whether a lawfully-serving General Counsel or Acting General Counsel would have exercised discretion to prosecute the cases. *Id.* at *10.

I was confirmed as General Counsel on November 4, 2013. After appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act.

allegations, the judge applied the “reasonably construe” prong of the Board’s decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) (*Lutheran Heritage*). The judge addressed two of the rules allegations under a different standard.² Recently, the Board overruled the *Lutheran Heritage* “reasonably construe” test and announced a new standard that applies retroactively to all pending cases. *The Boeing Co.*, 365 NLRB No. 154, slip op. at 14-17 (2017). Having duly considered the matter,

NOTICE IS GIVEN that cause be shown, in writing, filed with the Board in Washington, D.C., on or before April 9, 2019 (with affidavit of service on the parties to this proceeding), why the complaint allegations involving the maintenance of allegedly unlawful work rules or policies should not be severed and remanded to the administrative law judge for further proceedings consistent with the Board’s decision in *Boeing*, including reopening the record if necessary. Any response should address whether a

My action does not reflect an agreement with the appellate court ruling in *SW General*. Rather, my decision is a practical response aimed at facilitating the timely resolution of the charges that I have found to be meritorious while the issues raised by *SW General* are being resolved. Congress provided the option of ratification by expressly exempting “the General Counsel of the National Labor Relations Board” from the FVRA provisions that would otherwise preclude the ratification of certain actions of other persons found to have served in violation of the FVRA. *Id.* at *9 (citing 5 U.S.C. § 3348(e)(1)).

For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint.

In view of the independent decision of General Counsel Griffin to continue prosecution in this matter, we would reject as moot any challenge to the actions taken by Solomon as Acting General Counsel after his nomination on January 5, 2011.

² Specifically, in recommending dismissal of the complaint allegations related to Rule 1.6 Soliciting and Fundraising and Rule 3.4.1 Prohibited Activities, the judge relied on *Register-Guard*, 351 NLRB 1110 (2007), *enfd.* in relevant part and remanded sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009), overruled by *Purple Communications, Inc.*, 361 NLRB No. 126 (2014).

remand would affect the Board's ability to resolve the complaint allegations to which the judge applied *Register Guard*, including whether those allegations should be severed and retained or instead included in the remand. Any briefs or statements in support of the motion shall be filed on the same date.

Dated, Washington, D.C., March 26, 2019.

By direction of the Board:

Roxanne Rothschild

Executive Secretary