

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VERIZON WIRELESS

Respondent

and

Case 02-CA-157403

**COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO**

Charging Party

**VERIZON NEW YORK INC., EMPIRE CITY
SUBWAY COMPANY (LIMITED), VERIZON
AVENUE CORP., VERIZONADVANCED
DATA INC., VERIZON CORPORATE SERVICES
CORP., VERIZON NEW ENGLAND INC.,
VERIZON SERVICES CORP. AND
VERIZON NEW JERSEY INC.**

Respondents

and

Case 02-CA-156761

**COMMUNICATIONS WORKERS OF
AMERICA (“CWA”)**

Charging Party;

**VERIZON PENNSYLVANIA INC.,
VERIZON SERVICES CORP. AND
VERIZON CORPORATE SERVICES CORP.**

Respondents

and

Case 04-CA-156043

**COMMUNICATIONS WORKERS OF
AMERICA, DISTRICT 2-13, AFL-CIO, CLC**

Charging Party;

**VERIZON WASHINGTON, D.C. INC.,
VERIZON MARYLAND INC., VERIZON
VIRGINIA INC., VERIZON SERVICES
CORP., VERIZON ADVANCED DATA INC.,
VERIZON SOUTH INC. (VIRGINIA),
VERIZON CORPORATE SERVICES CORP.
AND VERIZON DELAWARE INC.**

Respondents

and

Case 05-CA-156053

**COMMUNICATIONS WORKERS OF
AMERICA, DISTRICT 2-13,
AFL-CIO CLC**

Charging Party

**VERIZON CALIFORNIA, INC. AND
VERIZON FEDERAL INC., VERIZON
FLORIDA INC., VERIZON NORTH LLC,
VERIZON SOUTHWEST INC., VERIZON
CONNECTED SOLUTIONS INC., VERIZON
SELECT SERVICES INC. AND MCI
INTERNATIONAL, INC.**

Respondents

and

Case 31-CA-161472

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

Charging Party

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO
CHARGING PARTY'S EXCEPTIONS TO THE ALJ'S ORDER**

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

ARGUMENT..... 2

I. THIS CASE IS NOT PROPERLY BEFORE THE BOARD. 3

II. EVEN IF THE CHARGING PARTY’S ARGUMENTS WERE PROPERLY BEFORE THE BOARD,
THEY ARE SUBSTANTIVELY WITHOUT MERIT. 4

 A. *The General Counsel Has Exclusive Authority Over the Prosecution of the
 Complaint.* 4

 B. *The General Counsel Appropriately Requested - and the ALJ Granted –
 Withdrawal of Certain Portions of the Complaint.* 5

 C. *A Violation Cannot be Found Based on a Theory Supported Only by the
 Charging Party.*..... 7

CONCLUSION 10

PRELIMINARY STATEMENT

On May 25, 2017, Administrative Law Judge Donna N. Dawson (“the ALJ,” or “the Judge”) issued a decision in this case, along with an order transferring the proceedings to the Board. This decision was based on stipulated facts. On December 14, 2017, the National Labor Relations Board (“the Board”) issued the decision in *The Boeing Corp.*, 365 NLRB No. 154 (2017). On November 19, 2018, the Board issued a Notice to Show Cause why this case should not be remanded for further consideration under *The Boeing Corp.*, and, on March 22, 2018, the Board remanded the case, in part, to the Judge

After the Board remanded this case, in part, to the Judge, the Counsel for the General Counsel moved to withdraw certain allegations contained in the original complaints. These portions of the complaints dealt with the allegedly unlawful work rules and policies maintained by the Respondent, which were now to be analyzed under *The Boeing Corp.*

By order dated September 27, 2019, the Judge issued a “Decision Granting the General Counsel’s Motion to Withdraw Complaint Allegations in Light of *The Boeing Co.* and Order Withdrawing Consolidated Complaint” (“the ALJ’s Order”). In doing so, the Judge ordered “that these remaining allegations in this above-numbered consolidated complaint before me are Withdrawn and that the entire consolidated complaint be remanded to the appropriate Regional Director for DISMISSAL.” (emphasis in original). The matter was then remanded to the Regional Director for Region Six. Importantly, the case was not transferred back to the Board.

The Judge’s decision to grant the General Counsel’s motion and order the complaint to be remanded to the Regional Director for Region Six prompted the Charging Party to file “Exceptions to the Decision of the Administrative Law Judge” (“the Exceptions”) here. Notably,

the Charging Party did not file a request for a special appeal, and instead relies solely on the Exceptions to make its arguments to the Board. For the reasons set forth below, the Exceptions should be rejected.

ARGUMENT

The Charging Party's Exceptions should be rejected because they are not properly before the Board, are procedurally deficient, and are substantively without merit. The Charging Party filed the Exceptions directly with the Board despite the fact that the Judge never transferred the proceedings to the Board and the Charging Party never sought special permission to appeal the ALJ's Order to the Board. As a result, the Exceptions should be denied. That fact notwithstanding and even if the Exceptions are considered, they should be rejected.

Procedurally, the Charging Party failed to comply with the Board's Rules and Regulation as it relates to several of the purported exceptions.¹ Those exceptions should clearly be rejected.

Substantively, the Charging Party's exceptions are, in essence, an attempt to commandeer the role of prosecutor in this matter and substitute its judgment for that of the General Counsel. For that reason, the Exceptions should be rejected.

¹ The Charging Party's exceptions 1, 12, and 15 contain no clear support in the Charging Party's Brief in Support of Exception to the Decision of the Administrative Law Judge ("the Charging Party's Brief"). Without such support, or concise statements for the grounds of the exceptions, the Exceptions fail to comport with the Board's Rules and Regulations. *See* 29 CFR 102.46(a)(1)(i)(A)-(D). Nonetheless, addressing their substance, these exceptions should still be rejected. With respect to the first exception, the ALJ's Order did not address, discuss, or consider the recusal of any Board members. The Charging Party had ample opportunity to raise this argument previously, and it is not properly considered here. To the twelfth exception, it is unclear how the date of the ALJ's Order aggrieved the Charging Party. Finally, to the fifteenth exception, the ALJ's Order did not contain any findings – or remedy, for that matter – because it was an order and ruling on motions. Accordingly, there is no requirement under the Board's Rules and Regulations obligating the Judge to include findings of fact or a remedy.

I. This Case is Not Properly Before the Board.

The Board's Rules and Regulations provide clear pathways for a case to be presented to the Board for review. If an administrative law judge issues a decision, then the judge will transfer the proceedings to the Board for processing and a party to the case may timely file exceptions under Section 102.46. If an administrative law judge issues a ruling on motions or objections, then an aggrieved party may promptly file a special request to appeal the ruling or related order under Section 102.26. Here, the Judge did not transfer the proceedings to the Board for further processing, and the Charging Party did not file a special request to appeal the ALJ's Order.

The ALJ's Order did not transfer the case to the Board. Certainly, if an administrative law judge issues a decision,² the Board's Rules and Regulation permit a party to file exceptions within 28 days "from the date of the service of the order transferring the case to the Board." *See* 29 CFR § 102.46(a). However, that is not what happened here. In fact, no "order transferring the case the Board" ever issued. Instead, the Judge only ordered the case to be remanded to the Regional Director for further processing. As a result, the Judge did not present the case to the

² To be clear, as well, the ALJ's Order is not a decision as contemplated by the Board's Rules and Regulations. According to the Board's Rules and Regulations, a "decision" will be prepared "after a hearing for the purpose of taking evidence upon a complaint," and will contain "findings of fact, conclusions of law, and the reasons or grounds for the findings and conclusions, and recommendations for the proper disposition of the case." *See* 29 CFR § 102.45. That is not what the ALJ issued on September 27, 2019. In fact, the Judge specifically denied the Charging Party's request to reopen the record and present additional evidence. More still, the ALJ's Order contains no findings of fact or conclusions of law. Instead, the ALJ's Order simply ruled in favor of the General Counsel's Motion to Withdraw Complaint Allegations and remanded the complaint to the Regional Director. Accordingly, the Judge's document is properly classified as an order or ruling, rather than a decision. Thus, the Charging Party appears to have filed exceptions to a decision that did not issue. However, this semantic distinction aside and assuming that the Exceptions can properly be considered regardless of form, the fact remains that the Judge did not transfer the proceedings to the Board.

Board. Thus, there was no process for exceptions to be filed and the Exceptions here should be rejected.

Nor did the Charging Party request permission to file an appeal to the Board. If a case is not otherwise before the Board, then a party to the proceeding may certainly request special permission to appeal from the ruling of the Administrative Law Judge. *See* 29 CFR § 102.26. However, such a request, along with the appeal, must be filed in writing “promptly.” *Id.* The Charging Party did not file a request for special permission in this case here. As a result, the Charging Party has failed to properly present the case to the Board for review.

Since the Charging Party failed to properly make use of either pathway for challenging the ALJ’s Order and because the matter is not currently before the Board, the Exceptions should be denied.

II. Even if the Charging Party’s Arguments Were Properly Before the Board, They Are Substantively Without Merit.

A. The General Counsel Has Exclusive Authority Over the Prosecution of the Complaint.

It is well-established that the General Counsel has exclusive authority over the issuance and prosecution of unfair labor practice complaints. *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). Indeed, a charging party cannot prevail on a theory or allegation that has been expressly disclaimed by the General Counsel, or even “enlarge upon or change” the General Counsel’s theories. “[T]o permit the Charging Party to introduce . . . evidence to support theories of violations [other] than the theory relied upon by the General Counsel is tantamount to granting to the Charging Party authority to amend the complaint in derogation of the authority of the General Counsel who has exclusive authority as to the issuance and conduct of the complaint.” *IBEW Local No. 903*, 230 NLRB 1017, 1019-20 (1977), *enfd* 503 F.2d 1044 (9th Cir. 1975).

Section 3(d) of the NLRA provides that the General Counsel possesses “final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board.” 29 U.S.C. § 153(d). Accordingly, the General Counsel *alone* has the discretion to issue and prosecute complaints based on theories that he determines are meritorious. *NLRB v. UFCW Local 23*, 484 U.S. 112, 123-125 (1987).

B. The General Counsel Appropriately Requested - and the ALJ Granted – Withdrawal of Certain Portions of the Complaint.

On August 21, 2019, the General Counsel submitted the “General Counsel’s Motion to Withdraw Complaint Allegations” (“the GC’s Motion”), seeking to withdraw certain allegations of the complaints.

The GC’s Motion followed a significant change in the case law governing certain allegations that had been contained in the complaints. After the Judge issued her original decision in this case, the Board issued its decision in *The Boeing Co.*, 365 NLRB No. 154 (2017). This decision announced a departure from the “reasonably construe” standard articulated under *Lutheran Heritage Village-Livonia*,³ and instead applied a new analytic framework for evaluating facially-neutral handbook policies. This new standard balanced the potential impact of such rules on employee rights protected by the National Labor Relations Act against an employer’s “legitimate justifications” for maintaining the rules or policies.

Applying this new standard, the General Counsel reasonably determined that certain policies would not now violate the Act, and expressly disclaimed those complaint allegations.

³ 343 NLRB 646 (2004).

Specifically, the General Counsel concluded that the following portions of the Respondent's Code of Conduct are lawful: (1) the "Speak Up" reporting section; (2) the compliance language in footnote 1 on page 10; (3) Section 1.8.2 of the Code, titled "Use of Recording Devices;" (4) Section 2.1.3 of the Code, titled "Activities Outside of Verizon;" (5) Section 3.2.1 of the Code, titled "Protecting Non-public Company Information;" (6) Section 4.6 of the Code, titled "Relationships with and Obligations of Departing and Former Employees;" and (7) two additional examples of actions considered illegal or unacceptable in the Code's "Conclusion" section. Based on this analysis and conclusion that the specified complaint allegations no longer have merit, the General Counsel appropriately requested withdrawal from the Judge. *See Sheet Metal Workers Local 28 (American Elgen)*, 306 NLRB 981 (1992) (once relevant evidence is introduced at hearing, the Regional Director must move the Administrative Law Judge to withdraw all or part of the complaint).

After the GC's Motion was submitted to the Judge, the Judge had the discretion to consider the request in light of the changed circumstances. The Judge did precisely that and concluded that General Counsel correctly determined that the specified complaint allegations no longer have merit. *See NLRB CASEHANDLING MANUAL PART 1: UNFAIR LABOR PRACTICE PROCEEDINGS* ("the Casehandling Manual"), at § 10275.3 (June 2019). Accordingly, the Judge then had the right to dismiss the complaint allegations instead of permitting the withdrawal. The Judge opted to pursue that option here, stating:

Therefore, I **ORDER** that these remaining allegations in this above-numbered consolidated complaint before me are Withdrawn and that the entire consolidated complaint be remanded to the appropriate Regional Director for **DISMISSAL**. (emphasis in original).

The GC's Motion and the ALJ's Order were issued consistently with the Board's Rules and Regulations and practices described in the Casehandling Manual. While the Charging Party may not be pleased with the result, that alone does not support overruling the ALJ's Order.

C. A Violation Cannot be Found Based on a Theory Supported Only by the Charging Party.

The Charging Party, through its Exceptions, raises a bevy of issues that are entirely outside the scope of the complaints or the GC's Motion. The GC's Motion focuses solely on the application of *The Boeing Co.*, and does not consider any of the ancillary theories of violations argued by the Charging Party.

The Charging Party's exceptions⁴ arguing that the Respondent's rules or policies, which the General Counsel has now determined to be lawful, should in fact be found to be unlawful by the Board, must be rejected. It is beyond dispute that, as a logical outgrowth of the General Counsel's sole prosecutorial discretion described above, a charging party has no right to enlarge upon or change the General Counsel's theory of a case. *See, e.g., Fremont Ford*, 364 NLRB No. 29, slip op. at 2 fn.1 (2016); *Hobby Lobby Stores, Inc.*, 363 NLRB No. 195, slip op. at 1 fn. 2 (2016); *see also Kimtruss Corp.*, 305 NLRB 710 (1991). Here, the General Counsel concluded that certain complaint allegations no longer had merit, and expressly disclaimed any theories or arguments that the underlying rules violated the Act. The Charging Party cannot now enlarge upon or change this General Counsel's position with respect to the lawfulness of the

⁴ The Counsel for the General Counsel understands this to include exceptions 2, 3, 4, 5, 6, 7, 8, 10, 11, 13, and 16.

Respondent's rules. Accordingly, to the extent that the Exceptions raise arguments unrelated to the theory promoted by the General Counsel, they should be rejected.

The Charging Party's exceptions,⁵ which argue that application of the Religious Freedom Restoration Act ("the RFRA")⁶ should support a finding of a violation, should be rejected. Under the RFRA, if a *governmental action* substantially burdens the free exercise of religion, the government must show a compelling interest for its action. Importantly, however, the RFRA only applies to government actions. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). As the Charging Party alludes to in its brief, the Respondent, a private entity, is responsible for maintaining the rules and policies that the Charging Party believes to be unlawful. It is not the federal government. Without some government action at issue in this case, the RFRA is inapplicable. Accordingly, the Charging Party's reliance on the RFRA is entirely misplaced, and the Charging Party's apparent argument, that the RFRA somehow compels the Board to act on the rules that the Charging Party alone believes to be unlawful, is wholly without merit.

The Charging Party's exceptions⁷ arguing that the Judge acted improperly in granting the GC's Motion should be rejected. The Charging Party asserts that it was "beyond [the Judge's] power" to order the consolidated complaint to be remanded to the Regional Director for dismissal. Tellingly, the Charging Party offers no case law in support of this categorical statement. However, both the Board's Rules and Regulations and the Casehandling Manual

⁵ The Counsel for the General Counsel understands this to include exception 14.

⁶ 42 U.S.C. §§ 2000bb–2000bb-4

⁷ The Counsel for the General Counsel understands this to include exceptions 6, 8, 10, and 11.

make clear that the Judge acted entirely within her authority in the ALJ's Order. The Rules and Regulation clearly provide that an administrative law judge may consent to the withdrawal of allegations before the proceeding is transferred to the Board, and the complaint "will be dismissed by the Regional Director issuing the complaint, the Administrative Law Judge designated to conduct the hearing, or the Board." *See* 29 CFR §102.9. This authority is further confirmed in the Casehandling Manual, which provides that "On discovering lack of merit once evidence has been introduced during the hearing, counsel for the General Counsel (after appropriate Regional Office clearance) should make a motion to the Administrative Law Judge to withdraw the complaint. *See* the Casehandling Manual, at § 10388.3. However, the ALJ may dismiss instead of permitting withdrawal." *See Id.*, at § 10275.3. Accordingly, it is clear that the Judge acted properly in the ALJ's Order, and the Charging Party's exceptions to such should be rejected.

The Charging Party's exceptions arguing that the Judge improperly refused to reopen the record should be rejected. On May 21, 2019, the Judge issued an order directing the parties to submit their positions on the necessity to reopen the record. Both the General Counsel and the Respondent opposed re-opening, while the Charging Party asserted that the Judge should reopen the record to permit the introduction of evidence related to a legitimate business justification for the work rules under *The Boeing Co.* The Judge denied the Charging Party's request in the ALJ's Order. This decision was sound. Under the Board's Rules and Regulations, the Judge certainly has the authority to hear and consider motions to reopen the record. *See* 29 CFR § 102.35(a)(8). However, there is a "strong policy favoring an end to litigation" which cannot be overcome here by the Charging Party's desire to compel the Respondent to put forth additional

evidence⁸ that the General Counsel is not relying upon in his prosecution of the case. *See, e.g., R.L. Polk & Co.*, 313 NLRB 1069, 1070 (1994). In this case, reopening the record would encourage the waste of resources and perpetuate unnecessary litigation, as the General Counsel is not relying upon any unintroduced evidence to support its theory of the case. Accordingly, the exceptions related to this portion of the ALJ's Order should be rejected.

Based on the foregoing, it is clear that the Exceptions, to the extent that they may even be considered before the Board, should be rejected.

CONCLUSION

For the reasons articulated above, Counsel for the General Counsel respectfully requests that the Exceptions be rejected.

Dated at Pittsburgh, Pennsylvania, this 26th day of November 2019.

Respectfully submitted,

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⁸ *See* the Charging Party's Brief, at 31-32 ("The Board must remand this to the Administrative Law Judge with directions to allow the Charging Parties to present evidence to demonstrate the lack of business justification or, in the alternative, to force the Respondent to establish on the record its business justification.").

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

**AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO
CHARGING PARTY'S EXCEPTIONS TO THE ALJ'S ORDER**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on November 26, 2019, I served the above-entitled document(s) by electronic mail upon the following persons, addressed to them at the following addresses:

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November 26, 2019
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