

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

COMMUNICATIONS WORKERS OF
AMERICA DISTRICT 9, AFL-CIO,

Charging Party,

And

CELLCO PARTNERSHIP d/b/a
VERIZON WIRELESS,

Respondent.

COMMUNICATIONS WORKERS OF
AMERICA DISTRICT 9, AFL-CIO,

Charging Party,

And

AIRTOUCH CELLULAR,

Respondent.

Cases Nos. 21-CA-075867
21-CA-098442

Case No. 21-CA-115223

**VERIZON WIRELESS' AND AIRTOUCH CELLULAR'S
RESPONSE TO NOTICE TO SHOW CAUSE**

The National Labor Relations Board need not and should not remand the complaint allegations involving Sections 1.6 and 3.4.1 of Respondents' Code of Conduct to an administrative law judge "for further proceedings consistent with the Board's decision in *Caesars Entertainment*" since an ALJ long ago assessed those rules in a manner consistent with *Caesars Entertainment*. Order Remanding & Notice To Show Cause, at 3.

In *Caesars Entertainment*, the Board overruled *Purple Communications*, 361 NLRB 1050 (2014) as the standard applicable to questions concerning employee access to employer email systems. When doing so, however, the Board did not announce a *new* standard for this area. Rather, it "return[ed] the standard announced in *Register Guard*." *Caesars Entertainment*, 368

NLRB No. 143, at *1 (2019) (citing *Register Guard*, 351 NLRB 1110 (2007)). The *Caesars Entertainment* standard is the *Register Guard* standard, and vice versa. Thus, to remand this case for proceedings consistent with *Caesars Entertainment* would be to remand for proceedings consistent with *Register Guard*.

But in July 2014, when the now-retired Administrative Law Judge William Nelson Cates issued his decision below in this matter, the controlling authority was still *Register Guard* – not *Purple Communications*, which the Board did not issue until December of that year. Therefore, in assessing Code Sections 1.6 and 3.4.1, Judge Cates applied *Register Guard*, and he found the provisions lawful under that again-controlling case. To remand this matter for *another* assessment consistent with *Register Guard/Caesars Entertainment* would simply be a further waste of resources in a case that has been pending long enough.

I. BACKGROUND

This case began in early 2012. The claims in the case include a facial challenge by the Communications Workers of America to Respondents’ facially neutral Code of Conduct Sections 1.6 and 3.4.1. These provisions restrict employees from using company resources – including email systems – to solicit or distribute, or to communicate with employees on behalf of an outside organization. The Union’s position, in turn, centered on seeking to overturn *Register Guard* as well as arguments that “[t]o the extent that employees have access to emails or computers, they should be permitted to use those emails or computers to solicit.” Brief of Charging Party at 8-11.

On July 25, 2014, Administrative Law Judge Cates issued a decision in the case. In the portion relevant here, he determined that Sections 1.6 and 3.4.1 were both lawful under *Register Guard*. See ALJ Decision JD(ATL)-24-14 (July 25, 2014) at 8-9 (finding “pursuant to *Register Guard*” that Section 1.6 “does not violate the Act.”); *id.* at 13 (finding that Section 3.4.1 “falls

squarely under the *Register Guard* precedent”). On September 4, 2014 the Union filed cross-exceptions to these findings. The Union also filed cross-exceptions to certain findings that Judge Cates made applying *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), and Respondents filed exceptions to other portions of Judge Cates’ decision.

This case was before the Board in December 2014, when the Board issued *Purple Communications* and, for the time being, overruled *Register Guard*. And the case remained pending at the Board as of December 2017, when the agency overturned *Lutheran Heritage* with its decision in *Boeing*, 365 NLRB NO. 154 (2017). As such, on March 26, 2019, the Board issued a Notice to Show Cause in the above-captioned matter seeking the parties’ positions on whether it should remand the complaint allegations that Judge Cates had decided under the *Lutheran Heritage* standard. On May 15, 2020, the Board remanded those allegations, but severed the allegations regarding Code Sections 1.6 and 3.4.1 (which Judge Cates decided under *Register Guard* standards). *See* Order Remanding & Notice To Show Cause, at 3. The Board then asked for the parties’ position as to whether they should be remanded “for further proceedings consistent with the Board’s decision in *Caesars Entertainment*, including reopening the record if necessary.” *Id.*

II. REMAND IS UNWARRANTED

While the Board generally has authority to remand matters before it, it is judicious in exercising that authority. A remand is appropriate only upon a showing that further proceedings are necessary to address an unanswered open question. *See, e.g. T-Mobile USA, Inc.*, 369 NLRB No. 90, *slip op.* at 1 (2020) (declining remand where “there is no indication in the record that the Respondent’s employees do not have access to other reasonable means of communication”). Here, the Board should not remand the allegations related to Sections 1.6 and 3.4.1 “for further proceedings consistent with the Board’s decision in *Caesars Entertainment*” because there are no

such open questions. Instead, the Board should retain those allegations and dismiss them. There are three reasons for this conclusion.

First, Judge Cates long ago assessed Sections 1.6 and 3.4.1 under standards “consistent with the Board’s decision in *Caesars Entertainment*.” Order Remanding & Notice To Show Cause, at 3. That is, the ALJ applied *Register Guard*, which supplied the Board’s controlling standard in July 2014. *See* ALJ Decision JD(ATL)-24-14 (July 25, 2014) at 8-9 (“pursuant to *Register Guard* the rule here does not violate the Act.”); *id.* at 13 (“the rule falls squarely under the *Register Guard* precedent”). And following *Caesars Entertainment*, *Register Guard* once again supplies the controlling standard. *See Caesars Entertainment*, 368 NLRB No. 143 at *1 (“we shall overrule *Purple Communications* and return to the standard announced in *Register Guard*”). There is no need for a second ALJ to replicate Judge Cates’ analysis.

Second, there is no scenario in which “reopening the record” with respect to Sections 1.6 or 3.4.1 would be permissible, let alone “necessary.” Order Remanding & Notice To Show Cause, at 3. Under the *Register Guard/Caesars* standard, employers may restrict employees’ nonbusiness use of their IT systems, subject to one extremely “rare” exception. *Caesars Entertainment*, 368 NLRB No. 143, *slip op.* at *1.¹ That exception applies in the unlikely scenario that the “employer’s email system furnishes the only reasonable means for employees to communicate with one another.” *Id.* Here, since *Register Guard* supplied the controlling law at the time, the Union could have argued for application of a such an “exception to the *Register*

¹ *Register Guard/Caesars* supplies the standard applicable to facial challenges to the maintenance of email policies, such as the challenge in this case. Of course, employers must also apply their lawful email rules in a neutral fashion. *Register Guard*, 351 NLRB 1110 (“Respondent may lawfully bar employees’ non-work related use of its e-mail system, unless the Respondent acts in a manner that discriminates against Section 7 activity”). This case has never involved allegations that Respondents unlawfully applied their rules. *See* Complaint ¶¶ 6-8. Moreover, it is well settled that the Union cannot expand on the General Counsel’s theory of the case. *See, e.g., Zurn/N.E.P.C.O.*, 329 NLRB 484, 486 (1999) (providing that a charging party may not “enlarge upon or change the General Counsel’s theory of the case”); *see also Roadway Express, Inc.*, 355 NLRB 197, 201 n.16 (2010).

Guard rule” in proceedings before Judge Cates, in 2014 if it wished. *Id.*; *see also Register Guard*, 351 NLRB at 1116 (noting that there was “no contention” that Register Guard’s employees “rarely or never see each other in person or that they communicate with each other solely by electronic means”). But the Union failed to make such an argument in 2014, and therefore it is now waived. *See, e.g., Yorkaire, Inc.*, 297 NLRB 401, 401 (1989) (finding issue waived where party did not raise it at the “hearing or in its brief to the judge”), *enfd.* 922 F.2d 832 (3d Cir. 1990).

Third, even if Judge Cates had not found Sections 1.6 and 3.4.1 lawful under *Register Guard* standards and even if the Union had not waived any argument that an exception applies, remand would remain inappropriate absent an affirmative showing from either the General Counsel or the Union that it would not be a further waste of time. *Cf. T-Mobile USA, Inc.* 369 NLRB. No 90, *slip op.* at 1 (2020) (declining remand where “there is no indication in the record that the Respondent’s employees do not have access to other reasonable means of communication”). This case is now eight years old, and it has been at the Board for six. It is past time to end it.

III. CONCLUSION

The Board should not remand the complaint allegations related to Sections 1.6 and 3.4.1 to an Administrative Law Judge. It should retain those allegations and dismiss them.

Dated: May 29, 2020

Respectfully submitted,

/s/ E. Michael Rossman

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CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of May, 2020, I electronically filed the foregoing document with the National Labor Relations Board. In addition, a copy of the document was sent via email to the following:

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In addition, a copy of the document was sent via mail to the following:

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