

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

CELLCO PARTNERSHIP d/b/a
VERIZON WIRELESS

and

SARA PARRISH, an Individual

Case No. 28-CA-145221

**CELLCO PARTNERSHIP’S RESPONSE TO THE
BOARD’S NOTICE TO SHOW CAUSE**

Remand of Charging Party Sara Parrish’s facial challenge to Code of Conduct Sections 1.6 and 3.4.1 to an Administrative Law Judge is unnecessary and unwarranted. Facially, the Code sections at issue are lawful under the general rule that the Board announced in *Register Guard*, 351 NLRB 1110 (2007) and returned to in *Caesars Entertainment*, 368 NLRB No. 142 (2019). As of this filing, Parish has stated no indication that she intends to argue for applicability of the “rare” *Register Guard* exception that the Board described in *Caesars Entertainment*, 368 NLRB No. 143, *slip op.* at *1, and the exception does not apply in any event. As such, remand of the allegations pertaining to Code Sections 1.6 and 3.4.1 would be a futile waste of the Agency’s and parties’ time and resources. The National Labor Relations Board should retain jurisdiction over Code Sections 1.6 and 3.4.1 and dismiss the allegations relating to them.

I. BACKGROUND

Individual Sara Parrish filed the charge underlying this matter in January 2015. On February 24, 2017, the Board issued a decision, analyzing the allegations regarding Sections 1.6 and 3.4.1 under the standards articulated in *Purple Communications, Inc.*, 361 NLRB 1050 (2014). *See Cellco Partnership*, 365 NLRB No. 38 (2017). The Company petitioned for review,

Parrish petitioned for review as to other aspects of the case, and the Board petitioned for enforcement.

Through a random selection process, the case landed at the U.S. Court of Appeals for the Ninth Circuit. While pending there, the Board issued *Boeing*, which changed the standards applicable to certain aspects of the case. Later, the Board issued *Caesars Entertainment*, overruling *Purple Communications* and reinstating *Register Guard* as the standard applicable to Sections 1.6. and 3.4.1. The General Counsel asked the Ninth Circuit to return the allegations to the Board for reconsideration under the new standards, and the court returned the last of the allegations to the Board on January 30, 2020.

Then, on May 18, 2020, the Board remanded to an ALJ the allegations subject to *Boeing*. When doing so, however, the Board severed the allegations regarding Code Sections 1.6 and 3.4.1. *See Order Remanding & Notice To Show Cause*, at 3. The Board 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

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. In doing so, the Board did not announce a wholly new standard. Rather, it "return[ed] to the standard announced in *Register Guard*." *Caesars Entertainment*, 368 NLRB No. 143, at *1 (2019) (citing *Register Guard*, 351 NLRB 1110 (2007)).

Under the *Caesars/Register Guard* standard, employees generally "have no statutory right to use employer equipment, including IT resources, for Section 7 purposes." *Caesars Entertainment*, 368 NLRB No. 143, at *1 (2019). There is an extremely "rare" exception. *Id.*

Some level of Section 7 use may be permitted in the unlikely event that “an employer’s email system furnishes the only reasonable means for employees to communicate with each other.” *Id.*

Following its reinstatement of *Register Guard*, the Board has confronted the issue of what to do with cases before it in which an ALJ applied the now-defunct *Purple Communications* standard. In particular, the Board’s recent decision in *T-Mobile USA, Inc.*, 369 NLRB No. 90 (2020) suggests a framework for assessing whether remand is appropriate in such in cases. Under that framework, the Board would first assess whether the Charging Party or General Counsel has stated an intent to argue for applicability of the “rare” *Caesars* exception. *T-Mobile USA, Inc.* 368 NLRB. No. 90, *slip op.* at 1 (“no party contends that the Respondent’s email system furnishes the only reasonable means for the employees to communicate with one another”). Second, if so, the Board would assess whether the party stating such an intent has any material evidence to support potential application of the exception, and some plausible basis to suggest that remand would not be a waste of time. *Id.* (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”).

Applying that sensible framework here, the Board should decline remand. As an initial matter, there is no question that Sections 1.6. and 3.4.1 fit comfortably within the *Register Guard/Caesars* general rule. In a separate case involving these same rules, an Administrative Law Judge long ago determined that Sections 1.6 and 3.4.1 were lawful under *Register Guard*. 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”). That decision was undoubtedly correct - 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. There is no need for a second ALJ to replicate Judge Cates' analysis from this separate case.¹

As of this writing, neither Parrish nor the General Counsel has given any indication that either intends to argue that the narrow exception to the *Caesars* standard applies. In any event, there is no plausible argument here that, absent access to Verizon Wireless' email system, Company employees would "otherwise be deprived of any reasonable means of communicating" with other Company employees. *See Caesars Entertainment*, 368 NLRB No. 143, *slip op.* at 8-9. The connected employees of Verizon Wireless – a technology and telecommunications company – have any number of methods to communicate with each other and need not be given access to the Company's email system for Section 7 purposes.² *Id.* at 8 ("in modern workplaces employees also have access to smartphones, personal email accounts, and social media, which provide additional avenues of communication, including for Section 7-related purposes.").

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.

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 the Company unlawfully applied its rules. Moreover, it is well settled that a charging party 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).

² The Board also asked "whether remand would be appropriate ... in light of *Boeing*." It would not, because these rules fall squarely within the *Register Guard/Caesars* framework. This conclusion is bolstered by the fact that when the Board analyzed these rules in 2017, it did so under the then-applicable *Purple Communications* standard (overruled by *Caesars Entertainment*) rather than the then-applicable *Lutheran Heritage* standard (overruled by *Boeing*). Remanding these matters for further consideration under *Boeing* is unnecessary and would serve only to interject further delay into this long-pending matter.

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Respectfully submitted,

/s/ E. Michael Rossman

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CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of June, 2020, I electronically filed the foregoing document with the National Labor Relations Board. In addition, a copy of the document was sent via email and to the following:

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