

**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

**RESPONDENTS' MOTION FOR REPLY AND REPLY INSTANTER IN SUPPORT OF
THEIR RESPONSE TO THE BOARD'S NOTICE TO SHOW CAUSE**

Respondents respectfully request that the Board permit them a brief reply to the General Counsel's and Union's respective responses to the Board's Notice to Show Cause, and in support of the Respondents' position that the Board should retain jurisdiction over the allegations in this case pertaining to Sections 1.6 or 3.4.1. The reply will assist the full and fair consideration of this matter.

Neither the Counsel for the General Counsel nor the Union have demonstrated that remand of the Section 1.6 and 3.4.1 allegations is necessary or warranted. For instance, Counsel for the General Counsel contends that the Board should remand these allegations because the parties "have not had an opportunity to address the applicability of the *Caesars Entertainment*

exception.” General Counsel’s Response to Notice to Show Cause, at 2. As Respondents showed in their May 29, 2020 Response, however, that is simply not so. Although *Caesars Entertainment* is of course a new case, it served to reinstitute “the standard announced in *Register Guard*” as the controlling standard for Sections 1.6 and 3.4.1. *Caesars Entertainment Corp.*, 368 NLRB No. 143, at *1 (2019). That same *Register Guard* standard was controlling in July 2014, when Administrative Law Judge Cates issued his decision below. 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”). At that time, Counsel for the General Counsel and Counsel for the Union had the opportunity to present the judge with whatever arguments they wanted with respect to *Register Guard*. Yet they did not argue then that Respondents’ email system was the only means that employees had to communicate with one another (something that is obviously not so in any event). And, having failed to do so then, Counsel for the General Counsel and Counsel for the Union waived the ability to do so now.¹

The Union’s request for remand fares no better. While it identifies a bunch of arguments it hopes to raise on remand, the Union never: (a) states an intent to argue that Sections 1.6 and 3.4.1 are subject to the “rare” exception to the *Register Guard* rule, and (b) makes a substantial proffer suggesting that such an argument would not be a futility. To the contrary, the Union’s

¹ Even if Counsel for the General Counsel (and the Union) had not waived the argument, remand would remain inappropriate here because the General Counsel has made no substantial proffer demonstrating that application of the *Register Guard*/*Caesars* exception is even a remote possibility in this case. See, e.g. *T-Mobile USA, Inc.*, 369 NLRB No. 90, 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”).

Further, the General Counsel’s position on remand here is impossible to square with the General Counsel’s position in *T-Mobile*, where he opposed remand in a case involving similar claims. *T-Mobile*, 369 NLRB No. 90, at *1 (“The General Counsel ... opposes remand because it does not intend to submit additional evidence or argument regarding the *Caesars Entertainment* exception.”).

various contentions demonstrate only that remand of the allegations pertaining to these provisions would be a waste of the Agency's and the parties' resources.

Specifically, the Union first states that, if this case is remanded, it will seek "the recusal of all Board members." Response to Notice to Show Cause at p. 1 The Union identifies no possible basis for recusal of Chairman Ring and Member Kaplan, as there is none. With respect to Member Emanuel, the Union states that "his firm continues to represent Purple Communications and related litigation." *Id.* at p. 1-2. That, even if true, is an irrelevancy. Purple Communications is not a party to this case. And Littler Mendelson – the law firm of which Member Emanuel was partner between 2004 and 2017 – is not a party and does not represent any party to this litigation. *See Caesars*, 368 NLRB No. 143, at *3 n. 11.

Next, the Union states that it will raise various arguments under "the *Boeing* standard." Response to Notice to Show Cause at p. 2. In their relevant parts, however, Sections 1.6 and 3.4.1 address employee use of Cellco's email system. As such, and as Respondents demonstrated in their response, questions regarding them are controlled by the *Register Guard/Caesars* standards. *See Caesars Entertainment Corp.*, 368 NLRB No. 143, at *1 ("return[ing] to the standard announced in *Register Guard*," under which employees have "no statutory right to use employer equipment, including IT resources"). In *Boeing*, by contrast, the Board established standards for assessing claims that facially neutral work rules interfere with protected rights. *See Boeing Co.*, 365 NLRB No. 154, at *3 (2017). In matters (such as access to employer IT systems) where employees do not have protected rights in the first instance, then, *Boeing* is inapplicable.

Furthermore, the specific *Boeing* arguments that the Union hopes to raise are particularly groundless in light of *Register Guard* and *Caesars*. For example, the Union contends that there

is “no business justification” for Sections 1.6 and 3.4.1 Response to Notice to Show Cause at 2; *see also id.* (“If the rule were to prohibit solicitation to support trump and his cronies, that would have a legitimate business justification. But the rule isn’t that narrow.”). But in *Register Guard* and *Caesars*, the Board recognized the multiple sound business reasons that employers limit non-business use of their IT systems. *See Caesars*, 368 NLRB No. 143, at *3, n.32 (noting that such limitations protect productivity and the integrity of IT system”); *Register Guard*, 351 NLRB at 1114 (noting employers’ “legitimate business interest in maintaining the efficient operation of its e-mail system” and “valid concerns about such issues as preserving server space, protecting against computer viruses and dissemination of confidential information, and avoiding company liability for employees’ inappropriate e-mails”).

Similarly, the Union contends that Sections 1.6 and 3.4.1 are unlawful because Respondents permit employees to use its email system “for very important business purposes.” Response to Notice to Show Cause at 2 (noting that employees use email to “distribute business-related material” and “information about products and services all the time”). But so what? Respondents maintain its IT systems to facilitate its business, and *Register Guard* and *Caesars* foreclose any claim that employees have a presumptive Section 7 right to use IT systems for non-business uses. *Caesars*, 368 NLRB No. 143, at *1.²

² To the extent that the Union intends to rehash its claims that this case should have been tried on a discrimination theory, it will again fail. The General Counsel’s Complaint alleges only maintenance claims, not as-applied claims, and the Union has no right to expand the General Counsel’s theory by adding discrimination claims not alleged in the complaint. *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).

CONCLUSION

For the reasons stated here and in Respondents' May 29, 2020 Response, 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: June 4, 2020

Respectfully submitted,

/s/ E. Michael Rossman

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CERTIFICATE OF SERVICE

I hereby certify that, on this 4th 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 to the following:

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