

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

COMMUNICATIONS WORKERS)	
OF AMERICA, AFL-CIO,)	
)	
Petitioner,)	
)	Case No. <u>20-1186</u>
v.)	
)	
NATIONAL LABOR RELATIONS BOARD,)	
)	
Respondent.)	

**PETITION FOR REVIEW OF DECISION AND ORDER
OF THE NATIONAL LABOR RELATIONS BOARD**

Under 29 U.S.C. §160(f) and Federal Rule of Appellate Procedure 15, Petitioner Communications Workers of America, AFL-CIO, petitions the United States Court of Appeals for the District of Columbia Circuit for review of the Supplemental Decision and Order of Respondent National Labor Relations Board in the matter of *T-Mobile USA, Inc., and Communications Workers of America, AFL-CIO*, Case Nos. 14-CA-155249, 14-CA-158446, 14-CA-166164, and 14-CA-162644, issued on May 27, 2020, and reported at 369 NLRB No. 90. A copy of the Supplemental Decision and Order of the National Labor Relations Board is attached to this Petition as Exhibit A.

This case is related to another case currently pending before this Court: *Communications Workers of America, AFL-CIO v. National Labor Relations*

Board and T-Mobile USA, Inc., Case No. 20-1112 (D.C. Circuit) (oral argument not yet scheduled). The National Labor Relations Board's Supplemental Decision and Order that is the subject of this petition for review resolves issues that the Board previously severed from the Decision and Order that is the subject of pending Case No. 20-1112. Petitioner plans to move to consolidate this case with Case No. 20-1112 as soon as this case is docketed by the Court.

Respectfully Submitted,

Dated: June 3, 2020

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DISCLOSURE STATEMENT OF PETITIONER
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

Under Federal Rule of Appellate Procedure 26.1, and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the District of Columbia, the undersigned counsel certifies the following:

1. Communications Workers of America, AFL-CIO (CWA) is an unincorporated association that operates as a nonprofit, international labor union headquartered in Washington, DC.
2. CWA is affiliated with the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), also an unincorporated association.
3. CWA's members include workers in the telecommunications, airline, media, electronic, public sector, and other industries.
4. No parent company or publicly-held company owns an interest in CWA.

Respectfully submitted,

Dated: June 3, 2020

/s/Glenda L. Pittman

Glenda L. Pittman

CERTIFICATE OF SERVICE

This is to certify that service of the foregoing Petition for Review of Decision and Order of the National Labor Relations Board has been made on all interested parties in this action by deposit with the United States Postal Service in envelopes with the proper first class mail postage affixed to each, and by email where indicated below, on this 3rd day of June, 2020, as follows:

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EXHIBIT A

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

T-Mobile USA, Inc. and Communications Workers of America, AFL–CIO. Cases 14–CA–155249, 14–CA–158446, 14–CA–162644, and 14–CA–166164

May 27, 2020

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

On April 2, 2020, the National Labor Relations Board issued a Decision and Order in this proceeding, reported at 369 NLRB No. 50, that, among other things, severed and retained complaint allegations affected by the Board’s decision in *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, 368 NLRB No. 143, slip op. at 8–9 (2019). Specifically, the severed allegations pertain to whether the Respondent, in response to employee Chelsea Befort attempting to use her work email to send a message to her 595 coworkers encouraging them to join the Communications Workers of America (the Union), unlawfully announced new workplace rules and told Befort that employees could not send certain emails to other employees’ work email addresses. The lawfulness of the Respondent’s conduct is dependent on whether Befort had a Section 7 right under *Caesars Entertainment* to use her work email to send her message to her coworkers about joining the Union.

In *Caesars Entertainment*, the Board overruled *Purple Communications, Inc.*, 361 NLRB 1050 (2014), and announced a new standard that applies retroactively to all pending cases. *Id.* The *Caesars Entertainment* standard states, in relevant part, that “an employer does not violate the Act by restricting the nonbusiness use of its IT resources *absent proof that employees would otherwise be deprived of any reasonable means of communicating with each other, or proof of discrimination.*” *Id.*, slip op. at 8 (emphasis added). Under this limited exception, employees are permitted to access their employer’s IT resources for nonbusiness use, even absent discrimination, where the employees would otherwise be deprived of any reasonable means of communication with each other. Because the parties did not previously have an opportunity to address whether this exception to the rule of *Caesars*

¹ The judge also found that the new workplace rules announced by the Respondent were overbroad in violation of Sec. 8(a)(1). We disagree and reverse the judge. The Respondent promulgated its rules in an email to employees that began by directly addressing Befort’s improper use of the Respondent’s email system. Because the Respondent sent its email in response to Befort’s violation of several of its policies, all of the employees reasonably knew that the Respondent promulgated its rules—the

Entertainment applies to the facts of this case, the Board issued a notice to show cause why the severed allegations should not be remanded to the judge for further proceedings in light of *Caesars Entertainment*, including, if necessary, the filing of statements, reopening the record, and issuance of a supplemental decision.

On April 6, 2020, the Union responded to the notice to show cause by stating that it opposes remand of the severed allegations because it does not intend to offer additional evidence or argument concerning the *Caesars Entertainment* exception and that there is, therefore, no reason to remand. On April 7, 2020, the General Counsel also responded that, consistent with the Union, it opposes remand because it does not intend to submit additional evidence or argument regarding the *Caesars Entertainment* exception. On April 15, 2020, the Respondent responded that remand is unnecessary because the record contains detailed information establishing that its employees already have adequate and effective means of communicating with each other without the use of the Respondent’s email system, including oral solicitation during nonworking time, distribution of union literature in nonwork areas during nonworking time, and access to smartphones, social media, and personal email accounts.

Because there is no indication in the record that the Respondent’s employees do not have access to other reasonable means of communication, and no party contends that the Respondent’s email system furnishes the only reasonable means for the employees to communicate with one another, we find that Befort did not have a Section 7 right to use her work email to send her message to her coworkers. See *id.*, slip op. at 12; see also *Argos USA, LLC d/b/a Argos Ready Mix, LLC*, 369 NLRB No. 26, slip op. at 3 (2020). The Respondent was entitled to exercise its property rights to restrict Befort’s use of its email system for that purpose. Moreover, the Respondent was also entitled to announce its new workplace rules and tell Befort that employees could not send certain emails to other employees’ work email addresses because the rules and statement to Befort were promulgated in response to Befort’s impermissible use of its email system in light of the Respondent’s lawful restriction, and not because she had engaged in any protected activity. Accordingly, we find that the Respondent did not violate Section 8(a)(1) of the Act by the conduct alleged in the severed allegations.¹

language of which prohibited the very type of impermissible conduct Befort engaged in—because of Befort’s improper use of its email system and to prevent similar infractions in the future. For that reason, when employees reasonably interpret the rules at issue here, they would understand that they do not prohibit or interfere with the exercise of NLRA rights, but only restrict the type of impermissible use of the Respondent’s

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DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

ORDER

The severed and retained complaint paragraphs 6, 7(a),
and 7(c) are dismissed.

Dated, Washington, D.C. May 27, 2020

Marvin E. Kaplan, Member

William J. Emanuel, Member

John F. Ring, Chairman

(SEAL) NATIONAL LABOR RELATIONS BOARD

email system engaged in by Befort. See *Boeing Co.*, 365 NLRB No. 154,
slip op. at 3 (2017).