

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

Verizon Pennsylvania Inc.
Verizon Services Corp.
Verizon Corporate Services Corp.

Respondents

and

Communications Workers of America,
District 2-13, AFL-CIO, CLC

Charging Party

Case No. 04-CA-156043

Verizon Wireless

Respondent

and

Communications Workers of America,
AFL-CIO

Charging Party

Case No. 02-CA-157403

Verizon New York, Inc.
Empire City Subway Company (Limited)
Verizon Avenue Corp.
Verizon Advanced Data Inc.
Verizon Corporate Services Group
Verizon New England Inc.
Verizon Services Corp.
Verizon New Jersey Inc.

Respondents

and

Communications Workers of America
("CWA")

Charging Party

Case No. 02-CA-156761

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.
Verizon Delaware Inc.

Case No. 05-CA-156053

Respondents

and

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.
MCI International, Inc.

Case No. 31-CA-161472

Respondents

and

Communications Workers of America,
AFL-CIO, District 9

Charging Party

VERIZON WIRELESS' AND VERIZON WIRELINE ENTITIES'
RESPONSE TO NOTICE TO SHOW CAUSE

The National Labor Relations Board should not remand Charging Parties' challenge to Sections 1.6 and 3.4.1 of Verizon Wireless' and the Verizon Wireline Entities' Codes of Conduct. Facially, these Code provisions are lawful under the general rule set out in *Register Guard*, 351 NLRB 1110 (2007) and *Caesars Entertainment*, 368 NLRB No. 142 (2019). To date, Charging

Parties have not indicated that they intend to argue for application of the “rare” exception to the *Caesars/Register Guard* rule, let alone that they possess evidence that could even arguably support application of that exception. But what Charging Parties have stated publicly is that they would like to delay this case indefinitely, in hopes that a future Board might change the law in a direction more to their liking.

In short, remand of the Section 1.6 and 3.4.1 allegations would be a waste of time, and in all events the Board should not countenance Charging Parties’ gamesmanship. The Agency should retain jurisdiction over the claims pertaining to Code Sections 1.6 and 3.4.1 and dismiss them.

I. BACKGROUND

Five years ago, the Communications Workers America filed the charges that underlie the above-captioned matter. The Union alleged that Sections 1.6¹ and 3.4.1² of the Verizon Wireless’

¹ In its relevant part, Section 1.6 addresses use of company email and other resources to solicit or fundraise. It states:

Solicitation and fundraising distract from work time productivity, may be perceived as coercive and may be unlawful. Solicitation during work time (defined as the work time of either the employee making or receiving the solicitation), the distribution of non-business literature in work areas at any time or **the use of company resources at any time (emails, fax machines, computers, telephones, etc.) is prohibited.**

(emphasis added).

² Section 3.4.1 limits use of company computer systems. It provides:

You may never use company systems (such as e-mail, instant messaging, the Intranet or Internet) to engage in activities that are unlawful, violate company policies or result in Verizon Wireless’ liability or embarrassment. Some examples of inappropriate uses of the Internet and e-mail include:

- Pornographic, obscene, offensive, harassing or discriminatory content;
- Chain letters, pyramid schemes or unauthorized mass distributions;
- Communications on behalf of commercial ventures;
- Communications primarily directed to a group of employees inside the company on behalf of an outside organization;
- Gambling, auction-related materials or games;
- Large personal files containing graphic or audio material;

and the Verizon Wireline Entities' Codes of Conduct were inconsistent with standards articulated in *Purple Communications*, 361 NLRB 1050 (2014), and that a number of other sections were facially unlawful because they adversely impacted Section 7 rights. On October 31, 2016 the General Counsel issued Complaints, and he consolidated them on November 4, 2016.

Administrative Law Judge Donna Dawson issued a decision on May 25, 2017, and the parties filed exceptions.

On March 22, 2019, following the Board's decision in *Boeing*, 365 NLRB No. 154 (2017) that overturned *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Agency remanded a number of complaint allegations to Judge Dawson, but it kept the allegations related to Sections 1.6 and 3.4.1 along with separate allegations related to Code Section 1.8.1.³ The General Counsel moved to withdraw the remanded complaint allegations, concluding that rules back before Judge Dawson were lawful under *Boeing*. Judge Dawson granted the General Counsel's request on September 27, 2019, and the Charging Parties sought Board review of that decision.

(continued...)

- Violation of others' intellectual property rights; and
- Malicious software or instructions for compromising the company's security.

Also, you may not send e-mail containing non-public company information to any personal e-mail or messaging service unless authorized to do so by your supervisor and you comply with company requirements relating to the encryption of information.

³ Section 1.8.1 relates to Company investigations and searches necessary to ensure employee safety and protect assets. It provides:

In order to protect company assets, provide excellent service, ensure a safe workplace, and to investigate improper use or access, Verizon monitors employees' use of Verizon's communications devices, computer systems and networks (including the use of the Internet and corporate and personal web-based email accessed from Verizon devices or systems), as permitted by law. In addition, and as permitted by law, Verizon reserves the right to inspect, monitor and record the use of all company property, company provided communications devices, vehicles, systems and facilities – with or without notice – and to search or monitor at any time any and all company property and any other personal property (including vehicles) on company premises.

On June 24, 2020, the Board denied the Charging Parties' request for review of Judge Dawson's decision approving withdrawal of the *Boeing*-impacted allegations in this case. *See Verizon Wireless*, 369 NLRB No. 108 (2020). Separately, the Board held that one of the rules that it had retained – Section 1.8.1 – was a lawful, Category 1(b) rule under *Boeing*. *See id.* at *3-5. In so, holding the Board noted that there was no need to remand the allegation pertaining to Section 1.8.1, since doing so “would only further delay this long-pending issue.” *Id.* at 4 n.19.

As to the remaining allegations (those pertaining to Section 1.6 and 3.4.1) the Board asked the parties to submit their position as to why they “should not be remanded to the administrative law judge for further proceedings consistent with the Board's decision in *Caesars Entertainment*” and “whether remand to the judge would be appropriate for further proceedings in light of *Boeing*.” *Verizon Wireless*, 369 NLRB No. 108, at *5.

A number of legal publications issued articles covering the Board's June 24, 2020 decision. One reported that counsel for the Charging Party “would likely file a motion to reconsider **in order to delay the case.**” *See* Julia Arciga, *NLRB OKs Searching Workers' Cars, Company Devices* (June 26, 2020), Law360, <https://www.law360.com/articles/1286759/nlr-oks-searching-workers-cars-company-devices> (emphasis added) (attached as Exhibit A). The article further reported that Charging Party's counsel “hoped a new board that would come in with a new administration would reverse the decision and other determinations made under the *Boeing* test.” *Id.*

II. REMAND IS UNWARRANTED

The Board should not remand the allegations pertaining to Sections 1.6 and 3.4.1 for further proceedings under either *Caesars Entertainment* or *Boeing*, because doing so would serve no useful purpose. This is so for several reasons.

First, these Code of Conduct provisions are plainly subject to the general rule announced in *Caesars Entertainment* (and *Register Guard* before it). Sections 1.6 and 3.4.1 set limits on employees’ non-business use of their employer’s email system. While the Union contends that these rules unlawfully limit Section 7 rights, *Caesars Entertainment* and *Register Guard* provide that employees have “no statutory right to use employer equipment, including IT resources, for Section 7 purposes.” *Caesars Entertainment*, 368 NLRB No. 143, at *1 (noting its “return to the standard announced in *Register Guard*”). There is no need to remand for a determination that Sections 1.6 and 3.4.1 are presumptively lawful.⁴

Second, while the *Caesars Entertainment/Register Guard* rule is subject to a “rare” exception,⁵ a hypothetical possibility that this exception might apply in a given case is insufficient to support remand. In *T-Mobile USA, Inc.*, 369 NLRB No 90 (2020), for example, the Board refused to remand allegations related to an employer’s email rule in the absence of some suggestion that a party would *credibly* argue for application of the rare *Caesars Entertainment* exception. Thus, in denying remand, the Board first noted that “no party contends that the Respondent’s email system furnishes the only reasonable means for employees to communicate with one another.” *Id.* at *1. Further, the Board noted that there was no record evidence that could support application of the exception in any event. *See 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”).

⁴ Moreover, in a separate CWA-filed case involving Sections 1.6 and 3.4.1, 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 (holding that “pursuant to *Register Guard* [Section 1.6] does not violate the Act”); *id.* at 13 (holding that Section 3.4.1 “falls squarely under the *Register Guard* precedent”).

⁵ *Cf. Caesars Entertainment*, 368 NLRB No. 143, slip op. at 8-9 (suggesting that an exception to the general *Caesars/Register Guard* rule might apply where limiting access to the employer email system would “deprive[]” employees of “any reasonable means of communication”).

Here, likewise, neither the Charging Parties nor the General Counsel have given any indication that they intend to argue that the narrow exception to the *Caesars* standard applies. Further, they have not and cannot point to any evidence that, absent access to Verizon Wireless' or the Verizon Wireline Entities' email systems, employees would be "deprived of any reasonable means of communication" with other Verizon Wireless or Verizon Wireline employees. *Caesars Entertainment*, 368 NLRB No. 143, *slip op.* at 8-9 ("in modern workplaces employees also have access to smartphones, personal email accounts, and social media, which provide additional avenues of communications, including for Section 7-related purposes").

Third, there is no need to remand for further proceedings under *Boeing*. As noted, Sections 1.6 and 3.4.1 are properly analyzed under the *Register Guard/Caesars* framework.

Fourth, remand would only promote further gamesmanship from Charging Parties. Their counsel has confirmed that the Union's strategy is now "delay," in hopes that the 2020 election will (someday) bring about a change in Board composition and (even further down the line) changes in the underlying law. *See* Exhibit A. The Board should not countenance Charging Party's tactics, and it should not countenance "further delay resolving this long-pending matter." *Verizon Wireless*, 369 NLRB No. 108, at *4 n.19.

III. CONCLUSION

The Board should not remand complaint allegations regarding Section 1.6 and 3.4.1 to an Administrative Law Judge. It should retain these allegations and dismiss them.

Dated: July 8, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 8th day of July, 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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EXHIBIT A



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NLRB OKs Searching Workers' Cars, Company Devices

By **Julia Arciga**

Law360 (June 25, 2020, 7:22 PM EDT) -- Employers don't violate the law when they monitor or search company-issued devices or networks and employees' cars on company premises, the National Labor Relations Board said Wednesday in a decision applying its revamped policy on workplace rules.

The NLRB found that policies stating that employers could monitor employee use of company devices and reserve the right to search personal property — like cars — on company premises did not violate the National Labor Relations Act. The board made its finding while reviewing Administrative Law Judge Donna N. Dawson's 2017 decisions that found 10 out of 11 disputed work rules maintained by Verizon Wireless and various Verizon entities to be unlawful.

The board's new decision comes in the wake of its 2019 decision to **apply a revamped test** for reviewing workplace rules.

The board said it rejected Judge Dawson's "unsupported speculation" that fear of searches could discourage employees from exercising their right to self-organization.

It dismissed the idea that Verizon's policies could open up the possibility of "employer eavesdropping" in labor organization-related discussions.

The NLRB also said the possibility of a search through an employee's car or property was not enough to make the action illegal.

"Moreover, the rule on its face merely 'reserves the right' to search employees' personal property or vehicles; nothing in its text suggests that such searches will take place, let alone that they will occur routinely or frequently," the decision read. "We do not believe that the remote prospect that a search might someday occur would have any material impact on the exercise of [self-organization] rights."

In addition, the board said an employer may lawfully create a policy to monitor employee-issued computers and devices for "legitimate management reasons."

The revamped test for reviewing workplace rules, otherwise known as the Boeing test, replaced a 2004 test that said seemingly neutral workplaces rules were illegal if workers would "reasonably construe" them to limit their rights outlined in the NLRA.

The Boeing test directs administrative judges to look at whether a reasonable employee would interpret a rule as restricting their rights. If the rule was found to infringe on NLRA protections, then the judge must decide whether the rule's effects on workers' rights outweighed the employer's reasons for maintaining the rule. If the rule's effects do not outweigh the employer's reasons, the rule is allowed to stand.

David A. Rosenfeld of Weinberg Roger & Rosenfeld, counsel for the charging parties, told Law360 that if Verizon's searches would be unlawful if the company were to conduct searches with the knowledge that employees had materials related to organizing activity. He also said they would likely file a motion to reconsider in order to delay the case.

In addition, Rosenfeld said he hoped a new board that would come in with a new administration would reverse the decision and other determinations made under the Boeing test.

"The new board will flip it back to make it stronger for workers... in the meantime, workers will suffer," he said.

Counsel for Verizon did not immediately respond to requests for comment Thursday.

Verizon and Verizon entities are represented by E. Michael Rossman and Elizabeth L. Dicus of Jones Day.

The charging parties are represented by David A. Rosenfeld of Weinberg Roger & Rosenfeld, Amy Young of the Communications Workers of America, and Laurence Goodman Willig of Williams & Davidson.

The case is Verizon New York, Inc., Empire City Subway Company (Limited), Verizon Avenue Corp., Verizon Advanced, case number 02-CA-156761.

--Additional reporting by Braden Campbell. Editing by Kelly Duncan.

Update: This article has been updated with comment from the charging parties' counsel.

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