

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

CELLCO PARTNERSHIP d/b/a
VERIZON WIRELESS

and

COMMUNICATIONS WORKERS OF
AMERICA DISTRICT 9, AFL-CIO;
COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO

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

AIRTOUCH CELLULAR

and

COMMUNICATIONS WORKERS OF
AMERICA DISTRICT 9, AFL-CIO;
COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO

Case No. 21-CA-115223

**VERIZON WIRELESS' AND AIRTOUCH CELLULAR'S
REPLY IN SUPPORT OF THE GENERAL COUNSEL'S MOTION
TO WITHDRAW CERTAIN ALLEGATIONS FROM COMPLAINT
AND FOR REMAND TO THE REGIONAL DIRECTOR**

Following *Boeing*, 365 NLRB No. 154 (2017), the General Counsel has concluded that the Code of Conduct provisions at issue in this case do not violate the National Labor Relations Act. Each is a lawful Category 1 work rule under *Boeing*, and for that reason continued litigation regarding the rules would serve no useful purpose. Therefore, with the Motion¹ now before Your Honor, the General Counsel rightly seeks to end the above-captioned matter.

The Charging Party, however, would prefer this dispute to continue. It wants Your Honor to order a “a full hearing,” at which the Union would have “an opportunity to present

¹ Counsel for the General Counsel’s Motion to Withdraw Certain Allegations from Complaint and For Remand to the Regional Director will be referred to as the “Motion.”

evidence.” Despite this request, the Charging Party has identified no cogent reason – let alone a compelling one – that the General Counsel should be forced to expend resources litigating a case that the Agency has concluded has no merit. Your Honor should grant the General Counsel’s Motion and dismiss Consolidated Complaint paragraphs 5(b), 6(a), 6(b), 6(d) and 6(e).

I. BACKGROUND

In March 2012, the Charging Party filed an unfair labor practice charge against Verizon Wireless, asserting facial challenges to certain provisions of its Code of Conduct. On June 28, 2013, Region 21 issued a Complaint, asserting that Verizon Wireless “maintained” certain rules that chilled Section 7 rights. Later in 2013, the Union filed a charge against AirTouch, contending that this Company’s Code of Conduct contained the same allegedly unlawful rules as the Verizon Wireless Code of Conduct. On January 31, 2014, the Region issued an Amended Consolidated Complaint against Verizon Wireless and AirTouch, alleging that both “maintained” certain rules that chilled Section 7 rights.

The matter was tried to ALJ William Nelson Cates on the basis of a stipulated record, and he issued his decision on July 25, 2014. Pertinent to the instant Motion, ALJ Cates applied the then-applicable *Lutheran Heritage* framework, concluding that Code of Conduct Sections 1.8.2, 3.2.1, and 4.6 were lawful, but that Sections 1.8 and 3.7 were unlawful.

All parties filed Exceptions or Cross-Exceptions. On December 11, 2017, while those Exceptions and Cross-Exceptions were pending, the Board issued *Boeing*, 365 NLRB No. 154 (2017), overruling the *Lutheran Heritage* framework and instituting a new standard for evaluating facial challenges to employer work rules. On March 26, 2019, the Board issued a Notice to Show Cause as to why the allegations related to Sections 1.8, 1.8.2, 3.2.1, 3.7, and 4.6 should not be remanded for further consideration under the now-controlling *Boeing* standard. On April 9, 2019 the General Counsel responded by requesting that the allegations be remanded to

the Region for dismissal because “the Region has concluded that these rules, viewed in context, are not unlawful under *Boeing*.” General Counsel’s Response to Notice to Show Cause, at 2. On May 15, 2020 the Board issued its remand order.

Following two status conferences, the General Counsel filed the instant Motion with Your Honor, seeking to withdraw the Consolidated Complaint allegations related to Sections 1.8, 1.8.2, 3.2.1, 3.7, and 4.6. In doing so, the General Counsel again noted that “the [at issue] portions of the Code are not unlawful under current precedent and thus do not violate Section 8(a)(1) of the Act.” Motion, at 3-4.

II. ARGUMENT

Congress assigned the General Counsel “authority . . . in respect of the prosecution of . . . complaints before the Board,” 29 U.S.C. § 153(d), and the General Counsel’s discretion is particularly broad when he seeks to end prosecution of a matter. At least up to the point that evidence on the merits has been introduced in a case, the General Counsel has the unlimited right to withdraw a complaint. *See, e.g., Boilermakers Union Local 6 v. NLRB*, 872 F.2d 331, 334 (9th Cir. 1988). Even thereafter, the General Counsel’s interests as prosecutor necessarily outweigh any contrary wishes of the charging party. *See id.* (concluding an ALJ continuation of a case where the General Counsel seeks dismissal would either “severely compromise the prosecutorial independence of the General Counsel or in effect convert the proceeding into a two-party private litigation,” results that would be “inconsistent with Congress’s clear intent”).

Against this backdrop, Your Honor should grant the instant Motion because the General Counsel has correctly concluded that Sections 1.8, 1.8.2, 3.2.1, 3.7, and 4.6 are lawful under the controlling *Boeing* standard. Start with 1.8.2, 3.2.1, and 4.6; in 2014, ALJ Cates concluded that these rules were lawful under the then-applicable – and more narrow – *Lutheran Heritage* test. They are plainly lawful under *Boeing*, and, unsurprisingly, the Board recently upheld the

withdrawal of allegations regarding Section 1.8.2, 3.2.1, and 4.6 in a related case. *See Verizon Wireless*, 369 NLRB No. 108, *slip op.* at 3 (2020) (concluding that the ALJ “did not act arbitrarily or capriciously or otherwise abuse her discretion by granting the motion to withdraw the complaint allegations related to ... Sections 1.8.2, 3.2.1, and 4.6”).

Sections 1.8 and 3.7 are equally lawful under *Boeing*. In that case, the Board identified three broad categories for employer work rules. Category 1 rules are the most plainly lawful, and that category includes those that either do not prohibit or interfere with the exercise of Section 7 rights or whose potential adverse impact on employees’ rights is outweighed by the justifications associated with the ruler. *See Boeing*, 365 NLRB No. 154, at *3. Both Section 1.8 and Section 3.7 fall into this category.

Section 1.8 – which Verizon Wireless and Airtouch Wireless actually replaced more than six years ago – requires employees to protect “personal information” contained in company files, such as social security numbers and information that the companies collect when providing employee benefits. Employers have an “obvious need” to maintain the confidentiality of such information. Memorandum GC 18-04, at 11. Further, the Act does not entitle employees to “access[] or disclos[e] confidential employee records or documents.” *Id.* at 10; *see also Macy’s, Inc.*, 365 NLRB No. 116, at *3 (2017) (finding lawful rules that restrict the use or disclosure of employee information “obtained from the Respondent’s own confidential records”). Section 1.8 does not interfere with protected rights, and thus the balance under *Boeing* is wholly one sided.

Section 3.7 is entitled “Handling External Communications.” It is expressly aimed at ensuring that persons who speak on behalf of the Companies are authorized to do so, and that persons presenting personal views do not create the misimpression that they are speaking on behalf of the Companies. This is a wholly legitimate aim. *See Office Of General Counsel*

Memorandum OM 12-59, at p. 17 (May 30, 2012) (noting that employers have “a legitimate need ... to protect itself from unauthorized postings” and finding lawful a rule that “prohibit[s] comments that are represented to be made by or on behalf of the employer”). By contrast, employees have no Section 7 right to imply that their personal messages are attributable to their employer. Thus, once again, the rule does not interfere with protected rights, and the *Boeing* balance wholly favors the Companies.

For its part, the Charging Party raises two contrary arguments as to why the litigation over Sections 1.8, 1.8.2, 3.2.1, 3.7, and 4.6 should continue in spite of the General Counsel’s desire to end it. First, the Charging Party claims that it is too late for the General Counsel to conclude that the provisions at issue are lawful because the case has been pending since 2012. *See* Charging Party Response at 2. Here, the Charging Party simply ignores both the *Boeing* case and the Board’s subsequent Notice to Show Cause in the above captioned matter. *Boeing* changed the standard applicable to facial challenges to employer work rules, and the Board’s Notice to Show Cause in fact asked the parties to evaluate their positions here in light of *Boeing*. As such, it was wholly appropriate for the General Counsel to reassess its position in this matter following *Boeing*.

Second, the Charging Party argues that it should be permitted to develop a “full record” in support of its argument that the rules at issue lack any business justification and are instead “only in existence to interfere with protected concerted activity.” Charging Party Response at 2. This contention is baseless. As shown above, the rules at issue do not interfere with Section 7 rights in any respect, and therefore there is no need for Your Honor to inquire as to the business justification for each rule. *Boeing*, 365 NLRB No. 154, at *16 (“when a facially neutral rule, reasonably interpreted, would not prohibit or interfere with the exercise of NLRA rights,

maintenance of the rule is lawful without any need to evaluate or balance business justifications, and the Board’s inquiry into maintenance of the rule comes to an end.”). But, even if there were, the business justification for each rule is obvious from the plain language of each², and that justification transparently outweighs any alleged impact on protected rights.

III. CONCLUSION

For the foregoing reasons, under the *Boeing* standards the Code provisions at issue are lawful and the General Counsel’s Motion to Withdraw Certain Allegations from Complaint and For Remand to the Regional Director should be granted.

Dated: September 3, 2020

Respectfully submitted,

/s/ E. Michael Rossman

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*Attorney for Respondents Verizon Wireless
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² See Section 1.8 (“Verizon Wireless acquires and retains personal information about its employees in the normal course of operations, such as for employee identification purposes and provision of employee benefits” and restricting disclosure from the Companies’ records “unless you are acting for legitimate business purposes and in accordance with applicable laws, legal process and company policies, including obtaining any approvals necessary under those polices.”); Section 3.7 (“Unless you receive prior approval, you may never suggest that you are speaking on behalf of Verizon Wireless when presenting your personal views at community, professional or cultural functions or on the Internet.”).

CERTIFICATE OF SERVICE

I hereby certify that, on this 3rd day of September, 2020, I electronically filed the foregoing document with the Division of Judges. In addition, a copy of the document was sent via email to the following:

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