

Nos. 20-1112, 20-1186

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

**COMMUNICATIONS WORKERS
OF AMERICA, AFL-CIO
Petitioner**

v.

**NATIONAL LABOR RELATIONS BOARD
Respondent**

and

**T-MOBILE USA, INC.
Intervenor**

**ON PETITIONS FOR REVIEW OF ORDERS OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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

COMMUNICATIONS WORKERS)	
OF AMERICA, AFL-CIO)	
)	
Petitioner)	Nos. 20-1112, 20-1186
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case Nos.
Respondent)	14-CA-155249 et al.
and)	
)	
T-MOBILE USA, INC.)	
)	
Intervenor)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certifies the following:

A. Parties and Intervenor

Communications Workers of America, AFL-CIO (“the Union”) was the charging party before the Board in the unfair-labor-practice proceedings below and is the Petitioner in this court proceeding. The Board’s General Counsel was a party before the Board in the unfair-labor-practice proceedings. T-Mobile USA, Inc. (“the Employer”) was the respondent before the Board in the unfair-labor-practice proceedings, and is the Intervenor in this court proceeding.

B. Rulings Under Review

This case is before the Court on the Union's petitions for review of a Decision and Order of the Board, issued on April 2, 2020, reported at 369 NLRB No. 50, and a Supplemental Decision and Order, issued on May 27, 2020, reported at 369 NLRB No. 90. The Union challenges the Board's dismissal of several unfair-labor-practice allegations. The Board requests that the Court enter a judgment denying the Union's petitions for review of the Board's Orders.

C. Related Cases

The Orders on review were not previously before this Court or any other court. Board counsel is unaware of any related cases pending in this Court or any other court.

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Dated at Washington, D.C.
this 26th day of August, 2020

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GLOSSARY

Act	National Labor Relations Act, 29 U.S.C. §§ 151, et seq.
Board	National Labor Relations Board
Employer	T-Mobile USA, Inc.
Union	Communications Workers of America, AFL-CIO

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**BRIEF FOR
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STATEMENT OF JURISDICTION

This case is before the Court on the petitions of Communications Workers of America, AFL-CIO (“the Union”) for review of a Board Decision and Order issued on April 2, 2020, reported at 369 NLRB No. 50, and for review of a Supplemental Board Decision and Order issued on May 27, 2020, reported at 369 NLRB No. 90.

The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the National Labor Relations Act, 29 U.S.C. §§ 151 et seq., as amended (“the Act”). 29 U.S.C. § 160(a). The Board’s Orders are final, and this Court has jurisdiction pursuant to Section 10(f) of the Act. 29 U.S.C. § 160(f). The petitions are timely, as the Act provides no time limit for such filings. The respondent below, T-Mobile USA, Inc. (“the Employer”), intervened in support of the Board.

STATEMENT OF THE ISSUES

1. Does substantial evidence support the Board’s finding that the Employer did not violate Section 8(a)(1) of the Act by reprimanding an employee for sending union-related emails to hundreds of coworkers using the Employer’s email system?

2. Does substantial evidence support the Board’s related findings that the Employer did not violate Section 8(a)(1) of the Act by promulgating and maintaining new workplace rules in response to those union-related emails?

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are included in the attached Addendum.

STATEMENT OF THE CASE

I. THE BOARD’S FINDINGS OF FACT

A. The Employer’s Wichita Call Center

The Employer is engaged in the telecommunications business throughout the United States, including from a call center that it operates in Wichita, Kansas.

(D&O 6; Tr. 375-76.)¹ The Employer employs approximately 600 customer service representatives at its Wichita call center. (D&O 6; Tr. 376.) The employees' work consists of taking calls at their workstations and assisting customers or selling services. (D&O 6; Tr. 40, 375-76.) As part of their jobs, the employees routinely use computers at their workstations and are expected to remain at their workstations, wearing tethered headsets, whenever they are not on break. (D&O 6-7; Tr. 268-69.)

B. The Employer's Written Policies

The Employer maintains a six-page "Acceptable Use Policy for Information and Communication Resources," most recently revised in 2014, which governs employees' use of the Employer's resources including company email and other electronic messaging systems. (D&O 7-8; GCX 11.) The Acceptable Use Policy states that the Employer's electronic information and communication resources "are to be used for legitimate business purposes." (D&O 7; GCX 11.) As examples of legitimate business purposes, the policy states that internal email "may be used to discuss work-life balance, traffic and carpool arrangements,

¹ "D&O" refers to the Board's April 2, 2020 Decision and Order; "SD&O" refers to the Board's May 27, 2020 Supplemental Decision and Order; "Tr." refers to the unfair-labor-practice hearing transcript; "JX" refers to the joint exhibits admitted at the hearing, "GCX" to the Board General Counsel's exhibits, and "RX" to the Employer's exhibits. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." refers to Union's opening brief to the Court.

weather conditions, [and] charitable events promoted by T-Mobile.” (D&O 7;

GCX 11.) The policy further states:

Incidental and infrequent personal use of T-Mobile’s communication resources by approved Users is acceptable, but is subject to the requirements of this policy. Personal use must not interfere with any use of these resources for legitimate business purposes.

(D&O 7; GCX 11.) The policy then provides examples of prohibited uses, including the distribution or storage of “junk mail and chain letters,” and “[a]ny use that advocates or solicits for religious causes, political causes, or other non-company related outside organizations where the advocacy, solicitation, or opinion is not related to T-Mobile business.” (D&O 7-8; GCX 11.)

The Employer maintains a separate “Enterprise User Standard,” most recently revised in 2013, which is designed to “ensure appropriate security and protection of T-Mobile information assets.” (D&O 8; GCX 18.) The Enterprise User Standard discusses topics such as anti-malware controls, information backup, passwords, remote access, and computer and mobile-device security. (D&O 8;

GCX 18.) Section 3.4, governing “Access Management,” states:

1. Users must follow the appropriate authorization process for requesting an account granting specified access and permission levels. Most authorization processes start with a Remedy ticket and specific approvals from T-Mobile Management. Contact your manager or the Help Desk for more information.
2. All access that is not explicitly authorized is forbidden.
3. Users are responsible for all acts associated with their UserID.

(D&O 8; GCX 18.)

As part of its employee handbook, as revised in 2014, the Employer also maintains a “No Solicitation or Distribution” policy, which states that “[s]olicitation and distribution activities can, under certain circumstances, be disruptive to work.” (D&O 8-9; GCX 12, p. 28.) The policy contains a list of prohibited activities, including “[s]olicitation of any kind by employees on Company premises during working time (of either the employee engaged in soliciting or the employee being solicited).” (D&O 9; GCX 12, p. 28.)

C. Email Practices at the Wichita Call Center

Customer service representatives at the Wichita facility send and receive messages, some nonwork-related, and use the Employer’s proprietary email system to communicate with each other and with coaches, senior representatives, team managers, and the facility director. (D&O 7; GCX 8, Tr. 45, 270.) Employees have received facility-wide emails regarding various nonwork-related subjects meant to foster employee morale, such as free popcorn and hockey tickets, nacho day in the cafeteria, upcoming salsa and lip-syncing contests, births and deaths in employees’ families, baby showers, and condolence cards. (D&O 3, 7 & n.9; GCX 8, Tr. 177-79, 408, 475-76.) On at least one occasion, a non-supervisory senior representative emailed the entire facility to ask about a lost phone charger, and the administrative assistant to the facility’s director twice emailed all

employees about signing a birthday card for the Employer's chief executive officer. (D&O 3; GCX 8.) Customer service representatives sometimes use the "Reply All" feature to send responses to the entire facility. (D&O 7; Tr. 178.)

D. The Union's Organizing Campaign; Employee Chelsea Befort Sends Union-Related Emails to Her Coworkers; the Employer Reprimands Befort and Announces New Workplace Rules

The Union has been engaged in a long-running campaign to organize the Employer's customer service representatives. (D&O 6; Tr. 31.) On May 29, 2015, while not on working time, customer service representative Chelsea Befort attempted to use her work email to send an email to 595 other customer service representatives at the Wichita call center. (D&O 2; GCX 6, Tr. 49-50.) Befort's message stated:

Subject: Raise Your Voice!

Dear T-Mobile Wichita Employees,

For far too long now, our voices have been silenced. We are told we do not have the right to discuss work conditions in an organized manner. Enough is enough. It is time to make a change! Join the movement!

Feel free to contact me with any questions, but please do so outside of working hours.

Some of us that are currently involved will be meeting at North Rock Lanes tomorrow night. Please join us to meet our team and have some fun!

Sincerely,
Chelsea Befort

T-Mobile CSR 1
Wichita, KS

(D&O 8; GCX 6.) Befort received an automated notice indicating that her email had not been sent because the Employer's email system prevented emails from being sent to more than 100 recipients. (D&O 2; Tr. 50.) The notice advised that she should "try to resend with fewer recipients." (D&O 2; Tr. 50.) Befort proceeded to resend her email to smaller groups of coworkers. (D&O 2; GCX 6, Tr. 50-51.) Over the course of the day, always while on non-working time, Befort sent eight separate emails containing her message to groups of fewer than 100 recipients. (D&O 2; GCX 6, Tr. 50-51.) Several employees forwarded Befort's email to management and, in line with company policy, the Employer's chief of human resources at the Wichita call center generated a report to upper management flagging it as an instance of pro-Union activity. (D&O 6-8; GCX 24.)

On June 2, the director of the Wichita call center, Jeff Elliott, sent an email to the entire facility addressing Befort's emails. (D&O 2; GCX 7.) Elliott's email stated in full:

Subject: Email Use

Team,

It has been reported to us that on Friday an employee sent hundreds of you emails about the union. Many of you told us it was disruptive and unwanted communication. We apologize for any disruption or inconvenience this may have caused. I'd like to take this opportunity to remind you that it is not appropriate for employees to send emails to

large numbers of employees. We don't allow mass communication for any non-business purpose since this disrupts the work place and distracts employees from their work. Also, it is not appropriate to solicit other employees for any purpose when employees are working. We certainly recognize employees' rights to support the union, but we ask that they do so without violating these policies.

Since this email addressed the union issue, I'd like to take this opportunity to respond. It is not the case that anyone's voices have been silenced. And no one is telling employees they don't have a right to discuss work issues—you know employees around here aren't shy about discussing anything. Employees have countless opportunities to communicate with others when they are not working—about the union or anything else. They can talk with others in break areas, before work, or after work. They can talk from home, or text while eating out. They can use social networks—off the job of course. But it is not appropriate to solicit or discuss other issues when you are supposed to be working.

Employees have a right to support the union, and an equal right not to. And employees have a right to discuss the union—as long as they are not working—and a right to refuse to discuss the union. Employees have a right to sign authorization cards, and employees have a right to refuse to sign authorization cards. But before you sign, make sure you understand what it means to sign a card.

And if you have any questions about the union, its claims, or authorization cards, feel free to ask your Coach, your Manager or me. We'd be happy to answer any questions you may have.

Jeff

(D&O 9; GCX 7.)

Also on June 2, Befort was called into a closed-door meeting with her coach, Angel Meeks, and team manager, Lillian Maron. (D&O 9; Tr. 52.) Maron stated, in relevant part, that employees were not allowed to send “mass emails,” and that nothing union related could be sent while on the clock. (D&O 9, 17; Tr. 53.)

When Befort noted that she had not sent her emails while on the clock, Maron stated that nothing “union related” could be sent using the Employer’s email system because it was considered a form of solicitation. (D&O 9, 17; Tr. 53.)

Befort did not receive any further discipline. (D&O 9; Tr. 90.)

E. The Union Files Unfair-Labor-Practice Charges

The Union filed an unfair-labor-practice charge with the Board in July 2015, as amended in September 2015, alleging numerous violations of the Act, including that the Employer unlawfully prohibited employees from using its email system to communicate about the union campaign, and that the Employer unlawfully promulgated and maintained various workplace rules. (D&O 5-6; GCX 1(a), 1(i).) The Union’s amended charge was consolidated with several additional charges filed by the Union, and the Board’s General Counsel issued a third consolidated complaint in February 2016. (D&O 5-6; GCX 1(nn).) An administrative law judge held a two-day evidentiary hearing. (D&O 5.)

On June 28, 2016, the judge issued a recommended decision and order finding that the Employer violated the Act as alleged. (D&O 5-25.) In relevant part, the judge relied on the Board’s decision in *Purple Communications, Inc.*, 361 NLRB 1050 (2014), to find that the Employer violated the Act by discriminatorily applying its email policies to proscribe Befort’s statutory right to use the Employer’s email system to engage in Section 7 activity, and that the

Employer again violated the Act by promulgating and maintaining overbroad workplace rules in response to Befort's union-related emails. (D&O 14-18.) The Employer filed exceptions with the Board objecting in part to the judge's recommended decision and order. (D&O 1.) While the Employer's exceptions were pending before the Board, the Board issued its decision in *Caesars Entertainment*, 368 NLRB No. 143, 2019 WL 6896714 (Dec. 16, 2019), which overruled the Board's prior decision in *Purple Communications*. No party submitted supplemental filings.

II. THE BOARD'S CONCLUSIONS AND ORDERS

On April 2, 2020, the Board (Chairman Ring and Members Kaplan and Emanuel) issued a Decision and Order affirming in part and reversing in part the administrative law judge. (D&O 1-5.) The Board found that the Employer committed numerous unfair labor practices, which are not at issue on review, and dismissed several complaint allegations, which the Union challenges before the Court. (D&O 1-5.) As relevant here, the Board applied its decision in *Caesars Entertainment* and found, contrary to the judge, that the Employer did not discriminatorily enforce its written policies when it reprimanded Befort for sending her union-related emails. (D&O 2-3.) However, the Board observed that the parties had not had an opportunity to address the exception in *Caesars Entertainment* for employees who would otherwise be deprived of any reasonable

means of communication with each other. (D&O 3.) Accordingly, the Board severed and retained for further consideration the complaint allegations that the Employer violated the Act by promulgating and maintaining new workplace rules in response to Befort's union-related emails. (D&O 3-4.)

On May 27, 2020, the Board (Chairman Ring and Members Kaplan and Emanuel), issued a Supplemental Decision and Order in the severed proceeding and dismissed the remaining unfair-labor-practice allegations. As an initial matter, the Board noted that remand for a further evidentiary hearing was unnecessary because no party intended to submit additional evidence. (SD&O 1.) Given that there was no indication in the record that employees lacked other reasonable means of communication, the Board found that the relevant *Caesars Entertainment* exception did not apply and that the Employer lawfully restricted Befort's use of its email system. Consequently, the Board dismissed the allegations that the Employer unlawfully promulgated and maintained new workplace rules in response to Befort's union-related emails. The Board explained that the rules were sent in response to Befort's improper use of the email system, and that reasonable employees would therefore interpret them as restricting that type of impermissible use only, and not as restricting Section 7-protected conduct. (SD&O 1-2 & n.1.)

SUMMARY OF ARGUMENT

The primary issue on review is whether substantial evidence supports the Board's finding that the Employer did not violate the Act by reprimanding an employee for using the Employer's email system to send union-related emails to her coworkers. Under Board law, an employer generally does not violate the Act by restricting the use of its proprietary equipment, including its email system, absent proof of discrimination. The Board applies a specific standard for assessing discrimination in this context, which the Union does not challenge, and which requires a showing that the employer treated emails of a similar character differently based on their statutorily protected content. The mere fact that an employer has allowed some nonwork-related emails is not determinative. The Union has failed to demonstrate that substantial evidence does not support the Board's application of this unchallenged legal standard to the facts at hand.

As a result, the Union has also failed to demonstrate that the Board erred by dismissing several related allegations regarding new workplace rules announced by the Employer. Insofar as substantial evidence supports the Board's finding that the Employer acted lawfully in prohibiting the initial union-related emails, substantial evidence also supports the Board's findings that the new rules announced by the Employer in response to Befort's impermissible use of its email system were not

unlawfully motivated, and that those rules would not be interpreted by reasonable employees as restricting statutorily protected conduct.

STANDARD OF REVIEW

The Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Reviewing courts may not “displace the Board’s choice between two fairly conflicting views,” even if the court would justifiably have made a different choice in the first instance. *Universal Camera*, 340 U.S. at 488. The Court will uphold the Board’s dismissal of an unfair-labor-practice allegation unless the Board’s findings “are unsupported by substantial evidence in the record considered as a whole, or unless the Board acted arbitrarily or otherwise erred in applying established law to facts.” *United Food & Commercial Workers Union, Local 204 v. NLRB*, 506 F.3d 1078, 1080 (D.C. Cir. 2007) (internal quotation marks omitted). As such, the Court will not reverse the Board’s failure to find a violation unless “the record is so compelling that no reasonable factfinder could fail to find to the contrary,” *Ruisi v. NLRB*, 856 F.3d 1031, 1035 (D.C. Cir. 2017), or unless the Board failed “to adequately explain its reasoning” or left “critical gaps in its analysis,” *United Steel Workers Int’l Union, Local 14300-12 v. NLRB*, 807 F. App’x 1, 3 (D.C. Cir. 2019) (internal quotation marks omitted).

ARGUMENT

I. Substantial Evidence Supports the Board’s Finding That the Employer Did Not Violate Section 8(a)(1) of the Act by Reprimanding Befort for Sending Union-Related Emails

A. An Employer Generally Does Not Violate the Act by Restricting the Use of Its Proprietary Email System, Absent Proof of Discrimination

Section 7 of the Act guarantees employees the right “to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining.” 29 U.S.C. § 157. In turn, Section 8(a)(1) makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees” in the exercise of their Section 7 rights. 29 U.S.C. § 158(a)(1).

However, the Board has held that Section 7 does not grant employees an unrestricted right to utilize their employer’s proprietary equipment. *Caesars Entm’t*, 368 NLRB No. 143, 2019 WL 6896714, at *4 n.17 (Dec. 16, 2019) (collecting cases); *see, e.g., HealthBridge Mgmt., LLC v. NLRB*, 798 F.3d 1059, 1073 (D.C. Cir. 2015) (“Unions and employees have ‘no statutory right to use an employer’s bulletin board.’”). The Board recently reaffirmed that this principle extends to an employer’s proprietary email system, and that employees do not have a statutory right guaranteeing unrestricted use of their employer’s email system to communicate with coworkers. *Caesars Entm’t*, 2019 WL 6896714, at *6-10

(overruling *Purple Communications, Inc.*, 361 NLRB 1050 (2014), which had held that employees have a presumptive statutory right to use their employer's email system for Section 7 purposes).² Accordingly, an employer will not normally violate Section 8(a)(1) by restricting its employees' nonwork-related use of its email system, even if the restrictions affect emails that concern unionization or other Section 7-related subjects. *Id.*

The Board recognizes two situations in which an employer's restrictions on employees' use of its email system or other proprietary equipment will nonetheless be found unlawful. *Caesars Entm't*, 2019 WL 6896714, at *10. Only one such exception is implicated in this case: an employer may not enforce its restrictions "in a manner that discriminates against Section 7 activity." *Register Guard*, 351 NLRB 1110, 1116-19 (2007), *enforced in part and remanded in part sub nom. Guard Publ'g Co. v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009); *see Caesars Entm't*, 2019 WL 6896714, at *10 n.68 (reaffirming applicability of *Register Guard*).³

The Board has adopted a "modified standard for determining whether discriminatory enforcement has been established" in the context of an employer's

² The Union does not challenge the Board's decision to overrule *Purple Communications* in *Caesars Entertainment*, and that issue is not before the Court.

³ A second exception arises if employees "would otherwise be deprived of any reasonable means of communication with each other." *Caesars Entm't*, 2019 WL 6896714, at *10. That exception is not at issue here. (SD&O 1.)

proprietary equipment. *Caesars Entm't*, 2019 WL 6896714, at *10 n.68 (citing *Register Guard*, 351 NLRB at 1116-19). In particular, the Board has determined that in the context of employer equipment the concept of discrimination should involve “the unequal treatment of equals.” *Register Guard*, 351 NLRB at 1117 (citing *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 319 (7th Cir. 1995)).

Accordingly, the Board’s *Register Guard* standard requires a showing that an employer’s email-use restrictions discriminate “along Section 7 lines” by disparately treating “communications of a similar character because of their union or other Section 7-protected status.” *Id.* at 1118. The mere fact that an employer has allowed *some* nonwork-related emails, or that union-related emails fall on the prohibited side of the line drawn by the employer, is not enough to establish unlawful discrimination. *Id.* Nonetheless, “if the evidence show[s] that the employer’s motive for the line drawing was antiunion, then the action would be unlawful.” *Id.* at 1118 n.18.

In challenging the Board’s finding that the Employer lawfully reprimanded Befort for sending her union-related emails, the Union argues that the Board “misconstrued the legal question” by asking whether the Employer had previously permitted similar mass emails sent for an employee’s personal benefit or to advance an organizational purpose. (Br. 20.) In doing so, however, the Union only indirectly acknowledges (Br. 34) that the Board’s *Register Guard* standard,

which the Board ultimately applied in the present case, is the controlling legal framework in the context of an employer's email system. *Caesars Entm't*, 2019 WL 6896714, at *10 n.68 (citing *Register Guard*, 351 NLRB at 1116-19). The Union did not challenge that context-specific standard before the Board, and thus the validity of the Board's standard is not properly before the Court. *See* 29 U.S.C. § 160(e) ("No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."); *Enter. Leasing Co. of Fla. v. NLRB*, 831 F.3d 534, 550-51 (D.C. Cir. 2016) (explaining that Section 10(e) constitutes a "jurisdictional bar" and that the Court is "powerless" to entertain arguments not raised to the Board in the first instance).⁴ Moreover, the Union has not directly made such a challenge in its opening brief to the Court. *See Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 418-19 (D.C. Cir. 1996) (holding that parties waive an argument by not raising it in their opening brief to the Court).

⁴ While the present case was pending before the Board, there was an intervening change in Board law when the Board issued its decision in *Caesars Entertainment* reaffirming the applicability of *Register Guard* to employer email systems and overruling *Purple Communications*. *Caesars Entm't*, 2019 WL 6896714, at *6-10. However, the Union subsequently failed to file a motion for reconsideration with the Board challenging *Caesars Entertainment* or the applicability of the *Register Guard* standard. *See CCI Ltd. P'ship v. NLRB*, 898 F.3d 26, 35 (D.C. Cir. 2018); *Flying Food Grp., Inc. v. NLRB*, 471 F.3d 178, 185-86 (D.C. Cir. 2006).

In light of the Board's controlling *Register Guard* standard, the Union does not advance its position by citing (Br. 22, 29, 36) cases involving analytically distinct standards for finding discrimination in other contexts. *See ITT Indus., Inc. v. NLRB*, 251 F.3d 995, 1006 (D.C. Cir. 2001) (employer rules regarding in-person solicitation); *Rest. Corp. of Am. v. NLRB*, 827 F.2d 799, 804-05 (D.C. Cir. 1987) (same); *Stowe Spinning Co.*, 70 NLRB 614, 623-24 (1946) (employer refusal to grant union representatives access to property), *affirmed*, 336 U.S. 226 (1949), *reversing* 165 F.2d 609 (4th Cir. 1947); *cf. Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (viewpoint-based discrimination under the First Amendment). As explained, the Board applies different standards when assessing discriminatory enforcement of a rule restricting the use of employer equipment versus, for example, a rule restricting in-person conversations during working hours. *Compare MEK Arden, LLC*, 365 NLRB No. 109, 2017 WL 3229289, at *1 n.3 (July 25, 2017) (applying *Register Guard* standard to find violation where employer treated employee bulletin-board postings "of a similar character" disparately based on their union status), *enforced*, 755 F. App'x 12 (D.C. Cir. 2018), *with Oberthur Techs. of Am.*, 362 NLRB 1820, 1820 n.4 (2015) (applying another standard to find violation where employer prohibited employees from

discussing union on worktime despite permitting employees “to discuss other subjects unrelated to work”), *enforced*, 865 F.3d 719 (D.C. Cir. 2017).⁵

Although the Union cites (Br. 30) at least one case that did involve an employer’s discriminatory restrictions on the use of its proprietary equipment, that case predates by several decades the Board’s decision in *Register Guard* to adopt a modified discrimination standard in such context. In *Honeywell, Inc.*, the Board, as affirmed by the Eighth Circuit in an opinion cited by the Union, found that the employer could not lawfully restrict union-related postings on its company-maintained bulletin boards once it had permitted employees to use the bulletin boards “for *any* non-work-related matters.” *Honeywell, Inc.*, 262 NLRB 1402, 1402-03 (1982) (emphasis added), *enforced*, 722 F.2d 405, 406-07 (8th Cir. 1983). The Board later reaffirmed the same principle in *Fleming Companies*, citing *Honeywell* and finding that employees obtained a statutory right to post union-

⁵ Indeed, the Board applied two different standards in this very case. The Board first determined—in a finding not at issue on review—that the Employer violated Section 8(a)(1) by informing employees that they could not talk about the Union during worktime in working areas, despite permitting discussions of other subjects “not associated or connected with their work tasks” during worktime in working areas. (D&O 1 (citing *Jensen Enters., Inc.*, 339 NLRB 877, 878 (2003)).) The Board then proceeded to apply its separate standard for equipment-use cases to find that the Employer did not violate Section 8(a)(1) by reprimanding Befort for sending her union-related emails, because there was no evidence the Employer had permitted emails “of a similar character.” (D&O 3 (citing *Register Guard*, 351 NLRB at 1118).) The Union has not challenged, before the Board or the Court, the existence of distinct legal standards.

related content to an employer bulletin board once their employer had permitted employee use “for any purpose.” *Fleming Cos.*, 336 NLRB 192, 194 (2001), *enforcement denied in relevant part*, 349 F.3d 968, 975-76 (7th Cir. 2003). In *Register Guard*, however, the Board made clear that it was overruling its “decisions in *Fleming* . . . and other similar cases,” and adopting a new standard for establishing discrimination in the context of employee use of an employer’s proprietary equipment. *Register Guard*, 351 NLRB at 1119 & n.21.⁶

Thus, under current Board law, and contrary to the Union (Br. 20-21), the mere fact that the Employer here allowed *some* personal use of its email system is not determinative, as long as the line between prohibited and permissible emails was not drawn “along Section 7 lines” in order to treat emails “of a similar character” disparately due to their union or other Section 7-related content. *Register Guard*, 351 NLRB at 1118. And thus, again contrary to the Union (Br. 20, 28-33), the Board was not tasked with interpreting the Employer’s written policies to determine whether by their terms they *should* have been applied to

⁶ The Union also cites (Br. 23) the Board’s decision in *Gallup American Coal Co.*, 32 NLRB 823 (1941), *enforced*, 131 F.2d 665 (10th Cir. 1942). It is unclear and perhaps doubtful whether such case, which involved union-related signs painted on boulders lining the employer’s 29,000-acre property, 32 NLRB at 828-29, could be classified as an employer-equipment case implicating the *Register Guard* standard. In any event, even assuming that it could, and that *Gallup American Coal* is factually analogous to an email-system case such as this one, the case predates the Board’s decision to adopt a revised standard in *Register Guard*.

Befort's emails—or whether, for example, the Employer reasonably invoked its No Solicitation and Distribution Policy despite the administrative law judge's finding that Befort's emails did not constitute union solicitation (D&O 16).⁷ The pertinent question is whether the Employer's decision to restrict Befort's use of its proprietary email system was discriminatory relative to its treatment of similar emails, not whether its interpretation of its own policies was accompanied by sufficiently detailed explanations. As such, the Union's claim that the Board improperly based its findings on a “post hoc” rationale of its own invention (Br. 35) is without merit.

As shown below, the Board reasonably applied *Caesars Entertainment* and *Register Guard* to the facts of the present case in order to dismiss the allegation that the Employer acted unlawfully by prohibiting Befort's union-related emails.

⁷ In general, the Union's reliance on the administrative law judge's findings regarding the applicability of the Employer's policies (Br. 20, 28-34) is misplaced insofar as the judge was applying a legal framework that was subsequently overruled by the Board. (D&O 14-16.) Under the *Purple Communications* framework, Befort had a presumptive statutory right to use the Employer's email system, and it was the Employer's burden to justify its restrictions by demonstrating “special circumstances necessary to maintain production or discipline.” *Purple Commc'ns*, 361 NLRB at 1063. However, under *Caesars Entertainment*—the merits of which are not before the Court—the Employer was entitled to restrict the use of its proprietary email system absent evidence of discrimination. *Caesars Entm't*, 2019 WL 6896714, at *10.

B. The Employer Did Not Discriminate Along Section 7 Lines or Treat Emails of a Similar Character Disparately

Substantial evidence supports the Board's finding that the Employer did not discriminate against Befort's union-related mass emails along Section 7 lines.

(D&O 2-3.) In the absence of proof of such discrimination, the Employer's enforcement of its internal email policies did not violate the Act, and the Board properly dismissed the allegation that the Employer violated Section 8(a)(1) of the Act by reprimanding Befort and prohibiting the use of its email system to send the union-related emails in question. *See Caesars Entm't*, 2019 WL 6896714, at *10.

In particular, the Board found that the Employer has never broadly permitted its employees to send mass emails for their personal benefit or for the benefit of an outside organization, or advocating in favor of a specific union or against union activity. (D&O 3.) Instead, the only comparator emails in the record "were, by and large, emails that [the Employer] sent for its own business-related interests of improving the camaraderie among its work force or helping to reunite a lost item with its owner." (D&O 3.) For example, the record shows that the Employer has only allowed mass emails regarding nonwork-related topics such as "free popcorn and hockey tickets, nacho day in the cafeteria, upcoming salsa and lip-syncing contests, deaths in employees' families, condolence cards, baby showers, and birth announcements to foster employee morale"—all of which the Board found to be dissimilar to Befort's mass emails encouraging support for the Union. (D&O 3.)

As the Board noted, it was the Board General Counsel's burden to prove that the Employer "discriminatorily enforced its Acceptable Use Policy, Enterprise User Standard, or No Solicitation and Distribution Policy," and that burden was not met in the present case. (D&O 3.)⁸

In objecting to the Board's findings, the Union is incorrect to suggest that the Employer "liberally permitted" employees to send mass emails for nonwork purposes (Br. 7, 17, 19), or that it tolerated mass emails regarding "*anything* except unions" (Br. 23, 36). The Union primarily relies (Br. 7-8) on the Employer's acknowledgement, at the unfair-labor-practice hearing, that it allowed *some* "personal use" of its email system by employees. (Tr. 25, 311-12) Indeed, such use was expressly contemplated by the Employer's Acceptable Use Policy, which notes that "[i]ncidental or infrequent personal use" may be permitted. (GCX 11.) That policy also states that any such use is subject to the Employer's other policies and will be deemed impermissible if the Employer determines that it "interfere[s] with" legitimate business operations. (GCX 11.) The Board found that while maintaining those policies the Employer had never permitted employees to send mass emails comparable to Befort's emails here. (D&O 3.) Aside from Befort's

⁸ The Employer asserted before the Board that Befort's emails violated its "Acceptable Use Policy, Enterprise User Standard, and No Solicitation or Distribution Policy." (D&O 2.) There is no allegation that those preexisting workplace policies are unlawful. (D&O 3 n.8.)

union-related emails, the record contains just nine examples of nonwork-related mass emails that were sent to the entire facility, most of which were sent on behalf of the Employer itself. (GCX 8; *see also* Tr. 177-79, 408, 475-76.) Substantial evidence thus supports the Board's findings of fact. (D&O 2-3.)

Accordingly, the Court's partial reversal of the Board in *Register Guard* itself is distinguishable and the Union is wrong to suggest that the outcome of the present case is "governed by *Guard Publishing*." (Br. 26). In that case, the evidence showed that prior to disciplining an employee for sending union-related email solicitations the employer had permitted employees to send "other kinds of personal solicitations," including email solicitations for "sports tickets or other similar personal items." *Guard Publ'g*, 571 F.3d at 60. And yet, in response to an employee's union-related solicitations, the employer broadly prohibited the employee from using the email system for "personal" business or for any purpose "other than company business." *Id.* The Court did not take issue with the *Register Guard* standard applied by the Board, but rather held that "substantial evidence [did] not support the Board's determination that [the employee] was disciplined for a reason other than that she sent a union-related e-mail." *Id.* Thus, in reversing the Board, the Court implicitly concluded that the employer had previously permitted employees to send comparable nonwork-related emails and was treating the union-related emails disparately. Here, by contrast, substantial evidence supports the

Board's conclusion that the Employer had only previously permitted emails that "were not similar in character to Befort's emails." (D&O 3.)

In the absence of evidence that the Employer treated Befort's emails disparately due to their union content, the Board found that Befort lacked a statutory right to send the emails in question, that the Employer did not act unlawfully in reprimanding her for sending them, and that the unfair-labor-practice allegation should be dismissed. (D&O 2-3, SD&O 1.) The Union has failed to establish that "no reasonable factfinder" could find as the Board did, or that there is any basis for reversing the Board's decision. *See Ruisi*, 856 F.3d at 1035.⁹

II. Substantial Evidence Supports the Board's Related Findings That the Employer Did Not Violate Section 8(a)(1) of the Act by Promulgating or Maintaining New Workplace Rules

In addition to its primary finding that the Employer did not unlawfully reprimand Befort for sending union-related emails, the Board dismissed several additional unfair-labor-practice allegations involving the Employer's promulgation

⁹ The Board noted in *Register Guard* that an employer's facially neutral enforcement of an otherwise valid policy regulating the use of its email system may nonetheless be found unlawful "if the evidence show[s] that the employer's motive for the line drawing was antiunion," 351 NLRB at 1118 n.18, but the Union has not demonstrated that the record evidence compelled such a finding in the present case. The fact that the Employer specifically referenced the "union" content of Befort's emails (Br. 27) merely illustrates that it deemed the type of emails Befort was sending to be inconsistent with its written policies. By their own terms those policies appear to prohibit, for example, emails that "advocate[] or solicit[] for . . . non-company related outside organizations" in a manner "not related to [company] business." (GCX 11.)

and maintenance of new workplace rules, “as to which the lawfulness of [the Employer’s] conduct is dependent on whether Befort engaged in protected activity under *Caesars Entertainment* by sending her emails.” (D&O 3, SD&O 1-2.) The rules at issue were announced by the Employer, via email and in a meeting with Befort, four days after Befort’s emails. In particular, the Employer informed employees, in the context of responding to Befort’s emails, that: (i) the Employer did not allow “mass communication[s] for any non-business purpose” (GCX 8); (ii) employees were only permitted to use social networks while “off the job” (GCX 8); (iii) employees were not allowed to send out “mass emails” (Tr. 53); and (iv) employees were not permitted to send anything “union related” using the Employer’s email system (Tr. 53). (D&O 2, 9.)

A. The Employer Did Not Promulgate Its New Workplace Rules in Response to Protected Union Activity

The Board first found that the Employer did not violate Section 8(a)(1) by discriminatorily announcing the new workplace rules in response to Befort’s union-related emails. (SD&O 1.) An employer violates Section 8(a)(1) by promulgating otherwise lawful rules “in response to union activity” or other statutorily protected conduct. *AdvancePierre Foods, Inc.*, 366 NLRB No. 133, 2018 WL 3495120, at *1 n.4 (July 19, 2018), *enforced*, 966 F.3d 813 (D.C. Cir. 2020); *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). However, the Board found here that the Employer’s new rules “were promulgated in

response to Befort's impermissible use of [the Employer's] email system in light of the [Employer's] lawful restriction[s]" on employees' use of its system.

(SD&O 1.) Thus, the Board found that the Employer's rules were not promulgated in response to protected union activity. (SD&O 1.)

In challenging the Board's dismissal of the allegations that the new workplace rules were promulgated "in response to" protected union activity, the Union effectively concedes (Br. 38) that such allegations turn on whether or not the Employer acted lawfully in reprimanding Befort for sending her union-related emails several days earlier. Insofar as substantial evidence supports the Board's dismissal of that preliminary allegation, substantial evidence also supports the Board's finding that the Employer's new workplace rules were not unlawfully promulgated in response to protected union activity. (SD&O 1.)

B. Reasonable Employees Would Not Interpret the Employer's New Workplace Rules as Restricting Protected Conduct

The Board further found that the new rules announced by the Employer are not unlawfully overbroad in violation of Section 8(a)(1). (SD&O 1 n.1.) The Board evaluates the lawfulness of a facially neutral policy by first asking whether that policy, "when reasonably interpreted," would potentially interfere with the exercise of employees' Section 7 rights. *Boeing Co.*, 365 NLRB No. 154, 2017 WL 6403495, at *4 (Dec. 14, 2017). If so, the Board then performs a further balancing analysis. *Id.* However, if the Board finds that the facially neutral policy

would not be reasonably interpreted as prohibiting or interfering with the exercise of Section 7 rights, then the policy is lawful to maintain and the Board's inquiry comes to an end. *Id.* at *17. The Board performs this analysis “by reference to the perspective of an objectively reasonable employee.” *Argos USA, LLC*, 369 NLRB No. 26, 2020 WL 591742, at *1 n.3 (Feb. 5, 2020).

Here, the Board found that reasonable employees would not interpret the rules as interfering with the exercise of their Section 7 rights. (SD&O 1-2 & n.1.) The Board emphasized that the Employer announced its new rules “in response to Befort’s violation of several of its policies,” and that, as a result, “all of the employees reasonably knew that [the Employer] promulgated its rules—the 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.” (SD&O 1 n.1.) Thus, contrary to the Union’s contention that the rules in question “indisputably” limit statutorily protected conduct (Br. 39), the Board concluded that “when employees reasonably interpret the rules at issue here, they would understand that they do not prohibit or interfere with the exercise of [statutory] rights, but only restrict the type of impermissible use of [the Employer’s] email system engaged in by Befort.” (SD&O 1-2 n.1.)¹⁰

¹⁰ To the extent the Union is suggesting that employees have a presumptive statutory right to send union-related emails using an employer’s proprietary email system—because it is an “important means by which T-Mobile employees

Having found at the first step of its analysis that reasonable employees would not interpret the new rules as restricting or interfering with protected activity, the Board had no cause to apply its *Boeing* balancing test. *See Boeing*, 2017 WL 6403495, at *17 (explaining that “when a facially neutral rule, reasonably interpreted, would *not* prohibit or interfere with [protected activity],” then the Board’s inquiry “comes to an end”). Thus, contrary to the Union (Br. 39-42), the Board did not reach the question of whether the Employer had shown “legitimate justifications” for the rules outweighing their “potential impact on [employees’ statutory] rights.” *Id.* Once again, the Union has failed to establish that “no reasonable factfinder” could reach the conclusions that the Board did here, *Ruisi*, 856 F.3d at 1035, and the Board’s dismissal of the unfair-labor-practice allegations is therefore entitled to deference.

communicate with each other about union-related issues at work” (Br. 39)—that position has been rejected by the Board. *See Caesars Entm’t*, 2019 WL 6896714, at *13. As noted, the validity of *Caesars Entertainment* is not before the Court. *See supra* note 4.

CONCLUSION

For the foregoing reasons, the Board requests that the Court enter a judgment denying the Union's petitions for review of the Board's Orders.

Respectfully submitted,

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National Labor Relations Board
August 2020

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

COMMUNICATIONS WORKERS)	
OF AMERICA, AFL-CIO)	
)	
Petitioner)	Nos. 20-1112, 20-1186
v.)	
)	
NATIONAL LABOR RELATIONS BOARD)	
)	Board Case Nos.
Respondent)	14-CA-155249 et al.
and)	
)	
T-MOBILE USA, INC.)	
)	
Intervenor)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its proof brief contains 6,898 words of proportionally-spaced, 14-point type, and that the word processing system used was Microsoft Word 2016. This document also complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type-style requirements of Fed. R. App. P. 32(a)(6).

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Dated at Washington, D.C.
 this 26th day of August, 2020

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T-MOBILE USA, INC.)	
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Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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Dated at Washington, D.C.
this 26th day of August, 2020

STATUTORY ADDENDUM

Federal Statutes

Page(s)

National Labor Relations Act, as amended
(29 U.S.C. §§ 151 *et seq.*)

Section 7 (29 U.S.C. § 157)	i
Section 8(a)(1) (29 U.S.C. § 158(a)(1))	i
Section 10(a) (29 U.S.C. § 160(a))	i
Section 10(e) (29 U.S.C. § 160(e))	ii
Section 10(f) (29 U.S.C. § 160(f))	iii

29 U.S.C. § 157

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

29 U.S.C. § 158(a)(1)

[Sec. 8. (a) It shall be an unfair labor practice for an employer-] (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

29 U.S.C. § 160(a)

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately

local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

29 U.S.C. § 160(e)

[Sec. 10.] (e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove

provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

29 U.S.C. § 160(f)

[Sec. 10.] (f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.