



Cornell University
ILR School
Labor and Employment Law Program



NLRB Region 3



Labor and Employment
Law Section

THE NLRA AT 80: IS THE STATUTE ADAPTING TO THE MODERN WORKPLACE?

DEVELOPMENTS AT THE BOARD:

EMPLOYEE USE OF EMPLOYER EMAIL SYSTEMS UNDER
PURPLE COMMUNICATIONS, INC., 361 NLRB NO. 126 (2014)

Blitman & King
LLP

Brian J. LaClair, Esq.

bjlaclair@bklawyers.com

Nolan J. Lafler, Esq.

njlafler@bklawyers.com

**EMPLOYEE USE OF EMPLOYER EMAIL SYSTEMS UNDER
PURPLE COMMUNICATIONS, INC., 361 NLRB NO. 126 (2014)**

I. INTRODUCTION

- A. The Board's recent decision in *Purple Communications, Inc.* represents a significant adaptation of longstanding NLRA principles to modern industry and the contemporary workplace.
- B. In reaching this point, the Board emphasized and cited available data demonstrating the proliferation of employee email usage. For example, the majority draws from studies by the American Management Association and the Pew Research Center finding that 96 percent of employees use the internet, email, or cell phones to stay connected with their job, often outside of working hours.
- C. When in 2007 the Board equated an employer email system as legally identical to a bulletin board and a piece of scrap paper, former Members Liebman and Walsh, in dissent, aptly deemed the Board "the Rip Van Winkle of administrative agencies" given its failure to recognize that email had revolutionized communication within and outside of the workplace.
- D. Overruling *Register Guard* is a step further towards calibrating and making responsive national labor policy to enormous technical advancements taking place in society every day.

II. THE BOARD'S DECISION IN *PURPLE COMMUNICATIONS, INC.*, 361 NLRB NO. 126 (2014)

A. FACTUAL BACKGROUND

- 1. The employer provided sign-language interpretation services. The employees, known as video relay interpreters, worked at call centers where they provided two-way, real-time interpretation of telephone communications between deaf or hard-of-hearing individuals and hearing individuals. *Id.* slip op. at 2.
- 2. Since 2012, the employer maintained an employee handbook containing an electronic communications policy stating: "Employees are strictly prohibited from using the computer, internet, voicemail, or email systems, and other Company equipment in connection with any of the following activities: . . . (2) Engaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company . . . (5) Sending uninvited emails of a personal nature." *Id.* at 2.

3. In the fall of 2012, the Communications Workers of America (“Union”) filed petitions to represent the interpreters that resulted in Board elections at seven of the Employer’s call centers. Following the elections, the Union filed objections to the results with the Board, including an objection asserting that the electronic communications policy interfered with employees’ freedom of choice in the election. The Union also filed an unfair labor practice charge regarding the policy, giving way to the instant case. *Id.* at 3.

B. PROCEDURAL HISTORY

1. Administrative Law Judge Paul Bogas adjudicated the unfair labor dispute, and dismissed the General Counsel’s allegation based on the electronic communications policy and overruled the Union’s objection. *Id.* at 2.
2. Identifying his obligation to follow Board precedent, Judge Bogas held that sustaining the unfair labor practice charge regarding the electronic communications policy would require overruling the Board’s earlier decision in *Register-Guard*, 351 NLRB 1110 (2007), *enf’d in part sub. nom. Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009).
3. Thus, Judge Bogas dismissed the General Counsel’s and Union’s charge that the Employer violated Section 8(a)(1) of the NLRA by maintaining a rule that prohibits use of company equipment for anything other than business purposes.

C. DISCUSSION

1. INTRODUCTION

- a. In *Register Guard*, the Board held that an employer may completely prohibit employees from using an employer operated and maintained email system for Section 7 activity, so long as the prohibition is not applied discriminatorily. *Purple Commc’ns*, 361 NLRB at 4. Drawing heavily from Board precedent on employer owned equipment, the *Register Guard* majority reasoned that email systems are the equivalent of other employee communication equipment, such as public address systems, telephones, and bulletin boards, and that employers may lawfully ban non-work related use of such company equipment by employees.
- b. Reversing *Register Guard*, the majority in the instant case found that *Register Guard* “undervalued employees’ core Section 7 right to communicate in the workplace about their terms and conditions of employment, while giving too much weight to employer property rights.” *Id.* at 4.

- c. Moreover, the *Purple Communications* majority found *Register Guard* lacking sufficient consideration for the enhanced importance of email systems as a method of employee communication.
- d. Drawing substantially from the Supreme Court's decision in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), "the leading case addressing employees' right to communicate on their employer's property about their working conditions," the Board adopted a presumption that employer provided email systems may be used for statutorily protected discussions between employees. *Id.* at 5.

2. BOARD'S DISCUSSION OF "THE CENTRALITY OF EMPLOYEES' WORKPLACE COMMUNICATION TO THEIR SECTION 7 RIGHTS"

- a. The Board has previously held that employees' exercise of their Section 7 rights "necessarily encompasses the right effectively to communicate with one another regarding self-organization at the job site." *Beth Israel Hospital v. NLRB*, 437 U.S. 491 (1978). The Supreme Court has recognized that the workplace is a particularly appropriate location for Section 7 activities because it is a place of common interest where employees traditionally seek to persuade coworkers regarding matters affecting their terms and conditions of employment. *Id.* at 5 (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978)).
- b. Accordingly, there is a longstanding presumption that a work rule banning oral solicitation during nonworking time is "an unreasonable impediment to self-organization" that is only capable of being justified by special circumstances making the otherwise unlawful restriction necessary to maintain production or discipline. *Id.* at 6 (quoting *Republic Aviation*, 324 U.S. at 803-04).

3. BOARD'S TAKE ON "THE NATURE AND COMMON USE OF BUSINESS EMAIL"

- a. Following its acknowledgment of longstanding precedent favoring employee communications regarding Section 7 activity in the workplace, the majority reflected upon the ubiquitous, substantial and unavoidable impact of email systems as a method of communication, both at and away from work. *Id.* at 6.
- b. Citing the *Register Guard* dissent, which was penned in 2007, the majority in the instant case noted that over 81 percent of employees spend an hour or more on email during a typical workday, with about 10 percent spending at

least four hours. The same survey identified 86 percent of respondents as sending and receiving nonbusiness email during working hours. *Id.* at 6.

- c. Reflecting more recent trends, the majority cited favorably to reports indicating that work-related email traffic will continue to increase, and even the Supreme Court has acknowledged that “[m]any employers expect or at least tolerate personal use of [electronic communications] equipment by employees because it often increase worker efficiency.” *Id.* at 7 (*City of Ontario, California v. Quon*, 560 U.S. 746 (2010)).
- d. The majority reasoned that not unlike the water cooler or the cafeteria, email has effectively become the natural gathering place for employee conversations at work. *Id.* at 8.
- e. “The reluctance of the *Register Guard* majority to fully acknowledge the major role that email had already come to play in employees’ workplace communication – including communication protected by Section 7 – reflects ‘a failure to adapt the Act to the changing patterns of industrial life.’” *Id.* at 8.

4. MAJORITY’S DISCUSSION OF THE BOARD’S “EQUIPMENT” PRECEDENTS

- a. According to the majority, *Register Guard* was premised on the notion that an email system is legally analogous to employer-owned equipment which, under Board precedent, employers could prohibit the use of during non-working time. The majority found the reliance on the employer-owned equipment doctrine unpersuasive and flawed as applied to company email systems. *Id.* at 8.
- b. The Board concluded that email systems are different “in material respects” from the types of employer owned workplace equipment considered in prior Board decisions, such as telephones and bulletin boards. The flexibility and almost unlimited capacity of an email system make competing demands on use much less of an issue than with respect to telephone, copy machines or bulletin boards, which have a finite amount of space and capacity. *Id.* at 8.
- c. Beyond practical considerations, the *Purple Communications* Board also took issue with the authorities cited by the *Register Guard* majority in support of its holding. Many of those decisions, which the *Register Guard* majority cited for the proposition that an employer may prohibit all non-work use of company equipment, failed to address this precise issue and therefore provided only dicta. *Id.* at 9-10.

- d. In sum, the majority found that a reading of Board precedent permitting total bans on employee use and an employer's personal property was impossible to reconcile with NLRA and common law principles.

5. THE BOARD ADOPTS A NEW ANALYTICAL FRAMEWORK

- a. Having concluded that *Register Guard* misapprehended preexisting Board precedent on employer-owned equipment and that its prior ruling failed to adapt to changing communication patterns in industrial life, the majority in *Purple Communications* set out to formulate a new analytical framework for evaluating employees' right to use their employer's email systems.
- b. Looking primarily to *Republic Aviation*, the Board noted that while employees have a right to effectively communicate amongst themselves regarding organizing matters at work, employers also have a legitimate interest in managing the business efficiently and effectively.
- c. The Board held that "we will presume that employees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time." *Id.* at 14.
- d. Despite the Board's recognition of a presumption in favor of an employee's ability to use employer provided email for Section 7 activity, the Board acknowledged that an employer may rebut the presumption "by demonstrating that special circumstances necessary to maintain production or discipline justify restricting its employees' rights." *Id.* at 14.
- e. An employer contending that special circumstances justify a particular restriction on an employee's right to use company provided email for Section 7 activity during non-working time must "demonstrate the connection between the interest it asserts and the restriction." The Board was clear that merely asserting an interest "that could theoretically support a restriction" is insufficient. *Id.* at 14.
- f. Despite its unqualified rejection of *Register Guard*, the Board noted that its holding in *Purple Communications* does not, at this point, apply to other forms of electronic communication. Additionally, it does not confer upon nonemployees, such as union organizers, the right to access employer email systems, nor does it require that employers provide all employees access to such email systems. *Id.* at 14-15.

6. RETROACTIVITY AND APPLICATION TO THIS CASE

- a. After explaining the new analytical framework, the Board stated that its new rule would be applied retroactively to matters currently pending in all cases at whatever stage. *Id.* at 16.

D. DISSENT (MEMBER MISCIMARRA)

1. Member Miscimarra dissented from the majority's decision, citing both legal and practical concerns with the new rule and analytical framework. First, Member Miscimarra argued that the majority improperly presumed that employees need their employer's email systems to engage in Section 7 activity while, at the same time, failing to consider and balance the employer's managerial and property interest in maintaining control over its computer systems. Additionally, Member Miscimarra reasoned that the majority's new standard would make it impossible for the parties to have "certainty beforehand" regarding their rights and obligations. The new standard, he argued, blurs lines between lawful and unlawful employer restrictions and would be increasingly difficult with respect to practical application. *Id.* at 18-28.

E. DISSENT (MEMBER JOHNSON)

1. Member Johnson also issued a lengthy dissent criticizing the majority's presumption that employees have a Section 7 right to use employer provided email systems during nonworking time. Member Johnson attacked the majority's finding that physical meeting spaces, such as a water cooler, and virtual meeting spaces, such as a company email system, are identical for purposes of an employee's right to communication about organizational matters at the worksite during nonworking time. Member Johnson would have applied to the employer-owned equipment cases, which the majority rejected, to employer email systems, thereby permitting an employer to restrict use for any non-work purpose. Next, he reasoned that even in *Republic Aviation*, not *Register Guard*, was the proper analytical framework, the majority's rule remains untenable because it fails to account for whether alternative channels for employee conversation exist and the potential risk of interference with the employer's business operation. Finally, Member Johnson critiqued the feasibility and practical application of the new rule finding, similar to Member Miscimarra, that the rule is plainly unworkable. *Id.* at 29-61.