DAVID A. ROSENFELD, Bar No. 058163
LISL R. DUNCAN, Bar No. 261875
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
Telephone (510) 337-1001
Fax (510) 337-1023
Email: drosenfeld@unioncounsel.net;
lduncan@unioncounsel.net

Attorneys for Charging Party/Petitioner COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

PURPLE COMMUNICATIONS, Employer, and COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, Charging Party/Petitioner.	Case Nos. 21-CA-095151; 21-RC-091531; 21-RC-091584 **CHARGING PARTY/PETITIONER'S BRIEF**

TABLE OF CONTENTS

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

TABLE OF AUTHORITIES

NLRB Cases

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

Federal Cases

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

State Authorities

Federal Statutes

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

State Statutes

State Regulations

Other Authorities

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

I. INTRODUCTION

Purple Communications is involved in a specialized portion of the communications industry. It facilitates communication between the deaf and hard of hearing and others through Video Relay Interpreted Services. The Federal Communications Commission finances and controls this program known as the Telecommunications Relay Service ("TRS"). It describes VRS as follows:

> VRS, like other forms of TRS, allows persons who are deaf or hard-of-hearing to communicate through the telephone system with hearing persons. The VRS caller, using a television or a computer with a video camera device and a broadband (high speed) Internet connection, contacts a VRS CA, who is a qualified sign language interpreter. They communicate with each other in sign language through a video link. The VRS CA then places a telephone call to the party the VRS user wishes to call. The VRS CA relays the conversation back and forth between the parties -- in sign language with the VRS user, and by voice with the called party. No typing or text is involved. A voice telephone user can also initiate a VRS call by calling a VRS center, usually through a toll-free number.
>
> The VRS CA can be reached through the VRS provider's Internet site, or through video equipment attached to a television. Currently, around ten providers offer VRS. Like all TRS calls, VRS is free to the caller. VRS providers are compensated for their costs from the Interstate TRS Fund, which the Federal Communications Commission (FCC) oversees.

(http://www.fcc.gov/guides/video-relay-services.)[1]

The questions before the Board involve the right of employees to communicate using email. Under the National Labor Relations Act, Purple should be required to allow its employees to communicate among themselves or with others regarding wages, hours and working conditions using the employer's email communications systems, subject to specific limits discussed below.

[1] This service is one form of the services offered by Telecommunications Relay Service, which assists persons with hearing or speech disabilities to communicate. *See* http://www.fcc.gov/encyclopedia/telecommunications-relay-services-trs. These services are all part of a broad effort by the FCC to provide communications services to various disability communities. Text-to-Voice, Speech-to-Speech and Voice Carry Over are examples of these services.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

II. PURPLE'S OPERATIONS

As described by the FCC website and Purple's website, VRS provides interpretive services using American Sign Language for customers who have hearing impairments (either hard of hearing or deaf). Purple's services are displayed on its website. https://www.purple.us/contactus?mID=68.

A. THE NATURE OF PURPLE'S VRS SERVICES

Purple operates call centers, which are open 24 hours a day, 7 days a week, 365 days a year (Tr. 250), as required by the FCC rules. Purple operates sixteen call centers (Tr. 250), although it makes no difference where they are physically located because of the requirement that the calls be routed in the order they are received. The video interpreters (VIs) in the two centers involved, Corona and Long Beach, work in shifts; so, although there are 42 (Long Beach) or 31 (Corona) employees, a small percentage of them work at any time in order for Purple to maintain enough shifts to operate the centers 24/7.

The client uses a 10 digit phone number and calls in to access those services. Under the FCC rules, the calls must be handled in the order in which they are received and are to be responded to within 120 seconds of receiving the call. Purple has implemented a Queue system so it can monitor when the calls are backing up past the 120 seconds mandate imposed by the FCC. (Tr. 154.)

The client is seen on a video screen, and the client must have similar video screen capability.[2] Clients and Purple have proprietary equipment and software used to process the calls. (Tr. 46.) All of this is done on the Internet through high speed lines. VIs who work for Purple are certified according to industry standards established by a national organization of such interpreters. (http://www.rid.org/. Tr. 270-71.) The hearing impaired are equally well-organized and have their own advocacy organizations. (http://www.nad.org/.)

[2] The service is detailed on Purple's website: https://www.purple.us/usernotice.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

B. THE THREE DIFFERENT TYPES OF COMMUNICATION SYSTEMS USED BY THE INTERPRETERS

Each VI is provided an email address, [xxx]@purple.us. (Tr. 26, 47.) Interpreters use the email every day. (Tr. 48, 129.) Clients must provide an email address to use Purple's services. https://www.purple.us/register/default.aspx.

There are three different computer terminals used by the VIs: (1) computers at their workstations, (2) a computer maintained in a central portion of the office, known as the Queue computer, and (3) a terminal in the lunch or break rooms. The email communication systems made available by Purple to its VIs in each of those settings are as follows:

Workstation: There is limited internet access, and it is used only for the purposes of signing on by the VIs. VIs have access to Purple's Intranet at their workstations. (Tr. 25.) In addition, VIs have a phone connection to use to talk to third parties with whom the communication is made for the hearing impaired client. The VIs use the computer to connect with the video screen at the client's location. VIs also have games available that are already loaded into the computer system. (Tr. 46.)

QUEUE: This is a computer located in the center part of the office. This computer has Internet Explorer access to the internet. AOL Messenger is constantly on, and this computer is generally used for communicating operations through AOL Messenger. The interpreters all have access to Internet Explorer on this terminal.

The Break Room: In each of the centers (Tr. 27, 50), there is a computer available to the employees in the break room to which there is Internet access. The company intranet is available as well as other programs, such as Microsoft Word. (Tr. 27.)

Personal Computers or Cell Phones: VIs can access their email from their personal PDAs or other devices. (Tr. 10, 204-05 and 210.)

C. THE USE OF PURPLE'S COMMUNICATIONS EQUIPMENT.

(1) **Email**. The email system, which is available to all the employees, has been used by employees to communicate on issues of working conditions. (Tr. 64.) Managers will often respond to employee emails on the weekend. (Tr. 141.) The VIs have access to their emails on

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

their personal devices and use it anytime, 24/7. (Tr. 204-05 and 210.) Management similarly uses the email during non-work hours. (Tr. 204-206, 211.) VIs used email during the campaign to circulate an anti-organization petition. (Tr. 71.) VIs advised management of the petition and asked management to stop its circulation. (Tr. 76-79 and 192.) One manager responded to the inquiry regarding the petition. (Tr. 193.) As noted, the employees have access from their personal devices of the company email and have used it. (Tr. 10 and 211.)

Purple uses the email system to send memos to the interpreters regarding working condition issues. (Tr. 132. *See also*, Emp. Ex. 10 [key metric adjustment memo to all video interpreters] and Ch. P. Ex 7 [announcing bonus].) Purple also has a newsletter that it sends through the company email to the employees. (Tr. 238.) The President of the company testified that the email was used during the representation election campaign. (Tr. 303-04.) The Hostess bankruptcy was the subject of "commuique" among VIs and management. (Tr. 272.) When describing communications between employees, it is apparent that when the word "talk" is used, Purple is referring to the use of the email. (Tr. 207.)

Purple, in order to encourage communications, has an open door policy. (Jt. Ex. 1 at p. 29.) Because the headquarters are located in a remote location in Rocklin, California, it is apparent that these open door communications are encouraged to be accessed by email since employees can't communicate with the President or the Human Relations Department except by email or by phone.

During the election campaign, Purple admitted the lack of communication and the necessity of communication among the employees. Employer CEO John Ferron used the term "communication" repeatedly in captive audience meetings. He complained repeatedly about the lack of communication and said that Purple would encourage more communication in an effort to improve the workplace. (Tr. 273, 278.)

(2) **Internet**. VIs have unlimited access to the internet in the break room and the Queue computer.

(3) **Intranet**. Human Resources material is available on the intranet. It is available at the workstation and in the break room. (Tr. 25 and 27.)

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

(4) **Social Media**. Although not the subject of the hearing, Purple also relies on various social media services. There is no limitation on employee access to such sites at any time.

(5) **Phone**. The company rules allow limited personal use of the phone up to three minutes a call. (*See* Employee Handbook, Jt. Ex. 1 at p. 29 [prohibiting making or accepting personal telephone calls, including cell phone calls, of more than three minutes in duration during working hours, except in cases of emergency].) This policy does not prohibit employees from using their cell phones, including, presumably, emails or text messaging. Similarly, if an employee is hearing impaired, the employee is specifically permitted to use "relay" in the "normal course of your business" to make that "personal" call. (Jt. Ex. 1 at p. 33.)

D. THE RULE THAT IS BEFORE THE BOARD

The Board is asked to evaluate the following rule in light of the context in which the interpreters work.

The primary rule that is at issue states:

> Employees are strictly prohibited from using the computer, internet, voicemail and 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 email of a personal nature.

(Jt. Ex. 1 at p. 30-31.)

E. PURPLE'S BUSINESS MODEL CREATES PERIODS OF TIME WHEN VIDEO INTERPRETERS ARE NOT ENGAGED IN PRODUCTION, WHICH IS RESPONDING TO CALLS AND INTEPRETING USING PURPLE'S COMMUNICATION SYSTEMS.

VIs have limited periods of time during the work day when they are not engaged in "production," meaning answering calls from clients and interpreting for them using the communications services. In order for the Board to properly evaluate the availability and use of email in this workplace, we describe this below.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

VIs process calls during a period that is somewhat less than 100% of their "work time." VIs are expected to be logged in only 80% of their time for core hours and 85% for non-core hours. (Tr. 85-86.) Log-in means that the VI is "to be sitting in your chair, logged into the system waiting for calls to come in." (Tr. 86.) The VI only has to be processing calls 55% of the shift. This is billable time for which the FCC is billed by the minute, so the more processing time, the more Purple is reimbursed. The processing time is the critical metric for reimbursement and the business model. (Tr. 42, 85, 86.) These metrics had increased before the organizing and then changed again just before the election. (Tr., 85-88.) Purple implemented a "High Traffic Fail Safe" (Em. Ex. 9), which reduced the expected log-in time when utilization met high traffic conditions. Even under these metrics, VIs were expected to be interpreting 55% of the shift (132 minutes out of 240 minutes), which would be reduced during the remainder of the 8 hour shift to 46% (122 minutes out of 240 minutes).

It is apparent that between the log-in time and the actual processing time, there are periods of time "in between calls." (Tr. 107 and 172.) There is no evidence in the record that their activities are restricted when they are logged-in but not on a call. Presumably, when they start the call by reaching out to the client, they must be at the work station using the computer and be prepared to complete the phone hook up. There is no evidence of any limitation on activities during this non-productive time.

This work schedule means that VIs are actually working, that means interpreting, for approximately 50% of the time that they are in the facility. For approximately 15% to 20% of the time, they are not actually logged in and thus have no responsibility for video interpreting.

The VIs are entitled to a 10 minute break every four hours as provided for by Purple policy. (Jt. Ex 1, p 21.) During this break period they are paid and do not have to log out of their computers. (Tr. 74.) In California, this is also state law. (*See* IWC Order 4, Section 11.) Under California law, the employee is not forced to take a break, it must be available.

Employees are also entitled to a 30 to 60 minute meal period during which they are relieved of all duty. (Jt. Ex 1, p 21.) The VIs log out, and they are not paid for that time. In

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

California, this is also state law. (*Id*. at p. 21. Cal. Lab. Code Section 512; IWC Order 4, Section 12.)

The amount of actual interpreting time, processing time and log-in in time are limited because of ergonomic concerns. (Tr. 253, 298.) Purple expects each of the VIs to take a 10 minute break each hour from interpreting with clients. (Tr. 75.) Presumably this is "free time" when they can read, talk with other VIs or engage in non-interpreting activity not involving the use of the interpreting communication equipment.

Finally, in order to encourage VIs to work more efficiently, the company maintains a bonus system that is based upon the amount of processing time. (Tr. 161.)

Although work time is defined from when the employee logs in until when the VI logs out, the business model is designed to permit a portion of time in several blocks and/or each hour when the VIs are not actually working. They are paid for this time but are free to leave their workstations or remain at their work stations and are free to engage in communications with other interpreters or managers or use their email, the phones[3] or the internet. They are free to go to the break rooms. The company maintains a minimum standard processing time that allows some remaining time that is paid and that is work time but which does not require interpreting.

There are workplaces where this is common. Truck drivers wait for a dispatch. Machine operators wait while material is delivered. Assembly line workers wait for the next batch of product. There are times during any work time when employees are not engaged in direct production.

III. ARGUMENT

A. ELECTRONIC COMMUNICATIONS SYSTEMS MAINTAINED BY EMPLOYERS SHOULD BE AVAILABLE TO EMPLOYEES TO COMMUNICATE FOR PROTECTED CONCERTED ACTIVITY AND UNION ACTIVITY.

Questions 1 and 2 contained in the Board's notice are best answered together.

[3] Purple's phone rule allows personal calls up to three minutes. Jt. Ex. 1, p 28-29.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

In summary, where an employer generally allows employees access to an email system, the Board should create a presumption that such use allows for communication of matters relating to working conditions, including relating to efforts to form, join or assist a labor organization or for mutual aid and protection within the meaning of Section 7. Such a presumption could be rebutted by an employer who expressly limits the email system to specific and defined business uses or limits and demonstrates that it strictly enforces such a rule. Where such business uses include matters of wages, hours or working conditions, employees may use such communication systems for communications relating to working conditions.[4] We believe this is a practical approach that accommodates employer interests and the Section 7 rights of employees under the Act.

As a corollary, where the employer allows any personal use of the email, meaning non-work related[5] use, the employees may use the email for communication about efforts to form, join or assist a labor organization or for mutual aid or protection.

The Board's Notice is not limited to email and refers generally to employer communication systems. There is some difference between access through a company provided computer terminal at work and employee provided electronic device either of which can access email or other communication systems. The principles of access and use that Section 7 seeks to protect are, however, the same. We address the Board's concerns attempting to encompass the broad array of such systems.

---

[4] One variant of the restriction would be an email system on an intranet where the employees would receive emails and not have access to sending emails. In those cases, the employer would not have opened up the email system to general use.

[5] We use the term "work related" rather than "business related." The term business is ambiguous since employees could interpret "business related" to exclude communications about wages, hours and working conditions. The Board uses the term "work" in other contexts and it follows the statutory language that recognizes "work" and "working." 29 U.S.C. sections 142 (2); 143; 151, 152 (3); 152 (12); 158(b)(4)(D); 158(g). "Work" thus encompasses both business issues that may not related to wages, hours and other conditions of employment as well as those that do. Of course, if the employer prohibits any communications specifically about working conditions, that would not be permissible.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

B. WELL-SETTLED PRINCIPLES GOVERN THE RIGHTS OF EMPLOYEES TO COMMUNICATE IN THE WORKPLACE.

Well-settled National Labor Relations Act principles regarding employee workplace communications entail the following conclusions regarding employee communications *via* email: *First*, where employees are allowed to communicate with one another about nonwork related matters, meaning personal matters, through a company's email system, employees have an NLRA-protected right to use the email system to communicate with one another about union or other matters of mutual aid or protection so long as the communication is concerted. *Second*, the employer may restrict such email, if the email constitutes solicitation, to nonworking time, and it may impose additional restrictions on such communications only if the restriction is justified by a showing that it is necessary to further substantial managerial interests. *Third*, in no event can an employer take adverse action against an employee, nor limit such communication, based on the ground that the employee's email communications concerned union or other concerted, protected matters related to mutual aid or protection.

The NLRA principles regarding the right of employees to communicate with one another at their workplace regarding union and other matters of mutual aid and protection were summarized and explained by the Supreme Court in *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), and *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

Beth Israel described the basic analytical framework for determining whether employer restrictions on employees' workplace communications constitute unlawful interference with the exercise of Section 7 rights:

> [T]he right of employees to self-organize and bargain collectively established by § 7 of the NLRA, 29 U.S.C. § 157, necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), articulated the broad legal principle which must govern the Board's enforcement of this right in the myriad factual situations in which it is sought to be exercised:
>
> > "[The Board must adjust] the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

> rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee." *Id*., at 797-798.

That principle was further developed in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), where the Court stated:

> "Accommodation between [employee-organization rights and employer-property rights] must be obtained with as little destruction of one as is consistent with the maintenance of the other." *Id*., at 112.

Beth Israel Hospital, 437 U.S. at 491-492 (footnote omitted).

Eastex, in turn, explained that, since "employees are already rightfully on the employer's property, . . . it is the employer's management interests rather than its property interests that primarily are implicated" by employee workplace communications. *Eastex*, 437 U.S. at 573 (quotation marks, citation and brackets omitted). It follows that, to justify the suppression of such communications, an employer must "show that its management interests would be prejudiced" to a sufficient degree to justify the suppression. *Ibid*.

In sum, under the NLRA, "[n]o restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956).

We recognize, further, that an employer may limit use of the email to strictly business related purposes where it establishes such a clear rule and strictly enforces the rule. This accommodation recognizes that there may be managerial reasons to limit communications. For example, in the hospital setting, discussions in front of patients or in patient care areas may be limited. An employer could limit email use only to communications with customers or for a specific purpose such as checking on the status of orders. Similarly, in a retail setting, discussion can be limited on the sales floor in front of customers. VIs cannot be communicating with others while interpreting in front of clients on the video screen. But, like every such substantial managerial interest, it must be narrowly applied and subject to a substantial managerial interest. We submit that any employer who wants to implement and enforce such a rule should carry the

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

burden of establishing that it promulgated such a clear rule and enforced it. Proof of enforcement falls upon the party that has access to the records to prove this. The employer can retain emails for a reasonable period of time and will likely do so in a context where it has such a managerial interest. Employees are not likely to save all emails, and employers do so as matter of course. Finally, we think this is practical. When employees communicate about work related issues, they often mix in personal matters. We just don't think, and neither will the Board agree, that it is likely that any employer that allows email use will strictly enforce any rule against any communication on all non-work related matters. But with resect to oral communications by phone, in person, Skype, 2-way radio or any other system, personal remarks and communications, either standing alone or in conjunction with work related communications, are the rule and the accepted norm for workplace communications.

C. THESE PRINCIPLES APPLIED IN THE EMAIL AND COMMUNICATION SYSTEM CONTEXT

To put the foregoing general principles into the email context: Where an employer allows employees to use the company's email system to communicate with each other on workplace matters generally (and this applies where they are allowed to communicate on personal matters unrelated to workplace issues), the "employees are already rightfully on the employer's property" in the sense of having been allowed access to the email system. *Eastex*, 437 U.S. at 573. And, "[e]ven if the mere distribution by employees of [email messages] protected by § 7 can be said to intrude on [the employer's] property rights in any meaningful sense, the degree of intrusion does not vary with the content of the [email]." *Ibid*. Thus, "it is the employer's management interests rather than its property interests that primarily are implicated" in the choice of nonbusiness matters about which employees may communicate *via* email. *Ibid*.

In such workplaces, a rule prohibiting employees from using email to communicate with each other about union or other matters of mutual aid or protection is most certainly a "restriction . . . on the employees' right to discuss self-organization among themselves." *Babcock & Wilcox*, 351 U.S. at 113. Such a rule violates § 8(a)(1)'s proscription of employer "interfere[nce] with . .

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

. the exercise of the rights guaranteed in section 7," 29 U.S.C. § 158(a)(1), "unless the employer can demonstrate that a restriction is *necessary* to maintain production or discipline." *Babcock & Wilcox*, 351 U.S. at 109 and 113 (emphasis added).

D. EMPLOYERS MAY IMPLEMENT SPECIFIC RULES LIMITING EMAIL TO DEFINED BUSINESS PURPOSES IF THEY STRICTLY ENFORCE THOSE RULES; EMPLOYERS MAY IMPLEMENT NON-DISCRIMINATORY RULES LIMITING SOLICITATION DURING WORKTIME.

This is not to say that employees are always entitled to use their employers' email systems for Section 7-protected communications, nor does it mean that employers are prohibited from maintaining reasonable non-discriminatory rules regarding employee use of company email.

Where an employer *altogether* denies employees the right to use a company email system for any communications, employees have no right to use that system for Section 7-communications relating to wages, hours and conditions of employment.

Just as an employer is not required to provide employees with access to its email system at all, if an employer maintains and strictly enforces a rule limiting use of the email to a specific business purpose (such as contacting customers, forwarding medical records or other business records or dispatchers or schedulers), it need not permit employees to use that system for union-related solicitation, even during non-work time. In contrast, as we have explained, once an employer creates an "avenue[] of communication open to [employees] . . . for the interchange of ideas," *LeTourneau*, 54 NLRB at 1253, 1260 (1944), by permitting employees to use its email system for communications, it may not deny employees the right to use that system for Section 7-protected communications as well. Of course, where the communications system is open to use for personal purposes unrelated to work, the employer cannot limit the nature of the communication if concerning issues of wages, hours and conditions of employment for mutual aid or protection.

The rationale for this sensible rule is that, pursuant to the logic of the Supreme Court's decision in *Eastex*, an employer may rest on its managerial interest in its email system only to decide: (1) whether to provide employees with access to its email system at all; and to then

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

exercise its managerial interests (2) whether to permit employees to use that email system for non-work purposes. Once "employees are already rightfully on the employer's property" – by means of the employer providing employees with access to its email system and permitting non-work use of that system – "it is the employer's *management interests* rather than its property interests that primarily are implicated." *Eastex*, 437 U.S. at 573 (quotation marks and brackets omitted) (emphasis added).

In other words, the act of employees sending emails regarding issues of mutual aid and protection with which the employer disagrees does not cause "an injury to the company's interest in its computers – which worked as intended and were unharmed by the communications – any more than the personal distress caused by reading an unpleasant letter would be an injury to the recipient's mailbox, or the loss of privacy caused by an intrusive telephone call would be an injury to the recipient's telephone equipment." *Intel Corp. v. Hamidi*, 71 P.3d 296, 300 (Cal. 2003). Thus, as between personal emails, whose content is not protected by the NLRA, and Section 7-protected emails, "the degree of intrusion [into the employer's property rights] does not vary with the content of the material." *Eastex*, 437 U.S. at 573.

Although an employer that permits employees to use its email system cannot prohibit employees from using that system for Section 7-protected communications, the employer can enforce reasonable non-discriminatory rules regarding employee use of a company email system, as long as those rules do not interfere with the ability of employees to use the company email system to engage in solicitation during non-work time.

Having said that much, it is also true that a general nondiscriminatory rule limiting employees' communications that are solicitations to nonwork time is valid on its face and may be applied to email communications as to other communications. This follows from the fact that "[w]orking time is for work" so that "a rule prohibiting union solicitation during working hours . . . must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose." *Republic Aviation*, 324 U.S. at 803 n. 10. By the same token, because "time outside working hours . . . is an employee's time to use as he wishes without unreasonable restraint, . . . a rule prohibiting union solicitation by an employee outside of working hours,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

although on company property[,] . . . must be presumed to be an unreasonable impediment to self-organization . . . in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline." *Republic Aviation*, 324 U.S. at 803-804 n. 10. Thus, to justify restrictions on employee email communications concerning union or other concerted, protected matters during *non*work time, the employer must show "special circumstances" that "make the rule necessary."[6]

Furthermore consistent with *United Steelworkers v NLRB (Nutone*), 357 U.S. 357 (1958), we could imagine an employer setting up a one way captive audience meeting where it did blast emails requiring employees to read but not respond directly at that time. But if employees had otherwise access to email, the principles discussed here would not prevent further communication and discussion.[7]

An employer also could lawfully prohibit employees from sending abusive and threatening email messages on the company email system, as long as such a rule is not applied in a manner that interferes with employees' right to engage in Section 7-protected communications. "[A] rule prohibiting 'abusive language' is not unlawful on its face," rather "[t]he question of whether particular employee activity involving verbal abuse or profanity is protected by Section 7 turns on the specific facts of each case." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). *See Costco Wholesale Warehouse*, 358 NLRB No 106 at page 2 (2012). Communications that are "malicious, abusive or unlawful: would not be protected. *Id*., citing

[6] We recognize that, as a practical matter, an employee who sends an email containing a solicitation or a non-business related matter may not know whether the recipient is working. Relatedly, a recipient who is on work time may not be able to discern whether an email contains a solicitation or a non-business related matter without opening it. For these reasons, an employer who chooses to limit the use of company email for solicitation to non-work time or strictly limit the use of email to business purposes must reasonably account, in a non-discriminatory manner, for these idiosyncrasies of email communication.

[7] *Virginia Concrete Corp*., 338 NLRB 1182, 1187 (2003) (one way text messaging).

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

Lutheran Heritage Village-Livonia, and other cases.[8] This general principle applies to employer rules prohibiting abusive communications in the email context.[9]

E. WHERE EMPLOYEES HAVE ACCESS TO EMAIL DURING WORK HOURS, THEY CAN BE PROHIBITED FROM ENGAGING IN SOLICITATION; THEY CANNOT BE PROHIBITED FROM WORK RELATED COMMUNICATIONS CONCERNING WORKING CONDITIONS WHERE THEY OTHERWISE HAVE ACCESS TO EMAIL.

This principle that employers can limit use of the email to specific business purposes and prohibit solicitation during working hours, must, however, recognize the equally important rule that employers cannot prohibit employees from talking about and communicating for purposes of mutual aid or protection when the email is generally available unless the email use is restricted to a business use unrelated to those issues. It is well settled that rules prohibiting employees' discussion of their wages, hours, or other terms and conditions of employment violate Section 8(a)(1) of the Act. *Mcpc, Inc.*, 360 NLRB No. 39 (2014); *Flex Frac Logistics*, 358 NLRB No. 127 at *1-2 (2012), *enforced*, 746 F.3d 205 (5th Cir. 2014); *Costco Wholesale*, 358 NLRB No 106 at p 2-3; *Flamingo Hilton Laughlin*, 330 NLRB 287, 292 (1999); *Koronis Parts*, 324 NLRB 675, 686, 694 (1997). *See also Scientific-Atlanta, Inc.*, 278 NLRB 622, 624-625 (1966) (wages are a "vital term and condition of employment," "probably the most critical element in employment" and "the grist on which concerted activity feeds").

It is important here to distinguish between solicitation and communication.[10] The Board has historically drawn an important distinction between solicitation and mere talking. *Fremont Medical Center*, 357 NLRB No. 158 fn. 9 (2011). In *W. W. Grainger, Inc.*, 229 NLRB 161, 166 (1977), *enforced*, 582 F.2d 1118 (7th Cir. 1978), the Board noted that, "It should be clear that 'solicitation' for a union is not the same thing as talking about a union or a union meeting or whether a union is good or bad." *See Powellton Coal Co*., 354 NLRB 419 (2009), incorporated

[8] Charging Party in its Brief in Support of Exceptions has asked the Board to overrule *Lutheran Heritage Village-Livonia.*

[9] Purple maintains such rules which are not challenged. Jt. Ex 1, p 30-31.

[10] Purple maintains an unchallenged rule prohibiting solicitation "during working time for any purpose." Jt. Ex.1, p 32.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

by reference in 355 NLRB 407 (2010) (employer unlawfully prohibited employees from engaging in conversations about the union); "An employer may not restrict union related conversations while permitting conversations relating to other topics." *Rockline Industries*, 341 NLRB 287, 293 (2004); *Jensen Enterprises*, 339 NLRB 877, 878 (2003). Thus, an employer cannot turn a valid no-solicitation rule into a no-talking rule. *Starbucks Corp.*, 354 NLRB 876, 891-93 (2009); *Emergency One, Inc.*, 306 NLRB 800 (1992) (respondent unlawfully restricted conversations about the union during work time while permitting other conversations including those about non-work matters); *ITT Industries*, 331 NLRB 4 (2000) (respondent's instruction not to engage in any discussion of the union with any employee unlawful where employees were, notwithstanding rule in employee handbook prohibiting all solicitations during working time, allowed to engage in discussions and solicitation on the production floor). In *Wal-Mart Stores*, 340 NLRB 637, 639 (2003), *enforced in relevant part*, 400 F.3d 1093 (8th Cir. 2005), the Board found that the wearing of union insignia was not solicitation and would not justify the application of a no solicitation rule.

Since the first email case in 1993, the Board has recognized that employees, once they have access to email, use it for work related purposes, including communicating issues about working conditions. *E. I. Du Pont De Nemours & Co*., 311 NLRB 893, 919 (1993).

Thus, as long as an employer such as Purple allows any communication during work time about work related matters, it cannot prohibit such communications when they involve issues concerning the workplace, including how those conditions might be improved. Furthermore, so long as the employer uses the email system to communicate about wages, hours and working conditions or matters of mutual aid and protection, it cannot prohibit employees from doing the same. And further, where any employer such as Purple allows use of email for personal purposes unrelated to working conditions, it cannot prohibit communications about work related conditions. Again, however, the employer could limit email use to defined uses relating to production. And, further, even to workplace issues, it could make email available to communicate only with employees. Once the employer allows employee personal use among employees, it cannot prohibit use about workplace issues.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

Here, Purple uses email for human resources communications, and this is the norm with employers who have an intranet or email on the internet. (Tr. 64, 132. Em. Ex. 10 [key metric adjustment memo to all video interpreters] and Ch. P. Ex 7 [announcing bonus].) Where email is used for such purposes, employees have a right to communicate with management or other employees about such issues where, again, employees are given access to use of the email. *Timekeeping Sys., Inc.*, 323 NLRB 244 (1997) illustrates this principle from a case that arose almost 20 years ago. There, the employer used its email system to communicate with employees about changes in vacation and incentive bonus. One employee objected to the change in the vacation policy and offered a detailed criticism of the change to the employer and copied the other employees. There was no restriction imposed on employees that limited communication on the email system. When the employee wouldn't retract his criticism, he was fired. The Board applied traditional principles and found the conduct was concerted, protected and for mutual aid or protection. All of the conduct was on work time. These were not personal communications.

The Board's recent decision in *California Institute of Technology*, 360 NLRB No. 63 (2014), illustrates this. Employees used the email system to engage in a vigorous and sharp debate about a workplace issue involving privacy. The employees sent mass emails to other employees and to outsiders, apparently on work time, concerning the subject of privacy and were disciplined for their conduct. The Board had no trouble finding the conduct did not lose the protection of the Act. The Board described the testimony of the director of Human Resources:

> She aptly described these communications as being "part of the fabric of every working group in every day work operations." She continued: "[T]hat is part of, in a work group, what people inform each other about."

Id. at p. 14.

This demonstrates our point that once access is allowed to email for email communications among employees, employees are allowed to use it for purposes related to mutual aid and protection. The employer cannot then discipline employees who use it to debate workplace issues.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

This is forcefully illustrated in *Food Services of America*, 360 NLRB No. 123 (2014). The Board sustained the termination of one discriminatee because he used the company email to disclose "confidential business information." *Id* at n. 4. Note that the disclosure was "confidential" information, not just business information. On the other hand, the email and instant message exchanges between discriminatee Rubio and others was protected activity. From the entire context it was clear that the employees were using company communications systems and company email.[11] Food Services condoned this use and only terminated Mr. Rubio when it objected to his instant messaging about job security. In summary, an employer can promulgate clear rules limiting company communications systems to specific business purposes. It can similarly limit solicitation for union or protected activity to non-work time. But once it allows access to the email system without clear business related limits, which are strictly enforced, it cannot prohibit communications about wages hours and working conditions for mutual aid or protection.

Of course, the employer has the right to limit communications to ensure productivity and other substantial business needs. Just like it can make sure the VIs respond promptly to any incoming call, it can ensure anyone with an employer communications service or device is not distracted from his or her work task. Just like employers can limit the time workers use to spend at the water cooler, they can limit communications, as long as the limit is non-discriminatory.

F. THE REGISTER-GUARD RULE SHOULD BE DISCARDED.

The *Register-Guard* Board, confronting the same question presented here, rejected the applicability of *Republic Aviation* to employee use of a company email system for Section 7-protected solicitation on the ground that "[a]n employer has a 'basic property right' to 'regulate and restrict employee use of company property.'" *Register-Guard*, 351 NLRB 1110, 1114 (2007) (quoting *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663-64 (6th Cir. 1983)). As we have already shown, however, while an employer may exclude employees completely from using a company email system for non-work communications altogether, once it permits employees to

[11] Many of the emails were forwarded from the company email system. *Id*. at p. 14.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

use that system for work purposes, "it is the employer's *management* interests rather than its property interests that primarily are implicated." *Eastex*, 437 U.S. at 573 (emphasis added). At that point, *Republic Aviation* – with its focus on the right of employees "effectively to communicate with one another regarding self-organization at the job site" (*Beth Israel Hospital*, 437 U.S. at 491) – fully applies.

The cases relied upon by the *Register-Guard* Board for its conclusion that employees have "no statutory right" to use "employer-owned property – such as bulletin boards, telephones, and televisions – for Section 7 communications," (351 NLRB at 1114) follow the rule set forth in *Eastex*.[12] As those cases make clear:

> When an employer singles out union activity as its only restriction on the private use of company [property], it is not acting to preserve the use of the [property] for company business. It is interfering with union activity, and such interference constitutes a violation of Section 8(a)(1) of the Act.

Churchill's Supermarkets, Inc., 285 NLRB 138, 156 (1987).

Contrary to the conclusion drawn by the *Register-Guard* Board, the cases cited in that decision actually demonstrate that the Board has applied *Republic Aviation*'s interference analytic framework to employee use of a wide range of employer equipment for Section 7-protected communications, including bulletin boards (*Eaton Tech., Inc.*, 322 NLRB 848, 853 (1997) ("when an employer permits . . . employees . . . to post personal . . . notices on its bulletin boards, the employees' . . . right to use the bulletin board receives the protection of the Act")), telephones (*Union Carbide Corp*, 259 NLRB 974, 980 (1981) ("once [the employer] grants the employees the privilege of occasional personal use of the telephone during work time, . . . it could not lawfully exclude the Union as a subject of discussion"), *see also Churchill's*

[12] The *Register-Guard* Board relied on *Mid-Mountain Foods*, 332 NLRB 229 (2000). 351 NLRB at 1114. There was no showing that the employer had permitted any kind of videos to be shown on a company provided video player. Thus, the Board's conclusion that "the Union's employee supporters do not have a statutory right to show the video . . . since it has not been established that the Respondent permitted employees to show other videos," (*Id.* at 230) was arguably correct**.**

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

Supermarkets, 285 NLRB at 155-56 (1987) (same)), and photocopy machines (*Champion Int'l Corp.*, 303 NLRB 102, 109 (1991) ("An employer may not invoke rules designed to protect its property from unwarranted use in furtherance of pro-union activities while, at the same time, freely permit such use for non business related reasons")).[13] Based on this precedent, the Board should apply *Republic Aviation*'s analytic framework to employee use of a company email system for Section 7-protected communications as well.[14] Thus, Suzi Prozanski's May 4 email was protected because the Register-Guard's discipline interfered with her Section 7 right to communicate about workplace issues

G. THE STRONG POLICY REASONS TO ADOPT THE RULES ADVOCATED HEREIN

There are strong policy-based reasons for the Board to adopt the rule urged here pursuant to the Board's responsibility "to formulate and adjust national labor policy to conform to the realities of industrial life." *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 693 (1980).

First, and foremost, email and other forms of electronic communication are ubiquitous in most all modern workplaces. Other forms of communication systems, both hardware, text messaging, applications, RFID, social media and other forms are everywhere, sometimes in multiple formats. In many workplaces, then, electronic communication has become an important "avenue[] of communication open to [employees] . . . for their right to self-organization." *LeTourneau Co., supra* at 1260.

---

[13] Some of the cases cited refer to employer discrimination in stating the basic *Eastex* rule. *See, e.g., Champion Int'l Corp.*, 303 NLRB at 109 ("an employer may not use that basic right [to regulate and restrict employee use of company property] to discriminatorily restrict pro-union activities"). However, it is clear from the context of these statements that the Board does not refer to anti-union animus, but rather, as in *Republic Aviation* itself, to discrimination in the sense of an "unreasonable impediment to self-organization." 324 U.S. at 803 n.10. As we have explained in the text, we strongly suggest that the Board avoid this use of the term "discrimination" in deciding this and future cases that rest on the rationale set forth in *Republic Aviation* and its progeny.

[14] Discriminatory enforcement of otherwise valid rules would constitute also a violation of 29 U.S.C. section 158(a)(3). *Guard Publishing Co. v. NLRB*, 571 F. 3d 53 (D. C. Cir 2009).

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

In addition, "[r]apid changes in the dynamics of communication and information transmission are evident, not just in the technology itself, but in what society accepts as proper behavior" regarding the use of email. *City of Ontario v. Quon*, 560 U.S. 746, 759 (2010). In particular, "[m]any employers expect or at least tolerate personal use of [electronic communications] equipment by employees because it often increases worker efficiency." *Ibid.* There is a movement among some employers to encourage employees to "bring their own devices' (BYOD), which poses many issues for employers and employees. But we also concede that there are many employees who do not currently use email, at all, for work. Many who do not have email use may have other forms of employer communication equipment. There are many forms that allow limited communications, sometimes only one way (employer to employee), but sometimes employee to employer, employee to other employee or employee to non-employee. This rapid change is equally illustrated by Purple's website advertising new communications services for its clientele. Email and related communications, such as text messaging, will evolve and change.

One federal district court has recently recognized this: "The Court takes judicial notice of the fact that it is a customary practice for employees to use their business emails and computers for both personal as well as business purposes, but merely using a work computer or email address does not implicate the employer's involvement in the employee's personal business, let alone that the employer purposefully directed the activity." *Farkas v. Rich Coast Corp.*, 2014 WL 550594 (W.D. Pa. Feb. 11, 2014). *See also*, *Stengart v. Loving Care Agency, Inc.*, 201 N.J. 300, 307 (2010) ("In the modern workplace, for example, occasional, personal use of the Internet is commonplace"). *See also, Schill v. Wis. Rapids Sch. Dist.*, 786 N.W.2d 177, 182-83 (Wis. 2010).

The speed and efficiency of email communication, as well as the ability of many employees to access a work email account from a mobile electronic device or a home computer, makes email communication, if anything, less disruptive than face-to-face communication at the workplace. In addition, unlike the use of a company bulletin board for Section 7-protected communications – where employee non-work use may crowd out the employer's use of its

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

property for work-related communications – normal employee use of a company email system for non-work communications is highly unlikely to interfere with the simultaneous use of that system for work tasks. *Cf.*, *Intel Corp.*, *supra* at 303-04 (no evidence of email messages slowing or impairing employer's email system even where former employee sent thousands of messages simultaneously) and *Cal. Inst. of Tech.*, 360 NLRB No. 63. To the extent that certain *forms* of employee use of a company email system potentially could interfere with an employer's use of that system for work purposes – such as the sending of large attachments that might slow the employer's email system or spamming that might create such a distraction as to interfere with employees' use of the email system for work purposes – an employer could lawfully place limits on such forms of use of its system, as long as it does so in a non-discriminatory manner.

Thus, because "[f]lexible, common-sense workplace policies that allow occasional personal use of email are in line with the mainstream of professional practice" (*Schill*, 786 N.W.2d at 196), and because such use does not create additional cost for an employer or interfere with the employer's property rights, the Board's *Register-Guard* rule, permitting an employer to lawfully prohibit *all* employee use of email for Section 7 purposes is far out of step with the "realities of industrial life" (*Yeshiva Univ.*, 444 U.S. at 693), and represents an unwarranted restriction on the ability of employees to "effectively . . . communicate with one another regarding self-organization at the jobsite" (*Beth Israel Hosp.*, 437 U.S. at 491).

The practicalities of the presumption we advocate should be readily apparent.

The employer can choose to make any electronic communications device available to any given employee or group of employees. It is a managerial decision. There are various communications systems that it can choose from. For example, it can select a voice activated or text messaging system that permits only one way communication or communication with a designated person, such as dispatcher or supervisor. It can control the recipients of email. It can preclude all attachments or links. It can limit the length of the email message. So long as there is a clearly stated business purpose, and it is strictly enforced and it is not discriminatory, the employer has a wide range of tools to control the use of its email systems.

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

Here, Purple evidences this flexibility. Many employers prohibit use of employer phones for personal use, meaning, again, for communication unrelated to work. Purple, however, allows such use on company phones and employee cell phones so long as each call is limited to 3 minutes. (Jt. Ex. 1, p 29.) It allows use of relay services "to make a personal call, [the employee] is entitled to use relay in the normal course of your business." (Jt. Ex. 1, p 33.)

Employers, furthermore, have the ability to monitor use of these emails in ways that did not apply when the Board formulated its rules 50 or more years ago.[15] An employer can monitor every aspect of electronic communications. As in many other circumstances where employee use of communication interferes with work, it can take appropriate action. For example, if VIs are allowed to read a book, but the FCC requires each call be answered with 120 seconds, Purple can easily monitor each VI to ensure that he or she was available to answer each call promptly when each call appeared. Purple can tell whether the VI was logged into a call, or waiting, and how long before he or she answered the next waiting call. Thus, productivity can easily be measured and enforced. These issues are not directly before the Board. They serve to illustrate the practicalities of the rule we propose.

H. THE AVAILABILITY OF EMPLOYEE CELL PHONES, PERSONAL DEVICES, SOCIAL MEDIA SITES AND PERSONAL EMAIL DOES NOT AFFECT THE PRESUMPTION URGED IN THIS BRIEF.

The Supreme Court has clearly held that the availability of alternative means of employee-to-employee communication is not relevant in determining the nature and strength of the Section 7 right. *See Beth Israel*, 437 U.S. at 504-05; *Babcock & Wilcox*, 351 U.S. at 112-13. Here, the employees are disbursed among 16 call centers. The inability of some employees to

[15] *Mcpc, Inc.*, 360 NLRB No. 39. * 7- 8, n. 13 (2014) (audit of computer used by employee demonstrated he did have inappropriate access to data). Employers will have to observe federal law, which can limit access to email accounts and other electronic media. *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 876- 880 (9th Cir. 2002).

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

communicate with fellow workers, other than through email, demonstrates the critical nature of this Section 7 right. Thus, availability of other forms of communication is not a relevant issue.[16]

I. QUESTION 5 AND THE FUTURE OF EMAIL AND SIMILAR ELECTRONIC COMMUNICATIONS SYSTEMS

Question 5, as posed by the Board, requires some clairvoyance, but reliance on bedrock principles, as described above, should guide the Board. It is not possible to predict all forms of communication systems that will be available and used by employers or employees. In the future, there will be many forms of communication that are only being developed. For example, there has been recent publicity about implanting medical devices that will send signals regarding medical history. There was also, in the development stage, wearable devices that will monitor work activity. Could the employee wear his or her own device in order to monitor his or her own activity to provide information to other employees? Could the employee transmit safety or work performance data to a union concurrently with transmitting it to the employer? Could the employee use his own device to download and email company information that is related to wages, hours and working conditions? These questions will arise in the future. However, the basic statutory right of employees to engage in communication in the workplace established by Section 7 will govern these questions. What is certain is that efficient industry and productive work requires communication. Employers will have to accommodate their need to allow employees to communicate through electronic means with the right of employees to engage in Section 7-protected communications.

IV. CONCLUSION

For the reasons suggested above, the Communications Workers of America urges the Board to adopt the presumption that employees can use employer email systems, including related communications systems, such as text messaging, for protected concerted activity concerning mutual aid or protection or Union activity unless the employer adopts a clear rule

[16] The Board need not reach the issue of access to email by non-employees. The right of non-employees to communicate, solicit or send attachments is governed by state or federal law. *Lechmere, Inc. v. NLRB,* 502 U.S. 527 (1992). *See also Intel Corp., supra,* and CAN SPAM, 15 U.S. C. section 7701 *et seq.*

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

limiting the email system to a specific business purpose and strictly enforces that rule. Alternatively, the employer may prohibit all access to its email system unless discriminatory. This reflects the modern day use of electronic communication systems. It protects and properly balances the rights of employers and employees.

Dated this 16th day of June, 2014.

Respectfully submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

/S/ DAVID A. ROSENFELD
DAVID A. ROSENFELD
By: LISL R. DUNCAN

Attorneys for COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

133337/769185

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200 Alameda, California 94501.

On June 16, 2014, I served the **Charging Party/Petitioner's Brief** on the interested party in said action by placing a true and exact copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Via Email and US Mail

Robert J. Kane
Stuart Kane
620 Newport Center Drive, Suite 200
Newport Beach, CA 92660-6422
rkane@stuartkane.com

Via U.S. Mail

Olivia Garcia, Regional Director
Cecilia Valentine, Attorney
National Labor Relations Board, Region 21
888 S. Figueroa Street, Floor 9
Los Angeles, CA 90017-5449

I certify under penalty of perjury that the foregoing is true and correct. Executed at Alameda, California on June 16, 2014.

/s/ Katrina Shaw
Katrina Shaw

WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
(510) 337-1001