UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PURPLE COMMUNICATIONS, INC.

and

Cases 21-CA-095151
21-RC-091531
21-RC-091584

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

BRIEF OF *AMICUS CURIAE* COUNCIL ON LABOR LAW EQUALITY

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TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT OF COLLE'S MEMBERSHIP AND INTEREST 3

SUMMARY OF THE CASE 4

ARGUMENT 5

I. The Board Should Adhere to *Register-Guard's* Holding That Employees Do Not Have a Section 7 Right to Use Their Employer's Email or Electronic Communications Systems 5

A. *Register-Guard* Is Based on Decades of Well-Established Precedent Regarding the Use of Employer Equipment 5

B. The General Counsel's Position Is Without Basis in Precedent 6

C. Employees Have Other Means to Engage in Email or Other Electronic Communications 9

II. *Register-Guard's* In-kind Discrimination Standard Should Remain in Place 11

A. The In-Kind Discrimination Standard Is Sound and Consistent with the Standard Applied by Courts of Appeal 11

B. Employers May Restrict, on a Content-Neutral Basis, Use of Their Email Systems During Working Time 15

C. Employers May Lawfully Enforce Other Content-Neutral Restrictions on the Use of Their Email Systems 15

D. Employers Have a Legitimate Interest in Monitoring Employee Use of Email and Computer Systems 16

CONCLUSION 18

INTRODUCTION

The Council on Labor Law Equality ("COLLE") submits this *amicus curiae* brief in response to the Board's April 30, 2014 Notice and Invitation to File Briefs. The Board's invitation presents the following issues for consideration:

1. Should the Board reconsider its conclusion in *Register Guard* that employees do not have a statutory right to use their employer's email system (or other electronic communications systems) for Section 7 purposes?
2. If the Board overrules *Register Guard*, what standard(s) of employee access to the employer's electronic communications systems should be established? What restrictions, if any, may an employer place on such access, and what factors are relevant to such restrictions?
3. In deciding the above questions, to what extent and how should the impact on the employer of employees' use of an employer's electronic communications technology affect the issue?
4. Do employee personal electronic devices (e.g., phones, tablets), social media accounts, and/or personal email accounts affect the proper balance to be struck between employers' rights and employees' Section 7 rights to communicate about work-related matters? If so, how?
5. Identify any other technological issues concerning email or other electronic communications systems that the Board should consider in answering the foregoing questions, including any relevant changes that may have occurred in electronic communications technology since *Register Guard* was decided. How should these affect the Board's decision?

COLLE submits that the Board should adhere to *Register-Guard's* holding that employees do not have a statutory right to use their employer's email system to engage in Section 7 activity. That conclusion inevitably flows from decades of well-reasoned and consistently applied precedent on the use of employer equipment to engage in Section 7 activity, and the corollary restrictions placed on employers under Section 8(a)(1). To hold, instead, that employees have a statutory right to use their employer's equipment, in the absence of discrimination, would be a radical departure from long-settled precedent.

In answering the questions identified above, the Board should consider the major technological developments that have occurred since *Register-Guard* issued seven years ago,

including the now widespread use of portable smart phone and tablet devices, which makes access to employer email systems unnecessary for electronic communications between co-workers. Many employees now have constant access to personal devices to send and receive non-work email, text messages, and engage in social media activity. If, at the time of *Register-Guard*, employer email systems had become the modern version of the "water cooler," then between 2007 and 2014 these personal electronic devices replaced that water cooler. These technological developments counsel in favor of affirming *Register-Guard*. Employees do not need their employer's email system in order to communicate with co-workers or a union representative.

Furthermore, use of an employer's email system for non-work related communication is more comparable to distribution of literature than solicitation. Even if an employee sends an email during non-working time, it may be received by other employees while they are working or supposed to be working. If the recipients are not working at the time the email solicitation is received, they will see the email when they return to their desk and open up their email in order to begin working again. In this way, email is like literature that clutters a work area, and therefore may be prohibited *at all times*. This is an additional reason for adhering to *Register-Guard*.

Beyond the threshold issue of access to an employer's email system, the Board should adhere to *Register-Guard's* "in-kind" discrimination test. This standard allows an employer to draw reasonable distinctions between, for example, personal or charitable use of the employer's email system and use on behalf of commercial, political, or religious causes. Under *Register-Guard*, the employer bears the burden of enforcing policies in a way that does not discriminate against Section 7 activity.

If, however, the Board decides to modify *Register-Guard's* discrimination test, the Board should recognize that employers may still maintain and enforce content-neutral restrictions on the use of its email system, such as limitations on the number of recipients or the size of attachments. Further, the Board should recognize that employers have the right to monitor email and internet traffic in order to ensure that its systems are not being used to engage in illegal activity. And the Board should recognize that employers may police the use of their email and computer systems to maintain productivity. Even if the use of email is analogized to solicitation, rather than distribution, an employer has the right to prohibit employees from sending non-work related email during the working time of the sender and the recipient(s).

In this *amicus* brief, COLLE more fully addresses these and other issues posed in the Board's Notice and Invitation.

STATEMENT OF COLLE'S MEMBERSHIP AND INTEREST

COLLE is a national association of employers that was formed to comment on, and assist in, the interpretation of the law under the National Labor Relations Act. COLLE's single purpose is to follow the activities of the Board and the courts as they relate to the Act. Through the filing of *amicus* briefs and other forms of participation, COLLE provides a specialized and continuing business community effort to maintain a balanced approach – in the formulation and interpretation of national labor policy – to issues that affect a broad cross-section of industry. COLLE has participated as *amicus curiae* in numerous cases before the NLRB.

With respect to this case, COLLE members are large, national employers whose employees generally have access to the company's email and computer systems. The General Counsel's proposed expansion of employee rights to use employer equipment to engage in Section 7 activity is of special importance and significance to COLLE's members. The Board's

decision could substantially impact workplace policies and procedures governing email and computer systems, which are essential to conducting business and maintaining productivity in the modern workplace.

SUMMARY OF THE CASE

The underlying case involves an allegation that the employer, Purple Communications, Inc. ("Purple" or the "Employer"), violated Section 8(a)(1) of the Act by maintaining a policy prohibiting the personal use of the Employer's electronic equipment and systems. On October 24, 2013, Administrative Law Judge Paul Bogas dismissed the allegation because under existing law "employees have no statutory right to use the Employer's e-mail system for Section 7 purposes." Decision of the Administrative Law Judge, *Purple Commc'ns, Inc.*, JD-75-13, at 5-6 (Oct. 24, 2013) ("ALJD") (citing *The Register-Guard*, 351 NLRB 1110 (2007)).

On November 21, 2013, counsel for the General Counsel filed exceptions to the ALJD, arguing instead that "employees have a statutory right to use their employer's electronic communication system for Section 7 activities, subject only to the employer's need to maintain production and discipline." Gen. Counsel's Limited Exceptions and Brief in Support of Limited Exceptions, at 5 (Nov. 21, 2013). The General Counsel argued that "[b]ecause employees have a Section 7 right to communicate at work, employees who have access to and utilize electronic communication in their workplace have a Section 7 right to communicate through email." *Id.* at 6. The General Counsel noted that "the inability of some employees to communicate with fellow workers other than through email demonstrates the critical nature of this Section 7 right." *Id.* Thus, the General Counsel seeks to render unlawful the Employer's policy, which prohibits employees from using the Employer's email system for "engaging in activities on behalf of

organizations or persons with no professional or business affiliation with the Company" or "sending uninvited email of a personal nature." *Id.* at 7.

The General Counsel's pending exceptions to the ALJD ultimately led to the Board's April 30, 2014 Notice and Invitation to File Briefs.

ARGUMENT

I. THE BOARD SHOULD ADHERE TO *REGISTER-GUARD'S* HOLDING THAT EMPLOYEES DO NOT HAVE A SECTION 7 RIGHT TO USE THEIR EMPLOYER'S EMAIL OR ELECTRONIC COMMUNICATIONS SYSTEMS.

A. *Register-Guard* Is Based on Decades of Well-Established Precedent Regarding the Use of Employer Equipment.

Register-Guard followed long-settled law on employee use of employer equipment, including communications equipment, for Section 7 purposes. *Register-Guard's* holding is based on the unremarkable proposition that an employer's email system "is the [employer's] property and was purchased by the [employer] for use in operating its business." 351 NLRB at 1114. The Board majority then followed "a long line of cases governing employee use of employer-owned equipment." *Id.* For example, in *Mid-Mountain Foods*, the Board summarized cases holding that employees do not have a statutory right to use their employer's bulletin boards, telephones, public address systems, or video equipment:

> [T]here is no right to use an employer's bulletin board. *Honeywell, Inc.*, 262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983); *Container Corp.*, 244 NLRB 318 fn.2 (1979), *enfd.* 649 F.2d 1213 (6th Cir. 1981) (per curiam). Nor is there a statutory right of an employee to use an employer's telephone for personal or nonbusiness purposes, such as union organizing matters. *Union Carbide Corp.*, 259 NLRB 974, 980 (1981), *enfd. in relevant part* 714 F.2d 657, 663-664 (1983). Similarly, the Board has held that employees are not entitled to use an employer's public address system to communicate their union views. *See, e.g.*, *The Heath Co.*, 196 NLRB 134 (1972). From these cases, it appears equally clear that the Union's employee supporters do not have a statutory right to show the video, especially since it has not been established that the Respondent permitted employees to show other videos.

Mid-Mountain Foods, 332 NLRB 229, 230 (2000). This precedent naturally extends to employer email systems.

Each new phase of technological development with respect to workplace communications should not trigger a new Board doctrine governing its use. If that were the case, then the introduction of telephones, photocopiers, fax machines, or other devices would have, over time, required a re-examination of the law on Section 7 rights and the use of employer equipment. However, that has not happened. Board law on the use of employer equipment has been consistent for decades. Email systems should not be treated differently. An alternative approach would create continual uncertainty with regard to new forms of employer equipment and communications systems. The Board should adhere to its longstanding precedent on this issue.

B. The General Counsel's Position Is Without Basis in Precedent.

There also is no legal foundation for the General Counsel's argument that the Act *mandates* that employers allow employees to use email and computer systems in order to engage in Section 7 activity. The General Counsel's position is not supported by the Supreme Court's decision in *Republic Aviation v. NLRB*, 324 U.S. 793 (1945). While *Republic Aviation* held that employees have the right to engage in solicitation during their non-working time, *Republic Aviation* in no way supports the General Counsel's argument that an employer *must* permit its email system to be used as the forum for such solicitation. *Republic Aviation* holds that an employer cannot prohibit employees from engaging in solicitation during non-working time, on the employer's property, because that would "entirely deprive[]" employees of the right to engage in Section 7 activity. 324 U.S. at 801 & n.6. Thus, the Supreme Court held that the employer's property interests had to accommodate the *limited right* for employees to engage in Section 7 activity during their non-working time. As the Board held in *Register-Guard*,

employees otherwise "would have no time at the workplace in which to engage in Section 7 communications." *Register-Guard*, 351 NLRB at 1115.[1]

Republic Aviation cannot be read to require that the employer's email system be available as a forum for Section 7 activity, simply because it is a *more convenient* way for employees to communicate. Absent proof that employees do not have an opportunity to engage in in-person solicitation during non-working time, or lack any other ability to communicate while on the employer's property, the General Counsel's position is untethered from *Republic Aviation's* limited holding. Just as employees do not have a statutory right to use telephones, photocopiers, or other equipment that might make it *more convenient* to engage in Section 7 communications, employees do not have the right to use email simply because that is a more convenient forum for communication.

The General Counsel's position is also contrary to the Supreme Court's decision in *NLRB v. United Steelworkers of America (NuTone, Inc.)*, 357 U.S. 357 (1958). In *NuTone*, which issued 13 years after *Republic Aviation*, the Court held that an "employer is not obliged … to offer the use of his facilities and the time of his employees for pro-union solicitation." *Id.* at 363. Such use could raise, as the Court remarked, Section 8(a)(2) concerns over making employer resources and systems available to aid an organizing campaign. *Id.* Even if an employer's restrictions on the use of certain media have "the effect of closing off one channel of communication," the Court explained that the NLRA "does not command that labor organizations as a matter of law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a

[1] The Board majority in *Register-Guard* noted that its holding was not intended to address a unique situation where employees *only* communicate with each other via the employer's email system. 351 NLRB at 1116 n.13.

medium of communication simply because the employer is using it." *Id.* at 363-64.

The General Counsel's position with respect to email is contrary to this well-established principle. An employer's business decision to restrict access to and use of its own equipment, in a way that does not discriminate against Section 7 activity, does not violate the Act. Indeed, the AFL-CIO, in an *amicus curiae* brief filed on April 7, 2014 in *Shadyside Hospital*, Case No. 06-CA-081896, acknowledged that if "an employer *altogether* denies employees the right to use a company e-mail system for personal communications, employees have no right to use that system for Section 7-protected communications." AFL-CIO Brief at 8 (emphasis in original).

The General Counsel's position in this case lacks any logical end point. If access to an employer's email system is *required* simply because it is a more convenient method of communication, what other steps must an employer take in order to facilitate union solicitation or distribution? Must an employer grant employees access to its email and computer systems even if they do not normally use such systems to perform their job duties? Alternatively, must the employer schedule breaks and lunch times in way that will maximize the opportunity for in-person solicitation? The Board should not venture down this slippery slope.

Employers have legitimate business reasons for restricting non-work related use of their email systems. Non-work related email is more like distribution of literature, rather than solicitation. Unlike verbal solicitation, which is fleeting and can be ignored, email exists until it is deleted by the recipient. Employees who receive non-work related emails must take the time to read and delete them. Individually, this may not take much time, but in the aggregate, if many employees are sending non-work related emails on the employer's system, there is an impact on productivity. The non-work related emails clutter the virtual workspace in the same way that paper literature can clutter a factory floor. Decades of precedent recognizes an employer's

legitimate interest in keeping its work areas clean and free of "litter" that can interfere with the operation and employee productivity. *See, e.g.*, *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 619 (1962). The same rules governing distribution of literature in working areas should apply to "virtual" working areas, such as an employer's email system.

The General Counsel has called email the modern "water cooler." Gen. Counsel Br. at 5 ("email is the present day water cooler"). The dissenting Board members in *Register-Guard* took the same position. *Register-Guard*, 351 NLRB at 1125 ("discussion by the water cooler is in the process of being replaced by the discussion via e-mail"). But this analogy does not hold because, unlike a water cooler, the employer's email system is a place where work is supposed to occur. It is not a break area or some sort of virtual employee lounge. It is a forum for productivity in the modern workplace. Employers should not be required to open it up to non-work related communication.

C. Employees Have Other Means to Engage in Email or Other Electronic Communications.

Since *Register-Guard* issued in 2007, there have been many technological developments that provide other channels of electronic communication for employees. Personal electronic devices, such as smart phones and tablets, are now a ubiquitous fact of life. The applications available on these devices – email, text messages, social media, and the internet – provide easy and constant access to a multitude of channels of electronic communication. The proliferation of these devices since 2007 has been extraordinary. The introduction of the first smart phone in 2007 led, in just four years, to 35% of the American public owning smart phones, with that number increasing to 58% in 2014. Pew Research Study, *The Web at 25 in the U.S.* at 15 (Feb. 27, 2014), available at http://www.pewinternet.org/files/2014/02/PIP_25th-anniversary-of-the-Web_0227141.pdf. A 2013 study by the International Data Corporation (IDC), sponsored by

Facebook, concluded that by 2017 smart phone ownership will increase to 68% of the American public. IDC Study, *Always Connected* at 3 (2013), available at https://fb-public.app.box.com/s/3iq5x6uwnqtq7ki4q8wk. And between 2009 and 2013, the percentage of Americans using portable electronic devices to routinely send and read personal emails jumped dramatically from 25% to 52%. Maeve Duggan & Aaron Smith, Pew Research Study, *Cell Internet Use 2013* at 2 (Sept. 16, 2013), available at http://www.pewinternet.org/2013/09/16/cell-internet-use-2013/. These numbers will continue to increase in the coming years.

None of COLLE's members restrict their employees from bringing personal electronic devices to work for use during non-working time, such as breaks, lunches, or before or after shifts. As a result, employees have regular access to email and other forms of electronic communication (Facebook, Twitter, etc.) while at work, regardless of whether they have access to the employer's email system for non-work communications. Labor organizations have taken advantage of this social media trend, often establishing Facebook pages to promote organizing or collective bargaining efforts, as well as sending and receiving text and electronic messages to employees. *See* Robert Quackenboss, *Technology: Friending the unions*, Inside Counsel (Apr. 20, 2012), available at http://www.insidecounsel.com/2012/04/20/technology-friending-the-unions?page=1.

Thus, employees who are interested in gathering around the virtual "water cooler" can easily do so without using their employer's email system. Indeed, many of the Board's recent decisions demonstrate that it is common for employees to use Facebook and other social media sites to engage in concerted activity. *See, e.g.*, *Bettie Page Clothing*, 359 NLRB No. 96 (Apr. 19, 2013) (finding employer violated the Act by discharging three employees for Facebook postings); *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37 (Dec. 14, 2012) (finding

employer violated the Act by discharging five employees for Facebook postings); *Knauz BMW*, 358 NLRB No. 164 (Sept. 28, 2012) (finding no violation when employer discharged employee for posting certain photos and comments to Facebook).

Given these technological developments, there is simply no basis for the Board to hold that access to an employer's email system is necessary for employees to engage in Section 7 activity.

II. *REGISTER-GUARD'S* IN-KIND DISCRIMINATION STANDARD SHOULD REMAIN IN PLACE.

A. The In-Kind Discrimination Standard Is Sound and Consistent with the Standard Applied by Courts of Appeal.

Register-Guard's in-kind discrimination standard is sound and should not be overturned. The standard defines unlawful discrimination as "disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status." *Register-Guard*, 351 NLRB at 1118. The Board majority relied on *Fleming Companies, Inc. v. NLRB*, 349 F.3d 968 (7th Cir. 2003), and *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317 (7th Cir. 1995), in adopting this standard. In *Guardian*, the Seventh Circuit articulated the common sense notion that "the concept of discrimination involves the unequal treatment of equals." *Register-Guard*, 351 NLRB at 1117 (citing *Guardian Industries*, 49 F.3d at 319).[2] Other federal courts of appeal have rejected a broader definition of "discrimination" in the context of union-related access to employer property. *See, e.g., Salmon Run Shopping Ctr. LLC v. NLRB*, 534 F.3d 108 (2d Cir. 2008); *Sandusky Mall Co. v. NLRB*, 242 F.3d 682 (6th Cir. 2001); *Be-Lo Stores v. NLRB*, 126 F.3d 268 (4th Cir. 1997); *Cleveland Real Estate Partners v.*

[2] The D.C. Circuit declined to enforce part of *Register-Guard* due to the conflict between the employer's written solicitation policy and its actual practices, but the court noted that it was not reviewing the Board's adoption of the "in-kind" discrimination test. *Guard Publ'g Co. v. NLRB*, 571 F.3d 53, 58-60 (D.C. Cir. 2009).

NLRB, 95 F.3d 457 (6th Cir. 1996); *NLRB v. Great Scot, Inc.*, 39 F.3d 678 (6th Cir. 1994); *Sparks Nugget, Inc. v. NLRB*, 968 F.2d 991 (9th Cir. 1992).[3]

As applied to an employer's email system, "discrimination" under the Act cannot mean that once an employer allows *any* non-work email, the employer must permit its email system to be used for any and all Section 7-related activity. As the *Register-Guard* majority correctly held, "nothing in the Act prohibits an employer from drawing lines on a non-Section 7 basis." 351 NLRB at 1118. "That is, an employer may draw a line between charitable solicitations and noncharitable solicitations, between solicitations of a personal nature (e.g., a car for sale) and solicitations for the commercial sale of a product (e.g., Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and nonbusiness-related use." *Id.*[4]

Thus, under the in-kind discrimination test, an employer may allow employees to send personal emails while restricting solicitation on behalf of charitable, commercial, political, or religious organizations. Many employers, including some of COLLE's members, have email policies that permit employees to engage in limited or incidental personal use of the company's email system if such use does not interfere with the employee's work or productivity.

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[3] In a January 7, 2011 *amicus* brief in *Roundy's Inc*, Case No. 30-CA-17185, COLLE addressed these and other cases as related to the "discrimination" standard for non-employee access to employer property.

[4] Notably, the Board historically has not found "discrimination" when the company itself sponsors the group or organization as part of the employer's fringe benefit or charitable programs. *See Rochester Gen. Hosp.*, 234 NLRB 253 (1978); *George Washington Univ. Hosp.*, 227 NLRB 1362 (1977). *See also Wal-Mart Stores, Inc.*, Case 4-CA-28666, 2001 WL 1155418, at *7 (NLRBGC, Apr. 23, 2001) (determining that "in-store solicitations conducted solely by Wal-Mart employees on behalf of [charitable groups] are not included [as] incidents of discrimination").

By allowing such limited or incidental personal use, employers should not be required to open up their email systems for all Section 7 or union-related communications. Nor should an employer be found to discriminate against union-related solicitation if it permits some charitable solicitation on its email system, while prohibiting all other forms of solicitation (including for commercial, religious, or political causes). The Board has historically recognized that charitable solicitation is different, at least when the frequency of the solicitation is limited. *See Hammary Mfg. Corp.*, 265 NLRB 57 (1982).

The dissenting Board members in *Register-Guard* argued that the in-kind discrimination standard would not sufficiently protect employees or unions from all forms of possible "discrimination," in that the test would be "a license [for employers] to permit almost anything but union communications, so long as the employer does not expressly say so." *Register-Guard*, 351 NLRB at 1130. COLLE submits that these concerns are greatly exaggerated. For instance, in *Lucile Salter Packard Children's Hospital v. NLRB*, the D.C. Circuit agreed with the Board that an employer could not ban solicitation by nonemployee union agents for purposes of organizing when the employer *permitted* solicitation by other organizations for "purely commercial purposes" that were not related to the employer's "legitimate business purposes and functions." 97 F.3d 583, 589-90 (D.C. Cir. 1996). The union's attempted solicitation was found to be sufficiently similar to the commercial solicitation that the employer allowed. Nothing in *Register-Guard* would change the outcome in *Lucile Salter*. To the contrary, the D.C. Circuit found that its conclusion was consistent with the Seventh Circuit's decision in *Guardian Industries*, upon which the *Register-Guard* standard is based. *Id.* at 591-92 (citing *Guardian Industries*, 49 F.3d at 320-22).

Similarly, in the petition for review of *Register-Guard* in the D.C. Circuit, the union argued that the Board made an error of fact in determining that the employer enforced its policy without discriminating against union activity. *Guard Publ'g Co. v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009). The D.C. Circuit agreed with the union because the employer's written "Communication Systems Policy" prohibited all *non-job-related solicitations*. In reality, like many companies, the employer allowed incidental personal solicitations. The record contained evidence that employees frequently sent emails for personal solicitations involving social gatherings, sporting tickets, and request for services. *Id.* at 60. The D.C. Circuit concluded that the Board lacked substantial evidence to find the discipline for union solicitation was non-discriminatory because the employer's practice of allowing personal email solicitations violated its own policy. *Id.* at 60-61.

Thus, the *Register-Guard* in-kind discrimination standard simply does not give an employer license to "permit almost anything but union communications." *Register-Guard*, 351 NLRB at 1130 (dissenting opinion). The employer must articulate, and enforce, a policy that does not discriminate against union-related communications. Consistent with this standard, an employer may maintain and enforce a policy that allows for limited or incidental personal use of the email system, provided that it does not interfere with the employees' work or productivity, without allowing the system to be used for solicitation on behalf of outside organizations or causes. *Register-Guard* prohibits an employer from restricting use "of a similar character" to union-related communication. *Id.* at 1118. Incidental personal email use is not of the same nature or character as solicitation on behalf of a union or other organizations.

B. Employers May Restrict, on a Content-Neutral Basis, Use of Their Email Systems During Working Time.

Even the dissenting Board members in *Register-Guard* recognized that "rules limiting nonwork-related e-mails to nonworking time would be presumptively lawful, just as with oral solicitation." 351 NLRB at 1127. Similarly, the AFL-CIO, in its brief in *Register-Guard*, acknowledged that an "employer may impose a nondiscriminatory restriction on e-mail communications during working time." *Id*. at 1113. The AFL-CIO maintained this position in its April 7, 2014 brief in *Shadyside Hospital*, *supra*, stating that "an employer can, consistent with *Republic Aviation*, prohibit employees from using a company e-mail system to engage in solicitation during working hours." AFL-CIO Brief at 10.

Thus, there is no quarrel with the fundamental principle that "working time is for work." The Board has, since the early years of the Act, recognized that an employer may prohibit union-related solicitation or distribution during the working time of the solicitor or the employee who is being solicited. *See Peyton Packing Co.*, 49 NLRB 828, 843 (1943). Based on this principle, an employer may broadly prohibit *any* non-work related use of its email system – including for Section 7 activity – during an employee's working time. And because email communications may arrive at the recipient employees' computer during *their* working time, even if the sender is not presently working, the employer may lawfully prohibit such solicitation during *either* the sender or the recipient's working time.

C. Employers May Lawfully Enforce Other Content-Neutral Restrictions on the Use of Their Email Systems.

Even if the Board modifies the in-kind discrimination test adopted in *Register-Guard*, that should not affect other legitimate content-neutral limitations that an employer may place on the use of its email system. For instance, employers have a legitimate interest in prohibiting employees from sending emails to large groups of employees, or prohibiting emails with video

files or other large attachments. These types of content-neutral restrictions serve the employer's legitimate interests in maintaining productivity and protecting the email system from overloads or viruses. Large group emails can disrupt productivity by burdening many employees' inboxes with non-work related messages. Emails with large video or other attachments can slow down the speed of the employer's network and clog up limited space in employees' inboxes.

In *Register-Guard*, the "General Counsel concede[d] that the employer has an interest in limiting employee e-mails to … protect against system overloads and viruses, to preserve confidentiality, and to maintain productivity." 351 NLRB at 1113. Similarly, the AFL-CIO's brief in *Shadyside Hospital* acknowledges the legitimacy of such content-neutral concerns: "To the extent that certain forms of employee use of a company e-mail 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 e-mail system or spamming that might create such a distraction as to interfere with employees' use of the e-mail 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." AFL-CIO Brief at 17.

Therefore, even if the Board modifies *Register-Guard's* in-kind discrimination test, the Board should recognize that employers have the right to maintain and enforce these and other content-neutral restrictions on the use of their email systems. If these restrictions are consistently applied to all non-job-related emails, no violation of Section 7 rights or anti-union discrimination should be found.

D. Employers Have a Legitimate Interest in Monitoring Employee Use of Email and Computer Systems.

It is common practice for employers, including many of COLLE's members, to have policies that provide for regular monitoring of email or other use of the employer's computer

system. These policies typically warn employees that there is no expectation of privacy in using the company's email system, and that the company monitors employees' use of the email system. The General Counsel in *Register-Guard* recognized an employer's legitimate interest in regulating electronic communications "to prevent liability for inappropriate content." 351 NLRB at 1113. Employers routinely deploy monitoring software and tools in order to meet their legal obligations, enforce their policies, and to ensure their equipment is not abused by employees. *See* American Management Association Survey, *The Latest on Workplace Monitoring and Surveillance* (last updated June 2, 2014), available at http://www.amanet.org/training/articles/The-Latest-on-Workplace-Monitoring-and-Surveillance.aspx; *see also* Jessica K. Fink, *In Defense of Snooping Employers*, 16 Univ. of Penn. J. of Bus. Law 551 (Winter 2014).[5]

Employers thus have legitimate business reasons for monitoring email and internet usage by employees. Such monitoring policies are lawful and consistent with existing Board precedent. *See Lechmere, Inc.*, 295 NLRB 92, 99-100 (1989) (employer's installation of surveillance cameras was lawful where the cameras served a legitimate business purpose), *enf'd on other grounds*, 914 F.2d 313 (1st Cir. 1990), *rev'd on other grounds*, 502 U.S. 527 (1992). *See also Mid-Mountain Foods*, 332 NLRB at 237 (dismissing Section 8(a)(1) allegation regarding installation of security cameras in warehouse where there was no evidence that employer installed cameras in response to union organizing campaign and where employer had

[5] Fink's article aptly summarizes as follows: "Concerns about employees' rights must include consideration of the rights and responsibilities of employers as well - the right of an employer to protect itself from financial injuries or legal exposure; the responsibility to protect its shareholders from unnecessary loss; the responsibility to protect its employees from a host of physical, mental, and other harms; and the responsibility to protect the public from what might result if employers were to make important hiring and other work-related decisions based upon dangerously incomplete information. We cannot maintain a framework where a lack of information subjects employers to significant risks and potential liability, and then stymies employers' reasonable efforts to gather that information in a reasonable manner." *Id.* at 596-97.

legitimate business reasons for installing camera; "it would be unusual to find any commercial warehouse without a security system").

CONCLUSION

COLLE urges the Board to adhere to *Register-Guard*. *Register-Guard* correctly held, in line with decades of precedent, that employees have no Section 7 right to use employer communications equipment. To the extent email is considered to be a "virtual" work area, then the ordinary rule governing distribution of literature should apply. Employers should be able to prohibit all non-work related use of their email and computer systems.

The Board also should maintain the "in-kind" discrimination test adopted in *Register-Guard*. If that test is modified, however, COLLE submits that the Board should recognize an employer's well-established right to prohibit any non-work related use of its email system. In addition, the Board should recognize that employers may lawfully maintain and enforce other legitimate, content-neutral restrictions on the use of its email system, and to monitor use in order to ensure that it does not violate company policies or the law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 16, 2014, a true and accurate copy of the foregoing Brief of *Amicus Curiae* Council on Labor Law Equality was served by email on the following:

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