UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

PURPLE COMMUNICATIONS, INC., - and - COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO	:	Case Nos. 21-CA-095151; 21-RC-091531; and 21-RC-091584

BRIEF OF THE AMICUS CURIAE BY THE NATIONAL GROCERS ASSOCIATION ON BEHALF OF RESPONDENT PURPLE COMMUNICATIONS, INC.

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I. INTRODUCTION & INTEREST OF THE AMICUS

On behalf of the National Grocers Association ("NGA"), Epstein Becker & Green, P.C. submits this Amicus Curiae brief in response to the invitation by the National Labor Relations Board (the "Board") to help determine the questions posed in the case of *Purple Communications, Inc.*

NGA is the national trade association representing the retail and wholesale grocers that comprise the independent sector of the food distribution industry. An independent retailer is a privately owned or controlled food retail company operating in a variety of formats. Most independent operators are serviced by wholesale distributors, while others may be partially or fully self-distributing. Some are publicly traded but with controlling shares held by family members, while others are employee-owned. Independents are the true "entrepreneurs" of the grocery industry and dedicated to their customers, associates, and communities. Independent grocers are responsible for over $131 billion in annual sales accounting for approximately 1% of U.S. Gross Domestic Product, 944,000 in direct jobs, and $30 billion in wages paid. NGA members include retail and wholesale grocers, as well as state grocer associations.

NGA has a direct interest in the Board's resolution of the present case because many of its members have employees that are represented by unions or are the target of union organizing petitions. Additionally, many of NGA's members maintain email systems for work-related purposes with some access granted to its employees. Therefore, the laws surrounding the use of employer-provided email systems for union organizing efforts have a direct bearing on NGA and its members.

On behalf of its membership, NGA strongly urges the Board to maintain the current rule that employers are not required to allow employee use of their email systems for protected, concerted activities as established in the case *The Guard Publishing Company d/b/a The*

Register-Guard, 351 NLRB 1110 (2007) ("*Register-Guard*"); *see also Guard Publishing Company v. NLRB*, 571 F.3d 53 (2009). The Board in *Register-Guard* correctly held that "employees have no statutory right to use the Employer's email system for Section 7 purposes" and that principle remains true as access to an employer-provided email system is not necessary to facilitate protected, concerted activity. Today, employees have access to numerous other sources of technology through which they can instantly connect with co-workers, many much more effective than an employer-provided email system. Furthermore, allowing an employee access to an employer's email system for purposes of Section 7 activity unreasonably infringes on the property rights of the employer and could severely compromise an employer's ability to monitor its electronic systems for any misuse and abuse of its resources.

II. LEGAL PRECEDENT

In *Register-Guard,* the Board recognized the general rule that employees do not have a right to use employer-provided email systems for purposes of Section 7 activities. In that case, the union asserted that the employer violated Section 8(a)(1) of the National Labor Relations Act ("NLRA") by maintaining a "Communications Systems Policy" that prohibited employees from using its communications system for any non-work-related solicitations. 351 NLRB at 1114. Although finding other violations of the NLRA, the Board determined that this policy alone did not violate Section 8(a)(1) because the employer had a property right in its email system and a legitimate business interest in maintaining the efficient operation of this system by limiting the types of communication for which it can be used. *Id.* at 1114.

Furthermore, the Board held that the NLRA protects the rights of employees to communicate with one another to engage in concerted activity, but does not require the use of a particular means to facilitate that communication. *Id.* at 1115. Due to the fact that employees were able to communicate with each other in other ways, the Board found no basis to disturb the

well-settled law establishing no statutory right to use an employer's equipment or media for Section 7 communications unless the employer's policy or its implementation is discriminatory. *Id.* at 1116.

Upon review of the Board's decision, the United States Court of Appeals for the District of Columbia affirmed the Board. It did not, however, specifically address the issue of an employee's right to use the employer's email system for Section 7 activities because the union did not challenge the lawfulness of the policy banning non-work-related solicitation in a neutral manner. *Guard Publishing Company v. NLRB*, 571 F.3d at 58.

III. *Purple Communications, Inc.*

Purple Communications, Inc. raised a similar legal issue. Purple Communications, Inc. ("Purple Communications") provides interpreting services to deaf and hard of hearing individuals, primarily offering sign language interpretation during video calls. To facilitate these calls, Purple Communications employs "video relay interpreters" at each of its fifteen call center locations. In 2012, interpreters at seven of its facilities attempted to campaign for union representation with the Communications Workers of America, AFL-CIO ("CWA"). The CWA held representation elections at two of the facilities on November 28, 2012, and the employees voted against union representation. After the election, the CWA objected to Purple Communications' pre-election conduct, citing two handbook provisions as violating Section 8(a)(1) of the NLRA. One of these provisions limited employee use of Purple Communications' equipment to business purposes.

The handbook provision regarding employee use of Purple Communications' email system identified all communications exchanged through the company's equipment as property of Purple Communications and limited use to "business purposes only." Additionally, it strictly prohibited employees from using the email system for (1) "engaging in activities on behalf of

organizations or persons with no professional or business affiliation with the Company"; and (2) "sending uninvited email of a personal nature."

One issue for the Administrative Law Judge ("ALJ") was whether "over-broad" rules limiting the use of Purple Communications' equipment to business purposes, including its email system, inhibited the exercise of the employees' Section 7 rights in violation of Section 8(a)(1) of the NLRA. The ALJ dismissed this allegation because he was bound by the decision of *Register-Guard*, which explicitly provides that employees do not have the right to use Purple Communications' email system for non-business reasons.

In response to exceptions from the General Counsel and the CWA, the Board now looks to reconsider its decision in *Register-Guard*. NGA asserts that the status quo should be maintained. Because other avenues of communication are available, allowing access to employer email systems for Section 7 purposes is both unnecessary and an infringement on the employer's property interest in its email system.

IV. ARGUMENT

The Board has invited interested *amici* to file briefs on five questions. NGA submits its brief in response to the following two:

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?

A. <u>The Rule Limiting Employee Use of Employer-Provided Email Systems Should Not Be Reconsidered</u>

NGA submits that the Board should maintain the current rule under *Register-Guard* allowing employers to limit access to their email systems because the limits are based on legitimate employer property rights and there is no indication that this rule inhibits employees' exercise of their Section 7 rights. The U.S. Supreme Court in *Republic Aviation v. NLRB* held that an employer's property rights must give way to an employee's Section 7 activity only where the employer's rules cause an "unreasonable impediment to self-organization." 324 US 793, 803 fn. 10 (1945). *Republic Aviation*, however, addressed the permissibility of a rule that completely prohibited the employees' ability to solicit one another on employer property. *Id.* at 795. Here, no such "unreasonable impediment" exists because other avenues of solicitation and organization are available, including face-to-face interaction and social media technology. The Court in *Republic Aviation* held that some "inconvenience or even some dislocation of property rights, may be necessary in order to safeguard collective bargaining," 324 US at 802 fn. 8, but if collective bargaining and other Section 7 rights may be freely exercised inside and outside the workplace, this "dislocation" becomes unnecessary.

1. Unions Have a High Success Rate in Representative Elections

As an initial matter, employees already have ample means and methods to organize, as demonstrated by the election success rate of unions. Over the past six months of fiscal year 2014, unions have prevailed in 64.3% of representation elections.[1] This success rate demonstrates that there is no need to provide employees with another means by which to exercise their Section 7 rights as the avenues already available have proven sufficiently effective. This success rate likely stems from the fact that employees are able to solicit one another face-to-face both on and off employer property, as well as communicate via telephone, personal email

[1] *See* N.L.R.B. Election Report for Cases Closed, November 2013, December 2013, January 2014, February 2014, March 2014, and April 2014.

and through social media. These methods of communication are readily accessible to a majority of employees without allowing intrusion on employer property rights.

2. Employees Have Numerous Available Means to Exercise Their Section 7 Rights

Many methods of communication that allow effective and instantaneous interaction are now available to virtually all of the working population. These means of communication include text messaging, personal email, Facebook, Twitter, blogging, and other social media technology. Many individuals can access these technologies from their cell phones, while others can correspond through any personal computer with an internet connection. This is significant because approximately 90% of American adults have a cell phone and about 63% of adult cell phone owners use them to go online.[2] Furthermore, 81% of adult cell phone owners communicate with one another through the delivery and receipt of text messages.[3] These statistics signify that a vast majority of employees already have access to technology through which they can readily communicate with one another for Section 7 purposes outside of having access to their employer's email system. If almost all adults have cell phones and can access online resources through their cell phones, including social media technology and personal email systems, there is not much to be gained by providing access to employer email systems, while employers have much to lose.

Independent of their ready accessibility via cell phones, personal email and social media are widely available and commonly used by employees. In 2008, approximately 76% of employed adults had at least one personal email account, with 31% having two or more.[4] With the increasing availability and accessibility of internet technology and the consistent rise in its

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[2] *Mobile Technology Fact Sheet*, Pew Research Internet Project, Pew Research Center (2014), *available at* http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/.

[3] *See id.*

[4] *Internet and Email Use for Work*, Report, Pew Research Center (Sept. 24, 2008), *available at* http://www.pewinternet.org/2008/09/24/internet-and-email-use-for-work/#fn-610-17.

use, it is likely that a significantly higher portion of employed adults have personal email accounts now. Therefore, employees can already communicate with one another in the same exact manner they would be able to if given access to their employer's email system, meaning the current rule presents no impediment to employee organizing efforts. This is further supported by the fact that more employees have personal email accounts than have work email accounts. A majority of NGA members offer work email only to certain employees, and many limit access solely to management. Furthermore, many provide a work email to less than half of their employees and most to only about 10-15% of their employee population. Thus, for small and medium sized businesses, like grocery store owners, providing access to employer email systems may not actually facilitate employees' exercise of their Section 7 rights if a large portion of the employees that may be impacted by organizing activities are not accessible through this method. This is particularly true when only management employees have access to the system.

Finally, social media provides a method of communication for employees that already has the protection of the Board and the NLRA. As of May 2013, approximately 72% of adult internet users spent time on social networking sites.[5] Specifically, the use of Twitter has more than doubled since 2010.[6] Notably, a slightly greater amount of individuals earning below $30,000.00 a year, about 75%, regularly accessed social networking sites.[7] The widespread availability and use of social media provides an additional means through which employees can easily and voluntarily conduct Section 7 activities; making access to employer email systems unnecessary, especially because the Board has already created strong protections for messages exchanged using social media. A 2012 Report from the Acting General Counsel for the Board discusses several different employer policies and procedures related to social media deemed

[5] *72% of Online Adults are Social Networking Site Users*, Report, Pew Research Center (Aug. 5, 2013), *available at* http://www.pewinternet.org/2013/08/05/72-of-online-adults-are-social-networking-site-users/.
[6] *See id.*
[7] *See id.*

unlawful under the NLRA because of their restraint on Section 7 protected activity.[8] These unlawful policies range from prohibitions against disclosing confidential employer information to cautioning against the use of "offensive, demeaning, abusive or inappropriate remarks" online as this could include criticisms protected by Section 7. In one example, Acting General Counsel Solomon found unlawful a provision simply warning employees to "think carefully about 'friending' co-workers" because "it would discourage communications among co-workers." Although NGA does not necessarily agree that such policies should be unlawful under the NLRA, these broad protections, already available for exchanges between employees over social media, ensure that employees have sufficient means of participating in Section 7 activity in a manner that has a vast and accessible reach.

In her dissent in *Register-Guard*, Member Liebman suggested that "National labor policy must be responsive to the enormous technological changes that are taking place in our society." 310 NLRB at 1121. But surely the current broad access to and use of personal email and social media is one such technological change that must be recognized by the Board. Accordingly, the Board should recognize that a restriction on employee use of employer email systems is not an "unreasonable impediment" where other means of exercising Section 7 rights are so readily available and already in wide use.

B. The Appropriate Standard

NGA submits that the Board should maintain the current standard, which allows employers to non-discriminatorily prohibit employee use of its email system for Section 7 purposes.

1. Employees Do Not Have A Section 7 Right to Communicate by Email

[8] Lafe E. Solomon, *Report of the Acting General Counsel Concerning Social Media Cases*, Memorandum, Office of the General Counsel (May 30, 2012).

In *Republic Aviation*, the seminal decision on the interplay between employee and employer rights, the Supreme Court held that there should be a balancing of an employee's Section 7 rights and an employer's right to maintain discipline and protect its property. 324 U.S. at 803 fn. 8. An employee, however, has no specific right, under the NLRA or otherwise, to engage in Section 7 activity electronically or by using a particular type of employer-provided equipment. Several courts have already recognized that Section 7 of the NLRA "protects organizational rights . . . rather than [the] particular means by which employees may seek to communicate." *Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 318 (7th Cir. 1995). This is particularly true as it relates to use of employer-provided equipment and media, as long as the employer's restrictions are not applied discriminatorily. *See Mid-Mountain Foods*, 332 NLRB 229 (2000) (finding no statutory right to use the television in the employer's breakroom for a pro-union video); *see also Eaton Technologies*, 322 NLRB 848 (1997) (holding no statutory right to use an employer's bulletin board for Section 7 activities); *Union Carbide Corp.*, 259 NLRB 974 (1981) (finding employer could "unquestionably" limit employee use of its telephones).

In *Johnson Technology Inc.*, the Board recognized that it is fundamentally different to determine employee rights while on an employer's premises (as in *Republic Aviation*) and their right to use their employers' "personalty" without consent and for non-work-related activities. 345 N.L.R.B. 762, 763 fn. 8 (2005) (holding an employer's limitation on the use of its scrap paper lawful because of the employer's absolute control over its equipment, despite the employer's insignificant property interest in the paper and the paper's modest value). In such a situation, an employee's right to use her employer's equipment can be very limited. *See id.* Although the servers and wires and the email system they create are quite different from scrap paper or a bulletin board, they remain "personalty" under the control of the employer as long as

the employer applies its rules in a non-discriminatory fashion. The Board further stated it did not matter how significant or insignificant the employer's property interest in its resources was because, "it is not unlawful for an employer to caution employees to restrict the use of company property to business purposes." *Id.* at 763. Similar to the scrap paper in *Johnson Technology*, but of much greater significance and value, the email systems at issue here are "company property" and, thus, employers must be able to control their use.

In her dissent in *Register-Guard*, Member Liebman asserted that email is different because email is not "finite" equipment, but an interactive network that allows for simultaneous communications; thus, employee access to the system for Section 7 purposes would not inhibit the employer's use or add any additional cost. 351 NLRB at 1125. This comparison, however, does not account for the fact that an employer's email system is powered by wires, similar to telephone lines, and servers that may be affected by multiple, simultaneous users and the frequency of use depending on the sophistication of the system in place. Furthermore, email is uniquely susceptible to internet viruses and the damage such viruses can cause to an employer's electronic systems and, potentially, their business. The employer's electronic system becomes more accessible to such viruses the more it is opened up to additional uses beyond those that are solely work-related. Therefore, Member Liebman's assertion that the employer's email system equipment will not be impacted by extending use to Section 7 activities is simply not accurate. Finally, as the majority in *Register-Guard* points out, the mere proliferation of a system and its impact on employees' ability to communicate with each other in the workplace, does not automatically generate an employee's right to use the system for Section 7 purposes. 351 NLRB at 1116.[9]

[9] The majority in *Register-Guard* pointed to the fact that the use of telephone systems had been widespread and had a significant impact on business communications, yet the Board in *Union Carbide Corp.* held it was still "unquestionably" the employer's right to prohibit their use for Section 7 purposes. 351 NLRB at 1116.

In considering the parameters of the Board's potential findings in this case, NGA also submits that unions do not have a right to use employer email for Section 7 purposes. In potentially opening up employee access to employer email systems for concerted activities, NGA fears that the Board may also consider allowing union access to employees through employer email systems, particularly in light of the Board's proposed changes to current rules for union elections.[10] Board precedent is quite clear regarding a non-employee's right to use employer property for Section 7 purposes, and that right is very limited. In *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), the Supreme Court recognized the general rule that non-employee union officials do not have a right to access the private property of an employer. The Supreme Court, however, provided two exceptions to this rule, known as the "inaccessibility" and "discrimination" exceptions. *Id.* Under the inaccessibility exception, a union may be permitted access to an employer's private property only if there are no other available channels of communication for the union to reach employees; the union's burden of proving this is very high. *See Sears Roebuck and Co. v. NLRB*, 436 U.S. 180, 205 (1978). Based on the above referenced sources of communication – texting, personal email and social media – as well as the more traditional means of telephone solicitations and face-to-face interactions, unions have many sources through which to access employees. Thus, whatever the final rule on the use of employer email systems, the Board should not permit union access to the employer's private property.

2. Employers Have the Right to Monitor Email Use for Compliance with its Policies

Beyond the employer's property interest in its email system, every employer has the right to monitor employee use pursuant to its established policies and to prevent against abuse. *See*

[10] The Board has proposed making employee email addresses available to unions engaged in representation elections.

Union Carbide, 259 NLRB at 980. Many NGA members maintain policies that preserve their right to monitor employee use of their email systems, where such a system is provided, and restrict access to employees if they abuse the privilege. If, however, the Board decides to allow employees to use employer email systems for Section 7 purposes, monitoring employee activity becomes much more difficult if not impossible.

In *City of Ontario v. Quon*, the Supreme Court recognized that an employer may monitor use of its equipment and technology where it has a legitimate work-related purpose for its surveillance that is not excessive in scope. 130 S.Ct. 2619, 2631 (2010) (holding the employer could monitor the messages sent from an employer-provided pager because its purpose was to ensure employees were not overpaying for use and that the city was not paying for extensive personal conversations). Although this case relates to public employers and the extent of a public employee's Fourth Amendment right to privacy, its holding is applicable to any employer who monitors its equipment and systems for "legitimate work-related purposes." Furthermore, the Fourth Amendment does not apply to private employers; thus, the scope of employer monitoring is not as confined as that of a public employer. Accordingly, private employers have wide latitude in how they monitor employee use of their property.

The Board has also recognized an employer's right to monitor the use of the resources it provides. In *Union Carbide Corp.*, the Board held, "[t]here can, of course, be an abuse of any privilege and Respondent would be within its rights to police any abuses." 259 NLRB at 90 (holding employers may prohibit personal use of telephones as long as the prohibition is not discriminatory).

Although monitoring employee use of an employer's equipment and systems is permissible, surveillance of union activity is not. Under Section 8(a)(1) of the NLRA, an employer is not allowed to interfere with, restrain, or coerce employees in the exercise of their

rights. In interpreting this provision, Board precedent dictates that surveillance of union activity is an unlawful restraint of an employee's rights. *See Flamingo Las Vegas Operating Company, LLC*, 359 NLRB 98 (2013) (holding that an "employer creates an unlawful impression of surveillance [if], under the circumstances, an employee could reasonably conclude that his union activities are being monitored.") Thus, in considering a rule that would allow employee use of employer email systems for Section 7 purposes, the Board renders the employer's right to monitor meaningless as it relates to one of the employer's most important resources – its email system.

Allowing employee use of employer email systems for Section 7 purposes would likely leave employers completely unable to "police abuse" of their email systems without creating the impression that they are surveying union activity. Even if union related-emails are not specifically viewed, an employee may feel restrained in exercising his/her rights if he/she knows his/her emails may be examined. Thus, this rule would significantly limit an employer's ability to monitor, and thus control, a very important business resource. Additionally, such a rule would limit the methods available to maintain employee discipline. Not only must an employer be able to confirm work time is not being wasted on personal correspondence, but it must also ensure that its employees are not harassing co-workers, customers, or the public pursuant to the federal laws prohibiting discrimination and harassment in the workplace.

For the foregoing reasons, NGA submits that the Board should maintain the current rule under *Register-Guard.*

V. CONCLUSION

The Board should maintain the status quo set by *Register-Guard* and affirm its precedent that employees have no right to use their employer's email system for Section 7 purposes. Under *Republic Aviation*, this rule does not create an "unreasonable impediment" to employees' ability

to engage in protected, concerted activity because employees have access to numerous other means of communication with one another. Text messaging, personal email and social media allow employees to widely disseminate information and instantaneously converse with each other. Particularly, social media provides an outlet for organizing that is already protected by the Board.

Additionally, employees have no specific right to engage in Section 7 activity electronically or to use a particular type of employer-provided equipment; thus, allowing employee access to employer email would create an impermissible burden on the property of the employer. Pursuant to its property interest in its email system and its policies of use, employers have a right to monitor employee access to the employer's email system, which would create likely entanglements with a rule that allows employees to use employer email for organizing purposes. Finally, if the Board decides to permit employee access to an employer's email system, it must limit its rule to employees, as non-employees/unions have many other means available to communicate with employees.

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Respectfully submitted,

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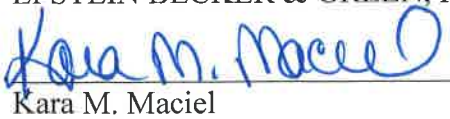

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