UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PURPLE COMMUNICATIONS,

Employer,

and **Cases 21-CA-095151; 21-RC-091531; 21-RC-091584**

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party

BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION AS AMICUS CURIAE

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INTEREST OF PARTY

The Service Employees International Union (SEIU) submits this amicus brief in response to the Board notice issued on April 30, 2014 requesting briefs concerning the Board's decision in *Register Guard*.[1] SEIU is an international labor organization, with members in a wide geographic area, many of whom work remotely from one another, for employers with myriad electronic use policies. Accordingly, SEIU has a robust online outreach program that utilizes a number of digital and mobile technologies to reach workers and activists, as well as to help new members in organizing. As part of its online presence, SEIU uses email, text messaging and social media platforms such as Facebook[2], Twitter[3], and YouTube[4].

As technologies change, SEIU has had to adapt to new mediums of communication in order to effectively reach our members and the public. SEIU constantly analyzes data trends and as SEIU adapts to new realities in the way workers use technology, it has to learn how to harness new technologies and understand the unique legal issues that may arise from the usage of the new technology. In SEIU's experience, the rapid changes occurring in the workplace require that agencies such as the NLRB develop flexible laws and standards that can withstand the test of time, allowing Administrative Law Judges and the NLRB to easily apply them to emergent technologies, including email. SEIU thanks the Board for the opportunity to submit this brief in support of the Charging Party and to provide its experiences in organizing online and email usage.

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[1] 351 NLRB 1110 (2007), enfd. in part sub nom. *Guard Publishing v. NLRB,* 571 F.3d 53 (D.C. Cir. 2009).
[2] https://www.facebook.com/SEIU/timeline
[3] https://twitter.com/SEIU
[4] http://www.youtube.com/user/SEIU

INTRODUCTION

The issue we address in this amicus brief is whether a facially neutral policy restricting email usage to business purposes only is a violation of Section 8(a)(1) of the National Labor Relations Act. The answer to that question is yes, unless an employer can show special circumstances to justify such a broad policy. SEIU urges the Board to overturn its decision in *Register Guard* because the analytical framework developed in that case is no longer applicable. The rapid technological changes that have occurred since 2007 demonstrate that electronic communications are not analogous to an employer's bulletin board, as the Board in *Register Guard* determined. Rather, employees use email for both business and personal purposes in a ubiquitous manner, and they now carry their work home with them in their pocket. Analyzing electronic communications in *Register Guard's* outdated framework results in the infringement of employees' Section 7 rights.

Technology has changed significantly since the Board issued its decision in *Register Guard* in 2007, and even more so since 2001, when the events at the heart of *Register Guard* occurred. In the early part of this century, smart phones, instant mobile messaging applications, Bring Your Own Device (BYOD) to work policies and YouTube did not exist, or were just coming into being. In 2001, email was a cutting edge technology. Today it is merely one of many forms of online communication used by employees to perform their work and communicate with their coworkers.

At the time the *Register Guard* decision issued in 2007, the first iteration of the iPhone was still in its infancy. Facebook, the now ubiquitous social media platform, had only 20 million users and Twitter was largely unknown. Today, in 2014, workers use their iPhone or other

mobile device to communicate with each other on Twitter and Facebook, which now have 255 million users[5] and one billion users respectively.[6]

Employees are not only using social media to keep up with their friends – they are using these tools at the behest of their employers to communicate with one another. According to a recent study by management consulting firm Towers Watson,

- 56% of employers encourage their employees to use social media tools during work hours to build community,
- 51% of workers use SMS (text) messaging to communicate with each other for work-related purposes,
- 73% of workers use some type of instant messaging application to perform work or communicate with their colleagues,
- 53% use social networks to communicate with one another, and
- 44% use apps or other mobile approaches.[7]

While employers continue to assess the effectiveness of these new and different tools, undoubtedly employees are using smartphones and other mobile technology applications to perform work both at their offices and homes. In order to deal with this phenomenon, employers are increasingly attempting to establish Bring Your Own Device (BYOD) policies to control how workers are sharing information on their personal devices, and to incentivize workers to bring their own devices to work. Permitting employees to use their own smartphones allows employees to avoid carrying two devices—one for work and one for personal use—but it

[5] *Our mission: To give everyone the power to create and share ideas and information instantly, without barriers*, TWITTER (2014), *available at* https://about.twitter.com/company (last visited June 16, 2014).
[6] *Our Mission*, FACEBOOK (2014), *available at* http://newsroom.fb.com/company-info/ (last visited June 16, 2014).
[7] *Just Over Half of Employers Using Social Media Tools for Internal Communication, Towers Watson Survey Finds*, TOWERS WATSON (May 23, 2013), *available at* http://www.towerswatson.com/en-US/Press/2013/05/just-over-half-of-employers-using-social-media-tools-for-internal-communication (last visited June 16, 2014).

inevitably means that the line between work and personal time becomes blurred as people send personal emails at work, and work emails on personal time. In fact, about 69% of employees check their work email outside normal working hours either frequently or occasionally. Another 32% of employees report that their employer expects them to stay in touch outside working hours, and the average time spent working remotely with some type of mobile device is 6.3 hours per week.[8]

The dual use of these devices for both work and home raises serious questions concerning property interests and worker rights. For example, if a worker sends an email to a union from his or her personal smartphone while using the employer's wireless Internet network, is it a personal email? What if the employer requires that the employee use the wireless network for all email sent from the phone in order to protect the employer's systems? What if the worker tried to send the email from home, but it remained in his or her outbox until arriving at work and then was sent? With recent advances in storage capacity and the increasing use of "the cloud" to manage and store data, what exactly constitutes the employer's property? The phone? The network? The server? The cloud? What if an employer establishes a Virtual Private Network that allows for information to travel over public Internet bands in an encrypted manner? Would that be property? The manner in which data moves from a personal device, through an employer's email system, and through a third party server makes drawing lines on the basis of who owns certain property nearly impossible to administer.

The questions noted above demonstrate that the standard the Board set forth in *Register Guard* has become obsolete in today's technological world. The Board should reject *Register*

[8] *Computers and the Internet*, GALLUP (2014), *available at* http://www.gallup.com/poll/1591/Computers-Internet.aspx#1 (last visited June 16, 2014).

Guard's central holding, and instead fashion a new rule based on the *Republic Aviation* framework to hold that today's technological advances render Section 7 activity occurring on an employer's electronic property a *de minimis* infringement of property rights that must cede to workers' rights to organize under the Act. On that basis, the Board should adopt a presumption that a policy permitting only business-related communications on an employer's electronic systems violates Section 8(a)(1) of the Act, absent special circumstances. Such special circumstances could be where an employer provides work email addresses that employees only access from work to communicate to customers and not each other, for example. Another example could be where an employer provides a text messaging service that is only used to report maintenance problems, and it is not used for any other communication among employees.

For cases involving policies that permit but restrict Section 7 activity on an employer's electronic system, the Board should allow reasonable restrictions consistent with the balancing test in *Republic Aviation* whereby the Board balances "the undisputed right of self-organization assured to employees… and the equally undisputed right of employers to maintain discipline in their establishments."[9] This approach would allow employers to protect their management interests, and avoid placing the Board in a position where it would need to involve extensive forensic data examinations to determine the extent that an employer's property is involved in communications. Such a rule would also be flexible enough to adapt to the inevitable technological changes workplaces will see in the future.

[9] 324 U.S. 793, 797-98 (1945). For example, an employer may be able to limit the size of attachments to emails, if it establishes that it is necessary because of the limits of its electronic systems or due to security concerns. Likewise, an employer may permit incidental personal use of email as long as such use does not interfere with an employee's duties. If enforcement is non-discriminatory, such policies would meet the standard of *Republic Aviation.*

I. SINCE *REGISTER GUARD* THERE HAVE BEEN SWEEPING CHANGES IN THE USE OF WORKPLACE ELECTRONIC SYSTEMS THAT HAVE BLURRED THE LINE BETWEEN PERSONAL TIME AND WORK TIME.

When Register Guard was decided in 2007, telecommuting and working remotely were rare. In 2011, according to a Pew report, only 35% of American adults owned a smartphone.[10] Today, a mere three years later, that number is 58%.[11] In 2007, smartphones made up a mere 4% of the mobile market.[12] Today, smartphones are the majority of the mobile market.[13] According to a recent Gallup poll, 76% of working adults see it as an advantage that they can use their devices to work remotely outside of normal business hours; 69% check their work email outside normal working hours either frequently or occasionally; 32% report that their employer expects them to stay in touch outside working hours; and the average time spent working remotely with some device is 6.3 hours a week.[14] Approximately 69% of employees with personal email accounts check their personal inboxes while at work.[15]

Workers are also increasingly telecommuting, since email and social media tools are widely available to facilitate workplace communication, and this has made it less likely that workers have traditional face-to-face communications with coworkers. Telecommuting increased 79.7% from 2005 to 2012, according to the Global Workplace Analytics and Telework

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[10] Aaron Smith, *35% of American adults own a Smartphone, One quarter of smartphone owners use their phone for most of their online browsing*, PEW RESEARCH CENTER (July 11, 2011), *available at* http://pewinternet.org/Reports/2011/Smartphones.aspx (last visited June 16, 2014).
[11] *Mobile Technology Fact Sheet*, PEW RESEARCH CENTER (Jan. 2014), *available at* http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/ (last visited June 16, 2014).
[12] *ComScore Reports May 2012 U.S. Mobile Subscriber Market Share*, COMSCORE DATA MINE (July 2, 2012), *available at* http://www.comscore.com/Insights/Press_Releases/2012/7/comScore_Reports_May_2012_U.S._Mobile_Subscriber_Market_Share (last visited June 16, 2014).
[13] *Ibid.*
[14] Gallup *supra* note 9.
[15] Towers Watson *supra* note 7.

Research Network.[16] Of the roughly 3.3 million teleworkers analyzed in 2012, the vast majority of these workers were in the private sector, with 2.5 million employees working at for-profit employers.[17] Many teleworkers in the non-profit sector also fall under the jurisdiction of the NLRB. By 2018, the size of the mobile workforce is expected to double if not triple.[18]

Work emails are also increasingly found on personal devices as well. Among employed respondents who actively use their personal device for email, only 44% say that most or all of the messages they send and receive are personal, while 32% say that most or all of the messages are work-related.[19] Another 25% say their email use is equally split between personal and work-related messages, and 37% of those with work email accounts check them constantly, up from 22% in 2002.[20]

A. The Increased Use of Personal Devices for Work Purposes Makes Any Distinction Between Work and Personal Time on these Platforms Virtually Impossible to Administer.

The proliferation of personal mobile devices, combined with the increase in employer supported "Bring Your Own Device" policies, has muddled the line between work and personal time and eroded the idea of what can clearly be considered employer property. Employers have created BYOD policies as a way to permit employees to use their preferred personal device, such as a smartphone or tablet, to perform their work from any location, while at the same time

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[16] *Latest Telecommuting Statistics*, GLOBAL WORKPLACE ANALYTICS (Sep. 2013) at Table 6, *available at* http://www.globalworkplaceanalytics.com/telecommuting-statistics (last visited June 16, 2014).

[17] *Ibid.*

[18] Larry Dignan, *2014 enterprise trends: BYOD pain, HTML5 apps, hybrid cloud, SDx*, ZDNET (Oct. 8, 2013), *available at* http://www.zdnet.com/2014-enterprise-trends-byod-pain-html5-apps-hybrid-cloud-sdx-7000021705/ (last visited June 16, 2014).

[19] Marry Madden and Sydney Jones, *Networked Workers*, PEW RESEARCH CENTER, (September 24, 2008), *available at* http://www.pewinternet.org/2008/09/24/networked-workers/.

[20] *Ibid.*

protecting how that information is used. Some BYOD policies may also include provisions that require that the employee agree to load a tracking program on their phone, to permit the employer to locate its employee or to erase information on the device if it is lost.[21]

The use of personal devices at work is steadily increasing as well. According to industry experts in the United States, most U.S. based employers will require employees to provide their own device for use in the workplace. A 2011 Forrester Research poll found that over half of employees already use their own personal device for professional purposes.[22] This suggests that fewer and fewer people are keeping two sets of devices, one for work, and one for personal use. The devices themselves encourage mixing personal and work use. For example, a worker using a smartphone or tablet[23] can link both their personal and work emails, viewing all email on the same device.[24]

Personal mobile devices are only the beginning of a workplace trend. "Bring your own IT" (information technology) policies are on the horizon. Once these new devices are in the mix, employees will be bringing their own applications, collaboration systems, and even social networks into businesses.[25]

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[21] Larry Dignan, *2014 enterprise trends: BYOD pain, HTML5 apps, hybrid cloud, SDx*, ZDNET (Oct. 8, 2013), *available at* http://www.zdnet.com/2014-enterprise-trends-byod-pain-html5-apps-hybrid-cloud-sdx-7000021705/ (last visited June 16, 2014).

[22] Rachel King, *Forrester: 53% of employees use their own devices for work*, ZDNET (June, 2012), *available at* http://www.zdnet.com/blog/btl/forrester-53-of-employees-use-their-own-devices-for-work/79886 (last visited June 16, 2014).

[23] *iOS: Adding an email account*, APPLE (Dec. 24, 2013), *available at* http://support.apple.com/kb/HT4810 (last visited June 16, 2014).

[24] *Set up and use email: Use the Mail app or Outlook, if you have it, to read and respond to email messages from your email accounts,* MICROSOFT (2014), *available at* http://www.microsoft.com/surface/en-us/support/email-and-communication/mail (last visited June 16, 2014).

[25] *Gartner Says Bring Your Own Device Programs Herald the Most Radical Shift in Enterprise Client Computing Since the Introduction of the PC* (Aug. 28, 2012), *available at* http://www.gartner.com/newsroom/id/2136615 (last visited June 16, 2014).

B. Technological Advancements Have Allowed Employers to Emphasize Productivity Over Hours Spent in the Office, Further Blurring the Line Between Work and Personal Time.

Certain social and demographic patterns, such as increased dual-income households, increased number of employees with dependents, increased single parent families, and the rise of the millennial class have contributed to a trend towards flexible workplace arrangements (FWAs). Employers have begun structuring compensation based on production, as opposed to time spent in the office. When employees are paid for output and not simply time spent in the physical office space, management's interest in controlling employees' use of time is lessened. Much of this flexibility is facilitated by employee use of personal electronic devices.

Much of the move towards flexibility is to encourage more family-friendly workplaces. The 2014 National Study of Employers examined workplace changes since 2008 and found that policies offering workers more flexibility regarding when and where they can work are rapidly increasing. Two-thirds of employers reported that they offered employees options to work remotely, an increase of 17% as compared to six years earlier. "Flexible work arrangements have become more popular" and are "no longer the exception" given that they are "critical for organizations to maximize their talent pool."[26]

FWAs are likely to continue to rise as more Millennials enter the workforce. A survey by Harris Interactive found that young people are "leading the charge." Eighty-four percent of 18-34 year old working adults report having "at least a little" flexibility in their current position, as compared to only 67% of those 55 and older.[27]

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[26] Anna Beninger & Nancy Carter, *New Research: Flexibility Versus Face Time*, HARV. BUS. REV. BLOG (July 8, 2013), *available at* http://blogs.hbr.org/2013/07/new-research-flexibility-versu/ (last visited June 16, 2014).

[27] *Workplace Flexibility is Top Consideration for Nearly Three-Fourths of U.S. Working Adults* —MOM CORPS (July, 2013), *available at* http://www.harrisinteractive.com/vault/Mom%20Corps_2013%20workplace%20survey%20release%20FINAL.pdf (last visited June 16, 2014).

II. MORE EMPLOYEES RELY ON ELECTRONIC SYSTEMS FOR COMMUNICATION WITH COWORKERS.

The advancement of electronic communication is resulting in more employees working remotely. Indeed, the NLRB increasingly encounters cases involving employees who work from home.[28] Still other employee groups may work outside the home, but nonetheless never gather together in one space. Adjunct faculty members at universities are an example of this trend. An estimated three-quarters of university faculty teach in part-time, contingent positions. Most universities do not give adjunct faculty full or effective use of campus facilities, including office space, telephones and computers, forcing them to use their personal devices for professional purposes. SEIU represents 21,000 adjunct faculty around the country. Perhaps the greatest obstacle that adjunct faculty face in organizing is reaching out to fellow members of the bargaining group, who can be geographically dispersed and whose work is structured so as to afford little opportunity to have contact with each other.

In *Pacific Lutheran University*,[29] the Regional Director correctly found that contingent, non-tenure track faculty shared a sufficient community of interest to constitute a bargaining unit. Nonetheless, there was substantial variation across departments in the unit members' ability to contact one another. Some of the unit members were not afforded an accessible break room, nor even invited to attend regular department meetings. Twenty-two of the contingent faculty members worked entirely off-site, and an additional thirteen unit members split their time on and off campus.

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[28] See *Guide Dogs for the Blind, Inc.,* 359 NLRB No. 151, slip op. 3 (2013) ("Many community field representatives work out of their homes"); *Star West Satellite, Inc.,* 19-CA-075668, at 9 (2013) ("remote technicians are bargaining unit technicians who work from their homes"); *Am. Red Cross Ariz. Blood Servs. Region*, 28-CA-23443, at 8-9 (2012) (involved Donor Recruitment Representatives who were permitted to work at home three days a week); *Odwalla, Inc.,* 357 NLRB No. 132, slip op. 3 (2011) (involved merchandisers who worked from home).

[29] 19-RC-102521 (2013).

The difficulties in communications between adjunct professors employed at the same institution are not unique to *Pacific Lutheran University*. The Regional Director in *Loyola Marymount University*[30] also determined that the entirety of the non-tenured, contingent faculty constituted an appropriate bargaining unit. At *Loyola*, like at many other universities, faculty work in schools and departments scattered across the Employer's campus and at sites off-campus, which could result in situations where adjunct faculty do not even know about the existence of other adjunct faculty. A professor from Loyola Marymount University recently testified before the Board about his experience during the union organizing campaign at a public meeting for the Proposed Rule on Representation Case Procedures.[31] Dr. Darrin Murray testified specifically about the inclusion of "fieldwork supervisors," a group of employees who did not work primarily on campus and whom he had not met:

> [The employer] knew who the fieldwork supervisors were from the beginning. [The employer] had been using work emails to send anti-union messages to employees right from the beginning, even before the hearing and the petition was filed. … I want to tell my co-workers that we are the union, we are the ones organizing, but I feel limited in getting that message out there. … We're still trying to cobble together accurate contact information for our unit and especially for the fieldwork supervisors. Oddly enough, and I'll let you draw your own conclusions on this, one of my colleagues who was against forming a union somehow or another had a complete list of every email address for every adjunct in the entire university and was able to send out his email message to everyone. [32]

The dangers to Section 7 rights posed by preventing employees from using employer electronic systems are exacerbated if the Employer is able to use the same systems for an anti-union campaign. Dr. Murray's testimony reveals that the university had numerous ways to

[30] 31-RC-118850 (2014).
[31] Notice of Proposed Rulemaking, Representation Case Procedures, Public Meeting, April 11, 2014. Transcript Volume II, *available at* http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-4233/publicmeeting4-11.pdf
[32] Id. at 597, 599.

contact its individual divisions, individual schools, and individual departments.[33] When the Board questioned Dr. Murray about whether he was paid for reading the anti-union messages sent from his employer, he responded, "I'm definitely not checking email while I'm teaching a class."[34]

III. DATA COSTS HAVE PLUMMETED, REDUCING EMPLOYERS' FINANCIAL INTERESTS IN CONTROLLING COMPANY EMAIL SYSTEMS.

Employers' claims that personal emails between workers will burden their servers have become increasingly untenable. In addition to advances in personal device technology, it has become economically feasible for employers to absorb the costs of processing and storing huge amounts of information.

The costs of processing and storing data, which are already at historic lows, will only continue to decrease. According to "Moore's law," which is commonly accepted in the technology community, overall computer processing speed should double about every 18 months.[35] Another commonly accepted law working in conjunction with Moore's law is Kryger's law. Kryger's law states that the amount of data that can be stored on a device will double every 13 months.[36]

According to AT&T estimates, five gigabytes of storage is enough to send 150,000 one page emails in one month. There are 1000 gigabytes in a terabyte. That means a terabyte is

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[33] *Ibid.*
[34] *Id.* at 602.
[35] Jimmy Daley, *Remember When One Gigabyte of Storage Cost $700,000?*, EDTECH (Dec. 4, 2012), *available at* http://www.edtechmagazine.com/higher/article/2012/12/remember-when-one-gigabyte-storage-cost-700000
[36] Chip Walter, *Kryder's Law* (July 25, 2005), SCIENTIFIC AMERICAN, *available at* http://www.scientificamerican.com/article/kryders-law (last visited June 16, 2014).

equivalent to 30 million one-page emails.[37] In 1980, a terabyte of storage space would have cost $700,000. By the time the Board issued its decision in *Register Guard* in 2007, costs decreased to 0.44 cents per terabyte per month. By 2009, costs decreased to .09 cents per terabyte per month and continue to trend downward. According to recent Board data, the average petitioned-for bargaining unit is 24 people.[38] That means it costs employers $.09 (and possibly less) to store 30 million one-page emails for a month. The emails that a union sends to members of a potential bargaining unit impose a miniscule cost on employers. Data storage has become so cheap that Google allows users to store 15 gigabytes of information, equal to 450,000 one-page emails, for free.

IV. REGISTER GUARD SHOULD BE OVERRULED, AND WORK POLICIES INVOLVING ELECTRONIC SYSTEMS SHOULD BE ANALYZED UNDER REPUBLIC AVIATION

The Supreme Court's seminal decision in *Republic Aviation,*[39] set up a balancing test, whereby the Board balances "the undisputed right of self-organization assured to employees… and the equally undisputed right of employers to maintain discipline in their establishments."[40] In *Republic Aviation,* an employee was discharged for passing out union cards in the plant on his own time during lunch. The Court upheld the Board's determination that a rule prohibiting all solicitation at any time on the employer's premises was unlawfully overbroad, and that the employer had to permit solicitation on its property during non-work time.

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[37] *Data estimates for common applications under 5GB (Gigabytes)*, AT&T (2014) *available at* http://www.att.com/esupport/article.jsp?sid=KB101553&cv=820#fbid=TM0F1n2b5Qc (last visited June 16, 2014).
[38] *Median Size of Bargaining Units in Elections*, NLRB (2013), *available at* http://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/median-size-bargaining-units-elections (last visited June 16, 2014).
[39] 324 U.S. 793, 803 (1945).
[40] *Id. at* 797-98.

Beth Israel Hospital v. NLRB,[41] involved a solicitation rule that permitted employees to solicit and distribute literature to coworkers during non-working time in employee-only areas, but prohibited these activities in patient-care areas, other work areas, and any public areas of the hospital, including the cafeteria. The Court upheld the Board's finding that the rule prohibiting solicitation in the cafeteria violated Section 8(a)(1). In *Beth Israel*, workers were permitted to engage in face-to-face solicitation on non-work time in some areas of the employer's premises, but on balance, the Court affirmed the Board's finding that restricting solicitation in the cafeteria was unlawful where the possibility of disruption from allowing solicitation in the cafeteria was remote, and the hospital had permitted employees to use the cafeteria for other types of solicitation. In reaching that decision, the Court relied on *Republic Aviation*:

> *Republic Aviation Corp. v. NLRB,*[42] 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 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."[43]
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> That principle was further developed in *NLRB v. Babcock & Wilcox Co.,*[44] where the Court stated:
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> "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.[45]

In *Register Guard*, the Board held that a policy that prohibited employees from using the email system for any "non-job related" solicitations was lawful because an employer's communications system, including its email system, is the employer's property. The Board

[41] 437 U.S. 483 (1978).
[42] 324 U.S. 793 (1945).
[43] Id., at 797-798.
[44] 351 U.S. 105 (1956).
[45] *Beth Israel,* supra at 492.

found that "an employer has a basic property right to regulate and restrict employee use of company property."[46] The Board relied on cases upholding rules that restricted use of employer's equipment, including a break room television, a bulletin board, a copy machine, company telephones, and a public address system.[47]

The dissent in *Register Guard* rightfully argued that email is not the same as other property such as an employer's bulletin board,[48] and that is all the more true today for email and other forms of electronic communication. The facts demonstrate that the employer's property interest in electronic communication has decreased because of the intermingled use of employees' private property with employers' electronic communication systems, the physical fluidity of data, and the decreased costs to employers for providing such systems. Furthermore, at least with social media usage, the employers do not even own the network for storing the information. Just as important as the reduced property interest of employers is the increased interest of employees to have access to electronic communications to exercise their Section 7 rights. This increased need is demonstrated by the rising use of electronic communication in the modern workplace. Indeed, for some potential bargaining units that contain employees who work from home, or otherwise include employees who work remotely such as the adjunct professors discussed above, electronic communication may be the only means to communicate with coworkers.

[46] *Register Guard*, 351 NLRB 1110, 1114 (2007) citing *Union Carbide Corp. v. NLRB,* 714 F.2d 657, 663-64 (6th Cir. 1983).
[47] *Ibid.*
[48] 351 NLRB at 1126-27.

The majority in *Register Guard* distinguished *Republic Aviation* by arguing that the email policy at issue did not restrict face-to-face solicitation.[49] However, when considering the realities of workplaces today, to find that an opportunity for face-to-face solicitation justifies a restriction on all Section 7 communications over an employer's email system is inconsistent with the balancing test set forward in *Republic Aviation.* Where an employer has the ability to communicate anti-union messages to all its employees electronically at once with ease, and such messages can be read by employees at home on their own electronic devices on their own time, allowing employees to meet in person on non-work time does not sufficiently balance their Section 7 rights.[50]

The Court in *Beth Israel* described its holding in *Republic Aviation* as follows:

> [T]he Board is free to adopt, in light of its experience, a rule that, *absent special circumstances*, a particular employer restriction is presumptively an unreasonable interference with Section 7 rights constituting an unfair labor practice under Section 8(a)(1), without the necessity of proving the underlying generic facts which persuaded it to reach that conclusion.[51]

Thus, the Board has the authority, in light of its experience, to adopt the presumption that a policy permitting only business-related communications on an employer's electronic systems violates Section 8(a)(1) of the Act, absent special circumstances. It is unrealistic to presume that employers with strict bans on non-work email will police their systems for innocuous personal

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[49] *Register Guard,* supra, 1115.

[50] The majority in *Register Guard* noted that employees do not have a right to use an employer's property for pro-union messages just because an employer uses its own property for anti-union messages. Id. at fn. 17 (internal citations omitted). While this is true, an employer's use of its email system to send anti-union messages is still relevant in determining the balance of rights. Such lopsided access to communication further frustrates employees' Section 7 rights to communicate with each other about their views on unionization.

[51] *Beth Israel,* supra at 493 (emphasis added).

communications the same way they will for union-related communications. Further, it is unfair to place the burden on employees working under such strict policies to prove discriminatory enforcement each time such a "neutral" policy is enforced in response to union activity. Rather, it should be the employer's burden to demonstrate special circumstances showing that employers have a justified management interest in prohibiting all non-business electronic communication. As described in the introduction, an employer can overcome this presumption and lawfully maintain a policy that completely bans non-business related electronic communication in special circumstances where the communication system is used in a narrow manner, and employees do not actually use the system to casually communicate with one another.[52]

The Board should also reverse *Register Guard* and find that a policy prohibiting non-work related solicitations constitutes a violation of Section 8(a)(1). In *Register Guard*, the Board upheld such a policy and split hairs to determine which emails constituted solicitation. A ban on "non-work related solicitations" would prohibit the most basic of union-related messages, as demonstrated in *Register Guard.* There, the Board held that two emails – one asking coworkers to wear green to support the union's position in negotiations, and another asking employees to participate in the union's entry in an upcoming town parade – were solicitations for which the employer lawfully disciplined the employee.[53] The Board found that a third email, which clarified facts about a previous union rally, was not a solicitation, and therefore the employer unlawfully disciplined the employee for that email.[54] Because such a policy would prohibit many if not most union-related communications, the Board should find that such a policy is

[52] That is not to imply that one employee or two employees who violate such a policy will mean the employer must open the floodgates for all communication. However, an employer must demonstrate a good faith effort to enforce its policy in a non-discriminatory manner against all non-business related communication.
[53] *Register Guard,* supra at 1119.
[54] Id.

overly broad, and unreasonably interferes with the Section 7 rights of employees in violation of Section 8(a)(1).

SEIU urges the Board to analyze other employer policies that restrict (without prohibiting) the personal use of electronic communication systems under the general balancing test of *Republic Aviation*. The Board should weigh "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"[55] to determine the limits employers can place on Section 7 activity in electronic communications on an employer's system.

V. CONCLUSION

Important changes have occurred regarding workplace electronic communication since the Board decided *Register Guard*. Such changes include 1) an increase in the use of employee-owned mobile devices to perform work, 2) the blurring of work-time and non-work time, 3) the increased use of electronic communication as a means for employees to communicate with one another, and 4) a decrease in the cost of providing electronic communication systems.

As a result, these changes have decreased the impact that employees have on an employer's property when using an employer's electronic systems, while increasing the importance of employees' rights to access electronic communication in the workplace to exercise their rights under Section 7. For these reasons, SEIU respectfully requests that the Board overrule *Register Guard*, and find that a policy permitting only business-related communications on an employer's electronic systems presumptively violates Section 8(a)(1) of the Act, absent special circumstances.

[55] *Republic Aviation,* supra at 787-789.

Respectfully Submitted,

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June 16, 2014

THE UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CERTIFICATE OF SERVICE OF BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION AS *AMICUS CURIAE*

I hereby certify that on this 16th day of June, 2014, an electronic copy of the foregoing was filed on the NLRB e-filing website and served by electronic mail on:

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