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 UNITED STATES POSTAL SERVICE

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The United States Postal Service, as *amicus curiae*, submits this brief addressing questions raised by the National Labor Relations Board in its Notice and Invitation to File Briefs (the "Board's Invitation") in *Purple Communications, Inc.*, Case 21-CA-095151, et al., regarding its previous decision in *Register Guard*, 351 N.L.R.B. 1110 (2007), *enf'd in relevant part and remanded sub nom. Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009). The Board seeks input whether it should overrule *Register Guard* and adopt a rule that employees who are permitted to use their employer's email for work purposes have the right to use their employer's email for Section 7 activity, subject only to the employer's need to maintain production and discipline.

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?

The United States Postal Service urges the Board to adhere to both the existing standard under *Register Guard* and other long-standing precedent that an employer's property rights should trump Section 7 rights except under narrow circumstances. At the heart of this issue is a simple proposition: Under long-standing Board precedent and relevant court cases, there is no Section 7 right to use an employer's property. Company emails and other company-provided electronic media used in the workplace are company property. Consequently they are indistinguishable from traditional forms of employee communication such as bulletin boards, intercoms, or telephones, which the Board and courts have held are the employer's property and therefore may be lawfully controlled by the employer. Therefore, an employer may restrict the nonbusiness use of its equipment. The Board should not interfere with the employer's right to control access to and use of its email systems, so long as such control is not discriminatory.

The Board's decision in *Register Guard* is not an anomaly. Indeed, since at least the Supreme Court's 1958 decision in *NLRB v. Steelworkers Union (Nutone)*, it has been understood that the National Labor Relations Act (NLRA) "does not command that labor organizations . . . are entitled to use a medium of communications simply because the employer is using it." 357 U.S. 357, 364 (1958). Instead, "Section 7 of the Act protects organizational rights . . . rather than particular means by which employees may seek to communicate." *Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 318 (7th Cir. 1995). Furthermore, the Supreme Court has held that employers may control activities in the workplace "both as a matter of property rights (the employer owns the building) and of contract (employees agree to abide by the employer's rules as a condition of employment)." *Guardian Indus.* 49 F.3d at 318 (citing *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978)).

The Board and reviewing courts have long recognized that employees have "no statutory right ... to use an employer's equipment or media." *Mid-Mountain Foods, Inc.*, 332 N.L.R.B. 229, 230 (2000), *order enforced, Mid-Mountain Foods, Inc. v. NLRB,* 269 F.3d 1075 (D.C. Cir. 2001). Employers "*unquestionably* [hold] the right to regulate and restrict employee use of company property," *Union Carbide Corp. v. NLRB,* 714 F.2d 657, 663 (6th Cir. 1983). This includes the right to bar nonbusiness use of employer-owned communications equipment, such as telephones, bulletin boards, TV/VCRs, photocopiers – and email. *See, e.g.*, *Adtranz, ABB Daimler–Benz,* 331 NLRB 291, 293 (2000), *vacated in part, Adtranz ABB Daimler Bentz v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001); (rule on email usage analogous to rules regarding use of bulletin boards and company telephones); *Cf. Media Gen. Operations, Inc.,* 346 N.L.R.B. 74, 76 (2005) *aff'd,* 225 F. App'x 144, 148 (4th Cir. 2007); *Union Carbide Corp.*, 714 F.2d at 663

(telephones); *NLRB v. Southwire Co.*, 801 F.2d 1252, 1256 (11th Cir. 1986); (bulletin boards); *Fleming Cos. v. NLRB*, 349 F.3d 968, 974–75 (7th Cir. 2003) (bulletin boards); *J.C. Penney Co. v. NLRB*, 123 F.3d 988, 997 (7th Cir. 1997) (bulletin boards); *Mid-Mountain Foods*, 332 N.L.R.B. at 230 (no statutory right to use the television in the respondent's breakroom to show a prounion campaign video); *see also Eaton Technologies*, 322 N.L.R.B. 848, 853 (1997) ("It is well established that there is no statutory right of employees or a union to use an employer's bulletin board."); *Champion Int'l Corp.*, 303 NLRB 102, 109 (1991) (stating that an employer has "a basic right to regulate and restrict employee use of company property," such as a copy machine); *Churchill's Supermarkets*, 285 N.L.R.B. 138, 155 (1987) ("[A]n employer ha[s] every right to restrict the use of company telephones to business-related conversations . . . ."), *enf'd*, 857 F.2d 1474 (6th Cir. 1988), *cert. denied*, 490 U.S. 1046 (1989); *Union Carbide Corporation-Nuclear Division*, 259 NLRB 974, 980 (1981), *enf'd in relevant part*, *Union Carbide Corp. v. NLRB,* 714 F.2d 657 (6th Cir. 1983) (employer could bar personal use of telephones, but employer held to have discriminatorily applied rule on personal telephone usage); *Heath Co.*, 196 N.L.R.B. 134 (1972) (employer did not engage in objectionable conduct by refusing to allow prounion employees to use public address system to respond to antiunion broadcasts).

In fact, the holding of *Register Guard* was cited as recently as April 2014 by the ALJ for the proposition "that employees have no statutory right to use an employer's equipment for Section 7 activity." *First Transit, Inc.*, 360 N.L.R.B. No. 72, slip op. at 16 (2014).

Register Guard reflects the realities of the evolving workplace. Email is both a pervasive tool and a potential time-waster. Relaxing or eliminating the *Register Guard*

standards ignores this reality. "The average interaction worker spends an estimated 28 percent of the workweek managing e-mail and nearly 20 percent looking for internal information or tracking down colleagues who can help with specific tasks." MICHAEL CHUI, ET AL., MCKINSEY GLOBAL INSTITUTE, THE SOCIAL ECONOMY: UNLOCKING VALUE AND PRODUCTIVITY THROUGH SOCIAL TECHNOLOGIES (July 2012), http://www.mckinsey.com/insights/high_tech_telecoms_internet/the_social_economy.

Of that average time spent on email, one study estimated that an average worker received on average 304 weekly business emails, the average employee checks his or her email 36 times in an hour, and spends 16 minutes spent refocusing after handling incoming email. This creates annual productivity costs per employee of $1250 in spam, $1800 in unnecessary emails, and $2100 to $4100 in poorly written communications. Susan Gunelius, *How Wasted Time Affects Workplace Productivity,* WOMEN ON BUSINESS (November 27, 2012), http://www.womenonbusiness.com/how-wasted-time-affects-workplace-productivity-infographic/.

The policies and case law supporting email as company property permit employers to make reasonable attempts to manage productivity and capacity associated with email and internet use. This point was made by various *amici* in the *Guard Publishing* case before the D.C. Circuit in 2009.

> These policies [governing employees' use of company-provided email and related information technology] serve critical business interests for member companies. They curtail commercial solicitations and solicitations on behalf of social, political, or religious organizations, which could distract employees from their work. They limit the risk of liability and embarrassment due to transmission of inappropriate messages or confidential information from company email accounts, as well as the risk of illegal copyright infringement or file-downloading on company computers. They prevent non-business email traffic from reducing network speeds and wasting computer memory. They prevent transmission of

> material that could be construed as sexual harassment, discrimination, or defamation. And they prevent the introduction of computer viruses and other security threats onto company networks.
>
> These and other goals for employers . . . cannot be achieved without restrictions on non-business use of company email systems. . . . [T]his case . . . presents fundamental issues regarding employers' right to control email technology that they purchase and maintain for business purposes.

Brief of *Amici Curiae* HR Policy Association, Chamber of Commerce of the United States of America, Society for Human Resource Management, and Council on Labor Law Equality at p. 2, *Guard Publishing Co. v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009) 2008 WL 4735415.

The Postal Service agrees with the *amici* and Board's holding in *Resister Guard* that it is a "settled principle that, absent discrimination, employees have no statutory right to use an employer's equipment or media for Section 7 communications." 351 N.L.R.B. at 1116. Industrial experience and the weight of case law from the Board and the courts favor the continuation the standard set forth in *Register Guard.*

Finally, the Board must remain cognizant of the balancing required between employers' property rights and employees' rights to engage in Section 7 protected activity. The Postal Service avers that the *Register Guard* opinion recognizes the Supreme Court's admonition that "accommodation between the two must be obtained with as little destruction of the one as is consistent with the maintenance of the other." *N.L.R.B.* v. *Babcock & Wilcox Company*, 351 U.S. 105, 112 (1956). Therefore the Postal Service respectfully urges the Board to continue this precedent regarding employers' property rights to control email usage.

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?

Limited personal use of company email and the access to the internet via company-owned personal computers is a modern workplace reality that is difficult if not impossible to control. However, this does not mean that permitting or allowing such limited personal usage should be construed as a *carte blanche* invitation by employers to allow unfettered use of their proprietary email systems.

Admittedly, *Register Guard* conflicts with the policy enunciated by the Sixth Circuit, which holds, "Where, by policy or practice, the company permits employee access to bulletin boards for any purpose, section 7 of the Act . . . secures the employees' right to post union materials." *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 660 (6th Cir. 1983). *Register Guard* also conflicts with the General Counsel's proposed standard, which states, "employees who are permitted to use their employer's email for work purposes have the right to use it for Section 7 activity, subject only to the need to maintain production and discipline." Board's Invitation, Case No. 21-CA-095151, at 1. If this standard is adapted to the email regime, it would substantially undermine employers' right to control proprietary email technology that is to be primarily dedicated to business purposes.

However, the Postal Service believes the Board's decision in *Register Guard* is amply supported by case law. In *Register Guard* the Board adopted the reasoning of the Seventh Circuit in *Guardian Industries Corp. v. NLRB,* 49 F.3d 317, 318 (7th Cir. 1995) and *Fleming Cos., Inc. v. NLRB,* 349 F.3d 968 (7th Cir. 2003). The Seventh Circuit has held that "we explicitly reject . . . the position that whenever the employer permits employees any access to a bulletin board, it must permit the posting of union

notices." *Fleming Cos.*, 349 F.3d at 975 (citing *Guardian Indus.*, 49 F.3d at 320). The Seventh Circuit has recognized the difference between "for-sale notices as a category of notices distinct from organizational notices (which would include union postings), [as well as the] category of personal postings." *Id.* at 975. The Postal Service urges the Board to continue to employ this standard rather than a rule permitting blanket access if any personal postings or email usage are allowed.

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?

The Postal Service submits that this impact is central to the issue for two reasons: First, when the Board considers expanding employees' access to the employer's property, it must balance any such expansion against the employer's interests in promoting efficiency, maintaining discipline, and protecting its property. This balancing act is a zero-sum exercise; expanding one party's rights necessarily reduces the other's rights. Thus, if the Board is to expand employees' access to the employer's electronic communications systems, it must consider how that expansion will protect the employer's legitimate interests.

Second, if the Board grants employees unfettered access to their employer's electronic communications systems, it will raise a host of novel legal questions. And unless the Board answers those questions, it will cast doubt on the legality of several common email and internet-use policies—leaving employers facing newfound uncertainty. The Board should therefore craft its decision to reduce any unnecessary uncertainty.

(a). The Board must consider the employer's legitimate countervailing interests.

The Supreme Court has long recognized that, when determining the scope of employees' Section 7 rights, the Board must consider the employer's countervailing

interests, including its interests in protecting property and maintaining discipline and efficiency. *See, e.g.*, *Hudgens v. NLRB*, 424 U.S. 507, 522–23 (1976) (explaining that the National Labor Relations Act's "basic objective" is to accommodate "[Section 7] rights and private property rights"); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 111–14 (1956) ("Accommodation between [Section 7 rights and property rights] must be obtained with as little destruction of one as is consistent with the maintenance of the other."). As discussed above, adopting the General Counsel's proposed standard would degrade employers' property rights: employers would enjoy less discretion to control their electronic communications systems. *See* section 1, *supra*. Therefore, in considering whether to adopt that standard, the Board must consider the harm employers will suffer as a result. *See Hudgens*, 424 U.S. at 523 (entrusting the "responsibility to adapt the Act to changing patterns of industrial life" to the Board).

The most obvious harm to employers will be increased costs. Maintaining a proprietary email system is not free. TED SCHADLER, FORRESTER RESEARCH, INC., SHOULD YOUR EMAIL LIVE IN THE CLOUD? A COMPARATIVE COST ANALYSIS 4 (2009) (stating that the cost of maintaining a proprietary email system can be "surprisingly high"). Employers must invest substantial sums to maintain such systems; and a large portion of their expenditures go to email retention and archiving. *See Id.* at 10 (estimating that on-premises email systems can cost businesses as much as $25.18 per month per user, the most expensive component being message archiving). If employers cannot prevent employees from using their systems at the employees' leisure, then employers must necessarily retain and archive a greater number of emails—thereby increasing costs. And employers cannot simply decide not to retain or archive such emails: in many cases, employers have a legal duty to retain them. *See* FED. R. CIV. P. 34. This

duty under the Federal Rules of Civil Procedure was also explained by the court in *Banas v. Volcano Corporation*, 2013 WL 5513246 (N.D. Cal. 2013):

> The Federal Rules of Civil Procedure obligate a party to produce "discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(2)(A). This obligation extends to electronically stored information unless the party can show that the information is "not reasonably accessible because of undue burden or cost." Fed. R. Civ. P. 26(b)(2)(B); see also Fed. R. Civ. P. 34(a) ("A party may serve on any other party a request within the scope of Rule 26(b)").

Thus, adopting either the General Counsel's or the Sixth Circuit's standard would impose new, potentially prohibitive costs on employers. *Cf.* Thomas M. Jones et al., *Best Practices: Formulating a Records Retention Policy*, 50 DRI FOR DEF. 42 (2008) ("Given the large volume of e-mails sent and received by most organizations on a daily basis . . . archival storage, management, and retention of e-mail can be a difficult problem.").

(b). The Board should also consider the impact of legal uncertainty on employers.

In addition to coping with these new costs, employers will also be forced to struggle with novel legal concerns; for instance, how to maintain employee privacy and confidentiality. As noted, many employers retain emails sent through their proprietary systems. They also monitor those emails, and employees generally have no expectation of privacy in their email messages' content. *See, e.g.*, *Smyth v. Pillsbury Co.*, 914 F. Supp. 97, 101 (E.D. Pa. 1996) (holding that private-sector employee had no "reasonable expectation of privacy in e-mail communications voluntarily made by an employee to his supervisor over the company e-mail system notwithstanding any assurances that such communications would not be intercepted by management"); *Kelleher v. City of Reading*, No. CIV.A.01-3386, 2002 WL 1067442, at *7–8 (E.D. Pa.

May 29, 2002) (holding that plaintiff had no reasonable expectation of privacy in messages sent over public-sector employer's email system); *see also Garrity v. John Hancock Mut. Life Ins. Co.*, No. CIV.A. 00-12143-RWZ, 2002 WL 974676, at *1–2 (D. Mass. May 7, 2002) (holding that even if employee had reasonable expectation of privacy in emails sent through employer's email system, employer's interest in investigating alleged harassment overcame that privacy expectation); *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650, 662 (N.J. 2010) (noting that "courts might treat e-mails transmitted via an employer's e-mail account differently than they would web-based e-mails sent on the same company computer").

But the Board has limited the circumstances in which an employer may monitor employees when they are engaged in Section 7 activity. *See, e.g., Int'l Paper Co.*, 313 N.L.R.B. 280, 286 (1993) (concluding that the employer "violated Section 8(a)(1) by closely monitoring [an employee's] activities in order to discourage his engagement in union activities"). And the Board has held that, under certain circumstances, employees' communications with their union representatives are confidential and privileged. *Cook Paint & Varnish Co.*, 258 N.L.R.B. 1230, 1231–32 (1981); *see also Peterson v. State*, 280 P.3d 559, 562–65 (Alaska 2012) (finding a union-representative privilege under Alaska law); *City of Newburgh v. Newman*, 70 A.D.2d 362, 366 (N.Y. App. Div. 1979) (recognizing potential union-representative privilege under NY law); *but see Curry v. Contra Costa Cnty.*, No. C-12-03940 WHO (DMR), 2013 WL 4605454 (N.D. Cal. Aug. 28, 2013) (declining to recognize union-representative privilege).

However, if the Board adopts the General Counsel's proposed standard, it would call into question the legality of such common monitoring policies. Employers would be left to navigate an uncertain legal landscape. *See* Alfred A. Marcus, *Policy Uncertainty*

and Technological Innovation, 6 ACADEMY MGMT. REV. 443 (1978), http://amr.aom.org/content/6/3/443.short (abstract) ("Without certainty about government policies, business decision makers are unable to assess risk and opportunity and make the trade-offs necessary for investment in new technologies.").

Monitoring policies are not the only policies whose legality would be in doubt. Rather, uncertainty would haunt many other common, neutral email policies:

- *Internet-access policies*. Many employers, including the Postal Service, restrict their employees' ability to use their work computers to access certain internet sites, including social-media sites. But the Board has held that employees' communications through social-media sites may implicate their Section 7 rights. *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37, 1 (2012). This raises the question: if employees have a right to use employers' communications networks for Section 7 purposes, do they also have a right to access social-media sites for those purposes?
- *Bulk-email policies*. Some employers, like the Postal Service, restrict employees' ability to send bulk emails. But if employees have a right to use their employer's communications systems for Section 7 activity, can the employer nevertheless apply its mass-email policy to Section 7 related emails?
- *Email directories*. Many employers, including the Postal Service, keep internal email directories. These directories may contain information about individual employees, including email addresses, position titles, and telephone numbers. But if employees have a right to use the employer's

email system for Section 7 activity, do they also have a right to use the employer's email directory for that activity?

Before the Board can adopt the General Counsel's proposed standards, it should answer these questions. If it does not, employers will be left facing untenable uncertainty, not knowing whether they may legally apply these and other common email and internet-use policies to employees' Section 7-related emails. *See Marcus*, *supra*.

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?

This question requires clarification as to what exactly is being asked with regard to a "proper balance." Does this refer to employee solicitation during work time *via* these media? Does the question also refer to employee distribution *via* these media during working time? Regardless of the means or media used (personal devices or social media accounts) the issue still boils down to what rules employers may lawfully enforce to govern employee communications during working time (and in working areas *vis a vis* distribution). The Postal Service believes that lawful rules prohibiting solicitation on working time apply as well to personal devices and social media. Otherwise how can an employer even expect productive work during working time?

This area of the law is well settled. An employer may ban solicitation on working time and in working areas. See *Restaurant Corp. of America v. NLRB*, 827 F.2d 799, 806 (D.C. Cir. 1987) *(citing NLRB v. Babcock & Wilcox Co.,* 351 U.S. 105, 112-113 (1956); *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 797–798 (1945)). Furthermore, an employer may limit distribution to nonwork areas of the employer's premises during nonworking periods. *See Eastex, Inc. v. NLRB,* 437 U.S. at 570–72 (holding that and

employers may not interfere with this right except to the extent necessary to maintain production or discipline).

The Board has also addressed the issue of how employees may interact with social media and the rules employers may use to govern such communications. *See, e.g., Costco Wholesale Corp.*, 358 N.L.R.B. No. 106, slip op. at 2 (2012) (holding that company rule providing for discipline up to and including termination regarding "statements posted electronically (such as [to] online message boards or discussion groups)" that damage the company's reputation have "a reasonable tendency to inhibit employees' protected activity and, as such, violate[] Section 8(a)(1)."); *see also Dish Network Corp.* , 359 N.L.R.B. No. 108 (2013) (social media policy prohibiting employees from making "disparaging or defamatory comments about DISH Network, its employees, officers, directors, vendors, customers, partners, affiliates or our, or their, products/services" held to be unlawful because, first, "analogous electronic limitations on negative commentary violated the Act," (citing *Costco, supra*) and second, "equivalent rules, which ban union activities during "Company time" are presumptively invalid because they fail to clearly convey that solicitation can still occur during breaks and other nonworking hours at the enterprise")

It is apparent under the holding in *Dish Network, supra,* that an employer may lawfully ban non-work-related electronic communications during working time. However, this does not address the issue of what constitutes distribution *via* electronic media. And if computers and work stations are working areas, how can distribution even be allowed under current Board case law? That question remains unanswered; and until the General Counsel clarifies this question, employers will be left uncertain as to what rules governing electronic distribution may be valid.

The "proper balance" to be struck goes back to the basic question about the employer's right to control working time versus employees' Section 7 rights. *Register Guard* gives employers a rational, nondiscriminatory means to govern electronic solicitation and maintain control of the workplace while respecting Section 7 rights. The Postal Service believes that *Register Guard* is effective guidance regardless of the media or technology involved in employee communications.

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?

Since the Board's *Register Guard* decision in 2007, internet usage and social media such as Facebook have grown exponentially. As of the first quarter of 2014 Facebook had 1.28 billion monthly active users worldwide. Contrast that with roughly the 100 million monthly users it had in 2008. *Number of monthly active Facebook users worldwide from 3rd quarter 2008 to 1st quarter 2014 (in millions)*, STATISTA, http://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide (last visited June 6, 2014). Likewise, in 2012 it was estimated that internet penetration in the US was at 78.1% of the population. *Internet Users in the Americas* MINIWATTS MARKETING GROUP, http://www.internetworldstats.com/stats2.htm (last updated April 25, 2014).

Aside from these statistics, the so-called "Arab Spring" highlighted the growth, power and efficacy of social media in transforming the way people communicate, despite government censorship. All this means for the future of workplace electronic media is that employees and their employers will have more diverse means of

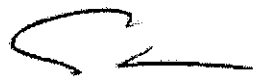
communicating and more powerful tools to do so. If the Board reverses *Register Guard* employers' ability to manage the balance of accommodation between employer property rights and employees' protected use of electronic media would be severely degraded and the Board will be forced to revisit this conundrum in the not too distant future.

CONCLUSION

Given the growth in internet usage and social media, allowing greater rights to employees in this regard would necessarily be destructive of employer rights to protect their investment in internet technologies. For all the foregoing reasons the Postal Service urges the Board to not 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.

DATED this 16th day of June, 2014.

Respectfully submitted,



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