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PURPLE COMMUNICATIONS, INC.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C.

PURPLE COMMUNICATIONS, INC. and COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO	Cases Nos. 21-CA-095151 21-RC-091531 21-RC-091584 **BRIEF IN SUPPORT OF EXCEPTIONS OF RESPONDENT AND EMPLOYER TO DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE**

I. INTRODUCTION AND SUMMARY

Pursuant to the National Labor Relations Board's Rules and Regulations, including Section 102.46 thereof, Respondent Purple Communications, Inc. ("Purple," "Company," "Employer," or "Respondent"), submits this Brief in Support of its Exceptions to the Decision of the Administrative Law Judge ("ALJ") dated March 16, 2015 ("Decision").[1]

Purple seeks review of the ALJ's decision that the Company's Internet, Intranet, Voicemail and Electronic Communication Policy ("Electronics Communication Policy" or "the

[1] References to the ALJ's Decision will be referred to as "Dec. __". References to the transcript of the hearing will be referred to as "Tr. __". References to Joint Exhibits will be referred to as "Jt. Exh. ___".

Policy") violates Section 8(a)(1) of the Act on the basis that it is purportedly overbroad because employees have a presumptive "right" to use their employers' electronic communications systems for Section 7 purposes. In doing so, the ALJ, relying on the Board's earlier decision in this matter, *Purple Communications*, 361 NLRB No. 126 (2014) (hereafter "*Purple I*"), improperly presumed that employees who have been given access to an employer's email system – or any employer-provided electronic communications system – in the course of their work are entitled to use the system to engage in statutorily protected Section 7 discussions while on nonworking time. Respondent respectfully contends that the Board's conclusion in *Purple I*, and hence the ALJ's reliance on that conclusion, are erroneous. To the extent the ALJ's decision was compelled by the Board's previous order in *Purple I*, then that order should be reconsidered because it violates Purple's rights under the Act, as established by longstanding Board precedent and controlling judicial authority.

The Board's holding in *Purple I* is contrary to decades of Board precedent confirming that absent special circumstances, employers have no duty to permit employees to use employer-owned property, equipment, or materials for Section 7 purposes, as long as the employer restrictions are not discriminatory. There is no basis for applying the standard set forth regarding face-to-face communications or employer's real property interests under *Republic Aviation,* 324 U.S. 793 (1945), to electronic communications. The *Purple I* decision expands the reach of Board precedent to limit the extent to which an employer can place restrictions on its employees' use of the employer's equipment, and effectively eviscerates the employer's property rights. There is no justifiable basis for ignoring well established precedent for the purpose of imposing special rules applicable to electronic communications.

The Purple I decision unreasonably restricts the Company's ability to ensure that employees remain productive during working time. Furthermore, the decision and order will

make Purple's email systems further vulnerable to increased usage and spam, which increases the risk of viruses and the diminished effectiveness of the email communications systems. Moreover, Purple's free speech rights protected under Section 8(c) and the First Amendment have been pushed to the side as Purple must now allow its email system to communicate messages that Purple may not endorse. Finally, even if the Board is somehow permitted to subject employer electronic communications to the same standards that govern face to face solicitation/distribution rules, then the Board has acted arbitrarily by failing to treat electronic communications as "distributions" of literature, rather than verbal "solicitations." Email plainly distributes literature, which the Board has previously held outside the electronic context can be lawfully excluded from all working areas. The same principle must be applied to emails if they are to be (incorrectly) governed by the principles of *Republic Aviation.*

For these and the other reasons set forth below and in the accompanying Exceptions, the Decision of the ALJ should be reversed.

II. FACTS

Purple is a communications provider of interpreting services for the deaf and hard of hearing. (Tr. 228.) The Company has sixteen call centers deployed across the country providing services to the deaf and hard of hearing on a 24-hour, seven days a week, 365 days a year basis – including the call centers at Corona and Long Beach, California, which are the sites at issue in the instant matter. (Tr. 250:9-13.) Purple's video interpreters perform their work in open cubicles located on the call center floor (Tr. 166:3-17). They have a video screen and a computer at their workstation and typically have the hearing person on an audio feed and the non-hearing person on a video feed, so the interpreter can use sign language to communicate with the non-hearing person and use the spoken word with hearing person. The computer, which the interpreter uses to make and process calls (Tr. 25: 2-26:24), has access to

Purple's email system (46:20-47:2).

In addition to the computer with email access at each workstation, at both the Long Beach and Corona call centers, there is a computer terminal with internet access as well as Microsoft Word and other business related programs, and Purple's intranet and email, located in the break room (Tr. 27:20-21, 49:20-50:6). In addition, in Long Beach there is another computer located at the queue desk located in the middle of the call center floor (Tr. 48:6-15, 48:18-49:14 14) that has AOL Instant Messenger and is used for communication with Purple's operations department (Tr. 49:11-19).

Purple has a written policy in its Employee Handbook providing that email should be used for business purposes only, and listing specific activities that are strictly prohibited ("Electronic Communications Policy" or "the Policy") (Jt. Ex 1, pp. 30-31). The Policy provides in relevant part:

> INTERNET, INTRANET, VOICEMAIL AND ELECTRONIC COMMUNICATION POLICY
>
> Computers, laptops, internet access, voicemail, electronic mail (email), Blackberry, cellular telephones and/or other Company equipment is provided and maintained by the [*sic*] Purple to facilitate Company business. All information and messages stored, sent, and received on these systems are the sole and exclusive property of the Company, regardless of the author or recipient. All such equipment and access should be used for business purposes only.
>
> * * *
>
> Prohibited activities
>
> Employees are strictly prohibited from using the computer, internet, voicemail and email systems, and other Company equipment in connection with any of the following activities:
>
> * * *
>
> 2. Engaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company.

* * *

5. Sending uninvited email of a personal nature. (*Id.*)

The intention and effect of that provision is to prohibit all personal use of email, and that Policy has been enforced uniformly.

The video interpreters have personal email accounts (Tr. 135:8-136:4, 210:6-25). They also access the company email, as well as their own email accounts, on smartphones (Tr. 211:15-20). They text each other on their smartphones (Tr. 80:20-25, Tr. 190:20-191:3, 193:7-11).

The video interpreters are expected to be "logged in" *i.e.*, in their workstation connected and ready to take calls, 80 percent of the time in a day and 85 percent of the time from 9:00 p.m. to 9:00 a.m. (Tr. 86:1-7, 86:22-24). They apparently consider themselves to be on break when they are not logged in (Tr. 74:14-16). They also are provided a 30 minute meal period if they work five hours or more (Jt Ex 1 at p. 21). Purple has a kitchen/break room in both its Long Beach (Tr. 66:25-67:2) and the Corona call centers (Tr. 16:24-166:2). Although Purple provides services 24 hours per day, every day of the year (Tr. 250:9-13), that does not mean that each call center operates 24 hours per day (Tr. 213:3-4).

III. THE ALJ'S DECISION

On October 24, 2013, the ALJ issued his initial decision, in which he relied on *Register Guard*, 351 NLRB 1110 (2007), and found that the Employer's Electronic Communications Policy did not violate the Act. The General Counsel and the Charging Party Communications Worker of America, AFL-CIO ("the Union") filed exceptions to the decision. On December 11, 2014, the Board issued the Decision and Order in *Purple I*, which reversed *Register Guard* and remanded the matter to the ALJ for a determination of whether the Company's policy violated the new standard set forth in *Purple I*, or whether any "special circumstances" existed

that justified the policy. 361 NLRB No. 126 (2015). On March 16, 2015, the ALJ issued his Supplemental Decision. In the Supplemental Decision, the ALJ, following the Board's remand order, ruled that the Company's Electronic Communications Policy presumptively interferes with employees' Section 7 rights and violates Section 8(a)(1) of the Act unless Purple could rebut that presumption by showing that the restrictions set forth in the Policy are justified by special circumstances necessary to maintain production or discipline. (Dec. 4:27-30). Purple presented no evidence to establish such special circumstances, maintaining that *Purple I* was wrongly decided, and thus, the ALJ found that the Electronic Communications Policy violates Section 8(a)(1). (Dec. 4:32-42).

The ALJ ordered Purple to cease and desist from maintaining the Electronic Communications Policy; rescind the Policy; and furnish employees with an insert for the current employee handbook that advises employees of the rescission, provides a lawfully worded Electronic Communications Policy in its place, or contains no Electronic Communications Policy at all. (Dec. 7:32-45.)

IV. ARGUMENT

As explained further below, the ALJ's decision adopting the Board's previous remand order, is inconsistent with longstanding NLRB precedent.

First, the Board in *Purple I* and the ALJ here erred by ruling that the Electronic Communications Policy is overbroad. The Policy in no way violates Section 8(a)(1) as it does not prevent employees from exercising Section 7 rights. *Purple I's* expansion of the *Republic Aviation* doctrine to this matter is unwarranted and inconsistent with the purposes of the Act.

Second, the Board in *Purple I* and the ALJ here erred by issuing an order that is inconsistent with Purple's free speech rights protected under Section 8(c) and the First Amendment to the United States Constitution. The ALJ's order requires Purple to permit

Respondent's employees to send messages that Purple may not support on Purple's email systems from a Purple email address. These emails may create the appearance that Purple supports such messages, which may not be the case. Such compelled speech is impermissible.

Third, assuming that *Register Guard* is no longer recognized by the Board as good law, the ALJ erred by failing to evaluate the Electronic Communications Policy under the Board's well-established precedent applicable to employer rules regarding employee distribution of literature. Electronic communications via the Company's email system are in fact written communications distributed in the workplace, and thus, the ALJ should have relied on the Board's distribution rule precedent. The ALJ's refusal to do so was erroneous.

Fourth, the ALJ erroneously applied the Board's new rule regarding electronic communications retroactively. Retroactive application in this case is not proper as Purple's Policy was undisputedly lawful under decades of Board precedent.

For these reasons, as explained in greater detail below, the Respondent's Exceptions must be granted and the charge relating to the Electronic Communications Policy must be dismissed.

A. The ALJ Erred By Finding That Purple's Electronic Communications Policy Is Overbroad. (Exception Nos. 1-21.)

The ALJ erred in finding that Purple's Electronic Communications Policy violates the Act. The Board's prior decision in *Purple I* to reverse *Register Guard* runs contrary to decades of Board decisions recognizing that employers generally have no obligation to permit employees to use employer-owned property, equipment, or materials for Section 7 purposes, provided such restrictions on employee usage are not discriminatory. *See, e.g., Mid-Mountain Foods*, 332 NLRB 229, 230 (2000); *Eaton Technologies*, 322 NLRB 848, 853 (1997); *Champion International Corp.*, 303 NLRB 102, 109 (1991); *Churchill's Supermarkets*, 285

NLRB 138, 155 (1987); *Union Carbide Corp.*, 259 NLRB 974, 980 (1981). Contrary to the Board's *Purple I* decision, on which the ALJ relied, *Republic Aviation* has never been applied in a manner that compels an employer to make its own resources, equipment, and materials available to its employees so that they can engage in Section 7 activity.

Moreover, the ALJ's decision and that of the Board impermissibly affords less protection to employer-provided email that it does not provide to other types of employer-owned property.[2] There is no basis for such a finding. Email is neither the "natural gathering place" at work nor the "present day water cooler." Employees have numerous other options available to them in which they can communicate and engage in Section 7-protected activity. While email is widely used as a form of communication, it is merely one of several forms of communications in which employees engage. Employees at Purple and elsewhere have several other channels in which they can communicate, including personal email accounts, social media accounts, instant messaging, and text messaging. (Tr. 49:11-19, 135:8-136:4, 210:6-25, 211:15-20) Purple employees also communicate with one another through those same channels with their own personal smartphones. (Tr. 80:20-25, Tr. 190:20-191:3, 193:7-11, 211:15-20).

In light of *Purple I* and the ALJ's decision, Purple may now be forced to provide third parties access to Purple email for purposes of Section 7 activity. Moreover, Purple will incur substantial new costs (*e.g.*, data storage, maintenance costs, and the costs of retrieval) due to the Company being required to allow employees to use email systems for Section 7 purposes. Moreover, the inevitable increase in employee email usage that will arise out of this decision,

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[2] Equally erroneous is the apparent conclusion that personal property is entitled to less legal protection than real property. This is a novel conclusion that is contradicted by decades of Board precedent. *See, e.g., Johnson Technology, Inc.*, 345 NLRB 762, 763 fn. 8 (2005). Real property and personal property are entitled to the same degree of protection. Any conclusion otherwise is unfounded.

which limits the extent to which employers can regulate the use of email for non-work purposes, will increase the likelihood of the Company's email system jamming or becoming vulnerable to external threats, such as computer viruses.

Furthermore, the decision does not adequately consider the impact of the decision on Purple's ability to monitor employee productivity on the email system, without at least creating the appearance of unlawful surveillance.[3] Under the standard imposed by *Purple I*, it will be essentially impossible for Purple to determine whether its employees are drafting non-work related emails during work time. As such, Purple is deprived of its right to ensure that employees remain productive during working time. Moreover, the ruling exposes Purple to additional risks because requiring the Company to allow its employees to use Purple email systems for non-work purposes limits the extent to which Purple can control the use of non-work-related email (which can include email that could impose legal liability on Purple, such as emails that are deemed threatening or harassing).

In light of the foregoing, the Board should reverse the ALJ's conclusion and find the Electronic Communications Policy lawful.

B. The ALJ Erred By Issuing A Ruling That Improperly Interferes With Purple's Free Speech Rights Protected By Section 8(c) And The First Amendment. (Exception Nos. 17-18.)

The *Purple I* decision and the ALJ's ruling here failed to provide sufficient consideration to the fact that the reversal of *Register Guard* violates Section 8(c) of the Act and perhaps the First Amendment. The decision forces Purple to permit employees to communicate non-business related and unapproved messages on their email systems. The fact

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[3] While the Board's *Purple I* decision addresses the issue of surveillance and purports not to prohibit employers from monitoring employee usage, the Board's analysis ignores the practical realities. The Board gives no guidance to employers as to what level of monitoring will be permitted and how employers can avoid inadvertently surveilling protected Section 7 activity on the Company's email system.

that these messages would be delivered via the Purple's email system necessarily would create the appearance that the Company endorses the message being disseminated by its employees.

In *Purple I*, the Board rejected such arguments. 361 NLRB No. 126, slip op. at p. 16. In doing so, the Board made an off-base comparison of an email sent through employer-provided email to email sent through a Gmail account. While one would not reasonably deem an email on Gmail from a non-Google employee to constitute a message sent by the email sender on behalf of Google, it is much more reasonable to assume that an email from a Purple employee sent through a Purple email address represents the views of Purple.

The ALJ, adopting the Board's reasoning, failed to consider these factors. The ALJ's decision violates Section 8(c) and arguably the First Amendment because the ruling imposes compelled speech on Purple. *See National Association of Manufacturers v. NLRB*, 717 F. 3d 947, 956 (D.C. Cir. 2013); *Wooley v. Maynard*, 430 U.S. 705 (1977); *West Virginia State Bd. Of Ed. v. Barnette*, 319 U.S. 624 (1943); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574-75 (1995); *Consol. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 544 (1980). For the same reasons, the ALJ's decision must be reversed.

C. The ALJ Erred by Failing to Evaluate the Electronic Communications Policy Under the Board's Precedent Applicable to Employer Rules Regarding Employee Distribution of Literature. (Exception Nos. 19-20.)

In light of the Board's holding in *Purple I*, which failed to definitively state whether email communications should be treated as "oral solicitation" or as "written distribution," the ALJ was called upon to make such a determination and apply the law accordingly. Under the Board's holding in *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 621 (1962), which was not reversed by Purple I, the ALJ should have found that emails are written distributions that the

Company was entitled to prohibit in work areas, including the computer system itself. The ALJ failed to make such a determination and should be reversed on this basis.

It has long been the case under Board precedent that employers may lawfully restrict the distribution of literature to non-working times and non-working areas. *See, e.g., Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 621 (1962). The Board allows employers to limit distribution to non-working areas because: (1) employers have a legitimate business interest in prohibiting the accumulation of litter in work areas, thereby "rais[ing] a hazard to production" regardless of when the distribution takes place; and (2) literature, unlike solicitation, is "of a permanent nature" and may be read at the recipient's convenience. *Stoddard-Quirk*, 138 NLRB at 619-20. As such, the "opportunity for effective distribution" of union literature is more easily afforded than the opportunity for effective oral solicitation, and the intrusion upon the employer's property rights can be correspondingly diminished without substantial prejudice to employee rights. *Id.* at 620-21.

Assuming, *arguendo*, that the ALJ appropriately refused to apply *Register Guard* to the instant dispute under the *Purple I* holding, emails must nevertheless constitute written material that should fall within the Board's distribution standards. Similar to the written documents in *Stoddard-Quirk* and its progeny, emails are themselves written, not spoken. Beyond that, electronic communications, like other forms of written materials to which the distribution rules apply, are likely to get mixed in with work related materials and, therefore, become a distraction, and occupy space on employer property, *i.e.*, an employer's computer systems. In fact, the accumulation of emails over time can occupy significant memory on an employer's computer system. Regular usage and frequent dissemination and receipt of non-work-related emails can congest an employer's server and otherwise interfere with productivity.

In addition, email correspondence, unlike oral solicitations, are permanent in nature.

Anyone who receives an email can review the email at his or her leisure. Provided the communication has been received, the email has served its most basic purpose. As such, email and all electronic communications are again more similar in nature to literature than to oral forms of solicitations. Thus, the ALJ should have evaluated Purple's Electronics Communication Policy under the Board's distribution standards. Applying the Board's distribution standards, Purple's Electronic Communications Policy is lawful. Pursuant to such Board precedent, Purple is permitted to prohibit distribution of all non-work related emails in all of the Company's work areas, including the Employer's computer systems. *Stoddard-Quirk*, 138 NLRB at 619-20. For these reasons, the ALJ's Decision should be reversed.

D. The ALJ Erred By Issuing A Retroactive Remedy. (Exception Nos. 5-8, 21.)

The ALJ's adoption of the Board's retroactive remedy in this case is improper. In doing so, the ALJ accepted the Board's incorrect assertion that there was no "suggestion" that Purple "when it chose to grant access to its email system to the employees involved here, actually relied on the fact that it could lawfully prohibit their use of the system for Section 7 purposes on nonworking time as part of a complete ban on non-work use." To the contrary, Purple drafted its policies in reliance on the legal authority that existed at the time, including the existing NLRB precedent. As explained above, longstanding Board precedent predating *Register Guard* permitted Purple to restrict its employees from using Purple-owned property, equipment, or materials for purposes of Section 7 communications, provided its restrictions were not discriminatory facially or in practice. Purple relied on these decades of precedent when crafting its policies. It is unfair to punish Purple based on its reliance on Board precedent.

The ALJ also erred by relying on the Board's conclusion that retroactive application of its ruling was appropriate because the presumption it created in this case is "rebuttable" based on undefined "special circumstances." The Board presented no guidance whatsoever on what sort of circumstances or evidence an employer may rely upon to meet its burden to rebut the new *Purple I* presumption, other than to state that it will be the rare case where special circumstances justify a total ban on non-work email use by employees. In the absence of such guidance, the notion of a "rebuttable presumption" with respect to the Electronic Communications Policy appears illusory. Thus, retroactive application was improper in this instance.

V. CONCLUSION

For the foregoing reasons and based on the record evidence, Purple respectfully requests that the Board reject those portions of the ALJ's Decision excepted to by the Employer. To the extent the ALJ relied on the Board's decision in *Purple I*, that decision should be reconsidered and overruled. As explained above, it must be found that Purple's Electronic Communications Policy does not violate Sections 7 and 8(a)(1) of the National Labor Relations Act and the Union's charge must be dismissed.

Dated at Newport Beach, California this 13th day of May, 2015.

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PROOF OF SERVICE
PURPLE COMMUNICATIONS, INC. v.
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO
Case No. 21-CA-0951151, 21-RC-091531, and 21-RC-091584

I am employed in the County of Orange, State of California. I am over the age of 18 and am not a party to the within action. My business address is 620 Newport Center Drive, Suite 200, Newport Beach, California 92660. On **May 13, 2015,** I served the foregoing document described as follows:

BRIEF IN SUPPORT OF EXCEPTIONS OF RESPONDENT AND EMPLOYER TO DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE

☐ **By United States Mail:** I am readily familiar with the firm's practice for collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Newport Beach, California, in the ordinary course of business. I enclosed the above-referenced document(s) in a sealed envelope or package addressed to the person(s) at the address(es) as set forth below, and following ordinary business practices above I placed the package for collection and mailing the date and at the place of business set forth below.

☒ ****By Overnight Delivery**: I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the person(s) at the address(es) listed below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

☐ **By Fax Transmission**: I caused to be transmitted the document described herein via the fax number listed below. Upon completion of said facsimile transmission, the transmitting machine issued a transmission report showing the transmission was complete and without error.

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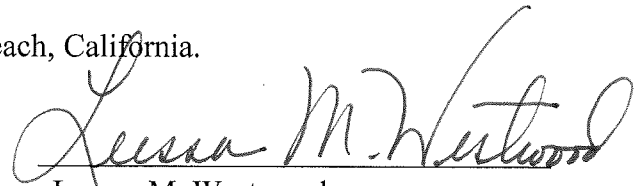
☒ ***(STATE)*** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

☐ ***(FEDERAL)*** I declare under the laws of the United States of America that I am employed in the office of a member of the Bar of this court at whose direction the service was made and that the foregoing is true and correct.

Executed on **May 13, 2015**, at Newport Beach, California.



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