

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Division of Judges

PURPLE COMMUNICATIONS, INC.

Respondent

and

Case 21-CA-095151

COMMUNICATIONS WORKERS OF  
AMERICA, AFL-CIO

Charging Party

PURPLE COMMUNICATIONS, INC.

Employer

and

Cases 21-RC-091531  
21-RC-091584

COMMUNICATIONS WORKERS OF  
AMERICA, AFL-CIO

Petitioner

BRIEF OF COUNSEL FOR THE GENERAL COUNSEL  
To The Honorable Paul A. Bogas, Administrative Law Judge

Submitted by:  
Cecelia Valentine  
Counsel for the General Counsel  
National Labor Relations Board, Region 21  
888 S. Figueroa Street, Ninth Floor  
Los Angeles, CA 90017  
Telephone (213) 894-6145  
Facsimile (213) 894-2778  
[cecelia.valentine@nrlrb.gov](mailto:cecelia.valentine@nrlrb.gov)

## **I. Introduction**

Pursuant to the February 10, 2015 Order of Administrative Law Judge Bogas (ALJ Bogas), Counsel for the General Counsel (General Counsel) hereby files this brief, limited to the issue remanded by the Decision and Order of the National Labor Relations Board (Board) in this matter in *Purple Communications, Inc.* 361 NLRB No. 126 (December 11, 2014) concerning the maintenance of an electronic communications policy which restricts employees use of the email system to business purposes only.

## **II. Issues Presented**

1. In light of Respondent Purple Communications, Inc.'s failure to, as invited by the Board's December 11, 2014 remand, submit evidence of special circumstances, is the stated reason for the Electronic Communication Policy, as articulated in the underlying unfair labor practice hearing, sufficient to justify the rule's existence?
2. Assuming the Electronic Communication Policy is found to be unlawful, what is the appropriate remedy, given that it is contained within Respondent's employee handbook, which applies to employees at all of Respondent's call centers, nationwide?

## **III. Statement of Facts**

### **A. Procedural Posture**

Following issuance of complaint in this matter, ALJ Bogas conducted a hearing on June 10 and 11, 2013.<sup>1</sup> The unfair labor practice allegations at issue were the maintenance of two workplace rules, both contained within Respondent's employee handbook.

---

<sup>1</sup> Objections to two elections, conducted pursuant to petitions in cases 21-RC-091531 and 21-RC-091584 were consolidated with the complaint, and were also heard, and decided, by ALJ Bogas.

ALJ Bogas issued his decision<sup>2</sup> in this matter on October 24, 2013, concluding inter alia, that Respondent did not violate Section 8(a)(1) of the Act by maintaining its Internet, Intranet, Voicemail and Electronic Communication Policy (Electronic Communication Policy), which strictly prohibits employees' use of Respondent's equipment, including its email system, for non-work purposes, at all times, including employees' non-working time. The relevant portions of the policy alleged by the General Counsel to constitute a violation of Section 8(a)(1) are as follows:

**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...

In reaching this decision, ALJ Bogas noted that he was bound to follow Board law at that time in *Register Guard* 351 NLRB 1110 (2007), en<sup>2</sup>d. in relevant part and remanded sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009).

The General Counsel filed limited exceptions<sup>3</sup> on November 21, 2013, excepting to ALJ Bogas' failure to find a violation with respect to the Electronic Communication Policy, arguing that *Register Guard* should be overturned to the extent it held that employees have no statutory right to use employer email for Section 7 purposes.

---

<sup>2</sup> ALJ Bogas also concluded that Respondent's maintenance of a workplace rule prohibiting "causing, creating, or participating in a disruption of any kind during working hours on Company property" violated Section 8(a)(1) of the Act, which was confirmed by the Board in its September 24, 2014 Decision and Order.

<sup>3</sup> Additionally, Respondent filed exceptions and a supporting brief, and the General Counsel responded with an answering brief; the Charging Party Union filed cross-exceptions and a supporting brief; and Respondent filed an answering brief to the exceptions and cross exceptions filed.

On April 30, 2014, the Board issued a notice and invitation to the parties and interested amici curiae to file briefs regarding *Register Guard* and the rights of employees with respect to the use of their employers' email systems and other electronic communications. On September 24, 2014, the Board issued an order in this case that severed the *Register Guard*/Electronic Communication Policy issue, and resolved all other issues. 361 NLRB No. 43 (2014).

On December 11, 2014, the Board issued its decision regarding the Electronic Communication Policy and addressed the *Register Guard* issue. By this decision, the Board overruled *Register Guard* to the extent it held that, under ordinary circumstances, employees who have been given access to their employer's email system have no right to use it for Section 7 purposes, and substituted the following standard: a rebuttable presumption, consistent with *Republic Aviation*, that "employees who have been given access to the employer's email system in the course of their work are entitled to use the system to engage in statutorily protected discussions about their terms and conditions of employment while on nonworking time, absent a showing by the employer of special circumstances that justify specific restrictions." 361 NLRB No. 126, slip op. at 5, citing 324 U.S. 793 (1945).

The Board remanded this matter to ALJ Bogas, to reopen the record, to afford the parties an opportunity to present evidence relevant to the determination of the lawfulness of the Respondent's Electronic Communication Policy. The remand, thus, presented an opportunity for Respondent to present evidence of special circumstances justifying the restrictions imposed on employees' use of its email system.

On February 3, 2015, in a letter to ALJ Bogas, which is attached to ALJ Bogas' February 10, 2015 Order, Respondent's counsel wrote that Respondent would not be presenting any additional evidence or argument, whether by brief, or otherwise, contending that special circumstances exist to justify Respondent's business use only restriction on the use of its e-mail system by its employees during their non-working time. Thereafter, ALJ Bogas issued an Order, dated February 10, 2015, stating that, in light of Respondent's assertions in its letter, there was no reason to take additional evidence, given that it is the Respondent's burden in the to rebut the presumption by "articulat[ing] the interest at issue" and demonstrating the "special circumstances."

## B. Relevant Facts

Respondent provides communications services for persons who are deaf and hard of hearing, including video relay services. (Tr. 228).<sup>4</sup> Respondent provides these services from approximately 15 call centers it operates, which are located throughout the United States, including centers in Long Beach, California and Corona, California. (Tr. 24, 250-51).

Respondent's video relay interpreters (VIs) perform video relay interpreting from workstations at their assigned facilities where they each log into Respondent-owned computers to process calls, using Respondent's proprietary software. (Tr. 24-25, 46, 61). All VIs are assigned email accounts by Respondent and use their Respondent-issued email accounts for workplace communications, every day. (Tr. 26-27, 47-48). Respondent's email system may be used by employees to communicate with one another. (Tr. 26, 47). VIs not only access their Respondent-issued email accounts using Respondent's equipment at their workstations; but they also can, and do, with Respondent's knowledge, access it while outside of the workplace, from their home computers, and on their personal smart phones. (Tr. 25-26, 46, 211).

Respondent's Electronic Communication Policy is contained within Respondent's employee handbook, which was last revised in 2012, and has been in effect, and applicable to its employees across the country, including those at the Long Beach, California and Corona, California call centers, since at least June 19, 2012. (Tr. 305-305, Jx. 2, Jx. 1, *See also* Respondent's July 16, 2013 Post Hearing Brief at p. 6). There are references throughout this employee handbook which demonstrate its applicability to employees who work for Respondent both inside and outside, the state of California (Jx. 1 at p.7, 8, 14, 15, 17, 18, 21). The record reflects that Respondent has enforced one or more policies contained within the handbook, including the Electronic Communication Policy, against one or more employees working in Respondent's Denver call center. (Tr. 306-307). The record also reflects that changes to Respondent's policy regarding Key Metrics and login rates were applied to employees at all of Respondent's call centers,

---

<sup>4</sup> Herein, references to the hearing transcript from June 10, 2013 and June 11, 2013 will be designated as "Tr.," followed by the transcript page number. References to exhibits will be designated as follows: Counsel for the General Counsel: "GCx.," Joint Exhibit: "Jx.," Respondent: "Rx.," and Charging Party: "CPx.," each then followed by the specific exhibit number.

including those in Long Beach, California and Corona, California. (Tr. 244, 316; Rx 7, 10).

At the hearing, Respondent's Vice President of Human Resources Tanya Monette testified that the reason for its Electronic Communication Policy is "protecting ...company confidential information from leaving the organization, inappropriate information being sent through company email as well as protecting the company from any type of internet viruses or email viruses." (Tr. 313). Respondent's President and CEO, John Ferron, also testified that any Respondent policy prohibiting non-business use of Respondent's equipment by VIs, whose work environment he characterized as a "production environment", would be for the purpose of preventing viruses which could "contaminate the call center" and interfere with Respondent's ability to serve its customers. (Tr. 308-309).<sup>5</sup> Aside from this testimony, Respondent presented no other evidence during the hearing to justify its Electronic Communication Policy. As noted above, Respondent admitted it has nothing further to add regarding its justification for the Electronic Communication Policy.

#### IV. Argument

In its December 14, 2014 decision, the Board overruled *Register Guard*, with certain caveats, as follows:

Our decision is carefully limited. In accordance with longstanding Board and Supreme Court precedent, it seeks to accommodate employees' Section 7 rights to communicate and the legitimate interests of their employers. First, it applies only to employees who have already been granted access to the employer's email system in the course of their work and does not require employers to provide such access. Second, **an employer may justify a total ban on nonwork use of email, including Section 7 use on nonworking time, by demonstrating that special circumstances make the ban necessary to maintain production or discipline. Absent justification for a total ban, the employer may apply uniform and consistently enforced controls over its email system to the extent such controls are necessary to**

---

<sup>5</sup> *Inexplicably*, during his testimony, Ferron denied even knowing whether Respondent maintained any policies prohibiting the use of Respondent's equipment, including its email system, for non-business purposes, or in connection with engaging in activities on behalf of organizations with no professional or business affiliation with Respondent; or whether any such rules are contained within Respondent's employee handbook. (Tr. 308-309)

**maintain production and discipline.**<sup>361</sup> NLRB No. 126, slip op. at 1.  
(emphasis supplied)

A. By Failing to Present any Additional Evidence Regarding Special Circumstances, Respondent's Policy Must be Found Unlawful Under the Test Articulated by the Board

By the remand in this matter, the burden has been placed upon Respondent to present evidence of special circumstances justifying the restrictions imposed on employees' use of its email system by the Electronic Communication Policy. Under the Board's December 14, 2014 decision, it is presumed that employees who have rightful access to their employer's email system in the course of their work (such as the VIs employed by Respondent in its call centers, nationwide) also have a right to use the email system to engage in Section 7-protected communications during their nonworking time. Respondent may rebut the presumption, however, by demonstrating that the restriction is justified by special circumstances, such that the restriction of its employees' rights is necessary to maintain production or discipline. Respondent may not simply assert that special circumstances are present, but must articulate the interest at issue and demonstrate how that interest supports the email use restrictions it has implemented,<sup>6</sup> and the limitations on employee communication should be no more restrictive than necessary to protect these interests.

Respondent has declined, however, to provide *any* additional evidence regarding special circumstances, and admits that no such evidence exists. In the absence of a showing of special circumstances justifying this total ban on employees' use of Respondent's email system during their non-working time, as required by the test articulated by the Board, the mere maintenance of the Electronic Communication Policy, to the extent it articulates this ban, violates Section 8(a)(1) of the Act.

As a result of Respondent's failure to present additional evidence of special circumstances, the only evidence presented to justify the Electronic Communication

---

<sup>6</sup> The Board also noted in its December 11, 2014 decision that the mere assertion of an interest that could theoretically support a restriction will not suffice. The Board also noted that, ordinarily, an employer's interests will establish special circumstances only to the extent that those interests are not similarly affected by employee email use that the employer has authorized. 361 NLRB No. 125, slip op. at 14.

Policy is that which was already provided at the hearing in June 2013: Respondent's asserted interest in "protecting...company confidential information from leaving the organization, inappropriate information being sent through company email as well as protecting the company from any type of internet viruses or email viruses" which could "contaminate the call center" and interfere with Respondent's ability to serve its customers. This generic articulation of business interests, without more, does not amount to special circumstances. The asserted interest of protecting confidential information from leaving the organization is insufficient to rebut the presumption, given the fact that Respondent permits employees to access their email while outside of the facility, and on their personal equipment, including home computers and smart phones. As for the asserted interest of preventing viruses, this also falls flat, as there are widely used safeguards available to Respondent, such as installing anti-virus software and other mechanisms to block potentially harmful downloads.

Given the existing and available safeguards Respondent could employ instead of the complete ban on personal use of Respondent's email system, the interests articulated by Respondent fall far short of the required "special circumstances." Respondent has failed to rebut the presumption that the prohibition on employees' non-work use of its email system, as set forth in the Electronic Communication Policy, is unlawfully overbroad, therefore its maintenance constitutes a violation Section 8(a)(1) of the Act.

B. The Employee Handbook Applies to Employees at Respondent's Facilities Across the United States, Therefore a Nationwide Remedy is Appropriate

The General Counsel urges the ALJ to require Respondent to take immediate action to rescind the unlawful portions of the Electronic Communication Policy handbook provision and to post copies of an appropriate remedial notice at each of Respondent's facilities, nationwide. The immediate rescission of the unlawful portions of the handbook provision must be carried out with respect to the employees at each of its facilities, nationwide, because the handbook (last revised in 2012) applies to the employees at Respondent's call centers across the country, not merely those in its Long Beach, California and Corona, California call centers. *Guardsmark, LLC*, 344 NLRB

809, 811-812 (2005), enfd, in relevant part, 475 F. 3d 369 (DC. Cir. 2007). Similarly, because the unlawful rule is maintained as a companywide policy, Respondent should be ordered to post an appropriate notice at each one of its facilities, across the United States. *Guardsmark, LLC*, 344 NLRB at 812 (citing *Albertson's, Inc.*, 300 NLRB 1013, fn. 2 (1990)). There is no dispute in this case that the Electronic Communication Policy applies to Respondent's employees, nationwide. Therefore, only a nationwide posting can adequately remedy this violation, by providing notice to all employees subject to these unlawful employee handbook provisions that this impediment to the exercise of their Section 7 rights has been removed.

## V. Conclusion

In response to the opportunity presented by the Board's December 11, 2014 remand, the Respondent has failed to submit any additional evidence of special circumstances to justify the existence of certain portions of its Electronic Communication Policy. As such, the General Counsel respectfully submits that the record evidence, as set forth at the hearing and argued above, considered in light of in the test articulated in the Board's December 11, 2014 Decision and Order, supports a finding that Respondent has been violating Section 8(a)(1) of the Act by maintaining these provisions of the Electronic Communication Policy within its employee handbook. The General Counsel urges the ALJ to issue a recommended Order requiring Respondent to take immediate action to rescind these portions of the Electronic Communication Policy, as to all of its employees, and to post the attached Board notice at each of its call centers, nationwide

## VI. Remedy

It is respectfully submitted that the appropriate remedy is the following:

### A. **Recommended Order:**

That Respondent Purple Communications, Inc., its officers, agents, successors, and assigns, be ordered to:

1. Cease and desist from:
  - a. Maintaining the unlawful provisions of the Internet, Intranet, Voicemail and Electronic Communication Policy of its employee handbook, which restrict the Section 7 activities of employees.
  - b. In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action, designed to effectuate the policies of the Act:
  - a. Immediately rescind the unlawful portions of Respondent's Internet, Intranet, Voicemail and Electronic Communication Policy rule from Respondent's employee handbook, specifically the provisions which strictly prohibit employees' use of Respondent's email systems, during their non-working time, for... "[e]ngaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company..." and "[s]ending uninvited email of a personal nature..."
  - b. Within 14 days after service by Region 21, post, at each of its facilities, nationwide (including its Corona, California and Long Beach, California call centers), in conspicuous places, including all places where notices to employees are customarily posted, copies of the Notice setting forth the violations found.
  - c. Within 14 days after service by Region 21, send an email message to all employees, nationwide (including those at Respondent's Corona, California and Long Beach, California call centers) with a copy attached of the Board Notice, setting forth the violations found.
  - d. Within 14 days after service by Region 21, post, on Respondent's intranet, so that it is visible to all employees, nationwide (including those at Respondent's Corona, California and Long Beach, California call centers) an electronic copy of the Board Notice setting forth the violations found.

- e. Within 21 days after service by the Region, file with the Regional Director for Region 21, a sworn certification of a responsible official on a form provided by the Region, attesting to the steps Respondent has taken to comply with this Order.

## **B. Proposed Notice**

### **NOTICE TO EMPLOYEES**

POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### **FEDERAL LAW GIVES YOU THE RIGHT TO:**

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities

**WE WILL NOT** maintain a rule that prohibits you from using your company-issued email account, during non-working time, for “[e]ngaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company” and/or “[s]ending uninvited email of a personal nature”, or that otherwise creates an overly broad restriction on non-business use of your company-issued email account that interferes with your Section 7 rights to engage in union and protected concerted activity.

**WE WILL NOT** in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

**WE WILL** rescind the portions of the Internet, Intranet, Voicemail and Electronic Communication Policy in our employee handbook which strictly prohibit you from using your company issued email account, during your non-working time for “[e]ngaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company...” or “[s]ending uninvited email of a personal nature...”

**WE WILL** supply you with an insert for the current employee handbook that (1) advises that these unlawful provisions have been rescinded, or (2) provides lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or **WE WILL** publish and distribute revised employee handbooks that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions.

DATED AT Los Angeles, California, this 10<sup>th</sup> day of March, 2015.

Respectfully submitted,



---

Cecelia F. Valentine  
Counsel for the General Counsel  
National Labor Relations Board, Region 21

**Statement of Service**

I hereby certify that a copy of Counsel for the General Counsel's Brief to the Administrative Law Judge was submitted for E-filing to the National Labor Relations Board, Division of Judges, Washington, D.C. on March 10, 2015

The following parties were served with a copy of said document by electronic mail on March 10, 2015:

Robert J. Kane, Esq.  
Stuart Kane LLP  
Email: rkane@stuartkane.com

David A. Rosenfeld, Esq  
Lisl R. Duncan, Esq.  
Weinberg, Roger & Rosenfeld, P.C.  
Email: drosefeld@unioncounsel.net  
Email: lduncan@unioncounsel.net

DATED AT Los Angeles, California, this 10<sup>th</sup> day of March, 2015

Respectfully submitted,

  
\_\_\_\_\_  
Cecelia F. Valentine  
Counsel for the General Counsel  
National Labor Relations Board, Region 21