

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ESSENDANT CO.

And

Case 5-CA-170845

TEAMSTERS LOCAL UNION NO. 570,  
AFFILIATED WITH INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS

**GENERAL COUNSEL'S REPLY TO RESPONDENT'S  
ANSWERING BRIEF TO THE GENERAL COUNSEL'S EXCEPTIONS**

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Pursuant to Section 102.46(e) of the National Labor Relations Board’s Rules and Regulations, the General Counsel files the following Reply Brief to Respondent’s Answering Brief to the General Counsel’s Exceptions to the Decision of Administrative Law Judge Arthur J. Amchan.

## **I. STATEMENT OF THE CASE**

On October 18, 2016, Administrative Law Judge Arthur J. Amchan (“ALJ”) issued his decision in this case. On November 15, 2016, the General Counsel filed Exceptions and a Brief in Support of Exceptions to the ALJ’s decision. On December 13, 2016, Essendant Co. (“Respondent”) filed an Answering Brief in Opposition to the General Counsel’s Exceptions to the ALJ’s decision.<sup>1</sup>

## **II. INTRODUCTION**

The General Counsel has argued throughout this proceeding that electronic communication is so pervasive in modern society that employees would reasonably read Respondent’s policy to prohibit conduct that Respondent may not lawfully prohibit, i.e. electronic communications sent on the sender’s non-working time. In support, the General Counsel has relied in considerable part on the Board’s decision in *Purple Communications* to demonstrate the Board’s recognition that many aspects of the modern workplace have fundamentally changed in the time since the Board was formulating certain of its rules. Despite this straightforward premise, Respondent continues in its Answering Brief to attack the General Counsel’s argument on grounds that have nothing to do with resolution of the issue. For instance, Respondent argues that the ALJ found its policy free of ambiguity, but fails to counter or even address the General Counsel’s examples of words susceptible to multiple meanings.

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<sup>1</sup> Citations to Respondent’s Answering Brief appear as “Ans. Brf, (page number).”

Elsewhere, Respondent argues that the ALJ did not err by failing to address the General Counsel's critical *Purple Communications* argument, but makes no effort to demonstrate why the Board should also ignore it.

The General Counsel has met its burden to show that Respondent's policy is fraught with ambiguity. Respondent's insistence that the policy has but a single possible meaning is supported neither by the record evidence nor by the environment within which we determine meaning for the words we speak, hear, and read. In the world of the modern-day employee, there can be no serious dispute that the word "posting" can mean writing and submitting an update on Facebook, or that the word "printed or written literature" can refer to paperless content downloaded to a tablet or Kindle. Rather than acknowledge the ALJ's failure to reconcile his decision with the General Counsel's argument and examples, and make the argument in his stead, Respondent simply argues that the ALJ's decision was well-reasoned and should not be disturbed. As discussed below, the Board is free to disregard the ALJ's interpretation, and to fully address the General Counsel's arguments on its own. The General Counsel respectfully requests that the Board draw from its experience in handling cases involving Section 7 electronic communications and find that the General Counsel has demonstrated that there is considerable ambiguity in Respondent's policy, all of which must be construed against Respondent.

### **III. ARGUMENT**

#### **A. Respondent Incorrectly Argues That the ALJ Did Not Err in Finding that the Policy is Free of Ambiguity.**

The no-distribution rule in this case is not "clear and unambiguous;" it fails to communicate to employees that it applies only to communications on paper. The General Counsel demonstrated in two steps that Respondent's policy is unlawfully ambiguous: 1) by establishing the Board's recognition of the pervasiveness of electronic communications among

employees in the modern workplace; and 2) by identifying key words in the policy into which such employees would read more than one meaning. No compelling argument has yet been made in this matter for why Respondent's policy is not so ambiguous that it reasonably covers electronic communications.<sup>2</sup>

Among the responses to the General Counsel's exceptions is Respondent's argument that its policy is free of "examples or suggestions that would cause an employee to construe 'printed or written literature' to be the same as *unprinted, unwritten, digital messages* that can be sent from a computer, tablet, or mobile phone." (Ans. Brf., 6 (emphasis added).) Respondent declines to expand upon its bare assertion that electronic messages are "unprinted" and "unwritten," much less to hold it up against the specific counterexamples provided by the General Counsel. Respondent provides no support for why the Board should subscribe to this claim under any circumstances, much less to do so at the expense of employees who use their computers, tablets, and phones to *write* and *print* every day.

In support of its contention that "posting" and "distribution," are among "the sort of common words that employees know and understand," Respondent writes: "In fact, as even the General Counsel has acknowledged . . . employees do not generally carry lawbooks to work or apply legal analysis to company rules. . . . Respondent's policy, therefore, does not add a layer of complexity [that Respondent must clarify by providing policy-specific definitions]." (Ans. Brf., 7 (referencing General Counsel's citation to *SolarCity*, 363 NLRB No. 83 (2015) at page 12 of the Brief in Support of Exceptions.)) It does not require consultation with lawbooks or legal analysis to think that "posting" might refer to communicating via Facebook, making a blog entry, or commenting on an internet forum. Respondent's attempt to turn this argument back on the

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<sup>2</sup> In its Answering Brief, Respondent leads with the argument that "the written text of the policy itself forecloses the General Counsel's interpretation." (Ans. Brf., 1.)

General Counsel fails; it is only Respondent who relies on an arcane conception (i.e., the Board's definition of "distribution") of a term it could easily have clarified for employees.

Finally, Respondent argues that "the General Counsel's failure to offer any evidence regarding how the policy was interpreted highlights the weaknesses of his arguments against the [ALJ's] decision." (Ans. Brf., 8.) Respondent contends that "evidence that any person interpreted the policy to cover electronic distribution of [Section 7] messages" would have been "instructive." However, the issue here is not how Respondent's employees understood the policy, but whether employees "would reasonably interpret [the policy] to infringe on their protected concerted activity. See, e.g., *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 5. The applicable standard is an objective one. See generally *2 Sisters Food Group, Inc.*, 357 NLRB 1816 at 1836 (2011). Because subjective employee testimony is not relevant to determining whether the policy here violates Section 8(a)(1), Respondent's argument here is again unavailing.

**B. Respondent's Argument Relies Entirely on Board Cases in Which the Issue Here Was Neither Litigated Nor Addressed.**

None of the cases cited by Respondent support its argument that "the ALJ's conclusion that the Policy is lawful is further supported by decades of Board law (including recent decisions) where similar policies were upheld." (Ans. Brf., 6.) The General Counsel is not aware of any previous case in which the Board (or an ALJ) has considered whether employees in the modern workplace would reasonably conclude that "distribution or posting of advertising material, handbills or printed or written literature of any kind is prohibited at any time in work areas" restricts electronic Section 7 communications..

Nonetheless, Respondent argues that "the ALJ had ample legal authority on which to conclude that the Policy was lawful and, notably, the General Counsel did not discuss these

authorities in his [briefs].” (Ans. Brf., 10.) The General Counsel did not discuss the cases cited by Respondent because, as those briefs repeatedly stress, nearly the entirety of the “decades of Board law” is of limited use here. As the ALJ did, Respondent ignores that the crux of the General Counsel’s argument here is guided by the Board’s December 11, 2014 decision in *Purple Communications*. That case—just over two years old—provides compelling support for the proposition that *the Board must take into consideration the prevalence of electronic communications among employees in the modern workplace when evaluating whether a work rule is unlawfully overbroad*. Neither the ALJ nor Respondent has offered any argument or authority contrary to this premise.<sup>3</sup> Furthermore, while the ALJ found no ambiguity in Respondent’s policy, he gave no real indication that he did so in reliance on the “decades of Board law” cited by Respondent.

By its continual insistence that its policy is lawful because similar language similar has emerged unscathed from past cases, Respondent assumes that the Board has no interest in examining whether the issue in this case is guided by the same considerations underlying its decision in *Purple Communications*. Finding Respondent’s policy unlawful does not throw longstanding rules out the window; it simply acknowledges that just because a rule might not run afoul of one particular doctrine does not mean that it is insulated from challenge on some other basis. The underlying rationale of *Stoddard-Quirk* is that employers have a legitimate interest in prohibiting distribution of paper in work areas; the crux here is that Respondent’s policy does not limit its prohibitions to the distribution of paper. The Board has not been holding for decades that employees could not possibly read new meanings into old words. To accept this argument

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<sup>3</sup> Respondent’s sole citation to a post-*Purple Communications* is *Casino Pauma*, 363 NLRB No. 60 (December 3, 2015). The hearing in that case was held the week after the Board issued *Purple Communications*. Electronic communications was not among the issues litigated.

would constitute a derogation of the Board's duty to "adapt the Act to changing patterns of industrial life." See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). The Board ably discharged its responsibility in *Purple Communications* by fully recognizing that workplace communication has fundamentally changed in recent years; consideration of those changing circumstances is no less critical to the performance of the Board's duty here.

**C. The Board Owes no Deference to the ALJ's Unsupported Interpretation of Respondent's Policy:**

Respondent attempts to cloak the ALJ's decision with unwarranted infallibility by arguing that certain of the General Counsel's exceptions, even if meritorious, are insufficient grounds for overturning the ALJ's decision. For instance, Respondent contends that "even if the General Counsel's broad reading of *Purple Communications* could be credited, the ALJ's factual findings in *this* case that no employee could reasonably construe the Policy to apply to electronic messages would *still* result in a dismissal of the complaint. . . . [T]here is no basis to disturb the ALJ's findings." (Ans. Brf. at 13.) Further, by making repeated reference in its Answering Brief to the ALJ's "factual findings," Respondent betrays a concern that the Board will not be inclined to defer to the ALJ's unsupported conclusions in the absence of frequent suggestions to do so. This concern is legitimate: there is no procedural duty on the Board's part to defer to an ALJ's reading of a work rule.

What Respondent characterizes as the ALJ's factual findings "fully supported by the record" are simply linguistic interpretations, independent of any record evidence other than the text of Respondent's policy. Thus, despite Respondent's suggestions to the contrary, these findings are not analogous to credibility determinations or even to evaluations of the relative weight assigned each party's evidence in a case with disputed facts. The record before the ALJ consisted of stipulations establishing jurisdiction and timeliness, and the language of the work

rule at issue. This has from the outset been a case that should have turned on the parties' arguments, not on their "evidence." Respondent's Answering Brief fails to show why the Board should affirm a decision that rejects the General Counsel's argument without addressing it.

#### **IV. CONCLUSION**

For the foregoing reasons, the Board should grant the General Counsel's Exceptions over Respondent's Answering Brief, and find the violation alleged in the complaint.

Dated at Baltimore, Maryland this 27th day of December, 2016

Respectfully submitted,

/s/ Andrew Andela

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**CERTIFICATE OF SERVICE**

This is to certify that on December 27, 2016, copies of the General Counsel's Reply to Respondent's Answering Brief to the General Counsel's Exceptions were served by e-mail on:

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