

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

ARGOS USA LLC d/b/a
ARGOS READY MIX, LLC,

and

Cases 12-CA-196002
12-CA-203177

CONSTRUCTION AND CRAFT WORKERS
LOCAL UNION NO. 1652, LABORERS'
INTERNATIONAL UNION OF NORTH
AMERICA, AFL-CIO

**GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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I. STATEMENT OF THE CASE

Counsel for the General Counsel respectfully submits this brief to the Board in support of General Counsel's Cross-Exceptions to the Decision of Administrative Law Judge Kimberly Sorg-Graves (the ALJ) in this matter. Respondent filed exceptions to the ALJ's findings and conclusions that it committed unfair labor practices. General Counsel's Answering Brief is being filed simultaneously with General Counsel's Cross-Exceptions and this Brief in Support of Cross-Exceptions. The facts of this case are fully set forth in General Counsel's Answering Brief.

First, the General Counsel respectfully requests that the Board overrule *Purple Communications, Inc.*, 361 NLRB 1050 (2014), and return to the holding of *Register Guard*, 351 NLRB 1110 (2007). The holding in *Purple Communications* runs contrary to decades of Board precedent and impermissibly created a right by employees to use employer-owned and -financed communication systems. Furthermore, the decision places an undue and unnecessary burden on employers' business operations, reduces employee productivity, disrupts business operations, and can compromise system security and confidentiality. Exceptions should be made on a case-by-case basis where the Board determines that employees are unable to communicate in any way other than through the employer's email system. Finally, *Register Guard* should apply to other employer-owned computer resources not made available by the employer to the public.

Second, the General Counsel requests that the Board overturn *Total Security Management Illinois, LLC (Total Security)*, 364 NLRB No. 106 (Aug. 26, 2016) because the decision is inconsistent with pre-existing Board law, conflicts with Sections 8(a)(5) and 8(d) of the NLRA as well as Supreme Court precedent in *NLRB v. Weingarten*, 420 U.S. 251 (1975), and imposes

impractical and unworkable bargaining requirements that disrupt business operations and impose obstacles to the negotiation of a first collective bargaining agreement.

Third, while the ALJ correctly found Respondent's policy prohibiting the possession of cell phones in the cabs of their ready-mix trucks unlawful, the ALJ erred by failing to explicitly find that Respondent does not assign specific work tasks to drivers when they are waiting to discharge cement and that while waiting employees generally do nothing or eat lunch. The ALJ further erred by failing to explicitly find that Respondent's managers are permitted to carry and use cell phones in their vehicles.

II. STATEMENT OF THE FACTS¹

Respondent is engaged in the business of manufacturing and delivering ready-mix concrete at its place of business in Naples, Florida and at various other locations throughout the United States. [ALJD. 2, 14-15]. Construction and Craft Workers Local Union No. 1652, Laborers' International Union of North America, AFL-CIO (the Union) has represented the eleven ready-mix drivers employed at Respondent's Naples facility since July 2015, when the Union² was certified as the drivers' exclusive collective-bargaining representative. [ALJD 3, 15-16; Tr. 192: 7-18]. At the time of the hearing, the Union and Respondent were negotiating, but had not yet reached, an initial collective-bargaining agreement. [ALJD 3, 17-18; Tr. 192: 19-21].

Ready-mix drivers³ are responsible for delivering concrete from the Naples facility to their assigned jobsite, ensuring the concrete is of good quality, and conducting an inspection of their

¹A complete discussion of the facts is set forth in General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision and Recommended Order, which is being filed concurrently.

² The ALJ found that the Union is a labor organization within the meaning of Section 2(5) of the Act. [ALJD 2, 20-22].

³ A ready-mix truck is a heavy-duty truck that contains a large drum used to mix and haul concrete. [Tr. 91: 1-2; 157: 20-22].

ready-mix trucks before and after their work shifts to ensure that the truck is in good working order. [Tr. 90: 13-16; 156: 17-25]. Ready mix drivers do not have fixed work schedules. [ALJD 3, 30; Tr. 92: 2-13; 158: 11-12]. Because delivery times are based on customer needs, the drivers' start and end time can vary significantly from day to day. [ALJD 3, 31-32; Tr. 341: 14-23]. On average, employees are assigned anywhere between three to five loads/work tickets per day. [ALJD 4, 34-35; Tr. 93: 4-5; 159:1-3].

Ready-mix drivers spend around 85 percent of their work day away from the facility either on the road or at jobsites. [ALJD 19, 37-40; Tr. 160: 23-25]. When the ready-mix driver arrives at the jobsite, they park their truck in a safe place, walk the jobsite, and ask the customer where they want the truck positioned to pour the concrete. [ALJD 4, 18-20; Tr. 161: 1-16]. A driver may spend anywhere between 15 minutes to 4 hours at any given jobsite. [Tr. 94: 16-18; 97:1-5, 161: 17-25; 162: 1-13]. The amount of time it takes a driver to deliver a load depends on a variety of factors including the type and size of job, the weather, traffic, or other delays. [ALJD 4, 20-23; Tr. 95:4-6; 160:15-25; 164:1-24]. Furthermore, Ready-mix drivers frequently have down time at jobsites when customers are not yet ready to use the concrete or while waiting for inspections, or other reasons. [Tr. 95:4-6; 160:15-25; 163: 18-19; 164: 1-24]. Delays at jobsites can last a couple of minutes to 90 minutes or more. [ALJD 4, 24-25; Tr. 163: 22-25; 164: 1-8]. Respondent does not assign ready mix drivers any specific tasks to perform while they are at a jobsite waiting to unload the concrete. [Tr. 96:19-25,162: 4-7]. Generally, during this waiting period, employees eat their lunch or do nothing at all. [Tr. 96:23-25, 162: 25; 163:1-2].

Employees are required to stay at a jobsite until their truck is emptied. [Tr. 162: 23-24]. Although the ready-mix truck remains operational during an employee's down time, the drum automatically rotates. [Tr. 165, 10-25]. During longer periods of down time, a driver may need to

check the condition of the concrete every 15 to 20 minutes to ensure that it is not drying and may need to add water prior to discharging the concrete. [Tr. 165: 23-25; 166: 7-18]. When the customer does not need any more concrete, the ready-mix driver proceeds to wash the truck of any excess concrete and heads back to the facility. [Tr. 161:13-16]. The average round trip for a load is about 2 hours. [ALJD 4, 37-38]. The time at the jobsite usually ranges between 20 to 80 minutes. [ALJD 4, 38-39; Tr. 161]. Employees spend between 15 and 20 percent of the workweek at the facility. [ALJD 5. 8-9].

While on the road, Respondent communicates with ready-mix drivers using a CB radio, also referred to as a two-way radio. [ALJD 5, 15-16; Tr. 167: 13-14]. A CB radio is a small box with a cord that connects to a microphone and is used as a method of communication between individuals that share a radio frequency within a specific geographical area. [ALJD 5, 18-20; Tr. 167:13-18]. Respondent has a centralized dispatch and a radio frequency assigned to its delivery area. [Tr. 167:13-14]. In order to use it, a driver must reach to grab the microphone, push a button on its side to speak, and release the button to listen. [ALJD 5, 20-21; Tr. 99:18-19; 167: 20-24]. The CB radio cannot be used as a hands-free device. [Tr. 100: 1-2; Tr. 167-168: 25-1]. Thus, a driver must reach over and grab the microphone. Respondent has communicated with drivers while they are operating and driving their ready mix-trucks. [Tr. 100: 19-23; 169:6-10].

Dating back to at least June 1, 2014, Respondent has maintained and enforced a cellphone policy at all its facilities prohibiting employees from possessing or using cellular phones in its ready-mix trucks. [ALJD 7, 15-40; GCX 5: pages 6-7 titled Cell Phone Policy While Operating a Vehicle]. The policy provides, in relevant part:

Commercial Vehicles and Heavy Equipment

It is strictly prohibited for a cell phone to be in the cab of a commercial and/or heavy equipment vehicle; (i.e. “commercial vehicles” are defined as having a

gross vehicle weight of 10,000lbs. or more including any heavy equipment used on the plant yard). This prohibition also extends to the use of any accompanying equipment (e.g. earpieces or hands-free devices) and applies regardless of where the commercial vehicle is being operated. Employees are encouraged to leave their cell phones in personal vehicles at all times. If a driver in a commercial vehicle is involved in an accident, the company reserves the right to look at the driver's cell phone call history (including their personal cellphone), to determine if the driver was using his/her phone at or around the time of the accident.

The policy further states:

Medium Duty Trucks, Small Trucks, and Light duty Passenger vehicles

Cellphone use is not permitted in a light duty (passenger) vehicle that is in motion, at any time, unless the employee is using a completely hands free device. When using a hands free device the driver must be able to operate, place and receive calls from the phone without distraction. The driver must not attempt to make notes or write while driving. If the driver finds it necessary to do so, they may have to pull the vehicle over and park in a safe manner and place before continuing the call.

...

Disciplinary Action

Failure to follow any aspect of the cell phone policy will result in a minimum of a three (3) day suspension and final written warning for the first offense and could result in Termination depending on other disciplinary write-ups in the employee's file under the progressive discipline guidelines.

As noted in the cell phone policy, Respondent also owns and operates a variety of other vehicles, including light duty trucks. [Tr. 81: 8-11]. Service trucks are heavy-duty vehicles, such as Ford F350s or 450s, with a large chassis and utility boxes on their side. [ALJD 6, 7-11; Tr. 81: 18-23]. Light-duty vehicles are assigned to and driven by Respondent's managers and supervisors. [Tr. 83: 10-11]. Managers drive light duty trucks from one facility to another. [Tr. 83: 11-12]. For example, the operations manager at Respondent's Naples facility will generally drive between Fort Myers to Naples, but may drive as far as Tampa. [Tr. 83: 19-25; 84: 1-6]. Thus, on a daily basis, the Naples operations manager may drive about hundred miles. [Tr. 84: 7-11]. Beer testified that operations managers are allowed to possess cell phones in their light duty trucks. [Tr. 84: 12-14].

On March 3, 2018, Respondent suspended Emmanuel Excellent pursuant to its policy banning possession of cellular phones in the cab of its ready-mix trucks after Respondent found Excellent's cell phone in the area near the slump rack at the Naples facility. [ALJD 10, 6-8; GCX 6; Tr. 272: 22-23; 349: 10-12]. Respondent formally discharged Excellent on April 28, 2017 pursuant to the aforementioned policy. (GCX 6).

Additionally, all of Respondent's employees are required to sign its electronic communication policy, which is in effect at all its locations nationwide. [ALJD 6, 40-41; Tr. 69; GCX 4]. Excellent's personnel file contains the "Electronic Communication Policy" signed on June 11, 2014, acknowledging that he understood that Respondent's e-mail system "is to be used for business purposes and not for personal purposes." [See GCX 4]. While ready-mix drivers generally do not have access to Respondent's e-mail system, excluding drivers who also work as backup plant operators, the ALJ found that Respondent was actively avoiding Counsel for the General Counsel's questions soliciting evidence on which employees had access to its e-mail system. [ALJD 17, 29-30; 32-35]. Accordingly, the ALJ correctly drew the conclusion that "there are some statutory employees assisting in the operations of a company the size of Respondent's with access to the e-mail system." [ALJD 17, 35-39].

III. ARGUMENT

a. The Board Should Overrule *Purple Communications*.

The Board should overrule *Purple Communications, Inc.*, 361 NLRB 1050 (2014), for a variety of legal and practical reasons. First, contrary to decades of Board precedent, the decision impermissibly created a right by employees to use employer-owned and -financed communication systems, even where employees possess a plethora of other means of communication. Second, the

decision requires employers to provide and pay for employee communications in violation of their First Amendment rights. Third, permitting employees to use an employer's email systems for Section 7 communications places an undue and unnecessary burden on employers' business operations and has the practical effect of reducing productivity, disrupting business operations, and can compromise system security and confidentiality.

i. *Purple Communications is in Conflict with Board Precedent.*

An employer has a "basic property right" to "regulate and restrict employee use of company property." *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663–64 (6th Cir. 1983). Email systems are purchased by employers for use in operating their businesses. Employers thus have a legitimate business interest in maintaining the efficient operation of their email systems. These systems are costly to establish, maintain, and keep secure, and have been created and implemented by employers to conduct business, not as a forum or platform for public communication. Thus, employers who have invested in email systems seek to use them to promote their business agenda and "have valid concerns about such issues as preserving server space, protecting against computer viruses and dissemination of confidential information, and avoiding company liability for employees' inappropriate e-mails." *Register Guard*, 351 NLRB 1110, 1114 (2007); *Purple Communications*, 361 NLRB at 1069 (Member Miscimarra, dissenting).

Whether employees have a right under the Act to use an employer's communication system purchased for business purposes for Section 7 communications has been addressed by the Board in numerous cases involving various communications media such as bulletin boards, telephones, televisions, and email systems. The Board has consistently held that there is "no statutory right ... to use an employer's equipment or media," as long as the restrictions are nondiscriminatory.

Register-Guard, 351 NLRB at 1114 (no statutory right to use employer’s email systems); *Mid-Mountain Foods*, 332 NLRB 229, 230 (2000) (no statutory right to use the television in the employer’s break room to show a pronoun campaign video), *enforced per curiam*, 269 F.3d 1075 (D.C. Cir. 2001). *See also Eaton Technologies*, 322 NLRB 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 International 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 NLRB 138, 155 (1987) (“[A]n employer ha[s] every right to restrict the use of company telephones to business-related conversations”), *enforced per curiam*, 857 F.2d 1474 (6th Cir. 1988), *cert. denied*, 490 U.S. 1046 (1989); *Union Carbide Corp.-Nuclear Div.*, 259 NLRB 974, 980 (1981) (employer “could unquestionably bar its telephones to any personal use by employees”), *enforced in relevant part*, 714 F.2d 657 (6th Cir. 1983). *Cf. Heath Co.*, 196 NLRB 134, 135 (1972) (employer did not engage in objectionable conduct by refusing to allow pronoun employees to use public address system to respond to antiunion broadcasts).

Those decisions all held that an employer had the right to prohibit use of employer-owned communications systems that were purchased for the employer’s business activities for non-business activities. In *Purple Communications*, the Board departed from this long-standing precedent and overturned *Register Guard* without adequate explanation as to what communication problem the *Register Guard* ruling had created that needed to be fixed or why the use of an employer’s email system required a different analysis. *See Purple Communications*, 361 NLRB at 1104 (Member Johnson, dissenting). Rather, apparently wishing to fix a problem that did not exist and to reach a result different from what precedent would require, the majority in *Purple Communications* relied on *Republic Aviation*—a decision that is inapt and does not support the

Purple Communications majority's conclusion. *See id.* at 1070 (Member Miscimarra, dissenting). In *Republic Aviation*, the employer maintained a general rule prohibiting all solicitation at any time on the premises. 324 U.S. 793, 802 (1945). The employer's rule "entirely deprived" employees of their right to communication in the workplace on their own time, and employees had no time at the workplace in which to engage in Section 7 communications. *Id.* at 801 n.6.

Here, and in *Purple Communications*, there was no claim that employees⁴ had no other means of communication or that they were restricted from communicating with each other during non-work time or were deprived of all types of communication. Further, *Republic Aviation* is inapplicable to the use of an employer's email system because *Republic Aviation* involved face-to-face solicitation and not the use of employer equipment. Moreover, according to *Register Guard*, "*Republic Aviation* requires the employer to yield its property interests to the extent necessary to ensure that employees will not be 'entirely deprived,' 324 U.S. at 801 fn. 6, of their ability to engage in Section 7 communications in the workplace on their own time. It does not require the most convenient or most effective means of conducting those communications, nor does it hold that employees have a statutory right to use an employer's equipment or devices for Section 7 communications." *Register Guard*, 351 NLRB at 1115.

⁴ While Respondent's ready-mix drivers, excluding drivers performing duties of a backup plant operator, do not have access to Respondent's e-mail system, the ALJ correctly concluded that, given the size of Respondent's business and the nationwide implementation of the rule, there must be non-supervisory employees who have access to the e-mail system. Accordingly, ready-mix drivers are not part of this analysis. However, should the Board reverse the ALJ's ruling that Respondent's cellphone policy prohibiting possession of cellphones in ready-mix cabs is unlawful, those ready-mix drivers that do have access to Respondent's e-mail system would be deprived from engaging in Section 7 communications in the workplace during non-working time. As explained in Counsel for the General Counsel's Answering Brief, the ALJ properly concluded that Respondent's ready-mix drivers had a greater need for non-face-to-face conversations because of their staggered shift start and end times, the time they spend away from the facility, and their erratic break and lunch schedules. [ALJD 18, 41-45].

Here, and in *Purple Communications*, there is no evidence that employees who have access to Respondent’s e-mail system cannot use other methods of communications systems normally available to them, including their own cellphones, which they may use to email, text, blog, tweet, and post. Indeed, the only restriction here is that employees may not use their employer-owned and paid-for email system to communicate. Thus, “[w]hat the employees seek here is use of the Respondent’s communications equipment to engage in additional forms of communication beyond those that *Republic Aviation* found must be permitted. Yet, ‘Section 7 of the Act protects organizational rights ... rather than particular means by which employees may seek to communicate.’” *Register Guard*, 351 NLRB at 1115 (quoting *Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 318 (7th Cir. 1995)). *See also NLRB v. Steelworkers (Nutone)*, 357 U.S. 357, 363–64 (1958) (The Act “does not command that labor organizations as a matter of . . . law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communications simply because the employer is using it”).

Accordingly, just because it may be more convenient for an employee to communicate via a particular communication system, the Act does not require that employees be given access to such a communication system if other communications systems are available to them. Thus, in numerous cases decided long after the issuance of the *Republic Aviation* decision, the Board found no Section 7 right to use an employer’s equipment for communication. *See, e.g., NLRB v. Southwire Co.*, 801 F.2d 1252, 1256 (11th Cir. 1986) (no statutory right to use an employer’s bulletin board); *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663 (6th Cir. 1983) (“As recognized by the ALJ, Union Carbide *unquestionably* had the right to regulate and restrict employee use of company property.” (emphasis in original)).

ii. Employers Should Not Be Required to Subsidize Speech.

The Board should also rely on First Amendment concerns to overturn *Purple Communications*, as discussed by the Supreme Court in *Janus*. See *Janus v. Am. Fed’n of State, Cnty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) (“Compelling a person to *subsidize* the speech of other private speakers raises . . . First Amendment concerns.” (emphasis in original)). See also *Purple Communications*, 361 NLRB at 1105–07 (Member Johnson, dissenting) (“The First Amendment violation is especially pernicious because the Board now *requires an employer to pay for its employees to freely insult* its business practices, services, products, management, and other coemployees on its own email.” (emphasis in original)). See generally Josh Carroll, *The NLRB’s Purple Communications Decision: Email, Property, and the Changing Patterns of Industrial Life*, 14 DUKE L. & TECH. REV. 280, 289 (2016) (discussing significant monetary cost in providing employees access to employer’s email systems, including information technology support and expensive hardware and software configurations). Thus, holding that employees have a presumptive right to use their employer’s email system to engage in Section 7 communications raises First Amendment concerns because the Board, as a government entity, may not compel an employer to subsidize hostile speech by requiring the employer to pay for an email system to send, receive, and store speech with which it does not agree.

iii. The *Purple Communications* Rule Burdens Employer Operations.

Finally, and most important, the practical effect of *Purple Communications* is that it unnecessarily burdens employer operations by creating unworkable rules that cannot easily be implemented without risking other possible violations of the Act. Employers typically limit the

use of their email systems to business usage for a variety of reasons, including (1) to ensure productivity so that employees are not using work time to send or look at personal emails, (2) to protect the dissemination of confidential information from disclosure, (3) to protect the integrity of its communications system from viruses and malware, (4) to prevent use of email systems for offensive or unlawful purposes, and (5) to protect themselves from liability due to the potential for employee use of email systems for discriminatory or other unlawful purposes. Permitting employees access to employers' email systems for Section 7 communications, even during non-work time, effectively eliminates the possibility that any of these goals can be achieved.

First, permitting employee use of the employer email system for Section 7 communications inevitably leads to lower productivity. Even if employees don't write and send Section 7 emails during work time, employees will open and read the emails during work time because employees will not know that the emails they have received are Section 7 communications until they are opened and read. And how many will resist the temptation to respond to the communication until after work hours? *See Carroll, The NLRB's Purple Communications Decision*, at 293 (*Purple Communications* requires employers to engage in "tedious monitoring of computer workstations" that will "build distrust among employers who will have limited ability to know when an employee is working or just sending an unauthorized email during work [time]"). Even if review of these emails took only 5 or 10 minutes per employee per day, if this review were replicated among hundreds of employees in a large workforce, loss of productivity and disruption of operations could be significant. Indeed, in work settings where breaks are not clearly defined, this negative result will be further compounded and work standards will be even more difficult to enforce. *See id.*

Second, permitting non-business use of email systems can compromise the security of the system as well as the confidentiality of proprietary and other confidential information. It is too easy to forward to outsiders emails containing confidential attachments and email strings and to receive email containing viruses and malware, if email usage is expanded beyond business purposes.

Third, permitting non-business email usage complicates and makes more expensive the monitoring of email systems for, and the detection of, prohibited usage. *See id.* (employers will need to set up enhanced monitoring systems and hire additional IT support specialists to monitor the increase in email traffic). Like the employee who does not know whether or not an email is a Section 7 communication until it is opened and read, the employer will not know whether an email is a protected Section 7 communication until it is opened and read by someone with sufficient knowledge of the Board's myriad interpretations of Section 7. Thus, employers will have to employ individuals who are experts in NLRA law to review emails to determine whether the email contained any Section 7 protected speech and whether the communication occurred during work time. Such monitoring can expose employers to unfair labor practice charges for surveillance, let alone unfair labor practice charges if an employee is disciplined for sending an email that is later considered to be protected under the Act.

Moreover, an employer acts at its peril if it does not monitor its email systems. In addition to the obvious threats of loss of proprietary information, invasion from an outside entity, and introduction of malware, today's employers face significant risks of liability in harassment and discrimination claims based on communications employees place on their internal communication systems. Requiring employers to allow employees to use their electronic communication systems for Section 7 activity will certainly increase the cost of monitoring those systems.

Finally, *Purple Communications* ignored the multitude of other easier and more efficient means for employees to communicate with one another, such as smart phones that can easily access personal email, text messaging, and various social media platforms. Indeed, personal email provides a better means for protected activity where the average consumer maintains 3.9 personal email accounts and logs into those accounts 3.8 times per day. Harrison C. Kuntz, *Crossed Wires: Outdated Perceptions of Electronic Communications in the NLRB's Purple Communications Decision*, 94 WASH. U. L. REV. 511, 537 (2017) (“Given the extensive role of personal email in modern life, it seems disingenuous to argue that employees must have access to *their employer's* email system in order to effectively exercise their Section 7 rights.” (emphasis in original)). Further, the use of smart phones and social media as a tool to bring individuals together around a common cause has continued to grow in both popularity and effectiveness since the Board's *Purple Communications* decision. See Stacey B. Steinberg, *#Advocacy: Social Media Activism's Power to Transform Law*, KY. L.J. 413, 433 (2017); PEW RESEARCH CENTER, April 2015, “The Smartphone Difference,” at 13, 23–24, available at: <http://www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015> (finding that nearly two-thirds of Americans own a smartphone that is capable of accessing personal email and social media). Smart phones are particularly apt as a superior means of organizing where they provide a “multiplier effect” to email, text messaging, and social media communication because they can be used anywhere the owner goes. Kuntz, *Crossed Wires* at 539.

Given the lack of applicable legal authority for its holding, the lack of evidence that employees are impeded in any way in communicating with each other concerning Section 7-related matters by using communications systems other than their employer's email system, and the real burdens to productivity and the integrity of employers' email systems by requiring non-business

usage, *Purple Communications* should be overruled. Rather than fixing a communications problem, that decision created one.

iv. The Board Should Return to the *Register Guard* Standard.

The Board should return to *Register Guard*'s well-reasoned holding that employees have no statutory right to use an employer's email system for Section 7 purposes, as long as the employer's restrictions on email use are nondiscriminatory. 351 NLRB at 1110, 1114–16. There, the Board explained that Section 7 protects organizational rights rather than employees' means to communicate in exercising their rights. *Id.* at 1115. The Board also noted, citing the Supreme Court's *Republic Aviation* decision, that employers must only yield their property interests to the extent necessary to ensure that employees are not "entirely deprived" of their ability to communicate with other employees in the workplace about their terms and conditions of employment. *Id.* (citing *Republic Aviation*, 324 U.S. at 801 n.6). Thus, although an employer may have to yield property rights so that employees are not "entirely deprived," neither Section 7 nor the *Republic Aviation* Court require an employer to yield property rights that will result in the most convenient or most effective way for employees to conduct Section 7 communications. Accordingly, employees do not have a statutory right to use an employer's systems for Section 7 communications.

In addition to face-to-face communications, employees use phones, personal emails, texts, tweets, social media postings, and blogs—to name only a few of the plethora of means available—to communicate with each other concerning Section 7 matters. There is thus no reason why an employer-owned and -subsidized email system must also be made available to employees as a

Section 7 communication tool. The *Register Guard* decision recognizes this reality, and its reasoning should be used by the Board in reviewing email systems policies.

Accordingly, the Board should return to the standard articulated in *Register Guard*. Here, under the *Register Guard* analysis, the Employer's rule is lawful because it prohibits use of the Employer's email system only for non-business communications.

v. Exceptions to the *Register Guard* Rule.

The Board should make exceptions to the *Register Guard* rule that employees have no statutory right to use their employer's email system for Section 7 purposes on a case-by-case basis only where it is shown that employees cannot communicate by other means. For example, although rare, there may be situations where the workplace is in an area with minimal or nonexistent cell phone coverage, or there is no established workplace and employees have no way to exchange personal contact information. Requiring employers to permit employee use of their email system in these circumstances is consistent with well-established Board law holding that, in balancing employer business and property interests with Section 7 rights, the Board needs to determine whether employees have "reasonable alternative means" to engage in Section 7 activities. *See Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 489–90 (1978) (requiring employer to allow employees to engage in solicitation in cafeteria where employer's rule otherwise insufficiently allowed its 2,200 employees to solicit in six scattered locker areas with only 613 lockers accessible to all employees); *Heath Co.*, 196 NLRB at 135 (employer lawfully denied prounion employees use of its broadcast system, in part because it provided alternative by approving employees' request to use plant cafeteria during nonwork time to present views to fellow employees). *See also Lechmere, Inc. v. NLRB*, 502 U.S. 527, 538–39 (1992) (nonemployee union organizers may be granted access

to employer's property where there is no viable alternative means to reach employees). *See generally Republic Aviation Corp.*, 324 U.S. at 801 n.6 (employer may not "entirely depriv[e]" employees of their "full freedom of association" (citations omitted)).

The ability to communicate for Section 7 purposes is necessarily limited to situations where employees work in locations with lack of access to face-to-face communication and minimal or nonexistent cell phone coverage, or where there is no established workplace and employees have no way to exchange personal contact information. Personal email, text messaging, and social media represent viable communication alternatives where employees are able to use their phones or other devices to access the internet or send text messages. If employees are unable to use these alternative means of communication, prohibiting all non-business use of an employer's email system could effectively deprive employees of their ability to communicate regarding their working conditions on their non-work time. Such deprivation of means of communication is a significant harm to the exercise of Section 7 rights that could outweigh the employer's property rights and First Amendment interests regarding its email system. Therefore, in this type of workplace, the Board should balance the interests of the employers and employees, and if alternative means of Section 7 communication are unavailable, employees should be able to use the employer's email system to engage in Section 7 communications.

vi. Other Computer Resources Provided by Employers.

To the extent employers provide computer resources and communications systems other than email as part of their business operations, the standards to be used in determining whether employees should be granted access to those systems for Section 7 communications should depend upon the reason for the resource, the intended use of the resource, and the group of individuals that

have access to such resource. The standards for reviewing resources that are internal and not available to the public would be different from those that are external or available to the public. For resources that are not open to the public, the General Counsel recommends that the same standards and guidelines articulated under *Register Guard* should apply. Thus, the General Counsel recommends review of such resources individually on a case-by-case basis.

Based on the foregoing, we urge the Board to overturn *Purple Communications* and, accordingly, dismiss the Complaint allegations that the Employer violated Section 8(a)(1) by maintaining its electronic communication policy that limits usage of its systems to authorized users for business purposes.

b. The Board Should Overturn *Total Security*.

The Board should overturn *Total Security Management Illinois 1, LLC* (“*Total Security*”), 364 NLRB No. 106 (Aug. 26, 2016) because the decision is inconsistent with pre-existing Board law, conflicts with Sections 8(a)(5) and 8(d) of the NLRA as well as Supreme Court precedent in *NLRB v. Weingarten*, 420 U.S. 251 (1975), and imposes impractical and unworkable bargaining requirements that disrupt business operations and impose obstacles to the negotiation of a first collective bargaining agreement. As Member Miscimarra succinctly stated in his dissent, the *Total Security* majority decision creates pre-imposition discipline bargaining requirements that “substitute mayhem for . . . longstanding and well-reasoned principles.” 364 NLRB No. 106, slip op. at 32.

In *Total Security*, a Board majority, for the first time in the history of the Act, read its provisions to say that, before a first contract is negotiated by a newly-certified or recognized union, an employer must give that union advance notice of and opportunity to request bargaining over

any proposed serious discipline of a unit employee *before* disciplinary action is taken. In creating this “discipline bar,” as the dissent termed it, 364 NLRB No. 106, slip op. at 17, *Total Security* not only upended decades of established Board and Supreme Court law, and overreached the Agency’s authority, it imposed a complicated and imprecisely-defined, and ultimately unworkable, “bargaining” scheme that suggests that negotiation to impasse is not required (while failing to explain what is required) that provides little benefit to employees, undermines employers’ fundamental rights to maintain order and discipline in the workplace, and improperly imposes contract terms on the parties contrary to Section 8(d). The General Counsel therefore urges the Board to overturn *Total Security* and return to the prior standard, under which an employer who has not changed its work rules or past practice has no duty to provide advance notice of or to engage in bargaining before taking disciplinary action.

i. Total Security Contradicts Fundamental NLRA Status Quo Principles.

1. Status Quo Principles

Despite the majority’s suggestion in *Total Security* that its pre-implementation discipline bargaining obligation was of limited and modest scope, the requirement has the purpose and effect of eliminating management’s common law right to make and implement its ordinary disciplinary decisions before any grievance or bargaining request need be entertained. This right, which has existed for more than a century,⁵ would otherwise continue throughout any period of contract

⁵ *Adair v. United States*, 208 U.S. 161, 175 (1908) (“[I]t cannot be, we repeat, that an employer is under any legal obligation, against his will, to retain an employee in his personal service any more than an employee can be compelled, against his will, to remain in the personal service of another.”); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45–46 (1937) (distinguishing *Adair* on the basis that “The [A]ct does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them;” “[t]he Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than [intimidating or coercing employees in rights under the Act].”).

negotiations—and most likely beyond—as the vast majority of extant collective-bargaining agreements recognize fully management’s disciplinary rights that *Total Security* so blithely disregards. This bargaining requirement is inconsistent with the employer’s duty to continue to maintain and run its business operations in the same manner after a union has been certified as before. See FRANK ELKOURI & EDNA ASPER ELKOURI, J.D., *HOW ARBITRATION WORKS*, 5-84 to -85 (Kenneth May, ed., 8th ed. 2016) (“[E]mployees must not take matters into their own hands, but must obey orders and carry out their assignments, even when they believe those assignments are in violation of the agreement, and then turn to the grievance procedure for relief.”).

It has long been understood that a labor organization is not an “equal partner in the running of the business enterprise” and has only those rights that it acquires by statute or through collective bargaining. *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 676 (1981). Although a union undoubtedly has the right to request bargaining over the employer’s disciplinary practices and procedures, as well as to receive notice of and request bargaining over any individual disciplinary decisions effected by the employer, the deliberation and implementation of initial disciplinary determinations are, and have historically been, the prerogative of management.

Thus, contrary to the suggestion in *Total Security*, the Board has *never* imposed an affirmative pre-implementation bargaining obligation concerning disciplinary matters on an employer who did no more than adhere to the lawful status quo. In *Total Security*, the question was whether an affirmative bargaining obligation should arise from an employer’s routine application of its pre-certification disciplinary policies and procedures, where those procedures allow it some measure of discretion in determining specific disciplinary outcomes.

It is well-settled that once a union has been certified an employer must maintain the status quo with respect to terms and conditions of employment and that an employer must bargain with

its employees' exclusive bargaining representative before implementing changes to employees' terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736, 743-44 (1962). However, when an employer's actions are consistent with its established policies or past practice, no "change" has occurred under established Board law. *See id.* at 746. Indeed, as Member Miscimarra observed in *Total Security*, the well understood obligation of an employer whose employees have recently voted for a union is emphatically clear: maintain the status quo and apply existing terms and conditions of employment unless notice is first provided to the union and it is given a reasonable opportunity to request bargaining over any "change" proposed. 364 NLRB No. 106, slip op. at 25–26 (Member Miscimarra, dissenting).

It is also well-settled that an employer is required to continue the status quo post-certification with respect to its general business operations. *See, e.g., Lafayette Grinding Corp.*, 337 NLRB 832, 833 (2002) (employer's obligation while bargaining for first contract is to maintain status quo consistent with past practice). Part of the status quo is continuing its business operations, including its pre-certification disciplinary procedures. *See, e.g., Southern Mail, Inc.*, 345 NLRB 644, 646 (2005) (employer unlawfully changed disciplinary policy from virtual nonenforcement to strict enforcement following union's certification and while bargaining for initial contract).

In running a business, an employer makes a myriad number of discretionary decisions. Thus, to continue operating a business in the same status quo manner post-certification as pre-certification, employers must continue to use discretion in their operational decisions. Personnel actions, such as disciplinary actions, needed to ensure employees are working properly were long considered to be among those non-remarkable discretionary business operations decisions required to be taken to continue status quo, viable business operations. Indeed, prior to *Total Security*, if

employers stopped making their usual discretionary disciplinary decisions, such activity would be contrary to the status quo. As Member Miscimarra pointed out in his dissent in *Total Security*, the relevant Board cases after *Katz* not only permitted an employer to follow its regular wage policies and practices, they required it. *See* 364 NLRB No. 106, slip op. at 26 (Member Miscimarra, dissenting), and cases cited therein.

Over the years, the Board has struggled over the issue of whether and to what extent ongoing economic employment practices that involve “a large measure of discretion” in their implementation, such as a merit wage increase, is a “change” warranting notice to the union and requiring pre-implementation bargaining. *See Katz*, 369 U.S. at 746–47 (holding unlawful an employer’s unilateral reduction in sick leave, across-the-board wage increase that was higher than that offered to the union, and merit increases that “were in no sense automatic”); *see also Oneita Knitting Mills*, 205 NLRB 500 (1973). Thus, in *Oneita Knitting*, the ALJ and Board held that, after a union had been certified or recognized, an employer was generally precluded from following the status quo as to merit wage increases, irrespective of whether the union had requested bargaining over wages. 205 NLRB at 500 (citing *Katz*, 369 U.S. at 746).⁶ In these cases, employers were precluded from continuing their regular practice of implementing merit wage increases because “the raises . . . in question were in no sense automatic, but were informed by a large measure of discretion.” *Katz*, 369 U.S. at 746–47 There was simply “no way in such case for a union to know whether or not there has been a substantial departure from past practice.” *Id.* at 746.

⁶ Notably, the Board had seemed to say the directly opposite thing a year before in *General Motors Acceptance Corp.*, 196 NLRB 137, 137 (1972) (that the employer retained “an element of discretion” as to the merit raises given to certain of the covered employees did not prevent its lawful continuation of the program during negotiations with the union).

Thus, the Board has developed a body of law in the area of wages and other economic benefits that decisions that change wage rates and other policies and practices where there is no showing of a practice of making such decisions or changes automatically or require a large measure of discretion in implementing the practice are, in fact, changes to the status quo. Whereas, decisions concerning employment policies and practices that do not involve actual changes in policies and practices, but decisions taken within existing policies and practices are not changes to the status quo. The cases cited by *Total Security* applying the concept that a policy or practice that requires a large measure of discretion in implementing such policy or practice is a change to the status quo all concerned implementation decisions of economic policies and practices, such as wage rates, sick leave, and number of work hours. None involved implementation of discipline.

2. Application of Status Quo Principles to Disciplinary Actions.

Prior to *Total Security*, no “change” to the status quo was found to have occurred if the disciplinary action was based on policies or past practices in place at the time the union was elected. *See Fresno Bee*, 337 NLRB 1161, 1186 (2002) (no unlawful change where employer maintained “detailed and thorough written discipline policies and procedures” that predated union; “[t]he fact that the procedures reserve to [the employer] a degree of discretion or that every conceivable disciplinary event is not specified does not alone vitiate the system as a past practice and policy.”), *overruled by Total Security Management*, 364 NLRB No. 106; *Virginia Mason Medical Center*, 350 NLRB 923, 932 (2007) (no pre-implementation bargaining obligation over employer’s decision to terminate employees if terminated under employer’s rules as applied in a manner consistent with past practice).

The cases upon which *Total Security* relies dealt with wages and other economic issues, not discipline. *See Katz*, 369 U.S. at 744–45. The Board’s authority over hiring and firing decisions

has long been viewed as more circumscribed, at least where those decisions do not represent interference with statutory rights. Indeed, beyond *NLRB v. Jones & Laughlin*, 301 U.S. 1 (1937), the decided Board and Supreme Court cases make it plain that disciplinary decisions are for the employer, and employees of all stripes are required to follow reasonable rules on company time and premises, and to cooperate in work-related disciplinary investigations. *Terry Poultry Co.*, 109 NLRB 1097, 1098–99 (1954) (permitting employer to discharge employees, for unauthorizedly leaving production line, even though purpose of their departure was to present a concerted grievance to management, adding: “It is not for us to pass judgment on the wisdom of the Respondent in choosing this disciplinary measure instead of another.”); *Cook Paint & Varnish*, 246 NLRB 646, 646 (1979) (employees may be required to participate in investigatory interview), *enforcement denied on other grounds*, 648 F.2d 712 (D.C. Cir. 1981); *Manville Forest Products Corp.*, 269 NLRB 390, 391 (1984) (given employer’s right to demand employee statements in investigation, union steward was engaged in unprotected conduct when he told employees that they need not provide such statements); *NLRB v. Weingarten*, 420 U.S. at 259 (employer has no obligation to bargain with union in the course of investigating and deciding disciplinary issues).

Accordingly, given the long-recognized right of employer discretion in the area of employee discipline, it is not surprising that the doctrine derived from *Katz* and its progeny has never before *Total Security* been applied in disciplinary action cases. Even the majority in *Total Security* was forced to admit that “. . . the Board has never clearly and adequately explained how (and to what extent) this established doctrine applies to the discipline of individual employees.” 364 NLRB No. 106, slip op. at 1.

Rather, Board law has long distinguished between actions involved in administering discipline and actions in changing policies. A distinction has been made between changing

disciplinary practices and making decisions under those disciplinary practices. In *Fresno Bee*, the Board rejected the then-General Counsel's arguments that the employer had violated Section 8(a)(5) by taking disciplinary action under disciplinary policies that provided for managerial discretion and making disciplinary decisions that were stricter than before without notifying and bargaining with the union. The Board there held that no change had occurred, stating:

The fact that the procedures reserve to Respondent a degree of discretion or that every conceivable disciplinary event is not specified does not alone vitiate the system as a past practice and policy.

337 NLRB at 1186. *See also Bath Iron Works Corp.*, 302 NLRB 898, 901 (1991); *Trading Port*, 224 NLRB 980 (1976).

Similarly, in *Washoe Medical Center*, 337 NLRB No. 32 (2001), the Board affirmed the ALJ's conclusions that unilaterally setting starting wage rates after a union election was an unlawful implementation of discretionary wage rates, but that a unilateral imposition of discipline was not unlawful. Even though the evidence suggested that some employees were given different levels of discipline, the employer appeared to be following its usual established disciplinary practices. While agreeing with the then-General Counsel that administering discipline is "at least in part, discretionary," the ALJ disagreed that discretion in implementing such policies changed the status quo. Rather, for there to be a violation of the Act, the then-General Counsel must also "demonstrate that imposition of discipline constituted a change in [the employer's] policies and procedures." The cases cited by the General Counsel in *Washoe Medical Center*, like the cases cited in *Total Security*, had nothing to do with discipline, but rather unilateral changes to economic policies and practices such as a reduction in hours and discretionary wage increases.

Total Security's requirement that an employer bargain before implementing discipline against an employee is also contrary to the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). There, the Court held that an employer must permit a union representative to attend an investigatory interview if the employee reasonably believes the meeting could result in discipline, but also stated that "the employer has no duty to bargain" at that meeting. *Id.* at 259. Further, the Court recited multiple times that, if an employee refrains from participating in the investigatory interview, the employer "would . . . be free to act"—i.e., unilaterally decide to impose discipline—based on information obtained from other sources. *Id.* at 259 (quoting *Mobil Oil Corp.*, 196 NLRB 1052, 1052 (1972)); *id.* at 260 (quoting *Quality Mfg.*, 195 NLRB 197, 198–99 (1972)). Significantly, *Weingarten*, which involved disciplinary action taken under a collective bargaining agreement, explicitly held that an employer had no pre-implementation duty to bargain concerning discipline. The Board's imposition of such a requirement in this context would deny management rights to employers that they would otherwise possess if a union had not been certified or if a collective-bargaining agreement had already been negotiated. This bargaining carve-out makes no logical sense and is contrary to Board and Supreme Court precedent.

Requiring an employer to bargain over pre-implementation discipline applied consistent with its past practice would also be inconsistent with the Act, Supreme Court precedent and the Board's dynamic status quo concept. It also disrupts business operations. Thus, for the reasons that have been set forth, the Board should return to the holdings in *Fresno Bee* and *Virginia Mason Medical Center* and long-standing Board precedent in the area of implementation of disciplinary actions and conclude that an employer in the position of Care One does not violate the Act if it fails to notify and bargain with a union prior to disciplining an employee pursuant to its established policy and past practice.

ii. The *Total Security* Holding Contravenes Section 8(d) of the Act.

The *Total Security* decision improperly imposes contract terms on the parties contrary to Section 8(d) of the Act. The majority in *Total Security* created a “safe harbor” whereby parties, prior to reaching an initial collective-bargaining agreement, could satisfy the majority’s new requirements by implementing an “interim” grievance procedure. 364 NLRB No. 106, slip op. at 9 n.22. However, by establishing a safe harbor premised upon the employer agreeing to particular terms and condition of employment, such as a grievance procedure, the Board ignored Section 8(d)’s express limits on its authority to enforce Section 8(a)(5). Section 8(d) states that the duty to bargain collectively “does not compel either party to agree to a proposal or require the making of a concession.” See *H.K. Porter & Co. v. NLRB*, 397 U.S. 99, 103 (1970) (“The object of this Act [is] not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees [can] work together to establish mutually satisfactory conditions.”). By essentially instructing employers and unions to create an interim grievance system, the *Total Security* majority improperly imposed substantive terms on parties rather than acting in the Board’s proper statutory role as a referee of the bargaining process.

Thus, in addition to its contravention of the NLRA’s status quo principles and Supreme Court precedent, *Total Security* should be overturned on the grounds that it imposes contract terms on the parties in violation of Section 8(d).

iii. *Total Security’s* Creation of Pre-imposition Bargaining Concerning Disciplinary Action is Practically Unworkable.

In addition to shunting aside basic NLRA principles concerning employer actions that are consistent with the status quo, the *Total Security* majority decision has created havoc in the post-

certification workplace by imposing staffing requirements on employers and creating a confusing and unworkable bargaining standard before implementation of discipline.

First, prior to *Total Security*, the Board *never* required that an employer keep on its premises an employee who has engaged in misconduct until a bargaining obligation has been fulfilled. *See Weingarten*, 420 U.S. at 259; *Virginia Mason Medical Center*, 350 NLRB at 923 (although Board requires employers to inform unions of employee rules and standards, there is no requirement to notify union of discipline applied consistent with past practice); *Fresno Bee*, 337 NLRB at 1187 (employers have no obligation to notify and bargain to impasse with union before imposing discipline). *See generally Anheuser-Busch, Inc.*, 342 NLRB 560, 561 (2004) (employees terminated for misconduct based on plant rules not entitled to make-whole remedy), *petition for review denied per curiam sub nom. Brewers and Maltsters, Local Un. No. 6 v. NLRB*, 303 F. App'x 899 (D.C. Cir. 2008). Although *Total Security* also creates an “exigent circumstances” exception, which the majority claimed would allow employers to impose serious discipline prior to bargaining if an employer has a “reasonable, good-faith belief that an employee’s continued presence on the job presents a serious, imminent danger to the employer’s business or personnel,” the majority provided insufficient guidance for employers to determine when this exception applies. 364 NLRB No. 106, slip op. at 9. Further, the majority seems to have narrowly limited the employee conduct to which this exception applies to “unlawful conduct.” Importantly, the *Total Security* majority failed to acknowledge that this exception would not cover the many instances of misconduct that may not rise to the level of unlawfulness that may nevertheless jeopardize production of a safe and profitable product and the safety of the workplace and other employees or result in other liabilities.

Second, the bargaining obligation set forth in *Total Security* is ill-defined and unclear and departs from long-recognized obligations under the Act. “Bargain” is a term of art in labor parlance

that means to meet and negotiate to either agreement or impasse. See *United Parcel Service*, 336 NLRB 1134, 1135 (2001) (“It is well established that . . . an employer’s obligation to bargain over mandatory terms and conditions of employment is not met until the parties either reach an agreement or an impasse in negotiations.” (citing *NLRB v. Katz*, 369 U.S. 736 (1962))). Under *Total Security*, however, the requisite pre-imposition “bargaining” over individual disciplinary actions does *not* entail bargaining to agreement or impasse, but the majority did not delineate what this “less-than” bargaining entails. See *Total Security*, 364 NLRB No. 106, slip op. at 9 (stating no duty to reach impasse or agreement before implementation, but not explaining how much bargaining is needed). This lack of guidance engenders tremendous uncertainty for employers, unions, and employees as to compliance with their legal obligations.

For example, although neither impasse nor agreement is required, it is nevertheless unclear how much pre-implementation bargaining is sufficient before lawful discipline can occur. In addition, if a union causes delay by requesting various kinds of information, it is unclear how long an employer must wait before pre-implementation bargaining can commence. *Id.*, slip op. at 8 (noting that an employer need not bargain to agreement or impasse “if it commences bargaining promptly”). Also unclear is what constitutes the “exigent circumstances” that would privilege the employer to immediately implement needed discipline. *Id.*, slip op. at 9 (creating only a loose “reasonableness” standard for the exigent-circumstances exception). Additionally, the lack of guidance from the Board makes employers that “engage[] in some discussion, but d[o] not yield to the union’s demands,” susceptible to a claim of surface bargaining. See *id.*, slip op. at 32 (Member Miscimarra, dissenting) (quoting *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. at 685). The *Total Security* majority’s vague description of its pre-imposition bargaining scheme is all the

more problematic considering that swift and resolute action is imperative once an employer has determined that an employee has engaged in serious misconduct warranting discipline.

iv. Overturing *Total Security* Does Not Deprive Employees of Any Rights.

In addition to creating significant confusion, *Total Security*'s novel standard created new employee and union rights that provide them with no greater benefits than already exist. Because employers may not ignore their employee representative's request to discuss any kind of workplace issue, there has always been negotiation of individual employee discipline, including prior to the action being effected. And, under well-established Board law (which did not change under *Total Security*), employers must bargain to agreement or impasse *after* imposing discipline, if requested by the union, where no grievance-arbitration procedure is in place. *See, e.g., Ryder Distribution Resources*, 302 NLRB 76, 90 (1991) (employer unlawfully refused to engage in post-implementation bargaining over four employee terminations where union expressly requested bargaining at a time when parties were bargaining for initial collective-bargaining agreement). That is, a union may be able to reverse an employer's disciplinary decision and obtain reinstatement of a discharged employee through post-implementation bargaining, and where an employer fails to engage in such post-imposition bargaining in good faith, the Board will issue a bargaining order. *See id.* at 76, 91–92.

Thus, because there has always been a post-implementation bargaining obligation, which still exists, employees would not lose any of the rights or remedies they have always possessed under the Act by returning to a pre-*Total Security* standard. Accordingly, when balancing the interests of employers in maintaining orderly workplace operations against the little, if any, advantage to employees in requiring employers to engage in pre-implementation "bargaining," the balance favors employers' interests.

v. *Total Security Undermines an Employer’s Right to Maintain Order and Discipline in the Workplace.*

Imposing a confusing requirement that entails something less than negotiating to impasse or agreement, and great uncertainty, certainly does not warrant imposing new burdens on employers’ long-recognized need to maintain order and discipline in the workplace. When an employee engages in serious misconduct warranting discipline, employers must act decisively to maintain order, production, and discipline in the workplace. *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797–98 (1945) (stating that employers have an “undisputed right . . . to maintain discipline in their establishments”); *Star-News Newspapers, Inc.*, 183 NLRB 1003, 1004 (1970) (“The Act’s grant of rights to employees to engage in organizing activities, to belong to a union, and to engage in collective bargaining was not intended to deprive management of its right to manage its business and to maintain production and discipline.”). In addition, employers are subject to a myriad of federal and state statutes governing the workplace, in addition to the NLRA, which require employers to ensure that employees are provided a safe and harassment-free work environment. For example, the EEOC advises employers to prevent workplace discrimination by adopting a strong anti-harassment policy that includes “[a]ssurance that the employer will take **immediate and appropriate corrective action** when it determines that harassment has occurred.” *See Best Practices for Employers and Human Resources/EEO Professionals: How to Prevent Race and Color Discrimination*, <https://www.eeoc.gov/eeoc/initiatives/e-race/bestpractices-employers.cfm> (last visited Feb. 22, 2019) (emphasis in original). *See also Curry v. District of Columbia*, 195 F.3d 654, 660 (D.C. Cir. 1999) (per curiam) (“An employer may be held liable for the harassment of one employee by a fellow employee (a non-supervisor) if the employer knew or should have known of the harassment *and failed to implement prompt and appropriate corrective*

action.” (emphasis added)). Cf. *Fresenius USA Mfg., Inc.*, 362 NLRB 1065, 1065 (2015) (acknowledging employers’ legitimate business need to prevent harassment). Some industries, such as the health-care industry at issue in the instant case, require particularly swift action because lives are literally at stake. See *Washoe Medical Center*, 337 NLRB at 204 n.3 (listing offenses under health care employer’s disciplinary code, including “abuse of patients and other personnel,” “reporting for work while under the influence of proscribed substances,” “falsification of records,” and “refusal to care for patients”).

Accordingly, the Board should overturn *Total Security*’s holding that employers must provide notice and an opportunity to bargain prior to implementing specific discipline on particular employees before the parties have reached an initial collective-bargaining agreement. *Total Security* flies in the face of well-settled and well-understood Board law concerning unilateral actions consistent with the status quo; provides insufficient guidance on how parties are to “bargain” without an obligation to negotiate to impasse or agreement; provides little, if any, benefit to unions and employees that would outweigh employers’ interests in workplace safety and discipline; and unduly burdens employers’ fundamental right to maintain order, production, and discipline in the workplace. The Board should return to the prior holdings of *Fresno Bee* and *Virginia Mason Medical Center*.

vi. Application to the Instant Case.

Under pre-*Total Security* law, an employer had no duty to provide the union with pre-imposition notice and an opportunity to bargain regarding Excellent’s suspension. Here, it is undisputed that Respondent and the Union did not bargain over the decision to suspend Excellent. Accordingly, if the Board overrules *Total Security*, this allegation should be dismissed.

c. The ALJ Erred by Failing to Find that Ready-Mix Drivers are not Required to Complete Specific Tasks While Waiting to Discharge Cement at a Jobsite. (Cross-Exception 5).

Ready-mix drivers frequently have down time at jobsites when customers are not yet ready to use the concrete or while waiting for inspections, or other reasons. [Tr. 95:4-6; 160:15-25; 163:18-19; 164: 1-24]. Delays at jobsites can last a couple of minutes to 90 minutes or more. [ALJD 4, 24-25; Tr. 163: 22-25; 164: 1-8]. While Respondent attempted to portray its drivers as always operating their ready-mix trucks while away from the facility, Perez credibly testified that drivers only need to check the condition of the concrete once every 15 or 20 minutes and that any change in the drum rotation will be obvious. [Tr. 165:18-25, 166:7-22]. Employees Excellent and Perz credibly testified that, other than checking the drum, drivers have no specific tasks to complete during these periods of waiting and can do nothing, or even eat lunch during these down periods. [Tr. 96:19-25, 162: 25; 163:1-2; 165:18-22].

Based on the above, the Board should grant General Counsel Cross-Exception 5 should be granted and the Board should revise the ALJ's findings of fact to include a finding that ready-mix drivers must check the condition of the concrete once every 15 to 20 minutes, but are free to engage in other activity, including eating lunch or doing nothing at all while waiting to discharge cement.

d. The ALJ Erred by Failing to Find that Respondent Permits its Managers and Supervisors to Carry and Use Cell Phones Inside their Vehicles. (Cross-Exception 6).

Respondent's managers operate light duty trucks, which they drive between Respondent's facilities in Fort Myers, Naples, and occasionally Tampa, Florida. [Tr 83:19-25, 84:1-6]. Director of Human Resources Michael Beer admitted that Respondent's operations managers are allowed to possess cellphones in their light duty trucks. [Tr. 84: 12-14]. Respondent's cell phone policy

permits light duty truck drivers to use their cellphones while driving if they are completely hands-free, and “if the driver finds it necessary to do so, they may have to pull the vehicle over and park in a safe manner and place before continuing the call.” [GCX 5].

Based on the foregoing, General Counsel Cross-Exception 6 should be granted, and the Board should amend that ALJ’s findings to include a finding that Respondent permits managers and supervisors to possess and use cell phones in their vehicles.⁷

e. The Facts Described in Cross-Exceptions 5 and 6 Lend Support to the ALJ’s Conclusion that Respondent’s Cell Phone Policy Violates Section 8(a)(1) of the Act.

An employer violates Section 8(a)(1) of the Act when it maintains workplace rules or policies that would reasonably tend to chill employees in the exercise of their Section 7 rights. See *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999). In *Boeing Co.*, 365 NLRB No. 154 (2017), the Board reevaluated its approach to determining when an employer’s mere maintenance of facially neutral rules will be found to violate the Act. The Board overruled prior applications of its holding in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), where facially neutral rules were found unlawful when employees “would reasonably construe” the rules to interfere with, coerce or restrain them in the exercise of Section 7 rights. *Id.*, slip op. 2. Under the new test, if the rule is not explicitly unlawful and is facially neutral, the Board will engage in a balancing test to evaluate two things: (1) the nature and extent of the potential impact of the rule on Section 7 rights, and (2) legitimate justifications associated with the rule. *Id.*,

⁷ The ALJ properly found that Respondent allowed drivers of flatbed truck to possess and use Nextel phones in their cabs until it stopped delivering cement blocks and that Respondent continues to allow maintenance employees who drive large pickup trucks to possess and use cell phones in their cabs. [ALJD 5:35 to 6:11].

slip op at 4, 15. If the potential impact on employees' rights outweighs the justifications for the rule, the rule is unlawful. *Id.*, slip op at 15.

As found by the ALJ, and as discussed in General Counsel's Answering Brief, Respondent's legitimate justification for its rule prohibiting the mere possession of cell phones in heavy duty vehicles, including ready-mix trucks, is outweighed by the rule's impact on Section 7 rights. The facts described in Cross-Exceptions 5 and 6 lend further support to the ALJ's conclusion that Respondent's cell phone policy is unlawful. In particular, Respondent's cell phone policy interferes with the right of drivers, who spend 85 percent of their day away from Respondent's facility, to engage in Section 7 activity when they are on break and when they are merely waiting to discharge cement at a jobsite and not actually performing work. Furthermore, the fact that Respondent permits its managers and supervisors, as well as maintenance employees, to possess and use cell phones in vehicles undercuts its proffered safety justification for the ban on possessing cell phones in ready-mix trucks. For the reasons cited by the ALJ and for these additional reasons, the Board should affirm the ALJ's conclusion of law finding that Respondent's rule prohibiting drivers from merely possessing cell phones in their trucks is unlawful.

IV. CONCLUSION

For the reasons set forth above, the General Counsel respectfully requests that the Board find merit to the General Counsel's cross-exceptions and overturn the Board's decisions in *Total Security Management* and *Purple Communications*, and that it modify the ALJ's findings of fact, conclusions of law, proposed remedy and recommended order in the manner set forth herein.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, General Counsel's Brief in Support of Cross-Exceptions to the Administrative Law Judge's Decision, was served on August 9, 2019 as follows:

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