

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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PURPLE COMMUNICATIONS, INC. and Its)		
Successor and Joint Employer CSDVRS, LLC)		
d/b/a ZVRS,)		
)		
Employers,)	Case Nos.	21-CA-149635
)		28-CA-179794
and)		21-CA-182016
)		32-CA-185337
PACIFIC MEDIA WORKERS GUILD,)		21-CA-185343
LOCAL 39521, THE NEWSPAPER GUILD,)		27-CA-185377
COMMUNICATIONS WORKERS OF)		27-CA-186448
AMERICA, AFL-CIO,)		28-CA-186509
)		21-CA-187642
Charging Party.)		28-CA-192041
)		27-CA-192084
)		28-CA-197009
)		28-CA-197062
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**RESPONDENT PURPLE COMMUNICATIONS, INC.'S REPLY
TO THE NATIONAL LABOR RELATIONS BOARD'S NOTICE TO SHOW CAUSE**

PRELIMINARY STATEMENT

The material facts leading to the Board's Notice to Show Cause are not in dispute. Purple Communications, Inc. ("Purple") maintained a work rule restricting the use of its email system to business purposes. The administrative law judge found that Purple violated Section 8(a)(1) of the NLRA for merely maintaining the rule. The General Counsel agrees that the finding is foreclosed by *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, 368 N.L.R.B. No. 143 (2019). The finding is also moot because Purple no longer employs the workforce covered by the complaint. Accordingly, the finding should be dismissed outright or remanded to the Regional Director for dismissal.

BACKGROUND

Purple operates call centers for the deaf and hard-of-hearing. The Pacific Media Workers Guild, Local 38521, TNG-CWA (the "Union") was the collective bargaining representative of four separate collective bargaining units of video relay interpreters employed at four of Purple's call centers until each center closed.

The video relay interpreters provided real-time sign language interpretation for hearing-impaired persons to communicate with hearing callers. From individual, side-by-side workstations, interpreters would use an audio headset to communicate orally with the hearing participant on a call, leaving their hands free to communicate in sign language, via video, with the hearing-impaired participant.

Interpreters were expected to be seated at their workstations, connected, and ready to take calls 80 percent of the time during shifts between 6 a.m. and 6 p.m. and 85 percent of the time for other shifts. The rest of the time, they were free to remain at their workstations or congregate in the break room. Purple provided interpreters a union bulletin board in the break room on

which they could prominently display announcements about their Union and the terms and conditions of employment.

Purple assigned an email account to each interpreter, which the interpreters accessed from the computers at their workstations. Management used the interpreters' email accounts to send them work assignments and other communications. Purple had a written policy in its Employee Handbook providing that email on Purple's business system should be used for business purposes only. That policy stated:

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 2016, the Union filed a charge alleging that Purple's "Internet, Intranet, Voicemail and Electronic Communication Policy" violated Section 8(a)(1) of the NLRA. The Regional Director for Region 28 then issued a complaint alleging virtually the same charge. Not long before, a divided Board in *Purple Communications, Inc.*, 361 N.L.R.B. 1050 (2014) held that if an employer gives its employees access to its email system, employees cannot be prohibited from using the system for Section 7 protected communications absent a showing of special

circumstances. Applying that standard, the administrative law judge in this case found that Purple violated Section 8(a)(1).

Meanwhile, in *Caesars*, the Board overruled *Purple*, holding that “employees have no statutory right to use employer-provided email for nonwork, Section 7 purposes.” 368 N.L.R.B. No 143, slip op. at *5. The Board applied its holding retroactively to all pending cases that involve allegations an employer restricted the use of its electronic resources for Section 7 purposes. *Id.* at *9.

ARGUMENT

I. *Caesars* Forecloses the Allegation in the Board’s Notice

The Union’s brief is premised on the claim that the Board’s decision in *Caesars* is “irrelevant,” but that is simply not correct. *Caesars* clearly resolved the *only* question at issue in the Board’s Notice: does an employee have a right to use his or her employer’s email system to engage in activity allegedly protected by Section 7 of the NLRA? As the General Counsel argued in its own brief, because the Board in *Caesars* made clear that “employees have no statutory right to use employer-equipment, including IT resources, for Section 7 purposes,” the answer is no.

In *Caesars*, the Board held that neutral rules like Purple’s handbook restriction on email use are always lawful “absent proof that employees would otherwise be deprived of any reasonable means of communicating with each other, or proof of discrimination.” *Id.* at *8. As relevant to the Board’s Notice, the complaint here challenges only the *facial* validity of Purple’s rule restricting its email system to only business uses. There is *no* allegation that email was the *only* reasonable means for employees to communicate with each other. In fact, the record here established that the employees had multiple avenues of communication with each other,

including personal email, mobile phones and, significantly, an employer-provided Union bulletin board in the break room. *Cf. Eaton Technologies, Inc.* 322 N.L.R.B. 848, 853 (1997) (“[A]n employer may ‘uniformly enforce a rule prohibiting the use of its bulletin boards by employees for all purposes,’” including for union-related messages. (quoting *Vincent’s Steak House*, 216 N.L.R.B. 647, 647 (1975)). It makes no difference that employees may prefer to use Purple’s email system to communicate with co-workers about Union matters or that they believe it is more effective than the other available means that are plainly available to them. The Act “does not require the most convenient or most effective means of conducting those communications.” *Caesars*, 368 N.L.R.B. No 143, slip op. at *8 (quoting *Register Guard*, 351 N.L.R.B. 1110, 1115 (2007)). That is because “Section 7 of the Act protects organizational rights . . . rather than particular means by which employees may seek to communicate.” *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 318 (7th Cir. 1995).

Nor does the complaint allege that Purple’s handbook restriction discriminates against Section 7 activity. Indeed, the Union itself concedes that the rule restricts communications on behalf of *any* organization “with [a] professional or business affiliation with the Company”—not just the Union. Union Brief in Response to Notice to Show Cause (“Union Br.”) at 4; *see Caesars*, 368 N.L.R.B. No 143, slip op. at *8 (“[E]mployees had no need to utilize employer-provided email in order to exercise their Section 7 rights, there was no basis for finding that employers interfered with, restrained, or coerced employees in the exercise of those rights by limiting business email to business-related purposes.”).

Rather than trying to explain how this complaint could possibly survive the clear holding of *Caesars*, the Union simply pretends the case does not apply, and instead argues that Purple violated the NLRA by excluding Section 7 discussions from the policy’s definition of “business

purposes.” Union Br. at 5-7. But it was never alleged that Purple did so, much less that doing so would violate the NLRA. Nor could it because Section 7 rights do not supersede the type of neutral restrictions on employer property here. *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802 n.8 (1945) (neutral restrictions on employer property unlawful *only* if those restrictions are “unreasonable impediment to the exercise of the right to self-organization”).

Accordingly, because there is “no statutory right to use employer-provided email,” *Caesars*, 368 N.L.R.B. No 143, slip op. at *5, and the record in this case establishes that Purple’s email system was not employees’ only reasonable means of communicating with one another, the challenge to Purple’s facially neutral restriction on email should be dismissed.

I. The Allegation Is Moot Because Purple No Longer Employs the Workforce

Because *Caesars* forecloses further prosecution of this allegation, the Board need not consider additional grounds for remand to the Regional Director for dismissal. Nevertheless, the allegation should be dismissed for the additional reason that it is moot.

Congress can confer jurisdiction to enforce federal statutes, including the NLRA, only where “an actual controversy” exists. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). An actual controversy “must be extant at all stages of review, not merely at the time the complaint is filed.” *Id.* (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). If an intervening circumstance deprives a party of a “personal stake in the outcome of the lawsuit,” at any point during litigation, the action can no longer proceed and must be dismissed as moot. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-478 (1990). Mootness thus has two aspects: “when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *Powell v. McCormack*, 395 U.S. 486, 496 (1969). Neither aspect is overcome here.

First, there is no longer a live controversy because the call centers at issue in the

complaint were permanently closed. Purple no longer employs the workforce at issue in the complaint, does not maintain its electronic communications policy at the shuttered call centers, and cannot enforce that policy against its former workforce. Therefore, Purple could not continue any alleged unfair labor practice. Because a court will not enforce a Board order “which the facts show is now inoperative and impossible to enforce,” an unfair labor practice finding here would not “serve in any degree to effectuate the purposes of the Act.” *NLRB v. Grace Co.*, 184 F.2d 126, 130 (8th Cir. 1950).

Second, the former Denver workforce lacks a legally cognizable interest in the outcome not only because they have no workplace rights to vindicate (the shuttered call center is no longer their workplace). Further prosecution of this case “would entail rendering an advisory opinion” that a court will “dismiss[] as moot.” *NLRB v. Global Sec. Servs., Inc.*, 548 F.2d 1115, 1118 (3d Cir. 1977). The interests of judicial economy and the Board’s limited resources would be put to better use enforcing ongoing violations of the Act, rather than the moot charge here that a court will not enforce.

CONCLUSION

Because *Caesars* forecloses the alleged unfair labor practice in the Board’s Notice, and in any event, the underlying charge is moot, Purple respectfully submits that the allegation should be remanded to the Regional Director for dismissal or dismissed outright.

Dated: March 23, 2020

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2020, I caused a copy of the foregoing to be served, via the NLRB e-filing system and electronic mail, on the following:

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