

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**  
**REGION 14**

**UNITED STATES POSTAL SERVICE**

**and**

**Case 14-CA-195011**

**ROY YOUNG, an Individual**

**GENERAL COUNSEL'S SUPPLEMENTAL BRIEF**  
**TO THE ADMINISTRATIVE LAW JUDGE**

COMES NOW the General Counsel of the National Labor Relations Board (Board), through the undersigned, and subsequent to Board remand of this matter, submits this supplemental post trial brief to the Honorable Melissa M. Olivero, Administrative Law Judge (ALJ). The General Counsel urges the ALJ to affirm her prior credibility findings, findings of fact, and conclusions of law, and decision that United States Postal Service (Respondent) violated the Act in all respect alleged by the General Counsel.

**I. PROCEDURERAL HISTORY**

This case tried before ALJ Olivero on September 25 and 26, 2017, in St. Louis, Missouri. The ALJ issued her decision on September 28, 2018, finding that Respondent violated Section 8(a)(1) and (3) as pleaded by the General Counsel in the Complaint. Respondent filed exceptions and a brief with the Board and the General Counsel filed an answering brief. While this matter was pending before the Board, the Board issued its decision in *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, 368 NLRB No. 143 ( December 16, 2019), overruling extant Board law in *Purple Communications, Inc.*, 361 NLRB 1050 (2014). Subsequent to issuance of its decision, on April 3, 2020, the Board remanded this case to the ALJ for further consideration in the light of its holding in *Caesars Entertainment* and issuance of a supplemental

decision and recommended Order. Subsequent to remand of the case, neither party moved to reopen the record or otherwise submit additional evidence to the ALJ.

## **II. THE ALJ'S DECISION**

Charging Party Roy Young (Young) has been employed by Respondent for more than 35 years in a bargaining unit of employees represented by the American Postal Workers Union, AFL-CIO. (ALJD p. 4, LL 10-11, 21-22) Young is employed as a national support technician (NST) domiciled in St. Louis, Missouri. (ALJD p. 4, LL. 21-24) The ALJ found that Young engaged in protected, concerted union activities by copying emails discussing work issues with supervisors to his entire Maintenance Technical Support (MTSC) workgroup.<sup>1</sup> Specifically, the ALJ concluded that Respondent violated Section 8(a)(1) of the Act on January 9 and 10, 2017, when Maintenance Management Specialist Erich Henegar directed Young, in responding to email inquiries regarding documentation and approval of leave, and after Young had sent previous responses to the MTSC network and certain union officers, to restrict his responses to Henegar and Maintenance Management Specialist Dan Fauchier. (ALJD p. 21, LL. 46-47)

The ALJ further concluded that Respondent violated Section 8(a)(1) of the Act on February 8 and 10, 2017, when, in response to supervisor email inquiries regarding the handling of calls for technical help desk assistance, Young copied his email responses to other NSTs on the MTSC network and to certain union officials, having been instructed by Henegar and Field Support Specialist Brian Watts not to do so. (ALJD p. 25, LL. 39-45) A March 13, 2017, directive by Fauchier instructing NSTs to stop email discussion of whether Respondent would pay for REAL ID compliant identification for employees, was also found to violate Section 8(a)(1). (ALJD p. 27, LL. 28-32) The ALJ further found a violation of Section 8(a)(1) in Henegar's March 15, 2017, directive to Young to refrain from emailing his response on a work

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<sup>1</sup> The violations of Section 8(a)(1) found by the ALJ turn not just on application of email policies to prohibit employees from using Respondent's email systems, but on Respondent's interference with employee rights to freely discuss their wages, hours and working conditions. (ALJD p. 27, LL. 5-9)

instructions and performance expectations issue to anyone else besides Henegar. (ALJD p. 28, LL. 13-17)

Lastly, the ALJ concluded that Respondent violated Section 8(a)(3) by issuance of a 14-day notice of suspension to Young because he violated Henegar's and Watts' directive on February 8 and 10, respectively, that he not copy his email responses to questions regarding Young's call-handling techniques to the MTSC network and others, including union officials. (ALJD p. 28, LL. 41-44) The ALJ found in these instances, and Respondent conceded in some cases, that Young was engaged in protected concerted union activities based on the subject of his communications with employees and union officers.<sup>2</sup> (ALJD p. 21, LL. 41-47)

### **III. RELEVANT FACTS**

The MTSC, located in Norman, Oklahoma, supports 280 postal facilities with maintenance programs and provides phone support, project support, and onsite support. The MTSC Help Desk fields calls from postal facilities and assigns service technicians to provide assistance. (ALJD p. 2, LL. 32-35; p. 3, LL. 1-2) MTSC service technicians operate around the clock, including weekends, and are domiciled in 76 postal facilities across the country in 6 different time zones. (Tr. 194-195, 324-325) NSTs work from desks with computers and have access to the internet. NSTs field calls routed through a virtual workspace called Service Now or through email from the Help Desk. (ALJD p. 3, LL. 31-33) NSTs communicate with each other and supervisors primarily by email. Emails to a "MTSC-DL-National Support Technicians" (MTSC distribution list) are received by all MTSC employees, supervisors, and managers. (ALJD p. 3, LL. 42-46) Young is the only NST domiciled in St. Louis, Missouri, and is remotely supervised from Norman, Oklahoma. (ALJD p. 4, LL. 23-24; Tr. 22-23) Young may meet other NSTs, supervisors, and managers in person as little as once a year, if at all. (Tr. 27)

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<sup>2</sup> On post-trial brief to the ALJ, Respondent disputed only whether Young engaged in protected, concerted activities with respect to Young's e-mails to the MTSC distribution list on February 8 and 10, 2017. (R. Br., p. 24) In respect of all other pleaded allegations that Young engaged in protected, concerted union activities, Respondent concedes the point.

Management Instruction EL-660-2009-10, Limited Personal Use of Government Office Equipment and Information Technology, Respondent's email policy, permits employees limited personal use of the email system and other electronic resources so long as it does not adversely affect employee productivity during working hours or interfere with Respondent's mission or operations. (ALJD p. 12, LL. 14-32; GC Exh. 4) Service technicians regularly send nonwork emails and emails on terms and conditions of employment to the MTSC-DL-National Support Technicians portal. (Tr. 235, 238)

Non-work email usage includes NST Louis Mazurek on September 24, 2016, sharing an Onion article by email to the MTSC distributions list, and NST Bill Larson emailing his response to the MTSC distribution list. The subject line of the email was "Experts Advise Against Throwing Laptop Across Office Even Though It Will Feel Incredible". (ALJD p. 13, LL. 31-35; GC Exh. 17) On March 15, 2017, NST Mike Tretick emailed an NBC News article on a purported plan by Respondent to offer early retirement to 150,000 employees, to 50 NSTs. NSTs emailed to the MTSC distribution list, commenting on this article. (ALJD p. 13, LL. 37-40; GC Exh. 28) NSTs at work on August 21 and 23, 2017, shared humorous emails about the solar eclipse. (ALJD p. 13, LL. 42-43; GC Exh. 29) In August and September, 2017, NSTs emailed to the MTSC distribution list jokes, photos of weather reports, photos from the movie "Jaws", and a photo of a ship being overtaken by a Kraken, all in jest and humor about flooding in Houston, Texas. (ALJD p. 13, LL. 42-46; GC Exh. 18) On September 11, 2017, NST Mike Tetrick emailed to the MTSC distribution list a humorous email about the aftermath of Hurricane Irma. On September 11, NST James Lynch emailed to the MTSC distribution list a jocular email on a vehicle running on whisky. Lynch's email spurred humorous responses emailed to the MTSC distribution list, including jokes about beer and chainsaws. (ALJD p. 14, LL. 10-15; GC Exh. 20) NSTs shared emails between September 15 and 17, 2017, as they bantered and joked about a group of employees referred to as the "Irma Road Crew." The emails sent to the MTSC distribution list included joking commentary about beer and steaks for the road crew. (ALJD p.

14, LL. 17-19; GC. Exh. 22) Watts and Henegar admitted that NSTs regularly send nonwork emails to the MTSC distribution list. (ALJD p. 14, LL. 25-32)

#### IV. ARGUMENT

##### A. **The Holding of Purple Communications Had Only Limited Applicability to Roy Young's Use of Respondent's Email System**

While the ALJ in her decision cited to the Board's decision in *Purple Communications, Inc.*, 361 NLRB 1050 (2014), in finding that Young engaged in a course of protected, concerted union activities in copying emails responding to management's questions to the MTSC distribution list and to union officers, her decision made clear that *Purple Communications* only had limited application on the facts of the case. Indeed, the ALJ distinguished it. (ALJD p. 24, LL. 30-34) *Purple Communications* applied to employee use of an employer's email system during nonwork time, and created a rebuttable presumption that employees already provided access to an employer's email system could use that email system for Section 7-protected communications about their terms and conditions of employment while on nonworking time, absent demonstration of special circumstances justifying specific restrictions. *Id.* at 1054.

The ALJ aptly noted that Young's emails to his supervisors, Henegar, Watts, and Fauchier, copied to his fellow NSTs on the MTSC distribution list and union officials, were sent on worktime, and significantly these emails were work-related emails. Henegar conceded as much. (ALJD p. 24, LL. 36-42) So, for instance, Young's e-mails of February 8 and February 10 to Henegar and Watts, respectively, addressed Young's technical diagnostic approach and handling of help desk calls. Respondent routinely discusses work matters with its MTSC service technicians by email to the MTSC distribution lists and service technicians are encouraged to work collaboratively and learn from each other.<sup>3</sup> Other than Young sending copies of his e-mails to management to the MTSC distribution list, there would have been nothing remarkable

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<sup>3</sup> It is significant that the right of Respondent's employees to use its email systems for protected, concerted union activities long predated the Board decision in *Purple Communications*, *supra*.

about service technicians discussing those very subjects over Respondent's email system using the MTSC distribution list. Thus, in this case, e-mails sent by Young to the MTSC distribution list and to union officers were work-related and also manifestations of Young engaging in protected concerted union activities.

Work-related communication, and non-work communication that is protected, concerted union activity are not mutually exclusive. Young was engaged in both. Respondent conceded and the ALJ found that Young's emails of January 9 and 10, March 13 and 14, 2017, all established that Young was engaged in protected, concerted union activities. (ALJD p. 21, LL. 41-47; R. Br. P. 2) Moreover, a purported distinction between working and non-working time on the facts here is unavailing. The Board's observation in *Caesars Entertainment*, that email creates a "virtual space in which the distinction between working and nonworking areas is meaningless," supports strongly that in the particular circumstances of this case, involving Young's and NSTs' use of Respondent's email, a distinction working and nonworking time is not particularly useful. 368 NLRB No. 143 slip op. at 7. Indeed, Respondent's own email use policies, Management Instruction EL-660-2009-10, countenances that employees will sometimes use the email system on working time. The distinction between working and nonworking time is not made in Respondent's own permissive policies on use of its email systems. In sum, *Purple Communications* was not critical to the ALJ's conclusion that Respondent violated Section 8(a)(1) of the Act in barring Young from using its email system to communicate with other NSTs and union officials while engaging in protected concerted union activities.

**B. Absent Use of Respondent's Email System, Roy Young and Other Employees Would Be Denied Reasonable Means of Communication to Engage in Section 7 Communication**

In *Caesars Entertainment d/b/a Rio Hotels All-Suites Hotels and Casino*, 368 NLRB No. 143, slip op. at 8-9 (2019), the Board, overruling precedent on employee use of employer email in *Purple Communications*, supra, held that an employer does not violate the Act by restricting

nonbusiness use of its IT resources (including email), absent proof that employees would be deprived of any reasonable means of communicating with each other, or proof of discrimination. *Id.* In so holding, the Board observed that there may be those atypical work situations where an employer's email system furnishes the only reasonable means for employees to communicate with one another on Section 7-protected matters. *Id.* In a typical workplace, employees have adequate avenues to communicate with other employees and may exercise Section 7 rights without encroaching on an employer's property rights. *Id.* fn. 35, slip op. at 6. A typical workplace, characterized by oral solicitation and employee opportunity for face-to-face literature distribution, provides adequate avenues for communication for employees to meaningfully assert their Section 7 rights. *Id.* slip op. at 7.

Given the peculiar work situation of the MTSC in the present case, it is clear that Young and his fellow MTSC service technicians work in what could only be seen as an atypical workplace where access to the Respondent's email system for Section 7 activities is necessary for vindication of the rights promised by the Act. Denied access to the MTSC distribution list and Respondent's email systems, Young would be virtually cut off from other service technicians. Young works alone in St. Louis. His peers are scattered throughout facilities across the United States. If at all, he could meet a fellow NST once a year. There is little ability to interface and communicate with other NSTs other than by email messages.

As the ALJ's decision noted, email is the primary mode of communication between NSTs and their managers, and between NSTs. (ALJD p. 3, LL. 42-46) With respect to Young's communications with other NSTs inquiring about harassment and potential changes in call-handling policies, barring use of Respondent's email, Young would have been in the impossible position of cold-calling some 100 NSTs. (ALJD, p. 23, LL. 1-3) With the MTSC employees spread out, and with some facilities employing as few as a single, solitary NST, use of Respondent's email system is not a matter of convenience. It is a matter of necessity if the guarantees of Section 7 are not to be illusory.

While there is evidence of existence of a closed Facebook group consisting of a tranche of MSTC service technicians, there is no evidence that such a group could effectively provide effective channels of communication for employees to assert Section 7 rights. Many people are not on social media. There is no evidence of the number of NSTs that are on this Facebook group or of the terms of use of such a group. Discussions and communications on wages, terms and conditions of employment often require subtlety and discretion. Such matters would not always be appropriate for social media, and employees may be uncomfortable engaging such matters on social media forums. Facebook is a very poor and inapt substitute for traditional channels of communication. It is manifestly unworkable to require employees to go vindicate their statutory rights on social media. Moreover, there is no requirement that employees be limited to but a single channel to communicate in the workplace about matters within Section 7. Because of the dearth of alternative means of communication by Young and NSTs in their work setting, employee use of Respondent's email system is necessary to vindicate and give utterance to Section 7 rights.

### **C. In Denying Roy Young Access to its Email Systems Respondent Engaged in Discrimination**

The record evidence establishes that Respondent discriminated in the application of its email policies. In *Caesars Entertainment*, supra, the Board held that a second basis for an employer's property interests to yield, so employees may have adequate avenues of communication, is where there is evidence of discrimination. The evidence that Respondent engaged in discrimination here is well documented in the record. Respondent not only discriminated by permitting freewheeling use of its email systems for a bevy of nonwork purposes by employees and denying access to Young; it also engaged in discrimination when it honed in to bar Young's use of its email and disciplined him while it permitted well-nigh unrestricted access to other employees. There is not a hint in the record of any employee other than Young being instructed to cease using Respondent's email system for nonwork purposes or being disciplined for using the email system. Young's use of Respondent's email was not shown

to be inconsistent with the limited use afforded employees by the email policy in Management Instruction EL-660-2009-10. As the ALJ's decision noted, there is no evidence that Young's sending of emails to the MTSC distribution list interfered with his work or the work of other employees. (ALJD p. 25, LL. 11-13)

As the General Counsel offered at hearing, and the ALJ's decision found, evidence of Respondent's discrimination included permitting employee emailing through the MTSC distribution list of a satirical article from the *The Onion* magazine. NSTs shared and emailed materials on the solar eclipse. NSTs, by emails to the MTSC distribution list, shared jokes about flooding in Houston, as well as a photo from the movie "Jaws," and a photo of a ship being overtaken by a Kraken. An NST shared, by email to the MTSC distribution list, jokes about Hurricane Irma. Emails circulated by NSTs throughout the MTSC distribution list include emails jesting about an "Irma Road Crew," including memes, jokes, and photos about beer and steaks. An NST emailed through the MTSC distribution network a humorous meme in an email about a vehicle running on whisky, touching off replies that included jokes about beer and use of chainsaws in cutting a tree. There are many more instances of employee carte blanche use of Respondent's email system, particularly the sharing of nonwork materials by email to the MTSC distribution list. Emails to the MTSC distribution list go not only to NSTs, but to supervisors and managers. (Tr. 56, 208) Henegar admitted at hearing that employees send lots of nonwork emails and it's a common problem. (Tr. 237-238) It was a "common problem" that Respondent selectively addressed only with Young. There is no evidence Respondent took any action to stop NSTs from using its email system for nonwork purposes.

The ALJ wholly discredited Watts' and Henegar's effete attempts to sanitize other employees' nonwork emails and differentiate them from Young's. As the ALJ aptly concluded, the only distinction between the other NST's emails to the MTSC distribution list and Young's emails, is that Young's emails constituted protected, concerted and union activities, and the other employees' emails did not. (ALJD p. 25, LL. 32-35) Respondent's discrimination in the use of

its email system is further highlighted by the fact that it singled out Young in issuing him a 14-day notice of suspension because he failed to abide Watts' and Henegar's directives not to use Respondent's email systems for protected, concerted and union activities. (GC Exh. 14; Tr. 119-120) There is not a single instance ever of any other employee being disciplined for use of Respondent's email system. Respondent, having engaged in discrimination in application of its email policies, it is foreclosed from denying access to its email system for protected, concerted union activities.

## V. Conclusion

The record establishes that Roy Young and employees of Respondent's Maintenance Technical Support Center lack alternative avenues of communication to exercise statutory Section 7 rights to engage in protected, concerted union activities. The record further establishes that Respondent engaged in discrimination in application of its email policies and is foreclosed from prohibiting employees from using its email systems for protected, concerted union activities. The Administrative Law Judge should affirm her findings of fact, conclusions of law, and her decision finding that the Respondent violated Section 8(a)(1) and (3) of the Act in all respects pleaded.

Dated at St. Louis, Missouri this 26<sup>th</sup> day of May, 2020.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of Counsel for the General Counsel's Supplemental Brief to the Administrative Law Judge was served on May 26, 2020, on the following parties:

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