

DAVID A. ROSENFELD, Bar No. 058163
LISL R. SOTO, Bar No. 261875
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
Telephone (510) 337-1001
Fax (510) 337-1023
E-Mail: drosenfeld@unioncounsel.net
lsoto@unioncounsel.net
courtnotices@unioncounsel.net

Attorneys for Charging Party/Petitioner
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

PURPLE COMMUNICATIONS,

Employer,

and

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO,

Charging Party/Petitioner.

Cases 21-CA-095151
21-RC-091531
21-RC-091584

**RESPONSE TO NOTICE TO SHOW
CAUSE; REQUEST THAT THE
BOARD TAKE ADMINISTRATIVE
NOTICE**

The Charging Party opposes remand.

There is already a compelling and conclusive record established of the regular and consistent use by employees and management of Purple's email system. The Board should take administrative notice of the record in PURPLE COMMUNICATIONS and Its Successor, Cases 21-CA-149635, 28-CA-179794, 21-CA-182016, 32-CA-185337, 21-CA-185343, 27-CA-185377, 27-CA-186448, 28-CA-186509, 21-CA-187642, 28-CA-192041, 27-CA-192084, 28-CA-197009 and 27-CA-197062. The Board has already taken administrative notice in the related *Caesar's* case of this record. See *Caesar's Entertainment* 368 NLRB No. 143 (2018) at footnote 11. The Board should take administrative notice of that record in this case which

involves the same employer. We can see no reason why the Board should decline to take administrative notice of the record in this case involving the same employer and the same rule where it took administrative notice in another case involving a different employer and different rule but related rule.

This record shows the consistent, unrestricted, constant, sanctioned and productive use of the email by and between employees and by and between management and the employees regarding wages, hours and working conditions. We quote the Brief in Support of Cross-Exceptions which the Charging Party filed:

I. **THE ALJ FAILED TO FIND THAT THERE IS WIDE SPREAD UNRESTRICTED USE OF ELECTRONIC COMMUNICATIONS EQUIPMENT INCLUDING EMAIL DURING WORK TIME**

Many of the exceptions focus on the failure of the ALJ to note that employees, both statutory employees and non-statutory employees communicate among themselves, repeatedly, constantly and necessary with respect to “wages, hours and other terms and conditions of employment”, during work time. See Exceptions (“EX”) 2, 4, 5, 39, 40, 45 and 48 as well as the exceptions discussed in III and IV below. Many of these communications relate to communications about the Charging Party and constitute protected concerted activity.

II. **THE ALJ FAILED TO FIND THAT THERE WAS NO BUSINESS JUSTIFICATION FOR PURPLE’S ELECTRONIC COMMUNICATION POLICY**

Purple maintains an electronic communications policy (“ECP”) which is the same electronic communications policy which was the subject of *Purple*. See Jt. Exh. 24 at 30, GC Exh. 2 at 30. See also ALJD p. 6:25-34.

At issue is the following language:

INTERNET, INTRANET, VOICEMAIL AND ELECTRONIC COMMUNICATION POLICY

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:

1. 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

9. Distributing or storing chain letter, jokes, solicitations or offers to buy or sell goods or other non-business material or activities.

Jt. Exh. 24 and GC Exh. 2 at 30-31.

The wide spread use of electronic communication equipment including the company's email use of email demonstrates that there is no business justification for any of these limitations. There can be no argument by Purple that there is any business justification for prohibiting use of the email by employees to communicate about "wages, hours and other terms and conditions of employment", including communications with or about the Charging Party and any Union. Since there is such wide spread use by statutory employees which is both acknowledged and not restricted, there can be no business justification for any existing prohibition or limitation. Since there is also such wide spread use by non-statutory employees among themselves or with statutory employees, there can be no business justification for any such restrictions.

On the flip side, the ALJ also failed to find that this wide spread use demonstrates that communications about "wages, hours

and other terms and conditions of employment” constitutes “business material or activities” within the meaning of the ECP. That is the prohibition in paragraph 9 about “Distributing or storing...other non-business material or activities” cannot apply to all the communications among the employees about “wages, hours and other terms and conditions of employment.” It’s plainly not encompassed within the prohibition because of its wide spread activity.

III. THE ALJ FAILED TO FIND THAT THERE IS NO BUSINESS JUSTIFICATION FOR THE ELECTRONIC COMMUNICATION POLICY

As discussed above, there can be no basis to justify the electronic communication policy because of its wide spread use by all employees to communicate about “wages, hours and other terms and conditions so employment.” As a result, the ALJ failed to make findings at various points in her Decision that would reflect the absence of such a business justification. Similarly, she failed at those points to make the appropriate findings that use of electronic communication equipment including email is business related and thus “business material or activities” within the meaning of the ECP. See Cr-Ex. 3, 5, 8, 9, 11, 13, 14, 17, 23, 24, 27, 29, 30, 31, 33, 39, 40, 45, 48, 50, 57 and 60. It is noteworthy to point out that Purple does not contest this in its Exceptions.

Its Brief argues that any Board order would violate the First Amendment, See Brief in Support of Exceptions p 14-15. Purple must have recognized that it allows widespread use so it retreats to the First Amendment argument only.

The ALJ failed to find that the Union is an organization “with [a] professional or business affiliation with the Company” pursuant to the ECP. Cr.-Ex. 13. Had she made that finding the ECP would have expressly permitted the employees to communicate during work time about “wages, hours and other terms and conditions of employment” as well as about the Union. They could have even communicated with the Union since it is an “organization[] or person[] with [a] professional or business affiliation with the Company.” Purple has not contested this.¹

IV. **THE ALJ FAILED TO FIND THAT COMMUNICATIONS TO OR ABOUT THE CHARGING PARTY OR ABOUT “WAGES, HOURS AND OTHER CONDITIONS OF EMPLOYMENT” ARE NOT PROHIBITED BY THE ECP**

The ALJ failed to find that the Union, the Charging Party” has a “professional or business affiliation with the Company” and thus all communications with it or about it are not prohibited by the ECP. Cr-Ex. 3, 5, 11, 12, 13, 14, 27, 31, 39, 40, 48 and 57. See ECP which prohibits “Engaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company.” The Union undoubtedly has such a relationship with the company. The Board certification at the facilities at various locations proves it with the issuance of the certification. Even in an organizing effort there is a relationship encompassed within the ECP which allows use of electronic equipment. Thus all communications about “wages, hour and other terms and conditions of employment” are not prohibited by

¹ The Board need not reach the question of whether a union which is organizing the employees would be such an organization.

this provision and indeed are allowed. The use of the email by non-statutory employees to communicate about the Union further demonstrates that such use by all employees, statutory and not, is permitted. The ALJ failed to find anywhere and throughout the Decision that communications to the Charging Party or about the Charging Party or about “wages, hours and other terms and conditions of employment” are activities on behalf of [an] organization[] or person[] with [a] professional or business affiliation with the Company.”

V. **THE ALJ FAILED TO MAKE THE EXPLICIT FINDING THAT USE OF EMAIL BY EMPLOYEES WITH RESPECT TO “WAGES, HOURS AND OTHER TERMS AND CONDITIONS OF EMPLOYMENT” IS SECTION 7 PROTECTED ACTIVITY**

As a corollary to the arguments made above, the ALJ should have found throughout her decision that use of the electronic communication equipment including email is Section 7 protected activity during work time as well as non-work time. See Cr-Ex. 3, 5, 8, 9, 12, 13, 14, 18, 24, 33, 45, 48 as well as the cross-exceptions listed in IV, .V and VII. Each of these cross-exceptions relate to activity described by the ALJ involving communications about “wages, hours and other terms and conditions of employment” among statutory employees and with non-statutory employees which were both concerted and protected. The use serves a legitimate business purpose because employees have to communicate about “wages, hours and other terms and conditions of employment.” Such communication between employees is surely concerted and protected. See Brief in Support of Cross-exceptions p 1-4.”

We quote further from the Answer Brief to the Exceptions of the Employer:

- VI. COMMUNICATIONS IN ELECTRONIC FORMAT OR BY VOICE OR IN WRITING THAT CONCERN WAGES, HOURS, AND OTHER TERMS AND CONDITIONS OF EMPLOYMENT ARE CORE PROTECTED CONCERTED ACTIVITY AND SERVE A BUSINESS PURPOSE**
- A. THE RULE AT ISSUE ALLOWS COMMUNICATIONS AMONG EMPLOYEES ABOUT “WAGES, HOURS AND OTHER TERMS AND CONDITIONS OF EMPLOYMENT”**

The rule that is at issue is as follows:

INTERNET, INTRANET, VOICEMAIL AND ELECTRONIC COMMUNICATION POLICY

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:

1. 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
9. Distributing or storing chain letter, jokes, solicitations or offers to buy or sell goods or other non-business material or activities.

Jt. Exh. 24 and GC Exh. 2 at 30-31.

In considering what is at issue, there are two phrases that are particularly important.

First, the rule contains a prohibition against “distributing or storing . . . other non-business material or activities.” As we will show, the employer treats communications about “wages, hours and other terms and conditions of employment” as “business

material or activities.”² Thus, the rule as written can reasonably be read as not to prohibit such communications among employees, even if that communication is adverse to the employer or even potentially disruptive to the employer. It is all part of Section 7 activities, which are permitted because it related to the business material or activities.

The second phrase at issue is “Engaging in activities on behalf of organizations or persons with no professional or business affiliation with the Company.” The question is whether the rule can be reasonably interpreted to allow “activities on behalf of organizations or persons with [a] professional or business affiliation with the Company,” which includes the Union, which is the legally recognized representative of the employees. It has both a “professional [and] business affiliation with the Company.” Thus, activities and communications with the Union are expressly permitted by the rule.³

We believe that, under the Board’s decision in *Boeing Co.*, 365 NLRB No. 154 (2017), Purple’s rule serves a reasonable business purpose because it allows employees to communicate

² The rule is unclear because of its grammar. The word “Distributing” modifies the last word “activities.” That makes no sense. Where the word “Distributing” modifies the phrase “non-business material,” this refers to attachments and not text such as emails, as was reflected in the many emails exchanged in this case. Thus, the phrase “non-business material” does not limit the text of email messages, only “material,” meaning attachments. Purple never offered any explanation of this ambiguity in its rule.

³ Purple never asserted at any time that communications with or about the union were “personal” and thus prohibited under the rule. Indeed, such a claim would have been demonstrably false since Purple allowed so much communication about the union. The Board should thus specifically note that personal use, which has nothing to do with “wages, hours and other terms and conditions of employment,” is not at issue. And further that communications about “wages, hours and other terms and conditions of employment” is not personal.

with the Union, which, at this point, has a relationship within the meaning of the rule.⁴ Secondly, the rule permits communications about “business materials or activities,” which encompasses communication about “wages, hours and other terms and conditions of employment.” Non-statutory employees, consisting of management and supervisors, certainly communicated about “wages, hours and other terms and conditions of employment,” so the rule allows Section 7 activity consisting of communication during work time. The rule is not limited to work time, so it allows use during non-work time.

Although the record does not demonstrate use by management of electronic equipment to “engag[e] in activities on behalf of organizations or persons with no professional or business affiliation with the company,” it is not necessary to show that because the Union has a “professional or business affiliation with the Company”; activities and communications are expressly permitted. Presumably, non-statutory employees communicate with organizations or persons with whom the company expects or hopes to have such a “professional or business affiliation with the company.” Business development requires it. Such communications would not be a violation of the rule. Likewise, organizing fits within the same framework because employees are trying to establish an affiliation, which is professional or business related, with the Union.

⁴ The fact that the contract expressly authorizes stewards who are employees supports the idea that the Union has a business affiliation with Purple.

The problem with Purple is that it takes the unlawful position that neither rule would allow communications with the Union. See ALJD at 10-12; Complaint at ¶5(a)-(d). See discussion below.

B. EMPLOYERS AND EMPLOYEES COMMUNICATE ABOUT WORKING CONDITIONS THROUGH VARIOUS MEDIA, INCLUDING EMAIL, AND THE COMMUNICATION INVOLVES BUSINESS INFORMATION

Here, it is undisputed that many of the unfair labor practices were committed through electronic communications, primarily email. There are other examples, for example, the use of Facebook. Email was used for the distribution of material (e.g., pictures through email or other electronic means).

The following exhibits reflected emails: Jt. Exh. 11; Jt. Exh. 6; Jt. Exh. 37; Jt. Exh. 68-70; Jt. Exh. 72-73; Jt. Exh. 82, Jt. Exh. 87-90. See also GC Exh. 14 at 519 and 520; GC Exh. 6; GC Exh. 1(qqqq); GC Exh. 26-27; GC Exh. 58; GC Exh. 91-92; GC Exh. 95-96.

Text messages are reflected at Jt. Exh. 15. Video conference was used. ALJD at 67, 69.

There is no dispute, moreover, that many of these emails and other electronic communications were originated by management to employees. Other emails were originated by employees among employees or in response to emails from management. Thus, this employer uses the email system to communicate with its employees.

This company is not unique, and email is a central part of its business model and functions. Its VIs communicate with

clients. There are many remote centers, so they have to communicate among the centers or with headquarters through the use of email. Calls are routed through a central call routing mechanism. All in all, electronic communications and, in particular, emails are a central part of communications about all issues or business activities, including “wages, hours and other terms and conditions of employment.”

The record, moreover, clearly establishes, as reflected above, that many of these communications are about the Union, organizing and, in general, communications about protected concerted activity concerning “wages, hours and other terms and conditions of employment.”

The rule does not prohibit communications with “organizations or persons with no professional or business affiliation . . .” it prohibits only “activities on behalf of” such organizations or persons. Furthermore, the rule permits activities on behalf of those that have a “professional business affiliation with the Company.” It is undisputed that the Union has such a relationship and, therefore, this rule cannot reasonably be read to prohibit such activities, including communication.

If this Board, however, wants to read the rule not to allow activities, including communications with the Union, because, for some reason, the Union’s relationship is allegedly neither “professional” nor “business,” then the Board will be ignoring the plain meaning of these words. Purple, moreover, has made no record of any business reason to impose such a limit. Thus, in summary, the rule allows employees to “engag[e] in activities on

behalf of [the Union]” because the Union has a “professional or business affiliation with the Company.” This, of course, includes communications, solicitation or distribution of literature during work time or non-work time because it is expressly permitted by the rule when employees use electronic communications, including email.

C. THE BOARD CANNOT AVOID THIS RECORD IN WHICH EMAIL IS A CENTRAL MEANS FOR COMMUNICATION

The Board cannot avoid this record in which email is a central means for communication and business activities. That communication includes communication regarding “wages, hours or other terms and conditions of employment” between employees and among non-statutory employees and statutory employees. It is encouraged and it is a central part of this employer’s business. This is the record the Board is presented with.

The Board has a far better record in this case than it did in the earlier *Purple* case about employee use and employer use of email. The record firmly establishes that employees are granted access to the email system and use it during work hours to communicate about “wages, hours and other terms and conditions of employment.” Those communications are often concerted and certainly always protected.

Thus, *Purple Communications* was too narrow. The Board majority held that once employees are allowed access to email (and impliedly other electronic communication systems), they should be allowed to use it during non-work time. *Purple* doesn’t restrict the right of employees to use their email during non-work time. None

of the rules suggest that employees can't use their email for various purposes at all times including for protected concerted activities.

It is, however, clear that during non-work time they can use it to communicate about “business material or activities” within the meaning of the rule, which includes “wages, hours and other terms and conditions of employment.” They can communicate to and about the Union and engage in activities on behalf of the Union because there is a “professional or business affiliation with the Company.”

The ALJ found, however, that Purple invoked the policy to limit what it permitted. See Complaint ¶ 5(a), ¶ 5(b) and ¶ 5(cc); ALJD at 10:27-11:28. See also Complaint ¶ 5(d); ALJD at 12:1-30. Purple tortured the rule so the violations occurred. But none-the-less, the rule supports a broader interpretation in this case of *Purple Communications*. The record then establishes that except for the instances of unlawful restrictions on use of email, the rule permits the kind of activity that Purple Communications only would allow during non-work time. Certainly, the Board cannot restrict Purple's rights to allow employees to use email and other electronic communications systems to communicate about “wages, hours and other terms and conditions of employment” and to do so concertedly. To impose a contrary rule would likely violate the First Amendment rights of Purple and the employees.

D. CONCLUSION

For these reasons, the Board must hold that, where an entity like Purple grants employees access to email and other electronic

communication systems during work time, the employees must be allowed to communicate about “wages, hours and other terms and conditions of employment” even if that communication is among themselves and critical of the employer. Employees can use the electronic communication systems for organizing purposes. If the employer chooses not to grant them access to email or other electronic devices, then they don’t have access to that form of communication. Here, because the nature of the business requires email use, the rules must read reasonably to allow such use for protected concerted activity. Furthermore, in light of *Boeing*, Purple has not established a business justification to limit use of electronic devices since the employer consistently uses such devices including email for communication about “wages, hours, and other terms and conditions of employment.” We believe this is true of all employers who use email and this undercuts any limit on use during non-work time or work time.

Given this record, there is no basis on which Purple can now restrict the use of email. If it uses email to communicate about wages, hours and working conditions and allows employees to do so, any restrictions that it would impose would be contrary to its expressed business use and business purpose. A remand is unnecessary because the Board can take administrative notice in this case as it did in the *Caesar’s* case of the record referred to above.

Additionally, remand is inappropriate since the other case is pending before the Board and the same issues are in that case regarding email. Purple asserted in that case that it could restrict email, but the record establishes as the briefing does in that case that email was used on an unrestricted basis.

Rather than remand, the cases should be consolidated and the Board should rely on the record in the other case. The Record in the other case is irrefutable of the wide-spread use of

email to communicate about wages, hours and working conditions. Any other action invites inconsistent decisions. We recognize that this puts the current Board (three members and vacant and vacant) in a difficult position. The record in the later Purple case makes it impossible to apply *Ceasars*. A better course to avoid the embarrassment would be to take no action, wait for President Biden to appoint the Board majority and then they can straighten this out.

In the alternative, if the Board should determine that remand is appropriate, the Administrative Law Judge should be directed to take administrative notice of that record and to allow evidence with respect to the issue of whether there is any business justification for any Purple rule that is at issue.

For these reasons the Board should decide the case and determine if the Employer's rule cannot be enforced because the Employer ignores it and allows repeated, consistent, constant, authorized and unrestricted use of the email, or, in the alternative, this matter should be remanded to the Administrative Law Judge to take administrative notice of the related case and take further action as suggested or the Board can take no action and wait for President Biden to appoint a Board which respects the rights of workers.

Dated: July 6, 2020

Organize and Resist!

Respectfully Submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: /s/ David A. Rosenfeld
 DAVID A. ROSENFELD

Attorneys for Charging Party/Petitioner
COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO

PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On July 6, 2020, I served the following documents in the manner described below:

RESPONSE TO NOTICE TO SHOW CAUSE

- (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld’s electronic mail system from rfortier-bourne@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

Mr. Robert J. Kane
Mr. Stuart Kane
Stuart Kane LLP
620 Newport Center Drive, Suite 200
Newport Beach, CA 92660
rkane@stuartkane.com
skane@stuartkane.com

Ms. Olivia Garcia
National Labor Relations Board, Region 21
888 South Figueroa Street, 9th Floor
Los Angeles, CA 90017
olivia.garcia@nlrb.gov

Ms. Cecelia Valentine
National Labor Relations Board, Region 21
888 South Figueroa Street, 9th Floor
Los Angeles, CA 90017-5449
cecelia.valentine@nlrb.gov

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 6, 2020, at Alameda, California.

/s/ Rhonda Fortier-Bourne
Rhonda Fortier-Bourne

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