

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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PURPLE COMMUNICATIONS, INC.	)		
	)		
Employer,	)		
	)		
and	)	Case Nos.	21-CA-095151
	)		21-RC-091531
COMMUNICATIONS WORKERS OF	)		21-RC-091584
AMERICA, AFL-CIO,	)		
	)		
Charging Party.	)		
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_____	)		
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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. An administrative law judge (“ALJ”) found that Purple violated Section 8(a)(1) of the NLRA for merely maintaining the rule. The General Counsel agrees that any challenge to this rule is foreclosed by *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, 368 N.L.R.B. No. 143 (2019). See *Purple Communications*, 28-CA-179794 (Mar. 20, 2020). Accordingly, the ALJ’s 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. Each call center is staffed with video relay interpreters who provide real-time sign language interpretation for hearing-impaired persons to communicate with hearing callers. From individual, side-by-side workstations, interpreters 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 are 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 are free to remain at their workstations or congregate in the break room. Purple provides interpreters a union bulletin board in the break room on which they can prominently display announcements about the terms and conditions of their employment.

Purple assigns an email account to each interpreter, which the interpreters access from the

computers at their workstations. Management uses 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 2012, the Communication Workers of America, AFL-CIO (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 21 then issued a complaint alleging virtually the same charge. A divided Board in *Purple Communications, Inc.*, 361 N.L.R.B. 1050 (2014) (*Purple I*) 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. Based on this new legal standard, the Board found that Purple violated Section 8(a)(1) by maintaining the policy. Both Purple and the Union petitioned for review, ultimately landing in the United States Court of Appeals for the

Ninth Circuit.

While *Purple I* was pending at the Ninth Circuit, in 2016, the Union filed a second charge alleging that Purple violated the NLRA by continuing to maintain the same policy. The Regional Director for Region 28 issued a complaint alleging that the policy violated Section 8(a)(1). An ALJ agreed, and Purple filed exceptions. See *Purple Communications, Inc.*, 28-CA-179794 (“*Purple II*”).

Meanwhile, in *Caesars*, the Board overruled *Purple I*, 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. On February 27, 2020, the Ninth Circuit remanded *Purple I* to the Board to apply *Caesars* to the challenged policy.

On February 28, 2020, the Board issued a Notice to Show Cause why allegations in *Purple II* should not be remanded to an ALJ. On March 30, 2020, Purple and the General Counsel filed response briefs arguing that remand would be unnecessary because *Caesars* forecloses further prosecution of the policy.

## ARGUMENT

*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 *Purple II*, 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 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.’” (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 8; *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 10-12. 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.

### **CONCLUSION**

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

Dated: July 6, 2020

Respectfully submitted,  
AKIN GUMP STRAUSS HAUER & FELD LLP

By /s/ James Crowley

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 6th day of July, 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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