

LAW AT THE SPEED OF DIAL UP: THE NEED FOR A CLEAR
STANDARD FOR EMPLOYEE USE OF EMPLOYER-PROVIDED
EMAIL SYSTEMS THAT WILL WITHSTAND CHANGING
TECHNOLOGY

*Jeffrey S. Bosley & Taylor Ball**

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ABSTRACT

In 2007, the National Labor Relations Board adopted two clear rules concerning employee use of employer-provided email in Guard Publishing Co.: First, the Board held that employers were not required to allow employees to use employer-provided email to engage in protected activity pursuant to section 7 of the National Labor Relations Act; second, the Board held that if an employer allowed employees to use its email system for non-work purposes, it could still lawfully adopt and enforce non-discriminatory rules that restricted otherwise protected activity. In 2014, the Board reversed this precedent in Purple Communications, Inc., and held that employees have a presumptive right to use an employer's email system to engage in protected activity on non-working time if they are provided access to email for work-related purposes.

This article analyzes the conflicting guidance provided by Guard Publishing Co. and Purple Communications, Inc. against the broader context of prior precedent concerning employer property rights. By highlighting numerous

* Jeff Bosley is a partner in the San Francisco office of Davis Wright Tremaine LLP, and Taylor Ball is counsel in the firm's Seattle office. Both advise clients in labor and employment matters, and Mr. Bosley briefed and argued *Guard Publishing* as amicus counsel before the National Labor Relations Board.

unanswered questions left open by the Board’s analysis in Purple Communications, Inc., this article advocates for the Board to reevaluate its position on employee use of company technology resources, including email, and to adopt a new framework that can readily and predictably be applied to new and developing technologies.

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INTRODUCTION

In 2007, more than ten years after email became common in many workplaces, the National Labor Relations Board (“NLRB” or “the Board”) first addressed whether employers must allow employees to use employer-provided email systems to engage in activity protected by Section 7 of the National Labor Relations Act (“NLRA” or “the Act”)¹. In *Guard Publishing Co.*, the Board held employers did not have to allow employees unfettered access to employer-provided email, and could restrict employee email use to

¹ 29 U.S.C. § 157 (2012).

solely business purposes.² If an employer did allow its employees to use an email system for limited purposes that were not work-related, then the employer could not discriminate between uses protected by the Act. The Board's approach was consistent with its prior decisions concerning other employer equipment, such as phones and bulletin boards.³

In 2014, a newly comprised Board overruled its prior holding. In *Purple Communications, Inc.*, the Board held employees have a presumptive right to use an employer's email system to engage in protected activity if they are provided access to email for work-related purposes. The Board went on to state that they would have to revisit whether similar access should be granted to other types of employer-provided equipment in the future.⁴

Email remains a popular tool for employees to communicate and accomplish tasks in the workplace despite the proliferation of new technologies such as electronic messaging systems and social media platforms. These new technologies compete for employee attention, affect employee safety and productivity, and raise data security concerns. Unfortunately, the Board's *Purple Communications* decision leaves many questions unanswered about the extent of an employer's property rights concerning these new (and even some old) technology tools. Employers must now navigate an uncertain legal framework when regulating use of employer-provided technology. This article discusses why *Purple Communications* creates an unworkable standard and gives inadequate deference to the Board's prior precedent and employer property rights, and proposes a new framework that need not be revisited each time a new technology is adopted.

I. PROTECTED ACTIVITY UNDER THE NATIONAL LABOR RELATIONS ACT

Congress enacted the Act in 1935. Section 7 of the Act guarantees private-sector employees "the right to self-organization,

² *Guard Publ'g Co.*, 351 N.L.R.B. 1110, *1116 (2007), *overruled by Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126 (2014).

³ *See, e.g., Mid-Mountain Foods, Inc.*, 332 N.L.R.B. 229, 230 (2000).

⁴ *Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126 at 75–6 (2014).

to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”⁵ Over time, Section 7 has been interpreted to protect employee communication about unionization and other terms and conditions of employment,⁶ including working hours, pay, discipline, and safety issues.

The right to engage in protected activity is not without limits. Over the past eighty years, the Board has wrestled with balancing the “undisputed” rights of employees to engage in activity protected by Section 7, against the “equally undisputed” rights of employers to maintain discipline and productivity in the workplace.⁷ The Supreme Court succinctly explained the Board’s task as follows: “Accommodation between [employee-organization rights and employer-property rights] must be obtained with as little destruction of one as is consistent with the maintenance of the other.”⁸

Applying this principle of accommodation, the Board has developed a series of presumptions regarding employer rules that seek to restrict protected activity by employees on employer property. In *Republic Aviation*, the Supreme Court enforced a decision by the Board invalidating an employer rule prohibiting employees from engaging in oral solicitation on company property, even during non-working time.⁹ Since *Republic Aviation*, the Board has consistently recognized that employers may lawfully limit solicitation during working time because of potential interference with productivity.¹⁰ However, the Board narrowly defines the term “solicitation,” limiting it to something more than brief discussions about union organizing, such as a request to sign an authorization card.¹¹ Restrictions on solicitation activity during

⁵ 29 U.S.C. § 157.

⁶ *E.g.*, *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945).

⁷ *Republic Aviation Corp.*, 324 U.S. at 797–798.

⁸ *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

⁹ *Republic Aviation Corp.*, 324 U.S. at 802.

¹⁰ *See, e.g.*, *Conagra Foods, Inc.*, 361 N.L.R.B. No. 113 at 7–8 (2014).

¹¹ *See id.* at 8–9.

non-working time are unlawful, regardless of whether the solicitation occurs in a working area or break facilities.¹²

The Board strikes a different balance with the distribution of literature, such as flyers, letters or other written materials. The Board has held that employers must allow distribution of materials by employees in non-working areas on non-working time.¹³ However, due to concerns about litter and employee distraction (especially in manufacturing environments), employer restrictions on distribution in working areas on non-working time are presumptively lawful.¹⁴

In its attempt to balance employee and employer rights, the Board has also developed specific rules concerning use of employer equipment.¹⁵ Until 2014, employers could lawfully prohibit the use of all employer equipment for non-work-related purposes, including solicitation or distribution. Employer equipment included copiers, phones, bulletin boards, and, until 2014, electronic resources, such as internet access and employer-provided email.

Just as access to employer property has been the subject of frequent Board litigation, so has the scope of such access.¹⁶ The majority held in *Guard Publishing* that an employer could restrict use of its systems for protected activity, as long as it did not allow personal use of a similar nature in its systems.¹⁷ For example, if an employer allowed employees to post notices on behalf of charitable or religious organizations on its bulletin boards, prohibit postings for unions would be discriminatory and unlawful.¹⁸ As described below, in 2014, the NLRB revisited this distinction, as well as its holdings concerning employer equipment.

¹² See *Republic Aviation Corp.*, 324 U.S. at 802.

¹³ *Stoddard Quirk Mfg. Co.*, 138 N.L.R.B. 615, 621 (1962)

¹⁴ *Id.* at 643 n.12.

¹⁵ *Container Corp. of Am.*, 244 N.L.R.B. 318, 318 n.2 (1979).

¹⁶ See *NLRB v. Honeywell, Inc.*, 722 F.2d 405 (8th Cir. 1983); *E.I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893 (1993).

¹⁷ *Guard Publ'g Co.*, 351 N.L.R.B. at 1121.

¹⁸ See, e.g., *Fleming Cos.v. NLRB*, 349 F.3d 968, 975 (7th Cir. 2003); *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 321–322 (7th Cir. 1995).

II. THE BOARD'S *GUARD PUBLISHING* DECISION

In *Guard Publishing*, the NLRB held in a 3-2 decision that employees do not have a statutory right to use their employer's email system for activities protected by Section 7. Therefore, an employer did not violate Section 8(a)(1) of the National Labor Relations Act by maintaining a work rule that prohibited employees from using company email for all "non-job-related solicitations."¹⁹ Instead, and consistent with its prior decisions concerning employer equipment, the Board held an employer violated the Act only if it discriminatorily enforced an otherwise neutral email policy against union-related emails while allowing non-job-related personal emails.²⁰

In *Guard Publishing*, the employer published The Register-Guard, a daily newspaper with circulation in the Eugene, Oregon area.²¹ Approximately 150 employees in various departments, including reporters, photographers, copy editors, secretaries, and advertising department employees, were represented by a Union, the Eugene Newspaper Guild, CWA Local 37194, AFL-CIO ("Union").²² The employer began installing a computer and information system at its facility in March 1996, and fully implemented the system, including internet and e-mail capability in 1997.²³ The employer adopted a communications policy that applied to use of its enhanced communications system, including use of telephones, message machines, computers, fax machines, photocopy machines, internet, and emails.²⁴ The policy specifically prohibited employees from using the employer's communications systems, including email, for commercial ventures, religious or political causes, outside organizations, and other non-job-related solicitations.²⁵ After the employer disciplined an employee for

¹⁹ *Guard Publ'g Co.*, 351 N.L.R.B. 1110 (2007), *enforced*, 571 F.3d 53 (D.C. Cir. 2009).

²⁰ *Id.* at *1119.

²¹ *Id.* at *1133.

²² *Id.*

²³ *Id.*

²⁴ *Guard Publ'g Co.*, 351 N.L.R.B. at *1133.

²⁵ *Id.*

using company email to send out union related emails to coworkers, the Union filed an unfair labor practice charge with the Board, alleging that the employer's policy, and its enforcement of it, violated the Act.²⁶ The case was one of first impression for the Board, and attracted numerous amicus briefs from labor groups, employee rights groups, and employer groups.²⁷

The General Counsel for the Board, the Union, and other employee rights groups, argued that the law should treat email differently than other equipment because email created a "gathering place" for communications on work and non-work issues.²⁸ Unlike other types of equipment, email was interactive and allowed thousands of communications to occur simultaneously. Granting an employee access to an email system, the General Counsel argued, was similar to allowing an employee to enter an employer's property (including break rooms) and engage in solicitation.²⁹ The General Counsel further argued the Board should evaluate limitations on employees' use of email the same way that it evaluates rules limiting employee communications in the physical workplace. Specifically, the General Counsel urged the Board to hold that an employer's ban on employee use of email during non-work hours was presumptively unlawful because such a ban would necessarily limit Section 7 communications.³⁰ To overcome this presumption, employers would need to demonstrate special circumstances to justify such a ban. This approach, argued the General Counsel, properly balanced employees' rights with the employer's interest in maintaining discipline. The majority of the Board disagreed, holding that employees have no statutory right to use an employer's email system for Section 7 purposes, and that the

²⁶ *Id.* at *1137.

²⁷ *Id.* at *1115.

²⁸ *Id.* at *1112–13. (The General Counsel is independent from the Board and is responsible for the investigation and prosecution of unfair labor practice cases. The General Counsel also generally supervises the NLRB field offices in the processing of cases).

²⁹ *Guard Publ'g Co.*, 351 N.L.R.B. at *1112–13.

³⁰ *Id.*

employer did not discriminate against email use along Section 7 lines.³¹

Employers welcomed the decision, believing it provided them an unambiguous, workable test to apply when drafting and enforcing email policies (and access to their systems moving forward).³²

III. NEW BOARD, A DIFFERENT BALANCE: *PURPLE COMMUNICATIONS* REVERSES *GUARD PUBLISHING*

Seven years after *Guard Publishing*, the Board reversed course, holding that employees possess a statutory right to use their employer's email systems for Section 7 purposes.³³ Accordingly, employers who give employees access to their email systems must permit employees to use email for statutorily protected communications during non-working time. The Board held employer policies preventing employees from using email on non-working time are presumptively unlawful—even if the policy does not discriminate between union-related communications and other personal or non-work-related use.³⁴

Purple Communications provided communications services for deaf and hard of hearing individuals.³⁵ Its primary service was sign language interpretation during video calls. Video relay interpreters facilitated communication between a hearing party and deaf party by interpreting spoken language into sign language and vice-versa.³⁶ The video relay interpreters used company-provided computers to perform their jobs. These computers provided access to the employer's intranet system and various work programs, but

³¹ *Id.* at *1116.

³² The Union challenged the Board's finding that the employer did not discriminatorily enforce its e-mail policy against union activity. The D.C. Circuit Court of Appeals concluded that the evidence did not support the Board's determination and remanded for further proceedings on that issue and that issue alone. *Guard Publ'g Co. v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009).

³³ *Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126 (2014).

³⁴ *Id.* at 14.

³⁵ *Id.* at 8.

³⁶ *Id.*

had limited, if any, access to the internet and non-work programs.³⁷ The employer provided employees with an email account, which was used by employees and managers alike to communicate with each other.³⁸ The employer maintained a policy that prohibited employees from using the company's computers, internet, voicemail, and email systems to engage in activities on behalf of organizations that did not have a professional or business affiliation with the company. The policy also prohibited employees from sending uninvited personal emails.³⁹

In November 2012, the Communications Workers of America ("CWA") held representation elections at two of the employer's facilities.⁴⁰ After CWA lost both elections, it filed an unfair labor practices claim, alleging that the employer had unlawfully interfered with employees' rights to engage in concerted activity. Specifically, CWA alleged that the employer's policy prohibiting the use of its equipment for anything other than business purposes violated the Act.⁴¹

Examining the CWA's claims, the Board adopted a new analytical framework for evaluating employees' use of an employer's email systems, holding email had effectively become a "natural gathering place," pervasively used for employee-to-employee conversations.⁴² Given the extensive and pervasive use of email in the workplace, the Board held it should be treated differently than other types of workplace equipment. Unlike bulletin boards with a finite amount of space or copy machines that could become backed up with heavy usage, the Board found email's flexibility and capacity made competing demands on its use considerably less of an issue than with earlier forms of communications equipment.⁴³ The Board further determined that employee email use would rarely interfere with other's use of the

³⁷ *Id.* at 9.

³⁸ *Id.* at 9–10.

³⁹ *Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126 at 9.

⁴⁰ *Id.* at 10.

⁴¹ *Id.*

⁴² *Id.* at 33.

⁴³ *Id.* at 37.

email system or add significant incremental usage costs.⁴⁴ Email was neither solicitation nor distribution and the Board found it unnecessary to characterize email systems as a work or non-work area. Email was simply “communication” and an employer’s email system amounted to a mixed-use area. The Board required that employers allow employees to use company email to engage in Section 7 activity during non-work hours.⁴⁵

A. *The Purple Communications Decision Disregards Employer Property Rights*

The Board’s analysis concerning employee use of employer provided email effectively ignores the legitimacy of employer property rights and entrepreneurial control recognized by the Board in *Republic Aviation*. Although the Board majority in *Purple Communications* claimed to reaffirm the principles first set forth in *Republic Aviation*, the Board’s decision is inconsistent with decades of precedent concerning employer-provided equipment.

An employer-provided email system, first and foremost, is a piece of equipment, and the Board should have treated it as such. The employer bears the cost of developing, operating, and maintaining the system. Similarly, the employer alone bears the risk of loss when the system goes down. Significant costs arise in providing email:

- An hour of email downtime costs, on average, \$100,000, with some companies reporting costs of \$1 million to over \$5 million per hour of downtime.⁴⁶
- Osterman Research, a Washington State based market research firm, estimates the initial cost of developing an

⁴⁴ *Purple Commc’ns, Inc.*, 361 N.L.R.B. No. 126 at 37.

⁴⁵ *Id.* at 61–62. (The employer appealed the Board’s decision to the Ninth Circuit. The appeal is pending.)

⁴⁶ *Cost of Hourly Downtime Soars: 81% of Enterprises Say it Exceeds \$300k On Average*, INFORMATION TECHNOLOGY INTELLIGENCE CONSULTING (August 2, 2016, 5:43 PM), <http://itic-corp.com/blog/2016/08/cost-of-hourly-downtime-soars-81-of-enterprises-say-it-exceeds-300k-on-average/>.

email system is several hundred dollars per user with the ongoing costs of \$10-\$50 per user per month depending on the size of the organization.⁴⁷

- Computer Economics, an IT research firm, estimated that in 2006 computer malware cost companies in excess of \$13 billion due to data loss, system crashes, diminished corporate credibility, increased IT costs, and lost productivity.⁴⁸

Additionally, email is a productivity tool. As the Board recognized in *Purple Communications*, 96% of employees use internet, email, or mobile devices to connect them to work and 89% of employees spend an hour or more on email during the weekday.⁴⁹ Collectively, North American workers spend nearly 75 billion hours on email every year at a cost of over \$1.7 trillion.⁵⁰ Just as a copier or high speed printer can become backed up by heavy use, massive quantities of unwanted email in the form of spam and bulk mailings can disrupt productivity and slow the employers' system in the process.⁵¹ In addition, unwanted email imposes unnecessary hardware costs and exposes employers to unnecessary risk in the form of fraudulent emails.⁵²

While email remained largely unchanged from 2007 through 2014, options available to employees to engage in protected communications with personal devices grew. Personal email, texts

⁴⁷ *Comparing the Cost of Leading Email Systems*, OSTERMAN RESEARCH (June 2011), https://www.novell.com/docrep/documents/yyufbom4u2/Comparing_the_Cost_of_Leading_Email_Systems.pdf.

⁴⁸ *Annual Worldwide Economics Damages from Malware Exceed \$13 Billion*, COMPUTER ECONOMICS (June 2007), <https://www.computereconomics.com/article.cfm?id=1225>.

⁴⁹ *Purple Commc'ns*, 361 N.L.R.B. No. 126 at 26.

⁵⁰ Graham Winfrey, *The Staggering Cost of Business Email*, INC. (August 29, 2014), <https://www.inc.com/graham-winfrey/the-staggering-cost-of-business-email.html>.

⁵¹ *Intel Corp. v. Hamidi*, 30 Cal. 4th 1342, 1354 (2003).

⁵² Derek E. Bambauer, *Solving the Inbox Paradox: An Information-Based Policy Approach to Unsolicited E-Mail Advertising*, 10 VA. J. L. & TECH. 5, 12 (2005).

on private phones, and even union mobile applications, provide employees with multiple avenues to engage in confidential, protected activity on their personal property, thus minimizing the need to rely on the employer's property for these communications.

In *Purple Communications*, however, the Board ignored these alternative means of communication. These alternative platforms—most of which are free and readily accessible to employees—provide an adequate, if not superior, platform for employee Section 7 communications, and do so with only minimal infringement on employer's property rights. As the Board observed in *Guard Publishing*, Section 7 does not require that employees be provided “the most convenient or most effective means of conducting [protected] communications,” nor does it require employers to provide the equipment for employees to do so.⁵³ In *Purple Communications*, the Board abandoned this critical element of the balancing test of employer versus employee rights. As Member Miscimarra noted in dissent:

This new right will wreak havoc on the enforcement of one of the oldest, clearest, most easily applied of the NLRB's standards—‘working time is for work.’ The majority's new right – combined with the nature of email and computer usage in most workplaces – will make it all but impossible to determine whether or what communications violate lawful restrictions against solicitation during working time. The resulting confusion will be out of all proportion to whatever benefit the new standard might yield for NLRA-protected concerted activities.⁵⁴

⁵³ *Guard Publ'g Co.*, 351 N.L.R.B. at *1115.

⁵⁴ *Purple Commuc's*, 361 N.L.R.B. No. 126 at 83 (Member Miscimarra, dissenting).

*B. Purple Communications Provides No Guidance on How
Employers Can Lawfully Control Employee Email Usage Even
During Working Time*

Simply put, employers are potentially liable for what an employee posts on the Internet.⁵⁵ The Internet and email systems provide fertile ground for employees to engage in online harassment of co-workers and others. Employers must retain authority to monitor employees' electronic conduct to avoid state and federal liability for harassment and defamation. Monitoring obligations also arise under laws governing digital piracy, computer fraud, and Homeland Security. For example, the Computer Fraud and Abuse Act ("CFAA") prohibits knowingly accessing a protected computer and obtaining something of value without authorization.⁵⁶ Courts hold employers liable under CFAA when employees access protected employee or customer information from other entities' computer systems.⁵⁷ Similarly, under the Digital Millennium Copyright Act of 1998, employers potentially have an obligation to ensure that employees are not downloading movies, music, etc. onto company property or distributing them via company email systems.⁵⁸ Employers have a compelling interest in monitoring employee conduct to ensure compliance with these and other laws.

Under the Board's new analytical framework, an employer cannot limit employee access to email for Section 7 purposes during non-working time unless the employer first demonstrates special circumstances necessary to maintain production or discipline.⁵⁹ While employers may apply uniformly enforced regulations over email systems, they can do so only to the extent such controls remain necessary to maintain production and discipline. In addition, employers cannot restrict employee email use to protect interests that are merely theoretical. The Board,

⁵⁵ *Blakey v. Continental Airlines*, 164 N.J. 38, 57 (2000).

⁵⁶ 18 U.S.C. § 1030(4) (2012).

⁵⁷ *Charles Schwab & Co. v. Carter*, No. 04 C 7071, 2005 WL 2369815 at *6 (N.D. Ill. Sep. 27, 2005).

⁵⁸ Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

⁵⁹ *Purple Commuc'ns*, 361 N.L.R.B. No. 126 at 62.

however, does not define “special circumstances,” and its decision provides no guidelines for employers on how to effectively prohibit improper use of employer provided email while still permitting free exchange of Section 7 communications during working time. For example, *Purple Communications* does not make clear whether an employer could adopt an otherwise reasonable rule prohibiting mass distribution of non-business email messages without the employer demonstrating that mass mailings affected productivity. Moreover, if such a rule had a disparate impact on union related communications—because, for example, they tend to be sent to large swaths of employees—it is unclear whether the Board would still permit the rule even in the absence of any evidence that the employer was enforcing the rule in a discriminatory manner.

Absent clear guidance from the Board, employers will continue to struggle to develop email policies that comply with the law. As Member Miscimarra noted in dissent:

[T]he majority today replaces a longstanding rule that was easily understood. In its place, the majority substitutes (i) a presumption giving all employees the right to engage in Section 7 activities using employer email systems to which they otherwise have access, and (ii) unspecified “special circumstances” that, if proven by the employer in after-the-fact Board litigation, will mean employees did not have the majority's presumed statutory “use-of-email” right.⁶⁰

In addition, the Act prohibits employers from engaging in surveillance of their employees’ Section 7 activity or from creating the impression of surveillance. Employers are permitted to lawfully observe public union activity so long as they do not do something “out of the ordinary.”⁶¹ Therefore, the Board in *Purple Communications* held that employers may monitor employees’

⁶⁰ *Purple Commuc's*, 361 N.L.R.B. No. 126 at 84.

⁶¹ *Sands Hotel, San Juan*, 306 N.L.R.B. 172 (1992), *enforced*, 993 F.2d 913 (D.C. Cir. 1993).

electronic communications for legitimate management reasons, so long as the employer does nothing out of the ordinary, such as intentionally increasing or focusing its monitoring in response to Section 7 activity. The Board did not, however, define what constituted a legitimate management reason. The Board also declined to explain whether a blanket email monitoring policy, or even an email monitoring policy that focused solely on non-work-related email, would create the impression of surveillance. The absence of clear guidance on these issues exposes employers to liability for enforcing the longstanding rule that working time is for work. If an employer allows employees to use email for protected activities, but still seeks to limit other, non-protected personal use, such as online shopping or fantasy sports, how does the employer lawfully monitor compliance with this policy? The Board does not answer this question. Instead, the Board posits that surveillance allegations involving employer provided email would be assessed using the same standards that the Board applied in the brick-and-mortar world.

In contrast to the inherent invitation in *Purple Communications* to litigate the lawfulness of future restrictions and monitoring of email use, the Board's holding in *Guard Publishing* provided employers with a straightforward and workable rule on how to manage employee use of email and the Internet. After *Guard Publishing*, employers had two options: they could either outright prohibit employees from using email for personal use, or they could allow personal use of email, so long as they did not limit or restrict employee use of that email in a discriminatory manner against union activity. While some employers attempted to prevent abuse of company systems by prohibiting all personal use of email and Internet access, such policies often proved unworkable for practical reasons. Employers retained little incentive to commit the resources necessary to monitor when employees sent or received personal emails, much less discipline them for doing so. In addition, most companies in today's workplace could not realistically attract and retain employees without permitting reasonable use of email and the Internet. More often than not, employers choose to adopt reasonable rules limiting email to narrowly address particular problems, and took the necessary steps to ensure that the rules did not discriminate against union or other

concerted activity. The Board's decision in *Purple Communications* replaced this clear test with an ambiguous and unworkable one. Again, as Member Miscimarra noted in dissent:

Although the majority's new standards are well intentioned, they are terribly suited to govern this very important area, which can quickly involve thousands of electronic communications even in small workplaces; where the debilitating impact on productivity and discipline will likely become clear only after the fact; and where virtually nobody will really understand--in real time--whether or when particular communications are protected. Many employees will undoubtedly exercise this new right to use their employer's email system to send what they believe are protected nonbusiness communications, only to learn, afterwards, that they face lawful discipline or discharge either because their communications did not constitute Section 7 activity, or the employee's use of email violated a lawful business-only requirement based on the "special circumstances" exceptions created today by the Board majority. For similar reasons, unions and employers are likely to have great difficulty advising employees whether or when they can engage in nonbusiness uses of the employer email systems.⁶²

C. The Board's Decision in Purple Communications is Limited to Email Systems and Will Not be Able to Keep Pace With New Technologies

Not surprisingly, unions and other employee groups frequently use new technology to expand organizing activities and collectively address employment issues. This use of technology goes beyond email communications to include a combination of

⁶² *Purple Commuc's*, 361 N.L.R.B. No. 126 at 83 at 85–86.

social media and Internet portals. Coworker.org provides an online tool for workplace organizing and petitioning for changes in workplace conditions. Although the site was founded by two former employees of the Service Employees International Union—a labor union representing nearly two million workers—the site is not affiliated with any one union.⁶³ The site allows employees to post petitions calling for specific improvements to their jobs and workplaces. Petitions range from calling for changes to employee dress codes, to responding to allegations of retaliation. Other sites in addition to Coworker.org are developing mobile apps specifically designed to help employees organize.⁶⁴

The Board's holding in *Purple Communications* is limited to employer email systems; however, the Board's General Counsel continued to expand the decision's reach.⁶⁵ As a new technology develops, employers will be unsure of the rules concerning access to this new technology. For example, if the employer provides employees with a smartphone, can it prohibit an employee from installing any non-work-related applications on the device? Or will it have to allow an employee to access union organizing applications on the device during non-work time? The Board will have to develop a “new” analytical framework for each unique piece of technology. Ostensibly, this requires the Board to evaluate whether the technology has effectively become a “natural

⁶³ Gwen Moran, *The Website That's Helping Workers Across Industries Organize*, Fast Company (Nov. 3, 2015).

⁶⁴ Cora Lewis, *Labr? An App For Organizing Workers Is Coming*, BUZZFEED NEWS (June 10, 2015, 11:59 AM), https://www.buzzfeed.com/coralewis/digitizing-the-labor-movement-an-app-for-organizing-workers?utm_term=.wuDWWdEpa#.yqpBBL3bn.

⁶⁵ See *Cardinal Financial Company, LP*, N.L.R.B. Div. of Advice, No. 28-CA-175402 (September 16, 2016). On October 31, 2017, the term of General Counsel Richard Griffin expired; Peter Robb was sworn in as General Counsel on November 17, 2017. On December 1, 2017, Robb issued guidance to Regional Directors and other Board personnel concerning cases or issues where he believed presenting an “alternate analysis” to the Board may be appropriate. *NLRB General Counsel Memorandum 18-02* (December 1, 2017), at 2. Robb specifically identified *Purple Communications* as a case where such an alternative analysis should be considered. *Id.* He also stated that the prior General Counsel's initiative to extend *Purple Communications* to other communications systems was “no longer in effect.” *Id.* at 5.

gathering place,” pervasively used for employee-to-employee conversations. As the Board demonstrated in *Purple Communications*, this standard is nebulous.

Email systems became common in many workplaces in the mid-1990s. The Board did not squarely address the question of whether employees had a right to engage in protected activity on employer-provided email systems until more than a decade later. Even then, the Board articulated a standard for employers to follow, then abandoned that standard seven years later. Absent a clear standard like the one articulated by the Board in *Guard Publishing*, employers are left to guess how the Board will treat employee use of future employer-provided technologies. This uncertainty undoubtedly affects employers’ ability to adapt to new technology. As Member Miscimarra observed:

In summary, I believe my colleagues’ newly created statutory right will create significant problems and intractable challenges for employees, unions, employers, and the NLRB. This will mean more work for the National Labor Relations Board and the courts. However, the losers will be parties who must endure years of litigation after the above issues arise (literally) with lightning speed, and then trudge towards resolution at a pace that, by comparison, appears to be standing still.⁶⁶

CONCLUSION

Over twenty years after email has become common in the workplace, the Board’s decision in *Purple Communications* leaves questions unresolved about the extent of an employer’s property rights, and an employer’s ability to control employees’ use of company provided technology in a manner consistent with its productivity goals. Returning to the standard of *Guard Publishing* restores clarity to the issue by providing a clear framework that can be readily applied to developing technology—without repeatedly

⁶⁶ *Purple Commuc’s*, 361 N.L.R.B. No. 126 at 117.

revisiting the issue or disrupting the status quo for both employees and employers in the process.

PRACTICE POINTERS

- The composition of the National Labor Relations Board changes with each new administration and this can result in reversal or significant modification of prior decisions. Before developing or advising on whether an email or other workplace policy complies with the National Labor Relations Act, make sure you are familiar with the most recent developments and holdings of the Board.
- As long as the *Purple Communications* standard remains in place, employers are advised to ensure and restrictions on technology use are carefully drafted and supported by objective evidence to comply with the requirements of *Purple Communications*.
- While *Purple Communications* recognizes that employers will need to monitor system usage, how and who monitors email usage should be carefully considered to preserve system performance and productivity while avoiding claims of discriminatory surveillance or interference with protect activity.
- While a blanket ban on personal use is generally not permissible under *Purple Communications*, the decision does not require that all employees be provided access to email or other technology resources if not necessary to accomplish their job duties. Employers may still limit to whom these resources are offered, and not provide email or other communications resources to employees who do not need them to perform their job duties.

