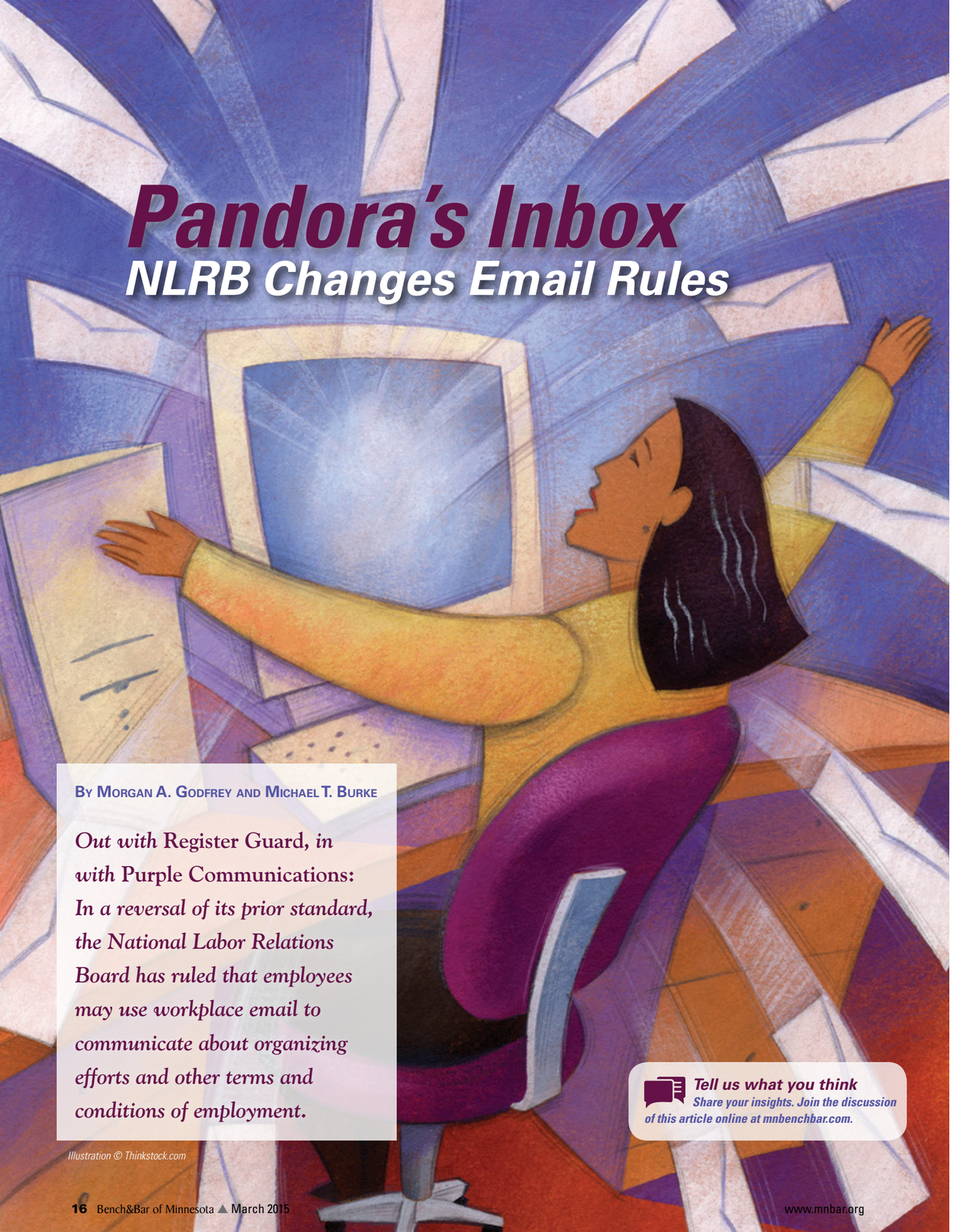

Pandora's Inbox

NLRB Changes Email Rules

By Morgan A. Godfrey and Michael T. Burke

Out with Register Guard, *in with* Purple Communications: *In a reversal of its prior standard, the National Labor Relations Board has ruled that employees may use workplace email to communicate about organizing efforts and other terms and conditions of employment.*

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The National Labor Relations Board's recent decision in *Purple Communications* ushers in a new policy for the workplace in response to the accelerating technological changes of our society, and significantly enhances employees' ability to organize to form unions and engage in concerted activities for the purpose of collective bargaining.[1]

On December 11, 2014, the board issued its decision addressing the narrow question of whether, under Section 7 of the National Labor Relations Act (NLRA), employees have statutorily protected rights to use their employers' email systems for purposes of communicating with one another regarding self-organization and other terms and conditions of employment. The board concluded that employees—who have been granted access to their employers' email systems in the course of the employees' work—enjoy a presumptive right under Section 7 to such use during nonworking time. This remarkable decision is a major shift from the board's previous position that email systems are employer "property" subject to employer regulation. Instead, the board placed an emphasis on employees' Section 7 rights and recognized that employees' pervasive use of employer email systems to share information for a wide range of purposes—including core production goals and other work-related purposes as well as personal matters—conforms with Section 7.

Purple Communications expressly overruled the previous controlling authority of *Register Guard*, a 2007 board decision which held that under ordinary circumstances, employees had no statutory right under the NLRA to use their employer's email system for Section 7 purposes.[2] In overruling *Register Guard*, the board called upon the time-honored framework outlined in *Republic Aviation* to explain its holding.[3] In announcing the presumption that employees may make such use of employer email, the board expressed the position that while society and technology may change, the principles of communication in the work place and the rights of the employee remain the same.[4]

The National Labor Relations Act

Enacted in 1935 as part of President Roosevelt's New Deal legislation, the NLRA—commonly referred to as the Wagner Act—was designed to diminish the causes of labor disputes that had burdened the United States for the previous two centuries.[5] Drafters of the NLRA maintained that the main source of labor conflicts grew from an unequal balance of power between the employees and the employer, with the latter reaping the benefits of a heavily one-sided scale. The drafters concluded that the general welfare of workers, businesses, and "the national interest of the United States to maintain full production of its economy"[6] would be best satisfied by defining and protecting the rights of employees and employers, encouraging collective bargaining, and by eliminating certain harmful practices on the part of labor and management.[7] The NLRA was to level the playing field between the employer and the employee by correcting:

> [I]nequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association, substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.[8]

Section 7 of the NLRA outlines the rights of employees to "self-organization, to form, join, or assist labor organizations, to bargain collectively… and to engage in other concerted activities for the purpose of collective bargaining…."[9] An employer's encroachment on Section 7 rights correspondingly triggers a violation of Section 8(a)(1) of the NLRA, which makes it an unfair labor practice for the employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."[10] Board and case decisions interpreting Section 7 have addressed whether and under what conditions private employers (union shop or not) may regulate organizational activities by employees on and off employer-owned premises.

Section 3 of the NLRA created the National Labor Relations Board, which consists of a five-member panel whose individual members are appointed by the President with the advice and consent of the Senate. Additionally, Section 3 created the position of general counsel, who has the final and independent authority on behalf of the board with respect to the investigation of charges and the issuance of complaints.[11]

If a charge is brought against an employer alleging that a particular employer interfered with the rights its employees, the allegation triggers a process to address whether infractions of Section 7 and Section 8(a)(1) of the NLRA have occurred.[12] The board's regional director is called upon to investigate the charge. If the regional director determines that formal action should be taken, the regional director issues a complaint and notice of hearing, which is then answered by the respondent employer.[13] The matter is then tried before an administrative law judge (ALJ) who will files a decision recommending either: (1) an order to cease and desist from the unfair labor practice and affirmative relief, or (2) dismissal of the complaint. The findings of the ALJ automatically become the decision of the board unless timely exceptions are filed. If timely exceptions are filed, the board will review the ALJ's decision.

By virtue of the power granted to the agency by Congress, the board—as the expert regulatory entity in the field of labor-management relations—is authorized to perform the important task of "identifying the fine line that distinguishes protected from prohibited conduct."[14] When coming to a conclusion one way or the other as to whether an act or incident is protected, the board is to engage in a process of informed decision-making. If the board engages in a process of reasoned and informed decision-making when confronted with a scenario that is within its scope and authority, the decision of the agency can be difficult to overturn, as courts routinely defer to the expertise of the agency when evaluating potential infractions.[15]

With certain exceptions, the board will engage in a balancing test that weighs the undisputed right of the employees to self-organization on the one hand against the necessity of the employer to maintain discipline within its establishment on the other.[16] Review of a final order of the board may be appealed to any United States court of appeals in the circuit wherein the unfair labor practice is alleged to have occurred, or in the United States Court of Appeals for the District of Columbia. Thereafter, review may be sought by certiorari to the U.S. Supreme Court.

Purple Communications

Purple Communications, Inc. provides sign-language interpretation services for individuals who are deaf or hard-of-hearing. In the company's employee handbook, Purple maintained a policy on electronic communications commonly used in private businesses. The policy read:

> 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.[17]

The policy language also prohibited employees from using the company email systems or other company equipment to engage in activities on behalf of other organizations that were unaffiliated with Purple, and further prohibited employees from sending uninvited emails of a personal nature.[18] When the Communication Workers of America (CWA)—a large communications and information technology labor union—ultimately failed in its petition to represent Purple's employees, CWA alleged that Purple's policy on electronic communications was in violation of Section 7 and 8(a)(1) of the NLRA.

The matter proceeded to an administrative law hearing. The presiding ALJ relied on the precedent set in 2007 by the board in *Register Guard* in ruling that Purple's handbook policy was in lawful compliance with the NLRA.[19] The *Register Guard* holding, which declared that employees had no statutory right to use their employers' email systems for Section 7 purposes, rested on two related premises: (1) email systems are the equipment of the employer, and (2) employers are free under the NLRA to ban any non-work use of such equipment by employees.[20]

After the CWA and NLRB's general counsel filed exceptions to the administrative law judge's ruling under *Register Guard*, the matter was brought before the board. Noting that it has been called the "Rip Van Winkle of administrative agencies" by previous board members for being out of touch with present-day issues, the current board seized the opportunity to re-evaluate whether *Register Guard*'s holding is a practical application of the NLRA in light of the high-tech world in which we live.[21]

Stating that national labor policy must be responsive to the enormous technological changes happening in society, the board explicitly overruled *Register Guard* in a 3-2 decision.[22] The board in *Purple Communications* acknowledged the monumental impact of email on 21st century communications, and indicated that due to email's unique qualities it is a miscategorization for email systems to be regarded exclusively as the equipment used for generating electronic property of the employer; according to the board, such a categorization places too much emphasis on employer property rights while undervaluing the central purpose of Section 7. Instead, the majority determined that email systems should be seen as the means of communication that it is.

Coming Full Circle

Ironically, the board reached back to one of its earliest cases on Section 7 rights for guidance on drafting a modern-day framework for email communication. The board called upon the 1945 decision of *Republic Aviation*—a case decided by the U.S. Supreme Court only ten years after the NLRA was enacted—as the starting point for its analysis.

In *Republic Aviation*, the Supreme Court granted certiorari to clear up conflicts between the circuits by hearing two separate cases with a similar topic, the focus of which was the legality of distributing union literature while at the workplace.[23] In the one case, an employee was discharged for continually passing out union cards to other employees during lunch periods and on his own time; the activity was in violation of the employer's general rule that "soliciting of any type was not to be permitted in the factory or offices."[24] In the other case, two employees were suspended for distributing union literature on the employees' own time while on company-owned parking lots.[25]

The *Republic Aviation* court held that rules prohibiting an employee from soliciting union membership—while on his or her own time—on an employer's premises interferes with employee rights under the NLRA and are accordingly invalid. When an employee is off the clock, whether during lunch break or before or after working hours, it "is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property."[26]

However, the court's ruling did not completely compromise the employer's ability to control the work site. The court made note that the NLRA does not prevent employers from making and enforcing reasonable rules while employees are on company time. Certainly, rules that prohibit union solicitation while employees are on the clock are presumed to be valid and enforceable to protect the employer's right to run an effective, stable, and profitable business.[27]

The lasting legacy of *Republic Aviation* stands for the principle that worktime is for working, and the board has continued to consider *Republic Aviation* as the enduring standard for evaluating whether employees' right to engage in Section 7 activity on an employer's real property is legitimate. As long as the conducted activity within the employer's building or on the employer's real estate occurs while the employee is on his or her own time, such activity is normally permissible under the NRLA.

Republic Aviation to Purple Comm

The board in *Purple Communications* noted that there is a distinct difference "between an employer-owned email system . . . and an employer's bricks-and-mortar facility and the land on which it is located,"[28] since email, unlike building materials, cannot be adequately categorized as a physical work area or a non-work area. This is because email is at its core a communicative tool. Email has become "the most pervasive form of communication in the business world," and all indications are that its use will continue to expand for the foreseeable future.[29] With the ability to transmit large amounts of data instantaneously, email has become an essential and preferred instrument for increasing productivity and efficiency in the workplace.[30]

Additionally, email has also become an indispensable means of facilitating communication in our personal lives outside of the office. Personal use of email is "often the fastest and least disruptive way to do a brief personal communication during the work day" and makes addressing the chores of daily life quicker while at the same time decreasing the frequency or amount of time that an employee would take out of the day to properly address and accomplish the same task.[31] Indeed, email is now regarded as such a commonly accepted means of communication that it is virtually inescapable and is deeply enmeshed in individuals' daily routines.

The board agreed with the *Register Guard* dissenters that email systems are distinguishable from the type of employer "equipment" that prior cases held employers could regulate. The board contrasted current email systems—with their ever-increasing transmission speed and capacity—with bulletin boards consisting of a finite amount of space, copy machines which could be backed up by heavy use, or public address systems that could convey only one message at a time.

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Exceptions

Purple, for its part, raised some cogent arguments in opposition to overruling *Register Guard*. These included that employees' access to their personal email accounts and smart phones had increased their collective ability to communicate. Purple was concerned about how it could practically exercise its right to keep non-employees off of its communications systems if employees contacted them. In addition, it argued that the measures and restrictions suggested by the general counsel would not adequately protect Purple's ability to protect confidential information, to prevent computer viruses, and to ensure that worktime is used for work.

The board's response was simple. The employer can still monitor and address legitimate problems. Time will tell whether the problems with capacity, confidentiality, computer viruses, and employees' ability not to miss important work-related communication in the face of increased traffic can be easily addressed.

In reaching its decision, the board acknowledged that email is a fundamental forum for communication. According to the board, email has become the digital water cooler of the modern day office by providing the workforce with a "natural gathering place" for employee-to-employee conversations rather than "property" in the purest sense of the word.[32] The inability to fit email systems into a proverbial box served as the impetus for creating the new *Purple Communications* standard.

Although *Purple Communications* is a groundbreaking decision for employees, and certainly makes it significantly easier for employees to participate and engage in organizational activity during nonwork time, it does not completely abrogate employer control.[33] Employers are still permitted to monitor computers and email systems for legitimate purposes,[34] and can suspend communications if "special circumstances" arise.[35] Large attachments and audio/video recordings may be prohibited if the employer can demonstrate that they would interfere with the email system's efficient functioning. Under some circumstances, an employer may be able to impose a restriction on certain types of email communications if the restriction can be applied uniformly, and the employer can demonstrate the reasonable "connection between the interest it asserts and the restriction" applied.[36]

Conclusion

Whether *Purple Communications* will be appealed remains an open question. For now, the decision represents an about-face from the board's earlier decision in *Register Guard*. Through *Purple Communications*, the board applied the longstanding principles of the NLRA to a medium wholly unforeseen by the Act's drafters. Will the next battle be over the scope of email monitoring? Stay tuned. ▲

Notes

1 *Purple Commc'ns, Inc.*, 361 NLRB No. 126. (Dec. 11, 2014).
2 *In Re the Guard Publ'g Co.*, 351 NLRB 1110 (2007), enfd. in relevant part and remanded sub nom. *Guard Publ'g. Co. v. N.L.R.B.*, 571 F.3d 53 (D.C. Cir. 2009).
3 *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793 (1945).
4 *Supra* note 1.
5 The National Labor Relations Act, 29 U.S.C. §§ 151–169.
6 Ellen Dannin, "NLRA Values, Labor Values, American Values," 26 BERKELEY J. EMP. & LAB. L. 223, 230 (2005).
7 *See supra* note 5 at § 151; Nat'l Labor Relations Bd., Basic Guide to the National Labor Relations Act, *available at http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3024/basic-guide.pdf*; Ellen Dannin, *supra* note 6.
8 *See supra* note 5 at § 151.
9 *See supra* note 5 at § 157.
10 *See supra* note 5 at § 158; *Interfering With Employee Rights (Section 7 & 8(a)(1))*, Nat'l Labor Relations Bd., *http://www.nlrb.gov/rights-we-protect/whats-law/employers/interfering-employee-rights-section-7-8a1*
11 Michael H. Gottesman, "Rethinking Labor Law Preemption: State Laws Facilitating Unionization," 7 YALE J. ON REG. 355, 399 (1990).
12 *See supra* note 5 at §§ 157–58; NAT'L LABOR RELATIONS BD. *supra* note 7.
13 See Unfair Labor Practice Process Chart. *http://nlrb.gov/resources/nlrb-process/unfair-labor-practice-process-chart*
14 Gottesman, *supra* note 11.
15 *See generally*, Daniel J. Gifford, *Administrative Law: Cases and Materials* 48 (LexisNexis 2nd ed. 2010).
16 *See supra* note 5 at §§ 157–58; *Beth Israel Hosp. v. N.L.R.B.*, 437 U.S. 483, 492 (1978) (quoting *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 797–98 (1945); NAT'L LABOR RELATIONS BD. *supra* note 7.
17 *Supra* note 1.
18 *Supra* note 1.
19 "Employer Email Can Be Used For Union-Related and Other Protected Communications NLRB Has Ruled," Fisher & Phillips LLP (Dec. 11, 2014), *http://www.laborlawyers.com/employer-email-can-be-used-for-union-related-and-other-protected-communications-nlrb-has-ruled*
20 *Supra* note 1; *see supra* note 2.
21 *Supra* note 1; *see supra* note 2 at 1121 (2007) (dissenting opinion of board Members Liebman and Walsh referring to the NLRB as the "Rip Van Winkle of administrative agencies); *see generally N.L.R.B. v. Thill, Inc.*, 980 F.2d 1137, 1142 (7th Cir. 1992); supra note 29; Brian Peterson, *Rip Van Winkle awakens! – the NLRB overturns Register-Guard*, Spencer Fane Britt & Brown LLP (Dec. 13, 2014), *http://www.spencerfane.com/Rip-Van-Winkle-Awakens---The-NLRB-Overturns-Register-Guard-12-13-2014/*
22 The current board, consisting of members Harry Johnson III, Philip Miscimarra, Nancy Schiffer, Kent Hirozawa and Mark Pearce, was confirmed by the Senate on July 30, 2013. Members Miscimarra and Johnson, GOP picks, dissented from the majority opinion.
23 *Supra* note 3.
24 *Supra* note 3.
25 *Supra* note 3 at 795–97.
26 *Supra* note 3 at fn 10 (citing Peyton Packing Co., Inc., 49 NLRB 828, 843 (1943).
27 *Supra* note 3 at 803–05.
28 *Supra* note 1.
29 Email Statistics Report, 2014–2018, Executive Summary, The Radicati, Group Inc., available at *http://www.radicati.com/wp/wp-content/uploads/2014/01/Email-Statistics-Report-2014-2018-Executive-Summary.pdf*
30 Meir S. Hornung, *Think Before You Type: A Look at Email Privacy in the Workplace*, 11 Fordham J. Corp. & Fin. L. 115 (2005).
31 *Supra* note 1; *see also* Schill v. Wisconsin Rapids Sch. Dist., 786 N.W.2d 177, 182–83 (Wis. 2010).
32 *Supra* note 1; *supra* note 2 at 1125 (dissenting opinion of board Members Liebman and Walsh).
33 *Supra* note 1; Eric C. Stuart, "NLRB Establishes new Right for Employees To Use Company Email During Non-Working Time: Is the Obama Board Out Of Control?", Ogletree Deakins Blog, *http://blog.ogletreedeakins.com/nlrb-establishes-new-right-for-employees-to-use-company-email-during-non-working-time-is-the-obama-board-out-of-control/*
34 *Supra* note 1.
35 *Supra* note 1; Stuart, *supra* note 33.
36 *Supra* note 1.