

THE NLRB'S PURPLE COMMUNICATIONS DECISION: EMAIL, PROPERTY, AND THE CHANGING PATTERNS OF INDUSTRIAL LIFE

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ABSTRACT

On December 11th, 2014, in a much-anticipated case, the National Labor Relations Board (“NLRB”) held in a 3-2 decision that employees with access to an employer’s email system had a presumptive right to use that email system during non-working time under Section 7 of the National Labor Relations Act (“NLRA”). In an attempt to adapt to the “changing patterns of industrial life,” the NLRB reversed a seven-year precedent by overturning In re Guard Publ'g Co., 351 N.L.R.B. 1110 (2007), and thereby gave employees the statutory right to use employer email systems for non-business purposes.

This issue brief argues that the majority opinion in Purple Commc'ns, Inc., 361 N.L.R.B. No. 126 (2014) erroneously presumed that a ban on employer email systems interfered with employees’ rights to engage in concerted activities under Section 7. In reality, the influx of alternative avenues of communication, such as smartphones, social media, and tablets, have substantially grown for employees over the past several years, thus strengthening employees’ Section 7 rights. The new framework set forth in Purple Communications not only exaggerates the need for employees to exercise their Section 7 rights by using a company’s email system, but also unfairly burdens an employer’s resources, time, and energy in implementing such access. For these reasons, the rule in Purple Communications is unworkable and the prior Register Guard standard should still apply.

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INTRODUCTION

“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.’”

Purple Commc'ns, Inc., 361 N.L.R.B. No. 126, slip op. at 17 (2014) (Miscimarra, dissenting).

It is no secret that labor unions in the United States are in decline. In 2014 only 6.7 percent of the private workforce belonged to a union.¹ Two of the major, traditional labor industries, steel and auto, have all but absolved themselves from labor altogether, with the steel industry moving overseas and the automobile industry moving to Mexico.² With these displacements, and the resultant influx of modern, digitally focused companies, the face of labor unions has had to change too.³ When the NLRA was enacted in 1935, the industrial workplace looked very different. The writers of the NLRA could not have envisioned that mechanized assembly lines would evolve into computer-driven workstations or virtual meeting rooms occupied by telecommuters.⁴

Many workers now require computers for their daily jobs, with email acting as an essential instrument.⁵ Email is used as much for professional reasons as for personal, and the potential for mixed use provides additional challenges in the workplace. An advantage of granting

¹ News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Union Members 2015 (Jan. 23, 2015), <http://www.bls.gov/news.release/union2.nr0.htm>.

² George Ross, *Labor Versus Globalization*, 570 ANNALS AM. ACAD. POL. & SOC. SCI. 78, 90 (2000) (explaining that labor union progress in the age of globalization has been limited and slow).

³ Gregory R. Watchman & Daniel P. Westman, *The Millennial Generation's Wireless Work Styles: Cutting Edge or Slippery Slope?*, ACC DOCKET 78, 79 (Apr. 1, 2009), www.acc.com/legalresources/resource.cfm?show=181373 (arguing that millennials are the fastest-growing segment of the workforce, and are bringing their digital devices and communication styles with them into the corporate workplace).

⁴ Alina Tugend, *It's Unclearly Defined, but Telecommuting is Fast on the Rise*, N.Y. TIMES (Mar. 7, 2014), http://www.nytimes.com/2014/03/08/your-money/when-working-in-your-pajamas-is-more-productive.html?_r=0 (citing that between 2005 and 2012, telecommuting has risen 79 percent and now makes up 2.6 percent of the American work force, or 3.2 million workers, according to statistics from the American Community Survey).

⁵ Morgan A. Godfrey & Michael T. Burke, *Pandora's Inbox N.L.R.B. Changes Email Rules*, BENCH & B. MINN. 16, 18 (Mar. 2015), <http://mnbenchbar.com/2015/03/pandoras-inbox/> (noting that e-mail is an inescapable form of communications, “deeply enmeshed” in an individual’s daily routine).

employees access to a company email system is that it allows workers to communicate without having to leave their workstations or to engage with one another face to face in non-working areas such as break rooms.⁶ The problem however, is that email also provides workers the ability to seamlessly transition from sending work related emails to personal emails throughout the day, thus cutting into work production. The increase of Smartphone use only exacerbates this problem.⁷

The NLRB's expansive ruling in *Purple Communications* represents an extraordinary shift in the law regarding employees' right to organize and will broadly impact management policies regulating email systems, and other digital technology in the future.⁸ The NLRB's decision to allow employees to use an employer's email during non-working time goes too far because it makes it increasingly difficult for employers to maintain a productive work environment, and regrettably leaves more questions than answers. This issue brief argues that the majority opinion in *Purple Communications* misapplied the competing rights approach under *Republic Aviation v. N.L.R.B.*⁹ by: (1) failing to consider other communication options available to employees in the modern industrial workplace by presuming that employees need to use employer email systems to engage in protected conduct, and (2) failing to properly balance an employer's property rights with an employee's Section 7 concerted activity rights. This issue brief focuses on both the legal issues and the practical realities of the *Purple Communications* decision.

Part I of this issue brief provides a background on Section 7 of the NLRA. Part II and Part III then explain the previous law under *Register Guard*, and then the case that overturned it in *Purple Communications*. Part IV analyzes the holding in the latter case, and argues that the NLRB was

⁶ *Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126, slip op. at 13 (2014) (arguing that in many cases an employer's e-mail system will amount to a mixed-use area).

⁷ Lee Rainie, *Cell Phone Ownership hits 91% of Adults*, PEW RESEARCH CENTER (June 6, 2013), <http://www.pewresearch.org/fact-tank/2013/06/06/cell-phone-ownership-hits-91-of-adults/> (noting that 56 percent of all U.S. adults have smartphones).

⁸ Brian J. Kurtz, *N.L.R.B. Grants Employees Access to Workplace E-Mail Systems*, 25 No. 7 Ill. Emp. L. Letter 3 (Feb. 2015) (stating it is customary for the N.L.R.B. to be made up of at least three members that reflect the political leanings of the White House, and that over the past few years, the N.L.R.B. has issued decisions giving employees rights under Section 7 far more weight than an employer's right to run its business efficiently and effectively).

⁹ *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793 (1945).

wrong in its decision, and why the NLRB should revert back to the *Register Guard* principle.

I. SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT

Section 7 serves as the core of the NLRA. It guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities¹⁰ for the purpose of collective bargaining or other mutual aid or protection."¹¹ Inherent in such collective action is the ability of employees to communicate with one another at work about union organization and other terms and conditions of employment.¹² The Supreme Court has long acknowledged that Section 7 rights protect employees' ability to talk about unionization with each other while at work.¹³ This is especially true if an employer permits employees to talk about other non-work related subjects. Both the NLRB and the Supreme Court have recognized that the job site is a "natural gathering place" for employees to communicate with each other.¹⁴

The *Purple Communications* majority expanded this notion of a "natural gathering place," to include email.¹⁵ Unsurprisingly, email has been an emerging form of communication among employees in the twenty-first century both inside and outside the workplace.¹⁶ Previously, in *Register Guard*, the NLRB held that employees could be prohibited from using their company email accounts for any non-work related communications.¹⁷

II. FACTS AND HOLDINGS FROM *REGISTER GUARD*

A. *Facts of the Case*

150 employees of Register Guard, an Oregon-based newspaper, were members of a union.¹⁸ Register Guard's company policy stated that company communications systems were "not to be used to solicit or

¹⁰ See, e.g., Robert Sprague, *Facebook Meets the N.L.R.B.: Employee Online Communications and Unfair Labor Practices*, 14 U. PA. J. BUS. L. 957, 959–60 (2012) (noting that the term "concerted activities" was not defined by the Act, and that over time, it has been interpreted as the right of workers to organize and express themselves freely regarding wages and working conditions).

¹¹ 29 U.S.C. § 157 (2014).

¹² *Beth Israel Hospital v. N.L.R.B.*, 437 U.S. 483, 491–92 (1978).

¹³ *Id.* at 491.

¹⁴ *Id.* at 505.

¹⁵ *Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126, slip op. at 1 (2014).

¹⁶ *In re Guard Publ'g Co.*, 351 N.L.R.B. 1110, 1116 (2007).

¹⁷ *Id.* at 1110 (2007).

¹⁸ *Id.* at 1133.

proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations.”¹⁹ Despite this ban on non-work related solicitations over email, in several instances union-related emails were sent over the company’s email system.²⁰ The employee responsible for the emails was disciplined for using her company email system to send messages to other union members about union-related matters.²¹ This prompted the Union to file an unfair labor practice complaint with the NLRB, challenging the company’s email policy.²²

B. Holdings

In a 3-2 decision, the NLRB held that the company’s email policy did not violate Section 7 of the NLRA because employers had a basic property right to regulate and restrict employees’ use of company property, which included the use of the email system, and that such nondiscriminatory regulations and restrictions were valid exercises of that right.²³ In their analysis, the NLRB drew parallels between email and telephone communication based on the their earlier decisions to restrict employee use of company owned telephones.²⁴

C. Dissent

The dissent disagreed with the majority’s employer property rights analysis and instead argued that email should be treated differently because of its interactive nature and ability to process thousands of communications simultaneously; and unlike a telephone call, email does not normally “tie up” the line and prevent simultaneous transmission of messages by others.²⁵ The dissent argued that email had revolutionized communications and that by failing to carve out an exception regarding the use of employer property,

¹⁹ *Id.*

²⁰ *Id.* at 1133–34. As described in the case, Ms. Prozanski, a copy editor in the newsroom for seventeen years, had also served as union president since January 2000. *Id.* In her capacity as copy editor, Prozanski sent an e-mail on May 4 from her workstation to employees. *Id.* On August 14 and August 22, she sent emails from the union office to employees at their work e-mail addresses. *Id.* In all three instances she was issued warnings for violating the company’s communications policy. *Id.*

²¹ *Id.*

²² *Id.* at 1137.

²³ *Id.* at 1110.

²⁴ *In re Guard Publ'g Co.*, 351 N.L.R.B. 1110, 1114 (2007) (citing *Churchill’s Supermarkets, Inc.*, 285 N.L.R.B. No. 21, slip op. at 155 (1987)).

²⁵ *Id.* at 1125. (Liebman and Walsh, dissenting in part).

the NLRB had failed to adapt the NLRA to the changing patterns of industrial life.²⁶

III. FACTS AND HOLDINGS FROM *PURPLE COMMUNICATIONS*

A. *Facts of the Case*

Purple Communications is headquartered in Rocklin, California and provides sign-language interpretation services.²⁷ Its employees, known as video relay interpreters, provide two-way, real-time interpretation of telephone communications for deaf or hard-of-hearing individuals.²⁸ The interpreters ordinarily use an audio headset to orally communicate with the hearing participant on a call, while leaving their hands free to communicate in sign language over the video with the deaf or hard-of-hearing participant.²⁹ The interpreters work at sixteen call centers that process calls across the country around the clock.³⁰

At issue was Purple Communications' electronic communications policy, which prohibited employees from using their work email system³¹ to engage in "activities on behalf of organizations or persons with no professional or business affiliation with the company," or to "sen[d] uninvited email of a personal nature."³²

The action that gave rise to the complaint against Purple Communications was a union election held at seven of Purple Communications' call centers. In 2012, the union seeking to represent the interpreters, Communications Workers of America, filed two separate objections to the union election results based on the theory that the electronic communications policy had interfered with the employees' freedom of choice in the election.³³ The union also filed an unfair labor

²⁶ *Id.* at 1132. (Liebman and Walsh, dissenting in part).

²⁷ Purple Commc'ns, Inc., 361 N.L.R.B. No. 126, slip op. at 2 (2014).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 17. (Johnson, dissenting) (stating Purple Communications' email policy: "Computers, laptops, Internet access, voicemail, electronic mail (email), Blackberry, cellular telephones and/or other Company equipment is provided and maintained by 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").

³² *Id.*

³³ *Id.*

practice charge alleging that the policy restricted employees' Section 7 rights to engage in protected concerted activity.³⁴

Relying on *Register Guard*, which held that an employer may prohibit employees from using the employer's email system for Section 7 purposes as long as the ban was not applied discriminatorily,³⁵ an administrative judge found the policy to be lawful and dismissed both the objections and the unfair labor practice charge.³⁶

B. Holdings

The union appealed the decision and the NLRB issued a sharply divided 3-2 decision that overturned *Register Guard*, holding that employees with permissive access to an employer's email system for work purposes have a presumptive right to use that email system to engage in Section 7 communications about their terms and conditions of employment during non-working time.³⁷ The NLRB also ruled that an employer might rebut this presumption only by demonstrating special circumstances that make a ban on non-business use of the system necessary to maintain production or discipline among its employees.³⁸

The majority discredited *Register Guard's* analysis, finding it undervalued the significance of communication as the foundation of Section 7 rights and that it placed too much emphasis on employers' property rights.³⁹ It also found fault in *Register Guard's* failure to recognize email as an increasingly "critical" mode of communication in the workplace.⁴⁰

In analyzing Purple Communications' company policy, the NLRB applied the Supreme Court's balancing test from *Republic Aviation Corp.* by weighing employees' Section 7 rights against the employer's interest in maintaining discipline.⁴¹ The NLRB found that the employer's property

³⁴ *Id.* (stating that a union representative argued that the employer maintained and enforced unlawful rules in the workplace which concomitantly contravened both the employees' freedom of choice in elections and the rights of employees to engage concerted action pursuant to section 7).

³⁵ *In re Guard Publ'g Co.*, 351 N.L.R.B. 1110, 1110 (2007).

³⁶ *Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126, slip op. at 2 (2014).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793 (1945).

rights were outweighed by its employees' Section 7 right⁴² to communicate about their terms and conditions of employment at the workplace.

The holding in *Purple Communications* limited itself to email and did not address other alternative forms of electronic communications.⁴³ Thus, the decision only applies to employees who have already been given access to their employer's email system, and does not consider non-employee access to employer email systems or require employers to provide employees with email capabilities.

C. The New Analytical Framework for Workplace Email

Purple Communications created a new framework for workplace email. First, employees who have been granted access to an employer's email system "in the course of their work" cannot be restricted from using that email during non-working time to communicate with co-workers concerning workplace issues.⁴⁴ Second, only in narrow and rare circumstances can management create a non-working time ban on all email by demonstrating "special circumstances . . . necessary to maintain production or discipline."⁴⁵ Third, an employer may apply uniform and consistently enforced regulations over its email system "to the extent such controls are necessary to maintain production and discipline."⁴⁶

This new analytical framework fails to balance employer property rights with employees' Section 7 rights. Instead this structure unfairly tips the scale in favor of employees by making employers demonstrate special circumstances through a rebuttable presumption if they want to ban non-working email use. The special circumstances requirement is not defined in the *Purple Communications* majority opinion, and no guidance is offered to employers. The NLRB in this instance failed to recognize an employer's reasonable desire to maintain discipline by preventing the misuse and abuse of non-work communications in the workplace.

⁴² 29 U.S.C. § 157 (2014) (stating in part that "[e]mployees shall have the right to self-organization, 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").

⁴³ *Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126, slip op. at 14 (2014) (explaining that the holding did not restrict employers from monitoring or enforcing its email systems in furtherance of legitimate management objectives).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

IV. A BRIDGE TOO FAR: WHY *PURPLE COMMUNICATIONS* FAILS

A. Failure to Balance Employer Property Rights with Section 7 Rights

The right to control the use of one's own property is one of the most fundamental of all rights.⁴⁷ It should follow that in the workplace an employer has a "basic property right" to "regulate and restrict employee use of company property."⁴⁸ The property at issue here is Purple Communications' email system. The NLRB "has consistently held that there is 'no statutory right . . . to use an employer's equipment or media,' as long as the restrictions are nondiscriminatory."⁴⁹ It seems rational, based upon basic property principles⁵⁰ and prior NLRB holdings,⁵¹ that an employer would reasonably be able to limit its equipment solely for work purposes. It would also seem that an employer would be compliant with the NLRA so long as the employer was not deliberately attempting to thwart employees' Section 7 right to engage in concerted activities.

Yet, the competing rights between an employer's property and an employee's Section 7 rights were improperly weighed in *Purple Communications*, by not adhering to the straightforward balancing analysis held in *Republic Aviation*. In *Republic Aviation*, the majority held that an employee's access to coworkers on employer property requires "an adjustment between the undisputed right of self-organization assured to employees . . . and the equally undisputed right of employers to maintain discipline in their establishments."⁵² *Purple Communications* overlooked this long acknowledged and straightforward balancing analysis, and replaced it with a new framework, which now opens the door to future intrusions of an employer's digital space.

In *Purple Communications*, traditional property rights were largely ignored. The email system at issue is devoted exclusively for business

⁴⁷ *Id.* at 17 (Miscimarra, dissenting).

⁴⁸ *Union Carbide Corp. v. N.L.R.B.*, 714 F.2d 657, 663–64 (6th Cir. 1983).

⁴⁹ *In re Guard Publ'g Co.*, 351 N.L.R.B. 1110, 1114 (2007) (citing *In re Mid-Mountain Foods, Inc.*, 332 N.L.R.B. 229, 230 (2000)).

⁵⁰ RESTATEMENT (SECOND) OF TORTS § 218(c) (AM. LAW INST. 1965) (stating that one who commits a trespass to a chattel is subject to liability to the possessor of the chattel only if the possessor is deprived of the use of the chattel for a substantial time).

⁵¹ See *In re Guard Publ'g Co.*, 351 N.L.R.B. 1110, 1110 (2007) (stating that an email system is analogous to employer-owned equipment and that prior cases had broadly prohibited non-work use of email).

⁵² *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 797–98 (1945).

purposes.⁵³ In that sense, it is akin to any other piece of office equipment that an employer owns and wishes to be used for work-related purposes (e.g. telephone, fax machine, copy machine, billboard, chalkboard, whiteboard). Although email is a more sophisticated form of technology, legally speaking, it should not be treated any differently.⁵⁴

Closely related to employer property rights are the employer's entrepreneurial rights,⁵⁵ which equally were not preserved in *Purple Communications*. Such rights prevent interference with an employer engaging in everyday business decision-making. Entrepreneurial rights recognize an employer's interest in deciding what uses to make of its property. Under the law, violating an employer's use of property, constitutes a trespass on an employer's chattels.⁵⁶ In order to recover under a trespass to chattels theory, the property owner must show specific harm.⁵⁷ The harm in this instance is the financial cost of providing server space, system administration support and maintenance for union related email, and the major disruption of productivity at work.

The monetary cost of providing employees access to an employer's email is significant.⁵⁸ First, any email system requires information technology support. Second, in order to send an email, a series of expensive hardware and software configurations must be formed. These include computers, a company network, SMTP⁵⁹ servers, and Internet service, and associated labor costs. Third, in addition to the operating costs of running and maintaining an email system each day, there is an inherent loss of productivity at stake, which *Republic Aviation* rightly recognized when it

⁵³ *Purple Commc'ns, Inc.*, 361 N.L.R.B. 126, slip op. at 1 (2014).

⁵⁴ Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. Rev. 1047, 1052 (2005) (explaining that virtual property such as email is rivalrous, persistent, and interconnected code that mimics real world characteristics).

⁵⁵ Martin H. Malin & Henry H. Perritt, Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. KAN. L. REV. 1, 7 (2000).

⁵⁶ RESTATEMENT (SECOND) OF TORTS § 217 (AM. LAW INST. 1965).

⁵⁷ *Id.*

⁵⁸ C. G. Lynch, *Gmail vs. Traditional E-Mail: Savings Adding Up*, CIO: IT STRATEGY (Jan. 7, 2009), <http://www.cio.com/article/2431440/collaboration/gmail-vs-traditional-e-mail-savings-adding-up.html> (stating that, based on a Forrester report, on-premise corporate email will eventually prove too costly for many companies because, for a typical information worker, it costs a company \$25.18 per user per month for an on-premise email system, including hardware, labor and other associated costs for managing in house email).

⁵⁹ Simple Mail Transfer Protocol (SMTP) is a protocol for sending email messages between servers.

noted that “working time is for work.”⁶⁰ The dissent in *Purple Communications* foreshadowed the eventual loss of this simple ideal by stating “[i]n time, working time will no longer be for work; it will be for extended bouts of Section 7 communication.”⁶¹

B. Purple Communication’s Employees Were Not Entirely Deprived of their Ability to Engage in Section 7 Communications

The majority in *Purple Communications* misconstrued *Republic Aviation’s* analysis. *Republic Aviation* required that an employer yield its property interests to the extent necessary to ensure that employees will not be “entirely deprived” of their ability to engage in Section 7 communications in the workplace during their own time.⁶² To that end, the rule does not require that employers provide the most convenient or even the most effective means of conducting those communications.⁶³ Rather, the appropriate inquiry according to *Lafayette Park Hotel* is whether the “rules would reasonably tend to chill employees in the exercise of their Section 7 rights.”⁶⁴ Banning the use of non-work related emails on an employer’s email system addresses legitimate business concerns and raises no chilling effect on protected, concerted activities that are better exercised through other means. It stands to reason that the employees in *Purple Communications* were neither “entirely deprived” of exercising their Section 7 rights, nor were they unreasonably chilled.

Even if the majority in *Purple Communications* applied *Republic Aviation’s* competing rights test correctly, it could have still ruled in favor of the employer’s electronic communication policy on other grounds. In *Republic Aviation*, the employer had a wide-ranging no solicitation policy in their plant.⁶⁵ This over-inclusive policy led to an employee being discharged for passing out union membership application cards during his lunch break.⁶⁶ The NLRB ruled that banning all solicitation during non-working time is “an unreasonable impediment to self-organization.”⁶⁷ *Purple Communications* is distinguishable because unlike *Republic*

⁶⁰ *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 803 n.10 (1945) (citing *Peyton Packing Co.*, 49 N.L.R.B. 828, 843 (1943)) (stating that the NLRA does not prevent employers from enacting and enforcing reasonable rules over the conduct of employees on company time).

⁶¹ *Purple Commc’ns, Inc.*, 361 N.L.R.B. No. 126, slip op. at 17 (2014) (Johnson, dissenting).

⁶² *In re Guard Publ’g Co.*, 351 N.L.R.B. 1110, 1115 (2007).

⁶³ *Id.*

⁶⁴ *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998).

⁶⁵ *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 805 (1945).

⁶⁶ *Id.* at 795.

⁶⁷ *Id.* at 803.

Aviation, the company did not have a broad, no solicitation policy.⁶⁸ Instead, employees were permitted to actively exercise their rights to engage in face-to-face solicitation, distribute literature or text, chat, and send personal email to their fellow employees on their own devices during non-working time.⁶⁹ The only method of interaction that was not available to employees for non-work related communications was a company provided email address. Under this reasoning, the *Republic Aviation* balancing test was unnecessary. Instead, the NLRB should have looked at the various alternative means of communication that employees had access to in order to exercise their Section 7 rights.

C. Employees Have Many Alternative Means of Communication

Email is an efficient means of communicating, but arguably not the most effective. Depriving an employee of using a company provided system does not entirely deny that individual the ability to communicate at work. Today, there are far more advanced forms of interaction such as video teleconferencing (Skype or Facetime) which serve as more personal methods of communication. That is not to suggest that employers should be required to provide such services for their employees. Rather, that the absence of company provided email does not detract from an individual's Section 7 rights, just as the existence of company email does not strengthen Section 7 rights. Email is but one of many forms of communication. Forgotten in the *Purple Communications* majority is that Section 7 merely protects union organizational rights, it does not provide for a particular means for employees to communicate.⁷⁰

Despite these new realities by which the NLRB could have adopted a more modern approach to the “changing patterns of industrial life,” the majority in *Purple Communications* chose not to factor in these various “alternative means” of electronic communication in their analysis.⁷¹ By

⁶⁸ *Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126, slip op. at 18 (2014) (Miscimarra, dissenting) (arguing that there is no evidence that the Respondent restricted or limited *any* type of solicitation during non-working time).

⁶⁹ *Id.* at 18–19 (Miscimarra, dissenting) (arguing that “certainly the record currently before the N.L.R.B. in this case--render implausible any suggestion that employees are unreasonably prevented from engaging in NLRA-protected communications absent a statutory right to conduct such activities on the employer's business email system”).

⁷⁰ See *Guardian Indus. Corp. v. N.L.R.B.*, 49 F.3d 317, 318 (7th Cir. 1995).

⁷¹ See *Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126, slip op. at 12 (2014); Jeffrey M. Hirsch, *The Silicon Bullet: Will the Internet Kill the NLRA?*, 76 GEO. WASH. L. REV. 262, 263 (2008) (arguing that the Internet represents both an opportunity and a threat to the NLRA and NLRB because the ability to communicate electronically has transformed employees' relationships with one another and their employers).

doing so, it also ignored the existence of free and widely available commercial services such as Yahoo, Gmail, Hotmail, and dozens of others, which can be accessed with a simple wifi or 3G/4G connection. These commercial email accounts are in many ways more conducive to facilitating concerted activities than an employer email system, as they can be accessed anywhere and at anytime. The irony of the *Purple Communications* ruling is best explained in the dissent, which remarked, “employees now have more opportunities to conduct concerted activities relating to their employment than at any other time in human history.”⁷²

In terms of collaboration, which is a key component to exercising concerted activities, email may not even be the most useful method of communication. New innovative social technologies facilitate dialogue and discussion, which creates more openness and transparency than email ever could.⁷³ In addition to the wide accessibility of email, the prevalence of smartphones in the workplace gives employees the opportunity to call or text message one another during non-working time.

Another form of digital collaboration is social media, which is easily accessed on smartphones, especially for millennial workers, who prefer the anonymity, speed of communication, and lack of administrative hurdles involved.⁷⁴ Social networking services like Facebook, Twitter, Snapchat, and Instagram are especially effective for employees who are geographically separated. These networking sites enable people to form groups, follow one another and contribute to live discussions remotely. Additionally, there are also blogs, Internet forums, and chat rooms that, compared to company provided email systems, require minimal resources or oversight.

D. Issues with Enforcement

The decision in *Purple Communications* may force employers to determine ways to categorize their employee’s emails as occurring either during work time or non-work time. Although not required, the decision in *Purple Communication* gives no guidance as to how such surveillance of

⁷² *Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126, slip op. at 18 (2014) (Miscimarra, dissenting).

⁷³ Scott Allison, *Email Stinks – Embrace Social in the Workplace Instead*, FORBES (July 22, 2013), <http://www.forbes.com/sites/scottallison/2013/07/22/email-sucks-embrace-social-in-the-workplace-instead/#3c6b67294020>.

⁷⁴ D. Martin Stanberry, *Youth and Organizing: Why Unions Will Struggle to Organize the Millennials*, 2 CASE W. RESERVE J.L. TECH. & INTERNET 103, 105–06 (2011) (arguing that Millennials have grown up with the Internet and that reality puts them in a different position than past generations).

email systems should be conducted, without violating Section 7 rights. As a result, future costly litigation is inevitable. *Purple Communications* left practical questions regarding how best to conduct proper inspection of employees' email unresolved. By leaving such uncertainty about the future in this regime, *Purple Communications* puts an unnecessary burden on employers to find the delicate balance between permitting employees access to company email during non-working time, while ensuring it is not abused for unauthorized use.

Purple Communications blurs the lines between “working” and “communicating” for Section 7 purposes. This new rule will require tedious monitoring of computer workstations and will furthermore build distrust among employers who will have limited ability to know when an employee is working or just sending an unauthorized email during work. Furthermore, such a result would leave employers with yet another handicap in being able to enforce workplace discipline, maintain morale, and recruit a talented workforce.

If monitoring is conducted, management will be forced to look over the shoulder of its employees, thereby causing a chilling effect on workplace relations, which is precisely what the majority in *Lafayette Park Hotel* held against.⁷⁵ This scenario is unfavorable to both employers and employees alike. In some work settings, where breaks are not clearly defined, this rule makes it even more difficult to enforce standards. It also ignores the reality that emails, which may have been written or sent outside of work, will likely be opened and read either accidentally or purposefully during working time. Therefore, employers are left with few practical solutions as to how employees are supposed to clearly distinguish between work and union emails in their inbox.

The NLRB has long held that employers have a right to ensure that employees are productive at work. Access to email at work for non-work purposes is an inherently unproductive use of time. Even the majority in *Purple Communications* recognizes the labor costs, by citing a 2004 survey, which found that 81 percent of employees spent an hour or more on email during a typical workday, with about 10 percent spending at least four hours.⁷⁶ The electric and maintenance costs of providing workplace email may only be the tip of the iceberg. With this new rule, employers may need

⁷⁵ *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998).

⁷⁶ *Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126, slip op. at 17 (2014) (citing *In re Guard Publ'g Co.*, 351 N.L.R.B. 1110, 1125 (2007)) (citing *Latest on Workplace Monitoring and Surveillance*, AM. MGMT. ASS'N (Nov. 17, 2014), <http://www.amanet.org/training/articles/the-latest-on-workplace-monitoring-and-surveillance.aspx>)).

to set up more robust monitoring systems, or pay additional employees to screen for inappropriate private emails being sent out by employees during work. Employers may also have to hire additional IT support specialists, and system administrators for the increase in email traffic that will ensue. In their organizing efforts, employees will inevitably send out large file attachments such as images, video or audio that could tie up business-related communications and create substantial interference with the email system. Or worse, in their communication with outside, non-employees, they could make networks susceptible to viruses.

Even if employers do put in the effort to screen for non-work related emails during working time, they run the dangerous risk of being perceived as spying, a practice that is clearly forbidden under the NLRA.⁷⁷ For employees who telecommute, the monitoring and enforcement becomes even more troublesome and less clear. This is not a desirable outcome for either employers or employees. In exchange for more Section 7 rights, employees have potentially traded away considerable privacy rights.

E. A “No Email Policy” is Not Discriminatory

Before *Purple Communications*, the NLRB never interpreted the NLRA to require that employers, in the absence of discrimination, must give employees access to business systems and equipment for Section 7 protected activities when other means were available.⁷⁸ Under this previous interpretation, if an employer had a policy denying electronic communications in the workplace, the NLRA did not mandate that an employer must under all circumstances, permit every possible means of communicating with workers, nor did they have to allow every kind of communication simply because the employer was using it.⁷⁹ *Republic Aviation* requires employers to defer its property interests to the extent necessary to ensure that employees will not be “entirely deprived.”⁸⁰ It does not direct, however, that employers then must provide the most convenient or effective means of conducting those communications.⁸¹ After all,

⁷⁷ *Atlas Underwear Co. v. N.L.R.B.*, 116 F.2d 1020, 1023 (6th Cir. 1941) (holding that the employment of undercover operatives to spy upon employees in their effort to organize, is a violation of the statute).

⁷⁸ *Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126, slip op. at 18 (2014) (Miscimarra, dissenting).

⁷⁹ *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 797 (1945).

⁸⁰ *Id.*

⁸¹ *Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126, slip op. at 17 (2014) (Miscimarra, dissenting).

employers have a legitimate business interest in managing their email systems.⁸²

Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the right to form, join or assist in labor organizations.⁸³ Nothing in *Purple Communications* supports the presumption that any employee had experienced unlawful interference, restraint, or coercion. The only restriction at issue in *Purple Communications* is the employer's policy that company email "should be used for business purposes only."⁸⁴ Employees today have unlimited opportunities to engage in protected workplace solicitation through traditional face-to-face communication and through the various other electronic means previously discussed. Based on these opportunities for employees to engage in Section 7 rights in the workplace, it does not follow that an employer participates in interference, restraint, or coercion simply because it requires email to be used for business purposes only.

F. Oral "Solicitation" or Written "Distribution"

Over the years, employers have enacted non-solicitation and non-distribution rules as a means of limiting union communication. In *Register Guard*, the NLRB held that absent special circumstances, an employer could not prohibit oral solicitations during non-working time.⁸⁵ Conversely, in *Stoddard-Quirk*, the NLRB ruled that employers could restrict distributions (handbills, pamphlets, flyers) even during non-work time from almost all of the worksite.⁸⁶ One of the reasons for the legal distinction between solicitation and distribution is that the latter has the ability to create litter problems, thereby creating hazards in the workplace.⁸⁷ No matter the

⁸² *Id.* at 18 (Miscimarra, dissenting) (stating that such business interests include "preserving server space, protecting against computer viruses and dissemination of confidential information, and avoiding company liability for employees' inappropriate e-mails").

⁸³ 29 U.S.C. § 158(a)(1).

⁸⁴ *Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126, slip op. at 18 (2014) (Miscimarra, dissenting).

⁸⁵ *See, e.g., In re Guard Publ'g Co.*, 351 N.L.R.B. 1110, 1123 (2007) (construing *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 797 (1945)).

⁸⁶ *See Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. No. 75, slip op. at 616 (1962) (noting that employers must allow distribution in worksite parking lots, entrances and exits)).

⁸⁷ *Id.* at 621 (holding that an employer's property interest is greatest in the production areas of the workplace).

rationales, these two decisions have led the NLRB to provide employees with more solicitation rights than distribution rights.

Internet communications, specifically email, do not fit neatly into either oral solicitation or written distributions.⁸⁸ However, when fairly analyzed email is more akin to distribution since it is *per se* written communication. Even though messages are sent electronically and do not create a physical litter problem, by taking up digital space, they do create a cyber or virtual litter problem. One can imagine even a physical problem. If either an employee or non-employee printed a particular email that then led to discarded flyers polluting a workplace, this would interfere with production, resulting in a traditional distribution problem.⁸⁹

In *LeTourneau*,⁹⁰ the NLRB found a workable solution to allow the distribution of literature on an employer's property. The NLRB ruled that employees could distribute union literature in the plant parking lot, but not inside the plant.⁹¹ The NLRB reasoned that company rules centered on order and productivity had more force inside the building where production occurs than it did beyond the production area.⁹² *Purple Communications* should have been analyzed under this same rationale, by drawing a bright line, in order to protect the need for productivity at employee workstations. Section 7 communications have always been and should continue to be exercised in a manner that does not interfere with production, such as in break rooms, water coolers, meeting rooms (both physical or virtual), or email off property at the comfort of one's own computer. Allowing employees to use their work email accounts for Section 7 communications distorts the traditional spaces where work, not union organization, should occur.

⁸⁸ See Frederick D. Rapone, Jr., Comment, *This Is Not Your Grandfather's Labor Union—Or Is It? Exercising Section 7 Rights in the Cyberspace Age*, 39 DUQ. L. REV. 657, 670–72 (2001).

⁸⁹ See *N.L.R.B. v. Babcock & Wilcox Co.* 351 U.S. 105, 112 (1956) (discussing that absent discrimination, employers may prevent nonemployee distribution of union literature on property, so long as reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message).

⁹⁰ *Letourneau Co. of Georgia*, 54 N.L.R.B. 1253 (1944), was reversed in *Letourneau Co. of Georgia v. N.L.R.B.*, 143 F.2d 67 (5th Cir. 1944), which in turn was reversed in *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793 (1945).

⁹¹ *Letourneau Co. of Georgia*, 54 N.L.R.B. 1253, 1260 (1944).

⁹² *Id.*

CONCLUSION

Ironically, *Purple Communications* confirms the fact that the NLRB is indeed the Rip Van Winkle of administrative agencies⁹³—for the majority has neglected to appreciate or recognize the numerous alternative means of communication available to modern day workers in the digital age. *Purple Communications* replaced a clear bright line rule in *Register Guard* in favor of an uncertain holding that now blurs the line between “working time” and “Section 7 communication time.” Since the NLRB ignored the practical effects of such a holding, it merely created a messy and unworkable rule that will open the floodgates of litigation involving the use of technology in the workplace. Although *Purple Communications* may make it easier for employees to email one another at work, it does little to strengthen Section 7 rights. Instead, it is unfairly burdensome and unduly tips the scale in favor of unions, at the expense of the thousands of employers who now must suffer the consequences of losing significant control of their property, production, and order in the workplace.

Although email provides a more advanced form of communication, it is nevertheless still equipment bought and owned by an employer. While its use is prevalent today, no one is able to predict what may replace email in the future. Thus, it is far better to provide consistent and predictable rules based on a relied upon framework of property law than to re-litigate Section 7 issues case-by-case based on the preferred technological instrument of the day.

⁹³ *In re Guard Publ'g Co.*, 351 N.L.R.B. 1110, 1121 (2007) (Liebman & Walsh, dissenting in part) (using the phrase “Rip Van Winkle” for the opposite point being made in this issue brief).