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The NLRB is Reviewing Union Access to Employer Email and Electronic Communications Systems

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National Labor Relations Board General Counsel Jennifer Abruzzo recently asked the National Labor Relations Board ("Board") to overrule its decision in *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino*, 368 NLRB No. 143 (2019) ("*Rio All-Suites*"). The *Rio All-Suites* Board overruled the Board's prior decision in *Purple Communications, Inc.*, 361 NLRB 1050 (2014) ("*Purple Communications*"), which in turn overruled the Board's decision in *Register Guard*, 351 NLRB 1110 (2007). All three cases deal with whether the National Labor Relations Act ("Act") gives employees the right to use an employer's email systems to engage in union and other protected concerted activities.

General Counsel Abruzzo has asked the Board to do more than simply overrule *Rio All-Suites* and return to the *Purple Communications* standard, however. The Board's ruling in *Purple Communications* was limited to requiring employers to allow employees whom already had access to the email systems, to use the email systems for protected concerted activities. *Purple Communications*, 361 NLRB at 1063. The General Counsel has asked the Board to "revisit and overturn *Rio All-Suites* and expand upon the reasoning in *Purple Communications* to provide employees with a right to use for nonbusiness purposes company email and any other electronic communication platform that is used in their workplace." General Counsel's Brief in Support of Exceptions, *Garten Trucking LC*, 10-CA-279843, et. al., at 49.

The *Purple Communications* Board, and General Counsel Abruzzo in her recently filed Exceptions Brief, seek to apply the Supreme Court's decision in *Republic Aviation* in which the Supreme Court established that employees have the right to engage in union activity and solicitation on a company's property during the employees' own time. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). The *Purple Communications* Board, which was the first to establish any right under the Act to use email systems for union and related activities, acknowledged the line of Board precedent denying any right under the Act to use an employer's equipment or personal property. *Purple Communications*, 361 NLRB at 1057-58. However the *Purple Communications* Board rejected any application of that line of Board law to the issue of email system access, writing "we find *Republic Aviation* to be a more appropriate foundation for our assessment of employees' communication rights than our own equipment precedents." *Id*. at 1061.

The real reason underlying *the Purple Communications* Board's ruling, and General Counsel Abruzzo's current position, is because of how effective the email, along with other electronic communications tools, is for promoting unionization. *Id*. at 1057 ("If anything, email's effectiveness as a mechanism for quickly sharing information and views *increases* its importance to employee communication"). The General Counsel, like the *Purple Communications* Board, has tied her request to expand the Purple Communications reasoning to the increased use of technology as a means of communication. General Counsel's Brief in Support of Exceptions, *Garten Trucking LC*, 10-CA-279843, et. al., at 53.

Despite pointing to the advent of additional technologies, the General Counsel completely ignores the long line of Board decisions, cited to by the *Rio All-Suites* Board, holding that "there is no Section 7 right to use employer-owned televisions, bulletin boards, copy machines, telephones, or public address systems." *Rio All-Suites*, 368 NLRB. at 6. The reason for this is likely because, as with her multiple other controversial decisions, General Counsel Abruzzo appears focused on promoting the interests of unions, rather than simply protecting the rights of employees to engage in, or refrain from, unionization and other protected concerted activities.

The Board and General Counsel have failed to ever explain how access rights *on* an employer's real property equate to the right to *use* of an employer's personal property. Additionally, the General Counsel does not address the problem of how to effectively limit the use of email and other electronic communications systems to nonworking time, let alone acknowledge that as an enforcement issue. *See Rio All-Suites*, 368 NLRB at 5 ("although the right [to use email] was purportedly limited to nonworking time, in practice that limitation would be impossible to enforce"). Employers should closely monitor what the Board does when it eventually issues its decision in *Garten Trucking LC* which might necessitate changes to handbooks and other rules applicable to employees. If the Board goes as far as General Counsel Abruzzo is asking, there would be widespread implications effectively allowing unions to take over any and all electronic communication systems an employer currently uses for business purposes. Additionally, the standard would create the impossible task for employers to ensure that employees are working while on the clock, rather than using email and other electronic communications systems to promote their own interests.

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