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STATEMENT TO THE RECORD

"What Should Workers and Employers Expect Next
From the National Labor Relations Board?"
U.S. House Committee on Education and the Workforce
Health, Education, Labor & Pensions Subcommittee

June 24, 2014 – 10:00 a.m.

Good morning, Chairman Roe, Ranking Member Tierney and distinguished Members of the Subcommittee. It is a great honor and privilege to appear before this Subcommittee as a witness. My name is Seth Borden. I am a partner in the New York office of the law firm McKenna Long & Aldridge.

My testimony today should not be construed as legal advice as to any specific facts or circumstances. I am not appearing today on behalf of any clients. My testimony is based on my own personal views and does not necessarily reflect those of McKenna Long or any of my individual colleagues there.

I have been practicing traditional labor and employment law for 16 years. During that time, I have represented employers of all types and sizes, in a variety of industries, throughout the United States and Puerto Rico before the National Labor Relations Board. In 2010, I authored a chapter regarding new technologies and traditional labor law in the Thompson publication *Think Before You Click: Strategies for Managing Social Media in the Workplace*, the first treatise of its kind. Finally, since 2008, my team and I have maintained the *Labor Relations*

Today blog, which has received numerous accolades and has been archived by the U.S. Library of Congress. A copy of my firm bio is provided with the written version of my testimony.

Mr. Chairman, I request that the entirety of my written testimony, and the attachments thereto, be entered into the record of the hearing.

Mr. Chairman, my testimony this morning is presented within the context of this Subcommittee's examination of a number of pending National Labor Relations Board ("Board") cases wherein the Board appears poised to reverse longstanding precedents. Most specifically, my testimony focuses on the *Purple Communications* case, NLRB Case Nos. 21-CA-095151, 21-RC-091531, 21-RC-091584, now before the Board. The Board has solicited amicus briefs in this case with an eye toward overruling longstanding Board law; and creating a new employee right to utilize employer equipment for union organizing and other Section 7 purposes.

The Board should decline to do so. There is simply no compelling reason for the Board to depart from decades of precedent, most recently outlined in the Board's 2007 *Register Guard* case, 351 NLRB No. 70 (2007), which provides that absent evidence of discrimination, employees have no statutory right to use employer equipment for Section 7 activity.

First, this is an issue of employer property rights – and not employee communication. Employers who invest their money in the purchase and maintenance of equipment and materials for the furtherance of their enterprise should be able to control the manner in which they are used. Other longstanding principles of labor law protect employees' rights to engage in communication, solicitation and distribution in furtherance of union organizing or other Section

7 activity, so long as their activity does not interfere with operations or other legitimate employer interests. The question in *Purple* is to what extent an employer must ***provide and pay for*** the means of employee communication and organizing activity.

Second, the General Counsel's assertion that email is the modern day, "virtual water cooler" is entirely misplaced. Employer computer networks and email ***are not*** the 21st century water-cooler; they are the ***21st century production floor***. The Board has long protected legitimate employer interests – most significantly the means of production – without which there would be no employees. Insofar as employees have at their disposal a wide range of means of communication with each other, an employer should not be compelled to open its network to additional burdens on efficiency, external threats, and potential legal exposure occasioned by non-business use.

Third, for decades the National Labor Relations Board has agreed that Section 7 provides employees with no such right to use employer equipment. This has been consistently true with respect to each new technological development or increasingly common type of workplace medium: bulletin boards, public address systems, telephones, television, photocopiers, and most recently email systems. Over the course of several decades, the examples have changed, but the concept has remained the same: there simply is no such statutory right. If the Board wishes now to create one, it would seem that the more measured and deliberative administrative rule-making process or statutory amendment by the legislature are far more appropriate avenues.

I. There Is No Compelling Reason For The Board To Depart From Decades of Precedent, Most Recently Restated In *Register-Guard*, Which Holds Employees Have No Statutory Right To Use The Employer's Equipment For Section 7 Activity.

In his *Purple Communications* decision, the Administrative Law Judge ("ALJ") properly noted that he was bound by the decision in *Register-Guard*, 351 NLRB No. 70 (2007), which held in no uncertain terms that "employees have no statutory right to use the Employer's email system for Section 7 purposes[.]"[1] The Board's simple standard set forth in *Register-Guard* is consistent with decades' old precedent and achieves the proper balance between legitimate employer interests and employee rights under the National Labor Relations Act. The policy preferences of the current Board majority and General Counsel are not compelling reasons for casually tossing such longstanding precedent aside to create a new substantive employee right to use employer equipment.

The Board has long recognized that an employer has a legitimate business interest in maintaining the efficient operation of the equipment it obtains for use in its enterprise. No matter what the specific type of equipment, the Board has held that absent discrimination, employees have "no statutory right …to use an employer's equipment or media" for Section 7 activity. This has been the Board's holding with respect to the employer's televisions and VCR's, *Mid-Mountain Foods*, 332 NLRB 229, 230 (2000), *enfd*. 269 F.3d 1075 (D.C. Cir. 2001); bulletin boards, *Eaton Technologies*, 322 NLRB 848, 853 (1997); *Honeywell, Inc*., 262 NLRB 1402 (1982), *enfd*. 722 F.2d 405 (8th Cir. 1983); *Container Corp*., 244 NLRB 318 fn. 2

[1] The ALJ asserted that he was bound to follow Board precedent that has not been reversed by the Supreme Court. See *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004); *Hebert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993); *Lumber & Mill Employers Assn.*, 265 NLRB 199 fn. 2 (1982), *enfd*. 736 F.2d 507 (9th Cir. 1984), *cert. denied* 469 U.S. 934 (1984).

(1979), *enfd*. 649 F.2d 1213 (6th Cir. 1981) (per curiam); photocopy machines, *Champion International Corp*., 303 NLRB 102, 109 (1991); telephones, *Churchill's Supermarkets*, 285 NLRB 138, 155 (1987), *enfd*. 857 F.2d 1474 (6th Cir. 1988), *cert. denied* 490 U.S. 1046 (1989); *Union Carbide Corp*., 259 NLRB 974, 980 (1981), *enfd. in relevant part* 714 F.2d 657 (6th Cir. 1983); public address systems, *Heath Co*., 196 NLRB 134 (1972). In *Johnson Technologies*, 345 NLRB 762 (2005), the Board held that employees have no statutory right to use employer property as "trivial" as a *piece of paper*. *Id*. at 779 (2005) ("…research has disclosed no definitive Board authority that would allow employees to use company assets, even of minimal intrinsic value, without the permission or authority of the company.")

Email, as commonplace as its use in the workplace has become, is not so fundamentally different than the technologies before it that the same principles of law cannot be applied.[2] Transmission of email from one party to another on the employer's network still requires the use and interaction of various pieces of employer equipment -- including some combination of

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[2] Proponents of the creation of this new employee right have focused the weight of their argument on the fact that there is something so profoundly new and transformative about email that requires a departure from all this precedent, and the re-application of the standard in *Republic Aviation*, 51 NLRB 1186 (1943), enfd. 142 F.2d 193 (2d Cir. 1944), affd. 324 U.S. 793 (1945). But that argument is both unavailing and somewhat disingenuous. It has rather always been the position of these proponents that the employer's property rights in its equipment should yield to the union organizing rights of the employees. Then Member Liebman advanced the same exact arguments in 2000 about an employer's televisions and VCRs, and even then casually lumped "email, the internet and new communication technologies" together with those -- and a variety of other -- 20th century technologies:

> The question posed here, whether the Respondent may lawfully deny employees access to its electronic equipment in a nonwork area to communicate prounion messages, is a novel one before the Board. ***Undoubtedly, we will face this or similar issues with increasing frequency given the expanding prevalence in the workplace of TVs, VCRs, fax machines, email, the internet, and new communication technologies.*** Clearly, both employers and employees are increasingly using this kind of equipment to disseminate and exchange views on a wide variety of subjects, including the advantages and disadvantages of unionization.

Mid-Mountain Foods, 332 NLRB 229, 232-233 (2000), *enfd*. 269 F.3d 1075 (D.C. Cir. 2001) (Liebman, dissenting)(emphasis supplied). And yet in that case, and in numerous subsequent cases, the Board's longstanding precedent denying an employee right to use employer equipment prevailed.

computer monitors, keyboards, hard-drives, host servers, client servers, routers, gateways, and numerous forms of software. This equipment may have greater capacity for transmission of information than a bulletin board or photocopier, but it has a finite capacity nonetheless. When the employer invests money in these hardware and software components, it does so in order that this capacity may be utilized in furtherance of the employer's enterprise. Employers invest even more money in the maintenance and repair of this infrastructure. Insofar as employees have a variety of other means to communicate with and solicit each other about Section 7 issues, there is no compelling reason upon which to force an employer to allow non-business use of these resources.

II. Forcing Employers To Open Networks To Non-Business Use Threatens Efficiency and Competitiveness, Exposes Them To External Hazards, and Compromises The Ability to Prevent Unlawful Harassment.

In *Register-Guard*, the Board began its analysis with the recognition:

> An employer has a "basic property right" to "regulate and restrict employee use of company property." *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663–664 (6th Cir. 1983). * * * The General Counsel concedes that the Respondent has a legitimate business interest in maintaining the efficient operation of its e-mail system, and that employers who have invested in an e-mail system have valid concerns about such issues as preserving server space, protecting against computer viruses and dissemination of confidential information, and avoiding company liability for employees' inappropriate e-mails.

351 NLRB 1110, 1114 (2007)

A. Increased system traffic impedes efficiency, increases employer costs and decreases employee productivity.

Incremental increases in the non-business use of business equipment necessarily result in a decrease in the availability of the equipment for productive, business-related use. The increased volume in electronic traffic over the employer's network slows down the responsiveness of the system itself, potentially resulting in delays and decreased efficiency in the delivery of the employer's products or services. Moreover, this increased use also increases burdens on the system, and the amount of money and effort required to maintain it. Finally, even under the best of circumstances, the amplified distractions encountered by employees forced to sort through an additional quantity of emails unrelated to their work duties, will necessarily hamper productivity.

To be sure, there are employers of the view that some non-business, personal and/or recreational use of their email and computer equipment is beneficial to their enterprise. They simply may not care to enforce such limited restrictions. That is their prerogative, and such employers cannot then turn around and complain if and when their employees also use the equipment for union organizing or other Section 7 activity. But those who have made the legitimate business decision to protect or promote their operations by prohibiting non-business use of their equipment should not be second-guessed or compelled to provide otherwise. It is well settled that "the Board should not substitute its own business judgment for that of the employer in evaluating whether an employer's conduct is unlawful." *Framan Mechanical*, 343 NLRB 408, 412 (2004).

B. ***Increased Non-Business Use Needlessly Makes The Employer's System More Vulnerable To Viruses, Malware And Cyber-Attacks.***

Increasing the number of non-work-related emails, to or from an infinite range of unknown sources, obviously increases the prospect that opportunistic hackers, cyber-criminals or

simple mischief-makers might access the employer's system. The Department of Homeland Security notes:

> …for all its advantages, increased connectivity brings increased risk of theft, fraud, and abuse. As Americans become more reliant on modern technology, we also become more vulnerable to cyber attacks such as Corporate Security Breaches, Spear Phishing, and Social Media Fraud. Cybersecurity is a shared responsibility, and each of us has a role to play in making it safer, more secure and resilient.

http://www.dhs.gov/combat-cyber-crime (last accessed, June 18, 2014); see also Chinn et al., *Risk and Responsibility in a Hyperconnected World: Implications for Enterprises*, McKINSEY & COMPANY and THE WORLD ECONOMIC FORUM (Jan. 2014) ("The risk of cyberattacks could materially slow the pace of technology and business innovation with as much as $3 trillion in aggregate impact.") Forcing employers to open access to its systems to an infinite number of connections for a variety of reasons unrelated to their operations does not advance this cause.

C. ***This New Employee Right Will Hinder Efforts to Comply With Other Employer Obligations, Such As The Requirement To Provide A Harassment-Free Workplace***

Employers are obligated by law to provide a workplace free from sexual, racial and other forms of harassment. *See* 42 U.S.C. § 2000e *et seq* (1964); 29 C.F.R. Sec. 1604.11(f); *see also Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). Insofar as frequent use of profanity may constitute evidence of unlawful hostile work environment harassment, many employers employ a variety of email filtering technologies to prevent dissemination of objectionable material over its email system. The National Labor Relations Board is increasingly finding Section 7 protection for employees' profane and vulgar communications. *See, e.g., Starbucks Corporation*, 360 NLRB No. 134 (June 16, 2014); *Plaza Auto Center*, 360 NLRB No. 117 (May 28, 2014); *Hoot*

Winc LLC and Ontario Wings, LLC d/b/a Hooters of Ontario Mills, Cases No. 31-CA-104872, -104874, -104877, -104892, -107256, -107259, Slip Op. at 36-37 (May 19, 2014). If the Board creates a right for employees to use the employer's email system to communicate on Section 7 issues, it would seem the employer's use of a filter to quarantine emails containing profanity or vulgarity would in itself constitute a violation of Section 8(a)(1) of the Act which prohibits "interfere[ence]…with employees in the exercise of the rights guaranteed by Section 7." 29 U.S.C. §158(a)(1). This would put employers in the untenable position of having to choose which federal law it is better to violate.[3]

In sum, given the wide range of equally effective alternative communication vehicles available and easily accessible to employees, there is no compelling reason to force employers to undertake all these additional risks and complications.

III. If The Board Now Wants To Change The Decades Old Interpretation Of Unchanged Statutory Language, The Administrative Rulemaking Process Or Legislative Amendment Are The Proper Avenues.

The National Labor Relations Board's authority can be exercised either through formal rulemaking proceedings or by the more frequently utilized method of rulemaking through adjudication. *See Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781 (1996). As the Board has adopted an "evolutional" approach to its adjudicatory function, it has historically paid less deference to the value of precedent. As a result, labor practitioners have become accustomed to some degree of instability, with cases being overruled from one Board to the next. Many

[3] Similarly, legal principles regarding privacy expectations and the NLRA's prohibition against employer surveillance – or even creating the "impression" of surveillance – of employee Section 7 activity might needlessly be placed in conflict with each other.

commentators and practitioners have observed that during the last 15-20 years, there has been an increase in the frequency and intensity of these partisan pendulum swings. *See, e.g.*, Coxson, Jr., *The NLRB in the Obama Administration: The Pendulum Swings Dramatically*, ALI-ABA Employment Law Update (Fall 2010); Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 Ohio St. L. J. 1361 (2000). Former Board Chairman Wilma Liebman testified here years ago, and she called it the "notorious see-sawing with every change of administration". *See* Committee on Education and Labor, Health, Employment, Labor & Pensions Subcommittee, Joint Hearing with the Senate Employment and Workplace Safety Subcommittee, *The National Labor Relations Board: Recent Decisions and Their Impact on Workers Rights* (December 13, 2007). Neither employers, employees nor unions benefit from the deepening of this political divide – which results in a system where their obligations change drastically every 4 to 8 years.

But the developments before this Subcommittee today are perhaps even more problematic. *Purple Communications, Browning-Ferris* and other imminently anticipated decisions are not cases in which the current Board is just reversing course where its predecessor had previously reversed just a few years ago. These are cases wherein the current Board is looking to discard *decades* of precedent just to advance a different political worldview. A system where such longstanding, well-established and fundamental standards are cast aside so casually does not advance the industrial stability which the Act is intended to support.

The relevant text of the National Labor Relations Act has not been modified in decades. The significance of the employer's basic property rights in its business equipment, and the

import of its interests in the efficient operation of its enterprise have not changed. If anything, the other means of communication available to employees by which to discuss union organization and other Section 7 activity have grown exponentially. There is simply no reason why employers or employees should all of a sudden understand the language of Section 7 to convey an employee right to use employer business equipment for union organizing. The employer in *Purple Communications* – and thousands of other employers across America – ostensibly relied upon Register-Guard and decades of precedent before it in enforcing a perfectly lawful restriction upon the use of its business equipment. It would be manifestly unfair for the Board to now punish the employer because that lawful behavior does not comport with the new officials' view of what *should* be.[4] If there is to be an employee right to use an employer's equipment for non-business purposes, it should be created by a more thorough process of administrative rule-making or the more deliberative and representative process of legislative amendment.

CONCLUSION

For all the reasons set forth above, as well as many thoughtful arguments laid out in briefs before the Board, the Board should reaffirm the holding of *Register-Guard* that absent discrimination, employees have no Section 7 right to use employer equipment – including email and computers – for union organizing purposes.

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[4] The General Counsel concedes in *Purple* that the employer has not violated the longstanding principle restated in *Register-Guard.* The General Counsel simply believes that the conduct *should be unlawful* nonetheless. *See Purple Communications*, NLRB Case Nos. 21-CA-095151, 21-RC-091531, 21-RC-091584, Slip Op. at 5-6 (P. Bogas, ALJ, Oct. 24, 2013); *see also* Counsel for the General Counsel's Limited Exceptions to the Administrative Law Judge's Decision and Brief in Support of Limited Exceptions, NLRB Case Nos. 21-RC-091531, 21-RC-091584 (Nov. 21, 2013).