UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE GUARD PUBLISHING COMPANY,
d/b/a/ THE REGISTER GUARD,

and

EUGENE NEWSPAPER GUILD,
CWA LOCAL 37194, AFL-CIO.

Case 36-CA-7843-1
36-CA-8789-1
36-CA-8842-1
36-CA-8849-1

BRIEF ON BEHALF OF THE EUGENE NEWSPAPER GUILD, CWA LOCAL 37194, AFL-CIO, CHARGING PARTY, AND THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, *AMICUS CURIAE*

Charging party Eugene Newspaper Guild, CWA Local 37194, AFL-CIO, and the American Federation of Labor and Congress of Industrial Organizations, *amicus curiae*, submit this brief in response to the Notice of Oral Argument and Invitation to File Briefs issued by the National Labor Relations Board on January 10, 2007. The Board's notice requests answers to a number of questions regarding employer regulation of employee use of e-mail, grouped together in seven categories. We answer the Board's questions in the order they were posed by the notice. For ease of reference, we recite the relevant questions before each set of answers. Where it facilitates discussion, we provide a single answer to two related categories of questions.

> **1. Do employees have a right to use their employer's e-mail system (or other computer-based communication systems) to communicate with other employees about union or other concerted, protected matters? If so, what restrictions, if any, may an employer place on those communications? If not, does an employer nevertheless violate the Act if it permits non-job-related e-mails but not those related to union or other concerted, protected matters?**

2. Should the Board apply traditional rules regarding solicitation and/or distribution to employees' use of their employer's e-mail system? If so, how should those rules be applied? If not, what standard should be applied?

Well-settled National Labor Relations Act principles regarding employee workplace communications entail the following conclusions regarding employee communications *via* e-mail: *First*, where employees are allowed to communicate with one another about nonbusiness matters generally through a company's e-mail system, employees have an NLRA-protected right to use the e-mail system to communicate with one another about union or other concerted, protected matters. *Second*, the employer may, as a matter of course, restrict such e-mail communications to nonworking time but may impose additional restrictions on such communications only if the restriction is justified by a showing that it is necessary to further substantial managerial interests. *Third*, in no event can an employer take adverse action against an employee based on the ground that the employee's e-mail communications concerned union or other concerted, protected matters.

(a) The NLRA principles regarding the right of employees to communicate with one another at their workplace regarding union and other concerted, protected matters were summarized and explained by the Supreme Court in *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), and *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

Beth Israel described the basic analytical framework for determining whether employer restrictions on employees' workplace communications constitute unlawful interference with the exercise of § 7 rights:

"[T]he right of employees to self-organize and bargain collectively established by § 7 of the NLRA, 29 U.S.C. § 157, necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), articulated the broad legal principle which must govern the Board's enforcement of this right in the myriad factual situations in which it is sought to be exercised:

> '[The Board must adjust] the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee.' *Id.*, at 797-798.

That principle was further developed in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956), where the Court stated:

> 'Accommodation between [employee-organization rights and employer-property rights] must be obtained with as little destruction of one as is consistent with the maintenance of the other.' *Id.*, at 112." *Beth Israel Hospital*, 437 U.S. at 491-492 (footnote omitted).

Eastex, in turn, explained that, since "employees are already rightfully on the employer's property, . . . it is the employer's management interests rather than its property interests that primarily are implicated" by employee workplace communications. *Eastex*, 437 U.S. at 573 (quotation marks, citation and brackets omitted). It follows that,

to justify the suppression of such communications, an employer must "show that its management interests would be prejudiced" to a sufficient degree to justify the suppression. *Ibid.*

In sum, under the NLRA, "[n]o restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956).

(b) To put the foregoing general principles into the e-mail context: Where an employer allows employees to use the company's e-mail system to communicate with each other on nonbusiness matters generally, the "employees are already rightfully on the employer's property" in the sense of having been allowed access to the e-mail system. *Eastex*, 437 U.S. at 573. And, "[e]ven if the mere distribution by employees of [e-mail messages] protected by § 7 can be said to intrude on [the employer's] property rights in any meaningful sense, the degree of intrusion does not vary with the content of the [e-mail]." *Ibid.* Thus, "it is the employer's management interests rather than its property interests that primarily are implicated" in the choice of nonbusiness matters about which employees may communicate *via* e-mail. *Ibid.*

In such workplaces, a rule prohibiting employees from using e-mail to communicate with each other about union or other concerted, protected matters is most certainly a "restriction . . . on the employee's right to discuss self-organization among themselves." *Babcock & Wilcox*, 351 U.S. at 113. Such a rule violates § 8(a)(1)'s proscription of employer "interfere[nce] with . . . the exercise of the rights guaranteed in

section 7," 29 U.S.C. § 158(a)(1), "unless the employer can demonstrate that a restriction is *necessary* to maintain production or discipline," *Babcock & Wilcox*, 351 U.S. at 113 (emphasis added).

Having said that much, it is also true that a general nondiscriminatory rule limiting employees' nonbusiness communications to nonwork time is valid on its face and may be applied to e-mail communications as to other communications. This follows from the fact that "[w]orking time is for work" so that "a rule prohibiting union solicitation during working hours . . . must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose." *Republic Aviation*, 324 U.S. at 803 n. 10, quoting *Peyton Packing Co.*, 49 NLRB 828, 843 (1943). By the same token, because "time outside working hours . . . is an employee's time to use as he wishes without unreasonable restraint, . . . a rule prohibiting union solicitation by an employee outside of working hours, although on company property[,] . . . must be presumed to be an unreasonable impediment to self-organization . . . in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline." *Republic Aviation*, 324 U.S. at 803-804 n. 10, quoting *Peyton Packing Co.*, 49 NLRB at 843-844. Thus, to justify restrictions on employee e-mail communications concerning union or other concerted, protected matters during *non*work time, the employer must show "special circumstances" that "make the rule necessary."

(c) Applying the foregoing to the facts of this case will help make our answers to the Board's general questions more concrete.

Virtually every employee in the Guild-represented bargaining unit at *The Register Guard* has direct access to the newspaper's e-mail system. ALJD 3; Tr. 131, 161. The employees are allowed to – and do – freely use the newspaper's e-mail system for nonbusiness communications during nonwork time. Tr. 161-65, 217, 273-74, 295, 384. The employees find e-mail to be a convenient alternative for delivering individual messages that would previously have been delivered in face-to-face conversation. Tr. 164-66, 218-19, 274-75, 297. And, they often send group e-mails inviting fellow employees to outside gatherings or making nonbusiness inquiries. Tr. 165, 273; GC Ex. 10, 11, 16, 41, 46, 47.

The Register Guard installed its e-mail system in 1996. Tr. 351. The first time the newspaper disciplined any of its employees for nonbusiness use of the e-mail system came in May 2000 when the newspaper disciplined two employees who were active in the Guild's effort to negotiate a new collective bargaining agreement. Tr. 339; CP Ex. 3. The two employees were disciplined for replying to a group e-mail sent by *The Register Guard*'s managing editor, David Baker, warning that the Eugene police had reported anarchists might attend a Guild rally in front of the newspaper. R 8 (p. 2 of attached e-mail). William Bishop, a reporter and member of the Guild Executive Board, responded to all the recipients of Baker's group e-mail by copying an e-mail from the Eugene police that Bishop believed suggested the newspaper had called the police about the Guild rally. R 8 (pp. 1-2 of attached e-mail). Suzi Prozanski, a *Register Guard* copy editor and Guild President, sent a subsequent e-mail to the group of employees who had received the

Baker/Bishop correspondence, explaining that the newspaper had not called the police. Tr. 83; GC Ex. 7.

Baker disciplined Bishop and Prozanski for the e-mails. GC Ex. 8; R. Ex. 8. Baker testified that, despite having received numerous nonbusiness e-mails from *Register Guard* employees, Bishop and Prozanski were the first employees he had disciplined on the ground of e-mail misuse. Tr. 339.

Because Prozanski believed that she had been disciplined for using company equipment to prepare her May e-mail, when Prozanski composed two union-related e-mails to *Register Guard* employees at their work e-mail addresses in August, she did so on Guild equipment. Tr. 88; GC. Ex. 4, 5 & 9. Prozanski was nevertheless disciplined for sending the two August e-mails to employees. GC Ex. 9. The disciplinary notice issued by *The Register Guard*'s Director of Human Resources, Cynthia Walden, stated that Prozanski's August e-mails violated the newspaper's rule that the e-mail system is "not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations." GC Ex. 9. In testimony, Walden explained that *Register Guard* employees were free to use the newspaper's e-mail system to communicate with each other about nonbusiness matters, including the employees' terms and conditions of employment. Tr. 429-30. However, Walden explained that such communications would violate the rule if sent or received by an employee who was active in the Guild. Tr. 430-31.

The Register Guard has not attempted to show that its restriction on union-related e-mail communications between employees is necessary to serve significant managerial

interests. Instead, the newspaper's sole defense is that prohibiting union-related e-mails is a nondiscriminatory application of the policy against "solicit[ing] or proselytiz[ing] for . . . outside organizations." GC Ex. 2. There are two things wrong with that defense.

In the first place, *The Register Guard*'s policy that the newspaper's e-mail is "not to be used to solicit or proselytize for . . . outside organizations," GC Ex. 2, is unlawful even though "the rule does not explicitly restrict activity protected by Section 7." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). The maintenance of the rule is unlawful both because "employees would reasonably construe the language to prohibit Section 7 activity" and because "the rule has been applied to restrict the exercise of Section 7 rights." *Ibid.* The rule has been discriminatorily applied against "the exercise of Section 7 rights" and, indeed, has only been applied against "the exercise of Section 7 rights." *See Richmond Times-Dispatch*, 346 NLRB No. 11, p. 3 (2005) (prohibiting union-related e-mails while allowing personal e-mails constitutes unlawful anti-union discrimination); *E.I. du Pont & Co.*, 311 NLRB 893, 919 (1993) (same).

The Register Guard was most certainly engaged in anti-union discrimination in this regard. As we have noted, *Register Guard* employees are free to communicate with each other through the company e-mail system on a wide variety of nonbusiness matters. And, Bishop and Prozanski, the only employees who have ever been disciplined for e-mail misuse, were singled out for discipline for being union activists communicating about matters of concern to the union. *The Register Guard*'s Director of Human Resources explained that reply e-mails of the sort sent by Bishop and Prozanski in May *are* permitted under the newspaper's policy, just so long as neither the person sending the

reply nor any of the recipients are union activists. Tr. 429-31. *See also* Tr. 399-401; GC Ex. 23.

It is also very much to the point that Prozanski's first August e-mail urging *Register Guard* employees to support the union's bargaining efforts by wearing green to work, GC Ex. 5, is no more "solicit[ing] or proselytiz[ing] for . . . [an] outside organization[]" than Managing Editor Baker's group e-mails urging employees to support the United Way, GC Ex. 57 & 58. And, Prozanski's second August e-mail inviting *Register Guard* employees to join the Guild's contingent at the annual Eugene Celebration Parade, GC Ex. 6, is in substance no different than the myriad group e-mails inviting employees to such outside group activities as house parties and poker sessions, Tr. 162, 165, 273; GC Ex. 10, 11, 46, 47.

The sole factor that distinguishes Prozanski's e-mails from the many nonbusiness group e-mails that were allowed by *The Register Guard* is that her e-mails concerned the union. Indeed, *The Register Guard*'s Director of Human Resources carefully explained that a union connection was sufficient to distinguish a permissible employee e-mail from an impermissible one. Tr. 399-401, 429-31.

The second flaw in *The Register Guard*'s defense is that, even though nondiscrimination is the minimum condition a restriction on employee workplace communications must meet to pass muster under the NLRA, merely meeting that condition is not sufficient in itself to justify the restriction. "[T]he right of employees to self-organize and bargain collectively established by § 7 of the NLRB, 29 U.S.C. § 157, necessarily encompasses the right effectively to communicate with one another regarding

self-organization at the jobsite." *Beth Israel*, 437 U.S. at 491. Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with . . . employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 8(a)(1). Thus, a restriction on employees' workplace communications with one another that is not justified by special circumstances that make the restriction necessary to maintain production or discipline is an unfair labor practice, even if the restriction is nondiscriminatory.

A simple example will make this point undeniably clear. If an employer provides a workplace cafeteria for its employees, the employer clearly may not prohibit the employees from talking about union-related matters while they eat lunch in the cafeteria. And, it would not suffice to justify a ban on union-related communications for the employer to show that it prohibits the employees from talking about any organization-related matters while they eat. Union-related matters enjoy a privileged status under the NLRA, and the employees have an affirmative right to discuss such matters, even if they are barred from discussing analogous topics that are not subject to § 7 protection. *See Beth Israel Hospital*, 437 U.S. at 491-492.

In short, even if *The Register Guard* had consistently enforced a rule prohibiting employee e-mails concerning outside organizations, the newspaper could not lawfully apply such a rule to prohibit employee e-mails concerning union matters.

3. If employees have a right to use their employer's e-mail system, may an employer nevertheless prohibit e-mail access to its employees by non-employees? If employees have a right to use their employer's e-mail system, to what extent may an employer monitor that use to prevent unauthorized use?

(a) This case concerns employer restrictions on *employee* use of a company e-mail system. There is no evidence of *non*employees attempting to use *The Register Guard* e-mail system to address the newspaper's employees about union or other concerted, protected matter. Indeed, the evidence shows that all of the Guild presidents have been employees of *The Register Guard*. Tr. 432.

(b) There is no indication that *The Register Guard* monitored the content of its employees' e-mails. The e-mails for which Bishop and Prozanski were disciplined came to management's attention through a variety of routes but not through monitoring. *See* Tr. 49, 329; GC 5, 6, 7.

(c) The issues of nonemployee access and employer monitoring and employees working at home are thus not implicated in this case. For the reasons stated in the Guild's Motion for Reconsideration (which are incorporated herein by reference), the Board does not have authority to address these issues in adjudicating the instant case. Moreover, each of these issues is highly context-dependent, and it would be inadvisable for the Board to attempt to address these issues in a vacuum in a case where they are not presented in a concrete factual context, even if doing so were not beyond the Board's adjudicatory authority.

4. In answering the foregoing questions, of what relevance is the location of the employee's workplace? For example, should the Board take account of whether the employee works at home or at some location other than a facility maintained by the employer?

Only two of *The Register Guard* employees worked at remote locations. Tr. 168. No claim has been made that this fact distinguishes these two employees from the other

newspaper employees with regard to their right to use the company e-mail. Therefore, the issue of whether a remote location is relevant is not presented by this case and should not be addressed for the same reasons that the nonemployee access and monitoring issues should not be addressed.

5. Is employees' use of their employer's e-mail system a mandatory subject of bargaining? Assuming that employees have a Section 7 right to use their employer's e-mail system, to what extent is that right waivable by their bargaining representative?

6. How common are employer policies regulating the use of employer e-mail systems? What are the most common provisions of such policies? Have any such policies been agreed to in collective bargaining? If so, what are their most significant provisions and what, if any, problems have arisen under them?

(a) In response to the questions in category 5, it is our view that, because employee use of the company e-mail system is a term or condition of employment, it is a mandatory subject of bargaining. However, the employees' § 7 right to use the company e-mail system to communicate with each other about union or other concerted, protected matters may not be waived by the union under *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974).

The *Magnavox* Court explained that the right of employees to communicate with one another at the workplace about union and other concerted, protected matters is of central importance to accomplishing the purposes of the Act:

> "The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees. So long as the distribution is by employees to employees and so long

> as the in-plant solicitation is on nonworking time, banning of that solicitation might seriously dilute § 7 rights. For Congress declared in § 1 of the Act that it was the policy of the United States to protect 'the exercise by workers of ull freedom of association, self-organization, and designation of representatives of their own choosing.' 29 U.S.C. § 151." *Magnavox*, 415 U.S. at 325-26.

For this reason, the Court held that it is beyond "the power of the collective-bargaining representative to waive those rights." *Id.* at 325.

(b) In terms of the instant case, by reason of the *Magnavox* rule, *The Register Guard*'s collective bargaining proposal that the Guild waive the employees' right to use the newspaper's e-mail to communicate with each other on matters related to the union was an unlawful proposal. The newspaper's explanation that its proposal was intended to allow employees to disseminate *anti*-union messages does not save the proposal. As the Supreme Court explained in *Magnavox*, "a limitation of the right of in-plant [communication] to employees opposing the union does not give a fair balance to § 7 rights, . . . [f]or employees supporting the union have as secure § 7 rights as those in opposition." 415 U.S. at 326.

The Guild could have agreed that the union itself would not use *The Register Guard* e-mail system. And, indeed the Guild did subsequently agree to forego use of the newspaper's e-mail for official Guild communications. It is questionable, however, whether such a limitation on official Guild communications could apply to a *Register Guard* employee even when acting as an agent of the Guild. *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 7005-7066 (1983) ("a union may bargain away its members'

economic rights, but it may not surrender rights that impair the employees' choice of their bargaining representative"). In any event, were such a waiver permissible, it would have to be clear and unmistakable to be effective. *Id.* at 709 "("to waive a statutory right the duty must be established clearly and unmistakably"). And, the Guild could not waive the right of individual employees to communicate their *own* views – even if related to union matters – to fellow employees *via* the e-mail system. *See Magnavox*, 415 U.S. at 325-326.

We would add that *The Register Guard* policy that was invoked to justify the disciplining of Bishop and Prozanski was not a part of the collective bargaining agreement, had not been agreed to by the Guild, and thus could not possibly be considered a waiver of the employees' § 7 rights to communicate on union-related matters *via* the newspaper's e-mail system. Tr. 63-63, 432. In any event, for the reasons just stated, even if the policy had been incorporated in the collective bargaining agreement, it would not have waived Bishop's and Prozanski's right to communicate their own views on union-related matters *via* e-mail with their fellow employees.

(c) The record does not contain evidence concerning the e-mail policies and the collective bargaining agreements of employers other than *The Register Guard*. Such evidence is irrelevant to whether *The Register Guard* committed an unfair labor practice.

7. Are there any technological issues concerning e-mail or other computer-based communication systems that the Board should consider in answering the foregoing questions?

The evidence shows that there is no technological justification for *The Register Guard*'s prohibition on employees' use of the newspaper e-mail system for communicating with one another about union or other concerted, protected matters.

Joseph Clark, a computer programmer who works on *The Register Guard*'s e-mail system, testified that the newspaper e-mail system handles three to four thousand pieces of e-mail each day without any difficulty. Tr. 320-23. Clark further testified that text messages of the sort sent by Bishop and Prozanski place virtually no burden on the e-mail system. Tr. 322. Indeed, Clark testified that photographs – such as the baby photographs employees were allowed to distribute by e-mail, Tr. 295 – consume much more computer memory than simple text messages. Tr. 323-24.

The later testimony of Richard Baker, the Assistant General Manager with responsibility for *The Register Guard* e-mail system, served to confirm Clark on both points. Baker testified generally about the installation of the newspaper's e-mail system and how employees accessed the e-mail system. Tr. 351-53. In so doing, Baker did not even claim that the e-mail system had any difficulty, technical or otherwise, in handling the flow of e-mail that was generated by *The Register Guard*'s employees or that there was any technological justification for the ban on employee e-mails concerning union or other concerted, protected matters.

Simply stated, the evidence in this case refutes any suggestion that *The Register Guard*'s rule was justified by any technological concern. The Board should so rule and should not reach out to consider on the basis of nonrecord submissions any hypothetical technological issue not presented by this case.

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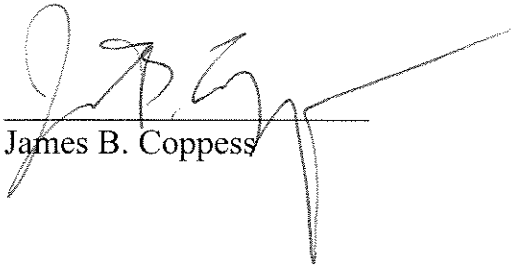

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