UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

and **Cases: 36-CA-8743-1**
36-CA-8789-1
36-CA-8842-1
36-CA-8849-1

EUGENE NEWSPAPER GUILD,
CWA LOCAL 37194

PRE-ARGUMENT BRIEF OF THE GENERAL COUNSEL

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On January 10, 2007, the Board solicited the parties to file pre-argument briefs addressing issues related to the National Labor Relations Act's application to e-mail systems.

I. Summary of Argument

The important issue before the Board here is how it will balance employees' Section 7 right to communicate with each other in workplaces that utilize modern communication technologies such as e-mail and employers' equally important right to protect their business interests in those communications. The Register-Guard's communications system policy prohibits all non-business solicitation through e-mail, which would include Section 7 communications. In the General Counsel's initial brief to the Board five years ago, we argued that this policy was overbroad and facially unlawful under the rules set forth in Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), and Stoddard-Quirk Mfg. Co. 138 NLRB 615 (1962), governing oral solicitation and the distribution of literature. Using the presumptions set forth in those cases, the General Counsel argued that the employees here used e-mail in such a

way as to make the computer network a virtual "work area." Because e-mail was more akin to solicitation than distribution, the above policy was unlawful because it prohibited solicitation during nonwork time in work areas.

While it is feasible for the Board to analyze e-mail communication under the above framework and find policies effectively banning Section 7 e-mail to be unlawful, we set forth here an alternative construct — one that better addresses the realities of modern workplaces utilizing new, computer-based, communication technologies and avoids the rigid application of legal presumptions created to deal with oral solicitation and paper distribution to e-mail, a fundamentally different type of communication.[1] Since the filing of our initial brief, e-mail has become even more deeply entrenched in both workplaces and homes and has become the preferred method of communication for many employees.

In evaluating rules limiting employee-to-employee communications via e-mail, the Board should follow Republic Aviation's fundamental instruction to strike a particularized balancing of interests by identifying the employees' Section 7 interest in engaging in communications via e-mail and the employers' business interests in regulating that use and by reconciling these interests with the least possible abridgment to either. An analysis of the employer and employees' interests at stake with e-mail demonstrates that an employer's business interests can be achieved by far less drastic measures than banning personal e-mail. The Board should thus conclude that broad rules prohibiting employees' nonbusiness use of e-mail, which encompasses Section 7 activity, are presumptively unlawful absent a showing of special circumstances. Other

[1] Workplaces that utilize some or all modern computer communication technologies, such as e-mail, the internet, an intranet, mobile telephones, and wireless handheld devices that support e-mail and mobile telephone (such as Blackberries), will hereinafter be referred to as "technological workplaces."

limitations (short of a ban) on e-mail usage should be evaluated by weighing the particular employer and employee interests involved.

II. History of the Case

The Eugene Newspaper Guild, CWA Local 37194, represents about 150 employees, including reporters, photographers, copy editors, secretaries, clerks, advertising department employees, and district managers of the Employer. Guard Publishing Co., d/b/a The Register-Guard, Case 36-CA-8743-1 (February 21, 2002), JD-15-02, slip op. at 2-3. On October 4, 1996, the Employer promulgated an employee communications policy that applied to all telephones, message machines, computers, fax machines, and photocopy machines. Id. at 3. That policy provided, "[c]ommunications systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations." Improper use of the communication systems would result in discipline, up to and including termination. Id. at 3.

Pursuant to that policy, the Employer disciplined 17-year employee and newly-elected Union president Suzi Prozanski three times in 2000. Id. at 3. As a copy editor, Prozanski had her own desk, computer, and e-mail account, which she used for work and nonwork purposes. On May 4, Prozanski sent an e-mail from her computer at work during a break time to about 50 coworkers at their work e-mail addresses, replying to the Employer's e-mail to those same 50 employees about a union-sponsored rally that took place on May 1. Id. at 3; Transcript (Tr.) 83-84. The next day, the Employer issued Prozanski a written warning for violating the Employer's Communication Policy by sending "a Union-related e-mail." Id. at 3.

On August 14, Prozanski sent an e-mail from a computer in the Union's offsite office to employees' work e-mail addresses advising them to wear green to support the Union's efforts to

obtain a wage raise and a contract. Id. at 3. Four days later, Prozanski sent another e-mail from the Union office asking employees to support the Union's entry in the Eugene Celebration Parade. The Employer again issued a written warning to Prozanski for sending the two "Guild related e-mails to employees' workstations in violation of the Respondent's Communications Policy." Id. at 3-4.

On October 26, 2000, in the course of bargaining for a new contract, the Employer proposed Counterproposal 26, a policy stating that the "electronic communications systems are the property of the Employer and are provided for business use only. They may not be used for union business." Id. at 5. On April 9, 2001, the Employer clarified that its proposal would ban bargaining unit members from discussing the Union and all union business through the Employer's electronic systems. Id. at 5-6. The Union repeatedly objected to Counterproposal 26 and filed an unfair labor practice with the Board. Id. at 10.

The Administrative Law Judge found the record replete with evidence of personal use of computers both before and after the Employer disciplined Prozanski. Id. at 8. He concluded that the Employer's discipline of Prozanski was unlawful because the Employer had permitted a "plethora of non-business e-mail." Id. at 8. The ALJ, however, rejected the General Counsel and Charging Party's argument that the Employer's policy banning employee solicitation over e-mail was facially unlawful. Id. at 7. The ALJ further concluded that the Employer's Counterproposal 26 was an unlawful attempt to codify a discriminatory policy and was therefore an illegal subject of bargaining. Id. at 10.[2]

[2] The ALJ also ruled that the Employer had unlawfully promulgated and enforced its unwritten insignia policy in violation of Section 8(a)(1).

The Employer filed exceptions to that decision, and the General Counsel and Charging Party both filed cross-exceptions, arguing that the ALJ erred by finding that the Employer's communication policy was not facially unlawful.

On January 10, 2007, the Board gave notice of oral argument set for March 27, 2007, and solicited the parties and amici to submit pre-argument briefs addressing seven questions.

In Section A of our brief, we address Questions 1, 2, 4, 6, and 7, which address whether employees have a right to use an employer's e-mail-system to communicate about Section 7 matters, whether an employer can place restrictions on that right, and whether an employer violates the Act if it permits non-job-related e-mails but not those related to union or other concerted, protected matters (Question 1); whether traditional rules governing solicitation and distribution or a new standard should apply to employees' use of e-mail (Question 2); the relevance of employees' work location in the analysis (Question 4); how common are employer policies regulating e-mail usage and what are the common provisions of such policies (Question 6)[3]; and other relevant technological issues (Question 7).

In Section B, we briefly address the remaining issues, most of which are not raised in this appeal, including: whether an employer may prohibit nonemployees from accessing its employees on its e-mail system (Question 3); whether employers have a right to monitor e-mail use to prevent unauthorized use (Question 3); whether e-mail is a mandatory subject of bargaining (Question 5), and whether a union can waive employees' Section 7 right to communicate via e-mail (Question 5).

[3] The General Counsel does not address the extent to which e-mail policies exist in collective bargaining agreements (part of Question 6).

III. Argument

A. Republic Aviation Requires a Balancing of Employee Section 7 Rights and Employer Business Interests in a Way that Accommodates Each While Causing the Least Abridgment to Either.

When evaluating rules limiting employee-to-employee communication, the Board must balance the employees' Section 7 interest at stake and the employer's interests in limiting that communication for business reasons. In Republic Aviation, the Supreme Court held that the validity of the employer rule depended on "an adjustment between 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." 324 U.S. at 797-98. The Court stressed the importance of both interests: "Opportunity to organize and proper discipline are both essential elements in a balanced society." Id. at 798. In balancing these rights, the Court rejected a "rigid scheme of remedies," instead favoring flexibility within appropriate statutory limits to accomplish the "dominant purpose of the legislation . . . the right of employees to organize for mutual aid without employer interference." Id.[4] The Court determined that the Board's presumption that an employer cannot prohibit union solicitation during nonwork time at the plant absent special circumstances was rationally based on the Board's appraisal of the normal employee and employer interests at stake in industrial establishments. Id. at 803-05. The Court reasoned that "[l]ike a statutory presumption or one established by regulation, the validity [of such a presumption] depends upon the rationality between what is proved and what is inferred." Republic Aviation, 324 U.S. at 804-05.

[4] See Frederick D. Rapone, Jr., "This is Not Your Grandfather's Labor Union—Or Is It? Exercising Section 7 Rights in the Cyberspace Age," 39 Duq. L. Rev. 657, 660-667 (Spring 2001) (discussing legacy of Republic Aviation and its policy of accommodating competing interests).

In evaluating employer limits on workplace distribution of literature, the Board in Stoddard-Quirk followed Republic Aviation's basic premise that the lawfulness of employer rules restricting communication depended upon adjusting employees' self-organization rights and the employer's right to maintain discipline at work. Stoddard-Quirk, 138 NLRB at 616-17. The Board reasoned that the employer and employees' interests regarding the distribution of literature were different than those involved in solicitation. Id. at 619. The employees' interests in distribution were achieved once the employee received the literature, while the employer had an additional interest in preventing litter in the work area. Id. at 619-21. In balancing these particular interests, the Board concluded that prohibitions on the distribution of literature on nonwork time in nonwork areas are presumptively unlawful. Id. at 621. As in Republic Aviation, the Stoddard-Quirk Board created a rational rule to minimize the infringement on both Section 7 rights and employer business interests.

The Supreme Court has continued to evaluate the lawfulness of workplace rules limiting Section 7 communication by considering the rationality of the Board's balancing of the particular Section 7 and employer interests. See NLRB v. Baptist Hospital, 442 U.S. 773, 789-90 (1979) (criticizing Board's presumptions regarding solicitation in hospital settings for failing to consider medical practices and patient treatment in modern hospital). In Beth Israel Hospital v. NLRB, 437 U.S. 483, 495, 501-02 (1978), for instance, the Supreme Court approved a qualified extension of the solicitation-distribution rule in Republic Aviation to hospitals. The Beth Israel Court emphasized the importance of balancing legitimate Section 7 interests with management interests, concluding that the Board's presumption permitting solicitation in areas other than immediate patient-care areas was appropriate where the cafeteria was the "natural gathering place" for employees and the risk of disruption to patient care was relatively low. Id. at 490,

495, 504-05. See also Marriott Corp., 223 NLRB 978, 978 (1976) (to account for employers' interests in serving customers, employers can prohibit solicitation on nonwork time in customer or sales areas of restaurants).

Because e-mail communication is significantly different from oral and paper communications, mechanically applying the presumptions created for oral solicitation and paper distributions in industrial workplaces to e-mail communications does not best effectuate the Supreme Court's instruction that the Board should avoid a rigid scheme of remedies and that it should tailor its presumptions to the realities of the modern workplace. See Baptist Hospital, 442 U.S. at 789-90. The perfunctory application of presumptions to new settings severs "the connection between the inference and the underlying proof." Beth Israel, 437 U.S. 483, 510, 514 (1970) (J. Powell, concurring) (criticizing the application of presumptions created for the industrial and manufacturing plants to hospital settings, where it was not as simple to divide the work environment into work and nonwork areas).[5] While e-mail arguably is more like solicitation than distribution, in that it is interactive in nature, informal, and often replaces face-to-face communications, it also has properties similar to the distribution of literature, in that it is a written communication, it may be permanent, and it can be read at a later time.[6] Thus, it does

[5] Miles Macik, Note, "'You've Got Mail.' A Look at the Application of the Solicitation and Distribution Rules of the National Labor Relations Board to the Use of E-Mail in Union Organization Drives," 78 U. Det. Mercy L. Rev. 591, 604-05, 614 (Spring 2001) (noting difficulty of applying traditional presumptions to e-mail communication; technological advances call for new rules and presumptions).

[6] See, e.g., Elena N. Broder, Note, "(Net)workers Rights: The NLRA and Employee Electronic Communications," 105 Yale L. J. 1639, 1662 (1996) (e-mail, like speech, is informal, individually targeted, and allows the reader to "talk back"). As set forth in the General Counsel's initial brief, if e-mail is analyzed under the traditional solicitation-distribution framework, we maintain that e-mail generally, and certainly the e-mails at issue here, must be characterized as Section 7 "discussion" or solicitation because it is largely a substitute for direct oral communication. The fact that e-mail can be read at a later time (characteristic of

not fit neatly within the solicitation-distribution paradigm developed in Beth Israel and Stoddard-Quirk.

Further, while a computer system is a virtual "work area," the concepts of "work areas" and "nonwork areas" were created to contrast the plant floor from break rooms, lunch rooms and parking lots. In technological workplaces, where employees may work, eat, and take breaks at their computer terminals, the work area/nonwork area paradigm is blurred and less meaningful. This is particularly true for employees who telecommute, work from home, work substantially outside their office (such as sales representatives, repair workers, and even attorneys), and employees who may not even have an office. Similarly, the concept of "work time" may have limited application in technological workplaces, where employees often self-release for breaks and may be judged on their productivity rather than on their hours of work.[7] Given the limited value of these concepts to e-mail communications, the Board should return to Republic Aviation's fundamental premise: What are the employer and employee interests at stake with e-mail, and how can the Board balance these interests in a way that causes the least intrusion on the rights of either?

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distribution) weighs in favor of permitting e-mail usage, as it is less likely to disrupt employees during work time. Further, much of the discussion of concerted activity or unions that occurs over e-mail would be more akin to protected concerted "talk" than to solicitation or distribution. See Wal-Mart Store, Inc. v. NLRB, 400 F.3d 1093, 1099 (8th Cir. 2005) (citing cases holding that an employee does not engage in "solicitation" by making pro-union statements, informing employees of a meeting, inviting employees to attend a meeting, introducing a co-worker to a union representative, and asking another employee questions about union issues; an employer may not prevent conversations about unions that do not interfere with work productivity).

[7] See 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, 52-53 (November 2000) (discussing limited applicability of concepts of working and nonworking time and home and work to e-mail and other electronic technologies).

1. Employees' Section 7 Interest in Engaging in E-mail Communication.

The Supreme Court has long recognized that the right of employees to self-organize and collectively bargain "necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite." Beth Israel Hospital, 437 U.S. at 491-92; see Republic Aviation Corp., 324 U.S. at 797-98. This is because Section 7 rights are only effective to the extent that employees are able to learn about the advantages and disadvantages of organization from others. Beth Israel, 437 U.S. at 492 fn. 9, citing Central Hardware Co. v. NLRB, 407 U.S. 539, 542-43 (1972). In Timekeeping Systems, 323 NLRB 244, 244, 248 (1997), the Board recognized employees' Section 7 interest in communicating through e-mail in holding that an employee's e-mail to fellow employees about company policy changes constituted concerted activity because the employee was "communicating with" fellow employees to voice opposition to the employer's proposed changes and the communication was not "expressed in so intolerable a manner as to lose the protection of Section 7."[8]

In the last 10 years, the emergence and widespread use of e-mail has transformed the manner in which many employees interact in the workplace. Studies show that e-mail is the most commonly used form of work-related communication — more common now than face-to-face communications.[9] A 2004 study by the American Management Association showed that

[8] The ALJ in Timekeeping Systems distinguished the Board's decision in Washington Adventist Hospital, 291 NLRB 95, 103 (1988), where an employee's use of e-mail to break into and supplant the messages being sent between more than 100 computer terminals in a hospital was found to be unprotected. Timekeeping Systems, 323 NLRB at 249. These two decisions together foreshadow the balancing test we urge in evaluating Section 7 e-mail usage: where employee's Section 7 use of the e-mail system infringed upon the employer's legitimate business interests, it was unprotected; where it did not, that use was protected.

[9] Frank Kuzmits, "Using Information and E-mail for Political Gain," 9/1/02 Info. Mgmt. J. 76 (2004) (collecting data from 244 employers representing variety of interests).

81.5% of employees spend at least one hour working on e-mail each day.[10] "Due to its ease of use, in many cases this technology has replaced the hand-written note or discussion by the water cooler as the preferred method of communication."[11]

As employees increasingly use e-mail communication to work, e-mail has likewise become the "natural gathering place" for nonwork-related communication. See Beth Israel, 437 U.S. at 490 (referring to cafeteria as "natural gathering place" for employees where employer used space to communicate with employees and employees used area to discuss nonwork-related matters). The 2004 American Management Association study showed that 86% of employees engage in some use of personal e-mail at work. Thus, even where employees work at the same site, e-mail has clearly become a virtual "gathering place" in computer communications about work and nonwork issues.[12] Because employees have a Section 7 right to communicate at work, employees in technological workplaces have a Section 7 right to communicate through e-mail.

Employees who are geographically separated, working at home, or telecommunicating rely on electronic communications even more to communicate in the workplace, as they may have limited other means of communication. Thus, while the Supreme Court has clearly held that the availability of alternative means of employee-to-employee communication is not relevant in determining the nature and strength of the Section 7 right, see Beth Israel, 437 U.S. at 504-05, the inability of some employees to communicate with fellow workers other than through email demonstrates the critical nature of this Section 7 right.

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[10] American Management Association, 2004 Workplace E-Mail and Instant Messaging Survey (2004), located at http://www.amanet.org/research/pdfs/IM_2004_summary.pdf

[11] C. Forbes Sargent, III, "Electronic Media and the Workplace: Confidentiality, Privacy, and Other Issues," 41 Boston B. J. 6 (May/June 1997); see Hon. Ronald J. Hedges, "Discovery of Digital Information," SMO51 ALI-ABA 271, 276 (2006) (informal communications previously relayed by telephone or at the water cooler are now sent via e-mail).

[12] See Beth Israel, 437 U.S. at 490.

2. Employer's Business Interests in Limiting Employee Access to Its Communications Network.

The Supreme Court has clearly held that, where employee Section 7 interests are at stake, the Board should balance those interests against the employer's management, not property, interests. See Beth Israel, 437 U.S. at 504-05, citing Hudgens v. NLRB, 424 U.S. 507, 521-22, fn. 10 (1976); Republic Aviation, 324 U.S. at 797-98 (reviewing adjustment between employees' self-organization rights and employer's right to "maintain discipline" at work). In weighing these management interests, the Board has recognized that oral solicitation impinges upon the employer's interest in maintaining discipline only to the extent that it occurs on working time, while the distribution of literature, which carries the potential for littering the employer's work areas, raises a "hazard to production" no matter when it occurs. Stoddard-Quirk, 138 NLRB at 619. Following this analysis, the Board should identify the employer's management interest in limiting employee's communication through e-mail because it is this particularized interest that must be weighed against the employees' Section 7 rights to communicate at work.

An employer has a business interest in limiting employee-to-employee e-mail communication to prevent liability triggered by inappropriate e-mail content, to protect space on its server, to protect against computer viruses that can be transferred through e-mail attachments, and to ensure that employees are not spending excessive time engaged in personal e-mail to the detriment of productivity.[13] In certain workplaces, the employer may also have an interest in protecting confidentiality and trade secrets (if, for instance, employees have different types of security clearances).

[13] See "Special Report: E-mail & Internet Use Policies: An HR Manager's Guide," Thompson Publishing Group Inc., p. 7-16 (1999).

An employer does not have an indefeasible interest in banning the personal use of e-mail simply because the computer system or computer from which employees send or receive e-mail may be owned by the employer.[14] This is because ownership is not relevant where the organizational activity of employees already rightfully on the employer's property is at stake. See Hudgens, 424 U.S. at 522 fn. 10; Republic Aviation, 324 U.S. at 803 fn. 8 ("[i]nconvenience, or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining").[15] While the Board has found that an employer may put nondiscriminatory limits on employees' use of bulletin boards, public address systems, video equipment, and photocopiers,[16] the property at issue in the so-called "equipment" cases did not involve interactive, electronic communication regularly used by employees. The Board has never prohibited employees from communicating with each other at the workplace via a common, interactive employee-to-employee communication form, and should decline to extend the "employer equipment" cases to fashion such a rule here.

In addition, an employer's business interests in prohibiting employees from monopolizing the employer's bulletin board, public address system, or photocopier is more compelling than in the case of computers and e-mail addresses issued to individual employees to

[14] The limitations of the "property" concept are exemplified by the fact that Prozanski's August e-mails were not even sent from an employer computer. We submit, however, that employees' right to engage in e-mail communication is the same regardless of whether they send or retrieve the e-mail via an employer-owned or other computer.

[15] Malin & Perritt, "The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces, 49 U. Kan. L. Rev. at 54 (just as, once employer has invited employees onto its property, it may not prohibit employee solicitation to support union during nonworking hours without showing special circumstances, once employer licenses employees to use e-mail system, it may not prohibit solicitation to support union without showing special circumstances).

[16] See, e.g., Mid-Mountain Foods, Inc., and UFCW Local 400, 332 NLRB 229, 230 (2000) (video on television); Champion International Corp., 303 NLRB 102, 109 (1991) (photocopier); Honeywell, Inc., 262 NLRB 1402, 1402-03 (1982) (bulletin board), enfd. 722 F.2d 405 (8th Cir. 1983); The Heath Co., 196 NLRB 134, 134 (1972) (public address system).

use on networks where thousands of communications occur simultaneously. See Sprint/United Management Co., 326 NLRB 397, 399 (1998) (noting employer's legitimate business interest in prohibiting use of bulletin boards is to ensure that its postings can easily be seen and read and that they are not obscured or diminished by employees' postings). While two Administrative Law Judges stated in dicta that an employer could bar employees from using telephones for personal use, both cases were decided on discriminatory enforcement grounds, and the Board has never squarely addressed this issue. See Union Carbide Corp., 259 NLRB 974, 974 fn. 1, 980 (1981), enfd. in rel. part 714 F.2d 657, 663-64 (6th Cir. 1983); Churchill's Supermarkets, 285 NLRB 138, 155 (1987), enfd. 857 F.2d 1474 (6th Cir. 1988). In any case, management interests 20 to 25 years ago in regulating employees' personal use of telephones, which may not have had multiple lines, call waiting, voice-mail, and other modern characteristics, may be different today, where technology has blurred the lines between telephones and other forms of electronic communication (devices such as the Blackberry now even combine both technologies). Thus, the "equipment" cases are distinguishable based on the management interest at stake in regulating e-mail, the way employees use e-mail, and the nature of the technology.

3. Balancing Employees' Section 7 Interests Against Employer's Business Interests.

The Board should adopt a presumption that a total ban on employees' right to communicate about non-work matters through e-mail is unlawful. Employees have a Section 7 right to communicate at work, and, in technological workplaces, e-mail is the present day water cooler. A total ban on e-mail for personal use would effectively nullify employees' Section 7 right to communicate in the "natural gathering place." See Beth Israel, 437 U.S. at 490. Thus, achieving the balance required by Republic Aviation is not possible if an employer is permitted

to prohibit all personal e-mail in the workplace. Further, the Supreme Court has clearly held that the availability of alternative means of employee-to-employee communication is not relevant in determining the nature and strength of the Section 7 right. See Beth Israel, 437 U.S. at 504-05; NLRB v. Babcock & Wilcox, 351 U.S. 105, 112-13 (1956). Thus, the fact that employees in technological workplaces work at the same office (rather than from home or from another facility) and may also have a cafeteria or a break room does not diminish their Section 7 right to engage in e-mail communication.

Most significantly, a complete ban is "more restrictive than necessary" to address the employer's interests. See Beth Israel, 437 U.S. at 502-03 (rule prohibiting distribution of literature in hospital areas accessible to patients and visitors was "more restrictive than necessary" to avert disruption to patients and provide quality medical care); Stoddard-Quirk, 138 NLRB at 617 (abridgment of either employer or employee's right should be "kept to a minimum"). The primary employer interests in restricting e-mail — preventing liability triggered by e-mail content, protecting the computer system from large attachments and potential e-viruses, and ensuring employees are using work time for work — can be accomplished by far less restrictive means than banning personal e-mail, including Section 7 communications. For instance, employers could apply existing harassment and confidentiality policies to e-mail communications, restrict the size or nature of e-mail attachments, or prohibit communicating about personal matters other than during breaks and lunch.

The rarity of policies completely banning personal use of e-mail demonstrates that such policies are unnecessary to satisfy an employer's legitimate interests. Recent studies show that

84 percent of employers now have workplace policies governing personal e-mail usage,[17] but only five to eight percent of companies have told workers that e-mail may not be used to send personal messages.[18] Human resource specialists and best business practices do not even recommend prohibiting all personal use of e-mail usage to protect an employer's interests.[19] A presumption that employer prohibitions on personal e-mail that include Section 7 communications are unlawful is thus rationally related to what is likely to be proved — that complete bans on personal e-mail are more restrictive than necessary to achieve the employer's legitimate business goals. See Republic Aviation, 324 U.S. at 804-05. Even if Section 7 e-mail communications intrude to some extent upon the employer's business interests, the Board has recognized that limited intrusions are warranted to accord "commensurate recognition to the statutory right of employees" to communicate about workplace issues using this technique. See Stoddard-Quirk, 138 NLRB at 620-21.

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[17] See American Management Association, 2005 Electronic Monitoring & Surveillance Survey, (2005), available at http://amanet.org/research/pdfs/EMS_summary05.pdf

[18] See "META Group Says 57 per-cent of Employees Use Work Instant Messaging for Personal Reasons, Tells Employers to Develop an 'IM Policies' to Regulate Use," Information Technology Association of American (ITAA) E-Letter (five percent) (November 2004), available at http://www.cordant.com/news/IMNews/IMNews_112004_METAGroup.pdf; W. Michael Hoffman, Laura P. Hartman & Mark Rowe, "You've Got Mail… And the Boss Knows: A Survey by the Center for Business Ethics of Companies' Email and Internet Monitoring," Business and Society Review 108:3 285-307, 293 (eight percent) (2003) available at http://www.bentley.edu/cbe/documents/email_monitoring.pdf

[19] See "Special Report: E-mail & Internet Use Policies: An HR Manager's Guide," Thompson Publishing Group Inc., p. 7 (noting that "occasional personal use of e-mail at work has become commonplace and is not likely to strain a company's system"); Nancy Flynn, The ePolicy Handbook: Designing and Implementing Effective E-Mail, Internet, and Software Policies, AMACOM, pp. 20, 102 (2001) (sample policy provides that "a certain amount of personal e-mail and Internet use is expected and authorized," and notes that "[w]hile e-mail is intended for business use, most organizations accept a limited amount of personal use").

As with the presumptions governing solicitation and distribution, an employer may establish that special circumstances related to production or discipline require a complete ban on personal e-mail, including Section 7 communications. This would require more than a general identification of the management interests at stake, but a particularized showing that the employer cannot achieve its actual, identified interest without banning employees' Section 7 right to communicate via e-mail. The parameters of such special circumstances should be developed through the application of specific facts — none of which are present in this case, where the employer in fact permitted a wide range of personal e-mail usage.

As for employer limitations (short of a ban) on personal e-mail, we recognize that employers have legitimate business interests related to their e-mail systems and, thus, limited incursions on Section 7 e-mail usage may be lawful where necessary to protect those legitimate interests. E-mail regulations should be evaluated on a case by case basis, where the Board can engage in a particularized balancing of the employer's specific business and technology interests and the relative infringement on employees' Section 7 rights. An employer, for instance, clearly has an interest in restricting certain content in e-mails to protect against liability as a result of those e-mails, and such restrictions would not reasonably discourage employees from engaging in Section 7 activity.[20] An employer also has a strong business interest in protecting its server capacity against e-viruses that may be contained in attachments and excessively large e-mail attachments, such as audio and video segments, and employees' Section 7 interest in sending such attachments is minimal. Finally, an employer has an interest in ensuring that employees are not spending excessive time engaging in personal e-mail usage, and employees do not have a

[20] See Martin Luther Memorial Home d/b/a Lutheran Heritage Village-Livonia, 343 NLRB No. 75, slip op. at 4 (2004) (rule prohibiting "verbal abuse," "abusive or profane language," and "harassment" would not reasonably discourage employees from engaging in Section 7 activity).

Section 7 right to engage in personal emailing that interferes with their work productivity. By weighing the particular interests involved, the Board can develop rational rules and ensure that any encroachment on either employee or business interests is minimized.

4. Discriminatory Enforcement of E-mail Policies Violates Section 8(a)(1).

The Board has clearly held that an employer discriminates against bargaining unit employees, in violation of their Section 7 rights, by prohibiting them from using e-mail to distribute union literature and notices where it permits personal e-mail usage. Media General Operations d/b/a Richmond Times-Dispatch, 346 NLRB No. 11, slip op. at 3 (2005); E.I. du Pont de Nemours & Co., 311 NLRB 893, 893, 919 (1993). Thus, at a minimum, employees engaging in Section 7 activity must be granted e-mail access and usage commensurate with that granted to employees for other nonwork activities.

As in du Pont and Media General, employees here used e-mail at work for non-business purposes, including e-mails about parties, jokes, breaks, community events, births, lunch meetings, and poker games. JD, at 4. Accordingly, the Board should affirm the ALJ's finding that the Employer discriminated against Prozanski by disciplining her for sending union-related e-mail.

B. Other Questions Posed by the Board.

1. Right of Nonemployees to Access the Employer's E-mail System.

The U.S. Supreme Court has recognized that an employer may validly prohibit nonemployees from distributing literature to employees on its real property if the union has reasonable alternative means of communicating with employees and if the employer's rule does not discriminate against the union by allowing other distribution. Babcock & Wilcox, 351 U.S. at 112. The Court reasoned that "the right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others," but that the

employer's property interests generally outweigh the employees' interests if the organizers had other "readily available" means of communicating with employees. Id. at 113-14. Thus, access rights of nonemployees are necessarily lesser than those of employees.

However, the nonemployee access cases are grounded in state trespass laws and employers' interest in protecting real property from trespass.[21] State and federal laws have largely not addressed employers' rights to exclude nonemployees from utilizing their e-mail systems. See Intel Corp. v. Hamidi, 30 Cal. 4th 1342, 1359-60 (2003) (where former employee sent current employees unauthorized e-mails critical of company, court held that trespass to chattel required proof of harm or interference with Internet system).

Since the only e-mails at issue here involved employee-to-employee communications, non-employee union access to employees through an employer's e-mail system is not an issue in this case and should not be addressed. Rules pertaining to nonemployee access to e-mail systems are best handled through case-by-case adjudication on records developed according to the requirements of Section 10(c) of the Act. This is particularly true where state and federal law involving an employer's legal right to exclude nonemployees from its e-mail systems is largely undeveloped.

2. Employer's Right to Monitor E-mail to Prevent Unauthorized Use.

Employers generally have the right to monitor employee e-mail messages under federal law, if the employer provides the system, if the employee gives consent, or if there is a legitimate business reason. See generally 18 U.S.C. §§ 2510(5)(a), 2511(2)(a)(i), 2511(2)(d), 2701(c)(1), 2702(a)(1). The test set forth by the General Counsel for evaluating the lawfulness of employer

[21] See Malin & Perritt, "The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces," 49 U. Kan. L. Rev. 1, 38-42 (2000) (discussing Supreme Court's distinction between employee-licensees and nonemployee-trespassers).

e-mail usage rules in no way impinges upon employers' ability to promulgate nondiscriminatory monitoring policies.

This case presents no issues pertaining to monitoring. Specifically, there is no allegation that the Employer engaged in unlawful surveillance in reading or monitoring Prozanski's e-mails, nor is an Employer monitoring policy at issue. While employers generally can monitor employee e-mail communications to prevent improper usage, whether an employer engages in unlawful surveillance by monitoring Section 7 e-mail may depend on whether the employees at issue have an expectation of privacy in the e-mail message; whether the employer has informed the employees that it is monitoring their e-mail; and whether the employer is discriminatorily monitoring Section 7 e-mail. The Board should decline to comment on the circumstances in which employer monitoring could constitute unlawful surveillance where this issue is in no way raised in this case.

3. E-mail As Mandatory Subject of Bargaining.

Mandatory subjects of bargaining are those that involve wages, hours, or other conditions of employment. While e-mail policies generally are mandatory subjects of bargaining because they concern rules governing employee behavior, see Associated Services for the Blind (ASB), 299 NLRB 1150, 1158 (1990), the ALJ here correctly determined that the Employer's specific proposal here was illegal because it was an attempt to codify a discriminatory policy. That decision should be affirmed.

Whether a union could waive employees' Section 7 right to communicate through e-mail is not before the Board and should not be addressed. We note, however, that even where a condition of employment is a mandatory subject, a union may not waive employees' rights to communicate about their choice of bargaining representative — whether to change their

bargaining representative, to opt for no representative, or to retain their present bargaining representative. NLRB v. Magnavox Co. of Tennessee, 415 U.S. 322, 325 (1974) (union could not agree to policy banning right of in-plant distribution of literature or solicitation of union support by employees at the plant during nonworking time); Mead Corp., 331 NLRB 509, 510 (2000) (union could not agree to rule prohibiting solicitation during working hours, not just during working time, and distribution throughout plant premises, not just in work areas); Kelly-Springfield Tire Co., 223 NLRB 878, 881 (1976) (union could not agree to rule prohibiting distribution of literature where rule had effect of "stifling communication channels guaranteed to employees under the Act"). Thus, a union could not agree to a complete prohibition on employees' Section 7 right to communicate over e-mail because that would infringe upon employees' Magnavox rights.

IV. Conclusion

The right of employees to communicate about protected concerted activity at work is at the heart of the Act, and e-mail is the new means of workplace communication. Following the Supreme Court's clear instructions to balance competing employer and employee interests with as little destruction to either as possible and to develop new, rational accommodations for substantially different work environments, the Board should seize this opportunity to strike a new balance addressing employee-to-employee e-mail communications. In striking this balance, the Board should conclude that bans on personal e-mail abridge employees' fundamental right to engage in Section 7 communication at work far more than necessary to serve the employer's management interests and are thus presumptively unlawful.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Pre-Argument Brief of the General Counsel was duly sent by overnight mail (Federal Express) to all parties listed below on this 8th of February, 2007.

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