UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

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

Respondent

and

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

Charging Party.

CASES 36-CA-8743-1
36-CA-8849-1
36-CA-8789-1
36-CA-8842-1

CALIFORNIA NEWSPAPERS PARTNERSHIP
d/b/a ANG NEWSPAPER,

Respondent

and

NORTHERN CALIFORNIA MEDIA WORKERS
GUILD/TYPOGRAPHICAL UNION, LOCAL
#39521, TNG-CWA, AFL-CIO

Charging Party.

Case 32-CA-19276-1

CHARGING PARTIES' RESPONSE TO BRIEF *AMICUS CURIAE* OF THE HR POLICY ASSOCIATION, INC. IN SUPPORT OF THE RESPONDENT EMPLOYERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

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The Charging Parties in the above-captioned cases, the Eugene Newspaper Guild, Local 37194, and the Northern California Media Workers Guild/Typographical Union, Local 39521,

both of the Newspaper Guild-Communications Workers of America, AFL-CIO (" the Charging Parties") hereby submit the following response to the *amicus curiae* brief filed by the HR Policy Association, Inc. ("the *amicus*"). The Charging Parties respectfully submit that the application of current Board precedent adequately addresses the propriety of employer restrictions on e-mail, which should be evaluated on a case-by-case basis under existing laws governing no-solicitation policies. There is no compelling need, on the facts presented to the Board, to accept the *amicus*'s invitation to forge drastic new doctrines that would rewrite existing precedent.

ARGUMENT

I. The facts of this case do not support the *amicus*'s proposed blanket rule that all employer restrictions on e-mail are presumptively lawful.

While claiming that it does not want to create new rules, the *amicus* nonetheless proposes a radical theory, which would brusquely depart from settled Board law: from here on forward, employers should be awarded a *presumptive* right to prohibit or restrict non-business use of e-mail. Such a ban would effectively ignore Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), which held that no-solicitation policies in fact are presumptively *unlawful*, unless they are shown to interfere with discipline or productivity.

Indeed, the facts of this case make it a particularly inappropriate vehicle for declaring all employer e-mail restrictions to be presumptively lawful.[1] In Register Guard:

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1 Discussion shall henceforth be limited to the Register Guard case. The amicus's arguments do not properly apply to ANG Newspapers, a "garden variety" case on the unilateral implementation of a policy without notice and an opportunity to bargain afforded to the union. While the policy implemented happened to concern e-mail, it is undisputed (and was before the ALJ) that e-mail is a mandatory subject of bargaining. The exceptions before the Board concerning ANG Newspapers turn on the process of

- The ALJ found that the no-solicitation rule was discriminatorily enforced, as the company tolerated (and even participated in[2]) widespread use of non-business e-mails, only cracking down on the union-related e-mails. Under longstanding Board precedent, even where a restriction on solicitation is permitted, it cannot in any case be discriminatorily enforced against solicitation activities protected by Section 7 of the National Labor Relations Act.

- A unit employee sent the e-mail in question to other unit employees; no outside individuals or accounts were involved. This calls into question the *amicus*'s litany of hypothetical concerns regarding outside viruses, spam, and the like-- the e-mail sent remained within the company's server at all times, and was thus similar to the work-related e-mails that employees sent each other.

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bargaining and implementation of the policy, and do not implicate the more theoretical concerns of the *amicus* regarding the underlying propriety of policies governing e-mail. We respectfully request that the Board affirm the ALJ's decision in ANG Newspapers.

2 See ALJ McCarrick's Decision, 8: 37-38 ("The record is replete with evidence of personal use of Respondent's e-mail systems by its employees and mangers...") The widespread record evidence of employee non-business e-mails, includes, for example, Transcript ("Tr"). pp. 161:22-162:12; 164:23-165:25; 296-298; 217; 273-274; 295-298; 315-316; 317:10-17 and GC Exhs. 3, 4, 10-17, 19-23 (excluded GC Exhs. 24-26), 27-42, 44-48, 55-59. Stipulation #1 (GC Exh. 60) contains the names of managers who appear as authors or recipients in many of the General Counsel Exhibit emails just listed. Oral testimony also confirmed managers' involvement. Tr. 161:11-15; 218.

3 Please see Charging Party Eugene Newspaper Guild's full discussion on the factual and legal support for ALJ McCarrick's finding that the policy was discriminatorily applied, in our Answering Brief to Respondent's Exceptions to Decision of Administrative Law Judge, p. 6-13.

- One of the key e-mails in question itself responded to a manager's e-mail on the same topic (cautioning employees about an upcoming union rally).[4] While Board law in other settings has not found fault in different policies applying to managers and unit employees, this still belies the dire warnings of the *amicus*-- that non-business use of e-mail inevitably leads to a parade of horribles, including dallying employees, crashed servers, etc.-- when the company's very own managers send e-mails to the same e-mail accounts, on the same topic. If the *amicus* demands vigilance against even the slightest of risks that a non-business e-mail may lead to infectious viruses and plummeting productivity, why doesn't it engage in similar hand-wringing over a manager's anti-union e-mail sent to unit employees at work?

- Computers at the Register Guard were essential work areas. Not every business that provides computers and e-mail access may necessarily provide them in a manner so as to create work areas. Here, though, there is no question but that they did so, under the facts presented. The reporters and other employees at the Register Guard constantly depended on computers and e-mail addresses to fulfill their daily work, to communicate with each other, the public, sources for stories, etc.[5] Indeed, the employees of the Register Guard

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[4] Manager David Baker originally sent an email to the newsroom staff urging caution regarding an upcoming Guild rally. Tr. 85:14-16; 325-329.

[5] Testimony from reporters reflects that when they were not outside the building, the computer was central to their work. Tr. 216; 272-273; 291-293. Copy editors and news aides regularly used the computer and email in their work. Tr. 74-75; 318:21-25. All of the newsroom employees, and inside classified sales employees, had computers with an email address. Tr. 161:1-5, 313-314. Two employees, located away from Eugene in Salem and Portland, regularly communicated with the Eugene office via email. Tr.

were actually required to examine incoming, unsolicited e-mails from the public to gauge story leads, reader reactions, etc.[6] Thus, the *amicus*'s proposed blanket rule fails to take into account the particularities of how e-mail and computers are used in the setting in question, and whether their use has established that they should properly be considered work areas-- this, despite the *amicus*'s own recognition that its members place varying limitations on computer use "depending on each company's particular business needs and philosophy." *Amicus* at 3.

- There was no finding that the employer met its burden on proving productivity problems or disciplinary problems associated with the non-business use of e-mail. In fact, unrebutted testimony by the employer's information systems employee indicated that thousands of e-mails were sent every day; that the computer system had never experienced problems; and that, under the particular computer system that the employer used, each particular text e-mail (such as the one in question in the case) in and of itself resulted in no additional cost to the employer.[7] This may help explain why the employer in fact knowingly permitted some non-business use of e-mail. See Tr. 397, 1:16 (testimony of employer's human resources manager).

167:25-169:7. Register Guard employee email addresses were published to the public at the end of newspaper articles. Tr. 292:23, 294:12-17. They were also made available to the public on the Register Guard's website and were given over the telephone on the newspaper's "Guard line". Tr. 323. In this particular workplace, e-mail was commonly used in a conversational tone and manner, often replacing oral conversation. Tr. 274:13-22; Tr. 164:23-165:6.

[6] Tr. 292-294.

[7] Tr. 322-324.

For the *amicus* to succeed in obtaining a sweeping new presumption, based on alleged productivity and disciplinary problems associated with non-business e-mail, it clearly has the burden of proving such problems. It has not carried this burden, beyond making some conclusory arguments about the potential that "spam" in general (not employee non-business e-mails in particular) may pose in the abstract. It clearly has not met its burden-- the burden that an employer would have in any solicitation case-- of establishing that particular computer systems and practices can not accommodate employee e-mails regarding terms and conditions of employment without engendering productivity or discipline problems.

The facts of this particular case, then, make it clear that the policy in question was enforced only in the breach; that managers and unit employees alike sent non-business e-mails to each other regularly, and that e-mail at the Register Guard had to some extent supplanted oral conversation as a means for communicating with (and soliciting) colleagues, and that all this occurred without demonstrable effect on productivity, computer security, etc. Following the *amicus*'s invitation to extend a presumption of lawfulness to an employer's e-mail policy is clearly not warranted in the Register Guard case, where the employer not only generally tolerated employees' widespread disregard for the official policy, but failed to demonstrate any adverse consequences to the company resulting from the common employee practice of sending non-business e-mails to fellow employees.

II. As existing Board precedent adequately deals with the case at hand, it is unnecessary to create new doctrines and legal presumptions.

Existing Board precedent is clearly equipped to deal with the situation at hand.[8] The *amicus* presents theoretical concerns based on an absolutist view of employer property rights: any byte on a computer server, any possible risk of a virus, no matter how low, any second spent marking a personal e-mail for reading on non-work time-- any of these possibilities would justify a company's sweeping policy prohibiting, among other things, all discussion of terms and conditions of employment via e-mail. Yet when employees are on non-work time in a work area, long-standing precedent makes clear that they have a right to solicit on topics covered by Section 7 of the NLRA-- a right to which employer property rights must give way in many circumstances. See Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 (1945) ("inconvenience, or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining").[8] An employer frequently has property rights in the physical work area itself, wherever it may be, in its water cooler, in its parking lot, etc.-- but when an employee has been granted a license to use the work area, the property rights may be required to give way, on non-working time, to employee solicitation rights.

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[8] Existing Board precedent also clearly recognizes that employers often apply e-mail policies in a discriminatory manner against use for union-related topics. See DuPont de Nemours and Chemical Workers Assoc., 311 NLRB No. 88 (1993). The ALJ found that had occurred here. This finding is an appropriate one, making this a curious case for establishing that the underlying policy was "presumptively lawful", given the problems surrounding its enforcement and application.

8 Please refer to our earlier briefs for a more complete discussion of our argument explaining why the e-mails referring to the Guild rally and contract talks constitute solicitation under Board precedent.

On this point, the *amicus* misstates the import of certain past Board decisions, which it seeks to convert into an ironclad doctrine that any and all employer restrictions on solicitation are appropriate if they occur on "communications systems" owned by the employer. Such an argument fails to take into account the situations in which inconvenience to employer property rights may be necessary to properly protect employee solicitation rights, as set out in Republic Aviation, above. And it relies primarily on cases involving the more static media of public address systems, TV/video recorders set to a single channel, photocopiers, etc., where the same potential for conversation evident in e-mail is not present, and where the cost to the employer (and monopolization of the resource in question) is far more apparent.[9]

Here, testimony clearly established that, in this particular workplace, e-mail was used as a common means of conversing with, and soliciting, fellow employees, just as it was with the newspaper-reading public at large, and all at no proven cost or harm to the employer. Indeed, the unrebutted testimony in Register Guard-- that the e-mail in question did not result in any additional cost to that employer's particular computer system-- makes the *amicus*'s theoretical

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9 The *amicus*, and employer, also cite *dicta* from two administrative law judges opining that a certain employer could have prohibited all personal use of the phone at their particular workplace. Champion International Corp., 302 NLRB 102 (1991); Churchill's Supermarkets, Inc., 285 NLRB 138, 139 (1987). In neither case was the *dicta* necessary (the ALJ had already decided that the policy as applied was discriminatory), nor did the Board consider the *dicta* in specificity. Not only is this insufficient to establish a "well-settled" policy on the subject, we submit that there is insufficient evidence to equate the occasional use of the company phone at the two workplaces in question with the widespread testimony in Register Guard regarding the ubiquity of e-mail use among reporters and other employees, the essentiality of e-mail to their jobs, and the lack of strain on this particular employer's resources caused by non-business use of e-mail.

argument, resting on abstract views of property rights,[10] and potential hazards detailed in such documents as the unpublished training materials of an unnamed "member company", of little practical value in justifying an unfettered ban on union solicitation via e-mail.

Importantly, the existing standard set out in Republic Aviation, *supra*, properly allows for an employer to argue that its particular problems with productivity or discipline justify its particular restrictions on solicitation-- but without going so far as to sanction all policies restricting a certain form of solicitation, that occur via e-mail. And under existing law, an employer's mere preference that employees not engage in solicitation on non-work time based on hypothetical hazards (similar to the list presented by the *amicus*) would not normally justify a blanket prohibition on solicitation. Rather, the employer must meet its burden to demonstrate actual concerns regarding productivity or discipline, in its particular case, so as to justify a particular ban.

Whether any employer may conceivably make such a showing is not a question before the Board. This employer clearly has not, and Board precedent makes clear that this employer's policy restricting non-business solicitation -- among this particular group of reporters, dependent on e-mail for workplace and other communications-- was an overly broad no-solicitation policy, in violation of the Act.

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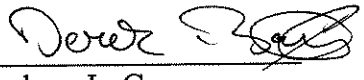
10 Note that, in another context, the California Supreme Court decided last year, in Intel v. Hamidi, 1 Cal. Rptr. 3d 32 (Cal. S. Ct. 2003) that electronic communications that did not damage or impair a company's computer system did not constitute harm to an employer's property interests so as to constitute a trespass to chattels under California law.

CONCLUSION

For the foregoing reasons, the Charging Parties respectfully urge the Board to reject the *amicus*'s invitation to rewrite existing Board law, and instead to consider the Register-Guard case under longstanding Board precedent on solicitation and discriminatory application of a solicitation policy.

Respectfully submitted,



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I hereby certify that on this 9th day of June, 2004, a true and correct copy of this Charging Parties' Response to Amicus Curiae Brief of the HR Policy Association, Inc., was served by overnight delivery service to the following:

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