**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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|---|---|---|
| THE GUARD PUBLISHING COMPANY, d/b/a THE REGISTER-GUARD | ) | CASES 36-CA-8743-1 |
| | ) | 36-CA-8849-1 |
| AND | ) | 36-CA-8789-1 |
| | ) | 36-CA-8842-1 |
| EUGENE NEWSPAPER GUILD, CWA LOCAL 37194 | ) | |

# BRIEF OF *AMICUS CURIAE* HR POLICY ASSOCIATION IN SUPPORT OF THE RESPONDENT EMPLOYER


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## TABLE OF CONTENTS

**Page**


TABLE OF AUTHORITIES ..... iii

STATEMENT OF INTEREST ..... 1

STATEMENT OF THE CASE ..... 3

SUMMARY OF ARGUMENT ..... 5

ARGUMENT ..... 7

I. Employers May Impose Non-Discriminatory Restrictions on Employer-Provided Email ..... 7

A. Like Telephones, Bulletin Boards, and Other Communications Equipment, Email Systems Are Employer Property Subject to Employer Control ..... 8

B. The Charging Party's and General Counsel's Proposal To Treat Email as Solicitation Is Flawed and Unworkable ..... 9

1. The Categories of Solicitation and Distribution Cannot Accommodate Email ..... 9

2. Were the Solicitation/Distribution Framework Applicable, Email Should Be Classified as Distribution ..... 12

C. Employers May Bar Outside Access by Unions to Employer-Provided Email So Long As Alternative Channels of Communication Exist ..... 12

II. An Email-Related Discrimination Charge Requires Proof That the Employer Disciplined a Union-Related Communication While Imposing No Discipline on a Substantially Similar Non-Union Email of Which the Employer Was Similarly Aware ..... 14

A. Employers May Adopt Any Policy or Practice That Results in Similar Treatment for Substantially Similar Emails ..... 14

1. Because Email Poses Unique Enforcement Challenges, Employers Should Have Flexibility in Regulating Its Use ..... 14

2. Judicial Decisions Support Requiring Close Comparison Between Permitted and Prohibited Emails ..... 16

3. These Decisions Support Several Possible Distinctions Among Kinds of Email ..... 19

4. Employers Should Be Permitted To Follow a Practice of Disciplining Employees for Improper Email Use Only When It Is Called to Their Attention ..... 21

B. The ALJ's Analysis in This Case Was Flawed and Casts Doubt on Valid Policies and Practices of Association Members ..... 22

III. Unions and Employers May Agree to Limits on the Use of Email ..... 24

A. Union Access to Employer Email Systems Is Not an Illegal Subject of Bargaining ..... 25

**TABLE OF CONTENTS**
**(continued)**

**Page**

B. The Board Should Not Prejudge in This Case Whether Employer Email Policies Are a Permissive or Mandatory Subject of Bargaining in All Circumstances ..... 29

CONCLUSION ..... 32

REQUEST TO PARTICIPATE IN ORAL ARGUMENT

CERTIFICATE OF SERVICE

## TABLE OF AUTHORITIES

**Page**

### CASES

*6 West Ltd. Corp. v. NLRB*,
237 F.3d 767 (7th Cir. 2001) ..... 17-18, 19, 21

*Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*,
253 F.3d 19 (D.C. Cir. 2001) ..... 18-19, 20

*Ariz. Portland Cement Co.*,
302 N.L.R.B. 36 (1991) ..... 25-26, 30

*Be-Lo Stores v. NLRB*,
126 F.3d 268 (4th Cir. 1997) ..... 18, 21-22

*Champion Int'l Corp.*,
303 N.L.R.B. 102 (1991) ..... 9

*Churchill's Supermarkets, Inc.*,
285 N.L.R.B. 138 (1987), *order enforced*, 857 F.2d 1474 (6th Cir. 1988) ..... 8

*Cleveland Real Estate Partners v. NLRB*,
95 F.3d 457 (6th Cir. 1996), *overruled on other grounds by NLRB v. Webcor Packaging, Inc.*, 118 F.3d 1115, 1119 & n.2 (6th Cir. 1997) ..... 18, 19

*Consol. Rail Corp. v. Ry. Labor Executives' Ass'n*,
491 U.S. 299 (1989) ..... 31

*Davis Co. v. United Furniture Workers of Am.*,
674 F.2d 557 (6th Cir. 1982) ..... 25, 26

*E.I. Du Pont De Nemours & Co.*,
311 N.L.R.B. 893 (1993) ..... 22

*Eastex, Inc. v. NLRB*,
437 U.S. 556 (1978) ..... 8

*Fibreboard Paper Prods. Corp. v. NLRB*,
379 U.S. 203 (1964) ..... 30, 31

*First Nat'l Maint. Corp. v. NLRB*,
452 U.S. 666 (1981) ..... 25, 29, 30, 31

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

*Fleming Cos.*,
336 N.L.R.B. 192 (2001), *rev'd in part and enforced in part*, 349 F.3d 968, 975-76 (7th Cir. 2003).....22

*Fleming Cos. v. NLRB*,
349 F.3d 968 (7th Cir. 2003) ..... 8, 16-17, 19, 20

*Ford Motor Co. v. NLRB*,
441 U.S. 488 (1979).....29, 30, 31

*Guardian Indus. Corp. v. NLRB*,
49 F.3d 317 (7th Cir. 1995) .....8, 17

*Hammary Mfg. Corp.*,
265 N.L.R.B. 57 (1982) .....18, 21, 23

*Heath Co.*,
196 N.L.R.B. 134 (1972) .....9

*Hotel Employees & Rest. Employees Union v. Honolulu Country Club*,
100 F. Supp. 2d 1254 (D. Haw. 1999).....29

*Lechmere, Inc. v. NLRB*,
502 U.S. 527 (1992)..... 8, 12-13, 24, 26, 28

*Lockheed Martin Skunk Works*,
331 N.L.R.B. 852 (2000) ..... 14, 26-27

*Mead Corp.*,
331 N.L.R.B. 509 (2000) .....27

*Meat Cutters Local 421 (Great Atl. & Pac. Tea Co.)*,
81 N.L.R.B. 1052 (1949) .....25

*Metro. Edison Co. v. NLRB*,
460 U.S. 693 (1983).....28, 29

*Mid-Mountain Foods, Inc.*,
332 N.L.R.B. 229 (2000), *order enforced*, 269 F.3d 1075 (D.C. Cir. 2001).....9

*Mid-Mountain Foods, Inc. v. NLRB*,
269 F.3d 1075 (D.C. Cir. 2001) .....19, 20

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

*NLRB v. Am. Nat'l Ins. Co.*,
343 U.S. 395 (1952).....31

*NLRB v. Babcock & Wilcox Co.*,
351 U.S. 105 (1956).....13

*NLRB v. Great W. Coca-Cola Bottling Co.*,
740 F.2d 398 (5th Cir. 1984) .....26, 30

*NLRB v. Magnavox Co.*,
415 U.S. 322 (1974).....7, 27, 28

*NLRB v. Proof Co.*,
242 F.2d 560 (7th Cir. 1957) .....25, 30

*NLRB v. Southwire Co.*,
801 F.2d 1252 (11th Cir. 1986) .....9, 17

*NLRB v. Unbelievable, Inc.*,
71 F.3d 1434 (9th Cir. 1995) .....26, 30

*NLRB v. United Steelworkers of Am.*,
357 U.S. 357 (1958).....14, 27

*NLRB v. United Techs. Corp.*,
706 F.2d 1254 (2d Cir. 1983)..... 28-29

*NLRB v. Wooster Div. of Borg-Warner Corp.*,
356 U.S. 342 (1958).....25

*Republic Aviation Corp. v. NLRB*,
324 U.S. 793 (1945).....10

*Rest. Corp. of Am. v. NLRB*,
827 F.2d 799 (D.C. Cir. 1987).....17, 19, 20, 21

*Roadway Express, Inc. v. NLRB*,
831 F.2d 1285 (6th Cir. 1987) .....9

*Sandusky Mall Co. v. NLRB*,
242 F.3d 682 (6th Cir. 2001) .....18

## TABLE OF AUTHORITIES
## (continued)

**Page**

*Serv-Air, Inc.*,
175 N.L.R.B. 801 (1969) .....22

*Serv-Air, Inc. v. NLRB*,
395 F.2d 557 (10th Cir. 1968) .....18

*Sheet Metal Workers Local 91 (Schebler Co.)*,
294 N.L.R.B. 766 (1989) .....25

*Stoddard-Quirk Mfg. Co.*,
138 N.L.R.B. 615 (1962) .....10, 11, 12

*Titanium Metals Corp. v. NLRB*,
392 F.3d 439 (D.C. Cir. 2004) .....28

*Union Carbide Corp. v. NLRB*,
714 F.2d 657 (6th Cir. 1983) .....8, 9

*Wash. Adventist Hosp., Inc.*,
291 N.L.R.B. 95 (1988) .....9

### STATUTES

National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq.* .....1
29 U.S.C. § 158(a) .....3, 8, 14
29 U.S.C. § 158(d) .....25, 29

### AGENCY MATERIALS

*TXU Elec.*, NLRB Advice Memorandum, Nos. 16-CA-20576, 16-CA-20568-2 (Feb. 7, 2001) .....20

The HR Policy Association ("the Association") respectfully submits this brief *amicus curiae* in this case, which addresses, among other things, the legality of employer rules restricting employees' use of company-provided email systems. The Association urges the Board to hold that employers may restrict employees' use of employer-provided email systems based on any neutral criteria. So long as the employer does not treat union-related emails differently from substantially similar non-union emails of which the employer is similarly aware, the employer should not be held to have discriminated in violation of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq.* The Association urges the Board also to hold that unions may agree to limits on their access to employer-provided email.

## STATEMENT OF INTEREST

The HR Policy Association is an organization of the chief human resource officers of more than 250 of the nation's largest private-sector employers. Collectively, its member companies employ over 19 million people worldwide and over 12 percent of the private-sector workforce in the United States. Since its founding, one of the Association's principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to the realities of the modern workplace.

With the exception of those subject to the Railway Labor Act, all of the member companies of the Association are employers subject to the NLRA. These members have a general stake in how the Act is interpreted. All of the Association's member companies, moreover, provide email systems to some or all employees for business purposes.

Acquiring and maintaining the computer hardware, servers, networks, software, and support staff necessary to operate these email systems has required substantial investment by member companies—investment totaling billions of dollars per year in some cases. To help protect this investment and avoid abuse of company-provided systems, most, if not all, of the

Association's members have policies governing their employees' use of company-provided email systems and related information technology. The specifics of these policies vary. Some prohibit all non-business use by employees, while others allow limited personal use in accordance with specified conditions. Many specify that non-business uses must be limited in frequency and duration and must not overburden or unduly impact the company's information systems or consume significant company resources. Some specifically prohibit "chain" emails or emails to more than a specified number of recipients. Most, if not all, prohibit the transmission of any material that reasonably could be considered harassing, offensive, defamatory, discriminatory, disruptive, or otherwise illegal, unethical, or inappropriate. And many, if not most, member policies forewarn employees that the employer may monitor communications on employer-provided equipment to ensure compliance with the company's policy.

These policies serve critical business interests for member companies. They prevent non-business email traffic from reducing network speeds and wasting computer memory, diminishing the value of member companies' multimillion-dollar technology investments. They prevent transmission of material that could be construed as sexual harassment, discrimination, or defamation. They limit the risk of liability and embarrassment due to transmission of inappropriate messages or confidential information from company email accounts, as well as the risk of illegal copyright infringement or file-downloading on company computers. And they prevent the introduction of computer viruses and other security threats onto company networks.

These and other goals for member companies cannot be achieved without restrictions on non-business use of company email systems. Association members thus have a strong interest in the resolution of this case, which presents fundamental issues regarding employers' right to

control email technology that they purchase and maintain for business purposes. In addition, the Association itself has an interest, consistent with its mission, in ensuring that the Board's analysis takes account of the needs and imperatives of the modern workplace. The Association thus respectfully submits this brief as *amicus curiae*. In addition, the Association respectfully requests to participate in oral argument.

## STATEMENT OF THE CASE

As the parties' briefs and the decision of the Administrative Law Judge ("ALJ") describe in greater detail, this case involves allegations that respondent, an Oregon newspaper publisher, violated sections 8(a)(1), (3), and (5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(1), (3), (5), by (1) maintaining, promulgating, and enforcing an overly broad no-solicitation policy, (2) discriminatorily enforcing that policy against a particular employee, (3) proposing an illegal subject of bargaining during negotiations with its employees' union, and (4) promulgating and maintaining an insignia policy prohibiting the display of union insignia or signs. *See* Decision of Administrative Law Judge John J. McCarrick, No. JD(SF)-15-02, slip op. at 1 (Feb. 21, 2002) (hereinafter "ALJ Decision"). In this brief, the Association, as *amicus curiae*, will address the first three of these charges while expressing no view about the fourth. The Association will respond in the course of its analysis to the seven questions posed by the Board in its January 10, 2007 Notice of Oral Argument and Invitation to File Briefs.

The no-solicitation policy at issue is respondent's "Company Communications Policy," which applied during the relevant time period to all of respondent's communications systems, including telephones, computers, fax machines, and photocopiers. ALJ Decision at 3. As relevant here, the policy provided that "[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." *Id.* The policy further specified that "[i]mproper use of Company

communication systems will result in discipline, up to and including termination." *Id.* Pursuant to the policy, respondent sent warning letters to the union president, an employee of the company, after she sent three union-related emails to employees at their work email addresses. *Id.* at 3-4, 8-9. The first email, sent to about 50 coworkers from a work computer, pertained to a union rally that had occurred several days earlier. *Id.* at 3. The second and third, both sent to multiple employees from a computer at the union's offices, urged employees to wear green in support of the union and to participate in a union parade. *Id.* at 3-4, 9. The ALJ held that, although the employer's email policy was valid, the enforcement of that policy against the union president was discriminatory. *Id.* at 7-9. In the ALJ's view, record evidence that employees sent personal emails without incident sufficed to establish that the employer discriminated against union-related communications. *Id.* at 8-9.

During contract negotiations several months after the disputed emails were sent, respondent proposed that the union agree to the following restriction on the use of the employer's email system:

> Electronic Communications Systems—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. The union objected to this proposal, taking the position that it would illegally restrict employees' rights under the NLRA. *Id.* In response to a letter from the union, the employer explained that, while it would not "pre-judge all possible hypothetical acts and circumstances," it did not interpret the proposed language as waiving employees' rights with respect to decertification of the union or selection of a new union. *Id.* at 5-6. "By agreeing to this proposal," respondent wrote:

> we are not asking the union to waive any rights employees may hypothetically have regarding the selection of a new union and/or

> to decertify [*sic*] [the current union]. This proposal is intended to cover the conduct of union business and the employees represented by this union under this contract while it represents them.

*Id.* at 6. Though the union objected to this proposal, the employer declined to withdraw it. *Id.* at 5-6. The ALJ, deeming the proposed language "an unlawful codification of a discriminatory policy" and thus "an illegal subject of bargaining," held that the employer violated the NLRA by "insist[ing]" on this term over the union's objection. *Id.* at 10.

Respondent, the charging party, and the general counsel have all filed exceptions to the ALJ's ruling. The Board, in announcing it will hold oral argument, has provided seven questions on issues relating to employer email rules.

The Association appreciates the interest the Board has shown in email-related issues by identifying specific questions for briefing, inviting participation by *amici*, and scheduling the case for oral argument. In light of the need for clear guidance for employers, employees, and unions, the Association respectfully urges the Board to address the issues in this case expeditiously.

## SUMMARY OF ARGUMENT

While email resembles older communications technologies in many respects, it also raises novel challenges and concerns. This case provides an opportunity for the Board to articulate meaningful legal standards in this new area—standards that take into account the realities of the workplace and the nature of email.

The proper starting point for the analysis is clear: Because employer-provided email systems are employer property, employers may restrict their use, provided they do not discriminate against union-related speech. In numerous cases addressing other employer-provided technologies and property—phone systems, bulletin boards, VCRs, and the like—the

Board and reviewing courts have recognized employers' rights of control. The same conceptual framework applies equally to email, as the ALJ correctly held in this case.

Arguing that email should be considered a "work area," the charging party and general counsel suggest that the legal framework developed for "solicitations" and "distributions"—oral and print communications delivered at a worksite—should apply to email instead of the framework of the employer-equipment cases. But the unique characteristics of email make the solicitation/distribution framework inappropriate in this context. For one thing, email does not fit easily in either category. Like oral solicitations, email exchanges may occur in real time, but like written distributions, email may be retained and read at leisure. Furthermore, email poses unique enforcement challenges. Whereas employers may observe oral conversations and literature distributions as they take place, email correspondence generally is not a public communication. As a result, detecting violations of company email policy, to the extent it is possible at all, requires costly and technically difficult forms of monitoring.

These unique characteristics of email also necessitate a careful application of the NLRA's non-discrimination principle. In recognition of the special enforcement challenges and concerns raised by email monitoring, the NLRA should be construed to permit employers to distinguish between emails according to any neutral criteria that do not selectively disfavor union-related communication. Employers do not discriminate in violation of the Act simply by allowing *any* non-business email while restricting union solicitation. Employers, rather, discriminate only if they apply non-neutral criteria and thus treat substantially similar union and non-union communications differently. Accordingly, if the employer, for example, generally restricts emails on behalf of organizations of all types while allowing other non-business messages, or restricts emails over a certain size or those employing offensive language but not all personal

communications, no discrimination has occurred, for the employer has adopted criteria that do not selectively disfavor union-related communication.

In addition, because of the special enforcement challenges and concerns posed by email, employers should be free to refrain from active monitoring and instead discipline employee abuses only when those abuses are called to their attention. So long as the employer applies such a policy evenhandedly, it does not discriminate in violation of the Act.

Finally, contrary to the ALJ's decision, a union may legally agree to restrictions on its access to employer-provided email; such restrictions are not an illegal subject of bargaining. Much like limitations on union use of bulletin boards or union access to employer facilities—matters routinely subject to bargaining—restrictions on email access merely limit the union's use of employer property for communicative purposes. They do not bar the union from communicating with employees by other means. Nor do they affect employees' individual rights under *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974), to engage in solicitation and distribution regarding their union's performance.

## ARGUMENT

### I. Employers May Impose Non-Discriminatory Restrictions on Employer-Provided Email

Employer-provided email systems are, at bottom, employer property. They are made up of servers, networks, workstations, software, and other components that are purchased, installed, and maintained by the employer, often at substantial cost. Indeed, the email-related investments of the Association's members total billions of dollars. Because email systems thus are employer property, employers may regulate their use. Employers may exclude some or all non-business use by employees and some or all use of any sort by unions, provided they do not discriminate

against union-related speech. This principle, and not the law of solicitation and distribution invoked by the charging party and general counsel, governs this case.

### A. Like Telephones, Bulletin Boards, and Other Communications Equipment, Email Systems Are Employer Property Subject to Employer Control

Email is a communications device owned and operated by the employer, much like an office telephone network, PA system, or bulletin board. An employer should have the basic property right to regulate and restrict the use of communications equipment it owns, so long as it does not discriminate against union-related speech in violation of the NLRA, 29 U.S.C. § 158(a)(1), (3).

The Board and reviewing courts have consistently recognized this right of employer control. In *Union Carbide Corp. v. NLRB*, 714 F.2d 657 (6th Cir. 1983), the Sixth Circuit held that an employer could restrict the use of company telephones because the employer "*unquestionably* ha[s] the right to regulate and restrict employee use of company property," provided it does so evenhandedly. *Id.* at 663-64; *see also Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 318 (7th Cir. 1995) ("We start from the proposition that employers may control activities that occur in the workplace, both as a matter of property rights (the employer owns the building) and of contract (employees agree to abide by the employer's rules as a condition of employment).") (citing *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), and *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978)). The Board likewise has held that "an employer ha[s] every right to restrict the use of company telephones to business-related conversations." *Churchill's Supermarkets, Inc.*, 285 N.L.R.B. 138, 155 (1987), *order enforced*, 857 F.2d 1474 (6th Cir. 1988). Numerous cases establish that, absent discrimination, employers may regulate company bulletin boards as they see fit. *See, e.g.*, *Fleming Cos. v. NLRB*, 349 F.3d 968, 974 (7th Cir. 2003) ("An employer has the right to restrict access to its bulletin boards."); *Guardian Indus.*, 49 F.3d at 318 (similar);

*Roadway Express, Inc. v. NLRB*, 831 F.2d 1285, 1290 (6th Cir. 1987) ("employees have no statutory right to use an employer's bulletin boards"); *NLRB v. Southwire Co.*, 801 F.2d 1252, 1256 (11th Cir. 1986) (similar). And the same principles apply to employer-owned photocopiers, *see, e.g.*, *Champion Int'l Corp.*, 303 N.L.R.B. 102, 109 (1991), PA systems, *see, e.g.*, *Heath Co.*, 196 N.L.R.B. 134, 134-35 (1972), and TVs and VCRs, *see, e.g.*, *Mid-Mountain Foods, Inc.*, 332 N.L.R.B. 229, 230 (2000), *order enforced*, 269 F.3d 1075 (D.C. Cir. 2001) (per curiam).

No less than an office telephone system, bulletin board, or VCR, an employer-provided email system is employer property—it is made up of computers, software, and network connections purchased by the company for use in its business. Indeed, even when employees access employer-provided email from home, they cannot use the system without using employer property (in the form of servers, network connections, and the like) any more than they could place telephone calls without a telephone, post a bulletin-board announcement without a bulletin board, or make copies without a photocopier. *Cf. Wash. Adventist Hosp., Inc.*, 291 N.L.R.B. 95, 102 (1988) (describing the transmission of a disruptive electronic message as an "expropriation of the computer-communication system"). Accordingly, just as employers may restrict the use of such other forms of employer property, so do they enjoy the "basic property right," *Union Carbide*, 714 F.2d at 664, to impose non-discriminatory restrictions on some or all non-business use of company email.

### B. The Charging Party's and General Counsel's Proposal To Treat Email as Solicitation Is Flawed and Unworkable

#### 1. The Categories of Solicitation and Distribution Cannot Accommodate Email

The charging party and general counsel urge the Board to apply a separate body of case law addressing in-person oral "solicitations" and on-site "distributions" of printed literature.

This proposal is flawed and unworkable, and it fails to account for the nature and unique characteristics of email.

Under settled law, employees generally have the right to solicit one another orally on company property during non-work time. *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 & n.10 (1945). On the other hand, employers enjoy a presumptive right to ban distributions in all work areas (even during non-work time), though not in non-work areas such as break rooms. *See Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615, 621 (1962).

The tidy dichotomies underlying this scheme—work time versus non-work time, work areas versus non-work areas—break down when applied to email. Is an employee who pauses to send a personal email on a break, or is he or she shirking on work time? Does it matter where the recipient is located (at home or at work) when he or she reads the email, and does it matter whether the recipient is working at the time? What distinguishes a work-area email from a non-work-area email? And is an email message, which can be read immediately or printed and saved, more like an oral solicitation or a written distribution?

The charging party and general counsel propose an answer to these conundrums, but their proposal is fanciful. Insisting that under *Republic Aviation* email networks are "work areas" comparable to an office or factory floor, they maintain that all emails are solicitations, no different from the oral conversations that employers may restrict only during work time. *See* General Counsel's Exception to the ALJ's Decision 4-5; Charging Party's Cross-Exceptions to Decision of ALJ 1-2. This is wrong: Email is not a work area because it is not a place. It is an employer-owned communications device and, as such, it is subject to employer regulation. *See supra* I.A. Nor can email readily be classified as either solicitation or distribution. In fact, email bears attributes of both those categories, but fits meaningfully in neither.

On the one hand, email messages resemble oral communications in that they often elicit an instantaneous response; employees may even trade emails in real time much as in an oral conversation. *Cf. Stoddard-Quirk*, 138 N.L.R.B. at 624 n.6 (distinguishing "the situation where an employee is asked to sign an authorization card" from the distribution of literature). On the other hand, email can be "retained by the recipient for reading or re-reading at his convenience"—a quality the Board has long deemed "[t]he distinguishing characteristic of literature as contrasted with oral solicitation." *Id.* at 620. Indeed, at the click of a mouse email can be printed, thus rendering it indistinguishable from printed literature.

Furthermore, email poses monitoring challenges not presented by traditional solicitation and distribution. Whereas an employer generally may detect improper oral solicitations and literature distributions simply by observing events in the workplace, a manager observing an employee at his or her computer may well be unable to determine whether the employee is working on company business, transmitting a joke, or advocating membership in a union or other organization. Even assuming, then, that email use may be divided meaningfully into work time and non-work time and work areas and non-work areas, employers may well have no effective means of policing those boundaries; their only option is constant monitoring, which is unrealistic.

In sum, the categories of solicitation and distribution are designed for a context of in-person, technologically unaided communication that differs in fundamental respects from email. As a practical matter, an email message bears greater resemblance to a telephone conversation or fax than to an oral conversation or handbill. As with phones and faxes, then, employers' proprietary rights, and not the law of solicitation and distribution, should provide the framework for analyzing employers' policies and restrictions with respect to company-provided email.

### 2. Were the Solicitation/Distribution Framework Applicable, Email Should Be Classified as Distribution

Even were the Board to accept the incorrect premise that email is a workplace, and thus analyze email restrictions according to the rules of solicitation and distribution, the argument of the charging party and general counsel should fail. Given that email can be printed and retained permanently—the "distinguishing characteristic" of literature, *Stoddard-Quirk*, 138 N.L.R.B. at 620—email bears greater resemblance to distribution than to solicitation. In addition, insofar as email clogs the employer's network and wastes scarce computer memory, it creates a burden on the employer akin to the risk of shopfloor litter following a distribution of union literature—a risk that the Board has cited in justifying bans on the distribution of literature in work areas. *Id.* at 619.

Thus, if, contrary to the Association's view, the solicitation/distribution framework were deemed applicable, email should be classified as distribution, not solicitation. As a result, employers could restrict union-related email not only during work time but also in all work areas. *See id.* at 621. And even the charging party and general counsel acknowledge that, if the solicitation/distribution framework applies, the email system should be viewed as a work area, not a non-work area. Employers, then, would be free to prohibit all union-related email on the system. Application of the solicitation/distribution framework thus would place the employer in much the same position as under the (correctly governing) employer-equipment cases: Employers could restrict some or all non-business email, provided they did not discriminate against union-related messages.

## C. Employers May Bar Outside Access by Unions to Employer-Provided Email So Long As Alternative Channels of Communication Exist

In addition to restricting employee use, employers may block outside organizations like unions from accessing company email. As the Supreme Court held in *Lechmere,* "the NLRA

confers rights only on *employees*, not on unions or their nonemployee organizers." 502 U.S. at 532. Accordingly, except in the "rare case," *id.* at 537, where the union meets the "'heavy'" burden of "'showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer's access rules discriminate against union solicitation,'" *id.* at 535 (quoting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 205 (1956)) (emphasis omitted), employers may exclude non-employee union representatives from their property, *id.* at 533, 539. By the same token, employers are free to exclude non-employee communications from employer-provided email systems so long as reasonable alternative channels exist for communicating the union's message.

Rarely will unions be able to show an absence of reasonable alternatives to employer-provided email. Not only do all the means of communication that existed before email remain available, but the advent of cell phones, personal email accounts, and searchable address databases makes access to employer-provided communications systems less important than ever before. Of course, employer-provided email may be a convenient means of reaching a firm's employees, but convenience is not the legal standard. As *Lechmere* makes plain, even a "cumbersome or less-than-ideally effective" means is a reasonable alternative that forecloses any right of access to employer property. *Id.* at 539.

Accordingly, in the great majority of cases, employers, as property owners, may not only restrict employees' non-business use of company email systems, but also exclude unions from the system altogether.

## II. An Email-Related Discrimination Charge Requires Proof That the Employer Disciplined a Union-Related Communication While Imposing No Discipline on a Substantially Similar Non-Union Email of Which the Employer Was Similarly Aware

In applying the NLRA's prohibition on discrimination by employers against union-related speech, *see* 29 U.S.C. § 158(a)(1), (3), the Board should adopt meaningful standards that take into account the realities of the workplace and the nature of email. As court of appeals cases addressing other communicative tools make clear, the non-discrimination rule need not be construed to require restrictions on *all* non-business email if the employer wishes to bar *any* union-related correspondence. Nor does the rule necessarily obligate employers to root out every last non-business email violating company policy—an objective that would be achievable only through comprehensive monitoring of employees' correspondence. The rule is a requirement of equal treatment: union-related emails must not be selectively censored. Accordingly, charging parties alleging discrimination should be required to show that the employer has singled out union-related correspondence, treating it differently from substantially similar non-union emails of which the employer was similarly aware.[1]

### A. Employers May Adopt Any Policy or Practice That Results in Similar Treatment for Substantially Similar Emails

#### 1. Because Email Poses Unique Enforcement Challenges, Employers Should Have Flexibility in Regulating Its Use

As noted earlier, *see supra* I.B.1., email differs in important ways from other workplace communication tools. Unlike telephone conversations, oral solicitations, and PA announcements, email exchanges cannot be casually overheard. Nor can they be observed like

[1] The non-discrimination rule addressed here relates only to communications by employees and outside parties. As a general rule, management may employ the email system to express its views even if it restricts similar union communication. *See, e.g.*, *NLRB v. United Steelworkers of Am.*, 357 U.S. 357, 363 (1958) (holding that, where union neither requested an exception to employer's no-solicitation policy nor showed that its ability to carry its message was diminished, employer could engage in anti-union solicitation without granting equivalent opportunities to union); *Lockheed Martin Skunk Works*, 331 N.L.R.B. 852, 854-55 (2000) (declining to set aside election where management allowed anti-union emails and union had access to "traditional methods of communication"); *see also infra* III.A.

fliers, bulletin-board postings, and audiovisual presentations. Because email correspondence generally is not a public communication, employers can police email usage only by monitoring employees' email messages.

At present, no reliable technology exists for distinguishing business from non-business emails. To be sure, computers can scan emails for addresses or key words, but accurate determinations require a human workforce to read emails, which is prohibitively expensive for any business seeking comprehensive enforcement. Moreover, although employers often reserve the right to inspect messages on company email systems, in practice many employees use company-provided email systems for personal correspondence, and many employers tolerate such personal use, at least within limits. Some Association members, for example, allow at least "limited" or "incidental" personal use while prohibiting specific types of email such as offensive or demeaning messages, illegal correspondence, mass mailings, messages that consume significant computer memory, or emails that may be distracting or disruptive to other employees. Further, at least some Association members do not actively monitor employees' emails; they instead enforce their policies only when violations are brought to their attention, as may occur when another employee complains or when technical support staff discover inappropriate material on a computer they are servicing.

Such policies and practices provide a degree of autonomy to the workforce. While restricting emails of particular concern to the business—messages, for example, that consume significant network resources or that prompt employee complaints—they allow employees to make responsible use of company property. They reflect, moreover, a realistic view of the practical limits on email supervision.

Employers with policies like these should not be held to discriminate in violation of the NLRA when they restrict union-related correspondence. Although these employers allow some non-business email use, their criteria for restricting email usage have nothing to do with whether the emails in question relate to union activity. These employers, in other words, have not selectively disadvantaged union-related communication. Accordingly, their policies and practices should be deemed non-discriminatory. More broadly, whenever an employer can show that differently treated emails are distinguishable according to neutral criteria, discrimination charges against that employer should fail. The charging party should prevail only by establishing that the employer's email enforcement practice resulted in unequal treatment for substantially similar emails of which the employer was similarly aware.

### 2. Judicial Decisions Support Requiring Close Comparison Between Permitted and Prohibited Emails

This interpretation of the NLRA—as permitting employers to draw neutral distinctions between non-business emails—finds support in numerous judicial decisions addressing older technologies. As these cases recognize, an employer does not discriminate within the meaning of the NLRA if its enforcement practice results in substantially similar treatment for substantially similar communications. Thus, an employer need not open a proprietary forum to *all* non-business speech merely because it allows *some* such speech.

One illustrative case reflecting this view is *Fleming Cos. v. NLRB*, 349 F.3d 968 (7th Cir. 2003). Although the employer in that case had allowed non-business postings despite a formal policy reserving the boards "for company business purposes only," *id.* at 972, the non-business postings were limited to personal notices such as announcements of weddings and births, *id.* at 974-75. There was no evidence that the employer allowed notices advocating membership in a group or organization. *Id.* Based on this "*actual* practice of permitting personal postings, but

not organizational ones," *id.* at 975, the Seventh Circuit correctly recognized that no discrimination had occurred. The employer had treated like communications alike, differentiating between postings only according to criteria (personal versus organizational) that made no reference to unions. *Id.*; *see also Guardian Indus.*, 49 F.3d at 321-22 (finding no discrimination because an employer could properly differentiate between union announcements and "swap-and-shop" postings announcing sales of personal property); *Southwire Co.*, 801 F.2d at 1256 (rejecting the "argument that once a bulletin board is made available for any designated type of non-work related notice the employer may exercise no control over content and employees ipso facto have an unlimited right to post union materials").

In *Restaurant Corp. of America v. NLRB*, 827 F.2d 799 (D.C. Cir. 1987), the D.C. Circuit likewise carefully considered the nuances of an employer's enforcement practice. Despite a general ban on solicitation, the employer in that case allowed "spontaneous general social collections" for such items as co-worker birthday cakes and gifts. *Id.* at 804, 807. At the same time, the employer imposed discipline on "systematic" union solicitations involving "explanation of the comparative merits of the union's dental, hospitalization, and legal plans." *Id.* at 807. Focusing on "the comparative *disruption of the workplace*," the D.C. Circuit observed that "[t]he interference by [the union organizer] was substantial, systematic, and concentrated while the interference caused by the social solicitations was comparatively minimal and irregular." *Id.* The solicitations at issue were different in kind; they were not substantially similar. The employer thus could treat them differently without falling afoul of the NLRA non-discrimination rule. *Id.* at 807-08, 809.

Echoing this reasoning, the Seventh Circuit held in *6 West Ltd. Corp. v. NLRB*, 237 F.3d 767 (7th Cir. 2001), that a restaurant could allow employee solicitations for Girl Scout cookies,

Christmas ornaments, raffle tickets, and the like without opening the door to union advocacy. *Id.* at 780. "A restaurant in the United States of America," the court explained, "should be free to prohibit solicitations on the premises that interfere with or bother employees or customers, and allow those solicitations which neither interfere with nor bother employees or customers." *Id.*; *see also Be-Lo Stores v. NLRB*, 126 F.3d 268, 284 (4th Cir. 1997) (expressing doubt that "an employer's approval of limited charitable or civic distribution while excluding union distribution constitutes discrimination").

The Board, too, has long held that employers do not discriminate by restricting union-related speech while allowing solicitations for isolated "beneficent acts"—a category including not only spontaneous collections for bereaved or injured employees, but also annual company-sponsored United Way drives. *See, e.g., Hammary Mfg. Corp.*, 265 N.L.R.B. 57, 57 & n.4 (1982); *Serv-Air, Inc. v. NLRB*, 395 F.2d 557, 560 (10th Cir. 1968). And cases addressing restrictions on union handbilling at shopping malls have recognized that limited charitable solicitations on mall property do not necessarily establish discrimination vis-à-vis union activity. *See Sandusky Mall Co. v. NLRB*, 242 F.3d 682, 692 (6th Cir. 2001); *Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457, 464-65 (6th Cir. 1996), *overruled on other grounds by NLRB v. Webcor Packaging, Inc.*, 118 F.3d 1115, 1119 & n.2 (6th Cir. 1997). "To discriminate in the enforcement of a no-solicitation policy cannot mean that an employer commits an unfair labor practice if it allows the Girl Scouts to sell cookies, but is shielded from the effect of the Act if it prohibits them from doing so." *Cleveland Real Estate*, 95 F.3d at 465.

Finally, courts have recognized that neutral restrictions on the style of employee communications may be applied to union advocacy. In *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001), the court deemed it "preposterous" that a

prohibition on threatening and abusive language discriminated against union activity. *Id.* at 25-26. Likewise, a general ban on solicitation and distribution during work time without employer authorization was, in the court's view, "clearly focused upon preventing work disruptions and curbing potential distractions," not on impermissible union suppression. *Id.* at 28. Because both these policies applied "across the board" to all workplace speech (not just to union advocacy), neither could be said "to discriminate against unionization efforts or other protected activity." *Id.* at 29; *cf. Mid-Mountain Foods v. NLRB*, 269 F.3d 1075, 1077 (D.C. Cir. 2001) (expressing doubt that a neutrally applied cleanup policy could discriminate against pro-union literature).

The clear import of this body of precedent, as concerns email, is that employers may adopt any number of restrictions on employee communications, provided that in practice they apply neutral criteria to justify differences in treatment. The burden is on the charging party to identify substantially similar communications that the employer treated differently. Where, as in *Fleming Cos.*, there is "no evidence," 349 F.3d at 975, that the employer strayed from a practice consistent with neutral distinctions, discrimination has not been established. Likewise, where, as in *Restaurant Corp.*, *6 West*, or *Cleveland Real Estate*, a substantial distinction may be drawn between the union-related communication at issue and previous non-business communications, a discrimination charge cannot succeed.

### 3. These Decisions Support Several Possible Distinctions Among Kinds of Email

Consistent with these cases addressing other technologies, the Board should construe the Act in the email context to allow permissive policies and practices like those adopted by some Association members—policies and practices that allow some forms of non-business use while restricting others. More specifically, the cases suggest several such permissible distinctions.

First, consistent with *Fleming Cos.*, an employer should not be held to have discriminated when it allows personal email but not solicitation on behalf of social, religious, political, and charitable organizations. When the employer follows such a practice, union-related emails are restricted not because they are made in support of a union, but because they are made in support of an organization. Moreover, insofar as organizational solicitations may carry special risk of sparking debate and controversy, thus disrupting the workplace, *cf. Restaurant Corp.*, 827 F.2d at 807, the policy serves legitimate business goals unrelated to union suppression. Accordingly, if the charging party identifies only personal emails and produces "no evidence," *see Fleming Cos.*, 349 F.3d at 975, of organizational solicitations allowed by the employer, the discrimination charge should fail.

Second, as indicated by *Adtranz* and *Mid-Mountain Foods*, an employer does not discriminate where the disputed union-related email differs from previously allowed emails according to neutral technical or stylistic criteria such as the size of the email, the number of recipients, and the respectfulness of the tone. A policy or practice prohibiting offensive, illegal, profane, or harassing emails applies equally to pro-union and anti-union messages, and it serves workplace values of decency and respect that have nothing to do with whether employees support or oppose a union. Similarly, a practice of restricting mass emails or emails with large attachments conserves the company's computer resources and does nothing to discriminate against union-related messages. Thus, a difference in treatment between emails that differ according to such criteria should not suffice to establish discrimination. Indeed, supporting this view, the general counsel has voiced approval of email-size and recipient-number restrictions in at least one Advice Memorandum. *See TXU Elec.*, NLRB Advice Memorandum, Nos. 16-CA-20576, 16-CA-20568-2 (Feb. 7, 2001).

Finally, under *Restaurant Corp.*, *6 West*, and the Board's longstanding "beneficent acts" exception, employers cannot be charged with discrimination if they restrict union-related solicitations while allowing isolated charitable solicitations, including an annual United Way drive. Insofar as "beneficent acts," *Hammary Mfg.*, 265 N.L.R.B. at 57, are distinguishable from union solicitations in other contexts, they are equally distinguishable with respect to email.

These three types of differences are merely examples; other neutral distinctions no doubt may be drawn. The key point is that the NLRA should not be construed to confront employers with an all-or-nothing choice between allowing all non-business email, including union advocacy, and allowing none. So long as employers regulate in an evenhanded manner, treating union-related emails the same as substantially similar non-union emails, discrimination charges against them must fail.

#### 4. Employers Should Be Permitted To Follow a Practice of Disciplining Employees for Improper Email Use Only When It Is Called to Their Attention

In addition to allowing neutral distinctions between different types of non-business email, the Board should also validate the choice of some Association members to refrain from active enforcement and punish email-policy violations only when those violations are called to their attention.

The Fourth Circuit's recent decision in *Be-Lo Stores* is instructive. There, in addressing whether a grocery store chain could enforce a general no-solicitation policy against union activists, the court did not require the employer to show that no solicitation ever occurred on the employer's property. Quite the opposite: The court rejected the argument that occasional unauthorized solicitations by religious and political groups supported a charge of discrimination against the store chain. *See* 126 F.3d at 284-85. "These few solicitations," the court observed, "which occurred in but a few of Be-Lo's thirty stores over the period of a year and a half, are no

more than could be expected at any large retail chain that was zealously defending its property rights." *Id.* at 285; *see also Serv-Air, Inc.*, 175 N.L.R.B. 801, 801-02 (1969) (finding no discriminatory enforcement where there was "no evidence" that a prior solicitation on work time "came to the attention of management").

Similar realism about employers' enforcement capabilities is necessary in the email context. Given the challenges raised by email monitoring, employers should be deemed to have discriminated only if they have differentiated between substantially similar emails of which they were similarly aware.

### B. The ALJ's Analysis in This Case Was Flawed and Casts Doubt on Valid Policies and Practices of Association Members

The ALJ's analysis in this case wrongly imperils valid email policies like those of the Association's members. Relying on the Board decision overturned by the Seventh Circuit in *Fleming Cos.*, *see Fleming Cos.*, 336 N.L.R.B. 192 (2001), *rev'd in part and enforced in part*, *Fleming Cos.*, 349 F.3d at 975-76, and echoing the reasoning of an earlier ALJ decision affirmed by a panel of the Board, *see E.I. Du Pont De Nemours & Co.*, 311 N.L.R.B. 893 (1993), the ALJ held that "[i]f an employer allows employees to use its communications equipment for non-work related purposes, it may not validly prohibit employee use of communications equipment for [NLRA-protected] purposes." ALJ Decision at 8-9. The ALJ thus concluded that the employer at issue had violated the statute. The record was "replete with evidence of personal use of [the employer's] e-mail system," so, in the ALJ's view, the employer's disciplining of union-related emails was discriminatory. *Id.*

The ALJ's analysis is flawed. As explained above, *see supra* II.A., judicial decisions undermine the notion that employers necessarily must treat *all* non-business email equivalently. In fact, the employer here did not even purport to prohibit all non-business use: The relevant

provision of its policy restricted "solicit[ing] and proselytiz[ing] for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations." *See* ALJ Decision at 3. This provision—which restricts solicitations but allows other non-business communication—does nothing to disadvantage unions relative to other organizations. Accordingly, it is not discriminatory. Furthermore, even assuming that in practice employees sent other solicitations without incident, these communications would show discrimination against union-related speech only if the employer was as aware of them as it was of the union president's messages. Judged by these standards, the only examples of organization-related emails cited by the ALJ—emails regarding company-sponsored Weight Watchers and United Way programs, *see id.* at 8—do not support the ALJ's holding. The United Way emails would fall within the "beneficent acts" exception, *see Hammary Mfg.*, 265 N.L.R.B. at 57 n.4, and communications regarding a company-sponsored dietary-health program are hardly comparable, in terms of workplace disruption if nothing else, to an email from a social, political, or religious organization such as a union. Indeed, rebutting any inference of discrimination, respondent asserts that it blocked emails from other outside organizations, including churches and the Red Cross. *See* Resp't's Br. In Support of Exceptions to Decision of ALJ 8.

Were the ALJ's analysis accepted, Association members that allow non-business email, or that do not actively enforce their email policies, would risk a discrimination charge any time they disciplined an employee for union-related email, even if the discipline was imposed for neutral reasons. Because such employers "allow[ed] employees to use [their] communications equipment for non-work related purposes," ALJ Decision at 8, they would be deemed to have discriminated against any union-related speech they disciplined. Indeed, as a practical matter, it would be nearly impossible for any employer to discipline employees for union-related email

use. At virtually any workplace where employees use email, at least some personal use is likely to occur. And because employers—for sound technical and business reasons—often do not actively monitor emails, employees may well be able to identify instances where such emails went unpunished, notwithstanding a formal policy of the employer. Under the ALJ's approach, then, many if not all employers would have no choice but to open their email systems to aggressive solicitations, including those by unions, no matter how disruptive of the workplace.

As the Supreme Court has repeatedly emphasized, "accommodation between employees' [NLRA] rights and employers' property rights 'must be obtained with as little destruction of one as is consistent with the maintenance of the other.'" *Lechmere*, 502 U.S. at 534 (quoting *Babcock*, 351 U.S. at 112). The ALJ's holding in this case hardly comports with that principle. The Board should reverse the ALJ and, if necessary, remand the email-related charges for further factfinding and a more careful examination of the employer's email policy and enforcement practice.

## III. Unions and Employers May Agree to Limits on the Use of Email

As noted in the Statement of the Case, the employer in this case proposed the following provision during collective bargaining:

> Electronic Communications Systems—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.

ALJ Decision at 5. The ALJ, deeming this provision illegal, held that the employer violated the NLRA by insisting on it despite the union's objections. *Id.* at 10. This conclusion is unsupportable.

Under longstanding Supreme Court doctrine, bargaining proposals fall in three categories—mandatory, permissive, and illegal. Mandatory subjects are those that relate to

"wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d); *see also First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 674-75 (1981). As to those topics, employers and unions must bargain in good faith and may not make unilateral changes. *See First Nat'l Maint.*, 452 U.S. at 674-75. All other bargaining subjects are "permissive" unless they propose terms barred by the Act, in which case they are illegal. Parties may make proposals and enter agreements regarding permissive terms, but they may insist to the point of impasse on neither a permissive nor an illegal proposal. *See, e.g.*, *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958) (permissive terms); *Sheet Metal Workers Local 91 (Schebler Co.)*, 294 N.L.R.B. 766, 772-73 (1989) (illegal terms); *Meat Cutters Local 421 (Great Atl. & Pac. Tea Co.)*, 81 N.L.R.B. 1052, 1061 (1949) (illegal terms).

While the categorization of email-related issues as either mandatory or permissive raises thorny questions—questions that need not be resolved in this case—the proposal here clearly was one or the other; it was not illegal.

### A. Union Access to Employer Email Systems Is Not an Illegal Subject of Bargaining

The employer's proposal in this case was lawful because nothing in the Act precludes a union from agreeing to limit its own use of employer property. In fact, unions routinely bargain over such subjects. Employers and unions may enter agreements, for example, over union access to employer bulletin boards. *See, e.g.*, *Davis Co. v. United Furniture Workers of Am.*, 674 F.2d 557, 563 (6th Cir. 1982) (noting it "would not be tenable" for the union to challenge an agreement forbidding false or misleading postings as a "*quid pro quo*" for access to a company bulletin board). Indeed, courts have long deemed bulletin-board access a mandatory subject of bargaining; employers may not revoke access without consulting the union. *See, e.g.*, *NLRB v. Proof Co.*, 242 F.2d 560, 562 (7th Cir. 1957); *Ariz. Portland Cement Co.*, 302 N.L.R.B. 36, 36,

44 (1991). Similarly, bargaining over union representatives' right of access to employer premises is mandatory, so agreements on this issue are also common. *See, e.g.*, *NLRB v. Unbelievable, Inc.*, 71 F.3d 1434, 1438 (9th Cir. 1995); *NLRB v. Great W. Coca-Cola Bottling Co.*, 740 F.2d 398, 403 (5th Cir. 1984). Email is indistinguishable from such other forms of employer property. If unions may agree to limit their access to employer premises and bulletin boards, they are equally free to forgo "union business" on company email. After all, under *Lechmere*, the employer could exclude the union from the system altogether, *see supra* I.C.; *Lechmere*, 502 U.S. at 533-34, so by agreeing to email restrictions a union merely accepts limits that the employer could have imposed in the first place.

In reaching a contrary conclusion and deeming the employer's proposal "illegal," the ALJ confused self-control with discrimination. To be sure, an email agreement that bans "union business" but not management business is discriminatory in the sense that it treats union and management communication differently. But the same is true of an agreement that grants unions access to some bulletin boards or employer premises but not others—agreements that, again, are perfectly permissible. *See, e.g.*, *Davis Co.*, 674 F.2d at 563 (upholding agreement that provided for access to a company bulletin board while barring certain uses of the board). At least so long as alternative channels of communication (such as traditional solicitation and distribution) remain open, the union is free to assess for itself the importance of communicative access relative to other bargaining goals.

Though arising in a different context, the Board's recent decision in *Lockheed Martin Skunk Works*, 331 N.L.R.B. 852 (2000), illustrates this point. There, in considering whether a decertification election should be set aside, the Board rejected claims that the employer acted improperly by allowing repeated anti-union mass emails without providing equivalent

opportunities to the union. *Id.* at 854-55. The union had access to "traditional methods of communication," *id.* at 855, the Board explained. Moreover, the union had obtained permission to send three mass emails but sent only one, *id.* at 854-55—in effect waiving its right to access the company email system. Accordingly, the union suffered no unfair disadvantage; the employer had no obligation to ensure exact communicative equality. *Id.* at 854 ("We cannot fault the Employer for the Union's subsequent failure to take full advantage of the opportunity to use the e-mail system presented to it."); *see also NLRB v. United Steelworkers of Am.*, 357 U.S. 357, 363 (1958) ("Certainly the employer is not obliged voluntarily and without any request to offer the use of his facilities and the time of his employees for pro-union solicitation."). By the same token, the employer here had no obligation to preserve equal email access for the union.

In addition to repeating the ALJ's discrimination theory, the charging party suggests, *see* Charging Party's Cross-Exceptions to Decision of ALJ 2; Charging Party's Answering Br. to Resp't's Exceptions 20-22, that the employer's proposal violated the Supreme Court's decision in *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974), which establishes that unions may not waive employees' right to solicit and distribute in opposition to the union or in support of a different union. *See also Mead Corp.*, 331 N.L.R.B. 509, 510 (2000) ("[A] union may not waive the rights of employees to engage in activities by which employees may seek to change their bargaining representative, to opt for no bargaining representative, or to seek to retain their present bargaining representative."). This theory is equally misguided. To begin with, the charging party is wrong to suggest that the employer's proposal would have affected *Magnavox* rights. To the extent the employer's proposal may be read to restrict only "union business" and not all non-business email use, it nevertheless bans only union *business*, not all communication regarding the union. Indeed, the employer made this interpretation clear during negotiations.

"By agreeing to this proposal," the employer stated, "we are not asking the union to waive any rights employees may hypothetically have regarding the selection of a new union and/or [decertification of the current union]." ALJ Decision at 6.

In any event, the charging party's *Magnavox* theory depends on the same fanciful notion of a cyberspace "work area," the flaws of which were discussed earlier. *See supra* I.B. An email system is not a workplace, and email is not solicitation. Accordingly, email restrictions do not affect employees' *Magnavox* rights. Indeed, all the opportunities for traditional solicitation and distribution protected by *Magnavox* remain available even if the employer bans all non-business email use. Employees can still disseminate their message; they just cannot use the employer's email equipment to do so. *Cf. Lechmere*, 502 U.S. at 534-35 (holding that employers may exclude non-employee union organizers from their property so long as reasonable alternative channels of communication remain open).

Furthermore, even if email could qualify as solicitation, as the charging party claims, the employer's proposal still would not violate *Magnavox*. The protection for employee solicitation and distribution rights established in that case is a narrow exception to the general rule that "a union may waive a member's statutorily protected rights," *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 705 (1983); *see also Titanium Metals Corp. v. NLRB*, 392 F.3d 439, 447 (D.C. Cir. 2004). The Court's rationale was to protect employees from union waivers affecting employee criticism of the union—an issue where employees' individual interests may not align with the union's own. That rationale does not extend to agreements affecting only the time and place of union-related solicitation and leaving ample alternative channels for employee communication. In other words, the union is free "to bargain with respect to mere limitations on the time and place of union solicitation, as contrasted with the complete elimination of such solicitation." *NLRB v.*

*United Techs. Corp.*, 706 F.2d 1254, 1264 (2d Cir. 1983); *see also Hotel Employees & Restaurant Employees Union v. Honolulu Country Club*, 100 F. Supp. 2d 1254, 1257-58 (D. Haw. 1999) (upholding arbitral award based on *United Techs.*); *cf. Metro. Edison*, 460 U.S. at 706 n.11 (noting that "the [NLRA] contemplates that individual rights may be waived by the union so long as the union does not breach its duty of good-faith representation"). By the same token, the union should be free to waive employee rights with respect to one medium of communication (*e.g.*, email) among others. Such a waiver affects employee communication only at one time and place (when the employee is using email), not across the board.

For all these reasons, the employer's proposal in this case was not illegal; it was a term to which the union could have agreed. The Board should reverse the ALJ's holding that the employer proposed and insisted on an illegal subject of bargaining.

### B. The Board Should Not Prejudge in This Case Whether Employer Email Policies Are a Permissive or Mandatory Subject of Bargaining in All Circumstances

Because the charge in this case focuses on whether the employer proposed illegal subject matter, the Board may dispose of the case simply by holding that the proposal was lawful. The Board, however, has raised the further question of whether employer email policies in general are mandatory or permissive subjects of bargaining. Answering this question in this and other cases requires a nuanced, fact-dependent inquiry.

The Supreme Court's analysis of whether bargaining subjects relate to "terms and conditions of employment," 29 U.S.C. § 158(d), and thus qualify as mandatory subjects of bargaining, has focused on whether the issue in question "settle[s] an aspect of the relationship between the employer and the employees." *See First Nat'l Maint.*, 452 U.S. at 676 (internal quotation marks omitted). Applying that standard, the Court held in *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979), that prices at a factory cafeteria were mandatory subjects of bargaining.

*See id.* at 493. "[W]here the employer has chosen, apparently in his own interest, to make available a system of in-plant feeding facilities for his employees," the Court explained, "the prices at which food is offered and other aspects of this service may reasonably be considered among those subjects about which management and union must bargain." *Id.* At the same time, the Court has indicated that matters such as advertising expenditure, product design, and company financing—matters that "lie at the core of entrepreneurial control," *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring), and "have only an indirect and attenuated impact on the employment relationship," *First Nat'l Maint.*, 452 U.S. at 677 (citing *Fibreboard Paper Prods.*, 379 U.S. at 223 (Stewart, J., concurring))—are management prerogatives as to which bargaining is merely permissive.

Given this understanding of the NLRA, changes to employer email policy may well qualify as mandatory subjects of bargaining in some circumstances. As noted earlier, lower courts have concluded, consistent with *Ford Motor Co.*, that changes in union access to bulletin boards and other employer facilities are mandatory subjects of bargaining. *See, e.g.*, *Unbelievable, Inc.*, 71 F.3d at 1438; *Great W. Coca-Cola Bottling*, 740 F.2d at 403; *Proof Co.*, 242 F.2d at 562; *Ariz. Portland Cement*, 302 N.L.R.B. at 36, 44. These cases could imply that once union-related email communications are allowed, either tacitly or expressly, the employer may not revoke its permission for such email use without first raising the issue with the union. Were that so, the employer here likely would have had a duty to bargain over changes to its email policy once that policy was in place—a point that, if nothing else, further undermines the ALJ's view that the employer's proposal was illegal.

That said, the category of mandatory bargaining subjects need not reach all email-related decisions of the employer. For example, the initial decision as to whether or not to have an email

system and what restrictions to impose on it—matters akin to the decision whether or not to have a factory cafeteria—lies "at the core of entrepreneurial control," *Fibreboard Paper Prods.*, 379 U.S. at 223 (Stewart, J., concurring), and is not subject to mandatory bargaining. *Cf. Ford Motor*, 441 U.S. at 498 n.10 ("We should not be understood as holding that whether in-plant food services are to be provided where such services do not already exist is a mandatory bargaining subject."). Given the substantial investment required, system upgrades and other significant technical changes should likewise fall within management's exclusive responsibility. Further, insofar as certain restrictions are necessary to block security threats or prevent the system from overloading, these matters, too, should be deemed basic business decisions subject to management control. And by the same token, employers should have the prerogative to protect the integrity of the email system by unilaterally prohibiting the transmission or receipt of profane, offensive, harassing, or illegal materials. Furthermore, even as to matters that potentially qualify as mandatory subjects, the Board should take careful account both of current industrial practice, *see First Nat'l Maint.*, 452 U.S. at 684; *Ford Motor*, 441 U.S. at 498; *Fibreboard Paper Prods.*, 379 U.S. at 211, and of whether management-rights clauses may grant employers the freedom to make unilateral changes, *see*, *e.g.*, *Consol. Rail Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S. 299, 308 (1989); *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 409 (1952).

In sum, the question whether particular email-related decisions qualify as mandatory or permissive subjects of bargaining may require sensitive judgments based on the facts and circumstances of particular cases. The Association respectfully urges the Board not to prejudge the issue with respect to contexts unrelated to this case.

## CONCLUSION

For the reasons given above, the Association respectfully requests that the Board hold: (1) that employers may restrict employees' use of employer-provided email systems; (2) that restrictions on union-related email violate the NLRA non-discrimination rule only if the employer applies non-neutral criteria that result in dissimilar treatment for substantially similar emails of which the employer is similarly aware; and (3) that unions may agree to restrictions on union use of employer-provided email systems. As to the specific charges at issue, the Association respectfully requests that the Board reverse the ALJ's findings of discrimination and illegal bargaining.

Respectfully submitted,

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Dated: February 9, 2007

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

| | | |
|---|---|---|
| THE GUARD PUBLISHING COMPANY, d/b/a THE REGISTER-GUARD | ) | CASES 36-CA-8743-1 |
| | ) | 36-CA-8849-1 |
| AND | ) | 36-CA-8789-1 |
| | ) | 36-CA-8842-1 |
| EUGENE NEWSPAPER GUILD, CWA LOCAL 37194 | ) | |

## REQUEST OF *AMICUS CURIAE* HR POLICY ASSOCIATION TO PARTICIPATE IN ORAL ARGUMENT

*Amicus curiae* HR Policy Association hereby respectfully requests leave to participate in oral argument in the above-captioned cases.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February, 2007, an electronic copy of the Brief of *Amicus Curiae* HR Policy Association In Support of the Respondent Employer was filed and eight true and correct copies of the brief were served by hand delivery on:

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