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

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

EUGENE NEWSPAPER GUILD
CWA LOCAL 37194,
Charging Party.

BRIEF *AMICUS CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF THE POSITIONS TAKEN BY THE GENERAL COUNSEL AND THE CHARGING PARTY

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The National Employment Lawyers Association (NELA) respectfully submits this *amicus curiae* brief in support of the positions taken by the General Counsel and the Charging Party urging a ruling by the Board that the Respondent Guard Publishing Company's policy governing its electronic communications system violates rights accorded by Section 7 of the National Labor Relations Act, 29 U.S.C. 157, et. seq..

STATEMENT OF INTEREST

The National Employment Lawyers Association (NELA) has a long history of advocating for the rights of individuals in the workplace whose conduct, although not necessarily occurring in the context of assisting the organization of trade unions, frequently occurs in the context of self organization or concerted activity for mutual aid and protection. NELA reminds the Board

that the ruling in this case will impact the rights of employees without regard to whether their concerted-protected activity involves a labor organization or the formation of a labor organization.

The rights of employees to act in concert for their mutual aid and protection as protected by Section 7, provides a layer of security for employees acting in concert to address an array of workplace conditions and matters even if their ultimate goal is merely the correction of the immediate problem and not the formation of a labor union. In an age of changing employment paradigms, for example, Section 7 would protect employees at Enron, WorldCom, and Tyco, in their discussions of Directors' misconduct that has diminished the value of their retirement or 40lk plans. While NELA members may vindicate the substantive rights of these individuals in courts of law, it is the fundamental rights accorded by Section 7 that provide the procedural basis for employees to discuss these problems which may ultimately be resolved in a concerted fashion, but not always before the Board.

NELA is the only professional membership organization in the country comprised of lawyers representing employees in labor, employment, and civil rights disputes. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys committed to working on behalf of those seeking to vindicate their statutory and common law rights as employees. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA advocates for employees' rights and workplace fairness while promoting the highest standards of professionalism, ethics, and judicial integrity.

NELA agrees with the positions of the General Counsel and the Charging Party and expresses particular concern about any employer policy which may by intent or affect curtail

communication protected by Section 7 of the Act. Through involvement in countless employment cases in the United States, NELA expresses the position that employer email systems are no different than lunch rooms, break rooms and cafeterias, and any attempt to micromanage communication by those given access to these systems would ultimately have the effect of violating Section 7 rights.

STATEMENT OF THE CASE

At issue before the Board is an electronic email system that is typical of that found in virtually every workplace.[1] Cyberspace is the lunch room of the new millennium. Respondent, here, created an electronic communication system that was not only open to employees but was accessible by the public at large including Respondent's own readers. The open nature of such a system implicates unique business and public relations synergies which are of benefit to any employer including the Respondent. Attached to the benefits of such a system are the incidental possibilities that messages will be transmitted that are not appreciated by management. Yet, the same could be said of a break room which can form a center for communications favorable and unfavorable for company management. Regulation of such communication beyond basic constraints such as profanity and speech that would violate Federal Laws, e.g. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, is virtually impossible without infringing on rights protected by Section 7 of the Act.

The Guard Publishing Company's position that its "electronic communication system"[2] costs money could similarly be said of a lunch room, cafeteria or hallway of an employer's

[1] NELA would have ordinarily said "workplace in America," but our global economy and the growth of the internet has meant even the linking of domestic workplaces with those abroad.
[2] Respondent's Brief in Support of Exceptions at p. 5

building. Each of these facilities, of course, costs some money to build and maintain. Yet, like a cafeteria, hallway or break-room, electronic communications systems have certain initial and fixed maintenance costs that do not markedly vary depending on the level of communication or at least the level at issue in this case.

Respondent's arguments about trespass (Respondent's Brief in Support of Exceptions at p. 34) are without merit where the underlying premise of any trespass is an un-permitted entry onto property.[3] Respondent opened its system to its own employees and even the public. To be clear, Respondent does not claim that the employees in question "hacked" into the system. Entry here was permitted; Respondent does not here challenge the entry but the message upon entering.

Curiously, the Respondent's stated prohibitions here do not even facially proscribe the communications at issue.[4] The communications at issue are job related and Respondent's system guidelines permit work related communications.

Though not specifically articulated, the ALJ's Opinion seems to indicate that union related communications are by definition not job related. Thus, the ALJ Opined that a violation of the Act occurred not because the Respondent was proscribing union communication that was sanctioned by its guidelines, but because the Respondent allowed non-job related communications and only raised issue with the ones relating to the union.

NELA would suggest that not only are the communications at issue simply not proscribed by the Respondent's policy, but that any attempt to micro-manage the content of electronic

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[3] The law of trespass certainly has no bearing on this case and even if it did, Respondent's recitation of California law makes absolutely no sense where this case arises in the State of Oregon. Even if the Court's holding in *NLRB v. Babcock & Wilcox Co.*, provided the rule of this case, the Board would determine property rights in Oregon by analyzing Oregon and not California law. What is more, the California precedent relied upon by Respondent was overruled in *Intel Copr. v. Hamidi*, 30 Cal. 4th 1342, 71 P.3d 296 (2003).

[4] Respondent's Brief in Support of Exceptions at p. 6. Suzi Prozanski was not an "outside organization." She was Respondent's own employee and President of the union of Respondent's employees. That union here was also the certified bargaining agent for Respondent's workers. The emails in question were indeed "job – related" as they had to do with wage and benefit negotiations.

messages transmitted by employees during off hours will no doubt impede Section 7 rights just as such efforts would if they were targeted to regulate speech in the lunch room. Moreover, justifications of such micromanagement on notions of an employer's right to regulate the use of its equipment are sham arguments. Here, this logic was applied where one of the emails at issue was actually written, or could have been written, on a computer that was not owned by the Respondent. There is no parallel between the use of a medium that acts as a conduit for fluid speech – e.g. a lunchroom or email system – and a TV set that can only be used to show a video tape.

NELA would thus urge the Board to adopt the positions of the General Counsel and the Charging Party.

ARGUMENT

I. RESPONDENT'S POLICY SANCTIONS THE COMMUNICATIONAS AT ISSUE

The relevant portion of Respondent's policy governing its electronic communication system is recited at page six (6) of Respondent's Brief in Support of Exceptions:

> Company communication systems and the equipment used to operate the communication system are owned and provided by the Company to assist in conducting the business of The Register-Guard. Communications systems are not to be used to solicit or proselytize for commercial venture, religious or political causes, outside organizations or other non-job related solicitations.

Respondent, (Brief in Support of Exceptions p. 7), maintains that two emails violated this policy. The first email, made by company employee and Union President Suzi Prozanski, told employees to wear green in support of a "fair contract" and "fair raises." The second email

solicited Guardian employees and Guild members to participate in the "Eugene Celebration Parade" using newspaper themes; newspaper-related drums and a "simple funny newspaper related drill team."

A. The First email was not proscribed

The First email, which solicited employees to wear green in support of a fair contract and raise, was not proscribed by the policy. Respondent's policy proscribes communication that "solicit[s] or proselytize[s] for commercial ventures, religious or political causes, outside organizations, or other non-job related solicitations." [Emphasis added.] In this case, Ms. Prozanski – who was not a third party but a company employee – was soliciting employees to engage in concerted-protected activity in support of securing a fair contract from the Respondent. While Ms. Prozanski's communication was clearly job related, and thus sanctioned by the policy, it simply was not the type of job related communication that management appreciated.

B. The ALJ does not directly find that the communication was not job related.

In finding a violation of the Act, the ALJ opines that "[i]t is clear that Prozanski was engaged in union activity at the time she sent her email messages. . ." (Opinion. at p. 9.)[5] The ALJ further opined that: "[h]aving permitted a wide variety of non-business use for its e-mail, Respondent cannot rely on this policy to establish that it would have disciplined Prozanski in the absence of her union activity." *Id.*

NELA does not question the ALJ's ultimate result in finding a violation. Rather, it merely questions why the ALJ simply ignored the point that employees' solicitation of efforts to secure a wage increase is a job related solicitation and thus sanctioned by the policy. This communication is job related in the same way that communication concerning substandard safety

[5] Obviously a finding of "union activity" implicates Section 7 protection. It is, however, not clear as to whether the ALJ is also saying that union speech means that it was not job related.

conditions would be job related or speech concerning an employer's conduct leading to devaluation of 401k plan investments would be job related. Just because it is a message that management does not appreciate, does not mean that it is not job related. It does not even mean that it is a message contrary to the best interests and long term viability of the company. If the underpinning of the message is that employees should be paid more because valued employees will stay on the job, why is this a message that is not job related and in the company's interest?

In this post-Enron era, a corporation is an entity that can no longer be solely managed by dictatorial forces conflicted by personal short term planning horizons tied to maximizing personal wealth by forcing quick increases in the stock price and cashing in options. Changes in stock exchange rules governing executive compensation have made this a clear point. Rather, a corporation – as the recent debate over corporate governance has made clear to observers – is an entity guided in the first instance by Officers and Directors whose conduct is properly kept in check by shareholders and employees who in many cases are also shareholders. Where "checks" and "balances" are so important in corporate governance, how can it be said that employees who are surely interested in maintaining a place to work should be silenced in their efforts to discuss a wage increase which in the long run may help – as in Respondent's case – keep reporters and editors who are known to readers from finding other employment?

Thus, when one contemplates the notion of concerted-protected conduct, it is not merely about the notion of workers banding together to extract more from an employer. In an era where corporations are sometimes saved by whistleblowers and Director conduct is called into account on an almost daily basis, concerted-protected conduct is also about preservation of the employer as a place to work. It is conduct, by definition in this day and age, which is "job related." Against this perspective, the Board needs to look carefully at rules that regulate workplace speech –

particularly during off hours – where a changed corporate environment has given new and expanded meaning to what messages are now protected by Section 7.

C. The Second email was not proscribed

Respondent's dispute over the second email actually illustrates the point that employee conduct may better serve the interests of the corporation than the conduct of company managers. When managers attempt to promulgate rules barring speech that is not "job related", their subjective application of such rules run the risk of treading on concerted-protected rights.

Specifically, the second email was also job related as it pertained to Guard employees participating as a group in a local parade. The theme of the presentation – i.e. the newspaper business – could not have been more job related. One can only surmise that this type of participation in a local community event by a (relatively) small town newspaper's staff would have developed local good will to the benefit of the paper.

Similar to the first email, the ALJ should have found that the second email was sanctioned by the policy and that the Act was violated because it was a message that also involved concerted-protected activity.

II. REPUBLIC AVIATION PROVIDES THE RULE IN THIS CASE

This case involves solicitation by employees who have access to a company forum. The company forum in this case should be treated no differently than a cafeteria, a break room or a company parking lot. The rule to apply in these types of cases is provided by the Supreme Court's holding in *Republic Aviation Corp. v. National Labor Relations Board*, 324 U.S. 793 (1945.) The Court explained that it:

> "is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee, outside of working hours although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline." Id. at 803.

The two emails in question were not written on employer time and there is nothing in the record to indicate that production or discipline was impacted.

As the ALJ properly found that this case is governed by *Republic Aviation*, analysis of alternative means of communication as required when non-employee organizers are involved, as set forth in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) is not relevant. Where the communication is made by an employee or someone who has rightful access to the property, it would be reversible error to consider alternative means of access. *Southern Services, Inc.* 300 NLRB 1154 (1990) (Reversing ALJ's decision) See also, *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) (Distinguishing between the *Republic Aviation* and *Babcock* analysis.)

CONCLUSION

For the above reasons, the Board should find that *Republic Aviation* governs this case and that Respondent's policy as applied was over-broad.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February 2007, a true and correct copy of the foregoing Brief *Amicus Curiae* of the National Employment Lawyers Association in Support of the Positions taken by the General Counsel and the Charging Party was served by U.S. First Class Mail, postage paid, addressed as follows:

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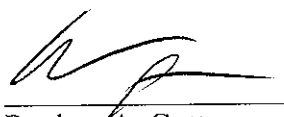

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