



NLRB Rules that Employer's E-mail System Policy Trumps Employees' Section 7 Rights

By Edwin S. Hopson

So you thought you could use the company e-mail system to organize for the union—not so fast, says the National Labor Relations Board.

On Dec. 16, 2007, the five-member National Labor Relations Board (NLRB) issued its long-awaited decision in *Register-Guard*,¹ dealing with employees' use of their employer's e-mail system for the purpose of engaging in union activities, including soliciting support for a union. The case involved three issues. First, whether the employer violated § 8(a)(1) of the National Labor Relations Act (NLRA) by maintaining a policy that prohibits the use of the employer's e-mail system for all solicitations that are not related to work. The second issue was whether the employer had violated § 8(a)(1) by discriminatorily enforcing the company's policy—that is, by allowing other personal uses of the e-mail system while enforcing its policy against employees who sought to use it for union activity purposes—as well as whether the employer had violated § 8(a)(3) by disciplining employees who violated the poli-

cy. The final question involved whether the employer had violated § 8(a)(5) of the act by bargaining to impasse in collective bargaining negotiations with the union over the employer's proposal to prohibit employee use of the e-mail system for union business.

Because of the importance of the issues, the NLRB took the unusual step of setting oral argument and invited not only the parties but also interested amici curiae to file briefs in the case. A number of amici curiae filed briefs, including the AFL-CIO, National Employment Lawyers Association, HR Policy Association, and the U.S. Chamber of Commerce; and the board heard oral arguments on March 27, 2007. By a vote of three (Chairman Battista, Schaumber, and Kirsanow) to two (Liebman and Walsh), the board found for the employer on all three issues that had been presented.²

Section 7 of the NLRA states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own

choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of this title.³

Factual Background

Register-Guard is a newspaper, and CWA Local 37194 of the Eugene Newspaper Guild represents some 150 employees at the paper. Some time ago, the newspaper company installed a computer system, and many employees represented by the union had e-mail access to the employer's system. The company implemented the Communications Systems Policy (CSP) at issue in the NLRB case, which stated the following, in part: "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 ventures, religious or political causes, outside organizations, or other non-job-related solicitations."

It was well known that employees used e-mail for personal matters—including such things as birth announcements, party invitations, and offers to sell tickets for sporting events—as well as for work-related purposes. There is no indication that employees used the e-mail system to solicit support for outside causes other than for the United Way annual campaign. But the union president, who was also an employee of the newspaper, was issued several written warnings because he had used the company's e-mail system to promote the union and to conduct union activity.

During negotiations for a new collective bargaining agreement, the company made the following proposal to the union: "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." The union never made a counterproposal and never responded to the company's proposal. The NLRB's administrative law judge who conducted the hearing on the union's charge found that some violations had occurred but also dismissed some of the allegations.

Various Positions of the Parties and Amici Curiae

On appeal to the NLRB, the board's general counsel took the position that broad rules prohibiting nonbusiness use of an e-mail system must be found presumptively unlawful, absent a showing of special circumstances. The general counsel would evaluate other limitations on the use of e-mail systems on a case-by-case basis. He also took the position that an employer cannot prohibit union-related e-mails while permitting employees to use the system for personal reasons.

The union and the AFL-CIO contended that, when an employer allows employees to use the e-mail system for nonbusiness purposes generally, the employees are already rightfully "on the employer's property," in the sense that

they have been allowed access to the e-mail system. Thus, they asserted, it is the employer's management interests, not its property interests, that were implicated. The union and the AFL-CIO further claimed that the employer may impose a nondiscriminatory restriction on e-mail communications during working hours but may impose additional restrictions only by showing that they are necessary to further substantial management interests. The union argued that, if the board is faced with a conflict between property rights and § 7 rights, the board must balance the two sets of interests. The NLRB should first determine the impact of the restriction on employees' rights, then determine the effect of forbidding the restriction on the employer's property rights. The union and the AFL-CIO also argued that, because the company permitted employees to use e-mail for personal reasons, the company had violated the act by enforcing the CSP against the union president for sending e-mails related to union activities.

The company contended before the NLRB that § 7 of the NLRA does not provide a basis for the employees to use the employer's e-mail system for union or protected concerted activities. The company claimed that, as part of the computer system, the e-mail system is equipment owned by the company for the purpose of conducting its business, and under current board precedent, the company may restrict nonbusiness use of its system. The company argued that *Republic Aviation Corp. v. NLRB*⁴ and other cases dealing with oral solicitation of employees were not applicable, because these cases did not deal with use of the employer's equipment. The company also pointed out that the union and employees had other means of communicating. Finally, the company argued that the claim of discriminatory application must fail, because, in determining whether discriminatory enforcement has occurred, the NLRB should determine only whether an employer had prohibited union-related e-mails but allowed outside organizations to use the employer's equipment for the purpose of, for instance, selling products, distributing literature in an effort to persuade employees, promoting organizational meetings, or inducing group action.

Amicus National Employment Lawyers Association asserted that e-mail is no different from a lunchroom or a break room and also argued that proscribing e-mail communications on employee nonworking time would contravene the Supreme Court's holding in *Republic Aviation*. The association also contended that the union president's conduct did not violate the CSP on its face because, it claimed, her actions—albeit taken in behalf of the union—should be considered work-related. Amicus National Workrights Institute, arguing on behalf of the union's position, asserted, among other things, "that e-mail is becoming the predominant method of business communication, and that most employer e-mail policies allow some personal use."

Amici supporting the company's position argued that the company's property interests were at stake and contended that employers should be able to place nondiscriminatory restrictions on the use of e-mail just as they may with their other equipment. Amici HR Policy Association, Minnesota Management Attorneys Association, and the U.S. Chamber

of Commerce asserted that “e-mail does not fit neatly into the Board’s analytical framework for workplace solicitation and distribution.” Some amici claimed that, if the board decided “to analyze e-mail as either solicitation or distribution, e-mail should be considered more analogous to distribution.” Two of the amici further argued that employers who permit personal use of e-mail systems should be allowed “to impose reasonable, nondiscriminatory limits on e-mail use, such as those relating to the size of messages, the size of attachments, and the number of recipients.” Amici supporting the company also claimed that an employer should not be found in violation of the act simply because the company allows personal e-mails while prohibiting solicitations on behalf of unions or other organizations.

The NLRB’s Majority Decision

In deciding the case, the board’s Republican majority agreed with the administrative law judge that the company did not violate § 8(a)(1) of the NLRA by maintaining the CSP. The board majority also upheld the judge’s finding that the company had violated § 8(a)(1) by enforcing the CSP and disciplining the union president in the case of one of the e-mails, because the message did not constitute a solicitation. The board did reverse the administrative law judge as to the discipline imposed on the union president for several other e-mails that she had sent to members, as well as the judge’s finding that the company had violated § 8(a)(5) of the act by insisting to impasse on its proposal regarding the CSP that had been made during bargaining.

Implementation and Application of the Communications Systems Policy

With respect to the implementation and application of the CSP, the NLRB majority noted that the issue of employees’ use of their employer’s e-mail system for purposes possibly protected by § 7 of the NLRA was one of first impression. According to the board,

Consistent with a long line of cases governing employee use of employer-owned equipment, we find that the employees here had no statutory right to use the Respondent’s e-mail system for Section 7 matters. Therefore, the Respondent did not violate Section 8(a)(1) by maintaining the CSP.

An employer has a “basic property right” to “regulate and restrict employee use of company property.” *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663–664 (6th Cir. 1983). The Respondent’s communications system, including its e-mail system, is the Respondent’s property and was purchased by the Respondent for use in operating its business.⁵

The board also pointed out that employers have a legitimate business interest in the maintenance and operation of e-mail systems in order to avoid company liability for employees’ inappropriate e-mails, dissemination of confidential information, protection against computer viruses, and preservation of server space. The board majority also

stated that, “... in numerous cases, however, where the board has addressed whether employees have the right to use other types of employer-owned property—such as bulletin boards, telephones, and televisions—for Section 7 communications, the Board has consistently held that there is ‘no statutory right ... to use an employer’s equipment or media,’ as long as the restrictions are nondiscriminatory.”⁶

The three dissenting board members argued that, “given the unique characteristics of e-mail and the way it has transformed modern communication, it is simply absurd to find an e-mail system analogous to a telephone, a television set, a bulletin board, or a slip of scrap paper.” They asserted that, pursuant to *Republic Aviation* and *Beth Israel Hospital v. NLRB*,⁷ the NLRB should balance employees’ § 7 rights with the employer’s right to protect its business interests. Thus, the dissenters claimed, when the company has provided employees with access to e-mail in the workplace for regular and routine use, the standard should be the following: a ban on nonjob-related solicitations should be unlawful absent a showing of special circumstances. In the case at hand, the dissenters found no proof of special circumstances and therefore would have found that the company’s implementation of CSP had violated § 8(a)(1).

Alleged Discriminatory Enforcement of the CSP

With respect to the issue of discriminatory enforcement of the CSP, the NLRB majority set a new standard for analyzing such issues. The administrative law judge, applying prior NLRB precedent, had found that the company had discriminatorily enforced the CSP, relying on evidence that the company had permitted employees to use e-mail for personal messages, such as “jokes, baby announcements, party invitations, and the occasional offer of sports tickets or request for services such as dog walking.” The majority pointed out that there was no indication that the company had permitted employees to use e-mail for solicitation in aid of outside causes or organizations other than the United Way, which was supported by the company itself. The three-member majority went on to apply the analysis made by the U.S. Court of Appeals for the Seventh Circuit in *Guardian Industries Corp. v. NLRB*, 49 F.3d 317 (7th Cir. 1995) and *Fleming Companies v. NLRB*, 349 F.3d 968 (7th Cir. 2003), which denied enforcement of the board’s decisions in both cases. In *Guardian*, the court “started from the proposition that employers may control the activities of their employees 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).’ *Id.* at 317.”⁸ Even though employers may not discriminate against § 7 rights in the enforcement of its rules, the Seventh Circuit noted that the concept of discrimination involves the unequal treatment of equals.⁹ The court pointed out that the employer in question had not permitted employees to post notices regarding organizational meetings. The nonwork-related postings that were allowed had been primarily “swap and shop” notices for the sale of personal items. The Seventh Circuit stated, “We must therefore ask in what sense it might be discriminatory to distinguish between for-sale notes and

meeting announcements.” In *Guardian*, the court held that “[a] rule banning all organizational notices (those of the Red Cross along with meetings pro and con unions) is impossible to understand as disparate treatment of unions.” In *Fleming*, the Seventh Circuit reaffirmed its *Guardian* decision and went on to state: “Just as we have recognized for-sale notices as a category of notices distinct from organizational notices (which would include union postings), we can now add the category of personal postings. The ALJ’s factual finding that Fleming did not allow the posting of organizational material on its bulletin boards does not support the conclusion that Fleming violated Section 8(a)(1) by prohibiting the posting of union materials.”¹⁰

Thus, the board majority held “that discrimination means the unequal treatment of equals. Thus, in order to be unlawful, discrimination must be along § 7 lines. In other words, unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other § 7-protected status.” The board went on to cite some examples: An employer would violate § 7 “if it permitted employees to use e-mail to solicit for one union but not another, or if it permitted solicitation by antiunion employees but not by prounion employees.” An example of an employer drawing lines on a non-Section 7 basis would include making a distinction between charitable solicitations and noncharitable solicitations and would also include the distinction of solicitations of a personal nature (such as the sale of a car or boat) and solicitations for the commercial sale of a product (such as Avon products). Invitations to join an organization and invitations of a personal nature to meet after work were additional examples offered by the board. The majority pointed out that, in each of the cited examples, “the fact that union solicitation would fall on the prohibited side of the line does not establish that the rule discriminates along Section 7 lines.” Thus, a policy that allows charitable solicitations but bans noncharitable solicitations would permit solicitations for the Red Cross, but it could prohibit solicitations for Avon and the union.

The two dissenting board members argued that the discrimination analysis applied by the Seventh Circuit and adopted by the NLRB majority should not be used in analyzing § 8(a)(1) cases. Rather, they assert, the essence of a discriminatory enforcement violation is interference with § 7 rights, and “[d]iscrimination, when it is present, is relevant simply because it weakens or exposes as pretextual the employer’s business justification” for prohibiting the protected activity.

Insistence to Impasse Issue

Finally, the NLRB majority found that the company had never insisted to the point of impasse on its proposal to include the Communications Systems Policy in the collective bargaining agreement and thus did not violate § 8(a)(5) of the National Labor Relations Act. Therefore, there was no reason to determine whether or not such a proposal was unlawful. The two dissenting members believed that there was sufficient evidence in the record to demonstrate the company’s “insistence” on its proposal and that the proposed CSP

provision was an illegal bargaining subject for which the company should have been found in violation of § 8(a)(5).

Conclusion

Perhaps the most significant aspect of this decision is the change in the discriminatory application rule adopted by the three-member majority of the National Labor Relations Board. Unless or until that holding is reversed, the NLRB must use the “unequal treatment of equals” approach to evaluate such issues. As of this writing, the five-member board is down to two members, one Democrat and one Republican. Based on the current political situation and composition of the NLRB, assuming a Democrat wins the presidential election in November 2008, it may be 2009 or 2010 before a newly constituted NLRB can consider these issues again. **TFL**

Edwin S. Hopson is a partner at Wyatt, Tarrant & Combs, LLP in Louisville, Ky., and former chair of its Labor and Employment Practice Group. He is a member and past president of the FBA Kentucky Chapter.



Endnotes

¹351 NLRB No. 70 (Slip Opinion), 183 L.R.R.M. 1113 (2008).

²Chairman Robert J. Battista and members Peter C. Schaumber and Peter N. Kirsanow are Republican appointees to the board, and the dissenting members, Wilma B. Liebman and Dennis P. Walsh, are Democratic appointees.

³29 U.S.C. § 157.

⁴324 U.S. 793 (1945).

⁵Slip Opinion, p. 5.

⁶*Id.*, citing *Mid-Mountain Foods*, 332 NLRB 229, 230 (2000) (no statutory right to use the television in the respondent’s break room to show a prounion campaign video), *enfd.* 269 F.3d 1075 (D.C. Cir. 2001). See also *Eaton Technologies*, 322 NLRB 848, 853 (1997) (“It is well established that there is no statutory right of employees or a union to use an employer’s bulletin board.”); *Champion International Corp.*, 303 NLRB 102, 109 (1991) (stating that an employer has “a basic right to regulate and restrict employee use of company property” such as a photocopying machine); *Churchill’s Supermarkets*, 285 NLRB 138, 155 (1987) (“[A]n employer ha[s] every right to restrict the use of company telephones to business-related conversations. . . .”), *enfd.* 857 F.2d 1474 (6th Cir. 1988), *cert. denied* 490 U.S. 1046 (1989); *Union Carbide Corp.*, 259 NLRB 974, 980 (1981) (employer “could unquestionably bar its telephones to any personal use by employees”), *enfd. in relevant part* 714 F.2d 657 (6th Cir. 1983); cf. *Heath Co.*, 196 NLRB 134 (1972) (employer did not engage in objectionable conduct by refusing to allow prounion employees to use the public address system to respond to antiunion broadcasts).

⁷437 U.S. 483 (1978).

⁸Slip Opinion, p. 8.

⁹49 F.3d at 319.

¹⁰349 F.3d at 975.