NLRB: An Employer May Restrict a Union's Use of its Email System

by David W. Garland and William R. Horwitz

Resolving a significant issue created by technological changes in the workplace, the National Labor Relations Board (NLRB) recently addressed whether an employer may prohibit employees from disseminating pro-union messages via its email system. In a 3–2 decision, the NLRB ruled in *The Guard Publishing Company*[1] that the National Labor Relations Act[2] (NLRA) does not provide employees with a right to use an employer's email system for union-related purposes. As a result, the board concluded that an employer may lawfully bar union-related use of its email system as part of a broader policy that does not discriminate specifically against unions. The ruling allows an employer to restrict union solicitations even if the employer otherwise permits employees to send and receive personal emails.

The Facts

The Guard Publishing Company, publisher of the *Register-Guard* newspaper in Eugene, Oregon, employed approximately 150 members of a union, the Eugene Newspaper Guild. In 1996, the company adopted a policy governing the use of its email system. The policy provided:

> 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.

The company's employees regularly sent and received email regarding work-related matters. In addition, employees used email for personal messages, including birth announcements, party invitations, offers of sporting event tickets, and requests for services such as dog walking. The company was aware of and permitted these nonwork-related email messages. Other than solicitations for the United Way, for which the company conducted charitable campaigns, employees apparently did not use the company's email system to solicit participation in or support for any outside organization or cause.

In 2000, the company issued written warnings to Suzi Prozanski, a company employee and president of the union, for three union-related emails she sent to her fellow members at their company email addresses. On May 4, she sent an email discussing a union rally that had taken place earlier in the week. On Aug. 14, she sent an email urging employees to wear green to show their support for the union during negotiations. On Aug. 18, she sent an email encouraging employees to participate with the union in an upcoming town parade. Following the written warnings, the union filed an unfair practice charge challenging, among other things, the email policy and the warnings.

The NLRA

Section 7 of the NLRA provides, in relevant part, that employees

> 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.[3]

Under the NLRA, an employer engages in an unfair labor practice if it interferes with an employee's Section 7 rights (Section 8(a)(1)) or discriminates against an employee in order to "encourage or discourage" union membership (Section 8(a)(3)).[4]

The ALJ Decision

The administrative law judge (ALJ) ruled that the company's email policy did not violate the NLRA. He determined, however, that the company discriminated in violation of the NLRA by issuing written warnings to Prozanski for her union-related emails while permitting other employees to send and receive other non-work-related emails. The company and union filed exceptions to the decision.

The NLRB

The NLRB considered whether the company's email policy prohibiting "non-job-related solicitations" violated the NLRA. To resolve this question, the NLRB had to decide an issue of first impression: "[w]hether employees have a specific right under the [NLRA] to use an employer's e-mail system for Section 7 activity." The NLRB explained that the company's "communications system, including its e-mail system, is the [company's] property and was purchased by the [company] for use in operating its business." Therefore, as long as the company did not discriminate against union activity, it was not required to permit union-related email.

The NLRB distinguished this case from Supreme Court precedent preventing employers from barring all solicitations, including union solicitations, on their premises. According to the NLRB, the company's rule only restricted email use, not face-to-face solicitation. While recognizing that "e-mail has, of course, had a substantial impact on how people communicate, both at and away from the workplace," the NLRB asserted that it "has not eliminated face-to-face communication among the [company's] employees or reduced such communication to an insignificant level." Thus, the board observed, barring email solicitation is not the equivalent of barring all solicitations.

The NLRB then considered whether the company's enforcement of the email policy was discriminatory. It acknowledged previously ruling that an employer that permits its communications equipment to be used for non-work purposes cannot properly bar use of the equipment for union activity. Nonetheless, the NLRB determined that the approach "fail[ed] to adequately examine whether the employer's conduct discriminated against Section 7 activity."

According to the NLRB, "discrimination means the unequal treatment of equals." Therefore, "an employer clearly would violate the [NLRA] 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 prounion employees." In contrast, "an employer may draw a line between charitable solicitations and noncharitable solicitations, between solicitations of a personal nature (*e.g.*, a car for sale) and solicitations for the commercial sale of a product (*e.g.*, Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and non-business-related use." Thus, an employer can prohibit union communications as part of a ban on all "communications of a similar character."

Applying this reasoning, the NLRB determined that the company was permitted to discipline Prozanski for her Aug. 14 and Aug. 18 emails asking employees to take action in support of the union because, although the company permitted personal emails, no evidence showed that it permitted the use of email to solicit support for any organization or group. The NLRB reached a different conclusion regarding Prozanski's May 4 email, which it characterized as merely an account of facts about a union rally, and not a solicitation. Given that the company permitted other non-work-related emails, it could not prohibit ones simply because they related to the union. Thus, the company violated Section 8(a)(1) and (3) by issuing a warning to Prozanski for her May 4 email.

Conclusion

Employers should already have policies in place governing employee use of email. In light of the NLRB's *Guard Publishing* decision, employers should also consider prohibiting non-work-related emails that solicit support for any cause or organization. Employers also should ensure that their email policies are enforced in an even-handed and non-discriminatory manner. ⚖

Endnotes

1. 351 NLRB No. 70 (2007).
2. 29 U.S.C. § 151 *et seq.*
3. 29 U.S.C. § 157.
4. 29 U.S.C. § 158(a)(1), (3).

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