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In a significant ruling, the NLRB held that an employer may maintain a policy prohibiting the use of company e-mail for nonwork purposes, including union activities, as long as the policy as crafted and enforced avoids discrimination against union-related communication.

NLRB Rules That Employers May Implement a Corporate E-Mail Policy That Has the Effect of Barring Union-Related Communications

By Philip L. Gordon and Michael Mankes

In a highly anticipated decision, a sharply divided National Labor Relations Board ruled by a vote of 3-2 that employers may prohibit employee use of a company's e-mail system for nonwork solicitations, including union-related solicitations.

At a time when the labor movement is focusing heavily on organizing and adding members, unions are increasingly relying on communications technology, like e-mail, electronic bulletin boards, and web pages, in an attempt to more efficiently and effectively disseminate their message and solicit new members. While an employer's ability to monitor traditional methods of communication – print and oral – and in-person solicitation has been the subject of numerous NLRB decisions, the Board had not previously addressed the rules for regulating electronic workplace conduct in compliance with the National Labor Relations Act.

In *The Guard Publishing Co. d/b/a The Register Guard,* the Board ruled for the first time upon the legality of an employer's e-mail policy that effectively bans union-related solicitations. The Board released its decision on the final day of Chairman Robert Battista's term, ruling that "employees have no statutory right to use an employer's equipment or media for Section 7 communications." Although Section 7 of the NLRA encompasses communications about virtually all union activities by employees as well as concerted activity in the non-union environment, most Section 7 cases arise in the context of union organizing. Under the Board's ruling, employers may lawfully establish policies that prohibit or restrict use of the company's e-mail system for non-work-related purposes, including union-related activities.

At the same time, the NLRB made clear that an employer, in prohibiting or restricting non-work-related e-mails, may not discriminate against union-related communications. In doing so, however, the Board established a new, narrower standard for analyzing discrimination under the NLRA. The new definition is clearly beneficial to employers. The Board held that an employer's policy discriminates against union-related communications only if the policy as stated or as applied bars or restricts those communications but does not treat similar communications about other membership organizations in an equal manner. The Board's new discrimination standard is likely to have broad implications, affecting not only an employer's ability to regulate e-mail communications, but also its ability to regulate more traditional means of communication and solicitation using company property, such as company bulletin boards and telephones.

Employees Have No Statutory Right To Use E-Mail for Union-Related Communications

The Register Guard, a daily newspaper in Eugene, Oregon, maintained a policy that prohibited employees from using the company's e-mail system "to solicit or proselytize for commercial ven-

tures, religious or political causes, outside organizations, or other non-job-related solicitations." Relying on this policy, the employer disciplined an employee, the union president, for sending the following union-related e-mails: (1) communicating to employees the union's perspective regarding a controversial union rally; (2) requesting that employees wear green to support the union during negotiations; and (3) requesting that employees participate in the union's entry in a town parade. The first e-mail was sent from a company computer while the employee was on break. The second and third e-mails were sent from a computer in the union's office, which was located off company premises. The employee and the union challenged the employer's right to prohibit these types of union-related e-mail communications, particularly during nonworking time.

The NLRB initially addressed the argument that employee e-mails are akin to protected, face-to-face solicitations that occur in an employee break or lunch room, which cannot be restricted during nonworking time. Although recognizing that e-mail has "had a substantial impact on how people communicate, both at and away from the workplace," the Board rejected the analogy to face-to-face interaction, instead finding an employer's e-mail system comparable to other employer-owned communications equipment, such as bulletin boards and telephones, which may be subject to restriction. The Board explained that as with other communications equipment, the employer has a "basic property right" to regulate and restrict use of its e-mail system to protect its property interests by, for example, "preserving server space, protecting against computer viruses and dissemination of confidential information, and avoiding company liability for employees' inappropriate e-mails." The fact that employees are rightfully on their employers' premises and are authorized to use company equipment for work purposes does not afford them the right to use such equipment for Section 7 activities.

The Board noted that employees continue to "have the full panoply of rights to engage in oral solicitation on nonworking time and also to distribute literature on nonworking time in nonwork areas," but employers are not required to yield property interests to provide employees with more convenient or more effective means of solicitation. The majority concluded that, "absent discrimination, employees have no statutory right to use an employer's equipment or media for Section 7 communications."

Notably, the Board pointed out that *Guard Publishing* did not involve a situation where employees rarely or never see one another or could communicate with one another only electronically. This express omission leaves open the issue of whether union-related e-mail communications must be allowed where a policy prohibiting such communications would effectively bar employees from engaging in Section 7 activities in the workplace.

The Board Establishes A New Discrimination Standard

The NLRB cautioned that while an employer may prohibit employee use of e-mail for union-related communications, it must do so in a nondiscriminatory manner. Accordingly, the Board next analyzed whether the newspaper's discipline of the employee for sending union-related e-mails was discriminatory given that the newspaper allowed use of its e-mail system for non-work-related purposes, such as jokes, baby announcements, party invitations, offers for sports tickets, requests for personal services, and the newspaper's periodic solicitation in support of the United Way charitable organization.

In undertaking the discrimination analysis, the Board overturned its prior precedent, which held that where an employer allows employees to use communications equipment for any non-work-related purpose, the employer must permit employee use of such equipment for union-related purposes. Under the Board's prior rulings, for example, where an employer allowed use of a bulletin board or the telephone for non-work-related reasons regardless of their nature – such as solicitations for charitable contributions, the sale of personal items, or fantasy sports leagues – the employer also would be required to permit use of such equipment for union-related activities. Because almost every employer allows employees to use company equipment for some communications unrelated to work – even if the "official" policy prohibits use of equipment for such purposes – this broad concept of "discrimination" effectively prevented employers from enforcing restrictions on union-related communications using company property.

In *Guard Publishing*, the Board instead adopted the discrimination standard articulated by the United States Court of Appeal for the Seventh Circuit in two opinions denying enforcement of two Board rulings that had applied the broad standard described above. The Seventh Circuit's narrower definition of "discrimination" requires "unequal treatment" of similar communications; thus, union-related communications must be compared, not to personal communications such as baby announcements or party invitations, but to non-work-related communications of a similar character, such as employees' anti-union communications or solicitations pertaining to other noncharitable groups or organizations.

Under the Board's new, narrower standard of discrimination, an employer is permitted to choose what categories of communications to allow and disallow provided the distinction is not premised on or motivated by animus against Section 7 communications. As examples, the Board explained that an employer could lawfully draw the line between charitable solicitations and noncharitable solicitations, personal solicitations (*e.g.*, sale of a car) and commercial solicitations (*e.g.*, sale of Avon products), and personal invitations and organizational invitations, even if this line drawing has the incidental effect of barring or restricting union-related communications. An employer, however, cannot use this line drawing as a subterfuge for suppressing union-related e-mail communications – for example, by promulgating a policy that permits only charitable solicitations for the hidden purpose of

barring union communications using the corporate e-mail system.

Notably, Members Liebman and Walsh argued in a heated dissent that the element of "unequal treatment" is misplaced in the context of rights created by the NLRA, and the analysis of whether the employer's conduct violates the law should focus not on discrimination, but on interference. The dissent called the majority's logic "absurd" and argued that "unlike [federal employment] antidiscrimination statutes, the [NLRA] does not merely give employees the right to be free from discrimination based on union activity. It gives them the affirmative right to engage in concerted *group* action for mutual benefit and protection."

In applying the new standard to the facts of the case, the Board reasoned that, although the employer permitted employee e-mails of a personal nature, *e.g.*, jokes, baby announcements, and the offer of sports tickets or other personal items, there was no evidence that the employer permitted employee e-mails intended to solicit support for a group or organization (with the sole exception of the United Way). Thus, the newspaper could lawfully prohibit employees from using e-mail to solicit support for the union, and the newspaper acted within its right in disciplining the employee for the two e-mail communications urging support for the union – the request to wear green in support of the union and the request to participate in a parade to support the union. The Board noted with respect to the periodic United Way solicitation that, consistent with prior Board rulings, an employer does not discriminate "by permitting a small number of isolated 'beneficent acts' as narrow exceptions to a no-solicitation rule."

With respect to the employee's e-mail communicating the union's perspective on facts concerning a union rally, the NLRB held that the newspaper's disciplinary action was discriminatory. The Board explained that such communication was informational rather than a solicitation and, thus, was not prohibited under the company's policy. Moreover, because the employer permitted a variety of non-work-related e-mails that were not solicitations, it could not prohibit the e-mail in question simply because it pertained to union activity.

What Does *Guard Publishing* Mean for Employers?

In order to take advantage of this apparently employer-friendly ruling and at the same time comply with the Board's new discrimination standard, employers must carefully develop and consistently and strictly enforce their electronic communications policies. The good news is that such enforcement does not have to involve the prohibition of all personal e-mail usage, as such a prohibition would be extremely difficult to enforce in today's e-mail-driven world.

Employers should review their existing policies on workplace communications to determine whether they are consistent with the *Guard Publishing* decision, and, if not, revise the policies accordingly. In revising an e-mail policy or preparing one for the first time, employers must decide whether they wish to impose a broad prohibition on e-mail use for all non-work-related purposes (which is very difficult to apply) or instead restrict certain categories of non-work-related e-mails, such as allowing charitable solicitations while prohibiting noncharitable solicitations (which would be significantly easier to administer). The policy should specifically describe what types of communications are prohibited.

When promulgating a new or revised e-mail policy, employers should have legitimate, nondiscriminatory justifications for their line drawing, such as preserving server space, protecting against computer viruses, avoiding loss of productivity, preventing dissemination of confidential information, and minimizing company liability for employees' inappropriate e-mails. We recommend that any new or revised policy be implemented soon, and as a result of the Board's decision, as the promulgation of a new policy upon the signs of (or in the midst of) a union organizational campaign may be viewed as being discriminatorily motivated.

Monitoring employee e-mail is not always an easy task, but lack of proper enforcement puts even a properly drafted communications policy at risk of challenge. The Board's revised discrimination standard underscores the need for employers to consistently and strictly enforce their e-mail policy. Unions can be expected to test employers by encouraging supporters to send prohibited non-work-related e-mails that do not concern the union to see if the policy will be enforced. If the policy is not enforced as to the nonunion-related e-mail, but the employer enforces the ban as to a union-related e-mail of a similar type, it would likely give rise to a discrimination charge.

Certainly some employers, whose employees regularly use e-mails for private as well as employer-related purposes, should carefully consider the question of implementing a new policy. An employer interested in maintaining a union-free environment could inadvertently undercut its own strategy by suddenly imposing a policy that workers would find unfair and inappropriate. In that light, a particularly restrictive policy will be easier to implement in an industrial environment than in an office environment.

Finally, before disciplining an employee for using corporate e-mail to communicate about union-related activities, an employer should confirm that the communication, in fact, violated existing policy. As explained above, the Board found that *The Register Guard* violated the NLRA by disciplining an employee for sending a union-related e-mail that was informational only, finding that the e-mail did not fall within the newspaper's policy barring non-work-related "solicitations."

Given that e-mail has become an increasingly common and often effective means for union supporters to communicate union messages in the workplace, labor organizations will likely view this decision as a significant restriction on their organizing tools. As a result, this

decision is likely to be appealed to a federal appellate court. Further litigation testing the parameters of the new discrimination standard and the distinctions drawn in employer communications policies can also be expected. In addition, given the deep division of the Board on this issue and the heated dissent, depending upon the outcome of the 2008 presidential election, a new Board with a different perspective may revisit the decision.

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