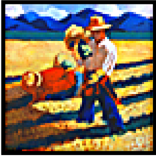

National Labor Relations Board Reinforces Employers Right To Regulate and Restrict Use of Employer-Owned Property

by *Jennifer Parda*

To the great relief of employers, in a December 2007 opinion the National Labor Relations Board ("NLRB" or "Board") clarified an employer's ability to regulate and restrict employee use of an employer- owned email system. *See The Guard Publishing Company d/b/a The Register-Guard and Eugene Newspaper Guild*, 351 NLRB No. 70. The decision addressed specifically an employer's right to prohibit the use of an employer-owned email system for union-related messages. However, the decision potentially has a much broader reach and may affect an employer's ability to prohibit employee use of *all* forms of its property, including bulletin boards and telephone systems, for union-related business. Also, the opinion provides guidance for non-union employers that desire to take preventative action against union organization campaigns.

Guard Publishing Company – What happened?

In 1996, the employer, a newspaper publisher, implemented the following policy regarding the use of its email system: "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 employer had historically permitted employees to use its email system for *personal* use, i.e., for party invitations, jokes and to sell personal items. In May 2000, the employer disciplined an employee, who was the local union president, for using the email system to provide information about a union rally that had occurred earlier that week. The employer disciplined the same employee again in August 2000 for sending two additional emails to employees asking them to take specific actions to support the union during negotiations. The union challenged the disciplinary actions, as well as the employer's policy itself, arguing that: (1) the policy unlawfully infringed upon employees' statutory right to engage in various union related activities under Section 7 of the National Labor Relations Act ("Section 7 rights"); and (2) the employer discriminatorily enforced its policy as to union activities.

The NLRB's Opinion

The Board majority rejected the union's first argument that the employer's policy unlawfully infringed upon its employees' Section 7 rights. Relying on previous opinions concerning employee use of employer owned bulletin boards, telephones and televisions for Section 7 purposes, the Board recognized that employees have no statutory right to use an employer's equipment or media, so long as the restrictions are nondiscriminatory. Thus, the Board held that an employer may lawfully bar employees from using employer-owned email for union-related purposes, so long as the policy does not discriminate against Section 7 activities.

The Board then considered and rejected the union's argument that the employer discriminatorily enforced its policy as to union activities because it permitted employees to use its email system for *personal* use. In considering this issue, the Board majority announced a new standard for determining whether a policy is applied in a discriminatory manner. Specifically, to prove unlawful discrimination, it must be shown that the employer: (1) adopted the policy out of a discriminatory animus against unions (or against a particular union); *or* (2) that the employer barred union-related activities or communications of a similar character to those permitted for non-union-related purposes. In other words, "unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status." For example, "an employer clearly would violate the Act if it permitted employees to use email to solicit for one union but not another, or if it permitted solicitation by anti-union employees but not by pro-union employees."

Under its newly announced standard, the Board majority concluded that the company employees' personal use of email were not activities or communications of a character sufficiently similar to the emails sent by the union president in August 2000 soliciting employees to support the union. Thus, the union failed to show a discriminatory application of the employer's policy because there was no evidence that the employer had allowed employees to send emails soliciting support for any *other* organization or cause. In contrast, the May 2000 email was not a union solicitation but merely the same type of informational email the employer had allowed its employees to exchange in the past. The Board majority therefore held that the employer did engage in unlawful, anti-union discrimination as to that message.

What *Guard Publishing Company* Means for Employers

Guard Publishing Company gives employers the ability to implement and enforce policies that restrict employee use of employer-owned property for certain non-personal solicitation, including union-related business, *so long as such restrictions are evenly enforced*. Thus, now is a good time for unionized employers to reevaluate current policies, bearing in mind that existing working conditions cannot be changed unilaterally, but rather must be bargained. For non-union employers, unions are dedicating increasing amounts of money and effort to organizing campaigns. Thus, *Guard Publishing Company* serves as a reminder of the need for vigilance and preventative action in advance of an organizing campaign, including an assessment of whether to implement policies in line with the Board majority's holding.

In reviewing existing policies and/or implementing new policies, or while bargaining regarding such policies, employers should consider the following:

- Policies regarding the use of any employer property (*i.e.*, email, bulletin boards, telephones) should make clear what types of personal use, if any, will be permitted using a company email system. They should also clearly indicate which categories of non-business-related uses are prohibited (*i.e.*, solicitations, etc.).
- All policies should clearly state that all electronic devices (computers, email, phones, PDA's, laptops, etc.) are company property and not private property; that all data and messages, sent or received, are subject to review; and that the email system and all messages distributed on it are the property of the employer, not the employee.
- All policies should clearly state that any violation of the policy subjects the employee to discipline, up to and including discharge.
- All policies should be strictly and consistently enforced to avoid unlawful discriminatory application as to union-related activities.

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