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LABOR BOARD UPHOLDS BAN ON EMPLOYEE USE OF COMPANY E-MAIL TO SOLICIT UNION SUPPORT

By Judd Lees

In a recent flurry of decisions which have drawn fire from labor unions, narrow majorities of the National Labor Relations Board have decided a number of cases in favor of management rights in union organizing settings. One such decision handed down in December of 2007 was the Guard Publishing Company decision which addressed employer rules governing employee use of e-mail systems for union solicitations. The newspaper in question had a written policy prohibiting the use of e-mail for "non-job-related solicitations." Despite the policy, the Company had allowed nonwork-related employee e-mails such as announcements of sales of personal possessions and weddings. The Company issued two written warnings to an employee for sending pro-union e-mails to fellow employees. The newspaper guild filed an unfair labor practice charge claiming that the policy was unlawful since employees had a right under the National Labor Relations Act to use the company system to communicate with one another. The Guild also alleged that the enforcement of the policy against the employee in question was discriminatory.

In a 3-2 decision, the Board upheld the lawfulness of the employer policy proscribing use of company e-mails for, what it termed, "group solicitations." According to the Board, prior cases striking down employer rules banning solicitation during non-working time were inapplicable because those involved face-to-face employee solicitations rather than the use of employer equipment. The Board found that employees have no statutory right to use employer equipment for union-related communications.

Turning next to the alleged discriminatory application of the policy in this case, the Board had to wrestle with the fact that the Company had narrowly defined "non-job-related solicitations" proscribed under the policy by allowing nonwork-related employee e-mails such as personal announcements and individual sales. Did this undermine the Company's ability to discipline employees when they used e-mails for soliciting union support rather than a garage sale? Not at all according to the Board, since "discrimination under the Act means drawing a distinction along Section 7 lines." The fact that the employer had permitted a variety of personal nonwork-related e-mails was not fatal to enforcement since there was no evidence the Company had ever permitted e-mails for solicitation of support for groups or organizations. As a result, the Company's enforcement of its policy against employee solicitations to support a union was not discriminatory since there was no evidence it had allowed such solicitations in the past. In order to reach this narrow interpretation of "discriminatory application," the Board majority had to turn to court precedent versus contrary Board precedent since, according to the Board, it "better reflects the principle that discrimination means the unequal treatment of equals." The Board did find that a third e-mail by the employee pertaining to an explanation of a recent union event did not constitute a solicitation and therefore was not in violation of the policy. The Board also struck down an employer rule prohibiting employees from wearing or displaying union insignia while working with the public.

The strongly-worded dissent by two members of the Board took issue with both rulings. According to the dissenters, employees should have a right under the Act to use company e-mail for employee-to-employee communications which should only be limited upon a showing of special circumstances. With regard to enforcement of the policy, the dissenters argued that the allowance of other nonwork-related communications by the Company undermined its ability to

single out group communications. The Board's long awaited and long-anticipated ruling will have a significant impact on employer e-mail policies and should be kept in mind when crafting and enforcing such policies.