Connecticut Law Tribune
ALM
January 2008
Vol. 34, No. 3 • $10.00
ctlawtribune.com

SENDING A MESSAGE ABOUT E-MAILS

NLRB says unions can't use employers' communications systems

By BRIAN CLEMOW

The National Labor Relations Board has finally answered a question that labor and management representatives have been arguing about ever since the use of e-mail in the workplace became common. Do employees have the right to use a company's e-mail system for union business? That question has taken on more significance as traditional methods of union organizing have failed to stop the decline of union membership as a percentage of the nation's workforce.

In *Guard Publishing d/b/a Register-Guard, 351 NLRB No. 77*, decided on Dec. 16, 2007, the board ruled 3-2 that workers do not have a right to use their employers' electronic communication systems for such purposes. The majority also affirmed the longstanding principle that employers cannot establish or enforce policies or practices that discriminate against union-related communication, but in so doing adopted a new approach that will make it much more difficult to prove that such discrimination has occurred.

The union argued that the policy was invalid on its face, because e-mail has become a universal method of workplace communication.

Newspaper Workers

The case involved a newspaper in Eugene, Ore., that was involved in contract negotiations with a union representing more than 100 employees. The publisher disciplined the union president for sending three e-mail messages to fellow employees. The first was composed and sent from her workstation during a break, and was intended to correct what the president thought was misinformation distributed by management about a union rally. The other two were sent from the union office to the work e-mail addresses of co-workers, urging them to support union activities or the union's position in negotiations.

The employer maintained a policy that prohibited employees from using its e-mail system for "non-job-related solicitations." In practice, however, workers were allowed to send and receive e-mails on a variety of personal matters, including party invitations, requests for a dog walker, offers of sports tickets, etc. Apparently there were no e-mail solicitations on behalf of organizations until the union president sent her messages.

The union argued that the policy was invalid on its face, because e-mail has become a universal method of workplace communication, and therefore workers should have the same rights with respect to e-mail that they have with respect to one-on-one conversations. That is, they should be able to discuss union matters as long as it isn't on working time. Even if the policy was not found to be invalid on its face, however, the union claimed it was discriminatory as applied, because longstanding NLRB precedent holds that an employer can't permit some non-business use of its equipment or facilities but deny similar use for union-related purposes.

The majority found that the principles of *Republic Aviation Corporation v. NLRB, 324 U.S. 793 (1945)*, which established that employees may discuss union matters in the workplace as long as it isn't on working time, do not apply to the use of e-mail. For one thing, employers have substantial property rights in their electronic communication systems, and for another, employees have available alternatives, especially face-

Brian Clemow is a partner at Shipman & Goodwin in Hartford. He represents public and private employers in labor relations, personnel problems and other employment law matters.

to-face conversations. Therefore, the majority declined to find that employers must make their email systems available for union business.

Swap And Shop

The question of discriminatory application was a tougher one. In *Fleming Company, 336 NLRB 192 (2001)*, the board ruled that an employer cannot allow its facilities (in that case a bulletin board) to be used for some non-work purposes, such as personal announcements, and yet deny use for union business.

Earlier, in *Guardian Industries, 313 NLRB 1275 (1994)*, the board reached the same conclusion where the employer permitted "swap-and-shop" postings, but not postings on behalf of any outside organization, whether the Red Cross or a union. However, both cases arose in the Seventh Circuit, where enforcement was denied, because the judges felt that discrimination involved the unequal treatment of equals, and they did not agree that personal notices and organizational notices were of a similar character. In their view, if the Red Cross and a union were treated the same way, there could be no discrimination.

The NLRB majority, over a vigorous dissent, adopted the Seventh Circuit's approach. They held that "an employer may draw a line between charitable solicitations and non-charitable 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."

Solicitation Questions

The *Fleming* and *Guardian* cases were overruled.

However, that did not end the inquiry. The board found that in the *Guard Publishing* case, while two of the union president's e-mails involved solicitations, and therefore could be prohibited under the employer's policy, the third did not, since it only explained the union's view of the facts on a particular issue. Disciplining the employee for that message went beyond the employer's own policy, and was therefore a violation.

Drawing a distinction between solicitation and other forms of communication may prove problematic in future cases, if sophisticated union advocates develop techniques for encouraging employee support without actually asking for it. The same may be true of line-drawing between personal messages and organizational messages. Employers will need to think through these issues before issuing revised rules about the use of bulletin boards, email, and other company-owned facilities and equipment.

Further, we may not have heard the last word on this subject from the NLRB. The decision in *Guard Publishing* was released on the last day of the term of board Chairman Robert J. Battista. Members of the board have become at least as polarized as the rest of Washington, and nobody knows what the NLRB will look like under a new administration. The board has reversed itself more than once in the recent past as its makeup has changed, so practitioners should stay tuned. ■