

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE GUARD PUBLISHING COMPANY)	
d/b/a/ THE REGISTER GUARD,)	
)	
RESPONDENT,)	
)	
AND)	CASE NOS. 36-CA-8743-1
)	36-CA-8849-1
THE EUGENE NEWSPAPER GUILD)	36-CA-8789-1
LOCAL 194,)	36-CA-8842-1
)	
CHARGING PARTY.)	

BRIEF IN REPLY TO THE CHARGING PARTY'S
ANSWERING BRIEF TO RESPONDENT'S
EXCEPTIONS TO THE DECISION OF
THE ADMINISTRATIVE LAW JUDGE

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**BRIEF IN REPLY TO THE CHARGING PARTY’S ANSWERING BRIEF TO
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COMES NOW, Respondent, THE GUARD PUBLISHING CO. d/b/a *The Register-Guard* (hereinafter “*The Register-Guard*” or “Company”), pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, (hereinafter “Board”), files its Brief in Reply to the Charging Party’s Answering Brief to Respondent’s Exceptions to the Decision of the Administrative Law Judge John J. McCarrick (hereinafter “ALJ” or “ALJ McCarrick”) and in support thereof would offer the following:

I. ARGUMENT

A. THE ALJ IMPROPERLY SHIFTED THE BURDEN OF PERSUASION TO *THE REGISTER-GUARD*.

Contrary to ALJ McCarrick’s ruling, the burden of proof could only shift to *The Register-Guard* after the charging party proved by a preponderance of the evidence that the employer acted with a discriminatory motive. In Director, Office of Workers’ Compensation Programs,

Dept. of Labor v. Greenwich Colliers, 512 U.S. 267, 276-77, 114 S.Ct. 2251, (1994), the United States Supreme Court overturned its earlier decision in NLRB v. Transportation Management Corp., 462 U.S. 393, n. 7 (1983), holding that, contrary to the Court's ruling in Transportation Management Corp., the charging party must do more than carry merely the burden of production and raise an inference of improper motive before the defendant takes on the burden of persuasion. However, the cases cited by ALJ McCarrick, as well as ALJ McCarrick's application of those cases, show that ALJ McCarrick prematurely shifted the burden of persuasion to Respondent, requiring the charging party merely to meet a burden of production and raise an inference of improper motive, rather than prove by a preponderance of the evidence that the Respondent acted with an illegal motive. (See ALJ Dec., p. 8, L. 18-34, citing Western Plant, 322 NLRB 183, 194 (1986)), and Roure Bertrand Dupont, Inc., 271 NLRB 443 (1984)¹. Based upon the standard of proof (the burden of production) to which the ALJ held the General Counsel, the Company did not have a burden of persuasion, but rather, the burden to merely offer a legitimate reason for its actions. The Company met that evidentiary standard.

In light of the fact that ALJ's improper burden shifting applies across the spectrum of issues decided by the ALJ, including determining whether *The Register-Guard* violated the Act by enforcing its 1996 Communications System Policy against Suzi Prozanski, and whether the Company violated the Act, when it enforced its insignia policy against Ron Kangail, the ALJ's decision must be reversed.

¹ The cases cited by ALJ McCarrick cite Transportation Management Corp. for the proposition that the charging party only needs to establish a prima facie case and raise an inference of improper motive, rather than prove by a preponderance of the evidence that the employer acted with an improper motive.

B. IN 1996, THE UNIT MEMBERS HAD NO RIGHT TO USE THE RESPONDENT'S EQUIPMENT. THERE WAS NO RIGHT TO WAIVE.

The Union wrongly argues that it did not waive the unit members' rights to use the Company's equipment through a clear and unmistakable waiver in 1996, and, therefore, no waiver occurred. The Union's premise is faulty. Regardless of whether the Board finds that the Company did not uniformly enforce its 1996 Communications System Policy after 1996, in 1996 the unit members had no right to use the Company's equipment. Thus, no clear and unequivocal waiver was required.

C. THE UNION IMPROPERLY CHARACTERIZED THE RELEVANCE OF THE RECORD EVIDENCE. THE COMPANY DID NOT ALLOW A WIDE RANGE OF NON-BUSINESS USE OF THE COMPANY'S COMMUNICATIONS SYSTEM.

First, although employees may have received unsolicited junk mail, as the Union asserts, there is no evidence in the Record that any employee ever informed the Company that they received such junk mail, or that the Company failed to enforce its 1996 Communications System Policy in response to being informed that an employee had received such unsolicited junk mail.

Second, it is the Company's business to collect information from the public, regardless of whether that information eventually is found to be valuable or mere "crack-pot correspondence," and regardless of whether the public initially directed the information to the wrong Company employee. Third, as the Company argued in its initial brief, management is not bound by Company policy. Therefore, it is irrelevant in determining whether the Company discriminatorily enforced its Communications System Policy to note the extent to which the Company's managers used the communications system.

Last, the Union, like the ALJ, misstates the Record, asserting that the Record shows that the Company allowed non-charitable outside organizations, such as Weight Watchers, or charitable organizations, such as the United Way, to use the Company's electronic

communications system. The Union cites to no evidence to support their bald assertion. There is no such evidence. It never happened.

D. THE UNION HAS WAIVED ITS RIGHT TO ARGUE THAT SUZI PROZANSKI'S E-MAIL WAS NOT AN UNSOLICITED E-MAIL SENT BY THE UNION.

The Union wrongly and improperly opposes the Company's argument that it could prevent the Union from sending unsolicited e-mail through the Company's system because it did not allow other outside organizations to use its computers or its electronic communications system. The Union did not except to ALJ McCarrick's finding that Suzi Prozanski was engaged in Union business and sent her e-mail through the Company's system on behalf of the Union. Because the Union failed to except to the ALJ's finding, it may not challenge this aspect of the Company's argument. N.L.R.B. v. DeBartelo, 241 F.3d 207 (2nd Cir. 2001); Capital Cleaning Contractors, Inc. v. N.L.R.B., 147 F.3d 999, (D.C. Cir. 1998); N.L.R.B. v. GAIU Local 13-B, Graphic Arts Intern. Union, 682 F.2d 304 (2nd Cir. 1982).

Even if the Union could challenge the Company's argument, Board law shows that the actions taken by a union officer are considered to be taken by the union organization. Yellow Freight System, Inc., 307 NLRB No. 156 (1992), citing Seago Construction Co., 141 NLRB 872 (1963); Anderson Construction, 129 NLRB 1447 (1961), *enfd.* 295 F.2d 657 (7th Cir. 1961); Bellkey Maintenance Co., 270 NLRB 1049 (1984); Lee Way Motor, 229 NLRB 832 (1977), and Regor Construction, 249 NLRB 840 (1980); Duncan Electric, 269 NLRB 691 (1984); McGraw Edison, 268 NLRB 308 (1983), *enfd.* 759 F.2d 533 (6th Cir. 1985); AGC, 166 NLRB 532 (1967).

For the same reason, the Company correctly continues to argue that the United States Supreme Court's holding in Lechmere should be applied in this case.

E. Suzi Prozanski did commit a trespass to chattels.

Contrary to the Union's assertion, an employee, such as Suzi Prozanski, can trespass on the employer's property. Just as an employee who may have used a work tool while serving his employer may become a thief by taking those tools without the employer's permission, an employee only has a limited license to access the employer's property to the degree that the employer agrees to allow that employee on the employer's property to perform work. Wright v. Com. Unem. Comp. Bd. of Rev., 465 A.2d 1075, 1077 (Pa. ComnWlth. 1983) (Employee stole employer's property); McCabe Hamilton & Penny Co., Ltd. V. Chung, 43 P.2d 244 (Hawaii App. 2002) (TROs granted by lower court to protect against employee trespass). An employer has the general right to demand that an employee leave the employer's premises at any time. If the employee insists upon using the employer's property for other purposes than to perform the work for which he or she is paid and refuses to leave the employer's premises at his or her employer's demand, the employee is trespassing on the employer's property. Therefore, the Union's argument that Ms. Prozanski's unauthorized spam on behalf of the Union could not have constituted a trespass to chattel is nonsense.

F. The Board's decision in Mid-Mountain Foods was not based on how the employer's equipment had previously been used.

The Board's holding in Mid-Mountain Foods, 332 NLRB, No. 19, *10 (Slip Op) (2000), that the union had no right to use the employer's television to show a videotape, was not reliant on the fact that the employer had not let others use its television to show other videos. The Board quite explicitly stated that the propriety of its holding was only augmented by the fact that the employer in that case had not allowed employees to use its equipment for other purposes: "From the cases, it appears equally clear that the Union's employee supporters do not have a statutory right to show the video, **especially** since it has not been established that the Respondent permitted employees to show other videos." (**emphasis** added). Id. Had the Board relied on how

the employer allowed its television to be used in the past, it would not have included the adverb “especially.”

G. THE UNION’S CLAIMS ARE TIME BARRED BY §10(B).

The Union wrongly argues that Control Services, Inc., 305 NLRB 435 (1991), and Alamo Cement Co., 277 NLRB 1031 (1985), show that the 10(b) period did not start to run with respect to the Union’s spam until the Company enforced its 1996 Communications System Policy in response to said spam. In Control Services, Inc., the Board found that the term of the party’s agreement being enforced was unlawful and that §10(b), therefore, did not apply. In Alamo Cement Co., the Board found that the terms of the collective bargaining agreement did not prevent the employer from taking the actions that the union alleged violated the Act, and the employer had previously taken the same actions without complaint by the union.

Here, in contrast to Control Services, Inc., the 1996 Communications System Policy was not facially unlawful and it was not discriminatorily administered. Thus, §10(b) does apply in this case. The 1996 Communications System Policy did not effect a total ban on all distribution and solicitation, but rather, it merely put in place an agreed upon place/time restriction on the use of the Company’s equipment to conduct Union business.² Thus, all the cases cited by the Union for the proposition that Company Counterproposal No. 26 is an illegal subject of bargaining are inapposite, as **all the cases cited by the Union involve a total ban** on solicitation and distribution.

² The Union’s Answering Brief, p. 18, misstates that the evidence in the Record shows that Company Counterproposal No. 26, which was meant to memorialize in writing the status quo, constitutes a flat ban at all times of using e-mail for Union Business. In contrast, the evidence in the Record shows that the Company’s existing policy and Company Counterproposal No. 26 would not restrict, among other hypothetical uses, employees right to select a new bargaining representative and/or decertify the Union. (G.C. Ex. 53).

H. THE ALJ IMPROPERLY ENGAGED IN CONTRACT INTERPRETATION.

Contrary to the Union's assertion, the ALJ did engage in impermissible contract interpretation, and Intrepid Museum Foundation, Inc., 2001 WL 967464 (August 22, 2001), is directly applicable to the instant case. First, with respect to the application of the Company's 1996 Communications System Policy, Suzi Prozanski admitted that the parties had agreed to the 1996 Communications System Policy. All that was left for the ALJ to determine was to what extent does the policy agreed upon by the parties differ, if at all, from the way in which the Company enforced the policy, which is exactly the kind of improper contract interpretation from which the ALJ in Intrepid refrained. In essence, the ALJ was merely choosing whose interpretation of the 1996 Communications System Policy was correct, which is exactly what the ALJ in Intrepid declined to do because such activity is without the jurisdiction of the Board. ALJ McCarrick engaged in an inordinate, improper amount of contract interpretation in reaching his decision.

Secondly, with respect to the Company's enforcement of its insignia policy, the ALJ based his decision that the Company violated the Act, in part, on the grounds that the ALJ found the policy to be vague. Clearly, such a finding connotes that the ALJ engaged in the impermissible activity of determining which of the parties' interpretations of the policy was correct. Thus, Board law states that the ALJ engaged in impermissible contract interpretation.

I. COMPANY COUNTERPROPOSAL NO. 26 WAS NOT AN ILLEGAL SUBJECT OF BARGAINING, AND THE ALJ IMPROPERLY IMPOSED THE UNION'S BARGAINING POSITION ON THE COMPANY.

The ALJ went beyond determining that Company Counterproposal No. 26 was unlawful. Without even explaining what principle of law prohibits the parties from agreeing to a place/time restriction on solicitation and distribution previously enforced by an employer, (which the union

now alleges occurred without such an agreement between the parties), the ALJ actually imposed upon the Company an indefinite moratorium on bargaining with the Union over place/time restrictions on the use of the Company's equipment.

The Union does not dispute that the Board cannot force an employer to adopt any particular bargaining position, it merely argues that the ALJ was justified in forcing the Company to accept the Union's bargaining position on Company Counterproposal No. 26 because the Union believes that the ALJ could have found that the Company's overall bargaining posture in regard to Company Counterproposal No. 26 reflected bad faith bargaining. However, the Union points to no evidence in the Record to support such a finding or to dispute the Company's argument that the Union had never proposed a counterproposal to Company Counterproposal No. 26, the Union did not state during negotiations that it was taking the position that Company Counterproposal No. 26 dealt with something other than a mandatory subject of bargaining, and, in contrast with the employer in John Ascuaga's Nugget, 298 NLRB 524 (1990), the Company never bargained to impasse over the proposal. The Union simply filed an unfair labor practice charge over the proposal after it was first proposed. The Union conducted the only bad-faith bargaining in this case.

J. THE UNION COULD WAIVE UNIT MEMBERS' "RIGHTS" TO USE THE COMPANY'S COMMUNICATIONS EQUIPMENT.

As argued above and in the Company's initial Brief in Support of the Company's Exceptions to the Decision of the ALJ, the Union is prohibited from waiving unit members' Section 7 rights only to the extent it agrees to a plant-wide blanket ban on such rights, and if that blanket includes a waiver of Section 7 rights regarding the selection of a new bargaining representative, retaining the present representative, or having no bargaining representative at all.

The Union cites to no case in which a plant-wide blanket ban on all Section 7 rights was not at issue. As argued above, Company Counterproposal No. 26 does not involve a blanket ban on distribution and solicitation on the Company's property, and, contrary to the Union's assertion, the undisputed evidence in the Record shows that limited time/place restrictions on distribution and solicitation do not apply to choosing a new bargaining representative, retaining the present representative, or choosing to have no bargaining representative at all. (G.C. Exs. 50, 53). Thus, under NLRB v. Magnavox, 415 U.S. 322 (1974), and its progeny,³ Company Counterproposal No. 26 does not require the Union to perform an unlawful act.

K. THE COMPANY'S INSIGNIA POLICY DID NOT VIOLATE THE ACT.

The Union wrongly asserts that the Company has not asserted that any special circumstances exist to permit it to implement a narrowly drawn limitation on the wearing of controversial insignia. As in John P. Scripps Newspapers, 1992 NLRB LEXIS 746, *12-13 (1992), the Company placed a limited restriction on the wearing of inflammatory insignia when working with the public, because the Company had a legitimate interest in protecting its public image as a neutral reporting enterprise. As in John P. Scripps Newspapers, the uncontested evidence in the Record shows that at the time the Company enforced its insignia policy against Ron Kangail, the labor dispute between the parties had become a regular feature on the radio and television through commercials run by the Union. The labor dispute was even being discussed on the nightly news. The insignia displayed by Kangail was connected with those negotiations. The sign in Kangail's car read, in part, "WORKERS AT THE REGISTER-GUARD DESERVE

³ The Company takes no position as to the validity of Board cases applying Magnavox, but to say that all of them involve a blanket, facility-wide ban on solicitation and distribution, and none of them involved the use of company-owned equipment to solicit and distribute. Thus, they are inapposite.

A FAIR CONTRACT.” (G.C. Ex. 18). Similarly, the union message at issue in John P. Scripps Newspapers stated, “RECORD SEARCHLIGHT UNFAIR TO EMPLOYEES.”

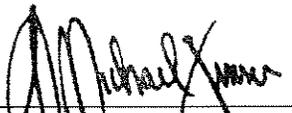
The Union does not dispute the fact that Kangail, like the employees in John P. Scripps Newspapers, was allowed to display the insignia at issue when not working with the Company’s customers or the public, even on the Company’s premises; they do not dispute the Kangail, like the employees at issue in John P. Scripps Newspapers, had extensive contact with the public as the Company’s representative. Clearly, John P. Scripps Newspapers is directly applicable to the instant case and supports the finding that the Company had the right to enforce a narrowly drawn proscription on the display of union insignia.

II. CONCLUSION

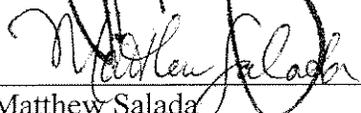
For the foregoing reasons, *The Register-Guard* respectfully requests that the Second Consolidated Complaint, all amendments thereto, and all underlying charges be dismissed in their entirety, that the Exceptions of *The Register-Guard* be granted and that the Decision of the ALJ be reversed to the extent that Respondent has excepted thereto.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this 28th day of May, 2002, that I caused to be served a copy of the Brief in Reply to the Charging Party's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge via Federal Express to the following:

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