

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

**GUARD PUBLISHING COMPANY
d/b/a THE REGISTER GUARD**

and

**Cases 36-CA-8743-1
 36-CA-8849-1
 36-CA-8789-1
 36-CA-8842-1**

**EUGENE NEWSPAPER GUILD, CWA
LOCAL 37194**

**GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S
EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

It is the position of the Counsel for the General Counsel that the Decision of the Administrative Law Judge (ALJ) is fully supported by the credible record evidence and case law with respect to the exceptions filed by Respondent. The Board is invited to reference Counsel for the General Counsel's Brief to the ALJ as an aid in locating passages in the record and exhibits that support the ALJ's conclusions and findings.

Respondent filed 102 exceptions to the ALJ's Decision. This Brief will comprehensively address those exceptions by topic rather than specific exception.¹

¹ In its Brief in Support of Exceptions, Respondent consolidated its 102 exceptions into ten questions, located on pages 17-18 of its Brief. This brief is generally organized around those questions. The subsequent footnotes will identify the specific question raised by Respondent as well as the specific exceptions being addressed.

I. Respondent's Exceptions

A. Issue 1: Whether the ALJ correctly found that Respondent failed to show special circumstances justifying its discriminatory union insignia policy²

“The right of employees, while working, to wear union pins, buttons, and other insignia has long been held to be activity protected by Section 7 of the Act.”³ This right is not absolute. In some narrow circumstances, the employer can limit or even prohibit the employee’s right to wear union insignia if the employer can show such a ban on Section 7 activity is necessitated by special circumstances.⁴ “[S]pecial considerations which may justify prohibiting employee display of union insignia include situations where *employee’s safety, the employer’s product, or equipment might be threatened, or when harmonious interemployee relations might be jeopardized by wearing the particular button.*”⁵ None of these special circumstances exist in this case. The ALJ correctly ruled that the burden of proof rests with Respondent, who must demonstrate that special circumstances exist to justify the limitation on the employees’ Section 7 rights.⁶

In this case, Respondent failed to shown any special circumstances that would justify the limitation on District Manager Ronald Kangail’s Section 7 rights. Respondent argued that the Register Guard’s occasional coverage of labor issues justified its outright prohibition on employees publicly showing support for their Union. At best, such argument would justify a prohibition of wearing union insignia for reporters who are covering labor disputes. However, Respondent failed to present any evidence that would justify a Company-wide prohibition on

² This section of Brief addresses Respondent’s questions 1 and 6, and Respondent’s exceptions 1-10, 62-77, 80-82 and 100-102.

³ *Albertson’s, Inc.*, 319 NLRB 93, 102 (1995).

⁴ *See Mack’s Supermarket*, 288 NLRB 1082, 1098 (1988).

⁵ *Nordstrom, Inc.*, 264 NLRB 698, 700 (1982) (emphasis added).

⁶ *See Albertson’s*, 319 NLRB at 102.

Union insignia any time a reporter leaves the building on assignment, and certainly no evidence to support why a district manager in the Circulation Department should be prohibited from exercising his Section 7 rights.

While it is not a per se violation of the Act for Respondent to maintain a policy prohibiting employees from wearing offensive or controversial insignia, Respondent must show special circumstances why such a rule is necessary. Respondent's unwritten policy, by its broad nature, sweeps up Section 7 activity. Thus, it is Respondent's burden of proof to demonstrate that special circumstances exist for its policy. However, Respondent presented no justification for the prohibition against district managers in the Circulation Department. As such, the ALJ correctly found that Respondent's unwritten policy, as applied to Ronald Kangail, violated Section 8(a)(1) of the Act.

Issue 2: Whether the ALJ correctly found that Respondent discriminatorily applied its Communications Systems Policy to Union President Suzi Prozanski⁷

The record clearly and unequivocally established that Respondent discriminatorily applied its Communications Systems Policy (CSP) to employee and Union President, Suzi Prozanski. In *E.I. Dupont & Co.*,⁸ the Board held that an employer may not discriminatorily limit employees' use of e-mail for Section 7 purposes.⁹ Since the CSP's inception in 1996, Respondent's employees, supervisors and managers alike, have enjoyed unrestrained use of Respondent's e-mail system for dissemination of a virtual potpourri of non-business e-mail. The record is replete with examples of such non-business e-mail messages. The fact is, Respondent disparately and discriminatorily singled out employee and Union President Suzi Prozanski for

⁷ This section of Brief addresses Respondent's questions 2 and 3, and Respondent's exceptions 11-58 and 98-99.

⁸ 311 NLRB 893 (1993).

⁹ *E.I. Dupont*, 311 NLRB at 919.

her two Union-related e-mail messages, while allowing virtually every other non-business e-mail usage to go unquestioned. The ALJ correctly found that Respondent, “[h]aving permitted a plethora of non-business uses of e-mail, . . . cannot validly prohibit e-mail dealing with Section 7 subjects.”

Issue 3: Whether the Union is an outside source for purposes of the CSP¹⁰

Here, Respondent is attempting to present a post hoc justification of its disparate and discriminatory enforcement of the CSP to employee and Union President Suzi Prozanski. The ALJ correctly saw through Respondent’s weak argument in finding Respondent violated the Act. The record clearly shows that Prozanski is an employee of the Register Guard sending an e-mail message to other Register Guard employees. She is *not* an “outside organization,” as Respondent is now trying to argue. The record is full of examples where employees, managers and supervisors alike, had unfettered access to the e-mail system for non-business purposes, including using e-mail to promote so-called “outside organizations” such as Weight Watchers, United Way, a poker playing group and a fun run. Respondent only objected to the non-business use of e-mail when it involved Section 7 subjects. The ALJ correctly found that Respondent’s disparate enforcement of the CSP violated the Act.

As a side note, Respondent cannot argue that it precludes outside sources from e-mailing its employees. The record clearly demonstrated that Respondent actively promotes public contact with its reporters by e-mail. Respondent publishes the e-mail address of every Register Guard reporter on its web site. In addition, Respondent prints the e-mail address below each reporter’s article printed in the newspaper and invites the public to contact that reporter via e-mail.

¹⁰ This section of Brief addresses Respondent’s question 4 and Respondent’s exceptions 11-58.

Issue 4: Whether the Union's charges should be barred by the statute of limitations because Respondent's Insignia Policy and CSP were in effect longer than the 10(b) period¹¹

Respondent's argument here is specious. The ALJ did not find Respondent's Insignia Policy or its CSP to be facially unlawful. Rather, the ALJ found the application of those policies illegal. Therefore, the 10(b) period commences at the time Respondent discriminatorily applies the policy to the employee, not the date Respondent implements the policy. Both charges were filed well within six months of the time the discriminatory action took place.

Issue 5: Whether Respondent's proposal to codify the existing CSP (Counter Proposal No. 26) can be illegal if it is a mandatory subject of bargaining¹²

Respondent completely misses the point with its argument here. Respondent is attempting to argue that because the CSP is a mandatory subject of bargaining, a proposal to codify that policy can never be unlawful. The ALJ did not rule on whether Respondent's initial attempt to codify the CSP was unlawful. Rather, the ALJ found the CSP, *as proposed* at the bargaining table, to be violative.

The ALJ found that Counter Proposal No. 26, as clarified, discriminatorily excludes Section 7 communication. Counter Proposal No. 26, as clarified, permits the non-business use of the communications system, but specifically prohibits union-related uses, except in certain situations where an employee may wish to replace or otherwise decertify the existing Union. Initially, it was not unlawful for Respondent to simply propose a codification of the CSP. However, Respondent's clarification of Counter Proposal No. 26, and its continued insistence on that clarified proposal, despite the Union's rejection, made the Proposal unlawful. The ALJ

¹¹ This section of Brief addresses Respondent's questions 5 and 6, and Respondent's exceptions 59-77, 80-82 and 101-102.

¹² This section of Brief addresses Respondent's questions 7 and 8, and Respondent's exceptions 83-97.

correctly found Respondent's continued insistence on an unlawful Proposal to be in violation of the Act.

Issue 6: Whether the ALJ and the Board are illegally engaged in contract interpretation with respect to the Union insignia policy and the CSP¹³

The Board is not engaged in the interpretation of either Respondent's Union insignia policy or its CSP. The Board is properly engaged in remedying unfair labor practices resulting from Respondent's discriminatory application of those policies. The question of whether the specific application of an employer's policy violates the Act, clearly falls within the jurisdiction of the Board.

II. Conclusion

The ALJ's Decision is clearly and fully supported by the record and the cited case law. Respondent raised no exception or argument that warrants the Board overturning the ALJ's well-reasoned Decision. Consequently, Counsel for the General Counsel respectfully requests the Board affirm the portions of the ALJ's Decision to which Respondent has taken exception.

Respectfully submitted,



Adam Morrison, Counsel for the General Counsel
National Labor Relations Board
601 S.W. Second Avenue, Suite 1910
Portland, OR 97204

¹³ This section of Brief addresses Respondent's questions 9 and 10, and Respondent's exceptions 60 and 78-79.

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of May 2002, a copy of the **General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge** was served by Federal Express and regular mail on the following parties:

FEDERAL EXPRESS:

Mr. John J. Toner, Executive Secretary
Office of Executive Secretary
National Labor Relations Board
1099 14th Street, N.W., Room 11600
Washington, D.C. 20570-0001
(FedEx Tracking # 8312 9936 2421)

Barr & Camens
Ms. Jill Wrigley, Esq.
Ms. Barbara Camens, Esq.
1025 Connecticut Avenue, N.W., Suite 712
Washington, D.C. 20036

Guard Publishing Company d/b/a
The Register-Guard
Ms. Cynthia Walden
Human Resources Dir.
P.O. Box 10188
Eugene, OR 97440

REGULAR MAIL:

The Zinser Law Firm P.C.
Mr. L. Michael Zinser, Esq.
150 Second Avenue, N., Suite 410
Nashville, TN 37201

Eugene Newspaper Guild,
CWA Local 37194
Mr. Bill Bishop, Exec. Board Member
132 E. Broadway, Suite 416
Eugene, OR 97401

Harrang Long Gary Rudnick P.C.
Ms. Sharon A. Rudnick, Esq.
P.O. Box 11620
Eugene, OR 97401



Adam D. Morrison
Counsel for the General Counsel