

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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THE GUARD PUBLISHING COMPANY, d/b/a	:	
THE REGISTER-GUARD,	:	Case Nos. 36-CA-8743-1
	:	36-CA-8849-1
Respondent,	:	36-CA-8789-1
	:	36-CA-8842-1
-and-	:	
	:	
EUGENE NEWSPAPER GUILD,	:	
CWA LOCAL 37194,	:	
	:	
Charging Party.	:	

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BRIEF OF PROSKAUER ROSE LLP AS *AMICUS CURIAE*

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**STATEMENT OF INTEREST OF THE *AMICUS CURIAE***

This brief is filed with the National Labor Relations Board (“NLRB” or the “Board”) by and on behalf of Proskauer Rose LLP (“Proskauer”).

Proskauer is one of the nation's largest law firms, with clients throughout the United States and around the world. Founded in 1875 in New York City, the firm provides legal services from eight offices located in New York, Los Angeles, Washington, Boston, Boca Raton, Newark, New Orleans and Paris.

The Proskauer Labor and Employment Law Department, which numbers nearly 175 attorneys, is one of the largest management labor and employment law practices within a general practice firm. Proskauer has enjoyed a national reputation for over 50 years for the depth and breadth of its practice on behalf of numerous multi-national and Fortune 500 companies in a wide range of industries, including manufacturing, entertainment, financial services, health care, professional sports, hospitality, higher education, information technology, media and communications, pharmaceuticals, property management and transportation, in addition to numerous not-for-profit social service agencies and cultural institutions.

Proskauer attorneys represent employers in connection with the full spectrum of complex employment issues arising in today’s workplace. In particular, our lawyers regularly appear before the NLRB and have participated in hundreds of representation and unfair labor practice cases in Regional Offices from coast to coast. The firm also is well-known for its representation of employers and employer associations in collective bargaining, having negotiated thousands of contracts over the years with many different labor organizations around the country.

Based on its extensive experience in drafting and defending personnel policies and procedures, including those relating to employer e-mail systems, Proskauer has a unique understanding of the myriad issues, both practical and legal, surrounding employee access to company e-mail for the purpose of engaging in Section 7 activity.

With respect to the issues set forth in the Board's January 10, 2007 Notice of Oral Argument and Invitation to File Briefs, Proskauer's interest is to protect the integrity of its clients' e-mail systems by supporting clear rules that recognize their inherent right to limit the use of such critical workplace technology to business purposes only.

**I. SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT DOES NOT GUARANTEE EMPLOYEES THE RIGHT TO USE THEIR EMPLOYER'S E-MAIL SYSTEM FOR PURPOSES OF PROTECTED CONCERTED ACTIVITY.**

A workplace e-mail system, purchased and maintained by the employer at its expense, is no different than the employer's other tangible property, *e.g.*, telephone, telecopier, bulletin board, *etc.* The Board historically has upheld an employer's right to restrict the use of such equipment for business purposes only. An employer's e-mail system is no different, and should be treated no differently.

**A. The Board Repeatedly Has Held That Employers May Restrict Employee Use Of Their Communications Equipment.**

The Board has long recognized the primacy of employer property rights when employees have sought to use employer-owned equipment for union organizing and other non-business purposes. Thus, over several decades and in countless decisions the Board has upheld the promulgation and enforcement of company policies that restrict use of its equipment and other property for business purposes only, provided that there is no evidence of discriminatory application.<sup>1</sup> This well-settled doctrine has been applied across-the-board to bulletin boards, video equipment, telephones, and public address systems. *See, e.g., Mid-Mountain Foods, Inc.*, 332 NLRB 229 (2000) (television and video cassette recorder); *Eaton Techs., Inc.*, 322 NLRB 148 (1997) (bulletin board); *Champion Int'l Corp.*, 303 NLRB 102 (1991) (copier); *Union Carbide Corp. Nuclear Div.*, 259 NLRB 974, 980 (1982), *enfd. in relevant part*, 714 F.2d 657 (6th Cir. 1983) (telephones); *Honeywell, Inc.*, 262 NLRB 1402 (1982), *enfd.*, 722 F.2d 405 (8th Cir. 1983) (bulletin board); *Heath Co.*, 196 NLRB 134 (1972) (public address system).

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<sup>1</sup> We acknowledge that where an employer allows its employees to make unrestricted personal use of its equipment, including its e-mail system, the employer may jeopardize its right to prevent employees from using the e-mail to engage in Section 7 activity.

The Board consistently has held that employers do not violate the Act by restricting employee use of its equipment and other property. *See, e.g., Mid-Mountain Foods, Inc.*, 332 NLRB at 230 (upholding employer’s prohibition of employee use of the employer’s video cassette recorder to watch pro-union video on ground that “there is no statutory right of an employee to use an employer’s equipment or media”); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 292-93 (1999) (affirming ALJ’s dismissal of complaint challenging employer’s rule requiring management’s permission before posting notices on employer property; employees lack a statutory right to use employer property); *Eaton Techs., Inc.*, 322 NLRB 148 (“the Board has held that an employer may uniformly enforce a rule prohibiting the use of its bulletin boards by employees for all purposes”) (citation omitted); *Mr. Potty, Inc.*, 310 NLRB 724, 728-29 (1993) (upholding employer’s rule requiring employees to obtain management approval prior to posting on the company bulletin board).

Significant to the NLRB’s consideration of an employer’s right to restrict employee use of its e-mail system are the Board’s prior decisions repeatedly recognizing the employer’s right to control its communications equipment in the workplace, and consistently sustaining restrictions on employee use for all non-business purposes. Thus, in a long line of opinions regulating telephone usage, the Board has made it exceedingly clear that employees do not have a statutory right to use company phones for organizing purposes and has upheld employer policies prohibiting all non-business use. *See, e.g., Churchill’s Supermarkets, Inc.*, 285 NLRB 138, 155 (1987) (“[a]n employer had every right to restrict the use of company telephones to business-related conversations and to forbid employees from using company phones for personal reasons”); *enfd.*, 857 F.2d 1474 (6th Cir. 1988), *cert. denied*, 490 U.S. 1046 (1989); *Union Carbide Corp. Nuclear Div.*, 259 NLRB at 980 (employer “could unquestionably

bar its telephones to any personal use by employees”); *K-Mart Corp.*, 255 NLRB 922, 938 (1981) (“[a]s an abstract matter an employer would have plenary jurisdiction over how employees use provided telephones”), *enfd. without op.*, 676 F.2d 710 (9th Cir. 1982).

The Board already has applied these principles in cases concerning employee usage of an employer’s “new media” equipment. In *Mid-Mountain Foods*, the Board held that the employer’s refusal to permit employees to use the employer’s television in an employee break room to show a pro-union video was lawful under the Act, where the employer’s policy prohibited employees from using company equipment to show videos of any kind. 332 NLRB 229, 230. Relying on a multitude of Board and court precedents, the Board explained the simple principle, which equally governs the issues currently under consideration, that “there is no statutory right of an employee to use an employer’s equipment or media . . . nor is there a statutory right of an employee to use an employer’s telephone for personal or non-business purposes, such as union organizing matters.” *Id.*

*Mid-Mountain Foods* is particularly instructive here, because the Board majority pointedly rejected the suggestion made in Member Liebman’s partial dissent that concepts of solicitation/distribution tip the balance in the employee’s behalf when employers place restrictions on communications equipment in the workplace. *Id.* Member Liebman reasoned that once the employer ceded the break room to employees for their personal use, the company could not prohibit employees from using that room to communicate about the Union during non-working time. Thus, Member Liebman urged the Board to adopt a “unique doctrine[.]” affording employees rights to use the employer’s electronic equipment, in a non-work area, on non-work time. *Id.* at 232. She did not, however, seek to extend the doctrine to require employers to permit employees to utilize the employer’s private property in working areas. Significantly, the

majority categorically rejected Member Liebman's argument, based on numerous prior decisions acknowledging an employer's proprietary right to its equipment and sustaining employer policies barring non-business use of its property. *Id.* at 229.

While the Board has never squarely addressed the scope of an employer's rights to restrict access to its e-mail system, one ALJ correctly extended the foregoing principles to such technology. In *Adtranz*, 331 NLRB 291(2000), *vacated in part on other grounds*, 253 F.3d 19 (D.C. Cir. 2001), the employer's policy prohibited employees from using the company's e-mail system for non-business purposes. The General Counsel contended, among other things, that the company e-mail policy unlawfully restricted employee Section 7 rights during non-working time. Rejecting that argument, based on reasoning equally applicable here, the ALJ found that the employer "could bar its computers and E-mail system to any personal use by employees." *Id.* at 293. The Board adopted the ALJ's finding.

Earlier Board decisions likewise support the proposition that an employer's e-mail system is its property and that prohibitions on all non-business use are lawful. The Board's decision in *Washington Adventist Hospital, Inc.*, 291 NLRB 95 (1988), is a case in point. There, the employer maintained a computer network of approximately 150 terminals linked via a mainframe computer. Employees used the computer system to transmit business-related information and instructions from one department to another. Employees were required to agree in writing that they would not use the computer system for any unauthorized purpose. When an employee sent an unauthorized system-wide message to all users criticizing the company president's announcement of layoffs, he was terminated. *Id.* at 98.

In a decision adopted by the NLRB, the ALJ ruled that the employee's unauthorized use of company equipment was unprotected, explaining that "the sudden,

unauthorized taking over of an employer's communications system for non-business purposes in an industrial setting would be a matter of great consequence and potential harm." *Id.* at 103. The ALJ also found that the employee's action in sending a message via the computer system violated the employer's policy regulating usage of its equipment and, accordingly, merited discipline. As to the harm caused by the employee's unauthorized use of the employer's computer system, the ALJ noted that the employee's message actually interfered with the duties of the recipients by interrupting their work and causing confusion. *Id.*

**B. An Employer's E-mail System Unquestionably Is Its Property And It Is Essential For Employers To Be Able To Restrict Its Use To Business Purposes.**

There can be no question that a workplace e-mail system constitutes employer property no less than company telephones, public address systems, bulletin boards, fax machines, and other equipment.

Like all business decisions, the installation of a workplace e-mail system involves an evaluation of not only the benefits that e-mail can provide but also the costs and risks attendant to its installation. These include the cost of the servers on which the e-mail system operates, the hubs, routers, and cables comprising the employer's computer network, and the software the employer must purchase to operate the e-mail system; the cost of employing personnel, or contracting with an outside vendor, to operate and maintain the e-mail system; the cost of protecting the system from computer viruses that can cause devastating disruptions and loss of business; and, the cost of filtering "spam" e-mail.

Simply put, employers *choose* to install e-mail systems because it serves a business purpose. There is no law requiring employers to install an e-mail system, and there is no law entitling employees to an employer-provided e-mail address. To introduce an e-mail system to its workplace, an employer must make a huge investment in equipment, software, and

personnel, and must continue to expend economic and human resources on an ongoing basis to maintain the system. There is no basis in logic, fact, or precedent for treating this type of company property any differently than other employer-owned communications equipment or media. Accordingly, the long settled rule recognizing employers' right to restrict the use of its tangible property for business purposes only must be applied to company e-mail.

In addition, there are a host of practical considerations that arise with respect to e-mail that further compel the Board's recognition of the primacy of employer's property rights. Among these considerations are the legal implications that are triggered by a workplace e-mail system. The growth of e-mail has created an entirely new source of potential employer liability. According to one recent survey, 20 percent of employers have had e-mail subpoenaed by courts and regulators; another 13 percent have faced workplace lawsuits triggered by an employee's e-mail.<sup>2</sup> Employers are finding themselves facing increasing costs and burdens related to e-mail storage and preservation, as courts have imposed growing obligations with respect to company retention of e-mail in connection with litigation. *See, e.g., Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003). Indeed, the Federal Rules of Civil Procedure recently were amended to clarify that e-mail is subject to discovery like any other document. *See* United States Supreme Court, Order Adopting Amendments to the Federal Rules of Civil Procedure dated April 12, 2006. In addition, certain industry regulatory bodies, most notably the NASD also impose their own set of obligations on financial institutions to retain and preserve employee e-mails, and for which the company may be held responsible for the content of its employees' e-mails.<sup>3</sup> As a result, employers face complex and costly e-mail retention and preservation

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<sup>2</sup> AMA and ePolicy Institute 2004 Workplace E-Mail and IM Survey.

<sup>3</sup> *See* n.8 *infra* (discussing NASD Rule 3010).

obligations that simply do not exist with respect to telephones, bulletin boards, or virtually any other form of workplace communication.

There are other fundamental differences between e-mail and the types of communications devices that the Board previously has addressed. For example, unlike a telephone conversation or a public address system announcement, an e-mail leaves a record that is, in a very real sense, permanent; it takes up space on the employer's e-mail server. In addition, while an employee must physically approach a bulletin board in order to read a posting, an e-mail can be sent directly to an employee distracting him/her from whatever he/she was doing and essentially depriving the individual of the right to be left alone. Moreover, a company faces very little, if any, threat of harm from a "virus"-like attack on its telephones, fax machines, copiers, and bulletin boards, while the threat of such an attack on its computer system – via e-mail – is ever present and the consequences of failing to defend against such attack can be disastrous.

The foregoing establishes two essential points about workplace e-mail. First, there can be no question that a workplace e-mail system is the employer's property. Without the equipment purchased and maintained by the employer – the servers, hubs, routers, computer terminals and software that constitute an e-mail system – the system would not operate. Even where employees are able to access their workplace e-mail accounts from personally-owned computers or other outside connections, it would be impossible for employees to gain access to the company's e-mail network without those components.<sup>4</sup> Given the multitude of Board decisions recognizing an employer's plenary right to limit employee usage of company

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<sup>4</sup> For this reason, it is immaterial to the analysis whether an employee obtains access to his or her workplace e-mail from a computer terminal located on the employer's premises or from some other location, including the employee's home. The critical fact is that the employee's e-mail account operates on and through employer-owned hardware and software.

equipment to business purposes only, including numerous telephone cases, it is manifestly evident that an employer's computers, e-mail system, and network be treated no differently.

Moreover, given e-mail's unique nature and the attendant obligations and burdens it imposes upon employers, there can be no question that an employer must retain the right to promulgate and enforce a policy limiting e-mail usage to business purposes only. The imperative for this is far stronger than the need to restrict usage of telephones, fax machines, bulletin boards and most other property. The costs, risks, and potential harm associated with the installation and operation of a workplace e-mail system are far greater than those associated with any other communications equipment found in the workplace. Employers have a legitimate and critically important interest in being able to ensure the security and orderly functioning of such systems.<sup>5</sup>

**C. There is No Section 7 Right of Access to the Employer's E-mail System Because Employees Already Have Sufficient Alternative Means of Communication.**

In analyzing whether the Act requires that employees be allowed to have access to their employer's e-mail system to engage in union-related solicitation, the Board must take into consideration – as it consistently has in the context of union access to employer property – that employees already have at their disposal sufficient alternative means of communicating with one another concerning such non-business matters.

It is indisputable that communications technology has been evolving at a blinding pace in recent years, to the point where virtually all employees have their own cellular telephones with text-messaging capability, if not more sophisticated hand-held devices that not only give them

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<sup>5</sup> We note that, even assuming, *arguendo*, that employees do have a right to use their employer's e-mail system for non-business purposes, under no circumstances should a union have a similar right of access because, as the Supreme Court has held, "[b]y its plain terms . . . the NLRA confers rights only on employees, not on unions." *Lechmere v. NLRB*, 502 U.S. 527, 532 (1992).

the ability to speak with their coworkers, but also make it possible to transmit and receive e-mail messages via their own personal e-mail accounts. Competition among the sellers of these wireless communication units has been fierce, driving down the cost to a level where even the lowest-paid workers have easy access to it. If cell phones and these other devices are not already in the pockets of every employee, they surely will be by the time the NLRB issues its long-awaited decision in this case.

Given the multiplicity of very serious problems that would likely arise from a Board ruling that employers cannot – consistent with employee rights under Section 7 of the Act – maintain “business use only” policies to protect the e-mail systems that have become the backbone of commerce today, the existence of these reasonable alternative means of communication must be considered by the NLRB. If they are, it becomes readily apparent that any balancing of employer-employee rights would tip decidedly in favor of the employer.

**D. Outside the NLRA Context, Courts Routinely Have Held That an E-Mail System Is Employer Property and Is Subject to Monitoring By The Employer.**

Looking beyond traditional labor law, the primacy of the employer’s right to control its computers and e-mail systems is beyond dispute.

In the privacy context, courts consistently have held that employees have no privacy interest in their e-mail at work that is transmitted through the employer’s computer infrastructure and e-mail system and, consequently, are precluded from stating legal claims based on an employer’s monitoring of e-mail stored on or transmitted over the company’s computer system. *See, e.g., Smyth v. Pillsbury Co.*, 914 F. Supp. 97 (E.D. Pa. 1996); *McLaren v. Microsoft Corp.*, No. 05-97-00824-CV, 1999 Tex. App. LEXIS 4103 (Tex. App. Dallas May 28, 1999); *Garrity v. John Hancock Mut. Life Ins. Co.*, No. 00-12143, 2002 U.S. Dist. LEXIS 8343 (D.

Mass. May 7, 2002); *United States v. Monroe*, 50 M.J. 550 (A. F. Ct. Crim. App. 1999), *affd.*, 52 M.J. 326 (C.A.A.F. 2000).

Thus, in *United States v. Monroe*, a United States serviceman was provided a mailbox on a government e-mail system to afford him access to the Defense Data Network and Internet. In light of the fact that the mailbox was issued via official channels for performance of official duties, and restricted unofficial personal use, the court held that the “electronic mailbox was akin to other types of government property routinely designated for or assigned to military personnel for performance of their official duties.” *Id.* at 558. As such, the court found that the serviceman had no reasonable expectation of privacy in his e-mail box. *Id.* at 559. *See also McLaren*, 1999 Tex. App. LEXIS 4103, at \*11 (“the e-mail messages contained on the company computer were not [the employee’s] personal property, but were merely an inherent part of the office environment.”).

Similarly, in *Cyber Promotions Inc. v. America Online Inc.*, 948 F. Supp. 436 (E.D. Pa. 1996), the court held that the plaintiff, an on-line advertising company, had no right under the First Amendment or the Pennsylvania and Virginia state constitutions to send unsolicited e-mail advertisements to subscribers of America Online (“AOL”). Thus, the Court ruled that AOL, as a private company, had the right to block Cyber’s attempts to do so. Analogous to precedents in the labor law context, the court recognized that plaintiff had available to it alternative means of communication, such as the world wide web, mail, telemarketing, television, cable, newspapers, magazines, and handbilling that would “allow Cyber to disseminate its e-mail advertisements in a manner which would not interfere with AOL’s private property rights and the rights of its subscribers.” *Id.* It was enough, the court said, that plaintiff had adequate alternative means of communication available, a refrain not

unlike that espoused by the Supreme Court in *NLRB v. Babcock & Wilcox, Co.*, 351 U.S. 105 (1956).

**E. It Is Not Discriminatory For An Employer To Maintain A Business-Only E-mail Policy That Contains A Limited Personal-Use Exception But Does Not Allow Union-Related E-mails.**

While most employers have promulgated business-only e-mail policies, some rules contain a narrow exception for limited personal use of workplace e-mail accounts.

Although the Board has held that permitting personal use of employer property, including e-mail, precludes an employer from thereafter prohibiting employee use of the property for union-related purposes, the Board should reconsider this rule in the context of e-mail.

Limited personal use exceptions to business only e-mail policies allow employees to send e-mail messages when exigent circumstances require it. Such circumstances are in the nature of family emergencies, medical problems, and other unforeseeable situations in which the employee would be unduly and unfairly burdened if he or she were unable to use the employer's e-mail system. Such permissible personal use would not include gratuitous e-mails to friends and/or coworkers on non-business topics. Limited personal e-mails of this nature typically are not sent to multiple recipients, do not invite extensive responses or exchanges, and do not involve e-mail attachments.

It should not be deemed discriminatory for an employer to allow employees to undertake limited *personal* use of its e-mail system while prohibiting union-related uses along with all other non-business uses. As the Seventh Circuit explained in *Guardian Industrial Corp. v. National Labor Relations Board* 49 F.3d 317, 319-22 (7th Cir. 1995), for there to be discrimination there must be unequal treatment of similar communications. There, the court found that allowing "for sale" signs on a bulletin board did not require the employer to also allow union announcements because of the obvious dissimilarities between the two types of

postings. *See also Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457 (6th Cir. 1996) (denying enforcement of Board order and holding that owner of private retail shopping mall did not unlawfully discriminate by forbidding union representatives from distributing handbills on mall premises while permitting non-labor-related handbilling and solicitations by others in the mall).

This reasoning should apply with equal force to workplace e-mail. On the other hand, an employer that allows employees to use workplace e-mail for such non-business purposes as solicitations of other coworkers to join causes, to participate in non-business activities, to distribute literature on specific issues, or to engage in discussions about non-business topics should not, of course, be permitted to bar use of its e-mail system for union-related e-mails. However, allowing employees limited personal use of workplace e-mail, for the purposes described above, none of which involves solicitation of any kind, is fundamentally different from use of the employer's e-mail system for union-related purposes. Accordingly, employers should be permitted to promulgate business-only e-mail policies that contain a limited personal use exception, without being deemed discriminatory.

**F. The Board's Traditional Rules Concerning Solicitation and Distribution Are Not Applicable to Workplace E-mail Systems.**

As discussed above, the principle is well established that an employer is not required to permit employee usage of its equipment and other property for union-related purposes, provided that the employer does not permit other non-business use by employees. For all the reasons discussed above, this rule plainly should apply to workplace e-mail systems just as it has been applied to telephones.

Although the Board has yet to find that employees have a Section 7 right to use their employer's e-mail system for non-business purposes, there have been several General

Counsel memoranda that reach this conclusion.<sup>6</sup> Those memoranda are based on a 1998 Advice Memorandum by the NLRB's then-Acting General Counsel, setting forth his view that an employer's e-mail policy prohibiting non-business usage was overbroad and unlawful under the Board's governing solicitation and distribution rulings. *Pratt & Whitney*, Case No. 12-CA-18446, 1998 NLRB GCM LEXIS 51 (NLRB GCM Feb. 23, 1998). According to the General Counsel, the computers on which employees worked were deemed "work areas" and, consequently, an e-mail policy that prohibited solicitation on non-working time was unlawful. The General Counsel's position is not only contrary to well-established doctrine governing employer property rights, it also wholly ignores a multiplicity of practical problems that would result from its enforcement.

The *Pratt & Whitney* Advice Memorandum was issued in response to an organizing drive among the company's professional and technical employees. Although the company had a business-use only policy in place for its equipment and other resources, including computer system, the policy was not strictly enforced. Thus, Pratt & Whitney's employees routinely communicated with each other via company e-mail and spent a significant amount of time at work on the computer network. During the organizing drive, Pratt & Whitney disciplined several employees for using company computers to send e-mail messages concerning the union, salaries and layoffs. The Regional Director issued a complaint against the employer for discriminatory application of its policy on computer use, and at the same time sought advice from the General Counsel's office as to whether the policy was unlawful on its face because it prohibited solicitation-like e-mails during non-working time.

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<sup>6</sup> See, e.g., *TU Electric*, 1999 NLRB GCM LEXIS 19 (NLRB GCM Oct. 18, 1999); *Sitel Corp.*, 2000 NLRB GCM LEXIS 59 (NLRB GCM Oct. 5, 2000); *TXU Electric*, 2001 NLRB GCM LEXIS 74 (NLRB GCM Feb. 7, 2001); *Banca Di Roma*, 2004 NLRB GCM LEXIS 59 (NLRB GCM Nov. 26, 2004).

On the facts presented, the General Counsel concluded that employer e-mail policies must be governed by the Board's solicitation and distribution rules, reasoning that when two employees on non-working time conduct an interactive e-mail "conversation" regarding unionization, in real time, that communication is indistinguishable from verbal solicitation. *Id.* at \*17. Thus, the General Counsel opined:

Where the communication can reasonably be expected to occasion a spontaneous response or initiate reciprocal conversation, it is solicitation; where the communication is one-sided and the purpose of the communication is achieved so long as it is received, it is distribution. If it is solicitation, it must be permitted in all areas in the absence of an overriding employer interest; if it is distribution, it may be prohibited in work areas unless the employees have no available non-work areas.

*Id.* at \*13-\*14.

The General Counsel's position is inherently flawed, impractical to administer, and departs from longstanding Board and court precedents recognizing an employer's right to restrict the use of its own equipment.<sup>7</sup>

First, the *Pratt & Whitney* paradigm erroneously equates rules on spoken communication and solicitation with an e-mail environment, the source of which is employer-owned equipment that the employee usurps to transmit a non-business related message. The General Counsel's underlying premise, that interactive electronic communication between employees cannot be meaningfully distinguished from other verbal communications, is nothing

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<sup>7</sup> The same may be said for the ALJ's decision in *Prudential Insurance Company of America*, Cases 22-RC-12173, 22-RC-12174, 2002 NLRB LEXIS 551 (NLRB Nov. 1, 2002). There, in holding that the employer's business-only e-mail policy constituted an overbroad infringement on employees' Section 7 rights, the ALJ inexplicably declined to apply the well settled Board doctrine upholding an employer's right to restrict its tangible property, erroneously concluding that "cases involving company personal property [] have not explicated in any great detail why a company's right to exclusivity should be the rule." *Id.* at \*23. As discussed above, the Board's cases have in fact explained the basis for that rule and the ALJ's analysis was therefore erroneous.

more than a dry oasis. That is so because spoken communication between non-working employees has minimal impact on the employer's property interest. It does not infringe on control over the employer's computer system, nor does it affirmatively burden the employer's property interest by using electronic storage space and potentially slowing down the company's entire information systems network, all of which would occur here if employees could use their employer's proprietary e-mail system and network for personal messages during non-working time. *See Mid-Mountain Foods*, 332 NLRB 229, 231 (2000) (Member Liebman, dissenting in part). These very distinctions, moreover, underlie the NLRB's seminal ruling in *Stoddard-Quirk*, where the Board emphasized that "solicitation, being oral in nature" was quite different from "distribution" of printed material where the "message is of a permanent nature," a "distinction too often overlooked." *Stoddard-Quirk*, 138 NLRB 615, 619-20 (1962).

*Second*, the General Counsel's characterization that e-mail is "interactive in nature" and "more like a telephone call than mail" ignores decades of Board and court precedents upholding employer policies prohibiting employee use of company-owned telephones, copiers, public address systems and VCRs for non-business purposes. *See Pratt & Whitney*, 1998 NLRB GCM LEXIS 51, at \*17. Manifestly, employees who use employer-owned telephones are engaging in interactive conversations requiring reciprocal responses, yet the Board and courts have *never* applied the rationale set forth in *Pratt & Whitney* to telephones and, instead, have upheld employer business-use only telephone policies.

*Third*, even assuming that e-mail correspondence should be analyzed under the solicitation/distribution paradigm, e-mail correspondence fits the analytical framework applicable to distribution. Whereas solicitation is a verbal communication, distribution is a written form of communication, and raises special concerns justifying greater restriction. E-mail

correspondence is also written, because, like a letter or handbill, it can be printed, stored, re-sent and revised. Like paper litter, stored e-mail correspondence resides on a computer hard-drive and is relatively permanent in nature even after deletion. Indeed, the General Counsel himself acknowledged that stored e-mail correspondence takes up cyberspace, creates “cyber-litter” and poses a potential hazard to production by slowing performance of the employer’s computer network. *Id.*

*Fourth*, the General Counsel’s formulation “poses practical difficulties that make it unworkable in everyday life.” Maureen W. Young, *Can Employers Limit Employer Use of Company E-Mail for Union Purposes*, 72 N.Y. St. B.J. 30, 35 (2000). For example, while actual solicitation and distribution can be physically limited to non-working time and non-working areas: how does an employer know whether the sender of the e-mail correspondence composed and transmitted the message on non-working time?; how does the employer monitor that the recipient read the e-mail message on non-work time?; how does an employer confirm whether the sender’s intent was to elicit an interactive dialogue?; etc.

Accordingly, the Board’s traditional solicitation and distribution rules were improperly applied in *Pratt & Whitney* and in fact should have no applicability to workplace e-mail systems.

\* \* \*

In sum, existing Board law conclusively establishes that an employer’s policy prohibiting non-business use of its e-mail system is a valid restriction on the use of its tangible property. Moreover, in other contexts, the judiciary has recognized the employer’s plenary jurisdiction over its own e-mail system and computer infrastructure network, describing it as “private property,” no different than company telephones, and rejecting employee arguments equating e-mail with speech or oral communication.

## **II. EMPLOYER MONITORING OF EMPLOYEE USE OF WORKPLACE E-MAIL DOES NOT VIOLATE THE ACT.**

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Employers must be permitted to monitor the use of workplace e-mail systems without risk of violating the Act. There are several legitimate business reasons for the need to engage in such monitoring. *First*, and as discussed above in Point I, inasmuch as employers have the right to promulgate policies limiting the use of workplace e-mail to business purposes, they must be allowed to monitor employee e-mail usage to ensure compliance with such policies. *Second*, e-mail monitoring is necessary for protecting against security threats to an employer's e-mail system and/or overall computer network. *Third*, e-mail monitoring may be required simply to ensure the smooth operation of an e-mail system, through ascertaining the nature and types of e-mails that are being sent at various times (*i.e.*, with or without attachments, large versus small content, etc.). *Fourth*, monitoring may be the only way an employer can ensure that its system is not being used for illegal activities in which the employer could become implicated. *See, e.g., Doe v. XYZ Corp.*, 392 N.J. Super. 122 (N.J. Super. Ct. App. Div. 2005) (employer liable for employee's use of workplace computer for an illegal purpose).<sup>8</sup> Accordingly, for a workplace e-mail system to operate properly, employers must be permitted to monitor employees' use of that system.

Monitoring for these legitimate business reasons is entirely consistent with the Board's prior decisions on the subject of workplace monitoring. The Board has permitted employer monitoring, including the monitoring of employee activities, based on security concerns. *See Lechmere, Inc.*, 295 NLRB 92 (1989), *enfd.* 914 F.2d 313 (1st Cir. 1990), *rev'd on other grounds*

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<sup>8</sup> In addition, monitoring may be required by regulation, as in the financial services industry. For example, Rule 3010 of the National Association of Securities Dealers ("NASD") requires member firms to review the incoming and outgoing correspondence between its registered agents and the public relating to the firm's securities business. Notably, Rule 3010 specifically applies to electronic correspondence (*i.e.*, e-mail). See [http://nasd.complinet.com/nasd/display/display.html?rbid=1189&element\\_id=1159000466](http://nasd.complinet.com/nasd/display/display.html?rbid=1189&element_id=1159000466).

502 U.S. 527 (1992) (installation of rooftop security cameras to monitor illegal activity in parking lot and catch shoplifters was a lawful business objective); *Wackenhut Corporation*, 348 NLRB No. 93 (Dec. 19, 2006) (general security purposes justified the use of security cameras and the recording of protected concerted activity did not violate the Act); *Roadway Package Sys., Inc.*, 302 NLRB 961 (1991) (“passive” surveillance of employees’ union activities is permissible where such conduct does not disrupt or interfere with union organizing activities); *Sage Dining Serv., Inc.*, 312 NLRB 845 (1993) (close observation of employees’ activities while on duty or during break periods during the normal course of business does not violate the Act).

The legitimate business concerns that the Board has long held to justify employer monitoring of the workplace, and of employees’ activities, are equally present with respect to workplace e-mail. Under the precedents cited above, an employer would not violate the Act by monitoring employee use of workplace e-mail systems.

CONCLUSION

E-mail use has become pervasive and has surpassed many other forms of communication – including face-to-face conversation – in the workplace and elsewhere. Nevertheless, the employer has the right to protect its e-mail system by, *inter alia*, prohibiting all non-business use. The NLRB has so held on numerous occasions with respect to an employer’s telephone system, and the Board should so hold with respect to an employer’s e-mail system. Indeed the arguments supporting the employer’s right to enforce a “business use only” rule are far stronger with respect to e-mail, for all the reasons discussed at length above.

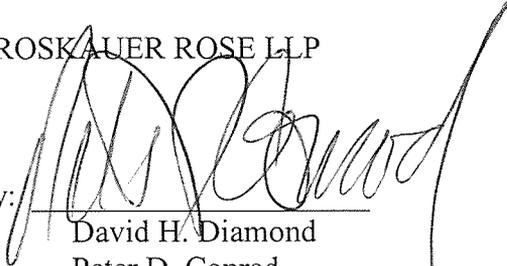
Furthermore, restricting use of the employer’s e-mail system to business purposes does not unlawfully interfere with employee exercise of their Section 7 rights to form, join or assist labor organizations given the plethora of alternative means of communication that exists, including cellular telephones, text messaging, BlackBerries and other hand-held devices capable of transmitting electronic messages via the employee’s personal email address, not to mention personal interaction.

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Respectfully submitted,

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**AFFIRMATION OF SERVICE**

I, BRIAN J. GERSHENGORN, ESQ. do hereby affirm that on the 9th day of February, 2007, I caused copies of the attached brief in Case Nos. 36-CA-8743-1, 36-CA-8849-1, 36-CA-8789-1 and 36-CA-8842-1 to be served upon counsel for the parties listed below by UPS Next Day Air pursuant to the Board's Rules and Regulations:

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