

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

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

and

EUGENE NEWSPAPER GUILD,  
CWA LOCAL 37194, AFL-CIO.

Case 36-CA-7843-1  
36-CA-8789-1  
36-CA-8842-1  
36-CA-8849-1

**MOTION FOR RECONSIDERATION**

Charging party Eugene Newspaper Guild, CWA Local 37194, AFL-CIO (“the Guild”), moves for reconsideration of the Notice of Oral Argument and Invitation to File Briefs issued on January 10, 2007. The Guild requests that the Board withdraw the notice and issue a revised notice eliminating the questions in items 3, 4, 6 and 7.

The grounds for this motion are that the Notice invites submissions that go beyond the issues presented and the record evidence in this case. The questions in items 3, 4, 6 and 7 raise wide-ranging issues related to employee use of e-mail that have nothing to do with the decision of the unfair labor practice case framed by the General Counsel’s complaint and litigated before the administrative law judge. What is more, items 6 and 7 call for the submission of extra-record evidence without reopening the hearing or otherwise adhering to the requirements applicable to the receipt of evidence in unfair labor practice cases.

As discussed more fully below, by raising issues that are not presented in this case and calling for the submission of extra-record evidence, the notice ignores “[t]he basic

distinction between rulemaking and adjudication” – “a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other.” *United States v. Florida East Coast R. Co.*, 410 U.S. 224, 244 & 245 (1973). Thus, the notice suggests that this case will be decided in a manner that is inconsistent with the method for adjudicating unfair labor practices cases defined by the National Labor Relations Act and will instead be treated as the occasion for rulemaking conducted in a manner that is inconsistent with the Administrative Procedure Act.

## **ARGUMENT**

1. “The Administrative Procedure Act prescribes radically different procedures for rule making and adjudication. Accordingly, the proper classification of agency proceedings as rule making or adjudication is of fundamental importance.” *Attorney General’s Manual on the Administrative Procedure Act* 12 (1947). “Rule making . . . is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent’s past conduct. Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policy-making conclusions to be drawn from the facts.” *Id.* at 14. By contrast, “adjudication is concerned with the determination of past and present rights and liabilities. Normally, there is involved a decision as to whether past conduct

was unlawful, so that the proceeding is characterized by an accusatory flavor and may result in disciplinary action.” *Ibid.*

“Proceedings instituted by . . . the National Labor Relations Board leading to the issuance of orders to cease and desist from . . . unfair labor practices” constitute “adjudication” within the meaning of the Administrative Procedure Act. *Attorney General’s Manual* 15. Section 10 of the National Labor Relations Act states with some particularity how such unfair labor practice adjudications are to be conducted. 29 U.S.C. § 160.

The object of a proceeding under NLRA § 10 is “to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce.” 29 U.S.C. § 160(a). Such a proceeding is initiated by the filing of charges alleging that “any person has engaged in or is engaging in any such unfair labor practice.” 29 U.S.C. § 160(b). “The General Counsel of the Board . . . ha[s] final authority . . . in respect of the investigation of charges and issuance of complaints under section 10 and in respect of the prosecution of such complaints before the Board.” 29 U.S.C. § 153(d).

“The person so complained of . . . ha[s] the right to file an answer to the . . . complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint.” 29 U.S.C. § 160(b). Other interested persons “may be allowed to intervene in the said proceeding and to present testimony.” *Ibid.* “Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States . . . .” *Ibid.*

“The testimony taken” before an administrative law judge in an unfair labor practice proceeding must be “reduced to writing and filed with the Board.” 29 U.S.C. § 160(c). “[T]he Board upon notice may take further testimony or hear argument.” *Ibid.* Based “upon the preponderance of the testimony taken,” the Board must “state its findings of fact” and issue “an order” either remedying the alleged unfair labor practices or dismissing the complaint. *Ibid.*

2. The General Counsel’s complaint in this case alleges three unfair labor practices with respect to employee use of e-mail. First, the complaint alleges that the Register Guard’s “Communications Policy is unlawfully overbroad . . . insofar as it pertains to employee use of Respondent’s e-mail system for solicitations pertaining to Section 7-protected topics.” Second Consolidated Complaint ¶ 6(b). The theory of this allegation, as explained by Counsel for the General Counsel at the hearing, is that, while “it appears [that the Policy] would have precluded the use of Respondent’s electronic communication systems for any nonbusiness purposes[,] . . . the rule was essentially ignored by employees, supervisors, managers alike.” Tr. 27-28. Second, the complaint alleges “a discriminatory application of the Communications Policy based on the Section 7-related content of [an employee’s] use of Respondent’s e-mail system for ‘dissemination of [Union] information.’” Second Consolidated Complaint ¶ 8(c). Third, the complaint alleges that the Register Guard advanced “an illegal subject for the purpose of collective bargaining” when the newspaper “proposed contractual language (‘Proposal’) which would prohibit Unit employees from utilizing Respondent’s electronic communications systems for the purpose of discussing or communicating with other

employees concerning Union related matters” and that the newspaper “refused to withdraw the Proposal.” *Id.* ¶ 9.

In November 2001, three days of testimony were taken on the complaint in this case. On February 21, 2002, the administrative law judge issued a decision recommending that the first of the e-mail allegations be dismissed and that the other two e-mail allegations be sustained. The newspaper filed exceptions, and the General Counsel and the charging party each filed cross-exceptions. The case has been fully briefed and before the Board for decision since May 2002.

The questions in items 3, 4, 6 and 7 of the Notice have nothing whatsoever to do with the unfair labor practice case alleged by the General Counsel’s complaint and litigated by the parties in the hearing before the ALJ.

Item 3 contains questions concerning the legality of “an employer . . . prohibit[ing] e-mail access to its employees by nonemployees” or “monitor[ing]” employee use of e-mail. There is no allegation that the Register Guard has engaged in either of these activities. Nor has the Register Guard defended its policy on the grounds that it serves legitimate interests in preventing nonemployee access or in assisting lawful monitoring.

Item 4 contains questions regarding the “relevance [of] the location of the employee’s workplace” – particularly “at home or at some location other than a facility maintained by the employer” – to the employee’s right to communicate with co-workers through the employer’s e-mail system. This case does not involve employees communicating from remote work locations, and no party has contended otherwise.

Item 6 contains a series of questions regarding e-mail policies adopted by other employers. Evidence of policies adopted by other employers has no bearing on whether the Register Guard committed the unfair labor practices alleged in the complaint. And, no such evidence was presented at the hearing. Moreover, such evidence cannot properly be considered by the Board in deciding this case because it has not been submitted on the record in accordance with the governing rules of evidence. See 29 U.S.C. § 160(b).

Item 7 asks an open-ended question about whether “there [are] any technological issues concerning e-mail or other computer-based communication systems that the Board should consider” in deciding this case. Neither the General Counsel in prosecuting the complaint nor the Register Guard in answering the complaint has raised any “technological issues,” and no evidence regarding such issues is contained in the record.

In sum, it is readily apparent that the questions in items 3, 4, 6 and 7 have nothing whatsoever to do with “adjudicat[ing] disputed facts in [the] particular case[.]” before the Board. *Florida East Coast R.*, 410 U.S. at 245. Rather, these questions are clearly intended to assist the Board in “promulgating policy-type rules or standards” regarding employer regulation of e-mail usage by employees. *Ibid.*

3. “The Administrative Procedure Act contains specific provisions governing agency rule making, which . . . require[], among other things, publication in the Federal Register of notice of proposed rule making and of hearing; opportunity to be heard; a statement in the rule of its basis and purposes; and publication in the Federal Register of the rule as adopted.” *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 763-764 (1969)

(Opinion of Fortas, J.). “The rule-making provisions of that Act . . . may not be avoided by the process of making rules in the course of adjudicatory proceedings.” *Id.* at 764.

“Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies,” but only of policies “which are applied and announced therein.” *Wyman-Gordon*, 394 U.S. at 765 (emphasis added). Precisely because the “announced” policies must be “applied . . . therein,” an adjudicated case can serve as the vehicle for formulating only those policies that are relevant to deciding the particular case. Thus, when the Board chooses to “develop[] its standards in a case-by-case manner” through adjudication, it must do so “with attention to the specific [circumstances] . . . in each [case].” *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). “There is no warrant in law for the Board to replace the statutory scheme with a rule-making procedure of its own invention,” *Wyman-Gordon*, 394 U.S. at 764, that disregards “[t]he basic distinction between rulemaking and adjudication,” *Florida East Coast R.*, 410 U.S. at 244, by conflating the two.

If the Board wishes to address the legality of “an employer . . . prohibit[ing] e-mail access to its employees by nonemployees” or “monitor[ing]” employee use of e-mail (item 3), or to consider the rights of employees working in remote locations to communicate via an employer’s e-mail system (item 4), it is free to do so through case-by-case adjudication—that is, by issuing decisions in concrete cases that actually present those issues, on records developed in each case in accordance with the requirements of NLRA §10(c). Alternatively, the Board may address these issues by exercising its authority to make “such rules and regulations as may be necessary to carry out the

provisions of th[e] Act,” 29 U.S.C. § 156, in which case it would be free to solicit information from the public on such questions as what policies employers are currently following with respect to employee use of email (item 6) and whether there are technological issues that should be taken into account in promulgating rules regarding access to e-mail (item 7). But, if the Board is to exercise its rulemaking authority, it must do so “in the manner prescribed by the Administrative Procedure Act.” 29 U.S.C. § 156. If the Board wishes to engage in rulemaking with respect to employer e-mail policies, it must follow the notice and comment procedures required by the APA and proceed in the same manner as it did in promulgating rules regarding health care bargaining units. *See Health Care Rulemaking*, 284 NLRB 1515-1597 (collecting Federal Register notices of proposed and final rules).

The Board should not delay disposition of this case, which has been before the Board awaiting decision for nearly five years, by entertaining submissions addressed to issues that have no bearing on whether the Register Guard committed the unfair labor practices alleged in the General Counsel’s complaint.

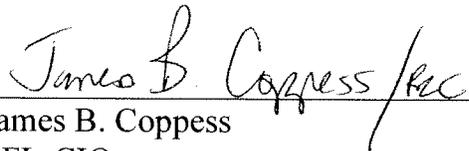
### **CONCLUSION**

For these reasons, the Board should withdraw the notice and issue a revised notice eliminating the questions in items 3, 4, 6 and 7.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of the foregoing Motion for Reconsideration with 18<sup>th</sup> day of January 2007 by delivering a copy of same by overnight delivery to:

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