UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE GUARD PUBLISHING COMPANY, d/b/a/ THE REGISTER GUARD,	
and	Case 36-CA-7843-1 36-CA-8789-1
EUGENE NEWSPAPER GUILD, CWA LOCAL 37194, AFL-CIO.	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

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 polices 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 18th day of January 2007 by delivering a copy of same by overnight delivery to:

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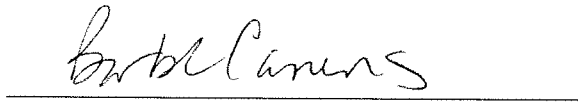
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