

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

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WEYERHAEUSER COMPANY	:	
	:	
and	:	Case 19-CA-33069
	:	19-CA-33095
ASSOCIATION OF WESTERN	:	
PULP AND PAPER WORKERS	:	

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**WEYERHAEUSER COMPANY'S RESPONSE TO THE  
ACTING GENERAL COUNSEL'S EXCEPTIONS**

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DATED: May 7, 2012

## I. INTRODUCTION

This case involves Weyerhaeuser Company's Longview, Washington facility. On August 30, 2011, the Regional Director for Region 19 issued a Complaint against Weyerhaeuser, alleging in part that the Company's "Electronic Media Use Policy" was unlawful because it purportedly barred non-business use of the Company's e-mail system. On January 30, 2012, Administrative Law Judge Eleanor Laws dismissed the Complaint as it pertained to the Electronic Media Use Policy because that policy was lawful under *The Register Guard*, 351 NLRB 1110 (2007), which held that employees have no statutory right to use an employer's e-mail system for Section 7 purposes.

The Acting General Counsel ("AGC") argues that *Register Guard* was erroneously decided, and urges a new test in which a blanket ban on employee use of e-mail for non-work purposes would be presumptively unlawful. For a host of reasons, the Board should decline the AGC's invitation to revisit *Register Guard*.

First, the AGC's brief contains fundamental factual misrepresentations that fatally undermine his claim. The AGC's entire argument is premised on the claim that Weyerhaeuser's Electronic Media Policy bars all non-work use of the Company's e-mail system. But it very clearly does not. Although the Policy states that the Company's electronic media (including e-mail) are to be used for "business purposes only," that prohibition is *immediately* followed by an exception for "limited personal use" with the consent of an employee's manager and subject to certain exceptions protecting the company from liability and protecting it from data loss. In other words, the entire substantive basis of the AGC's exceptions – that an employer cannot ban all non-business use of e-mail – is absent in this case. Accordingly, the issue of whether an

employer can ban all non-business use of e-mail, in addition to being already settled Board law, is not properly before the Board in this case.

Second, the AGC's exceptions are moot. Since the issuance of the Complaint, Weyerhaeuser has eliminated its Electronic Media Use Policy, in favor of a new Electronic Network Use Policy. The new policy permits non-business use of e-mail during an employee's non-working time – a policy that even the dissenters in *Register Guard* would find “presumptively lawful.”

Third, there is no substantive basis for the Board to overturn the well-reasoned decision in *Register Guard*. In *Register Guard*, the Board held, consistent with a long line of previous cases, that employees do not have any statutory right to use an employer's equipment or media, as long as any policy prohibiting such use is not applied in a discriminatory manner. Particularly in this case, there is no reason to disturb that holding because the undisputed testimony shows that employees rarely use the Company's e-mail system for work or non-work purposes. In addition, contrary to the AGC's claim, the test in *Republic Aviation* is inapplicable here. A policy restricting non-business use of e-mail does not “entirely deprive” employees of their right to engage in Section 7 communications, and absent such a deprivation, there is no basis for the Board to invade an employer's property rights.

Finally, overturning *Register Guard* and compelling employers to cede their property rights to employees (and potentially other outside entities), and potentially to compel an employer to broadcast views with which it may not agree, violates not only an employer's property rights, but also an employer's Section 8(c) free speech rights and the First Amendment.

For all of these reasons, the Board should affirm the ALJ's decision with respect to the Company's Electronic Media Use Policy, and dismiss the AGC's exceptions.

## II. ARGUMENT

### A. The Acting General Counsel's Exceptions Are Entirely Based on a Misrepresentation of the Company's Electronic Media Use Policy.

The “sole substantive basis” for the AGC’s exceptions is the ALJ’s dismissal of the Complaint allegations relating to Weyerhaeuser’s Electronic Media Use Policy. (Exceptions Brief of AGC, at 1). More specifically, the AGC believes that Weyerhaeuser’s Electronic Media Use Policy (as written at the time of the Complaint) violates Section 8(a)(1) because it “prohibits employees from using e-mail for non-business purposes” and “directly prohibits employee use of e-mail for Section 7 activities.” (AGC at 1; *see also* AGC at 11 (“The General Counsel’s position is that it is appropriate to apply a presumption that a total ban on employees’ right to communicate about non-work matters through e-mail is unlawful”); AGC at 12 (“a complete ban is ‘more restrictive than necessary’”).)

The AGC’s entire exceptions brief is entirely premised on the claims that Weyerhaeuser’s Electronic Media Use Policy “prohibits employees from using e-mail for non-business purposes” and that the policy “directly prohibits employee use of e-mail for Section 7 purposes.” However, the policy does not do these things. Simply put, the AGC very obviously has the facts wrong. It is undisputed (and in fact quoted in the AGC’s brief) that the Electronic Media Use Policy in effect at the time of the hearing states as follows:

It is a Weyerhaeuser policy that the company’s electronic media, including intranet, internet, extranet, telephony and messaging services, are to be used for business purposes only. *Limited personal use may be permitted with the consent of the employee’s supervising manager* if the use does not adversely affect:

- productivity;
- work performance;
- network performance;
- Weyerhaeuser’s goodwill or reputation;
- Or the cost of doing business

Unacceptable use of electronic media includes, but is not limited to the following: *Excessive, unreasonable or unauthorized personal use . . .*

(JX-1; *see also* AGC at 2; ALJ Decision, at 2).<sup>1</sup>

The policy does not define “business purposes,” but lists 14 bullet-point examples of inappropriate use, such as visiting pornography websites, sending chain mail, unauthorized use of passwords, running a business for personal benefit, violating copyright rules, bypassing network security, forging or auto-forwarding e-mail messages, and violating attachment size limits. The policy also provides that “excessive, unreasonable, or unauthorized personal use” is inappropriate. (JX-1). There is no allegation by the AGC that this standard is deficient or inadequate. To the contrary, such standard is consistent with the types of distinctions that are common in employment policies, procedures, work rules and collective bargaining agreements.

Thus, contrary to the assertion on which the AGC’s entire brief is premised, the Company’s Electronic Media Use Policy on its face *permits* “limited personal use,” and none of the exceptions can reasonably be read to “directly prohibit[] employee use of e-mail for Section 7 purposes.” This is an indisputable fact – there is simply no basis in the record for the AGC to claim otherwise – and it unravels the AGC’s entire theory of the case. Accordingly, the issue of whether a total ban on non-business related use of e-mail systems is lawful – *i.e.* the issue of whether *Register Guard* should be overturned – is not properly before the Board in this case.<sup>2</sup> The record evidence not only fails to support AGC’s theory of violation, it demonstrates this case is not a legitimate vehicle for revisiting the Board’s *Register Guard* ruling, and the AGC’s brief

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<sup>1</sup> The Acting General Counsel’s brief omits the “work performance” portion of the policy. Also, it bears emphasis that the AGC does not allege that the policy violates the Act based on the reference to “consent of the employee’s supervising manager” (JX-1). Thus, the AGC’s alleged violation presumes the existence of a prohibition that is contrary to the policy’s actual terms.

<sup>2</sup> Unlike in this case, in *Register Guard*, the applicable policy banned *all* use of e-mail for any non-business related solicitation.

consists largely of generic “Register Guard” arguments that have no proper application to the instant case.

Indeed, the AGC’s brief actually makes an argument that Weyerhaeuser’s Electronic Media Use policy is lawful. In his brief, the AGC states that:

The primary interests in restricting e-mail – preventing liability triggered by e-mail content, protecting the computer system from large attachments and potential e-viruses, and ensuring employees are using work time for work – can be accomplished by fair less restrictive means than banning personal e-mail.

(AGC at 12).

Here, Weyerhaeuser’s Electronic Media policy does not ban personal e-mail at all – it explicitly permits limited personal use of e-mail except in certain circumstances, such as where e-mail content could subject the Company to liability, could slow network performance (*e.g.*, via large attachments or viruses), and where it would affect productivity or work performance. In other words, Weyerhaeuser’s policy permits personal use except in nearly identical situations to what the AGC believes are acceptable limitations.

In short, contrary to the AGC’s claim, this is not a case where the employer has instituted a total ban on non-business use of e-mail. As such, the issue of whether or not an employer may institute a policy that bars all non-business use of e-mail is simply not before the Board in this case. In other words, this case is not an appropriate case for the Board to consider overruling *Register Guard*.

**B. The General Counsel’s Exceptions Are Moot.**

The Board should dismiss the AGC’s exceptions for the additional reason that they are moot. The Complaint in this case was issued on August 30, 2011. (ALJD at 1). The hearing

was held November 8, 2011, and the ALJ's decision was issued on January 30, 2012. (*Id.* at 1, 15).

Effective February 29, 2012, Weyerhaeuser instituted a new "Electronic Network Use Policy." (*See Weyerhaeuser's Motion to Dismiss a Portion of the Complaint and to Stay Briefing*, filed March 22, 2012, exhibit C, affidavit of Diana Lynn Zolotko, ¶ 2) (hereinafter "Motion"). The new policy replaced the old "Electronic Media Use Policy" that was the subject of the Complaint in this case. (*Id.*). The new policy provides as follows:

It is a Weyerhaeuser policy that the company's electronic network including intranet, Internet, extranet, telephone, messaging services, and all forms of portable electronic data storage are to be used for business purposes only. *Limited personal use during non-working time including rest and meal periods* may be permitted if the use does not adversely affect:

- safety;
- productivity;
- network performance;
- Weyerhaeuser's goodwill or reputation; or
- the cost of doing business.

(*Id.*, emphasis added).

The Board's disposition of Weyerhaeuser's Motion did not involve any substantive review of the new Weyerhaeuser Electronic Network Use Policy, and the Board should take into account employer policy changes that, among other things, eliminate any doubts regarding compliance with the Act. The Electronic Network Use Policy was communicated to all employees at the Company's Longview, Washington facility by (a) posting a link to the new policy on the Longview intranet; (b) providing a copy of the new policy to the hourly production employees' representative; (c) posting the policy on 41 separate bulletin boards throughout the Longview facility. (*Id.* at ¶ 3).

In the *Register Guard* dissent, Chairman Liebman stated that “rules limiting nonwork-related e-mails to nonworking time would be presumptively lawful, just as with oral solicitations.” 351 NLRB at 1127. Here, the new Weyerhaeuser Electronic Network Use Policy fits squarely into that category. It permits non-work related e-mails during nonworking time. Thus, any order by the Board upholding the AGC’s exceptions and requiring Weyerhaeuser to rescind the Electronic Media Use policy would serve little purpose, as the Company has already rescinded the policy.

### **C. The Board Should Not Overturn Register Guard**

The parties and the ALJ agree that in order for the Board to find merit to the Complaint allegations relating to the Company’s Electronic Media Use Policy, the Board would need to overturn its 2007 *Register Guard* decision, which held that “employees have no statutory right to use [an employer’s] e-mail system for Section 7 purposes.” 351 NLRB at 1110. For two main reasons, the Board should not accept the invitation to do so.

First, the Board has long held, in *Register Guard* and a litany of cases before it, that employees have no statutory right to the use of employer-owned equipment. There is no dispute that the Company owns its e-mail system, and there is no reason to depart from the well-established law in this area, particularly in this case, where the undisputed testimony shows that employees rarely use e-mail and the employer rarely communicates with employees via e-mail. Second, contrary to the AGC’s claim, the test in *Republic Aviation* is simply inapplicable here. A policy restricting non-business use of e-mail hardly “entirely deprive[s]” employees of their right to engage in Section 7 communications; rather, it regulates only one manner of communication. Section 7 does not give employees the right to communicate in any form an

employee may choose, even if the barred form of communication may be the most convenient or most effective means of communication.

**1. *Register Guard* Correctly Held That Employees Have No Statutory Right to Use Employer-Owned Equipment.**

In *Register Guard*, the Board held, consistent with a long line of previous cases, that employees have “no statutory right . . . to use an employer’s equipment or media, as long as the restrictions are nondiscriminatory.” 351 NLRB at 114, citing *Mid-Mountain Foods*, 332 NLRB 229, 230 (2000), *enf’d.* 269 F.3d 1075 (D.C. Cir. 2001) (no statutory right to use television in employer’s break room to show pro-union video); *Eaton Technologies*, 322 NLRB 848, 853 (1997) (finding it “well-established” that employees have no statutory right to use an employer’s bulletin board); *Champion International Corp.*, 303 NLRB 102, 109 (1991) (employer has “basic right to regulate and restrict use of company property such as a copy machine); *Churchill’s Supermarkets*, 285 NLRB 138, 155 (1987), *enf’d.* 857 F.2d 1474 (6th Cir. 1988) (employers have “every right to restrict the use of company telephones to business-related conversations); *Union Carbide Corp.*, 259 NLRB 974, 980 (1981), *enf’d. in relevant part*, 714 F.2d 657 (6th Cir. 1983) (employer “unquestionably” could bar employees from using its telephones for personal use).

The AGC concedes that employers may ban non-business use of its equipment, but claims that the Board’s long-standing rules in these so-called “equipment” cases should not apply because those cases “did not involve interactive, electronic communication regularly used by employees.” (AGC at 10). This argument has two main flaws. First of all, in this case, it is undisputed that e-mail is *not* “regularly used by employees.” The Longview facility employs approximately 400 bargaining unit employees. (Tr. 80). At the hearing, the testimony showed that only five or six of the 400 bargaining unit employees have dedicated computer terminals

which are their primary work stations (Tr. 53-54). And in 2009, then-Union Officer Rex Osborne told the Longview Human Resources department that:

“Local 580 has mentioned on **numerous** occasions to you at 2<sup>nd</sup> and 3<sup>rd</sup> step meetings **not all of our members look at their email much less use it** and that the Company should not rely on email for all communications to employees.”

(R. Ex. 2:17) (emphasis added).

Indeed, other than one employee (out of 400) who spent “60 to 75 percent” of his day in front of a computer (Tr.74), the only other evidence in the record regarding use of the Company email by bargaining unit employees is that some union representatives used the Company email system to conduct Union business. (R. Exs. 1-4). Because the employees in this case do not use e-mail to any significant degree, the AGC’s argument falls apart. *See also Register Guard*, 351 NLRB at 1121 (Liebman and Walsh, dissenting in part, and stating that where “an employer has given employees access to e-mail *for regular, routine use in their work*, we would find that banning all nonwork-related ‘solicitation’ is presumptively unlawful absent special circumstances”).<sup>3</sup>

Second, the idea that the Board should make a distinction between employer-owned equipment because one type of equipment is “interactive and electronic” is wide of the mark, and based on a false premise. Telephones too are obviously “interactive and electronic” yet the Board has held that employees have no statutory right to use them for non-business purposes. Likewise, company televisions are electronic, as are copy machines, and the Board has held that employees have no statutory right to use them for non-business purposes as well. None of those

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<sup>3</sup> It may be true generally, as the dissent in *Register Guard* stated, that “e-mail has revolutionized business and personal communications.” 351 NLRB at 1125. However, the testimony in this case shows that is certainly not the case at the Longview facility. Thus, the Longview facility is hardly the “technological workplace” where the company email is “the present day water cooler” and the “natural gathering place” for non-work related communications.

cases can be materially distinguished from this one. Saying that e-mail is different because it is “interactive and electronic” does not make it so, and the AGC has provided no reason, let alone a compelling reason, why e-mail should be treated differently than any other employer-owned communication system. In short, the Board in *Register Guard* got it right - e-mail should be treated like bulletin boards, telephones, public address systems, video equipment, and any other communication device provided by an employer for use in its business.

**2. The *Republic Aviation* Test Does Not Apply Because a Ban on Non-Business Related E-mail Does Not “Entirely Deprive” Employees of the Ability to Communicate and Engage in Section 7 Activity.**

In *Republic Aviation v. NLRB*, 324 U.S. 793 (1945), the Court held that if an employer rule “entirely deprived” employees of their right to communicate in the workplace, then some “dislocation” of employer property rights might be necessary in order to safeguard Section 7 rights. *Id.* at 802. *Republic Aviation* was a solicitation case, and held that a rule banning all solicitation during nonworking time was an “unreasonable impediment to self-organization . . . in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.” *Id.* at 803.

In *Register Guard*, the Board held that the *Republic Aviation* test was not appropriate because the policy banning e-mail solicitation “does not regulate traditional, face-to-face solicitation,” and because “[w]hat the employees seek here is use of the Respondent’s communications equipment to engage in additional forms of communication beyond those that *Republic Aviation* found must be permitted.” 351 NLRB at 1115. The *Register Guard* Board noted that while Section 7 protects organization rights it does not protect the “particular means by which employees may seek to communicate.” *Id.*

The decision in *Register Guard* was undoubtedly correct. As noted in that case, *Republic Aviation* “requires the employer to yield its property interests to the extent necessary that employees will not be ‘entirely deprived’ of their ability to engage in Section 7 communications in the workplace on their own time. **It does not require the most convenient or most effective means of conducting those communications.**” *Id.*, (emphasis added), quoting *Republic Aviation*, 324 U.S. at 801. In other words, there obviously is a significant difference between the right to communicate *while on* company property, which the Board addressed in *Republic Aviation*, and the right to communicate *using* Company property, which the Board has addressed in numerous other cases.

Here, the AGC has made no showing that a ban on non-business e-mail will “entirely deprive” employees of the right to communicate; indeed, to the contrary, all of the record evidence shows that such a ban will have essentially no effect on employees’ right to communicate, as the vast majority of employees at Longview do not use e-mail to communicate regularly. Or, to use the AGC’s language, there has been no showing at all that email has become the “natural gathering place” or the “present day water cooler” for employees at Longview. (AGC at 8).<sup>4</sup>

The AGC’s argument that only Weyerhaeuser’s managerial interest (as opposed to its property interests) are implicated here is clearly wrong. While that would be true if the policy contained a total ban (both electronic and non-electronic) on solicitation (or distribution), simply being on the employer’s property, or having access to such property, does not – and never has – given employees license to use that property for Section 7 purposes or any other non-work purpose.

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<sup>4</sup> Moreover, as noted, Weyerhaeuser’s policy does not even restrict all non-business use of e-mail. See Section II.A, *supra*.

Finally, the AGC argues the Board to adopt a *Republic Aviation* “balancing test” when looking at e-mail access. *See* AGC 11-13. That test, according to the AGC, should presume that a total ban on employees’ right to communicate via e-mail regarding non-work matters is unlawful absent special circumstances, but that employers may limit e-mail communications based on “legitimate business interests” such as protecting against liability and protecting network security. *Id.* That, of course, is exactly what Weyerhaeuser’s Electronic Media Use Policy did – it permitted limited personal use of e-mail with various exceptions for things like protecting against liability and ensuring network security. In other words, Weyerhaeuser’s Electronic Media Use Policy already permits what the AGC is seeking in this case, another reason for the Board to dismiss his exceptions.

**D. Compelling Employers to Accept Speech on Company E-mail Violates the Company’s Property Rights and its First Amendment and Section 8(c) Free Speech Rights.**

Obviously, the Company’s Electronic Network, which includes the computer stations, servers, software and other infrastructure, is solely and wholly owned by the Company. Notwithstanding this, the AGC maintains that employees should have a presumptive right of access to use such Company’s property for virtually any speech they choose. This expropriation of private property by government fiat not only vitiates the Company’s property rights, but also violates the Company’s First Amendment and Section 8(c) Free Speech Rights.

The First Amendment protects “both the right to speak freely and the right to refrain from speaking at all.” *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). This principal necessarily flows from the “fundamental rule of protection under the First Amendment that a speaker has the autonomy to choose the content of his own message” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Corp. of Boston Inc.*, 515 U.S. 557, 573-74 (1995). This “fundamental rule” is not

limited to individuals. “For corporations, as for individuals, the choice to speak includes within it the choice of what not to say.” *Pac. Gas & Elec. Co v Public Utilities Commission of California*, 475 U.S. 1, 16 (1986). Thus, the First Amendment’s protection of freedom of speech “prohibits the government from telling people what they must say.” *Rumsfeld v. Forum for Academic and Intellectual Rights, Inc.*, 547 U.S. 47, 62 (2006). The Supreme Court has stated that where a statute “[m]andat[es] speech” that a speaker would not otherwise make, the statute “necessarily alters the content of the speech.” *Riley v National Federation of the Blind of NC*, 487 U.S. 781, 795 (1998). Indeed, a requirement that a speaker promote a particular point of view is “censorship in a most odious form.” *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 98 (1972). The “basic principles of free speech...do not vary” with new or different communications medium, *Joseph Burnstyn, Inc v Wilson*, 343 U.S. 495 (1952); *Brown v Entertainment Merchants Assn.*, 564 U.S. \_\_\_\_ (2011).

In this case, the AGC, by asking the Board to bar business-use-only email policies, transparently seeks to compel employee access to Company-owned equipment and to permit employees to express views with which the Company may not agree. “Compelled access like that [requested] in this case both penalizes the exercise of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set” *Pac. Gas & Elec.*, *supra* at 19. The fact that that this case is dealing with a “new” medium, email, is of no consequence. First Amendment protections do not ebb or flow based upon the medium of communication, *Burnstyn, supra*; *Brown, supra*. For First Amendment purposes, the AGC’s attempt to mandate employee access to Company email is no different than forced messages on license plates, *Wooley, supra*, dictated staffers in billing statements, *Pac. Gas & Elec.*, *supra*, or sanctioned participation in a parade to express diverse points of view, *Hurley, supra*. Compelled

access for subjective information is constitutionally impermissible, regardless of the form in which it is compelled.

In addition to being a violation of the first amendment, the AGC's proposed compelled employee access to Company email would also violate employer free speech rights under Section 8(c), 29 USC § 158 (c). Section 8(c) permits employers to express their views, arguments, and opinions as they deem fit on subjects covered by the Act. The Section also grants employers the right to select the medium through which they communicate their message. Nothing in the Act requires the Company to provide equal access to the union to company-owned property for pro-union speech. *See, e.g., NLRB v. Steelworkers*, 357 U.S. 357 (1958) (union access to company employees on company time to combat anti-union solicitation); *Heath Co.*, 196 NLRB 134 (1972) (company public address system); *Eaton Technologies*, 322 NLRB 848, 853 (1997) (company bulletin board). Compelling the Company to "publish" union and employee views with which it does not agree on Company property violates the Company's statutory right of free speech just as it violates the First Amendment.

**III. CONCLUSION**

For all of the foregoing reasons, the Board should affirm ALJ's finding that the Company's Electronic Media Use Policy does not violate the Act.

Dated: May 7, 2012

Respectfully submitted,

WEYERHAEUSER COMPANY

/s/ Ross H. Friedman

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 7th day of May 2012, a true and correct copy of the foregoing Weyerhaeuser's Response to the Acting General Counsel's Exceptions was filed with the NLRB Executive Secretary via the Board's electronic filing system, and served by electronic mail upon the following:

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