

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UPMC AND ITS SUBSIDIARIES
UPMC PRESBYTERIAN SHADYSIDE
AND MAGEE-WOMENS HOSPITAL
OF UPMC, SINGLE EMPLOYER, D/B/A
SHADYSIDE HOSPITAL AND/OR
PRESBYTERIAN HOSPITAL AND/OR
MAGEE-WOMENS HOSPITAL,

Employer,

and

Case 06-CA-081896

SEIU HEALTHCARE PENNSYLVANIA,
CTW, CLC,

Charging Party.

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations files this brief as *amicus curiae* in support of the request by the then-Acting General Counsel and the union in this case to overrule the National Labor Relations Board's decision in *Register-Guard*, 351 NLRB 1110 (2007), and to find UPMC's solicitation policies limiting employee use of the company's e-mail system for Section 7-protected activities unlawful under Section 8(a)(1) of the National Labor Relations Act.

STATEMENT

Respondent UPMC operates several acute care hospitals in Pittsburgh, Pennsylvania. ALJ 2. At these facilities, UPMC operates an electronic mail system and provides many of its employees with e-mail addresses. ALJ 4. UPMC permits personal use of company e-mail “to the extent that such use does not affect the employee’s job performance nor prevents other employees from performing their job duties.”¹ ALJ 6.

Despite generally permitting personal use of company e-mail, UPMC maintains a blanket no-solicitation policy (the “Solicitation Policy”) stating that “staff members may not use UPMC electronic messaging systems to engage in solicitation.”² ALJ 4. In addition, another UPMC policy (the “Electronic Mail and Messaging Policy”) states that “electronic messaging systems may not be used . . . in a way that may be disruptive, offensive to others, or harmful to morale; or . . .

¹ UPMC characterizes this policy as “permitt[ing] de minimis personal use,” but defines “[d]e minimis personal use’ . . . as use of the information technology resource only to the extent that such use does not affect the employee’s job performance nor prevents other employees from performing their job duties.” ALJ 6. By UPMC’s own definition, then, “de minimis” refers not to any specific amount of use, but rather to the use’s effect – the degree to which “such use . . . affect[s] the employee’s job performance []or prevents other employees from performing their job duties.” *Ibid.*

² The phrase “electronic messaging systems” is elsewhere defined in UPMC’s policies to include e-mail. *See* ALJ 5.

[t]o solicit employees to support any group or organization, unless sanctioned by UPMC executive management.”³ ALJ 5.

The Acting General Counsel and the union challenged both policies as violating Section 8(a)(1) of the Act on the ground that they interfere with Section 7-protected communications and that UPMC has not justified either policy by any showing that the restrictions on protected employee communications are necessary to maintain production and discipline.⁴ The ALJ concluded that UPMC’s Solicitation Policy is lawful based on *Register-Guard*, 351 NLRB 1110 (2007), which gave predominance to the “employer’s . . . property right to bar generally nonwork solicitation.” ALJ 11. In contrast, the ALJ found that UPMC’s policy prohibiting “disruptive” and “offensive” e-mails and e-mail solicitations not “sanctioned by UPMC management” violated Section 8(a)(1) because the policy was “overly broad and ambiguous” such that a “chilling effect” on employees’ exercise of Section 7 rights “is unavoidable.” ALJ 12-14.

The Acting General Counsel and the union excepted from the portion of the ALJ’s decision finding UPMC’s Solicitation Policy lawful as applied to employee use of the company e-mail system for Section 7-protected communications,

³ The Solicitation Policy gives examples of solicitation as including “solicitation for raffles, charity drives, sale of goods, proposing or procuring membership in any organization, [and] canvassing.” GC Exhibits 2, 3.

⁴ The Acting General Counsel and the union also challenged a third policy, the Acceptable Use of Information Technology Resources Policy, on grounds unrelated to *Register-Guard*. ALJ 7.

requesting that the Board overrule *Register-Guard*. UPMC excepted from the portion of the ALJ’s decision finding the company’s Electronic Mail and Messaging Policy prohibiting “disruptive” and “offensive” e-mails and e-mail solicitations not “sanctioned by UPMC management” unlawful.

ARGUMENT

1. Section 7 of the NLRA guarantees that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid of protection.” 29 U.S.C. § 157. Section 8(a)(1) of the Act makes it an unfair labor practice “for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7].” 29 U.S.C. § 158(a)(1). Unlike a violation of § 8(a)(3), which requires a showing of “discrimination . . . to encourage or discourage membership in any labor organization,” 29 U.S.C. § 158(a)(3), “[a] violation of § 8(a)(1) . . . presupposes an act which is unlawful even absent a discriminatory motive,” *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965).

It is fundamental that “employees cannot realize the benefits of the right to self-organization guaranteed them by the Act unless there are adequate avenues of communication open to them . . . for the interchange of ideas necessary to the

exercise of their right to self-organization.” *LeTourneau Company of Georgia*, 54 NLRB 1253, 1260 (1944). In this regard, “the Board’s view [is] that the right of employees to self-organize and bargain collectively established by § 7 of the NLRA, 29 U.S.C. § 157, necessarily encompasses the right effectively to communicate with one another regarding self-organization *at the jobsite*.” *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978) (emphasis added). “[T]he plant is a particularly appropriate place for the distribution of § 7 material, because it ‘is the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.’” *Eastex Inc. v. NLRB*, 437 U.S. 556, 574 (1978) (quoting *Gale Products*, 142 NLRB 1246, 1249 (1963)).

Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 n.10 (1945), affirmed the Board’s rule that it is an unfair labor practice for “an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property,” and endorsed the Board’s reasoning that “[s]uch a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.” (Quoting *Peyton Packing Co.*, 49 NLRB 828, 843-44 (1943)). The

Court has subsequently reaffirmed the Board's rule on several occasions. *See Beth Israel Hospital*, 437 U.S. at 492-93; *Eastex*, 437 U.S. at 571 n. 21; *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 109-10 (1956).

In this case, UPMC violated the fundamental principle of federal labor law set forth in *Republic Aviation* and its progeny by permitting employees general access to the company e-mail system for personal use while, in one rule, altogether barring the use of the e-mail system for solicitation, and, in another rule, barring use of the e-mail system for solicitation for "any group or organization, unless sanctioned by UPMC executive management." ALJ 5. The former rule, like the no-solicitation rule at issue in *Republic Aviation*, constitutes a straightforward violation of the Act by "prohibiting union solicitation by an employee outside of working hours, although on company property." 324 U.S. at 793 n.10. The second rule constitutes an unfair labor practice as well because it places a significant "restriction[] on employee solicitation during nonworking time," *Beth Israel Hospital*, 437 U.S. at 492-93, by requiring the company's sanction before employees can send e-mail solicitations. Board law is clear that "the imposition of such 'prior approval' requirements before employees c[an] exercise their Section 7 right to engage in lawful solicitation and distribution activities [is] facially unlawful." *Baptist Medical Center*, 338 NLRB 346, 357 (2002) (citing cases).

To be clear, what is at issue here, and what was at issue in *Republic Aviation* itself, is not anti-union animus in the vein of “discrimination . . . to encourage or discourage membership in any labor organization.” NLRA § 8(a)(3); 29 U.S.C. § 158(a)(3). Rather, UPMC’s no-solicitation rules are discriminatory in the sense that they constitute an “unreasonable impediment[s] to self-organization *and therefore [are] discriminatory,*” *Republic Aviation*, 324 U.S. at 793 n.10 (emphasis added), *i.e.*, UPMC’s no-solicitation rules function in a manner detrimental to its employees’ Section 7 rights. To establish a violation of § 8(a)(1), it is not necessary to prove discrimination in the sense of acts motivated by anti-union animus but only in the sense used in the *Republic Aviation* opinion – that any employer rule that “imped[es] . . . self-organization” is, *ipso facto*, “discriminatory” towards the union. *Ibid.* By contrast, the Supreme Court’s decision in *Babcock & Wilcox* used the word discrimination in the more limited meaning of treating similarly-situated things differently. *See* 351 U.S. at 110-11 & n.4.

The Board’s invocation of discrimination as a principle in some § 8(a)(1) cases applying *Republic Aviation*’s analytical framework to employee communications has resulted at times in difficulties in the courts of appeals. *See, e.g., Fleming Co.*, 336 NLRB 192 (2001), *enf. denied* 349 F.3d 968 (7th Cir. 2003); *Guardian Industries Corp.*, 313 NLRB 1275 (1994), *enf. denied* 49 F.3d

317 (7th Cir. 1995). The Board should use this case as an opportunity to clarify that the essence of the matter at issue in § 8(a)(1) cases is whether the employer's "nondiscriminatory regulation of solicitation in the workplace . . . diminish[es] to an unacceptable degree employees' ability to communicate with each other about organization," *Guardian Industries Corp. v. NLRB*, 49 F.3d at 322 (discussing *Republic Aviation*) (emphasis added), *not* whether the employer's rule is motivated by animus against the union.

2. This is not to say that employees are always entitled to use their employers' e-mail systems for Section 7-protected communications, nor does it mean that employers are prohibited from maintaining reasonable non-discriminatory rules regarding employee use of company e-mail.

a. Where an employer *altogether* denies employees the right to use a company e-mail system for personal communications, employees have no right to use that system for Section 7-protected communications. Just as an employer is not required to provide employees with access to its e-mail system at all, if an employer maintains and strictly enforces a rule against all non-work use of a company e-mail system, it need not permit employees to use that system for union-related solicitation, even during non-work time. In contrast, as we have explained, once an employer creates an "avenue[] of communication open to [employees] . . . for the interchange of ideas," *LeTourneau*, 54 NLRB at 1260, by permitting

employees to use its e-mail system for personal communications, it may not deny employees the right to use that system for Section 7-protected communications as well.

The rationale for this sensible rule is that, pursuant to the logic of the Supreme Court's decision in *Eastex*, an employer may rest on its property interest in its e-mail system only to decide: (1) whether to provide employees with access to its e-mail system at all; and (2) if so, whether to permit employees to use that e-mail system for non-work purposes. Once "employees are already rightfully on the employer's property" – by means of the employer providing employees with access to its e-mail system and permitting non-work use of that system – "it is the employer's *management interests* rather than its property interests that primarily are implicated." *Eastex*, 437 U.S. at 573 (quotation marks and brackets omitted) (emphasis added).

In other words, the act of employees sending union-related e-mails with which the employer disagrees does not cause "an injury to the company's interest in its computers – which worked as intended and were unharmed by the communications – any more than the personal distress caused by reading an unpleasant letter would be an injury to the recipient's mailbox, or the loss of privacy caused by an intrusive telephone call would be an injury to the recipient's telephone equipment." *Intel Corp. v. Hamidi*, 71 P.3d 296, 300 (Cal. 2003).

Thus, as between personal e-mails whose content is not protected by the NLRA and Section 7-protected e-mails, “the degree of intrusion [into the employer’s property rights] does not vary with the content of the material.” *Eastex*, 437 U.S. at 573.

b. Although an employer that permits employees to use its e-mail system for personal use cannot prohibit employees from using that system for Section 7-protected communications, the employer can enforce reasonable non-discriminatory rules regarding employee use of a company e-mail system, as long as those rules do not interfere with the ability of employees to use the company e-mail system to engage in solicitation during non-work time.

In particular, an employer can, consistent with *Republic Aviation*, prohibit employees from using a company e-mail system to engage in solicitation during working hours. As with face-to-face solicitation, because “[w]orking time is for work[,]” “[s]uch a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose,” *Republic Aviation*, 324 U.S. at 803 n.10, or is applied differently against Section 7-protected e-mail solicitations on work time than against unprotected e-mail solicitations.⁵

⁵ We recognize that, as a practical matter, an employee who sends an e-mail during non-work time may not know whether the recipient is working. Relatedly, a recipient who is on work time may not be able to discern whether an e-mail contains a non-work communication without opening it. For these reasons, an employer that chooses to limit the use of company e-mail for solicitation to non-

An employer also could lawfully prohibit employees from sending abusive and threatening e-mail messages on the company e-mail system, as long as such a rule is not applied in a manner that interferes with employees' right to engage in Section 7-protected communications.⁶ "[A] rule prohibiting 'abusive language' is not unlawful on its face," rather "[t]he question of whether particular employee activity involving verbal abuse or profanity is protected by Section 7 turns on the specific facts of each case." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). *See also Adtranz ABB Daimler-Benz Transp., N.A. v. NLRB*, 253 F.3d 19, 28 (D.C. Cir. 2001) (holding lawful a "broad prophylactic rule against abusive and threatening language" in the workplace). This general principle applies to employer rules prohibiting abusive communications in the e-mail context.

3. The *Register-Guard* Board, confronting the same question presented here, rejected the applicability of *Republic Aviation* to employee use of a company

work time must reasonably account in a non-discriminatory manner for these idiosyncrasies of e-mail communication.

There is no need to reach these issues in this case, however, because UPMC's blanket no-solicitation policies do not distinguish between employee use of company e-mail during work time and non-work time at all.

⁶ In this case, UPMC's Electronic Mail and Messaging Policy prohibits e-mail messages that "may be disruptive, offensive to others, or harmful to morale," but that same policy also prohibits *all* use of the company e-mail system "[t]o solicit employees to support any group or organization, unless sanctioned by UPMC executive management." ALJ 5. Because this latter aspect of the rule renders it unlawful, there is no need for the Board to decide whether UPMC's policy prohibiting disruptive, offensive, and harmful messages independently violates the Act.

e-mail system for Section 7-protected solicitation on the ground that “[a]n employer has a ‘basic property right’ to ‘regulate and restrict employee use of company property.’” *Register-Guard*, 351 NLRB 1110, 1114 (2007) (quoting *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663-64 (6th Cir. 1983)). As we have already shown, however, while an employer may exclude employees from using a company e-mail system for non-work communications altogether, once it permits employees to use that system for non-work purposes, “it is the employer’s *management* interests rather than its property interests that primarily are implicated.” *Eastex*, 437 U.S. at 573 (emphasis added). At that point, *Republic Aviation* – with its focus on the right of employees “effectively to communicate with one another regarding self-organization at the job site,” *Beth Israel Hospital*, 437 U.S. at 491 – fully applies.

The cases relied upon by the *Register-Guard* Board for its conclusion that employees have “no statutory right” to use “employer-owned property – such as bulletin boards, telephones, and televisions – for Section 7 communications,” 351 NLRB at 1114 – with one minor exception discussed in the margin – hew to the rule set forth in *Eastex*.⁷ As those cases make clear:

⁷ In addition to the cases discussed in the text, the *Register-Guard* Board relied on *Mid-Mountain Foods*, 332 NLRB 229 (2000) for the proposition that “there is ‘no statutory right . . . to use an employer’s equipment or media,’ as long as the restrictions are nondiscriminatory.” *Register-Guard*, 351 NLRB at 114 (quoting *Mid-Mountain Foods*, 332 NLRB at 230). However, in that case, which

“When an employer singles out union activity as its only restriction on the private use of company [property], it is not acting to preserve the use of the [property] for company business. It is interfering with union activity, and such interference constitutes a violation of Section 8(a)(1) of the Act.”

Churchill’s Supermarkets, Inc., 285 NLRB 138, 156 (1987).

Contrary to the conclusion drawn by the *Register-Guard* Board, the cases cited in that decision actually demonstrate that the Board has applied *Republic*

concerned an employees’ request to show a pro-union video on a company television, “[t]here [wa]s no showing that the Respondent ha[d] permitted other kinds of videos to be shown on its equipment.” *Mid-Mountain Foods*, 332 NLRB at 231. Thus, although the Board’s conclusion that “the Union’s employee supporters do not have a statutory right to show the video . . . since it has not been established that the Respondent permitted employees to show other videos,” *id.* at 230, was correct, it does not support the *Register-Guard* Board’s conclusion that an employer can prohibit employees from using employer equipment for Section 7-protected communications while permitting employees to use such equipment for other non-work uses. In fact, it suggests the opposite.

The final decision cited by the *Register-Guard* Board, albeit with a *cf.* signal, was *Heath Co.*, 196 NLRB 134, 135 (1972), an objections case in which the Board found that an employer did not engage in conduct sufficiently objectionable to overturn an election when it permitted an employee to make an anti-union speech over the plant public address system but denied a request by pro-union employees to do the same. The Board reasoned that because the speech was “of less than a minute’s duration” and the employer “approved the pro-union employees’ request to use the plant cafeteria during lunchtime to present their views,” the anti-union speech “had a *de minimis* impact upon the election and does not constitute grounds for setting it aside.” *Ibid.* While *Heath Co.* is arguably distinguishable from the cases cited in the text – as the *Register-Guard* Board recognized with the *cf.* signal – on the bases that in *Heath Co.* the employer did not routinely permit non-work use of the public address system, there was a rough equivalence between what the employer permitted anti- and pro-union workers to do, and it was an objections case, the Board should overrule *Heath Co.* because it is in direct tension with the precedent cited in the text and the rule urged here.

Aviation's analytic framework to employee use of a wide range of employer equipment for Section 7-protected communications, including bulletin boards, *Eaton Tech., Inc.*, 322 NLRB 848, 853 (1997) (“when an employer permits . . . employees . . . to post personal . . . notices on its bulletin boards, the employees’ . . . right to use the bulletin board receives the protection of the Act”), telephones, *Union Carbide Corp.*, 259 NLRB 974, 980 (1981) (“once [the employer] grants the employees the privilege of occasional personal use of the telephone during work time, . . . it could not lawfully exclude the Union as a subject of discussion”), *see also Churchill’s Supermarkets*, 285 NLRB at 155-56 (1987) (same), and photocopy machines, *Champion Int’l Corp.*, 303 NLRB 102, 109 (1991) (“An employer may not invoke rules designed to protect its property from unwarranted use in furtherance of pro-union activities while, at the same time, freely permit such use for non business related reasons.”).⁸ Based on this precedent, the Board should apply *Republic Aviation*'s analytic framework to employee use of a company e-mail system for Section 7-protected communications as well.

⁸ Some of the cases cited refer to employer discrimination in stating the basic *Eastex* rule. *See, e.g., Champion Int’l Corp.*, 303 NLRB at 109 (“an employer may not use that basic right [to regulate and restrict employee use of company property] to discriminatorily restrict pro-union activities”). However, it is clear from the context of these statements that the Board does not refer to anti-union animus, but rather, as in *Republic Aviation* itself, to discrimination in the sense of an “unreasonable impediment to self-organization.” 324 U.S. at 803 n.10. As we have explained in the text, we strongly suggest that the Board avoid this use of the term “discrimination” in deciding this and future cases that rest on the rationale set forth in *Republic Aviation* and its progeny.

4. There are strong policy-based reasons for the Board to adopt the rule urged here pursuant to the Board's responsibility "to formulate and adjust national labor policy to conform to the realities of industrial life." *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 693 (1980).

First, and foremost, e-mail is ubiquitous in the modern workplace. "E-mails have replaced other forms of communication besides just paper-based communication. Many informal messages that were previously relayed by telephone or at the water cooler are now sent via e-mail." *Thompson v. United States HUD*, 219 F.R.D. 93, 97 (D. Md. 2003) (quotation marks and citation omitted). In many workplaces, then, e-mail has become an important "avenue[] of communication open to [employees] . . . for their right to self-organization." *LeTourneau Co.*, 54 NLRB at 1260.

In addition, "[r]apid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior" regarding the use of e-mail. *City of Ontario v. Quon*, 560 U.S. 746, 759 (2010). In particular, "[m]any employers expect or at least tolerate personal use of [electronic communications] equipment by employees because it often increases worker efficiency." *Ibid.*

As one state supreme court recently explained in discussing the workplace e-mail policies that apply to its own state workforce:

“. . . As a part of normal workplace operation, many government offices, like many private employers, have chosen to allow their employees to send and receive occasional personal messages on the employer’s e-mail system.

There are good reasons why employers allow this practice. E-mail can enhance a worker’s productivity. It is often the fastest and least disruptive way to do a brief personal communication during the work day, and employees who are forbidden or discouraged from occasional personal use of e-mail may simply need to take more time out of the day to accomplish the same tasks by other means. Reasonable government workplace policies in line with private sector practice help government attract and retain skilled employees.” *Schill v. Wis. Rapids Sch. Dist.*, 786 N.W.2d 177, 182-83 (Wis. 2010).

The speed and efficiency of e-mail communication, as well as the ability of many employees to access a work e-mail account from a mobile electronic device or a home computer, makes e-mail solicitation, if anything, less disruptive than face-to-face solicitation at the workplace. In addition, unlike the use of a company bulletin board or telephone for Section 7-protected communications – where employee non-work use may crowd out the employer’s use of its property for work-related communications – normal employee use of a company e-mail system for non-work communications is highly unlikely to interfere with the simultaneous

use of that system for work tasks. *Cf., Intel Corp.*, 71 P.3d at 303-04 (no evidence of e-mail messages slowing or impairing employer’s e-mail system even where former employee sent thousands of messages simultaneously). To the extent that certain *forms* of employee use of a company e-mail system potentially could interfere with an employer’s use of that system for work purposes – such as the sending of large attachments that might slow the employer’s e-mail system or spamming that might create such a distraction as to interfere with employees’ use of the e-mail system for work purposes – an employer could lawfully place limits on such forms of use of its system, as long as it does so in a non-discriminatory manner.

Thus, because “[f]lexible, common-sense workplace policies that allow occasional personal use of e-mail are in line with the mainstream of professional practice,” *Schill*, 786 N.W.2d at 196, and because such use does not create additional cost for an employer or interfere with the employer’s property rights, the Board’s current rule permitting an employer to lawfully prohibit *all* employee use of e-mail for Section 7 purposes is far out of step with the “realities of industrial life,” *Yeshiva Univ.*, 444 U.S. at 693, and represents an unwarranted restriction on the ability of employees to “effectively . . . communicate with one another regarding self-organization at the jobsite,” *Beth Israel Hosp.*, 437 U.S. at 491.

CONCLUSION

The Board should overrule *Register-Guard* and affirm the ALJ's ruling that UPMC's Electronic Mail and Messaging Policy violates § 8(a)(1) and reverse the ALJ's ruling that UPMC's Solicitation Policy is lawful.

Respectfully submitted,

/s/ Matthew J. Ginsburg
Lynn K. Rhinehart
Harold C. Becker
James B. Coppess
Matthew J. Ginsburg
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5397