E-MAIL DECISIONS BY NLRB TOPIC OF ABA MEETING

Two recent National Labor Relations Board (NLRB) decisions involving the use of employer e-mail systems draw opposite reviews from a management and a union attorney at an American Bar Association conference. The board decided in Trustees of Columbia University, 350 NLRB No. 54 (2007), that an employer did not have to provide a union with the work e-mail addresses of employees who were at sea during most of the period prior to a representation election. It decided in Guard Publishing Co. d/b/a The Register-Guard, 351 NLRB No. 70 (2007), that employees do not have a statutory right to use their employer’s e-mail system for Section 7 activity.

Columbia University undercuts the purpose of the Excelsior rule—requiring employers to provide the union with the names and home addresses of the unit employees prior to an election—to ensure that employees are well informed regarding their choice, says Anee P. Raulerson, associate general counsel with the American Federation of Television and Radio Artists in Bethesda, Maryland.

Anna Wermuth, a management attorney with Meckler Bulger & Tilson in Chicago, asserts that the circumstances in Columbia University did not warrant expanding Excelsior because the union had access to the employees before they set sail, and the union won a simultaneous election to represent employees in a second unit despite the lack of e-mail access. As for Register-Guard, Wermuth says the board properly recognized that the e-mail system, made up of hardware and software, is the employer’s property maintained at great cost and that the newspaper publisher in the case did not discriminate by enforcing its policy prohibiting non-job-related solicitations against an employee who sent union-related e-mails to her co-workers. In contrast, Raulerson says the board should have held that the publisher lacked a legitimate business justification for interfering with employees’ Section 7 rights and that it discriminated against the employee because of her union activity while ignoring other types of non-job-related e-mail solicitations.

It was necessary for the board to rethink what constitutes discriminatory enforcement of an employer’s e-mail policy, Wermuth says. Because of the number of e-mail messages sent each day, employers would have to implement an aggressive monitoring system to police compliance with a policy restricting nonbusiness use. It would be unfair to find that by allowing husbands and wives to e-mail each other about matters such as who will pick up the kids and who will make dinner, the employer “opens the door” to allowing Section 7 activity through the employer’s e-mail system.

Raulerson agrees with the dissenting board members’ view that prior rulings in cases involving nonemployee organizers, in which the board looked at whether they had alternative means of communicating with the employees, were “irrelevant” because Register-Guard involved employee-to-employee communication. She argues that if the employer allows its e-mail system to be used for any nonbusiness purpose, the employer must allow the system to be used for union activity. In the four years that the Register-Guard had its e-mail policy in place, the publisher disciplined employees only for violating it to engage in union activity and ignored many other types of non-job-related solicitations. She asserts that it makes no sense to compare only the employer’s response to solicitations on behalf of the union and those on behalf of other outside organizations and not to look at the employer’s response to other kinds of non-job-related solicitations.