FINAL BRIEF **ORAL ARGUMENT: NOT YET SCHEDULED**

Nos. 07-1528, 08-1006 & 08-1013

UNITED STATES COURT of APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GUARD PUBLISHING COMPANY D/B/A THE REGISTER-GUARD
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

and

EUGENE NEWSPAPER GUILD, CWA Local 37194, AFL-CIO
Intervenor

EUGENE NEWSPAPER GUILD, CWA Local 37194, AFL-CIO
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

and

GUARD PUBLISHING COMPANY D/B/A THE REGISTER-GUARD
Intervenor

ON PETITIONS FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1) of this Court's Rules, counsel for the National Labor Relations Board ("the Board") certify the following:

A. Parties and Amici

The Guard Publishing Company d/b/a The Register Guard ("the Company") was the respondent before the National Labor Relations Board ("the Board"), and is the petitioner/cross-respondent in Case. Nos. 07-1528 and 08-1013 herein. The Board is the respondent/cross-petitioner in Case Nos. 07-1528 and 08-1013 herein, and the respondent in Case No. 08-1006 herein. The Board's General Counsel was a party before the Board. The Eugene Newspaper Guild, CWA Local 37194, AFL-CIO ("the Union") was the charging party before the Board, and is the petitioner in Case No. 08-1006 herein. The Company is also an intervenor in support of the Board in Case No. 08-1006, and the Union is an intervenor in support of the Board in Case Nos. 07-1528 and 08-1013.

The *amici* before the Board were: the American Federation of Labor and Congress of Industrial Organizations, the Council on Labor Law Equality, Employers Group, the HR Policy Association, the Minnesota Management Attorneys Association, Proskauer Rose LLP, the National Employment Lawyers Association, the National Workrights Institute, and the United States Chamber of

Commerce. The amici before this Court in support of the Board are: the HR Policy Association, the Society for Human Resource Management, the United States Chamber of Commerce, and the Council on Labor Law Equality.

B. Rulings Under Review

The ruling under review is a decision and order of the Board (Chairman Battista and Members Schaumber, Kirsanow, Liebman and Walsh), in *The Guard Publishing Company d/b/a The Register Guard and Eugene Newspaper Guild, CWA Local 37194*, Cases 36-CA-8743, 36-CA-8849, 36-CA-8789, and 36-CA-8842, issued on December 16, 2007, and reported at 351 NLRB No. 70.

C. Related Cases

The case under review was not previously before this Court or any other court. Board Counsel are unaware of any related cases either pending in this Court or any other court.

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Dated at Washington, DC
this 31st day of July 2008

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FOR ENFORCEMENT OF
AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court upon three consolidated actions involving the same final Order of the National Labor Relations Board ("the Board"): (1) the petition of Guard Publishing Company d/b/a The Register Guard ("the Company") to review the final Order of the Board (No. 07-1528); (2) the Board's cross-application for enforcement of that Order (No. 08-1013); and (3) the petition of the Eugene Newspaper Guild, CWA Local 37194, AFL-CIO ("the Union"), the Charging Party before the Board, to review the Board's Order (No. 08-1006). The Union intervened on behalf of the Board in the Board's cross-application for enforcement. The Company intervened on behalf of the Board in the Union's petition for review.

The Board had jurisdiction below pursuant to Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"), which authorizes the Board to prevent unfair labor practices. This Court has appellate jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). The Board's Decision and Order issued on December 16, 2007, and is reported at 351 NLRB No. 70. (JA 265-94.)[1] The Company filed its petition for review on

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[1] Record references are to the Joint Appendix ("JA") and the Board's Supplemental Appendix ("SA"), which the Board is moving to file with this brief. When references contain a semi-colon, references preceding it are to findings of

December 21, 2007, and the Board filed its cross-application for enforcement on January 14, 2008. The Union filed its petition for review on January 9, 2008. This Court consolidated all three cases on February 4, 2008. All filings were timely; the Act places no time limits on petitioning to review or applying to enforce Board orders. The Board's Order is a final order with respect to all parties.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board reasonably found that the Company violated Section 8(a)(1) and (3) of the Act by discriminatorily enforcing its Communications Systems Policy and disciplining unit employee and Union President Suzi Prozanski for sending a union-related e-mail to fellow employees at their company e-mail addresses on May 4, 2000, but did not violate the Act by disciplining Prozanski for sending two other e-mails to unit employees soliciting support for the Union in August 2000.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by maintaining an overly broad rule prohibiting employees from wearing or displaying union insignia while working with the public.

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the Board. References after the semi-colon are to the supporting evidence. References to the transcript contained in the JA will be noted specifically as (JA __ [Tr __]) because the JA uses a condensed transcript.

APPLICABLE STATUTES

The Company and Union included most of the relevant applicable statutes in their briefs. The remaining provisions are in this brief's appendix.

STATEMENT OF THE CASE

This unfair labor practice case arose out of the Company's maintenance of a Communications System Policy ("CSP") and its enforcement of that policy against unit employee and Union President Suzi Prozanski. The Company gave Prozanski written letters of warning for union e-mails that she sent to fellow employees in May and August 2000. In addition, the Company ordered employee Ron Kangail to remove a green band from his arm and a placard from his car.

Based upon charges filed by the Union, the Board's General Counsel issued a consolidated complaint against the Company alleging that it had committed several unfair labor practices by engaging in the above actions. (JA 105-11.) Following a hearing, an administrative law judge found merit to some of the General Counsel's allegations and issued a decision and recommended order (JA 265-94), to which the Company and Union excepted. The Board later solicited additional briefs from the parties and *amici* whom it had given permission to participate in this matter. The Board then held an oral argument before the Chairman and the four Board Members. On December 16, 2007, the Board issued a decision affirming the judge's findings in part, and reversing them in part, and

accordingly modified his recommended order. (JA 265-94.) The Board's findings of fact are set forth below; its Conclusions and Order are summarized thereafter.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Company, Its Communications Systems Policy, and Employee E-Mail Use

The Company publishes The Register-Guard, a daily newspaper. (JA 288; JA 1 [Tr 42], 74.) The Union represents a unit of about 150 of the Company's employees, including reporters and circulation department employees. (JA 286, 288; JA 8 [Tr 73.])

In 1996, the Company installed a new computer system, through which all newsroom employees and many other unit employees had e-mail access. (JA 266, 288-89; JA 55 [Tr 351-52].) In October 1996, the Company implemented its CSP, which governed employees' use of the Company's communications systems, including e-mail. (JA 266, 289; JA 123-24.) The policy stated, in relevant part:

> Company communication systems and the equipment used to operate the communication system are owned and provided by the Company to assist in conducting the business of The Register-Guard. Communications systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations.

(*Id*.)

The Company's employees regularly used e-mail for work-related matters. (JA 288-89; JA 55 [Tr 351].) The Company also used the e-mail system to conduct a periodic charitable campaign for United Way. (JA 273, 289; JA 154-57.) Throughout the relevant time period, the Company was aware that employees also used e-mail to send and receive personal messages such as baby announcements, jokes, birthday greetings, party invitations, and the occasional offer of sports tickets or request for services such as dog walking. (JA 266, 289; JA 23-24 [Tr 161-65], 28 [Tr 217], 41 [Tr 273-74], 46 [Tr 295], 125, 126, 133-36, 142-44, 146-47, 154-57.)

The Union and company managers also used the e-mail system to schedule meetings and communicate about labor relations matters. (JA 272 n.14; JA 220-21, SA 1-5, JA 42 [Tr 276-78], SA 6-7 [Tr 279-80].) This practice continued even after company manager C.J. Heaton gave then-Union President Bill Bishop a memorandum in 1997 stating that the Company's e-mail system should not be used for union business. (JA 272 n.14; JA 42 [Tr 276-78], SA 1-5, SA 6 [Tr 279], JA 44 [Tr 289].)

B. On May 4, 2000, Employee and Union President Suzi Prozanski Sends An E-mail to Employees Regarding a Union Rally That Had Taken Place On May 1

On May 4, 2000, unit employee and Union President Suzi Prozanski sent an e-mail from her work computer to unit employees at their company e-mail

addresses. (JA 266; JA 10 [Tr 83], 129.) The e-mail discussed events surrounding a union rally that had taken place a few days earlier, on May 1, which are described below.

1. Background: rumors that anarchists would attend a May 1 Union rally

On May 1, prior to a scheduled rally, Managing Editor Dave Baker sent an e-mail to employees stating that they should try to leave work early because the police department had notified the Company that anarchists might attend the rally. (JA 266; JA 224.) Shortly thereafter, employee (and former Union President) Bishop replied by e-mail to Baker and many employees. (JA 266; JA 223-24.) Bishop attached to his e-mail a separate e-mail that the police department had sent to the Union. (JA 266; JA 224.) The police department's e-mail said that the Company had notified the police about the possibility of anarchists. (*Id*.) Thus, Bishop's e-mail implied that Baker was wrong to have told employees that the police department, rather than the Company, had been the impetus behind the alert. (JA 266.)

After the May 1 rally, Prozanski learned that, contrary to Bishop's e-mail, the police department had first notified the Company about the possibility of anarchists. (JA 266; JA 10 [Tr 81-83].) On May 2, Prozanski told Baker that she wanted to communicate with employees to "set the record straight." (JA 266; JA 10 [Tr 82-83].) Baker told her to wait until he talked to Human Resources Director

Cynthia Walden. (JA 266; JA 10 [Tr 82].) On May 4, Prozanski, who had not heard anything back from Baker, told Baker that she was going to send an e-mail responding to Bishop's May 1 e-mail to employees. (JA 266; JA 11 [Tr 85].) Baker said, "I understand." (*Id.*)

2. The content of Prozanski's May 4 e-mail

On May 4, Prozanski sent an e-mail entitled, "setting it straight," from her work computer to unit employees at their company e-mail addresses. (JA 266; JA 10 [Tr 83], JA 129.) The e-mail began: "In the spirit of fairness, I'd like to pass on some information to you . . . . We have discovered that some of the information given to you was incomplete . . . . The [Union] would like to set the record straight." (*Id*.) The e-mail then explained that the police department had first called the Company regarding the anarchists, and indicated that Bishop's earlier e-mail may have misled employees by implying that the Company had been untruthful. (*Id*.) Prozanski signed the May 4 e-mail, "Yours in solidarity, Suzi Prozanski." (*Id*.)

C. The Company Disciplines Prozanski for Her May 4 E-mail

On May 5, Baker gave Prozanski a written warning for using e-mail for "conducting Guild business." (JA 266; JA 9 [Tr 78], JA 130.) The warning stated that Prozanski's May 4 e-mail had been "a violation of the [C]ompany's [CSP],"

and that the warning would "become part of [her] personnel file." (JA 266; JA 130.)

D. Prozanski Sends Two More Union-Related E-Mails to Employees on August 14 and 18

On August 14, Prozanski sent an e-mail to employees asking them to wear green to support the Union's position in negotiations. (JA 267; JA 127.) On August 18, she sent another e-mail to employees asking them to participate in the Union's entry in an upcoming town parade. (JA 267; JA 128.) As with the May 4 e-mail, Prozanski sent these e-mails to unit employees at their company e-mail addresses. (*Id*.)

E. The Company Disciplines Prozanski for the August E-mails

On August 22, Human Resources Director Walden issued Prozanski a written warning for the two August e-mails, stating that Prozanski had violated the CSP by using the Company's communications system for union activities. (JA 266; JA 131-32.) The warning quoted the CSP's prohibition on "non-job-related solicitations." (*Id*.) It also referred back to Prozanski's May 4 e-mail, specifically noting that, in the earlier instance, she had also been counseled and received a letter in her personnel file for "improper use of the Company's e-mail system, specifically for [union] business." (*Id*.)

F. The Company Orders Circulation Department Employee and Union Representative Ronald Kangail Not to Display Union Insignia When He Is Out in the Field

Employee and Union Representative Ronald Kangail worked as a district manager in the Company's circulation department. (JA 289; JA 33 [Tr 237], JA 34 [Tr 241-42].) In this position, he signed contracts with independent contractors who purchased newspapers from the Company. (*Id*.) Kangail interacted with these independent subscribers both in his office and out in the field. (JA 289; JA 34-35 [Tr 242-43].) Kangail displayed union signs and insignia in his office, including a green armband and green placard. (JA 289; JA 35 [Tr 243].) The placard was 8-1/2 by 11 inches in size and stated, "Workers at the [Company] Deserve a Fair Contract! Support the [Union]. Want to help? Call 343-8625." (JA 289; JA 137.)

In November, Kangail began to wear the green armband while working in the field to show support for the Union and to indicate that the Union did not have a contract with the Company. (JA 289; JA 35 [Tr 244-46].) At the same time, he displayed the green placard in his car's window. (JA 289; JA 35 [Tr 245-46].) Other district managers wore insignia while in the field, including hats with the logos of football teams and the Marine Corps and shirts displaying college names. (JA 290; JA 36 [Tr 250.])

On December 12, Kangail's supervisor, Zone Manager Steve Hunt, told Kangail to remove the armband and the placard from his car when he was in the field. (JA 290; JA 35 [Tr 246], JA 58 [Tr 372].) Kangail complied. (JA 289; JA 58 [Tr 372].)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Battista and Members Schaumber, Kirsanow, Liebman and Walsh) agreed in part and disagreed in part with the administrative law judge. The Board (Members Liebman and Walsh, dissenting) agreed (JA 265, 267-71) with the judge that the CSP was not facially invalid and thus dismissed the allegation that the CSP on its face violated Section 8(a)(1) of the Act.[2] The Board further found, in agreement with the judge, that the Company violated Section 8(a)(1) and (3) of the Act (29 U.S.C. § 158(a)(1) and (3)) by discriminatorily enforcing the CSP against Prozanski for her May 4 e-mail. (JA 269, 271-75.) The Board (Members Liebman and Walsh, dissenting), however, reversed the judge's finding that the Company violated Section 8(a)(3) and (1) of the Act by enforcing the CSP against Prozanski for her August e-mails, and dismissed those allegations.[3] (JA 269, 271-75.) Finally, the Board upheld (JA

[2] This finding is not being challenged in this appeal.
[3] The Board (Members Liebman and Walsh, dissenting) also dismissed a Section 8(a)(5) failure-to-bargain allegation, not being challenged in this appeal.

265 n.2) the judge's finding that the Company violated Section 8(a)(1) of the Act by maintaining an overly broad rule prohibiting employees from displaying union insignia in public.

The Board's Order requires the Company to cease and desist from engaging in the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their statutory rights. (JA 276.) Affirmatively, the Order requires the Company to rescind its May 4 disciplinary warning to Prozanski and its rule prohibiting circulation employees from displaying union insignia while dealing with customers, and to post copies of a remedial notice. (JA 276.)

SUMMARY OF ARGUMENT

In a well-explained, carefully reasoned decision, following extensive briefing and the rare step of holding an oral argument, the Board determined that the Company discriminatorily enforced its CSP in one instance, but not in another. In the first instance, the Board reasonably found that the Company unlawfully treated similar e-mails dissimilarly: it permitted employees to send non-job-related e-mails that were not solicitations, but disciplined Prozanski for sending a merely informational e-mail related to the Union. On the other hand, in the second instance, the Board reasonably determined that the Company lawfully treated similar e-mails similarly: it did not permit any solicitation e-mails on behalf of private groups or organizations, including Prozanski's e-mail solicitations on behalf of the Union.

Neither the Company nor the Union has demonstrated that the Board's application of its reasonable discrimination rule to these circumstances was improper. The Company's challenge to the Board's finding that it discriminatorily enforced the CSP against Prozanski for her May 4 union-related e-mail ignores the Board's meaningful distinction between solicitations and non-solicitations, and consequent reasonable finding that the Company unlawfully treated Prozanski's non-solicitation, union-related e-mail differently than similar e-mails that were not

union-related. The Company also unsuccessfully attempts to augment this claim with a meritless statute of limitations argument.

The Union's challenge, which purports to be limited to the application of the Board's new discrimination rule but, in reality, attempts to attack the rule itself, was not properly preserved for appeal. In any event, however it is styled, the Union's argument fails because it relies on inapposite cases that arose in the context of oral solicitation rather than employee access to employer equipment, like the Company's e-mail system. As shown below, this Court should therefore affirm the Board's decision on these issues.

Finally, this Court should affirm the Board's additional finding that the Company unlawfully maintained a prohibition on employees wearing union insignia in public. Substantial evidence supports the Board's reasonable finding that the Company failed to establish the "special circumstances" necessary to justify ordering circulation department employee Kangail to stop wearing an armband in support of the Union, and to stop displaying a union sign in his car, when working out in the field. None of the Company's assertions regarding its public image—which are not supported by the law or the facts—constitute the requisite "special circumstances." Accordingly, the Board's finding is entitled to enforcement.

ARGUMENT

I. THE BOARD REASONABLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(1) AND (3) OF THE ACT BY DISCRIMINATORILY ENFORCING ITS CSP AND DISCIPLINING UNIT EMPLOYEE AND UNION PRESIDENT PROZANSKI FOR HER UNION-RELATED MAY 4, 2000 E-MAIL, BUT DID NOT VIOLATE THE ACT BY DISCIPLINING PROZANSKI FOR HER AUGUST E-MAILS SOLICITING SUPPORT FOR THE UNION

A. Introduction

As a threshold matter, the Board held (JA 265-71) that employees do not have a "statutory right to use an employer's e-mail system" for union or other organizational activity. In so holding, the Board determined that employee use of an employer's e-mail system should be analyzed under the well-settled law applicable to employee use of employer equipment, such as bulletin boards and telephones, rather than the law governing the regulation of oral, face-to-face communication. The propriety of this determination is not before the Court, as neither the Company nor the Union has challenged it.

The Board went on to reaffirm longstanding law establishing that, although a rule restricting the use of employer equipment may not violate the Act on its face, an employer nevertheless violates the Act if it discriminatorily enforces such a rule against union or other organizational activity. The Board then set forth a new standard of discrimination in employer equipment cases, and held that in such cases, discrimination consists of treating similar categories of communication

differently. It then further defined the parameters for distinguishing between categories of communication for purposes of its discrimination analysis.

As we show below, the Board's well-thought-out rule is reasonable and consistent with the Act and, as such, is entitled to deference from this Court. Indeed, the Company and the Union focus not on the Board's definition of discrimination as such, but on its application to the instant facts. We further show that both challenges fail: the Company's challenge is based on an unpersuasive parsing of the e-mail at issue, and the Union's challenge, which is in fact a late attempt to overturn the Board's new rule, relies on case law in the context of oral solicitation not applicable to this employer-equipment case.

B. Applicable Principles and Standard of Review

Section 7 of the Act (29 U.S.C. § 157) guarantees employees "the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection . . . ." Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) implements those guarantees by making it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights.

This Court has upheld the Board's well-established doctrine that an employer violates Section 8(a)(1)'s proscription against interfering with the

exercise of employee rights if it discriminatorily enforces an otherwise valid work rule against union activity. *See Pioneer Hotel, Inc. v. NLRB*, 182 F.3d 939, 947-48 (D.C. Cir. 1999). Moreover, Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it an unfair labor practice for an employer "by discrimination in regard to tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization."

Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), where the plain terms of the statute do not specifically address the precise issue, the courts must defer to the Board's reasonable interpretation of the Act. Here, the Act is silent with respect to the specific definition of discrimination, so the Board's interpretation is subject to review under the deferential *Chevron* standard.

Accordingly, the Union is wrong (U Br 14) that the Board "is owed no deference" regarding its discrimination finding because it considered how courts have defined the term "discrimination" in other areas of the law. To the contrary, the Board simply demonstrated its thorough consideration of the meaning of "discrimination." To that end, it reviewed similar legal decisions assessing discrimination under the Act in the context of employee access to employer equipment. Those cases, in turn, considered discrimination in various areas,

including under the First Amendment and the Age Discrimination in Employment Act, to better inform the definition of discrimination in the labor law context.[4]

Where, as here, the Board adopts a rule and applies it to facts before it, "[t]he judicial role is narrow: the rule which the Board adopts is judicially reviewable for consistency with the Act, and for rationality, but if it satisfies those criteria, the Board's application of the rule, if supported by substantial evidence on the record as a whole, must be enforced." *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 501 (1978); *see also Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996) (citation omitted) (where the plain terms of the statute do not specifically address the precise issue, the courts must not only defer to the Board's reasonable interpretation of the Act, but also "must respect the judgment of the agency empowered to apply the law 'to varying fact patterns,' even if the issue 'with nearly equal reason [might] be resolved one way rather than another'").

As this Court has stated, "[t]he court applies the familiar substantial evidence test to the Board's findings of fact and application of law to the facts, and

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[4] Neither case cited (U Br 14) by the Union is to the contrary. *IUE v. NLRB*, 41 F.3d 1532, 1537 (D.C. Cir. 1994), is a duty of fair representation case (U Br 14), a category of cases in which this Court has routinely applied the same *Chevron* deference to which the Board is entitled here. *See Finerty v. NLRB*, 113 F.3d 1288, 1291 (D.C. Cir. 1997) (evaluating Board duty of fair representation finding under *Chevron* standard). The Union's reliance on *NLRB v. USPS*, 8 F.3d 832, 837 (D.C. Cir. 1993), is also misplaced because it is a contract interpretation case for which "courts are charged with developing a uniform federal law." No such concern is present here.

accords due deference to the reasonable inferences that the Board draws from the evidence, regardless of whether the court might have reached a different conclusion *de novo.*" *United States Testing Co. v. NLRB*, 160 F.3d 14, 19 (D.C. Cir. 1998); *see generally* Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951). Where the Board finds that conduct does not violate the Act, the Board's determination must be upheld unless it "has no rational basis in the record." *American Postal Workers Union, AFL-CIO v. NLRB*, 370 F.3d 25, 27 (D.C. Cir. 2004); *accord Kankakee-Iroquois County Employers' Ass'n v. NLRB*, 825 F.2d 1091, 1093 (7th Cir. 1987). In dismissal cases, the "rational basis" standard essentially "particularizes the general rule that the court will defer to Board findings of facts supported by 'substantial evidence on the record considered as a whole.'" *Cincinnati Newspaper Guild, Local 9 v. NLRB*, 938 F.2d 284, 286-88 (D.C. Cir. 1991).

C. The Board's Definition of Discrimination Is Reasonable

The Board set forth a new definition of discrimination for analyzing employers' restrictions on employee use of employer equipment. As shown below, the Board's definition of discrimination is reasonable and consistent with the Act.

To begin, the Board held (JA 273, 274, 275) that "unlawful discrimination" for purposes of establishing violations of Section 8(a)(1) and (3) of the Act requires "the disparate treatment of activities or communications of a similar

character because of their union or other Section 7-protected status." *See Lucile Salter Packard Children's Hosp. v. NLRB*, 97 F.3d 583, 587 (D.C. Cir. 1996) ("employer treated nonunion solicitations differently than union solicitations"). The Board then "careful[ly] consider[ed]" (JA 265, 271-74) its precedent and court cases regarding employee access to employer equipment to determine what constitutes "the unequal treatment of equals" in such circumstances. (JA 271-74) (citing *Fleming Co. v. NLRB*, 349 F.3d 968 (7th Cir. 2003), and *Guardian Industries Corp. v. NLRB*, 49 F.3d 317 (7th Cir. 1995)).

Consistent with this, the Board (JA 272) explained that, for discrimination purposes, "the unequal treatment of equals" cannot be found merely because the employer "draw[s] lines on a non-Section 7 basis" by treating different categories of activity differently. To that end, the Board cited (JA 272) *Guardian* for the proposition that it is not discriminatory "to distinguish between for-sale notices and meeting announcements," and therefore, under the Act, "a rule banning all organizational notices . . . is impossible to understand as disparate treatment of unions." *See* 49 F.3d at 320. In addition, the Board (JA 273) cited *Fleming*'s holding that "personal postings," in addition to for-sale notices, "are distinct from organizational notices," and therefore "[a factual finding] that [an employer] did not allow the posting of organizational material on its bulletin boards does not

support the conclusion that [the employer] violated Section 8(a)(1) by prohibiting the posting of union materials." *Fleming*, 349 F.3d at 975.

Based on this relevant precedent, the Board went on (JA 273) to refine the parameters of unlawful discrimination in the context of employee use of employer equipment. In doing so, the Board considered (JA 269, 272) both the employer's basic property right to regulate and restrict employee use of its property—here, its e-mail system—as well as the employees' right to be free from discrimination. *See Guardian*, 49 F.3d at 318 (recognizing that Section 7 of the Act does not protect "the particular means by which employees seek to communicate," but employer may not discriminate against employee organizational efforts).

Thus, the Board explained (JA 273) that while an employer cannot "draw[ ] a line" on "Section 7 grounds," such as permitting the use of e-mail to "solicit for one union but not another," or solicitation "by antiunion but not by prounion employees," it can lawfully draw certain neutral lines between permitted and non-permitted uses of its equipment. For example, the Board held (JA 273) that an employer can "draw a line between charitable solicitations and noncharitable solicitations, and between solicitations of a personal nature (e.g., a car for sale) and solicitations for the commercial sale of a product (e.g., Avon products)" without unlawfully discriminating against unions "simply because union solicitation would fall on the prohibited side" of those lines. *See Guardian*, 49 F.3d at 319 ("hard to

see why allowing employees to tell each other about cribs that have been outgrown implies that the employer must dedicate space to the union's organizational notices").

In the same vein, the Board held (JA 273) that valid distinctions can be made between invitations of a personal nature and invitations for organizations without discriminating against unions. *See Guardian*, 49 F.3d at 319 (doubting whether offering another employee the opportunity to "buy a newly born puppy" is "the same" as announcing a union organizational meeting). So, too, the Board approved employer distinctions (JA 273) between "solicitations and mere talk, and between business-related use and non-business-related use [of its equipment]." Thus, the Board concluded (JA 273) that the drawing of such "non-Section 7" lines does not "establish . . . discriminat[ion] along Section 7 lines."

The Board's framework reasonably takes account of the relevant judicial precedent, employees' statutory right to be free from discrimination against organizational activity, and the legitimate interests of employers to regulate their equipment. Accordingly, it is entitled to deference from this Court. *See ITT Industries, Inc. v. NLRB*, 413 F.3d 64, 76 (D.C. Cir. 2005) (court must accord a Board rule considerable deference and uphold it as long as it is "rational and

consistent" with the Act even if court would have "formulated a different rule had we sat on the Board").[5]

D. The Board Reasonably Applied Its Discrimination Standard to Find That the Company Discriminatorily Enforced the CSP Against Prozanski for her May 4 E-mail

In applying its new discrimination standard, the Board found that the Company violated Section 8(a)(1) and (3) of the Act by disciplining Union President Prozanski for sending the union-related May 4 e-mail to fellow employees at their company e-mail addresses. As we now show, the Board's finding is a reasonable application of its new test and supported by substantial evidence. Therefore, the Board's Order with respect to this violation is entitled to enforcement.

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[5] The Board also properly modified (JA 265, 272, 274 n.10) its earlier, arguably broader, rule (denied enforcement by the Seventh Circuit in *Fleming* and *Guardian*) permitting a finding of discrimination if an employer allowed employees to use its equipment for *any* nonwork-related purpose, but prohibited employee use of the equipment for Section 7 purposes. Indeed, it is well established that an agency may change its interpretation of substantive law so long as its interpretation does not conflict with the statute and so long as the agency provides a reasoned justification for changing its view. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co*., 463 U.S. 29, 42 (1983); *United Steelworkers of America, Local Union 14534 v. NLRB*, 983 F.2d 240, 244-45 (D.C. Cir. 1993), and cases cited therein. Such reasoned justification is exactly what the Board provided here, and no party has argued otherwise.

1. The Board reasonably applied its new discrimination test to Prozanski's May 4 e-mail

As the Board stated (JA 274), "in determining whether the [Company] discriminatorily enforced the CSP, we must examine the types of e-mails allowed by the [Company] and ask whether they show discrimination along Section 7 lines." In examining Prozanski's May 4 e-mail, the Board determined that it was not a solicitation, because it did not ask or call for any action. *See Flamingo Hilton-Laughlin*, 324 NLRB 72, 110 (1997) (conversation in which one employee merely talked to another employee about union issues, without more, was not solicitation), *enforced in relevant part Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166, 1175 (D.C. Cir. 1998). Thus, it was not prohibited by the CSP, which banned "only 'non-job-related solicitations,' not all non-job-related communications." Accordingly, the Board found (JA 274-75) that the proper way to assess whether the Company discriminated against Section 7 activity by disciplining Prozanski for her May 4, non-solicitation e-mail was to compare it to the "variety of nonwork-related e-mails other than solicitations" that the Company permitted.

More specifically, the Board considered the many nonwork-related e-mails—such as baby announcements and jokes—that were routinely sent by employees. The Board then concluded (JA 275) that, "[t]he only difference between Prozanski's May 4 e-mail and the e-mails permitted by the [Company] is

that Prozanski's e-mail was union-related." Thus, it found (JA 275) that the Company violated Section 8(a)(1) of the Act by enforcing its policy with respect to the May 4 e-mail.[6]

The Company's primary challenge (Co Br 34-38) to the Board's unfair labor practice finding is that the Board should have found Prozanski's May 4 e-mail to be a solicitation, like her August solicitation e-mails, which the Board found (JA 274-75) were lawfully prohibited under the CSP. However, the Company's support for this claim—based on its parsing of Prozanski's e-mail and seizing on terms like "we" and "in solidarity" to assert that she was soliciting employees in her May 4 e-mails—is woefully inadequate to upset the Board's reasoned finding. As the Board explained (JA 274-75), the thrust of the May 4 e-mail, which was to correct misleading union communications, was distinct from the thrust of the August e-mails, which was to urge employees to support the Union by wearing green and helping with a parade float.

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[6] The Board also found (JA 275) that the Company violated Section 8(a)(3) by issuing the warning to Prozanski for her May 4 e-mail. The Company has not independently challenged this Section 8(a)(3) violation, which relies on the same discrimination finding as the Section 8(a)(1) discriminatory enforcement claim. Thus, this Court should affirm the Board's Section 8(a)(3) finding for the same reasons given to affirm the Section 8(a)(1) finding.

The Company splits hairs to no avail (Co Br 37) by claiming that Prozanski's May e-mail ran afoul of the CSP because, like Prozanski's August e-mails, it was an improper "proselyt[ization]." Indeed, the Company's argument that, by merely stating in the e-mail "what the [Union] had done or said and why," Prozanski improperly "advocat[ed]" for an organization, is unfounded. By that logic, any union member who made reference to any union activity in an e-mail would violate the CSP. The Board was not required to interpret the CSP in such a far-reaching manner.

In sum, although the Company discounts (Co Br 36) the significance of the Board's distinction between its two discrimination findings, such disagreement with the Board's reasonable findings is not enough to carry the day. *See Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99 (1996) (citation omitted) (where the plain terms of the statute do not specifically address the precise issue, the courts must not only defer to the Board's reasonable interpretation of the Act, but also "must respect the judgment of the agency empowered to apply the law 'to varying fact patterns,' even if the issue 'with nearly equal reason [might] be resolved one way rather than another'").[7]

[7] The Company also makes a passing reference (Co Br 34, n.3) to its failed contention that under *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), there would be no violation of the Act "because the Board found 'no statutory right to use the [Company's] e-mail system . . . ." However, the Company utterly ignores the Board's reasoned finding (JA 275, n.25) that it need not reach the issue of whether

2. The Company's 10(b) defense has no merit

In a last-ditch attempt to avoid liability for its actions regarding Prozanski's May 4 e-mail, the Company asserts (Co Br 29-32) that Section 10(b) of the Act (29 U.S.C. § 160(b)) bars such a finding. As shown below, however, the Board properly rejected this weak claim.

Section 10(b) of the Act (29 U.S.C. § 160(b)) provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge . . . ." As the Company correctly observes (Co Br 31), the Section 10(b) period begins to run when a party has "clear and unequivocal notice" of the violation. *See Leach Corp.*, 312 NLRB 990, 991 (1993), *enforced Leach Corp. v NLRB*, 54 F.3d 802, 805, 806-08 (D.C. Cir. 1995).

However, a complaint that is based on a timely-filed charge may include allegations not raised in the underlying charge, if the allegations are "closely related" to the violations named in the charge. *Texas World Service Co. v. NLRB*, 928 F.2d 1426, 1436-37 (5th Cir. 1991); *NLRB v. Complas Industries, Inc.*, 714 F.2d 729, 734 (7th Cir. 1983); *Eastern Maine Medical Center v. NLRB*, 658 F.2d 1,

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Lechmere applies because, regardless, "there would still be a violation as to the May 4 e-mail under *Lechmere*'s discrimination exception." *See Lechmere*, 502 U.S. at 535 (employer may exclude nonemployee union agents from its property, except where the employer acts discriminatorily).

6 (1st Cir. 1981); *Redd-I Inc.*, 290 NLRB 1115, 1116 (1988). In determining whether complaint allegations are closely related to a timely charge, the Board, with this Court's approval, considers three factors, whether: (1) both sets of allegations involve the same legal theory, (2) they arise out of the same sequence of events, and (3) the charged party would raise similar defenses to both allegations. *Nickles Bakery of Indiana,* 296 NLRB 927, 928 (1989). *Accord Tic-The Indus. Co. Southeast, Inc. v. NLRB,* 126 F.3d 334, 339 (D.C. Cir. 1997) (endorsing and applying *Nickles Bakery* test, citing *Drug Plastics & Glass Co., Inc. v. NLRB,* 44 F.3d 1017, 1021 (D.C. Cir. 1995)).

The Company first argues (Co Br 29-31) that Heaton's 1997 memorandum to then-Union President Bishop, stating that the Company would be closing the door to e-mail for union communications, constitutes the requisite "clear and unequivocal notice" that the Company was enforcing the CSP. Thus, the Company claims (Co Br 29) that the charges in this case, made in 2000, were well beyond the 6-month limitation of Section 10(b). The fatal flaw in this analysis is that the Board reasonably found (JA 272, n.14) that the Company's actions after the 1997 memorandum belied the language therein.

Indeed, as the Board found (JA 272, n.14), despite issuing that memorandum, the Company continued to allow the Union and employees to communicate over e-mail regarding union issues. (SA 1-7.) As the relevant post-

memorandum e-mails demonstrate (SA 1-5, SA 6 [Tr 279]), many were either initiated by union members or employees, or were managers' responses to earlier e-mails that union members or employees had sent. Thus, the memorandum did not constitute the required "clear and unequivocal notice" to begin the running of the statute of limitations. *See Leach Corp*., 312 NLRB at 991-92 (employer failed to show union had requisite knowledge of necessary facts to begin running of limitations period), *enforced Leach Corp. v. NLRB*, 54 F.3d 802, 805, 806-08 (D.C. Cir. 1995).

The Company's remaining procedural argument (Co Br 32)—that the written warning Prozanski received for her May 4 e-mail should not have been before the Board because "there was no unfair labor practice charge filed" over it— fares no better. As a threshold matter, the Company failed to properly preserve this issue for review under Section 10(e) of the Act.

Section 10(e) of the Act (29 U.S.C. § 160(e)) states, in pertinent part, that "[n]o objection that has not been urged before the Board . . . shall be considered by the court." *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982); *see also Contractors' Labor Pool, Inc. v. NLRB*, 323 F.3d 1051, 1061-62 (D.C. Cir. 2003) (court is "without jurisdiction" to consider issue not properly raised before the Board). When a party files a brief along with its objections (referred to as "exceptions" in the Board's regulations), the brief must set forth

"argument or citation of authority in support of the exceptions." 29 C.F.R. § 102.46 (b). Any exception which fails to comply with the foregoing requirements may be disregarded. *Id*; *see also* 29 C.F.R. § 102.46 (c) ("[a]ny brief in support of exceptions shall contain . . . . [t]he argument, presenting clearly the points of fact and law relied on . . . with specific page reference to the record and the legal or other material relied on").

Here, the Company made *pro forma* exceptions (SA 175-201 at ¶¶44-45, 48, 51) that only relate, in a general way, to the judge's finding (JA 288, n.1) regarding the May 4 e-mail allegations. The Company never specifically argued that the Board improperly considered the May 4 incident because it was not included in an unfair labor practice charge. Such exceptions, devoid of argument or citation to legal authority, are insufficient to preserve the issue. *Accord Elizabethtown Gas Co. v. NLRB*, 212 F.3d 257, 265 (4th Cir. 2000) ("passing reference" not sufficient to preserve objection; allegation of error must be grounded in an appropriately specific objection).

Neither did the Company perfect its claim in its exceptions brief. [8] To be sure, the Company stated in its exceptions brief (Brf Supp Exs at 24-25) that, "the

[8] The Board is filing a motion to lodge the Company's exceptions brief with this Court.

warning issued to Prozanski [for her May 4 e-mail] is . . . outside the 10(b) period" because Prozanski "notified the [Company] that she was aware" of it on May 5 and "therefore the 10(b) period commenced on May 5 [ ]." These statements, however, do not resemble the Company's wholly different argument (Co Br 32) that "there was no unfair labor practice charge filed over the May 4 allegation." Indeed, while the Company's vague statements in its exceptions brief seem to complain about the statute of limitations, they do not explain why that issue would be problematic here, given that the relevant charge was filed on September 7, well within 6 months of May 5, when it claims that Prozanski became "aware" of the incident.

Accordingly, the Company's exceptions and exceptions brief did not take issue with the judge's specific finding (JA 288) that the General Counsel properly included the May 4 e-mail allegation in the complaint, despite there being no separate charge filed over it, because it was "closely-related" to the September 7 charge (JA 73) regarding the August e-mails.[9] It is therefore barred from making such arguments now. *See* Section 10(e); *Woelke*, 456 U.S. at 665-66 (1982).

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[9] In fact, not even in its brief before this Court does the Company challenge (Co Br 31-32) the judge's "closely-related" finding. *See* Fed R. App. Proc. 28(a)(9)(A) (party waives argument it fails to make in opening brief).

In any event, as the judge found (JA 288), the May 4 allegation arose from the same sequence of events as the August allegations, involved the same legal theory of discriminatory enforcement, and the Company has a similar defense to the allegations. Moreover, the August discipline (JA 131) referenced in the charge (JA 73) specifically noted Prozanski's earlier discipline for the May 4 e-mail. Accordingly, the Board reasonably found (JA 288, n.1) that the lack of a separate charge did not preclude the General Counsel from including it in the complaint.

E. The Board Rationally Dismissed the Allegations That the Company Violated the Act By Disciplining Prozanski for Her August E-Mails

In evaluating the Company's response to Prozanski's August e-mails, the Board applied the same definition of discrimination that it used to assess the Company's response to Prozanski's May 4 e-mail. As shown below, the Board's finding that the Company did not violate the Act by disciplining Prozanski for her August e-mails is reasonable and supported by substantial evidence.

1. The Board reasonably applied its new discrimination test to Prozanski's August e-mails

Prozanski's August e-mails solicited employees to support the Union by wearing green and helping with its parade float. (JA 127, 128.) The Board considered (JA 274) the nature of these e-mails, compared to other e-mails allowed by the Company, and assessed whether the Company had engaged in "the unequal

treatment of equals." As we show below, because the Company had not permitted other e-mails that solicited support for outside organizations, the Board reasonably found that the Company did not discriminate by prohibiting Prozanski's e-mails.

As discussed above at p.20-22, the Board (JA 272) agreed with the reasoning of the Seventh Circuit in *Fleming* and *Guardian*, and determined that, in employee access to employer equipment cases, an employer must treat comparable categories of activity comparably, but does not improperly draw a line on a Section 7 basis if it treats legitimately-different categories of activity differently. For example, for-sale notices are not in the same category as announcements for meetings, and personal postings are distinct from organizational notices. *See Guardian*, 49 F.3d at 320, *Fleming*, 349 F.3d at 975. Thus, the Board held (JA 273) that communications in those categories can be treated differently without constituting discrimination. The Board elucidated this concept with further examples, explaining distinctions between other categories, such as between charitable versus non-charitable solicitations, personal versus commercial solicitations, and invitations of a personal versus organizational nature.

Based on these distinctions, the Board rationally concluded (JA 274) that the Company lawfully treated comparable categories similarly when it prohibited Prozanski's August e-mail solicitations to support the Union, because it had not permitted other solicitations on behalf of groups or organizations. Indeed, the

Board's finding explicitly (JA 274) turned on the fact that there was "no evidence that the [Company] permitted employees to use e-mail to solicit other employees to support *any* group or organization." (emphasis added).[10] Thus, without evidence of the Company's permitting other e-mails soliciting support for private groups or organizations, the Board acted rationally in "declin[ing] to find" (JA 274, 274 n.24) that "the [Company's] barring of e-mail solicitation on behalf of the Union constituted disparate treatment of activities or communications of a similar character." Therefore, the Board's dismissal of the complaint allegations relating to the August e-mails should be upheld.

2. The oral solicitation analysis in the *Restaurant Corporation* case does not impugn the Board's rational dismissal of the discrimination allegations in this access to equipment case

The Union claims throughout its brief (U Br 2, 10-11, 13-17, 22-24) that it limits its challenge to the "application" of the Board's new definition of discrimination. However, in doing so, it relies heavily on the "actual disruption of the workplace" standard set out in this Court's decision in *Restaurant Corp. of America v. NLRB*, 827 F.2d 799, 806-09 (D.C. Cir. 1987). More specifically, the Union argues (U Br 22) that "the point of comparison 'the law deems relevant'" in

[10] The Board made a reasonable exception (JA 274, n.23) under well-settled law for charitable solicitations for the United Way. *See Hammary Mfg. Corp.*, 265 NLRB 57 (1982).

discrimination analysis is "whether, in terms of the actual disruption of the workplace, the respective solicitations were substantially equivalent." To the extent that this argument attacks the Board's new rule on its face, and not merely its application, it must fail. Not only does Section 10(e) of the Act bar such an attempt, but, in any event, the argument is without merit. Indeed, however it is framed—either as an attack on the Board's rule or an attack on the application of that rule—it relies on inapposite analysis from oral solicitation cases and should be disregarded.

a. Section 10(e) bars the Union's new "workplace disruption" challenge to the Board's definition of discrimination

As discussed above at p. 29, an objection not properly urged before the Board may not be considered by a reviewing court unless the failure to urge the objection is excused because of extraordinary circumstances. 29 U.S.C. § 10(e); *Woelke*, 456 U.S. at 665-66 (1982). The parties filed numerous briefs before the Board, including one in response to the Board's specific question to the parties regarding discrimination. However, nowhere did the Union contend, as it does now, that in analyzing discrimination regarding employee use of an employer's equipment, the Board must use the "actual disruption of the workplace" standard, established by the Court in *Restaurant Corp*., as the linchpin for determining whether discrimination has occurred.

To be sure, the Union urged (SA 42) the Board to apply the balancing test set forth in *Republic Aviation* when evaluating employer rules governing employee use of an employer's e-mail system. Thus, the Union asserted that an employer should not be allowed to single out union activity unless it can establish the primacy of management concerns such as "productivity and discipline." (SA 42, SA 51-52, 24-27.) However, the Union has now abandoned its challenge (U Br 13) to the Board's determination that e-mail should be treated like other forms of employer-owned equipment rather than oral solicitation. Thus, the Union's claim that even under the bulletin board/e-mail discrimination line of cases workplace disruption is the only relevant factor, was never presented to the Board, and, accordingly, is not properly before this Court.[11]

Moreover, the Union continued to sit on its rights to challenge the Board's definition of discrimination after the Board's decision issued. Any challenge to the Board's newly-announced discrimination rule should have come in the form of a motion for reconsideration before the Board prior to a petition for review in this

[11] The General Counsel and one of the *amici*, the HR Policy Institute, cited *Restaurant Corp.*'s workplace disruption standard to the Board. (SA 13, SA 86, 89). However, neither the General Counsel nor HR Policy Institute claimed that the standard was the only way to analyze discrimination in the access to equipment context, as the Union claims here. Indeed, the dissent does not even make such an argument, stating (JA 284, 285) only that it believes there need be "some business justification."

Court. *See Contractors' Labor Pool, Inc. v. NLRB*, 323 F.3d 1051, 1061-62 (D.C. Cir. 2003) (holding that party could not challenge issue raised by Board *sua sponte* because it did not file a motion for reconsideration); *Accord Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982). Thus, despite many opportunities to do so, the Union did not properly preserve its challenge to the Board's rule. It is accordingly barred from raising this argument before this Court.[12]

b. The oral solicitation analysis in *Restaurant Corp*. is inapplicable here

In any event, *Restaurant Corp*. is inapposite. *Restaurant Corp*. involved an analysis of what constitutes discrimination vis-à-vis an oral solicitation rule, unlike this case, which analyzes discrimination in the context of employee access to employer equipment. *See Restaurant Corp*., 827 F.2d at 802-03 (oral solicitation at issue). Such distinction is important because, as shown below, only in the context of an oral solicitation rule is the Board required to engage in a balancing of management and employee interests to which the workplace disruption standard is

[12] This Court's decision in *APWU v. NLRB*, 370 F.3d 25, 27 (D.C. Cir. 2004), is not to the contrary. In *APWU*, the Court found that the union gave the Board "adequate notice" of the contested issue and that in those circumstances, a motion for reconsideration would have been an "empty formality." Here, however, the briefs filed by the parties did not give the Board such adequate notice. Moreover, given that the Board set out a new rule in the instant case, a motion for reconsideration would not be an "empty formality."

relevant. *See e.g., Republic Aviation v. NLRB*, 324 U.S. 793 (1945) (cited in *Restaurant Corp.*, 827 F.2d at 805).

Management interests (such as whether an employee's actions disrupt the workplace), rather than employer property interests, are particularly relevant in oral solicitation cases because, in such cases, the employer has already significantly ceded its property interests in the property being regulated, that is, the premises of the workplace itself. Thus, when assessing whether an oral solicitation rule discriminates against Section 7 activity, the Board looks to how the employee's oral solicitation affects management's right to have a workplace free from disruption. *See Restaurant Corp.*, 827 F.2d at 806-07. However, as the Board explained here (JA 270, 271), in the context of rules regulating access to employer equipment, as opposed to traditional oral solicitation rules regulating face-to-face communication, "being rightfully on the premises . . . confers no additional right on employees to use the employer's equipment for Section 7 purposes." (JA 271). Thus, when assessing whether a solicitation rule regarding an employer's equipment discriminates against Section 7 activity, the Board does so in the context of the employer's property right to its equipment, not in the management of the workplace itself.

Indeed, as the Board (JA 270, 271, 271 nn. 9 & 10) repeatedly emphasized, "the analytical framework of *Republic Aviation*, which considered the regulation of

'traditional, face-to-face solicitation,'" is "inapplicable" where employees seek "use of the [Company's] communications equipment to engage in additional forms of communication beyond those that *Republic Aviation* found must be permitted." As noted above, the Union (U Br 13) explicitly waived any challenge to this finding. Thus, the Board's definition of discrimination here, which allows an employer to draw neutral lines regarding the use of its equipment, reasonably takes into account the relevant statutory and legal precedent in the relevant comparison cases involving employer equipment, not oral solicitation cases. This reasonable interpretation is entitled to deference. *See ITT Industries, Inc. v. NLRB*, 413 F.3d 64, 76 (D.C. Cir. 2005) (court must accord a Board rule considerable deference and uphold it as long as it is "rational and consistent" with the Act even if court would have "formulated a different rule had we sat on the Board").[13]

Finally, even taking the Union at face value that it is challenging the Board's application of its rule to the facts in this case, such challenge fails for the same reasons discussed above. The Board reasonably applied its rule to the Company's

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[13] Similarly, the Union's reliance (U Br 9, 10, 16, 21, 22) on *St. Margaret Mercy Healthcare Centers v. NLRB*, 519 F.3d 373 (7th Cir. 2008), is without merit. That case, like *Restaurant Corp*., is an inapposite oral solicitation case. Moreover, it involved oral solicitation in the healthcare context, where patient disruption is a key concern. As the court specifically observed, "it is far from obvious that a patient in intensive care will be less disturbed by a nurse hawking bikini lotion or organizing a birthday party than by a union organizer." *St. Margaret Mercy*, 519 F.3d at 375. No such concern is present here.

prohibition of Prozanski's August e-mails because the Company did not permit any other private organizations to solicit on its e-mail system. Given that *Restaurant Corp*. is inapplicable, the Union has failed to overcome the Board's reasonable application of its new discrimination standard to the August e-mail allegations. Accordingly, the Board's dismissal of these allegations should be affirmed.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S REASONABLE FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY MAINTAINING AN OVERLY BROAD RULE PROHIBITING EMPLOYEES FROM WEARING OR DISPLAYING UNION INSIGNIA WHILE WORKING WITH THE PUBLIC

A. Applicable Principles and Standard of Review

Section 8(a)(1) of the Act protects the right of employees to wear union insignia while at work. *See Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 801-03 & n.7 (1945). Accordingly, it is well-settled that an employer's prohibition against wearing such insignia violates Section 8(a)(1) of the Act. *See Pioneer Hotel, Inc. v. NLRB*, 182 F.3d 939, 946 (D.C. Cir. 1999).

The only exception is if an employer makes an affirmative showing of "special circumstances" necessary to justify such a prohibition. *Id*. (citing *NLRB v. Malta Constr. Co.*, 806 F.2d 1009, 1011 (11th Cir.1986) (burden of proof on employer to show "special circumstances")); *see also Mack's Supermarket*, 288 NLRB 1082, 1098 (1988). Such special circumstances include safety, ensuring harmonious employee relations, and protecting an employer's product or image.

See Nordstrom, Inc., 264 NLRB 698, 700 (1982). An employer's public image can be a special circumstance when the display of union insignia "unreasonably interferes with a public image which the employer has established, as part of its business plan, through appearance rules for its employees." *Meijer, Inc*., 318 NLRB 50, 50 (1995), *enforced Meijer, Inc. v. NLRB*, 130 F.3d 1209, 1217 (6th Cir. 1997); *accord Nordstrom, Inc*., 264 NLRB 698, 700 (1982). However, the mere exposure of customers to union insignia does not constitute a requisite special circumstance. *Flamingo Hilton-Laughlin*, 330 NLRB 287, 287-88, 292 (1999).

The Board examines "the entire circumstances" of a particular situation to balance "the potentially conflicting interests" of an employee's right to display the insignia and the employer's right to limit or prohibit the display. *Nordstrom, Inc.*, 264 NLRB at 700. When the Board balances such rights, the balance it strikes is "subject to limited judicial review." *NLRB v. Weingarten, Inc*., 420 U.S. 251, 267 (1975). This court upholds the Board's judgment in such cases "unless, upon reviewing the evidence as a whole, [it] conclude[s] that the Board's findings are not supported by substantial evidence, or that the Board acted arbitrarily or otherwise erred in applying established law to the facts of the case." *Pioneer Hotel*, 182 F.3d at 942.

B. The Board Reasonably Found That In the Circumstances, the Company Unlawfully Maintained a Rule Against the Public Wearing of Union Insignia

As the Board found (JA 292), Kangail wore his green armband and displayed his car placard in support of the Union, and thus the armband and placard constituted union insignia.[14] The Board then reasonably found (JA 292) that the record did not establish "that Kangail's display adversely affected [the Company's] business, employee safety, or employee discipline." (JA 292.) Accordingly, the Company could not maintain a rule prohibiting Kangail from wearing the armband and displaying the placard activity unless it could otherwise demonstrate "special circumstances." As shown below, the Board reasonably found (JA 265, 292) that the Company failed to meet its burden.

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[14] The Company's specious footnote (Co Br 41, n.4) asserting that Kangail's armband did not constitute union insignia because it "identified no connection to a labor organization or labor dispute," should be disregarded because the Company never made this argument before the Board. *See* Section 10(e) of the Act. Indeed, in its Brief in Support of Exceptions, the Company made the exact opposite argument ("[Kangail's] display and wearing of union insignia was clearly connected to a controversy related to the Union's position in negotiations"). (Brf Supp Exs at 15.) Moreover, the Company's citation (Co Br 41, n.4) to the Board's recent *Five Star* decision does not otherwise excuse this late claim. To the contrary, as the Board recognized in *Five Star*, the issue of what constitutes the requisite "connection to a labor dispute" is not new, and it thus pre-dates the onset of the instant proceedings. *See Five Star*, 349 NLRB No. 8, 2007 WL 185977 (citing, *e.g.*, *Emarco, Inc.*, 284 NLRB 832, 833 (1987) (noting "connection to labor dispute" standard)). In any event, *Five Star* and similar cases do not concern union insignia, but instead concern employees' criticism of their employer to third parties in the context of a protected labor dispute, and thus have no application here.

The Company's primary attempt to prove "special circumstances" (Co Br 38-48) boils down to a two-pronged claim that: (1) it had a longstanding "public image" policy that it consistently applied to employees when they interacted with the public, and (2) Kangail's insignia violated this policy by interfering with the Company's public image in a variety of ways. To be sure, if the Company had such a consistently-enforced policy and established that Kangail's display interfered with its public image, such a claim might have some legs. *See Meijer, Inc*., 318 NLRB 50, 50 (1995) (special circumstances require finding that insignia "unreasonably interferes with a public image which the employer has established, as part of its business plan, through appearance rules for its employees"); *see also* Co Br at 45 (citing *Flamingo Hilton-Laughlin*, 330 NLRB 287, 292 (1999) ("must have been a longstanding policy pertaining to appearance rules" that was "implemented in a nondiscriminatory manner"). However, the record evidence belies the Company's argument.

The first flaw in this argument is that it ignores the Board's amply-supported finding (JA 292) that any such policy that the Company may have had was "vague and unwritten" and thus insufficient. Indeed, the Company's reliance (Co Br 45) on the testimony of managers Raz and Downing falls flat, given that neither manager could cite a specific policy and that the judge found (JA 290) that they gave "conflicting testimony." Neither is the Company helped by its reliance (Co

Br 46) on the testimony of Human Resources Manager Walden, who could not reference a specific written policy. (JA 71 [Tr 427].) Moreover, the Board specifically found (JA 290) that any such policy was not implemented in a nondiscriminatory manner because it was "not enforced in a wide variety of other situations." *See* JA 290; JA 36 [Tr 250] (sports teams, colleges, and Marine Corps logos allowed). Accordingly, the Company falls woefully short of establishing the requisite longstanding, consistently-enforced policy regulating its public image.

In addition, even if it could establish such a policy, the Company's argument fails because it has not demonstrated that Kangail's display in any way interfered with the Company's public image. One such spin (Co Br 40) that the Company puts on its public image—that the impartiality necessary in the "news-gathering" and "news-reporting" business, in and of itself, justifies a ban on the public display of Kangail's insignia—fails because Kangail was in the circulation department, and not in the "news-gathering and reporting" part of the paper. (JA 289; JA 33 [Tr 237], JA 34 [Tr. 241-42].) [15] Thus, the Company's reliance on manager

[15] The Company attempts (Co Br 40) to support this general proposition by relying on the administrative law judge's decision in *John P. Scripps Newspapers*, 1992 NLRB WL 1465895). However, no exceptions were filed to that decision (*see* SA 202), and thus under well-settled law it is not precedential. *See Whirlpool Corp.*, 337 NLRB No. 117 n.4 (2002) (Board's adoption of judge's decision to which no exceptions are filed does not serve as precedent for any other case). In any event, even *Scripps* dealt with the problem of reporter bias and not with a circulation employee like Kangail.

Gobold's e-mail to news department staff (Br 46, JA 244), instructing them not to wear political or union-related buttons while interacting with the public, is misplaced given that Kangail was in the circulation department. (JA 289; JA 33 [Tr 237], JA 34 [Tr. 241-42].)

The remaining ways (Co Br 38-48) that the Company tries to decry Kangail's insignia as contrary to its public image are no more successful. Its claim (Co Br 39-40, 43-44) that Kangail's green armband and placard were "conspicuous" and "disruptive" to its public image relies on inapposite cases in which employers either required employees to wear a uniform or were high-end establishments. *Compare Burger King v. NLRB*, 725 F.2d 1053, 1055 (6th Cir. 1984) (employer required employees to wear uniforms); *Nordstrom, Inc.*, 264 NLRB 698 (1982) (employer was high-end department store); *NLRB v. Harrah's Club*, 337 F.2d 177 (9th Cir. 1964) (employees wore uniforms and employer was casino and upscale restaurant). In contrast, Kangail did not wear a uniform with which his insignia would interfere, nor is the Company a "high-end" establishment whose upscale image might be marred by Kangail's plain green armband and placard.

Nor does the Company carry its burden by speculating (Co Br 41-42) that Kangail's insignia contradicts his "public ambassador" role for the Company and could discourage subscribers from continuing to do business with the newspaper.

Indeed, Kangail's innocuous armband and benign placard stating, "workers deserve a fair contract" and "support the [Union]," are miles apart from the kinds of insignia in the remaining cases (Br 38, 41) that the Company cites. *See Komatsu America Corp*., 342 NLRB 649, 650 (2004) (racially inflammatory and offensive t-shirt implied that outsourcing plans by Japanese-owned employer was similar to "sneak attack" of 1941 bombing of Pearl Harbor); *Bell-Atlantic-Penn., Inc*., 339 NLRB 1084, 1086 (2003), *enforced* 99 Fed. Appx. 233 (D.C. Cir. 2004) ("road kill" t-shirts worn by employees depicted employees as "squashed and lying in a pool of blood").

Therefore, as shown above, the Company's primary defense is nothing more than sheer speculation that exposing the Company's customers to Kangail's armband and placard could somehow interfere with the newspaper's public image. As such, it flouts the well-established principle, recognized here by the Board (JA 292), that "mere exposure of customers to union insignia does not constitute a special circumstance." *See Flamingo Hilton-Laughlin*, 330 NLRB 287, 287-88, 292 (1999). Thus, it should be rejected.[16]

[16] Contrary to the Company's implication (Co Br 44), it was not the Board that improperly held that the Company had to "wait until actual harm occurred" to establish the requisite special circumstances. Rather, as the above demonstrates, it was the Company—who shoulders the burden of proof as to this affirmative defense—that failed to establish either potential or actual harm to the Company's image.

The Company's remaining claim (Co Br 49-50), that the Board should not have "engaged in contract interpretation," simply flies in the face of the facts and the law. The Company's prohibition on Kangail's insignia was not embodied in the parties' contract, and language from the expired contract that gave the Company the right to create additional rules does not turn the unlawful prohibition into a creature of the contract (nor does it transform the Board's analysis of well-established law into "contract interpretation"). Finally, the Company relies (Co Br 48-50) on failure-to-bargain cases decided under Section 8(a)(5) of the Act, which have no applicability to the Section 8(a)(1) violation established herein. Accordingly, this Court should affirm the Board's finding that the Company violated the Act by maintaining an overly broad insignia policy.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court enter judgment denying the petitions for review and enforcing the Board's Order in full.

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July 31, 2008

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GUARD PUBLISHING COMPANY, D/B/A THE REGISTER-GUARD	*	
Petitioner/Cross-Respondent	*	Nos. 07-1528, 08-1006 & 08-1013
v.	*	
NATIONAL LABOR RELATIONS BOARD	*	Board Case No. 36-CA-08743
Respondent/Cross-Petitioner	*	
and	*	
EUGENE NEWSPAPER GUILD, CWA LOCAL 37194, AFL-CIO	*	
Intervenor	*	
EUGENE NEWSPAPER GUILD, CWA LOCAL 37194, AFL-CIO	*	
Petitioner	*	
v.	*	
NATIONAL LABOR RELATIONS BOARD	*	
Respondent	*	
and	*	
GUARD PUBLISHING COMPANY, D/B/A THE REGISTER-GUARD	*	
Intervenor	*	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 10,884 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 31st day of July, 2008

ADDENDUM

STATUTORY ADDENDUM

Relevant provisions of the National Labor Relations Act ("the Act"), 29 U.S.C. Section 151, et. seq., and the Federal Regulations ("C.F.R."), that are not included in the Company and Union's briefs, are excerpted below:

Section 10 of the Act (29 U.S.C. § 160):

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. . . .

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the

Board, any other person may be allowed to intervene in the said proceeding and to present testimony. 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, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. . . .

Regulations:

29 C.F.R. § 102.46(b), (c):

§ 102.46 Exceptions, cross-exceptions, briefs, answering briefs; time for filing; where to file; service on the parties; extension of time; effect of failure to include matter in exceptions; reply briefs; oral arguments

(b) (1) Each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception. If a supporting brief is filed the exceptions document shall not contain any argument or citation of authority in support of the exceptions, but such matters shall be set forth only in the brief. If no supporting brief is filed the exceptions document shall also include the citation of authorities and argument in support of the exceptions, in which event the exceptions document shall be subject to the 50-page limit as for briefs set forth in § 102.46(j). (2) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

(c) Any brief in support of exceptions shall contain no matter not included within the scope of the exceptions and shall contain, in the order indicated, the following: (1) A clear and concise statement of the case containing all that is material to the consideration of the questions presented. (2) A specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate. (3) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page reference to the record and the legal or other material relied on.

Fed. R. App. P. 28(a)(9)(A)

(**a) Appellant's Brief.** The appellant's brief must contain, under appropriate headings and in the order indicated:
(9) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies;

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Intervenor	*	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by hand delivery the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of the final brief by first-class mail upon the following counsel at the addresses listed below:

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Dated at Washington, DC
this 31st day of July, 2008