IN THE MATTER OF AN ARBITRATION

BETWEEN

CEP LOCAL 87-M (SOUTHERN NEWSPAPER GUILD)

-and-

THE GLOBE AND MAIL

AND IN THE MATTER OF A UNION GRIEVANCE CONCERNING THE Use of E-mail

Kevin Whitaker, Sole Arbitrator

Appearances for the Guild
Tim Gleason, Counsel
Sue Andrew, Unit Chair
Howard Law, Staff Representative

Appearances for the Employer
Stephen J. Shamie, Counsel
Julie-Anne Cardinal, Counsel
Brenda Shacht, Vice-President, Employee and Labour Relations

A hearing was held in Toronto on June 10, 2009

I

What This Case is About

By letter dated December 9, 2008 from Sue Andrew, Guild Unit Chair, to Brenda Schacht, Vice-president, Employee and Labour Relations, the Guild grieves the employer's refusal to permit any union use of the employer's e-mail system. The Guild alleges that this refusal is contrary to the provisions of Article 2.02 of the collective agreement which provide:

> *There shall be no interference or attempt to interfere with the operation of the Union.*

The employer denies that it has breached any provision of the collective agreement.

For reasons which follow, the grievance is dismissed.

II

The Facts

The parties filed an agreed statement of fact supplemented by further information provided verbally by counsel.

The employer is a national newspaper. The Guild represents employees in Toronto and other locations, including several Canadian and international bureaus.

The collective agreement contains four schedules which each cover separate groups of employees in the Editorial, Advertising and Sales, Circulation and Maintenance Departments. The entire bargaining unit includes about 430 employees.

The employer has for some time, maintained a proprietary e-mail system for the use of employees. The employer owns the system, pays and provides for its maintenance.

The employer provides employees with e-mail addresses and access to the system. The use of the e-mail system is governed by an employer policy entitled the "*Electronic Property and Security Policy*" (the "Policy").

The Policy provides that the e-mail system is primarily for business purposes, but that:

> "*limited personal use...is permissible, provided that this does not interfere with the electronic property or the user's job performance...*".

There is routine personal and non-business use of the e-mail system. The employer has not disciplined employees for this type of use, nor taken any steps to eliminate it. The employer asserts that at least one employee has in the past, been disciplined for the inappropriate use of e-mail although that use was not for the purposes of communicating union business.

The employer has no policy or rule which limits the personal use of the employer's telephone system. Managers regularly monitor telephone records.

During the last round of bargaining in 2005, the Guild proposed the following language:

The Employer shall permit employees to make reasonable use of the email system for the purpose of communicating union business.

The employer opposed the proposed language which was subsequently withdrawn by the Guild.

In two other newspaper bargaining units with other Ontario employers, the Guild has been able to achieve collective agreement language which expressly permits employees to reasonably use the employer's e-mail for the purposes of communicating union business:

Employees shall be allowed to make reasonable use of the Employer's electronic mail system for union communication outside the employee's working hours. Union Stewards and executive members may utilize the e-mail system during working hours for incidental purposes restricted to the administration of their duties as stewards or executive members. Employees may use the e-mail system during working hours for the purpose of contacting a union steward or executive member to request assistance.

and:

This letter confirms our understanding during negotiations that Union stewards and executive members may utilize the e-mail system during working hours for incidental purposes restricted to the administration of their duties as stewards or executive members.. Employees may use the e-mail system during working hours for the purpose of contacting a Union steward or executive member to request assistance.

On November 12 2008, the Guild established and announced to its members a regular e-mail newsletter. Later that day, the employer advised the Guild that it

would not permit the use of its e-mail system for purposes of union related communication.

In May of 2009 and in preparation for bargaining, the Guild unsuccessfully sought the employer's permission to use the e-mail system to survey its membership for use in demand setting.

The employer has not assessed the marginal cost of the union's proposed use of the e-mail system and there is no concern that the Guild's desired use of the system will result in increased employer cost or expense.

The collective agreement obliges the employer to provide the Guild with bulletin boards for Guild use. The collective agreement also obliges the employer to provide the Guild with the following information for each employee every three months: name, sex, social insurance number, address, telephone number if available, date of hiring, date of birth, classification, experience rating and experience anniversary and salary.

The collective agreement in Article 20.02 precludes the employer from discriminating against any employee because of her membership or activity in the union.

Section 70 of the *Labour Relations Act* (the "Act"), precludes the employer from interfering with the administration of the Guild.

III

Positions of the Parties

The issue to be determined is whether the collective agreement obliges the employer to permit the Guild to use the employer's e-mail system for purposes of communicating Guild business.

In support of its position, the Guild argues:

- the employer's policy which governs the use of the e-mail system is an unreasonable unilaterally promulgated rule, inconsistent with the management's rights provisions of the collective agreement;

- the policy is contrary to Article 2.02 of the collective agreement and section 70 of the Act, which preclude employer interference in the administration of the Guild; and

- the policy is contrary to Article 20.02 which precludes discrimination on the basis of union membership or activity.

The employer responds:

- there is no provision in the collective agreement which permits the Guild to use the employer's e-mail for purposes of communicating with its members;

- the Guild proposed language in the last round of bargaining that would permit such use, withdrew the proposed language and is now attempting to obtain what it could not through bargaining;

- the collective agreement in Article 16:04 provides for bulletin board communication;

- the employer is obliged to provide the Guild with employee telephone numbers on a quarterly basis;

- there has been no practice of permitting the Guild to use the employer's e-mail in this proposed fashion; and

- in at least two other collective agreements, the Guild has successfully bargained language which does permit the use of an employer e-mail system for the communication of Guild business and that the appropriate way to address this issue is indeed to propose it in bargaining.

The parties were only able to find one Canadian authority on point. In *Re Sudbury Memorial Hospital and OPSEU Local 619* 31 CLAS 464 (July 12, 1993), Arbitrator Kaufman dealt with discipline imposed on an employee for having used the employer's e-mail system for the communication of union business. In this case there was no specific employer rule or policy which precluded such use. In dismissing the grievance, the Arbitrator noted at paragraph 11:

> *...It is fundamental and self evident that the equipment of an employer exists for the business of the employer, and that any use other than for that purpose, without permission, constitutes unauthorized use.*

The parties also put before me a decision of the National Labor Relations Board in *The Guard Publishing Company d/b/a/ The Register Guard and Eugene Newspaper Guild, CWA Local 37194* 352 NLRB No 70. 1110 (December 16, 2007).

In the *Guard* case, the majority of the Board concluded that the union had no statutory right to use the employer's e-mail system for purposes of communicating union business to its membership. The majority confirmed that there is no right or entitlement of the union to use "employer's equipment or media".

Two members of the Board dissented, suggesting polemically that the decision of the majority confirmed that the "NLRB has become the Rip Van Winkle of administrative agencies".

The Guild relies on a number of authorities which stand for the proposition that unions in Ontario are entitled to obtain from employers, telephone numbers and other contact information for employees (*Labourers' International Union of North America, Local 1059 v. Co-Fo Concrete Forming Construction Limited* OLRB Rep. Sept. 1987 1213, *Hotel and Restaurant Employee CAW Local 448 v. The Millcroft Inn Limited* 2000 CanLII 12208 (ON LRB), *OPSEU v. the Alcohol and Gaming Commission of Ontario* [2002] OLRB Rep. January/February 1, and *UNITE HERE Local 75 v. Canadian Niagara Hotels Inc.* 2005 CanLII 49081 (ON LRB)).

Further, the Guild relies on the proposition that employees may be entitled to communicate with each other in the workplace by wearing ribbons or buttons (*ETFO v. Hamilton-Wentworth District School Board* 2002 CAN LII 26879 (ON LRB).

Finally the Guild relies on the well known award in *Re Lumber and Sawmill Workers Union and KVP* 16 LAC 73 which deals with the legitimacy of unilaterally imposed employer rules and suggests that such rules must be reasonable in all the circumstances.

Analysis

The first issue is whether the employer's position interferes with the Guild's work on behalf of its members and is by that reason, a breach of Article 2.02 of the collective agreement and section 70 of the Act.

The second issue is – taking the Guild's theory -whether the employer's position is reasonable. The employer does not agree that its conduct here must meet the test of reasonableness but in the alternative argues that the policy is in fact, reasonable.

On the first question of whether there has been interference, it is clear that the Guild has been able to effectively communicate with its members in other ways to this point and certainly has the option of communicating with its members by e-mail to personal e-mail addresses.

There is no suggestion that being unable to access the employer's e-mail system for Guild business has in any way impaired the ability of the Guild to function effectively as a trade union. Freedom from employer interference does not mean that the union can always insist on the particular way in which it wishes – in this case – to communicate with its membership using the employer's property.

On the first point, I conclude that the employer's policy does not interfere with the union.

On the second question as to whether the employer's position is reasonable, I find the following to be of assistance:

- the e-mail system is the property of the employer, obtained, supported and maintained by the employer for a cost;

- the Guild does not appear in any way to be put at a disadvantage in its relationship with its membership as a result of the employer's policy;

- the employer's position does not amount to interference with the Guild;

- the Guild has other mechanisms for communicating with its members including the ability to obtain personal e-mail addresses and to send and receive information in this fashion;

- there are no other cases where arbitrators have permitted union access to employer e-mail systems in the absence of language permitting the practice in the collective agreement;

- to the extent that the question here has been addressed before, the authorities suggest uniformly that the employer's position in the present matter is lawful;

- the Guild must have assumed that collective agreement language permitting the requested practice was necessary - which is why it proposed such language in the last round of bargaining;

- the Guild is free to propose language in bargaining which would permit the practice and one presumes like most proposals, it is likely to be available at a particular cost.

I do not necessarily accept the reasoning in *Sudbury Memorial Hospital* and in *Guard Publishing* that an employer's ownership of property and equipment means that there is an absolute right on the part of an employer to prohibit the union from using that property. I do however accept that the fact of employer ownership is appropriately taken into consideration in the determination of whether or not the

policy is reasonable. To this extent, as a factor that goes to the issue of reasonableness, the employer's ownership of the e-mail system is relevant.

In this case, it would seem that the union may by other methods, accomplish what it wishes to do with the employer's e-mail system. The employer provides the union with a great deal of personal information about employees and would likely be obliged to provide the union with personal employee e-mail addresses if they were collected and if they were so requested.

Further, the union must understand from its bargaining relationships with this and other employers that access to employer's e-mail is in the normal course, an issue to be negotiated through the bargaining process and in the absence of agreement, there is no absolute entitlement for the union to use the system to communicate with its members. This is why the union proposed such language in the last round of bargaining with this employer and why it has successfully obtained such agreements with other employers.

In my view, the union must demonstrate a very compelling case as to why it needs to use the employer's email system if the employer's policy in this case is to be characterized as unreasonable and contrary to the collective agreement. Reasonableness in this case must turn on the competing interests at play. The employer's significant property rights – its entitlement to determine how and in what manner its property is to be used in the workplace - must be balanced against the union's need and interest in using the e-mail system. The union has the burden of demonstrating that the balance of reasonableness here is in its favour.

Such a burden has not been met.

IV

Disposition

The grievance is dismissed.

Dated at Toronto this 9th day of October 2009

Kevin Whitaker, Sole Arbitrator