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Edited by
Arthur B. Shostak

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15. Union and Employee Access to Employer E-Mail Systems Under Federal Labor Law

Stuart W. Davidson, Esq., and Eric M. Fink, Esq.

Given how recent is the age of the Internet (circa 1995), it is understandable that in our litigious society much remains uncertain where the law and relevant administrative rulings are concerned. We have only just begun to sort out legalities, and much remains problematic and volatile. All the more valuable is the sage counsel below from two labor lawyers who are closely following fast-breaking developments. They provide sound advice for union activists wondering about using an employer's e-mail system.

As electronic means of communication, including e-mail and the Internet, become more prevalent, issues will inevitably arise concerning the right of employees and unions to make use of employers' computer systems to communicate about union matters. While the National Labor Relations Board (NLRB) "has not yet adopted any unique doctrines governing employees' right of access to the employer's electronic equipment to communicate with each other about unionization,"[1] the Board has begun to address these issues in terms of existing legal principles. This article will review the most significant statements of the NLRB in this area, and offer some guidance to unions and their supporters seeking to use electronic communications as organizing tools.

Discriminatory Restrictions on Access

One principle that appears reasonably clear is that an employer's rule or practice that prohibits employees from using the company e-mail system to send pro-union messages, while permitting other types of personal, nonwork-related messages, is discriminatory and therefore unlawful.[2] Even if the employer's official policy is facially nondiscriminatory, the employer may still run afoul of the law if, in practice, it allows nonunion-related personal messages but prohibits union messages or notices.[3]

If a union believes that an employer's e-mail policy discriminates against union messages, the union should file a charge of unfair labor practices. If the Labor Board finds that the employer's e-mail policy, either facially or as

applied, discriminates against union-related messages, the remedy will be a "cease and desist" order, requiring the employer to treat union-related messages the same as other nonwork-related messages under its e-mail policy.

The decision of the NLRB in Lockheed Martin Skunk Works[4] is instructive in that it suggests some affirmative steps that a union should take where it believes that an employer is discriminating against pro-union messages on its e-mail system. In Lockheed Martin Skunk Works, the employer maintained a policy prohibiting solicitation during working time and prohibiting the distribution of literature in working areas or during the working time of either the person distributing or the person receiving the literature. The company also maintained a policy regulating the use of its electronic mail system.

Occasional personal use of the system was permitted during nonwork time, provided that was "of reasonable duration and frequency," did "not interfere with or adversely affect the employee's performance," and was not "in support of a personal business." Employees commonly used the company's e-mail system to send personal messages without being subject to discipline. However, the company had previously disciplined employees after receiving complaints about certain "inappropriate" uses of the system, such as running a personal business, administering a pornographic Web site, and sending "off-color jokes and ethnic comments."

A bargaining unit member filed a decertification petition with the NLRB. In support of the petition, that member, along with other employees, sent six mass e-mails to the entire unit of 1,100 employees. The union objected to those messages, and asked the company to put a stop to the use of the company's e-mail system for decertification campaign messages. The company assured the union that the messages would stop; however, the company did not order employees to cease using the e-mail system for such messages. The union then requested permission to send up to three e-mail messages over the company's system "to remedy the discriminatory manner in which [it] has been used to date." The company granted that request. However, the union sent only one mass e-mail message over the company's system.

The NLRB found that the union was not placed at an unfair disadvantage relative to decertification proponents. Even assuming that the pro-decertification mass e-mails violated the employer's policy, the employer was not responsible for the union's failure to make greater use of the e-mail system. The company never precluded the union from sending e-mails over the system, but granted the union's only request for access. It was the union's own choice not to avail itself fully of the access that the employer granted to its e-mail system. Accordingly, the NLRB concluded, the union could not com-

plain that the absence of additional pro-union messages was discriminatory.

The lesson for unions from Lockheed Martin Skunk Works is twofold. First, unions should be alert for anti-union messages circulated over the employer's e-mail system. Where the union learns of such messages, it should immediately request that the employer clarify its e-mail policy. If the employer responds that its e-mail policy prohibits such messages, the union should demand that the employer put a stop to the offending use of the e-mail system. If the employer responds that such messages are permitted under its e-mail policy, the union should encourage its supporters to make similar use of the system.

Second, the union should request equal access to the e-mail system to send its own messages. If the employer refuses, while permitting others to circulate anti-union messages, the union should file a charge of unfair labor practices protesting the discrimination.

An interesting side note in the Lockheed Martin Skunk Works case is a disagreement between the NLRB majority and its dissenting member over the relative efficacy of e-mail over other means of communication. In her dissent, NLRB member Wilma B. Liebman asserted, "It is by now beyond dispute that e-mail is a most effective means of communication. It is a particularly powerful organizing tool. Fast and easy to send, e-mail messages are immediately accessible to their audience and have a more direct impact than messages sent by other means."[5]

The majority, however, noted that there was no evidence to show that "the distribution of campaign materials by e-mail is inherently more effective than distribution by more traditional means."[6] In some cases the union may wish to offer expert testimony or other evidence to demonstrate the particular efficacy of e-mail as a means of communication. For example, where a group of employees rely heavily on e-mail for their routine communication, the union will want to emphasize that fact in proceedings before the NLRB.[7]

Nondiscriminatory Prohibitions

While an employer may not impose or selectively enforce rules so as to discriminate against union communication, it is less clear whether an employer may impose and enforce a nondiscriminatory blanket prohibition on all nonbusiness uses of its electronic mail system, including messages relating to union issues. Two distinct and conflicting lines of analysis have emerged in this area. It remains to be seen which line the Board ultimately will adopt.

One line of analysis holds that employers should have the right to prohibit outright any nonbusiness use of employer-owned electronic mail systems, on the grounds that these systems are the private property of employers.[8] In

this view electronic mail is analogous to more traditional communications devices, such as photocopiers, bulletin boards, telephones, or internal mail systems.[9] The NLRB has held that employers may prohibit the use of such company equipment for nonbusiness purposes, including communication about union matters.[10] Employer advocates argue that the same principles should apply to electronic mail and other computer-based communications systems.

The property rights theory has found some acceptance within the NLRB. In one case, the NLRB General Counsel's office opined that an employer could lawfully discipline an employee for using the employer's computer and printer to produce pro-union literature, where the basis for the discipline was the employee's misuse of company equipment and not the pro-union nature of his communication.[11] In another recent case, an NLRB administrative law judge applied the doctrine pertaining to bulletin boards and telephone systems to uphold the validity of an employer rule prohibiting nonbusiness use of the company computer system, including electronic mail.[12]

A contrasting approach rejects the absolutism of the property rights view and instead analyses electronic mail within the established framework that the Board applies to employer restrictions on "solicitation" and "distribution" in the workplace.[13] A distribution is a one-sided communication that is effective so long as it is received and can be retained for later consumption. In contrast, a solicitation is any communication inviting a spontaneous response or reciprocal conversation. The hallmark of solicitation is the immediacy of the communication. Solicitation may include nonverbal communications, such as the circulation of union authorization cards that invite the recipient to respond in some timely manner.

An employer may limit both distributions and solicitations to nonwork time. However, while an employer may outright prohibit distributions in work areas at any time, an employer must permit solicitations in work areas during nonwork time. An outright ban on solicitation is unlawful even where alternative avenues of communication are available. In contrast, the availability of nonwork areas for distributions renders a blanket ban on work-area distributions presumptively lawful.

The NLRB and various legal commentators have analyzed employee and union access to employer e-mail systems in terms of the solicitation-distribution framework. For example, in Pratt & Whitney,[14] the NLRB General Counsel opined that an employer's blanket prohibition on all nonwork use of its e-mail system was overbroad and therefore facially unlawful. In that case the employees spent the majority of their time on computers, and e-mail was their primary means of communication. For these employees, then, the computer, including the e-mail system, was a "work area." The legitimacy of

the employer's rule against any nonbusiness use of the e-mail system thus turned on whether the prohibited communication constituted distribution or solicitation.

In some respects, employee e-mails resembled distribution, the General Counsel conceded. Like traditional literature distributions, which may cause litter in the workplace, e-mail messages may take up valuable space on the employer's computer system. Like a traditional leaflet, an e-mail message can be preserved to be read at a later time.

However, at least some employee e-mail communication could be classified as solicitation. The General Counsel noted the ability of an e-mail recipient to "talk back" in direct response to a message, and observed that the employees at Pratt & Whitney engaged in real-time e-mail conversations about union issues. In these respects, e-mail communications possess the hallmark of immediacy to render them solicitations. Because the employer's rule precluded any nonbusiness e-mail, even those that resembled solicitations, the rule was overbroad and unlawful.

The Pratt & Whitney analysis will be most applicable in workplaces where employees rely heavily on e-mail to communicate with one another. In settings where employees make little or no use of e-mail in the performance of their work, the company e-mail system is less likely to be deemed a "work area," and thus less likely to fall within the solicitation-distribution framework at all (and also less likely to be of value as a means of communicating with employees about union issues).

Assuming that the solicitation-distribution framework does apply to employee and union access to employer e-mail systems, unions and their supporters should tailor their messages accordingly. Where an e-mail message invites a direct response from the recipient, it is more likely to be treated as a solicitation, which the employer must permit during nonwork time. In contrast, where a message simply announces some information, without calling for a response, it is more likely to be treated as a distribution and thus subject to outright prohibition by the employer. The interactive capabilities of e-mail and the Internet make these modes of communication especially suited to solicitation-like messages, and unions and their supporters should take full advantage of these capabilities, both to maximize their right of access to the employer's system and to maximize the effectiveness of their communications.

Unresolved Issues

The General Counsel's memo in Pratt & Whitney expressly left certain issues unaddressed. First, the General Counsel noted that the "the lines between working time and nonworking time may be even more blurred and

doubtful with regard to professional and quasi-professional employees whose work involves extensive use of computers."

Second, employee access to employers' electronic bulletin boards may not fall within the same distribution-solicitation framework as e-mail communication. Third, the right of employees to access an employer's e-mail system during nonwork time for solicitations does not guarantee that nonemployees (including unions) have a right of access to employee e-mail addresses to send such solicitations.

Finally, while employers may not prohibit employees outright from using e-mail systems for solicitations, employers may be able to impose "reasonable rules limiting E-mail to narrowly address particular problems," such as interference with the functioning of the e-mail system.

The NLRB will likely confront these and other issues in future cases, as the use of e-mail for intercompany communication continues to grow. In the meantime, unions and pro-union employees should continue to explore the use of company e-mail systems as a means of communicating with employees about union issues and encourage the Labor Board to develop clear guidelines on the right of employees and unions to access company e-mail systems to circulate such messages.

Notes

1. Mid-Mountain Foods, 332 NLRB No. 19, 2000 NLRB LEXIS 638 at *21 (2000) (Member Wilma B. Liebman, dissenting).
2. See E.I. Du Pont de Nemours & Co., 311 NLRB 893 (1993).
3. Ibid.
4. 331 NLRB No. 104, 200 NLRB LEXIS 463 (2000).
5. 200 NLRB LEXIS 463 at *28.
6. Ibid. at *17, n. 14.
7. See Pratt & Whitney, 1998 NLRB GCM LEXIS 40 (General Counsel Advice Memo 1998) (citing evidence that e-mail is principal means of communication among employees).
8. See, for example, Susan S. Robgfogel, "Electronic Communication and the NLRA: Union Access and Employer Rights," 16 *Labor Lawyer* 231 (2000).
9. Ibid. at 236–37.
10. Champion Int'l Corp., 303 NLRB 102 (1991) (copy machines); Eaton Tech., Inc., 322 NLRB 848 (1997) (bulletin boards); Honeywell, Inc., 262 NLRB 1402 (1982) (bulletin boards); Churchill's Supermarkets, Inc., 285 NLRB 138 (1987), enf'd, 857 F.2d 1474 (6th Cir. 1998) (telephones); The Cincinnati Enquirer, Inc., 279 NLRB 1023 (1986) (company mail system). Union access to company bulletin boards is a mandatory subject of collective bargaining. *NLRB v. Proof Co.*, 242 F.2d 560, 562 (7th Cir. 1957), cert. denied, 355 U.S. 831 (1957).
11. National Tech Team, 2000 NLRB GCM LEXIS 30 (Gen'l Counsel Advice Memo 2000).
12. Adtranz, 200 NLRB LEXIS 80 (ALJ Dec'n 2000).

13. See Stoddard-Quirk Mfg. Co., 138 NLRB 615 (1962); Le Tourneau Co. of Georgia, 54 NLRB 1253 (1944), enf. denied 143 F.2d 67 (5th Cir. 1944) rev'd 324 U.S. 793 (1945); Republic Aviation Corp., 51 NLRB 1186 (1943), enf'd 142 F.2d 193 (2d Cir. 1944), aff'd 324 U.S. 793 (1945).

14. 1998 NLRB GCM LEXIS 40 (NLRB Gen'l Counsel 1998).

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16. Lessons from Pioneering in Union Uses of the Internet

Ed Czarnecki

Pioneers have special lessons to share, lessons learned the proverbial hard way. Refined over time and after many revisions, their guidelines have unique value, especially for those of us open to learning from both the mistakes and the "eureka" moments of others long on the job.

The essay below is authored by possibly the first, and probably the longest-lasting, editor of a labor-oriented, computer-based Internet newsletter. Answers are offered to such questions as: What might you do when labor leaders ignore the case you are making for computer uses? What are some of the major weaknesses today in labor's use of the Internet? Contrarily, what are some of the major strengths? Above all, what is the *ultimate value of the Internet to organized labor . . . as seen from the vantage point of a very experienced user.*

No one I know of has had as long an experience (six years so far) as I have issuing a *Labor Education Newsletter.* Art Shostak, one of my subscribers, invited me to "mine" this for lessons to share with unionists eager to make better use of the Internet, and that led to the short essay below.

Getting Started

Computers came to the AFL-CIO in the late 1980s, and the Education Department, where I was the Assistant Education Director (having worked for the AFL-CIO since 1977), was hooked up early in the 1990s.

I had had a computer for many years, and I was already impressed with the potential to access information from a wide variety of sources. I subscribed to various new services, such as Delphi, Prodigy, AOL, and CompuServe, that initially provided connections to news, sports, entertainment, weather, and so forth, and then eventually provided connections to the Internet.