

Organizing Through Cyberspace: Electronic Communications and the National Labor Relations Act

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Welcome to the electronic age. Electronic communications are transforming the way that people communicate and the way companies do business. Corporations are embracing electronic communications and keeping in better touch with customers and vendors through e-mail, learning more about their competitors and potential markets by surfing the Internet, and promoting and selling their products and services on the World Wide Web through corporate home pages. Companies have recognized that e-mail and the Internet are remarkably efficient and effective means of disseminating information.

Perhaps no one realizes this better than employees, who are using the Internet and e-mail as finely-honed union organizing tools, as a way to effectively express grievances, and as a means of putting key information at the fingertips of ordinary workers. As a federal district court noted in 1996, "[t]he Internet is a far more speech-enhancing medium than print, the village green, or the mails."¹ It therefore is not surprising that employees would turn to this speech-enhancing medium in the workplace to elicit support from fellow employees regarding company policies. Recognizing that e-mail and the Internet are fast joining the fax machine and voice mail as indispensable tools of doing business, companies have eagerly embraced this new technology, but often without having fully considered the labor relations issues raised by this powerful communications medium.

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The 1997 case of *Timekeeping Systems, Inc.*, 323 NLRB No. 30 (1997), received considerable press because it applied traditional labor laws to the new corporate mainstay, e-mail. The National Labor Relations Board (NLRB) held that an employee's e-mail message constituted protected, concerted action under the National Labor Relations Act (NLRA). The discussion that follows will highlight the growing use by workers of electronic media for union organizing and other protected, concerted activities. This column will also discuss the application of the

Board's traditional rules governing solicitation, distribution, and bulletin board use to electronic communications in the workplace. Finally, this column will briefly consider those items that should be contained in a workplace policy in order to control electronic organizing in the workplace.

Electronic Communications, Unions, and Employee Organizing

Electronic communications are changing the way in which unions and employees communicate with each other and attempt to organize the workplace. Union organizing efforts that once took years of tedious or painstaking cultivation can now be successfully accomplished in substantially less time. The effort to unionize a Borders bookstore at the World Trade Center in lower Manhattan is a recent case in point.

A union member of Local 888 of the United Food and Commercial Workers, in a New York City suburb, used e-mail to initiate and maintain contact with a lead clerk at the Borders Manhattan store, followed up by an in-person meeting, to provide assistance in unionizing.² Four months later, workers at that Borders store voted 55 to 31 in favor of the union. Months before that first contact from Local 888, Borders employees had used the Internet to access a "How to Unionize" Web site³ created by a former Borders employee. The Web site is filled with information about basic labor law, key elements of a contract, common misconceptions about unions, frequently asked questions (FAQs) about unions, a primer on establishing a union, and links to other union/labor Web pages. The Internet also contains numerous Web sites and links devoted to organized labor's boycott of Borders' stores.

This Web site is not atypical. A casual surf of the World Wide Web offers a staggering array of union and labor-related Web sites,⁴ where employees can gather invaluable information and establish key contacts with professional organizers. A few examples:

On April 1, 1996, United Auto Workers (UAW) president Stephen P. Yokich announced that the UAW was launching two new World Wide Web sites (UAW On-Line at www.uaw.org and Breaktime at www.uaw.org/breaktime) and that the union planned to use every tool it could to communicate directly with workers and the public, to open doors, and reach out to new members.⁵ This visually appealing, up-to-date, information-packed site includes UAW news and releases, legislation updates, FAQs, UAW online magazines, an Internet guide, links to various other locals, and links to news, labor, and government resources (including the National Labor Relations Board site, which allows users to use key words to search for NLRB decisions and related rules and regulations).⁶

The AFL-CIO site,⁷ in addition to providing information about the union, key news items, and how to organize, includes an Executive Pay Watch site,⁸ where visitors can read about the increasing pay disparity between CEOs and U.S. workers, the reasons for runaway executive pay, and individual profiles and photos of particular CEOs whose allegedly excessive compensation has earned them a place in the so-called online Overboard Room. The site also provides links to proxy statements (searchable by company name), an Executive PayWatch Database (searchable by company name), and tips for taking action.

Countless other unions have established World Wide Web sites varying from a few somewhat static pages to a rich, frequently updated array of information. These include, inter alia, the United Food & Commercial Workers International Union,⁹ the Sheet Metal Workers International Association,¹⁰ the Teamsters Union,¹¹ the Communications Workers of America,¹² and the American Federation of State, County and Municipal Employees¹³ (which features a guide to company research on the World Wide Web, including helpful links¹⁴). Refusing to die, or to be left off the information superhighway, the Industrial Workers of the World (Wobblies) have established their own Web site with links to various branches and locals across the globe.¹⁵

Armed with the information provided by such Web sites and the contacts with union representatives, employees have the tools they need to unionize their workplaces or at least challenge management's authority. E-mail and the Internet will only become more entrenched in our lives and workplaces, especially as younger employees (Generation Xers, who have grown up with computers) take their places in the workforce. Unhappy workers will increasingly search the Internet for kindred spirits, and they will find them; workers will discover that they are not alone, that others have confronted the same or similar issues, and that the Internet provides the means for building solidarity. Workers will also increasingly discover that internal e-mail can be a particularly efficient way to mobilize their fellow workers against wage cuts, changes in benefits, and other employer actions. In turn, employers must be aware of the tremendous electronic resources at their employees' disposal and position themselves to address the issues arising from the provision of e-mail and Internet access in the workplace.

E-Mail as Protected, Concerted Activity: The Case of *Timekeeping Systems*

The case of *Timekeeping Systems* has served as a wake-up call for many employers that have not thoroughly considered the implications of electronic technology with regard to traditional labor laws and employee rights under Section 7 of the NLRA. In this decision, the Board adopted the administrative law judge's ("ALJ") finding that an employer had violated the Act by terminating an employee who used the company's e-mail system to organize opposition to a planned change in the company's vacation policy.

In *Timekeeping Systems*, the employer's chief operating officer, Barry Markwitz, sent an e-mail message to all company employees regarding proposed changes in both the company's incentive-based bonus system (to which employees were required to respond with comments) and the company's vacation policy (to which employees were "welcome" to share comments). One employee, Larry Leinweber, a software engineer, responded to Markwitz by e-mail that the proposed changes would result in the same number of vacation days per year, but with less flexibility to employees in their use. A coworker, Tom Dutton, subsequently sent an e-mail to Markwitz with a copy to other employees, including Leinweber, indicating that the proposed vacation policy was "GREAT!"

Leinweber responded to this message by doing two things. First, he sent a reply e-mail message to Dutton telling him that the proposed policy did not benefit employees. Second, he sent a lengthy e-mail message containing "some flippant and rather grating language" to all employees

(with the salutation, "Greetings Fellow Traveler") outlining in detail his own calculations regarding how the proposed policy actually hurt employees. Dutton subsequently sent a new e-mail message to Markwitz indicating that Leinweber's e-mail had made him realize that the proposed vacation plan was "not so great."

Markwitz responded by sending a memorandum to Leinweber in which he stated that he was "saddened and disappointed" by Leinweber's e-mail, which was "inappropriate and intentionally provocative" and "beneath someone as talented and intelligent as you are." Markwitz also cited a provision in the company's employment manual that makes "failure to treat others with courtesy and respect" an offense justifying immediate discharge. Markwitz then directed Leinweber to submit a written statement to him indicating why the e-mail message was inappropriate, how an "e-mail message like this hurts the company," and how the matter should have been handled. Markwitz indicated that if Leinweber's response was acceptable, Leinweber would be expected to e-mail it to all employees who had received the original message; if Leinweber's response was inappropriate in tone or if he refused to respond, Leinweber would be immediately terminated.

Leinweber refused to draft the memorandum and was terminated, according to Markwitz's official letter of discharge, for "failure to treat others with courtesy and respect" and for "failure to follow instructions or to perform assigned work." Following Leinweber's termination, Markwitz sent an e-mail message to all employees regarding the proposed vacation policy, "Larry's memo," and the proper way to address grievances. Markwitz emphasized that the right way to handle a grievance or comment is to discuss it with management, not by writing "long or provocative" e-mail messages that take up everyone's time and "unnecessarily cost our company time and money."

Leinweber filed unfair labor practice charges alleging that he was terminated for engaging in concerted, protected activity in violation of Section 8(a)(1) of the NLRA. The Board adopted the ALJ's decision that Leinweber's e-mail message was concerted, protected activity and that his termination violated the Act. Section 7 of the Act permits "employees" to engage in "concerted activities for the purpose of collective bargaining or *other mutual aid or protection*,"¹⁶ and does not limit its definition of "employee" to union workers.¹⁷ Once the activity is determined to be concerted, a violation of Section 8(a)(1) will be found if: (1) the employer knew of the concerted nature, (2) the concerted activity was protected by the NLRA, and (3) the employee's protected, concerted activity motivated the adverse employment action at issue (that is, discharge).¹⁸

In holding that this was a case of concerted activity for the purpose of mutual aid or protection, the Board adopted the ALJ's conclusion that the object of inducing group action need not be express, that the e-mail in question elicited support from employees, and that it went beyond "mere talk," which is generally not protected. The activity was concerted because, in communicating with his fellow employees, Leinweber was attempting to correct any misimpressions about the vacation proposal, such as Dutton's, and to arouse support for his own decision to oppose the proposal. The ALJ also acknowledged that once Dutton had sent his e-mail, he was, to the employer's knowledge, converting Leinweber's message into concerted activity. However, the ALJ found it unnecessary to rely on such a theory, because

Leinweber's sending the e-mail message to the other employees was, in and of itself, concerted activity.

The ALJ next addressed the issue of whether Leinweber's concerted action became unprotected because it was so "opprobrious" or of such serious character to render the employee unfit for further service. Noting that the concerted activity must go beyond unpleasantness to behavior that is truly insubordinate or disruptive of the work process, and recognizing that protected behavior has included calling supervisors "a-holes," describing management as "despotic," "hypocritical," and "tyrannical," and calling the chief executive officer a "cheap son of a bitch," the ALJ found that Leinweber's conduct was not so egregious as to remove him from the protections of the Act.

The ALJ also rejected the employer's argument that Leinweber's conduct was unprotected because he "took over" the e-mail system, noting that Markwitz had failed to cite this as a reason for the discharge in either the memorandum in which he objected to Leinweber's e-mail message or the formal letter of discharge. Moreover, Markwitz admitted at the hearing that use of the e-mail system was not a predominant factor in the discharge; instead, it was the tone of the message. The ALJ also noted that the employer had conceded at the hearing that employees were allowed to post "simple" e-mails to one another, make personal telephone calls, and otherwise spend some working time pursuing nonwork pursuits. In the ALJ's view, Leinweber's message, though on the long side and involving mathematical calculations, could not have taken the recipients more than a few minutes to digest.

The ALJ distinguished the case from that of *Washington Adventist Hospital*, 292 NLRB 95 (1988), where an employee used the hospital's e-mail system to break into and supplant messages being sent between approximately 100 computers, thus interrupting transmissions regarding the care of patients in the acute care hospital and confusing employees who did not know how to delete such messages, thereby requiring the assistance of other employees to eliminate the disruption. Instead, the ALJ concluded that Leinweber's actions were more like employees leaving, after hours, pamphlets on the desks of employees for brief review the next morning, as in the case of *American Hospital Association*, 230 NLRB 54, 56 (1977).

Employer Restrictions on Employee Electronic Communications and the NLRA

The question arises as to what kinds of rules employers can impose regarding the company e-mail system without running afoul of the NLRB's traditional rules governing employee communications or without committing an unfair labor practice. The Board will no doubt look to its traditional presumptions regarding solicitation and distribution to answer these questions.

Generally, oral solicitation or communication is allowed in working and nonworking areas during nonworking times, and may be prohibited by the employer only during working time.¹⁹ However, the Board normally allows an employer to forbid the distribution of literature during working time and in working areas at all times.²⁰ This is because the latter practice can create litter and interfere with production whether or not it occurs during working time.

Although employees tend to view e-mail as transitory, like a phone call or face-to-face oral solicitation, it arguably is more like traditional literature distribution. It uses employer resources, including hardware, computer time, and server space. Many systems are set up to automatically make backup copies of e-mail messages. Heavy use of the e-mail system for union and other collective action purposes can slow down the entire system and strain limited computer storage space, that is, it litters the system.

Moreover, the Board has stated that an employer cannot permit groups or individuals to solicit employees or distribute communications for various nonwork purposes via electronic mail, while banning solicitation and distribution by employees for union or other concerted, protected activities. Such selective enforcement has been found to violate Section 8(a)(1) of the Act. In the case of *E.I. du Pont de Nemours & Co.*, 311 NLRB 893 (1993), e-mail was used extensively at the employer's large facility to communicate with hundreds of terminals. The messages that were sent by employees were not limited to business-related topics and included poems, notices, and discourses on drugs, morality, philosophy, life, and religion. However, the employer prohibited any employee from using e-mail to distribute any union literature or notice. The Board found that the employer's policy unlawfully discriminated against employees in violation of Section 8(a)(1).

The Board did not reach the issue of whether a company could ban union e-mail communications if it had a nondiscriminatory policy of prohibiting *all* e-mail communications unrelated to the company's business. However, such a nondiscriminatory prohibition would presumably be lawful given the Board's traditional rules concerning distribution and solicitation, and given the Board's specific modification of the remedial order, limiting it to prohibiting discriminatory enforcement of its policy only. Absent further guidance from the Board, employers that want to prohibit union-related use of the company e-mail system should also ban personal messages for all employees. Otherwise, the *du Pont* case indicates that the employer would be committing an unfair labor practice by interfering with an employee's Section 7 rights. Likewise, implementation of, or strict enforcement of, a no-solicitation/no-distribution e-mail rule during a union organizational drive would also invalidate such a policy.

In the case of company bulletin boards, the Board has recognized—in *Honeywell, Inc.*, 262 NLRB 1402 (1982), and *Container Corp. of America*, 244 NLRB 318 (1979) that the Act does not grant employees a statutory right to have or use an employer's bulletin board. However, the Board has determined that if an employer allows general-purpose use of a company bulletin board, then employees have a right to place union or protected, concerted materials on the bulletin board. The same would hold true for electronic bulletin boards on company e-mail systems. Thus, where the employer allows its employees to post personal, nonbusiness messages on its electronic bulletin board, it would be committing an unfair labor practice by prohibiting the posting of protected, concerted, or union-related messages.

The Board and the courts have also made a distinction between the rules applicable to employees and the rules applicable to nonemployees, including union organizers. In *NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956), the Supreme Court held that the employer may prohibit the distribution of union literature on its property if reasonable efforts through other

available channels of communication exist that will enable it to reach the employees and the employer does not discriminate against the union by allowing distribution of items by other nonemployees with no business purpose. While the Board has not ruled on the subject, it would appear that the underlying principles of *Babcock & Wilcox* can be applied to transmission and receipt of e-mail communications between employees and nonemployees, including union organizers, so long as the prohibition is applied in a nondiscriminatory manner. For example, an employer that allowed its employees to receive outside online solicitations from charitable organizations, such as the Girl Scouts, but prohibited employees from receiving solicitations from union or labor-related organizations, would be committing an unfair labor practice.

Protecting the Workplace from Cyberspace Organizing and Electronic Concerted Activity

As the above discussion indicates, the threat of union organizing and other concerted actions by employees mandates that employers develop strictly enforced policies governing the use of information technology and electronic communications. Aside from the legal issues related to the protection of company records, proprietary interests, privacy rights, and so on, which are beyond the scope of this column, the rights guaranteed to employees by the NLRA to organize and engage in other concerted activity dictate that employers develop policies that prohibit employees from using the employer's Internet and e-mail systems for personal, nonbusiness communications. Moreover, the employer must diligently enforce this policy in a nondiscriminatory manner. Such a policy should include the following:

Scope—the policy should clearly express what systems it covers, for example, e-mail, Internet/World Wide Web, Intranet, and voice mail.

Ownership of Messages—that everything related to the employer's electronic communications systems, including messages on them, belongs to the Company.

Business Use of Systems—that an electronic communications/information technology systems belong to the employer and may be used for business purposes only. Nonemployees are prohibited from using the employer's electronic systems for nonbusiness purposes.

No Privacy—that employees have no expectation of privacy in the use of the systems, or in the communications, and that the employer reserves the right to monitor, retrieve, read, and disclose the electronic communications at any time.

Prohibited Activities—using electronic systems for nonbusiness purposes, such as soliciting other employees, as well as other prohibited actions such as transmitting trade secrets, proprietary information, or cyberporn.

The Consequences of Violating the Policy—the specific disciplinary actions to be imposed.

Strict enforcement of an electronic communications policy, including the prohibition against personal use, may be costly in terms of time and money. However, an employer with a serious desire to prohibit the use of its electronic systems for union or other concerted activities has

little choice. This is because once an employer allows its systems to be used for personal reasons, it will not be able to prohibit union-related or other concerted communications without committing an unfair labor practice.

Conclusion

The *Timekeeping Systems* case has helped make employers more aware of the ways in which traditional labor laws apply to new electronic media in the workplace. The case also serves as a reminder to employers that they must develop strict policies to control unauthorized use of electronic systems. Because employee use of the company e-mail and Internet system is bound to increase in the future, companies should explore these issues and formulate policies before an incident arises. Absent adequate controls, one disgruntled employee—who either is already a union member or who seeks to organize a union or at least encourage collective action—can quickly gain hundreds of supporters by sending a single message over the company e-mail system. The NLRB is likely to apply its traditional rules regarding distribution and solicitation to this new medium, and an employer that has no policy or discriminatorily enforces its policy will be placed at a severe disadvantage.
