

NOTE

Business-only E-mail Policies in the Labor Organizing Context: It Is Time to Recognize Employee *and* Employer Rights

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I. INTRODUCTION

Technological advances are expanding the medium and increasing the speed of communication. Society is adapting and so must the law. The Uniform Commercial Code (UCC) reflects these changes in many aspects,

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including a section decreasing the time periods that banks are allowed to dishonor checks.¹ In the United States, Congress has enacted new laws that protect privacy of information in order to control the information that passes in the growing commercial market.² E-mail is now admissible as proof for employment discrimination³ and defamation⁴ cases. Congress adapted copyright laws to include information exchanged via e-mail and the Internet.⁵ It only seems natural that labor law will acclimate to cyberspace along with the rest of society.

The effects of cyberspace in labor law are the most prevalent with union organizing activity. The use of an employer's e-mail system is a new, unique, and efficient tool that could enable labor organizers to reach a larger number of employees in a shorter amount of time. With the use of e-mail and a list of e-mail addresses, a union officer could contact thousands of employees with one letter in a matter of seconds. Strikes could be announced at a moment's notice. Meetings could be scheduled, rescheduled, or even occur over e-mail. The organizers no longer have to leave their own offices to reach the workers. Access to employer e-mail systems would lift a boundary—that is, if the employees are granted use of the employer's e-mail system for protected concerted organizing activity.

The employees have a major hurdle before they can freely use company e-mail—it is the *employer's* e-mail system. The employer pays for the computers, programs, technical support staff, and the employee's time while the employee uses the system. So, in conjunction with organizing power, cyberspace extends the boundaries of employer property rights. Although it is crucial to allow employees the ability to organize, employer rights may not be unreasonably infringed. There must be a balance of employer's property right interests with the employee's rights to organize.

Where does the National Labor Relations Act (NLRA) fall on the issue of whether e-mail is the employer's tool or the employee's tool? The National Labor Relations Board (NLRB or Board) has not had the opportunity to decide this issue. Hence, employers and employees are left wondering what uses of e-mail are permissible in the labor context. This is a very prevalent concern. Not only is e-mail becoming a common tool in the workplace, but it is also a very common tool in the organizing context.

1. See U.C.C. §§ 4-301, 4-302 (midnight deadline rules).
2. See, e.g., Fair Credit Reporting Act, 15 U.S.C. § 1681 (1994).
3. See, e.g., *Strauss v. Microsoft, Corp.*, 814 F. Supp. 1186 (S.D.N.Y. 1993).
4. See, e.g., *Blakey v. Continental Airlines, Inc.*, 730 A.2d 854 (N.J. Sup. Ct. 1999).
5. See, e.g., *Religious Tech. Ctr. v. Netcom On-line [sic] Comm. Servs., Inc.*, 923 F. Supp. 1231 (N.D. Cal. 1995).

There are Web sites covering the Internet that link viewers to union literature, union official applications, and a list of union Web pages.⁶

This Note focuses on the next step the NLRB must take to bring labor law up to speed with technology. With guidance from the NLRA and previous NLRB and court decisions, this Note demonstrates that employer property interests in e-mail systems may not be ignored when dealing with e-mail in the labor organizing context. Due to the fact that the NLRB consistently has ruled that forms of employee written communication, labeled “distribution” in the organizing context, may be nondiscriminatorily limited with a showing of legitimate business interests, employees’ personal use of company e-mail systems may be prohibited. This is not a pro-employer or pro-employee position, just an efficient and effective solution. Both the employer and employee must sacrifice with a business-only e-mail policy but less rights overall will be infringed.

II. BACKGROUND

To understand the issues that arise when unions and employees have unlimited access to employer e-mail systems, it is important to grasp the purpose and substance of the NLRA. The NLRA’s dominant purpose is to foster the “right of employees to organize for mutual aid without employer interference.”⁷ This purpose is achieved through setting out the rights of employees and consequences for those who do not follow the NLRA. The pertinent sections of the NLRA, when dealing with rights to employer provided mediums of communication, are (1) 29 U.S.C. § 157, which sets out employee rights:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title[;]⁸

(2) 29 U.S.C § 158(a)(1), which states “[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the

6. See, e.g., *Geo* <*cites*> (visited Mar. 19, 2000) <<http://www.geocities.com/WallStreet/3088/labor.htm>>; UAW, *Why UAW* (visited Jan. 26, 2000) <<http://uaw.org/faqs/faqs.html>>; International Brotherhood of Teamsters, *Organize Your Future* (visited Jan. 26, 2000) <http://www.teamster.org/organizing_why.html>; AFL-CIO, *Organizing Institute* (visited Jan. 26, 2000) <<http://www.aflcio.org/orginst/index.htm>>.

7. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945).

8. 29 U.S.C. § 157 (1994).

exercise of the rights guaranteed in section 157 of this title”;⁹ and (3) 29 U.S.C. § 158(a)(3), which explains “[i]t shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization”¹⁰ The NLRB then applies the NLRA general language according to specific facts, which allows a certain amount of flexibility within the statutory limitations. If the NLRB decides that the employer’s practice does constitute an unfair labor practice, it institutes remedies such as back pay, reinstatement of work for discharged employees, and rescission of the unlawful rule.¹¹

An employee’s use of an employer’s e-mail system comes under issue in the NLRA because, due to the nature of e-mail and cyberspace generally, it is not clear exactly whether communicating over e-mail is considered a protected “concerted activity.” A concerted activity includes both traditional union organizing efforts but also any worker activity that is “in some way . . . in concert with the efforts of at least one other worker or . . . based on a right provided by a collectively bargained agreement.”¹² In the past, the Board considered union organizing communication a protected concerted activity based on a distinction of whether the union communication is considered solicitation or distribution. However, the NLRB has not decided which category e-mail fits and is therefore a pivotal issue. If the Board decides that cyberspace belongs to the employees, the Board allows union organizing efforts to trump employer rights in company e-mail systems, and employer interests are completely ignored. Therefore, the NLRB must decide that e-mail is distribution under the labor standards, and as a result the employer may have a business-only policy for company e-mail systems.

III. SOLICITATION VS. DISTRIBUTION: APPLICATION TO CYBERSPACE

Solicitation “normally involves oral communications between workers regarding organizing.”¹³ This form of communication is especially protected due the nature of face-to-face communication. Hence, “a rule against solicitation is invalid as to union solicitation on the employer’s

9. *Id.* § 158(a)(1) (1994).

10. *Id.* § 158(a)(3).

11. *See, e.g., Republic Aviation Corp.*, 324 U.S. 793 (example of the Board awarding back pay, reinstatement of jobs, and rescission of the employer’s no-solicitation rule).

12. ALVIN L. GOLDMAN, *LABOR AND EMPLOYMENT LAW IN THE UNITED STATES* 168 (1996) (footnote omitted).

13. Daniel V. Yager & Thomas S. Threlkeld, *Workplace Cyber-Space—Going Where No Board Has Gone Before*, at 9 (visited Sept. 11, 1999) <<http://www.nlrwatch.com>>.

premises during employee's own time" and is therefore a section 8(a)(3) violation.¹⁴ The principal behind this presumption is to stop the employer from controlling union activity by denying access to company property. An example of the NLRB ruling that a nondiscriminatory, no-solicitation rule is invalid is *Republic Aviation Corp.*,¹⁵ where an employee was wearing a union steward button while passing out union cards on employer's property during nonworking hours.¹⁶ The employer discharged the employee due to a no-solicitation rule prohibiting any and all solicitation in the plant.¹⁷ Even though the employer did not apply the rule in a manner as to discriminate solely against union supporters, the Board still ruled that this was an "unreasonable impediment to self-organization" and was unlawful given the absence of special circumstances.¹⁸

If the court considers that organizing activity is solicitation, there are still some limits. The employer can enforce a rule prohibiting union solicitation during working hours as long as the rule is not adopted for the purpose of discrimination against union activity.¹⁹ After all, "[w]orking time is for work,"²⁰ and the employer's work-time productivity is not expected to suffer because employees are not fulfilling their job responsibilities due to union organizing activity. Basically, the NLRB will permit a no-solicitation rule if limited to working time and not targeted at union-related activity.

Distribution, on the other hand, "[normally] involves the circulation of written union literature by [an] employee."²¹ An employer has more rights when employee communication falls into this category because, due to the nature of the communication, it can be handed out but read at another time. There is, however, a distinction between nonemployee and employee distribution of union literature.

Nonemployee distribution is not as difficult for the employer to prohibit.

[The] employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employers' notice or

14. *Republic Aviation Corp.*, 324 U.S. at 805.

15. *Id.*

16. *See id.* at 795.

17. *See id.*

18. *Republic Aviation*, 51 N.L.R.B. 1186, 1187 (1943).

19. *See Peyton Packing Co.*, 49 N.L.R.B. 828, 843 (1943).

20. *Id.*

21. Yager & Threlkeld, *supra* note 13, at 9.

order does not discriminate against the union by allowing other distribution.²²

Due to the fact that “[o]rganization rights are granted to workers by the same authority”—the federal government, which preserves property rights of the employers—accommodation “between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other.”²³ An example of this concept is *NLRB v. Babcock & Wilcox Co.*,²⁴ where nonemployee union organizers distributed union literature in employer parking lots. The Board looked to the location of the plant and living quarters of the employees and decided that since the employee had available other usual methods to get the message out that the employees were not “beyond reach of reasonable union efforts to communicate with them.”²⁵ Therefore, the employer validly prohibited the nonemployer organizers from its parking lots.

Employee distribution is more of an obstacle for the employer than nonemployee distribution because “no restriction may be placed on the employees’ rights to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline.”²⁶ A good example of this policy is in *Stoddard-Quirk Manufacturing Co.*,²⁷ where the employer discharged an employee for distributing literature in company parking lots in violation of the employer’s rule prohibiting unauthorized distribution of literature on company premises. The Board examined the employer’s concerns, such as littering of the premises (which is a legitimate concern), but held that—based on the employee’s interest in distributing the literature and the nature of distribution—nonwork areas must be made available for distribution regardless of other available methods of communication.²⁸

As a result of the differences between solicitation and distribution, NLRB decisions on the matter of whether e-mail is distribution or solicitation are fact sensitive. Although most decisions rely on the oral/written distinction, the Board must look to the circumstances surrounding the communication before deciding the limits an employer may place upon its employees. Therefore, it is within the Board’s discretion as to how the solicitation/distribution distinction will be applied in order to comply with the purposes of the NLRA.

22. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

23. *Id.*

24. *Id.*

25. *Id.* at 113.

26. *Id.* at 113.

27. 138 N.L.R.B. 615 (1962).

28. *See id.*

Only one case discusses the use of the employer's e-mail system with labor organization, *E.I. Du Pont de Nemours & Co.*²⁹ In this case, the Board found it unlawful for a company to ban distribution of union literature over e-mail when the company allowed other nonwork related e-mails under the policy.³⁰ The Board was not too helpful here because basically it reaffirmed that a medium of communication cannot be restricted discriminatorily against union activity. The case did not address nondiscriminatory, no-distribution policies nor did it discuss the conflict of e-mail as solicitation or distribution. Thus, the Board's decision does not give the unions or employers much to rely upon when making policies or using employer e-mail property.

Employers and employees are left with the *Report of the General Counsel (Report)*.³¹ The *Report* discusses "whether an [e]mployer's prohibition of all non-business [sic] use of electronic mail . . . including employees' messages protected by [s]ection 7 of the [NLRA], was overbroad and facially unlawful."³² The *Report* specifically addresses the issue of solicitation versus distribution.

The General Counsel adheres to the original principles of distribution and solicitation rules in the labor context and concludes that the distinction between solicitation and distribution "must be defined based on the nature of the employees' interests and purposes in addition to interest of the employer."³³ Standards also state that:

Where the communication can reasonably be expected to occasion a spontaneous response or initiate reciprocal conversation, it is solicitation; where the communication is one-sided and the purpose of the communication is achieved so long as it is received, it is distribution.³⁴

The *Report* concludes that employee e-mail regarding protected concerted activity is solicitation in some cases.³⁵ In those where the e-mail meets the definition of distribution, the General Counsel admits that because distributed literature may be put down and read or reread later, the Board weighs employer interests more heavily with distribution. The *Report* also

29. *E. I. Du Pont de Nemours & Co.*, 311 N.L.R.B. 893, 919 (1993) (stating that nonwork related e-mails were materials that had "little or no relevance to the Company's business").

30. *See id.* at 920.

31. *See* Fred Feinstein, NLRB Acting General Counsel Fred Feinstein's Report on Cases Decided from March 31, 1996 to June 30, 1998, 172 Daily Lab. Rep. (BNA) at E-4 (Sept. 4, 1998). This is the *Report* of the General Counsel.

32. *Id.*

33. *Id.*

34. *Id.*

35. *See id.*

states that sent messages could be a disruption or affect production through littering of cyberspace. But since a blanket, nonbusiness purpose e-mail prohibition policy would curtail the solicitation messages as well, such a policy is overbroad and facially unlawful.³⁶

Although the *Report* addresses the solicitation/distribution issue head on, it does not leave the Board with much relief in its decision due to the evidentiary holes in the *Report*. The General Counsel interprets e-mail to be solicitation in *some* instances and supports this finding by citing to authorities that do not analyze e-mail from a labor perspective but from the perspective of judges communicating during court and agencies discussing the Electronic Communications Privacy Act of 1986.³⁷ The NLRB is a separate administrative body that deals solely with labor issues. Thus, the Board is the authority as to whether under the NLRA business-only e-mail policies are unlawful, not courts nor house reports dealing with e-mail in other areas. Hence, although the Board may take into consideration other views, the NLRB ultimately must decide how to view e-mail from a *labor* perspective in order to make labor organizing a less complicated activity.

In the past, the NLRB has dealt with legal issues differently due to the labor consequences. For example, in the property rights context, the NLRB ruled that employees do have certain rights in equipment in which the employer clearly has complete ownership rights.³⁸ The Board is able to restrict an employer from using its own bulletin board to announce a local nonbusiness purpose meeting if the employer does not give the employee rights in the bulletin board to announce a union meeting.³⁹ Other areas of the law do not tolerate this type of a restriction on property rights. It would be an outrage if courts *required* a private home owner, once he puts a sign in his lawn advertising a candidate, to permit other candidates with platforms adverse to the home owner's interests to advertise on the owner's lawn as well. Nonetheless, the NLRB controls the private employer's property this way. The NLRB also curbs free speech in the labor context under section 8(c) of the NLRA.⁴⁰ Although employer and employee free

36. *See id.*

37. *See id.* at E-5 (citations omitted). "E-mail transmissions are quickly becoming a substitute for telephonic and printed communications, as well as a substitute for direct oral communications." "E-mail 'is interactive in nature and can involve virtually instantaneous 'conversations' more like a telephone call than mail.'"

38. *See, e.g.,* Guardian Indus. Corp. v. NLRB, 49 F.3d 317, 318 (7th Cir. 1995).

39. *See id.*

40. 29 U.S.C. § 158(c) (1994) (stating that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit").

speech is still protected under the Act, if an employer threatens reprisal or force or promises benefits if employees vote a certain way in union elections, then the employer committed an unfair labor practice.⁴¹ Clearly, the Board is able to interpret everyday activities and rights differently for the labor context, and, therefore, decision-making bodies, other than the NLRB, have only a persuasive effect on labor decisions.

Another problem with the General Counsel's opinion is, if followed, it would bog down the Board with litigation over whether a specific e-mail had the qualities of a conversation or writing. In order for the Board to achieve the purpose of the NLRA, it must establish strict rules so that employers and employees are not left wondering if organizing e-mails are "oral" or "written" and therefore illegal to prohibit or not.

The *Report* at least recognizes that there are still unresolved issues: (1) "whether there is an [e]-mail equivalent to 'distribution;'" (2) "what the precise definition of 'working time' is for employees who work on computers at flexible times and places;" and (3) "whether there could be reasonable rules limiting the use of [e]-mail in order to narrowly address particular problems."⁴² As a result of the discrepancies in the *Report* and the issues that have not been addressed, employers must particularly watch their e-mail policies. An *Oregon Employment Law Letter* warns employers to at least make sure that enforcement of e-mail policies is "uniform and consistent."⁴³ Since the Board has made no decision as to whether organizing over e-mail constitutes solicitation or distribution, the employers are left with only vague advisory articles.⁴⁴

IV. THE PROBLEMS WITH E-MAIL AS SOLICITATION

If the Board decides that e-mail is solicitation, and therefore may be used for union activities during nonworking times in working and nonworking areas, numerous problems will ensue. Although such a decision would resolve the solicitation/distribution issue, it would raise many more issues equally troublesome. As a result, the NLRB decision would not promote the purpose of the NLRA—to facilitate protected concerted activities related to employee organization—but cause immense litigation and confusion.

First, facilitating the no-work-time e-mail rule would cause significant monitoring issues. The employer would not know whether

41. See GOLDMAN, *supra* note 12, at 169-171.

42. Feinstein, *supra* note 31.

43. Perkins Coie, *Business-only E-mail Policy Under Attack by NLRB*, 5 No. 10 Or. Employment L. Letter 3 (June 1999).

44. See *id.*

employee is abusing the system unless it monitored the employee's e-mail. The Electronic Communications Privacy Act of 1986⁴⁵ addresses the issue of monitoring e-mails in the private workplace and prohibits interception of electronic communications both during the transmission and from electronic storage. There are some exceptions that the employer clearly fits into which allow such monitoring,⁴⁶ but this just opens up more areas for confusion and litigation.

In addition to the problems of complying with monitoring statutes, the employer would face more problems with the NLRA. The employer monitoring may be viewed as surveillance of employee activity, which is a section 8(a)(1) violation when it interferes with employee section 7 rights. Previously, the Board has ruled against the employer monitoring. For example, when a company security officer questioned employees about their union activities, the court ruled that this monitoring implied intrusive and illegal surveillance under the NLRA.⁴⁷ The Board also ruled that an employer engaged in illegal surveillance when the employer had union agents followed as the agent talked to the employees.⁴⁸ Clearly, the employer delves into a complicated and risky area when it monitors its employees. Again, there are no cases to support whether or not monitoring e-mail is illegal surveillance. Many of the past cases occurred in response to monitoring violence during such activities as picketing.⁴⁹ E-mail in the labor organizing setting is a new issue, and the Board may decide to extend its surveillance limits to prohibit e-mail observation as well. Further supporting this possibility is the fact that the Board primarily allows surveillance of protected concerted activities in cases when an employer has a "reasonable, objective justification" for surveillance, such as security reasons.⁵⁰ It is not a security interest but a property interest that the employer would be protecting if the employer monitored employee e-mails for illegal union activity. E-mail surveillance would become yet another litigation magnet.

Surveillance is especially an issue with e-mail because e-mail and Internet use cannot be easily monitored without much intrusion. Normally,

45. 18 U.S.C. § 2510 (1994 & Supp. IV 1998).

46. *See, e.g.*, 18 U.S.C. §§ 2510(5)(a) (ordinary course of business exception), 2701(c)(1) (storage access exception), 2511(2)(d), 2701, 2702(b)(3) (Supp. IV 1998) (consent exception). Due to the labor perspective and concentration on the NLRA taken in this Note, these provisions are not explored further.

47. *See* NLRB v. Security Plating Co., 356 F.2d 725, 728 (9th Cir. 1966).

48. *See* West Lawrence Care Ctr. Inc., 308 N.L.R.B. 1101, 1101 (1992).

49. *See, e.g.*, NLRB v. Colonial Haven Nursing Home, Inc., 542 F.2d 691, 699 (7th Cir. 1976); Waco, 273 N.L.R.B. 746 (1984).

50. National Steel & Shipbuilding Co. v. NLRB, 156 F.3d 1268, 1271 (D.C. Cir. 1998).

the employer could just walk around the company's premises to see if there is a misuse of employer's property. It is easy to tell if an employee is announcing a union meeting during work hours just by standing in the work area. With e-mail, an employer must buy and install monitoring programs and employ and train staff to perform the monitoring. This list of negative consequences resulting from a Board ruling that e-mail is solicitation in the labor context is not exhaustive.

Even if employees complied with the solicitation limits on e-mail use and only sent e-mail during nonworking time, an employee could not control when e-mail is received. It would be unfair for the employer to hold the employee responsible for receiving messages during work hours. At the same time, it would be expensive and intrusive for the employer to set up a monitoring system that sifts through e-mails to determine whether the subject is personal (such as union related) or business related and then only permit the business-related e-mails to be transmitted to the individual employee accounts. This problem is complicated by employees with flexible work schedules. As the General Counsel points out in the *Report*, working time is difficult to define when employees are able to work from home or at different periods during the day.⁵¹ The employer would never know in the flexible work time situation when it is illegal for an employer to curtail union organizational communication.

Assuming that the employees diligently monitored their e-mail and did not open any union-related e-mail during working time, problems would still occur. In many systems, a message appears on the screen indicating who sent the e-mail and the subject of the message. It would be alarming and disruptive for a subject line to comment across the screen with "STRIKE!" These subject lines could cause chaos in the workplace. Ultimately, if the Board decides that e-mail is solicitation, it would not only open up the floodgates for litigation but also hurt organizing efforts.

V. THE FUTURE: E-MAIL IS DISTRIBUTION

E-mail fits soundly into the category of distribution. Beginning with the obvious, e-mail is communication through writing. Although there are some exceptions to the written/oral distinction,⁵² it is a good basis for the analysis as to whether e-mail is solicitation or distribution. As the General Counsel points out, there are other factors that come into play when a determination must be made as to which category employee communications fits.

51. See Feinstein, *supra* note 31.

52. See, e.g., Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945) (holding that wearing union steward buttons is a form of solicitation).

The General Counsel's *Report* formulates a test of sorts as noted above.⁵³ Using the *Report's* analysis it is clear that e-mail is distribution because it fits the attributes set forth for distribution and does not comply with the solicitation characteristics. Communication over e-mail is clearly one-sided with the purpose to reach the reader, similar to a letter. E-mails may be saved for reading or rereading at another time.⁵⁴ Furthermore, there is no person standing by the recipient of e-mail waiting for an immediate response or action as is true with solicitation. Ironically, even the General Counsel's criteria prove e-mail communications to be distribution.

As a matter of fact, it would shock most to hear that e-mail is the same as speaking to someone. A reader cannot hear the inflection in a person's voice through e-mail nor can the subtleties of speech such as concern, fear, sympathy, or sarcasm be detected. What is originally drafted as a joke, without the actual voice of the writer communicating the words, might come across as a personally offensive commentary over e-mail. Obviously, e-mail does not have the same qualities as oral communication. While some may point to the speed in which information over e-mail may be transferred, time lapse alone is not enough to determine that e-mail is like communicating face-to-face. E-mail soundly fits into the category of distribution and adheres with standards set by the courts, the General Counsel *Report*, and common sense.

VI. BUSINESS-ONLY E-MAIL POLICY

Since e-mail is distribution, employers may limit its use through a business-only e-mail policy. The Board allows these blanket policies with most other mediums of communication as long as the policy does not discriminate against the union. The NLRA "does not command that labor organizations . . . are entitled to use a medium [of communication in the workplace] simply because the employer is using it."⁵⁵ The Board does not overlook the employers' property rights in their physical property and their businesses. The Board has decided many limiting use cases in favor of the employer.

53. See *infra* Part III (determining "[w]here communication can reasonably be expected to occasion a spontaneous response or initiate reciprocal conversation, it is solicitation; where the communication is one-sided and the purpose of the communication is achieved so long as it is received, it is distribution.").

54. See Mark A. Spongardi & Ruth Hill Bro, *Organizing Through Cyberspace: Electronic Communications and the National Labor Relations Act*, 23 EMPLOYEE REL. L.J. 141, 147 (1998) (supporting that most view e-mail as a form of written communication).

55. *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 318 (7th Cir. 1995) (citing *NLRB v. Steelworkers Union*, 357 U.S. 357, 364 (1958)).

For example, in *Union Carbide Corp.*,⁵⁶ the Board decided that the employer's business-only policy is valid as it relates to the use of the telephone as long as the employer does not grant employees the privilege to use the telephones during work time for personal reasons.⁵⁷ *Guardian Industries Corp.* is another example of a valid business-only policy. The Seventh Circuit Court of Appeals held that an employer can restrict the use of a bulletin board from union organizing activities even though employer allowed "swap-and-shop notices." Therefore, even with this leniency in the employer's business-purpose only rule, as long as the employer banned all organizational notices, there was no "disparate treatment" of the unions.⁵⁸ The court further states that "the right of labor organization does not imply that the employer must promote unions by giving them special access to bulletin boards."⁵⁹ If an employer designed its limiting rules to protect its legitimate interests, then the rule is valid—"even where such rules and regulations might have an ancillary effect of discouraging union membership."⁶⁰ Thus, the next step is to prove that the employer has a legitimate business interest for controlling e-mail use.

VII. LEGITIMATE EMPLOYER INTEREST

While employer rights may be pushed aside to allow the sharing of information for employee organization,⁶¹ "the right to distribute is not absolute, but must be accommodated to the circumstances."⁶² Hence, a restrictive, nondiscriminatory e-mail policy is legal if the employer is able to demonstrate that a restriction is "necessary to maintain . . . discipline."⁶³ If the NLRB finds legitimate employer interests to support nondiscriminatory restrictions of bulletin board use, which is much less expensive and takes a small portion of the employer's property, the employer should be able to have a nondiscriminatory business-use only rule for e-mail for the same reasons and more.⁶⁴

56. *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663 (6th Cir. 1983) (holding that the employer in this case discriminatorily applied its business-use only policy and allowed other personal phone calls during work time but not calls in relation to the union).

57. *See id.* at 663.

58. *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 320 (7th Cir. 1995).

59. *Id.* at 318.

60. *Union Carbide Corp.*, 714 F.3d at 664 (citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 701 (1983)).

61. *NLRB v. Babcock & Wilcox Corp.*, 351 U.S. 105, 112 (1956).

62. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532-33 (1992) (citation omitted).

63. *Babcock & Wilson*, 351 U.S. at 110.

64. *See* Frank C. Morris, Jr., *Issues from the Electronic Workplace E-Mail Communications: The Developing Employment Law Nightmare*, SB07 ALI-ABA 335, 346 (1996) (stating "[e]-mail impinges on the rights of employers even more so than

Productivity is a prevalent employer interest that is disrupted with an unlimited e-mail policy. E-mail can reach an employee at any time, including work time. An employer compensates an employee for effectively performing a service to further an employer's business. An employer is not paying an employee to read union messages or any nonwork related messages. "Working time is for work,"⁶⁵ not for organizing meetings of any sort—even for a local sports club. To allow employees unlimited use of the employer's e-mail system invites abuse of the employer/employee relationship to the detriment of the employer's business goals.

The employer's property interests are also important. There should be a balance of employer's property rights and employees organizing rights. To allow an employer's property to be so counterproductive as to cost the company a great loss is not taking into consideration an employer's rights. While it is understandable that the Board wants to keep the lines of communication open for self-organizing, Congress organized the NLRA to keep the employer from discriminating against speech and organizational efforts by "making them more costly than they would be if the employer left the employees to their own devices."⁶⁶ Offering a medium that the employees would otherwise only have access to with tremendous expense on the union's part (setting up all members and possible members on e-mail) does not comply with the purpose of the NLRA. As long as the employer is not discriminating against union activities, it should be able to control the tools it provides for its employees to participate in their jobs.

The Board also decided that preventing litter on the employer's premises is a legitimate interest as well.⁶⁷ While it might not be clear at first, this interest is very pertinent in the e-mail context. Although one cannot see the electronic litter that excessive e-mails cause, it still concerns the employer. The employer has to worry about the disturbances and the extra hours it takes to clean up this clutter. E-mail storage is not unlimited and when e-mail messages overload electronic mailboxes, the e-mail system does not work efficiently. If company e-mail is used for all purposes, including union organizing, the employer is unable to predict the support needs for the system. Wasted time and energy is then sapped into

distribution, because [e]-mail uses employer's hardware, time[,] and resources and constantly interferes with work functions").

65. *Peyton Packing Co.*, 49 N.L.R.B. 828, 843 (1943).

66. *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 318 (7th Cir. 1995).

67. *See United Parcel Serv.*, 327 N.L.R.B. No. 65 (Dec. 4, 1998) (stating "the employer has a legitimate interest in keeping [a work area] free from litter"); *Commercial Controls Corp.*, 118 N.L.R.B. 1344, 1353 (1957) (stating "an employer has a legitimate interest in keeping his plant clean and orderly").

computer support staff, which could be limited if the system was kept clean. Also, outside e-mails can carry viruses that can virtually wipe out entire computer systems. The General Counsel agrees that e-mailing does take up cyberspace and “has the potential to affect the performance of an employer’s computer network.”⁶⁸ Electronic litter takes a great deal of time and money from the employer.

Clearly, the employer has substantial legitimate business interests that should convince the NLRB that a nondiscriminatory, business-only e-mail policy is valid. Without such a policy the employer is giving away its own property to increase the union organizing efforts and decrease company productivity. This is not the purpose of the NLRA.

VIII. E-MAIL POLICY MUST BE STRICT

If an employer chooses to have a business-only e-mail policy, it must be nondiscriminatory. This entails a hard line prohibition to any e-mail other than business e-mails. Under no circumstances may the employer permit any e-mail to be sent by an employee concerning a personal topic. To do this would completely disrupt the property and productivity protection the NLRA affords to the employer.

Despite the appearances of this strict rule, it is useful for the employee and the employer. Obviously, the employer benefits because the employer is assured employees will not abuse the company e-mail system thereby decreasing property. The less obvious result is, however, that the employer must be willing to forgo personal use of the company e-mail system as well. If the employer chooses to limit its employees’ use of e-mail, the employer too must not use e-mail for nonbusiness purposes, which essentially places the employer under the same restrictions as the employee. Therefore, an employer will not make a business-only e-mail policy unless the employer perceives that employee e-mail use issues outweigh the convenience of employer personal use of the company e-mail system. This places yet another check on employers to design e-mail policies that do not discriminate against union organizing activity.

The strictness of the business-only e-mail policy also eases enforcement issues for employers and the NLRB. By not allowing any person to use e-mail for personal matters, the employer is able to set clear guidelines for workers to follow. The Board is also able to clearly adjudicate cases in which employees abuse e-mail policies or company e-mail systems. Once the employer establishes that a business-only e-mail policy is valid under its circumstances, the NLRB may limit its case to

68. Feinstein, *supra* note 31.

analyzing the evidence demonstrating discriminatory use of e-mail or violation of the employer's policy. Therefore, these policies will be administered without tremendous litigation. In short, the hard-line approach of a business-only e-mail policy will be beneficial.

IX. CONCLUSION

Labor organizing in cyberspace is not a subject that the NLRB ignored. A case has yet to come before the Board. When one does, the Board must be prepared. Its decision in this context will affect not only the manner in which employees may organize, but also the way employers may run their businesses and control their property. Due to the competing important interests of the employee's right to organize and the employer's property rights and rights to conduct a profitable business, it is necessary for the NLRB to rule that e-mail in the labor context is distribution. Therefore, use of company e-mail systems may be limited by a nondiscriminatory, business-only e-mail policy if the employer has legitimate business interests. To ensure that neither group needlessly intrudes upon the other's rights, this ruling is necessary for both the employer and employee.

This Note recommends that the weary employee or employer take heed to the General Counsel *Report* for it is the only authority that directly addresses the solicitation versus distribution issue. It is only one opinion of many, however, and the Board must make a ruling on e-mail use in the labor context. The Board's job is to make decisions according to the NLRA, which traditionally entails recognizing the rights of employers to nondiscriminatorily limit personal written communication from the work area. A case will come before the NLRB soon, and this Note advocates that the Board should decide that e-mail sent on company e-mail systems is distribution. Until this decision is made, this Note can do no more than repeat the warnings given by articles. Employers should: (1) have an e-mail policy supported by legitimate employer interests; (2) make sure the policy does not discriminate; (3) enforce the policy in a consistent, nondiscriminatory manner; and (4) if an employer decides to follow through with a business-only e-mail policy, be prepared to have the policy challenged.