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# The Impact of Employer E-Mail Policies on Employee Rights to Engage in Concerted Activities Protected by the National Labor Relations Act

Christine Neylon O'Brien\*

This article addresses the interrelationship of employee rights to engage in “concerted activities” under Section 7 of the National Labor Relations Act (NLRA) and employer policies on electronic mail (e-mail) use. Should traditional labor law rules regarding solicitation and distribution be applied to e-mail communication? Does a “business-use-only” e-mail policy avoid legal problems? Is such a policy practical in light of the pervasive use of e-mail for general communication? If employers permit selective personal use of the e-mail system, but prohibit discussions related to a union, or to wages, hours and working conditions, such discrimination is legally problematic. Also, employer monitoring of employee e-mail is a form of surveillance that may be prohibited during a union organizational campaign. This article analyzes existing case law interpreting similar issues under the NLRA in light of new issues arising with e-mail in the workplace. The article concludes with recommendations for appropriate resolution of the competing interests of employers, unions, and employees.

## I. Introduction

Pervasive use of e-mail as a means of communication is a fact of life in the new millennium. Communication in the workplace has been transformed by the medium. E-mail is quick, efficient, and has numerous advantages over using the telephone or writing letters.<sup>1</sup> E-mail messaging avoids telephone “tag,” reduces paper

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\* Professor, Business Law, Wallace E. Carroll School of Management, Boston College. The author wishes to express her appreciation to: Professor David P. Twomey and Lecturer Margo E.K. Reder, Wallace E. Carroll School of Management, Boston College, for their research ideas, and to Dominic L. Blue,

and postage use, and provides a system for saving, commenting upon, and editing documents.<sup>2</sup> Employers are grappling with many issues when devising policies to regulate or limit e-mail and Internet use in the workplace. If ever there was a legal minefield for employers, this is it.

There has been much written about employee use of e-mail in the workplace generally. Several issues surrounding workplace e-mail are particularly problematic for employers. Employee privacy issues and employer policies regarding cyber-misconduct by employees seem to be of current concern to those who shape workplace rules.<sup>3</sup> Employers fear incurring liability for employee breaches against others via e-mail.<sup>4</sup> The accessibility of information that may be damaging to the company during the discovery phase of litigation is yet another worry for employers, as is the danger of trade secret disclosure. It is no wonder that employers have implemented policies regulating e-mail use, and that they also monitor employee use with an eye toward preventing abuse of the system.

The right to free speech and the right to be free from unreasonable searches and seizures of information do not provide private sector employees much protection with regards to workplace e-mail messages. This results from the fact that the federal Constitution does not protect private sector employees in the same way that it protects government employees.<sup>5</sup> If a private

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M.B.A./J.D. candidate at Boston College, for his research assistance.

1. See John Araneo, Note, *Pandora's (E-Mail) Box: E-Mail Monitoring in the Workplace*, 14 HOFSTRA LAB. L.J. 339, 340-41 & n.15 (1996) (noting e-mail combines immediacy of telephone with thoroughness of letter).

2. See Christopher S. Miller & Brian D. Poe, *Employment Law Implications in the Control and Monitoring of E-mail Systems*, 6 U. MIAMI BUS. L. REV. 95, 97 (1997).

3. For a broad treatment of employer e-mail issues, see Mark E. Schreiber, *Employer E-Mail and Internet Risks, Policy Guidelines and Investigations*, 85 MASS. L. REV. 74 (2000). See also Patrick Boyd, *Tipping the Balance of Power: Employer Intrusion on Employee Privacy Through Technological Innovation*, 14 ST. JOHN'S J. LEGAL COMMENT. 181, 183 (1999) (noting employee right of privacy limited in private sector workplace); Margo E. K. Reder & Christine Neylon O'Brien, *Corporate Cybersmear: Employers File John Doe Defamation Lawsuits Seeking the Identity of Anonymous Employee Internet Posters*, 8 MICH. TELECOMM. & TECH. L. REV. 2 (2002) (focusing on anonymous speech by company employees who post negative comments about their employers on the Internet).

4. See Gerald L. Maatman, Jr., *Cyberspace Harassment*, 2 EMP. DISCRIM. L. 268 (2000) (discussing employer liability for sexual harassment).

5. See LAWRENCE LESSIG, *CODE & OTHER LAWS OF CYBERSPACE* 164 (1999) (discussing free speech rights in public sector); DAVID P. TWOMEY, *LABOR & EMPLOYMENT LAW* 614 (11th ed. 2001) (discussing searches on company property

sector employer perceives the content of employee e-mail as disloyal, distracting, or counterproductive to the employer's mission, there is little to prevent the employer from exercising its common law right to terminate an at-will employee.<sup>6</sup> The employer may perceive it to be in the best interest of the business to cut loose such negative actors, and absent some statutory or contractual prohibition, the employer is likely to do so. Employers generally own the computer, maintain the network from which e-mail messages are sent and maintain the servers, a limited resource. Unless altered by some overriding public policy concern, the right to regulate matter sent and stored via e-mail flows from the employer's inherent property rights in the physical plant and electronic communication system.<sup>7</sup> In addition, statutory provisions protect the employers' right to supervise its communication systems. The Electronic Communications Privacy Act of 1986 contains exceptions for monitoring workplace communications of both private and public sector employees, based upon consent.<sup>8</sup> These exceptions have been interpreted to permit "ordinary course of business" review of telephone activity, but do not necessarily permit extensive surveillance of personal calls.<sup>9</sup>

In the public sector, the Fourth Amendment to the United States Constitution provides some limited privacy protection to employees, but not such as to defeat the employer's reasonable need to supervise and control within the "operational realities" of a workplace.<sup>10</sup> With respect to e-mail monitoring, prior warning of the surveillance generally suffices to defeat an expectation of

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by private sector employers). See also STUART J. KAPLAN, E-MAIL POLICIES IN THE PUBLIC SECTOR WORKPLACE: BALANCING MANAGEMENT RESPONSIBILITIES WITH EMPLOYEE PRIVACY INTERESTS, 15 LERC Monograph Ser. 103 (1998), at [http://library.ukc.ac.uk/library/info/subjectg/law/wjls\\_km.htm](http://library.ukc.ac.uk/library/info/subjectg/law/wjls_km.htm) (discussing e-mail policies in public sector workplace).

6. The Electronic Communications Privacy Act, 18 U.S.C. §§ 2511(2)(b)-(d) (1986) (amended 1994), contains exceptions for monitoring in the "ordinary course of business" where the employee has consented. "Consent" is usually obtained by employers at the start of employment, and it may be a prerequisite to access to the employer's e-mail system.

7. See generally Frederick D. Rapone, Jr., *This Is Not Your Grandfather's Labor Union—Or Is It? Exercising Section 7 Rights in the Cyberspace Age*, 39 DUQ. L. REV. 657, 667 (2001) (noting employer's property interest in plant not entirely dispositive of the lawfulness of a given plant rule).

8. See 18 U.S.C. § 2511(2)(b)-(d).

9. See *Deal v. Spears*, 980 F.2d 1153, 1158 (8th Cir. 1992) (involving employer's excessive surveillance of employee's personal telephone calls not protected by "consent" and "ordinary course of business" exceptions since monitoring not limited to that necessary for legitimate business reasons).

10. See *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987).

privacy, and thus, even public sector employee e-mail communication is far from protected. Ironically, in this cyber-tech era, New Deal labor laws may provide some shield from unreasonable e-mail-related discipline or discharge in the workplace even where the workplace or employee in question is nonunion.<sup>11</sup>

## II. Concerted Activities: Section 7 of the National Labor Relations Act

This article focuses on the labor law aspect of the legal environment employers face when they implement workplace e-mail policies. Employee Section 7 rights under the National Labor Relations Act (NLRA) clearly impact employer rights to regulate e-mail use.<sup>12</sup> The “netscape” navigated here is that which relates to employee rights to act collectively for mutual aid or protection, sometimes through the vehicle of unionization, and at other times, through discussion with co-worker(s) in the absence of a union.<sup>13</sup> Employees have the right not to be discriminated against by their employer for engaging in discussions relating to wages, hours, and working conditions; assuming that the discussions do not violate a legitimate employer policy regarding use of work time or work equipment. A legitimate policy is defined as one that is nondiscriminatory.<sup>14</sup> For example, an employer may not allow solicitation of Girl Scout cookie sales (assuming that this is a non-

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11. Employees who are not members of a labor organization also have the right to engage in concerted activity. See *Northeastern Univ.*, 235 N.L.R.B. 858, 865 (1978); *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

12. Section 7 provides:

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 such activities. . . .

29 U.S.C. § 157 (1994).

13. See Martin H. Malin & Henry H. Perritt, Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 KAN. L. REV. 1 (2000) (discussing transformation of workplace by electronic communication and implications for union organizing); see generally Elena N. Broder, *(Net)workers' Rights: The NLRA and Employee Electronic Communications*, 105 YALE L.J. 1639, 1642 (1996) (discussing NLRA issues relating to workers in cyberspace, whom the author refers to as (net)workers).

14. Non-work-related activity that is given preference over non-work-related “concerted activity” may give rise to an unfair labor practice complaint against the employer where the employer is deemed to interfere with a protected activity of a “covered” employee. See 29 U.S.C. § 158 (a)(1), (a)(3) (1994). Covered employees are not supervisory, not independent contractors, and not agricultural workers. See 29 U.S.C. § 152(3) (1994).

work activity) during working hours and in working areas, while simultaneously prohibiting the discussion of working conditions, the solicitation of union authorization cards, or the distribution of union literature in non-working areas.<sup>15</sup>

How should the traditional labor law rules regarding solicitation and distribution of union material be applied to e-mail communications? The National Labor Relations Board (NLRB) permits oral solicitation while on work premises, during non-work time.<sup>16</sup> In contrast, distribution of written materials may be restricted to non-work areas by employers.<sup>17</sup> The even stiffer rules for non-employee distribution involve a balancing of whether alternative means of communication exist in order to require an imposition upon the employer's private property rights.<sup>18</sup> The non-employee is viewed as a trespasser, and for the employer who limits other non-business solicitation and/or distribution of literature, there is generally no need to permit strangers to trespass.<sup>19</sup> Once some non-employees, or non-business invitees are allowed on the employer's property for solicitation, there will be scrutiny of the employer's reason for excluding non-employee union representatives.<sup>20</sup> Whether employee use of e-mail to solicit support or distribute information may be restricted under these traditional oral/written and employee/stranger tenets will be considered next, as well as whether restricting employees use of e-mail to business only solves the employer's liability concerns under Section 7 of the NLRA.<sup>21</sup>

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15. See Broder, *supra* note 13, at 1652 n.61 (discussing how Section 7 rights prevent an employer from banning statutorily protected activity on company property if employer allows other non-work uses of its property).

16. Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615, 619 (1962).

17. *Id.* This is at least in part because it may litter the employer's premises and possibly alarm customers in some fashion. See also *Le Tourneau Co.*, 54 N.L.R.B. 1253 (1944), *enforcement denied*, 143 F.2d 67 (5th Cir. 1944), *rev'd*, 324 U.S. 793 (1945) (holding a nondiscriminatory application of a no distribution rule to employees who were distributing union literature in company parking lot an unreasonable impediment to organization, given layout of area surrounding plant).

18. See *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956) (prohibiting non-employee organizers from distributing literature in company parking lots in light of alternative means of communication available); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (finding employer's property interests paramount over non-employee organizer access).

19. See *Babcock*, 351 U.S. at 112. Some exceptions do not exist under state law. In California, for example, shopping center owners are not free to exclude solicitors. See *Bristol Farms, Inc.*, 311 N.L.R.B. 437, 439 (1993) (holding union organizers privileged to solicit under state law and, thus, United States Supreme Court's decision in *Lechmere* not applicable).

20. See Malin & Perritt, *supra* note 13, at 44.

21. While not the subject of this paper, employer policies regarding employee

### III. Business Use Only Policies

Do business use only policies for e-mail communications make sense at work?<sup>22</sup> Most employees use their workplace e-mail systems for both personal and business use. Even though workplace e-mail systems are generally company property, employees expect that their personal communications on these systems will remain private. However, in many cases, they will be mistaken as employers often do monitor employee e-mail (while protecting themselves from claims of invasion of privacy by notifying employees of such monitoring up front).<sup>23</sup> The trail left by e-mail messages, even unsent drafts, that may be recovered, has driven at least one wary firm to prohibit its investment bankers from using e-mail at work.<sup>24</sup> While such a decision certainly eliminates recovery of damaging information during the discovery phase of a lawsuit, it also results in the loss of an efficient tool for communication in the workplace.

Employer policies that limit employee e-mail use to business purposes may solve some problems, including keeping employees

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internet use are a related issue in terms of unfair labor practice scrutiny. Are employees free to surf the web for the cheapest air fares for personal trips, or to find golf courses located near a business junket, while at the same time being prevented from viewing union web sites?

22. See Michael J. McCarthy, *Sympathetic Ear, Your Manager's Policy on Employees' E-Mail May Have a Weak Spot, Labor Board Takes on Rules that Restrict Discussion of Workplace Concerns*, WALL ST. J., Apr. 25, 2000, at A1 (discussing *Pratt & Whitney* case where company was "forced to back off a blanket policy barring use of e-mail for non-business purposes"); Allegra Kirsten Weiner, Note, *Business-Only E-Mail Policies in the Labor Organizing Context: It Is Time to Recognize Employee and Employer Rights*, 52 FED. COMM. L.J. 777 (2000) (arguing for classifying e-mail as distribution rather than solicitation so that employer property rights in its system will be protected).

23. See Tamara Loomis, *E-mail Gets Companies in Litigation Hot Water, Clear Corporate Guidelines Can Prevent Problems; One Employer Orders Abstinence*, NAT'L L.J., Mar. 12, 2001, at B9 (discussing American Management Association report that nearly forty percent of major U.S. companies monitor employee e-mail); News, *Employment Policies: Employers Watching Computer Use for Legal Liability, AMA Survey Finds*, Daily Lab. Rep. (BNA) No. 153, at A-5 (Aug. 9, 2001) [hereinafter *Employers Watching Computer Use*] (discussing survey of U.S. companies where forty-seven percent reported storing and reviewing employees' e-mail messages with legal liability cited as the most important reason for monitoring); Lisa Guernsey, *Management: You've Got Inappropriate E-Mail: Monitoring of Office E-Mail Is Increasing*, N.Y. TIMES, Apr. 5, 2000, at C1 (noting that e-mail servers do not have unlimited space, and thus employers monitor the network with software, partly to avoid abuse and clogging the network with personal messages).

24. Loomis, *supra* note 23; *Employers Watching Computer Use*, *supra* note 23; Guernsey, *supra* note 23.

on task while at work, but such bans on e-mail usage may create other legal problems. A carefully delineated e-mail policy will put employees on notice as to what types of conduct exceed the boundaries of proper business use, and what may be grounds for discipline or discharge. E-mail can be an efficient means of communication but if employees use the system to chat and mangle, to improperly harass or defame others, or to divulge trade secrets, then profits and productivity decline, and employer liability may ensue.<sup>25</sup> Employer e-mail policies should address these problem areas but also be implemented with attention to potential labor law strictures.

#### IV. Labor Law Issues and Workplace E-Mail Policies

##### A. *NLRB Decisions*

The National Labor Relations Board has addressed complaints about employer e-mail policies or employer reactions to employee e-mail use in several cases involving concerted activities. In 1993, the Board upheld an Administrative Law Judge's (ALJ) finding that an employer policy that prohibited employee access to the e-mail system for union purposes, while allowing many other non-work uses of the e-mail system, violated Section 8(a)(1) of the NLRA.<sup>26</sup> The case of *E.I. du Pont de Nemours Co.* also involved Section 8(a)(2) charges.<sup>27</sup> The employer had authorized employee committees, and these company-dominated committees were permitted e-mail access.<sup>28</sup> The case followed traditional non-discrimination labor law theory. An employer policy may not single out a union purpose as being prohibited when other non-work uses are being permitted on the medium of communication.<sup>29</sup> It is important to note that the ALJ's opinion in the *du Pont* case specifically excluded a ruling that the union would be entitled to

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25. One down side of limiting workplace e-mail to business use only is that for some employees, e-mail may be an efficient and less intrusive way than using the telephone to keep tabs on family members.

26. *E.I. du Pont de Nemours Co.*, 311 N.L.R.B. 893, 898 (1993); 29 U.S.C. § 158(a)(1) (1994).

27. *E.I. du Pont*, 311 N.L.R.B. at 909.

28. *Id.* at 895, 918. There were also Section 8(a)(5) issues involved in bypassing the union by dealing directly with the safety and fitness committees regarding working conditions. *Id.* at 918.

29. See Broder, *supra* note 13, at 1652 (noting that the type of "differential treatment often indicates anti-labor animus and constitutes discrimination against labor activity, in violation of the Act.").



use the e-mail system absent the other non-work use of the system.<sup>30</sup> In addition, the ruling focused on employee use versus stranger access to the system.<sup>31</sup> The Board's decision and order in *du Pont* limited "the remedy to discriminatory prohibition of the use of the electronic mail system for distributing union literature and notices."<sup>32</sup>

In 1997, the National Labor Relations Board issued a decision in *Timekeeping Systems, Inc.*, a non-union e-mail case that has far-reaching implications for employer e-mail policies.<sup>33</sup> Computer programmer Lawrence Leinweber was terminated because of his e-mail response to a memo from the company's chief operational officer, Barry Markwitz. Markwitz outlined a new proposed plan for an incentive based bonus system, as well as changes to company vacation policy that were touted as providing employees "more days off each year, compared to our present system."<sup>34</sup> Markwitz

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30. *E.I. du Pont*, 311 N.L.R.B. at 919.

31. *Id.* The ALJ made clear that the finding of discriminatory treatment pursuant to the rule prohibiting employees from using the electronic mail system for distributing union literature and notices was bounded by the circumstances of this case. Administrative Law Judge Marion C. Ladwig wrote:

I do not deem it necessary . . . to rule on whether the Union would otherwise be entitled to use this common means of plant communications for contacting the bargaining unit employees it represents. I do find that having permitted the routine use of the electronic mail by the committees and by the employees to distribute a wide variety of material that has little if any relevance to the Company's business, the company discriminatorily denies employees use of the electronic mail to distribute union literature and notices.

*Id.* The ALJ in *E.I. du Pont* limited the decision to the issues presented, in contrast to *Adtranz*, discussed *infra* notes 50-69 and accompanying text.

For an interesting twist on the usual issues involving e-mail access for organizational purposes, see *Lockheed Martin Skunk Works v. Moreland*, 331 N.L.R.B. No. 104, 2000 NLRB LEXIS 463 (July 24, 2000). There, a bargaining unit employee filed a decertification petition, and the employer did not inhibit the petitioner's use of the e-mail system for campaigning purposes. *Id.* at \*2-3. This was consistent with the employer's "general practice of allowing its employees wide latitude in using its e-mail system for non-business purposes." *Id.* at \*18. Upon request, the union was given access to do a mass mailing. *Id.* at \*6-7. When the union lost the election, they filed objections, complaining that the employer's e-mail policy interfered with free choice. *Id.* at \*1, 14. The NLRB refused to set the election aside, noting that the union apparently preferred traditional methods of communication prior to its one use of the e-mail system. *Id.* at \*16. The employer had allowed the union access via direct solicitation, interoffice mail, posting of union literature on plant bulletin boards, and the one requested mass e-mail. *Id.* at \*17.

32. *E.I. du Pont*, 311 N.L.R.B. at 893 n.4 (citing *Storer Comms.*, 294 N.L.R.B. 1056, 1099 (1989)).

33. 323 N.L.R.B. 244 (1997).

34. *Id.* at 245-46. The president of the company, Barry's father, George Markwitz, was "essentially inactive in the business." *Id.* at 245.

sent his memo by e-mail and told employees that with respect to the incentive plan “reply with your comments or stop by to see me. A response to this is required.”<sup>35</sup> Markwitz indicated that with respect to changes in the vacation policy “[y]our comments are welcome, but not required.”<sup>36</sup>

Leinweber wrote first to Markwitz by an individual e-mail, demonstrating that in fact the vacation proposal would result in the same number of vacation days and that it provided less flexibility.<sup>37</sup> Markwitz did not reply to this e-mail.<sup>38</sup> When another employee, Tom Dutton, sent an e-mail to Markwitz, copied to others, including Leinweber, that indicated that the vacation plan was “GREAT!,” Leinweber then sent an e-mail to all employees that began with: “Greetings Fellow Travelers.”<sup>39</sup> The company memorandum’s promise of extra time off pursuant to the new plan was “proven false” pursuant to Leinweber’s own calculations in his memorandum to all.<sup>40</sup> Thereafter, co-worker Dutton sent a new e-mail indicating that he changed his comment to “Not so Great” on the proposed vacation policy.<sup>41</sup> Markwitz responded by a paper memorandum to Leinweber that the tone of Leinweber’s e-mail memorandum “was inappropriate and intentionally provocative.”<sup>42</sup> He demanded that Lawrence compose a memorandum on a short deadline reflecting as to “why the e-mail message was inappropriate” and “how sending an e-mail message like this hurts the company.”<sup>43</sup> Markwitz wanted this response, after his review and acceptance, to be posted on the e-mail to all. Even if Leinweber complied with this requirement, he would still remain on probation for six months.<sup>44</sup>

When Lawrence Leinweber did not compose the requested memorandum, he was terminated.<sup>45</sup> While the ALJ ruled that Leinweber’s e-mail had “arrogant overtones,” and that he was a “bit of a wise guy” the conduct of the employer nonetheless violated Leinweber’s right to engage in concerted activity under the

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35. *Id.* at 246.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 247.

Act.<sup>46</sup> The ALJ made note of several prior cases where other more egregious statements within employee letters failed to destroy their status as being protected concerted activity under the Act.<sup>47</sup> The NLRB adopted the ALJ's decision, ordering back pay and reinstatement.<sup>48</sup> Leinweber took the money, but refused to return to the company.<sup>49</sup>

The Board has ventured further since the *Timekeeping Systems* decision. In *Adtranz*,<sup>50</sup> a three-member panel of the National Labor Relations Board affirmed the ALJ's rulings, findings, conclusions, and modified order.<sup>51</sup> There, the union lost an election among production and maintenance employees.<sup>52</sup> Objections to the conduct of the election were filed, and the hearing on objections was consolidated with an unfair labor practice hearing.<sup>53</sup> The employer had refused the union's offer of an authorization card check, and insisted upon a NLRB election.<sup>54</sup> Pending the election, the employer held meetings with employees.<sup>55</sup> During the pre-election period, according to the NLRB's General Counsel, the employer informed employees that the employees would have to meet certain "new requirements" in order to qualify for an Employee Incentive Plan.<sup>56</sup> The General Counsel contended that the employer changed the requirements for qualification to retaliate against the employees' union activity.<sup>57</sup> The Board found no violation with respect to the employer's administration of the incentive plan, indicating that respondent employer "acted

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46. *Id.* at 249-50.

47. *Id.* at 249. These included letters referring to supervisors as "a-holes" and to a chief executive officer as a "cheap son of a bitch." *Id.* (citations omitted).

48. *Id.* at 250.

49. *See* McCarthy, *supra* note 22, at A1.

50. 331 N.L.R.B. No. 40, 2000 NLRB LEXIS 334 (May 31, 2000), *enforcement denied on other grounds*, *Adtranz v. N.L.R.B.*, 253 F.3d 19 (D.C. Cir. 2001).

51. The three-member panel included Chairman Truesdale, as well as Members Liebman and Brame. *See id.* at \*6. Brame dissented, finding that Respondent's rule against abusive language did not violate Section 8(a)(1). *See id.* at \*2 n.3.

52. *See id.* at \*7.

53. *See id.* at \*8.

54. *Id.* at \*10.

55. *See id.* at \*10. Such a card check refusal is well within the employer's rights under the Act, and while it may seem a standard management strategy to avoid or delay unionization, it does ensure that the safeguards associated with an NLRB secret ballot election protect employee free choice.

56. *Id.*

57. *See id.*

consistently with its past practice” after the representation petition was filed.<sup>58</sup>

The Board in *Adtranz* noted, however, that the employer’s e-mail rule raised a “novel legal issue.”<sup>59</sup> The employer provided hardware, software, intranet and Internet e-mail, and an instant messaging system.<sup>60</sup> The company had set out a policy that the corporate e-mail system was for business use only, but employees nonetheless used the e-mail system for personal communication.<sup>61</sup> The ALJ looked to analogous precedent regarding use of company bulletin boards and telephones,<sup>62</sup> because while there is no statutory right to use an employer’s telephone for personal purposes, if the employer permits non-business related use, then the employer may not prevent employees from discussing union activities<sup>63</sup> However, the NLRB General Counsel presented no evidence showing that the employer “prohibited union discussion on [the] e-mail system,” and so no unfair labor practice was established.<sup>64</sup> The ALJ’s final finding was that while the rule on personal discussions via e-mail was not strictly enforced, “it would be improper to presume that union discussions would be treated differently.”<sup>65</sup> Accordingly, I find that Respondent’s E-mail rule is valid and that General Counsel has not established that the rule was discriminatory [sic] applied.”<sup>66</sup> The NLRB did not tamper with this statement, as no exceptions were filed regarding the ALJ’s dismissal of the complaint on the employer’s e-mail rule.<sup>67</sup> The ALJ also noted that pursuant to established rules on company bulletin boards and telephone use, by analogy “[r]espondent could bar its computers and E-mail system to any personal use by employees.”<sup>68</sup>

What does the *Adtranz* case add to NLRB law on employer e-mail policies? The ALJ’s reference to the validity of a business use only company e-mail policy fell outside the facts of the case, in that the employer had a written policy limiting use to business, but did

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58. *Id.* at \*22.

59. *Id.* at \*16.

60. *Id.* at \*15-16.

61. *See id.*

62. *See id.* at \*16-17 (citing *J.C. Penney, Inc.*, 322 N.L.R.B. 238 (1996); *Guardian Indus. Corp.*, 313 N.L.R.B. 1275 (1995); *Container Corp. of Am.*, 244 N.L.R.B. 318 (1979)).

63. *Id.* at \*16-17 (citing *Union Carbide Corp.*, 259 N.L.R.B. 974 (1982); *K-Mart Corp.*, 255 N.L.R.B. 922 (1981)).

64. *Id.* at \*17-18.

65. *Id.* at \*18.

66. *Id.* at \*18-19.

67. *See id.* at \*2 n.l.

68. *Id.* at \*17.

not enforce the policy. This borderline dicta hardly sets a forceful or far-reaching precedent in this area. In *Adtranz*, the failure to establish discriminatory enforcement of the business use only rule meant that the ALJ and the NLRB had no basis upon which to find an unfair labor practice. But, there was an unfair labor practice shown with respect to the company's no solicitation rule. The no solicitation/distribution rule was unduly restrictive in that it required prior authorization by the employer. There, the precedent and evidence of violation was clear.<sup>69</sup> In *Adtranz*, neither the ALJ nor the Board referred to pre-existing memoranda from the NLRB Division of Advice providing direct guidance on employer e-mail policies and the NLRA.

*B. Direction from the NLRB Division of Advice*

NLRB Advice Memoranda provide further insight on workplace e-mail policies.<sup>70</sup> In a 1998 Advice Memorandum regarding *Pratt & Whitney*, the Board's Division of Advice responded to three cases in Region 12 where the question was "whether the employer could lawfully prohibit all non-business use of electronic mail (E-mail), including employees' messages otherwise protected by Section 7."<sup>71</sup> The employees' computer and e-mail use was prolific, e-mail being the "main method of communicating;" moreover, the employer provided access to the system from outside of the workplace for about ten percent of its employees by the use of laptop computers.<sup>72</sup> As in *Adtranz*, although the employer in *Pratt & Whitney* had a written policy prohibiting non-business use of the e-mail system, the policy had not been strictly enforced.<sup>73</sup> With the onset of a union organizational campaign at the work

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69. *Id.* at \*12-13.

70. *Pratt & Whitney*, 1998 NLRB GCM LEXIS 51 (Feb. 23, 1998); *IRIS-USA*, 2000 NLRB GCM LEXIS 4 (Feb. 2, 2000). It should be noted that Memorandum from the General Counsel's office do not have the same precedential value as Board decisions. Nonetheless, such agency guidance is often given weight by the courts, as there is a need for answers to particular problems and consistency, and the officials producing the advice are from the agency most entitled to deference because of expertise developed by continual exposure to like issues. See FREDERICK C. HICKS, *MATERIALS AND METHODS OF LEGAL RESEARCH* (3d ed. 1942); see generally *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 322-23 (1989) (Brennan, J. & Marshall, J., dissenting) (indicating that deference should be afforded to NLRB's general counsel because the general counsel of the NLRB has "a better understanding than the Court" regarding the relationship between drug testing and routine physical examinations).

71. *Pratt & Whitney*, 1998 NLRB GCM LEXIS at \*1.

72. *Id.* at \*2-3.

73. *Id.* at \*3.

place, several employees were warned and disciplined for sending union-related messages or downloading information from the Union's web page onto company computers.<sup>74</sup> The question submitted was solely "whether an employer can issue a complete ban on all non-business use of E-Mail."<sup>75</sup>

In answering the question, the Board's Division of Advice concluded that the employer's prohibition of all non-business use of e-mail was "overbroad and facially unlawful."<sup>76</sup> Communication that is "expected to occasion a spontaneous response or initiate reciprocal conversation" was classified as solicitation.<sup>77</sup> One-sided communication where "the purpose of the communication is achieved so long as it is received" was defined as distribution.<sup>78</sup> The Advice Memorandum noted how the Board characterizes circulation of authorization cards and decertification petitions as solicitation because of the interchange involved rather than mere receipt of documents.<sup>79</sup> In applying the NLRB's *Stoddard-Quirk* rule regarding distribution, namely that an employer may limit distribution of written materials in work areas, the Memorandum observed that the Board in *Stoddard-Quirk* also looked to the employees' interests and found the interests met even if employees received the material in non-work areas, such as plant entrances or parking lots.<sup>80</sup> Further, the Board in *Stoddard-Quirk* indicated that absent the non-work areas for distribution, the usual presumption that an employer may bar work area distribution might not apply.<sup>81</sup>

In applying these rules to e-mail technology, the memorandum from the Division of Advice in *Pratt & Whitney* identified computers as a "work area" for employees, as these were areas where employees were productive.<sup>82</sup> Both the rules in *Stoddard-Quirk* and in *Republic Aviation*<sup>83</sup> dictated that the balance of interests had been struck such that the employer could not prohibit

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74. *Id.*

75. *Id.* at \*4-5 & n.3.

76. *Id.* at \*5.

77. *Id.* at \*13-14.

78. *Id.* at \*14.

79. *Id.* (citing *Rose Co.*, 154 N.L.R.B. 228, 229 n.1 (1965); *Southwire Co.*, 145 N.L.R.B. 1329 (1964)).

80. *Id.* at \*12 (citing *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615, 619 (1962)).

81. *Id.* at \*13 (citing *Stoddard-Quirk*, 138 N.L.R.B. at 621).

82. *Id.* at \*15-16.

83. *Republic Aviation v. NLRB*, 51 N.L.R.B. 1186 (1943), *enforced*, 142 F.2d 193 (2d Cir. 1944), *aff'd.*, 324 U.S. 793 (1945) (holding "rule prohibiting union activity on company property outside of working time constitutes an unreasonable impediment to self-organization" and unlawful absent special circumstances or "cogent reason"). *Id.* at 1187.

e-mail messages that amounted to solicitation, and indeed such e-mail messages were characterized as very similar to oral conversation.<sup>84</sup> The Memorandum concluded that the employers' rule banning all non-business use of the e-mail was facially unlawful and overbroad because it banned oral solicitation and no evidence was presented of special circumstances making such a rule necessary in order to maintain production or discipline.<sup>85</sup> As a result of this Memorandum, numerous attorneys who represent management have since gone on the record as advising employers against a total workplace ban on personal e-mail.<sup>86</sup>

A later case analyzed by the NLRB Division of Advice involved IRIS-USA.<sup>87</sup> In the context of a union organizational campaign and a resulting tie vote, the union filed objections to a

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84. *Pratt & Whitney*, 1998 NLRB GCM LEXIS at \*17.

85. *Id.* at \*20. The *Pratt & Whitney* case was never tried, it was resolved informally with the company. See Victoria Roberts, *Analysis & Perspective, Employment Policies: Attorneys Say Employees' Use of E-Mail Creating Possible Legal Pitfalls for Employer*, Daily Lab. Rep. (BNA) No. 130, at C-1, C-3 (July 6, 2000).

86. See Roberts, *supra* note 85, at C-3. In addition, these attorneys advise that it is best to confine monitoring to work-related e-mail. *Id.*; see also Sharon C. Zehe, *BUSINESS FORUM; Beware Abridging E-speech; Blanket Bans on Personal E-mail and Internet Use Can Lead to Trouble- for Employers*, STAR TRIBUNE (Minn.), July 24, 2000, at 3D (advocating targeting specific problems in e-mail policy and enforcing consistently).

87. IRIS-USA, 2000 NLRB GCM LEXIS 4 (Feb. 2, 2000). The Associate General Counsel, Barry J. Kearney, authored both the *IRIS-USA* Advice Memorandum and the *Pratt & Whitney* Advice Memorandum. In the year after the *Pratt & Whitney* Memorandum was issued, the Office of the General Counsel, Leonard R. Page, issued Memorandum GC 99-10 Submission of Advice Cases (Dec. 22, 1999), available at <http://www.nlr.gov/gcmemo/gc99-10.html>, outlining a list of cases containing a variety of issues that would be required for mandatory submission to the Division of Advice. These included: "[c]ases involving rules, or discipline under rules, regarding employee use of employer e-mail, access to the Internet, or other aspects of using employer-owned means of electronic communication for Section 7 activities". *Id.*

At a recent conference, the current General Counsel of the National Labor Relations Board, Arthur Rosenfeld responded to this author's question concerning the ongoing vitality of mandatory submission of e-mail policy questions relating to Section 7 activities. The question was raised in light of the General Counsel's discussion of the goals he hoped to set for his first six months in the position. In particular, he mentioned his intent to review the mandatory submission (to Advice) list with a view toward simplifying it. Such a move could be viewed as vesting more discretion in the Regional Directors, but at the same time, GC Rosenfeld indicated his intent to provide more GC Memoranda to guide the regions, the bar, and the public on issues. The GC did not indicate any current plan to delete e-mail policy/concerted activity questions from the mandatory submission list. Arthur Rosenfeld, Remarks at 30th Annual Joint Labor Law Conference National Labor Relations Board, U.S. Dept. of Labor, Boston & Mass. Bar Ass'ns, Suffolk University Law School (Oct. 30, 2001).

number of the employer's rules, including those regarding confidential information, a no solicitation rule, and rules regarding use of e-mail and voicemail.<sup>88</sup> The Division advised Region 32 that the employer's ban on solicitation was lawful because it only prohibited such during work time.<sup>89</sup> The company's handbook provision restricting systems use to company business was deemed lawful, because unlike the *Pratt & Whitney* work situation, IRIS-USA employees did "not use E-mail or computers as part of their regular work, a 'computer work area' in fact does not exist for them."<sup>90</sup> Thus, the rule did not restrict a "work area" use in an overbroad manner.<sup>91</sup> In another advice case cited within *IRIS-USA*, that of *TU Electric*, a rule prohibiting the use of company software for other than company business was problematic because the employer's E-mail network was used sufficiently that it did constitute a "work area."<sup>92</sup> In *TU Electric*, it was estimated that an employee worked about one hour on the e-mail system per day.<sup>93</sup> Employees at TU Electric used e-mail to communicate with each other and with management, and announcements and required reading for employees were found there.<sup>94</sup>

## V. Conclusions and Recommendations

The NLRB itself, as well as the Courts, should speak more expansively to the issue of the impact of employer e-mail policies upon employee rights to engage in concerted activity.<sup>95</sup> Meanwhile,

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88. *IRIS-USA*, 2000 NLRB GCM LEXIS at \*1.

89. *Id.* at \*5-6.

90. *Id.* at \*9.

91. *Id.* at \*9-10.

92. *See id.* at \*8-9 (citing *TU Elec.*, Case 16-CA-19810, 1999 NLRB GCM Mem. (Oct. 18, 1999)). A later Advice Memorandum concerning the same employer found that TU's "Integrity and Ethical Standards—Computer and Software" policy was unlawfully overbroad. *See TU Elec.*, Case No. 16-CA-19895, 1999 NLRB GCM LEXIS 20 at \*5 (Nov. 16, 1999). However, their "Conduct in the Workplace—Respect in the Workplace" policy was facially lawful, permitting the employer to discipline an employee who, in the context of an e-mail that was otherwise protected under Section 7, referred to a supervisor as "Bozo Bob." *See id.* at \*9.

93. *See IRIS-USA*, 2000 NLRB GCM LEXIS at \*8-9 nn. 5-7 (citing *TU Elec.*, 1999 NLRB GCM LEXIS 20.)

94. *Id.* at \*9 n.6.

95. *See generally* Susan J. McGolrick, *New Bush Administration Means Republican Appointments for Top NLRB Posts*, Daily Lab. Rep. (BNA) No. 17, at S-16 (Jan. 25, 2001) (quoting Daniel V. Yager, Vice President and General Counsel of LPA Inc., a pro-management group, that despite "NLRB's Advice Division addressing e-mail issues in specific cases, until these issues are resolved by the Board and by the courts, people have to act at their peril").



employers are left to read between the lines of *E.I. du Pont, Timekeeping Systems*, and *Adtranz*, as well as to attempt to follow the guidelines set forth in memoranda from the NLRB's Division of Advice.

The bottom line appears to be that where employee use of workplace e-mail is significant enough for it to constitute a "work area," employers may not totally restrict employee e-mail that is equivalent to oral solicitation, which is protected by Section 7 of the Act. The *Pratt & Whitney* Advice Memorandum made clear that "special circumstances that make such a prohibition necessary in order to maintain production or discipline" will not be met by the "minimal burden placed upon an employer's computer network by such electronic traffic."<sup>96</sup> A total ban on non-business use of the e-mail system is thus not the answer to potential labor law violations in all cases. This is especially true where employees rely on the e-mail as a significant avenue of communication, and where they do not otherwise work in close physical proximity.<sup>97</sup>

As far as the Board's solicitation/distribution dichotomy is concerned, it seems that the definition of solicitation relies on a probability of interchange, or interaction. If the purpose of an e-mail communication is met by the mere receipt of documents without an expectation of a reciprocal response, the communication will likely be classified as the dead end of distribution.<sup>98</sup> E-mail fits the definition of oral solicitation in many cases. Even so, it may be lawful for an employer to ban all non-business use of e-mail on the employer's system among employees who do not use computers at work since such a ban would not constitute an overbroad restriction on a work area.<sup>99</sup>

Another labor law problem that may arise in the e-mail context is that of monitoring e-mail, particularly where the onset of such monitoring occurs at the same time as the onset of union organizational activities. Section 8(a)(1) of the NLRA may be violated where employees' union activities are subjected to

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96. *Pratt & Whitney*, 1998 NLRB GCM LEXIS 51, at \*16-17, \*20. See also *NLRB Acting General Counsel Fred Feinsein's Report on Cases Decided from March 31, 1996 to June 30, 1998*, Daily Lab. Rep. (BNA) No. 172, at E-4 (Sept. 4, 1998) (discussing employer restriction against use of e-mail); *NLRB General Counsel Leonard R. Page's Dec. 14, 2000 Report on Selected Cases of Interest*, Daily Lab. Rep. (BNA) No. 243, at E-1 (Dec. 18, 2000) (discussing employer rules limiting employee use of company computers and e-mail).

97. See Broder, *supra* note 13, at 1656-57.

98. See *Pratt & Whitney*, 1998 NLRB GCM LEXIS at \*18-19.

99. See *IRIS-USA*, 2000 NLRB GCM LEXIS at \*8-10.

management surveillance.<sup>100</sup> Thus, while the employer must of course maintain its e-mail system, and prevent abuse of the system, it should be cognizant of the parameters of labor law when making changes to its monitoring and/or implementing new restrictions. The nature and timing of such changes may be deemed to reflect anti-union animus. Even in the absence of a union, as the *Timekeeping Systems* case illustrates, employees are entitled to engage in concerted activity by e-mail, and should not be disciplined or discharged for engaging in protected activities that are deemed to elicit "mutual aid or protection."<sup>101</sup>

Perhaps an employer is wisest to promulgate a policy that notes the e-mail system is primarily for business use but limited personal use of a lawful nature will be permitted where such does not overburden the system. What is unlawful should be specifically outlined in language for the layperson. Employees should be warned that the system is not private, that it will be monitored for reasonable business purposes, and that material on the system, even where the employee believes it is deleted, may generally be retrieved in the event of its value as evidence in a lawsuit. Employers should feel free to implement e-mail policies that won't inhibit employees' legal rights and yet balance the employers' legitimate business interests.

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100. Broder, *supra* note 13, at 1658 n.100 (citing *Auto. Plastic Techs.*, 313 N.L.R.B. 462, 464-64 (1993) (discussing employer surveillance of union activities violating Act). *See also* *Montgomery Ward*, 269 N.L.R.B. 904 (1984) (using detectives for surveillance of union activity unlawful).

101. *See supra* notes 29-50 and accompanying text (discussing *Timekeeping Sys.*, 323 N.L.R.B. 244 (1997).)

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