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(Net)workers’ Rights: The NLRA and Employee Electronic Communications

Elena N. Broder

Most of our models for information technology today are industrial models. The notion of an office really is just a wholesale transposition of industrial processes. We process words in the same way we process metal to put into a car. And when you have a processing mentality, a place for processing, like an office, is essential. But the moment we abandon that processing model and go to stranger and newer models, then the idea of having a physical place where you go and sit down and have a desk and a stapler and all that becomes very quaint.

INTRODUCTION

The notion of “going to work” may be an early casualty of the Digital Revolution. Today, manufacturing is no longer the dominant model of work. Because many industries of the Information Age do not require heavy machinery and infrastructure, the physical centralization of labor that was a hallmark of the Industrial Revolution is waning. In mid-1994, a survey found that over seventy percent of large employers offered some employees the option of telecommuting—working at home while remaining connected to the office by telephone, facsimile machine, or computer network. By the end of the decade, the number of U.S. users of electronic mail is projected nearly to triple from its 1993 level, in large part because of increased use by mobile employees. Motivated by employers’ desires to reduce real estate overhead,
as well as to accommodate personal needs of employees, a new employment setting is emerging: the (net)workplace.

Like the earlier transition from field to factory, the transition to the new workplace is not without problems. Some workers have rushed to the countryside, wooed by the promise of an end to rush hour, only to discover that pure telecommuting engenders poor morale and feelings of isolation. At the same time, both telecommuters and workers in traditional offices complain that unbreakable electronic links to their work have eroded the last remaining distinctions between work and nonwork time. Employers expect employees to "overwork" if they want to get ahead.

Yet despite the new context, traditional employment concerns remain. As one commentator has noted:

Working in cyberspace will be, in many fundamental ways, radically different than any sort of work humankind has ever done before. But we can't forget that some of the basic issues will remain: fairness in the workplace, privacy, health and safety, seniority, decent wages, overtime, dignity and more. Cyberspace workers may be working in a whole new frontier but in the end they remain workers with rights to protect.

How those rights will be protected is the concern of this Note. As workers who have common wages, benefits, working conditions, projects, and supervisors become geographically separated, they lose the opportunity to discuss their concerns in the breakroom. The one common space in which they can meet, despite their physical isolation, is cyberspace—often in the form of an employer-owned and -maintained Local Area Network (LAN) into which homebound employees telephone, a Wide Area Network (WAN) covering multiple offices, or the Internet. Because this network technology is devoted to improving communication, it is well suited for organizing widely dispersed employees who report to the same management and have the same work concerns but for whom isolation impedes organization through traditional means. In addition to its value for organized labor, network communication increasing number of telecommuting employees and that roughly 12,000 people or 10% of its salaried U.S. work force telecommute).

6. See David A. Fryxell, Telecommuting: Working at Home with the Use of Computers and Modems, LINK-UP, May 1994, at 18, 18 (reporting low morale and productivity among Bell Telephone telecommuters unless they retained ties to office); Michael A. Verespej, Communications Technology: Slave or Master?, INDUSTRY WK., June 19, 1995, at 50 (noting isolation because of lack of "office chitchat").

7. Fryxell, supra note 6, at 18; Verespej, supra note 6, at 50; see also Marc Belanger, A Bill of Rights for Workers in Cyberspace, CAN. DIMENSION, Dec. 1994-Jan. 1995, at 4, 6 (suggesting overtime pay for on-line work to discourage expansion of work day).

8. Verespej, supra note 6, at 50.


10. See, e.g., NCR Corp., 313 N.L.R.B. 574 (1993). In this case, the Board noted that NCR field engineers, who repaired computer equipment, were largely unorganized. Id. at 574. This may well have been attributable to the fact that while engineers each reported to a district office, "they [were] assigned
seems uniquely conducive to assisting employees who may band together around timely concerns without forming long-term organizations, a group that includes many white-collar workers. Yet, at present, whether employees may take advantage of the tremendous potential of network communication in order to discuss their employment concerns often depends on the whim of their employers. And the National Labor Relations Act (NLRA), the primary legal mechanism that regulates employers' and employees' rights and responsibilities in this changed environment, dates from a time when the paradigmatic workplace was the factory.

The NLRA bears the unmistakable imprint of its industrial origins. Its declaration of purpose states:

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife

...
and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.\textsuperscript{14}

Communication among employees has always been a prerequisite for achieving this purpose. As an early National Labor Relations Board (NLRB) opinion explained:

It is clear that employees cannot realize the benefits of the right to self-organization guaranteed them by the Act, unless there are adequate avenues of communication open to them whereby they may be informed or advised as to the precise nature of their rights under the Act and of the advantages of self-organization, and may have opportunities for the interchange of ideas necessary to the exercise of their right to self-organization.\textsuperscript{15}

When an employer rule "constitutes such a serious impediment to the freedom of communication which is essential to the exercise of the right to self-organization, . . . the right to self-organization must be held paramount, and the rule give way."\textsuperscript{16}

This Note argues that despite changes in workplace context, the underlying values of the NLRA remain appropriate to protect the essential rights of (net)workers. Fifty years of NLRA enforcement have been guided by the need to maintain a delicate balance between the right of employees to act collectively to improve their conditions and benefits and that of employers to maintain production and discipline. Guaranteeing to employees who use electronic communication technology in the course of their jobs the right to use that technology for activity protected by the NLRA\textsuperscript{17} develops logically from these precedents.\textsuperscript{18}

\textsuperscript{15} LeToumeau Co., 54 N.L.R.B. 1253, 1260 (1944), aff'd sub nom. Republic Aviation v. NLRB, 324 U.S. 793 (1945). The Board went on to say:
It must also be noted that speech is not the only mode of communication by which self-organization is effected, nor is it sufficient that this channel alone be free. Effective organization requires the use of printed literature and of application and membership cards, and these modes of communication are also protected by the Act.
\textit{Id.}
The principle of protecting effective communication, whatever its form, is fundamental to understanding the rights of (net)workers to use employer-provided systems for labor purposes.
\textsuperscript{16} \textit{Id.}
\textsuperscript{17} 29 U.S.C. § 157 (1994).
\textsuperscript{18} This Note does not argue that employers must make electronic communications available to workers who do not have access to the network in the normal course of their employment. The NLRA balances employer and employee interests. "The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization." NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956).
This Note also accepts, for the sake of argument, the contours of protected concerted activity developed in prior cases. For criticism of these contours, see, e.g., Hyde, \textit{supra} note 10, at 168–69 & nn.
To assure that the underlying purposes of the Act are fulfilled in an economy in which physically centralized industry no longer predominates, however, requires more than a mechanical application of existing labor law. Justice Powell's warning about applying labor law precedents in new work contexts should alert us to the dangers of uncritical application of such precedents:

The rule of Republic Aviation was adopted in the context of labor relations in industrial and manufacturing plants . . . . The latter part of the Board's set of presumptions reflects the reasonable inference, based on the Board's experience with the actual facts of industrial life, that such employers will not have legitimate reasons to restrict employees' activities on their own time, even if on company property.

. . . .

The rationality found to exist in Republic Aviation, and therefore the validity of the presumption, cannot be transferred automatically to other workplaces, for to do so would sever the connection between the inference and the underlying proof. 19

This Note heeds Powell's admonition to acknowledge the factual context of work in enforcing labor law. To this end, it reexamines the jurisprudential tests developed by the NLRB and the courts to achieve balance in the industrial workplace and evaluates their appropriateness for the (net)workplace. 20 Part I of the Note paints a picture of cyberspace and the (net)workplace by describing developing technologies and their increased use by businesses. Part II sets forth the legal framework governing employee communications, analyzing existing labor law to expose the principles currently at work. Part III argues that these principles promise (net)workers the right to communicate effectively at the jobsite but that the presumptions developed in traditional workplaces are inadequate to protect this right in the (net)workplace. Part IV proposes alternative methods of accommodating employer and employee rights in light of the realities of (net)work.


20. What I undertake might be termed a modest exercise in "translation," a term I borrow from Lawrence Lessig. Professor Lessig has employed the term most recently to discuss constitutional fidelity 200 years after the drafting of that document. See Lawrence Lessig, Understanding Changed Readings: Fidelity and Theory, 47 STAN. L. REV. 395 (1995) [hereinafter Lessig, Understanding]; see also Lawrence Lessig, Fidelity in Translation, 71 TEX. L. REV. 1165 (1993). For the genealogy of the term and its close relation to views of dynamic statutory interpretation, see Lessig, Understanding, supra, at 400 n.26.
PICTURING THE (NET)WORKPLACE: TAKING CYBERSPACE SERIOUSLY

Although a pure (net)workplace, one with no physical component, exists only on paper today, the shift to networking is underway even where employees still share office space. At least one company has eliminated most traditional methods of communication from its offices: Sun Microsystems has no phone directory, no public-address system, and no memo pads or stationery; instead, its employees each receive an average of 160 e-mail messages a day, for a company total of about two million messages daily. Although such exclusive use of electronic communication is not yet common, a recent survey of fifty Fortune 1000 companies found that more than fifty-five percent of their employees had electronic mail. E-mail usage is prevalent across industries. Moreover, the fact that workers in their late twenties and early thirties use e-mail most frequently suggests that the trend toward greater use of electronic communications will continue in the decades ahead.

Although e-mail is the type of electronic communication most often used by businesses at present, the ever-expanding repertoire of network technologies offers many other potentially valuable forms. Many of these network applications refute the idea that electronic communication is merely another replacement for memos, an alternative to phone or fax. Bulletin Board Systems, Internet newsgroups, and other “message bases” provide fora for group discussions of every imaginable topic; they allow participants to read the remarks of all other participants and then to append their own reactions to the “threads” of developing public commentary or, often, to respond privately to individuals. Participants can often exchange software or graphics files, as


22. Verespej, supra note 6, at 48.

23. Taylor, supra note 4, at 1 (citing report by Forrester Research).

24. As of August 1995, more than 50% of workers in the transportation, manufacturing, and business services industries in the United States used e-mail at least once a month. Yvonne Chiu, E-Mail Gives Rise to the E-Wail, WASH. POST, Aug. 18, 1995, at D1 (graph). Over 30% of health care workers and over 20% of tradespeople used e-mail at least once a month. Id. Although the greatest inroads have been made in white-collar jobs, electronic communication is not limited to that sector of the workforce. Northern Telecom has erected multimedia kiosks on the factory floor at its Brampton, Ontario, telecommunications switch manufacturing plant to keep its 2400 line workers better informed about company business. Martin Slofstra, Northern Telecom Is Taking Multimedia to Its Natural Next Step, COMPUTING CAN., Feb. 16, 1994, at S9. In the future, factory workers may have access to the Internet, individual e-mail accounts, or BBSs through line-side network terminals.

25. Chiu, supra note 24, at D1.

26. Edward A. Cavazos and Gavino Morín use the term “public messaging system” to refer generically to systems that allow participants to read and respond to messages posted by others but do not contain individually addressed, private messages. I use their term “message base” to refer to any forum for posting and reading messages accessible by a group. Message bases typically group messages into “threads” formed by all the successive responses to a given message. Where such a message base is part of a larger network also containing individual e-mail accounts, participants often can respond to comments with individual
well as simply leave verbal "posts." Real-time communication is also possible: Internet Relay Chat (IRC) lets participants all over the world type out a continuing dialogue on many "channels," each devoted to a single topic, and business computer conferences are not far behind.

(Net)working produces more than new forms of correspondence, however. "Groupware" allows people at different geographic locations to access and work together on databases, documents, and spreadsheets. Multi-User Dungeons (MUDs) go even further; in these all-text applications, participants not only converse in real time, but actually construct the environment around them by adding lasting descriptions of objects and places that later participants may encounter and use. As more of these applications are adapted for business, workers routinely will be able not just to correspond, but also to interact, manipulating both data and "objects" as their communications themselves define virtual space. Because these more sophisticated business applications are still nascent, this Note concentrates on the examples of e-mail and message bases, which will likely remain important in future (net)working. Nonetheless, the basic concerns explored are relevant to adapting the NLRA to the wider spectrum of network applications. For workers who jointly prepare projects without meeting in the same geographic location, what is at stake in envisioning how the NLRA will apply to the (net)workplace is a right to communicate in a new work territory: cyberspace. Like the factories of the

e-mail messages as well as with posts to the group forum. See Edward A. Cavazos & Gavino Morin, Cyberspace and the Law: Your Rights and Duties in the On-Line World 6 (1994).


29. See LaPlante, supra note 21, at 34. An extremely popular example of such software is Lotus’s Notes.

30. The term “Multi-User Dungeon” reveals the roots of MUDs in interactive sword and sorcery games. MUDs for such fantasy games remain very popular today, see, e.g., Ilsa Godlovitch, Jackal Takes Dragonfly to Be His Bride, The Independent, Aug. 28, 1995, at 16 (describing popular adventure MUD), but MUDs can be put to educational and professional use as well. Anyone with Internet access can participate in MicroMUSE (Multi-User Simulation Environment), an educational MUD run out of computers at the Massachusetts Institute of Technology. MicroMUSE includes a mission to Mars, a sailing trip, logic puzzles with knights and knaves, a virtual space station where science experiments may be conducted, and other environments, all designed by and for users from elementary school to the post-graduate level. See Dern, supra note 27, at 438–41. Several companies are exploring the business potential of MUDs, potentially integrating graphics and videoconferencing technologies into the MUD structure. See LaPlante, supra note 21, at 34 (reporting that Xerox PARC and Electric Communities are developing business applications for MUDs). In the future, combining computer simulation technology, such as that used to design aircraft, and the interactive environment of a MUD, workers may build and test almost anything together in their cyberspace labs while remaining at home in their pajamas.

31. One journalist has already painted this picture, arguing that electronic mail, computer conferencing, groupware, and even the Internet, "are simply entry points into cyberspace—that realm of activity reached by people with their computers." Belanger, supra note 7, at 4. He writes:

If you’re interested in the future of work you should be interested in cyberspace. Because in the not so distant future, millions of people will be cyberspace workers.

Already there are thousands of people working part-time, and some even full-time, in cyberspace. The Internet for example, that huge global network of computer systems, has some 20 million users, and many of them are using the Internet for work purposes. Meanwhile, according to Toronto-based Evans Research, there are 2,725,300 business computers plugged
Industrial Age, this workplace is a uniquely appropriate place to discuss the concerns that are the subjects of collective bargaining.  

II. THE TRADITIONAL LEGAL FRAMEWORK

Having provided a glimpse of the (net)workplace, I turn now to the legal framework of employee communications. Before examining the case law, I begin with § 7 of the National Labor Relations Act and the agency that interprets it.

A. Protected Activities: § 7 of the NLRA

The philosophical heart and soul of the NLRA appears in its § 7:

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.  

While the Act enumerates other specific unfair labor practices, the fundamental unfair practice which both employers and labor organizations are prohibited from engaging in is interference with the § 7 rights of any covered employee. Traditionally, § 7 has been viewed as protecting three types of

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32. See NLRB v. Magnavox Co., 415 U.S. 322, 325 (1974) ("The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees.").
34. See id. § 158(a)(1) (interference with § 7 rights is unfair labor practice for employers); id. § 158(b)(1) (interference with § 7 rights is unfair labor practice for labor organizations).

Not all employees qualify for the Act’s protection. Some transportation workers, including railroad workers and airplane pilots, are covered under the Railway Labor Act, 45 U.S.C. § 151 (1994). Agricultural workers, independent contractors, and “supervisors” are not covered by the NLRA. 29 U.S.C. § 152(3) (1994). Nor does it apply to federal, state, or local governments. Id. § 152(2). The omission of government employees excludes from the Act’s ambit many of the workplaces in which electronic communications are already best established and most useful for uniting physically dispersed communities of workers. Nonetheless, the NLRA does cover many white-collar and professional workers, both those who have traditionally formed unions, such as clerical workers, and those who have not, such as engineers and accountants.

Many of the (net)workers with whom this Note is concerned are white-collar workers in service fields who have not commonly organized in the past. One hurdle for some of the most technologically advanced
activity: union organizing by employees, collective bargaining and preparation therefor by established unions, and "other concerted activities for the purpose of... mutual aid or protection,"35 usually considered to cover activities in nonunionized workplaces, often prior to an organizing campaign.36 Whether the employees are part of a labor organization as that term is understood in the statute, however, "makes no difference, for, as employees, [they] have a protected right to act concertedly as individuals to improve their wages, hours, and working conditions."37 These individual rights depend upon "concerted activity"—ordinarily more than one employee acting toward the same end38—which in turn depends fundamentally on the right of employees to communicate.39 From the beginning, many disputes have arisen over how, when, where, and by whom this communication may take place.

B. Interpreting the Act: The National Labor Relations Board

The resolution of these disputes is the responsibility of the administrative body charged with primary enforcement of the NLRA, the National Labor Relations Board, the members of which are appointed by the President. The Board spends most of its time adjudicating labor disputes and thus sets its policies primarily through quasi-judicial opinions rather than through administrative rulemaking.40 Thus, in the course of adjudicating individual

36. Charles Morris has dubbed these "other" protected concerted activities "pre-organizational" activities, even while recognizing that they may occur in workplaces where employees have no desire to organize formally. See Morris, supra note 18, at 1677 n.17. Alan Hyde has criticized this traditional, evolutionary view of the activities protected by § 7. He argues that the decline of unions has exposed the independent importance of concerted activity for mutual aid and protection among workers whose group actions are event-driven and unlikely to lead to organization. See Hyde, supra note 10, at 164–65.
37. Northeastern Univ., 235 N.L.R.B. 858, 865 (1978). In Eastex, Inc. v. NLRB, 437 U.S. 556 (1978), the Supreme Court affirmed that concerted activity for mutual aid or protection is guaranteed the same presumptions as labor organizing or bargaining.
38. For a discussion of circumstances in which a single employee's action may be protected concerted activity, see Morris, supra note 18, at 1702–04, 1713–22. Morris emphasizes that a single employee who attempts to communicate with another employee for a protected purpose is exercising his right to engage in concerted activity, regardless of the other employee's reaction or receptivity, and thus must be protected. See id.
39. See supra note 15 and accompanying text.
40. Although the NLRB is authorized by 29 U.S.C. § 156 (1994) to promulgate rules through the informal "notice and comment" procedures specified in the Administrative Procedure Act, 5 U.S.C. § 553 (1994), it has used this power very rarely. In the last eight years, it has promulgated one major rule, which defines bargaining units in health care facilities, Mark H. Grunewald, The NLRB's First Rulemaking: An
disputes, the Board often makes policy changes that reflect its political tenor. As with the decisions of other administrative agencies, courts afford its interpretations considerable deference;\(^4\) hence, the Board's contribution to the development of doctrine is crucial.\(^4\)

To maintain the balance between workers' rights and employers' prerogatives required by the NLRA, through years of case law the NLRB has articulated a series of presumptions that govern whose rights—employers' or employees'—will be protected by default. These presumptions, based on experiential assumptions about the nature of the workplace and the interests to be protected, establish the starting position for equitable bargaining. Under current law developed in traditional industrial settings, different rules govern employees and nonemployees, solicitation and distribution, activities in work areas and in nonwork areas.\(^4\)

C. General Principles Governing Employee Communication

Under current labor law, two major types of presumption have developed to govern employee communication rights. In Subsection 1 below, I discuss the

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*Exercise in Pragmatism*, 41 DUKE L.J. 274, 276 (1991), and has proposed a second important rule governing the spending of union dues, Scott A. Zebrik, Comment, *The Future of NLRB Rulemaking: Analyzing the Mixed Signals Sent by the Implementation of the Health Care Bargaining Unit Rule and by the Proposed Beck Union Dues Regulation*, 8 ADMIN. L.J. AM. U. 125, 126-27 (1994). This recent increase in rulemaking activity is far from predictive of the Board's future inclinations, however. The possibility of NLRB rulemaking is discussed further in Part IV.

The Supreme Court has approved this adjudicative policymaking in general. *See* SEC v. Chenery Corp., 332 U.S. 194, 201-03 (1947) (agency may fill interstices in its statute by adjudication as well as by rulemaking). Nonetheless, approval has sometimes been uneasy. In NLRB v. Bell Aerospace Co., 416 U.S. 267, 294-95 (1974), the Court upheld the Board's general right to change policy through adjudication while remanding for reconsideration of its specific change in the treatment of buyers. The divided Court in NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969), gave two different rationales for upholding the Board's decision in the case. Justice Fortas, joined by Justices Warren, Stewart, and White, acknowledged agency power to change policy through adjudication but rejected the Board's ability to avoid requirements of the APA through this method, *id.* at 764-65 (plurality opinion), while Justice Black, joined by Justices Brennan and Marshall, acknowledged the agency right to choose between rulemaking and adjudication but required that changes in policy announced in case law be incident to the decision before the Board in order to be enforceable, *id.* at 770-72 (concurring opinion).


42. As Professor Winter has noted, court approval of an NLRB interpretation may sometimes cause one reasonable interpretation of the Act to become locked in as the necessary interpretation of the Act, freezing Board policy and limiting the Board's flexibility. *See* Ralph K. Winter, Jr., *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53, 73-73.

43. This Note assumes that the activities it discusses are carried out by employees of the company whose network is used. The language of the statute confers rights on employees, and the Supreme Court has held that rights of nonemployees to communicate with employees on company property, even in an attempt to assist in organizing labor, are significantly weaker than those of employees themselves. *See* Lechmere, Inc. v. NLRB, 502 U.S. 527, 533 (1992) (allowing employer to ban nonemployee union organizers from its property); NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956) (allowing employer to ban nonemployee organizers from their property where other methods are available to reach employees).
presumptions regarding the time of communications, and in Subsection 2, I examine the limits the NLRB and the courts have imposed on the places where employees may engage in oral solicitation and distribution of written materials.

1. Time Restrictions

In the granddaddy of NLRA cases, Republic Aviation Corp. v. NLRB, employees at two large industrial plants that produced materials for the Army had been fired after distributing union materials to fellow employees on company property during nonwork time, in violation of their employers’ longstanding, nondiscriminatory policies forbidding solicitation. In both cases, the NLRB had found that employee rights had been violated. The Supreme Court established that the NLRB’s fundamental task in applying the Act’s general standards to myriad factual situations is to balance “the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments.” In striking such a balance between employer and employee rights, the Republic Aviation Court established several important principles. First, the fact that the employers were exerting control over their own property was not dispositive. “It is not every interference with property rights that is within the Fifth Amendment... Inconvenience, or even some dislocation of property rights, may be necessary in order to safeguard the right to collective bargaining.” Second, the possibility that employees could contact each other through other means was irrelevant to the weighing of interests. While later cases permitted the exclusion of nonemployee organizers absent proof that there were no other means of contact, the Act’s specific grant of rights to employees guaranteed their ability to communicate

44. 324 U.S. 793 (1945).
45. Id. at 795-96.
46. Id. at 795, 797.
47. Id. at 797-98.
48. Id. at 802 n.8 (quoting LeTrouneau Co., 54 N.L.R.B. 1253, 1259-60 (1944)) (internal quotation marks omitted).
49. The Court explicitly noted that other avenues of communication were present: “Neither in the Republic nor the Le Trouneau cases can it properly be said that there was evidence or a finding that the plant’s physical location made solicitation away from company property ineffective to reach prospective union members.” Id. at 798–99. Furthermore, after NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956), in which the Court noted that the Act itself produced a “distinction between rules of law applicable to employees and those applicable to nonemployees” that was “one of substance,” id. at 113, and thus restricted nonemployee access to company property, the Board interpreted this distinction as an affirmative statement of employee rights to engage in protected communication on employer property regardless of the proven availability of alternative means. See also Stoddard-Quizk Mfg. Co., 138 N.L.R.B. 615, 622 (1962) (interpreting as corollary of Babcock & Wilcox that employees may distribute literature on company property, subject to reasonable restrictions; fact that nonemployees had successfully distributed literature in area just outside property was irrelevant).
with each other without requiring them to show similar hardship.\textsuperscript{50} Third, proof that the no-solicitation rule at issue predated union activity and was uniformly enforced against all solicitors did nothing to mitigate the fact that a prohibition of union solicitation on the employees' own time violated the Act by discouraging membership in a labor organization.\textsuperscript{51} Nonetheless, while the Court emphasized that employees could determine how to spend their time off the clock, employers had the right to exercise control over their employees during work time in order to ensure production.\textsuperscript{52} Agreeing that the rights of employers and employees could thus be accommodated, the Court approved the NLRB's presumption that employees may engage in protected concerted activity on company property during nonwork time, absent proof by the employer that restrictions are necessary to maintain production or discipline.\textsuperscript{53}

2. \textit{Place Restrictions: Solicitation vs. Distribution}

While \textit{Republic Aviation} establishes a right to engage in concerted activity on nonwork time on the employer's property, it does not confront the question of how much or what portions of an employer's property must be made accessible. Applying the basic balancing of employer and employee rights identified in \textit{Republic Aviation}, subsequent NLRB decisions have approved additional employer restrictions limiting the locations in which employee communications may take place. The most important of these is the general presumption that distribution of written materials may be limited to nonwork areas.\textsuperscript{54}

The Board classifies traditional communication into two modes: oral solicitation and distribution of written materials. The effects of these modes on the physical environment of the workplace are presumed to be quite different. Spoken communication ordinarily does not affect the employee's physical surroundings.\textsuperscript{55} Distribution of literature, on the other hand, "because it carries the potential of littering the employer's premises, raises a hazard to

\textsuperscript{50} The focus on the rights of employees, the explicit subject of the NLRA, led to the distinction in later cases between the rights of employees and of nonemployee union organizers who seek access to company property to reach employees. Superior convenience of reaching employees at work is not sufficient to justify mandating that employers grant access to strangers. Lechmere, Inc. \textit{v. NLRB}, 502 U.S. 527 (1992); \textit{Babcock \& Wilcox Co.}, 351 U.S. 105. Such individuals must show effectively that they have no other way of reaching the target employees, as, for example, when the employees live in isolated timber camps where even the housing and recreational areas are owned by the company. \textit{See}, e.g., \textit{NLRB v. Lake Superior Lumber Corp.}, 167 F.2d 147 (6th Cir. 1948) (union organizers may enter bunkhouses where loggers live on company property, but company has legitimate interest in enforcing curfew); \textit{NLRB v. Cities Serv. Oil Co.}, 122 F.2d 149 (2d Cir. 1941) (union representatives granted access to oil tankers to investigate sailor grievances).

\textsuperscript{51} \textit{Republic Aviation}, 324 U.S. at 805.

\textsuperscript{52} \textit{Id.} at 803 n.10.

\textsuperscript{53} \textit{Id.} at 803-04 & n.10.

\textsuperscript{54} \textit{See Beth Israel Hosp. v. NLRB}, 437 U.S. 483, 491-93 & n.10 (1978) (following Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615 (1962)).

production whether it occurs on working time or nonworking time.”

Furthermore, in the Board’s view, “[t]he distinguishing characteristic of literature as contrasted with oral solicitation . . . is that its message is of a permanent nature and that it is designed to be retained by the recipient for reading or re-reading at his convenience. Hence, the purpose is satisfied so long as it is received.”

Weighing the potential threats to production, safety, or discipline against employees’ right to communicate, the Board created the presumption that solicitation may be conducted anywhere on nonwork time, but distribution may be prohibited even on nonwork time unless limited to nonwork areas such as parking lots and cafeterias. As with the time presumption, an employer may further restrict the location of employee communications if it sets forth legitimate reasons related to production and discipline. Later cases have revealed that many of the special business needs that justify further restrictions on employee exercise of § 7 rights are related to the effect that the content of the communication will have on its audience, especially nonemployees who might come into contact with it. Again, assumptions are made: that solicitation, despite its general intimacy, may be accidentally overheard, or that distribution runs the risk of leaving provocative materials where they may be found accidentally by patrons.

D. Deviation from the Presumptions: Other Labor Law Principles

Although the time and place presumptions purport to draw neat lines dividing the instances in which employers may restrict § 7 conduct from those in which they may not, their rigid application would at times endanger the fundamental values of the Act, even in the traditional workplace context for which they were developed. The Board has attempted to avoid such results. For example, so as not to severely limit one direct exercise of § 7 rights—electing a union—the NLRB classifies distribution of union cards as solicitation, allowing it to occur in work areas, although such activity involves physical objects that might litter the workplace. The fact that employers

57. Id. at 620.
58. Id. at 620–21.
59. See May Dep’t Stores Co., 59 N.L.R.B. 976, 980–81 (1944) (noting that clerks may be prohibited from discussing union matters at any time on sales floor where customers might overhear them); Beth Israel Hosp., 437 U.S. at 503–04 & n.23 (noting hospital workers may be prohibited from leaving pamphlets discussing their complaints about understaffing in area where patients might read them).
60. Stoddard-Quirk, 138 N.L.R.B. at 620 n.6, cited in Beth Israel Hosp. v. NLRB, 437 U.S. 483, 493 n.10 (1978), The Stoddard-Quirk majority, basing this distinction presumably on the fact that such a signature card must be returned to be counted, declared that “the situation where an employee is asked to sign an authorization card” was wholly distinguishable from distribution. It criticized the dissent, which would have subjected all distribution to the same rules as solicitation, stating, “[o]ur dissenting colleagues exploit a semantic gambit by analogizing the solicitation of signatures on authorization cards to the distribution of ‘literature.’” Stoddard-Quirk, 138 N.L.R.B. at 620 n.6.
may justify more severe restrictions than those allowed by the temporal and spatial presumptions by establishing legitimate needs related to production and discipline also demonstrates that the categories of permitted and forbidden behavior may be forced to yield in order to uphold the purposes of the Act. In several situations, in fact, the Board has entirely collapsed or ignored its presumptions, sometimes to the benefit of employees and sometimes to that of employers.

1. Pro-employee: Prohibiting Discriminatory Conduct

Many of the deviations from the presumptions operate in favor of employers. For example, although employers may expand restrictions on employee § 7 rights to cover nonwork times and places by demonstrating legitimate business needs, employees can never invalidate a ban on such activities on company time or on the work floor by proving that their actions have not actually harmed productivity or discipline. Nonetheless, limits on employers' freedom to curb employee rights exist. Chief among these is the prohibition on discriminatory conduct. Where an employer allows some nonwork uses of its property, it may not prevent employees from using the property to the same extent for § 7 purposes. This is true even where the basic presumptions have been violated. For example, in one recent case, the Board held that where an employer's rule prohibiting solicitation was not enforced against employees who solicited for football pools and similar nonwork purposes during work hours, an employee labor organizer could not be fired for discussing the union, even though some such conversations took place on company time. Differential treatment often indicates antilabor animus and constitutes discrimination against labor activity, in violation of the Act.

2. Pro-employer: Blanket Prohibitions

Where differential treatment has not been at issue, however, the Board has at times upheld extremely broad prohibitions on access to fellow employees. In *GTE Lenkurt, Inc.*, it ruled that an employer could forbid off-duty employees to remain on the premises of the business for any purpose if this

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61. See, e.g., Storer Communications, Inc., 294 N.L.R.B. 1056 (1989) (union is entitled to post own minutes of meetings with management on bulletin board where management posted its version; employees also posted personal notices there); Northeastern Univ., 235 N.L.R.B. 858 (1978) (denial of access to meeting rooms outside of work hours constituted violation where other employee groups were able to schedule meetings); May Dep't Stores Co., 59 N.L.R.B. 976 (1944) (Act violated where no-solicitation rule was enforced against union but another organization allowed to solicit, even during working hours).


63. 204 N.L.R.B. 921 (1973).
prohibition was uniformly applied and not motivated by anti-union bias.\textsuperscript{64} In accord with \textit{Republic Aviation}, the Board found that rules specifically prohibiting solicitation and distribution in the plant and parking lot during nonwork times in which the employee was nonetheless legitimately on the company property—presumably during breaks or immediately prior to work—violated the Act where no production, safety, or disciplinary reason necessitated the prohibition.\textsuperscript{65} However, the Board likened "an off-duty employee who seeks to enter"\textsuperscript{66} the employer’s premises to organize to a nonemployee, whose rights are significantly narrower than an employee’s rights.\textsuperscript{67} The Board stated:

\begin{quote}
[To require an employer to open his premises for union activities to off-duty employees is, in fact, to compel him to make available an additional means of communication, one which we believe he need not afford them. For, in our view, there is no significant diminution of the employee rights by such a no-access rule, inasmuch as the Board and courts protect the right to engage in union activities during the normal period of employee association and communication; i.e., during nonwork periods when employees are on the premises in connection with their jobs.\textsuperscript{68}]
\end{quote}

Two dissenters sharply criticized the majority, noting that the rule "has the effect of forbidding employees on Respondent’s three shifts to engage in such activity in nonwork areas at any time except during their own 'breaks' and immediately before and after their own shifts."\textsuperscript{69}

While the NLRB has never expressly overruled \textit{GTE Lenkurt}, in \textit{Tri-County Medical Center, Inc.},\textsuperscript{70} it echoed the reasoning of the \textit{GTE Lenkurt} dissent and limited the prior decision "to prevent undue interference with the rights of employees under § 7 of the Act freely to communicate their interest in union activity to those who work on different shifts."\textsuperscript{71} The Board wrote:

\begin{quote}
[I]n order to effectuate the policies of the Act, . . . such a [no-access] rule is valid only if it . . . limits access solely with respect to the interior of the plant and other working areas . . . . [E]xcept where
\end{quote}

\[\textsuperscript{64} \textit{Id.} at 922.\]
\[\textsuperscript{65} \textit{Id.} at 921 n.4.\]
\[\textsuperscript{66} \textit{Id.} at 921 (emphasis added). The Board characterized the employee covered by the upheld rule in this way, although nothing in the facts indicated that the employees in question were in fact ones who sought to enter the premises while off-duty rather than to remain after work or to return earlier than necessary when reporting for work. The rule would prohibit employees from being on the property in all of these situations.\]
\[\textsuperscript{67} \textit{See Lechmere, Inc. v. NLRB, 502 U.S. 527, 541 (1992); NLRB v. Babcock \& Wilcox Co., 351 U.S. 105, 113 (1956).} \]
\[\textsuperscript{68} \textit{GTE Lenkurt, 204 N.L.R.B.} at 922.\]
\[\textsuperscript{69} \textit{Id.} (Fanning \& Jenkins, Members, concurring in part and dissenting in part).\]
\[\textsuperscript{70} \textit{222 N.L.R.B.} 1089 (1976).\]
\[\textsuperscript{71} \textit{Id.} at 1089.\]
justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.\textsuperscript{72}

E. "Effective" Communication

The Board's decisions regarding nondiscriminatory prohibitions of employee access to employer facilities, even on nonwork time, may appear grave for the claims of (net)workers. Employers will protest that mandating access to e-mail is "to compel [the employer] to make available an additional means of communication."\textsuperscript{73} Even the softened stance of \textit{Tri-Country}, with its reliance on interior/exterior distinctions to disallow the strictest uniform prohibitions, gives little comfort to (net)workers, for one cannot easily identify the parking lots of cyberspace. Fortunately for (net)workers, another body of case law offers protection against an employer who so limits the location and times of communication as to make the employees' rights meaningless.

Although it upheld the Board's general presumptions regarding nonwork times and places, the Supreme Court emphasized in \textit{Beth Israel Hospital v. NLRB}\textsuperscript{74} that "the right of employees to self-organize and bargain collectively . . . necessarily encompasses the right \textit{effectively} to communicate with one another regarding self-organization at the \textit{jobsite}."\textsuperscript{75} Because of concerns that employee solicitation and distribution activities could disrupt the hospital's delivery of patient care, Beth Israel Hospital had limited labor activity to locker rooms and adjacent bathrooms that were accessible only to employees. In nonwork areas that were open to the public, including the cafeteria and coffee shop, such activities were prohibited.\textsuperscript{76} Noting that only some of the locker rooms were accessible to \textit{all} of the hospital employees, the Court found that restriction of employee communications to these areas denied their right to exercise their § 7 rights effectively. The Court remarked that the hospital itself did not ordinarily use the locker area to communicate with employees but did use the cafeteria for official notices.\textsuperscript{77} On the other hand, although the Court voiced some doubt regarding the employer's need to protect

\textsuperscript{72.} \textit{Id.}

\textsuperscript{73.} See GTE Lenkurt, Inc., 204 N.L.R.B. 921, 922 (1973).

\textsuperscript{74.} 437 U.S. 483 (1978).

\textsuperscript{75.} \textit{Id.} at 491 (emphasis added). While \textit{Beth Israel} involved formal labor organization, Eastex, Inc. v. NLRB, 437 U.S. 556 (1978), decided the same day, established that employees may engage in other concerted activities "for mutual aid or protection," subject to the same restrictions as self-organization. \textit{Id.} at 572–74.

\textsuperscript{76.} \textit{Beth Israel}, 437 U.S. at 486–87.

\textsuperscript{77.} \textit{Id.} at 489–90. The Court also noted that the hospital had allowed other nonwork solicitation, such as a United Way fund drive, in the cafeteria entrance. \textit{Id.} at 490. This could provide an independent ground for allowing labor access, since as we have seen, \textit{see supra} Subsection II.D.1, discriminatory treatment is prohibited by the Act.
patients by preventing their exposure to labor arguments, the Court did not find this justification for the additional restriction to be pretextual. Rather, it agreed that the Board could, on balance, find that the harm to employees caused by the ban was greater than the harm to patients that it averted. The Court sought a careful equilibrium. It noted:

"The availability of one part of a health-care facility for organizational activity might be regarded as a factor required to be considered in evaluating the permissibility of restrictions in other areas of the same facility. That consideration is inapposite here, however, where the only areas in which organizational rights are permitted is not conducive to their exercise."

The Court upheld the decision to grant employees the right to use the cafeteria for concerted activity while leaving open the possibility that a more restrictive rule, such as one "requiring face-to-face distribution rather than leaving literature on a table accessible to all," would strike an adequate balance of employee rights with the employer's "legitimate desire to avoid having potentially upsetting literature read by patients." Thus, the Court established that, although a legitimate business need to restrict nonwork communication access will justify some limitation, such limitation must not compromise meaningful employee exercise of § 7 rights. This principle has great import as we consider the balance of employee communication rights and employer business needs in cyberspace.

III. LAW IN THE (NET)WORKPLACE

The NLRB thus far has decided only one case involving employee e-mail access, and that case was resolved on straightforward antidiscrimination grounds. In E.I. du Pont de Nemours & Co., the Board held that an employer had discriminated against bargaining unit employees, in violation of their § 7 rights, by prohibiting them from using e-mail to distribute union literature and notices. The Administrative Law Judge (ALJ) had found that, in addition to authorizing specific employee committees to send notices and solicit concerns over the system, the company allowed employees to send messages "to sometimes hundred[s] of other terminals," ranging from notices to poems to discourses on boredom, drugs, Federal Express, TV programs, and

78. Id. at 502-03.
79. Id. at 505.
80. Id. at 504 n.23.
82. Id. at 897.
83. These were found to be company-dominated labor organizations, in violation of § 8(a)(2) of the Act. Id.
a host of other nonwork topics. Because he had found the denial of union use under these circumstances to be clearly discriminatory, the ALJ had ordered the employer to grant the union access to the e-mail system but had declined 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." The Board affirmed the ALJ's ruling but, determining that the wording of his remedy for the discriminatory exclusion was too broad, required only that union access be commensurate with that granted to other employees. Thus, it left the employer the option of closing all of its network to nonbusiness use, leaving a very real question as to the availability of access under a uniform prohibition.

The possibility that an employer's tolerance of personal network use will open it to a requirement of wholesale use for labor purposes is likely to encourage employers to institute draconian prohibitions on all personal use, particularly in light of the potential power of the electronic communications medium. In fact, one practitioner has warned employers: "If a corporation allows its employees to use E-mail for personal purposes, the company will be hard pressed to justify a ban on pro-union messages." As a prophylactic measure, he recommended that companies establish and enforce uniform prohibitions on all nonbusiness uses of the electronic communications system.

May employers institute a nondiscriminatory total prohibition on nonwork use of electronic communications? To answer this question, we must return to Beth Israel, which establishes that the right to engage in concerted activity guaranteed by the NLRA "necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite." If employees work in physical proximity to each other and have access to real-world facilities such as bulletin boards and cafeterias, their right to effective communication at the jobsite may be fulfilled without network access. But for those employees who are geographically separated because of

84. Id. at 919.
85. Id.
86. See id. at 893 n.4 (limiting remedy to discriminatory prohibition).
87. Such a prohibition runs a serious risk of provoking employee resentment, however, and may not be in the employer's overall best interest. For example, a 1991 attempt by the Veterans Administration to prohibit all personal use of the office e-mail met with a swift negative response from the union. See American Fed'n of Gov't Employees, Nat'l Veterans Admin. Council, 42 F.L.R.A. 1327 (1991). Although many private companies have restrictive e-mail policies, they are rarely enforced. See Andrew Jacobs, Cranking Up the E-mail Business, Employees Discover No-holds Barred Communication, SAN DIEGO UNION-TRIB., May 21, 1995, at I-1.
88. Morris, supra note 10, at 583–84.
89. See id. at 587–89.
91. Where the employer itself does not communicate with employees by using these meeting rooms or bulletin boards, but rather relies on e-mail, employees' rights to use the same method would seem to be strengthened. See id. at 490 (noting employer's use of cafeteria and not locker rooms to communicate with employees in ascertaining adequate forum for employee communication).
telecommuting, or who work nonstandard hours, these traditional outlets provide no solutions. Where the common jobsite is primarily cyberspace, networks may be the sole medium of effective communication. In such a situation, an outright ban on all nonwork use of e-mail would prevent employees from acting collectively and thus would violate the NLRA.

Although employees' ability to communicate must be effective, it need not be unfettered. As the foregoing review makes clear, in the traditional workplace, the time and place restrictions on employee exercise of §7 rights provide administratively convenient default rules for preserving employees' ability to communicate effectively with one another while protecting the employer's right to maintain a disciplined, productive workplace.92 Yet the tests themselves derive specifically from the paradigm of industrial work in which they developed. In the next sections, I demonstrate that the fit between these presumptions and (net)work realities is often poor; if rigidly applied, the presumptions may have results tantamount to a ban on employee communication.

A. Examining Nonwork Time

The Supreme Court has declared that "[o]rganization rights are granted to workers by the same authority, the National Government, that preserves [employer] property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other."93 The restriction of employee communication rights to nonwork time, first approved in Republic Aviation,94 embodied the Board's experiential judgment regarding one primary way of striking this balance in the industrial workplace.

An uncritical application of the nonwork-time presumption to the (net)workplace would entitle employees to send electronic communications before and after work, during lunch, or on other breaks. However, this traditional accommodation will not satisfy employers in the new context of (net)work. Employers fear that if employees have guaranteed access to e-mail for labor-related communication, they will inevitably spend work time engaged in such activity.95 Some employers already limit personal use of intra-office

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93. Babcock & Wilcox, 351 U.S. at 112.
94. 324 U.S. at 803 n.10.
95. One practitioner, stating the case against allowing employees to use employer electronic communications, wrote: "In disseminating information via E-mail, union organizers would be doing so at the expense of the employer, using employer resources, equipment and time to organize. Moreover, sending E-mail in order to support union organization further provides a constant and on-going disruption of work to those receiving the messages." Morris, supra note 10, at 582. This assertion rests on questionable generalizations. An employee sending or reading electronic communications during her coffee break is not using company time and thus remains protected, at least under traditional nonwork-time analysis.
e-mail because of the tendency of some employees to waste time passing
electronic notes back and forth.\textsuperscript{96}

Moreover, effective monitoring of e-mail abuse is difficult. A casual
observer cannot tell if a person pounding away at his computer is working,
asking a coworker to join his petition for a paternity leave policy, or spreading
gossip.\textsuperscript{97} Employers can monitor best by examining the e-mail traffic.
Although such eavesdropping generally falls within an employer's rights,\textsuperscript{98}
it raises substantial privacy concerns even if employers read only the e-mail
headers, which generally contain both the sender's and recipient's addresses
and the time of transmission.\textsuperscript{99} Privacy rights are beyond the scope of this
Note, but the obvious concerns raised in that area should employers enforce
their right to maintain a disciplined and productive workplace by monitoring
e-mail traffic demonstrate one negative result of applying the traditional
nonwork-time presumption to (net)work.\textsuperscript{100}

As an alternative to monitoring, for practical or legal reasons, an employer
might institute a prohibition on electronic communications. Restrictions on
communication during nonwork time may be permitted, however, only if the
employer demonstrates legitimate need.\textsuperscript{101} The traditional presumption itself
may be viewed as justifying prohibition during work time by establishing that

Furthermore, whether the recipient of the message is disrupted will depend on the configuration of the
system, something that (presumably) will be in the employer's control. Nondisruptive configurations are discussed in Part IV, infra.

96. Jacobs, infra note 87, at I-I; see also Chiu, supra note 24, at D1, D8 (describing lost productivity
caused by traffic in personal messages). One large law firm instituted a special bulletin board on its LAN
for personal messages. Id.

97. See Jacobs, supra note 87, at I-I (quoting Solomon Brothers analyst describing greater ease of
disguising gossip on e-mail than of hiding gossip on telephone).

98. The privacy rights at issue in this context have been the subject of extensive debate in both popular
and scholarly publications. Although it is hotly debated, most authors have concluded that current law
favors employers in this matter. See, e.g., Julia Tumer Baurnhart, The Employer's Right to Read Employee
E-Mail: Protecting Property or Personal Prying?, 8 LAB. LAV. 923 (1992); Laurie Thomas Lee, Watch
Your E-Mail! Employee E-Mail Monitoring and Privacy Law in the Age of the “Electronic Sweatshop,”
28 J. MARSHALL L. REV. 139 (1994); Steven Winters, Comment, The New Privacy Interest: Electronic Mail
in the Workplace, 8 HIGH TECH. L.J. 197 (1993); Lois R. Witt, Comment, Terminally Nosy: Are Employers
Free to Access Our Electronic Mail?, 96 DICK. L. REV. 545 (1992); see also R.J. Ignelzi, Under Scrutiny:
E-mail, Phone Calls, Voice Mail Legally Can Be Monitored by Boss, SAN DIEGO UNION-TRIB., July 3,
1995, at D1; Glenn Rifkin, Do Employees Have a Right to Electronic Privacy?, N.Y. TIMES, Dec. 8, 1991,
§ 3 (Business), at 8.

99. It is possible to counterfeit headers on most systems to alter this information. See Elizabeth Weise,
Beware Internet Strangers Bearing “Spoof” E-mail, S.F. EXAMINER, July 17, 1995, at D-6. Counterfeiting
can often be detected by looking at the name of the machine from which the message originates. See id.
(discussing tracing of harassing messages). But see Amy Harmon, Expulsion from Caltech Raises Issue of
E-mail Harassment, ATLANTA J.-CONST., Nov. 23, 1995, at A11 (discussing difficulty of authenticating e-
mail in context of student's expulsion for sending harassing messages that he claims were forged or
altered).

100. Employer surveillance of protected concerted activity might itself violate the NLRA in some
cases. See Automotive Plastic Technologies, 313 N.L.R.B. 462, 463-64 (1993) (explaining circumstances
under which employer observation of union activities violated Act).

101. See, e.g., NLRB v. Lake Superior Lumber, 167 F.2d 147, 151 (6th Cir. 1948) (timber company's
need to enforce curfew for lumberjacks justified limit on times union organizer could meet with
employees).
proof of § 7 communication on company time provides irrebuttable circumstantial evidence of lost production. But even if the employer demonstrates the onerousness of monitoring nonwork communications to discern whether § 7 activities are being conducted on company time, it has not carried its burden of demonstrating that either production or discipline are compromised. Thus, the difficulty of monitoring whether or not labor-related electronic communications are occurring on work time does not justify a ban where employees’ ability to act collectively depends on network communications.

Why does the nonwork-time presumption fit the (net)workplace so uneasily? Recall that the nonwork-time presumption was first articulated in Republic Aviation, a case involving heavy industrial plants. The employees affected were factory workers. They worked shifts. Their coworkers worked the same hours they did. They had regular times off for lunch. The hours before they punched in and after they punched out were clearly their own, while periods in between belonged to the boss. In this context, the Republic Aviation Court could cite with approval an NLRB decision dividing the employment universe and the rules governing it into distinct parts:

Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. . . . It is no less true that the time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee’s time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property.102

Although this bright-line rule serves to ease enforcement, the model of work on which it is based will not be the paradigm for the next century. In fact, (net)work is possible because many of the assumptions underlying the traditional presumptions are frequently no longer true. Service industries do not require the uniform coordination of assembly lines, so it is not necessary for all workers to have the same hours. Individual workers, while engaged in a common project, may operate with substantial autonomy. No longer is the workday divided neatly into company time and nonwork time: If an employee sets his own schedule, whether he works this quarter hour and engages in § 7 activity the next or vice versa is irrelevant as long as he works the total time contracted for. If employees telecommute, there is not even the concern that

102. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 n.10 (1945) (quoting Peyton Packing Co., 49 N.L.R.B. 828, 843 (1943)).
another worker will need to use the computer, desk, or telephone, or that the company is being forced to keep the office heated and lit for a few late workers. In many jobs, moreover, time is not the measure of productivity; the employee is expected to work until the project is done. It is this very trait—the fact that many employers simply want the work done, as quickly as possible—that has led some (net)workers to complain of overwork. But it also means that time's primary relevance is as a means of setting deadlines, not of measuring output. Thus, for many (net)workers, the nonwork-time presumption is essentially meaningless. Before we consider alternative visions of labor law that these changes suggests, we should examine the presumptions governing the location of work and nonwork activities as well.

B. Considering Nonwork Places

As I discussed above, the traditional presumptions about location depend on certain common sense assumptions about the nature of different types of communication. Conversation is intangible, so oral solicitation may presumptively be conducted anywhere as long as employer time is not infringed. Distribution of written materials, on the other hand, produces paper debris that can threaten productivity and even safety, so it must not be conducted in work areas. Further limitations on either form of communication may be justified by demonstrating special needs, often related to the effect the communication might have on nonemployee hearers. But these common sense views derive from traditional workplaces and may not retain their reasonableness in the (net)workplace.

1. Electronic Communication Is Nondisruptive

One concern justifying the restriction of communication in work areas—the impact of employee communications on (often) incidental audience members—is largely inapplicable to (net)workers. Electronic communication is silent. It will not accidentally be overheard by customers. It is also

103. Verespej, supra note 6, at 50.
104. This assertion is not true for all telecommuters. An individual who works at home, using a computer and telephone to field customer service inquiries or take mail orders, for example, will be likely to have a specific shift. In this situation, a division of time similar to the traditional model may remain appropriate. The very nature of this work—answering customer-initiated inquiries—may prevent e-mail abuse during work time, especially as the employer might be able to ascertain whether or not employee communications during the shift correlated with incoming calls.
107. See May Dep't Stores Co., 59 N.L.R.B. 976, 980–81 (1944) (noting that clerks may be prohibited from discussing union matters at any time on sales floor where customers might overhear them); Beth Israel Hosp., 437 U.S. at 503–04 & n.23 (noting hospital workers may be prohibited from leaving pamphlets discussing their complaints about understaffing in area where patients might read them).
intangible. It leaves no signs in the real world to attract the curiosity or anger of consumers, and it does not spontaneously escape the proprietary network to become accessible to nonemployees. Clients rarely have any access to a company network, and even where they do, the employer generally controls access to the system and can ensure that clients do not wander into the employee communication spaces.

By properly configuring the system, an employer can also minimize the chance that employees will be distracted by messages. Inherently, the most common forms of electronic communication eliminate the need for simultaneity; both e-mail and message base announcements can be sent whenever the speaker is free, and each recipient will have an opportunity to respond when she is not working, whether moments or days after the message is sent. Accordingly, electronic mail will disrupt production only if the system notifies the employee when a message arrives. If a recipient must check her own in-box for new mail, the flow of messages will pose no interruption to her work. Systems also can easily be configured to allow employees to delete unread messages in their individual mail boxes. In some cases, an employee may even be able to establish a “kill file” to screen out messages automatically.108 If messages are posted to a message base, the employee will receive no notice that a new message has been sent and need only look at the messages if she desires. Thus, a good part of the imposition that traditional communication is assumed to make on employer productivity and discipline is simply not present with electronic communications.

2. Speech or Distribution?

Leaving aside assumptions about audience reaction to electronic communication, to apply the traditional location presumptions to employee use of cyberspace requires us to decide whether electronic communications are speech or distribution, an exercise that produces no clear answers. Electronic communication shares qualities of both written and spoken communication, and its different forms resemble one or the other more closely. “Chat” and real-time conferencing share the hallmark ephemerality and simultaneity of oral solicitation. The form on which this Note has primarily concentrated—e-mail—is enduring, yet it too shares many qualities of speech.

108. Kill files screen by identifying the sender. See DERN, supra note 27, at 213, 218–19. Thus, an employee who sometimes received necessary, work-related messages from a particular coworker would not be able to add him to her kill file.
a. E-mail as Speech

Like speech, e-mail is often informal and individually targeted. But even where an initial message is neither informal nor personalized, it is still not merely equivalent to a flyer because e-mail allows the reader to talk back. This ability to exchange ideas and discuss what action to take collectively is the key to the effective preservation of labor rights and the equalization of bargaining power. Conversation provides the opportunity to meet the listener's resistance point by point as it develops, producing fuller deliberation about issues as well as a better chance of swaying the skeptic than does the more limited and formal medium of distribution. Likewise, electronic communication promotes responsive interchanges, not just an exchange of position papers.

On many systems, the participant reading the contents of a message base may either post her response in the same, group forum or comment directly to individuals, including the initial sender. Each person with access to such a network thus may take the floor at the "public meeting" by posting to the message base or may engage others in one-on-one discussion. As with speech, no outlay of employee resources is necessary, ensuring that the message of the leaders is not the sole one. Such ease of access may also empower the shy to speak. Thus, electronic communications promote a multiplicity of interchanges and, on the level of values, resemble speech more than distribution of literature.

b. E-mail as Distribution

On the other hand, as discussed previously, electronic communications do not require simultaneity of communication. Thus, like literature, electronic communications are effective as long as they are received. Yet the traditional presumption limiting distribution to nonwork areas is largely justified by the physical debris that distribution of printed materials leaves behind. Logically, one must ask if network communications "litter" cyberspace.

The answer may be yes. If employees receive hundreds of messages in the same directory, some work-related and some not, they will have to spend time sorting the messages to determine what requires their attention as part of their work duties. This inundation may be annoying to employees, much as junk mail is annoying. Indeed, even if the mail itself is welcome, sheer volume can

111. Electronic communication also does not share the physical qualities that underpinned the Board's initial fixation on this distinction. For example, safety concerns, such as the risk of fire when paper debris accumulates around industrial machinery, are simply not present.
impede the employer’s right to productivity by causing employees to miss time-sensitive work-related messages or by requiring them to spend time sorting through nonwork messages. In addition, an extremely large volume of electronic messages could slow the processing of the entire network, occluding bandwidth and occupying processors, in turn slowing the processing of data for all employees, including those not engaged in protected activities. Thus, one practitioner opposed to employee cyberspace rights has argued: “Just as employers have the right to curb the distribution of literature in working areas in the interest of workplace efficiency, so should employers be permitted to limit the intrusion of union initiated E-mail distributions.”

Even if the enduring nature of electronic messages and the potential for litter that they present result in their classification as distribution, under the traditional presumption this merely justifies their limitation to nonwork areas. But do such divisions exist in the geography of cyberspace? If an employer enforces a uniform ban on nonbusiness messages on its network, has it established that the entire territory of its cyberspace is a work area? The real-world analogue to such a space would be a factory with no break rooms, locker areas, bathrooms, or parking lots—only the work floor. Such a workplace could not exist because of the physical needs of workers. A (net)worker satisfies these physical needs too, but in real space, in his home or at a branch office; the facilities are not part of his (net)workplace. Thus, it is possible that the only space that he would share with his coworkers is in fact the cyberspace work area.

This possibility demonstrates another inadequacy of employing the presumptions developed in an industrial setting to restore equality of bargaining power in cyberspace. Although controlling the volume of messages may be the only way of protecting overall network efficiency, allowing a blanket prohibition of employee electronic communications would run afoul of the guarantee of effective communication espoused in Beth Israel. Since the severity of the problem will be directly related to the bandwidth of a specific company’s system, a prohibition would be an overinclusive solution to what may be a phantom concern for many employers. Rather than fixating on the industrial models for solutions, we must determine how the broad principles of the NLRA may be fulfilled in the new context of (net)work.

IV. MEANINGFUL RIGHTS

To determine what standards should govern the (net)workplace, we should remember the NLRA’s purpose of establishing an environment for equitable bargaining between employers and employees. Beth Israel ensures workers’

112. Morris, supra note 10, at 585.
rights to effective communication, thus ruling out an absolute ban on (net)workers’ electronic communication, but employers may still protect productivity to the greatest extent compatible with meaningful employee rights. Therefore, we must consider the characteristics of modern work and of network communications to understand how employees can engage in protected § 7 activity without undermining employer productivity. Greater experience with (net)work in the future may suggest new tests to keep pace with work realities. For the time being, I suggest that solutions may be found by making interrelated inquiries into the ways § 7 communications affect both the individual employee’s ability to perform required work and the overall efficiency of the network.

A. Effects on the Performance of Individual Employees

Employers will want to establish general rules that maximize the output from each individual (net)worker. If both § 7 and work messages are posted to an employee's e-mail account, the employee will have to spend time sorting through her mail in order to find the pressing work messages and may become distracted from her task. Thus, the simplest measure to promote individual employee performance while preserving § 7 communication rights is to segregate work messages from § 7 messages. Creating a work-only account and another forum for § 7 communications can be likened to defining nonwork areas under the traditional view. Partitioning cyberspace would make an employer's files and directories more organized and thus save employees time in sorting through the information sent to them. Employers could monitor the content of work-only accounts without infringing employee privacy rights, and individuals posting nonwork messages there could be properly subject to discipline for presumptive impairment of the recipient's performance. If all § 7 messages are thus segregated from work messages, the threat that a deluge of nonwork messages will distract an employee or even make it impossible for her to locate important work-related messages will be largely eliminated.

Several inherent features of electronic communication also may make it less likely than traditional communication to harm an individual employee’s performance. As noted above, the removal of the requirement of simultaneity makes electronic communication less disruptive than traditional communication. Furthermore, the ability to initiate conversation with many people using the same message is more efficient than oral solicitation, which enables one to speak only to those present, necessitating repeated conversations. But to the extent that an individual employee fails to meet

114. Id. at 491–92.
115. I will discuss the potential forms of such § 7 fora in Section IV.B, infra.
116. See supra Subsection III.B.1.
employer expectations, despite the restriction of her § 7 activity to a nonwork forum, existing principles of labor law other than the ill-suited time and place presumptions allow employers adequate recourse.

Under the general rule of at-will employment, an employee may be fired for any reason. The NLRA limits this general principle only by preventing the employer from firing employees because they engage in protected activity. The employee bears the burden of proving that her conduct protected by § 7 was a substantial or motivating factor in her discharge. If mixed motives are alleged, the employer may raise as an affirmative defense that the employee would still have been fired regardless of any antilabor animus. Thus, for example, if the employer prohibits nonwork e-mail generally, and the employee sends a great deal of personal, nonlabor e-mail in addition to messages protected under § 7, her § 7 activity will not immunize her from dismissal. If, however, the employer never enforced its general e-mail prohibition, such firing would constitute discriminatory treatment, presumptively on the basis of the § 7 conduct.

Perhaps the most difficult situation would arise if an employer were to fire an employee for failure to meet required productivity levels. An employer could establish requirements so high that an employee could not meet them without sacrificing time she otherwise would spend on § 7 activity. If the employee proved that antilabor animus motivated the work quota—for example by presenting evidence that work expectations were higher for labor activists, or by introducing extrinsic evidence of the animus—she would prevail under general principles prohibiting discrimination against labor. Should she fail to prove discriminatory reasons for the work level, however, the employee could likely be dismissed.

In addition to the proscription of antilabor animus, other sources offer workers some protection from unreasonable work requirements. If the NLRA is fulfilling its purpose, collective bargaining would shield the employee from unreasonable employer demands. In addition, the Fair Labor Standards Act (FLSA) limits the number of hours that may be required of many workers and mandates compensation for overtime. For workers who have contracted for a certain number of hours, this will offer substantial protection. Unfortunately, the invocation of the FLSA is not a perfect solution. Unlike the NLRA, the FLSA does not apply to professional employees. These workers may be especially susceptible to overwork because of constant

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117. NLRB v. Transportation Management Corp., 462 U.S. 393, 400-03 (1983). The employee will be represented by the NLRA's General Counsel.
118. Id. at 401-02.
119. An employee with the resources of a union behind her would likely have better luck in making this case than would one acting on her own.
121. Id. § 207.
122. Id. § 213(a)(1).
electronic links to their projects,\textsuperscript{123} and could benefit from collective action to negotiate more reasonable work expectations.

In addition to the FLSA, the NLRB itself could exercise its long-dormant rulemaking powers to promulgate FLSA-type regulations. Even if the Board took this unlikely step, however, it would be faced with a variety of problems ranging from its own lack of experience in rulemaking and concomitant lack of staff for the purpose, to the difficulty of creating a workable standard that would neither impair employer competitiveness nor deprive employees of the right to increase their production in return for other benefits.\textsuperscript{124} Moreover, an attempt to avoid these difficulties by a prohibition of unreasonable production requirements would do little more than duplicate the NLRA's general prohibition of unfair labor practices. It would provide inadequate guidance to employers and employees and would again require adjudication to fill in its substance.

Ultimately, if the (net)workplace is recognized as a legitimate work environment, existing principles of nondiscrimination will govern in the same ways that they have in traditional, physical workplaces. In the end, (net)workers too will have to depend largely upon traditional showings of animus and the fruits of collective action itself to defend against unfair work demands. The Board, exercising its adjudicatory power, must be on the lookout for situations in which employers prevent the meaningful exercise of employee § 7 rights through oblique mechanisms such as those described above.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{123} See Verespej, supra note 6, at 50, 55 (describing various telecommuters).
\item \textsuperscript{124} Scholars have long urged the NLRB to exercise its rulemaking powers more often, in the interests of fairness and uniformity. See, e.g., Samuel Estreicher, \textit{Policy Oscillation at the Labor Board: A Plea for Rulemaking}, 37 ADMIN. L. REV. 163 (1985); Cornelius J. Peck, \textit{The Atrophied Rule-Making Powers of the National Labor Relations Board}, 70 YALE L.J. 729 (1961); Carl S. Silverman, \textit{The Case for the National Labor Relations Board's Use of Rulemaking in Asserting Jurisdiction}, 25 LAB. L.J. 607 (1974). Their efforts have been to little avail. See Zebrak, supra note 40, at 126–27 (noting that Board has undertaken only one major rulemaking in last eight years).
\item Even if the Board did embark upon the APA-dictated series of notice and comment proceedings, there is a serious risk that the end product would be overly favorable to employers. Unlike individual adjudications, in which both parties have direct knowledge of the facts and an incentive to participate, rulemaking relies on voluntary participation. Employers, clearly aware of the stakes, will have a great incentive to provide information supportive of their rights. Employees who are not already organized, however, are unlikely to read the \textit{Federal Register} and may be entirely unaware of the rulemaking proceedings and their right to participate. Unorganized employees will also lack the resources to mount comments equal to those put forth by well-heeled industry. It may be left to the unions to oppose industry. Organized labor has been in decline in recent years, however. In 1955, the AFL-CIO had 12,622,000 paying members in its affiliated unions. \textit{DIRECTORY OF U.S. LABOR ORGANIZATIONS} 64 (Courtney D. Gifford ed., 3d ed. 1986–87). In 1965, the number was 12,919,000, while in 1975 the number swelled to 14,070,000. \textit{Id.} By 1985, however, the number had again declined to 13,109,000. \textit{Id.} Between 1979 and 1993, when many unions' membership dropped significantly, the Service Employees Union, benefiting from some mergers, grew from 537,000 to 919,000 members. \textit{BUREAU OF THE CENSUS, supra note 2}, at 438. Unless network access is granted, however, this momentum may be hard to sustain as employees decentralize, so a major achievement of employee access to networks may be to shore up faltering unions. Thus, the absence of network access that rulemaking would be intended to alleviate could itself impair employee ability to comment, hampering equitable and effective rulemaking.
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B. Effects on the Network: Overall Productivity

In addition to the effects that § 7 activity may have on a single employee’s production, employers may take action to remedy the collective inefficiencies of such employee communications. The Board must scrutinize an employer’s remedial actions based on the combined effects of individual productivity losses particularly carefully; some employer claims rest on empirically questionable assumptions. One business leader, for example, has claimed that if 500 employees each take thirty seconds to read a message, the company has been deprived of 250 minutes of work, or approximately one half of a day’s work for a single employee.125 This conclusion assumes that losses are additive, a doubtful assertion since a negligible reduction in work by an individual is unlikely to affect his total production, meaning that overall company productivity will also appear unaffected. In addition, the segregation of nonwork from work messages advocated in the preceding section will minimize the additive effects of such distractions. Nonetheless, excessive traffic creates other productivity losses by overburdening the technological capacity of the system.

Ultimately, establishing rules to maintain the balance between employee communication and the employer’s need for efficient and predictable work patterns will depend greatly on the specifics of system capacity and work type. Such rules might be a proper subject for negotiation between the parties. Until accommodations can be agreed upon by contracting parties, however, certain specific measures suggest themselves to restore the balance of employee and employer prerogatives.

The easiest and least restrictive mechanism for segregating work and nonwork messages and thereby controlling traffic levels is to establish a message base for employee § 7 communication. By encouraging or requiring employees to post to a message base any communication that many people receive in identical form, rather than duplicating a message perhaps hundreds of times to send to individual e-mail boxes, bandwidth is conserved and system speed protected.126 A message base will also discourage personal nonwork messages, which pose a greater threat of overuse than protected § 7 messages even in a unionized workplace. Because of its very publicity, a message base will be an unlikely forum for gossip, and “netiquette” may be sufficient to keep the volume of other nonwork messages, such as for-sale notices, to reasonable levels.

Whether an employer could satisfy the employees’ right to communicate while strictly limiting network access to the use of a special message base

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125. Chiu, supra note 24, at D8.
126. See DERM, supra note 27, at 201–02. Creating a message base would also further employees’ § 7 right not to communicate. Employees who were not interested in the collective discussion would not be required to access this space, and they would not find their own digital in-boxes filled with mass mailings.
remains an open question. As Beth Israel clearly indicates, the employer may only be required to permit the minimum conditions for effective communication. So long as employees retain the ability to communicate, and thus to act collectively, the purposes of the NLRA are fulfilled. Collective dialogue does not seem adequate for effective communication in all situations, however. For example, where members of a union become dissatisfied with their bargaining representative, they may wish to discuss alternatives outside of her hearing. Such discussion is protected by the NLRA.

In addition, of course, much of the concerted activity for mutual aid or protection engaged in outside of the context of labor organizations takes place on a small scale. Where an employee discusses with a coworker her own perceived maltreatment by a supervisor to gain support before seeking relief, she may be protected in the traditional workplace. Logically, if she sends an e-mail to her friend rather than airs her grievance with the entire workforce through the message base, she should likewise be protected, regardless of whether the employer has a blanket prohibition on nonwork use of the e-mail system.

Whether employees have the right to communicate privately—that is, to voice their concerns to some group smaller than all employees—is a question that previous cases have not considered. It is a unique possibility of the (net)workplace that employees might never meet face-to-face, and thus, if the employer made only an open message base available for communication, employees would be required either to make all of their discussion open to all of their fellow workers, or not to engage in it at all. Where official bargaining units have been established in a workplace, this problem could be mitigated somewhat by establishing bargaining-unit message bases to provide some less-public discussion space. An employer-wide message base, accessible to all interested employees, would remain necessary to allow employees to act in concert on general issues of concern.

Thus, to preserve (net)workers' rights to engage in other activities for mutual aid or protection, a total ban on nonwork e-mail use would be impermissible, at least with respect to § 7 communications between specific employees. In order to secure to the employer the benefits of limiting messages to message bases, however, an employer might prohibit employees from sending messages to a mailing list of people using the e-mail system. This would prevent an employee from sending copies of the same message to the individual e-mail accounts of a group of people, cluttering the system, while

127. In a case involving pilots for Federal Express, decided under the Railway Labor Act, the employer attempted precisely this, restricting all union election information to an electronic bulletin board and preserving e-mail for business use. See Federal Express Corp., 20 N.M.B. 486, 505–06 (1993). Traditional means of communication were also available, and the case did not confront the question I raise. Id.

allowing § 7 use of individual e-mail when the subject of the message is legitimately private.

Ideally, the employer would create a mechanism for sorting messages within e-mail accounts or establish one work and one nonwork account for each employee. As described earlier, the employer could then read the contents of work accounts to make certain they were being properly used, but employees would not have to worry that their private § 7 messages would also be read. Assuming that the employer's policy prohibited all nonwork electronic communication other than protected § 7 communication, an employer concerned that employees would hide personal messages in the nonwork accounts might establish a policy of monitoring the volume of mail in those accounts. Employees and employers might ultimately bargain over the amount of traffic allowed in the nonwork account before employer scrutiny is triggered.\(^{129}\) If an employee exceeded the traffic limits in her account, the employer could institute disciplinary action. The employee could rebut the presumption of e-mail abuse, however, if she revealed the contents of her account to an arbitrator or other neutral party and proved that they were legitimate § 7 communications. Thus, the combination of dual e-mail accounts and message bases would protect employee communication rights while allowing employers to control traffic and maintain productivity.\(^{130}\)

**CONCLUSION**

Because the drafters of the NLRA could not anticipate all the factual variables to which the Act would have to apply, they left the task of fulfilling its purposes to the National Labor Relations Board and the courts. In the decades since its passage, these institutions have developed convenient methods for executing the NLRA, based on practical experience with work realities that would have been familiar to the Act's authors. Emerging technologies are radically reshaping the landscape of work, however, and they demand rethinking of the methods developed for achieving legislative values. Perhaps the changes engendered by electronic communications will one day necessitate a new statute to govern the negotiation of work relations. Today, however, the NLRA stands as the primary guarantor of (net)workers' rights, and despite changed contexts, the NLRA is not ill-suited to the task. By keeping in mind the underlying purpose of the Act—to protect meaningful communication among employees for the purposes of mutual aid and

\(^{129}\) As network carriage capabilities increase, the impact of genuine § 7 messages on network efficiency will probably be minimal because their number is likely to remain low.

\(^{130}\) Of course, whenever an employer takes disciplinary action against the employee, for example because of individual use of the e-mail system, the employee must be aware of his § 7 rights in order to exercise them. Ensuring electronic communications for employees of the same company will not solve the basic difficulty for effectiveness of the NLRA—making certain that employees are aware of their rights.
protection—and by taking the idea of cyberspace as a place of work seriously, we can preserve and perhaps reinvigorate labor rights for the (net)worker. Embracing new contexts, we can maintain fundamental fidelity to the values of the NLRA.