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Organizing Online: Union Solicitation on Employers' E-mail Systems

Cheryl M. Stanton†

The National Labor Relations Act ("NLRA")\(^1\) grants employees the right to organize labor unions.\(^2\) To secure this right, Congress enacted Section 8(a) of the NLRA, which forbids employer interference in organization efforts.\(^3\) The Supreme Court has held that this provision protects employers' and nonemployee union organizers' ability to disseminate information to targeted employees.\(^4\)

As more employees gain access to company electronic mail systems ("e-mail systems"), employees will increasingly use employer e-mail systems for union activity.\(^5\) Courts will need to determine what legal boundaries exist for employer restrictions on organizing by union members on employer e-mail systems. Thus far, no cases have addressed the ability of employees to organize in this manner.

The National Labor Relations Board ("NLRB") has not ruled on how organizers may use employers' e-mail systems. One NLRB case, *E. I. du Pont de Nemours & Co.*,\(^6\) held that employers cannot enact policies exclusively prohibiting union e-mail messages, but the decision left many questions unanswered. For example, the administrative law judge in *du Pont* declined to rule on whether an employer could ever lawfully prohibit its employees from using its e-mail system to transmit union messages.\(^7\)

This Comment argues that existing labor law can be applied to union organizing which utilizes employer e-mail systems, provided the courts permit flexibility in how employers structure

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\(^1\) 29 USC §§ 151-197 (1994).


\(^3\) 29 USC § 158(a) (1994).


\(^6\) 311 NLRB 893, 919 (1993).

\(^7\) Id.
and enact rules prohibiting organizing on e-mail systems. Part I explores the union organizer’s right to disseminate organizational information under the NLRA. Part II discusses how e-mail differs from existing methods of information dissemination. Part III outlines how existing labor law should apply to union use of employer e-mail systems and the e-mail policies employers should be permitted to enforce.

I. RULES GOVERNING UNION ORGANIZATION

When read together, Sections 78 and 8(a)(1)9 of the NLRA grant employees the right to organize unions without employer interference. Section 7 of the NLRA provides: “Employees shall have the right to self-organization, to form, join, or assist labor organizations . . .”10 This guarantee includes both the union officials’ right to discuss organization with employees and the employees’ right to discuss organization among themselves.11 Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer “to interfere with, restrain or coerce employees in the exercise of the rights guaranteed . . .” in Section 7.12 This Comment examines employers’ ability to restrict distribution, solicitation, bulletin board postings, and nonemployee access to the workplace.

A. No Distribution and No Solicitation Rules

Despite the employees’ right to self-organize, under certain circumstances a company may enact a no solicitation or no distribution rule prohibiting union soliciting and leafletting.13 Although the employees’ freedom to communicate with one another while on the job site is essential to their right to self-organize and to bargain collectively,14 an employer may place restrictions

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9 Codified at 29 USC § 158(a) (1994).
10 29 USC § 157.
11 Central Hardware Co. v NLRB, 407 US 539, 542-43 (1972); see also Thomas v Collins, 323 US 516, 533-34 (1945) (stating that “national law” fully and freely grants employees the right to discuss and be informed about the union choice).
12 29 USC § 158(a)(1).
13 See Republic Aviation Corp. v NLRB, 324 US 793, 797-98; see also Restaurant Corp. of America v NLRB, 827 F2d 799 (DC Cir 1987); Central Hardware, 407 US at 542-43 (stating that the effectiveness of Section 7 organizing rights depends on the freedom to communicate the advantages and the disadvantages of organizing).
14 Republic Aviation, 324 US at 803 n 10 (quoting Peyton Packing Co., 49 NLRB 828, 843-44 (1943)).
on organizing activity when the employer can demonstrate that such restrictions are necessary to maintain production or discipline.\textsuperscript{15}

1. Enacting no distribution and no solicitation rules.

The National Labor Relations Board ("NLRB") limits the activities a no distribution or no solicitation rule may prohibit. The NLRB balances the employees' right to organize, including the right to communicate with other employees at the job site, against the employers' right to maintain productivity and discipline.\textsuperscript{16} The Supreme Court has held that the NLRB may presume that restrictions on employee solicitation during nonworking time and on distribution of literature during nonworking time in nonworking areas violate Section 8(a)(1) of the NLRA.\textsuperscript{17} The Supreme Court's rationale is that employees may do what they wish during nonworking time, even when they are on an employer's premises, provided they do not interfere with the employer's interest in production and discipline.\textsuperscript{18} The employer may, however, overcome the presumption of unreasonable discrimination if it can prove that special circumstances make prohibiting solicitation during nonworking time essential to maintain production or discipline.\textsuperscript{19}

In contrast, bans on solicitation during working time in working areas are presumptively valid.\textsuperscript{20} The Court of Appeals for the District of Columbia Circuit explained that such rules may be presumed valid because they prevent solicitation from interfering with production.\textsuperscript{21} The Fifth Circuit has held that a no solicitation rule is permissible "provided that the rule or regulation is promulgated in good faith and bears some reasonable relation to efficient operation of the plant, and is not merely a device to obstruct or impede self-organization."\textsuperscript{22}

\textsuperscript{15} Id.

\textsuperscript{16} Beth Israel Hospital v. NLRB, 437 US 483, 491-92 (1978); Republic Aviation, 324 US at 797-98.

\textsuperscript{17} Beth Israel Hospital, 437 US at 492; see also Republic Aviation, 324 US at 803-04 n 10.

\textsuperscript{18} Republic Aviation, 324 US at 803-04 n 10 (quoting with approval NLRB decision presuming valid any rule prohibiting solicitation during working time).

\textsuperscript{19} Id; Beth Israel Hospital, 437 US at 492-93.

\textsuperscript{20} For example, see NLRB v Babcock & Wilcox Co., 351 US 105 (1956) (upholding a ban when other means of communication off site were available). See also Daylin Inc., Discount Division, 198 NLRB 281, 286 (1972).

\textsuperscript{21} Restaurant Corp. of Am. v NLRB, 827 F2d 799, 805-06 (DC Cir 1987).

\textsuperscript{22} Sunnyland Packing Co., 227 NLRB 590, 594 (1976), enf'd, 557 F2d 1157 (5th Cir 1977).
2. **Enforcing no distribution and no solicitation rules.**

An employer may not use an otherwise valid no solicitation rule to discriminate against union activity. Although banning solicitation during working time and in working areas is presumptively valid, a facially valid no solicitation rule enforced in a disparate manner is prohibited. Under Section 8(a)(3) of the NLRA, employers may not disparately enforce a no solicitation rule against unions: "It shall be an unfair labor practice for an employer, by discrimination in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization." Since the no solicitation policy sets forth rules which employees must follow, it is a condition of employment and cannot be discriminatorily applied to discourage union organizing.

The District of Columbia Circuit has held that an employer may enforce a no solicitation rule against union organizing and not against other social solicitations when the union solicitation is substantial, systematic, and concentrated, while the social solicitation causes only minimal and irregular interference. In *Restaurant Corp. v NLRB*, the defendant employer had a rule prohibiting "solicitation of any kind." The employer discharged two employees who discussed union organizing with other employees during working time in working areas. One employee, Roxie Herbekian, met with approximately ten people; the other employee, Sherwood Dameron, took part in only one on-site meeting with two other employees which lasted less than five minutes. During the preceding year the employer failed to discipline six other nonwork-related solicitations, including three instances of money collection for a going-away gift for an assistant manager, a baby gift for a chef, and a birthday cake for a waiter. The *Restaurant Corp.* Court examined whether "in terms of
the actual disruption of the workplace, the [union and social] solicitations were substantially equivalent. The Court, holding that Herbekian's solicitations interfered with work substantially more than the unpunished social solicitations, noted:

It is equally obvious that Herbekian's solicitations on behalf of the union were significantly more involved than, say, a simple request to chip in for a small gift. According to Herbekian’s testimony, her solicitations on behalf of the union often involved an explanation of the comparative merits of the union's dental, hospitalization and legal plans.

The Restaurant Corp. Court concluded, however, that the employer disparately enforced its no solicitation rule when it discharged Dameron after condoning nonunion solicitations that caused greater disruption in the workplace. The Court found Dameron's single, five-minute solicitation directed at only two employees "of substantially lesser duration and intrusion" than the other condoned social solicitations which involved many more employees.

Additionally, employers cannot enact a narrow no union solicitation rule to avoid the disparate enforcement analysis. As Judge Bork noted in his dissent in Restaurant Corp., when a no solicitation rule by its terms prohibits only union solicitation, and an employer permits nonunion solicitation, the issue is whether the employer adopted the rule to discriminate against union activity. Judge Bork explained that review of a no union solicitation rule is the same as the analysis of whether an employer disparately enforced a no solicitation rule against unions: the court must determine whether the employer has treated similar conduct differently.

3. Employers' rights absent a no solicitation rule.

Employers possess certain rights even in the absence of a no solicitation rule. They can fire employees who interfere with their

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33 Id at 808.
34 Restaurant Corp., 827 F2d at 807.
35 Id.
36 Id at 809.
37 Id at 812-13 (Bork dissenting in part and concurring in part).
38 Restaurant Corp., 827 F2d at 811.
coworkers' productivity. In *NLRB v General Indicator Corp.*, the Seventh Circuit held that when an employee leaves his work station and disrupts the work of other employees during their working time, even to discuss union business, the employer can terminate that disruptive employee regardless of whether the employer has a no solicitation rule. The NLRA does not protect disruption of other employees' productivity, even when the disruption involves discussing union business. Rather, the employer's interest in maintaining order and productivity in the workplace outweighs the employee's interest in union organizational activities.

B. Limiting Messages on Bulletin Boards

An employer can prohibit employees from placing nonwork-related notices on its physical bulletin boards. The NLRA does not provide employees a protectable interest in the use of an employer's bulletin board. The employees' right to discuss self-organization, however, extends to placing notices on bulletin boards when an employer has waived its right of exclusive control over the medium. Once an employer permits employee access to a company board, it can not thereafter remove notices or discipline or threaten an employee who posts union notices.

As with no solicitation and no distribution rules, employers may not disparately enforce their bulletin-board policies. Courts will not permit employers to preclude employees from posting union notices unless the company enforces the bulletin-board rules consistently. For instance, in *NLRB v Southwire Co.*, the

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39 *NLRB v General Indicator Corp.*, 707 F2d 279, 283 (7th Cir 1983).
40 Id at 279.
41 Id at 283.
42 Id at 282.
43 *General Indicator*, 707 F2d at 283.
44 *Union Carbide Corp. v NLRB*, 714 F2d 657, 660 (6th Cir 1983). The court stated that the provision came from the Labor Management Relations Act, when in fact the rule is codified in the NLRA. See also, *Honeywell, Inc.*, 262 NLRB 1402 (1982) (holding that it is an unlawful labor practice for an employer to permit employees to post any nonwork-related messages except for union messages); *NLRB v Southwire Co.*, 801 F2d 1252, 1256 (11th Cir 1986).
45 *Union Carbide*, 714 F2d at 660-61.
46 Id. See also *NLRB v Container Corp. of Am.*, 649 F2d 1213, 1215 (6th Cir 1981) (per curiam) (stating that employer could not discipline union employee who posted an antimanagement notice on company's bulletin board).
47 *Southwire*, 801 F2d at 1256-57 (holding that company improperly refused access to bulletin board where evidence showed company otherwise assented to employee access to bulletin board and discriminatorily refused to allow posting of union message); *NLRB v*
Eleventh Circuit held that a company violated Section 8(a)(3) of the NLRA when it refused to allow a union to place an organizing notice on a trade board when the company did not uniformly enforce its bulletin-board rules.\(^4\)

C. Nonemployee Access to Employers' Property

A nonemployee may not enter an employer's premises to discuss organizing a union\(^4\) unless the employees live and work beyond the reach of reasonable union efforts to communicate with them.\(^5\) Mere inconvenience does not warrant nonemployee access to employers' property.\(^6\) Courts often find, however, that "face-to-face contact" is necessary to make an alternative means of communication reasonable.\(^7\) Once a nonemployee enters the employers' property, the employer is permitted to limit the nonemployees' access and activity.

1. Prohibiting nonemployee access to property.

Nonemployee organizers cannot enter employers' property to organize a union. The guarantee contained in Section 7 of the NLRA "includes both the right of [nonemployee] union . . . [organizers] to discuss organization with employees, and the right of employees to discuss organization among themselves."\(^8\) The guarantee, however, does not insure that a nonemployee organizer may discuss organization on the employer's property.\(^9\) Rather, the general rule is that nonemployee organizers trespass when they enter an employer's property.\(^10\) Nonemployee organizers may enter an employer's property only under special circumstances. In *NLRB v Babcock and Wilcox Co.*, the Supreme Court announced an exception to the general rule for cases where the locations of the employees' workplace and living quarters place them beyond the reach of reasonable union efforts to communicate.\(^11\) To gain access to an employer's proper-

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\(^4\) *Southwire*, 801 F2d at 1256.
\(^5\) *NLRB v Babcock & Wilcox Co.*, 351 US 105, 112 (1956).
\(^7\) *Lechmere*, 502 US at 534.
\(^8\) See, for example, *National Maritime Union of America AFL-CIO v NLRB*, 867 F2d 767, 773-74 (2d Cir 1989).
\(^9\) *Central Hardware*, 407 US at 542.
\(^10\) *Lechmere*, 502 US at 534.
\(^11\) *Babcock & Wilcox*, 351 US at 112.
ty, the union bears the burden of showing that no other reasonable means of communicating its organizational message to the employees exist, or that the employer's no access rule discriminates against the union.\textsuperscript{57}

As the Supreme Court explained in \textit{Lechmere, Inc. v NLRB},\textsuperscript{58} the \textit{Babcock} exception is narrow.\textsuperscript{59} The exception is designed to protect Section 7 rights "of those employees who, by virtue of their employment, are isolated from the ordinary flow of information that characterizes our society."\textsuperscript{60} The exception, however, does not apply when nontrespassory access to employees is cumbersome or less than ideally effective:

\begin{quote}
[Babcock's rule] does not apply wherever nontrespassory access to employees may be cumbersome or less-than-ideally effective, but only where "the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them."\textsuperscript{61}
\end{quote}

Face-to-face contact may be necessary to make an alternative means of communication reasonable. In \textit{National Maritime Union of America v NLRB},\textsuperscript{62} the Second Circuit held that mail and telephone solicitation were not reasonable means for communicating a union's message because these methods did not involve "face-to-face" interaction between the union solicitors and the employees.\textsuperscript{63} Stating that an "effective organizing campaign" partially consisted of face-to-face interaction,\textsuperscript{64} the court stated, "without a reasonable opportunity for face-to-face contact, mailings and telephone calls are inadequate."\textsuperscript{65}

\textsuperscript{58} 502 US 527 (1992).
\textsuperscript{59} Id at 539-40.
\textsuperscript{60} Id at 540.
\textsuperscript{61} Id at 539 (quoting from and adding emphasis to \textit{Babcock}, 351 US at 113).
\textsuperscript{62} 867 F2d 767 (2d Cir 1989).
\textsuperscript{63} Id at 773-74.
\textsuperscript{64} Id at 774.
\textsuperscript{65} Id at 774.
2. Regulating nonemployee activity.

Even if nonemployee union organizers are permitted to enter the employer’s property, an employer may restrict nonemployee activity. In *Central Hardware, Inc. v NLRB*, the Supreme Court held that the employers may limit the permitted intrusion to the minimum necessary for employees to exercise their Section 7 rights. The Court intended that the *Babcock* principle only require an employer to “yield” property rights in a way that is “both temporary and minimal.” Thus, an employer may limit nonemployee access to (1) union organizers; (2) nonworking areas of the employer’s premises; and (3) the duration of the organizing activity.

II. Employees’ Use of Computer Networks to Disseminate Information

Companies and unions increasingly use e-mail as a method of disseminating work-related information. E-mail seems to resemble placing messages on a conventional bulletin board, but differs from traditional media because nonwork-related e-mail messages place a high burden on employers’ resources and are not easily detected.

A. E-Mail Availability at Work

Companies increasingly rely upon e-mail for work-related communication within the company and with outside groups as an additional means of information dissemination. The Electronic Messaging Association, an advocacy group funded by corporate e-mail users, estimates that sixty million workers correspond via electronic messaging. The Association estimates

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67 Id.
68 Id.
71 Miles, *BusinessWeek* at 110 (cited in note 70); *Hard Working Home*, Inc. 107 (Dec 1, 1995).
that Americans on the job send two billion electronic notes each month.\textsuperscript{73}

Companies point to the advantages of e-mail as a communications tool. One advantage cited is the irrelevancy of time—companies in the United States can e-mail Asia whenever they want without worrying about the time change.\textsuperscript{74} Additionally, e-mail arrives instantly while the traditional first-class mail can take three days or longer.\textsuperscript{75} In fact, the Post Office points to companies' reliance on e-mail as one of the factors causing a 33% decrease in business-to-business mail since 1988.\textsuperscript{76}

Corporate e-mail permits flexibility for employees as well. The president of Westinghouse, Paul Lego, relies on e-mail for continuous access to important information.\textsuperscript{77} This reliance is possible because over 10,700 Westinghouse employees are connected to e-mail.\textsuperscript{78}

Corporate e-mail, however, has its disadvantages. In a 1995 study, the Gartner Group found that employees spend an average of 50 hours a year using their computers for "no useful end."\textsuperscript{79} Additionally, outside e-mail users can "carpet bomb" a company—a strategy which involves sending e-mail messages to a large number of employees to gain the company's attention.\textsuperscript{80}

B. The Uniqueness of Disseminating Information Via E-mail

Although e-mail messages do not physically litter an employer's property, they can hinder production. Courts permit employers to ban employees from distributing literature in all working areas at all times\textsuperscript{81} because such distribution may litter the employer's premises, raising a hazard to production no matter when the distribution occurred.\textsuperscript{82} As Professor Frank Morris argues, transmitting e-mail also places a burden on the employer:

\textsuperscript{73} Id.
\textsuperscript{74} Miles, BusinessWeek at 110 (cited in note 70); \textit{Hard Working Home}, Inc. 107 (Dec 1, 1995) (cited in note 71).
\textsuperscript{75} Ratan, Time at 40 (cited in note 69).
\textsuperscript{76} Id; McTague, Barron's at 27 (cited in note 69).
\textsuperscript{77} Id, BusinessWeek at 110 (cited in note 70).
\textsuperscript{78} Id.
\textsuperscript{79} Ross Laver, \textit{The Games People Play}, Macleans 46 (April 1, 1996).
\textsuperscript{80} John A. Byrne, \textit{To Be Young, Gifted and Geeky}, Business Week 9 (March 18, 1996).
\textsuperscript{81} \textit{Honeywell, Inc.}, 262 NLRB 1402 (1982).
E-mail impinges on the rights of the employers even more so than [literature] distribution, because E-mail uses employers' hardware, time and resources and constantly interferes with work functions. Furthermore, permitting non-work related information to pass through E-mail slows down the entire e-mail system.83

Additionally, monitoring e-mail messages is more difficult and time consuming than monitoring solicitation, distribution, or bulletin boards. Employers are less aware of the contents of employee e-mail communication. E-mail messages pass through the computer systems without providing the employers an opportunity to read the messages except through formal monitoring. Employers present at the workplace can casually observe literature distribution or can periodically read bulletin board notices. Employers cannot, however, keep themselves informed of all employee-transmitted e-mail messages simply by being present at the workplace. The employer must instead develop an elaborate monitoring system to ascertain which topics employees are discussing in e-mail messages.

C. Current Labor Law for E-mail Systems

In a case addressing a union's right to use employer's e-mail, E.I. du Pont de Nemours and Co.,84 the NLRB found that the employer's e-mail restrictions were discriminatory and a violation of federal labor law. In *du Pont*, an Administrative Law Judge ("ALJ") found that the defendant company had discriminatorily restricted the union from using the employer's e-mail system. The company had a rule prohibiting its employees from using the company's e-mail system to distribute union literature.85 The company, however, permitted the employees to use the e-mail system to distribute literature on all other topics.86 The ALJ found the rule to be discriminatory because the prohibition targeted only union messages and not all nonwork-related matters.87 The ALJ, however, declined to rule on whether the union would have otherwise been entitled to use the e-mail sys-

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83 Id at 636-37.
84 311 NLRB 893 (1993).
85 Id at 919.
86 Id.
87 Id.
tem to contact employees if the employer prohibited all nonwork-related material. 88 The NLRB upheld the ALJ's finding. 89

III. TOWARD A BETTER FRAMEWORK

Employer no solicitation and no distribution rules should apply to company e-mail systems, or alternatively, company e-mail systems should be analogized to employer bulletin boards. Regardless of whether the no solicitation rule or the bulletin-board model applies, the legal rules should permit employers to prohibit all nonwork-related e-mail messages on their e-mail systems. Under either model, however, the employer must uniformly enforce the prohibition against all nonwork-related messages, or a court is likely to find that the employer disparately applied the policy against union activity.

On the other hand, consistently disciplining all nonwork-related e-mail messages requires employers to carefully review every e-mail message transmitted, placing high monitoring costs on the employer. This Comment offers a solution which balances the unions' right to equal treatment against employers' production rights. Finally, the Comment argues that the ability for nonemployee union organizers to use company e-mail systems to organize should be treated as a violation of the company's property rights that is not allowed absent extenuating circumstances.

A. Employer Prohibition of Nonwork-Related Messages

No distribution and no solicitation rules should apply to employers' e-mail systems. This would allow employers to prohibit any e-mail solicitation or distribution not related to work. 90 Alternatively, if courts decline to extend no solicitation and no distribution rules to e-mail systems, they should apply the bulletin board model to employer e-mail systems. 91 Even under the bulletin board analogy, employers would be able to prohibit employees from sending nonwork-related e-mail messages. 92 Under either theory, however, the courts will likely follow E.I. du Pont

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88 See du Pont, 311 NLRB at 919.
89 Id at 898.
90 See notes 13-45 and accompanying text.
91 See notes 46-50 and accompanying text.
92 Union Carbide Corp. v NLRB, 714 F2d 657, 660 (6th Cir 1983). See also Honeywell, Inc., 262 NLRB 1402 (1982) (holding that it is an unlawful labor practice for an employer to prohibit union related messages exclusively).
de Nemours & Co. in precluding the employer from exclusively prohibiting union e-mail messages. Thus, if employers wish to discipline workers who transmit union e-mail messages, they must discipline all workers who send nonwork-related e-mail messages, resulting in a high monitoring burden on the employer.

1. Limiting nonwork-related e-mail messages.

As Donald Seifman and Craig Trepanier argue, under the NLRA employers should be permitted to enact no distribution policies which prohibit distributing e-mail messages not related to work. Nonwork-related e-mail messages interfere with employee productivity because they burden firm resources and disrupt the employees' work.

Employers should be able to prohibit e-mail messages because transmitting e-mail messages not related to work interferes with productivity. Frank Morris argues that employee messages sent through an employer's e-mail system create a high burden on company resources because such messages use the company's computer hardware slowing the computer and cluttering its memory. Morris further argues that since transmitting e-mail creates a higher burden than distributing literature, employers should be able to regulate how employees transmit e-mail messages in the same way employers regulate how employees distribute literature.

Additionally, no solicitation and no distribution rules could apply to employer e-mail because e-mail organizing cannot be confined to nonworking time. The NLRB presumes that rules prohibiting solicitation and distribution during working time and in working areas are valid. The NLRB is likely to permit employers to prohibit the transmission of e-mail messages during working times in working areas. Although employee organizers will send the organizing e-mail messages during nonworking hours, neither employers nor employees can guarantee that the

93 311 NLRB 893 (1993).
96 Id at 637.
messages will be read during nonworking hours. Rather, employees will receive the organizing e-mail message either when turning on the computer to begin work or while working at their computers. Taking time to read and consider these messages will negatively affect the employer's productivity.

Additionally, employees will always receive e-mail messages in working areas. Employees can never organize in nonworking areas while using employers' e-mail systems since the computers are at employee workstations. As a result, organizing activity on an employer's e-mail system is likely to disrupt employees during work time and thereby impair production. This is similar to Morris's argument that although literature distribution occurs during nonworking times, a resulting hazard to production can still arise.98

Additionally, no distribution and no solicitation rules could extend to employees who log onto their employer's e-mail system from home. If employees read e-mail from home for business-related messages, the home becomes a working area and thus is covered by the e-mail policy prohibiting personal use. Also, the employees arguably enter the workplace when logging into the employer's e-mail system from home.

Additionally, employees could be denied access to their employer's e-mail system from home to check for personal messages. This use of the e-mail system would violate a prohibition against all nonwork-related e-mail messages. Although logging onto the e-mail system during nonwork time in nonwork areas for personal messages would not hinder the productivity of the employee reading the e-mail messages, such a use burdens the employer's computer system.99

_NLRB v General Indicator Corp._100 held that employers may, without a no solicitation or no distribution policy, discipline employees who disrupt their coworkers by discussing union business.101 "[C]ase law holds that an employee who disrupts other employees during working hours is not engaged in a protected activity even though he is discussing union business."102 An employer may thus discharge an employee who disrupts other em-

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98 Morris, ALI-ABA Course of Study at 635 (cited in note 82).
99 See id at 636-37 (arguing that e-mail uses employers' time and resources and constantly interferes with work functions).
100 707 F2d 279 (7th Cir 1983).
101 Id at 283.
102 Id at 282.
employees' productivity with an organizing e-mail message. As General Indicator suggests, the employers' interest in maintaining order and productivity outweighs the employees' interest in using e-mail to interfere with other employees at work.

Should courts treat e-mail like conventional bulletin boards, an employer can only prohibit e-mail messages as long as the employer has not relinquished control of the e-mail system. As with bulletin boards, the courts may determine that the NLRA does not provide employees with a protected interest in the use of an employers' e-mail system. An employer, however, waives its exclusive control of the e-mail medium when it permits employees to use the e-mail system for some other nonwork-related e-mail messages. Once an employer permits employees to use e-mail systems for nonwork-related messages, the employer cannot prevent an employee from transmitting a personal e-mail message, especially an organizing message.

2. Enforcing bans on nonwork-related e-mail messages.

Existing case law suggests that the employer must enforce the policy against all nonwork-related e-mail messages, or courts are likely to find that the employer evidenced a discriminatory intent. Existing law requires that no solicitation rules and bulletin-board policies not discriminate against unions. Employers will also need to enforce e-mail policies prohibiting personal use against all nonwork-related e-mail messages, not just organizational e-mail messages. As Judge Bork's analysis in Restaurant Corp. of America v NLRB suggests, employers cannot treat union e-mail messages differently from similar, personal e-mail messages.

Also, the du Pont decision suggests that an e-mail policy prohibiting personal use must be uniformly enforced. Some ambiguity remains since du Pont did not have a policy prohibiting all nonwork-related e-mail messages and thus the ALJ did not ad-

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103 Id at 281.
104 See notes 46-50 and accompanying text.
105 See note 46 and accompanying text.
106 See note 47 and accompanying text.
107 See note 48 and accompanying text.
109 827 F2d 799, 805 (DC Cir 1987).
110 Restaurant Corp. of America v NLRB, 827 F2d 799, 811 (DC Cir 1987) (Bork concurring in part and dissenting in part).
dress the enforcement issue. In *du Pont*, however, the ALJ reasoned that the employer must permit the union's transmission of notices via the employer's e-mail systems since the employer permitted all other types of messages.

Monitoring e-mail is more burdensome to the employer than monitoring solicitations, distributions, or bulletin-board notices. Applying either the no solicitation rules or the bulletin board analogy to e-mail systems will place a high monitoring burden on the employer. An employer, or an employee reporting to an employer, is more likely to overhear an oral solicitation for union organizing than to read an organizing e-mail message not sent to him or her. Similarly, an employer is more likely to observe literature being distributed than a personal e-mail message being transmitted in the same system as work-related e-mail unless the employer monitors the e-mail system.

Likewise, employers' monitoring costs will be higher for enforcing e-mail policies than bulletin board policies. E-mail is not as public as bulletin boards, making it more likely that more personal messages will remain undetected on the e-mail system than on the bulletin board. The only solution is a comprehensive monitoring system.

A sophisticated detection program might alleviate some monitoring costs. A detection program could monitor all employee transmitted e-mail to check for personal messages. Such a program, however, would have to be very sophisticated in order to distinguish personal from work-related issues. Additionally, the employer could not design the program to detect only union or organizing messages. Finally, the detection program must review the entire document, not just the subject line of the e-mail message. If the detection program did not review the text of the message, the organizer could create an innocuous subject description to disguise the true organizational message.

The controversial nature and importance of organization increase the likelihood that the employer will learn about the organizing e-mail messages. Since organizing messages are more controversial than baby shower invitations, employees are likely to discuss organizing messages more often and longer than shower invitations. An employer or supervisor will thus be more likely to hear the employees discuss organizational messages that they have received than other messages. Also, since union organiza-

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112 311 NLRB at 919.
113 Id.
union has a greater impact than does a shower on the employer's business and the employees' lives, employees would be more likely to discuss the controversial messages.

B. Solutions to the Enforcement Problems

Possible solutions to the enforcement policy are: (1) to permit random monitoring, and (2) to permit rules prohibiting mass e-mailings. Courts should permit employers to monitor for nonwork-related e-mail messages randomly instead of requiring employers to monitor all e-mail. When an employer uses a random monitoring system, the NLRB could compare the relative frequency of union e-mail messages for which employees are disciplined to that of other nonwork-related e-mail messages which are detected.

A less effective alternative would be to permit employers to prohibit, and to monitor, all nonwork-related mass e-mailings. This alternative still has high monitoring costs and may be less effective since the employee organizers could simply avoid sending the organizational message through the monitored mass mailings. In either case, the employer, recognizing that employees increasingly rely on e-mail to communicate with coworkers about many nonwork-related topics, should create an intranet or an electronic bulletin board for all nonwork-related notices, including messages for union organization.

1. Random monitoring.

Courts should permit employers to monitor their e-mail systems randomly. Employers could randomly monitor messages and systematically discipline all detected nonwork e-mail messages. When the employer discovers, either from a random check or from an employee's report of a violation, an e-mail for union organizing, the employer could discipline the employee for violating a rule against personal use.

As in Restaurant Corp. of America v NLRB, courts will need to compare the number of union messages that are disciplined with the number of nonunion personal messages similarly disciplined. In Restaurant Corp., the court examined how

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114 By "mass e-mailing" I refer to the process of sending one message to a large number of (if not all) employee e-mail addresses at once.

115 827 F2d 799 (DC Cir 1987).

116 Id at 812 (Bork concurring in part and dissenting in part).
much the union solicitations interfered with production.117 Under the random monitoring system courts would compare the extent to which disciplined union e-mail messages interfered with production to the amount of interference caused by other personal e-mail messages which the employer detected from a random search or from an employee report. Courts thus would not presumptively find an employer disparately applying an e-mail policy against personal use simply because the employer has not disciplined an employee for sending a nonunion-related personal e-mail that the employer did not detect. The court's comparison will require employers to record what messages are detected as well as those messages which result in an employee being disciplined.

2. Prohibiting mass e-mailings.

A less attractive alternative to the universal prohibition of nonwork e-mail messages is that the employer might prohibit mass nonwork e-mailings, such as shower announcements or group "thank-yous." The employer would be required to monitor only the large e-mail transmissions.

This alternative involves as many monitoring costs as a universal prohibition on personal e-mail messages and would likely be less effective. One difficulty with this alternative is that employers would have to determine what constitutes a mass e-mailing. If employers have discretion in defining what constitutes a "mass mailing," the courts may continue to find that employers are using the rule to discriminate against unions. On the other hand, if the minimum number of e-mail messages is fixed, then employees could send mailings in a number slightly less than the minimum to avoid detection. For instance, the employer may define a mass e-mailing to involve transmitting one message to ten employees' mail boxes. To avoid detection, the sender can transmit the message ten times to nine employees' mail boxes each time, rather than to all ninety employee mail boxes at once.

Another difficulty is that the mass e-mailing rule would still require an employer to monitor all mass e-mailings. While monitoring only mass e-mailings would be a less arduous task than monitoring all e-mail messages, it would still involve high monitoring costs because the technology needed to monitor mass e-mailings is the same as is needed to monitor a single message.

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117 Id at 807.
The burden is reduced only to the extent that the monitoring occurs less frequently.

3. **Intranets or bulletin boards for personal messages.**

   The employer might also create an intranet\(^{118}\) site or electronic bulletin board for all nonwork-related messages. Employers should recognize that employees will increasingly want, and in some cases need, to communicate with other employees about many nonwork issues. To decrease the use of e-mail for personal messages, the employer might permit employees to use an intranet site as an alternative forum for nonwork messages. With an intranet, the employer could require the employees to confine nonwork messages to one area which employees could access only during nonworking time. Thus, employees' productivity would not be jeopardized but employees would still be able to communicate with one another about nonwork matters.

   Once an employer permits a nonwork intranet, it must allow employees to place organizing messages on the electronic board. As with bulletin board policies, an intranet policy that excluded only electronic union notices would be discriminatory under Section 8(a)(3).\(^{119}\)

C. **Nonemployee Access to Employers' E-Mail Systems**

   As a general rule, employers should be able to prohibit nonemployee access to an e-mail system.\(^{120}\) Exceptions will arise when nonemployees are unable to reach employees through other reasonable means of communication.\(^{121}\) On the other hand, access to e-mail is less justified than entry to premises because unlike entry, e-mail affords no face-to-face interaction.\(^{122}\) Finally, nonemployees transmitting messages on employers' e-mail systems should be subject to the same restrictions as nonemployees who enter on employer's property.\(^{123}\)

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\(^{118}\) An intranet is closely related to the internet, except that it is a network which exists only within firms and between branch offices, fenced off from the outside Internet. The intranet is actually a Web site where employees can create a Web page to disseminate information. See *Enter the Internet*, The Economist 64, 65 (Jan 13, 1996); Kenan Pollack, *Gold Rush in Cyberspace*, US News and World Report 7274 (Nov 13, 1995).

\(^{119}\) See note 50 and accompanying text.

\(^{120}\) See notes 51-57 and accompanying text.

\(^{121}\) See notes 58-68 and accompanying text.

\(^{122}\) See notes 65-68 and accompanying text.

\(^{123}\) See notes 69-71 and accompanying text.
Employers will be able to prohibit nonemployees from using employer e-mail in the same way they can restrict access to their property.\(^{124}\) Under the current standard, for nonemployee entry onto employer property,\(^{125}\) nonemployee organizers will be unable to use employer e-mail unless they prove they are unable to reach employees via reasonable alternative efforts.

Professor Allen Hammond suggests that courts should analogize nonemployee access of e-mail systems to employer property.\(^{126}\) In his article Professor Hammond argues that the standard applied to nonemployee entry to employers' property for union organization should be extended to employer e-mail systems.\(^{127}\) The employer thus has the "right to bar union access [to the employer's e-mail systems] absent a showing that the union possesses no other reasonable means of communicating its organizational message to employers."\(^{128}\)

When applying this standard, however, courts will need to decide whether it is more reasonable to grant nonemployee access to employer property or to employer e-mail systems for union organization. Since the same standard would apply both for gaining access to employer property and for gaining access to employer e-mail systems, the issue of which is more reasonable—permitting the nonemployee to enter property or permitting the organizers to use e-mail systems—will probably arise.

Courts will likely find that, as with mailings and telephone calls, e-mail messages are inadequate for organizing because they do not afford a face-to-face interaction.\(^{129}\) Union organizers sending e-mail messages may appear to be more reasonable than union organizers entering employers' property since e-mail messages are not as physically intrusive. The courts' language, however, suggests that nonemployee access to the employers' e-mail is an unreasonable alternative.\(^{130}\) In *National Maritime Union of America v NLRB*, 867 F2d 767, 773-74 (2d Cir 1989).
of America v NLRB, the Second Circuit reasoned that the benefits of face-to-face interaction with employees justified permitting nonemployee union organizers to enter employers' property absent other reasonable means of communicating with employees. E-mail messages, especially the mass e-mailings which union organizers are likely to use, do not provide the face-to-face interaction that courts appear to value so highly.

Also, simply because e-mail is less cumbersome and more effective to organize does not make it the most reasonable alternative. A union organizer's strongest reason for seeking access to an employer e-mail system is convenience. E-mail permits the organizer to reach many workers in a matter of seconds. Courts, however, have made it clear that ideal effectiveness is not a factor when considering whether or not to allow nonemployee organizers to enter employers' property. The Babcock exception "does not apply wherever nontrespassory access to employers may be cumbersome or less-than-ideally effective." These factors should not differ for access to e-mail systems.

In addition, nonemployee union organizers cannot guarantee that they will fulfill the restrictions set forth in Central Hardware. Just as Professor Hammond suggests that the same standards are necessary to gain access both to employer premises and to employer e-mail, the same restrictions on nonemployee activity should apply. The courts should require nonemployee union organizers to adhere to the same restrictions while using e-mail systems as they would when entering the employers' premises. An organizer's e-mail message would thus be limited to (1) union organizing, (2) nonworking areas, and (3) the duration of the organizing activity. As described above, however, organizers cannot guarantee that employees will receive e-mail messages in nonworking areas.

CONCLUSION

A union's access to employer electronic mail systems is the next battle in the labor-management struggle. As unions begin to

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131 National Maritime Union of America, 867 F2d at 767 (2nd Cir 1989).
132 Lechmere, 502 US at 539-40.
133 Id at 539.
134 Central Hardware Co. v NLRB, 407 US 539 (1972).
136 See notes 71-73 and accompanying text.
137 See notes 111-13 and accompanying text.
organize on employer e-mail systems, the courts will be forced to provide legal rules for this activity.

Existing law can guide the courts on this issue. Employer no solicitation and no distribution rules should apply to all nonwork messages transmitted over employer e-mail systems including e-mail messages aimed at union organization. Organizers transmit messages to employees in working areas, but more importantly, employees generally read them during working times. E-mail messages disrupt employee productivity, and thus an employer may be justified in banning such messages. On the other hand, courts may analogize e-mail systems to bulletin boards, permitting employers to enact a policy prohibiting employees from placing notices. Under either model, however, the courts will require that the policy be uniformly applied to all nonwork e-mail messages and not disparately enforced against union organization messages.

Courts must find solutions to the enforcement problem. One solution is to permit employers to monitor employees' e-mail messages randomly for nonunion e-mail messages. Subsequently, when a court evaluates whether an employer discriminatorily enforced the e-mail policy prohibiting personal use with only union messages, the court should examine whether the employer failed to discipline other detected nonwork messages. The court should not examine whether any nonwork e-mail messages escaped punishment. Alternatively, the employer should be permitted to enact a rule prohibiting nonwork mass e-mailings. This alternative, however, is problematic because monitoring costs would still be high and violations would be frequent. Finally, employers could create intranets to provide a medium for employees to communicate nonwork material. Employers would then need to permit employees to place union organizing notices on these intranets.

Last, nonemployee union organizers should not be permitted to send organizing messages over the employers' e-mail unless the union has no other reasonable method to reach the workers. This standard must be more stringent than the standard used for permitting nonemployee union organizers onto the employers' property for practical as well as policy reasons.