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Martin H. Malin

*IIT Chicago-Kent College of Law*, [mmalin@kentlaw.iit.edu](mailto:mmalin@kentlaw.iit.edu)

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# The University of Kansas Law Review

## The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces

*Martin H. Malin\* and Henry H. Perritt, Jr.\*\**

### I. INTRODUCTION

The National Labor Relations Act (NLRA)<sup>1</sup> is the basic federal statute governing the relationship between labor unions and employers, other than railroads and airlines,<sup>2</sup> in the private sector. The NLRA dates from 1935<sup>3</sup> and its principal provisions were last amended in 1959.<sup>4</sup> It is premised on

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\* Professor and Director, Institute for Law and the Workplace, Chicago-Kent College of Law, Illinois Institute of Technology.

\*\* Vice President, Illinois Institute of Technology, Dean and Professor, Chicago-Kent College of Law; Secretary, Section on Labor and Employment Law, American Bar Association. © 2000 Martin H. Malin and Henry H. Perritt, Jr. The authors wish to thank Ralph Brill, Matthew Finkin, Rafael Gely, Harold Krent, Robert Ladenson, Peggie Smith, Ronald Staudt, Mary Rose Strubbe, Richard Warner, and Richard Wright for thoughtful comments. They also thank John DiJohn for excellent research assistance and the Marshall-Ewell Research Fund at Chicago-Kent College of Law for financial support.

1. 29 U.S.C. §§ 151-69 (1994).

2. Railroads and airlines are governed by the Railway Labor Act, 45 U.S.C. §§ 151-88 (1994).

3. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (1994)).

4. Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (1959). There have been two relatively minor amendments since 1959. In 1974, the Act's coverage was expanded to include not-for-profit health care institutions. National Labor Relations Act, Pub. L. No. 93-360, 88 Stat. 395, 397 (codified as amended at 29 U.S.C. §§ 152, 158, 169 (1994)). In 1980, the Act was amended to require unions and employers who have agreed to union shop clauses in their collective bargaining agreements to offer persons with religious objections to supporting unions an option of paying their union security fees to a nonlabor, nonreligious charitable institution. National Labor Relations Act, Pub. L. No. 96-593, 94 Stat. 3452 (1980) (codified as amended at 29 U.S.C. § 169 (1994)).

a workplace with the following characteristics: a fixed location or, in the case of mobile employees such as truck drivers, at least a fixed central location to which employees physically report; where communication among employees or between employees and management is person-to-person, either face-to-face or through written instrument or telephone; and commerce with consumers is largely through face-to-face transactions. In sixty-five years' experience with such traditional workplaces, the National Labor Relations Board (NLRB or the "Board") and the courts have applied the statute to develop a legal regime governing groupings of employees that are appropriate units for collective bargaining;<sup>5</sup> the rights of employees to solicit coworkers for union activity and the privilege of management to curtail such solicitation;<sup>6</sup> the rights of unions to have access to employees on employer property;<sup>7</sup> limitations on employer access to employees during nonworking time for purposes of campaigning against union representation;<sup>8</sup> and subjects that employers and unions are required to negotiate.<sup>9</sup> The NLRB and the courts also have developed a legal regime regulating each side's resort to economic weapons to pressure the other side.<sup>10</sup> The economic weapon which has received the most regulatory attention is picketing,<sup>11</sup> characterized by physical confrontation between picketers and customers, employees and other service providers.<sup>12</sup>

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5. See *infra* notes 58-59, 67-96 and accompanying text.

6. See, e.g., *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 805 (1945) (holding employer's "no solicitation" rule, "no distribution" rule, and termination of employee for violations thereof violative of the Act).

7. See, e.g., *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 540-41 (1992) (holding no violation of Act when employer refused non-employee union organizers access to employer property); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113-14 (1956) (same).

8. See, e.g., *Peoria Plastic Co.*, 117 N.L.R.B. 545, 547 (1957) (finding employer's visits to employees' homes for purpose of campaigning against unionization violative of the Act).

9. See, e.g., *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 686 (1981) (holding that employer was not required to bargain over the decision to close part of its business); *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 215 (1964) (holding that employer was required to bargain over the decision to subcontract bargaining unit work).

10. See, e.g., *NLRB v. Ins. Agents Int'l Union*, 361 U.S. 477, 492 (1960) (holding that a work slowdown, although not protected under section 7 of the NLRA, does not evidence bad faith bargaining by the union); *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 346-47 (1938) (opining that employer lawfully may permanently replace economic strikers, but may not discriminate on the basis of union activity in deciding which strikers to reinstate).

11. See generally National Labor Relations Act, 29 U.S.C. §§ 158(b)(4), 158(b)(7) (1994).

12. See, e.g., *NLRB v. United Furniture Workers*, 337 F.2d 936, 940 (2d Cir. 1964) (refusing

Today's workplace is becoming increasingly electronic. A growing number of employees telecommute or otherwise report electronically, instead of reporting physically to a fixed location.<sup>13</sup> Communication via electronic mail and other systems whereby the recipient controls when he or she receives and responds to the message is commonplace. An increasing amount of consumer commerce is taking place over the Internet.<sup>14</sup> Although most Internet commerce currently consists of orders placed electronically but filled via traditional delivery methods, thousands of consumers now order computer software, books and music compact discs and have the orders filled electronically over the Internet.

Only recently has the NLRB begun to confront issues requiring it to adapt the NLRA's legal regime to electronic workplaces. The NLRB has faced questions of the degree of statutory protection to give employee use of e-mail,<sup>15</sup> the appropriate bargaining unit where no employees have a fixed work location and all report electronically,<sup>16</sup> and union access to the employees in a virtual workplace.<sup>17</sup> In the future, the NLRB will have to

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to enforce an NLRB order based on the Board's failure to consider the extent of confrontation involved in alleged picketing).

13. See INT'L TELEWORK ASS'N & COUNCIL, TELECOMMUTING BOOSTED IN 1998 BY INTERNET & ECONOMY (1999) (reporting on a study by Cyber Dialogue which found that the number of telecommuters in the United States had risen to 15.7 million as of mid-year 1998), *available at* <http://www.telecommute.org> (last visited Aug. 22, 2000).

14. See generally UNITED STATES DEP'T OF COMMERCE, THE EMERGING DIGITAL ECONOMY II (June 1999) (reporting studies which estimated the amount of electronic retailing in 1998 at between \$7 billion and \$15 billion, and forecasting it to increase to between \$40 billion and \$80 billion by 2002), *available at* <http://www.ecommerce.gov/ede> (last visited Aug. 13, 2000).

15. See, e.g., *Timekeeping Sys., Inc.*, 323 N.L.R.B. 244, 248-50 (1997) (finding employee's e-mail critique of employer's new vacation benefits entitled to statutory protection); *E. I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893, 897 (1993) (finding employer violated NLRA when it prohibited employees from distributing union literature over the company e-mail system); NLRB REPORT OF THE GENERAL COUNSEL, EMPLOYER INTERFERENCE WITH PROTECTED ACTIVITIES (Sept. 1, 1998) (discussing a situation referred to the General Counsel for advice where e-mail was the employees' main method of communicating with each other), *available at* <http://www.nlr.gov> (last visited Aug. 13, 2000). See also Noam S. Cohen, *Corporations Battling to Bar Use of E-mail for Unions*, N.Y. TIMES, Aug. 23, 1999, at C1 (reporting the settlement of an unfair labor practice charge resulting in Pratt & Whitney's agreement to allow limited use of its e-mail system by union organizers), *available at* 1999 WL 30477979.

16. See, e.g., *Tech. Servs. Solutions*, 149 L.R.R.M. (BNA) 1302, 1303 (1995); *available at* 1995 NLRB LEXIS 891 (July 20, 1995). This Article discusses three decisions involving the same party, Technology Service Solutions. The spelling of the party's name appears as in the original sources.

17. See, e.g., *Tech. Serv. Solutions*, 324 N.L.R.B. 298, 299 (1997) (considering whether employer's refusal to provide the union with a list of names of employees who did not report to a fixed

consider such questions as whether an employer may approach employees in their homes when their homes are also their workplaces, the scope of bargaining over such electronic issues as telecommuting,<sup>18</sup> and the types of economic pressure that may be applied to completely electronic companies.

This Article takes the first steps in developing a framework for adapting the National Labor Relations Act to electronic workplaces. It focuses on the earliest stages of the employer-union relationship, when a union seeks to organize an employer's employees and establish itself as the employees' exclusive bargaining representative. The Article explores the continued utility in electronic workplaces of established NLRA doctrines, developed in traditional workplaces, governing the units of employees appropriate for collective bargaining and access to employees to solicit their support for, or opposition to, union representation. It also examines the developing potential for the use of electronic media to assess employee preferences regarding union representation.

Adapting the NLRA to electronic workplaces requires an understanding of the basic policies embodied in the statute. Therefore, Part II sets forth the sometimes conflicting policies that underlie the National Labor Relations Act. Adapting the NLRA also requires an appreciation of the differences between electronic and traditional workplaces. Part III discusses these differences, deriving them from a comparison of traditional and electronic communities. Part IV draws on the analysis presented in Parts II and III to develop an approach to defining appropriate bargaining units in electronic workplaces. Part V develops an approach to employer, employee, and union solicitation of employees in electronic workplaces. Part VI considers the use of electronic union authorization cards and electronic ballots in representation elections. Part VII concludes with some observations concerning the adaptation of the NLRA to electronic workplaces.

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work location violated the Act).

18. Some unions and employers already are bargaining over telecommuting. *See, e.g.,* U.S. Dep't of Health & Human Servs., 106 Lab. Arb. Rep. (BNA) 745, 747-49 (1996) (Malin, Arb.) (interpreting collectively bargained telecommuting agreement).

## II. POLICIES UNDERLYING THE NLRA

Many consider the New Deal as the beginning of the era of "big government," i.e., major government intervention in the economy and regulation of business. Indeed, the economic philosophy of the administration of President Franklin Delano Roosevelt was to avoid another depression by spreading the wealth among a greater number of people. This philosophy was manifested in the Social Security Act of 1935,<sup>19</sup> which established old age insurance and provided incentives for states to establish unemployment insurance systems, and the Fair Labor Standards Act of 1938,<sup>20</sup> which established minimum wage levels and required premium pay for hours worked in excess of a stated maximum.

The NLRA, however, was a relatively conservative piece of legislation. It did not radically alter the capitalistic nature of business by having the government dictate terms and conditions of employment.<sup>21</sup> Instead, the underlying philosophy of the NLRA was that guaranteeing workers the right to organize and bargain collectively, and giving their collective representative the exclusive right to negotiate for all employees in the bargaining unit, would alleviate the imbalance in bargaining power between workers and their employers. It was expected that the resulting freely negotiated agreements would improve wages and working conditions, thereby spreading the wealth further and improving the economy. The goal was private ordering, rather than substantive government regulation.

The NLRA's conservatism also was reflected in the absence of organization of employees along class lines. Rather, the private ordering of workplaces that the statute embraces occurs at relatively local levels. In this representation system, workers are organized based on their

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19. ch. 531, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. § 301 (1994)).

20. ch. 676, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201-19 (1994)).

21. The Senate Report made this clear:

Prudence forbids any attempt by the Government to remove all the causes of labor disputes. Disputes about wages, hours of work, and other working conditions should continue to be resolved by the play of competitive forces . . . This bill in no respect regulates or even provides for supervision of wages or hours, nor does it establish any form of compulsory arbitration.

S. REP. NO. 74-573, at 2 (1935).

community of shared interests. Bargaining units defined in terms of relatively small communities of interest mitigate concerns that unionization is the precursor of class warfare. The workers of the world are not uniting—only the members of a relatively small group within one workplace are collaborating.

Another major goal of the NLRA was to reduce industrial strife substantially. The statute was designed to accomplish this goal in several ways. First, the statute created a procedure whereby workers could compel employers to recognize and bargain with their unions, thereby eliminating the need to resort to strikes and other tools of economic warfare to compel recognition. Second, through unionization, workers would achieve a voice in the workplace. This coming of industrial democracy was envisioned as itself reducing industrial strife. Third, the mandate that employers bargain exclusively and in good faith with unions selected by a majority of employees, and the backing of that mandate with the legal ability to resort to economic weapons, was seen as most likely to lead to peaceful agreements. Thus, the protection afforded the right to strike is somewhat paradoxical. The statute protects the right to strike on the assumption that the desire to avoid strikes and other economic warfare will provide the incentive for both sides to reach agreement peacefully.

The NLRA was enacted to improve the capitalist system. Consequently, capitalism's basic assumptions concerning private ownership of property became an implicit part of the statute. As a result, several rights of employers, although not expressly provided for in the Act, have been read as essential ingredients in the statutory scheme.

Chief among these are the employer's property rights. The Supreme Court articulated the statute's foundation of respect for property rights in *NLRB v. Babcock & Wilcox Co.*:<sup>22</sup> "Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other."<sup>23</sup>

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22. 351 U.S. 105 (1956).

23. *Id.* at 112.

The clash between employer property rights and employee rights to organize manifests itself most vividly in cases involving union access to employees on employer property. When the individuals seeking access are not employees of the employer, they are seeking to trespass on the employer's property. The employer's basic property right to exclude trespassers outweighs employee organizational rights unless the locations of the employer's property and the employees' living quarters place the employees beyond the reach of reasonable efforts by the union to communicate with them.<sup>24</sup>

Employees seeking to communicate with coworkers concerning union activity are invitees on the employer's property. Consequently, the employer's property right to exclude trespassers is not at issue. Other aspects of the employer's property rights, however, are at issue. As the Court has characterized it, employee access to coworkers on employer property requires "an adjustment between the undisputed right of self-organization assured to employees . . . and the equally undisputed right of employers to maintain discipline in their establishments."<sup>25</sup> Consequently, employers may prohibit solicitation during working time but may not prohibit such conduct during nonworking time, absent special circumstances which justify the prohibition as necessary for the efficient operation of the business.<sup>26</sup>

Closely related to employer property rights are what we shall term employer entrepreneurial rights, i.e., rights to engage in basic business decisionmaking. Entrepreneurial rights recognize an employer's interest in deciding what uses to make of its property. The most fundamental example of such rights is the right to decide whether to be in business at all. In *Textile Workers Union v. Darlington Manufacturing Co.*,<sup>27</sup> the Court made clear that the NLRA was premised on respect for such a right. The Court unequivocally rejected the union's contention that the NLRA rendered illegal a complete closing of a business motivated by an anti-union animus: "A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling

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24. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533-34 (1992).

25. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-98 (1945).

26. *Id.* at 796.

27. 380 U.S. 263 (1965).



innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Relations Act. We find neither."<sup>28</sup>

Consequently, an employer has an absolute right to go completely out of business that always outweighs employee rights to organize and bargain collectively. In less extreme circumstances, the NLRB and the courts have had to balance employee organizational rights against employer entrepreneurial rights. Such balancing characterizes, *inter alia*, cases involving the degree to which a successor employer is bound by the relationships between the predecessor employer and its employees' union,<sup>29</sup> and the degree to which the statute obligates an employer to negotiate over basic business decisions which necessarily and directly affect job security.<sup>30</sup>

Thus, the NLRB and the courts have had to resolve conflicts between the NLRA's express policy of guaranteeing workers' rights to organize and bargain collectively and the implied policy recognizing employer property and entrepreneurial rights. Policy conflicts also have arisen as a result of the manner in which the statute has been enacted and amended.

As first enacted in 1935, the NLRA established a policy to encourage collective bargaining. The original Wagner Act<sup>31</sup> was markedly pro-union. Indeed, one of its most controversial elements was its regulation of employer conduct with no comparable regulation of union conduct.<sup>32</sup> In

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28. *Id.* at 270.

29. See generally *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987) (upholding NLRB's application of successorship doctrine to employer who purchased assets of bankrupt and liquidated predecessor); *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249 (1974) (holding on facts presented successor employer was not bound to arbitrate claim under predecessor's collective bargaining agreement); *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272 (1972) (holding that successor employers are not bound by previously negotiated bargaining agreements, but may be bound to recognize and negotiate with the incumbent union).

30. See generally *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666 (1981) (holding that an employer is not required to bargain over decisions to go partially out of business); *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964) (holding that employer was required to engage in collective bargaining when it replaced employees in the existing bargaining unit with employees of an independent contractor).

31. ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (1994)).

32. The Senate Report went out of its way to defend this imbalance:

Regulation of the activities of employees and labor organizations in regard to the organization of employees is no more germane to the purposes of this bill than would be regulation of activities of employers and employer associations in connection with the organization of employers in trade associations.

1947, however, the tide turned against organized labor with the enactment of the Taft-Hartley Act amendments to the NLRA.<sup>33</sup> The Taft-Hartley Act, however, did not repeal the policies of the Wagner Act. Instead, it layered a new level of restrictions on NLRB encouragement of unionization and on union activity. Consequently, the NLRB and the courts have had to reconcile Wagner Act language designed to encourage collective bargaining with Taft-Hartley Act language designed to restore balance to national labor policy.

For example, the Wagner Act provided that representation of employees would occur in bargaining units, i.e., portions of an employer's workforce who shared common interests in wages and working conditions. The statute directed the Board to decide in each case which bargaining unit was appropriate for collective bargaining in a manner that would "assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter."<sup>34</sup> The Board took this mandate seriously and, in defining a bargaining unit, placed great weight on the extent to which the union had succeeded in organizing the employees.<sup>35</sup>

In the Taft-Hartley Act, Congress reacted to this approach, but did not alter the language of the Board's mandate to define bargaining units to assure employees the fullest freedom under the Act. Instead, Congress

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Courts have held a great variety of activities to constitute "coercion": A threat to strike, a refusal to work on material of nonunion manufacture, circulation of banners and publications, picketing, even peaceful persuasion . . . . Thus to prohibit employees from "coercing" their own side would not merely outlaw the undesirable activities which the word connotes to the layman, but would raise in Federal law the ghosts of many much-criticized injunctions issued by courts of equity against activities of labor organizations, ghosts which it was supposed Congress had laid low in the Norris-LaGuardia Act.

S. REP. NO. 74-573, *supra* note 24, at 16. Senator Wagner similarly defended the absence of any restrictions on union conduct during the floor debates. See 79 CONG. REC. 7654, 7670 (1935) (statement of Sen. Wagner).

33. Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 151-69 (1994)).

34. National Labor Relations Act, 29 U.S.C. § 159(b) (1994).

35. See, e.g., *Garden State Hosiery Co.*, 74 N.L.R.B. 318, 321 (1947) (recognizing the Board's practice of considering the extent of organization by the union when determining the appropriate bargaining unit); see also 12 NLRB ANN. REP. 21 (1948).

layered on top of the statutory bargaining unit considerations a requirement that "the extent to which the employees have organized shall not be controlling."<sup>36</sup> Consequently, the Board and the courts have had to reconcile these two seemingly conflicting mandates concerning bargaining units.

The Board and the courts have reconciled these competing policies in the context of workplaces dominated by fixed locations and direct person-to-person communication. As more and more communication in the workplace becomes electronic and as more employees punch in remotely to virtual workplaces, the continuing validity of the policy resolutions developed in the context of traditional workplaces must be re-examined. Before such a re-examination can occur, however, it is necessary to examine the differences between traditional and electronic workplaces. Key differences arise from the different nature of traditional and electronic communities. Therefore, the next part explores the nature of electronic communities in general and electronic workplaces in particular, and how they differ from traditional communities and workplaces.

### III. TRADITIONAL VS. ELECTRONIC WORKPLACES

Although the concept of community is important in labor law, its relevance to the workplace antedates formal legal regulation of labor-management relations. Bargaining and unions themselves arose from communities of workers long before the law responded by creating frameworks for both.

Community is a practical rather than a purely legal concept. Communities exist when their participants are interdependent, when the communities address important participant needs, when there is a psychological or ideological commitment, and when the attachment of participants is not completely transitory. Collective bargaining works only when a group of employees participating in collective bargaining experience social and economic forces that make them stick together. No amount of legal or institutional structure will make collective bargaining work if these social and economic forces are absent.

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36. National Labor Relations Act, 29 U.S.C. § 159(c)(5) (1994).

Whether a community exists is tested at two major points in the representation and collective bargaining processes: first, when a union seeks to organize a group of workers for purposes of collective bargaining; and second, when a union seeks to maintain a strike. Both events require individual employees to decide if they are better off acting as a part of a group or acting alone. The practical concept of community has been determined largely by forces operating in relatively compact physical workplaces, with some notable exceptions in the transportation industry. Now, information technology makes it possible to organize work across formerly immutable physical boundaries, substantially decreasing the relevance of physical space as a consideration in the organization of work. Community may mean something different in these new geographically dispersed workplaces.

Communities play several important roles in American labor law and economics. Students of the sociology of workplaces long have observed that social networks (communities) exert powerful forces, sometimes at odds with formal rules, in defining and enforcing norms of behavior in the workplace. Erving Goffman studied the behavior of worker communities in emphasizing common problems and building a sense of solidarity by critical remarks about customers and bosses.<sup>37</sup> This behavior is a spontaneous social phenomenon originating in a sense of community and reinforcing the community sense at the same time.

A community has shared norms, ideals, and forms of social action and understanding.<sup>38</sup> These shared attitudes play, and are seen by members of the community as playing, a significant formative role in the historical development of a community: we are the way we are now because we were more or less this way in the past. Communities tend to be *self-sustaining regularities in thought and action*. When, as a member of a community, one shares its norms and values, one persists as a member of the community *because one is already a member*—i.e., because the norms and values I share make me continue to identify with the other members and conform to the community's standards. This approach explains why

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37. See generally ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959).

38. The authors are indebted to their colleague, Richard Warner, for these formulations of community.

communities are characterized by the four factors previously identified: interdependence, fulfillment of participant needs, psychological or ideological commitment, and non-transitory attachment.<sup>39</sup> Commitment is the key. Commitment to shared norms and values is explicitly related to self-conscious community membership. We do not simply share norms and values, we *see* ourselves and define ourselves by doing so. Communities so conceived fulfill member needs and desires in part because they also *instill* those very needs and desires. Member needs and desires are functions of the norms and values the member shares as a member of the community. Given that the community realizes a self-sustaining regularity in thoughts and actions centered around those norms and values, it must sufficiently meet the needs and desires it creates. Otherwise, the community would not continue to exist. Communities so conceived are obviously characterized by non-transitory attachment.

Leadership, rhetoric, and art are important techniques for raising community consciousness and increasing community solidarity.<sup>40</sup> Solidarity refers to the willingness of members of a community to act for a common purpose, even if individual sacrifice is required to do so. Communities distinguish sharply between members and nonmembers, and they typically have mechanisms for expelling members who violate community norms. Individuals are more tightly bound to communities when they depend upon community affirmation of their behavior and characteristics to enhance individual self-esteem. Often, community solidarity is increased by leaders who emphasize the differences between members of the led community from other communities, typically arguing that other communities are inferior. At the limit, this ethnocentric rhetoric leads to violent conflict. Derision of "scabs" (strike breakers) during a strike is an example.

Attachment to a community is transitory when the transaction costs of withdrawing are low. Tourists do not have strong attachments to the

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39. See discussion *supra* p. 10.

40. These factors might be thought more pertinent to political communities than to work communities, but that is not so. Leadership is important in organizing employees into bargaining units in the first place. Rhetoric helps members of potential communities identify common interests and reorient their perceptions so that they believe that economics militate in favor of community identification. Art, especially in the form of music, has been an important factor in creating a sense of solidarity among those identifying with labor unions.

communities through which they pass even though while they are there, the communities may meet many of their physical and social needs. The reason is that their attachment is entirely transitory.<sup>41</sup> Exercise gyms often are not communities because the transaction costs of withdrawing are low. Conversely, prison communities are not transitory because of the high transaction costs of withdrawing.<sup>42</sup> A workplace community may be transitory when labor market conditions make it easy to get another job and when the practice is for workers to move around from one employer to another in physically separated locations. Conversely, when labor market conditions or industry practices make it unusual for workers to quit and change jobs frequently, the workplace community is less transitory.

#### *A. Communities in Physical Workplaces*

Collective bargaining links sociology with law. Fundamentally, collective bargaining originated in voluntary communities of workers, not in law. The earliest American trade unions were craft organizations, organizing bodies of coopers, cobblers, and printers, for the purpose of regulating their labor markets. Members of these guilds and craft unions were united by their common skills defining their crafts. Members were distinguished from all others because practicing the craft required a skill set not widely possessed. Formal mechanisms such as membership cards, constitutions, rules, procedures for expulsion, and the economic reality that only members could practice the trade and earn higher wage levels held the members together.

Before the Industrial Revolution, trade unions were communities of entrepreneurs who banded together to mitigate the effects of market forces. Market forces were delimited by physical factors, encouraging localization

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41. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 5 (1991) (discussing the everyday appearance of "order" in a nonhierarchical, nonlegal environment). Professor Ellickson recognizes that there are important preconditions for informal community governance. Most important among these are the likelihood of continuing relationships among the people making, enforcing, and violating the rules, as well as the existence of multidimensional relationships in the community.

42. Transaction costs include more than pecuniary expense. One may get shot in attempting to withdraw from a prison. If one withdraws from a church, the emotional, ideological, and social costs may be high. Whenever commitment is high, the transaction costs of withdrawal are high.

of guilds. Early trade unions limited competition by agreeing on prices to be charged for their work and, as the geographic scope of markets increased, by regulating market entry by traveling members of the craft. Their geographic scope expanded as the geographic scope of their markets expanded.

The Industrial Revolution began to threaten established mechanisms for organizing work by breaking down skills components so they could be performed by less-skilled workers. Trade organizations reacted, transforming themselves into labor unions that sought to establish monopolies on labor and increase bargaining power vis-a-vis purchasers of that labor.<sup>43</sup> While trade organizations regulated all facets of work, including the entrepreneurial policy component, labor unions drew sharp boundaries between labor markets and product markets. In other words, entrepreneurial policy was outside the scope of matters addressed by the trade unions through collective bargaining.<sup>44</sup>

Industrial unionism presented new challenges to which labor law responded. For one thing, the sense of community was more diffuse when the only unifying factor was employment in a particular enterprise, as contrasted with the practice of a craft. Second, the potential existed for jurisdictional conflicts between newer industrial unions and older craft unions. Third, while craft unions had regulated labor markets, benefiting employers, there was no history of industrial union regulation of the labor market. There was much greater hostility by employers to unionization. Class warfare rhetoric used by labor union advocates to build a sense of community among industrial workers increased this hostility.<sup>45</sup>

The challenges posed by industrial unionism were mitigated by the characteristics of traditional physical workplaces. Physical workplaces reinforce the sense of community in groups of workers performing the same or interdependent tasks. In a traditional workplace, workers are present in the same physical area for eight hours a day. They work for a

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43. 1 PHILLIP S. FONER, *HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES: FROM COLONIAL TIMES TO THE FOUNDING OF THE AMERICAN FEDERATION OF LABOR* 67-77 (1972).

44. See *id.* at 73-74 (explaining competing roles of union and employer).

45. See generally Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-War Labor Law Liberalism and the Waning of Union Strength*, 20 *BERKELEY J. EMP. & LAB. LAW* 1 (1999) (discussing the role of interest group pluralism in development of industrial relations).

common boss. Everything that happens in those eight hours, whether on the assembly line or in the locker room, lunch room, break room, or parking lot, is necessarily shared because of physical proximity.

The NLRB embraced the concept of workplace communities in evaluating the appropriateness of proposed bargaining units. Although the legal determinants of an appropriate bargaining unit have developed a mechanical character, their conceptual foundation is premised on the existence of communities of workers. This foundation is captured in the term "community of interest." As Bok and Dunlop noted more than forty years ago, the need to define bargaining units arises from the principle of exclusive representation.<sup>46</sup> Other systems of collective bargaining lacking the exclusive representation principle rely altogether on informal communities of workers to assert their demands through collective bargaining.<sup>47</sup> Limiting the exclusive representative to a group with a community of interest mitigates criticisms that workers are being forced to accede to bargains struck against their will. Members of relatively homogeneous workgroups are more likely to have similar preference or utility functions.<sup>48</sup>

Consequently, the community of interest concept developed thus far in labor law focuses on economic considerations, especially on wage competition among members of the putative community. Labor law, as it has been expressed in cases and commentary, does not concern itself with purely social and psychological dimensions of association. Collective bargaining, however, extends beyond wages to subjects such as work rules and seniority systems which make up the framework of a complex social system in the workplace. The community of interest concept encompasses inquiry into these aspects of the social order for work. Moreover, social attachment to a workplace group—an aspect of community in the more than purely economic sense—is an important determinant of a union's

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46. DEREK C. BOK & JOHN T. DUNLOP, LABOR AND THE AMERICAN COMMUNITY 210-11 (1970).

47. *Id.*

48. No bargaining unit can be completely homogeneous, however. There always will be some differences in preference functions among members of any unit. The duty of fair representation is a legal mechanism developed out of whole cloth by the courts to mediate the tension between individual and community interests by establishing an individual right vis-a-vis the community representative. See generally MARTIN H. MALIN, INDIVIDUAL RIGHTS WITHIN THE UNION 346-421 (1988).



ability to organize and to apply economic pressure by withholding services. As John Dunlop observed over half a century ago:

The informal organization and social pressure of a group of wage earners, even in the absence of a trade union, substantially influences the amount of labor supplied under piece rates. Customary standards of the number of pieces that constitute a day's work develop and are typically enforced by informal and spontaneous pressures. The significant fact is that a working force is composed of much more than isolated and discrete individuals. A social community in miniature develops its own leadership, mores, and standards of proficiency and output. The individual's choice between income and leisure must be placed in this social context.<sup>49</sup>

Collective bargaining is a political, as well as an economic, process.<sup>50</sup> Accordingly, an explicitly political view of community is useful in supplementing an economic assessment. To be sure, if members of a group of workers have the same preference or utility functions, they will have little difficulty in formulating a bargaining strategy; they all will want the same thing. Conversely, if they have significantly different preferences, it will be much harder to agree on a group strategy. But if other determinants of solidarity are lacking, members are less likely to agree to act in concert, even if they all individually desire the same things. Whereas if other determinants of solidarity are present, members may be willing to rely on community institutions – the trade unions representing them<sup>51</sup> – to mediate individual differences. The ideology of solidarity may induce individual members of the community to sacrifice selfish preferences to support pursuit of goals important to others.

Political solidarity in this sense is important to a system of collective bargaining in three ways: (1) A union cannot win a representation election or maintain a strike without political solidarity. (2) A bargaining representative cannot effectively mediate differences over bargaining

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49. JOHN T. DUNLOP, *WAGE DETERMINATION UNDER TRADE UNIONS* 30 (Augustus M. Kelley 1966) (1944).

50. See *id.* at 46-61 (identifying "nonincome" objectives of wage policy, including extension of union organization, and noting use of slogans and other ideological tools to promote union objectives).

51. Recall the refrain in the union organizing song *Solidarity Forever*: "[T]he union makes us strong."

priorities without the legitimacy that comes from political solidarity and a sense of community in the social sense. Effective trade unionism depends on social norms regarding dispute resolution and institutional legitimacy. (3) Identifying subgroups of workers forming communities is necessary to limit the scope of economic conflict which otherwise might extend to the entire working class.

As long as workplaces were physically determined, no one had to define community of interest in social or political terms because the physical features of plants, reporting locations, and employer organization provided useful mechanical tests for assessing community. Board and court cases evidence little interest in the underlying theory of community as it relates to bargaining. Douglas Leslie did develop an underlying theory, but focused mainly on economic forces operating in employee communities.<sup>52</sup>

Shifting from physical to virtual workplaces does not ordinarily change the purely economic factors of competition among workers. However, it potentially changes social forces and therefore impacts seniority and work rule considerations in the conventional community of interest inquiry, as well as the practical ability of unions to organize and apply economic pressure. Therefore, with electronic workplaces we have to probe more deeply into the concept of community, unless the policies of labor law are to become inoperative in virtual workplaces because they cannot meet the physical tests for community of interest. A purely economic analysis is insufficient, in part because it would not limit sufficiently the scope of community of interest in labor markets that approach global extent when they operate through electronic rather than face-to-face channels. Merely assessing economic competition is not enough. Workers who compete in offering their services may nevertheless lack other ties that give a group of

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52. Douglas L. Leslie, *Labor Bargaining Units*, 70 VA. L. REV. 353 (1984). We share with Professor Leslie the goal of going beyond the relatively mechanical "appropriate unit" and "community of interest" criteria as applied by the Board, neither of which "is very helpful in predicting outcomes; [in giving] much insight into what the Labor Board is trying to accomplish in its unit decisions." *Id.* at 353-54. But we think we have to go beyond Professor Leslie's two models of labor markets—a price theory model and a relational contract model. Nevertheless, we do not seek to create "a single theory of optimal units." *Id.* at 354. Rather we, like Professor Leslie, seek to "create a framework for future analyses, both empirical and normative, of bargaining unit policy," *id.*, albeit one that is serviceable in electronic workplaces.

workers sufficient solidarity to choose an exclusive representative, to develop a coherent bargaining agenda, and to engage in concerted action in support of their agenda.

*B. Communities in Electronic Workplaces*

The degree to which workplaces have become electronic varies. At one extreme are workplaces that are completely virtual. In virtual workplaces, employees never report to fixed locations and transact all business electronically.<sup>53</sup> Less extreme are employees who have fixed work locations but telecommute some work days.<sup>54</sup> Even employees who report to fixed work locations every day have seen their work environments evolve to a point where they interact to an ever-increasing degree electronically, rather than face-to-face. The discussion by the water cooler is in the process of being replaced by the discussion via e-mail.<sup>55</sup>

Information technology is creating a revolution in the organization of production as profound as the Industrial Revolution more than a century ago. Entrepreneurial policy is being reintegrated with work, as information technology makes it possible for work to be performed outside physical workplaces and in circumstances in which the worker has greater independence. The boundary between labor markets and product markets is becoming less clear, and the exclusion of entrepreneurial policy from the collective bargaining process is a less satisfactory boundary for defining communities for purposes of labor law.

Electronic community is a much talked-about concept. Some observers of Internet newsgroups have seen in them new sources of social ties and the emergence of strong new communities. Skepticism is appropriate, however, with respect to virtual communities. Typically,

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53. See *Tech. Serv. Solutions*, 324 N.L.R.B. 298 (1997) (describing a computer service's virtual workplace characterized by geographically dispersed customer service representatives and facilities).

54. See, e.g., *Dep't of Health & Human Servs.*, 106 Lab. Arb. Rep. (BNA) 745, 749 (1996) (Malin, Arb.) (holding that employee was entitled to work at home four days per week and that this schedule would not impair the agency's mission).

55. See NLRB REPORT OF THE GENERAL COUNSEL, EMPLOYER INTERFERENCE WITH PROTECTED ACTIVITIES (Sept. 1, 1998) (discussing a situation referred to the General Counsel for advice where e-mail was the employees' main method of communicating with each other), available at <http://www.nlr.gov> (last visited Aug. 13, 2000).

membership in virtual communities is a unidimensional phenomenon. Little ties an individual member to a virtual place except for the possibility of conversation. When other tying factors exist, they are attributable to a pre-existing traditional community rather than to the virtual community itself. A religious group may meet online, but its character as a religious group has nothing to do with electronic communications in the first instance. Electronic communities tend to be transitory because the costs of withdrawal are low.

The viability and strength of a virtual community may increase significantly, however, when the electronic media make possible other kinds of relationships. Technology may reduce the costs of communities which otherwise would not be feasible to meet important needs.

This is particularly important in the labor context. The same electronic channels that may permit the formation of virtual communities also enable work relationships. When the work relationship is overlaid with other attributes of community, a stronger virtual community may be enabled than might be the case for a purely social community. Indeed, the better analytical model might be to postulate the same features and behavior of a virtual work community that one would find for the same group of people functioning in the same labor market in conventional ways, asking only, "What is missing, because the work community is virtual rather than real?"

In contrast to physical communities, which tend to be multidimensional, electronic communities tend to be tied together by specialized common experiences or interests, much as professional relationships tie professors, physicians, and lawyers together across the boundaries defining universities, hospitals, and law firms. The common experiences and interests are multidimensional, much as geographic proximity, community schools, and local work opportunities tie neighbors together, but they are more narrowly focused. The shift from multidimensional to specialized communities is a phenomenon of twentieth-century technology, characterized first by automobile transportation and more recently by communications and information technology.

Alienation may result from the replacement of multidimensional communities by specialized communities. The common boss may become relatively less important as a force tying a community of subordinates together defensively. As technology reduces transaction costs for communities that may exist across large physical spaces, it becomes easier

to organize work of greater scope and raise the level of supervisory decisionmaking far above the former level. The scope of foreman control in a traditional physical workplace is almost always defined in terms of relatively compact physical groupings of employees. When workers are tied together by e-mail, it is as easy for a boss located halfway around the world to give instructions to workers as it is for one at the end of the assembly line or down the hall. While the number of workers with a common boss may be larger, increasing the possibility of a larger scale community motivated by potential threats from the common boss, it also increases the diversity of experiences, thus reducing commonalities that define communities. In other words, the set of experiences that are important to an individual include a relatively smaller proportion of shared experiences.

The preconditions of community stated at the beginning of this Part identified four important factors: interdependence, fulfillment of participant needs, physical or ideological commitment, and attachment that is not transitory.<sup>56</sup> Interdependence on workplace tasks may be increased by technology in an electronic workplace, but interdependence on other important social or psychological factors may decrease because physical separation leads to greater autonomy in meeting these needs. Because participants in an electronic community are physically separated from each other, they may—and must—meet many of their needs independently of each other. Members of electronic communities are far less likely to live in the same or contiguous neighborhoods; thus, their children are less likely to go to the same schools, and their families are less likely to shop in the same stores. The weather is less likely to be an interesting topic of conversation because members of electronic communities spread across wide geographic areas are less likely to experience the same weather phenomena. Members no longer park their cars in the same parking lot. They do not get dressed in the same locker room. There is little reason for them to take lunch or coffee breaks together. Reduced costs of withdrawal make the electronic community more transitory. Breaking attachment to

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56. *See supra* p. 10.

one electronic community and forming an attachment to another can be as easy as clicking a mouse button.<sup>57</sup>

The differences between communities of workers in traditional and electronic workplaces have significant implications for NLRA doctrine as it relates to appropriate bargaining units and to rules governing access to employees. Parts IV and V explore these concerns.

#### IV. BARGAINING UNITS IN ELECTRONIC WORKPLACES

The NLRB typically is called upon to determine the appropriateness of a bargaining unit when a union files a representation petition asking the Board to conduct an election to determine whether a majority of the employees wishes to be represented for purposes of collective bargaining. The employer may contest the appropriateness of the bargaining unit in which the union is seeking the election. In resolving such contests, the NLRB applies its community of interest criteria. The factors the Board considers include: "(1) similarity in skills, interests, duties, and working conditions; (2) functional integration of the plant, including interchange and contact among the employees; (3) the employer's organizational and supervisory structure; (4) the bargaining history; and, (5) the extent of union organization among the employees."<sup>58</sup> In physical workplaces, the

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57. Electronic workplaces make it harder to distinguish performance of work as an employee from entrepreneurial decision-making reserved to supervisors and executives in physical workplaces. When someone works at home and is tied to the workplace by e-mail and the Internet's World Wide Web, the selection and purchase of work tools are as likely to be made by the individual worker as by the work enterprise. Standardization of desktop and notebook computers and of Internet connectivity weakens the need for the employer to select and purchase the computers and the Internet connections, as opposed to letting the worker do that herself. Detailed supervision of how work is performed is inherently more difficult in electronic workplaces than in physical ones, because much of the detail of how work is performed is invisible to supervision. In many electronic work contexts, the schedule of work is more susceptible to control by the individual worker than by the enterprise. It is far easier for an electronic worker to work for multiple enterprises without this even being visible to any one employing enterprise. Conversely, it is virtually impossible to work for two different employers when workplaces are physically defined, without leaving one place and going to another. Thus, according to the traditional factors for distinguishing independent contractors from employees—a fundamental distinction in labor and employment law—many electronic workers may not be employees at all and thus may be entirely outside the scope of labor and employment law. The emergence of electronic workplaces requires a rethinking of the boundary between employee and independent contractor. Under current law, there is no possibility for an independent contractor to be part of a bargaining unit.

58. *Mitchell v. NLRB*, 90 F.3d 1150, 1157 (6th Cir. 1996).

Board also has developed a presumption that a bargaining unit limited to a single physical location is appropriate. The Board, however, has not articulated a coherent theory explaining how these factors relate to the concept of community in the workplace.<sup>59</sup>

The absence of such a coherent theory of community in the workplace was evident in the Board's first encounter with bargaining units in a completely electronic workplace. In *Technology Services Solutions*,<sup>60</sup> the employees were customer service representatives (CSRs) who installed, serviced, and repaired computer equipment for the employer's clients on a nationwide basis. The CSRs had no fixed work location. They worked out of their homes or trucks and spent most of their time at the employer's customers' sites. The CSRs reported to customer service managers (CSMs) who were assigned territories. The CSMs also worked out of their homes. The employer did have a regional office that serviced a multistate, multi-CSM territory region. The union petitioned for an election in a unit consisting of CSRs in Colorado. The NLRB Regional Director directed that elections be held in two bargaining units, consisting of the territories of two CSMs in Colorado. The NLRB reversed and held that the smallest appropriate unit consisted of all CSRs in the region covered by the central regional office.<sup>61</sup>

Both the Regional Director and the Board attempted to fit these employees' virtual workplaces into the traditional community of interest criteria as developed in physically discrete workplaces. The Regional Director applied the presumption favoring a single location bargaining unit and concluded that each CSM was a single location in cyberspace. The Board rejected this analogy because of the absence of a discrete physical location. The Board focused its attention on the degree of centralized

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59. Perhaps as a consequence of the Board's failure to articulate such a coherent theory, courts of appeal at times have criticized the Board's unit determinations, observing that instead of analyzing the application of the community of interest factors, the Board merely listed them and asserted a conclusion regarding the appropriateness of a requested bargaining unit. See, e.g., *NLRB v. Indianapolis Mack Sales & Serv., Inc.*, 802 F.2d 280, 284 (7th Cir. 1986); *NLRB v. Purnell's Pride, Inc.*, 609 F.2d 1153, 1156 (5th Cir. 1980); *NLRB v. Tallahassee Coca-Cola Bottling Co.*, 381 F.2d 863, 866-67 (5th Cir. 1967); *Rayonier, Inc. v. NLRB*, 380 F.2d 187, 188-89 (5th Cir. 1967); see also *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-43 (1965) (criticizing the NLRB for failing to articulate its reasoning in application of its community of interest criteria).

60. 149 L.R.R.M. (BNA) 1302 (1995), available at 1995 NLRB LEXIS 891 (July 20, 1995).

61. *Id.* at 1303.

control exercised by the central regional office and concluded that the central office's region was the smallest appropriate unit, emphasizing the third community of interest criterion (organizational and supervisory structure).<sup>62</sup> Neither the Regional Director nor the Board attempted to analyze the concepts of community underlying bargaining unit determinations and how those concepts might differ in electronic workplaces.

As developed previously, a community exists when its participants are interdependent, the community addresses important participant needs, there is a psychological or ideological commitment, and the participants' attachments are not transitory.<sup>63</sup> The Board's community of interest criteria for testing the appropriateness of a proposed bargaining unit reflect these characteristics that define the concept of community. The first factor, similarity in skills, interests, duties and working conditions, is crucial to determining whether the employees in a proposed bargaining unit are interdependent and whether the proposed bargaining unit is capable of addressing important participant needs. Furthermore, to the extent that employees have similar skills, interests, duties and working conditions, they are likely to share a psychological commitment to the community necessary for a community to exist. The commitment, or sense of attachment, is stronger to the extent that the employees' common skills, interests, duties and working conditions differentiate them from other employees.

In traditional workplaces, functional integration of the plant and contact among employees are physically determined, in large part. This factor also differentiates a particular group of employees from others, thereby increasing their sense of attachment to the proposed bargaining unit. It also reflects the employees' interdependence. Moreover, to the extent that employees excluded from the unit are functionally integrated with the employees in the proposed unit, and to the extent that there is considerable contact and transfer between the two groups, membership in the proposed unit may be transitory as employees' attachments fluctuate from group to group.

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62. *Id.*

63. *See supra* Part III.



The Board often relies on the employer's supervisory and organizational structure as a basis for finding a union's proposed bargaining unit to be inappropriately small. For example, in *Technology Services Solutions*,<sup>64</sup> the Board rejected the Regional Director's direction of an election limited to CSRs in particular CSMs' territories because of the degree of control exercised by the central regional office. Similarly, when the Board decides that single physical location bargaining units are not appropriate, it relies on the degree of centralization of employer personnel functions. Such analysis is incomplete. Rather, it is necessary to determine whether the degree of centralization in the employer's supervisory and organizational structure affects the nature of the community of employees. The relevant inquiry should be whether centralized administration causes the employees to identify with employees outside the proposed bargaining unit in defining the needs that the community should address, disperses the employees' sense of commitment or attachment, or otherwise undermines the existence of a community within the proposed smaller bargaining unit.

The Board lists bargaining history as a separate factor considered in unit determinations. Unlike the other factors which reflect the likelihood that a group of employees form a community that will effectuate collective bargaining, bargaining history provides direct empirical evidence of whether such a community actually exists. A history of successful collective bargaining within a particular unit is strong evidence that the employees comprising that unit are interdependent, that the unit addresses important needs of the members, that the members of the unit share a psychological attachment to the unit, and that their membership is not transitory. On the other hand, a history of troubled collective bargaining may be evidence that the unit does not form a true community; or that a part of the unit, such as skilled craft employees within a larger industrial unit, lacks sufficient identity with the other members of the unit in terms of interdependence, participant needs, and psychological attachment such that it really is not part of the same community.

The relevance of the extent of union organization must be considered on two levels. On one level, the extent of organization may provide direct evidence of whether a community exists. If a particular group of

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64. 149 L.R.M. (BNA) 1302 (1995), available at 1995 NLRB LEXIS 891 (July 20, 1995).

employees has organized to a greater extent than any other group of employees, the disparity in organization may be due to the interdependence of the organized group of employees, their particular needs that can be met by collective bargaining, and their particular attachment to each other. Indeed, the fact that a particular group of employees is organized while most others are not may, in and of itself, differentiate that group from the rest of the workforce strongly enough to mark that group as a separate community.

On a second level, however, consideration of the extent of organization represents a statutory policy that favors unions in bargaining unit determinations. Appreciation for this policy requires consideration of the context in which NLRB unit determinations are made.

When the Board determines the appropriateness of a bargaining unit, its decision determines the election unit, i.e., the unit in which a representation election will be held. The positions of the parties to a dispute over the definition of the bargaining unit usually are determined by their election strategies. Unions usually seek the largest unit in which they believe they can win the support of a majority of employees. Employers seek larger units because such units are more difficult to organize and, therefore, are less prone to union victory in the election. A common employer strategy is to seek a unit so diverse that the employees within the unit will reject union representation because they are not a true community.

For example, during the NLRB's rule-making proceeding for hospital bargaining units, evidence showed that hospitals insisted on including non-nurse professionals in the same bargaining unit as registered nurses.<sup>65</sup> When their demands were met, the same employers urged the non-nurse professionals to vote against the union, arguing that they would be a minority in the bargaining unit and that a nurses union could not represent their interests adequately. The evidence further showed that when the union won elections in bargaining units combining nurses and non-nurse professionals, employers sometimes proposed to sever the non-nurse

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65. Collective-Bargaining Units in the Health Care Industry, 53 Fed. Reg. 33,900, 33,914 (Sept. 1, 1988) (codified at 29 C.F.R. § 103.30 (1999)).

professionals into a separate unit because of the difficulties of negotiating in such a broad unit.<sup>66</sup>

The NLRA provides that the Board determine unit appropriateness in such a manner as will “assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter.”<sup>67</sup> In the early years of the NLRA, the Board interpreted this mandate by allowing unions to carve out of an employer’s workforce the subset of employees with whom it enjoyed support and obtain an election limited to that group. For example, in *Jacoby-Bender, Inc.*,<sup>68</sup> the union had tried unsuccessfully to organize all production employees of the employer, a manufacturer of metal watch bands. It then petitioned for an election in a unit limited to the employer’s polishing department. The record revealed that all production departments had uniform hours and vacation policies, as well as similar working conditions.<sup>69</sup> Although permanent transfers between departments were rare, there was temporary interchange when necessary to equalize workloads.<sup>70</sup> Nevertheless, the Board held the petitioned-for unit to be appropriate, emphasizing the importance of the extent of the union’s organization.<sup>71</sup>

In *Botany Worsted Mills*,<sup>72</sup> the union sought a bargaining unit limited to wool sorters or trappers, employees who prepared the wool for use by other employees in subsequent manufacturing operations. The Board’s sole rationale for finding the requested unit appropriate was that the union had succeeded in organizing the employees in the requested unit and had failed to organize the rest of the company’s workforce. The Board opined, “[w]herever possible, it is obviously desirable that, in a determination of the appropriate unit, we render collective bargaining of the Company’s employees an immediate possibility.”<sup>73</sup> It found the unit appropriate “even if, under other circumstances, the wool sorters or trappers would not constitute the most effective bargaining unit . . . .”<sup>74</sup>

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66. *Id.*

67. National Labor Relations Act, 29 U.S.C. § 159(b) (1994).

68. 74 N.L.R.B. 337 (1947).

69. *Id.*

70. *Id.*

71. *Id.* at 339.

72. 27 N.L.R.B. 687 (1940).

73. *Id.* at 690.

74. *Id.*

Similarly, in *Garden State Hosiery Co.*,<sup>75</sup> the Board approved a unit limited to employees of the company's knitting department. The record revealed that knitting department employees began the production process and turned the product over to employees in the auxiliary department who completed the process, stamped, folded and packaged the product. The union had tried unsuccessfully to organize plant-wide, but enjoyed majority support among employees in the knitting department. The Board reasoned:

[I]t is often desirable . . . to render collective bargaining for the employees involved a reasonably early possibility, lest prolonged delay expose the organized employees to the temptation of striking to obtain recognition, and permit unorganized employees, engaged in other work-tasks, to thwart collective bargaining by those who evinced an interest in selecting a representative.<sup>76</sup>

In the Taft-Hartley Act of 1947,<sup>77</sup> Congress expressed its disapproval of this NLRB practice in defining bargaining units. The Taft-Hartley amendments, however, did not change the statutory mandate that the NLRB define bargaining units to assure to employees the fullest freedom in exercising their rights. Rather, Congress added a new section providing that "the extent to which the employees have organized shall not be controlling."<sup>78</sup> The potential contradiction between the unamended original Wagner Act language and the new Taft-Hartley Act language is resolved easily through legislative history of the Taft-Hartley amendments.

The prohibition on extent of organization controlling bargaining unit determinations arose in the House of Representatives. The version of Taft-Hartley which passed the Senate contained no such provision. The Conference Committee adopted the House's version.<sup>79</sup> Opponents of the provision argued that it would make it extremely difficult, and perhaps impossible, for unions to organize such industries as insurance and public utilities which had highly integrated employers with widely dispersed small operational units.<sup>80</sup> Proponents responded, however, that the NLRB was

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75. 74 N.L.R.B. 318 (1947).

76. *Id.* at 321.

77. ch. 120, 91 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 151-69 (1994)).

78. National Labor Relations Act, 29 U.S.C. § 159(c)(5) (1994).

79. See H.R. CONF. REP. NO. 80-510, at 48 (1947).

80. See 93 CONG. REC. 6611 (1947) (statement of Sen. Morse).

not to abandon application of its community of interest criteria in ways that assured employees their fullest freedom under the Act. Rather, proponents argued, the "extent of organization shall not be controlling" provision was intended to prevent the NLRB from granting unions requested bargaining units that were not supported by any valid criteria.<sup>81</sup>

Taking into account considerations of community reveals how the prohibition on extent of organization controlling bargaining unit definition actually furthers the NLRA's mandate that units be defined so as to ensure employees their fullest freedom under the Act. Effective collective bargaining cannot take place in an artificial community. Employees whose principal commonality is their membership in a union will not be able to bargain effectively with their employer. Employees who are not interdependent and do not share common needs or goals are not likely to maintain solidarity during collective bargaining. Employees who routinely interact with, and are interdependent with, employees excluded from the unit are not likely to develop the psychological ties to the unit that enable its members to stick together during bargaining. Thus, the NLRB's belief prior to Taft-Hartley that basing bargaining units on the extent of organization made collective bargaining an immediate possibility was credible, but was not defended with appropriate reference to the role of community in facilitating effective bargaining. The prohibition on giving controlling weight to the extent of organization is a requirement that bargaining units not only be capable of being organized, but that they also be constructed so that collective bargaining is a real possibility. The inquiry thus should be whether the small unit that the union has requested has sufficient indicia of community so that collective bargaining within such a unit is a realistic possibility.

The NLRB generally has recognized that this is the appropriate inquiry. The Board has held consistently that the issue before it is whether the unit requested by the union is an appropriate unit, not whether a larger unit may be more appropriate.<sup>82</sup> However, at times the Board has analyzed the

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81. See 93 CONG. REC. 7002 (1947) (statement of Sen. Taft).

82. See, e.g., *NLRB v. Chicago Health & Tennis Clubs, Inc.*, 567 F.2d 331, 334 (7th Cir. 1977) (recognizing that "[t]he Board is not required to select the most appropriate bargaining unit in a given factual situation; it need choose only an appropriate unit within the range of appropriate units") (citations omitted).

appropriateness of a requested unit not by focusing on whether the unit has sufficient indicia of community, but on balancing the union's interest in ease of organization against the employer's interest in efficient administration. This approach is readily apparent in the NLRB's handling of cases requiring it to choose between single location and multiple location bargaining units.

In the early years after the Taft-Hartley amendments, the Board faced representation petitions seeking bargaining units limited to a few of the employer's numerous retail stores within a particular geographic area. Under the Taft-Hartley prohibition, the Board properly rejected such bargaining units as inappropriate because their sole distinguishing feature appeared to be the extent to which the petitioning union had succeeded in organizing the employer's employees.<sup>83</sup>

In *Safeway Stores, Inc.*,<sup>84</sup> the employer operated twenty-two stores in its Waco, Texas district: six in Waco, four in Austin, two in Corsicana, and one each in ten smaller towns. The Waco district covered an area approximating a rectangle two hundred by forty-five miles. The towns in which the stores were located were on average thirty miles apart and were an average of sixty-one miles from Waco. Local store managers had authority to hire and discharge, requisition food stock requirements from the company's central warehouse, purchase local produce, adjust prices to meet local competition, and exercise other aspects of managerial control. Transfers between stores were very infrequent. Local managers kept payrolls and paid them out of local receipts. Employees of the meat department in the Austin stores already bargained separately. Nevertheless, the Board rejected separate units for each city in which the employer operated stores.<sup>85</sup> It interpreted its prior decisions, which properly had rejected units based solely on the extent of organization, as standing for the general proposition that "absent unusual circumstances, the appropriate

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83. See, e.g., *Kroger Co.*, 88 N.L.R.B. 194 (1950) (dismissing union's petition to represent a unit including all of the meat department employees at only five of the employer's stores where there was no basis on which they could be found to be a separate bargaining unit); *C. Pappas Co.*, 80 N.L.R.B. 1272 (1948) (dismissing a petition to form a unit which included only some of the employer's twenty-one stores, where the record indicated the employer's operations constituted an integrated whole and favored an all-inclusive unit).

84. 96 N.L.R.B. 998 (1951).

85. *Id.* at 1001.

collective bargaining unit in the retail grocery trade should embrace all employees . . . who perform their work within the Employer's administrative division or area."<sup>86</sup> Thereafter, until 1962, the NLRB apparently gave controlling weight to the employer's administrative structure in evaluating bargaining units of companies with multiple locations.<sup>87</sup>

In 1962, the Board changed its policy. It reasoned that its prior policy basing bargaining units on the employer's administrative geographic divisions "impede[d] the exercise by employees in retail chain operations of their rights to self-organization."<sup>88</sup> Six years later, the Board declared that single location units in the retail industry were presumptively appropriate.<sup>89</sup>

The presumption may be overcome, however.<sup>90</sup> The analysis looks to whether the employer's administrative structure deserves greater weight than the employees' interests in ease of organization. For example, in *Friendly Ice Cream Corp. v. NLRB*,<sup>91</sup> the United States Court of Appeals for the First Circuit described the evaluation of bargaining units as a process of balancing the "employer's interest in bargaining with the most convenient possible unit,"<sup>92</sup> with the "employees' interest in being

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86. *Id.* at 1000.

87. See, e.g., *Robert Hall Clothes, Inc.*, 118 N.L.R.B. 1096, 1098 (1957) (noting that the Board previously held that "the appropriate bargaining unit should embrace employees of all stores located within an employer's administrative division or geographical area") (citations omitted); *Father & Son Shoe Stores, Inc.*, 117 N.L.R.B. 1479, 1481 (1957) (finding that only one bargaining unit representing all the employees of multiple stores was appropriate where employer's operations were highly centralized and all the stores were within employer's administrative division); *Sparkle Mkts. Co.*, 113 N.L.R.B. 790, 791 (1955) (finding that bargaining unit representing a single store was inappropriate when all employer's stores were centrally administered and within the same geographic area).

88. *Sav-On Drugs, Inc.*, 138 N.L.R.B. 1032, 1033 (1962).

89. *Haag Drug Co.*, 169 N.L.R.B. 877, 877 (1968).

90. See, e.g., *Charrette Drafting Supplies Corp.*, 275 N.L.R.B. 1294, 1297 (1985) (noting that the presumption "may be overcome by a showing of substantial functional integration which negates the separate identity of the single-facility unit") (citations omitted); *Eastman Interiors, Inc.*, 273 N.L.R.B. 610, 613 (1984) (noting that the "presumption only can be overcome by a showing of functional integration so substantial as to negate the separate identity of the single-facility unit"); *Ohio Valley Supermarkets, Inc.*, 269 N.L.R.B. 353, 354 (1984) (noting that the presumption is rebutted where "the interests of the employees of a single store may be shown to have been effectively merged into a more comprehensive unit so that store has lost its individual identity") (citations omitted).

91. 705 F.2d 570 (1st Cir. 1983).

92. *Id.* at 575.

represented by a representative of their own choosing.”<sup>93</sup> The court opined that, in view of the statutory mandate that bargaining units be defined so as to afford employees the fullest freedom in exercising their rights, “this factor of employee freedom can legitimately tip the balance in determining which of two equally appropriate units should be preferred.”<sup>94</sup> Consequently, although the court characterized the employer’s structure as “a casebook study in centralized control,”<sup>95</sup> it found that the local manager had sufficient authority in personnel matters such that the employer had failed to rebut the single location presumption.<sup>96</sup>

The balancing of employer interests in efficient administration against employee interests in organizing and achieving representation is inappropriate. The NLRA requires that the NLRB determine bargaining units to ensure employees their fullest freedom under the Act.<sup>97</sup> The prohibition on making extent of organization controlling was not an open invitation to give independent weight to the employer’s administrative structure. Rather, prohibiting the Board from making extent of organization a controlling factor further ensures employees their fullest freedom under the Act by ensuring that the bargaining unit will have sufficient indicia of community so that effective collective bargaining is a realistic possibility. The employer’s administrative structure is relevant only to the extent that it bears on the employees’ interdependence, common needs, and other indicia of community. If the employer’s administrative structure is to be given any significance independent of its effect on the employees’ community, it must result from other policy reasons specific to the employer or industry. For example, the NLRB has refused to apply the single location presumption to public utilities because the industry “is

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93. *Id.* (citations omitted).

94. *Id.*

95. *Id.* at 577.

96. *Id.* at 578. Similarly, in *NLRB v. Chicago Health & Tennis Clubs, Inc.*, 567 F.2d 331 (7th Cir. 1977), the court also regarded the bargaining unit determination as setting a balance between employee rights to union representation in an easier to organize smaller bargaining unit against employer interests in administrative efficiency. The court opined that “the Board must effect the policy of the Act to assure employees the fullest freedom in exercising their rights, yet at the same time ‘respect the interest of an integrated multi-unit employer in maintaining enterprise-wide labor relations.’” *Id.* at 335 (quoting *NLRB v. Solis Theatre Corp.*, 403 F.2d 381, 382 (2nd Cir. 1968)) (citations omitted).

97. National Labor Relations Act, 29 U.S.C. § 159(b) (1994).



characterized by a high degree of interdependence of its various segments and . . . the public has an immediate and direct interest in the uninterrupted maintenance of the essential services that this industry alone can adequately provide.”<sup>98</sup>

Electronic workplaces take various forms. Most commonly today, electronic means of communication reduce but do not eliminate employees’ attachment to specific physical work sites. They do this in two ways. First, electronic communications free up employees from having to report physically to the same location each day. Telecommuting or flexiplace programs enable employees to work from home or other alternate locations one or more days per week.

Second, electronic mail and similar technologies enable employees to have more frequent and more prolonged communications with employees outside their physical work site. Electronic means of communication thus facilitate the integration of employees in different physical locations in the same production process. Nevertheless, in most cases, electronic communications are not likely to so eradicate employees’ attachment to their physical work sites as to eliminate the physical work location as a basis for community. Employees who physically report to a particular location, even if not on a daily basis, are likely to continue to identify with that location and share common needs and concerns with their coworkers at that location.<sup>99</sup> Consequently, in most cases, the single location presumption should apply to electronic workplaces. Nevertheless, the more that electronic communications result in employees from different locations working together frequently, the easier it will be for employers to rebut the single location presumption.

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98. *Baltimore Gas & Elec. Co.*, 206 N.L.R.B. 199, 201 (1973). Similarly, to conserve public resources, many jurisdictions in the public sector require that representation elections be held in the largest appropriate bargaining unit. *See generally* HARRY T. EDWARDS, ET AL., *LABOR RELATIONS IN THE PUBLIC SECTOR* 207-49 (4th ed. 1991).

99. An analogy may be drawn to the Department of Labor’s treatment of telecommuters under the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601-54 (1994). The FMLA covers employees who, *inter alia*, are employed at a work site where their employer employs at least fifty employees or where their employer employs at least fifty employees within seventy-five miles of the site. *Id.* at § 2611(2)(B)(ii). The Department of Labor considers telecommuters to be employed at the work site to which they report and from which assignments are made. 29 C.F.R. § 825.111(a)(2) (1999).

Far more problematic are cases like *Technology Services Solutions*,<sup>100</sup> where employees have no fixed work location and all reporting is conducted electronically. The common needs and concerns of such community members are likely to be derived from the specialized nature of what they have in common—i.e., that they work for the same company. They are not likely to be tied together by other common needs or experiences. They will not support the same sports teams, shop in the same stores, vote in the same elections, fight the same traffic, or have face-to-face dealings with the same bosses. They will not meet by the water cooler or in the cafeteria. Indeed, what characterized the employees in *Technology Services Solutions*, and what is likely to characterize employees in most such virtual workplaces, is the independence with which they perform their jobs. The common electronic boss is far less likely to be a tie that binds workers together in virtual workplaces than the common on-site supervisor who binds workers together in traditional workplaces.<sup>101</sup>

Similarly, membership in an electronic workplace community is likely to be more transitory than membership in a traditional workplace community. The costs of withdrawal from a traditional workplace community are both economic and social. The social costs result from leaving behind coworkers to whom an employee has become attached. The common refrain, “I hate my job but love the people I work with,” is far less likely to be heard in a virtual workplace than in a traditional one. The costs of withdrawing from a virtual workplace community are likely to be predominantly economic, i.e., the loss of compensation improvements, such as vested pensions and additional vacation days, that result from increased seniority with the same employer. Here again, the communal tie is employer-wide.

On what basis does a sufficient community of interest exist such that effective collective bargaining can be a realistic possibility in a virtual workplace? The Railway Labor Act (RLA),<sup>102</sup> with its bargaining

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100. 149 L.R.R.M. (BNA) 1302 (1995). See *supra* notes 60-62 and accompanying text.

101. Some of these electronic work communities may blossom into multidimensional communities, evidenced by electronic interaction on non-work subjects, such as child rearing, vacations, and hobbies or other leisure interests. Organization of list serves or Web pages related to other job opportunities with other employers also evidences broader community.

102. 45 U.S.C. §§ 151-88 (1994).

organized by system-wide craft or class, provides some helpful analogies. The RLA relies less than the National Labor Relations Act on physical proximity to define bargaining units. From the earliest days after its creation in 1934, the National Mediation Board (NMB) defined bargaining units only in terms of system-wide crafts or classes.<sup>103</sup> Craft organization of the railroad industry prevails even today.

The first stirrings of collective bargaining in the railroad industry occurred in the 1870s with locomotive engineers and firemen. After an abortive attempt by Eugene Debs to organize the railroad industry on an industry-wide basis, culminating in the violent strike at the Pullman Company south of Chicago in 1896, organization of the railroad industry existed primarily in operating crafts—conductors, trainmen, and switchmen.<sup>104</sup> Then, in the 1920s, the shop crafts organized, although still along craft lines. As automation and communication became more important, the signalmen joined telegraphers as other craft groups. The NMB, which enjoys virtually unreviewable authority to define bargaining units,<sup>105</sup> follows a policy of recognizing system-wide units of “crafts or classes.”<sup>106</sup>

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103. *Int'l Bhd. of Teamsters v. Tex. Int'l Airlines, Inc.*, 717 F.2d 157, 163 (5th Cir. 1983) (declining to enforce collective agreement of smaller merged airline because of interference with NMB's exclusive jurisdiction over representation disputes and noting Board's reluctance to fragment units below system-wide level in mergers).

104. See generally 2 PHILLIP S. FONER, *HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES: FROM THE FOUNDING OF THE AMERICAN FEDERATION OF LABOR TO THE EMERGENCE OF AMERICAN IMPERIALISM* 247-50 (2d ed. 1975).

105. “[T]he Board is given authority, in conducting an election in order to determine who is the representative, to ‘designate *who* may participate in the election.’” *Ass'n of Flight Attendants v. United Airlines, Inc.*, 71 F.3d 915, 917 (D.C. Cir. 1995) (quoting 45 U.S.C. § 152 (Ninth) (1986)). “Representation issues . . . are within the exclusive jurisdiction of the Board to investigate, if need be, and to decide, and are not ordinarily subject to judicial review.” *Id.* at 917 (citing *Switchmen's Union v. Nat'l Mediation Bd.*, 320 U.S. 297, 302-05 (1943)).

106. See, e.g., *Employees of the N.Y. Cent. R.R. Co.*, 1 N.M.B. 197, 208-09 (1941) (recognizing that the Railway Labor Act mandates system-wide craft or class designations and refusing to allow geographically based representation for parts of integrated railroad); *Transp. Communications Int'l Union*, 22 N.M.B. 70, 73-74 (1994) (stating that “[t]he craft or class includes all of the employees working in classifications deemed eligible, regardless of work locations. . . . The Board's longstanding practice, in keeping with its statutory mandate, is to certify unions that represent the majority of a system-wide craft or class of employees.”) (extinguishing certifications of unions representing portions of craft or class on merged railroad); *Ass'n of Data Processors*, 8 N.M.B. 434, 448, 452 (1981) (stating that “one of the most intrinsic dissimilarities between the National Labor Relations Act and the Railway Labor Act is that under the former employees are grouped for representation purposes into

Organization of the airline industry, which did not accelerate until the 1950s, proceeded along craft lines as well. In the late 1970s through the mid 1990s, airline employee representatives attempted to deviate from the system-wide craft or class norm. The Board rebuffed these attempts, holding steadfastly to its system-wide craft or class rule for defining bargaining units.<sup>107</sup> Of course, system-wide representation rights in a labor organization do not necessarily mean that collective bargaining takes place on a system-wide basis for all issues.<sup>108</sup> In a 1974 railroad merger case, the Board declined an invitation by the employer to state a policy that would enlarge representation units to conform to the scope of a merged railroad operation.<sup>109</sup> In the airline industry, however, the Board has adhered more strongly to the principle that system-wide representation rights must be expanded as the airline system expands through mergers and other corporate transactions:

The pattern of representation which has resulted in the railroad industry has, in the Board's judgment led to uneven representation, duplication of effort and confusion; and has significantly reduced the ability of railroads to integrate operations and manage a single rail system. In the absence of compelling facts,

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appropriate bargaining units. Under the latter, the larger system-wide craft or class is used for representation purposes," and noting historical reluctance to split historical and broad craft-or-class designations to recognize narrower occupational groups) (citations omitted).

107. See, e.g., *Allied Pilots Ass'n*, 22 N.M.B. 331, 426, 432-33 (1995) (finding nominally separate air carriers to constitute a single transportation system and ordering system-wide election); *Hotel Employees and Rest. Employees Int'l Union*, 25 N.M.B. 96, 109 (1997) (declining to certify separate units for Guam and Saipan, despite some differences in pay rates and other factors). *But see Ass'n of Data Processors*, 8 N.M.B. 434, 446 (1981) (noting refusal to apply craft boundaries developed in railroad industry to airline industry).

108. Collective bargaining agreements, it should be remembered, are not necessarily coextensive with bargaining units. It is rather common, for instance, for a multi-employer bargaining group to arrive at one contract covering separate employers and therefore separate bargaining units. And there is no barrier to an employer and union agreeing to separate contracts covering different groups of employees—although the Board discourages it—within the same Board-certified craft or class.

*Ass'n of Flight Attendants v. United Airlines, Inc.*, 71 F.3d 915, 919 (D.C. Cir. 1995) (affirming district court determination that dispute over scope clause in airline merger must be arbitrated, notwithstanding potential conflict with Board representation authority).

109. See *Burlington N., Inc. v. Am. Ry. Supervisors Ass'n*, 503 F.2d 58, 61-62 (7th Cir. 1974) (rejecting railroad's argument that representation rights extending only to property of former Chicago Burlington & Quincy Railroad were extinguished when that railroad was merged into Burlington Northern System and noting NMB position that merger did not extinguish pre-existing representation rights).

judged in each instance on a case-by-case consideration of the situation presented, the Board does not intend to foster a similar pattern of representation in the airline industry.

To exempt the Flight Attendants from the Board's finding that USAir and the Shuttle are a single transportation system would lead to an inconsistent and disruptive pattern of representation the Board has sought to avoid. Therefore, the Board applies its determination [that Shuttle flight attendants should not be kept in a different bargaining unit and subject to different rates of pay, hours and working conditions] to all crafts or classes on the combined system.<sup>110</sup>

The effect of the system-wide craft or class bargaining unit rule of the RLA is to strengthen occupational affiliation forces and to weaken those based on location. Organizing collective bargaining along craft or class lines in the railroad and airline industries reflects the realities of community in those industries. Airline pilots, railroad engineers, airline mechanics, and railroad police share expertise, have common experiences, and face labor market pressures that transcend geographic boundaries. They work across considerable distances, serve customers who are themselves in transit, and frequently find themselves away from home. For them, the relevant workplace community is not a fixed facility, but a mobile flight deck, locomotive cab, airplane, or squad car. This is reflected in the NMB's emphasis on the work-related community of interest the employees share.

For example, in *Independent Ass'n of Continental Pilots*,<sup>111</sup> the National Mediation Board restated the community of interest factors it uses in defining a craft or class for RLA representation purposes: actual duties of employees, nature and set-up of operations, work environment, qualifications of employees, job retention requirement, interaction of employees, and role of major equipment.<sup>112</sup> According to the Board, the factor of "work-related community of interest" is particularly important.<sup>113</sup> The motivation for this factor is to "ensure a mutuality of interest in the

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110. USAir, Inc., 19 N.M.B. 388, 419 (1992) (finding that representation units on USAir and Shuttle must be expanded to include entire system including both carriers).

111. 27 N.M.B. 99 (1999).

112. *Id.* at 103.

113. *Id.* at 109.

objective of collective bargaining."<sup>114</sup> In the case before it, the Board concluded that ground school instructors were not part of the same craft or class as flight instructors because the ground instructors, unlike the flight instructors, did not need experience as Continental pilots. The ground school instructors had significantly different teaching responsibilities, worked in separate organizational units, and received markedly different benefits and compensation.<sup>115</sup> This analysis does not emphasize social interaction, but interaction on matters of employment.

Similarly, communities of interest in virtual workplaces are more likely to organize around occupations and job responsibilities rather than physical locations. The service technicians in *Technology Services Solutions*<sup>116</sup> in all probability identified with each other as service technicians, not as employees working out of any one particular location. The tie that bound them together was their occupation. Indeed, a bargaining unit limited to service technicians in one state, as requested by the union, might have been easier to organize, but would not have had a sufficient sense of community and solidarity to make successful collective bargaining realistic. The odds that a union victory among service technicians in one state would prove to be illusory are high. It is far more likely that collective bargaining can be successful in virtual workplaces when organized along occupational lines rather than geographic location.

The structure of communities in electronic workplaces is likely to make organizing such workers more difficult. The electronic communication system itself is a critical component of the employees' community in an electronic workplace. Access to such electronic communication systems is also critical for unions seeking to organize employees in electronic workplaces. Accordingly, Part V explores the access issues.

## V. ACCESS TO EMPLOYEES IN ELECTRONIC WORKPLACES

The legal regime governing access to employees has developed entirely within the confines of traditional physical workplaces. The initial inquiry

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114. *Id.*

115. *Id.* at 109-110.

116. *See supra* notes 60-62 and accompanying text.

focuses on the employer's actions in exercising its right to exclude individuals physically from the property. When the employer has properly exercised that privilege, it yields to employee section 7 rights<sup>117</sup> only when the employees are so isolated physically as to render alternative means of communication with the employees infeasible. When employees already are lawfully on the property, the employer's privilege to forbid solicitation is much more circumscribed.<sup>118</sup> In electronic workplaces, however, the distinction between physical exclusion from and invitation onto the property is far less meaningful. An ongoing case in California illustrates how this is so.

In late 1998, a California state trial court in *Intel Corp. v. Hamidi* enjoined Ken Hamidi from sending e-mail to employees of Intel Corporation.<sup>119</sup> Hamidi, a former Intel employee, distributed e-mails en masse to current employees criticizing Intel's employment practices. The court regarded Hamidi's actions as a trespass and, therefore, enjoined.<sup>120</sup> Hamidi was not a current employee of Intel and was not seeking to organize current employees or otherwise communicate with them for their mutual aid and protection. Consequently, *Hamidi* does not raise issues under the NLRA. It does, however, highlight the conceptual difficulties of applying legal concepts that initially developed in physically defined spaces to electronic communications.

If Hamidi had physically come onto Intel's premises and distributed leaflets to Intel employees, he clearly would have trespassed. If, instead, he had stationed himself on a public sidewalk outside Intel's offices and distributed the same leaflets to employees heading to work, he clearly would not have trespassed even though many of those leaflets would have been brought by Intel employees onto Intel's property. In the actual case, Hamidi sent e-mail to Intel employees over the Internet. It is not intuitively obvious whether such actions are more analogous to distributing leaflets on

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117. Section 7 provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." National Labor Relations Act, 29 U.S.C. § 157 (1994).

118. See *supra* notes 24-26 and accompanying text.

119. No. 98A05067, 1999 WL 450944, at \*1 (Cal. Apr. 28, 1999). *Hamidi* is discussed in *Developments in the Law—The Law of Cyberspace*, 112 HARV. L. REV. 1574, 1622-34 (1999).

120. *Hamidi*, 1999 WL 450944, at \*1.

Intel's property or to distributing them on the public sidewalk and leaving it to Intel employees to bring them onto the property.<sup>121</sup>

Electronic communications present extremely powerful tools for organizing employees for unions generally and around specific issues.<sup>122</sup> For example, a union organizer could engage in a conversation with prospective members via cyberspace in a non-union workplace:

I'm trying now to organize [name deleted] company. The employees all have computer terminals on their own desk. There's nothing in the law that prevents me from sending e-mail from my office to theirs, unless their employer puts a firewall up. It's legal! So if I'm going to reach them, I'm going to flood them. As for getting e-mail addresses, that's easy: You get someone inside to provide them. It's usually their first initial and last name—at "com."<sup>123</sup>

Consequently, the stakes will be high when the NLRB and the courts consider issues concerning electronic access to employees. In considering electronic access issues, they will attempt to build on a legal regime that developed in workplaces completely bounded by physical space.

Any analysis of union access rules must go back more than half a century to the Supreme Court's decision in *Republic Aviation Corp. v. NLRB*.<sup>124</sup> Republic terminated an employee for soliciting coworkers to join

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121. A student commentator has suggested that the case is best analogized to Hamidi standing on a soapbox in a public park, pointing his megaphone toward Intel's property. See *Developments in the Law—The Law of Cyberspace*, 112 HARV. L. REV. 1574, 1631 (1999). Which analogy is most appropriate depends, in part, on whether employee access to the Internet and to e-mail boxes depended on employer-provided facilities.

122. For example, when IBM recently announced changes to its pension plan, an IBM employee established a web site, the IBM Pension Club on Yahoo, which quickly turned into a forum for IBM employees around the world to protest the changes. Ellen E. Schultz & Jon G. Auerbach, *IBM Pension-Plan Changes Spark Ire-Filled Web Site*, WALL ST. J., June 14, 1999, at C1, available at 1999 WL-WSJ 5456329. Another web site urged IBM employees to respond to the pension plan changes by organizing a union. *Id.* at C13. See also Shauna Curphey, *E-Trade Unions: A New Wave of Organizers is Taking Union Drives Online*, at <http://www.shenetworks.com> (last visited Aug. 18, 2000) (describing on-line organizing at IBM); Michael J. McCarthy, *Sympathetic Ear: Your Manager's Policy on Employees' E-Mail May Have a Weak Spot*, WALL ST. J., Apr. 25, 2000, at A1 (discussing electronic organizing at Pratt & Whitney); David Propson, *Workers of the Web, Unite!*, BUSINESS2.COM, Sept. 26, 2000, at 48 (discussing electronic organizing at IBM, Microsoft, and Amazon.com).

123. ARTHUR B. SHOSTAK, *CYBER UNION: EMPOWERING LABOR THROUGH COMPUTER TECHNOLOGY* 47 (Daniel J.B. Mitchell, series ed., 1999).

124. 324 U.S. 793 (1945).



a union during his lunch break in violation of the company's blanket ban on solicitation on company property. The Court upheld the Board's approach that such no-solicitation rules were presumptively illegal when applied to employees soliciting their coworkers during nonworking time.<sup>125</sup> In such instances, they violated section 8(a)(1) by interfering with, restraining, and coercing employees' exercise of their rights under section 7 to engage in concerted activities for mutual aid and protection.<sup>126</sup> The employer could overcome the presumption by showing that special circumstances warranted restricting solicitation to protect a valid business purpose.

The Board applied *Republic Aviation* to nonemployee union organizers as well as employee solicitors. The Supreme Court, however, disagreed. In *NLRB v. Babcock & Wilcox Co.*,<sup>127</sup> the Court found the distinction between employee and nonemployee solicitation to be crucial.

The Court characterized the distinction between employee and nonemployee solicitors as "one of substance."<sup>128</sup> Nonemployee solicitors were trespassers and, the Court stated, "an employer may validly post his property against non-employee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees . . . ."<sup>129</sup> The Court made clear that it was protecting the employer's property rights, specifically the "right to exclude from property."<sup>130</sup> Such rights would yield to section 7 rights only "when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels . . . ."<sup>131</sup>

Twenty years after *Babcock*, the Court seemed to invite the NLRB to exercise its expertise in developing an approach to reconciling employee section 7 rights with the employer's strong property right to exclude nonemployees from its property. In *Hudgens v. NLRB*,<sup>132</sup> the Court held

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125. *Id.* at 803-04.

126. *Id.* at 801-03.

127. 351 U.S. 105 (1956).

128. *Id.* at 113.

129. *Id.* at 112.

130. *Id.*

131. *Id.*

132. 424 U.S. 507 (1976).

that the Board improperly relied on the First Amendment in holding that a striking union had the right to picket an employer at the employer's retail store in a large shopping mall.<sup>133</sup> It remanded the case to the Board to consider "[t]he locus of that accommodation" between section 7 rights and employer property rights.<sup>134</sup>

Taking the Court up on its apparent invitation, the NLRB established a general approach to all access cases in *Jean Country*.<sup>135</sup> The Board indicated that it would balance the impairment of section 7 rights that would be posed by a denial of access against the impairment of private property rights that would be posed by compelling access. In the balancing process, the availability of reasonable alternative means of communication would be entitled to particular weight.<sup>136</sup>

In *Lechmere, Inc. v. NLRB*,<sup>137</sup> the Supreme Court held that the Board's *Jean Country* approach conflicted with *Babcock*. The Court regarded *Jean Country* as impermissibly eroding *Babcock*'s holding that an employer may post its property against solicitation except where reasonable alternatives are not available to the union,<sup>138</sup> and as impermissibly sanctioning "reasonable trespass."<sup>139</sup> The Board was not authorized to require access merely because "nontrespassory access to employees may be cumbersome or less-than-ideally effective . . . ."<sup>140</sup>

The crucial distinction between *Babcock-Lechmere* and *Republic Aviation* is the difference between nonemployees, who are strangers to the property and may be physically excluded by the property owner, and employees who are licensed by the property owner to be on the property. The Court itself has cited the primacy of this distinction in other access cases.<sup>141</sup> Professor Cynthia Estlund has debunked this distinction

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133. *Id.* at 521-23. The Board had relied on the Court's prior decision in *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1966). In *Hudgens*, the Court overruled *Logan Valley Plaza*.

134. 424 U.S. at 522.

135. 291 N.L.R.B. 11 (1988).

136. *Id.* at 14.

137. 502 U.S. 527 (1992).

138. *Id.* at 538.

139. *Id.* at 537.

140. *Id.* at 539.

141. See, e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556, 571 (1978) (stating "the nonemployees in *Babcock & Wilcox* sought to trespass on the employer's property, whereas the employees in *Republic*

effectively. She has demonstrated that the common law of property at the time of *Republic Aviation* and *Babcock* provided that a licensee who exceeded the scope of the license, such as an employee who violated a no-solicitation rule, became a trespasser.<sup>142</sup>

Nevertheless, the licensee-trespasser distinction has been given paramount weight in access cases. For example, in California, shopping center owners do not have an absolute right to exclude solicitors.<sup>143</sup> The NLRB has held that *Lechmere* does not apply to California shopping centers because union solicitors are privileged under state law to be on the property.<sup>144</sup> More generally, the Board has refused to apply *Lechmere* whenever the employer's property interests do not include control over physical access to the property.<sup>145</sup>

The rationale behind the licensee-trespasser distinction becomes more comprehensible when we realize that what is at stake is the property owner's naked right to exclude individuals from the property regardless of reason or justification. As respected commentators have observed, for example, the only apparent reason for *Lechmere*'s exclusion of the union organizers was to prevent their message from being communicated.<sup>146</sup> There was no showing that the solicitation disrupted the employer's business in any material way.

In determining the boundaries of this naked property right, the licensee-trespasser distinction defers, in the first instance, to the property

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*Aviation* did not."); *Hudgens v. NLRB*, 424 U.S. 507, 521-22 n.10 (1976) (describing the employees in *Republic Aviation* as already being rightfully on the property in contrast to the nonemployees in *Babcock*).

142. Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305, 312, 323 (1994).

143. See, e.g., *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980) (holding that a California Supreme Court decision upholding the right to solicit in a shopping center did not violate the shopping center's First Amendment or property rights).

144. *Bristol Farms Inc.*, 311 N.L.R.B. 437, 439 (1993).

145. See, e.g., *Farm Fresh, Inc.*, 326 N.L.R.B. 997, 1001-02 (1998) (finding that employer failed to establish the requisite property interest to exclude organizers), *rev'd on other grounds sub nom. United Food & Commercial Workers Int'l Union Local 400 v. NLRB*, 222 F.3d 1030, 1033 (D.C. Cir. 2000); *Indio Grocery Outlet*, 323 N.L.R.B. 1138, 1142 (1997) (finding employer did not have the right to exclude union agents from the walkway in front of its store).

146. Estlund, *supra* note 142, at 325. See also James A. Gross, *A Human Rights Perspective on United States Labor Relations Law: A Violation of the Right of Freedom of Association*, 3 EMPLOYEE RTS. & EMP. POL'Y J. 65, 95 (1999) (noting that the employer made no claim that union activity "interfered with production, services, security, or other business functions.").

owner/employer's determination as to who shall have access to the property. It takes that determination as a given and applies settled modes of analysis to the property owner's solicitation restrictions. Thus, if the property owner has decided to exclude certain individuals physically, including nonemployee union organizers, the distinction applies the very property-protective *Babcock-Lechmere* analysis and upholds the solicitation restrictions in most instances. On the other hand, if the property owner has decided to invite certain individuals, such as its employees, onto the property, it has opened itself up to the more section 7-protective analysis of *Republic Aviation*. In other words, the law does not impose access requirements on the employer/property owner; the employer/property owner imposes them upon itself by deciding whom to invite onto the property.

This approach of taking the employer's basic exercise of property or entrepreneurial rights at face value and applying established modes of analysis to them is common in labor law. For example, the law respects a successor employer's basic entrepreneurial right to hire whomever it wants and to structure its workforce any way it wants. The law does not compel the successor to hire the predecessor's employees.<sup>147</sup> However, once the successor has decided to hire the predecessor's employees, an established mode of analysis allows the NLRB to compel the successor to recognize and bargain with the predecessor's union.<sup>148</sup> Similarly, the law accepts the workforce structure as developed by the employer and applies established modes of analysis to that structure to determine who, if anyone, will have collective bargaining rights.<sup>149</sup>

Thus, once an employer has decided to allow solicitation by strangers on its property, it may not pick and choose which solicitation it will

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147. *NLRB v. Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 280 n.5 (1972).

148. *Id.* at 281; *see also* *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 41 (1987) (holding that a new employer is obligated to bargain with the predecessor's union where the majority of the successor's employees were employed by the predecessor).

149. *Compare, e.g., City Cab Co. v. NLRB*, 628 F.2d 261, 266 (D.C. Cir. 1980) (holding that where company maintained control over manner in which drivers performed duties and over driver compensation, drivers were employees and were entitled to collective bargaining rights) *with* *Local 777 v. NLRB*, 603 F.2d 862, 872-81 (D.C. Cir. 1978) (holding that union had no right to demand collective bargaining because drivers retained sufficient control to be considered independent contractors rather than employees).

countenance; at the least, it may not pick some solicitors that it will allow and choose not to allow union solicitation. An exception to an employer's right lawfully to post its property against union solicitation when the employer discriminates in the exercise of that right was recognized by the Court in *Babcock*<sup>150</sup> and *Lechmere*.<sup>151</sup> Recently, the circuits have divided over whether an employer who allows charitable and other community solicitation on its property may lawfully prohibit union solicitation.<sup>152</sup> Those courts that allow an employer to discriminate in favor of charitable and community solicitors and against union solicitors lose sight of the basis behind the discrimination exception to the naked right to exclude. An employer who decides to open up the property for some solicitors has, by its own actions, chosen to allow solicitation on the property and invites scrutiny when it then seeks to bar union solicitors.<sup>153</sup>

A similar approach underlies the NLRB's analysis of employer restrictions on the use of company bulletin boards. Since at least 1941,<sup>154</sup> the Board has held that an employer lawfully may prohibit employees from using company bulletin boards and similar areas for the posting of notices; but if the employer allows employees to post some notices, it may not

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

151. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 535 (1992).

152. *Compare Cleveland Real Estate Partners v. NLRB*, 95 F.3d 457, 464-65 (6th Cir. 1996) (holding that the owner of a private shopping mall could prohibit union representatives from distributing handbills to shoppers, even though the owner allowed solicitation by politicians and community and charitable organizations) with *Lucile Salter Packard Children's Hosp. v. NLRB*, 97 F.3d 583, 587 (D.C. Cir. 1996) (stating that an employer engages in discrimination by denying union access to its property while permitting solicitation by nonemployee entities).

153. In *Farm Fresh, Inc.*, 326 N.L.R.B. 997 (1998), *rev'd on other grounds sub nom. United Food & Commercial Workers Int'l Union Local 400 v. NLRB*, 222 F.3d 1030 (D.C. Cir. 2000), the NLRB overruled a long-standing line of authority that had culminated in its decision in *Montgomery Ward & Co.*, 288 N.L.R.B. 126 (1988). In *Montgomery Ward*, and its predecessor decisions, the Board held that an employer violated section 8(a)(1) when it prohibited a nonemployee union organizer from entering its in-store restaurant and soliciting off-duty employees as long as the organizer conducted himself in a manner consistent with that of other patrons of the restaurant. 288 N.L.R.B. at 127. Thus, an employer could not bar an organizer from meeting with employees about the union. In *Farm Fresh*, the Board concluded that its *Montgomery Ward* decision did not survive *Lechmere*. 326 N.L.R.B. at 999. In so doing, the Board failed to recognize that, consistent with *Lechmere*, the *Montgomery Ward* approach defers to the employer's determination in the first instance of appropriate uses of the property. However, once the employer has decided to open up the property, i.e., the restaurant, to nondisruptive conversation among patrons, it may not exclude conversation about a union between an organizer/customer and an off-duty employee.

154. *Gallup Am. Coal Co.*, 32 N.L.R.B. 823 (1941), *enforced*, 131 F.2d 655 (10th Cir. 1942).

prohibit them from posting union notices.<sup>155</sup> The Board regards such prohibitions as discrimination against union notices. Two circuit courts of appeals have approved the Board's approach.<sup>156</sup>

In *Guardian Industries Corp. v. NLRB*,<sup>157</sup> however, the Court of Appeals for the Seventh Circuit rejected the Board's approach. The court reversed a Board decision which found that the employer had violated the NLRA by prohibiting the posting of union meeting notices on company bulletin boards after allowing the posting of employee notices of various items that were for sale. The court reasoned that employee for sale notices were not comparable to union meeting notices and that, therefore, the employer did not discriminate when it permitted the former but disallowed the latter. Interestingly, the court suggested that the Board might require that the employer give employees access to its bulletin boards to post union meeting notices if it found that the employer's nondiscriminatory refusal to post meeting notices for outside groups interfered with employee section 7 rights in a manner comparable to the no-solicitation rule in *Republic Aviation*.<sup>158</sup> Perhaps because the NLRB characterizes its findings in bulletin board cases as findings of discrimination, the Seventh Circuit failed to realize that the Board's rule concerning access to bulletin boards is no different from *Republic Aviation*'s rule concerning solicitation prohibitions.

The starting point of analysis in both instances is recognition that, as a property owner, an employer has a right to exclude anyone from its premises. Once it invites employees onto the premises, however, albeit for the limited purpose of performing their job responsibilities, it may not prohibit or restrict them from soliciting their coworkers to join a union unless the prohibition or lesser restriction is necessary to ensure order and prevent disruption of the business operation. Similarly, an employer has a property right to exclude all employee use of its bulletin boards. Once it

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155. See, e.g., *Timken Co.*, 331 N.L.R.B. No. 86 (2000); *Kroger Co.*, 331 N.L.R.B. 1187, 1199 (1993); *Fairfax Hosp.*, 310 N.L.R.B. 299, 304 (1993); *Honeywell, Inc.*, 262 N.L.R.B. 1402 (1982), *enforced*, 722 F.2d 405 (8th Cir. 1983); *Challenge Cook Bros. of Ohio, Inc.*, 153 N.L.R.B. 92 (1965).

156. See *NLRB v. Honeywell, Inc.*, 722 F.2d 405, 406 (8th Cir. 1983); *Union Carbide Corp. v. NLRB*, 714 F.2d 657 (6th Cir. 1983).

157. 49 F.3d 317 (7th Cir. 1995).

158. *Id.* at 322.

invites employee use of the bulletin boards, however, albeit for the limited purpose of posting for sale notices, it may not prohibit or restrict them from posting union meeting notices unless the prohibition or lesser restriction is necessary to prevent disruption or interference with the employer's business purpose.<sup>159</sup>

Thus, an employer who chooses to invite certain types of persons on the property, stranger solicitors in the case of the *Babcock-Lechmere* discrimination exception, or employees in the case of *Republic Aviation*, becomes subject to the *Republic Aviation* mode of analysis. The employer may still prohibit or regulate solicitation when necessary to the operation of the enterprise. Consequently, the employer may limit solicitation to nonworking time and may prohibit solicitation during nonworking time where special circumstances justify it.<sup>160</sup> The employer may not prohibit literature distribution, but may limit it to nonworking areas and may prohibit it completely upon a showing that distribution even in nonworking areas creates excessive litter or otherwise unduly disrupts operations.<sup>161</sup>

The different modes of analysis applied to employee invitees and nonemployee trespassers have led many unions to convert their organizers into employee invitees. The process is known as "salting." Paid union organizers seek to be hired by the employers they have targeted for organizing and thus become employee invitees who enjoy broader rights to solicit under the *Republic Aviation* mode of analysis. In *NLRB v. Town & Country Electric, Inc.*<sup>162</sup> the Supreme Court held that such salts are employees under the NLRA and enjoy the same section 7 rights and section 8(a) protections as other employees.<sup>163</sup> Although the Court's rationale in *Town & Country* was quite narrow—it relied on the plain meaning of the term "employee" as defined in section 2(3) of the NLRA<sup>164</sup>—as Professors Gely and Bierman have aptly demonstrated, the salting issue properly is

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159. For example, the employer could restrict the size of the notice to prevent it from interfering with other notices posted on the board.

160. See, e.g., *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 784-86 (1979) (finding prohibition of solicitation in certain areas of hospital to be justified based on the potential ill effects on patients).

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

162. 516 U.S. 85 (1995).

163. *Id.* at 98.

164. *Id.* at 89.

understood as an access issue.<sup>165</sup> The privilege of salting an employer tends to level the playing field of access to employees.

A second area where the Board and the courts have attempted to level the uneven playing field of access to employees involves home visits, although this area does not implicate employer property rights. The NLRB has held that employer solicitation of employees at their homes is inherently coercive and per se violative of the NLRA.<sup>166</sup> However, to offset their lack of access to employees at the workplace, the Board has refused to prohibit unions from soliciting employees at their homes.<sup>167</sup>

The playing field that the Board and the courts have developed is a markedly physical one. In *Lechmere*, the Court emphasized that physical space is what is at issue:

[T]he exception to *Babcock's* rule [that an employer may validly post its property against union solicitation by nonemployees] is a narrow one. It 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." Classic examples include logging camps, mining camps, and mountain resort hotels.<sup>168</sup>

Similarly, the home visits doctrine also is based in physical space. The employer's physical property is off limits to nonemployee union organizers, but the employee's physical property, i.e., the employee's home, is off limits to the employer. This model is based on traditional industrial workplaces where employer and employee time and territory are segmented with relatively strict boundaries and ongoing border skirmishes fought over such matters as mandatory overtime and the taking of personal phone calls during working time.<sup>169</sup>

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165. Rafael Gely & Leonard Bierman, *Labor Law Access Rules and Stare Decisis: Developing a Planned Parenthood-Based Model of Reform*, 20 BERKELEY J. EMP. & LAB. L. 138, 148-52 (1999).

166. *Peoria Plastic Co.*, 117 N.L.R.B. 545, 547 (1957).

167. See, e.g., *Plant City Welding & Tank Co.*, 119 N.L.R.B. 131, 133-34 (1957) (emphasizing that unions do not have frequent opportunities to address employees and may have a need to seek out individual employees to present their views). For further discussion of the home visits doctrine see Gely & Bierman, *supra* note 165, at 144-45.

168. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 539 (1992) (citations omitted) (emphasis in original).

169. See generally CHRISTENA E. NIPPERT-ENG, *HOME AND WORK: NEGOTIATING BOUNDARIES*



In physical workplaces, the solicitor and the target of the solicitation usually are in the same place at the same time. The solicitation takes place in a discrete transaction which has a beginning and an end. Solicitations in electronic workplaces do not share these characteristics. The solicitor may be anywhere and the target of the solicitation may receive and read the solicitor's message minutes, hours, or even days after it is sent.

The NLRB's forays into access issues in cyberspace have, thus far, been very limited. Its decisions concerning employee use of electronic mail for section 7 purposes have been limited to traditional issues of employer discrimination and the boundaries between protected and unprotected conduct.

In *Washington Adventist Hospital, Inc.*,<sup>170</sup> the employer discharged an employee for sending a "break message" via e-mail to all individuals on the employer's system sarcastically criticizing the employer's restructuring and reductions in force. The break message was one that automatically appeared on the screens of every computer that was logged on and required intervention by the computer user to delete it. The discharged employee sent the message during the time period that the hospital's computer system was at its peak usage. The NLRB adopted an administrative law judge's (ALJ) decision that recommended dismissing the complaint, holding that the employee's actions were not protected by section 7 of the NLRA.<sup>171</sup> The ALJ reasoned that the employee had taken over the employer's computer system at a time when a great deal of medical information concerning patients was being entered and communicated, and "arrogate[d] to himself the decision [as to] whether the hospital's computer-communication facility should cease being used for hospital purposes and be used for his own purposes: to communicate his dissatisfaction with hospital policy . . . ."<sup>172</sup> The ALJ further found the employee's actions unprotected because his use of a break message interrupted the work of employees using the computer system "during the rush hour, such work being the care of patients in an acute hospital setting."<sup>173</sup>

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THROUGH EVERYDAY LIFE 40-42 (1995).

170. 291 N.L.R.B. 95 (1988).

171. *Id.* at 102.

172. *Id.*

173. *Id.* at 103.

In *Timekeeping Systems, Inc.*,<sup>174</sup> the Board adopted an ALJ recommended decision holding that an employee's use of the employer's e-mail system to disseminate a message critical of an employer's policy was protected. The employee was discharged for sending a flippant and grating e-mail message to all persons on the system criticizing an employer memo which announced a new vacation policy. The ALJ gave the employer's reliance on *Washington Adventist Hospital* short shrift.<sup>175</sup> The ALJ observed that the case before him did not involve the interruption of transmissions regarding patient care. The employer had conceded that "employees were permitted to post 'simple' e-mails to each other," make personal phone calls, and engage in similar personal matters during work time.<sup>176</sup> Furthermore, in the ALJ's view, the e-mail message could not have taken more than a few minutes to digest. There being no material disruption of the employer's operation, the ALJ concluded that firing the employee violated the NLRA.<sup>177</sup>

At issue in *Washington Adventist Hospital* and *Timekeeping Systems* was the application of traditional NLRA doctrine concerning the boundaries of protected concerted activity. In *Washington Adventist Hospital*, the nature of a break message was critical. The break message interrupted all transmissions to all terminals. The evidence established that such messages were used only to warn users when the system was going down.<sup>178</sup> Under any reasonable analysis, the employer had legitimate business reasons for restricting the use of break messages, as opposed to routine e-mail messages. Similarly, in *Timekeeping Systems*, the primary focus was on the tone of, and language used in, the e-mail message. The message itself was otherwise little different from routine personal e-mail messages that the employer permitted employees to send. The analysis and the result are not unlike those for employee invitees who engage in union solicitation during personal time on the employer's premises.

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174. 323 N.L.R.B. 244 (1997).

175. *Id.* at 249.

176. *Id.*

177. *Id.* at 249-50.

178. *Washington Adventist Hosp., Inc.*, 291 N.L.R.B. 95, 96 (1988).

Another relatively straightforward application of traditional labor law doctrine occurred in *E. I. du Pont de Nemours & Co.*<sup>179</sup> In *du Pont*, the Board held that an employer violated the Act by denying the union access to the e-mail system to distribute union literature while allowing employees to use the system to distribute a wide variety of other material, a clear case of illegal discrimination.

Eventually, the Board will face a case in which an employer broadly prohibits employees from using the computer system for any nonbusiness purpose and where the special circumstances present in *Washington Adventist Hospital* are absent.<sup>180</sup> To date, the most significant decisions have arisen out of the International Brotherhood of Electrical Workers' efforts to organize employees of Technology Service Solutions (TSS).

As discussed previously, the union sought to organize TSS's Customer Service Representatives (CSRs) who worked out of their homes and communicated almost entirely electronically. The NLRB Regional Director had directed election in two bargaining units covering all employees located in the state of Colorado. After the NLRB reversed the Regional Director and held that the smallest appropriate bargaining unit was all CSRs in the multistate south central region,<sup>181</sup> the union asked the employer for a list of all CSR names and home addresses. The employer declined, and the union filed charges alleging a violation of section 8(a)(1).<sup>182</sup> At the close of the General Counsel's case-in-chief, the ALJ dismissed the complaint, reasoning that the employer had done nothing affirmatively "to interfere with, restrain or coerce employees in the exercise of their rights" to organize.<sup>183</sup> The "interference," if any, resulted, in the ALJ's opinion, from the employer's structure and its method of conducting business.<sup>184</sup>

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179. 311 N.L.R.B. 893 (1993).

180. Some management lawyers have advised employers to adopt such nondiscriminatory prohibitions on nonbusiness use of e-mail. See Mark A. Spognardi & Ruth Hill Bro, *Organizing Through Cyberspace: Electronic Communications and the National Labor Relations Act*, 23 EMPLOYEE REL. L.J. 141 (1998).

181. See *supra* notes 60-62 and accompanying text.

182. Tech. Serv. Solutions, 324 N.L.R.B. 298, 298 (1997).

183. *Id.* at 301.

184. *Id.* at 300-01.

The Board reached the opposite conclusion. It rejected the ALJ's analysis that an affirmative employer act was required and held that the General Counsel had established a *prima facie* case.<sup>185</sup> The Board observed that the CSRs were widely scattered and had limited contact with each other, and that they received and sent messages, ordered parts, and documented their work assignments electronically via handheld portable terminals (PTs).<sup>186</sup> It also observed that a CSR in Colorado had succeeded in contacting other Colorado-based CSRs on his PT, but was unable to use his PT to locate CSRs in other states.<sup>187</sup> The Board held that the ALJ had inappropriately concluded that CSRs were accessible and that organizing them was not impossible.<sup>188</sup> It remanded the case to the ALJ to allow the employer an opportunity to rebut the General Counsel's *prima facie* case.

On remand, the ALJ again dismissed the complaint.<sup>189</sup> The ALJ found, as a matter of fact, that the General Counsel had failed to prove that the employees were inaccessible. Significantly, the primary rationale behind this finding was evidence that employees could locate coworkers in other states by using their PTs.<sup>190</sup> The ALJ also found that employees could be solicited when they went to central locations to obtain parts they needed to service customers.<sup>191</sup> Consequently, he concluded that the union's organizer "did not take reasonable steps to determine if she could organize Respondent's CSRs outside Colorado,"<sup>192</sup> and held that the employer did not violate section 8(a)(1) when it refused to provide the union with a list of CSR names and addresses.<sup>193</sup>

The ALJ's analysis of the reasonable alternatives that the union should have explored prior to requesting a list of employee names and addresses is quite telling.<sup>194</sup> One such alternative, which involved approaching CSRs

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185. *Id.* at 310-12.

186. *Id.* at 298.

187. *Id.* at 300.

188. *Id.* at 302.

189. Tech. Serv. Solutions, No. 27-CA-13971, 1999 NLRB LEXIS 47, at \*48 (NLRB Feb. 2, 1999) (Kennedy, A.L.J.).

190. *Id.* at \*31.

191. *Id.* at \*43.

192. *Id.* at \*45.

193. *Id.* at \*48-49.

194. The ALJ faulted the union organizer for not using the PTs to access employees and for not soliciting employees at the central parts locations. Additionally, the ALJ faulted the union organizer

in the larger cities when they came to the employer's central parts locations to obtain parts needed to service customers, essentially would have the union soliciting employees during working time. The other alternative would have the union, acting through CSRs, use the employer's computer system to solicit the employees. Regardless of whether such unconventional analysis is accepted by the Board and the courts, the ALJ's approach illustrates the need to rethink basic assumptions when considering access issues in electronic workplaces.

Access rules developed in traditional workplaces center on discrete physical boundaries and discrete separations between working and nonworking time. E-mail and related electronic technologies blur these boundaries. Employees who work all or part of their time from their homes tend to integrate home and work in a manner directly contrary to the strong home-work boundary found in traditional industrial settings. Remote access to the job also blurs the distinction between working and nonworking time. The blurring of these distinctions strongly suggests that employer solicitation of employees at their homes does not carry with it the same level of intimidation that such home solicitation carries in traditional workplaces. Electronic workplace home solicitations by employers should not be considered per se coercive. Rather, the NLRB should scrutinize them on a case-by-case basis, inquiring into whether the solicitation differs materially from other communications sent by the employer to, or accessed by the employee at, the employee's home. The burden should be on the General Counsel to demonstrate the coercive nature of the home solicitation.

Person-to-person solicitation in traditional workplaces lends itself to stringent rules confining it to nonworking time. The solicitation is a discrete act that happens at a discrete time. With electronic solicitation, however, the recipient controls when he or she will actually read the message. Even though the recipient receives the message during working time, the recipient need not read it immediately. The recipient can recall

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for not travelling to cities outside of Colorado in an effort to locate additional CSRs, for not contacting most of the CSRs on the *Excelsior* list provided in response to the regional director's initial order directing a representation election in the two territories located in Colorado, and for not contacting two CSRs in New Mexico whom the CSR in Colorado working with the organizer had located. *Id.* at \*29-30.

the message during break time or even remotely from home after departing the premises. Moreover, remote site workers tend to exercise greater control over their time and can determine whether any given moment is "working time" or not.

Consequently, there is no reason to assume that the electronic solicitation of employees necessarily causes more than a de minimus disruption of the workplace. In many respects, the sending of electronic solicitations to employees in the workplace resembles the distribution of leaflets to employees as they enter the workplace. The employee may choose to read the leaflet during working time or may reserve it until break or other nonworking time. The possibility that the employee may decide to read the leaflet on the job does not justify the employer in prohibiting the leaflet's distribution.<sup>195</sup>

The Board has required something more than the mere possibility of disruption before allowing employers to prohibit certain types of solicitation. For example, in *American Hospital Ass'n*,<sup>196</sup> several employees left leaflets on their coworkers' desks at the end of the day, positioned so that the coworkers would find them upon arrival the following day.<sup>197</sup> The Board adopted the ALJ's decision that the employer violated the Act by discharging the employees. Although the bulk of the opinion concerned the sarcastic nature of the leaflets, the ALJ observed that there was nothing inherently disruptive of the employer's operation in the employees' actions and found no specific showing of actual disruption.<sup>198</sup> Similarly, casual conversation among employees about a union is protected, even though it occurs during working time, as long as it does not actually disrupt productivity.<sup>199</sup>

Nevertheless, employers may promulgate rules restricting the use of their electronic communications systems to business purposes. Such rules often will prove impossible to enforce because in electronic workplaces, e-mail often becomes the dominant mode of communication for business and

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195. One student commentator has argued that the rules governing literature distribution in the workplace should apply to e-mail solicitation. See Elena N. Broder, Note, *(Net)workers' Rights: The NLRA and Employee Electronic Communications*, 105 YALE L.J. 1639, 1642-43 (1996).

196. 230 N.L.R.B. 54 (1977).

197. *Id.* at 54.

198. *Id.* at 57.

199. See, e.g., *Cooper Tire & Rubber Co. v. NLRB*, 957 F.2d 1245, 1251 (5th Cir. 1992).

personal matters. Even if the employer succeeds in enforcing the rule, the validity of the rule must be analyzed in terms of the nature of the employer's property rights.

When the rule applies to employees, there is no principled reason to treat it differently from any other no-solicitation rule. As discussed previously, the law takes the employer's decision concerning who may have access to the property and applies a settled mode of analysis in light of that decision in evaluating no-solicitation rules. Although at common law an employer could restrict the scope of the license it gave to its employees to enter the property, under *Republic Aviation*, once the employer has invited the employee onto the property, the employer may not prohibit the employee from soliciting for a union during nonworking time unless the employer can show special circumstances.<sup>200</sup> Similarly, once the employer licenses the employees to use the e-mail system, or other electronic communication devices, it may not prohibit the employees from using the system to solicit coworkers to support a union without a showing of special circumstances. There is no principled reason to treat employee use of the computer system differently from the use of the employee parking lot, cafeteria, locker room, or entry hall for the same purpose.

Employers, however, may bar nonemployees from trespassing on the property. As discussed previously, it is conceptually problematic whether a nonemployee who sends a union solicitation to an employer's employees over the Internet is trespassing. It is just as reasonable conceptually to regard the solicitor as sending the electronic solicitation to the boundary of the employer's property, to have it drawn across the boundary line by the recipient by opening the message,<sup>201</sup> as it is to regard the solicitor as having trespassed on the employer's property. However, even if we assume that the sending of such electronic solicitations is trespassing, the nature of the property rights at stake differs significantly from the *Babcock-Lechmere* line of authority.

At issue in *Babcock* and *Lechmere* was the employer's naked property right to exclude trespassers for no reason whatsoever.<sup>202</sup> That property right

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200. See *supra* notes 124-45 and accompanying text.

201. Of course if the employer maintains the e-mail box, the message is already "on" the employer's property before the employee retrieves it.

202. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992); *NLRB v. Babcock & Wilcox Co.*,

is very strong. At common law, damage from a trespass to land is presumed and no specific damage need be shown. The harm the law remedies is interference with the possessor's interest in excluding others from the land.<sup>203</sup> If the sending of an unauthorized e-mail message over the Internet is a trespass at all, it is not a trespass to land. Courts have given relief to Internet service providers who have sued to restrain commercial solicitors from spamming their customers. Courts have grounded such relief in trespass to chattels rather than land.<sup>204</sup> In trespass to chattels, however, damage is not presumed. A plaintiff must make a showing of actual damage to obtain relief.<sup>205</sup> Accordingly, an employer should be required to prove injury before excluding union solicitations by nonemployees. The employer should not be allowed to exclude such solicitation merely because the employer is opposed to the message being communicated.

The different nature of electronic workplaces further distinguishes electronic solicitations from solicitations in traditional workplaces. In traditional workplaces, work communities are multidimensional. They typically involve not only work oriented interaction in the workplace, but also a variety of social relationships that extend outside the workplace—bowling, softball, and touch football teams; co-ownership of boats and vacation houses; and entertainment in one another's homes. Sometimes, these non-work relationships antedate the work relationship, as when someone helps his friend or neighbor get a job with the same employer. In other cases, the work relationships come first, as when someone moves to a new community and makes friends first with her coworkers.

Electronic communities are more likely to be one-dimensional because the members of the community interact only through electronic media. It may be that the relationship begins through electronic media provided by

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351 U.S. 105, 113-14 (1955).

203. See RESTATEMENT (SECOND) OF TORTS § 163 (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 13, at 67, 75 (5th ed. 1984).

204. See, e.g., *America Online, Inc. v. IMS*, 24 F.Supp. 2d 548 (E.D. Va. 1998); *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F.Supp. 1015 (S.D. Ohio 1997). Professor Dan Burk has raised serious questions about the applicability of trespass to chattels to spamming. Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27, 32-39 (2000).

205. KEETON ET AL., *supra* note 202, § 14, at 87; see also RESTATEMENT, *supra* note 203, § 218, at 420.



the employer, and subsequently extends into other media, such as chat rooms, list serves, and e-mail exchanges occurring without the use of employer facilities. But the lack of face-to-face interaction makes these relationships far less likely to evolve into multidimensional relationships.

In traditional workplaces, unions can reach members of the community in various places to encourage them to organize. And once they are organized, unions can encourage members to support concerted action at a variety of places—churches, neighborhoods, bowling alleys, and softball fields, as well as the workplace. The workplace may be the most convenient means of contact, but other face-to-face possibilities are available.

Electronic workplaces lack this character. Because the work communities are embodied only in the electronic communications medium, the electronic medium is not only the backbone, it is the entirety of the work community. Denial of access to this backbone is denial of access to the community altogether.

Furthermore, the Board's and the courts' traditional access rules developed not only in an environment of physical workplaces, but in an environment characterized by the presumption favoring single location bargaining units. In single location bargaining units, the playing field levelers of home visits and salting are likely to be effective. When employees telecommute on a daily basis, however, the presumption favoring single location bargaining units must yield to a presumption favoring bargaining units organized along occupational lines. When employees report to fixed work locations at least some days of the workweek, the single location presumption should still hold, but extensive use of electronic communications will make it much easier for employers to rebut the presumption. Consequently, larger bargaining units are inevitable in electronic workplaces. In these much larger electronic workplace bargaining units, the levelers of salting and home visits are far less likely to be effective. Indeed, as shown above, the entire home visits doctrine must be re-examined in electronic workplaces and employers should no longer be prohibited per se from soliciting employees at their homes.

Thus, in electronic workplaces, employees will be more widely dispersed, bargaining units will tend to be larger, employees will often regard electronic mail as their primary means of communication, and traditional methods of organizing such as home visits and face-to-face

communications are not likely to be reasonable alternatives. Distinctions between home and work, and between working and nonworking time, will be blurred. Moreover, employer property interests in electronic communications systems do not include naked rights to exclude. Considering all of these factors, questions of employee and union access to the employer's electronic communication system should be resolved through a modified *Republic Aviation* analysis. Broad no-solicitation rules should be presumed invalid. The burden should be on the employer to demonstrate a legitimate business need to prohibit particular uses of its electronic communication system. In some cases, such as the use of break messages in *Washington Adventist Hospital*,<sup>206</sup> the legitimate business reason to limit use of the communications system to particular business purposes will be readily apparent. The risk of disruption to critical hospital operations from the unauthorized use of break messages was so great that no further demonstration from the employer should be required. However, in the typical e-mail system, the employer should be required to show some actual significant disruption to its operations resulting from the use of e-mail to solicit employees on behalf of a union. The mere fact that the solicitation can be read during working time should not, standing alone, be sufficient to enable an employer to prohibit it.

Under this proposed scheme, unions and employees will have better access to an electronic workforce than under the current regulatory regime for traditional workplaces. With such increased access, there will be no need to treat union solicitations of employees at their homes more favorably than employer home solicitations. As with employer home solicitations, union solicitations at employee homes should be scrutinized carefully, with the burden on the General Counsel to demonstrate their coercive nature.

Electronic communication systems have the potential to equalize access, thereby increasing the level of democracy in union representation disputes. No longer would employers be excluded artificially from contacting employees at home, and no longer would unions be given artificial playing field levelers, such as special treatment regarding home visits and salts. Electronic access to employees can result in full

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206. 291 N.L.R.B. 95 (1988).

competition in the marketplace of ideas between unions and employers for the support of the workforce. Electronic communications also offer powerful tools for employees to express their preferences regarding union representation. Part VI explores this potential.

## VI. ELECTRONIC AUTHORIZATION CARDS AND BALLOTING

The pervasiveness of links to the Internet offers new tools in union organizing campaigns. Employers can present their arguments on their own Web sites. Unions can publish their appeals on their Web sites and use e-mail to solicit employees. The Internet also offers new options for unions to solicit employee authorization cards and for employees to express their preferences. One union organizer has described the use of a Web site to distribute and collect authorization cards:

If you want to organize, "click here." And you then offer all kinds of information. If they agree, you can download an authorization card: "Sign this card if you wish, in the privacy of your own home and away from your employer, and mail it in." I then print you up as a potential union member on my daily information list. Not 10 pages, just one paragraph. Let's face it, going out to the factory gate and handing out leaflets doesn't work anymore. That's just a dead issue! Mass mediums don't work! Small mediums do!<sup>207</sup>

But the Internet and its World Wide Web also open up possibilities for fraud and forgery. While the NLRB should open its representation case procedures to new forms of employee expression, it also must protect against fraudulent conduct. Several forms of employee preference should be distinguished. One form involves employee transmission of e-mail messages constituting authorization cards. Another form involves employee use of Web forms for the same purpose. A third form involves distribution of authorization card forms via the Web or e-mail which then can be printed, signed by employees, and submitted on paper.

The third form of employee communication presents few risks of fraud or forgery not present already with conventional paper cards. Accordingly,

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207. SHOSTAK, *supra* note 123, at 46-47 (quoting an unidentified union organizer); *see also* Curphey, *supra* note 122 (reporting that the Communications Workers of America provided a means for employers to join the union on-line in its organizing drive at IBM).

the Board should accept signed cards regardless of whether the card form was distributed electronically or physically on paper.

The first form involves the greatest risk of forgery or tampering. While it is not true, as many alarmists report, that e-mail messages transmitted through the Internet come to rest on a multiplicity of servers where they can be intercepted, e-mail messages are plain text, and the SMTP protocol<sup>208</sup> does no checking as to whether the origination and return addresses on an e-mail message actually conform to the Internet address from which it was sent. Accordingly, someone wishing to forge a message easily can alter the return address fields in a message already received, and can "spoof" the return address on a message before it is sent. There is no reliable mechanism to guard against this, although a system administrator can consult log files routinely maintained on e-mail servers to see if the information showing the time and origin of a transmission conforms to what the e-mail message header says. It probably is not a good idea to allow authorization cards in the form of ordinary e-mail messages to be accepted with the same presumption of authenticity accorded paper cards.

The second form of employee communication, completion of Web forms, offers an intermediate level of reliability. If the Web server displaying the Web forms is maintained by a union or an employer, the potential exists for tampering with the submitted forms after they are accumulated on the Web server. On the other hand, a Web site operated by the Board itself or by a neutral third party is not open to that kind of tampering. As long as appropriate user names and passwords are provided for individual employees, and there is no indication that the user name and password system has been compromised, completed Web forms submitted through a third party should be accorded a presumption of authenticity.

There is, of course, a rich variety of encryption applications that assure greater authenticity. Submitters can be given private keys, and use of these keys permit encryption software on the receiving end to authenticate the sender. As such applications become easier to use, they may represent appropriate requirements in highly contested cases. The basic conceptual approach might be similar to that expressed by the Electronic Commerce

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208. The Simplified Mail Transfer Protocol (SMTP) defines e-mail formats for transmission and receipt through the Internet.

Security Act,<sup>209</sup> which says that an electronic format for a document is not legally disqualified, although a party challenging the authenticity of an electronic document may present evidence to undercut presumed legality. When more sophisticated digital signature techniques involving encryption are used, the statute establishes a presumption of authenticity. But no absolute assurances are possible, just as they are not possible with paper cards. Private keys used in encryption systems can be compromised, as can user names and passwords. Of course, written signatures can be forged also.

In any event, the Board should move quickly to accept certain forms of electronic authorization cards and to learn by adjudicating specific cases what refinements in its policy are appropriate to assure the integrity of the representation process.

The Internet offers improvements in processes for determining employee representation beyond solicitation and review of authorization cards. Representation elections can be conducted on the Internet.

Interest is growing in the use of the Internet to conduct elections for public officials.<sup>210</sup> Vendors offering secure Internet voting systems are beginning to offer their services via the Web.<sup>211</sup> Of course there are risks

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209. 5 ILL. COMP. STAT. ANN. 175/1-101 (West 1993 & Supp. 2000). "Information, records, and signatures shall not be denied legal effect, validity, or enforceability solely on the grounds that they are in electronic form." *Id.* at 175/5-110. "A digital signature that is created using an asymmetric algorithm certified by the Secretary of State . . . shall be considered to be a qualified security procedure . . ." *Id.* at 175/15-105. "In resolving a civil dispute involving a secure electronic signature, it shall be rebuttably presumed that the secure electronic signature is the signature of the person to whom it correlates." *Id.* at 175/10-120(b).

210. See generally Pamela A. Stone, Comment, *Electronic Ballot Boxes: Legal Obstacles to Voting Over the Internet*, 29 MCGEORGE L. REV. 953, 974-76 (1998) (reporting on legislation in Minnesota, California, and Florida to explore voting via the Internet, and Department of Defense plans to allow military personnel to vote in general elections over the Internet).

211. See, e.g., <http://www.securepoll.com> (last visited Aug. 13, 2000) (collecting information on Internet voting); <http://www.votehere.net> (last visited Aug. 13, 2000) (reporting on an Internet voting trial hosted by VoteHere.net and held in conjunction with the February 29, 2000 presidential primary election); Lisa Chiu, *Hopes for Net Vote Dim Dems Encounter Resistance in State*, THE ARIZONA REPUBLIC, Feb. 11, 2000, available at 2000 WL 8004922 (reporting on opposition to plans for holding March 2000 presidential primary on the Internet, based on alleged discrimination against minorities and poor); Patrick May, *Alaskan Voters are Pioneers: They Cast Ballots Online in Presidential Straw Poll*, SILICON VALLEY NEWS, Jan. 25, 2000, available at <http://www.sjmercury.com>; <http://www.eballot.net> (last visited Aug. 19, 2000) (developing systems for online polling, voting, and election solutions); <http://www.votation.com> (last visited Aug. 19, 2000) (offering Internet election services for public elections, trade unions, and other organizations);

and concerns regarding Internet voting. In early January 2000, a California Internet voting task force released a report concluding that "the technological threats to the security, integrity and secrecy of Internet ballots are significant."<sup>212</sup> The same authentication issues aimed at avoiding forgery and ballot fraud exist with Internet balloting as exist with electronic authorization cards. In addition, concerns exist with respect to viruses and other hacker-type attacks that could surreptitiously take over Internet polling stations and generate multiple fraudulent ballots. Moreover, at least in public elections, the act of going to a regular polling place may have symbolic and ritual importance that reinforces the legitimacy of a political system. This symbolism would be lost if voters could vote from their homes or workplaces via the Internet.

In the workplace governance context, the symbolic value of voting at a regular polling place is less. Nevertheless, the same concerns that motivate the NLRB to prefer manual elections rather than mail-ballot elections in representation cases<sup>213</sup> may militate against use of Internet balloting as a routine matter in elections under the NLRA.

For electronic workplaces, however, the presumption in favor of manual elections should be easy to rebut. The scattered job sites, varying hours of work, and importance of travel time that justify mail balloting for employees who work at physical workplaces are characteristic of electronic workplaces.<sup>214</sup>

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<http://www.worldwideelection.com> (last visited Aug. 19, 2000) (describing Internet voting product to "make every library a potential early voting station").

212. Rebecca Fairley Raney, *Don't Rush Into Online Voting, California Panel Says*, N.Y. TIMES, Jan. 18, 2000, at <http://www.nytimes.com/library/tech/00/01/cyber/articles/19vote.html> (last visited Aug. 13, 2000) (quoting the California Internet Voting Task Force's fifty-four page report).

213. See *Nouveau Elevator Indus., Inc.*, 326 N.L.R.B. 470 (1998) (approving regional director's decision to hold a manual election rather than a mail-ballot election and describing presumption).

214. See generally NLRB CASE HANDLING MANUAL, Pt. 2, § 11301.2, available at <http://www.nlr.gov> (listing factors which suggest the use of mail ballots: job duties scattered over wide geographic area; varying working schedules so that eligible voters are not present at a common location at common times; and where a strike, lockout, or picketing is in progress). Cf. *Reynolds Wheels Int'l*, 323 N.L.R.B. 1062 (1997) (approving decision by regional director to hold a mail ballot election because workers' shifts were so varied that it would require three consecutive days of manual voting to accommodate all eligible voters, even though eligible voters were not scattered geographically). The NMB has a more flexible attitude regarding mail ballots. See, e.g., *Hotel Employees*, 27 N.M.B. 18 (1999) (ordering a more formal "Laker ballot" supervised by Board after mail vote via Federal Express was comprised); *Communications Workers of Am.*, No. R-6635, 1999

Web-based Internet voting is ripe for use on an experimental basis in representation elections under both the NLRA and the RLA. Several competing vendors offer secure voting systems that adequately protect against the most likely forms of forgery and fraud. Both the NLRB and the NMB have experience in and methods for scrutinizing mail ballot integrity which easily can be extended to Internet balloting. It is not uncommon to rerun representation elections, and any mishaps with Internet voting experiments easily can be remedied.

## VII. CONCLUSION

For six and one-half decades, the National Labor Relations Board and the courts have been developing and refining doctrine under the National Labor Relations Act in the context of traditional physically defined workplaces. Only recently has the NLRB been called upon to adapt its doctrines to electronic workplaces. The pace of such adaptation will accelerate as employers and employees continue to expand their use of e-mail and other electronic communication networks, as more employees work remotely from home and from other than fixed locations, and as more commerce is conducted electronically.

Adapting the NLRA to electronic workplaces will continue a process of balancing employee rights to engage in concerted activities against employer property and entrepreneurial rights. It also will continue a process of reconciling policies and statutory language from the original Wagner Act with sometimes conflicting policies and language of the Taft-Hartley and Landrum-Griffin amendments to the statute. In balancing conflicting rights and reconciling conflicting policies, the Board and the courts must give careful consideration to the differences between electronic and traditional workplaces.

Many of the differences between electronic and traditional workplaces result from the differences between electronic and traditional communities. For example, electronic communities tend to be more transitory because members find it easier to withdraw from them than from traditional

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WL 613469, at 1 (NMB Aug. 11, 1999) (considering alleged interference in conjunction with mail ballot).

communities. Electronic communities tend to be unidimensional, whereas traditional communities tend to serve multiple purposes. Consequently, the presumption that a single location bargaining unit is appropriate, a cornerstone of NLRB bargaining unit determinations for over three decades, will be of limited utility in electronic workplaces. Where employees report to physical locations at least part of the work week, the single location presumption should still apply, but greater use of e-mail and greater degrees of telecommuting should make rebuttal of the presumption easier. Where employees have no discrete physical reporting location, reporting electronically instead, the single location presumption will have no application. Instead, employees will be grouped appropriately by occupation and a presumption will arise that all employees of the same occupation are appropriately grouped in the same bargaining unit, regardless of physical location.

The differences between electronic and traditional communities also require a re-examination of the doctrine governing access to employees. Because electronic communities are unidimensional, the electronic communication system frequently will be the glue that holds the community together. Denial of access to electronic communication networks, therefore, will likely work a greater interference with employees' rights to engage in concerted activities than will denial of access to a workplace's physical plant. The larger bargaining units likely in electronic workplaces will exacerbate such interference.

On the other hand, employer property and entrepreneurial interests in precluding access to its electronic communication networks will not carry as much weight as in traditional physical workplaces. Unlike face-to-face solicitations, where the message is consumed simultaneously with its dissemination, an electronic solicitation may be consumed at a later time, when the employee is off duty and, perhaps, off the property. Furthermore, electronic communications against the employer's will do not involve a trespass on the employer's land. At most, they involve a trespass on the employer's chattel. Yet, the common law regards trespass to chattels differently than trespass to land. With trespass to land, damages are presumed to result from the trespass itself. Trespass to chattels, however, requires a showing of specific harm for the property owner to recover. Rebalancing the competing interests in the context of electronic workplaces leads to the conclusion that blanket employer prohibitions on electronic solicitations are overbroad. Employers must justify restrictions that they



place on electronic solicitations by showing that unrestricted solicitations will significantly disrupt the employer's enterprise.

Electronic media also can provide powerful tools for employees to express their views on union representation. The NLRB should begin to explore acceptances of electronic authorization cards and the use of electronic ballots in representation elections.

Re-evaluation of NLRA doctrine will not be confined to bargaining unit definitions, access to workers, and electronic expressions of worker sentiment concerning representation. Computer technology will blur the distinction between working conditions, over which employers are required to bargain, and methods of production, which are subject to unilateral employer control. As electronic commerce continues to expand, the Board, courts, and even Congress may have to rethink the role that strikes and other tools of economic pressure play in the collective bargaining process. Ongoing analysis of the differences between electronic and traditional workplaces will be necessary as computer technology pushes the NLRA on further forays into cyberspace.