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TECHNOLOGY SERVICE SOLUTIONS: NEW WINE IN OLD WINESKINS?

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INTRODUCTION

People do not put new wine into old wineskins. Otherwise the skins burst, the wine spills out, and the skins are ruined. Rather, they pour new wine into fresh wineskins, and both are preserved.¹

By endorsing the application of traditional union access rules to the nontraditional telework environment of the twenty-first century, the National Labor Relations Board effectively denies an emerging segment of U.S. workers a right that has long been a cornerstone of national labor policy—the right to organize and join a union.² Technology Service Solutions ("TSS"), a national computer system installation and repair company, employs 236 customer service representatives ("CSRs") in its eight-state south-central region.³ CSRs install, service, and repair computers at geographically dispersed TSS customer locations.⁴ They typically work alone and rarely report to any centralized TSS or customer location.⁵ Rather, CSRs routinely receive work assignments and communicate with their

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2. See 29 U.S.C. § 151 (2000) (declaring that U.S. labor policy will encourage the practice and procedure of collective bargaining via "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection").
3. Tech. Serv. Solutions, 332 N.L.R.B. No. 100, slip op. at 2 (2000). The south-central region includes the states of Colorado, New Mexico, Oklahoma, Kansas, Missouri, Arkansas, and parts of Nebraska and Wyoming.
4. Id.
5. Id.
supervisors through a computerized wireless dispatch system.\textsuperscript{6} CSRs have little contact with one another.\textsuperscript{7}

In an attempt to organize CSRs in the eight-state region, the International Brotherhood of Electrical Workers ("IBEW" or "the Union"), on behalf of an interested TSS employee, asked TSS to provide the names and addresses of all CSRs in the region.\textsuperscript{8} The Union issued this request early in its organizing campaign, before it established the 30\% initial showing of interest required to trigger a certification election.\textsuperscript{9} TSS denied the Union’s request, and the Union filed an unfair labor practice charge with the National Labor Relations Board ("NLRB" or "the Board") alleging an 8(a)(1) violation.\textsuperscript{10}

In resolving this issue, the Board applied the Supreme Court’s "reasonable alternative means" ("RAM") test\textsuperscript{11} and held that TSS did not commit an unfair labor practice when it refused to provide the union with the CSRs’ names and addresses.\textsuperscript{12} Specific realities of the 1950s workplace prompted the Supreme Court’s 1956 articulation of the RAM test.\textsuperscript{13} The Court affirmed the test’s application to the traditional fixed plant work environment in 1992.\textsuperscript{14}

\textsuperscript{6} Tech. Serv. Solutions, 324 N.L.R.B. 298, 298 (1997).
\textsuperscript{7} Id.
\textsuperscript{8} Tech. Serv. Solutions, 332 N.L.R.B. No. 100 slip op. at 2; see also Excelsior Underwear, Inc., 156 N.L.R.B. 1236, 1239–40 (1966) (establishing the "Excelsior list" requirement for NLRB representation election cases). Within seven days after the NLRB regional director approves a consent election agreement, or after the regional director or the Board directs a certification election, the employer must submit a list containing the names and addresses of all eligible voters in the bargaining unit to the regional director. The regional director makes the list available to all parties to the organizing campaign.
\textsuperscript{9} 29 C.F.R. § 101.18 (2003) (requiring a 30\% showing of bargaining unit interest before a certification election may be scheduled by the NLRB).
\textsuperscript{10} See Tech. Serv. Solutions, 332 N.L.R.B. No. 100, slip op. at 1. The Union alleged a violation of section 8(a)(1) of the National Labor Relations Act. Under this section, it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights under section 7 of the Act. Section 7 rights include 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.
\textsuperscript{12} Tech. Serv. Solutions, 332 N.L.R.B. No. 100, slip op. at 7.
\textsuperscript{13} See Babcock, 351 U.S. at 113–14. The workplaces in this case were large manufacturing plants close to small, well-settled communities. A large percentage of the plants’ employees lived in the community surrounding the plant.
\textsuperscript{14} See Lechmere, Inc. v. NLRB, 502 U.S. 527, 539–41 (1992). The workplace in this case was a single retail store located in a shopping plaza. All store employees lived in the same metropolitan area where the store was located.
This Comment argues that, in applying the Court's RAM test to the modern teleworkplace, the Board placed new wine in old wineskins. A new test is needed if, consistent with U.S. labor policy, the right of teleworkers to organize and join a union is to be preserved.\textsuperscript{15} A 2001 research survey indicates that there were approximately 28 million teleworkers in the United States that year.\textsuperscript{16} Therefore, a timely re-evaluation of Board's position is warranted. Part I of this Comment reviews the common and administrative law background necessary to analyze the Board's opinion. Part II outlines the facts, arguments, and issues raised by the TSS case. Part III evaluates the shortcomings of the Babcock & Wilcox/Lechmere RAM test in the modern teleworkplace. Part IV suggests a scheme for determining when employers should be required to provide the names and home addresses of workers to employees or nonemployee union organizers seeking to organize the teleworkplace.

I. EVOLUTION OF WORKPLACE RIGHTS

A. The National Labor Relations Act

With the passage of the 1935 National Labor Relations Act (the "NLRA" or the "Act"), and its progeny and amendments,\textsuperscript{17} employee's efforts to organize and bargain collectively through representatives of their own choosing gained legal protection.\textsuperscript{18} Section 7 of the Act contains the following list of protections:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organiza-

\textsuperscript{15} See INT'L TELEWORK ASS'N & COUNCIL, ITAC ADVANCING WORK FROM ANYWHERE (defining telework as the use of computers and telecommunications, from any remote location, to satisfy client needs), at http://www.workingfromanywhere.org/pdf/ITAC_brochure.pdf.


\textsuperscript{18} Id. § 151.
tion as a condition of employment as authorized in section 158(a)(3).19

Section 8 of the Act identifies behaviors that constitute unfair labor practices that violate employees' section 7 rights.20 Section 3 authorizes the creation of a five-person NLRB and charges it to make, amend, and rescind the rules and regulations necessary to implement the Act and guard the rights of both employees and employers.21

The Act's preamble offers two justifications, each based on workplace experience, for enacting the legislation.22 Specifically, through the Act, Congress recognizes that protecting workers' rights promotes behaviors that help to maintain industrial peace and safeguard the uninterrupted flow of commerce.23

Twenty years after Congress passed the NLRA, the Supreme Court recognized that workers would be unable to fully realize their section 7 rights unless they had the opportunity to exercise an informed choice regarding the advantages and disadvantages of self-organization.24 Guided by this judicial pronouncement, the NLRB employs its adjudication procedures to establish rules granting workers access to the information and dialogue they need to make such a choice.25 Through its appellate function, the Court refines the Board's rules.26

19. Id. § 157.
20. Id. § 158.
21. Id. § 153.
22. Id. § 151. In the Act's preamble, Congress explained that
[workplace experience] has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Id.

23. Id.
24. See NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956) (holding that "the right of self-organization depends in some measure on the ability to employees to learn the advantages of self-organization from others").
26. See, e.g., Lechmere, Inc. v. NLRB, 502 U.S. 527, 537–41 (1992) (rejecting the Board's balancing test that weighed employees' right to self-organization against employers' property right to exclude nonemployee union organizers from company property, and evaluating the availability of reasonably effective alternative means of communication between employees and the organizing union). The Court held that the NLRA did not compel employers to allow distribution of union literature by nonemployee union organizers on employers' property unless
In each of the key union access cases, the Court made deliberate mention of employee’s organizational rights under the Act and employer’s property rights under the common law. In addition, the Court recognized the unique workplace geography that framed the relationship between particular employees, employers, and labor organizations.

Many contemporary expressions of the American workplace have no mid- to late-twentieth-century counterpart. The American work scene is no longer predominantly comprised of large, highly centralized, fixed industrial worksites employing stable rosters of regular shift workers recruited from local neighborhoods. Rather, improvements in technology and transportation prompt many contemporary businesses to operate in decentralized electronic work environments staffed by geographically dispersed teleworkers. Such is the workplace for TSS’ customer service representatives.

the location of the plant and the living quarters of the employees placed employees beyond the reach of reasonable union efforts to communicate with employees through usual channels.

27. See id. at 537; Babcock, 351 U.S. at 112; Republic Aviation Corp. v. NLRB, 324 U.S. 793, 794 (1945).

28. See Lechmere, 502 U.S. at 540; Babcock, 351 U.S. at 106-07, 111; Republic Aviation, 324 U.S. at 797.

29. See INT’L TELEWORK ASS’N & COUNCIL, TELECOMMUTING (OR TELEWORK): ALIVE AND WELL OR FADING AWAY? (2000), at http://www.telecommute.org/aboutitac/alive.shtml (copy on file with author) (“Advances in information technology and telecommunications now enable work independent of location. The concept of a single assigned place to work is, for many workers, obsolete. It is costly, ineffective, and no longer matches the needs and desires of today’s workforce.”).

30. See BUREAU OF LABOR STATISTICS, BLS RELEASES 2000-2010 EMPLOYMENT PROJECTIONS (2001) (citing ten-year projections of employment by industry and occupation), available at http://www.bls.gov/news.release/ecopro.nr0.htm. Service-producing industries will continue to be the dominant employment generator, adding 20.5 million jobs by 2010. “As employment in the service-producing sector increases by 19 percent, manufacturing employment is expected to increase by only 3 percent over the 2000-10 period.” Id.

31. See INT’L TELEWORK ASS’N & COUNCIL, supra note 29: Infonetics Research forecasts a 529% increase in VPN (Virtual Private Networks—the technology that enables remote working) expenditures from 2000 through 2004. IDC projects that by 2004, mobile professionals will make up 34% of the US mobile & remote population, followed by work extenders (31%), telecommuters (21%), and mobile data collectors (14%). In sum, the numbers of teleworkers are growing, as are the enabling technologies that allow more people to do “office work” away from the office.

See also U.S. OFFICE OF PERSONNEL MANAGEMENT, TELEWORK WORKS: A COMpendium OF SUCCESS STORIES (2001), available at http://www.opm.gov/studies/FINAL-TELEWRK.htm. The U.S. Office of Personnel Management recognizes that “the advent of smaller-faster-better computers, the Internet, and email have made it possible for employees to seamlessly work away from the traditional office setting. Environmental concerns about pollution, fuel costs, and crowded roads have also contributed to the need to find creative approaches to accomplishing work outside of the traditional office setting.” Id.

B. The Recognition of Competing Rights

Congress enacted the NLRA to reduce industrial strife and promote the free flow of commerce.\textsuperscript{33} To achieve this goal within the context of a capitalist system, Congress had to recognize and accommodate the interests of both employers and employees.\textsuperscript{34} "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."\textsuperscript{35} Employer's property and control rights fall into this category of essential considerations.\textsuperscript{36}

To complete the industrial peace equation, Congress explicitly recognized and guaranteed workers the right to organize and bargain collectively with their employers.\textsuperscript{37} In passing the Act, Congress expressed its preference for a workplace relationship governed by the parties' unique collectively bargained private agreement over any generic understanding of workplace relationship defined by government regulation.\textsuperscript{38}

The tension between employer's property rights and employee's organizational rights is repeatedly illustrated in cases concerning nonemployee union organizer access to employees on employer property.\textsuperscript{39} In \textit{Republic Aviation v. NLRB}, one of the earliest union access cases, the Supreme Court wrote: "[union access cases] bring here for review the action of the National Labor Relations Board in working out an adjustment between the undisputed right of self-
organization assured to employees under the Wagner Act and the equally undisputed rights of employers to maintain discipline in their establishments."\textsuperscript{40} The Court reiterated this belief in a later key case, \textit{NLRB v. Babcock & Wilcox Co.}: "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."\textsuperscript{41}

\section*{C. Union Access to Employer Property}

\subsection*{1. During the Organizational Campaign}

In spite of the tension between the competing rights discussed above, the Supreme Court has long recognized that "the right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others."\textsuperscript{42} Thus, the Board and the courts have struggled to articulate equitable rules governing nonemployee union organizers' access to employer's property for the purpose of communicating the advantages of self-organization from the union's perspective.

In formulating union access rules, decision makers have been careful to consider the status of those seeking access and to map the particular workplace geography at issue. In \textit{Republic Aviation}, the Court endorsed the Board's policy of allowing employees to distribute and discuss union information on company property during nonwork time.\textsuperscript{43} However, the Court's earliest union access ruling

\begin{itemize}
\item \textsuperscript{40} Republic Aviation Corp. v. NLRB, 324 U.S. 793, 797–98 (1945).
\item \textsuperscript{41} 351 U.S. at 112.
\item \textsuperscript{42} Id. at 113.
\item \textsuperscript{43} See Republic Aviation Corp., 324 U.S. at 802–03; see also Peyton Packing Co., 49 N.L.R.B. 828, 843–44 (1943): The \textit{[National Labor Relations] Act}, of course, does not prevent an employer from making and enforcing reasonable \textit{[work]} rules covering the conduct of employees on company time. \textit{Working time is for work.} It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that is was adopted for a discriminatory purpose. It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the
\end{itemize}
contains more than a rule endorsement. While the Court considered the companies' manufacturing plant layouts and proximity to public property, the Court grounded its ultimate holding on the Board's appraisal of the behaviors constituting “normal conditions” in industrial establishments. Under normal industrial conditions, employees possess a right to enter the employer's property; thus, the Court found it unreasonable for employers to regulate employee conduct on company property during nonwork time.

The Court examined nonemployee union organizer access to employer's property eleven years later in Babcock. The change in status of the persons seeking access to the employer's property led the Court to modify the Republic Aviation rule. The Babcock Court held that employers could validly post their property against nonemployee solicitation and distribution of union materials when “reasonable efforts by the union through other available channels of communication enable it to reach the employees with its message” and the anti-solicitation policy is not discriminatorily applied to the union alone. The Court went on to recognize that, when organizational rights conflict with property rights, the Board must accommodate them “with as little destruction of one [right] as is consistent with the maintenance of the other.” Finally, the Court provided the Board with a guiding principle: “when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with [employees] through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize.”

Reasonableness may be assessed by examining the location of a plant in relation to the location of the living quarters of the employees. In Babcock, union access to the employer's property was

absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.”

44. Republic Aviation Corp., 324 U.S. at 802–03.
45. Id. at 795–800
46. Id. at 804.
47. Id. at 805.
49. Id. at 110–11, 113.
50. Id. at 112.
51. Id.
52. Id. (emphasis added).
53. Id. at 113.
denied because an analysis of the location factors did not place the employees beyond reasonable union efforts to communicate with them; usual methods of imparting information were available and deemed sufficient.\textsuperscript{54} The Court repeatedly affirmed this RAM test, rejecting the Board’s short-lived 1988 Jean Country “rights-oriented balancing test.”\textsuperscript{55}

\textit{Lechmere, Inc. v. NLRB}, a 1992 Supreme Court case, constitutes the Court’s most recent endorsement of the Babcock RAM/inaccessibility exception test.\textsuperscript{56} The Court reiterated Babcock’s teaching, which it characterized as “straightforward”:

Section 7 [of the NLRA] simply does not protect nonemployee union organizers except in the rare case where “the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels.” Our reference to “reasonable” attempts was nothing more than a commonsense recognition that unions need not engage in extraordinary feats to communicate with inaccessible employees—not an endorsement of the view (which we expressly rejected) that the Act protects “reasonable” trespasses. Where reasonable alternative means of access exist, Section 7’s guarantees do not authorize trespass by nonemployee organizers, even (as we noted in Babcock . . .) “under . . . reasonable regulations” established by the Board.\textsuperscript{57}

Several Board cases illustrate the application of Lechmere’s alternative means test.\textsuperscript{58} In \textit{Husky Oil NPR Operations}, the Board granted union organizers access to an employer’s property because the Board found it impossible for union organizers to reach employees through the usual means of communication;\textsuperscript{59} the Tenth Circuit Court of Appeals enforced the Board’s order.\textsuperscript{60} While the NLRB’s \textit{Husky Oil} decision predates \textit{Lechmere} by ten years, the 1998 Board and 1999 Ninth Circuit Court of Appeals found \textit{Husky Oil} of continuing precedential value because it was premised on a Babcock/Lechmere, rather than a Jean Country, analysis.\textsuperscript{61}

\textsuperscript{54} Id. at 113–14.

\textsuperscript{55} See Jean Country, 291 N.L.R.B. 11, 14 (1988) (establishing a test whereby the Board would assess an employer’s right to exclude nonemployee union organizers as trespassers via the analysis of three factors: the strength of the owners property rights, the strength of the union’s section 7 rights, and the availability of reasonable alternative means of communication).


\textsuperscript{57} Id. at 537.

\textsuperscript{58} See Nabors Ala. Drilling, Inc., 325 N.L.R.B. 574 (1998), enforced by 190 F.3d 1008 (9th Cir. 1999); Oakland Mall, Ltd., 316 N.L.R.B. 1160 (1995); Husky Oil NPR Operations, 245 N.L.R.B. 353 (1979), enforced by 669 F.2d 643 (10th Cir. 1982).

\textsuperscript{59} Husky Oil, 245 N.L.R.B. at 356.

\textsuperscript{60} Husky Oil, 669 F.2d at 648.

\textsuperscript{61} Nabors, 325 N.L.R.B. at 44.
Husky Oil’s forty-five employees worked in a remote area on the North Slope of Alaska, approximately 660 miles north of Anchorage.\textsuperscript{62} Employees worked twelve-hour shifts, seven days per week, over a four consecutive month period.\textsuperscript{63} Transportation in and out of the work camp was exclusively by airplane.\textsuperscript{64} Apart from the employer’s premises, union access to Husky Oil’s employees was limited to interactions at the Anchorage airport when employees were returning home at the conclusion of a four-month shift, or meetings at the employee’s homes.\textsuperscript{65}

The Board found problems with every employer-proposed alternative and indicated that none of the fiscally feasible options were likely to reach all of the employees in the proposed bargaining unit.\textsuperscript{66} Thus, finding effective and reasonable alternative means of communication lacking, the Tenth Circuit upheld the Board’s order granting union access to the employer’s property.\textsuperscript{67} Finally, the court noted that the Babcock standard did not require a union to undertake predictably futile methods of communication before such methods may be deemed unreasonable; rather, “[decision makers] may assess the channels available to the union without first requiring the union to try them.”\textsuperscript{68}

The Nabors Alaska Drilling case presents a similar fact pattern.\textsuperscript{69} An AFL-CIO affiliate sought to organize approximately 290 Nabors employees working on four arctic drilling rigs in several remote areas of Alaska.\textsuperscript{70} Initially, the union conducted informational meetings for Nabors employees at the Anchorage Airport.\textsuperscript{71} These gatherings helped the union garner enough signed authorization cards to petition for an NLRB certification election.\textsuperscript{72}

In its attempt to communicate with Nabors’ employees, the union mailed prounion information to employees’ homes, distributed leaflets at the airport, and directed prounion employees to discuss union benefits with their coworkers; because the cost was prohibitive,
the union did not advertise its cause in newspapers or on television. Nonetheless, upholding the Board's factual finding, the court granted union organizers access to Nabors' property because the union did not otherwise possess reasonably effective means of communicating with Nabors' employees.

2. Upon the Direction of a Board-Sponsored Election

An assessment of the workplace of the mid-1960s persuaded the Board to announce a rule requiring "higher standards of disclosure than [they had] heretofore imposed." This rule, now known as the *Excelsior* rule, requires an employer to file an election eligibility list containing the names and addresses of all eligible voters in the bargaining unit with the NLRB regional director once the regional director has approved a consent election agreement or has directed a representation election. The Board offered two central justifications for the imposition of this new rule. First, the Board desired to increase the likelihood that employees would cast informed ballots when voting for or against union representation. Thus, the Board believed it appropriate to promote communication methods that facilitate "free and reasoned choice." Second, the Board desired to acknowledge a twofold workplace reality: (a) employee names and addresses are not readily available from any source other than the employer, and (b) while employers are entitled to control the property they own, employers lack a significant interest in the secrecy of employee names and addresses. In crafting this rule, the Board explicitly acknowledged specific workplace realities:

[1] In a large plant or store, where many employees are unknown to their fellows, [union-supporting employees may be unable to secure] the names and addresses of a major proportion of the total

73. *id.* at 1011.
74. *id.* at 1014.
76. *id.* at 1239-40. Note the distinction between an *Excelsior* list (i.e., a list containing the names and home addresses of all eligible voters in a bargaining unit that is provided by an employer to the NLRB regional director upon the direction of a NLRB-sponsored representation election) and an *Excelsior*-type list (i.e., a list containing the names and home addresses of all eligible voters in a bargaining unit provided during the organizing phase, prior to the direction of an election).
77. *id.* at 1240-42.
78. *id.* at 1240.
79. *id.*
80. *id.* at 1241.
81. *id.* at 1243, 1245.
employee complement. . . . Furthermore, employees are frequently known to their fellows only by first names or nicknames, so that there may be significant problems in obtaining the home addresses even of those employees whose names are known. Finally, all the foregoing difficulties are compounded by the more or less constant turnover in the employee complement of any employer. 82

II. TECHNOLOGY SERVICES SOLUTIONS AND THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

A. Structure and Organization of TSS

Technology Service Solutions provides computer repair and maintenance services to its clients throughout the United States. 83 The business operates through regions which are further subdivided into territories. 84 Colorado, New Mexico, Kansas, Missouri, Oklahoma, Arkansas, and portions of Wyoming and Nebraska comprise TSS’s south-central region (the “region”). 85 The State of Colorado consists of two territories, E and X. 86

TSS employs customer service representatives to install, service, and repair computers at geographically dispersed TSS customer locations. 87 CSRs typically work alone and rarely report to any centralized TSS or customer location. 88 In fact, they routinely receive work assignments and communicate with their supervisors solely through TSS’s computerized wireless communication system. 89 TSS provides each CSR with a hand-held portable terminal known as a “brick” and CSRs use the brick to receive assignments and communicate with the Regional office. 90 Finally, CSRs have little contact with one another and neither wear a uniform nor drive a vehicle identifying them as TSS employees. 91

82. Id. at 1241.
84. Id.
85. Id.
86. Id. at 299.
88. Id.
89. Tech. Serv. Solutions, 324 N.L.R.B. at 298.
90. Id.
91. Id. at 299.
B. The Union’s Organizing Efforts

After receiving a pay cut in October 1994, Dennis Phillips, a Colorado-based CSR, contacted the IBEW about the possibility of organizing Colorado CSRs. To conduct a preliminary assessment of CSR interest, IBEW organizer Rosemary Sheridan asked Phillips for the names and addresses of his coworkers. As Phillips did not possess a TSS employee directory, he compiled his own by utilizing specific codes on his TSS-issued brick. Employing this method, Phillips eventually provided Sheridan with the names of approximately thirty CSRs.

The IBEW filed its first representation petition in April 1995. The petition was withdrawn when the Union learned it incorrectly calculated the required showing of interest. The Union secured additional authorization cards and filed a second petition approximately three weeks later.

TSS opposed the petition. Following a hearing, the regional director designated territory E and territory X as distinct appropriate bargaining units; TSS subsequently provided the requisite Excelsior list for these two units. Upon appeal by TSS, the Board overruled the regional director’s decision and designated TSS’s entire south-central region as the only appropriate bargaining unit. The Board based its July 20 decision on:

the great extent to which control of [TSS’s] operations, including labor relations and personnel matters, is centralized in the Employer’s SC Regional Office and the absence of any tenable basis for finding subsets of the SC Region’s CSRs that have a greater

92. Id.
93. Id.
94. Id. By entering specific “location codes” on his brick, Phillips could obtain the last names and code numbers of fellow CSRs in Colorado.
95. Id.
96. Id.
97. Id. At the time of the initial filing, neither the Union nor the Colorado CSR working with the Union knew for certain the number of CSRs working in Colorado territories E and X. Based on preliminary organizing efforts, they believed the number was thirty-eight. They were wrong. The actual number was seventy-eight. See Charging Party’s Brief at 7–8, Tech. Serv. Solutions, 324 N.L.R.B. 298 (Nos. 27-CA-13971 & 27-CA-13971-3); Answering Brief of Respondent Technology Service Solutions at 7, Tech. Serv. Solutions, 332 N.L.R.B. No. 100 (Nos. 27-CA-13971 & 27-CA-13971-3).
98. Tech Serv. Solutions, 324 N.L.R.B. at 299.
99. Id.
100. Id.
101. Id.
community of interest among themselves than the SC Region’s CSRs as a whole.\textsuperscript{102}

On July 25, the Union asked TSS to supply it with an \textit{Excelsior}-type list for all 236 CSRs in the south-central region.\textsuperscript{103} The Union asserted that TSS’s highly centralized organization and use of a wireless communication system denied CSRs interested in union organizing access to other CSRs in the Region; this lack of access allegedly constituted a violation of the NLRA as it interfered with and restrained CSRs from exercising their section 7 rights.\textsuperscript{104} When TSS denied the Union’s request, the Union filed an unfair labor practice charge with the NLRB.\textsuperscript{105} The regional director issued a complaint alleging that TSS’s denial of the \textit{Excelsior}-type list violated section 8(a)(1) of the NLRA because “there was no reasonable alternative means for the Union to communicate with the [south-central region] employees.”\textsuperscript{106} The complaint also alleged that TSS violated section 8(a)(1) when it threatened to discipline an employee if he contacted other employees regarding unionization.\textsuperscript{107}

In September 1996, Administrative Law Judge (“ALJ”) James M. Kennedy issued an order granting TSS’s motion to dismiss the complaint.\textsuperscript{108} In August 1997, in response to appeals filed by the Union and NLRB general counsel, the Board reversed, holding that the ALJ’s dismissal was “improvidently granted.”\textsuperscript{109} In addition, the Board rejected that portion of the ALJ’s holding that equated an unfair labor practice with the commission of an overt affirmative act

\textsuperscript{102} Tech. Serv. Solutions, No. 27-RC-7557, 1995 WL 681435 at *2 (N.L.R.B. July 20, 1995); \textit{see also} ARCHIBALD COX ET AL., \textit{LABOR LAW} 275–76 (12th ed. 1996). In making bargaining unit determinations, the Board attempts to identify an employee group united by a “community of interest.” In making such judgments, the Board considers factors such as:

(1) similarity in the scale and manner of determining earnings; (2) similarity in employment benefits, hours of work and other terms and conditions of employment; (3) similarity in the kind of work performed; (4) similarity in the qualifications, skills and training of the employees; (5) frequency of contact or interchange among the employees; (6) geographic proximity; (7) continuity or integration of production processes; (8) common supervision and determination of labor-relations policy; (9) history of collective bargaining; (10) desires of the affected employees; and (11) extent of union organization.

\textit{Id.}

\textsuperscript{103} Tech. Serv. Solutions, 324 N.L.R.B. at 299–300.

\textit{Id.}

\textsuperscript{104} \textit{Id.}


\textsuperscript{106} \textit{Id.} (ALJ quoting complaint allegation).

\textsuperscript{107} \textit{Id.}

\textsuperscript{108} \textit{Id.}

\textsuperscript{109} Tech. Serv. Solutions, 324 N.L.R.B. at 302.
by an employer. 110 The Board remanded the case, which raised issues of first impression, for a full hearing and directed the ALJ to more fully evaluate the issues of CSR accessibility and the practicability of union organization under TSS’s regional structure. 111

ALJ Kennedy completed the hearing and issued a final decision dismissing the complaint in its entirety in February 1999. 112 Employing Lechmere’s RAM analysis, the ALJ concluded that, because CSRs in TSS’s south-central region were not inaccessible to union organizers, TSS did not commit an unfair labor practice when it refused to provide an Excelsior-type list for the region. 113 In coming to this conclusion, the ALJ evaluated the Union’s efforts to contact CSRs employed throughout the region and found them deficient. 114

The Union and general counsel appealed ALJ Kennedy’s decision. 115 In October 2000, without adopting all of the ALJ’s findings or reasoning, a two-member majority (Chairman Truesdale and Member Hurtgen, Member Fox dissenting) affirmed the judge’s dismissal of the unfair labor practice charge regarding access to the Excelsior-type list. 116 The majority endorsed and utilized Lechmere’s reasonable alternative means test in resolving the case. 117

[W]e find application of Lechmere’s “no reasonable alternative means” standard to be appropriate here. Indeed, application of a lesser standard, under which the Respondent [TSS] would be required to supply a list of its employees’ names and addresses to the Union even when it is not shown that the Union lacks a reasonable means to communicate with the employees, would tend to undermine the careful balance drawn by the Board’s Excelsior decision, which... requires employers to provide such a list only after an election has been directed or agreed to. 118

The panel, however, held that TSS violated section 8(a)(1) when its customer service manager “cautioned” an employee about sending messages to other employees concerning union organizing efforts. 119 The Board ordered TSS to post a notice at its regional headquarters in

110. Id. at 300–02.
111. Id. at 302.
113. Id.
114. Id. at *28–*33.
116. Id. at 1.
117. Id. at 4.
118. Id. at 5.
119. Id. at 1.
**Colorado** that informed all employees of the violation and assured all employees that it would refrain from such conduct in the future.\(^{120}\)

Following this decision, the Union and the general counsel filed motions for reconsideration, arguing that the Board’s Order requiring TSS to post the notice of violation solely at its Colorado regional headquarters would fail to accomplish its purpose—communicating the Board’s decision to all TSS CSRs in the south-central region.\(^{121}\) The Board found these motions meritorious and modified the posting requirement as follows:

We . . . find that it would best effectuate the policies of the Act . . . to require [the employer, TSS] to mail the notice to all CSRs in the south-central region and to post the notice at all its parts locations in the south-central region. Requiring posting at the parts locations alone might not be adequate to assure that all CSRs are informed about the outcome of this case, as it is not clear from the record that all CSRs visit [TSS’s] parts locations.\(^{122}\)

### III. UNION ACCESS IN THE TELEWORKPLACE: THE **Lechmere** STANDARD DENIES TELEWORKERS THEIR RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT.

#### A. Lechmere *Standard Inappropriate*

The Board’s reliance on *Lechmere*’s RAM analysis is misplaced for three reasons. First, this case presents no question of access to TSS’s property by nonemployees; issues of trespass and the property rights of an employer are not involved. Second, the rights asserted are directly those of TSS’s employees, not outsider nonemployees. Third, and most important, only the limited privacy interest of TSS employees in their names and addresses is affected and this interest is hardly for the employer to safeguard.

The *Lechmere* test analyzes and attempts to balance employer’s property rights against employee’s section 7 rights.\(^{123}\) When a case fails to implicate both interests, however, *Lechmere* should not apply. In its July 25 letter to TSS, the Union requested both an *Excelsior*-type list for all CSRs in the region and access to TSS’s electronic

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\(^{120}\) *Id.* at 8.


\(^{122}\) *Id.* at 3.

\(^{123}\) See *Malin & Perritt*, *supra* note 33, at 7.
communication system.\textsuperscript{124} Only the equipment access request implicated a TSS property interest. But the Union did not include the denial of access to the electronic communication system in its unfair labor practice charge; only the \textit{Excelsior}-type list request was included.\textsuperscript{125} Thus, the case fails to implicate a significant employer property interest to be balanced.

To overcome TSS's lack of a property interest, the Board cites another significant employer right: the employee's right to privacy.\textsuperscript{126}

To be sure, in this [TSS] case, unlike \textit{Lechmere}, the Union does not seek to enter on the Respondent's land and thus the Respondent's rights in its real property are not at issue. Nevertheless, the Union's request for the names and addresses of the Respondent's employees implicates another significant right, the employees' right to privacy.\textsuperscript{127}

However, in recognizing CSR privacy as a substantial TSS employer interest, the majority ignores the fact that it rejected that very privacy right as an impediment to requiring employers to furnish a union with employee's names and addresses:

A list of employee names and addresses is not like a customer list, and an employer would appear to have no significant interest in keeping the names and addresses of his employees secret (other than a desire to prevent the union from communicating with employees—an interest we see no reason to protect). Such legitimate interest in secrecy as an employer may have is, in any event, plainly outweighed by the substantial public interest in favor of disclosure where, as here disclosure is a key factor in ensuring a fair and free electorate.\textsuperscript{128}

In her dissent, Board Member Sarah M. Fox, citing \textit{Excelsior}, criticized the majority for acting on the assumption that TSS was "entitled to champion the interest of its employees in maintaining the privacy of their names and addresses."\textsuperscript{129} Member Fox recalled that, in \textit{Excelsior}, the Board held that any privacy interest of employers or employees was "not considered of sufficient magnitude to require the Board to consider 'the existence of alternative channels of communication before requiring disclosure of information.'":\textsuperscript{130} A careful

\begin{itemize}
\item \textsuperscript{124} Charging Party's Brief at 26, Tech. Serv. Solutions (No. 27-CA-13971 & 27-CA-13971-3).
\item \textsuperscript{125} \textit{Id.}
\item \textsuperscript{126} \textit{Tech. Serv. Solutions}, 332 N.L.R.B. No. 100, slip op. at 3–4 (2000).
\item \textsuperscript{127} \textit{Id.}
\item \textsuperscript{128} \textit{Excelsior Underwear, Inc.}, 156 N.L.R.B. 1230, 1243 (1966).
\item \textsuperscript{129} \textit{Tech. Serv. Solutions}, 332 N.L.R.B. No. 100, slip op. at 11.
\item \textsuperscript{130} \textit{Id.}
\end{itemize}
reading of the Board's *Excelsior* opinion reveals that the Board did not fully legitimate the concept of an employer interest in nondisclosure.\textsuperscript{131} Rather, the Board merely allowed for this possibility to emphasize that any privacy interest must be subordinated to employee's demonstrated interest in self-organization.\textsuperscript{132}

The nature of the TSS teleworkplace and the enormity of the Board's ultimate bargaining unit designation prevent TSS's CSRs from promoting the possibility of unionization in the traditional way; face-to-face interpersonal dialogue between coworkers was not an option across an eight-state bargaining unit. This constellation of factors distinguishes the present case from all its predecessors.

In the language of *Lechmere*, TSS employees are "isolated from the ordinary flow of information that characterizes" the traditional workplace.\textsuperscript{133} Nonetheless, working together, the Union and a handful of CSRs were able to satisfy the 30\% showing of interest requirement for their desired statewide (Colorado) bargaining unit.\textsuperscript{134} Even then, the effectiveness of a bargaining unit limited to a single state was attributable to a lone CSR's unauthorized use of the brick—*employer property*—to interact with other in-state CSRs.

Once the Board determined that the appropriate bargaining unit was TSS's eight-state region, the Board imposed a huge burden on the employee's efforts to organize. The employer had already furnished the Union with an *Excelsior* list for the one-state bargaining unit. Certainly the employees in the eight-state unit had the same privacy right in their names and addresses as those employees in the single-state unit. And the employees seeking to organize had the same right to this limited information in the larger unit that, after all, was the unit that TSS had successfully appealed to the board. The Board's unwillingness to recognize the CSR's inability to communicate with one another within their unique electronic workplace, coupled with the Board's certification of an eight-state bargaining unit and the employer's refusal to provide a means for employees to communicate within that unit, effectively halted employee attempts to exercise their section 7 rights to organize.

\textsuperscript{131} *Excelsior*, 156 N.L.R.B. at 1245.

\textsuperscript{132} *Id.* *Excelsior* and its progeny clearly required demonstrated employee interest in self-organization as a precondition to disclosure.


\textsuperscript{134} *Tech. Serv. Solutions*, 332 N.L.R.B. No. 100, slip op. at 2.
Clearly, the Act and NLRB case law prohibit an employer from assisting employees in their organizational efforts. However, where the workplace itself presents unique obstacles to the ability of employees to exercise their rights under the Act, there must be reasonable accommodation between employee's section 7 rights and the realities posed by the workplace.

Consider the reality of the TSS worksite. CSRs are largely isolated from one another and are not readily identifiable as TSS employees. CSRs, as a group, have no common worksite at either the state or regional level. There is no physical plant or other physical location to which they commonly report; no cafeteria, parking lot, or lounge at which they gather; no bulletin boards where they may post notices for one another to see. Most CSRs work alone and out of their homes and drive unmarked cars. For CSRs, the TSS worksite is their employer's computerized dispatch and communication system.

Given the concern over protecting employer's property rights, it is curious that the Board and Judge Kennedy faulted the CSRs and the Union for failing to fully utilize communication methods that had been effective in establishing the required showing of interest for the Colorado bargaining unit. The Board and the ALJ trace the success of the Union's Colorado campaign to Phillips' unauthorized use of his employer's property—the brick. Unauthorized use of employer-supplied equipment constitutes a clear infringement on an employer's property right. As employers possess no property right to the names and addresses of their employees, their disclosure of such information in a telework environment advances national labor policy; it does not violate employer's legitimate property rights. The Lechmere/Babcock RAM test should not be extended to the teleworkplace; rather, to

135. See 29 U.S.C. § 158 (2000) (making it an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to such efforts); NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956) (holding that the union may not always insist that the employer aid the organization).
137. Id. at 298.
138. Id.
139. Id.
140. Id.
effectuate national labor policy in the new millennium, it must be limited to traditional fixed-plant work environments.

B. Lechmere Misapplied

The Babcock-Lechmere standard grants nonemployee union organizers access to an employer’s property only in the rare case where “the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels.”143 In crafting this rule, the Court defined “reasonable” attempts as those that do not require unions to engage in extraordinary feats to communicate with inaccessible employees.144 The Court went on to justify the inaccessibility exception as necessary “to protect the § 7 rights of those employees who, by virtue of their employment, are isolated from the ordinary flow of information that characterizes our society.”145

In the dynamic and evolving teleworkplace, where significant geographic distances often separate employees over vast multistate areas, what activities comprise “reasonable” attempts to communicate? Where face-to-face interpersonal contact between employees is rare, what communication channels are “usual?” With the advent of extraordinary technologies that allow employees to work away from a fixed site, what is the ordinary flow of information that characterizes society? Where employer property subject to nonemployee trespass does not exist, what employer right trumps employees’ long recognized right to organize and join a union? The Board’s majority ruling failed to fully address these issues in resolving Technology Services Solutions. As a result, the Board’s allegedly straightforward application of the Babcock-Lechmere rule to the TSS teleworkplace appears misdirected. However, assuming arguendo that the majority justifiably extended Lechmere’s reasonable alternative means test to TSS’s telework environment, it misapplied the test.

The Board majority adopted the ALJ’s finding that TSS did not violate the Act when it refused to provide the Union with a list of CSRs’ names and addresses because the Board’s general counsel failed to prove that, without the list, the Union had no reasonable

144. Id.
145. Id. at 540 (emphasis added).
means of communicating with bargaining unit employees throughout the eight-state south-central region. The majority recognized and lauded the Union’s success in obtaining a showing of interest in its desired single-state bargaining unit and faulted the Union for failing to employ similar organizing techniques in the expanded unit. The majority, however, ignored the fact that Union’s success in Colorado was directly attributable to an employee’s unauthorized use of employer property—his brick—to contact other Colorado CSRs!

In placing its imprimatur on such trespass, the Board endorsed the unauthorized use of employer property and essentially reclassified formerly impermissible conduct as reasonable. Thus, the Board did not apply the *Lechmere* standard. Rather, it redefined the test by expanding the sphere of what constitutes reasonable conduct.

Additional support for the proposition that TSS’s CSRs are “isolated from the ordinary flow of information that characterizes our society” comes from the Board itself. In resolving the *Technology Service Solutions* case, the Board made two major findings. First, the Board held that TSS did not violate the Act by failing to provide the Union with an *Excelsior*-type list. Second, the Board held that TSS committed an unfair labor practice when one of its supervisors “cautioned” an employee about sending prounion messages to other employees. In response to this violation, the Board ordered TSS to post a notice of violation at its regional headquarters in Englewood, Colorado. Thereafter, the Union and general counsel filed motions for reconsideration, contending that the Board’s usual single site posting requirement would—in this unusual case—fail to “effectuate the board’s objective of informing affected employees” because none of the south-central region’s CSRs reported to regional headquarters. Recognizing the communication challenges posed by TSS’s organizational structure and telework environment, the Board

147. *Id.* at 6
150. *Tech. Serv. Solutions*, 334 N.L.R.B. No. 18, slip op. at 1 (2001). The Board held that such conduct constituted a section 8(a)(1) unfair labor practice. Under this section, it is an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.”
granted the motions and required TSS to mail the notice to each CSR in the region.\textsuperscript{153}

In the telework environment of TSS's CSRs, communication between CSRs was unusual and occasional.\textsuperscript{154} Regional CSR gatherings occurred only once a year.\textsuperscript{155} CSRs did not physically report to the company's regional headquarters.\textsuperscript{156} Given these workplace realities, CSRs clearly qualify as workers for whom the Babcock-Lechmere inaccessibility exception was drafted: "employees who, by virtue of their employment, are isolated from the ordinary flow of information that characterizes our society."\textsuperscript{157}

\textbf{IV. NEW TEST FOR THE TELEWORKPLACE}

With its decision in \textit{Technology Services Solutions}, the NLRB failed to act on its Supreme Court recognized "responsibility to adapt the [National Labor Relations] Act to changing patterns of industrial life."\textsuperscript{158} Hopefully, as the number of employees working away from the traditional office or industrial plant setting continues to increase,\textsuperscript{159} the Board will take this charge seriously and—in doing so—develop a new standard that permits teleworkers to exercise "free and reasoned choice" in the exercise of their section 7 right. This Comment offers one such possibility:

\textbf{WHEN} any employee, group of employees, or labor organization acting in the employees' behalf, produces any evidence of employee interest in learning more about the benefits of self-governance through union representation; and where the employees typically work alone, rarely interact with each other, rarely gather together at a physical worksite, and primarily interact with their employer electronically; and employee names and addresses are not readily available from any source other than the employer, \textbf{OR}

\textbf{WHERE} an employee, group of employees, or any individual or labor organization acting in the employees' behalf, files a representation petition under Section 9(c)(1)(A) of the Act and satisfies the thirty percent showing of interest requirement; and the NLRB designates a significantly larger bargaining unit in which the employees have no central physical workplace location where members regu-

\textsuperscript{153} Id. at 2–3.
\textsuperscript{154} Tech Serv. Solutions, 324 N.L.R.B. 298, 298 (1999).
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{158} NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266 (1975) (recognizing that this responsibility is entrusted to the National Labor Relations Board, not the courts).
\textsuperscript{159} U.S. OFFICE OF PERSONNEL MANAGEMENT, supra note 31.
larly gather; and employee names and addresses are not readily available from any source other than the employer—

THEN, the employer is required to provide a list containing each employee’s full name, home address, home telephone and e-mail address to the employee, group of employees, or labor organization acting in the employees’ behalf.

The NLRA itself provides precedent to justify the development and implementation of special provisions for unique workplaces. The Act’s 1974 amendments, sections 8(d) and (g), articulate special notification and mediation provisions surrounding contract negotiations and strikes in the health care industry.\(^{160}\) If the rights of health care workers may be modified in response to the interests and demands of their unique workplace, the right of employers to refrain from assisting employees or unions in their organizing efforts may be modified in response to the interests and demands of the telework-place.

CONCLUSION

Traditionally, work linked employees to a single physical location. Advances in information technology and telecommunications currently permit work independent of location. Such advances will continue, making telework a valuable workplace option for an increasing number of employers and workers. Unless the Board recognizes these developments and drafts policies appropriate to the realities of this emerging nontraditional workplace, the Board will deny an increasing number of workers their right to organize and join a labor union. To preserve this right, the Board must fashion new wineskins suitable for the wine of the new millennium.
