

Given how recent is the Age of the Internet (circa 1995) it is understandable that in our litigious society much remains uncertain where the Law and relevant administrative rulings are concerned. We have only just begun to sort out legalities, and much remains problematic and volatile. All the more valuable is the sage counsel below from two labor lawyers who are closely following fast-breaking developments. They provide sound advice for union activists wondering about using an employer's e-mail system.

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Union and Employee Access to Employer E-Mail Systems

Under Federal Labor Law

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As electronic means of communication, including e-mail and the internet, become more prevalent, issues will inevitably arise concerning the right of employees and unions to make use of employers' computer systems to communicate about union matters. While the NLRB "has not yet adopted any unique doctrines governing employees' right of access to the employer's electronic equipment to communicate with each other about unionization," the Board has begun to address these issues in terms of existing legal principles.

This article will review the most significant statements of the NLRB in this area, and offer some guidance to unions and their supporters seeking to use electronic communications as organizing tools.

1. Discriminatory Restrictions on Access. One principle that appears reasonably clear is that an employer's rule or practice that prohibits employees from using the company e-mail system to send pro-union messages, while permitting other types of personal, non-work related messages, is discriminatory and therefore unlawful. Even if the employer's official policy is facially non-discriminatory, the employer may still run afoul of the law if, in practice, it allows non-union related personal messages but prohibits union messages or notices.

If a union believes that an employer's e-mail policy discriminates against union messages, the union should file a charge of unfair labor practices. If the Labor Board finds that the employer's e-mail policy, either facially or as applied, discriminates against union related messages, the remedy will be a "cease and desist" order, requiring the employer to treat union related messages the same as other non-work related messages under its e-mail policy.

The decision of the NLRB in Lockheed Martin Skunk Works, is instructive in that it suggests some affirmative steps that a union should take where it believes that an employer is discriminating against pro-union messages on its e-mail

system.

In Lockheed Martin Skunk Works, the employer maintained a policy prohibiting solicitation during working time, and prohibiting the distribution of literature in working areas or during the working time of either the person distributing or the person receiving the literature. The company also maintained a policy regulating the use of its electronic mail system. Occasional personal use of the system was permitted during non-work time, provided that was "of reasonable duration and frequency," did "not interfere with or adversely affect the employee's performance," and was not "in support of a personal business." Employees commonly used the company's e-mail system to send personal messages, without being subject to discipline.

However, the company had previously disciplined employees after receiving complaints about certain "inappropriate" uses of the system, such as running a personal business, administering a pornographic web site, and sending "off-color jokes and ethnic comments."

A bargaining unit member filed a decertification petition with the NLRB. In support of the petition, that member, along with other employees, sent six mass e-mails to the entire unit of 1100 employees. The union objected to those messages, and asked the company to put a stop to the use of the company's e-mail system for decertification campaign messages. The company assured the union that the messages would stop; however, the company did not order employees to cease using the e-mail system for such messages.

The union then requested permission to send up to three e-mail messages over the company's system, "to remedy the discriminatory manner in which [it] has been used to date." The company granted that request. However, the union sent only one mass e-mail message over the company's system.

The NLRB found that the union was not placed at an unfair disadvantage relative to decertification proponents. Even assuming that the pro-decertification mass e-mails violated the employer's policy, the employer was not responsible for the union's failure to make greater use of the e-mail system. The company never precluded the union from sending e-mails over the system, but granted the union's only request for access. It was the union's own choice not to avail itself fully of the access that the employer granted to its e-mail system. Accordingly, the NLRB concluded, the union could not complain that the absence of additional pro-union messages was discriminatory.

The lesson for unions from Lockheed Martin Skunk Works is two-fold. First, unions should be alert for anti-union messages circulated over the employer's e-mail system. Where the union learns of such messages, it should immediately request that the employer clarify its e-mail policy. If the employer responds that its e-mail policy prohibits such messages, the union should demand that

the employer put a stop to the offending use of the e-mail system. If the employer responds that such messages are permitted under its e-mail policy, the union should encourage its supporters to make similar use of the system.

Second, the union should request equal access to the e-mail system to send its own messages. If the employer refuses, while permitting others to circulate anti-union messages, the union should file a charge of unfair labor practices protesting the discrimination.

An interesting side note in the Lockheed Martin Skunk Works case is a disagreement between the NLRB majority and its dissenting member over the relative efficacy of e-mail over other means of communication. In her dissent, NLRB Member Liebman asserted,

It is by now beyond dispute that e-mail is a most effective means of communication. It is a particularly powerful organizing tool. Fast and easy to send, e-mail messages are immediately accessible to their audience and have a more direct impact than messages sent by other means.

The majority, however, noted that there was no evidence to show that "the distribution of campaign materials by e-mail is inherently more effective than distribution by more traditional means."

In some cases, the union may wish to offer expert testimony or other evidence to demonstrate the particular efficacy of e-mail as a means of communication. For example, where a group of employees rely heavily on e-mail for their routine communication, the union will want to emphasize that fact in proceedings before the NLRB.

2. Non-Discriminatory Prohibitions. While an employer may not impose or selectively enforce rules so as to discriminate against union communication, it is less clear whether an employer may impose and enforce a non-discriminatory blanket prohibition on all non-business uses of its electronic mail system, including messages relating to union issues. Two distinct and conflicting lines of analysis have emerged in this area. It remains to be seen which line the Board ultimately will adopt.

To read the rest of the article, purchase the CyberUnion Handbook. Look for it at www.cyberunions.net