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# AWAKING RIP VAN WINKLE: HAS THE NATIONAL LABOR RELATIONS ACT REACHED A TURNING POINT?

William R. Corbett\*

“Today’s decision confirms that the NLRB has become the ‘Rip Van Winkle of administrative agencies.’”<sup>1</sup>

## INTRODUCTION

Suppose that in 1945 Rip Van Winkle,<sup>2</sup> a man with a keen interest in labor law,<sup>3</sup> had taken a few drinks of liquor from the flagon as he was reading the much-anticipated opinion of the United States Supreme Court in *Republic Aviation Corp. v. NLRB*.<sup>4</sup> Suppose further that the combination of the liquor and

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<sup>1</sup> Guard Publ’g Co. (*Register-Guard*), 351 N.L.R.B. 1110, 1121 (2007) (Liebman & Walsh, Members, dissenting in part) (quoting *NLRB v. Thill, Inc.*, 980 F.2d 1137, 1142 (7th Cir. 1992)).

<sup>2</sup> WASHINGTON IRVING, *Rip Van Winkle: A Posthumous Writing of Diedrich Knickerbocker*, in *THE SKETCH BOOK OF GEOFFREY CRAYON, GENT.* 32 (The Heritage Press 1939) (1819).

<sup>3</sup> Although this variation may seem to take great liberties with Mr. Irving’s story and character, it is not so. Irving did comment on Rip Van Winkle and labor: he had “an insuperable aversion to all kinds of profitable labor.” *Id.* at 35. I think, then, that one who has an aversion to labor may take an interest in the laws that protect those who must engage in labor.

<sup>4</sup> *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). The importance of *Republic Aviation* will be explained more fully below. In *Republic Aviation*, the Supreme Court adopted presumptions regarding the circumstances under which an employer’s maintenance of rules prohibiting employees from soliciting their coemployees to support a union constitutes an unfair labor practice in violation of the National Labor Relations Act. *Id.* at 803. The Court approved two presumptions developed by the National Labor Relations Board (“Board”): 1) a rule prohibiting solicitations during working hours is presumed to be valid, *id.* at 803 n.10; and 2) a rule prohibiting solicitations outside working hours is presumed to be an unfair labor practice, *id.* at 803. Since *Republic Aviation*, there have been many Supreme Court and Board cases on employees and others (including union organizers) using person-to-person solicitation, distribution of literature, and other means of communicating messages to employees at the workplace. *See, e.g., Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992) (interpreting *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) and addressing the limited exception to the rule that employers may deny access to employer property to nonemployee union organizers); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483 (1978) (addressing solicitation by employees in areas open to the public in a health care facility); *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974) (discussing union’s inability to waive the normally applicable solicitation and distribution rights of employees); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) (addressing nonemployee union organizers’ access to property);

the soporific words of the Court left Rip in a state of deep slumber. He awakes in 2008, and realizing as he looks around him that he has been asleep for more than one night, begins to wonder about the changed condition of organized labor and collective bargaining in the United States.<sup>5</sup> Assuming the legendary sleeper gets a job<sup>6</sup> and is trained in computer use, he could research the matter on the Internet and perhaps send e-mail to experts who could update him, although he would be well advised not to send such e-mails from his employer's computer or on its e-mail system. I wonder whether Rip would be amazed at what had transpired in labor law during his sixty-plus years of slumber. If Rip told someone that the last thing he had read before his nap was *Republic Aviation*, that consultant might suggest that he begin his update by reading the 2007 decision of the National Labor Relations Board ("NLRB" or "the Board") in *The Guard Publishing Co. d/b/a The Register-Guard*.<sup>7</sup> What would Rip think if he read that decision?

What our legendary sleeper would find if he had slumbered for sixty-plus years is that "traditional" labor law in the United States is a relatively minor part of labor and employment law in 2009. Congress passed the Wagner Act in 1935,<sup>8</sup> establishing a model of collective bargaining between employers and representatives selected by employees.<sup>9</sup> Since the 1950s, union density in the nation has been declining,<sup>10</sup> and the decline accelerated in the 1970s.<sup>11</sup> The

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Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615 (1962) (sustaining a rule prohibiting distribution of literature in work areas).

<sup>5</sup> Washington Irving's Rip Van Winkle slept only twenty years, but I will need my character to sleep more than sixty years from ten years after the passage of the Wagner Act until the present. See IRVING, *supra* note 2, at 48.

<sup>6</sup> Here I deviate from Mr. Irving's story again. *Id.* at 50.

<sup>7</sup> *Guard Publ'g Co. (Register-Guard)*, 351 N.L.R.B. 1110 (2007).

<sup>8</sup> The current National Labor Relations Act is the Wagner Act, as amended by chapter 120 of the Taft-Hartley Amendments of 1947, 61 Stat. 136, and the Landrum-Griffin amendments of 1959, Pub. L. No. 86-257, 73 Stat. 519. It is codified at 29 U.S.C. §§ 151-169 (2006).

<sup>9</sup> Senator Wagner's legislative assistant and the principal draftsman of the statute, Leon Keyserling, said, "[I]t was our view that the greatest contribution to greater equity and the distribution of the product between wages and profit would come, not through the definition of terms by government, but by the process of collective bargaining with labor placed in a position nearer to equality." Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1683 (1989) (quoting Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 319 (1987)); see also Casebeer, *supra*, at 362 ("[T]he Wagner Act was in some ways a very conservative statute, because it says that there are a lot of things that the government ought not to decide. We should permit business and labor to decide them.").

<sup>10</sup> The percentage of employees in the United States represented by unions has declined from a peak in the early 1950s of approximately 36% of the workforce. *Right-to-Work Advocates Mark Labor Day with Calls for Repeal of National Labor Law*, Daily Lab. Rep. (BNA) No. 170, at A-11 (Sept. 2, 2005). The current level is about 12.1% of the overall workforce and 7.5% of the private workforce. Michelle Amber, *BLS Reports 12.1 Percent Unionization Rate in 2007; Unions Added 331,100 Members*, Daily Lab. Rep. (BNA) No. 17, at AA-1 (Jan. 28, 2008). In 1983, the first year for which the Bureau of Labor Statistics has comparable data, the level of union membership was 20.1%. John Sullivan, *Union Membership Rate Dropped in 2004 to 12.5 Percent, Continuing 20-Year Decline*, Daily Lab. Rep. (BNA) No. 18, at AA-1 (Jan. 28, 2005).

rights of employees protected by the National Labor Relations Act (“NLRA”)<sup>12</sup> have been eroded by decisions of the courts and the NLRB. Indeed, the organized labor/collective bargaining regime has become moribund, and Congress has not passed legislation to reinvigorate it. Instead, beginning in the 1960s, Congress turned to individual minimum rights laws as a means of protecting employees and has continued on that path.<sup>13</sup> If Rip Van Winkle awoke in 2008, he would no doubt find that the dream of Senator Wagner and others in the early and middle part of the twentieth century has not been realized and is on the brink of dying in the early part of the twenty-first century.

He also would realize that, among many bad years, 2007 was a remarkably bleak year for organized labor, collective bargaining, and the NLRA. On the legislative front, Congress considered the Employee Free Choice Act (“EFCA”),<sup>14</sup> which organized labor designated as its top legislative priority.<sup>15</sup> The Act would mandate Board certification of unions based on card check majorities without resort to Board-conducted elections.<sup>16</sup> In addition, it would institute mediation and eventually binding arbitration to achieve first collective bargaining agreements if the parties cannot reach agreement in specified periods of time.<sup>17</sup> Finally, the EFCA would strengthen enforcement by increasing the remedies available for the unfair labor practices of discharging or discrimi-

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<sup>11</sup> Paul Berks, *Social Change and Judicial Response: The Handbook Exception to Employment-At-Will*, 4 EMP. RTS. & EMP. POL’Y J. 231, 234-35 (2000) (“[U]nprecedented decline in union density and influence at the end of the 1970s and beginning of the 1980s effectively eliminated collective bargaining as a genuine alternative to the at-will regime.”); Jeffrey M. Hirsch, *The Silicon Bullet: Will the Internet Kill the NLRA?*, 76 GEO. WASH. L. REV. 262, 267 n.21 (2008) (noting decline in private sector union density from 21.7% in 1977 to 7.4% in 2006).

<sup>12</sup> The key provision of the NLRA setting forth the rights of employees is section 7. 29 U.S.C. § 157 (2006). It articulates the rights to self-organize, to form, join, or assist labor organizations, to choose representatives for collective bargaining, to engage in concerted activity for collective bargaining or other mutual aid or protection, and to refrain from exercising the foregoing rights. *Id.*

<sup>13</sup> James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1571 (1996) (“At some point during this legislative barrage, it became clear that Congress viewed government regulation founded on individual employee rights, rather than collective bargaining between private entities, as the primary mechanism for ordering employment relations and redistributing economic resources.”); 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. L. 1, 73 (1999) (“Since the 1960s, the labor movement has suffered from American liberalism’s rejection of the group basis of its own past and its inability to find a place for group rights within the model of individual rights it clings to so dearly.”).

<sup>14</sup> Employee Free Choice Act of 2007, H.R. 800, 110th Cong. (as passed by House of Representatives, Mar. 1, 2007). The Employee Free Choice of 2009 was introduced in the 111th Congress. See H.R.1409, 111th Cong. (as introduced in the House of Representatives on Mar. 10, 2009); S. 560, 111th Cong. (as introduced in the Senate on Mar. 10, 2009).

<sup>15</sup> Michael Bologna, *AFL-CIO Organizing Director Says Unions Will Press Fight for Employee Free Choice Act*, Daily Lab. Rep. (BNA) No. 186, at A-10 (Sept. 26, 2007); Susan J. McGolrick, *AFL-CIO Official Calls Card-Check Bill “Most Important” Labor Law Since 1935*, Daily Lab. Rep. (BNA) No. 80, at A-12 (Apr. 26, 2007).

<sup>16</sup> H.R. 800, 110th Cong. (2008); see also H.R. 1409, 111th Cong. § 2 (2009), and S. 560, 111th Cong. § 2 (2009).

<sup>17</sup> See H.R. 1409, 111th Cong. § 3 (2009); S. 560, 111th Cong. § 3 (2009).

nating against employees during a union organizing campaign or during the period leading to a first contract and prioritizing such cases and bolstering the Board's power to seek injunctions in such cases.<sup>18</sup> Under current law, employers may reject a union demand for recognition based on a showing of majority status and force the filing of a petition for an election.<sup>19</sup> Overstating the importance of this proposed legislation would be difficult. Many unions have abandoned attempts to use the mechanism of NLRB secret ballot elections to be certified as collective bargaining representatives of employees.<sup>20</sup> The win rates in such elections have been consistently low, owing in large part to strong campaigns by employers, sometimes laced with unfair labor practices, between the filing of the petition and conducting the election.<sup>21</sup> Although the House of Representatives passed the bill in 2007, it did not reach the Senate floor, falling nine votes short of the sixty needed to invoke cloture.<sup>22</sup> Not only did Congress not pass legislation to help unions gain recognition, but in 2007 the NLRB modified the recognition-bar doctrine, thereby facilitating the ouster of unions that have been voluntarily recognized. In *Dana Corp.*, the Board modified its recognition-bar doctrine, to now provide for a forty-five day period from notice of recognition during which a rival union or decertification petition can be filed.<sup>23</sup> The decisions of the NLRB, the agency charged with interpretation and enforcement of the NLRA, have been so bad for unions and employees over such a long period that in October 2007, the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") filed a complaint with the International Labour Organization's Committee on Freedom of Association ("ILO") alleging that a long string of decisions by the NLRB constituted violations of two fundamental ILO conventions on freedom of association.<sup>24</sup> That complaint cited a series of Board decisions during President Bush's two terms that "signal a retreat from the promises of the NLRA and a deepening crisis for American labor law and practice."<sup>25</sup>

Finally, in 2007, the Board issued one of its most eagerly and long-awaited decisions in *The Guard Publishing Co. d/b/a The Register-Guard*.<sup>26</sup> The decision was expected to address a number of issues regarding application of the NLRA to use of e-mail and the Internet. Although the decision did not address the full range of issues the Board suggested it might, the Board's decision that employees do not have a right to use the employer's e-mail system for

<sup>18</sup> See H.R. 1409, 111th Cong. § 4 (2009); S. 560, 111th Cong. § 4 (2009).

<sup>19</sup> See *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 308-10 (1974).

<sup>20</sup> See, e.g., Hirsch, *supra* note 11, at 264.

<sup>21</sup> Complaint to the ILO Committee on Freedom of Association by the American Federation of Labor and Congress of Industrial Organizations Concerning the United States Government's Violations of Freedom of Association and Collective Bargaining by Failing to Enforce the National Labor Relations Act at 10-41, ILO Case No. 2608 (Oct. 25, 2007), available at [http://op.bna.com/dlrcases.nsf/id/mamr-78btn4/\\$File/ILOcomplaint.pdf](http://op.bna.com/dlrcases.nsf/id/mamr-78btn4/$File/ILOcomplaint.pdf) [hereinafter Complaint].

<sup>22</sup> See Derrick Cain, *Kennedy Says Employee Free Choice Act Must Wait for Passage Until After Election*, Daily Lab. Rep. (BNA) No. 25, at A-11 (Feb. 7, 2008).

<sup>23</sup> *Dana Corp.*, 351 N.L.R.B. 434, 434 (2007).

<sup>24</sup> See Complaint, *supra* note 21, at 1.

<sup>25</sup> *Id.*

<sup>26</sup> *Guard Publ'g Co. (Register-Guard)*, 351 N.L.R.B. 1110 (2007).

section 7 purposes<sup>27</sup> and the Board's revision of its standard for discriminatory enforcement of rules<sup>28</sup> were significant setbacks for employees and organized labor. The decision also constitutes one of the most significant and far-reaching restrictions of section 7 rights in the Board's recent narrowing of the NLRA. One awaking in 2008 would find that recent decades have not been kind to collective bargaining and the NLRA regime, and that 2007 was a particularly bad year.

Historical perspective can, of course, change over time. What if Rip Van Winkle does not wake in 2008, but slumbers on and does not awake until 2013 or 2020? What would he discover about the state of labor law then? From that perspective, as bad as 2007 may seem for the NLRA regime, we may look back at some point in the future and realize that it was a turning point, or that the proverbial pendulum had reached the highest point and was about to swing back in the other direction. At the end of 2007, the appointments of three Board members expired, two of those being Republicans.<sup>29</sup> Although President Bush sent three nominations to the Senate in January 2008, confirmation was dead on arrival,<sup>30</sup> and the Board was down to two members. In December 2007, in anticipation of the Board's having only two members in January 2008, the then four-member Board delegated its powers to three members.<sup>31</sup> The Board took the position that with the delegation of power to three, a two-member quorum could issue decisions.<sup>32</sup> However, the legitimacy of the delegation was questionable. Regardless of whether two-member Board decisions are legitimate, the Board did not render decisions that made dramatic changes in labor law in 2008. Although the Board issued 328 decisions in fiscal year 2008, the two members could not reach a decision in approximately one-fifth to one-quarter of the new cases, and also did not decide many major cases that had been pending for years.<sup>33</sup>

In the wake of 2007, there are some prospects for success for organized labor. The EFCA lay dormant in Congress in 2008, but not dead.<sup>34</sup> In 2007, organized labor initiated efforts to have the NLRB issue a rule recognizing the right of employees to engage in minority-union bargaining.<sup>35</sup> Thus, inchoate

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<sup>27</sup> *Id.* at 1110.

<sup>28</sup> *Id.*

<sup>29</sup> The Board consists of five members appointed by the President with advice and consent of the Senate for staggered five-year terms. 29 U.S.C. § 153(a) (2008). By custom and practice, three members are of the same political party as the President, and two are of the other party. Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 OHIO ST. L.J. 1361, 1372 n.41 (2000).

<sup>30</sup> See *President Renominates Battista, Walsh, Nominates Morales to Fill Board Vacancies*, Lab. Rel. Wk. (BNA) No. 5, at 138 (Jan. 31, 2008).

<sup>31</sup> Susan J. McGolrick, *Board Temporarily Delegates Authority in Anticipation of Having Only Two Members*, Daily Lab. Rep. (BNA) No. 249, at A-1 (Dec. 31, 2007).

<sup>32</sup> *Id.*; Marcia Coyle, *Vacancies Threaten to Paralyze the NLRB*, NAT'L L.J., Feb. 4, 2008, at 1.

<sup>33</sup> Susan J. McGolrick, *Board Issued 328 Decisions in FY 2008, Lowered Inventory, Despite Three Vacancies*, Daily Lab. Rep. (BNA) No. 208, at A-10 (Oct. 28, 2008).

<sup>34</sup> See Cain, *supra* note 22, at A-11.

<sup>35</sup> See Steven Greenhouse, *Seven Unions Ask Labor Board to Order Employers to Bargain*, N.Y. TIMES, Aug. 15, 2007, at A14; *Change to Win Joins Other Unions Seeking Rule on Minority-Union Bargaining*, Daily Lab. Rep. (BNA) No. 4, at A-1 (Jan. 8, 2008). Currently,

efforts to reform the NLRA in ways that promote the collective bargaining regime remain alive and may come to fruition. The election of President Obama and the Democratic gains in Congress in the 2008 election enhanced the prospects for law reform favorable to organized labor and collective bargaining. For example, supporters of the EFCA became optimistic regarding the likelihood of enacting the proposed law, and bills were introduced in both houses in March 2009.<sup>36</sup> Moreover, former Board Chairman William Gould urged then-President-Elect Obama to initiate a number of reforms to the NLRB and the NLRA.<sup>37</sup>

Still, for the NLRA to become a revitalized part of labor and employment law in the United States, the Board's decision in *Register-Guard* needs to be overturned. Professor Jeffrey Hirsch suggests that how the NLRB deals with the Internet could save or destroy the NLRA.<sup>38</sup> Although that is a far-reaching statement, it may not be hyperbolic. The importance of the *Register-Guard* decision is not based on just the pervasiveness and importance of the Internet and related technology; the case required the Board to consider its rules regarding employee communication and its rules and views regarding the balancing of employer property interests against employee rights under section 7 of the NLRA. The Board's decision elevated employers' property interests over employees' rights, and interpreted the NLRA in a restrictive way that threatens to make it irrelevant and obsolescent. Correspondingly, the Board passed up an opportunity to begin interpreting the NLRA in a way that could make it an important part of the whole of United States labor and employment law. Part I of this Article discusses the Board's narrowing of the NLRA through its decisions from the expansive interpretation in *Epilepsy Foundation of Northeast Ohio* in 2000 to the restrictive interpretation in *Register-Guard* in 2007. Part II considers the importance of NLRA protection of employee Internet and e-mail use and discusses the *Register-Guard* decision. Part III considers the implications of *Register-Guard* for section 7 rights of union and nonunion employees.

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the NLRA is interpreted as permitting unions to represent employees only when a majority of employees in an appropriate bargaining unit supports the union.

<sup>36</sup> See, e.g., Susan R. Hobbs, *Change to Win Aims for Passage of EFCA, Health Care Legislation in First 100 Days*, Daily Lab. Rep. (BNA) No. 216, at AA-1 (Nov. 7, 2008). The EFCA was reintroduced in the 111th Congress in March 2009. See H.R. 1409, 111th Cong. (2009); S. 560, 111th Cong. (2009).

<sup>37</sup> See *Former NLRB Chairman Urges Reform of Board, NLRA in New Administration*, Daily Lab. Rep. (BNA) No. 212, at A-8 (Nov. 3, 2008).

<sup>38</sup> Hirsch, *supra* note 11, at 264.

I. SLOUCHING TOWARD *REGISTER-GUARD*: 2000 TO 2007<sup>39</sup>A. *Expansive Interpretation and Hope*

In 2000, the Board in *Epilepsy Foundation of Northeast Ohio*<sup>40</sup> changed the state of Board law and held that the *Weingarten*<sup>41</sup> right to be represented at an investigatory interview extends to workers not represented by a union.<sup>42</sup> Although one could question how often nonunion workers would either know about or use this right, the Board decision seemed to me significant because it enlarged the applicability of the NLRA to nonunion workers. In an earlier work, I proclaimed the importance of the decision and argued that the NLRA could become an important source of rights and protections for nonunion workers, and that the NLRA needed to fill a void left by other United States employment law.<sup>43</sup> I argued that the NLRA would be useful in protecting nonunion employees in the following areas, among others: expression and technology, rules established by employers, and employees' speaking out against employers.<sup>44</sup>

Regarding expression and technology, I stated that the NLRA is "about communication and expression," and "[c]omputers, e-mail, and the Internet make the NLRA more relevant in the twenty-first century than at any time since its passage."<sup>45</sup> Although there was reason to believe that this statement was accurate at the time, the Board's decisions since then repeatedly have frustrated rather than bolstered that hope. Among those decisions, I think that *Register-Guard* is the decision that marks the nadir.

The Board's decision in *Timekeeping Systems, Inc.*<sup>46</sup> was the exemplar I used in a prior article to show how the NLRA protects nonunion employees' expression and use of technology. The case involved an employee who protested his boss' proposal regarding a new vacation policy.<sup>47</sup> The boss sent the proposal out to employees via e-mail and indicated that comments were welcome.<sup>48</sup> The employee responded by e-mail to the boss and all other employees, criticizing the proposal and demonstrating that the supervisor was wrong in his calculations.<sup>49</sup> The angry boss gave the employee the option of submitting an acceptable apology or being fired.<sup>50</sup> He was fired.<sup>51</sup> The Board adopted the

<sup>39</sup> In this section I refer to and quote from two articles that I wrote. Despite the immodesty of doing that, this Article continues my work in those articles—tracing the Board's progress from expansive to restrictive interpretations of NLRA section 7 rights.

<sup>40</sup> *Epilepsy Found. of Ne. Ohio*, 331 N.L.R.B. 676 (2000), *enforced in part and rev'd in part*, 268 F.3d 1095 (D.C. Cir. 2001).

<sup>41</sup> *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

<sup>42</sup> *Epilepsy Found. of Ne. Ohio*, 331 N.L.R.B. at 679.

<sup>43</sup> William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 306 (2002).

<sup>44</sup> *Id.* at 287-96.

<sup>45</sup> *Id.* at 287.

<sup>46</sup> *Timekeeping Sys., Inc.*, 323 N.L.R.B. 244 (1997).

<sup>47</sup> *Id.* at 246.

<sup>48</sup> *Id.* at 245-46.

<sup>49</sup> *Id.* at 246.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 247.



decision of the administrative law judge, concluding that the employee's conduct was a concerted activity for mutual aid or protection under section 7 of the NLRA, and firing him was an unfair labor practice.<sup>52</sup> I will discuss later what effect the Board's decision in *Register-Guard* may have on *Timekeeping Systems*.<sup>53</sup>

The second area in which I hoped for broadened NLRA interpretation was Board findings of unfair labor practices where employers promulgated and maintained rules that could restrict protected conduct. Among the decisions illustrating section 7 protection were employer rules that prohibited discussion of wages,<sup>54</sup> that prohibited employees from criticizing employers or their approaches to workplace issues,<sup>55</sup> and that prohibited employees from using abusive or threatening language.<sup>56</sup>

The third area involved employees speaking out against their employers.<sup>57</sup> For example, an employee who gave an interview to a magazine in which he was critical of his employer engaged in section 7 conduct, and the employer committed an unfair labor practice by issuing a disciplinary warning letter to the employee.<sup>58</sup>

My hope for expansive interpretation of the NLRA that would make the Act relevant and useful in the nonunion sector was short-lived.

#### B. Restrictive Interpretations and Diminishing Hope

In 2004, the Board reversed its *Epilepsy Foundation* ruling, holding in *IBM Corp.*<sup>59</sup> that the *Weingarten* right to representation does not extend to nonunion workers.<sup>60</sup> Although the Board has changed its collective mind on that issue several times, the time between *Epilepsy Foundation* and *IBM Corp.* was a very short period of time for a reversal. It was not *IBM Corp.* alone, however, that moved me from optimism to pessimism after *Epilepsy Foundation*. Two other Board decisions in 2004 continued narrowing the expansive coverage that I thought was possible. In *Holling Press, Inc.*,<sup>61</sup> the Board held that section 7 did not cover the conduct of an employee who tried to persuade co-employees to testify in support of her in her sexual harassment case.<sup>62</sup> As troubling was *Lutheran Heritage-Village-Livonia Home, Inc.*,<sup>63</sup> in which the

<sup>52</sup> *Id.* at 250.

<sup>53</sup> See *infra* notes 205-14.

<sup>54</sup> Corbett, *supra* note 43, at 293 (discussing *NLRB v. Main St. Terrace Care Ctr.*, 218 F.3d 531, 543 (6th Cir. 2000), *enforcing* 327 N.L.R.B. 522 (1999)).

<sup>55</sup> *Id.* (discussing *Lockheed Martin Astronautics*, 330 N.L.R.B. 422 (2000)).

<sup>56</sup> *Id.* at 294 (discussing *Adtranz, ABB Daimler-Benz Transp., N.A., Inc.*, 331 N.L.R.B. 291 (2000), *enforcement denied*, 253 F.3d 19, 29 (D.C. Cir. 2001)).

<sup>57</sup> *Id.* at 295-96 (discussing *Ga. Farm Bureau Mut. Ins. Cos.*, 333 N.L.R.B. 850 (2001); *Allstate Ins. Co.*, 332 N.L.R.B. 759 (2000); *Robert F. Kennedy Med. Ctr.*, 332 N.L.R.B. 1536 (2000)).

<sup>58</sup> Corbett, *supra* note 43, at 296 (discussing *Allstate*, 332 N.L.R.B. 759).

<sup>59</sup> *IBM Corp.*, 341 N.L.R.B. 1288, 1289 (2004).

<sup>60</sup> See William R. Corbett, *The Narrowing of the National Labor Relations Act: Maintaining Workplace Decorum and Avoiding Liability*, 27 BERKELEY J. EMP. & LAB. L. 23, 30 (2006).

<sup>61</sup> *Holling Press, Inc.*, 343 N.L.R.B. 301 (2004).

<sup>62</sup> *Id.* at 301.

<sup>63</sup> *Martin Luther Mem'l Home, Inc. (Lutheran Heritage)*, 343 N.L.R.B. 646 (2004).

Board held that an employer's maintenance of rules prohibiting "abusive and profane language," "harassment," and "verbal, mental and physical abuse" did not violate section 7.<sup>64</sup> Prior to *Lutheran Heritage*, the Board had stated the standard in *Lafayette Park Hotel*<sup>65</sup> for determining whether maintenance of workplace rules violates section 8(a)(1):

[T]he appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their [s]ection 7 rights. Where the rules are likely to have a chilling effect on [s]ection 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement.<sup>66</sup>

In a 2007 decision, the Board explained the *Lutheran Heritage* modification of the *Lafayette Park* standard:

Under this standard, the first inquiry is "whether the rule *explicitly* restricts activities protected by [s]ection 7." If so, the rule is unlawful; if not the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit [s]ection 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of [s]ection 7 rights.<sup>67</sup>

As will be discussed below, the *Lutheran Heritage* modification of the rules standard may interact with the *Register-Guard* decision in ways that significantly restrict employees' ability to express themselves in the workplace.<sup>68</sup>

Thus, in a series of decisions, the NLRB began interpreting section 7 restrictively to remove protections that appeared promising only a few years before. These restrictive interpretations began closing down what had appeared to be available NLRA protection in the areas of communication and expression by employees. In addition, these interpretations gave employers greater latitude to maintain rules prohibiting certain types of communication and expression. The stripping away of protection was not specific to union or nonunion employees. Although the *IBM Corp.* decision took a section 7 right from nonunion employees that union-represented employees still possess, *Holling Press, Inc.* and *Lutheran Heritage* both narrowed protections under section 7, regardless of union representation. Moreover, the Board in those decisions interpreted section 7 of the NLRA restrictively to facilitate employers' efforts to avoid liability under employment discrimination laws. I found these decisions and the trend of the Board particularly disappointing because with the Board's decision in *Epilepsy Foundation I* I had envisioned a future for the NLRA in which the Act became increasingly relevant to and protective of nonunion employees, and thus increasingly relevant in a nation with declining union density. As the Board narrowed its interpretation of section 7, however, the protections were receding for both union and nonunion employees, and the NLRA was becoming increasingly irrelevant. Equally troubling was the fact that the Board was willing to narrow the protections of the NLRA in order to help employers avoid liability under other employment laws. If the Board, the

<sup>64</sup> *Id.* at 646.

<sup>65</sup> *Lafayette Park Hotel*, 326 N.L.R.B. 824 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999).

<sup>66</sup> *Id.* at 825 (footnote omitted).

<sup>67</sup> *Albertson's, Inc.*, 351 N.L.R.B. 254, 259 (2007) (quoting *Lutheran Heritage*, 343 N.L.R.B. at 647).

<sup>68</sup> See *infra* text accompanying notes 211-12.

agency charged with interpretation and enforcement of the Act, would not interpret the NLRA broadly and elevate it above other laws, who would be left to promote the NLRA and prevent its slide into obsolescence and irrelevance?<sup>69</sup>

I was not alone in my views regarding the Board's narrowing of the NLRA. The complaint filed by the AFL-CIO with the ILO Committee on Freedom of Association was more far-reaching in its criticism of Board decisions than my article on the narrowing of the NLRA.<sup>70</sup> The complaint did, however, criticize all three of the Board decisions that I discussed, *IBM Corp.*, *Holling Press*, and *Lutheran Heritage*.<sup>71</sup> The AFL-CIO quoted Professor St. Antoine for the proposition that the Board has been "resolving the doubts in borderline cases in the wrong direction," and that eventually these decisions would leave the NLRA "badly chewed" if not "eviscerated."<sup>72</sup> The complaint emphasized that the Board's sixty-one decisions issued in September 2007 were tantamount to "an onslaught against workers' rights under the Act."<sup>73</sup> Among those decisions was *Dana Corp.*<sup>74</sup> in which the Board varied its recognition-bar doctrine by creating a forty-five-day period after notice of voluntary recognition in which a petition can be filed to challenge the union's status.<sup>75</sup> The complaint concluded that the Board's many decisions interpreting the NLRA narrowly, removing protections, and diluting remedies demonstrate that the United States Government has not satisfied its obligations under I.L.O. Conventions 87 and 98.<sup>76</sup>

As every observer realized, however, the Board's important decision on employees' use of technology to communicate was still to come. Until the Board rendered its decision in *Register-Guard*, I could still cling to the hope of *Timekeeping Systems*<sup>77</sup> that the Board would find section 7 protection of employees' use of employers' e-mail systems for section 7 purposes. Most of the hope that I had for NLRA protection had been eclipsed by Board decisions, but employees' use of technology to communicate and express their views was still viable.

## II. REGISTER-GUARD: THE BOARD CONTINUES TO NARROW THE NLRA

### A. The Importance of NLRA Protection for Employee Use of the Internet and E-Mail

The importance of the Internet to the NLRA has been obvious for many years. Section 7 of the NLRA sets forth the fundamental rights under the Act: employees can self organize and join labor organizations, bargain collectively

<sup>69</sup> See Corbett, *supra* note 60, at 47.

<sup>70</sup> See Complaint, *supra* note 21.

<sup>71</sup> See *id.*

<sup>72</sup> *Id.* at 10 (quoting Theodore J. St. Antoine, *After 70 Years of the NLRB: Warm Congratulations—and a Few Reservations*, L. QUADRANGLE NOTES, Fall 2005, at 98, 101).

<sup>73</sup> *Id.* at 39.

<sup>74</sup> *Dana Corp.*, 351 N.L.R.B. 434 (2007).

<sup>75</sup> *Id.* at 434.

<sup>76</sup> Complaint, *supra* note 21, at 41.

<sup>77</sup> *Timekeeping Sys., Inc.*, 323 N.L.R.B. 244 (1997).

through representatives of their choosing, engage in other concerted activities for mutual aid or protection, and refrain from any of the foregoing.<sup>78</sup> In order for any of these rights to be effectuated, employees and unions must have the means to communicate effectively. Without adequate means of communication, employees simply cannot learn of their rights, assess their options, and make informed decisions about exercise or nonexercise of their section 7 rights. The Board and the Supreme Court have decided many cases dealing with issues of communication. In those cases, the Board and the Court have balanced the rights of employees and unions under section 7 of the NLRA against the rights of employers—managerial prerogative to run the business and property rights. Important issues in those cases have been the following: who was communicating (employee or nonemployee);<sup>79</sup> where they were communicating (working area or nonworking area);<sup>80</sup> when they were communicating (during working time or not);<sup>81</sup> and how they were communicating (by distributing material or orally).<sup>82</sup> In all cases, however, the Court understood that communication among employees and unions in the workplace is essential to section 7 rights.<sup>83</sup> The Court stated this forcefully in *Beth Israel Hosp. v. NLRB*: “[W]e have long accepted the Board’s view that the right of employees to self-organize and bargain collectively established by § 7 of the NLRA, . . . necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.”<sup>84</sup>

The importance of the Internet and e-mail to communication, and thus to the NLRA has long been obvious.<sup>85</sup> One of the most obvious and first issues to be raised was unions’ and employees’ use of e-mail to instigate and promote union-organizing campaigns.<sup>86</sup> As e-mail and Internet usage by employees and unions increased exponentially for union organizing and other purposes,<sup>87</sup> employers began developing computer use policies restricting types of uses.<sup>88</sup>

<sup>78</sup> 29 U.S.C. § 157 (2006).

<sup>79</sup> *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956).

<sup>80</sup> *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 485-86 (1978).

<sup>81</sup> *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 795 (1945).

<sup>82</sup> *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615, 616 (1962).

<sup>83</sup> *Lechmere, Inc.*, 502 U.S. at 532; *Beth Israel Hosp.*, 437 U.S. at 485-86; *Babcock & Wilcox Co.*, 351 U.S. at 113; *Republic Aviation Corp.*, 324 U.S. at 795; *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615.

<sup>84</sup> *Beth Israel Hosp.*, 437 U.S. at 491.

<sup>85</sup> See, e.g., Hirsch, *supra* note 11, *passim*; Susan S. Robfogel, *Electronic Communication and the NLRA: Union Access and Employer Rights*, 16 LAB. LAW. 231 (2000).

<sup>86</sup> See Hirsch, *supra* note 11, at 274-78; Martin H. Malin & Henry H. Perritt, Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. KAN. L. REV. 1 (2000); Gwynne A. Wilcox, *Section 7 Rights of Employees and Union Access to Employees: Cyber Organizing*, 16 LAB. LAW. 253 (2000).

<sup>87</sup> *Guard Publ’g Co. (Register-Guard)*, 351 N.L.R.B. 1110, 1125 n.7 (2007) (Liebman & Walsh, Members, dissenting in part) (citing AM. MGMT ASS’N, 2004 WORKPLACE E-MAIL AND INSTANT MESSAGING SURVEY (2004)).

<sup>88</sup> See, e.g., U.S. GEN. ACCOUNTING OFFICE, *EMPLOYEE PRIVACY: COMPUTER-USE MONITORING PRACTICES AND POLICIES OF SELECTED COMPANIES*, GAO-02-717, at 9-13 (2002); see also Louis J. Papa & Stuart L. Bass, *How Employers Can Protect Themselves From Liability for Employees’ Misuse of Computer, Internet, and E-Mail Systems in the Workplace*, 10 B.U. J. SCI. & TECH. L. 110, 124 (2004) (“To limit their liability, the employer

The Board's need to address what constitutes permissible restrictions on use of e-mail systems became clear, and some commentators predicted that the Board might apply its existing rules regarding either solicitation or distribution.<sup>89</sup> Others argued that Internet communications did not fit well within either category and the Board would do well to create a new rule specifically designed for such communications.<sup>90</sup> The importance of the Board's decisions on Internet and e-mail issues was described by Professor Jeffrey Hirsch as holding both the threat of "killing" the NLRA (by which he meant consigning it to utter obsolescence and irrelevance) and the hope of reviving it as a force in United States labor and employment law.<sup>91</sup>

As important as NLRA protection of Internet and e-mail usage was to unions and union-represented employees, it also was important to unrepresented employees. Employees who have used the Internet and e-mail to communicate their complaints about work and related matters and have faced their employers' wrath have found few protections in federal or state employment law. Public employees may be able to make claims for violation of their first or fourth amendment rights under the federal Constitution and comparable provisions in state constitutions,<sup>92</sup> but private sector employees do not have even those protections. The most promising-looking federal statute for such protection seemed to be the Electronic Communications Privacy Act of 1986<sup>93</sup> amendments ("ECPA") to the Omnibus Crime Control and Safe Streets Act of 1968 ("Federal Wiretap Act").<sup>94</sup> The ECPA added protection for "electronic communications" to the Federal Wiretap Act's protection of "wire and oral communications."<sup>95</sup> Title II of the ECPA, the Stored Communications Act ("SCA")<sup>96</sup> provided protection for wire or electronic communication while it is in electronic storage.<sup>97</sup> However, the ECPA and SCA have not been interpreted as providing protection of employees' use of e-mail and the Internet in

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should adopt strict and defensive Internet and computer use policies and procedures that prohibit illegal and wrongful computer and online conduct.").

<sup>89</sup> Hirsch, *supra* note 11, at 290-91.

<sup>90</sup> *Id.* at 291.

<sup>91</sup> *Id. passim.*

<sup>92</sup> There have been few such claims to date, but they are available to public employees. The First Amendment protects public employees' right to free speech. *See, e.g.,* Wernsing v. Thompson, 423 F.3d 732 (7th Cir. 2005) (unsuccessful first amendment retaliation claim); *see also* Tracie Watson & Elisabeth Piro, Note, *Bloggers Beware: A Cautionary Tale of Blogging and the Doctrine of At-Will Employment*, 24 HOFSTRA LAB. & EMP. L.J. 333, 340-42 (2007) (discussing First Amendment protection of public employees). The Fourth Amendment protects them against unreasonable search and seizure. *See* Quon v. Arch Wireless Operating Co., 529 F.3d 892 (9th Cir. 2008) (employee asserting successful fourth amendment claim based on employer's accessing and reading text messages sent on employer's pager).

<sup>93</sup> Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified in scattered sections of 18 U.S.C.).

<sup>94</sup> Omnibus Crime Control and Safe Street Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified in scattered sections of 5, 18, and 42 U.S.C.).

<sup>95</sup> 18 U.S.C. §§ 2511-2522 (2006).

<sup>96</sup> 18 U.S.C. §§ 2701-2711 (2006).

<sup>97</sup> *Id.* § 2701(a)(2).

most cases.<sup>98</sup> As the Ninth Circuit explained in *Konop v. Hawaiian Airlines, Inc.*:

[T]he existing statutory framework is ill-suited to address modern forms of communication like [plaintiff's] secure website. Courts have struggled to analyze problems involving modern technology within the confines of this statutory framework, often with unsatisfying results. . . . [U]ntil Congress brings the laws in line with modern technology, protection of the Internet and websites such as [plaintiff's] will remain a confusing and uncertain area of the law.<sup>99</sup>

Despite courts' recognition that the ECPA/SCA statutory scheme does not adequately address employers' monitoring and inspection of employee Internet use and e-mail communications, Congress has not passed legislation to address the issue.<sup>100</sup>

Turning to state common law, invasion of privacy claims have been notoriously ineffectual for employees because employers routinely undermine any expectation of privacy, a required element, with computer use policies and other documents, policies, and statements.<sup>101</sup> One court even denied recovery under an invasion of privacy theory to a plaintiff when the employer expressly assured employees that their e-mails were private.<sup>102</sup>

The dearth of protection for electronic communication under federal legislation, state legislation, and state common law tort theories has left the NLRA as the best hope of employees who suffer adverse employment actions for messages sent via e-mail or posted on the Internet.<sup>103</sup> An interesting twist on this point is that section 7 of the NLRA may not be just the best protection available to employees using the Internet and e-mail, but it may preclude other weak and limited options. A recent case decided by the California Court of Appeals considered the wrongful termination claim<sup>104</sup> of an employee who was fired after sending an e-mail message to a supervisor requesting help in a dis-

<sup>98</sup> See, e.g., *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107 (3d Cir. 2003) (holding no violation of ECPA because no interception); *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002) (holding no interception under ECPA, but reversing summary judgment for defendant on SCA claim). *But see* *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892 (9th Cir. 2008) (finding liability under the SCA).

<sup>99</sup> *Konop*, 302 F.3d at 874.

<sup>100</sup> Congress has considered bills that would have required employers to give employees notice before engaging in computer and electronic monitoring, but those bills did not move out of committee. They were the Privacy for Consumers and Workers Act of 1993, H.R. 1900, 103d Cong. (1993); S. 984, 103d Cong. (1993), and the Notice of Electronic Monitoring Act, H.R. 4908, 106th Cong. (2000). There are some state laws that require notice before monitoring. See, e.g., CONN. GEN. STAT. § 31-48d (2008); DEL. CODE ANN. tit. 19, § 705 (2008).

<sup>101</sup> See, e.g., *United States v. Thorn*, 375 F.3d 679, 683 (8th Cir. 2004); *TBG Ins. Servs. Corp. v. Superior Court*, 117 Cal. Rptr. 2d 155, 163 (Cal. Ct. App. 2002).

<sup>102</sup> *Smyth v. Pillsbury Co.*, 914 F. Supp. 97, 101 (E.D. Pa. 1996).

<sup>103</sup> *Timekeeping Sys., Inc.*, 323 N.L.R.B. 244 (1997); see also Nancy J. King, *Labor Law for Managers of Non-Union Employees in Traditional and Cyber Workplaces*, 40 AM. BUS. L.J. 827, 862 (2003) ("Employer policies that prohibit employees from sending e-mail to coworkers or accessing Web sites may violate the NLRA when they restrict employees from communicating with other employees about matters protected by [s]ection 7.").

<sup>104</sup> The wrongful termination in violation of public policy claims were under California Labor Code sections 923 and 232.5. *Luke v. Collopy Labels USA, Inc.*, 72 Cal. Rptr. 3d 440, 442 (Cal. Ct. App. 2008).

pute he was having with his immediate supervisor in *Luke v. Collotype Labels USA, Inc.*<sup>105</sup> A supervisor suspended plaintiff employee for three days for plaintiff's alleged dishonesty about having his position covered during a planned absence.<sup>106</sup> Plaintiff sent an e-mail message to the company's group managing director in the Australia office asking him to call plaintiff.<sup>107</sup> One day later the company terminated plaintiff, reasoning as follows: that he sent an e-mail to Australia without consulting with any of the managers in the United States, that he was soliciting signatures among his coemployees for a letter denouncing management, that he was making his peers uncomfortable, and that he was blatantly insubordinate.<sup>108</sup> The court held that plaintiff's conduct was covered by the NLRA and that his wrongful termination claims were pre-empted by the NLRA.<sup>109</sup> Although the court focused not on the sending of the e-mail as protected conduct, but rather on the plaintiff's discussions with coworkers about workplace complaints and his advice to them about how to keep records and make complaints to management, the court sent a message. The point is that if such conduct is covered by the NLRA, it might provide not only the best remedy, but perhaps the only remedy if tort claims are preempted.

In view of the importance of the NLRA in protecting Internet and e-mail usage for both union and nonunion employees, much was at stake in the Board's decision in *Register-Guard*.

*B. Register-Guard: The Board Declares the Internet and E-Mail Systems to be Just Another Chattel*

*1. Important and Wide-Ranging Issues Presented*

The importance of *Register-Guard* was clear. It was the NLRB's opportunity to address a number of issues regarding NLRA protection of e-mail and Internet use. The Board recognized the significance of the case when it took the unusual step of scheduling oral argument in the case and inviting *amici* to file briefs.<sup>110</sup> In the notice and order, the Board listed questions in which it was especially interested:

1. Do employees have a right to use their employer's e-mail system (or other computer-based communication systems) to communicate with other employees about union or other concerted, protected matters? If so, what restrictions, if any, may an employer place on those communications? If not, does an employer nevertheless violate the Act if it permits non-job-related e-mails but not those related to union or other concerted, protected matters?
2. Should the Board apply traditional rules regarding solicitation and/or distribution to employees' use of their employer's e-mail system? If so, how should those rules be applied? If not, what standard should be applied?

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> The e-mail had a caption "trouble brewing" and stated as follows: "Sorry to bother you. I usually go through my chain of command, but this will not work here at this plant. Would you please call me?" *Id.*

<sup>108</sup> *Id.* at 442-43.

<sup>109</sup> *Id.* at 448.

<sup>110</sup> Notice of Oral Argument and Invitation to File Briefs, *Guard Publishing Co. d/b/a The Register-Guard*, Nos. 36-CA-8743-1, -8849-1, -8789-1, -8842-1 (NLRB Jan. 10, 2007).

3. If employees have a right to use their employer's e-mail system, may an employer nevertheless prohibit e-mail access to its employees by non-employees? If employees have a right to use their employer's e-mail system, to what extent may an employer monitor that use to prevent unauthorized use?
4. In answering the foregoing questions, of what relevance is the location of the employee's workplace? For example, should the Board take account of whether the employee works at home or at some location other than a facility maintained by the employer?
5. Is employees' use of their employer's e-mail system a mandatory subject of bargaining? Assuming that employees have a [s]ection 7 right to use their employer's e-mail system, to what extent is that right waivable by their bargaining representative?
6. How common are employer policies regulating the use of employer e-mail systems? What are the most common provisions of such policies? Have any such policies been agreed to in collective bargaining? If so, what are their most significant provisions and what, if any, problems have arisen under them?
7. Are there any technological issues concerning e-mail or other computer-based communication systems that the Board should consider in answering the foregoing questions?<sup>111</sup>

The union subsequently filed a motion requesting that the Board delete four questions (nonemployee access, relevance of the employee's workplace, policies on e-mail use issued by employers or included in collective bargaining agreements, and technological issues regarding e-mail systems), that it argued had nothing to do with the particular case before the Board.<sup>112</sup> However, the Board denied the motion.<sup>113</sup> Thus, the Board left itself with a broad range of issues to address, which would enable it to announce a far-reaching decision regarding the limitations the NLRA places on employers' restrictions of e-mail use.

## 2. *A Harbinger of Register-Guard*: Trustees of Columbia University

The result in *Register-Guard* actually was presaged by a Board decision issued in August 2007 on an e-mail issue. In *Trustees of Columbia University*,<sup>114</sup> the Board considered the claim of a union organizing a proposed bargaining unit consisting of employees who were at sea aboard a vessel during the time of the pre-election organizing campaign.<sup>115</sup> The union requested e-mail addresses of the employees, and the employer refused to provide them.<sup>116</sup> The union filed an objection to the election, contending that the employer's refusal frustrated the purpose of the Board's well-established requirement in *Excelsior Underwear, Inc.*,<sup>117</sup> that the employer must provide a list of the names and home addresses of eligible voters within a week of an agreement or

<sup>111</sup> *Id.*

<sup>112</sup> *NLRB Refuses to Delete Questions in E-Mail Case*, Daily Lab. Rep. (BNA) No. 16, at A-12 (Jan. 25, 2007).

<sup>113</sup> *Id.*

<sup>114</sup> Trs. of Columbia Univ., 350 N.L.R.B. 574 (2007).

<sup>115</sup> According to the dissent, nine of the eleven proposed unit employees were aboard the vessel from the day the Excelsior list was due until the day of the election. *Id.* at 576 (Walsh, Member, dissenting).

<sup>116</sup> *Id.*

<sup>117</sup> *Excelsior Underwear Inc.*, 156 N.L.R.B. 1236 (1966).



order for an election.<sup>118</sup> The Regional Director had concluded that, notwithstanding the absence of any Board precedent requiring an employer to provide e-mail addresses, under the circumstances of the case, the “manifest purpose” of the *Excelsior* rule would not be satisfied if the employer were not required to provide the e-mail addresses.<sup>119</sup> In a two-to-one decision, the Board panel refused to extend the *Excelsior* rule under the facts of the case to require the employer to provide e-mail addresses.<sup>120</sup> The panel majority explained that “[p]lainly, the Board’s expertise does not encompass the rapidly expanding universe of information technology . . . .”<sup>121</sup> The majority raised a number of questions about the cost of sending e-mails, potential impairment of the system by voluminous e-mails, an employer’s right not to provide a forum for third-party expression of views on its virtual property, the relationship between existing rules regarding union access to employer property and any new rules that might be developed for virtual property, whether employers could continue current e-mail monitoring without engaging in illegal surveillance, and potential invasion of employees’ privacy rights.<sup>122</sup> The majority stated that it did not even have the knowledge to identify other issues that probably existed, and that the listed and unknown issues should be fully briefed before the Board departed from “long-standing, well- understood precedent.”<sup>123</sup>

The dissent argued that the employer had not fulfilled its *Excelsior* duty under the facts. As stated in the dissent, the objective of the *Excelsior* rule “is to ensure that all participants in an election have access to the electorate so that employees can make a free and reasoned choice regarding union representation.”<sup>124</sup> The *Excelsior* rule is not to be mechanically applied, and under the facts of the case before it, the dissent argued that the employer had not substantially complied with the requirement because employees had not received information necessary to an informed exercise of their section 7 rights.<sup>125</sup> The dissent rejected the majority’s characterization of the union’s position as requiring an extension of the *Excelsior* rule: provision of e-mail addresses would be required to comply only in the rare case, like this one, in which employees cannot be contacted at their home addresses.<sup>126</sup>

The panel majority’s rigid adherence to the outdated *Excelsior* rule and its list of concerns or issues about e-mail did not bode well for a bold and innovative new treatment of e-mail in *Register-Guard*.

### 3. *The Register-Guard Decision*

The case involved a newspaper that had an e-mail system and a “Communications Systems Policy” (“CSP”) that provided in relevant part as follows:

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<sup>118</sup> *Id.* at 1239-40.

<sup>119</sup> *Columbia Univ.*, 350 N.L.R.B. at 575.

<sup>120</sup> *Id.* at 574.

<sup>121</sup> *Id.* at 576.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 577 (Walsh, Member, dissenting).

<sup>125</sup> *Id.* at 578.

<sup>126</sup> *Id.*

Company communication systems and the equipment used to operate the communication system are owned and provided by the Company to assist in conducting the business of The Register-Guard. Communications systems are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations.<sup>127</sup>

Notwithstanding the policy, the employer was aware that employees used the e-mail system for various nonwork-related purposes, such as baby announcements, party invitations, offers of athletic event tickets, etc.<sup>128</sup>

The controversy arose when an employee who was the union president sent three e-mail messages regarding union matters.<sup>129</sup> The events leading up to the union president's emails involved a union rally.<sup>130</sup> The managing editor sent an e-mail message to all employees regarding a planned upcoming union rally.<sup>131</sup> The message informed employees that they might want to leave work early the day of the rally because police had warned the employer that anarchists might attend the rally.<sup>132</sup> An employee responded with an e-mail that suggested that the managing editor either mistakenly provided inaccurate information about the rally or lied to employees.<sup>133</sup> After the rally, the union president informed the managing editor that she wanted to send an e-mail to employees to "set the record straight."<sup>134</sup> The managing editor asked her to wait until he talked with the human resources director about it.<sup>135</sup> When she did not receive a response within two days, the union president told the managing editor that she was going to send the e-mail, and he said he understood.<sup>136</sup> She composed the message during her break and sent it from her work computer.<sup>137</sup> She was then told that she should not have used company equipment to send the message, and the employer issued a written warning to her.<sup>138</sup> She was later issued written warnings for two more e-mail messages she sent from a noncompany computer over the company's e-mail system.<sup>139</sup> The first was a message encouraging employees to wear green to support the union's negotiating position and the second was a request to employees to assist with the union's entry in a town parade.<sup>140</sup> She sent each of these messages from a computer in the union's office.<sup>141</sup> Thus, the union president was written up for three violations of the employer's CSP for sending nonjob-related solicitations over the company's e-mail system.

Later that year, during bargaining, the company proposed a clause in the collective bargaining agreement stating that the electronic communications sys-

<sup>127</sup> Guard Publ'g Co. (*Register-Guard*), 351 N.L.R.B. 1110, 1111 (2007).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 1112.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

tem was the employer's property and prohibited its use for union business.<sup>142</sup> The union filed an unfair labor practice charge alleging that the company violated section 8(a)(1) by promulgating, maintaining and enforcing an overly broad rule prohibiting e-mail use, section 8(a)(1) by discriminatorily enforcing that rule, and section 8(a)(5) by insisting on an illegal provision during bargaining.<sup>143</sup> The administrative law judge found that maintenance of the rule was not a violation of section 8(a)(1), but he found that the employer did violate 8(a)(1) by discriminatorily enforcing the rule by permitting some nonwork-related uses and punishing the union-related uses.<sup>144</sup> Thus, the stage was set for the Board to decide what section 7 of the NLRA has to say about employees' rights to use employers' e-mail systems.

In what had become a customary and predictable split, the Board held in a three-to-two decision that promulgating, maintaining, and enforcing such a rule does not violate section 8(a)(1), and thus insisting on it in bargaining does not violate section 8(a)(5).<sup>145</sup> The Board majority held that the issue of employees' right to use an employer's e-mail system is resolved by the well-established principle that "absent discrimination, employees have no statutory right to use an employer's equipment or media for section 7 communications."<sup>146</sup> Then the majority went on to reject the current standard for evaluating discriminatory enforcement (which would not have permitted prohibition for union purposes if other nonwork-related uses were permitted) and replaced it with a new standard that finds discrimination only when an employer prohibits union solicitations or messages, but permits nonunion solicitations or messages of a similar kind.<sup>147</sup>

*i. Majority Opinion*

The majority rejected the arguments of the General Counsel, the charging party, the AFL-CIO, and *amici* that under *Republic Aviation*, the employer's CSP was presumptively invalid because it did not distinguish between working and nonworking time.<sup>148</sup> Instead, the majority pigeonholed the case with Board decisions holding that employers have a property right to regulate and restrict use of their personal property.<sup>149</sup> Thus, the majority analogized the e-mail system to chattels (personal property) such as televisions, bulletin boards, copy machines, telephones, and public address systems.<sup>150</sup> Rejecting *Republic Aviation* as controlling authority, the Board majority distinguished it because the communications policy at issue dealt with electronic communications, not face-to-face solicitation, with which *Republic Aviation* was concerned.<sup>151</sup> Emphasizing its focus on property rights over communication rights, the major-

<sup>142</sup> *Id.*

<sup>143</sup> The allegations and analysis of section 8(a)(3) violations are omitted from discussion here.

<sup>144</sup> *Register-Guard*, 351 N.L.R.B. at 1112.

<sup>145</sup> *Id.* at 1110.

<sup>146</sup> *Id.* at 1116.

<sup>147</sup> *Id.* at 1118.

<sup>148</sup> *Id.* at 1113, 1114-16.

<sup>149</sup> *Id.* at 1114-16.

<sup>150</sup> *Id.* at 1114 (citing Board decisions).

<sup>151</sup> *Id.* at 1115.

ity explained that “[s]ection 7 of the Act protects organizational rights . . . rather than particular means by which employees may seek to communicate.”<sup>152</sup> Although the majority conceded that e-mail has radically changed how people communicate, it reasoned that telephones similarly changed communications, but the Board has not found a general section 7 right for employees to use their employers’ telephone systems.<sup>153</sup>

Still, even after announcing that the employer could promulgate and maintain the rule, the majority was left with a case in which, even if there were no section 8(a)(1) violation for having such a rule, there would be a section 8(a)(1) violation for discriminatory enforcement under the prevailing standard articulated by the Board in *Fleming Co.*: “[i]f an employer allows employees to use its communications equipment for nonwork related purposes, it may not validly prohibit employee use of communications equipment for [s]ection 7 purposes.”<sup>154</sup> The majority then embarked on an explanation of the meaning of discrimination (“unequal treatment of equals”), and based on that, adopted the discrimination standard developed by the Seventh Circuit: “disparate treatment of activities or communications of a similar character because of their union or other [s]ection 7-protected status.”<sup>155</sup> Under this new discriminatory enforcement standard, the majority found that the reprimand for the e-mail sent to provide clarifying information about the union rally was a violation of section 8(a)(1) because it was not a solicitation.<sup>156</sup> The employer’s policy prohibited “non-job-related solicitations,” and the employer permitted nonjob-related communications that were not solicitations.<sup>157</sup> The only difference between the personal e-mails that were permitted and those that were sent by the union president was the union aspect of the latter.<sup>158</sup> Therefore, under the new disparate-treatment-of-equals standard, reprimanding the union president for the informational e-mail was discriminatory.<sup>159</sup> In contrast, the other two e-mails were solicitations to take actions to support a group or organization—the union.<sup>160</sup> Because there was no evidence that the employer had permitted solicitations to support other groups or organizations, the Board majority held that reprimanding the union president for those two e-mails was not discriminatory enforcement in violation of section 8(a)(1).<sup>161</sup>

<sup>152</sup> *Id.* (quoting *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 318 (7th Cir. 1995)).

<sup>153</sup> *Id.* at 1116.

<sup>154</sup> *Id.* at 1117 (citing *Fleming Co.*, 336 N.L.R.B. 192, 194 (2001), *enforcement denied*, 349 F.3d 968 (7th Cir. 2003)).

<sup>155</sup> *Id.* at 1118. Curiously, the Seventh Circuit appears not to apply this standard consistently. For example, in a recent decision, the court rejected the argument that an employer could prohibit union solicitations when it permitted other types of solicitations in patient care areas. *See St. Margaret Mercy Healthcare Ctrs. v. NLRB*, 519 F.3d 373, 375-76 (7th Cir. 2008). Responding to the argument that some of the permitted solicitations were charitable or social rather than commercial, the court wrote, “[W]hat difference can that make?” *Id.* at 375.

<sup>156</sup> *Register-Guard*, 351 N.L.R.B. at 1119.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

*ii. Dissenting Opinion*

The dissent criticized the majority opinion on a number of grounds. The most general was the “Rip Van Winkle” ground that the majority is not fulfilling the Board’s duty of interpreting the NLRA in light of “changing patterns of industrial life.”<sup>162</sup> Turning to specific criticisms, the dissent would have found the CSP to be a section 8(a)(1) violation under *Republic Aviation*.<sup>163</sup> The dissent rejected the personal property cases as controlling, explaining that it was “absurd” to analogize e-mail to chattels such as telephones, televisions, or bulletin boards: “[A]n e-mail system and the messages traveling through it are not simply ‘equipment’; the [employer] does not own cyberspace.”<sup>164</sup>

On the issue of the majority’s changing the standard for discriminatory enforcement of a rule, the dissent criticized the majority for adopting a standard for discriminatory enforcement under section 8(a)(1) that was designed for discrimination based on motive, under the Constitution and employment discrimination statutes.<sup>165</sup> The dissent pointed out that the NLRA differs from antidiscrimination statutes because it does not *just* prohibit discrimination based on union and other concerted activity for mutual aid or protection, but it also protects the right to engage in such activity.<sup>166</sup> Or, stated differently, a section 8(a)(1) unfair labor practice is not primarily about discrimination, but about interference with section 7 rights.<sup>167</sup> The dissent also argued that the new standard does not protect section 7 rights because an employer can adopt and enforce a rule that permits almost every kind of nonwork-related communication except union-related communications.<sup>168</sup> The dissent offered the example of a rule that prohibits nonwork-related solicitations by membership organizations; such a rule would permit solicitations by or on behalf of many commercial and charitable organizations, but not those by or on behalf of unions.<sup>169</sup> The dissent also contended that, even under the new discrimination standard adopted by the majority, the employer violated section 8(a)(1).<sup>170</sup> Assuming *arguendo* that the e-mails urging employees to wear green to support the union’s bargaining position and to participate in the union parade entry were solicitations, the dissent explained that some of the personal messages permitted by the employer were personal solicitations.<sup>171</sup> The dissent also explained that the Seventh Circuit, in articulating the standard adopted by the majority, noted that allowing communications for anything but unions is “‘anti-

<sup>162</sup> *Id.* at 1125 (Liebman & Walsh, Members, dissenting in part). (quoting *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975)) (Liebman & Walsh, Members, dissenting in part). See *NLRB: No Section 7 Right to Use Employer’s E-Mail*, Lab. L. Rep. Insight (CCH) No. 960, at 1 (Jan. 23, 2008) [hereinafter *Insight*] (“[E]choing its now familiar criticism that the current Board has continually shirked its responsibility to adapt the Act . . .”).

<sup>163</sup> *Register-Guard*, 351 N.L.R.B. at 1127 (Liebman & Walsh, Members, dissenting in part).

<sup>164</sup> *Id.* at 1125-26.

<sup>165</sup> *Id.* at 1129.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 1130.

<sup>169</sup> *Id.* at 1130 n.26.

<sup>170</sup> *Id.* at 1131.

<sup>171</sup> *Id.*

union discrimination by anyone's definition.'"<sup>172</sup> The evidence in the case did not demonstrate that the employer enforced its CSP against any communications other than union messages.

### III. REGISTER-GUARD AND THE INCREDIBLE SHRINKING NLRA

#### A. Critique of the Specific Holdings and Assessment of Likely Ramifications

The long and eagerly anticipated Board decision in *Register-Guard* provoked predictable responses: employers praised it, and unions condemned it.<sup>173</sup> The first academic assessment was very critical.<sup>174</sup> In the aftermath of *Register -Guard*, employers likely will revise their computer use policies and enforcement strategies to try to prohibit and punish union-related communications.<sup>175</sup>

The dissent presented apt criticisms of both of the majority's holdings: maintaining a computer use rule that prohibits nonwork-related use and the new standard for discriminatory enforcement. The large-scale attack was that the Board was failing to fulfill its role to interpret the NLRA in light of the changing workplace. This is a criticism to which I will return after addressing the specific criticisms.

#### 1. Which Pigeonhole for E-Mail? The Myriad Standards Conundrum

Who had the better argument about the controlling precedent in the communication and access cases? The dissent would have found the computer use rule presumptively invalid under *Republic Aviation* rather than finding the personal property rights cases controlling, as did the majority. The dissent's criticism that e-mail and associated cyberspace are not chattels like bulletin boards, telephones, etc. is a sound argument. As the dissent states, while the employer may own the computers and the e-mail system, it does not own cyberspace.<sup>176</sup> The different lines of controlling authority cited by the majority and dissent also manifest the different emphases of the two sides. Throughout the history of the communication and access cases, the competing values have been the communication of information to facilitate informed exercise of section 7 rights, on one side, and property rights of the employer and managerial prerogative, on the other. In *Register-Guard*, the majority clearly comes down on the side of property rights of the employer: "Section 7 of the Act protects organizational rights . . . rather than particular means by which employees may seek

<sup>172</sup> *Id.* (quoting *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 321 (7th Cir. 1995)).

<sup>173</sup> See, e.g., Susan J. McGolrick, *Board's E-Mail Rulings Get Opposing Reviews from Management, Union Speakers at ABA*, Daily Lab. Rep. (BNA) No. 33, at C-1 (Feb. 20, 2008); Insight, *supra* note 162 at 3.

<sup>174</sup> See Hirsch, *supra* note 11, at 277-78.

<sup>175</sup> See Barbara E. Hoey & Jessica L. Berenbroick, *NLRB Ruling Allows Restrictions on Union Use of Company E-Mail*, N.Y. L.J., Mar. 20, 2008, at 24; see also Insight, *supra* note 162 (quoting management attorney Joseph Santucci that employers may review and revise computer use policies that are too liberal in light of the decision).

<sup>176</sup> See also King, *supra* note 103, at 869-72 (arguing for application of solicitation and distribution rules to cyber workplaces).

to communicate.’’<sup>177</sup> The dissent, in contrast, recognizes the balancing of rights and interests, but gives greater weight to the employees’ right to communicate about section 7 matters, as the dissent found little infringement on the employer’s property interest.<sup>178</sup> By now this is a well-worn path, and generally speaking, property rights have been faring well ever since *Lechmere v. NLRB*.<sup>179</sup> In *Lechmere*, the Supreme Court recognized the right of an employer to exclude from its real property nonemployee union organizers when alternative means of communication exist.<sup>180</sup> Although the *Register-Guard* majority did acknowledge the employer’s argument that *Lechmere* should apply when the union president sent the two e-mails from the union office in a footnote, the majority held that *Lechmere* was not controlling because it involved nonemployees and access to real property.<sup>181</sup> Still, the *Lechmere* formula, elevation of property rights over section 7 rights and the communication essential to their informed exercise, resonated in the majority opinion in *Register-Guard*.<sup>182</sup>

There are two points I wish to make about this ongoing balancing, or battle for supremacy, among rights and interests in communication and access cases. First, the Board continues to evaluate property rights, an area in which it has little expertise.<sup>183</sup> Second, the Board and the Supreme Court have not clarified why they continue to give employers more protection of their ownership interest in chattels than in their real property.<sup>184</sup> Tort law at least recognizes a more protected ownership right in real property than personal property.<sup>185</sup> As the dissent in *Register-Guard* points out, the torts cases dealing with e-mail systems and trespass to chattels, on which the employer relied, arguably should have led to a different result in the majority’s analysis of personal property rights.<sup>186</sup>

Beyond the positions of the majority and the dissent, another possibility is that advocated by Professor Hirsch. He argued that *Register-Guard* should not have been decided by forcing e-mail communication into any of the Board’s

<sup>177</sup> *Guard Publ’g Co. (Register-Guard)*, 351 N.L.R.B. 1110, 1115 (2007) (quoting *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 318 (7th Cir. 1995)).

<sup>178</sup> *Id.* at 1126 (Liebman & Walsh, Members, dissenting in part).

<sup>179</sup> *Lechmere v. NLRB*, 502 U.S. 527 (1992).

<sup>180</sup> *Id.* at 540-41.

<sup>181</sup> *Register-Guard*, 351 N.L.R.B. at 1119 n.25.

<sup>182</sup> See Insight, *supra* note 162 (quoting Jeffrey Hirsch as saying that the majority essentially applied *Lechmere*).

<sup>183</sup> See, e.g., Jeffrey M. Hirsch, *Taking State Property Rights Out of Federal Labor Law*, 47 B.C. L. REV. 891 (2006).

<sup>184</sup> Hirsch, *supra* note 11, at 285 (“The Board and Supreme Court have long refused to give employers a near-absolute right to restrict employee use of their real property, and there is no reason to give them greater power over their equipment.”).

<sup>185</sup> For example, establishing actual damage is not a required element to prove a trespass to real property, whereas actual damage is a required element to establish trespass to chattels. See, e.g., DAN B. DOBBS, *THE LAW OF TORTS* 124 (2000) (“Trespass to chattels differs from trespass to land in one important respect. . . . To establish liability for trespass to chattels, the possessor must show legally recognizable harm.”).

<sup>186</sup> *Register-Guard*, 351 N.L.R.B. at 1126 (Liebman & Walsh, Members, dissenting in part). The dissent explained that in trespass to chattels cases, plaintiffs cannot recover for interference with their ownership interest in chattels unless they prove some actual harm. *Id.*

precedents.<sup>187</sup> Instead, the Board should re-evaluate and modify its entire analysis of employer regulation of employee communications.<sup>188</sup> He argued for erasing the distinction between solicitation and distribution and replacing the old standards with a new one that employer interference with union-related communications is presumptively invalid.<sup>189</sup> In addition to the Internet being different from other types of communication, another rationale that would support such a result is the Board's breaking free from its property law shackles and focusing on communication in the twenty-first century. Such a focus in *Register-Guard* would have been better suited to the e-mail system at issue rather than characterizing it as a piece of personal property. Additionally and more significantly, a focus on communications would have grounded the Board's analysis in the key to effectuating section 7 rights.

I agree with Professor Hirsch that the Board needs to re-evaluate its analysis of the legality of employer rules restricting employee and union communications.<sup>190</sup> I think the overhaul of the analysis needs to be complete. The most salient problem on display in *Register-Guard*, in my view, is that the Board has too many standards for different types of employer rules, and that surfeit of standards is what provoked the argument about where in that grid to fit e-mail systems. The standards include the *Republic Aviation* standard for rules regarding solicitations, the rule regarding distribution, the cases cited by the majority for rules regarding use of an employer's personal property, the *Lechmere* standard for nonemployee access to real property, and so on.<sup>191</sup> The Board's and the Supreme Court's creation of a grid of different standards to evaluate the legality of employers' rules prohibiting different types of conduct seems both artificial and fraught with risk. The danger is that the Board will lose sight of the possible overlap and interactions among these different standards and permit employers too much license in regulating conduct that should be protected under section 7. The distinctions seem artificial because not every communication by a particular method fits neatly into one category, as the example of e-mail shows.

An example of overlap and interactions is the Board's failure to mention in *Register-Guard* one particularly relevant standard. I am not sure how this standard interacts with the rule established in *Register-Guard*. Although the majority considered and rejected the *Republic Aviation* standard and mentioned the *Lechmere* standard, missing from the majority's analysis of the legality of the employer's promulgating and maintaining the rule was any mention of the standard articulated in *Lafayette Park Hotel*<sup>192</sup> and revised in *Lutheran Heritage*.<sup>193</sup> Those cases establish the general standard for evaluating whether an employer commits an unfair labor practice by maintaining a rule that could be

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<sup>187</sup> Hirsch, *supra* note 11, at 291-95.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 293-94.

<sup>190</sup> *Id.* at 282-83.

<sup>191</sup> See *supra* text accompanying notes 78-84.

<sup>192</sup> *Lafayette Park Hotel*, 326 N.L.R.B. 824 (1998), *enforced*, *Lafayette Park Hotel v. NLRB*, 203 F.3d 52 (D.C. Cir. 1999).

<sup>193</sup> *Martin Luther Mem'l Home, Inc. (Lutheran Heritage)*, 343 N.L.R.B. 646, 647 (2004).



interpreted as prohibiting protected section 7 conduct.<sup>194</sup> Apparently the Board considered that standard irrelevant because the majority's focus was not on the communication that is prohibited, but on the prohibited means of communicating. This analytical framework of dividing types and methods of communicating and formulating a rule for each different type and means of communication can lead to confusion and increasing restriction of communication if one fails to appreciate the possible interactions of the various standards. What happens if, in the aftermath of *Register-Guard*, an employer issues a broad prohibition on employee e-mail communications? What is the interaction of *Register-Guard* and *Lafayette Park/Lutheran Heritage*?

## 2. *Changing the Discrimination Standard to Give Employers the Benefit of the E-Mail Standard*

Who had the better argument regarding discriminatory enforcement of the policy? Ironically, the Board majority that classified the e-mail system as conservatively as it could (as chattels) and forced it into an existing and ill-suited line of authority, in the same decision abrogated the firmly established Board standard for discriminatory enforcement. Thus, a Board that felt bound by ill-fitting precedent on the first issue broke free from clearly controlling precedent on the second issue. The arguments by the majority and dissent about the meaning of discrimination under the NLRA are interesting, but the majority undoubtedly understood that its first holding providing that prohibitory rules are permissible would have little practical and operational significance under the then-existing discrimination standard. Employers would have great difficulty uniformly monitoring and enforcing rules that prohibited all nonwork uses of computers or systems, or even as in *Register-Guard*, all nonwork-related solicitations. Thus, for employers to realize any benefit from the first holding, the discrimination standard had to be changed. The dissent suggests that what the majority did was create a standard under which employers could permit almost any communication and still prohibit union communications as long as the rule does not expressly refer to union communications.<sup>195</sup> The dissent makes a good point that the majority's holding allows employers to coordinate drafting their rules and enforcement so as to permit a great deal of communication but prohibit section 7 communications. Indeed, the majority's standard can be understood as pragmatic and functional, permitting employers to promulgate and maintain prohibitory rules and granting them some leeway in enforcement. The result is that employers are being advised to evaluate and perhaps redraft their rules as well as to evaluate and perhaps revamp their enforcement strategies. For example, a couple of commentators offering advice in light of *Register-Guard*, state that the decision "offers all employers a valuable opportunity to gain control of their e-mail systems."<sup>196</sup> They recommend that employers review and reissue their policies, train employees on permitted

<sup>194</sup> See *supra* text accompanying notes 63-67.

<sup>195</sup> *Guard Publ'g Co. (Register-Guard)*, 351 N.L.R.B. 1110, 1130 (2007) (Liebman & Walsh, Members, dissenting in part).

<sup>196</sup> See, e.g., Hoey & Berenbroick, *supra* note 175; see also Insight, *supra* note 162, at 3 (quoting management attorney Joseph Santucci).

e-mail usage, and finally enforce the policies through random monitoring and discipline for violations.<sup>197</sup>

In sum, then, the Board majority fit e-mail within the existing line of authority that completely subordinated section 7 rights and the communication needed to effectuate those rights to employers' property rights. Apparently recognizing that employers would not be able to satisfy the existing discriminatory enforcement standard, the Board majority revised it so that employers could draft rules and coordinate monitoring and enforcement in a way that will satisfy the new standard. This result very likely will invigorate employers to promulgate prohibitory rules and redouble their enforcement efforts.

*B. Critique of Register-Guard in the Big Picture: The Board and the Place of the NLRA in United States Labor and Employment Law*

Beyond assessing the holdings of the Board in light of options on controlling authority and incentives created, I turn now to the implications of the decision for the roles of the NLRB and the NLRA in the whole of United States labor and employment law.

First, the Board is depicted by the dissent, Professor Hirsch,<sup>198</sup> and others as being stuck in a past age and consequently deciding cases in ways that make the NLRA increasingly anachronistic. Indeed, the Board majority in *Register-Guard* sounded scarcely more prepared and competent than the timid panel in *Trustees of Columbia University* that proclaimed its lack of expertise in information technology and declared that it would need help from full briefing of known and unknown issues.<sup>199</sup> The Board certainly got briefing assistance in *Register-Guard*, yet it backed away from most of the questions in which it indicated an interest when it granted oral argument and invited amicus briefs.<sup>200</sup>

I am not so much concerned that the Board did not address all of the questions that it suggested it might in *Register-Guard*. Indeed, given the result, I prefer that it deferred addressing some questions. I am disappointed, however, that the Board still does not value communication as a matter of transcendent importance under the NLRA and the Internet and e-mail as the revolutionary means of communication that they are. My view expressed in my 2002 article, that because the heart of the NLRA is communication and expression, computers and technology present a hope for the Act to become more relevant than at any time since its passage,<sup>201</sup> is teetering on the brink. Professor Hirsch has predicted that the Internet will save or bury the Board and the NLRA, and that was before *Register-Guard*.<sup>202</sup> If he and I are correct

<sup>197</sup> Hoey & Berenbroick, *supra* note 175.

<sup>198</sup> Hirsch, *supra* note 11, at 268 (stating that the Board majority's "precedents frequently appear to be stuck in a bygone era" and "[t]his intransigence threatens to decrease the relevance of the NLRA to the point that it would cease to have more than a marginal impact on the labor landscape").

<sup>199</sup> See *supra* text accompanying notes 114-26.

<sup>200</sup> Hirsch, *supra* note 11, at 278 ("Even more disturbing than the Board's analysis in this case, was its failure to address many of the issues it had raised.") (footnote omitted).

<sup>201</sup> Corbett, *supra* note 43, at 287.

<sup>202</sup> Hirsch, *supra* note 11, at 303.

about the importance of the Board's treatment of e-mail and the Internet, the Board majority took a big step toward pushing the NLRA into the grave.

More important than the Board's being stuck in an archaic mode of analysis and a bygone era is the concern permeating the AFL-CIO complaint to the ILO Committee on Freedom of Association that the Board is consistently deciding issues in ways that disfavor employees and unions and their rights under the NLRA and favor employers and their rights from whatever sources; the Board is subordinating the NLRA and the rights embodied therein to other laws and the rights it finds therein (although its expertise in identifying rights in such laws is questionable). I asked in 2006: if the Board does not elevate the Act and the rights and values it embodies over other laws, who will?<sup>203</sup> *Register-Guard* represents the Board's continued narrowing of the protections of the NLRA for employees in the areas of expression and technology, employer rules, and employees speaking out against employers. These are areas in which it looked eight years ago as if the Board might expand protections.

I posited in 2002, after *Epilepsy Foundation*, that the Board would continue to interpret the NLRA in ways that made it more protective of nonunion employees. In so doing, the Board would make the Act more relevant in the overall body of United States labor and employment law. This latter conclusion would be true for at least two reasons. First, of course, the overwhelming part of the United States workforce is nonunionized. Second, there are issues of growing concern in United States workplaces that either are not addressed or are poorly addressed by other sources of employment law.<sup>204</sup> Some of the most salient examples are private sector employees' concerns and claims for freedom of expression, invasion of privacy, and computer monitoring. Rather than interpreting the NLRA expansively to cover union and nonunion employees alike in these important areas and thus expand the role and importance of the NLRA, the Board has interpreted the Act narrowly and decreased its importance.

To illustrate, *Timekeeping Systems, Inc.*<sup>205</sup> is a Board decision used in employment law casebooks to demonstrate that nonunion employees may have a claim when they disseminate complaints to coemployees about working conditions.<sup>206</sup> The employee sent an e-mail message response after his boss sent an e-mail explaining a new vacation plan.<sup>207</sup> The responsive e-mail, which criticized the boss' plan in disparaging terms, resulted in the employee's termination.<sup>208</sup> I am concerned that *Register-Guard* may affect the outcome of cases like *Timekeeping Systems*, in which employees send e-mails to coemployees critical of supervisors and/or employer terms and conditions. The obvious response is that *Register-Guard* would not change the result in *Timekeeping*

<sup>203</sup> Corbett, *supra* note 60, at 47.

<sup>204</sup> See *supra* notes 92-103.

<sup>205</sup> *Timekeeping Sys., Inc.*, 323 N.L.R.B. 244 (1997). See *supra* text accompanying notes 46-52.

<sup>206</sup> See, e.g., MARION G. CRAIN, PAULINE T. KIM & MICHAEL SELMI, *WORKLAW: CASES AND MATERIALS* 500 (2005); STEVEN L. WILLBORN, STEWART J. SCHWAB, JOHN F. BURTON, JR. & GILLIAN L.L. LESTER, *EMPLOYMENT LAW: CASES AND MATERIALS* 231 (4th ed. 2007).

<sup>207</sup> *Timekeeping Sys., Inc.*, 323 N.L.R.B. at 245-46.

<sup>208</sup> *Id.* at 247.

*Systems* because the e-mail in *Timekeeping Systems* dealt with work-related matters. Fair enough, but I think the response is too facile. At least three considerations leave me uncertain. First, the Board majority stated that employees have no section 7 right to use their employer's e-mail system for section 7 purposes.<sup>209</sup> Second, each case will involve a consideration of what the employer's rule says and how the employee communication is classified (work-related or nonwork-related, and solicitation or nonsolicitation) in the particular case. What is work-related and what constitutes a solicitation is not so clear.<sup>210</sup> Third, the result might be clearer if the Board had discussed in *Register-Guard* the interaction of its rule regarding e-mail use with the *Lafayette Park Hotel/Lutheran Heritage* standard for evaluating the validity of employer rules.<sup>211</sup> What if an employer maintained a rule that prohibited use of its computers and e-mail system to criticize or say offensive things about supervisors or workplace conditions? Although this may seem clearly impermissible, the Board in *Lutheran Heritage* reinterpreted the *Lafayette Park* standard to uphold employer rules prohibiting "abusive or threatening language."<sup>212</sup> The Board's modification of the *Lafayette Park* standard and the failure of the Board to explain the interaction of the *Register-Guard* standard and the *Lutheran Heritage* standard leaves me uncertain about the result in a case like *Timekeeping Systems*. If we say that *Timekeeping Systems* would be decided the same after *Register-Guard* because the messages in *Register-Guard* dealt with union activity, and the message in *Timekeeping Systems* dealt with nonunion work-related criticism, we are configuring a state of the law in which section 7 protects union-related activity less than nonunion work-related activity. That configuration is contrary to the purposes of the NLRA. The contours of *Register-Guard* will have to be worked out, if it is not overruled. Regardless, the decision continued the Board's trend of choosing not to interpret the NLRA in ways that could fill gaps in protection in United States labor and employment law.

Beyond not expanding the NLRA to fill gaps, *Register-Guard* probably has exacerbated the problems faced by employees in those legal gaps by creating incentives for employers to be active in unprotected areas. As mentioned above, the advice that employers have been receiving under pre-*Register-Guard* law was to issue computer use policies that prohibit uses and undermine expectations of privacy, to randomly monitor e-mail and Internet use, and to discipline employees for violations.<sup>213</sup> After *Register-Guard* this kind of employer action is likely to increase.<sup>214</sup> Rather than turning to the NLRA for vindication of their rights when torts and other federal statutes such as the ECPA fail them, employees may find that the Board's interpretation of the NLRA itself created a new incentive for employers to act.

Finally, as employers review, promulgate and enforce rules prohibiting e-mail and Internet use pursuant to *Register-Guard*, employees and employers

<sup>209</sup> *Guard Publ'g Co. (Register-Guard)*, 351 N.L.R.B. 1110, 1110 (2007).

<sup>210</sup> *See, e.g., id.* at 1125 (Liebman & Walsh, Members, dissenting).

<sup>211</sup> For discussion of this standard and its absence from the *Register Guard* decision, see *supra* text accompanying notes 63-68 & 192-94.

<sup>212</sup> *Martin Luther Mem'l Home, Inc. (Lutheran Heritage)*, 343 N.L.R.B. 646, 647 (2004).

<sup>213</sup> *See supra* note 88 and accompanying text.

<sup>214</sup> *See supra* note 175 and accompanying text.

are likely to be confused about what the law permits.<sup>215</sup> So far, in the early post-*Register-Guard* cases, discriminatory enforcement of rules still presents a problem for employers.<sup>216</sup> This is a state of the law that creates fear and reluctance regarding communication, a state that is wholly inconsistent with the rights contained in section 7—rights which depend on communication for their realization.

A petition for review of the Board's decision in *Register-Guard* is pending in the D.C. Circuit.<sup>217</sup> The court of appeal may reverse the Board.<sup>218</sup> Still, for the NLRA to reach a turning point, the Board must begin to interpret the Act expansively and view the Act as having a key role in United States labor and employment law.

#### CONCLUSION

For those who hold out hope for the reinvigoration of the NLRA as a force in United States labor and employment law, *Register-Guard* was a bad decision in a bad year. As the AFL-CIO in its complaint to the ILO and others have recognized, however, *Register-Guard* is just the latest Board decision in many over a period of years interpreting the NLRA restrictively and adversely to unions and employees. As the Board sat in what was a rather uneventful two-member state throughout 2008, however, there was hope that we have reached a turning point. The NLRA still has the potential to be interpreted in a way that makes it a major source of protection for employee communication and expression, both for represented and unrepresented employees. To facilitate that shift, *Register-Guard* should be overruled, and the Board should undertake a comprehensive review and restatement of the law regarding access and communication. This big project requires a Board, however, that wants to make the NLRA a vital part of United States labor and employment law in the twenty-first century. We shall see what fate awaits the NLRA when Rip Van Winkle awakes.

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<sup>215</sup> See Insight, *supra* note 162, at 3-4 (Barbara Camens, attorney of record for the union in *Register-Guard*, warning of traps for employers and a "twilight zone" for employees).

<sup>216</sup> The General Counsel has directed all Regional Offices to submit discrimination cases to the Division of Advice for decision to try to ensure consistency in application of the new law. See Memorandum GC 08-07 from Ronald Meisburg, General Counsel, to All Division Heads, Regional Directors, Officers-in-Charge, and Resident Officers (May 15, 2008), available at [http://www.nlr.gov/shared\\_files/GC%20Memo/2008/GC%2008-07%20Report%20on%20Case%20Development.pdf](http://www.nlr.gov/shared_files/GC%20Memo/2008/GC%2008-07%20Report%20on%20Case%20Development.pdf). In the first five cases reported on by the General Counsel, discriminatory enforcement was found in four. *Id.* at 3, 5, 7, 10.

<sup>217</sup> *Guard Publ'g Co. (Register-Guard)*, 351 N.L.R.B. 1110 (2007), appeal docketed, No. 08-1013 (D.C. Cir. Feb. 4, 2008).

<sup>218</sup> See Lawrence E. Dube, *Law Professors Speaking at ABA Conference Criticize NLRB's Register-Guard Decision*, Daily Lab. Rep. (BNA) No. 87, at C-1 (May 6, 2008) (reporting that Professor Hirsch predicts that the court of appeals will hold that *Register-Guard* is inconsistent with *Republic Aviation*).