

SOCIAL MEDIA POLICY CONFUSION: THE NLRB’S DATED EMBRACE OF CONCERTED ACTIVITY MISCONSTRUES THE REALITIES OF TWENTY-FIRST CENTURY COLLECTIVE ACTION

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* Juris Doctor Candidate, May 2015, William S. Boyd School of Law, University of Nevada, Las Vegas. To my wife, Cheri, and my daughters, Havannah and Kennedy, I offer my sincerest gratitude. It is not lost upon me that the enormous number of hours that law school required I spend with my head in a book and my fingers on a keyboard forced the three of you to get by without the benefit of a husband or father. Soon though, law school will end; the bar exam will be vanquished; and I will be yours again.

INTRODUCTION

The National Labor Relations Act (“NLRA”)—now 78 years old—was born of a need to mitigate disruption to the U.S. economy caused by unfair labor practices.¹ In the wake of the Industrial Revolution, the United States experienced an employment climate where business owners became so focused on production that they lost sight of basic human dignity.² Employers grossly mistreated, underpaid, and overworked laborers as a matter of course.³ Laborers were largely unskilled; many were illiterate, most were immigrants, and none—individually—had the power to effect change.⁴ When acting collectively, however, these unskilled laborers revealed an unbridled potential to derail the U.S. economy.⁵ With enactment of the NLRA, Congress sought to regulate the abuses of management (and the resulting responses of united laborers) by providing workers with greater power to negotiate the terms and conditions of their employment.⁶ In the wake of the Industrial Revolution, such power was most effectively conferred through protection of the collective bargaining rights outlined in Section 7 of the NLRA.⁷

¹ Enacted in 1935 to promote collective bargaining, the Act gave workers three significant rights considered essential to equalizing bargaining power between labor and management: (1) the right to organize; (2) the right to bargain collectively; and (3) the right to engage in concerted activities such as strikes and picketing. *See* National Labor Relations Act, ch. 372, § 7, 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. § 157 (2012)). Enactment of the NLRA followed “a procession of bloody and costly strikes.” 74 CONG. REC. 2,371 (1935) (statement of Sen. Robert F. Wagner regarding § 7(a)).

² *See* BENJAMIN J. TAYLOR & FRED WITNEY, LABOR RELATIONS LAW 10 (5th ed. 1987).

³ *Id.*

⁴ *Id.* at 11; *see also* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925, at 114 (paperback ed. 2002) (discussing the roles played by the unskilled, inexperienced European immigrants).

⁵ In the summer of 1877, the United States was brought to a standstill by the Great Railroad Strike of 1877. This strike did not involve labor unions, but rather eighty thousand railroad workers joined by hundreds of thousands of other Americans—employed and unemployed. The strike and associated riots lasted forty-five days and resulted in the deaths of several hundred participants, several hundred more injuries, and millions in damages to railroad property. The unrest was deemed severe enough by the government that President Rutherford B. Hayes intervened with federal troops. 1877: THE GRAND ARMY OF STARVATION (American Social History Productions, Inc. 1984), *information available at* <http://ashp.cuny.edu/ashp-documentaries/eighteen-seventy-seven/> (last visited Jan. 16, 2015).

⁶ *See supra* text accompanying note 1.

⁷ Employees have a right to engage in protected concerted activity under Section 7 of the NLRA which states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Today's employment climate, however, is intensely dissimilar. Disruption of the U.S. economy is more likely to come from failures of consumer confidence⁸ than from striking railway workers. Every employee with a computer, smartphone, or social media account now has a virtual voice capable of changing the world.⁹ This virtual voice is a powerful tool for aggrieved workers because it provides them with the opportunity to engage in "brand-shaping" campaigns. Brand-shaping campaigns seek to equalize the bargaining power between labor and management through viral action directed at altering consumer perception of a company's image.

This note examines how the National Labor Relations Board's ("NLRB") dated embrace of the way employees organize and communicate their understanding of the world is incompatible with the realities of twenty-first century collective action. This note begins in Part I by exploring the conditions that made the NLRA necessary. Part II continues by examining the evolution of collective action. Part III lays out the NLRB's framework for an acceptable social media policy. Part IV then analyzes the difficulties associated with implementing such policies, and Part V concludes with a discussion of the employer's illusive protection from an employee's opprobrious social media post.

This note concludes that the NLRB's insistence on applying an industrial-era view of collective action to a digital-age employment environment is akin to forcing a square peg into a round hole. Such sorcery requires a reliance on a fact-specific, case-by-case analysis that is both unpredictable and misguided. The solution lies in NLRB endorsement of social media policies that clearly explain Section 7 rights and then separately regulate nonconforming social media conduct. Such policies should begin by outlining the right to engage in collective action to improve the terms and conditions of employment, and then go on to designate conduct outside those limits. This solution will account for the inevitable conflict between an employee's Section 7 right to communicate information that the employer seeks to shelter and the employer's need to protect its brand. This solution will account for the reality of how workers today organize and express themselves.

29 U.S.C. § 157 (2012). Section 158(a)(3) provides in relevant part: "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ." 29 U.S.C. § 158(a)(3) (2012).

⁸ The 2008 "financial crisis springs from a catastrophic collapse in confidence." Stephane Dees & Pedro Soares Brinca, *Consumer Confidence as a Predictor of Consumption Spending: Evidence for the United States and the Euro Area*, INT'L ECON., Aug. 2013, at 1, 2 (quoting Nobel Laureate Joseph Stiglitz).

⁹ "[S]ocial media have been heralded as the driving force behind the swift spread of revolution throughout the world . . ." Julia Skinner, *Social Media and Revolution: The Arab Spring and the Occupy Movement as Seen Through Three Information Studies Paradigms 3* (Sprouts: Working Papers on Info. Sys., No. 11(169), 2011), available at <http://sprouts.aisnet.org/11-169>.

Where labor organizers of the twentieth century served as the primary catalyst for self-organization and concerted activity, today's aggrieved worker is more likely to organize and act in an online community.¹⁰ Twentieth-century laborers harnessed the power of collective action, through unions, to strengthen their negotiating position. Today's laborers, however, are more likely to harness the power of "viral action," through social media, to strengthen their negotiating position.¹¹ The reality of viral action means that today's employees have access to a communication network exponentially larger and faster than that of yesterday's employees. Thus, NLRB protections of social media posts, like a knife that cuts both ways, can be both a blessing and a curse for the distressed laborer and the targeted business owner. To ensure that employer social media policies protect the rights of both the employer and the employee, the NLRB must consistently uphold policies that focus on informing employees of their protected Section 7 rights, and then steadfastly hold employees accountable for brand-shaping expressions that fall outside of those rights.

The goal, after all, is to protect the flow of commerce from the negative effects of unfair labor practices;¹² the goal is not to stifle commerce with unpredictable mollicoddling.

I. THE GILDED AGE: AN EMPLOYMENT ENVIRONMENT RIPE FOR REFORM

Beginning in the mid-nineteenth century, the United States developed into an industrial powerhouse.¹³ This era has come to be known as the Gilded Age,¹⁴ and it was marked by exponential industrial growth¹⁵ and the creation of

¹⁰ Typical protected concerted activity involves union organizing, the discussion of unionization among employees, or the attempt by one employee to solicit union support from another employee. But concerted activity need not involve a union. Activities by groups of employees unaffiliated with a union to improve their lot at their work place are deemed protected concerted activities.

DOUGLAS L. LESLIE, *LABOR LAW IN A NUTSHELL* 85 (4th ed. 2000).

¹¹ "Like record stores and time-bound television, the labor union as an organizing device has outlived its usefulness: people simply don't need intermediaries to organize them into groups anymore." Tom Hayes, *Will Facebook Replace Labor Unions?*, HUFFINGTON POST (Feb. 28, 2011, 3:29 PM), www.huffingtonpost.com/tom-hayes/_b_828900.html. "Social networking sites allow a union organizer to short circuit what in the past may have taken months or years of legwork." Marissa Oberlander, *An Unlikely Union: Social Media and Labor Relations*, MEDILL REP. CHI. (Jan. 12, 2011), <http://news.medill.northwestern.edu/chicago/news.aspx?id=176075>.

¹² The purpose of the Act as stated in its preamble and evidenced by its long title is "[t]o diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce." National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–69 (2012)).

¹³ CYNTHIA L. CLARK, *THE AMERICAN ECONOMY: A HISTORICAL ENCYCLOPEDIA* 587 (Rev. ed. 2011).

¹⁴ *Id.* Mark Twain coined this term to describe the "unabashed desire of the wealthy of this era to broadcast their status through extravagant opulence." *Opulence in the "Gilded Age"*,

vast income inequalities.¹⁶ Entrepreneurs like Andrew Carnegie (in steel), John D. Rockefeller (in oil), and Cornelius Vanderbilt (in railroads) amassed incredible fortunes while, at the same time, scores of immigrants lived in abject poverty.¹⁷ The rampant use of unethical, exploitive, and illegal business practices throughout this period gave rise to many Gilded Age capitalists being branded as “robber barons.”¹⁸

Although U.S. wages for some industrial workers grew 50 percent from 1860 to 1890,¹⁹ the poorest of common laborers averaged 40 percent less income than the general slum-dweller.²⁰ More and more, increased mechanization undercut the need for skilled labor,²¹ and factories became assemblages of unskilled laborers performing simple and repetitive tasks under the direction of skilled foremen.²² Many of these workers were pulled from the swarms of immigrants and refugees entering the country in search of a better life.²³ Many were poor peasants and rural laborers from southern and eastern Europe who were qualified for little more than unskilled manual labor in mills, mines, and factories.²⁴ These workers were often easy to exploit because most were illiterate, impoverished, and non-English speakers.²⁵ Consequently, these laborers had insignificant power and inconsequential influence to alter the terms and conditions of their employment.

1890, EYEWITNESS TO HISTORY, <http://www.eyewitnesstohistory.com/gildedage.htm> (last visited Jan. 16, 2015).

¹⁵ CLARK, *supra* note 13.

¹⁶ Timothy Noah, *The United States of Inequality*, SLATE (Sept. 3, 2010, 3:06 PM), http://www.slate.com/articles/news_and_politics/the_great_divergence/features/2010/the_united_states_of_inequality/introducing_the_great_divergence.html.

¹⁷ PAUL KRUGMAN, *THE CONSCIENCE OF A LIBERAL* 18–20 (2007).

¹⁸ *See, e.g.*, Lida F. Baldwin, *Unbound Old Atlantics*, 100 ATLANTIC MONTHLY 679, 683 (1907) (“We hear now on all sides the term ‘robber barons’ applied to some of the great capitalists. . . . ‘The old robber barons of the Middle Ages who plundered sword in hand and lance in rest were more honest than this new aristocracy of swindling millionaires.’”) (quoting the August, 1870 issue of *The Atlantic Monthly*; writing in 1907 about how little business had changed in thirty-five years).

¹⁹ “The average daily wage made an estimated net over-all advance between 1860 and 1890 of roughly 50 percent for manufacturing and 60 percent for building trades workers.” CLARENCE D. LONG, NAT’L BUREAU OF ECON. RESEARCH, *WAGES AND EARNINGS IN THE UNITED STATES: 1860–1890*, at 13 (1960).

²⁰ HIGHAM, *supra* note 4, at 66.

²¹ *Id.* at 114.

²² *Id.*

²³ *Id.* at 65.

²⁴ *Id.* at 114.

²⁵ *Id.* at 66.

A. Securing Public Support

Unfortunately for them, the political and judicial ideology of the Gilded Age overshadowed workers' rights and held that freedom-of-contract principles justified laborers working under whatever conditions they personally negotiated and accepted.²⁶ In truth, most of them had no choice but to accept whatever job they were able to find in order to provide for their families—even if it meant working long hours, for little pay, under conditions devoid of basic dignity.²⁷

Take for example the story of the Triangle Waist Company, a garment factory in the heart of New York City.²⁸ The factory workers were mostly women, at least one of whom was only thirteen years old, and they were largely recent Italian and European Jewish immigrants who had emigrated to the U.S. with their families in hopes of realizing the American Dream.²⁹ Instead, they suffered under crushing poverty and deplorable working conditions.³⁰ On March 25, 1911, 148 of the 600 laborers crammed into the upper floors of this urban factory lost their lives to a fire cloaked in business negligence and greed.³¹ Many of the garment workers died leaping from ninth floor windows to avoid the searing flames.³² Later, workers who survived this tragedy reported that the ninth floor doors, which led to safety, were locked.³³ According to the reports, the owners frequently locked these exit doors to prevent workers from stealing materials.³⁴

This tragedy highlights the inhumane working conditions imposed upon industrial workers in the years before enactment of the NLRA. “To many, its

²⁶ See, e.g., *Adair v. United States*, 208 U.S. 161, 173 (1908) (“The right to purchase or to sell labor is part of the liberty protected by [the Fourteenth] Amendment” (quoting *Lochner v. New York*, 198 U.S. 45 (1905))); *Lochner*, 198 U.S. at 53 (“The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution.”) (citing *Allgeyer v. Louisiana*, 165 U.S. 578 (1897)).

²⁷ See, e.g., ROSE COHEN, *OUT OF THE SHADOW* 108–14 (1918).

²⁸ *141 Men and Girls Die in Waist Factory Fire; Trapped High Up in Washington Place Building; Street Strewn with Bodies; Piles of Dead Inside*, N.Y. TIMES, Mar. 26, 1911, at 1.

²⁹ *Id.*

³⁰ *See id.*

³¹ *Id.* “One hundred and forty-one of them were instantly killed, either by leaps from the windows and down elevator shafts, or by being smothered. Seven died in the hospitals.” *New York Fire Kills 148: Girl Victims Leap to Death from Factory*, CHI. SUNDAY TRIB., Mar. 26, 1911, at 1.

³² *New York Fire Kills 148*, *supra* note 31; *141 Men and Girls Die in Waist Factory Fire*, *supra* note 28.

³³ *The Triangle Factory Fire: Investigation & Trial*, CORNELL U., <http://www.ilr.cornell.edu/trianglefire/story/investigationTrial.html> (last visited Oct. 18, 2014).

³⁴ *Id.*

horrors epitomize the extremes of industrialism.”³⁵ These exploited workers rightfully believed that organizing with fellow workers and speaking out about the terms and conditions of their employment could end in one of two ways: either with the loss of a desperately needed job or with management agreeing to inconsequential, unenforceable concessions.³⁶ Accordingly, many Triangle Waist workers believed that the risk of the former did not justify the significance of the latter, so they continued to report to work each day and to endure personal indignities and severe exploitation.

Where laborers chose to organize and negotiate as a single unit, the primary method used to effect change was to strike: to withdraw all labor and cause a cessation of production.³⁷ Such actions were fraught with risk and sacrifice for both the laborers and the employers. The laborers risked losing their jobs and being blacklisted from future industry employment,³⁸ and the employers were forced to decide between accepting the costs of giving in to the strikers’ demands or suffering the cost of the lost production.³⁹ Because skilled workers were difficult to replace, they were the first groups to find success with this method of collective action.⁴⁰ However, the absence of enforceable legislative protections of worker rights meant that unskilled laborers—who were easy to replace and exploit—had substantially less success improving the terms and conditions of their employment.⁴¹

Although extreme examples like the Triangle Waist fire galvanized public support for labor reform,⁴² meaningful judicial and legislative support were still years away.

³⁵ *The Triangle Factory Fire: Introduction*, CORNELL U., <http://www.ilr.cornell.edu/trianglefire/story/introduction.html> (last visited Oct. 18, 2014).

³⁶ “In 1909, an incident at the Triangle Factory sparked a spontaneous walkout of its 400 employees. The Women’s Trade Union League, a progressive association of middle class white women, helped the young women workers picket and fence off thugs and police provocation.” *The Triangle Factory Fire: Sweatshops & Strikes Before 1911*, CORNELL U., <http://www.ilr.cornell.edu/trianglefire/story/sweatshopsStrikes.html> (last visited Oct. 18, 2014). By 1911, though the Triangle Factory was still a non-union shop, some of its workers had joined the International Ladies’ Garment Workers Union. *Id.*; see also William Greider, “Who Will Protect the Working Girl?”, *Introduction* to LEON STEIN, *THE TRIANGLE FIRE* xi, xiv–xv (Centennial ed. 2011).

³⁷ See, e.g., Greider, *supra* note 36, at xiv.

³⁸ *Id.*

³⁹ Worse yet, labor disputes often erupted into violent riots aggravated by employer-hired paramilitary units, like the Pinkerton Detective Agency, used “to bust strikes—often by busting heads.” *Strike at Homestead Mill: The Hated Men in Blue*, AM. EXPERIENCE, http://www.pbs.org/wgbh/amex/carnegie/sfeature/mh_blue.html (last visited Jan. 16, 2015).

⁴⁰ TAYLOR & WITNEY, *supra* note 2, at 11.

⁴¹ *Id.* at 11–12.

⁴² Greider, *supra* note 36, at xv.

B. Evolution of Judicial Support

For much of the nineteenth century the courts applied an ideology that was overtly hostile to organized labor; in 1806, a Philadelphia court went so far as to convict striking workers of criminal conspiracy.⁴³ Although this judicial treatment of strikers as criminal conspirators was diluted nearly forty years later in *Commonwealth v. Hunt*,⁴⁴ the doctrine was nonetheless applied as late as 1867.⁴⁵ Ten years later, the courts began to move away from criminal sanctions as a means to control disgruntled workers, and began to use an approach gleaned from tort law: “the speedy, flexible and potent weapon of the injunction.”⁴⁶ The courts began issuing injunctive relief to halt concerted activity, and justifying those decisions with the common-law principles of nuisance, trespass, and interference with advantageous relationships.⁴⁷

This approach, as it turned out, was similarly unpalatable to the labor movement. “After the criminal sanction had been replaced by the injunction, the courts had continued to act far beyond their range of competency; adjudicating without standards, without principles, and without restraint.”⁴⁸ Now emboldened by the doctrines of civil conspiracy, the courts began to pass judgment both on the means used or contemplated (strikes and boycotts) and the ends sought (workforce organization).⁴⁹ The Supreme Court declared that the law “prohibits any combination whatever to secure action which essentially obstructs the free flow of commerce between the states, or restricts, in that regard, the liberty of a trader to engage in business.”⁵⁰

⁴³ *Commonwealth v. Pullis*, (*Philadelphia Cordwainers’ Case*), Philadelphia Mayor’s Ct. (1806). This case was not tried in a court of record, and thus an official written decision was not preserved; for a synopsis of the trial based on a contemporary account, see *The Trial of the Boot & Shoemakers of Philadelphia, on an Indictment for a Combination and Conspiracy to Raise their Wages*, in 3 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59 (John R. Commons et al., eds. 1910).

⁴⁴ *Commonwealth v. Hunt*, 45 Mass. 111, 134 (1842) (holding that to find a union unlawful under the conspiracy doctrine the courts must find the objectives and/or activities of a union unlawful).

⁴⁵ *State v. Donaldson*, 32 N.J.L. 151, 158 (1867) (holding “the object of the combination . . . was to occasion a particular result which was mischievous, and by means which were oppressive”); Russell A. Smith, *Significant Developments in Labor Law During the Last Half-Century*, 50 MICH. L. REV. 1265, 1266 (1952).

⁴⁶ Smith, *supra* note 45.

⁴⁷ *Bhd. of Maint. of Way Emps. v. Guilford Transp. Indus.*, 803 F.2d 1228, 1230 (1st Cir. 1986) (citing *In re Debs*, 158 U.S. 564 (1895)).

⁴⁸ HARRY H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* 39 (1968).

⁴⁹ See, e.g., *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 261–62 (1917) (holding that “yellow-dog contracts,” contracts wherein employees agreed not to join or associate with a union, were legal and binding by state and federal courts); *Loewe v. Lawlor (Danbury Hatters’ Case)*, 208 U.S. 274, 292 (1908) (holding that the United Hatters’ nationwide boycott was a restraint on interstate commerce in violation of the Sherman Antitrust Act).

⁵⁰ *Danbury Hatters’ Case*, 208 U.S. at 293, (holding that both primary and secondary boycotts were actionable in damages pursuant to Section 7 of the Sherman Antitrust Act).

Although this period was marked by the liberal use of judicial injunctions to control collective action, some judges began to write passionate dissents recognizing the legal acceptability and social desirability of labor organizations.⁵¹ In a dissent that seems strangely prophetic of today's employment environment, Judge Oliver Wendell Holmes, while sitting on the Massachusetts Supreme Court, wrote:

It is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast, means an ever-increasing might and scope of combination. . . . Whether beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the fundamental axioms of society, and even the fundamental conditions of life, are to be changed.

One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.⁵²

Though it was still years from taking hold, the view expressed in Judge Holmes' dissent eventually won the day. A system based upon free competition is strongest when workers, acting in concert with one another, are provided equal footing with management in the negotiation of the terms and conditions of their employment. However, absent legislative protections of a worker's right to engage in collective action, Judge Holmes' words would remain purely prophetic—arguably persuasive, but legally inconsequential.

C. *Evolution of Legislative Support*

The lack of legislative guidance during this era may indicate “that the legislatures on the whole were satisfied with the results of judicial intervention,” but it also suggests that organized labor lacked political power or interest.⁵³ Accordingly, most of Congress's pro-labor legislation during this period was limited to railway workers,⁵⁴ but in 1914, the tide shifted significantly when Congress enacted the Clayton Act.⁵⁵

⁵¹ TAYLOR & WITNEY, *supra* note 2, at 76–78 (discussing the impact of Holmes's & Brandeis's dissents).

⁵² *Vegeahn v. Guntner*, 167 Mass. 92, 108 (1896) (Holmes, J., dissenting).

⁵³ Smith, *supra* note 45, at 1267.

⁵⁴ See, e.g., Railway Labor Act, ch. 347, 44 Stat. 577–78 (1926) (codified as amended at 45 U.S.C. §§ 151–88 (2012)) (supporting collective bargaining and protecting railway workers' rights to organize); Erdman Act of 1898, ch. 370, § 10, 30 Stat. 424, 428 (1898) (forbidding employers in the railroad industry from executing “yellow dog” contracts).

⁵⁵ Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12–19, 21–27 and 29 U.S.C. §§ 52–53 (2012)). Samuel Gompers, the president of the American Federation of Labor, declared the Clayton Act (Section 6) as “the Magna Carta upon which

The Clayton Act declared that human labor was not to be considered an article of commerce and that the existence of unions was not to be considered a violation of antitrust laws.⁵⁶ In addition, the Act prohibited federal courts from issuing injunctions in labor disputes except to prevent irreparable injury to property.⁵⁷ Congress intended for this prohibition to be absolute when peaceful picketing and boycotts were involved.⁵⁸ The Supreme Court, not of the same opinion, ruled that the Sherman Antitrust Act as amended by the Clayton Act still permitted employers injunctive relief from secondary boycotts (boycotts against suppliers or vendors of the employer).⁵⁹

In 1927, Congress presided over public hearings as it considered introduction of an anti-injunction bill.⁶⁰ These hearings set the stage for passage of the NLRA. The Norris-LaGuardia Act of 1932 effectively blocked the judiciary from handing out labor injunctions and from enforcing employment contracts wherein laborers agreed not to associate with unions (yellow-dog contracts).⁶¹ Then in 1933, President Roosevelt's New Deal plan, which was intended to spark economic recovery from the Great Depression, gave rise to the National Industrial Recovery Act ("NIRA").⁶² Section 7(a) of NIRA protected workers' rights to form or join unions of their choosing and to engage in collective bargaining.⁶³

Unfortunately, NIRA failed to specify the very labor practices it purported to prohibit, and it provided no substantive mechanisms for enforcement.⁶⁴ The resulting wave of union unrest and strike activity over that summer prompted President Roosevelt to create the National Labor Board to interpret and enforce the new law.⁶⁵ Though the Board was initially successful in settling the disputes of hundreds of thousands of workers, by February of 1934, the Board was ineffective and on the verge of collapse.⁶⁶ Soon thereafter, the U.S. Supreme Court held NIRA unconstitutional in its entirety.⁶⁷

the working people will rear their structure of industrial freedom." DANIEL R. ERNST, *LAWYERS AGAINST LABOR: FROM INDIVIDUAL RIGHTS TO CORPORATE LIBERALISM* 165 (1995).

⁵⁶ Clayton Act § 6, 15 U.S.C. § 17 (2012).

⁵⁷ Clayton Act § 20, 29 U.S.C. § 52 (2012); *Bhd. of Maint. of Way Emps. v. Guilford Transp. Indus.*, 803 F.2d 1228, 1231 (1st Cir. 1986).

⁵⁸ *See Bhd. of Maint. of Way Emps.*, 803 F.2d at 1233–34.

⁵⁹ *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 478–79 (1921) (holding Section 20's prohibition on injunctions is to be narrowed to disputes between parties in the proximate relation of employer and employee and not to secondary boycotts).

⁶⁰ TAYLOR & WITNEY, *supra* note 2, at 78.

⁶¹ *Id.* at 78–79, 81, 84.

⁶² *Id.* at 150.

⁶³ *Id.* at 151.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 152–53.

⁶⁷ *Id.* at 157; *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935).

Precisely one month later, Congress overwhelmingly passed the National Labor Relations Act.⁶⁸ The Act's preamble declares that it is the policy of the United States to protect a worker's full freedom of association, self-organization, and designation of representatives for the purpose of negotiating the terms and conditions of employment.⁶⁹ Finally, after years of struggling to highlight their plight, the laborers who protected their employment with little more than their endurance of muscle, silence of complaint, and employer's favor, now had a voice not easily suppressed. The NLRA established the will of the people, through their Congress, to balance the power dynamics in the employment relationship; Congress's constitutional authority to regulate interstate commerce became the vehicle for that reform.⁷⁰

II. EVOLUTION OF COLLECTIVE ACTION

In 1937, two years after enactment of the NLRA, the Supreme Court ruled upon the Act's constitutionality.⁷¹ In holding that the Act could be "construed so as to operate within the sphere of constitutional authority,"⁷² the Court found that labor relations had the potential to "burden[] or obstruct[]" interstate commerce.⁷³ The Court then succinctly described the essence of the struggle:

Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority. Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that, if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer.⁷⁴

For over seventy-eight years, the NLRA has stood for the proposition that equalizing the bargaining power between labor and management would aid the flow of commerce. The manner of equalization, borne of industrial-era realities, was collective action through unionization. It is important to note, however, that Congress did not enact the NLRA specifically to sanction unionization

⁶⁸ The *Schechter* decision was handed down on May 27, 1935, and the NLRA was passed on June 27, 1935. TAYLOR & WITNEY, *supra* note 2, at 157–58.

⁶⁹ National Labor Relations Act § 1, 29 U.S.C. § 151 (2012).

⁷⁰ "Experience has proved that protection by law of the right of employees to organize and bargain collectively . . . promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, . . . and by restoring equality of bargaining power between employers and employees." *Id.*

⁷¹ NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937).

⁷² *Id.*

⁷³ *Id.* at 31–32.

⁷⁴ *Id.* at 33.

per se; rather, the Act was intended to protect the flow of commerce from the negative effects of unfair labor practices.⁷⁵ In 1935, a union's threat to terminate, interrupt, or slow down production was such a formidable hazard, it served as the single most effective tool to compel that equalization.

Today, the notion that the equalization of bargaining power grows from a combination of workers beholden to the same employer fails to account for twenty-first century realities. Given the manner in which globalization, automation, and virtual communities shape today's employment environment, the potency of a union's threat to strike is greatly diminished.⁷⁶ Of much greater potency is the diminution of a company's brand. In an age where information is king, where "googling" has become a standard part of the lexicon, and where online posts have the permanency of digital tattoos, companies are more likely to fear damage to brand than damage to production. Consequently, the NLRB's lack of consistent guidance on issues related to viral action frustrates the fundamental goal of the NLRA: to protect the flow of commerce from the negative effects of unfair labor practices.⁷⁷

A. *Yesterday's Success, Today's Reality*

In the thirty years immediately following enactment of the NLRA, the Act was generally successful in achieving its goal.⁷⁸ Many of the benefits conferred upon today's workers grew from these successes and have become so conventional that they are no longer seen as progressive. In fact, legislation administered by designated government agencies now protects many of the terms and conditions of employment that laborers so vigorously fought to secure.⁷⁹ Indeed, the NLRB's website directs aggrieved workers whose complaints do not fall within the NLRB's authority to one of seven federal labor agencies or to an

⁷⁵ National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–69 (2012)).

⁷⁶ "Today, the right to strike is so weak that unions rarely utilize it, and serious efforts are underway to weaken it further." Julius G. Getman & F. Ray Marshall, *The Continuing Assault on the Right to Strike*, 79 TEX. L. REV. 703, 704 (2001).

⁷⁷ See 49 Stat. at 449.

⁷⁸ Richard B. Freeman, *What Can We Learn from the NLRA to Create Labor Law for the Twenty-First Century?*, 26 A.B.A. J. LAB. & EMP. L. 327, 329 (2011).

⁷⁹ The Department of Labor's Wage and Hour Division oversees complaints related to wages, tips, work hours, overtime, breaks, vacation pay, or the Family Medical Leave Act. See *Related Agencies*, NAT'L LAB. REL. BOARD, <http://www.nlr.gov/resources/related-agencies> (last visited Oct. 18, 2014). The Occupational Safety and Health Administration oversees work-related safety and health issues. *Id.* Employees discriminated against because of race, ethnicity, religion, age, gender, national origin or sexual orientation can seek relief through the Equal Employment Opportunity Commission. *Id.* Employees discriminated against because of immigration or citizenship status or because of national origin can contact the Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices. *Id.*

appropriate state labor office.⁸⁰ As a result, twenty-first century workers have several legal mechanisms at their disposal to help combat abuses of worker rights. Nevertheless, abuses continue.

Take for example the reemergence of garment center sweatshops in the United States, brought to the public eye in 1995. “In Los Angeles, labor officials discovered a slave-sweatshop where [eighty] Thai immigrants were forced to sew brand-name clothes in a compound behind razor wire and armed guards. The workers earned \$2 per hour for making clothes later sold at major stores.”⁸¹ Companies unwilling or unable to facilitate such blatantly prohibited, immoral operations in the United States may try to shield themselves from U.S. labor laws by offshoring the labor.

In Honduras, girls as young as 13 were found sewing clothing for TV talk-show host Kathie Lee Gifford’s apparel line sold at Wal-Mart. The girls worked from 7:30am to 9:00pm, Monday through Friday, and because of forced overtime to meet rush orders, the children were not permitted to attend night school, where from 6:00 pm to 10:00 pm they could have studied to complete their grammar school educations.⁸²

Offshoring of unskilled labor, however, may not be sufficient to shield U.S. corporations from shouldering financial responsibility for tragedies that occur as a result of negligent operations.

[A Bangladeshi garment worker] demand[s] that Walmart, which, among other retailers, had clothes manufactured at the facility, pay compensation to victims like herself and the families of those who died

. . . .

The disaster at Tazreen was the worst garment factory fire in the history of Bangladesh. Many of the [112] deceased were burned beyond recognition, and as many as 53 bodies were buried unclaimed, according to reports in Bangladesh.

The factory’s safety lapses have been well documented. The massive building didn’t have a staircase mounted to the outside for emergency exit, and each floor had windows securely bolted with iron frames, effectively turning the factory into a cage for workers.⁸³

These examples highlight the inhumane working conditions inflicted upon industrial workers in the years since enactment of the NLRA. Can it be that the

⁸⁰ *Id.*

⁸¹ *Background on Sweatshops*, DO SOMETHING, <http://www.dosomething.org/tipsandtools/background-sweatshops> (last visited Oct. 18, 2014).

⁸² *Id.*

⁸³ Dave Jamieson & Emran Hossain, *Bangladesh Factory Fire Victim Calls On Walmart to Pay Compensation*, HUFFINGTON POST BUS. (Apr. 12, 2013, 6:11 PM), http://www.huffingtonpost.com/2013/04/12/_n_3071974.html. The local business owner and management team have since been indicted. Farid Ahmed, *Bangladesh Court Orders Arrest of Apparel Factory Owner, Five Others*, CNN (Dec. 31, 2013, 7:05 AM), <http://www.cnn.com/2013/12/31/world/asia/bangladesh-fire-arrest-orders/>.

more things change, the more they stay the same? In truth, one of the most effective strategies for improving egregious terms and conditions of employment is to shine a light on them. Labor organizers who once stood on public sidewalks in front of factories holding up signs denouncing deplorable conditions, today can put that same message in front of millions more consumers by posting it online. Today, all David may need to take down Goliath is a smart phone and a Twitter account.

B. The Twenty-First Century Difference: Viral Action

A key difference between aggrieved employees of the past and aggrieved employees of today is that today's employees have extraordinary, high-speed access to a tremendous number of eyes and ears. The power of social media coupled with the reach of the World Wide Web enables every employee with a smart phone, social media account, or Internet access to publish their grievances with blazing speed and ominous longevity. The ubiquity of social media tools like text messaging, e-mail, photo sharing, social networking, blogs, and review sites reveals the extraordinary expressive capability supplied by today's media landscape.

This capability provides employees with an unprecedented ability to distribute information, organize supporters, and coordinate campaigns. Prior to the widespread use of social media, access to media was expensive and required the assistance of professionals to publish, mail, or broadcast messages to the media's consumers. Additionally, the effectiveness of these "non-social media" (NSM) tools was limited to either the distribution of a single message to many consumers (TV, radio, newspapers, mass mail), or the development of a message with a single consumer (telephone, telegraph, fax). Consequently, labor organizers endeavoring to develop accurate, compelling messages for mass distribution were encumbered by the many limitations of NSM.

"The media that is good at creating conversations is no good at creating groups. And the media that is good at creating groups is no good at creating conversations."⁸⁴ In this media landscape, if you wanted to have a conversation, you interacted with one other person; if you wanted to address a group, you were limited to one message for the entire group. The unfortunate consequence of the "one-to-many" messages delivered via NSM was that organizers had to write broadly phrased, inexact messages in the hopes of inspiring as wide-ranging a group as possible. The recipients of these messages were essentially spectators unable to resolve misunderstandings, disagreements, or apprehensions without engaging in a time-consuming, perhaps costly, "one-to-one" manner of communication.

⁸⁴ Clay Shirky, *How Social Media Can Make History*, TED, 03:06 (June 2009), http://www.ted.com/talks/clay_shirky_how_cellphones_twitter_facebook_can_make_history.html.

Those days are gone, never to return. Gone are the days when consuming information was an inherently passive experience. Today, social media tools permit every media consumer to also be a producer.⁸⁵ Information sharing has become so quick, inexpensive, and easy that the spectator paralysis typical of the NSM consumer has become an unfamiliar concept to members of the former audience.⁸⁶ “And to put it in one bleak sentence, no medium has ever survived the indifference of 25-year-olds.”⁸⁷

Media is no longer strictly a source of information; it is now, more and more, a source of coordination. Labor campaigns have effectively used this technology to redefine collective action, and their efforts have caused powerful, multinational corporations to overhaul labor-averse employment policies. As an example, Wal-Mart, often a target of such efforts, has yielded to public pressure over worker rights and has conceded that it needs to do more in its efforts to improve its foreign labor standards.⁸⁸ Today, non-profit pro-labor organizations routinely organize significant support through Facebook, Twitter, and other social media sites.

Companies, well aware of the power of social media to shape their brands, spend vast fortunes and significant man-hours each year on elevating their online image.⁸⁹ They also must devote resources to the development of social media policies that will both advance their business interests and protect their brand.⁹⁰ Often these two goals are in direct conflict with one another, and often the resulting policies impermissibly restrict employee rights to engage in collective action.

All the while, the NLRB struggles to define a meaningful Social Media Policy.

⁸⁵ See DAN GILLMOR, *WE THE MEDIA* 84 (2004), available at <http://www.authorama.com/book/we-the-media.html>.

⁸⁶ *Id.* at 141 (defining the former audience as a consumer of information who actively engages and contributes to the knowledge store).

⁸⁷ Decca Aitkenhead, *Clay Shirky: 'Paywall Will Underperform—the Numbers Don't Add Up'*, *GUARDIAN* (July 4, 2010), <http://www.theguardian.com/technology/2010/jul/05/clay-shirky-internet-television-newspapers>.

⁸⁸ Jessica Wohl, *Walmart Promises to Strengthen Supply Chain Safeguards After Bangladesh Factory Fire*, *HUFFINGTON POST BUS.* (Dec. 11, 2012, 1:13 AM), http://www.huffingtonpost.com/2012/12/11/_n_2275783.html.

⁸⁹ See, e.g., Louise Story, *The New Advertising Outlet: Your Life*, *N.Y. TIMES*, Oct. 14, 2007, at BU3, available at <http://www.nytimes.com/2007/10/14/business/media/14ad.html>; Craig Carter, *15 Viral Marketing Examples over the Past 5 Years*, *IGNITE SOC. MEDIA* (Sept. 18, 2013), <http://www.ignitesocialmedia.com/social-media-examples/15-viral-marketing-examples-campaigns-past-5-years/>.

⁹⁰ Spencer Hamer, *Creating an Effective Workplace Social Media Policy*, *BLOOMBERG LAW* (July 29, 2013), <http://www.bna.com/creating-an-effective-workplace-social-media-policy/>.

III. DEFINING A MEANINGFUL SOCIAL MEDIA POLICY

The NLRB's latest report concerning social media cases⁹¹ may have done more to confuse than to clarify what is required for a lawful workplace Social Media Policy ("SMP").⁹² The report provides a series of examples to distinguish lawful SMP provisions from unlawful SMP provisions.⁹³ Unfortunately, a judicious reading of the report provides little assurance that today's acceptable SMP will not become tomorrow's unlawful prohibition of employee rights to communicate about work-related grievances. Section 7 protects the right of workers to take collective action to improve their working conditions. Thus, it protects most employee comments about the terms and conditions of their employment, so long as the comments are not made "solely by and on behalf of the employee himself" or they are not "mere griping."⁹⁴

With such seemingly strong protections in place for employee communications, employers struggle to promulgate failsafe policies designed to promote workplace civility.⁹⁵ Additionally, employer policies designed to prevent disclosure of confidential workplace-related information are unlawful unless they clearly exempt Section 7 activity.⁹⁶ The unavoidable result is an uneasy tension between the employers' business interests and the employees' right to engage in collective action to improve working conditions. While the NLRB recognizes this tension, its SMP decisions have done little to relieve it.

Given the substantial authority of the NLRB to declare employer SMPs unlawful,⁹⁷ many employers must turn to the NLRB's published decisions, rec-

⁹¹ OFFICE OF THE GEN. COUNSEL, NLRB, MEMORANDUM OM 12-59, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES 2 (May 30, 2012) (construing policies presented in cases before the NLRB).

⁹² See, e.g., Steven Greenhouse, *Even If It Enrages Your Boss, Social Net Speech Is Protected*, N.Y. TIMES, Jan. 22, 2013, at A1, available at <http://www.nytimes.com/2013/01/22/technology/employers-social-media-policies-come-under-regulatory-scrutiny.html> ("Even when you review the [NLRB] rules and think you're following the mandates, there's still a good deal of uncertainty." (quoting labor attorney Steven M. Swirsky)).

⁹³ See generally OFFICE OF THE GEN. COUNSEL, *supra* note 91 (analyzing SMP provisions reviewed by NLRB).

⁹⁴ Ann C. McGinley & Ryan P. McGinley-Stempel, *Beyond the Water Cooler: Speech and the Workplace in an Era of Social Media*, 30 HOFSTRA LAB. & EMP. L.J. 75, 89-90 (2012) (quoting Wal-Mart, Case 17-CA-25030, Advice Memorandum, at 3 (July 19, 2011)); see also 29 U.S.C. § 158(a)(1) (2012) ("It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . .").

⁹⁵ See, e.g., Hispanics United of Buffalo, Inc., 359 N.L.R.B. No. 37, at 2, 4 (Dec. 14, 2012) (employer's "zero tolerance" policy prohibiting "bullying and harassment" does not insulate it from Section 8 violations); Karl Knauz Motors, Inc., 358 N.L.R.B. No. 164, at 1 (Sept. 28, 2012) (employer's "Courtesy" rule unlawful because it may chill protected speech).

⁹⁶ OFFICE OF THE GEN. COUNSEL, *supra* note 91, at 5.

⁹⁷ See 29 U.S.C. § 158(a).

ommendations, and examples for guidance.⁹⁸ Ultimately, rules that employees would reasonably construe “to chill . . . the exercise of their Section 7 rights” are unlawful.⁹⁹ Thus, rules that explicitly abridge employees’ ability to discuss with one another the conditions of their employment are unlawful.¹⁰⁰

Rules that do not explicitly restrict these protected activities, however, will only be deemed unlawful “upon a showing that: (1) employees would *reasonably construe* the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.”¹⁰¹ Furthermore, rules that clearly outline their purpose and then restrict the scope of their enforcement with well-defined examples of illegal or unprotected conduct are only lawful to the extent that employees would not reasonably construe the rule to cover protected activity.¹⁰²

A. *Defining the Acceptable Confidentiality Standard*

Although “[t]he Board has long recognized that employees have a right to discuss wages and conditions of employment with third parties as well as each other,”¹⁰³ the Board also recognizes a legitimate need for employers to keep certain corporate, financial, or trade information confidential.¹⁰⁴ Nevertheless, absent clear examples or context excepting Section 7 activity, rules similar to those listed below are overbroad and therefore unlawful¹⁰⁵:

- restrictions on “release [of] confidential guest, team member or company information,” to include employee salary information;¹⁰⁶
- rules requiring social media interactions be “completely accurate and not misleading”;¹⁰⁷
- rules requiring that employees “not . . . reveal non-public company information on any public site.”¹⁰⁸ Such nonpublic information includes:
 - “any topic related to the financial performance of the company”;¹⁰⁹

⁹⁸ See generally OFFICE OF THE GEN. COUNSEL, *supra* note 91 (providing framework for analysis and construction of lawful SMPs).

⁹⁹ *Id.* at 3 (quoting *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999)).

¹⁰⁰ *Id.* (citing *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646, 647 (2004)).

¹⁰¹ *Id.* (emphasis added).

¹⁰² *Id.* (citing *Tradesmen Int’l*, 338 N.L.R.B. 460, 460–62 (2002)).

¹⁰³ *Id.* at 4 (citing *e.g.*, *Cintas Corp.*, 344 N.L.R.B. 943, 943 (2005), *enforced*, 482 F.3d 463 (D.C. Cir. 2007)).

¹⁰⁴ *Id.* at 7, 18.

¹⁰⁵ See generally *id.* (construing legality of SMP provisions presented in cases before the NLRB).

¹⁰⁶ *Id.* at 4.

¹⁰⁷ *Id.* at 6.

¹⁰⁸ *Id.* at 7.

¹⁰⁹ *Id.*

- “information that has not already been disclosed by authorized persons in a public forum”;¹¹⁰
- “personal information about another [Employer] employee, such as performance, compensation or status in the company”;¹¹¹ and
- “confidential or proprietary” company information.¹¹²
- restrictions on providing such information to blogs, the press, or government agencies;¹¹³
- “rule[s] that require employees to get permission before reusing others’ content or images,” even where such material is protected by copyright;¹¹⁴ and
- “provisions that threaten employees with discharge or criminal prosecution for failing to report unauthorized access to or misuse of confidential information.”¹¹⁵

Note the inevitable tension here: the NLRB has recognized the need for employees to organize and discuss information that the NLRB has recognized employers may need to keep confidential. Thus, many seemingly sensible employer policies intended to safeguard sensitive company information inevitably fall short of protecting the employee, the employer, or the information.

B. *Defining the Acceptable Civility Standard*

Likewise, the NLRB deems rules governing employee civility—absent clear examples or context excepting Section 7 activity—to be overbroad and therefore unlawful.¹¹⁶ Employers must carefully construct rules of workplace civility such that employees are not chilled from engaging in concerted activity. Accordingly, when devoid of context, rules like the following are unlawful:¹¹⁷

- suggestions that employees “resolve concerns about work by speaking with co-workers, supervisors, or managers” rather than by posting complaints on the Internet;¹¹⁸
- “provision[s] prohibiting employees from expressing their personal opinions to the public regarding the workplace, work satisfaction or dissatisfaction, wages, hours or work conditions”;¹¹⁹

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 13.

¹¹³ *Id.* at 18–19.

¹¹⁴ *Id.* at 11.

¹¹⁵ *Id.* at 5.

¹¹⁶ *Id.* at 20.

¹¹⁷ *See generally id.* (construing legality of SMP provisions presented in cases before the NLRB).

¹¹⁸ *Id.* at 11.

¹¹⁹ *Id.* at 14.

- provisions “warning employees to avoid harming the image and integrity of the company”;¹²⁰
- restrictions on “negative conversations” about managers or working conditions;¹²¹
- “prohibition[s] on making disparaging or defamatory comments.”¹²²

Still, the NLRB recognizes that employers have “a legitimate basis to prohibit [some] workplace communications.”¹²³ As a result, employees can lose the Act’s protection (even if the SMP provision is found to be unlawful) when they combine concerted protected activity with egregious behavior, including displays of an “opprobrious or abusive manner.”¹²⁴

Finally, the NLRB report concludes that an employer’s use of a “saving clause”¹²⁵ does not cure otherwise unlawful provisions, so long as the clause fails to explain in layperson’s terms what the right to engage in “concerted activity” entails.¹²⁶

IV. DIFFICULTIES WITH IMPLEMENTING THE NLRB’S SMP GUIDANCE

The NLRB’s attempt at clarifying the requirements for lawful SMPs has struck some corporate officials as being more about show than substance; more about “an effort to remain relevant” in the twenty-first century than about protecting collective bargaining rights.¹²⁷ The Board’s inconsistent adaptation of the NLRA to social media policies is “causing concern and confusion.”¹²⁸ This confusion sprouts from the subjective nature of the unpredictable, fact-specific analysis found in many NLRB decisions related to social media.

For example, in *Karl Knauz Motors*, the NLRB found a “Courtesy” rule unlawful because of its broad prohibition against “disrespectful” conduct and “language which injures the image or reputation of the [employer].”¹²⁹ Yet in *Tradesmen International*, the Board discusses a series of cases where it viewed essentially the same facts in the opposite manner when it found rules prohibit-

¹²⁰ *Id.* at 13.

¹²¹ *Id.* (citing *Claremont Resort & Spa*, 344 N.L.R.B. 832, 836 (2005)).

¹²² *Id.* at 17.

¹²³ *Id.* at 20.

¹²⁴ *Cellco P’ship*, 349 N.L.R.B. 640, 646 (2007).

¹²⁵ A severability clause or “saving clause” is “a provision that keeps the remaining provisions of a contract or statute in force if any portion of that contract or statute is judicially declared void, unenforceable, or unconstitutional.” BLACK’S LAW DICTIONARY 1498 (9th ed. 2009).

¹²⁶ OFFICE OF THE GEN. COUNSEL, *supra* note 91, at 14 (citing *Clearwater Paper Corp.*, Case 19-CA-064418).

¹²⁷ *See Greenhouse*, *supra* note 92.

¹²⁸ *Id.*

¹²⁹ *Karl Knauz Motors, Inc.*, 358 N.L.R.B. No. 164, at 2 (Sept. 28, 2012).

ing conduct “tending to damage or discredit an employer’s reputation to be lawful.”¹³⁰

Employers desirous of providing guidance through SMPs have their hands tied as they seek to promote civility and decorum in the workplace. On the one hand, employers are compelled to create policies that outline acceptable behavior;¹³¹ on the other, they are constrained by the NLRB’s application of Section 7 to SMPs. “The [NLRB] says workers have a right to discuss work conditions freely and without fear of retribution, whether the discussion takes place at the office or on Facebook.”¹³² Employers, obliged to maintain good-natured work environments, must read between the lines of the NLRB’s conflicting messages in order to uncover meaningful solutions.

A. *Conflicting Confidentiality Messages*

The NLRB’s position on confidentiality policies is firmly rooted in a desire to ensure that employers do not mislead employees into believing that their Section 7 rights are somehow restricted.¹³³ A noble desire. NLRB decisions, however, have not been so stationary. This surreal dichotomy—NLRB’s noble desire, tainted by nomadic execution—is difficult to reconcile. The NLRB social media report deems unlawful an instruction that employees not “release confidential guest, team member or company information” because employees could reasonably interpret it as restricting them from discussing and disclosing their conditions of employment.¹³⁴ The NLRB then suggests, however, that where employers include such a rule within a list of prohibited “egregious conduct,” the surrounding context will preclude employees from reasonably construing the confidentiality rule as restricting Section 7 activity.¹³⁵

For example, in response to a challenged SMP involving employees posting employer related information to blogs, message boards, social networks, and other online media, the NLRB issued the following advice¹³⁶: “A prohibition against ‘negative conversations’ about managers within a list of policies

¹³⁰ *Tradesmen Int’l*, 338 N.L.R.B. 460, 462 (2002), *quoted in Karl Knauz Motors*, 358 N.L.R.B. No. 164, at 4 n.9 (Hayes, Member, dissenting).

¹³¹ *McGinley & McGinley-Stempel*, *supra* note 94, at 87 (discussing requirement for certain employer policies mandated by Title VII and the other antidiscrimination statutes).

¹³² *Greenhouse*, *supra* note 92.

¹³³ *See generally* OFFICE OF THE GEN. COUNSEL, *supra* note 91 (analyzing provisions from SMPs reviewed by NLRB).

¹³⁴ *Id.* at 4.

¹³⁵ *Id.* at 13–14 (citing *Tradesmen Int’l*, 338 N.L.R.B. 460, 462).

¹³⁶ Christine Neylon O’Brien, *The First Facebook Firing Case Under Section 7 of the National Labor Relations Act: Exploring the Limits of Labor Law Protection for Concerted Communication on Social Media*, 45 SUFFOLK U. L. REV. 29, 41 (2011) (referencing Advice Memorandum, Office of the Gen. Counsel, Sears Holdings (Roebucks), No. 18-CA-19081 (NLRB Dec. 4, 2009) [hereinafter *Sears Advice Memo*], *available at* <http://mynlrb.nlr.gov/link/document.aspx/09031d45802d802f>.)

about working conditions [is] deemed unlawful due to its ‘potential chilling effect.’”¹³⁷ The advice went on to say, “[i]n contrast, a rule that prohibit[s] statements ‘slandrous or detrimental to the company’ within a list of prohibited conduct including ‘sexual or racial harassment’ and ‘sabotage’ would not reasonably be understood to restrict section 7 activity because the context list[s] examples of ‘egregious misconduct.’”¹³⁸

Similarly, the NLRB found a Wal-Mart confidentiality provision lawful because it contained the following examples of prohibited disclosures: “information regarding the development of systems, processes, products, know-how, technology, internal reports, procedures, or other internal business-related communications.”¹³⁹ It seems odd that such a facile list is sufficient to save an otherwise unlawful provision. The more convincing analysis suggests that employees could easily construe each of those prohibitions as chilling their right to discuss the conditions of their employment. In truth, an employee fearful of a hazardous, disorganized procedure that his employer will soon impose on him would reasonably construe such a provision as restricting his right to discuss this procedure with others. Certainly, terms like “other internal business-related communications” are too broad.

This sort of inconsistency encumbers the employer’s ability and willingness to develop SMPs that adequately protect either the employer’s or the employee’s interests. The NLRB’s insistence that clear examples and proper context will somehow remove ambiguity from rules meant to regulate such inherently disparate interests, therefore, seems misplaced. For every example of inappropriate conduct not protected by Section 7, there is a protected example not far behind. Thus, to be failsafe, SMPs must be overflowing with precise, detailed examples.

That said, what sort of specificity would be necessary to protect both the employer’s confidentiality rights and the employee’s Section 7 rights in employment environments like Triangle Waist or Tazreen?

Consider the following scenario: A garment factory in Massachusetts employs several hundred laborers in the production of athletic attire for sale at national retailers. Prior to the start of their employment, each laborer signed a document indicating their acceptance and understanding of the employer’s social media policy. This policy included a confidentiality clause that prohibited the disclosure of information regarding the development of systems, processes,

¹³⁷ *Id.* at 42 (quoting Sears Advice Memo, *supra* note 136, at 5 (citing Claremont Resort & Spa, 344 N.L.R.B. 832, 836 (2005))); *see also* OFFICE OF THE GEN. COUNSEL, *supra* note 91, at 13 (citing Claremont Resort & Spa, 344 N.L.R.B. 832, 836).

¹³⁸ O’Brien, *supra* note 136, at 42 (quoting Sears Advice Memo, *supra* note 131, at 5–6); *see also* OFFICE OF THE GEN. COUNSEL, *supra* note 91, at 13–14 (citing Tradesmen Int’l, 338 N.L.R.B. 460, 462).

¹³⁹ OFFICE OF THE GEN. COUNSEL, *supra* note 91, at 20 (citing Walmart, Case 11-CA-067171).

products, know-how, technology, internal reports, or procedures. After working at the factory for several months, several of the employees began to commiserate with one another about the unsafe, custom-made machinery recently installed on the production line. They discussed ways of bringing their safety concerns to the attention of management. That night, one of the employees posted a photograph of the overcrowded production line to his Facebook account. Under the photo he declared, “Someday somebody walking through this factory is going to get hurt by this crappy machine.” A different employee, unaware of the previous post, posted to his Twitter account a similar photograph accompanied by the statement, “We should not have to work under these unsafe conditions.” A week later, they both were fired.

The current state of NLRB jurisprudence would seem to indicate that although both employees were engaged in concerted activity, only the second employee’s post would receive protection under the NLRA.¹⁴⁰ In *Five Star Transportation*, the NLRB found that of eleven letters written by a group of school bus drivers and sent to the School District as part of a letter-writing campaign, only six were entitled to protection.¹⁴¹ The NLRB separated the eleven drivers into three groups, based on their individual letters.¹⁴² In analyzing the first group, the Board found that the relationship between the content of the employees’ letters and their status as employees in search of mutual aid or protection was so attenuated that they were not entitled to the Act’s protection.¹⁴³

In the case of [the first group of drivers], we find that the content of their letters was not sufficiently related to the drivers’ terms and conditions of employment to constitute protected conduct. In their letters, [they] focused solely on general safety concerns and did not indicate that their concerns were related to the safety of the drivers as opposed to others. . . . Further, we are not persuaded that these two letters should be interpreted as raising the drivers’ common concerns simply because they were written as part of the drivers’ letter-writing campaign. Instead, *we determine whether certain communications are protected by examining the communications themselves.*¹⁴⁴

This treatment does not bode well for social media posts. The very nature of social media is antithetical to a system that confers protection by examining individual communications excised from their respective campaigns (their context). The astounding influence of social media campaigns derives from social media’s revolutionary distribution scheme. Every individual with access to the network is essentially a multi-national publisher. Every individual with access

¹⁴⁰ The above scenario is loosely based on the facts of *Five Star Transportation*, and the NLRB’s response indicated here is consistent with that holding. See *Five Star Transp., Inc.*, 349 N.L.R.B. 42 (2007).

¹⁴¹ *Id.* at 44–47.

¹⁴² *Id.* at 44.

¹⁴³ *Id.*

¹⁴⁴ *Id.* (emphasis added) (footnote omitted).

to the network can potentially advance an expression to a very large group of people; each recipient can in turn respond to the sender, to any other individual group member, to the entire group, or to an entirely new group. This one-to-many, many-to-one, many-to-many approach to distribution makes the NLRB's individual communication analysis unwieldy, impractical, and unrealistic. After all, a single post divorced from its contextual underpinnings may suggest a meaning entirely dissimilar from what was intended.

As for the hypothetical garment factory's SMP, the confidentiality clause appears to be lawful as it essentially mirrors the acceptable Wal-Mart policy above. Thus, any violation of the policy could rightfully serve as a terminable offense (unless the violation qualified for NLRA protection for some other reason). That said, the employer's authority here quickly becomes uncertain with the addition of a third, fourth, or fifth employee who refused to respond to the posts because they feared doing so would violate the confidentiality clause.¹⁴⁵ The chilling effect of this policy would presumably render the policy unlawful and preclude the company from using it as a means to terminate any of the employees. Employees who successfully link their fear of concerted activity—and their resulting inactivity—to an employer's social media policy have likely struck the Achilles' heel of the offending policy. However, this 'chilling effect' doctrine poses two problems. For the discouraged employee, the problem is that deterred activity is difficult to confirm. For the employer, the problem is that the level of SMP specificity required to prevent unauthorized disclosure of sensitive information while not discouraging concerted activity is unfathomable.

Nevertheless, specificity remains a fundamental element of the ideal SMP, and labor lawyers are wrestling with how to best advise clients on the NLRB guidance. SMPs must be more specific; they must go beyond simply barring workers from posting confidential information, advises labor lawyer Denise M. Keyser.¹⁴⁶ Ms. Keyser recommends explicitly restricting disclosure of "trade secrets, product introduction dates or private health details."¹⁴⁷ But not even specificity, according to labor lawyer Steven M. Swirsky, can keep employers from crossing the legal line.¹⁴⁸ "Even when you review the [NLRB] rules and think you're following the mandates, there's still a good deal of uncertainty."¹⁴⁹ This uncertainty, unfortunately, is not constrained to policies barring disclosure of confidential information.

¹⁴⁵ See Karl Knauz Motors, Inc., 358 N.L.R.B. No. 164, at 2 (Sept. 28, 2012) (citing "Board precedent holding that an employer rule is unlawful if employees would reasonably understand it to apply to protected activity.").

¹⁴⁶ Greenhouse, *supra* note 92.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (quoting Swirsky).

B. Conflicting Civility Messages

Uncertainty is similarly pervasive in NLRB decisions involving social media policies related to workplace civility. Anti-discrimination statutes incentivize employers to protect themselves from claims by implementing policies to regulate harassing, discriminatory, and hostile employee speech—whether it occurs at work or online.¹⁵⁰ Apparently sympathetic to this need, the NLRB endorsed an employer’s “Be Respectful” rule and, in so doing, stated that “[t]he Employer has a legitimate basis to prohibit such workplace communications.”¹⁵¹

The policy advised against posts that “could be viewed as malicious, obscene, threatening or intimidating,” and it explained that “prohibited ‘harassment or bullying’ [includes] ‘offensive posts meant to intentionally harm someone’s reputation’ or ‘posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy.’”¹⁵² It is not difficult to understand why such civility policies are necessary, and in some cases required by law, but it is difficult to understand the Board’s tendency to contravene both precedent and public policy when resolving civility complaints.

The Board’s mistreatment of a social media expression’s evolution into demonstrable collective action seems to be at the core of the uncertainty. The social media expression’s metamorphosis invariably commences with the ruminations of a single employee who seeks out understanding and support from his friends, family, and peers. This search for understanding and support begins with conversations within the employee’s community, and then evolves into organization, collaboration, and eventually collective action. In the past, the disgruntled employees’ understanding of their rights, their options, and their shared anguish required a time consuming, imprecise pursuit, and any subsequent organization or collaboration was additionally time consuming and fraught with impending termination if exposed. Today, the World Wide Web’s effortless capabilities mean that community is global, understanding is searchable, and support is predictable. Consequently, the Board must reexamine how it evaluates the employee’s search for understanding and support.

C. The Search for Understanding: Mere Gripping or Initiating Group Action

In a 2012 case, *Hispanics United of Buffalo*, an employer’s “zero tolerance” policy on bullying and harassment used substantially similar language to

¹⁵⁰ McGinley & McGinley-Stempel, *supra* note 94, at 86–87 (discussing affirmative defenses through employer policies).

¹⁵¹ OFFICE OF THE GEN. COUNSEL, *supra* note 91, at 20.

¹⁵² *Id.* (quoting a sample SMP).

the “Be Respectful” policy endorsed in the NLRB report,¹⁵³ yet the Board determined that the policy was not a valid justification for the discharge of five employees who allegedly harassed another online.¹⁵⁴ The Board affirmed the Administrative Law Judge’s (“ALJ”) finding that the allegedly harassing online behavior was protected concerted activity and that there was “no rational basis” for concluding that the behavior violated the policy.¹⁵⁵ The dissent, however, articulated the view that the employees were legally terminated because their online behavior never rose above mere griping.¹⁵⁶ The divergent views expressed in these conflicting opinions are indicative of the Board’s misunderstanding of the evolution of a social media expression.

If administrative law judges, NLRB members, and employers are unable to agree on the applicability of an employer’s “zero tolerance” courtesy policy to an employee’s behavior, it is disingenuous to assume that aggrieved employees can. Employees who are bullied or harassed in the workplace often find it difficult to describe their experience in a way that sounds plausible to themselves or others.¹⁵⁷ Yet the reality is that large numbers of employees have experienced workplace bullying.¹⁵⁸ “[B]ullying is a pervasive problem and not just the rare experience of a few ‘thin-skinned’ employees.”¹⁵⁹ Employees subjected to abuse struggle to make sense of their experience and often blame themselves for being targeted.¹⁶⁰

Social media conversations facilitate targeted group discussion, much like a focus group, and provide employees with the tools to identify, manage, and bring to an end the abusive conditions of their employment. Employees who reach out to similarly situated members of their online community may experience a synergy known as *group effect* that “occurs when participants hear others’ verbalized experiences that, in turn, stimulate memories, ideas, and experiences in themselves.”¹⁶¹ From this group conversation employees may discover a common language to vocalize their shared experience, and they may find validation in discovering that they are not alone.¹⁶²

The Board’s analysis of whether an abused employee’s statements surpass mere griping may have just as chilling an effect on an employee’s willingness

¹⁵³ *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37, at 10 (Dec. 14, 2012); OFFICE OF THE GEN. COUNSEL, *supra* note 91, at 22–23.

¹⁵⁴ *Hispanics United*, 359 N.L.R.B. No. 37, at 10.

¹⁵⁵ *Id.* at 4, 10.

¹⁵⁶ *Id.* at 4 (Hayes, Member, dissenting).

¹⁵⁷ Sarah J. Tracy et al., *Nightmares, Demons, and Slaves: Exploring the Painful Metaphors of Workplace Bullying*, 20 MGMT. COMM. Q. 148, 149 (2006).

¹⁵⁸ “From 25% to 30% of U.S. employees are bullied and emotionally abused sometime during their work histories—10% at any given time.” *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 154.

¹⁶¹ *Id.* at 155.

¹⁶² *Id.*

to engage in concerted activity as any offending civility policy. Employees prohibited or hindered from posting their gripes online may never discover that common language that appropriately elevates their concern above a gripe. Their semantic ignorance becomes a cause for termination (if they post) or further isolation (if they do not). Unfortunately for them, “[i]solation can serve as a punishment and further complicate targets’ efforts at collective resistance.”¹⁶³

D. The Search for Support: Sharing a Common Viewpoint or Preparation for Group Action

The Board’s misunderstanding of the evolution of the social media expression is further evidenced by the analysis in *Karl Knauz Motors*. The NLRB declared a “Courtesy” rule unlawful because of its broad prohibition against “disrespectful” conduct and “language which injures the image or reputation of the [employer].”¹⁶⁴ The Board explained that employees could interpret the policy as restricting them from engaging in “protected statements—whether to coworkers, supervisors, managers, or third parties who deal with the [employer]—that object to their working conditions and seek the support of others in improving them.”¹⁶⁵ In this statement, the Board acknowledges the Act’s protection of expressions made to third parties if the statement’s purpose is to improve employment conditions.

The two expressions at issue in *Karl Knauz Motors* were posted to the employee’s Facebook page. The first expression, deemed concerted activity, included a series of sarcastic, pointed comments below photographs of the food and beverages available at the BMW dealership’s sales event. One of those comments said,

No, that’s not champagne or wine, it’s 8 oz. water. Pop or soda would be out of the question. In this photo, [a salesperson] is seen coveting the rare vintages of water that were available for our guests.

. . . This is not a food event. What ever made you realize that?¹⁶⁶

The second expression, deemed *not* to be concerted activity, was in reference to a photograph of a car accident involving another one of the employer’s salespeople who had permitted a customer’s 13-year-old son to sit behind the wheel of a brand new Land Rover.¹⁶⁷ The comment stated,

This is what happens when a sales Person [sic] sitting in the front passenger seat (Former Sales Person, actually) allows a 13 year old boy to get behind the wheel of a 6000 lb. truck built and designed to pretty much drive over anything.

¹⁶³ *Id.* at 168.

¹⁶⁴ *Karl Knauz Motors, Inc.*, 358 N.L.R.B. No. 164, at 1 (Sept. 28, 2012).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 8.

¹⁶⁷ *Id.* at 7.

The kid drives over his father's foot and into the pond in all about 4 seconds and destroys a \$50,000 truck. OOOOPS!¹⁶⁸

The day after the accident, because she permitted a child to sit behind the wheel of an unsecured vehicle, the dealership stripped the careless salesperson of her "demo" vehicle and her monthly gas and insurance allowance. The dealership then provided her a used car and a \$500 "demo allowance" until she was able to purchase her own vehicle.¹⁶⁹

The ALJ determined that the first statement qualified for protection of the Act because concerted activity may include individual activity where "individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management."¹⁷⁰ The ALJ was satisfied that, in spite of the absence of an expressed common cause amongst fellow employees, the postings stemmed from, or logically grew from, prior employee conversations.¹⁷¹ In contrast, the ALJ found that the second expression was neither protected nor concerted activity.¹⁷²

It was posted solely by [the aggrieved employee], apparently as a lark, without any discussion with any other employee of the [employer], and had no connection to any of the employees' terms and conditions of employment. It is so obviously unprotected that it is unnecessary to discuss whether the mocking tone of the posting further affects the nature of the posting.¹⁷³

Consequently, a sarcastic comment about customers deprived of wine and champagne found protection in the Act because fellow employees had discussed it, and it could remotely influence the dealership's image.¹⁷⁴ Yet, a pointed jab at a crippling injury inflicted upon a customer by a poorly trained salesperson is "obviously unprotected" because there was no employee conversation about it. This sort of circular logic is particularly dangerous when applied to social media posts. Board precedent is clear; concerted activity may include individual activity where "individual employees seek to initiate or to induce or to prepare for group action."¹⁷⁵ There is no requirement that preparation for group action include prior employee discussion. On this too, Board precedent is clear, the object or goal of initiating, inducing or preparing for group action does not have to be stated explicitly when employees communi-

¹⁶⁸ *Id.* at 8.

¹⁶⁹ *Id.* at 7 n.2.

¹⁷⁰ *Id.* at 10 (quoting *Meyers Indus., Inc. (Meyers II)*, 281 N.L.R.B. 882, 887 (1986)).

¹⁷¹ *Id.* (citing *NLRB v. Mike Yurosek & Son*, 53 F.3d 261, 265 (9th Cir. 1995)).

¹⁷² *Id.* at 10–11.

¹⁷³ *Id.* at 11.

¹⁷⁴ "[T]here may have been some customers who were turned off by the food offerings at the event and either did not purchase a car because of it, or gave the salesperson a lowering [sic] rating in the Customer Satisfaction Rating because of it; not likely, but possible." *Id.* at 10.

¹⁷⁵ *Meyers Indus. (Meyers II)*, 281 N.L.R.B. 882, 887 (1986).

cate.¹⁷⁶ By posting both expressions—on the same day—the employee was engaging his community in a conversation related to the conditions of his employment. To believe otherwise is to believe that the employee had somehow utterly disassociated the champagne event, which he perceived as a management failure, from the Land Rover event, which he perceived as a management failure.

Such a belief misconstrues how conversations occur on social media. By viewing two social media posts made by the same person, on the same day, about the same topic in isolation from one another, the NLRB is essentially reading two random, disjointed pages of a novel and construing two plots. The overwhelming volume and speed of social media information exchanges requires that seemingly disorganized conversations not be excised from their context.

A powerful global conversation has begun. Through the Internet, people are discovering and inventing new ways to share relevant knowledge with blinding speed. As a direct result, markets are getting smarter—and getting smarter faster than most companies.

These markets are conversations. Their members communicate in language that is natural, open, honest, direct, funny, and often shocking. Whether explaining or complaining, joking or serious, the human voice is unmistakably genuine. It can't be faked.¹⁷⁷

A conversation that occurs in person or via an NSM tool is contextually fluid because the conversation is encapsulated within the confines of its transmission. A conversation that takes place through social media often has neither a discernable start nor a discernable conclusion. While judicial economy requires lines be drawn, the NLRB needlessly blurs those lines when it extricates expressions posted on the same day, on the same topic, by the same poster.

At bottom, employers have a legitimate need to develop policies that discourage the abusive behaviors that negatively influence workplace productivity, and the NLRB has a responsibility to protect the employee's right to "enlist[] the support of his fellow employees for their mutual aid and protection."¹⁷⁸ Regrettably, when the Board evaluates employee behavior divorced from context, the Board's treatment fails to advance either the employee's Section 7 rights or the employer's need to protect confidential data and manage workplace civility.

Consider, for example, the contradictory decision rendered in *Karl Knauz*. In declaring the employer's SMP unlawful, the Board explained, "an employee reading this rule would reasonably assume that [the employer] would regard statements of protest or criticism as 'disrespectful' or 'injur[ious] [to] the im-

¹⁷⁶ Whittaker Corp., 289 N.L.R.B. 933, 933 (1988).

¹⁷⁷ RICK LEVINE ET AL., *THE CLUETRAIN MANIFESTO: THE END OF BUSINESS AS USUAL*, at xxi (2001).

¹⁷⁸ *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969).

age or reputation of the [employer].”¹⁷⁹ Yet, in concluding that this policy would chill Section 7 activity, the Board seemingly disregarded its earlier finding that the terminated employee was fully engaged in Section 7 activity during the posting that resulted in his termination.¹⁸⁰ Evidently, the employee did not consider the policy to chill Section 7 activity. This result is difficult to reconcile. This is especially true given the Board’s more sensible conclusion in *Sears Holdings* that where employees continued to engage in Section 7 activities online in spite of a policy against it, the offending policy language was lawful because there was no evidence that employees’ Section 7 rights were chilled.¹⁸¹

If the rights of both employees and employers are to be secured, the NLRB must promote policies that focus on informing employees of their protected Section 7 rights, and then steadfastly hold employees accountable for brand-shaping expressions that fall outside of those rights. The goal, after all, is to protect the flow of commerce from the negative effects of unfair labor practices;¹⁸² the goal is not to stifle commerce with decisions rooted in cherry-picked facts and circumstances.

V. EMPLOYER PROTECTION: THE OPPROBRIOUS CONDUCT EXCEPTION

Some experts believe a well-structured social-media policy that clearly characterizes what is and is not appropriate social media behavior is an employer’s best defense against legal action.¹⁸³ This policy, they suggest, must then become the focus of employee and employer training sessions in order to ensure understanding and compliance.¹⁸⁴ Given the complexity of the Board’s treatment of concerted activity, the ironclad SMP appears to be both elusive and improbable. Adding to the confusion, even where the Board deems an employer’s social media policy unlawful, the employer may still properly terminate the employee if his or her behavior crosses the line.¹⁸⁵ That line, delineating protected concerted activity from unprotected concerted activity, is found through a balancing of the *Atlantic Steel* factors.¹⁸⁶

¹⁷⁹ *Karl Knauz Motors*, 358 N.L.R.B. No. 164, at 1 (second and third alteration in original).

¹⁸⁰ OFFICE OF THE GEN. COUNSEL, NLRB, MEMORANDUM OM 11-74, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES 8 (Aug. 18, 2011) (indicating NLRB’s conclusion that of the two Facebook posts the employee made, one was protected concerted activity).

¹⁸¹ *Sears Advice Memo*, *supra* note 136, at 6.

¹⁸² *See* National Labor Relations Act, 29 U.S.C. § 151 (2012).

¹⁸³ Jeanette Borzo, *Employers Tread a Minefield: Firings for Alleged Social-Media Infractions Sometimes Backfire on Companies*, WALL ST. J. ONLINE (Jan. 21, 2011, 12:01 AM), <http://online.wsj.com/news/articles/SB10001424052748703954004576089850685724570>.

¹⁸⁴ *Id.*

¹⁸⁵ *Atl. Steel Co.*, 245 N.L.R.B. 814, 816 (1979) (identifying the factors related to losing the Act’s protection).

¹⁸⁶ *Id.*

[E]ven an employee who is engaged in concerted protected activity can, by opprobrious conduct, lose the protection of the Act.

The decision as to whether the employee has crossed that line depends on several factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.¹⁸⁷

The NLRB has struggled to adequately define the parameters of the first and third of the *Atlantic Steel* factors. As to the first factor, the Board has concluded that the place of discussion should weigh against NLRA protection where opprobrious or abusive comments are made in the presence of other employees.¹⁸⁸ This factor, it seems, heavily weighs against the protection of social media posts. Especially given that the NLRA broadly defines employee as "includ[ing] any employee, and shall not be limited to the employees of a particular employer."¹⁸⁹ It is therefore difficult to envision a social media post that would qualify as falling outside the presence of other employees.

As to the third factor, appellate review has rejected the Board's suggestion that employees engaging in protected activity "could not be dismissed unless they were involved in flagrant, violent, or extreme behavior."¹⁹⁰ Consequently, where "an employee is fired for denouncing a supervisor in obscene, personally-denigrating, or insubordinate terms . . . then the nature of his outburst properly counts against according him the protection of the Act."¹⁹¹

The question then becomes one of how obscene, personally denigrating, or insubordinate behaviors should be defined. In a year where the tail end of the baby boomers are turning fifty and the leading edge of the millennials are running Fortune 500 companies,¹⁹² it is unlikely that a meaningful harmony of understanding exists between the NLRB, the employer, and the employee. In fact, employers who require the same level of maturity from millennial workers as was expected of them find it difficult to manage (or even understand) today's workforce.¹⁹³ What's more, the rapid-fire, acerbic quality of many social media

¹⁸⁷ *Id.*

¹⁸⁸ *Felix Indus. v. NLRB*, 251 F.3d 1051, 1054 (D.C. Cir. 2001).

¹⁸⁹ National Labor Relations Act, 29 U.S.C. § 152(3) (2012).

¹⁹⁰ *Felix Indus.*, 251 F.3d at 1055.

¹⁹¹ *Id.*

¹⁹² See, e.g., Shama Hyder, *Study Reveals Surprising Facts About Millennials in the Workplace*, FORBES (Dec. 5, 2013, 10:43 AM), <http://www.forbes.com/sites/shamakabani/2013/12/05/study-reveals-surprising-facts-about-millennials-in-the-workplace/> (defining millennials as those born in the 80's and 90's); *Fortune's 40 Under 40: 2013*, FORTUNE, http://archive.fortune.com/magazines/fortune/40-under-40/2013/full_list/ (last visited Oct. 19, 2014).

¹⁹³ "Employers, coaches, teachers, and parents are 'hunting' for an elusive maturity that, frankly, is hard to find." TIM ELMORE, *ARTIFICIAL MATURITY: HELPING KIDS MEET THE CHALLENGE OF BECOMING AUTHENTIC ADULTS 2* (2012). "68% of corporate recruiters say that it is difficult for their organizations to manage millennials." Hyder, *supra* note 192.

expressions reflects the reality of a generation that grew up in an age where feedback has always been instantaneous, public, and largely sarcastic.

For the employer, protecting its brand from the hazards of insubordinate or malicious employee expressions, which have the potential to go viral with blazing speed, is a valid concern. In a world overexposed to information and underexposed to real-life experience, social media expressions can reflect information rich convictions deprived of genuine understanding.¹⁹⁴ Today's employees often suffer from a sort of "Google reflex"; the curse of which is that the speed at which data—devoid of experience—can be accessed has "paradoxically slowed down . . . actual maturity."¹⁹⁵ What is more, employees who have extensive social media networks and who are accustomed to high-speed information exchanges may experience a phenomenon that psychologists refer to as "high arrogance, low self-esteem."¹⁹⁶ These employees unconsciously present themselves as mean-spirited and self-absorbed.¹⁹⁷ Their rapid-fire expressions motivated by little more than "a primitive impulse to respond" to the unremitting influx of texts, tweets, and Facebook updates.¹⁹⁸ The resulting expressions—"bursts of information"—evidence the consequences of social media distraction: "low creativity, lack of focus, and an inability to be totally in the moment."¹⁹⁹ The danger of such expressions to an employer's brand is palpable, and where that expression grows from malicious or insubordinate animus, the NLRA must not serve as a shield for the attacking employee.

The NLRB attempts to identify obscene, malicious, or insubordinate conduct by examining the tone of the employee's expression. That examination of tone begins with an analysis of whether the employee's behavior can be viewed as "public disparagement of the employer's product or an undermining of its reputation."²⁰⁰ It is not difficult to understand an employer's desire to minimize the negative effects of these potentially brand-damaging statements. In spite of its goal to protect the flow of commerce from the negative effects of unfair labor practices, the NLRB's decisions tend to favor protecting employee expressions. The resulting panoply of decisions is not easily applied to the overwhelming reach of social media expressions.

Those decisions favoring employee expression over employer reputation focus more on employee purpose than on employee tone. As a result, the way an employee communicates seems to carry less weight than whether the employee's expression can be definitively linked to improving a condition of their

¹⁹⁴ See ELMORE, *supra* note 193, at 4.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 20.

¹⁹⁷ *Id.* at 21.

¹⁹⁸ *Id.* at 26.

¹⁹⁹ *Id.* at 26–27.

²⁰⁰ Allied Aviation Serv. Co., 248 N.L.R.B. 229, 231 (1980) (quoting Veeder-Root Co., 237 N.L.R.B. 1175, 1177 (1978)).

employment. “[A]bsent a malicious motive, [an employee’s] right to appeal to the public is not dependent on the sensitivity of [the employer] to [the employee’s] choice of forum.”²⁰¹ Furthermore, a “mocking and sarcastic tone,” without more, is not sufficient to deprive an expression of the Act’s protection,²⁰² nor is the use of “satire and irony,” rather than “a more neutral factual recitation of [employee] dissatisfaction.”²⁰³ The use of “unpleasantries uttered in the course of otherwise protected concerted activity do[es] not strip away the Act’s protection.”²⁰⁴ Thus, referring to supervisors as “a—hole[s]”²⁰⁵ and calling the company’s chief executive officer a “cheap son of a bitch”²⁰⁶ did not lose the Act’s protection.²⁰⁷

Those decisions favoring employer reputation over employee expression, by contrast, focus on a disloyalty analysis. The Supreme Court articulated this disloyalty doctrine in 1953 when it upheld *Jefferson Standard*, an NLRB decision that legitimized the discharge of employees who distributed handbills sharply critical of their employer.²⁰⁸ In so holding, the Court reasoned that Congress did not intend Section 7 to “weaken the underlying contractual bonds and loyalties of employer and employee.”²⁰⁹ The Court emphasized that “[t]he legal principle that insubordination, disobedience or disloyalty is adequate cause for discharge is plain enough.”²¹⁰ While NLRB decisions since *Jefferson Standard* have increasingly broadened the employees’ right to criticize their employer, comments directed at third-parties may still lose protection if the motives are found to be disloyal.²¹¹ For instance, in *Five Star Transportation*, employee letters mailed to the school board characterized the employer as a “substandard company” that was “so reckless that they have employed alcohol abusers, drug offenders, child molesters, and persons that have had their license suspended.”²¹² In finding that these letters were unprotected, the court stated, “[i]t matters not whether the communications were true or false.”²¹³ Although the Board recognized that the statements referenced a labor dispute, it did not

²⁰¹ Richboro Cmty. Mental Health Council, Inc., 242 N.L.R.B. 1267, 1268 (1979).

²⁰² Karl Knauz Motors, Inc., 358 N.L.R.B. No. 164, at 10 (Sept. 28, 2012).

²⁰³ Pontiac Osteopathic Hosp., 284 N.L.R.B. 442, 452 (1987) (employees authored a fake newsletter employing satire and irony to mock the employer and its administrators).

²⁰⁴ Timekeeping Sys., Inc., 323 N.L.R.B. 244, 249 (1997).

²⁰⁵ U.S. Postal Serv., 241 N.L.R.B. 389, 390 (1979).

²⁰⁶ Groves Truck & Trailer, 281 N.L.R.B. 1194, 1194–95 (1986).

²⁰⁷ See also *Alcoa Inc.*, 352 N.L.R.B. 1222, 1225–26 (2008) (holding reference to supervisor as an “egotistical fucker” protected); *Stanford Hotel*, 344 N.L.R.B. 558, 558–59 (2005) (holding the calling of supervisor a “liar and a bitch” and a “fucking son of a bitch” not so opprobrious as to cost the employee the protection of the Act).

²⁰⁸ *NLRB v. Local Union No. 1229 (Jefferson Standard)*, 346 U.S. 464, 467, 472 (1953).

²⁰⁹ *Id.* at 473.

²¹⁰ *Id.* at 475.

²¹¹ *Sierra Publ’g Co. v. NLRB*, 889 F.2d 210, 216 (9th Cir. 1989).

²¹² *Five Star Transp., Inc.*, 349 N.L.R.B. 42, 46 (2007).

²¹³ *Id.*

consider the reference strong enough to overcome the “inflammatory language” used by the employees “intended to damage the [employer’s] reputation.”²¹⁴

Nevertheless, the Ninth Circuit’s summary of the state of the law in 1989 is remarkably cogent and supportive of non-malicious employee expressions related to improving the terms and conditions of employment.

In summary, the disloyalty standard is at base a question of whether the employees’ efforts to improve their wages or working conditions through influencing strangers to the labor dispute were pursued in a reasonable manner under the circumstances. Product disparagement unconnected to the labor dispute, breach of important confidences, and threats of violence are clearly unreasonable ways to pursue a labor dispute. On the other hand, suggestions that a company’s treatment of its employees may have an effect upon the quality of the company’s products, or may even affect the company’s own viability are not likely to be unreasonable, particularly in cases when the addressees of the information are made aware of the fact that a labor dispute is in progress. Childish ridicule may be unreasonable, while heated rhetoric may be quite proper under the circumstances. Each situation must be examined on its own facts, but with an understanding that the law does favor a robust exchange of viewpoints.²¹⁵

These seemingly contradictory assessments of opprobrious conduct make the creation of a properly fashioned social media policy that bars personally denigrating and insubordinate comments an insufferable task. The difficulty is that there is very little an employer can do to insulate itself from public disparagement of its products and services. Any social media policy that strives to restrict employees from posting potentially damaging expressions is unlikely to survive a challenge rooted in a properly coordinated, appropriately phrased attack on terms and conditions of employment. It is important to note, however, that an appropriately phrased attack is more about semantics than temperament. The NLRB will likely consider an attack on an employer’s operations or management as protected, regardless of inflammatory language, so long as the expression links the non-malicious attack to the employee’s terms and conditions of employment. On the other hand, the NLRB will likely dismiss the very same grievance, regardless of conciliatory language, if the link is not conclusive. Consequently, the employer’s protection from damage to brand caused by the opprobrious conduct of its employees is tenuous at best.

Employers today are justifiably baffled by the suggestions, the decisions, and the options.

CONCLUSION

In the Gilded Age, the extremes of industrialism exposed scores of laborers to grossly unfair labor practices. These laborers struggled to shine a light on their exploitation, but in those days, galvanizing the support necessary to affect

²¹⁴ *Id.*

²¹⁵ *Sierra Publ’g.*, 889 F.2d at 220.

change was time-consuming, complicated, and expensive. Getting a message to a substantial audience required a printing press; getting a message to a national audience required a newspaper. This hurdle was difficult to overcome, as many of the large newspapers of this era were not sympathetic to organized labor's message. With no other way to circulate a message to provoke change, the message failed to thrive. For these aggrieved laborers, there was no reprieve in the nation's high regard for protected speech. After all, in these early days of the labor movement, "[f]reedom of the press [was] guaranteed only to those who own[ed] one."²¹⁶

With enactment of the NLRA in 1935, employees for the first time had a mechanism which could secure their right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. While the Act did not dictate terms and conditions of employment, or even compel employers to reach agreement with their employees, it did allow for legitimate use of the strike weapon. By protecting the right of laborers to organize and strike, the NLRA provided employees with a substantial mechanism to mitigate the inequality of bargaining power between employees and employers. Where these laborers lacked an effective method for eliciting public support through widespread distribution of their grievance, their newfound right to strike became their most powerful weapon. "The strike plays the same role in labor negotiations that warfare plays in diplomatic negotiations. It facilitates agreement precisely because the consequences of failure are serious, unpleasant, and costly."²¹⁷

In the seventy-eight years since enactment of the NLRA, organized labor campaigns have secured a variety of significant terms and conditions of employment. In fact, federal and state labor laws now compel many of these employment terms, and administrative agencies supervise their enforcement. Additionally, in the seventy-eight years since enactment of the NLRA, technological advances have revolutionized the way information is shared, the way groups organize, and the way communities converse. Gone are the days where freedom of the press was only guaranteed to those who owned one. Where once few would argue whether the pen was mightier than the sword, today, few should argue social media's might.

However, not all that glitters in the twenty-first century cloud is protected. The protection of an employee's right to engage in concerted activities through social media is little more than an illusion; behind the curtain exists nothing more than a razor-thin barrier between protected speech and termination. While the NLRB has made clear that employer policies designed to regulate online expression must clearly exempt Section 7 activity from every provision, the re-

²¹⁶ Cf. A.J. Liebling, *The Wayward Press: Do You Belong in Journalism?*, NEW YORKER, May 14, 1960, at 105, 109 (referring to freedom of press not being a right belonging to the average person).

²¹⁷ Getman & Marshall, *supra* note 76, at 703–04.

ality is that employers must move beyond workplace policies so stuffed with examples and context that they have become too large to read. Social media users predisposed to communicating 140 characters at a time are not likely to read, or understand, such bloated hyperbole.

The NLRB's outdated interpretation of collective action encumbers the rights of both employees and employers. Employees seeking to improve the conditions of their employment should not be disadvantaged by the realities of twenty-first century expression and collaboration. At the same time, employers intent on protecting their business interests from the negative effects of brand-shaping campaigns, orchestrated by disgruntled employees, should not be prevented from implementing confidentiality and civility policies.

The answer, it seems, is quite simple. Any employer policy that regulates the expressions of employees must begin by clearly defining protected Section 7 activities, and then end by outlining the employer policies that regulate unprotected activities. An SMP that focuses more on explaining Section 7 employee rights and less on cataloging the requisite examples of prohibited egregious misconduct serves the needs of both employees and employers. Thus, the NLRB must consistently uphold policies that focus on informing employees of their protected Section 7 rights, and then steadfastly hold employees accountable for brand-shaping expressions that fall outside of those rights.

The goal, after all, is to protect the flow of commerce from the negative effects of unfair labor practices; the goal is not to stifle commerce with inconsistent, unpredictable governance of social media expressions.