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**Monitoring Employee Whereabouts:  
Collective Bargaining Implications of RFID and  
GPS Technologies in the Workplace**

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## I. INTRODUCTION AND BACKGROUND<sup>1</sup>

National Labor Relations Board (NLRB) Chairman Wilma Liebman's term concluded at the end of August 2011. She was appointed by President Obama after eight years of a Board led by President Bush appointees. Depending on the lens one looks through when viewing the Board's decisions during Chairman Liebman's tenure, the NLRB's past two years either marked a radical and unprecedented departure from established doctrine and a threat to the system of free enterprise, or a nascent effort to repair the Act following the damage and disrepair that occurred during the Bush years. Regardless of one's perspective the Board's stated objective these past two years has been to adapt the NLRA to the realities of the 21<sup>st</sup> century economy and workplace.

To that end, action by the NLRB General Counsel on cases involving employee use of Twitter and Facebook has received much attention.<sup>2</sup> However, despite a professed focus on updating the Act for the modern workplace, there remains a paucity of guidance from the NLRB with respect to the use of monitoring of employee whereabouts through technologies such as Radio Frequency Identification (RFID).

RFID is one of several related technologies that permit employers to track assets, inventory and individuals using radio waves.<sup>3</sup> It is but one of a growing number of technologies that have greatly enhanced employers' monitoring capabilities. Relying on microchips that transmit digital information through radio waves, RFID is finding broad application in various industries, such as healthcare and warehousing. These types of technologies enable employers to potentially improve efficiency, safety and productivity. At the same time, however, it enhances employers' ability to track employee activity and accumulate and store substantial amounts of digital information. As often occurs, the law, at least with respect to collective bargaining, has yet to fully address the legal implications created by these technologies.<sup>4</sup>

Undeniably, monitoring technologies such as RFID offer potentially powerful tools that can be used to improve an employer's operation and benefit employees. Consider the tracking of inventory within a large warehouse; monitoring the location of coal miners; keeping tabs on an Alzheimer's patient; or trying to quickly locate medical staff in a large hospital.

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<sup>1</sup> I am grateful for the able assistance provided by our summer law clerk, Robert Rose, Seattle University School of Law, Class of 2012.

<sup>2</sup> See <http://www.nlr.gov/news/acting-general-counsel-releases-report-social-media-cases> (August 18, 2011).

<sup>3</sup> For general information see RFID Journal, What is RFID?, <http://www.rfidjournal.com/article/articleview/1339/1/129/>

<sup>4</sup> For a useful survey of workplace surveillance and emerging technologies, including RFID see William A. Herbert & Amelia K. Tuminaro, *The Impact of Emerging Technologies in the Workplace: Who's Watching the Man (Who's Watching Me)?*, 25 Hofstra Labor & Empl. L. J. 355 (2008); Corey A. Ciocchetti, *The Eavesdropping Employer: A Twenty-First Century Framework for Employee Monitoring*, 48 Am. Bus. L.J. 285 (2011)

At the same time, automatic identification systems like RFID could easily be misused. Think of the temptation to track employees' whereabouts during breaks or non-work time, or to identify which employees appear to be congregating and where. Now imagine that capability existing during a union organizing drive.

Employers seeking to harness RFID's capabilities must be cognizant of employees' individual and collective rights, including rights of privacy, due process, and the right to organize and engage in concerted activity for mutual aid and protection.<sup>5</sup> Employers should think through what objectives they hope to accomplish through an RFID or similar monitoring program and how to implement it without inadvertently or needlessly provoking employee fears and anxiety. The law of unintended consequences can certainly apply in this area. As cited in Section IV below, employees who were Fair Labor Standards Act plaintiffs made use of their employer's GPS system to determine the amount of time it took to walk to and from their workstation.

As use of RFID and related monitoring technologies proliferate, collective bargaining representatives will need to examine precisely how it is used, or proposed to be used, and how it potentially alters the workplace. This raises the central issue of whether and to what extent use of RFID triggers the employer's obligation to bargain regarding the implementation or effects of RFID, including the duty to provide the union access to RFID information. Regardless of whether use of RFID constitutes a mandatory subject of bargaining, unions may seek to negotiate specified limitations on employers' use of monitoring data collected by RFID or similar technologies. Indeed, such bargaining can help establish clear rules as to what role employer-collected data will play in monitoring – and potentially disciplining – employees. Some existing contract provisions are included below by way of example.

Unfortunately at this stage the law offers little guidance. Despite increasing use of RFID, legal decisions or opinions addressing use of the technology in the collective bargaining context are scarce.<sup>6</sup> We are aware of an National Labor Relations Board Administrative Law Judge ruling, *Saint Barnabas Medical Center and N.J. Nurses Union, CWA Local 1091*, Case No. 22-CA-22907, JD(NY)-61-99, 1999 WL 33454655, that appears to address the implementation of RFID, without referring to the communication system at issue as "RFID."

The description of the system's features and how it was used strongly suggests that the new computer communication system at issue relied on RFID technology.<sup>7</sup>

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<sup>5</sup>Section 7, National Labor Relations Act, 29 USC § 157.

<sup>6</sup> This paper reflects searches as of August 2011 for relevant decisions by the following bodies: National Labor Relations Board (NLRB), NLRB Office of the General Counsel Division of Advice, Federal Labor Relations Authority, Washington Public Employment Relations Commission, California Public Employment Relations Board, New York Public Employment Relations Board, Florida Public Employees Relations Commission, Massachusetts Labor Relations Commission, Illinois Labor Relations Board and Educational Labor Relations Board, labor arbitrations and federal and state courts of any jurisdiction.

<sup>7</sup> The ALJ explained:

Relying on the Board's reasoning in *Colgate Palmolive, infra*, the ALJ concluded the medical center's implementation of the system had the potential to impact employees' working conditions and therefore was a mandatory subject of bargaining.

In the instant matter, the composer communication system monitors the location of all employees wearing the badges in the units covered, and this data remains in the computer for seven to ten days, and can be downloaded if need be. Even without addressing the issues of the possible danger to the nurses from wearing the badges, or any cost to the nurse for losing a badge, the tracking ability of this system clearly creates a potential to affect their employment status. The mere fact that on the two occasions where it has so far been employed, the system was used to exonerate nurses, does not mean that at a subsequent time it will never be used to implicate a nurse. The determinative factor herein is that the system has the capability, the potential, to do so. I therefore find that the installation of the composer communication system was a mandatory subject of bargaining, requiring prior notice to, or bargaining with, the Union.

1999 WL 33454655 at 5 (emphasis added). In other words, the fact the system could be used in monitoring employee conduct and thus support potential discipline rendered its implementation a change in employee working conditions subject to bargaining under the National Labor Relations Act.

Given the paucity of RFID case law, we turn to a more widely used and familiar technology – Global Positioning System (GPS) – that offers some useful insight. Although technologically different – GPS relies on the constellation of satellites orbiting hundreds of miles above the Earth's atmosphere – they share some common traits, at least with respect to their impact upon the workplace. Both technologies can track the location of individuals and/or employer property in real time and create detailed electronic records of data relating to location and movement, which can be used to generate various detailed reports and notices. For this reason, GPS technology may foreshadow how legal tribunals would address issues surrounding RFID and its impact on employees' working conditions. Decisions dealing with GPS in the labor law context are

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Under the new system, the nurses wear locator badges on their uniforms. These badges are beige colored and are about 2 to 3 inches long by about an inch and a half high. The other important element of this new system are the sensors that are installed in the rooms and the hallways of the unit. These sensors pick up signals from the locator badges worn by the nurses, and thereby can identify their location, but only within the unit. At the start of their shift, the nurses' names are placed into the computer together with the rooms that they are assigned to. When the patient presses a button to indicate the need for a nurse, the unit clerk uses the computer to locate the nurse covering that room and it will show where the nurse is at that time.

1999 WL 33454655 at 2.

outlined below to offer some insight into how the law of labor relations might evolve to address RFID in the workplace.

## II. THE CURRENT LAW OF GPS TECHNOLOGY IN LABOR RELATIONS

Before changing employees' "wages, hours and other terms and conditions of employment" the National Labor Relations Act (NLRA) obligates employers to bargain with their employees' collective bargaining representative. NLRA §8(d), 29 USC § 158(d). "[A]n employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." *Litton Financial Printing Div. v. N.L.R.B.* 501 U.S. 190, 198 (1991), citing *NLRB v. Katz*, 369 U.S. 736 (1962). However, "[c]ongress deliberately left the words 'wages, hours, and other terms and conditions of employment' without further definition, for it did not intend to deprive the [National Labor Relations] Board of the power further to define those terms in light of specific industrial practices." *First Nat. Maintenance Corp. v. N.L.R.B.* 452 U.S. 666, 675 (1981). While a substantial body of Board, and U.S. Supreme Court, jurisprudence has developed regarding the parameters of the duty to bargain, virtually none has addressed RFID technology.<sup>8</sup>

### A. Potential Bargaining Obligations Relating to GPS

Employers' bargaining obligations regarding GPS technology are somewhat unclear. A distinction must be drawn between general, widespread implementation of GPS technology and the focused use of GPS solely to surreptitiously investigate the behavior of particular employees suspected of misconduct. An employer is unlikely required to bargain in the latter situation.<sup>9</sup>

As to the former situation, an employer's potential duty to bargain may depend on the extent to which employees' movements or activities are already tracked, monitored or recorded at the time of implementing the new technology. The greater the resultant change to employees' working conditions, the more likely that the employer must bargain before implementing the change. An employer's bargaining obligations may also depend on extent to which the technology is characterized as "investigatory" versus "managerial," i.e., to what extent it's intended to monitor employee misconduct versus to

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<sup>8</sup> Although by no means identical, public sector bargaining statutes largely mirror the NLRA's framework with respect to subjects of bargaining.

<sup>9</sup> See *Riverside Sheriffs' Ass'n v. Trask*, 2009 WL 618239 (Cal. App. 2009) (unpublished decision) (County had no duty to meet and confer with union before secretly installing GPS in take-home vehicle of single employee who County suspected was misusing vehicle in violation of well-established rules; explicitly recognizing that distinct question whether County could unilaterally *randomly* install GPS units in take-home vehicles was not at issue). See also *Clay Educational Staff Association*, 34 Florida Pub. Employee Rep. 139 (2008) (Fl. PERC General Counsel) (Union's charge of failure to bargain dismissed because, inter alia, no evidence that any established past practice regarding surveillance was altered where employer secretly placed GPS unit on a single employee's assigned work vehicle during course of open disciplinary investigation.)

increase operational efficiency. Illustrative decisions exploring these themes are discussed below.

It should be noted that even if an employer is not required to bargain the implementation or effects of GPS technology, it may nonetheless be obliged to comply with a union's information requests regarding the new technology.<sup>10</sup>

### **1. Illustrative GPS Decision Where Bargaining Obligation Found**

- NLRB Office of the General Counsel, Advice Memorandum, *BP Exploration of Alaska, Inc.*, Case 19-CA-29566 (July 11, 2005).

Here the employer (BP) was engaged in oil and gas exploration and production in Alaska. BP had long maintained detailed driving safety rules and policies for use of company vehicles in the potentially hazardous environment. Prior to introduction of the new technology, driving rules were monitored and enforced by two company security officers using personal observation and hand-held radar devices. Driving safety statistics were regularly reported to and monitored by management and unit employees spent between 25 and 100% of their work time driving company vehicles.

BP unilaterally installed and began to utilize a "vehicle data recorder" (VDR) system that included GPS technology in company vehicles. The system collected, transmitted and recorded data relating to location, movement and operation of the vehicle and was capable of generating detailed reports and even of sending immediate electronic notices of specified vehicle occurrences to drivers and management. In determining whether BP violated §8(a)(5) of the NLRA by unilaterally implementing the VDR system, the General counsel identified a two-step analysis. First, whether use of the VDR system was a mandatory subject of bargaining and second, whether use of the system constitutes a material, substantial and significant change to employees' terms and conditions of employment.

As to the first step, the opinion finds the technology to constitute a mandatory subject of bargaining. In doing so, the tracking system is characterized as an investigatory technique for monitoring employee misconduct and analogized to other such systems that have previously been deemed mandatory subjects (drug and alcohol testing, polygraph testing and surveillance cameras).<sup>11</sup> Here the General Counsel approvingly references the Board's reasoning in *Colgate-*

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<sup>10</sup> See *King County*, Decision 9204-A (PECB 2007) (WA PERC) (Where GPS data had been used as basis for employee discipline, but union had waived any right to bargain implementation or effects of installation of GPS in workers' trucks, employer nonetheless violated state labor law by failing to timely comply with union's request for information regarding implementation and use of GPS and its effects, including disciplinary uses of the technology).

<sup>11</sup> *Colgate-Palmolive Co.*, 323 NLRB 515, 515 (1997)

*Palmolive Co.*, 323 NLRB 515 (1997) that hidden surveillance cameras were mandatory subjects because they affected employee discipline and job security and thus were “plainly germane to the working environment” and were not entrepreneurial in character or basic to managerial direction of the business.

As to second step in the analysis, the General Counsel found that implementation of the VDR caused a substantial and significant change to employees’ terms and conditions of employment. Unlike in *Roadway Express, Inc.*<sup>12</sup> and other cases, implementation of the VDR here did not constitute the mere substitution of one “mechanical” or technological method of employee monitoring for another. The VDRs collected far more information than was previously collected by the company’s two security officers—both in terms of the constancy of the monitoring/amount of data and in terms of the type of data collected (e.g., VDRs could detect and report engine r.p.m.’s and rates of acceleration). Implementation of the new technology greatly increased the likelihood of employee discipline and employees are further disadvantaged in no longer being able to offer an explanation for their behavior immediately following the apparent offense.

The General Counsel recommended issuance of a complaint that BP violated §8(a)(5) by unilaterally installing the VDR systems without bargaining with the union.

## **2. Illustrative GPS Decisions Where Bargaining Obligation Not Found**

- NLRB Office of the General Counsel, Advice Memorandum, *Roadway Express, Inc.*, Case 13-CA-39940-1 (April 15, 2002).

The General Counsel’s Office concluded that §8(a)(5) charges based on unilateral implementation of a GPS system should be dismissed because the employer’s action did not result in a significant change in employees’ terms and conditions of employment.<sup>13</sup> Here pick-up and delivery and shuttle drivers were represented by the Teamsters. Prior to implementation of the new technology, drivers were required to maintain contact with dispatchers via two-way radios, which included calling the dispatchers at certain specified times through the shift (e.g., when first leaving the yard, before and after breaks and lunch, and any time a greater than 15 minute delay was experienced) and to complete and submit daily logs.

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<sup>12</sup> NLRB Office of the General Counsel, Advice Memorandum, Case 13-CA-39940-1 (April 15, 2002) (discussed below).

<sup>13</sup> In *BP Exploration of Alaska*, 19-CA-29566, the General Counsel stated that in *Roadway Express* it recognized the employer’s action to have affected a mandatory subject of bargaining but declared the unilateral change non-actionable strictly because terms and conditions of employment were not significantly affected.



In 2000, the employer unilaterally replaced the two-way radios and logs with a Roadway Digital Dispatch (RDD) system, which included instant messaging on a laptop-type screen and a GPS unit in each vehicle. The General Counsel concluded that there was no “significant and substantial change” in terms and conditions of employment. The old and new systems were simply alternative “mechanical” or technological methods of obtaining the same information<sup>14</sup> and “the only difference is whether the employee initiates the reporting call...or whether the Employer can unilaterally initiate use of the RDD system to obtain the information in real time.”

- New York Public Employment Relations Board trio of ALJ decisions involving Civil Service Employees Association, Local 1000.<sup>15</sup>

An administrative law judge (ALJ) of the NY PERB dismissed charges alleging public employers’ unlawful failure to bargain in a trio of cases decided on June 26 2008 and all involving Civil Service Employees Association (CSEA) Local 1000. In each case, the employer unilaterally implemented GPS technology that tracked employees’ real time locations and electronically recorded and saved related data that could be accessed in the future and used to generate various reports and immediate e-mail alerts regarding employee activity to management. Although there were some seemingly meaningful factual differences between the cases,<sup>16</sup> the reasoning and language of the three opinions is strikingly similar, often identical.

The ALJ carefully noted in each case that the issue presented was whether the employer was required to bargain over the implementation, rather than the impact, of the new technology.<sup>17</sup> In finding no such duty, the ALJ focused his reasoning on PERB law establishing the selection of equipment to be used by employees as a management prerogative given the decision’s relationship to the manner and means by which an employer serves the public. Because selection of employee

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<sup>14</sup> Based on the information-gathering capabilities of GPS technology discussed in other decisions, it is factually highly suspect that the RDD collected no more information, in terms of amount, type and accuracy of data, than was collected through the use of two-way radios and logs.

<sup>15</sup> The three decisions are: Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO and County of Nassau, Case No. U-26816, 41 PERB P 4553 (2008) (ALJ Decision); Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, and County of Nassau, Case No. U-27544, 41 Perb P 4552 (2008) (ALJ Decision); Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Nassau County Municipal Employees Local 882, Village of Hempstead Unit and Village of Hempstead, Case No. U-27074, 41 PERB P 4554 (2008) (ALJ Decision).

<sup>16</sup>CaseU-26816 involved a switch from old cell phones to GPS-equipped cell phones; employees were permitted to deactivate phones and GPS during lunches and breaks. U-27544 involved the installation of GPS in employer-owned vehicles that many employees drove between home and work; employees were never permitted to deactivate the GPS; the GPS did not provide navigational assistance to employees. U-27074 involved installation of GPS in county-owned vehicles driven by employees that were not utilized for personal use or taken home between shifts; employees were never permitted to deactivate the GPS.

<sup>17</sup> In one of the cases the parties had in fact already bargained over the impact and in another the employer had offered to do so.

equipment is simply not a mandatory subject of bargaining, there was no need to engage in any balancing of employee and employer interests in these cases.

The various employee interests urged by the union as independently creating a bargaining obligation were found either inapplicable or insufficiently present to create any obligation. Employee privacy interests are no more affected by the use of GPS than if the employer assigns a supervisor to accompany an employee on job assignments, which is a managerial prerogative. Other privacy, duty to bargain cases involve intrusive effects on employees' personal belongings, bodily integrity or private information and are inapplicable to the present cases. There is no intrusive effect on off-duty time and employees were not "co-opted" into compiling surveillance on themselves - an employer has the managerial right to know the location of its property and the GPS did not require any increased employee participation in recordkeeping. Finally, the fact that utilization of the GPS had a disciplinary component did not require the employer to bargain over the technology's implementation.

- *City of Worcester and Local 495, National Association of Government Employees*, Case No. MUP-05-4409, 2007 WL 5880578, Mass. Labor Relations Commission (2007).

The City unilaterally required Department of Public Works "sanding" employees to use GPS-enabled phones during work hours. Employees were permitted to turn off the phones, deactivating the GPS, during breaks. Previously the City had monitored sanding operations through a radio system and use of inspectors who personally observed sanding employees at work. The GPS-equipped phones were now used in conjunction with the radio system and inspectors to monitor employees. The Commission ruled that the union had failed to show how use of the GPS phones altered standards of productivity and performance or otherwise changed terms and conditions of employment. A public employer may unilaterally alter procedural mechanisms or methods for enforcing existing work rules and the union failed to demonstrate how the City's action amounted to anything more.<sup>18</sup>

### **3. Note on the Mandatory Subject of Hidden Surveillance Cameras**

Interestingly, although the NLRB has not addressed potential bargaining obligations for GPS technology, the Board *has* clearly ruled that installation and use of

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<sup>18</sup> See also, *U. of Mass. Med. School*, Case No. SUP-06-5255, 2008 WL 5395637, Mass. Labor Relations Commission (2008), where an employer did not commit a refusal to bargain by unilaterally implementing new technology that tracked when individual employees entered and exited the parking garage. The employer used this data to discipline an employee for falsifying time records. The Massachusetts labor commission found that this technology did not change terms and conditions of employment because "the Employer is simply using a more efficient and dependable method of enforcing existing work rules." *Id.*

hidden surveillance cameras is a mandatory subject of bargaining.<sup>19</sup> The Board found installation of such equipment to be “both germane to the working environment [] and outside the scope of managerial decisions lying at the core of entrepreneurial control.”<sup>20</sup> As to the first criteria, the Board analogized the cameras to other “investigatory tools” or methods for monitoring employee misconduct, which had all previously been deemed mandatory subjects.<sup>21</sup> As an investigatory or monitoring tool, the installation and use of hidden surveillance cameras affects employees’ subjection to discipline and has serious implications for employees’ job security.<sup>22</sup> Additionally, cameras installed in areas such as restrooms and locker rooms raise privacy concerns further affecting employees’ working environment.<sup>23</sup> As to the second criteria, the Board found that installation of the cameras was not entrepreneurial in nature or fundamental to the basic direction of the enterprise.<sup>24</sup>

The ALJ opinion, affirmed as modified by the Board, stated that the union had a statutory right to bargain “over the installation and continued use of these surveillance cameras, including the circumstances under which they would be activated, the general areas they could be placed and how the effected [sic] employees would be disciplined if improper conduct is observed.”<sup>25</sup>

The UPS-Teamsters National Maser Freight Agreement offers a detailed example of the limitations and uses of video surveillance that parties have bargained.

The Employer may not use video cameras to discipline or discharge an employee for reasons other than theft of property or dishonesty. If the information on the video tape is to be used to discipline or discharge an employee, the Employer must provide the Local Union, prior to the hearing, an opportunity to review the video tape used by the Employer to support the discipline or discharge...The Employer shall not install or use video cameras in areas of the Employer’s premises that violate the employee’s right to privacy such as in bathrooms or places where employees change clothing or provide drug or alcohol testing.<sup>26</sup>

Comparatively, GPS and RFID technology could be considered less purely “investigatory” than hidden surveillance cameras. Depending on the context and application, demonstrable gains in productivity and efficiency may be realized through the use of GPS or RFID. These broader applications call into question whether the Board

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<sup>19</sup> *Colgate-Palmolive Co.*, 323 NLRB 515 (1997). See also *National Steel Corp.*, 335 NLRB 747 (2001); *Brewers and Maltsters, Local Union No. 6 v. N.L.R.B.*, 414 F.3d 36, 43-44 (DC Cir. 2005).

<sup>20</sup> *Colgate-Palmolive*, 323 NLRB at 515 (citing *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1979)).

<sup>21</sup> *Id.* at 515 (“investigatory tools” referenced were physical examinations, drug and alcohol testing and polygraph testing).

<sup>22</sup> *Id.* at 515-516.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 515.

<sup>25</sup> *Id.* at 519.

<sup>26</sup> See National Master Freight Agreement, April 1 2003 - March 31 2008, Section 2 cited in Petroff at 27.

would find GPS or RFID technology “both germane to the working environment [] and outside the scope of managerial decisions lying at the core of entrepreneurial control.”<sup>27</sup> To the extent those entrepreneurial features dominate or outweigh the changes to employee terms and conditions, the new technology would likely not implicate the duty to bargain under the *Colgate-Palmolive* standard. Conversely, it seems far more likely that an employer would face a duty to bargain if the new technology focuses on detection or deterrence of employee misconduct.

## **B. Use of GPS Data in Disciplinary Proceedings**

Employers appear to commonly offer GPS data against employees in disciplinary arbitrations without noted objection from the union.<sup>28</sup> In *Preferred Transp. Inc.*, 339 NLRB 1 (2003), a shuttle driver was discharged, in part based on GPS data, for allegedly misrepresenting his activities and whereabouts on company incident reports. The ALJ credited the GPS data over the General Counsel’s objections as to its accuracy.<sup>29</sup> The Board did not address the data’s accuracy or admissibility, concluding that the entire investigation was motivated by anti-union animus and therefore the discharge violated the Act.<sup>30</sup>

In *Hinkley v. Roadway Exp., Inc.*, 249 Fed.Appx. 13, 2007 WL 2709936 (10<sup>th</sup> Cir. 2007), a hybrid suit alleging breach of the union’s duty of fair representation and employer breach of the contract under § 301 of the LMRA, 29 USC § 185, the court addressed a disciplinary arbitration in which the union argued that since the CBA prohibited the employer from using “computer tracking devices” for disciplinary purposes and the employee’s discharge was based on GPS data, the employee should be reinstated and made whole. The two-state committee deciding the matter recognized the applicability of the CBA but, rather than ordering reinstatement, ordered the grievance back to the local committee to be heard on the merits without use of any GPS or computer tracking data.<sup>31</sup>

In *Smith v. Pacific Bell Telephone Co., Inc.*, 649 F.Supp.2d 1073 (E.D. Cal. 2009), an employee brought claims against his employer and union after he was fired for failing to safeguard company property and for misrepresenting facts during an investigation. The employee’s company-owned van had been stolen, and he insisted that he did not leave the keys in the vehicle. Data from the van’s GPS device, however, indicated that the van’s engine was idling when it was stolen. In his subsequent lawsuit

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<sup>27</sup>*Ford Motor Co.*, 441 U.S. at 498 (1979).

<sup>28</sup>*Superior Products*, 116 LA 1623 (Hockenberry, 2002). *Beverage Marketing Inc.*, 120 LA 1388 (Fagan, 2005). *Embarq*, 123 LA 923 (Armendariz, 2007) (although a timeline of employee’s activities on the dates in question could not be accurately constructed from the GPS data, the data was nonetheless sufficiently accurate to show employee was misreporting his time and supported just cause for termination). *Qwest Corporation*, 125 LA 26 (Calhoun, 2008). *In the Matter of the Dispute Between Waste Management of Akron and Truck Drivers Union Local #348*, 2004 WL 3354921 (Wendt, Arb. 2004).

<sup>29</sup>*Preferred Transp.*, 339 NLRB at 10-11.

<sup>30</sup>*Id.* at 3.

<sup>31</sup>*Hinkley*, 249 Fed.Appx. at 16, 2007 WL 2709936 at 2.

against the employer and union, the employee tried to introduce expert testimony to show that the GPS was not accurate or reliable. The court refused to permit this evidence, observing that the union and employer had collectively bargained and agreed that GPS data could be used in disciplinary proceedings. The court found, “[a]s Pacific Bell and the Union collectively bargained for the use of GPS data, Plaintiff cannot offer expert testimony challenging its accuracy and usage.” *Id.* at 1094.

### C. Use of GPS to Track Employees’ Concerted Activity

In some instances, employers have utilized GPS technology to track employees’ protected concerted activity. In one such case, the NLRB Division of Advice concluded that an employer violated Sections 8(a)(3) and 8(a)(1) of the NLRA by installing GPS units in two and only two company vehicles—the take-home trucks assigned to the two workers believed to be leading an organizing campaign.<sup>32</sup> The General Counsel’s Office recognized that the GPS technology would allow the company to interfere with its employees’ protected concerted activity by tracking the two worker-organizers’ every move in real time to immediately detect, for example, if they met at the same location or visited other employees at their homes during non-work hours.

## III. RFID AND ANALOGOUS TECHNOLOGIES IN COLLECTIVE BARGAINING AGREEMENTS

Some unions have succeeded in limiting employers’ use of RFID and analogous technologies in the workplace through collective bargaining. Following are examples of such agreements.

- The Alaska Nurses Association obtained the following contract language limiting the use of badge tracking systems, which appear to have utilized RFID technology: “The parties agree that data acquired by and preserved with the [tracking] system shall not be the sole source of information used to impose discipline or evaluate any nurse.”<sup>33</sup>
- The District of Columbia Nurses Association won even stronger contract language regarding badge tracking systems, which again were apparently based on RFID technology. Under the CBA, the tracking system would not be used for disciplinary purposes whatsoever, management could not track the amount of time that nurses spend in rooms and the union has the right to review information generated by the system.<sup>34</sup>

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<sup>32</sup> National Labor Relations Board, Office of the General Counsel, Advice Memorandum, *East Coast Mechanical Contractors*, 22-CA-25324 (Feb. 26, 2003).

<sup>33</sup> National Workrights Institute, *On Your Tracks: GPS Tracking in the Workplace* 15 (available at [http://www.workrights.org/issue\\_electronic/NWI\\_GPS\\_Report.pdf](http://www.workrights.org/issue_electronic/NWI_GPS_Report.pdf)).

<sup>34</sup> *Id.*

- The International Brotherhood of Teamsters' former National Master UPS Agreement provided: "No employee shall be disciplined for exceeding personal time based on data received from the DIAD/IVIS or other information technology."<sup>35</sup>
- The Teamsters' National Master Freight Agreement states: "Computer tracking devices, commonly known as 'Black Boxes', mandated by regulations shall not be used for disciplinary purposes, except in those incidents of violations of Federal Mandated Regulations or when an employee has intentionally committed malicious damage to the Employer's equipment or when an employee has unsafely operated the Employer's commercial motor vehicles."<sup>36</sup>
- The Massachusetts Organization of State Engineers and Scientists negotiated a settlement agreement in 2005 regarding mandatory use of GPS-equipped cell phones.<sup>37</sup> Under the agreement, the GPS devices must remain active during all work hours but may be turned off during lunches and breaks and data inadvertently gathered during such periods would be destroyed. Additionally, employees are to receive training on the technology and the union may access GPS data in its role as collective bargaining representative.
- In 2007, a New York police union negotiated a memorandum of agreement and settlement whereby the public employer agreed "not to use GPS technology of any kind to initiate discipline against any police officer, although it may be used for all other lawful (including evidentiary) purposes."<sup>38</sup>
- In *Otis Elevator Co. v. Local 1*, 2005 WL 2385849 (S.D.N.Y. 2005), the CBA contained extremely broad language whereby the union recognized the company's need "to continuously upgrade the technologies it employs," including "devices carried and used by its Employees to record data...to communicate with other Employees...to communicate with computers and computer-related devices, [and] to record service data." The CBA then went on to provide a non-exhaustive list of such devices, which included cell phones, beepers, portable computers, video technology, and any "evolution" of those respective technologies. The district court ruled that an arbitrator

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<sup>35</sup> National Master UPS-Teamsters Agreement, Aug. 1 2002 - July 31 2008, Article 37, Section 1(a) [http://www.browncafe.com/ups\\_national\\_master\\_agreement.html](http://www.browncafe.com/ups_national_master_agreement.html)

<sup>36</sup> See National Master Freight Agreement, April 1 2003 - March 31 2008, Section 3 cited in D. James Petroff, *Workplace Privacy in the Information Age*, 27 (AFL-CIO Lawyers Coordinating Committee 2006). This appears to be the CBA provision at issue in *Hinkley v. Roadway Exp., Inc.*, 249 Fed. Appx.13, 2007 WL 2709936 (10<sup>th</sup> Cir. 2007).

<sup>37</sup> See William A. Herbert & Amelia K. Tumarino, *The Impact of Emerging Technologies in the Workplace*, 25 Hofstra Lab. & Emp. L.J. 355, 377 (Spring 2008).

<sup>38</sup> See Herbert & Tumarino at 378.

clearly did not violate the essence of the CBA when, based on the above provisions, he ruled that the contract permitted the employer to install GPS devices in company vehicles. Notably, despite the CBA's broad grant of authority to the employer, the parties negotiated a Memorandum of Understanding whereby they agreed, inter alia, that GPS data would not be used for disciplinary purposes and that data recorded during non-working hours would not be reviewed.

#### **IV. EMPLOYEE USE OF MONITORING TECHNOLOGIES**

While use of monitoring technologies pose obvious concerns for employees, they may likewise hold unanticipated benefits. Conversely, for employers seeking to fortify their capacity to track or monitor workers, technology can present some unwelcomed outcomes. Employees have made their own attempts to apply electronic monitoring technology to their advantage.

In *McDonald v. Kellogg Co.*, 08-2473-JWL, 2011 WL 484191 (D. Kan. Feb. 7, 2011), the plaintiff wanted to use GPS technology to show the employer violated the FLSA when it failed to compensate for time walking to and from the workstation. The judge allowed an expert to use RFID technology to conduct an experiment that would show the exact time.

In *Frew v. Tolt Technologies Serv. Group, LLC*, 6:09-CV-49-ORL-19GJK, 2010 WL 557940 (M.D. Fla. Feb. 11, 2010) the plaintiff claimed the defendant failed to pay overtime. The defendant moved for summary judgment, arguing that the plaintiff could not show how many hours of overtime were actually worked. The court held that because the defendant regularly viewed GPS reports that tracked employee work time, a genuine issue of material fact was created as to whether the employer should have known that the employee was working through his unpaid lunch periods.

#### **V. LEGISLATIVE AND REGULATORY RESPONSES TO ELECTRONIC MONITORING IN THE WORKPLACE**

Some legislatures and regulatory agencies have begun addressing the increasing presence of electronic monitoring in the workplace.

- In August 2011, in *Owner-Operator Independent Drivers Assoc., Inc. v. Fed. Motor Carrier Safety Admin.*, 2011 WL 3802728 (7<sup>th</sup> Cir. 2011), a panel of the U.S. Court of Appeals for the Seventh Circuit struck down a rule issued by the Federal Motor Carrier Safety Administration which would require truckers to use electronic on-board systems instead of logbooks to monitor compliance with motor safety regulations. The Seventh Circuit struck down the rule, finding that the agency had failed to consider whether its rule would guard against (or fail to guard against) harassment of drivers.

- Connecticut law, Conn.Gen.Stat. § 31-48d, requires employers warn employees before they engage in electronic surveillance, except for when the surveillance is used to produce evidence of the employee violating the law; the employer's legal rights; or creating a hostile work environment. In *Vitka v. City of Bridgeport*, 2007 WL 4801298 (2007), a Connecticut superior court held that monitoring that occurred on public roads, and not at the employer's "premises", did not require notification. And in *Gerardi v. City of Bridgeport*, 294 Conn. 461, 985 A.2d 328 (Conn. 2010) the Connecticut Supreme Court held that the Connecticut electronic monitoring statute created neither an express nor an implied private right of action that would permit employees to sue their employers for violations of the statute.
- Texas law, Tex. Penal Code § 16.06, makes it a crime to install a GPS tracking device in a motor vehicle not owned by the installer.
- In 2005, the Food and Drug Administration granted approval for the use of human-implantable RFID. This technology has been used by only a few companies including an Ohio company in 2006.<sup>39</sup> However, the possibility behind implantable technology is diverse. Small sensors can be placed around the office that will read the RFID codes as employees pass by and has the potential to be used as a real time tracking device. The employer could know where employees are at all times and who they are with while in the work environment.
- Several states have written laws preventing the use of human implantable devices. *See:*
  - California Civil Code § 52.7 ("a person shall not require, coerce, or compel any other individual to undergo the subcutaneous implanting of an identification device");
  - Wisconsin Stat. § 146.25 ("[n]o person may require an individual to undergo the implanting of a microchip");
  - North Dakota Cent. Code 12.1-15-06 ("[a] person may not require that an individual have inserted into that individual's body a microchip containing a radio frequency identification device");
  - Missouri Statutes § 285.035 ("[n]o employer shall require an employee to have personal identification microchip technology implanted into an employee for any reason");
  - 63 Oklahoma Stat. § 1-1430 ("[n]o person, state, county, or local governmental entity or corporate entity may require an individual to undergo the implanting of a microchip or permanent mark of any kind or nature upon the individual").

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<sup>39</sup> <http://www.rense.com/general69/twogov.htm>.



## VI. CONCLUSIONS AND IMPLICATIONS FOR RFID

Admittedly, the analogy between RFID and other technologies such as GPS or video surveillance has significant limitations. There are fundamental differences in the nature of the technologies. RFID operates typically within a defined framework, e.g., 60-300 feet.<sup>40</sup> Consequently, most individuals would cease to be tracked when outside the reach of the RFID reader. By contrast, GPS, relying on satellites, enables real time tracking on a large geographic scale (G is for “global”) and truly has the potential to track employees far beyond the workplace and outside of their work hours.

As has been the case in some instances where GPS was introduced, the extent to which some type of tracking or monitoring already exists could inform how the introduction of RFID would be analyzed. But given the amount of data RFID and related technologies can track and store, as well as the precision it offers for monitoring location, there is a strong argument that pre-existing tracking and call-in protocols pale in comparison, thereby rendering the introduction of new technology a bargainable subject.

RFID offers capabilities far beyond traditional surveillance methods such as hidden video cameras. While the Board has found the installation and use of video cameras to be a mandatory subject of bargaining, whether that foretells how RFID would be analyzed is far from clear. As with any technology, much of the analysis will hinge on how an employer puts it to use. Using RFID to track inventory, hardware and employer assets differs substantially from traditional employee surveillance. Unlike the latter, RFID offers employers a breadth of data - well beyond the standard video tape. Likewise, query to what extent the analysis changes in a scenario where employees make use of the technology themselves to locate or assign work to one another. Consider hospital nurses or workers in a large plant or warehouse using RFID to track each other’s whereabouts to improve patient care, efficiency or safety. See *St. Barnabas Med. Ctr, supra*.

Generally speaking, the greater the entrepreneurial or managerial nature of an RFID program the less likely a statutory duty to bargain will arise. Though seemingly straightforward, the line between being primarily managerial in nature (and thus not a mandatory subject of bargaining) versus being primarily a term or condition of employment – and therefore subject to bargaining – is a difficult one to draw. As stated previously, much depends on the specific nature of the RFID or monitoring program, the past practice, bargaining history, and the nature of the industry.

RFID technology, like many instruments, can be subject to abuse. Employees understandably hold concerns regarding their privacy and their ability to engage in lawful protected activity without unnecessary monitoring or retaliation. This technology, without proper administration and communication with employees, can trigger Orwellian fears of detailed monitoring, tracking and storing of personal information.

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<sup>40</sup>The Basics of RFID Technology. <http://www.rfidjournal.com/article/articleview/1337/1/129/>

At the same time the potential for cost savings and improved efficiencies and safety can benefit all stake holders. The challenge for management and labor lies in their ability to balance those desired outcomes with legitimate concerns over employees' rights to organize, to privacy, and due process.