

**International Business Machines Corporation and
Communications Workers of America, Local
1120, AFL-CIO.** Case 3-CA-22062

August 8, 2003

SUPPLEMENTAL ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER
AND WALSH

This is a compliance appeal under Section 102.53 of the Board's Rules and Regulations. See also *Ace Beverage Co.*, 250 NLRB 646 (1980). The Charging Party Union is seeking review of the General Counsel's denial of its request, at the compliance stage, that the Respondent, International Business Machines Corporation (IBM), be required to post the Board's remedial notice on its electronic mail (e-mail) system and intranet, in addition to its traditional paper bulletin boards. For the reasons set forth below, we deny the Union's request for review.¹

The complaint in the underlying proceeding alleged, inter alia, that IBM had violated Section 8(a)(1) of the Act by maintaining a rule precluding employees from displaying prounion signs on their vehicles in company parking lots, and by telling employees that doing so violated company policy. The administrative law judge found these alleged violations, and issued an order that, among other things, included a standard notice-posting provision requiring IBM to post a notice "in conspicuous places including all places where notices to employees are customarily posted."

No party excepted to this standard notice-posting provision. Although the Union requested that the Board require IBM to post the notice companywide, rather than just at the two facilities involved, the Board rejected the Union's request, and affirmed the judge's findings and adopted his order. 333 NLRB 215 (2001).²

The United States Court of Appeals for the Second Circuit enforced the Board's order by unpublished opinion dated March 22, 2002. Thereafter, on April 26, 2002, the Union, apparently for the first time, requested in the compliance stage of this proceeding that the Regional Director require IBM to communicate the notice to its employees via its e-mail system and intranet.

By letter dated May 7, 2002, the Regional Director denied the Union's request. The Regional Director found that she lacked authority to require such a "special" remedy because: (1) the Board's decision and order con-

tained the standard notice-posting provisions; (2) there was no requirement in either the Board's decision or the court's decision enforcing the Board's order that the notice be electronically posted; and (3) the Union had the opportunity to urge electronic posting of the notice before the administrative law judge and the Board, but failed to do so.

The Union thereafter filed an appeal with the General Counsel. By letter dated July 25, 2002, the General Counsel denied the appeal "substantially for the reasons set forth in the Regional Director's letter."

On August 12, 2002, the Union filed the instant request for review of the General Counsel's determination. The Union argues that electronic posting "falls squarely within" the Board's order. It asserts that IBM is a "paperless" company that uses electronic communications almost exclusively to disseminate information to employees. For example, the Union asserts that human resources information is posted on the IBM intranet, and that public service announcements and other work related announcements and directives are communicated to employees almost exclusively by e-mail. Moreover, the Union notes that the company solicitation policy that was the subject of the Board's order is available exclusively on the intranet, and that much of the relevant communications between employees and managers was via company e-mail.³

Thus, the Union argues that, because notices are "customarily posted" electronically, the Board's notice should be posted electronically as well. Further, it asserts that the Company's bulletin boards are not in "conspicuous places," and that, by IBM's own estimate, 30 percent of its employees work off-site at least 50 percent of the time. Accordingly, the Union argues that posting the Board's notice on the bulletin boards would not fully comply with the Board's order.

Having duly considered the matter,⁴ we deny the Union's request for review. In agreement with the Regional Director and the General Counsel, we find that the appropriate time for the Union to request electronic posting of the remedial notice on the IBM e-mail system and intranet was before the administrative law judge and/or the Board in the underlying proceeding.

The Union argues, and our dissenting colleague finds, that electronic posting is contemplated by the Board's extant order. We recognize that, in this case, electronic

¹ The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

² The Board's decision and order was issued by Chairman Truesdale and Members Hurtgen and Walsh.

³ We assume that the Board's "cease and desist" order would require the Respondent to delete the offending policy from its intranet.

⁴ IBM has not filed a position statement in response to the Union's request for review. The record also does not contain any previous statement by IBM regarding the Union's initial compliance request to the Regional Director or appeal to the General Counsel.

posting on the Respondent's intranet may be the "customary" way of posting messages to Respondent's employees. However, the Union and our dissenting colleague cite no case where the Board's traditional order has been interpreted and applied to require electronic posting. Indeed, as indicated above, both the Regional Director and the General Counsel concluded that the requested electronic posting is not encompassed by the Board's traditional remedial order. In our view, if the Union wanted this provision in the order, it should have specifically sought such an order from the judge and the Board. In that event, all parties, and perhaps amici, would have had the opportunity to address it.

The Union also asserts that employees would not be adequately exposed to a notice posted on the bulletin board. In support, the Union claims that 30 percent of the employees work offsite 50 percent of the time. However, this means that even this 30 percent are at the work site for a substantial period. The Union further contends that electronic posting is warranted here because there are only a few bulletin boards in the affected IBM facilities. However, there has been no determination as to the number or location of the bulletin boards or showing that the number of such bulletin boards is atypically low, i.e., that the affected IBM facilities have substantially fewer bulletin boards than the typical respondent employer that is ordered to post a Board notice. Had the Union's request for this relief been timely made, these issues could have been appropriately considered.

In denying review, we do not pass on the policy issue raised by the Union and addressed by our dissenting colleague; specifically, whether electronic posting, including on the e-mail system and/or the intranet, should be required by the Board's standard remedial notice-posting language where the respondent customarily post notices to employees in that manner. As indicated above, we believe the appropriateness of such remedies should be resolved after a full briefing by the General Counsel, the private parties, and perhaps by amici as well.⁵ Because there has not been such briefing in this case, we decline to address the issue at this time.

ORDER

The Charging Party Union's request for review of the General Counsel's decision sustaining the compliance determination of the Regional Director is denied. The General Counsel's decision is therefore affirmed. See Section 102.53(d) of the Board's Rules and Regulations.

⁵ In addition, a hearing may be required on the factual issues of whether a company's customary practice is to communicate by e-mail/intranet posting and/or whether posting on bulletin boards would be inadequate.

MEMBER WALSH, dissenting.

The Charging Party Union is seeking review of the General Counsel's denial of its request, at the compliance stage, that the Respondent International Business Machines Corporation (IBM) be required to post the Board's remedial notice on its electronic mail (e-mail) system and intranet, in addition to its bulletin boards. For the reasons set forth below, I disagree with my colleagues' denial of the Union's request for review.

In the underlying proceedings, the Board held that IBM had violated Section 8(a)(1) of the Act by maintaining a rule precluding employees from displaying pro-union signs on their vehicles in company parking lots, and by telling employees that doing so violated company policy. *International Business Machines Corp.*, 333 NLRB 215 (2001), *enfd.* 31 Fed.Appx. 744, 2002 WL 451783 (2d Cir. 2002) (unpub.). The Board's order contains, among other things, a provision requiring IBM to cease and desist from this activity, and the Board's standard notice-posting provision, which requires IBM to post copies of the Board's notice "in conspicuous places including all places where notices to employees are customarily posted."

On April 26, 2002, the Union formally requested the Regional Director to require IBM to communicate the Board's notice to its employees via its e-mail system and intranet because those were the means by which IBM communicated with its employees. By letter dated May 7, 2002, the Regional Director denied the Union's request because the Board's order contained the standard notice-posting provision, there was no specific requirement in either the Board's order or the court's judgment enforcing the Board's order requiring electronic posting, and the Union had not specifically requested electronic posting of the notice in the underlying Board proceeding. The Union thereafter filed an appeal, and by letter dated July 25, 2002, the General Counsel denied the Union's appeal "substantially for the reasons set forth in the Regional Director's letter." On August 12, 2002, the Union filed the instant request for review of the General Counsel's determination.

The uncontested affidavits submitted by the Union in support of its request for review¹ show that IBM is essentially a paperless company. Thus, a vast array of human resources information is posted on the IBM intranet, including the very no-solicitation rule found unlawful by the Board in the underlying proceeding. The information on the intranet also includes information about, among

¹ Both the Union's appeal and request for review indicate that copies were sent to IBM's outside counsel, and the Union's original request to the Regional Director also reflects that it was sent to IBM's outside counsel. IBM has not responded to any of these filings.

other things, employment laws, such as the Family and Medical Leave Act, pension information, payroll information, the company phone book, and even the company cafeteria menu. With respect to IBM's use of e-mail to communicate with its employees, IBM uses e-mail to inform the employees about public service announcements and directives, such as building closings, holiday schedules, and security notices. Even IBM's messages about the Union's organizing campaign were disseminated to the employees via e-mail. These facts alone demonstrate that IBM "customarily" posts notices to its employees on its e-mail system and intranet. It necessarily follows that the standard notice-posting provision in the Board's underlying decision requires IBM to post the Board's notice electronically.

The Regional Director cites no Board decision holding that it is inappropriate to require a respondent to post the Board's notice electronically in circumstances where the respondent customarily posts notices to its employees electronically, and I am not aware of any. The Regional Director also provides no reason why requiring a respondent to post the Board's notice electronically in such circumstances is not encompassed within the Board's traditional remedial language. Thus, requiring IBM to post the Board's notice on its e-mail system and intranet would not be contrary to, or involve a change in, Board law, but instead is mandated by the plain language of the Board's standard notice-posting provision. To the extent there is any concern that the public might not understand that the Board's standard remedial language means what

it says, that posting in all places where notices to employees are customarily posted means e-mail or intranet posting if that is where the respondent customarily posts notices to employees, we should use this opportunity to make that clear to the public.

Finally, electronic posting is required here because paper bulletin board posting would be inadequate. Thus, the Union's affidavits establish that approximately 30 percent of the IBM employees covered by the notice-posting requirement work away from IBM's facility 50 percent of the time, and there are relatively few paper bulletin boards in the affected IBM facilities (one in the cafeteria, one in a building basement and one in the main lobby at one of the sites). See *Wells Fargo Guard Services*, 252 NLRB 55 (1980) (mailing required where employees do not regularly visit employer's facility). For this reason as well, I would grant the Union's request for review and order IBM to post the Board's notice via e-mail and on its intranet.²

² My colleagues contend that there should be a hearing to determine whether or not the Respondent's current bulletin boards are adequate for posting. Because the Respondent's internet and e-mail systems are clearly a "customary" method of posting notices to the Respondent's employees, there is no necessity, in my view, to inquire into whether traditional bulletin boards are adequate. To the extent that such a hearing might be required, however, the appropriate time to have that hearing is now, during the compliance stage of these proceedings.