THE UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ARKEMA, INC.		
	Case	16-CA-26371
and		16-CA-26392
UNITED STEELWORKERS OF AMERICA, LOCAL 13-227		
ARKEMA, INC., Employer		
and	Case	16-RD-1583
GREG SHRULL, Petitioner		
and		
UNITED STEELWORKERS OF AMERICA, LOCAL 13-227, Union		

STEVENS CREEK CHRYSLER JEEP DODGE, INC.		
	Cases	20-CA-33367
and		20-CA-33655
		20-CA-33603
MACHINISTS DISTRICT LODGE 190, MACHINISTS AUTOMOTIVE LOCAL 1101, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO		

CUSTOM FLOORS, INC., et al.,	Cases	28-CA-21226
		28-CA-21229
and		28-CA-21230
		28-CA-21231
INTERNATINONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 15		28-CA-21233

BRIEF OF SERVICE EMPLOYEES INTERNATIONAL UNION AS *AMICUS CURIAE*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANOUS

INTRODUCTION

The practice of the National Labor Relations Board ("Board" or "NLRB") to require the posting of paper remedial notices on employer bulletin boards has remained essentially unchanged for over 75 years, since before the advent of the internet, email, personal computers, and even the photocopy machine. A reexamination of the Board's notice-posting requirements, including its decision in *Nordstrom, Inc.*, 347 NLRB 294 (2006), is thus long overdue. The Board's standard notice-posting language should be updated to ensure that the notice remedy is designed to accomplish the ultimate goal of issuing notices – to ensure that the information contained in the notices is effectively communicated to the affected workers so that it can counteract the chilling effect of unfair labor practices.

The update urged by the General Counsel in *Arkema, Inc.*, changing the Board's standard notice language to make clear that notices must be posted by electronic means, including e-mail, whenever the employer already communicates with employees by those means, is a positive first step in modernizing the notice-posting language. But that change alone is not sufficient. Contemporary understanding of the way people learn and comprehend information make clear that to be effective, notices should be communicated to employees multiple times and in multiple formats. Thus, the Board should require that in addition to being physically posted, notices be distributed individually to employees and read aloud, and translated into languages other than English at the request of a charging party or the General Counsel. These improvements in the Board's notice-posting regime would ensure that as many employees as possible are actually notified of the Board's notices and are able to comprehend the information contained in them.

INTEREST OF AMICUS CURIAE

Service Employees International Union ("SEIU") is one of the largest unions in North America, representing 2.2 million men and women who work in health care, property services, and public employment. SEIU also focuses heavily on organizing workers who are not yet represented by a union. A vital and effective NLRB remedial regime is crucial to SEIU's ability to effectively protect the rights of the workers it already represents and to give unorganized workers the opportunity to unionize free from illegal employer intimidation and threats.

ARGUMENT

I. At a Minimum, the Board Should Modernize its Standard Notice Language to Provide for Notice by Electronic Means

A. The Board Must Ensure that its Remedies are as Effective as Possible Given the Constraints Imposed by the Act

Before turning to the matter of how the Board should revamp its remedial notice practices, it is necessary to place that question in the broader context of remedies for violations of the National Labor Relations Act ("Act" or "NLRA"), 29 U.S.C. §§ 151-169.

Chairman Liebman and multiple other commentators have noted the "weakness of the Act's remedies." *Flat Dog Prods.*, 347 NLRB 1180, 1189 (2006) (Member Liebman, dissenting). *See also* Archibald Cox et al., *Labor Law: Cases and Materials* 253-54 (13th ed. 2001) ("serious weaknesses have been identified – by scholars as well as by the Board itself – in the Board's traditional remedies ..."); Human Rights Watch Report, *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards* 14 (August 2000) ("[l]abor law enforcement efforts often fail to deter unlawful

conduct … weak remedies invite continued violations")[1]; Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 Colum. L. Rev. 1527, 1554 (2002) ("the weakness of the Act's remedies in the face of employer resistance has proven to be the Achilles' heel of employee rights"). If an employer violates the Act by terminating an employee, the affected employee can be ordered reinstated and be awarded backpay – but the backpay will be reduced by the amount of any mitigation (real or imputed), and no other compensatory or other damages are available. If an employer's violation of the Act does not involve terminating an employee, there are generally *no* monetary damages at all; rather, the standard remedies are a cease-and-desist order and the posting of a notice stating that the employer will not violate the Act in the future. If an employer's misconduct affects an election, the election may be rerun; and if the employer refuses to bargain in good faith, it may be required to bargain further. In other words, the available remedies revolve around instructions to the employer not to violate the law in the future – hardly a fearful prospect for an employer that wishes to avoid unionization, or a hearty reassurance to employees who wish to exercise their right to organize.

While the Act itself imposes some constraints on the types of remedies the Board is able to impose, at the same time the Act mandates that the Board "*shall* … take such affirmative action … as will effectuate the policies of th[e] Act." NLRA § 10(c), 29 U.S.C. § 160(c) (emphasis added). This "rather vague statutory command" requires the Board, "at a minimum," to ensure that "a proposed remedy be tailored to the unfair labor practice it is intended to redress." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984). The Board has "broad discretion" to determine what "affirmative action" will accomplish that goal. *Id.* In exercising its discretion to "fashion remedies to undo the effects of violations of the Act," the Board "must draw on enlightenment gained from experience." *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346

[1] *Available at* http://hrw.org/reports/pdfs/u/us/uslbr008.pdf.

(1953). In other words, the Board should not simply keep doing what it has always done. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941) ("the Act does not create rights for individuals which must be vindicated according to a rigid scheme of remedies"). Rather, "the Board, like all administrative agencies, has a duty to adopt its rules and policies to the demands of changing circumstances if the Act is to remain meaningful." *Airborne Freight Co.*, 338 NLRB 597, 599 (2002) (internal quotations omitted) (Member Liebman, concurring). *See also* NLRB Office of the General Counsel, Memorandum OM 99-79, 1 (Nov. 19, 1999) ("[i]t is the Board's institutional role to serve as a remedial laboratory, which involves a responsibility to periodically rethink and update its remedial strategies"). The Supreme Court has similarly acknowledged that "[t]he responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975).

With that background in mind, we now show why, at a very minimum, the Board should amend its standard notice-posting language to make clear that, in addition to physically posting a notice at the worksite, the employer must distribute the notice to employees electronically, including by e-mail, whenever the employer already uses those electronic means to communicate with employees.[2]

B. The Purpose of the Board's Notice Posting Requirement is to Communicate Effectively to Employees

The purpose of the Board's notice remedy is to ensure that employees are "apprised of the unlawful nature of the acts and assured that they will not be repeated." *Eastern Maine Medical Ctr.*, 253 NLRB 244, 228 (1980). Of course, notices can accomplish this only if they *effectively communicate* to employees that the Board has found a violation of the law has

[2] While the focus of this brief is on remedial notices, the same improved distribution methods discussed here – electronic notice at a minimum, or, better, multiple forms of notice, *see* discussion below in section II – should also be used to disseminate other types of notices ordered by the Board, such as election notices.

occurred and that the employer is legally required not to repeat that violation. Only when the information contained in the notice is successfully conveyed to employees can notices "effectuate the policies of th[e] Act," 29 U.S.C. § 160(c), by counteracting the chilling effect that unfair labor practices have on employees' exercise of their rights under the Act.

C. Posting a Notice Solely on a Bulletin Board is an Outdated and Ineffective Way to Communicate to Employees

Starting with its first reported case, the Board sought to accomplish the goal of effectively communicating the contents of notices to employees by requiring violators of the Act to post notices in "conspicuous places in all of the places of business wherein their employees ... are engaged." *Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1, 52 (1935). In 1935, the posting of a physical notice in a workplace may have been a common and effective way of communicating information. After all, Martin Luther's posting a piece of paper to the door of a church in the sixteenth century has been credited with sparking the Protestant Reformation. (In fact, though, it was the then-recently invented printing press which permitted Luther's "theses" to be widely copied and circulated throughout Europe. William C. Placher, *Readings in the History of Christian Theology*, Volume 2, 11-12 (1988).[3] Possibly more to the point, in the 1930s there was no obvious alternative way to ensure that all employees learned of the notice (other than requiring that it be read aloud, a remedy that is discussed below in Section II.C.1). It was decades before the advent of personal computers or the internet, and more than twenty-five years before the introduction of office copy machines. David Owen, *Copies in Seconds: How a*

[3] *Available* in excerpted form at http://books.google.com/books?id=fOaXP-CjPOIC&pg=PA11&dq=martin+luther+reformation+printing+press&cd=5#v=onepage&q=printing%20press&f=false.

Lone Inventor and an Unknown Company Created the Biggest Communication Breakthrough Since Gutenberg 9-10 (2004) (the first Xerox office copier was introduced in 1960).[4]

The Board has made few changes to its standard notice-posting requirement in the last 75 years. In 1996 and 1997, the Board modified the standard provision to include a provision stating that if the employer had gone out of business or closed the facility, the employer must mail a copy of the notice to employees since the time of the first unfair labor practice. *Indian Hills Case Center*, 321 NLRB 144, 144 (1996); *Excel Container, Inc.*, 325 NLRB 17, 17 (1997). In 2001, the boilerplate language of the notice was made less legalistic, in order to further the goal of "effectively appris[ing] employees of their rights, and of the unlawful acts of respondent employers or unions." *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 176 (2001). But despite requests, the Board has declined to address whether the practice of requiring notices to be physically posted should be updated to mandate electronic posting as well. *See International Business Machines Corp.*, 339 NLRB 966 (2003) ("*IBM*"), *Nordstrom, Inc.*, 347 NLRB 294 (2006). Meanwhile, the Board's notice-posting language has remained essentially the same, but workplaces, and the place of Board notices in them, have changed dramatically.

In contrast to what may have been the case 75 years ago, in today's workplace an NLRB notice tacked to a bulletin board is far from a "conspicuous" announcement. Rather, it is just one more piece of paper amidst a jumble of other legal notices required by various state and federal laws to be posted at all times. In California, for instance, employers are required to post more than a dozen notices to inform workers of their legal rights, in the absence of any violation of

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[4] *Available* in excerpted form at http://books.google.com/books?id=nMw9rKjy2E8C&printsec=frontcover&dq=David+Owen,+Copies+in+Seconds:+How+a+Lone+Inventor+and+an+Unknown+Company+Created+the+Biggest+Communication+Breakthrough+Since+Gutenberg&hl=en&ei=3nYRTKrVIIG0lQerrfTNBw&sa=X&oi=book_result&ct=result&resnum=1&ved=0CC0Q6AEwAA#v=onepage&q&f=false.

law.[5] This proliferation of legal notices has turned bulletin boards into the workplace equivalent of the small-print legal disclaimers at the end of an advertisement – entirely expected but generally ignored. That being so, the likelihood that an employee will notice when one additional piece of paper from the NLRB appears on the "legal notices" bulletin board is slim. The chance that a notice posted there will effectively communicate to *all* affected employees is next to none.

And the question whether employees are likely to notice an NLRB notice on a crowded bulletin board presupposes that they will ever see the bulletin board to begin with. In today's economy, many workers work in far-flung locations, or work from home, and may seldom visit the employer's "headquarters." *See, e.g., IBM*, 339 NLRB 968 (noting that 30 percent of IBM's employees worked away from the facility 50 percent of the time).

While NLRB notices on employee bulletin boards are inconspicuous, an employee who chooses to read the notice is quite conspicuous. An employee who manages to become aware of the existence of the notice and wants to read it must leave her work area to go to the location where the "legal notices" bulletin board is located, necessarily in a place where other employees and managers may also go, and stand there in front of the board, reading the notice. In some cases, employers post notices inside small offices where supervisors are always present. If the

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[5] Federal laws with posting requirements include Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-10, 29 C.F.R. § 1601.30; the Americans with Disabilities Act, 42 U.S.C. § 12115; the Family and Medical Leave Act, 29 U.S.C. § 2619, 29 C.F.R. § 825.300(a) (requiring notice to be posted either physically or electronically, and to be included in employee handbook or distributed individually to employees, either physically or electronically); the Age Discrimination in Employment Act, 29 U.S.C. § 627, 29 C.F.R. § 1627.10; the Occupational Safety and Health Act, 29 U.S.C. § 657(c)(1), 29 C.F.R. § 1903.2; the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4334(a), 20 C.F.R. § 1002 (Appendix), and the Employee Polygraph Protection Act, 29 U.S.C. § 2003, 29 C.F.R. § 801.6. California statutes and regulations requiring employers to post notices include the Fair Employment and Housing Act, 2 Cal. Code of Regulations § 7287.0(d); the California Family Rights Act, 2 Cal. Code of Regulations § 7297.9 (requiring posting and inclusion in employee handbook); the laws governing unemployment benefits, Cal. Unemployment Insurance Code §§ 1089 (requiring posting and distribution of individual copies to employees) and 2706, 22 Cal. Code of Regulations § 1089-1; and several separate provisions of the State Labor Code governing such matters as the time and place when wages will be paid, Cal. Labor Code § 207; minimum standards for wages and hours of work, Cal. Labor Code § 1183; and information relating to workers' compensation, Cal. Labor Code § 3550.

employee wishes to use the information contained on the notice about how to contact the NLRB, she must bring a piece of paper and pen with her to copy down the address and phone number contained on the notice. In doing this, she is quite publicly announcing her interest in the subject of unionization to her co-workers and her employer. When the employer has already committed an unfair labor practice, employees are understandably less likely to be willing openly to declare their interest in reading about their rights to organize or about their employer's violations of the law by being seen reading an NLRB notice. Indeed, even where the Employer has unlawfully created the impression of surveillance – has led employees to feel that it is "peering over their shoulders, taking note of who is involved in union activities, and in what particular ways," *Flexsteel Industries, Inc.*, 311 NLRB 257, 257 (1993), the Board still has not altered the traditional posting requirement to ensure that workers may review the notice in private.

These dynamics make it even less likely that all, or even many, employees will go out of their way to read a notice physically posted on a bulletin board. *See Stevens Creek Chrysler Jeep Dodge, Inc.*, Case 20-CA-33367 *et seq.*, 2009 NLRB LEXIS 236, * 11 (July 29, 2009) (finding merit in argument that electronic posting "allows an employee time to read the notice without standing in a location indicating to the employer that [he] is in fact reading the notice"). The D.C. Circuit cogently summarized the problems with the posting of notices solely on bulletin boards in 1981, when it wrote that "an employee who must scan the Board's notice hurriedly while at work, under the scrutiny of others, will not be able to absorb its meaning and hence to understand his legal rights as one who reads it at home in a more leisurely fashion." *UFCW Local 204 v. NLRB,* 447 F.3d 821, 828 (D.C. Cir. 2006) (quoting *Teamsters Local 115 v. NLRB,* 640 F.2d 392, 400-401 (D.C. Cir. 1981) (upholding Board order requiring that notice be mailed to employees and former employees at their homes, among other remedies).

D. Electronic Notice Increases the Likelihood That the Notice Will Be Effectively Communicated to Employees

It can hardly be denied that today, an employer wishing to communicate information to employees does not typically post a piece of paper on a crowded bulletin board. Rather, the employer most likely distributes a copy of a memo to each employee, either by e-mail or on paper, and where the information is particularly important, the employer also holds an in-person meeting. *See* discussion below in Section II. In many workplaces, employers utilize e-mail as the most efficient means to distribute notices. As the ALJ noted in *Pacific Bell*, 330 NLRB No. 31, slip op. 5 (Nov. 30, 1999), *enforced, Pacific Bell v. NLRB*, 259 F.3d 719 (D.C. Cir. 2000), the Board's "traditional notice posting as a means of communication with employees is increasingly less effective in an electronic age in which the physical posting of notices in common areas generally is not the sole or even the most common means of providing information to employees. . ." *Id.* (requiring employer, in addition to the normal posting requirement, to notify each unit employee by electronic transmission such as e-mail).

E-mail is now a ubiquitous form of communication in the workplace. The majority of American workers use the internet or e-mail at work.[6] E-mail is a simple, immediate, and inexpensive way to disseminate information to large numbers of people. Many people now use e-mail as their primary form of communication at work; it is in the process of replacing "discussion by the water cooler." Martin H. Malin & Henry H. Perritt Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. Kan. L. Rev.

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[6] *See Networked Workers*, Pew Internet & American Life Project (Sept. 2008), http://www.pewinternet.org/Reports/2008/Networked-Workers.aspx (62 percent of employed American adults use the internet or e-mail at work); American Management Association, 2004 Workplace E-Mail and Instant Messaging Survey, www.amanet.org/research/pdfs/IM_2004_summary.pdf (81 percent of employees spent at least an hour on e-mail on a typical workday in 2004); Economic News Release, U.S. Bureau of Labor Statistics, October 2003, http://www.bls.gov/news.release/ciuaw.t01.htm (55.5 percent of employed persons aged 16 and older used the computer or the internet at work).

1, 17 (Nov. 2000). Put another way, e-mail is in the process of replacing discussion near the bulletin board where legal notices are posted. Indeed, *Arkema, Inc.*, one of the cases on review here, is an example of the common practice of an employer using e-mail to disseminate information to employees; there, the employer used e-mail to request that employees disclose their coworkers' union activities to management, to threaten unspecified reprisals if employees engaged in protected acts, and to illegally withdraw recognition from the union. 2009 NLRB LEXIS 285, *4.

The NLRB itself has acknowledged the "widespread use of Internet E-Mail for communication in commercial and professional settings" in discussing the use of e-mail in Board case-handling. *See Use of Internet E-Mail by Outside Parties to Communicate with Board Agent and Submit Documents to Regional Offices*, OM 03-74; *see also Revisions to Unfair Labor Practice Casehandling Manual*, OM 10-27 (CH) (noting that the Casehandling Manual has been revised to make clear that "electronic submission of documents is strongly encouraged"). Although the Board has embraced electronic communication with parties and their attorneys, it has not taken the step of ensuring that its notices are communicated electronically to its ultimate constituents, American workers.

E. At a Minimum, the Board Should Amend its Current Notice-Posting Language to Make Electronic Notice the Norm

The Board should amend its standard notice-posting language to make clear that, in addition to being posted in the traditional paper format, a notice must be communicated to employees electronically, including via e-mail, whenever the employer already uses those electronic means to communicate with employees. The Board has said it will order electronic notice when the "respondent customarily communicates with its employees electronically" – but only if the General Counsel or a charging party gathers and presents evidence at the unfair labor

practice hearing showing that the employer customarily communicates with employees electronically, *and* makes a special request that the judge modify the standard language. *Nordstrom*, 347 NLRB 294, 294 n. 5. Making electronic notice the norm would eliminate those unnecessary hurdles.[7]

As current and former Board members have observed, the language of the Board's notice-posting requirement *already does* literally require employers who use e-mail to communicate with employees to use that same means to post remedial notices from the Board. "[R]equiring [an employer that already customarily posts notices to employees electronically] 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." *IBM*, 339 NLRB 966, 968 (2003) (Member Walsh, dissenting). Likewise in *Nordstrom*, 347 NLRB 294 (2006), then-Member Liebman noted that the standard notice-posting language "unequivocally references *all* places where notices to employees customarily are posted," *Id.* at 294 (emphasis in original); thus, that language is broad enough to "encompass new communication formats, including electronic posting which is now the norm in many workplaces." *Id.* Given, however, that the Board has repeatedly declined to conclude that its current notice-posting language requires an employer that communicates with its employees by e-mail or other electronic means to disseminate Board notices in that manner, *see IBM*, 339 NLRB at 966-67; *Nordstrom*, 347 NLRB at 294, the Board must now take the step of amending its standard notice-posting language to make that clear.[8]

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[7] If any questions arose as to whether notice had been given properly under this new standard, those issues should be addressed in compliance proceedings. In such proceedings, an employer taking the position that it should not be required post a notice electronically would bear the burden of proof, since the employer would be in the best position to have access to information relevant to that question.

[8] In grasping for arguments that the Board's current notice-posting language does not already mandate e-mail notice, the respondent employers in the cases under review are left to point to dictionary definitions of the word "post." *See* Arkema Inc.'s Answering Brief in Opposition to the General Counsel's Cross Exceptions at 2. This

The Board's current practice of ordering e-mail or other electronic posting of notices only in "particular case[s]" when the General Counsel or charging party introduces special evidence at the unfair labor practice hearing, *Nordstrom*, 347 NLRB at 294 n. 5., serves no purpose other than to make it less likely that remedial notices will be effectively communicated to employees. There would be no need for evidence in any particular case if the Board clarified the standard language to explicitly require electronic notice *whenever* the employer already communicates with employees electronically. After all, under the current bulletin-board-posting system, there is no requirement that the General Counsel introduce evidence that the employer actually communicates with employees by posting notices on bulletin boards. And beyond eliminating the requirement for evidence about the employer's e-mail practices in every case in which an unfair labor practice hearing is held, including electronic notice in the Board's standard notice language is the only way to ensure that electronic notice is provided for in the vast majority of unfair labor practice cases that are settled, since it is the Board's common practice to use the standard notice-posting language in settlement agreements.

The approach of including a conditional requirement in the Board's standard notice language, as we are proposing here, is not novel; it is precisely the approach the Board takes with respect to the mailing of notices when a company or plant has closed. In *Indian Hills Case Center*, 321 NLRB 144 (1996), the Board noted that its then-current practice of requiring record evidence of a plant closure before ordering that notices be mailed meant that if "the record fails

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argument is unavailing. For one thing, Arkema is selective in its dictionary use; a common meaning of "post" is "to *publish*, *announce*, or *advertise* by *or as if by* use of a placard." Merriam-Webster.com, http://www.merriam-webster.com/dictionary/post (first definition of "post" as transitive verb) (emphases added). In any case, even if the word "post" were somehow too narrow to include e-mail, there is nothing preordained about the word "post." The word is not found in the text of the Act; it is merely the word the Board has long used, beginning, as discussed above, an era in which "posting" was an accepted way of alerting groups of people to a document and "distribution" entailed expensive duplication. To value one particular understanding of the word "post" over the actual purpose of the posting requirement – the effective communication of information to employees affected by a violation of the Act – would be to place form far above substance.

to reflect [the closure] or if the closing occurs after the issuance of the Board's decision, there is no provision in the Order to ensure that employees are notified of the outcome of the Board proceeding." *Id.* at 144. The Board therefore changed its standard notice-posting language "to state that *if* the respondent's facility has closed, the respondent shall mail the notice to employees." *Id.* (emphasis added). Exactly the same consideration applies here. The Board is already willing to require electronic notice if the employer communicates with employees electronically. *Nordstrom*, 347 NLRB at 294 n. 5. But if "the record fails to reflect" the fact that the employer communicates with employees electronically, "there is no provision in the Order to ensure" that employees receive the Board's notice in the way they receive other communications from their employer, namely electronically.

The only way to ensure that electronic dissemination of NLRB notices becomes the norm, rather than the exception, just as electronic communication itself has become the norm rather than the exception in the modern workplace, is for the Board to update its standard notice-posting language to mandate that change.

Furthermore, under this proposed standard, it would not be sufficient for the employer merely to put the notice somewhere on its website or intranet system where employees may never see it. Instead, an employer would be required to communicate the notice to employees electronically in the same way or ways it already communicates with employees electronically. Thus, an employer that communicates with employees by e-mail and by posting information on an internet or intranet site would be required to post the notice electronically using both of those methods. An employer that communicates with employees by sending information to a handheld device by text message or other means would be required to disseminate the notice using those means.

Finally, instead of requiring electronic dissemination of the notice only where the employer "customarily" communicates with employees electronically, the test should be whether the employer *ever* does so. The purpose of conditioning electronic notice on the employer's already-existing practice is only to ensure that employers are not required to set up electronic posting systems that do not already exist – not to allow employers to avoid providing effective notice by arguing about whether prior electronic communication with employees was "customary."

II. The Board Should Go Beyond Electronic Notice to Require Notices to be Disseminated in Multiple Ways in Order to Maximize the Chances That Their Contents Will Be Effectively Communicated to Employees

While updating the current Board notice-posting language to take account of the widespread nature of electronic communication is a long-overdue step, it is not sufficient. This is particularly true because, despite the widespread use of e-mail, there are still many employers who do not communicate with employees via e-mail. This is particularly true in low-wage industries such as janitorial, security, and food service. In order to accomplish the goal of ensuring that the contents of notices are effectively communicated to employees, so that employees are "apprised of the unlawful nature of [the employer's] acts and assured that they will not be repeated," *Eastern Maine Medical Ctr.*, 253 NLRB 224, 228 (1980), the Board must make additional changes to its notice regime. Specifically, the Board should require that notices be disseminated on multiple occasions and through multiple methods: by being given to each employee individually (either electronically or in paper form) and read aloud in addition to being physically posted. Additionally, notice should be translated into languages other than English upon the request of the General Counsel or a charging party.

A. Multiple Forms of Notice Should Be Required Routinely, Not Just in Extraordinary Cases

The Board has long recognized the value of requiring multiple forms of notice to "undo the effect" of unfair labor practices. *J.P. Stevens & Co.*, 157 NLRB 869, 878 (1966), *enf'd*, 380 F.2d 292 (2d Cir. 1967). In *Fieldcrest Cannon, Inc.*, 318 NLRB 470 (1995), *enf'd in relevant part*, 97 F.3d 65 (4th Cir. 1996), the Board affirmed an order requiring the employer to, among other relief, mail a copy of the notice to each employee on the payroll since the unfair labor practices began; to publish the notice in its internal newsletter, in local newspapers of general circulation, and in local Spanish newspapers; to post the notice in the plant; to translate the notice into Spanish and to mail, publish, and post the Spanish version; and to read the notice aloud to employees. *Id.* at 473. The Board noted that these remedies were "necessary in order to convey the message to all employees ... that the [employer] is serious about remedying [its] unlawful conduct." *Id. See also Three Sisters Sportswear Co.*, 312 NLRB 853, 853 (1993) (affirming notice remedy including mailing, publication in newspaper, and reading aloud in Spanish and English); *Texas Super Foods, Inc.*, 303 NLRB 209, 209 (1991) (affirming remedies including reading of notice by company president). The courts have affirmed the imposition of such remedies, observing that they "assur[e] employees that the company will respect the rights of workers to form and join unions." *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 962 (2d Cir. 1988).

While recognizing their efficacy in some cases, the Board has treated the requirement of multiple forms of notice as an "extraordinary" remedy, to be reserved for cases involving "numerous, pervasive, and outrageous" violations of the Act. *See, e.g., Valley Hosp. Med. Ctr., Inc.*, 351 NLRB 1250, 1250 (2007). But there is no logical reason for limiting these remedies to the most egregious cases. Surely *any* case in which an employer has violated the NLRA is a case

in which it is worthwhile to assure employees that the employer is "serious about remedying [its] unlawful conduct." *Fieldcrest Cannon* at 473. None of the remedies we are advocating constitute monetary penalties; they are not in any way punitive; and they do not impose an undue burden on an employer found to have violated the Act. And, as we now show, they are precisely the type of reinforcement of a message that research demonstrates is necessary to achieve effective communication.

B. Research Shows That Information Must Be Communicated Repeatedly and Through Different Avenues to be Meaningfully Understood and Remembered

Research on cognition and comprehension shows that new information is more likely to be retained over long periods if the information is presented on several separate occasions. *See, e.g.,* Nicholas J. Cepeda et al., *Spacing Effects in Learning,* 19 Psychological Science 1095, 1095 (2008) ("multiple exposures [to the same piece of information] . . . are probably essential for most long-term instruction").[9] Thus, a notice that is *only* posted on a bulletin board is much less likely to be meaningfully recalled than a notice that is posted on a bulletin board *and* e-mailed or distributed to each employee *and* read aloud.

Research also shows that different people have different learning styles, and that a person understands information best if it is presented in a format tailored to that person's particular style. Richard M. Felder & Linda K. Silverman, *Learning and Teaching Styles in Engineering Education*, 78 Engineering Educ. 674, 676 (1988) ("an extensive body of research has established that most people learn most effectively with one of the three modalities and tend to miss or ignore information presented in either of the other two").[10] Specifically, in any group of people, some will learn most effectively through written words, while others will learn through

[9] *Available at* http://www.pashler.com/Articles/Cepeda%20et%20al%202008_psychsci.pdf.
[10] *Available at* http://www4.ncsu.edu/unity/lockers/users/f/felder/public/Papers/LS-1988.pdf. The authors of this piece later re-named the "auditory" modality "verbal" modality.

listening, and still others will learn best through taste, touch, and smell. *Id.* (describing the "visual," "auditory," and "kinesthetic" modalities).[11] The Occupational Safety and Health Administration accordingly recommends that information about workplace hazards be communicated to employees both in written form and orally. U.S. Dept. of Labor, Hazard Communication Guidelines for Compliance, OSHA 3111, 13 (2000) ("a properly conducted training program will ensure comprehension and understanding. It is not sufficient to either just read material to the workers or simply hand them material to read").[12] Board notices are likewise most likely to be meaningfully internalized by a collection of employees if they are conveyed in both written and oral forms.

Research into human learning thus indicates that the Board's practice of requiring that notice be disseminated only by affixing a written notice to a potentially remote and cluttered bulletin board has the potential to significantly limit the extent to which *all* workers will internalize the intended message. To better reflect the ways that employees retain and comprehend information, notices should instead be presented repeatedly and through a diversity of methods.

C. Notices Should be Physically Posted, Distributed Individually, Read Aloud, and Translated Because Each Method Carries Important and Unique Remedial Attributes

The specific methods included in the Board's standard notice regime should include individual distribution (either electronically or in paper form), reading aloud, and traditional paper posting. In addition, the notice should be translated into a language other than English (and then distributed, posted, and read in that language) upon the request of the General Counsel,

[11] There is no obvious way to convey Board notices in the learning style of "kinesthetic" learners, so we do not address that here.

[12] A*vailable at* http://www.osha.gov/Publications/osha3111.pdf .

or a charging party. Each mode of communication plays an important role in ensuring that the remedy is effective.

1. Individual Distribution

For the same reasons set forth in section I above as to why electronic notice should be the norm rather than the exception, even in workplaces in which electronic communication is not utilized, each employee should receive an individual copy of the Board notice. Indeed, a rule requiring that each employee receive a copy of the notice in some form is even simpler than a contingent rule requiring electronic notice only if the employer customarily communicates that way. The Department of Labor recently adopted such an approach in revising the regulations governing notices to employees of their rights under the Family and Medical Leave Act ("FMLA"). The new regulations require that in addition to being posted (either physically or electronically), an employer that has any FMLA-covered employees must give notice of FMLA rights to each employee, either as part of an employee handbook or by "distributing a copy ... to each new employee upon hiring." In either case, "distribution may be accomplished electronically." 29 C.F.R. §. 825.300(a)(3).

The individual distribution of notices, either in physical or electronic form, guarantees that every employee will at least lay eyes on the notice. Just as crucially, it provides employees with the opportunity to read the notice in private, so that they can "absorb its meaning and hence to understand [their] legal rights." *UFCW Local 204 v. NLRB*, 447 F.3d 821, 828 (D.C. Cir. 2006) (quoting *Teamsters Local 115 v. NLRB*, 640 F.2d 392 at 400-401 (D.C. Cir. 1981)). *See also J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 539 (5th Cir. 1969) (a notice mailed to an employee's home "surely aids in dispelling the chilling effect of [the employer's unfair labor practices] by giving the employee an opportunity in the privacy of his home to see that someone

stronger than [the employer] has a voice in protecting those who wish to support the Union"). Electronic notice is nearly cost-free, and copying and distributing a paper notice (whether in employee mailboxes, along with employees' paychecks, or by mail) "does not place any real financial strain" on an employer and "imposes no serious technical problems." *J.P. Stevens & Co. v. NLRB*, 417 F.2d at 539. Indeed, it is difficult to believe that the Board would not have ordered individual distribution of notices from the inception of the Act if only efficient, low-cost means of copying or electronically sending notices had then existed.

2. Reading

The reading aloud of a notice to an assembled group of employees is critical to signal to all employees that workplace rights will be respected. Such a reading is an "effective but moderate way to let in a warming wind of information and, more important, reassurance." *J.P. Stevens & Co. v. NLRB*, 417 F.2d at 540. Longstanding empirical research indicates that "leaflets or other printed propaganda devices cannot match the persuasive power of oral presentations." John W. Teeter, Jr., *Fair Notice: Assuring Victims of Unfair Labor Practices That Their Rights Will Be Respected,* 63 UMKC L. Rev. 1, 11 n.56 (1994) (internal citations omitted; collecting research). The Board has likewise recognized the "unique effectiveness of speeches addressed to employees assembled during working hours at the locus of their employment." *H.W. Elson Bottling, Co.,* 155 NLRB 714, 716 n.7 (1965); *see also* NLRB Office of the General Counsel, Memorandum OM 99-79, 2 (Nov. 19, 1999) (announcing that General Counsel would seek to have notices read as a standard remedial measure because reading serves multiple remedial interests). Employers are also well aware of the power of in-person meetings and oral explanations. This explains why employers seeking to defeat union organizing

campaigns commonly hold "captive audience" or one-on-one meetings with employees in addition to mailing, handing out, or posting antiunion literature.

And, unlike traditional posting or individual distribution, notice reading reflects the reality that ninety-three million American residents have only a basic or below-basic level of English language proficiency. Nat. Ctr. for Educ. Stats., U.S. Dept. of Educ., *National Assessment of Adult Literacy* (Feb. 2009).[13] *See also* Jane M. Von Bergen, *Low literacy limits half of Phila. Workforce, study finds*, Philadelphia Inquirer (June 28, 2009) ("more than half of Philadelphia's working-age adults, about 550,000 people, cannot handle the basic arithmetic and reading necessary to succeed in the majority of jobs in the city"). Making notice reading a standard practice addresses the additional truth that most employees who do not understand written English well are unwilling to volunteer, either to their employer or to the Board, that they are functionally illiterate, out of shame and the fear of negative repercussions. Leslie Kaufman, *Can't Read, Can't Write, Can Hide It*, N.Y. TIMES (Oct. 31, 2004) ("[h]iding illiteracy from a boss is common").[14]

3. Traditional Posting

The adoption of newer forms of notice-dissemination should not cause the Board to jettison its traditional requirement that physical notices be posted. Despite its limitations, the posting of a physical workplace notice remains significant as a public declaration that honors statutory rights and memorializes statutory wrongs. That the Board notice is usually affixed

[13] *Available at* http://nces.ed.gov/naal/kf_demographics.asp.

[14] Some courts have expressed concern that a requirement that a company official read a Board notice would be "humiliate[ing]" to the employer. *See, e.g., NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 962 (2d Cir. 1988). This concern is misplaced. Even putting aside the fact that it makes no sense to speak of a *company* experiencing a human emotion such as "humiliation," there is no reason why a company official's statement to employees that the company will follow the law should "humiliate" either the company or the official. But in any case, this entire question could be avoided by offering companies the option of having the notice read by Board agents. *See id.*

alongside other state and federal mandated notices only adds to its official and legalistic qualities, cementing its authoritative status in employees' minds.

4. Translation

As is the case with employees who are functionally illiterate, some employees who do not understand English well are likely to be hesitant to announce as much. According to Census data, in 2000, 18 percent of the total population aged 5 and over, or 47 million people, spoke a language other than English at home. U.S. Census Bureau, Census 2000 Brief, *Language Use and English-Speaking Ability: 2000*, at 2 (October 2003).[15] The percentage of the population that did not speak English at home *and* reported speaking English less than "very well" was 8.1 percent in 2000, up from 6.1 percent in 1990. *Id.* at 3.

To our knowledge, the Board has never set forth a clear standard for determining under what circumstances it will require translation of a notice. In one case, it rejected a request for translation even there was testimony in the record that "a lot" of workers in one department did not speak English. *Windsor Convalescent Center of North Long Beach,* 351 NLRB 975, 989 n.61 (2007). At a minimum, the Board's current practice requires an additional mini-trial at each hearing regarding the ability of employees to read and comprehend English. Even if workers did not have good reason to hide their inability to read English, it is not an effective use of the Board's limited resources to require testimony and/or documentary evidence on this collateral issue.

Thus, the sheer number of non-native speakers in the American economy counsels that all notices should include translations into any language requested by the General Counsel or a

[15] *Available at* http://www.census.gov/prod/2003pubs/c2kbr-29.pdf.

charging party, so that all employees, no matter their nation of origin, have equal access to the notice remedy.[16]

CONCLUSION

The Board bears the responsibility of ensuring that its notice remedies *effectively communicate* to employees that unlawful acts committed in violation of their rights will not be repeated. The remedy of requiring electronic notice whenever an employer already uses that method to communicate with employees is a first step in that direction. But in order to more fully ensure that the notice remedy "effectuates the policies of th[e] Act," 29 U.S.C. § 160(c), the Board should adopt the standard practice of requiring notices to be distributed to each employee (whether physically or electronically), posted, read aloud, and translated upon the request of the General Counsel or the charging party.

Respectfully submitted,

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[16] It may be that the burden of translating notices into a language other than Spanish imposes a sufficient burden on the agency to justify some additional showing before the Board will honor a translation request. But, there is simply no reason to require any showing before the Board will honor the Charging Party or General Counsel's request for translation of the notice into Spanish.

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2010, I caused a true and accurate copy of the foregoing **Brief of Service Employees International Union as Amicus Curiae** to be sent via U.S. mail to the following:

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