BEFORE THE NATIONAL LABOR RELATIONS BOARD

IN THE MATTERS OF:	)	
	)	
ARKEMA, INC.	)	Case No. 16-CA-26371
	)	
and	)	
	)	
STEVENS CREEK CHRYSLER JEEP DODGE, INC.	)	Case No. 20-CA-33367
	)	
and	)	
	)	
CUSTOM FLOORS INC.	)	Case No. 28-CA-21226
	)	

BRIEF *AMICUS CURIAE* OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION IN SUPPORT OF EQUAL APPLICATION OF ELECTRONICALLY POSTED BOARD-ORDERED REMEDIAL NOTICES

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INTEREST OF THE *AMICUS CURIAE*

The National Right to Work Legal Defense and Education Foundation is a nonprofit, charitable organization that provides free legal assistance to workers who, as a consequence of compulsory unionism, have suffered violations of their right to work; their freedoms of association, speech, and religion; their right to due process of law; and other fundamental liberties and rights guaranteed by the Constitution and laws of the United States and of the several states.

Foundation attorneys have represented numerous individual workers before the National Labor Relations Board and in the courts in cases under the National Labor Relations Act, including such landmark cases as *Communications Workers of America v. Beck*, 487 U.S. 735 (1988); *Ferriso v. NLRB*, 125 F.3d 865 (D.C. Cir. 1997), *granting review & rev'g* 322 N.L.R.B. 1 (1996); *California Saw & Knife Works*, 320 N.L.R.B. 224 (1995); and *Dana Corp.*, 351 N.L.R.B. 434 (2007). In scores of cases throughout the country, the Foundation is currently aiding individual employees who seek through Board proceedings to vindicate their rights to refrain from forced association with, and/or subsidization of, unions. Consequently, the Foundation has a concrete interest in the nature of the remedies ordered by the Board.

Amicus Foundation believes that any change in policy on the posting of notices should apply equally to both employers and labor unions. It is not clear from the Board's invitation of amicus briefs in these cases that the Board is considering requiring respondents to post notices electronically in Section 8(b) cases as well as Section 8(a) cases. The Foundation, therefore, submits this brief to highlight the history of equal application of the National Labor Relations Act and the importance of continuing the practice of equal application in the digital age.

ARGUMENT

I. INTRODUCTION

The Wagner Act was enacted in 1935. Until 1947, it proscribed employer unfair labor practices only. Since the passage of the Taft-Hartley Act in 1947, unions as well as employers have been regulated under the National Labor Relations Act, and are therefore subject to the Board's Section 10(c) authority to take affirmative action to remedy violations of Sections 8(a) and (b) of the Act, 29 U.S.C. §158(a), (b). 29 U.S.C. §160(c). One such "affirmative action" the Board orders is the posting by guilty respondents of "mea culpa" notices for sixty days. The Foundation takes no position as to whether the Board should require electronic posting of such notices. However, if the Board requires electronic posting by employers for Section 8(a) violations, that obligation should be applied to unions for Section 8(b) violations as well.

II. THE BOARD HAS APPLIED ITS REMEDIAL POWER EQUALLY TO EMPLOYERS AND UNIONS

Section 10(c) makes no reference to the posting of notices. It merely provides that, if the Board finds a respondent guilty of an unfair labor practice, the Board shall issue an order requiring that respondent "to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this subchapter." 29 U.S.C. § 160(c).

Nonethess, the Board applied Section 10(c) in its very first reported decision to require employers to post notices as a remedial affirmative action. *In the Matter of Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1, 51-52 (1935) (employer ordered to post notices in all conspicuous places in all facilities where its employees were located), *rev'd on other grounds*, 91 F.2d 78 (3d Cir. 1937), *rev'd*, 303 U.S. 261 (1938). The Supreme Court explicitly recognized the

Board's authority to require notice posting in *Pennsylvania Greyhound Lines*. *See* 303 U.S. at 266-67. The Court also approved this practice in *NLRB v. Falk Corp.*, 308 U.S. 453, 462 (1940).

Since 1947 the Board has applied its remedial power to labor organizations and required them to post notices when violations of Section 8(b) are found to have occurred. *See, e.g., Radio Officers' Union v. NLRB*, 347 U.S. 17, 32 (1954); *NLRB v. Electrical Workers Local 340*, 301 F.2d 824, 825 (9th Cir. 1962).

In enacting the Taft-Hartley Act Congress believed that unions and employers should both be held accountable for violating employee rights. In *Radio Officers' Union*, the Supreme Court held that the Taft-Hartley Congress amended section 10(c) "to give the Board power to remedy union unfair labor practices *comparable* to the power it possessed to remedy unfair labor practices by employers." 347 U.S. at 54 (emphasis added). Thus, where violations of the Act are found, remedial notice obligations should apply to unions and employers in equal measure, regardless of whether the notice is electronic or paper.

III. ELECTRONIC COMMUNICATION IS AVAILABLE TO UNIONS

In today's world, both labor unions and employers utilize electronic communication. Because of this, it is feasible to require electronic notice posting by both types of parties.

Many labor organizations covered by the Act operate a website, including, for example, the International Association of Machinists (http://www.goiam.org/), Communications Workers of America (http://www.cwa-union.org/), International Brotherhood of Teamsters (http://www.teamster.org/), and Service Employees International Union (http://www.seiu.org/splash/), as well as many other national, intermediate, and local labor organizations. *See* http://www.irle.berkeley.edu/library/index.php?page=24 (listing national,

intermediate, and local unions' websites); http://www.aflcio.org/aboutus/unions (listing AFL-CIO affiliates' websites).

These union websites often offer members and others the opportunity to receive e-mail updates and announcements by submitting an e-mail address. *E.g.*, http://www.seiu.org/splash/. Unions presumably often collect members' and other employees' e-mail addresses during organizing campaigns or representation of bargaining units. In short, unions already reach out to their members and other employees through electronic communication. Thus, requiring union violators of the Act to notify their members and other bargaining unit employees electronically of notices required by Board orders or settlements would not be burdensome.[1]

CONCLUSION

Employers and unions are equally capable of implementing electronic notice posting. Notice posting is a remedy with a long history of application to both unions and employers. Based on a precedent of equal application, and the fact that electronic notice posting is possible for both types of respondents, any change in the Board's policy concerning the posting of notices should apply equally to unions and employers.[2] We add, however, that the Board should also

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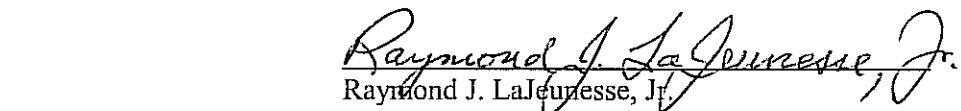
[1] The Foundation suggests that, where a union and employer are found to have committed unfair labor practices against employees in the same case, the employer should be required to post the notice of the union's violations as well as its own.

[2] The Board's section 10 remedial authority, however, does not authorize it to usurp an employer's electronic communication system to create union access to private property for purposes of organizing. Section 8(c), 29 U.S.C. § 158(c), guarantees an employer the protected right to communicate to its employees its opposition to union organizational campaigns. This statutory right cannot be abrogated by invoking the Board's jurisdiction over representation elections under section 9, 29 U.S.C. § 159. "[A]n employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union *or the Board." NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (emphasis added).

continue to require physical notice posting on bulletin boards, because not all employees have access to the Internet and/or use e-mail.

For the above-stated reasons, if the NLRB changes its policy concerning remedial notice posting, it should apply that change in policy equally to unions and employers.

Respectfully submitted,



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June 11, 2010

CERTIFICATE OF SERVICE

I, Raymond J. LaJeunesse, Jr., hereby certify that on June 11, 2010, a true and correct copy of Brief *Amicus Curiae* of the National Right to Work Legal Defense Foundation in Support of Equal Application of Electronically Posted Board-Ordered Remedial Notices was served as indicated below:

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