UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ARKEMA, INC., and UNITED STEEL WORKERS OF AMERICA, LOCAL 13-227	16-CA-26371 16-CA-26392
ARKEMA, INC., and GREG SCHRULL, and UNITED STEEL WORKERS OF AMERICA, LOCAL 13-277.	16-RD-1583
STEVENS CREEK CHRYSLER JEEP DODGE, INC., and MACHINISTS DISTRICT LODGE 190, MACHINISTS AUTOMOTIVE LOCAL 1101, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, et al.	20-CA-33367 20-CA-33655 20-CA-33603
CUSTOM FLOORS, INC., and INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 15, et al.	28-CA-21226 20-CA-21229 20-CA-21230 20-CA-21231 20-CA-21233

BRIEF OF CHARGING PARTIES MACHINISTS DISTRICT LODGE 190, MACHINISTS AUTOMOTIVE LOCAL 1101, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO and INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 15

David A. Rosenfeld
Caren P. Sencer
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501-1091
Telephone: (510) 373-1001
Facsimile: (510) 337-1023
Drosenfeld@Unioncounsel.Net
Csencer@Unioncounsel.Net
Attorneys For Machinists District Lodge 190, Machinists Automotive Local 1101, International Association Of Machinists And Aerospace Workers, AFL-CIO and International Union Of Painters And Allied Trades, District Council 15

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. INTRODUCTION

Machinists District Lodge 190, Machinists Automotive Local 1101, and International Association of Machinists and Aerospace Workers, AFL-CIO, the charging parties in *Stevens Creek Chrysler Jeep Dodge, Inc.*, 20-CA-33367, 20-CA-33655, 2-CA-33562, and 20-CA-33603, together with the International Union of Painters and Allied Trades, District Council 15, the charging party in *Custom Floors, Inc.*, 20-CA-21226, respectfully submit this brief in response to the Board's May 13, 2010 Notice and Invitation to File Briefs on the issue of electronic remedial notice. The May 13, 2010 notice was inadvertently not served on the parties in these cases until May 25, 2010, and on that date the Board extended the deadline for the parties' briefs to June 24, 2010.

The charging parties generally endorse the views expressed in the amicus briefs submitted by the AFL-CIO, SEIU and the Office of the General Counsel to the extent that those briefs 1) underscore the importance of Board-ordered remedial notice, 2) demonstrate the ubiquity of electronic communication in the workplace, and 3) propose electronic notice as a standard remedy which would better fulfill the goals of remedial notice and better effectuate the purposes of the National Labor Relations Act. These charging parties go further, however.

The standard remedy needs to get with the times. Email has existed in the workplace for almost twenty years. Other technologies, such as cell phones, personal digital assistants, personal computing stations, and internet social networking, to name but a few, have also proliferated in modern work culture. After two decades, it has taken a press-released call for amicus briefs for the glacial NLRB to start a discourse on whether humble email—an extremely common, time-worn reality for millions of

employed Americans—should be a standard forum for remedial notice posting. An uninterested passer-by on a search engine may have scoffed when he saw that 2010 was the year of the press release. A standard requirement of emailed remedial notice is a long overdue, insufficient step in the right direction. Because the present discourse should have taken place over fifteen years ago, this brief also treats the broader swath of communications technologies that Board orders should automatically require.

It is tragic that the NLRB has taken no action to amend the standard remedial policy to reflect the presence of these technologies. This delay further confirms the ossification of the National Labor Relations Act and its administration.[1] In an era in which some NLRB decisions allow technological advances to weaken the central mission of the NLRA,[2] an era in which employers are rapidly gaining technological abilities to monitor employee activity (through GPS tracking, email monitoring, inexpensive video surveillance systems, and other methods), the Board must change the remedial policy for the good of American worker and to make the Act relevant. At very minimum, where an employer breaks the law the employee should be entitled to an email affirming her rights. This brief attempts to show that such an email is hardly enough.

None of the recommendations this brief sets forth are meant to replace the current standard Board order for physical posting nor the special remedies available at the Board's discretion.

---

[1] For a broader treatment of the tragic ineffectuality of the NLRA, *see* Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 Colum. L. Rev. 1527 (2002) ("[N]o other major American legal regime—no other body of federal law that governs a whole domain of social life—...has been so insulated from significant change for so long.").

[2] Modern technology has occasionally threatened workers' right to organize. *See, e.g., Technology Service Solutions*, 332 NLRB 1096 (2000) (citing privacy concerns as the reason for not allowing union access to a database of employee names and addresses in a multi-state region)

II. THE STANDARD REMEDIAL BOARD ORDER SHOULD REQUIRE EMAILED NOTICE.

The aim of requiring remedial notices is to "inform employees of their statutory rights and the legal limits of the employer's conduct" when an employer violates the law. *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 399 (D.C. Cir. 1981). At times, the Board has ordered special remedies in unique cases as a way to ensure that employees actually get the message.[3] The Board has also amended the standard notice policy to accord with the prevailing reality of the American workplace. For instance, in 1997 the Board began to require that when a violating employer goes out of business, the employer must mail a copy of the notice to every employee since the time of the violation. *Excel Container, Inc.*, 325 NLRB 17, 17 (1997). Similarly, in 2001 the Board began to require that the standard notice be "expressed in simple and readily understandable language," throwing out the previous boilerplate legalese so as to ensure that employees comprehend the information. *Ishikawa Gasket Am., Inc.*, 337 NLRB 175, 176 (2001). These changes to the standard remedy illustrate the importance to the Board that remedial notice actually and effectively communicate a message to employees.

However, the Board has not consistently required remedial notices to be posted via email, even when the employer uses email to communicate with employees.

"The use of email has become almost mandatory in U.S. workplaces." Deborah Fallows, *Email at Work*, Pew Internet and American Life Project (December 8, 2002).[4] By 2002, 62% of American workers had internet access, and 98% of those workers used

---

[3] *See, e.g., Finn Industries*, 314 NLRB 556 (1994) (requiring mailing to employees); *Quinn Rest. Corp.*, 293 NLRB 465 (1989) (requiring printing in the language of employees); *Trident Seafoods Corp.*, 293 NLRB 1016 (1989) (requiring adjustment of the notice period to correspond to the employment pattern of a seasonal business); *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 399 (D.C. Cir. 1981) (enforcing a Board order for local publication of notice).

[4] *Available at* http://www.pewinternet.org/~/media//Files/Reports/2002/PIP_Work_Email_Report.pdf.pdf

email on the job (for a total of fifty-seven million "work emailers"). *Id.*; *see also* Mary Madden & Sydney Jones, *Networked Workers*, Pew Internet and American Life Project (2008) (reporting on the prolification of email and other communication technologies in the workplace).[5] Indeed, email has become so pervasive that some commentators remind employers to interact with employees face-to-face rather than solely by email. *See, e.g.*, Mary Ann McCauley, *Make Technology Work For You: Communicating With Employees During Tough Times*, Employee Benefit Plan Review (June 2010) (arguing that email is "no substitute" for one-on-one interaction).

Since email is so quick and easy, employers use it regularly to post notices of all types. Even the most modest email system can easily send a single message to a particular group of people with the mere click of a mouse.

The standard Board order should require that the violating party email the remedial notice to employees. Requiring employers to email notice as a default, without a special showing, better achieves the goals of remedial notice because it ensures that all employees whose rights are violated will actually see the notice and will have an opportunity to review it in relative privacy. The hurdle of a "special showing" for a type of communication used by a majority of American workers (62% as early as 2002),[6] is unnecessary and wastes resources. If the violating employer does not use email to communicate with employees, it will quickly and easily meet a burden of proof on that fact at the compliance stage. While *Excel Container* and *Ishikawa Gasket* demonstrate the Board's recent willingness to amend the standard remedy, other NLRB policy modernizations (such as the electronic submission of briefs, the Board's own use of an

[5] *Available at* http://pewresearch.org/pubs/966/networked-workers
[6] Deborah Fallows, *Email at Work*, Pew Internet and American Life Project (December 8, 2002).

email system, "NLRB on Twitter," and "NLRB on Facebook") demonstrate that the Board itself resides in the present era of communications technology. Requiring email notice as a standard remedy is a natural policy progression.

The electronic notice should contain a hyperlink to the Regional Office and the Board Website so employees may get more information. Where unions are involved as charging parties, the notice should contain a hyperlink to a website designated by the Union. Where the employer is a charging party similarly a hyperlink may be included to the employer's website. The notice should provide a hyperlink to the information on the Board's website about section 7 rights.

The offending employer should not be allowed to place narrow limits on which employees receive the emails. For example, in many cases there will be no established or determined bargaining unit and no determination of who may have known about the illegal conduct. Thus, email notice will best serve the remedial purpose if it is sent to the maximum number of employees that the violation could have possibly affected. Like physical notice, emailed notice should be posted for *all* to see.

III. THE STANDARD BOARD ORDER REQUIRING EMAILED NOTICE SHOULD GIVE EMPLOYEES AMPLE OPPORTUNITY TO READ AND DIGEST THE INFORMATION.

A. Employees Should be Allowed to Read the Remedial Email on Paid Work Time and They Should be Notified of This Allowance.

Making clear that employees are permitted to read the electronic notice on work time would continue the tradition of physical notice posting. However, it is worth mentioning; email is so prolific that 49% of email-using workers say that new technologies make it harder for them to disconnect from their work when they are at home and on the weekends. Mary Madden & Sydney Jones, *Networked Workers*, Pew

Internet and American Life Project (2008). 22% of employed email users say they are expected to read and respond to work-related emails even when they are not at work. *Id.* The remedial notice should not be among the emails that employers expect employees to review while off the clock.

B. Employees Should Be Able to Read Emailed Notice Without Fear of Being Monitored by the Violating Party.

With physical notice as the exclusive posting remedy, employees who choose to read the notice face the risk that the employer will monitor who is reading the notice. This deterrent is especially onerous when, as is often the case, all of the "conspicuous places" where notices are customarily posted are in the plain view of management. Emailed notice can alleviate this problem because employees can review the notice in the relative privacy of their own work station. Board orders should also expressly forbid the violating party from remotely monitoring which employees open and read the email. Such an express provision would ensure that employees are able to digest the information at their own pace and without fear of being watched.

C. The Violating Party Should Send the Remedial Email at Least Once per Month During the Notice Period.

Spam comprises 88-92% of global email volume. Messaging Anti-Abuse Working Group, *Email Metrics Program Report: Third and Fourth Quarters 2009* (March 2010).[7] Despite the development of spam-blocking tools, the volume of spam arriving in users' inboxes continues to persist. "[M]ore Americans than ever say they are getting more spam than in the past," including spam in work email accounts. Deborah

[7] *Available at* http://www.maawg.org/sites/maawg/files/news/MAAWG_2009-Q3Q4_Metrics_Report_12.pdf

Fallows, *Adjusting to a Diet of Spam*, Pew Internet and American Life Project (May 2007).[8] To avoid the remedial notice getting lost in the shuffle, and to underscore its importance in the remedial process, the violating party should release the remedial email at least once per month during the remedial period. Because email is so easy, this carries little marginal burden for the violating party (clicking "send" is arguably easier than tacking physical notice to the bulletin board).

D. Employees Should be Allowed to Forward the Notice Freely.

The Board should not permit adverse action against employees who forward the notice. Remedial notice is not confidential; in its current physical form, it is a worksite-wide announcement that the employer has violated the law, and it is an affirmation of employee rights.[9] Moreover, Board orders are a matter of public record. Employees should continue to be the masters of the email they receive. They should be able to forward the notice freely.

E. Employees Should be Allowed to Print the Notice.

Similarly, the Board should not permit adverse action against employees who print electronic notice. Employer emails are often subject to copying or printing. The same should apply to the notice which is electronically forwarded. Employees should be allowed to print and download to the same extent.

---

[8] *Available at* http://pewresearch.org/pubs/487/spam

[9] The policy of allowing forwarding of the email does not break with physical posting policy. With physical posting, employees can easily disseminate the notice through such common technologies as scanning, photocopying, or a quick picture with a cell phone camera that is then picture-messaged, emailed, "facebooked," "flickr-ed" "peep-ed" "picasa-ed," or otherwise sent to anyone instantly from the same phone that took the picture. Virtually any cell phone with a camera possesses one or more of these capabilities. Although it is thus already possible for *employees* to disseminate physical notice, the purpose of remedial notice is only served if it comes from the *violating party*.

F. The Board Should Require that "Important Notice," or a Similar Statement of the Importance of the Message, Appear in the Subject Line of the Remedial Email.

This requirement will set the notice apart from the other notices the employer disseminates. The requirement would accord with the current standard physical posting, which begins, "Notice to Employees: Posted by Order of the National Labor Relations Board."

IV. THE STANDARD ELECTRONIC NOTICE ORDER SHOULD INCLUDE ANY FORM OF ELECTRONIC COMMUNICATION THROUGH WHICH THE OFFENDING EMPLOYER COMMUNICATES WITH EMPLOYEES.

While 62% of the of the American employed adult population use email at work, fully 96% of employees use new communications technologies—either by going online, using email, or owning a cell phone. Mary Madden & Sydney Jones, *Networked Workers*, Pew Internet and American Life Project (2008) (reporting on the increased use of text messages, personal digital assistants, and cell phones in modern work culture). Beyond email, employers often require employees to use various other platforms of communication for work (such as the texting pagers seen in the recent U.S. Supreme Court case *City of Ontario v. Quon*[10]) and they also take advantage of of the many platforms of communication employees use in their personal lives (such as the practice of text messaging employees on their personal cell phones). Email does not suffice as the sole electronic posting forum. The standard notice requirement should include text messaging, instant messaging, and electronic bulletin boards, social networking sites (such as Facebook, Twitter, MySpace, and LinkedIn) and any other forms of electronic

[10] No 08-1332, 560 US ___ (2010).

communication that the violating party already uses to communicate with employees. If in 2010 the Board has a Twitter account, it should likewise require employers who violate the law to provide a Twitter notice of the remedial email as part of the remedy.

No special showing of types of communication should be required at the unfair practice hearing. "Special" showings on common workplace realities waste the Board's and the parties' time, and they will prove even less efficient as the employers continue to embrace more types of communication. To illustrate, some employers now distribute iPod Nanos pre-loaded with podcasts describing retirement plans and health benefits. *See* Lee Rainey, *Digital 'Natives' Invade the Workplace*, Pew Internet and American Life Project (2006).[11] Employers also commonly post notices to employees via text message including election campaign material. *See Virginia Concrete Corp.*, 338 NLRB 1182 (2003). Many employers use various handheld devices to communicate route information, delivery information, or other information to employees. Other employers may provide messages to employees who use a computer terminal on a regular basis, such as when the employee logs on.[12] The standard notice should automatically encompass all possible types of communication that the violating party has chosen to use to communicate with employees.

V. THE ELECTRONIC POSTING PERIOD SHOULD CORRESPOND TO THE NUMBER OF DAYS THAT HAVE ELAPSED FROM THE FIRST VIOLATION TO THE DATE OF NOTICE POSTING.

If the date of the first violation was exactly two hundred days prior to the issuance of the Board's remedial order, the remedial order should require electronic notice posting

[11] *Available at* http://www.pewinternet.org/~/media/Files/Presentations/2006/New%20Workers.pdf.
[12] This type of communication takes place, for example, many call centers when employees log on to their computers each day.

for two hundred days. In no case, however, should the remedial period be less than ninety days.

The traditional remedial period of sixty days is inadequate when email or intranet posting is a requirement. In the infant era of physical posting, employees presumably physically came to work five or six days a week. Today, in many cases, employees may not access the employer's intranet every day. The standard remedy should therefore require physical posting and electronic posting (at least once per month, as discussed *supra* at page 6) for a longer period than the outmoded sixty days of traditional posting.

A protracted time lapse between the violation and compliance with a posting order dramatically weakens the effect of remedial notice. In a situation where an employer has inhibited organization for two years, the statutory right of collective bargaining may have been completely lost for two years, and the delay may lead to significant harm to employee rights. Remedial notice adds little to other remedies unless it adequately counters the accrued harm.

Electronic notice is uniquely situated to solve this problem because it carries such a small burden for the violating party, and because when distributed repeatedly it can reinforce one of the principal goals of notice: to affirm employee rights. The longer the notice is repeated, the more the message of employee rights is reinforced. Unlike the static remedies (injunctions, reinstatements), remedial notice can harness the power of time to undo the violation's protracted harm.

The amount of time that has elapsed since the first violation should directly mirror the posting period for electronic remedial notice.

VI. IMPLEMENTATION

At the compliance stage, the violating party can object to any electronic mode of communication as a platform for notice posting. Because the violating party will be best situated to provide evidence of the types of communication it uses, it should bear the burden of proof if there is any reason that it should not be required to meet the standard requirements set forth above. Likewise, the General Counsel and Charging Party should seek additional notice requirements in appropriate cases.

The violating party should be required to provide the Region with proof, in electronic format, that it has complied with all physical posting and electronic posting requirements. This should be done at the outset of the remedial period and at intervals during the remedial period so that the region can be assured that the notice is accurate and contains the required hyperlinks.[13]

Some employees affected by the illegal conduct will have left the employment of the violating party. The standard Board order should require electronic notification to those employees by any email address known to the employer. As in the past, the Board should continue to also require postal mail notice in such cases.

VII. CONCLUSION

The Board should change the standard notice remedy to reflect the reality of electronic communication in the modern workplace. Emailed notice should be a standard remedy. The rules governing emailed notice should prioritize actual communication with employees: It should be read at work, unmonitored, sent more than once, and freely

[13] For example, the notice may contain a link to translations in other languages. In addition, all electronic notices should contain a link to the NLRB website.

forwarded. The standard remedy should further require the violating party to send the notice through all forms of electronic communication through which it already communicates with employees. The Board should apply an extended remedial period to electronic notice; the period should be the amount of time elapsed between the first violation and the implementation of the remedy by the violating party.

The violating party should bear all relevant burdens of proof at the compliance stage.

DATED: June 24, 2010

RESPECTFULLY SUBMITTED,

Weinberg, Roger & Rosenfeld

By _____
David A. Rosenfeld

Weinberg, Roger & Rosenfeld

By _____
Caren P. Sencer

2/577902

CERTIFICATE OF SERVICE

I, Karen Scott, hereby certify that on June 24, 2010, I electronically filed the foregoing with the National Labor Relations Board using the e-filing system, and served a true and correct copy as indicated below:

Via e-mail:

A. John Harper II
Morgan, Lewis & Bockius LLP
1000 Louisiana, Ste. 4200
Houston, TX 77002
Email: aharmer@morganlewis.com

Mara Louis Anzalone, General Counsel
NLRB
2600 North Central Ave., Suite 1800
Phoenix, AZ 85004
Email: mara_louise.anzalone@nlrb.gov

Thomas A. Lenz
Atkinson, Andelson, Loya, Ruud & Romo
12800 Center Court Dr., Suite 300
Cerritos, CA 90903
Email: tlenz@aalrr.com

Gregory E. Smith
Lionel Sawyer & Collins
1700 Bank of America Plaza
300 South 4th Street
Las Vegas, NV 89101
Email: gsmith@lionelsawyer.com

Lisa M. Smith
Klimist, McKnight, Sale, McGlow & Canzano
400 Galleria Office Center, Suite 117
Southfield, MI 48034
Email: lsmith@kmsmc.com

Daniel T. Berkley
Gordon & Rees
275 Batter Street, Suite 2000
San Francisco, CA 94111
Email: dberkley@gordonrees.com

Machinists Automotive Local 1101
Machinists Automotive Local 190
3777 Stevens Creek Boulevard, Suite 320
Santa Clara, CA 95051
jimschwantz@hotmail.com

David B. Reeves
Cecily A. Vix
NLRB Region 20
901 Market Street, Suite 400
San Francisco, CA 94103
Email: dreeves@nlrb.gov

Painters District Council 15
Local #86
1841 North 24th Street
Phoenix, AZ 85008
Email: jsmirk@msn.com

NLRB Region 16 RO – Houston
1919 Smith Street
Mickey Leland Federal Building, Suite 1545
Houston, TX 77002
Email: jallen@nlrb.gov

Bernard L. Middleton
Provost Umprey Law Firm LLP
490 Park Street
P.O. Box 4905
Beaumont, TX 77704
Email: blmiddleton@aol.com

Terry Freeman
Greg Schrull
Arkema, Inc.
2231 Haden Road
Houston, TX 77015
Email: Bigdawg051667@aol.com

FCS Flooring, Inc.
6445 South Industrial Road, Unit D
Las Vegas, NV 89118
Email: bekki@fcsflooring.net

Freeman's Carpet Service, Inc.
3150 Ponderosa
Las Vegas, NV 89118
Email: freemancarpet@aol.com

Via U.S. Mail:

Matt Zaheri
Stevens Creek Chrysler Jeep Dodge
4100 Stevens Creek Boulevard
San Jose, CA 95129

Dean Owens
NLRB Region 16
1919 Smith Street, Suite 1545
Houston, TX 77002

Custom Floors, Inc.
4275 West Reno Ave.
Las Vegas, NV 89118

Allison Beck, General Counsel
International Association of Machinists &
Aerospace Workers, AFL-CIO
9000 Machinists Place, Room 202
Upper Marlboro, MD 20772-2687

Flooring Solutions d/b/a FSI
2829 Synergy
North Las Vegas, NV 89030

Joe Wilson, International Representative
United Steelworkers of America Local 13-227
704 East Pasadena Freeway
Pasadena, TX 77506

FSI
2829 Synergy
North Las Vegas, NV 89030

J. Picini Flooring
4140 West Reno Avenue
Las Vegas, NV 89118

///

///

///

///

///

///

NLRB Region 16 – Ft. Worth
819 Taylor Street, Room 8A24
Ft. Worth, TX 76102-6178

NLRB Region 28 RO – Las Vegas
600 Las Vegas Boulevard South, Suite 400
Las Vegas, NV 89101

Eric Tilles
Arkema, Inc.
2000 Market Street
Philadelphia, PA 19103

I certify that the above is true and correct. Executed at Alameda, California, on June 24, 2010.

Karen Scott