UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

CUSTOM FLOORS, INC.

and 28-CA-21226

J & R FLOORING, INC.
d/b/a A J. PICINI FLOORING

and 28-CA-21299

FREEMAN'S CARPET SERVICE, INC.

and 28-CA-21230

FCS FLOORING, INC.

and 28-CA-21231

FLOORING SOLUTIONS OF
NEVADA, INC., d/b/a FSI

and 28-CA-21233

INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES, DISTRICT COUNCIL 15

and

ARKEMA, INC.

and 16-CA-26371
and 16-CA-26392

UNITED STEELWORKERS OF AMERICA,
LOCAL 13-227

and

ARKEMA, INC.
Employer

and 16-RD-1583

GREG SCHRULL
Petitioner

and

UNITED STEELWORKERS OF AMERICA,
LOCAL 13-227
Union

and

STEVENS CREEK CHRYSLER JEEP DODGE, INC.

20-CA-33367
and 20-CA-33562
and 20-CA-33603
and 20-CA-33655

and

MACHINISTS DISTRICT LODGE 190
MACHINISTS AUTOMOTIVE LOCAL 1001,
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations, (AFL-CIO), on behalf of its affiliated national and international labor organizations files this brief in response to a request by

the National Labor Relations Board for *amicus* briefs addressing whether electronic posting of Board-ordered remedial notices in unfair labor practices cases should be required and, if so, what legal standard should apply and at what stage of the proceedings should any necessary factual showing be required. We submit that remedial Notices ordered in unfair labor practice cases should be routinely communicated to employees electronically, in addition to the traditional bulletin board posting, with any evidentiary issues addressed during the compliance stage of the litigation.

1. The National Labor Relations Act addresses remedies in Section 10(c). It provides that the Board, upon a finding that an unfair labor practice has been committed, "shall issue … an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act…."[1]

The aim of this remedial charge – giving the Board broad discretion in fashioning appropriate remedies – is articulated in the legislative history of the Act. According to Senator Wagner, the intent of Section 10(c) was to prevent unfair labor practices.

> The result of all this nonenforcement of Section 7(a) has been to breed a wide-spread and growing bitterness on the part of workers, who feel

[1] 29 U.S.C. §160(c).

> with much justification, that they have been given fair words, but betrayed by the Government in the execution of its promises. Time and time employees who have sought to organize in pathetic reliance upon section 7(a) have found themselves discriminated against the employer, and appeals to the Government for redress have been in vain.... The only honest thing for the Congress to do, therefore, is to provide adequate machinery for its enforcement, which is the object of the present bill.[2]

The House report explains the broad authority given to the Board: "[The] Board is empowered, according to the procedure provided in section 10, to prevent any person from engaging in any unfair labor practice."

Section 10(c) leaves the Board with "broad discretion to devise remedies ... subject only to judicial review."[3] Since Congress could not define "the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations [it] ... met these difficulties by leaving the adaptation of means to end to the empiric process of administration."[4] Courts have recognized that "Congress has invested the Board, not the courts, with broad discretion" to fashion remedial orders.[5] The test of the appropriateness of the Board's remedial order is whether it bears "appropriate relation to the policies of the Act."[6]

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[2] Michael Weiner, *Can the NLRB Deter Unfair Labor Practices? Reassessing the Punitive-Remedial Distinction in Labor Law Enforcement,* 52 UCLA L. REV. 1579 (2005), at 1621-22, citing H.R. Rep. No. 74-972 at 5-6 (1935).
[3] *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984).
[4] *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).
[5] *NLRB v. Food Store Employees Union, Local 347*, 417 U.S. 1, 8, (1974).
[6] *NLRB v. Seven-Up Bottling Co.*, 344 US 344, at 348 (1953).

2. Since the first NLRB unfair labor practice case, the posting of "notices in conspicuous places in all of the places of business wherein their employees … are engaged" has been an integral remedial tool.[7] Such remedial notice posting has been endorsed by Congress and the courts.[8] Its purpose, according to the Court, of "advising the employees of the Board's order and announcing the readiness of the employer to obey it is within the authority conferred on the Board by §10(c) of the Act 'to take such affirmative action … as will effectuate the policies' of the Act."[9] Remedial notices constitute "significant sanctions," used for the purpose of advising employees of their rights under the NLRA and detailing the employer's violations.[10]

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[7] *Pennsylvania Greyhound Lines, Inc.,* 1 NLRB 1, (1935) (remedial posting ordered despite the employer's claim that a similar notice had already been posted under the N.I.R.A. since, according to the Board, the N.I.R.A. posting "pursuant to legal compulsion … cannot have the effect of excusing or preventing unfair labor practices – it does not even give rise to any interference that an unfair labor practice was not committed or that the respondent's attitude was that described in the posted notice." 1 NLRB at 38.)

[8] Report of the House Committee on Labor, J.R. 1147, 74th Cong., 1st Sess., p. 18, 24; cited by the Court in *NLRB v. Greyhound Lines*, Inc., 303 US 261, 267-68 (1938).

[9] *NLRB v. Express Pub. Co.*, 312 US 426, 438 (1941) (Board has the authority to require employers to post cease-and-desist notices following unfair labor practice determinations), citing *NLRB v. Greyhound Lines*, Inc., 303 US 261, 268 (1938) *and H.J. Heinz Co. v. NLRB*, 311 US 514 (1941).

[10] *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 US 137, 152 (2002); *Raley's*, 348 NLRB 382, 387 (2006) (the "purpose of the remedial notice is to inform employees that the Respondent has been found to have committee certain unfair labor practices and is being required to take specified remedial action.").

The remedial notice-posting requirement has changed little since it was first articulated in 1935.[11] Within the Act's first decade remedial orders regarding notice posting were variously articulated as a directive to "post notices at the main entrance to its plant, on its bulletin board and in other conspicuous places throughout its plant,"[12] "post immediately notices on all bulletin boards and time clocks about its plant,[13] "post notices on all bulletin boards in the plant,"[14] "post and keep visible on each of the bulletin boards,"[15] "immediately post notices on the bulletin boards, or in conspicuous places,"[16] and "immediately post notices … in conspicuous places, including among such places all bulletin boards commonly used by the respondent for announcements to its employees."[17] Routinely ordered whenever an unfair labor practice has been committed, notices are now required to "be posted wherever employee or member notices are customarily posted."[18]

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[11] Early on, the initial 30 day posting period was extended to 60 days. *Vegetable Oil Products Co., Inc.*, 1 NLRB 989, 1008 (1936); *Memphis Furniture Manufacturing Co.*, 3 NLRB 26, 35 (1937) (30 days); *Express Publishing Co.*, 13 NLRB 1213, 1227 (1939); *R. R. Donnelley & Sons Co.*, 60 NLRB 635, 721 (1945) (60 days).
[12] *Titan Metal Manufacturing Co.*, 5 NRLB 577, 596 (1938).
[13] *Oneita Knitting Mills*, 10 NLRB 537, 591 (1938).
[14] *Bluff City Lime Co., a wholly owned subsidiary of the Mississippi Lime Co.*, 10 NLRB 918, 922 (1939).
[15] *Park Hosiery Dyeing & Finishing Co., Inc.*, 17 NLRB 10, 14 (1939).
[16] *Stromberg-Carlson Telephone Manufacturing Co.*, 18 NLRB 526, 541 (1939).
[17] *United Zinc Smelting Corp.*, 43 NLRB 237 (1942).
[18] NLRB Casehandling Manual, Part Three, Compliance Proceedings, 10518.2.

3. The above iteration of the posting requirement includes the answer to the central question presented by the request of the National Labor Relations Board for amicus briefs in these cases: *Where are notices to employees customarily posted?* The answer is that such notices are now customarily communicated through electronic means. Email and intranet, among other electronic communication tools, have overtaken the physical bulletin board as a means of notification by employers to employees of its employment policies.

The purposes of a remedial notice-posting are to "advis[e] the employees of the Board's order and announc[e] the readiness of the employer to obey.[19] These communicative goals should be accomplished in the same manner by which the employer notifies employees of its other employment policies.[20] The language traditionally used to order a notice-posting requires as much by mandating that the notice be communicated to employees by means of its posting wherever such notices are customarily posted. Electronic notification is encompassed within both the goals and language of the Board's traditional notice-posting remedy. To so hold is not

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[19] See note 8, *supra*.

[20] To the extent that such communication has been linked to a piece of paper and a bulletin board, the word "posting" has become an anachronistic euphemism for "communication." And the word "notice" has taken on a stylistic overtone that has linked its meaning more to a piece of paper and less to its functional objective of notifying employees of unfair labor practices that have been committed and announcing to them their employer's readiness to obey the law.

a departure from the standard notice-posting remedy, but simply an acknowledgement that the workplace – and communications within it – have changed dramatically in the past 75 years.

When the notice posting requirement was first crafted and articulated, employees were routinely notified of important work announcements through postings on a bulletin board. The employer would prepare a paper on which the desired information was written or typed and then post the piece of paper in the plant on a bulletin board designated and maintained for such purpose. The bulletin board served as the primary means of communication between workers and management, and employees routinely checked the bulletin board for employment-related information.

The following examples, from the first decade of the Act, are job-related matters which employers advised their employees of through postings on bulletin boards:

- Lay-offs – *Memphis Furniture Mfg., Co.*, 3 NLRB 26, 32 (1937) ("the usual method of lay-off was to post a notice on the bulletin board").
- Plant rules – *Thompson Products, Inc., Thompson Aircraft Products Co.*, 47 NLRB 925, 1029, n. 130 (1944).
- Wage increases – *Peter J. Schweitzer, Inc.*, 54 NLRB 813, 816-817 (1944) (announcement of general wage increase of 5¢/hour); *Essex Rubber Co., Inc.*, 50 NLRB 283, 298 (1943) (announcement of 3¢/hour wage increase posted on bulletin board); *W.L. Maxson Corp.*, 44 NLRB 1136, 1150 (1942) (notice posted of 10¢ wage increase).
- The employer's intent to NOT lay off employees – *Swan Rubber Co.*, 56 NLRB 1312, 1318 (1944).

- Schedules of work – *Standard Gage Co., Inc.*, 54 NLRB 160, 166 (1943) (notice posted of full-time work schedule during holiday period).

At that time, providing that notices of violations of the NLRA be disseminated to employees pursuant to the same method customarily used to notify employees of all other important job-related events meant posting on a bulletin board. Bulletin board postings were the generally accepted and regularly utilized method of disseminating to employees information that the employer wanted them to have about employment matters.

4. But that was then and this is now. Increasingly, employers use email and other electronic means of communication with their employees. Probably the most dramatic and comprehensive transformation of the digital revolution is the widespread use of electronic forms of communication. Information gathering tools have evolved from town criers in medieval England to printed leaflets, newspapers and hand-written mail, through over-the-airwaves transmissions of radio and television broadcasts, and headlong into the Internet and electronic networking.

Fifty years ago, electronic computers did not exist. Now 75% of American households own computers.[21] By October of 2003, "[a]bout 2 of 5 employed individuals connected to the Internet or used e-mail while on the

[21] US Bureau of Labor Statistics, May 2010, Vol. 1, No. 4; available at: http://www.bls.gov/opub/focus/volume1_number4/cex_1_4.pdf

job."[22] In 2008, email use was described as "an essential communication tool in the modern workplace."[23] In many workplaces, email has replaced telephone conversations and face-to-face interaction, as well as written memos: "The magnitude of the preference for e-mail indicates a tipping point in the evolution of business communication."[24] Companies have recognized that e-mail and the Internet are remarkably efficient and effective means of disseminating information.[25] Email is easy-to-use, fast, cost-effective, and it works.

Employers use email, intranet and other electronic tools to communicate with employees about a range of personnel matters. It has become the new bulletin board, used by employers to:

- Announce proposed changes in the company's incentive-based bonus system and vacation policy.[26]
- Advise employees of schedules, pay and worker pairings.[27]

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[22] US Department of Labor, Bureau of Labor Statistics, *Computer and Internet Use at Work* (2003); available at: http://www.bls.gov/news.release/ciuaw.nr0.htm

[23] William A. Herbert. "The Electronic Workplace: To Live Outside the Law You Must Be Honest" *Employee Rights and Employment Policy Journal* 12.1 (2008): 49-104, at 73; Available at: http://works.bepress.com/william_herbert/4

[24] Roma Nowak, *E-Mail Beats the Phone in Business Communication*, InformationWeek, May 19, 2003. Available at: http://www.informationweek.com/news/software/enterpriseapps/showArticle.jhtml?articleID=10000052&queryText=business%20communication%20E-Mail%20Nowak%202003.

[25] Mark A. Spognardi and Ruth Hill Bro, Employee Relations Law Journal, Vol. 23, No.4, Spring 1998 *Organizing Through Cyberspace: Electronic Communications and the NLRA.* Available at: 216.36.221.44/attorneypublications/Spongardi/Organizing.Through.Cyberspace.pdf

[26] *Timekeeping Systems, Inc.*, 323 NLRB 244, 245-246 (1997)

[27] *Blakey v. Continental Airlines, Inc.,* 751 A.2d 538 (N.J. 2000) (employer potentially

- Direct employees to wage information on the employer's intranet.[28]
- Satisfy the notice requirements of COBRA. [29]
- Introduce new hires and announce promotions.[30]
- Self-enroll workers in health care plans.[31]

A wealth of electronic services and products are available to assist employers with electronic communications to employees regarding a wide array of employment-related issues:

- Making and keeping track of employee schedules.[32]
- Receiving and reviewing resumes.[33]
- Entering payroll hours and tracking time.[34]
- Making address changes.[35]

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liable for workplace harassment resulting from employees' email postings on interactive electronic bulletin board used by the employer to communicate with its pilots).

[28] Advice Memorandum, *Wal-Mart Stores, Inc.*, Cases Nos. 26-CA-22526, 26-CA-22551 and 26-CA-22563, January 26, 2007, slip op., p. 8. Available at: http://www.nlrb.gov/shared_files/Advice%20Memos/2007/26-CA-22526.pdf

[29] *COBRA Tips*, A Service of OnQue Technologies, Inc., (2004). Available at: http://onque.com/tips/delivery.html

[30] Available at: http://findarticles.com/p/articles/mi_m3495/is_11_51/ai_n2707.680/

[31] Joseph S. Bigley, *Electronic Enrollment Can Save Expense and Grief, Managed Care*, August 1997. Available at: http://www.managedcaremag.com/archives/9708/9708.enroll.shtml

[32] WhenToWork advance notification system. Available at: https://whentowork.com/faq.htm#Can_I_have_WhenToWork_automatically_send_e-mail_notifications_of_new_schedules_to_my_employees

[33] *Evolution of the Job Search: From Paper Resume to Online Career Portfolio*, HR Management, June 10, 2010. Available at: http://www.hrmreport.com/article/Evolution-of-the-Job-Search-From-Paper-Resume-to-Online-Career-Portfolio/ ("[O]nline job boards are becoming one of the primary places most people look for a job, and where companies search for potential employees. Monster.com, HotJobs.com, Craigslist, Protuo.com, specialty sites and several other sites dominate a landscape in which millions of resumes are currently posted, each waiting to be accessed by recruiters and employers who, in turn, post approximately 70 percent of their openings online.")

[34] Available at: http://www.microsoft.com/dynamics/en/us/products/gp-collaboration.aspx

[35] Available at: http://www.hyland.com/department-solutions/human-resources/employee/change-request.aspx

- Distributing Summary Plan Descriptions and other ERISA documents.[36]
- Completing I-9 information through a online interview process.[37]
- Informing employees of time off and work assignments as well as the price of the employer's stock and of guest speaker events.[38]

Providing important information to employees electronically mirrors the use of electronic communications outside the workplace. Although searching for information is the most common activity on the Internet,[39] we are all becoming increasingly accustomed to electronically paying bills, filing taxes, purchasing all manner of goods and services, signing up for classes, making a dinner reservation, arranging travel, getting concert tickets – and the list keeps growing. "[A]ccording to private researchers, global online transactions are currently estimated to total $10 trillion: Almost any transaction you can think of can now be done online—from consumers paying their utility bills and people buying books and movies, to major corporations paying their vendors and selling to their customers."[40]

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[36] Available at: http://www.bsiweb.com/mainsite/erisa_notification_distribution.htm
[37] Available at: http://www.adp.com/solutions/employer-services/pre-employment/services/large-business/recruitment-management/electronic-i-9-compliance.aspx
[38] *Nevada Power Co.*, 2008 NLRB LEXIS 87, March 26, 2008, ALJD
[39] *The Internet Study: More Detail.* Available at: http://www.stanford.edu/group/siqss/Press_Release/press_detail.html
[40] Secretary of Commerce Gary Locke, Remarks at Business Software Alliance Cybersecurity Forum , April 29, 2010. Available at: http://www.commerce.gov/news/secretary-speeches/2010/04/29/remarks-business-software-alliance-cybersecurity-forum

Email is a preferred means of business communication because it is instant, free, and can be targeted directly to intended recipients.[41] Confining a remedial notice of the employer's intent to abide by workers' NLRB rights to a physical bulletin board, when all other important work-related communications are made electronically, is antiquated, ineffective, and backward-looking.

5. Efforts to bring the NLRB's remedial notice-posting requirement into the digital age have been on-going for at least a decade. The issue was raised in *Pacific Bell*, 330 NLRB 271 (1999), in which the Board affirmed its ALJ's recommended remedy to mail or disseminate the notice by electronic means, in the absence of exceptions. Member Hurtgen dissented, objecting to the absence of evidence of the inadequacy of traditional notice posting and urging the Board to "first receive full briefing by the private parties, the General Counsel, and perhaps amici as well."

In 2000, NLRB General Counsel Leonard Page publicly urged electronic notice posting in those workplaces "in which e-mail messages and electronic bulletin boards constitute normal methods of communication with

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[41] Ben Wakeling, eHow Contributing Writer, *Business Communication Email Etiquette.* Available at: http://www.ehow.com/about_6197591_business-communication-email-etiquette.html

employees."[42] But a union's request was denied in *International Business Machines Corp.*, 339 NLRB 966 (2003) on the basis that the union should have made its request to the Administrative Law Judge and/or Board, before the compliance stage of the proceeding. Member Walsh dissented, arguing that electronic postings were "mandated by the plain language of the Board's standard notice-posting language," adding that "[t]o the extent that such a hearing [on the employer's use of electronic communications with employees] might be required, however, the appropriate time to have that hearing is now, during the compliance stage."[43]

Electronic notice posting was again rejected in *Endicott Interconnect Technologies, Inc.,* 345 NLRB 448, n. 2 (2005), "in the absence of a majority in favor of requiring electronic posting," although then Member Liebman "would leave this matter to the compliance stage." She articulated her support for such a change in *National Grid USA Service Co., Inc.*, 348 NLRB 1235, n. 2 (2006). According to Liebman, "the Board's current

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[42] NLRB General Counsel Leonard Page, Speech to University of Richmond School of Law, *NLRB Remedies: Where Are They Going?*, April 10, 2000. Available at: http://www.lawmemo.com/nlrb/remedies.htm. See also Brent Garren, *"When the Solution Is the Problem: NLRB Remedies and Organizing Drives,"* 51 Labor Law Journal 76, 78; 2000; Testimony of James Coppess before the Subcommittee on Employer-Employee Relations of the House Committee on Education and the Workforce, September 19, 2000. Available at: http://republicans.edlabor.house.gov/archive/hearings/106th/eer/nlrb91900/coppess.htm

[43] 339 NLRB at 968. See also *Streicher Mobile Fueling, Inc.*, 340 NLRB 994, n. 2 (2003).

notice-posting language, which unequivocally references all places where notices to employees customarily are posted, is sufficiently broad to encompass new communication formats, including electronic posting, which is now the norm in many workplaces." She reiterated that "[t]he subsequent determination as to whether electronic posting is necessary in a given case is a matter for compliance proceedings."[44]

Member Schaumber's view, set forth in *Windstream Corp.*, 352 NLRB 44, n. 3 (2008), is that electronic posting "may be appropriate where it is shown, through evidence adduced at the hearing, that the respondent regularly communicates its employment policies to employees through electronic mail."

Current law, set forth in *Nordstrom, Inc.*, 347 NLRB 294, n. 5 (2006), holds that electronic posting will be required only when supporting evidence has been adduced that the respondent "customarily communicates with its employees through an intranet" and "proposes such a modification to the judge in the unfair labor practice proceeding." In addition, electronic

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[44] See also *Texas Dental Ass'*n., 354 NLRB No. 57 n. 4 (2009) and *Valley Hospital Medical Center, Inc.*, 351 NLRB 1250, n. 1 (2007) ("Members Liebman and Walsh are of the view that the language of the Board's standard notice-posting provision, which requires the posting of a remedial notice 'in conspicuous places including all places where notices to employees are customarily posted, encompasses distribution of a remedial notice by e-mail if the respondent customarily disseminates notices to its employees electronically; whether it does so is an issue they would leave for compliance.").

notification is required when the violation was committed by electronic means, in the same manner and to the same group of employees.[45]

6. The breadth and extent to which employers communicate with their employees via electronic means demonstrate that electronic communication has become the new bulletin board. In the ten years the Board has been struggling with this issue, electronic communications have become the norm. These changes compel the communication of a Board's remedial order to employees in this same form and manner, such as through an email to each affected employee.

Other labor-related notice posting mandates have recognized and accommodated this reality. Electronic posting is required by Executive Order 13496: Notification of Employee Rights Under Federal Labor Laws, signed by President Barack Obama on January 30, 2009 (74 FR 6107, February 4, 2009). It requires that federal contractors and subcontractors which customarily post notices to employees electronically, also post the non-remedial notice electronically.[46] The Family and Medical Leave Act of 1993's requirement that non-remedial notices be posted to inform employees

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[45] *Public Service of Oklahoma*, 334 NLRB 487 (2001); NLRB Casehandling Manual, Part Three, Compliance Proceedings, 10518.2.

[46] Available at: http://edocket.access.gpo.gov/2009/pdf/E9-2485.pdf

of their rights under the Act provides for electronic posting. 29 U.S.C. § 2619; 29 CRF 825.300.

Strong policy reasons support the Board's recognition that the time has come for routinely requiring electronic notifications to employees. Clinging to the bulletin board notification system of the 1930's as the sole method of advising employees that their employer will abide by the Act serves to undermine the purpose of the notice posting requirement as a remedial device and fails to fulfill the directive of Section 10(c) that the Board order "such affirmative action … as will effectuate the policies of this Act." 29 U.S.C. §160(c).

First of all, such limitation trivializes the notice posting requirement. When employers notify employees of "important" work matters through electronic media, yet confine NLRB notices to a posting on a physical bulletin board, the clear message is: "This is not important – if it was important I'd make sure you got it because I'd email it to you." Important work-related matters are emailed to employees, or posted on an intranet, with a link sent by email to notify affected employees.

Secondly, posting a notice on a bulletin board does not ensure that the contents of the notice are read and understood. Because of the nature of bulletin board postings, employees must engage in a public act in order to

read them. In a workplace in which their employer has just been adjudicated to have violated their NLRA rights, workers receive the benefit of the Board's order only if they position themselves in front of the bulletin board for sufficient time to read and comprehend the contents of the notice – an act of courage. Courts have recognized that "[a]n employee who must scan the Board's notice hurriedly while at work, under the scrutiny of others, will not be as able to absorb its meaning and hence to understand his legal rights." *Teamsters Local 115* v. *NLRB*, 640 F.2d 392, 400 (D.C. Cir. 1981) (quoting *J.P. Stevens & Co.* v. *NLRB*, 380 F.2d 292, 304 (2d Cir. 1967)). An email notification is fast, confidential, and cheap. It can be read in relative privacy and sufficient time can be devoted to its understanding and comprehension.

Finally, the current Board requirement, that the propriety of electronic notices be litigated with the merits of the violation, needlessly delays the Board's processes and will give rise to more and more litigation on this issue as electronic communications become more and more common. Insisting on the development of a "concrete fact pattern"[47] whenever a notice posting is ordered, [i.e., in virtually EVERY unfair labor practice case], for the purpose of proving that a respondent communicates electronically will unduly

[47] *Nordstrom, Inc.*, 347 NLRB 294 (2006) (" We would like the benefit of a concrete fact pattern before deciding whether to depart from our standard notice-posting remedy and take the unprecedented step of requiring intranet or other electronic posting. … In our view, such a record should be made before we enter such an order, not afterward in the compliance stage.").

lengthen the adjudicative process and may be wholly unnecessary if no wrong-doing is found.

Such a requirement adds additional burden and expenditure to the litigation process during the critical liability phase of the case. It also places the burden of coming forward with such evidence on the party with the least information about the employer's electronic capabilities – a burden that rightfully belongs with the wrongdoer. And such a procedure will foster increasing litigation as electronic communications become more and more common.

The Board took a step towards acknowledging the digital age in *Bryant & Stratton Business Institute,* 327 NLRB 1135, n.2 (1999) when it required that respondents provide records necessary to determine backpay in electronic format. According to the Board, "electronic copies of the relevant records, where such already exist, are encompassed within the Board's traditional remedial language." So, too, notifying employees via electronic communication tools, such as an email to each affected employee, is encompassed within the Board's tradition remedial language which calls for postings "wherever employee or member notices are customarily posted."[48]

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[48] NLRB Casehandling Manual, Part Three, Compliance Proceedings, 10518.2.

The Board should now take the next step and ensure that employees are properly notified of its orders affecting their rights through all means of communications customarily utilized by the employer to notify its employees of employment-related matters.

7. In those circumstances where a respondent does not communicate with employees electronically, it should have an opportunity to so demonstrate during the compliance process. The Board, with court approval, regularly relegates such issues to the compliance stage of its proceedings. "We generally approve the Board's …order[ing] the conventional remedy of reinstatement with backpay, leaving until the compliance proceedings more specific calculations as to the amounts of backpay, if any, due these employees. This Court and other lower courts have long recognized the Board's normal policy of modifying its general reinstatement and backpay remedy in subsequent compliance proceedings as a means of tailoring the remedy to suit the individual circumstances of each discriminatory discharge."[49] This approach is consistent with the Court's admonition that "the most elemental conceptions of justice and public policy

[49] *Sure-Tan, Inc. v. NLRB*, 467 US 883, 902 (1984).

requires that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."[50]

In order to avoid the routine requirement that employees be notified of the Board's order through electronic communications, a respondent must affirmatively prove, during the compliance stage of the proceedings, that it does not notify its employees of employment-related matters through electronic communications, such as email, intranet, or other similar electronic tools. And it should demonstrate, through evidence it has the burden of presenting, that a posting on the bulletin board is how it customarily notifies employees of workplace policies. The remedial notice is, after all, a notification to employees the employer of its commitment to follow the policies of the Act with respect to the affected employees, just like other employment policies.

The timing and manner of such a showing should be similar to that required by the Board in other circumstances. Respondents are typically allowed to make particular showings during the compliance stage in order to exempt themselves from the Board's traditional remedies, as part of the "tailoring" process. For example, records required to be made available in a backpay case must be produced at a place designated by the NLRB Regional

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[50] *Bigelow v. RKO Pictures*, 327 US 251, 265 (1946).

Director, except that the respondent may make a showing during the compliance stage that the production of records at such location would be unduly burdensome.[51] Similarly, the compliance proceeding is the appropriate forum for adjudicating what would have occurred in a successorship-avoidance case had lawful bargaining taken place.[52]

The burden in both circumstances is placed on the successor as a matter of equity, since the successor is the wrongdoer, and as a matter of practicality, since the successor has superior access to the relevant evidence. So too, when notice posting is mandated, equitable and practical considerations require that the respondent should have the burden of showing that it does not customarily communicate with its employees electronically and that employment-related notifications to employees are not provided via email or intranet or other electronic means. This process is also cost-efficient for the Agency since, as electronic communications continue to expand, the absence of electronic communications in the workplace will become increasingly rare.

Conclusion:

For these reasons, the AFL-CIO urges the Board to recognize the electronic communication revolution, acknowledge its impact on the

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[51] *Ferguson Electric Co., Inc.*, 335 NLRB 142, 142-143, n. 3 (2001).
[52] *Planned Building Services, Inc.*, 347 NLRB 670, 676, n. 25 (2006).

workplace, and require that employees be notified of remedial notices through electronic communication tools. Such notifications should be accomplished via an email to affected employees and through such other electronic communication methods that the respondent customarily uses to notify employees of employment-related matters. In the compliance stage of the proceedings, a respondent should have an opportunity to demonstrate that it does not customarily use electronic communication tools to notify its employees. Such a requirement would enhance the remedial value of the notice posting requirement, streamline the litigation process, and apportion the burden of proof equitably and practically.

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