

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

ARKEMA, INC.,

and

16-CA-26371

UNITED STEELWORKERS OF AMERICA, LOCAL 13-227, ET AL

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STEVENS CREEK CHRYSLER JEEP DODGE, INC.

and

20-CA-33367

MACHINISTS DISTRICT LODGE 190, MACHINISTS  
AUTOMOTIVE LOCAL 1108, INTERNATIONAL  
ASSOCIATION OF MACHINISTS AND AEROSPACE  
WORKERS, AFL-CIO, ET AL

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CUSTOM FLOORS, INC.,

and

28-CA-21226

INTERNATIONAL UNION OF PAINTERS AND  
ALLIED TRADES, DISTRICT COUNCIL 15, ET AL

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**BRIEF OF AMICUS CURIAE BODMAN LLP**

BODMAN LLP

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## I. Introduction

### A. Statement Of Interest

Bodman LLP's Workplace Law Practice Group exclusively represents management in labor and employment cases. As an exclusive legal representative of management, Bodman LLP submits this *amicus curiae* brief on behalf of employers responding to the issue of "Whether Board ordered remedial notices should be posted electronically, such as via a company-wide email system, and if so, what legal standard should apply."<sup>1</sup>

### B. Statement Of The Case

On May 14, 2010, the NLRB posted an invitation for *amicus* briefs regarding whether the Board should depart from its traditional requirement of posting a remedial notice on company bulletin boards to also requiring the posting of notices electronically by company wide email or intranet. This issue requires the Board to reconsider its decision in *Nordstrom, Inc.*, 347 NLRB 294 (2006).

In *Nordstrom*, at 294, the Board refused to order the posting of a remedial notice on the company's intranet without evidence that the employer "clearly communicates" to its employees through intranet postings. The *Nordstrom* Board also relied upon *International Business Machines Corp.*, ("*IBM*") 339 NLRB 966 (2003), in finding that the NLRB's standard order requiring the posting of notices "in conspicuous places including all places where notices to employees are customarily posted," does not require the electronic posting or distribution of notices. *Nordstrom*, 347 NLRB at 294. Furthermore, the Board refused to modify its standard order to include company wide intranet posting, as the issue was not raised in the underlying

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<sup>1</sup> Issue statement taken from the NLRB's May 14, 2010 press release inviting *amicus* briefs on this issue.

proceeding, but instead was raised by the charging party union during a compliance procedure.

*Id.*

Bodman LLP takes the position, as *amicus curiae*, that the Board should follow *Nordstrom*, and continue to hold that the NLRB's standard order for posting notices does not include electronic posting or distribution. Furthermore, the Board should not modify its standard order to include electronic distribution or posting of notices. Instead, the Board should continue treating any deviation from traditional posting as a special or extraordinary remedy and order company wide distribution of notices by email or company wide intranet posting in limited or special circumstances.

## II. Argument

### A. **Historically Any Deviation From The Traditional Posting Order Is A Special Remedy And The Board Should Not Modify Its Standard Notice Language To Require The Special Remedy Of Electronic Posting Of Remedial Notices**

It is well recognized that the traditional posting of notices serves the Board's purpose to advise employees that the NLRB has protected their rights and the notice serves to prevent or deter future violations. *N.L.R.B. v. Hiney Printing Co.*, 733 F.2d 1170 (6<sup>th</sup> Cir. 1984)(*per curiam*). Even though technology has changed, the traditional posting order continues to serve the Board's purpose. Any deviation from traditional posting has always been treated by the Board as a special remedy. *Carbonex Carbon Coal Co.*, 262 NLRB 1306 (1982) (reading a notice to employees is a special remedy); *Laborers' Local Union 383*, 260 NLRB 1340, 1344 (1982) (mailing notices is a special remedy); *Control Services, Inc.*, 314 NLRB 421, 421-422 (1994) (corporate wide posting of notices is a special remedy); *Wal-Mart Stores*, 352 NLRB No. 103, \*80 (2008) (nationwide posting or company wide intranet posting is a special remedy).

While technology has clearly changed, no party in the instant cases, including the General Counsel, has argued that traditional posting requirements have suddenly become

ineffective or obsolete. Instead, the General Counsel argues that because employers have increasingly utilized electronic communications, the Board should modify its standard posting language to include email and intranet distribution of notices. That technology has changed, however, does not affect the NLRB's historic posting notice requirement. The Board's own existing rules continue to be applicable despite the technology changes and the General Counsel's argument must be rejected by the Board.

Indeed, the Board's existing rulings fully address new technologies. Board decisions continue to be applicable to both email and intranet postings as they are akin to traditional forms of communication that the Board has historically found to be special remedies that deviate from the standard notice posting order only when appropriate to the circumstances of the violation. Company wide distribution of notices to employees by email is similar to sending the notice by mail, another historic form of direct distribution to all employees constituting a special or extraordinary remedy. *Carbonex* 262 NLRB at 1306; *The Earthgrains Co.*, (“*Earthgrains*”) 349 NLRB 389, 401 (2007)(enf. granted in part, denied in part, 514 F.3d 422 (5<sup>th</sup> Cir. 2008); *Pontiac General Hospital*, (“*Pontiac*”) 353 NLRB No. 111, \*5 fn 4 (2009). For example, in *Loray Corp.*, 184 NLRB 557, 558 (1970), the Board ordered the mailing of the notice in response to “the Respondent's widespread and extensive coercive conduct.” Similarly, in *Charlotte Amphitheater Corp.*, 331 NLRB 1274, 1276 (2000), the NLRB required the mailing of the notice because the employees worked “on a seasonal basis for a variety of employers.” In *Wal-Mart Stores*, 352 NLRB at \*80, the ALJ refused to grant nationwide posting or company wide intranet posting because the violation occurred at only one store. In *Carbonex*, the Board found no need for the extraordinary relief of mailing a remedial notice to all employees, as posting the notice at the facility where the violation occurred sufficiently achieved the remedial purpose of the notice. *Carbonex*, 262 NLRB at 1306. Similarly, in *Laborers' Local Union 383*,

260 NLRB at 1344, the ALJ rejected the charging party's request to mail the notice to employees because, "No special facts were offered at the hearing to indicate this posting will not prove adequate." In *Pontiac*, the Board refused to issue the extraordinary remedy of mailing a copy of the notice to unit employees because the general counsel failed to address why the special remedy was necessary. *Pontiac*, 353 NLRB at \*5 fn 4. All of these cases point to the fact that direct distribution of the notice to employees is historically a special remedy. As both email and mail are forms of direct distribution, they should both continue to be treated as a special remedy.

Likewise, company wide distribution of notices through its intranet is also similar to the Board's traditional special remedy of company wide or multi-plant distribution of remedial notices. The Board has ruled that a company-wide posting order is a special remedy issued where the employer has committed multiple violations at multiple locations. *Control Services, Inc.*, 314 at 421-422 (1994); *Beverly Health and Rehabilitation Services, Inc.* ("Beverly"), 339 NLRB 1243 (2003). Likewise, where the violation occurs at only one location, the Board refrains from issuing a company-wide posting order. *Control Services*, 314 NLRB at 421-422; *Wal-Mart Stores*, 352 NLRB at \*80. The intranet changes nothing. Intranet is an internal company network system. For companies that have multiple offices, plants, or locations, the intranet has the capability of posting information at every employer location. As such, posting a remedial notice on an employer's intranet has the similar effect of a Board ordered special or extraordinary company-wide posting order and should be treated the same. *Wal-Mart Stores*, 352 NLRB at \*80. The Board already has long-standing and time tested rules for company-wide postings which are applicable to the new technology and should continue to limit company wide intranet postings to special or extraordinary cases.

Solely because the technology of communication has changed does not mean that the Board should transform a special remedy like company wide electronic communications into a

standard requirement for notice posting. Indeed, the most frequent form of employer communication is through verbal discussions with its employees, but the Board has not required as part of its standard posting requirement for employers to read notices to employees. *Carbonex*, 262 NLRB at 1306; *Mid-States Express, Inc.*, 353 NLRB No. 91, \*43 fn 40 (2009); *American Standard Co.*, 352 NLRB 644, 647, 658 (2008). Yet, a public reading of the remedial notice remains an extraordinary or special remedy even though verbal communication is the most prevalent form of employer to employee communication. Likewise, just because the prevalence of electronic communications has generally increased, the Board should not change its standard posting requirements to include a special or extraordinary remedy such as electronic posting or distribution.

Moreover, while electronic communication has become more prevalent, not all employers communicate electronically with their employees. There is a stark disparity between companies with state-of-the-art computers that practically operate in a “paperless” environment and companies with little or no electronic communication capabilities. *Nordstrom*, 347 NLRB at 294 (“There may be material differences among employers’ intranet systems, and we are reluctant to proclaim a ‘one-size-fits-all’ approach”).

The Board should continue to apply its rule that any deviation from traditional posting is a special remedy and include the electronic distribution of remedial notices as special or extraordinary remedy. Furthermore, because of the stark differences between employer’s access and use of electronic communications, the Board should not amend its traditional posting requirements to include electronic communications.

**B. Because Email Distribution Of Notices And Intranet Posting Of Notices Are Special Remedies, The Board Should Limit The Application Of Electronic Communication To Cases Requiring A Special Or Extraordinary Remedy**

Company wide email distribution of notices and posting company wide notices on the intranet constitute special or extraordinary remedies. As such, the application of this remedy should only apply where, (1) the employer “clearly communicates” to its employees through electronic communications; (2) the employer’s usage of electronic communication pertains to the unfair labor practice at issue in the complaint; and (3) a majority of the employees affected by the unfair labor practice work off-site and will not likely see a traditionally posted notice.

- 1. The employer “clearly communicates” to its employees through electronic communications:** In several cases addressing the issue of electronic notice posting, the Board has stated the requirement that an employer “clearly communicate” to its employee through email or intranet postings. *Nordstrom Inc.*, 347 NLRB at 294 *IBM*, 339 NLRB at 968 (Walsh, dissenting).
- 2. The employer’s usage of the electronic communication pertains to the unfair labor practice identified in the complaint:** In multiple Board cases where electronic posting of notices was at issue, the employer’s usage of electronic communication pertained to the actual unfair labor practice. *Nordstrom Inc.*, 347 NLRB at 294 *IBM*, 339 NLRB at 966. Because company wide email distribution and company intranet posting of notices is a special remedy, electronic posting of the notice should only be used when the underlying unfair labor practice involves a violation of the employer’s usage of electronic communications.
- 3. A majority of the employees affected by the unfair labor practice work off-site and will not likely see a traditionally posted notice:** Consistently, the Board has

### **III. Conclusion**

For all of the foregoing reasons, the Board should limit the application of posting or distributing remedial notices by email or intranet to cases where, (1) the employer “clearly communicates” to its employees through electronic communications; (2) the employer’s usage of electronic communication pertains to the unfair labor practice at issue in the complaint; and (3) a majority of the employees affected by the unfair labor practice work off-site and will not likely see a traditionally posted notice.

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Dated: June 11, 2010

### **CERTIFICATE OF SERVICE**

I hereby certify that on June 11, 2010, I electronically filed the foregoing paper with the National Labor Relations Board using the e-filing system, and served a copy of the foregoing paper by U.S. first class mail to the following:

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Dated: June 11, 2010