UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ARKEMA, INC.

and

Cases 16-CA-26371
16-CA-26392

UNITED STEEL WORKERS OF AMERICA, LOCAL 13-227

ARKEMA, INC.

Employer

and

GREG SCHRULL

Case 16-RD-1583

Petitioner

and

UNITED STEELWORKERS OF AMERICA, LOCAL 13-227

Union

STEVENS CREEK CHRYSLER JEEP DODGE, INC.

Cases 20-CA-33367
20-CA-33562
20-CA-33655

and

MACHINISTS DISTRICT LODGE 190 MACHINISTS AUTOMOTIVEE LOCAL 1101, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS OF AMERICA, AFL-CIO

CUSTOM FLOORS, INC.

and Case 28-CA-21226

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

Case 28-CA-21229

and

FCS FLOORING, INC.

and Case 28-CA-21230

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

and Case 28-CA-21231

INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 15

BRIEF OF AMICUS CURIAE
TEXAS ASSOCIATION OF BUSINESS
IN SUPPORT OF RESPONDENTS ARKEMA, INC., STEVENS CREEK CHRYSLER JEEP DODGE, INC., AND CUSTOM FLOORS, INC.

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I. Interest of the Amicus.

More than 4,000 Texas employers and 200 local Chambers of Commerce from all parts of the state are members of the Texas Association of Business. An important function of the Association is to address issues having widespread consequences for the Texas business community. The remedial notice posting issues on which the Board has invited amicus briefing fit into this category and potentially impact the Texas business community. Therefore, this amicus brief is submitted to address concerns that may be more broadly based than the particular interests of the litigants in this case.

II. Introduction.

The NLRB has traditionally employed a posted notice as part of the remedy for an unfair labor practice violation. A notice remedy is intended to expunge the effects of an unfair labor practice by informing employees of their rights under the NLRA, reporting the legal limitations on the respondent's conduct, and providing assurances that future unfair labor practices will not occur. Only in instances where it has found widespread, egregious violations has the Board required more extensive and burdensome notice such as mailing to employees, rather than simply posting the notice, expanding the facilities where the notice is posted/delivered, or even orally reading the notice to employees. The Board is now considering significantly altering these practices by ordering employers to post notices on their websites and to e-mail notices to employees, steps that would effectively abolish the distinctions between more routine violations and those pervasive and egregious violations that warrant expanded notification. For the reasons set forth below, the Board should forego modifying, or attempting to expand the definition of, its

standard remedial notice-posting provision to expressly include electronic posting and distribution by e-mail.

III. Board-Ordered Notices Should Not Be Posted Via E-Mail.

A. E-Mail Is Not A "Place" And Therefore, Not Encompassed By the Board's Standard Notice-Posting Provision.

"E-mail has revolutionized communication both within and outside the workplace."[1] With e-mail, people are able to communicate and distribute information faster, cheaper, and to a greater number of recipients than ever before.[2] As such, it is fair to say that "[e]-mail has dramatically changed, and is continuing to change, how people communicate at work." *Id*. But for all the tasks that e-mail makes possible and more efficient, e-mail is simply not a "place," as that term is used in the Board's current standard remedial notice-posting provision. Therefore, the Board should continue to interpret its standard order to not include posting Board notices via e-mail.[3]

The Board's standard order states, "copies of the [remedial] notice . . . shall be posted . . . and maintained . . . in conspicuous places including all places where notices to employees are customarily posted."[4] The issue is whether this standard order requires respondents to post remedial notices electronically, "such as via a company-wide e-mail

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[1] *See Register-Guard*, 351 NLRB 1110 (2007) (Liebman, M. & Walsh, M., dissenting).

[2] *See id*. ("[E]-mails versatility permits the sender of a message to reach a single recipient or multiple recipients simultaneously . . . .").

[3] *See Nordstrom, Inc*., 347 NLRB 294 (2006); *International Business Machines Corp*., 339 NLRB 966 (2003); *National Grid USA Service Company, Inc*., 348 NLRB 1235 (2006); *Wal-Mart Stores, Inc*., 348 NLRB 833 (2006); *Endicott Interconnect Technologies, Inc*., 345 NLRB 448 (2005).

[4] *See e.g., Nordstrom, Inc*., 347 NLRB 294 (2006) (emphasis added).

system." NLRB PRESS RELEASE, May 14, 2010 (inviting amicus briefs on electronic posting of notices). On numerous occasions, the Board has declined to rule on this question because the issue was not adequately addressed at the unfair labor practice hearing, and therefore, the Board lacked a "concrete fact pattern" on which to decide whether to depart from its "standard notice-posting remedy."[5]

On each occasion where the Board has addressed the electronic-posting issue, then-Member/now-Chair Liebman and/or Member Walsh maintained their dissenting view that the Board's standard order "is sufficiently broad to encompass new communication formats, including electronic posting which is now the norm in many workplaces." *See, supra* note 1, at 1. Therefore, in *International Business Machines, Corp*., for example, Member Walsh would have "order[ed] IBM to post the Board's notice via e-mail and on its intranet" because "IBM 'customarily' posts notices to its employees on its e-mail system and intranet."[6] However, Member Walsh's conclusion (at least with regard to notice via e-mail), overlooks a material requirement of the Board's standard notice-posting provision—namely, that notices be posted in "conspicuous *places*, including all *places* where notices to employees are customarily posted." (emphasis added).

The Board's standard order does not require respondents to post remedial notices in each and every manner in which employers customarily communicate with or

[5] *See e.g., Nordstrom, Inc*., 347 NLRB 294 (2006) (emphasis added); *see, supra* note 1.

[6] *International Business Machines*, 339 NLRB 966 (2003).

distribute information to employees.[7] Rather, the standard order requires respondents to post notices in "conspicuous *places*, including all *places* where notices to employees are customarily posted." (emphasis added). The standard order could have been written to require respondents "to communicate or distribute the Board's notice conspicuously, including in all manner in which notices to employees are customarily communicated or distributed"; however, it was not (and should not be modified in such a manner for the reasons described below in Section III.B.). Therefore, under the Board's current standard notice-posting provision, the first question is whether the Board-considered means of communication (in this case, e-mail) is a "place." If so, the second question is whether it is a place "where notices are customarily posted." Because e-mail is not a "place," it does not fall within the scope of the Board's current notice-posting provision.

A "place" is "an area with definite or indefinite boundaries." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 4th Ed. (2009). Stated simply, a "place" is a location where people can meet to, among other things, receive information. In the classic notice-posting context, a "place" is a bulletin-board where employment or union-related notices may be affixed. Traveling back to the genesis of the verb "post," a "place" may be a wooden post where notices are affixed. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 4th Ed. (2009). Today, a "place" can even include cyber-locations, including a website, a newsgroup, or a blog. A "place" is not, however, a form of communication: a telephone call or a fax is not a place; although the

[7] In fact, as discussed below in Section III.B., "distribution" of remedial notices is an extraordinary remedy that the Board has reserved for circumstances where the respondents' unfair labor practices are "numerous, pervasive, and outrageous."

equipment used to initiate it may be a place (*i.e.*, "meet me at the telephone or the fax machine"). Similarly, an e-mail is not a "place," and the term "post" is entirely foreign to e-mails—people do not say "I am going to post my notice to you by e-mail," they say, "I am going to e-mail you the notice." To label an e-mail a "place" ignores the practicalities of e-mail. Because e-mail is not a "place," it does not fall within the purview of the Board's standard notice-posting provision.

This conclusion is bolstered by the remainder of the Board's standard notice-posting provision: (1) that the notice be "posted . . . and *maintained* for 60 consecutive days" and (2) "[r]easonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material." These obligations clearly contemplate that notices will be posted at physical—and perhaps, even cyber—places. However, these obligations are entirely unworkable in relation to e-mail postings. For example, an employer can ensure that notices posted on physical bulletin boards are maintained for 60 days and are not torn down, vandalized, or covered by other postings. An employer can also ensure that notices posted on an electronic bulletin board or intranet site are not deleted or otherwise altered. However, an employer has no way of ensuring that an e-mail attaching a notice is "maintained" for any period of time, or is not deleted by the employee. Thus, postings via e-mail were not contemplated and are not encompassed by the Board's current standard notice-posting order.

In addition, the Department of Labor's implementation of 29 C.F.R. § 471 (which implements Executive Order 13496 signed by President Obama) supports the conclusion that e-mail is not included in the Board's standard notice-posting provision. Section

471.2(f)—entitled "Electronic Posting of Employee Notice"—requires federal contractors and subcontractors that customarily post notices to employees electronically, to also electronically post a notice containing the § 7 rights of employees. However, section 471.2(f) expressly states that contractors and subcontractors satisfy its electronic posting obligations "by displaying prominently on any *Web site* that is maintained by the contractor or subcontractor, whether external or internal, and customarily used for notices to employees about terms and conditions of employment, a link to the Department of Labor's Web site that contains the full text of the poster." (emphasis added). Notably, section 471.2(f) interprets "posting" to be limited to places (*i.e.*, a contractor's or subcontractor's Web site), and does not require distribution of the § 7 notice by e-mail.

For these reasons, it is apparent that the Board's current standard notice-posting provision does not require respondents to post notices via e-mail. In sum, the Board can't fit a square e-mail into a round "place": it simply will not fit.

B. The Board Should Not Modify its Standard Notice-Posting Order To Expressly Include E-Mail Because It Would Transform the Historically Extraordinary Remedy of Distribution into the Norm.

The Board's standard notice provision requires "posting," *not* distribution, of the Board's remedial notice. Indeed, under decades of Board precedent, a respondent is only required to distribute the Board's notice when its unfair labor practices are "so numerous, pervasive, and outrageous that special notice . . . remedies are necessary to dissipate fully the coercive effects of the unfair labor practices found." *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995) (finding respondent to have engaged in "egregious and notorious" unfair labor practices and requiring respondent to: (1) mail Board notice to present and

former employees, (2) read notice to employees, and (3) publish notice in internal newsletter and local newspapers).[8] This is consistent with the fact that the NLRA does not confer a punitive jurisdiction upon the Board. The Board only has the authority to remedy unfair labor practices.[9] Distribution is a severe remedy more appropriately reserved for situations where a respondent's unfair labor practices are particularly egregious.[10] If the Board modifies the standard notice provision to expressly include "posting" notices via e-mail, it will unjustly impose the severe remedy of distribution each and every time an unfair labor practice is found, regardless of its severity.

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[8] *See also, Am. Standard Cos., Inc*., 352 NLRB 644, 647, 658 (2008) (denying General Counsel's request for extraordinary remedies because no evidence of pattern or practice of violations); *New Concept Solutions, LLC*, 349 NLRB 1136, 1136, fn. 3 (2007) (referring to distribution by mail as a "special remedy" and modifying ALJ's order to omit mailing as there was no explanation as to why such special remedy was needed); *AM Property Holding Corp.*, 350 NLRB 998, 1009 (2007) (holding that only because of a clear pattern of unlawful conduct (fourth case where Board found the same violation) a company-wide posting as appropriate); *Beverly Cal. Corp.*, 334 NLRB 713, 713-14 (2001) (holding that company-wide cease and desist and posting was appropriate when respondent was in front of Board for third time for similar conduct and committed over 100 violations of the NLRA).

[9] *Carpenter Sprinkler Corp. v. NLRB*, 305 U.S. 197 (1938) (stating that the Board may not impose any penalty it desires simply because a party has committed an unfair labor practice, even if the policies of the NLRA would be effectuated by such penalty, because the Board's authority is remedial in nature). *See also*, BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION, *Beverly Cal. Corp. v. NLRB*, 121 S. Ct. 2592 (2001) (No. 00-1563) (arguing that extraordinary remedy of company-wide posting was, in fact, a remedy and not a penalty because of the egregious conduct in the case).

[10] *Fieldcrest Cannon, Inc.*, 318 NLRB at 473. *See also, Smithfield Foods, Inc.*, 349 NLRB 1225, 1233 (2006) (finding mailing to be an appropriate remedy so that the Board could conduct second election free from effects of unfair labor practices).

IV. Board-Ordered Remedial Notices Posted Using E-mail or On Company Intranet Systems Convert Appropriately Limited Remedies into Overbroad Remedies.

The Board can only require respondents to post remedial notices in the facility or facilities where the unfair labor practice occurred, and must individualize the notices when different unfair labor practices are found at different facilities.[11] This is all that is necessary to serve "the Board's remedial purposes."[12] Indeed, the Board is constrained by its remedial purposes and can only broaden the posting requirements in cases where the unfair labor practice violations would not be remedied unless the notice were posted at multiple facilities or facilities other than where the unfair labor practice violations occurred.[13] However, if the Board modifies its standard notice-posting provision to include e-mail distribution or electronic intranet posting, it will effectively reverse its precedent of limiting remedial notices to the geographic location(s) where the employer's unfair labor practices occurred.

In describing the versatility of e-mail in *Register-Guard*, the dissent noted that, among its many features, e-mail "permits the sender of a message to reach a single

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[11] *See e.g.*, *Mid-States Express, Inc*., 353 NLRB No. 91, at 25 fn. 40 (2009) (limiting posting to only certain facilities where unfair labor practices occurred); *Earthgrains Co.*, 351 NLRB 733, 740 (2007) (rejecting ALJ's order that common notice be posted at all facilities and stating, "Where…there is only one unfair labor practice common across different locations, the Board orders separate notices").

[12] *Mid-States*, 353 NLRB at 25, fn. 40.

[13] *See Albertson's Inc.*, 307 NLRB 787, 788-89 (1992) (question was whether unfair labor practices were similar enough to allow for a common notice to be posted at two facilities, noting that although the Board has discretion to devise remedies, the Board must tailor such remedies to the unfair labor practice the remedy is intended to redress); *AM Property Holding Corp.*, 350 NLRB 998, 1009 (2007) (holding that company-wide posting was necessary to remedy the unfair labor practices committed because respondent exhibited a clear pattern of unlawful conduct - fourth case where Board found the same violation).

recipient or multiple recipients simultaneously" and "to forward the message to others."[14] And therein lies the substantial danger of e-mail, particularly when used as a manner to distribute remedial notices. In many instances, there is no way of narrowing the geographic scope of a remedial notice if it is distributed by e-mail, particularly in light of the recipients' ability to forward such e-mails without limitation and the attendant disruption of the employer's work. With the ever-increasing popularization of social media websites (like Facebook, YouTube, and Twitter), electronic content is so easily distributed to the masses, that it is impossible to contain.

The difficulty in containing e-mail notices equally exists if notices are posted on company intranets. Not only is the remedial notice easily distributed, but the capabilities and limitations of intranets vary from employer to employer. As the Board noted in *Nordstrom, Inc.*, "[t]here may be material differences among employers' intranet systems."[15] All intranets are not created equal: some may have the capability to limit content to certain locations, departments, or employees, and others may not. Rather than adopting a "one-size-fits-all" approach by modifying the Board's standard notice-posting provision to include e-mail and/or intranet posting, the appropriateness of intranet posting should be evaluated on a case-by-case at the unfair labor practice hearing. *See, supra* note 1.[16]

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[14] *Register-Guard*, 351 NLRB 1110 (2007) (Liebman, M. & Walsh, M., dissenting).

[15] 347 NLRB 294 (2006).

[16] Notably, the Board's modification of its traditional records preservation language to include electronic records in *Bryant & Stratton Business Institute*, 327 NLRB 1135 (1999) does not support a conclusion that the Board should modify its standard notice-posting provision to include electronic posting. In *Bryant & Stratton Business Institute*, the Board reached the

V. E-mail and Electronic Notices Invite Tampering

The Board's standard notice posting provision provides that "[r]easonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material." As any person who has used Photoshop knows, providing something in electronic format invites alteration. Even a notice distributed over e-mail or posted in .pdf format can be easily tampered with and altered. This altered notice can then be e-mailed using the simple "reply to all" feature in Microsoft Outlook or posted on the intranet system. In short, electronic notices can and will be altered and

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unremarkable conclusion that its standard preservation language includes "electronic copies of" such records, and to avoid any ambiguity, modified the order to expressly provide for the preservation and production of "electronic copies of the specified backpay records if they are stored in electronic form." *Id*. This interpretation is consistent with a party's preservation obligations in traditional litigation, which now universally extend to electronically stored information. *See* Fed. R. Civ. P. 34; *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 436-47 (S.D.N.Y. 2004). In *Nordstrom, Inc.*, the dissent attempted to rely on *Bryant & Stratton Business Institute* to support its position that the Board should interpret its standard notice-posting provision to include electronic posting, or alternatively, to modify its standard notice-posting provision to expressly include electronic posting. *Nordstrom, Inc.*, 347 NLRB 294, 294 fn. 5 (2006). However, this argument is unpersuasive because the purpose of document preservation is easily distinguishable from the purpose of notice-posting. On the one hand, extending the preservation order to include electronic payroll records is necessary to carry out the purpose of document preservation, which is to calculate the amount of backpay a charging party is owed. On the other hand, electronic posting of remedial notices is not necessary to effectuate the purpose behind remedial notice-posting. The purpose of remedial notice-posting (which is to inform employees of their rights under the NLRA, to inform employees that they have remedies under the NLRA, to communicate that the employer has committed an unfair labor practice, to communicate what steps the employer is taking to remedy the act, and to provide assurances that the unfair labor practices will not continue) is effectively served by requiring the respondent to post the Board's remedial notice on physical bulletin boards. Where this procedure is inadequate (such as when an employer's unfair labor practices are egregious), the General Counsel or the charging party may pursue an extraordinary posting provision. Because there are fundamental differences between the purposes of the Board's standard document-preservation and notice-posting provisions, the Board should not rely on *Bryant & Stratton Business Institute* as justification for modifying its standard notice-posting provision.

used as a tool to disrupt or defame respondents. Respondents will lose control of the posting and the remedial purpose of the posting will be lost.

VI. Conclusion

For all the foregoing reasons, the Texas Association of Business urges the National Labor Relations Board to hold that e-mail posting is not encompassed by the Board standard remedial notice-posting provision, and not modify its standard remedial notice-posting provision to expressly include electronic posting.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

The Texas Association of Business hereby respectfully requests permission to present oral argument in this matter by counsel to be designated later.

As the Board undoubtedly realizes, the questions presented are not only fundamental to the administration of the NLRA, but have the potential to impact all employees who use e-mail or intranets to communicate with employees. The Texas Association of Business represents more than 140,000 Texas employers and 200 local chambers of commerce, the majority of which will be affected by the Board's resolution of the pending issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 11th day of June, 2010, a true and correct copy of BRIEF OF AMICUS CURIAE TEXAS ASSOCIATION OF BUSINESS IN SUPPORT OF RESPONDENTS ARKEMA, INC., STEVENS CREEK CHRYSLER JEEP DODGE, INC., AND CUSTOM FLOORS, INC. has been filed electronically with the party listed below:

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Further, this same day, a copy of has been sent by first class mail to all parties on the attached service list:

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