UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DC

ARKEMA, INC.	Cases 16-CA-26371 16-CA-26392
STEVENS CREEK	Cases 20-CA-33367 20-CA-33655 20-CA-33562 20-CA-33603
CUSTOM FLOORS, INC.	Case 28-CA-21226

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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1. STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae, the Chamber of Commerce of the United States of America (the "Chamber"), is a nonprofit corporation organized and existing under the laws of the District of Columbia. The Chamber is the largest federation of business, trade, and professional organizations in the United States. The Chamber represents 300,000 direct members and indirectly represents three million businesses and organizations. The Chamber has members of every size, in every sector, and in every region of the United States.

A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs before courts and administrative agencies in cases involving issues of vital concern to the nation's business community. Given the enormous costs, risks, and the evolving burdens and liabilities confronting businesses in the United States, the interests of the business community at large encompass a statement of position that is broader and more far-reaching than the more limited interests of individual litigants.

This case presents the question, *inter alia*, of whether the National Labor Relations Board (the "NLRB" or the "Board"), should overhaul its traditional method of requiring employers and unions to post remedial Board Orders in the workplace, except as part of an extraordinary remedy, by instead compelling the electronic posting of all remedial Orders on the intranet or otherwise communicating the Orders to employees via email.

This question is of significant concern to the Chamber as many of its members are employers subject to the NLRA. As one of the largest representatives of employers in the United States, the Chamber has a vital interest in ensuring that the federal labor law regime to which its members may be subject is rational, fair, and consistent, and that the agency responsible for

enforcing the NLRA is fulfilling its obligations and responsibilities under the statute in an objective fashion.

2. STATEMENT OF THE CASE

This issue arose pursuant to the May 14, 2010 invitation of the National Labor Relations Board for the submission of *amicus* briefs on the question, *inter alia*, of whether the Board should modify its decision in *Nordstrom, Inc.,* and require that Board-ordered remedial notices be posted electronically, such as on an intranet or via a company-wide email system, and if so, what legal standards should apply.[1] Such Board Orders, which announce steps taken to remedy violations, are now typically posted on workplace bulletin boards except in egregious cases.

In *Nordstrom, Inc.,* 347 NLRB 294 (2006), the Board Majority ruled that:

> "Because the General Counsel and the Charging Party presented no supporting evidence at the underlying unfair labor practice hearing to indicate that the Respondent customarily communicates with its employees through an intranet, we deny the Charging Party's further request for intranet posting of the Board's notice to employees. See, *International Business Machines Corp.,* 339 NLRB 966(2003) (observing that the Board's standard Order, which requires a respondent to post notices "in conspicuous places including all places where notices to employees are customarily posted," has never been interpreted and applied to require electronic posting, and declining to do so where the issue was not raised in the underlying proceeding)." 347 NLRB at 294.

The Majority also noted that:

> "We are open to considering the merits of a proposed modification to the Board's standard notice-posting language in a particular case, if the General Counsel or a charging party (1) adduces evidence at an unfair labor practice hearing demonstrating that a respondent customarily communicates with its employees electronically; and (2) proposes such a modification to the judge in the unfair labor practice proceeding." Id. at 294 fn.3.

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[1] The Chamber's *amicus* brief does not address the issue of "compound interest" which was part of the Board's invitation for *amicus* briefs. While the Chamber is interested in the issue, its interest is confined to the frequency of compounding not to its propriety. For that reason the Chamber has chosen to limit its amicus brief to the broader policy issues presented by compelled electronic posting of remedial Board Orders.

Thus, the Board Majority would require an evidentiary hearing prior to the compliance stage, before taking the unprecedented step of departing from the Board's traditional standard for notice posting. The evidence would determine whether there is a concrete fact pattern demonstrating that the party regularly and customarily communicates with employees via intranet, and whether the violation merits electronic posting of the remedial Board Order.

As the Majority noted: "there may be material differences among employers' intranet systems, and we are reluctant to proclaim a "one-size-fits-all" approach. In addition, a factual context would sharpen the issues, raise pragmatic considerations, and ensure that we hear the best possible arguments from parties who have a stake in the outcome."

In dissent in *Nordstrom*, then-Board Member Liebman, citing with approval Board Member Walsh's dissent in *International Business Machines Corp.*, 339 NLRB 966 (2003), stated that she would hold "that the Board's current 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. [citation omitted]."

As the dissent continued:

> "Indeed, the Board and most other Government agencies routinely rely on electronic posting to communicate information to their employees. Nor is there any need to require an evidentiary hearing before the Board rules, as a matter of general policy, that the current posting language encompasses electronic posting where appropriate. [citations omitted]. The subsequent determination as to whether electronic posting is necessary in a given case is a matter for compliance proceedings. [citation omitted]." *Id.* at 294 fn.3.

Alternatively, Member Liebman would modify the Board's current notice-posting language to explicitly clarify its application to electronic posting. *Id.*

In its invitation for *amicus* briefs the Board posed the question as being an 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." (emphasis added). The invitation then identifies three pending cases to serve as the basis for discussion in which electronic posting is, or the Board considers ought to be, required. Those cases are: *Arkema, Inc.*, 16-CA-26371; *Stevens Creek Chrysler Jeep Dodge, Inc.*, 20-CA-33367, and *Custom Floors, Inc.*, 28-CA-21226.

Whether intentional or inadvertent, the Board's invitation uses the phrase "company-wide" email system as the only example of the type of compelled electronic posting which the Board is contemplating, and then selects only three CA-cases involving employer violations as the context for this discussion. As argued below, the Chamber believes that the issue of electronic posting of remedial Board Orders should apply equally to unions as well as to employers. For the reasons discussed, the Chamber believes that an even stronger case can be made for requiring union posting of remedial Board Orders. That would include not only union "intranets" and union email communications to members. Because of the broader nature of union violations of legal restrictions on secondary activity which harms both neutral employers and the public, unions should also be required to post remedial Board Orders on union "internet" web sites as well. This is especially true, for example, where the union internet serves as the basis for, or evidence of, the violation itself, such as where the union internet posting proclaims recognitional picketing of security guards in violation of the Act. There should be no question that the harm done to the employer's business as a result of the union's electronic publication should be remedied by required electronic posting on the same website of the remedial Board Order or of a formal settlement.

The Chamber notes that in one case, *Arkema*, the administrative law judge required the respondent only to post its recommended Order in the workplace for 60 consecutive days, unless it has gone out of business or closed the facility in which case it requires that the Order be duplicated and mailed to all current and former employees, as is the standard language in traditional Board Orders. Even though there was evidence in the record that the respondent communicated with employees via email, and that in fact several of the unfair labor practices were based on memos communicated to employees by email, the judge did not require electronic posting.

In the Supplemental Decision in *Stevens Creek*, the administrative law judge found numerous unfair labor practices by the respondent, but refused to issue the extraordinary remedy of a *Gissel* bargaining order (*NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969)) against the respondent and found that the Board's traditional remedies were sufficient. The judge, however, found merit in the Union's request for internet/intranet posting on the grounds that electronic posting "allows an employee time to read the notice without standing in a location indicating to the employer that his (sic) in fact reading the notice." Ironically, the judge was sufficiently concerned about the potential for the employer to discriminate against employees for merely reading the Board's Order on a bulletin board, but apparently was not sufficiently concerned about the employer's conduct to order an extraordinary remedy beyond requiring electronic posting.

In the third case, *Custom Floors*, the administrative law judge rejected a Union's demand for Section 9(a) recognition based on a card check procedure under the terms of a collective bargaining agreement with several Respondents, and dismissed the Complaint. There was no request on the record for electronic posting of a remedial Board Order in the event that an Order

was issued. Apparently, the Board disagrees with the judge's decision, and plans to issue a remedial Order which, since it will involve several Respondents, may require the Order to be posted electronically.

3. SUMMARY OF THE ARGUMENT

The Chamber believes that the National Labor Relations Board should not compel the electronic posting of remedial Board Orders in all cases but, if at all, should compel electronic posting only as part of an extraordinary remedy in only egregious cases where, as part of the evidentiary hearing on the underlying Complaint prior to the compliance stage, the record reflects that such electronic posting is appropriate to the employer's regular and customary methods of communicating with employees. In any event, whatever the Board decides with regard to electronic posting of remedial Board Orders should be applied equally to unions as well as employers.

4. ARGUMENT

This issue is not a simple one; nor should it be treated simply. It raises a number of significant practical as well as public policy considerations and questions as demonstrated below.

1. Does the NLRB have the authority to, in effect, "commandeer" an employer's or union's private property - its electronic equipment - for purposes of compelling the posting of the agency's remedial Board Orders in all cases? Does the Board have the right to mandate in all cases that the employer or union must depart from their standard communications practices and post Board Orders electronically, or even create an electronic system where none presently exists? Would this constitute "compelled speech" in violation of First Amendment constitutional rights or a taking of "private property, " which an employer's electronic system surely is under

well-established Board law. *The Register Guard* , 351 NLRB 1110 (2007). [2] See also, *Mid-Mountain Foods, Inc.,* 332 NLRB 229 (2000); *Adtranz, ABB Daimler-Benz Transportation, Inc.,* 331 NLRB No. 40 (2000). See generally, *NLRB v. Avondale Mills,* 357 U.S. 357, 364 (1958) ("The Taft-Hartley Act does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, or that they are entitled to use a medium of communication simply because the employer is using it."). That admonition in the quote from *Avondale Mills*, supra, which is the only purpose for which the decision is cited, applies equally to compelled electronic posting of remedial Board Orders simply because an employer uses an email system for business purposes.

To be sure, the Board has broad discretionary authority to fashion remedies that will best effectuate the purposes of the Act. *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 260–263 (1969). Further, it is "firmly established that remedial matters are traditionally within the Board's province and may be addressed by the Board in the absence of exceptions." *Indian Hills Care Center*, 321 NLRB 144 fn. 3 (1996). However, the fashioning of extraordinary remedies implies that the decision as to what best effectuates the purposes of the Act should be determined on an individualized case-by-case basis. It should go without saying that an extraordinary remedy,

[2] Not all issues concerning the use of new electronic technology in the workplace involve the same policies under the Act, and the Board should not use this case to bootstrap other policies involving new workplace technologies. The Board should not become convinced that new forms of electronic communication in the workplace justifies overhauling decades of established Board law and fundamental labor policies. For example, the Board's earlier decision in *The Register Guard* concerning employees' use of an employer's email systems for soliciting support for a union has far different, and even more problematic policy considerations than compelled posting of remedial Board Orders. So, too, the policy considerations for imposing electronic voting via intranet or email in union representation elections are far different, and more problematic, than the issue of compelling electronic posting of remedial Board Orders. The instant case does not extend to those issues and whatever the Board decides with regard to compelled electronic posting of remedial Board Orders should not serve as precedent for extending Board policies in those broader and more troubling cases.. In that regard, the Chamber directs the Board's attention to its earlier *amicus* brief filed in *The Register Guard,* which is posted on the Board's website. The Chamber renews by reference its support for the Board's decision in that case which limited the use of the employer's email and other forms of electronic communication for union purposes, or other purposes unrelated to the employer's business, so long as there was not discriminatory application of the policy.

such as compelling electronic notice posting, ceases to be "extraordinary" if it is required in every case.

2. Not all employers use electronic equipment to communicate with employees, or they may limit the use of such communications to business matters rather than human resources or labor relations. Although email is becoming more prevalent in the workplace, not all employees have access to computers at work. For example, production line workers may not have computers or even access to email in the workplace. And because of costs of purchasing and maintaining electronic equipment, or even purely as a matter of personal choice, many employees may not have computers at home. For example, according to a study by the U.S. Census Bureau released in February 2010, a little over 31% of U.S. households have no internet access. That percentage is even higher for certain groups. For example, the percentage of African American households without internet access exceeds 45% while the percentage of Hispanic households without internet access exceeds 47%. Among those groups, someone (perhaps not the employee) in 68% of African American households has access to the internet either inside or "outside the home" (which is undefined, but probably includes libraries and other public places outside of work), and 63% of Hispanics have such access. That means, according to the latest census statistics, that 32% of African American households and 37% of Hispanic households have no access to the internet at all. See http://www.census.gov/population/socdemo/computer/2009/tab01.xls

What would the Board propose with regard to employees without access to internet, intranet or email? Based on these figures, the Board should also take into consideration the potential for disenfranchising employees. For while the administrative law judge in *Stevens Creek, supra,* asserted that electronic posting was appropriate for the privacy and convenience of

employees, these statistics indicate that there may be less privacy (since employees would have to go to computers at work monitored by employers) and it may be even less convenient (where employees have no access to the internet either inside or outside the home). For employees to receive notification of remedial Board Orders via electronic communication, therefore, may pose far greater obstacles than by simply reading a Board Order posted on a bulletin board. And to specifically require posting of Board Orders both on bulletin boards and on the intranet or internet would be redundant.

3. What evidence has been adduced that the Board's traditional notice posting requirement is inadequate or not sufficient, such that the Board should require respondents – both employers and unions when either is found to have violated the NLRA - to post Board Orders on the intranet or via email rather than "in conspicuous places including all places where notices to employees are customarily posted"? On what evidentiary basis has the Board concluded that bulletin boards in the workplace where other government notices and important information are traditionally posted are now inadequate, or that bulletin boards in union halls where employees congregate are unsatisfactory? What evidence does the Board cite that emails, which may be easily deleted, are any more suitable than manual posting on bulletin boards throughout the workplace or in union halls for informing employees of Board Orders?

As the Dissent of former Board Member Hurtgen explains in *Pacific Bell*, 330 NLRB 271 (1999), "the judge's recommendation that the Respondent be required to mail or electronically communicate the notice to unit employees was based on generalized references to "changing times" and the "electronic age" in which we live. However, I find that such generalized notions, standing alone, are insufficient to support a change in well-established Board remedial

principles. In any event, before the Board embarks on such an endeavor, the Board should first receive full briefing by the private parties, the General Counsel, and perhaps *amici* as well." *Id.*

The Chamber agrees with Member Hurtgen's dissent that compelling electronic notice posting should be an individualized decision, based on the severity of the violation and the methods by which employers and unions communicate with employees. Notice posting on bulletin boards is the Board's traditional means of notifying employees of their rights and of a respondent's unfair labor practices. See, e.g., *Page Aircraft Maintenance*, 123 NLRB 159 (1959). The Board does not additionally require that notices be mailed to employees or posted electronically unless a traditional posting is insufficient to apprise employees of their rights and of the unlawful conduct. *Peoples Gas System, Inc.*, 253 NLRB 1180, 1181 (1981). Thus, unless there is evidence that the traditional posting is inadequate, there is no basis for compelling employers or unions to electronically post Board Orders.

4. Does the NLRB have the authority to insist that a respondent communicate electronically where the respondent either does not have, or does not use electronic equipment for regularly communicating with employees? For example, it's one thing for the Board to order the reading of Board Orders in egregious cases as part of an extraordinary remedy, even though such is not the customary practice of the employer. See, e.g. *Postal Service,* 339 NLRB 1163 (2003). It's quite another to require an employer or union to expend the financial resources required for implementing an electronic communications system, or to adapt the system to communicate Board Orders, especially in non-egregious or non-recidivist cases.

5. At what stage of the Board's proceedings and by what means should evidence be adduced as to the respondent's regular and customary method of communicating with employees or members, and to argue that in any event being compelled to post the remedial Board Order is

unwarranted or not appropriate in a particular case? See *Nordstrom, supra* and *International Business Machines Corp., supra. See also Windstream Corp.,* 352 NLRB 44, at fn 3 (2008) (personal statement); *Texas Dental Association,* 354 NLRB No. 57 at fn. 4 (2009) *and Longview Fibre Paper and Packaging, Inc.*, 2009 WL 5162419 (N.L.R.B. Div. of Judges)(27-CA-21082) (December 17, 2009) ("As there is no evidence of record to support a contention that such an extraordinary remedy is in any way warranted in this case, I shall not require electronic posting.").

6. What are the potential practical ramifications of putting Board Orders into "cyberspace" where they may be preserved forever and can be passed on to anyone outside the workplace, for whatever business harm intended by the sender? Electronic email may be deleted immediately or preserved forever, or forwarded to whomever, unlike a traditional Board Order posted on a bulletin board for a finite period of time, as determined by the gravity of the violation.

7. Should the Board require that every "routine" remedial Board Order be posted electronically or communicated via email, or only those involving "egregious" unfair labor practice conduct, such as "hallmark" violations where electronic posting would be part of an "extraordinary" remedy for conduct sufficient to support a *Gissel* bargaining order, or for recidivist violators of the Act? In other words, should a Board requirement that its remedial Orders be posted electronically be a standard requirement for all remedial notices, "one size fits all," *Nordstrom, Inc., supra* at 294, or only where the Board determines that the respondent's unfair labor practices are so egregious that electronic notice posting is appropriate as part of an extraordinary remedy? See *Longview Fibre Paper and Packaging, Inc.*, 2009 WL 5162419 (N.L.R.B. Div. of Judges) (27-CA-21082) (December 17, 2009). *See also, Fresh & Easy*

Neighborhood Market, Inc., 2010 WL 561866 (N.L.R.B Div. of Judges (28-CA-22520) (February 9, 2010). Compelling the posting of every remedial Board Order would diminish its ability to deter future violations as would be the case if electronic posting were part of an extraordinary remedy.

8. Does the Board contemplate compelling electronic posting of Board Orders accompanying all formal settlement agreements as well as Board decisions? If so, an employer may conclude that it would prefer an unfair labor practice hearing rather than agree to a formal settlement which would require potential disclosure outside the workplace. The Board's current *Case Handling Manual* sets forth the standards for electronic posting of Board settlements in extraordinary circumstances and only where "mutually acceptable." *See* Appendix.

This is not an unimportant consideration. Indeed, without voluntary settlement agreements the Agency would be overwhelmed with contested unfair labor practice hearings. Even a slight drop in the number of settled cases would result in case-handling delays and backlogs of litigated cases, which would reduce the Agency's "effectiveness and efficiency in administering the Act" by its ability to obtain voluntary compliance. As reported in the Summary of Operations (Fiscal Year 2009), GC Memorandum 10-1, dated December 1, 2009:

> "The Agency's effectiveness and efficiency in administering the Act is greatly enhanced by its ability to obtain voluntary resolution of unfair labor practice cases, which, after investigation, are deemed worthy of prosecution. (See merit factor, below.) Over the years, the Agency has achieved an excellent settlement record due to the efforts of Agency staff and the cooperation of the Bar. In FY 2009, the Regions obtained 7,175 settlements of unfair labor practice cases, representing a rate of 95.2% of total merit cases..."

What practical effect would electronic posting of Board Orders in all cases have on the willingness of the parties to agree to settlements? What are the budgetary repercussions and impact on Board effectiveness and efficiency if the settlement rate were reduced as a result of

mandatory electronic posting? What economic damage would likely occur to employers if formal settlement agreements posted electronically or by email were forwarded to business competitors, customers/clients, shareholders and financial institutions?

9. If the NLRB requires employers to post remedial Board Orders electronically, does it not follow that it should also require unions to post remedial Board Orders regarding union unfair labor practices on the union's website and communicate with its members via email as well? Section 8(b) of the Act includes prohibited secondary activities which affect "neutral employers" as well as the public. As such, a union's 8(b) (4) and (7), and 8(e) violations, for example, go beyond the employees of the primary employer affected by the union's unfair labor practices and are designed to deter broader violations which affect neutral employers and the public.

The public policy purpose of the secondary boycott provisions in Section 8(b) is to eliminate obstructions to commerce, which is at least one of the important public policies underlying the National Labor Relations Act. Does it not follow then that remedial Board Orders for union violations should not only be posted electronically and communicated via email to the neutral employer, but also to the union's members, and should be posted on the union's external website which is visited by the public so as to inform the public that the conduct violated the Act? If the Board is sincere about wanting to have its Orders achieve a deterrent effect, and maintain public confidence in the objectivity of the Agency, it should apply whatever electronic notice posting requirement it creates to both parties – unions and employers.

10. Finally, does the Board have the authority, or should it exercise authority, to overturn Board precedent and dramatically change Board procedures on the basis of the vote of recess appointed Board Members, without a fully confirmed complement of Members?

Certainly before it does so, we trust that the questions enumerated above, and others, will be considered thoroughly and carefully. If, indeed, the Board intends to initiate its rulemaking authority under the Act, perhaps this would be an appropriate topic for inviting broader public input and discussion rather than legal briefs filed by a handful of parties.

While not addressing all of the questions posed above, the Chamber will more thoroughly address two overriding issues that are central to effectuating the policies of the Act : (1) consistency, uniformity and even-handed application of whatever the Board adopts with regard to remedial Board Orders as applied to employers and unions alike; and (2) weakening of the deterrent effect of remedial Board Orders if they are required to be posted electronically in all cases, including formal settlement agreements, rather than only in egregious cases where warranted by the evidence.

a. I. <u>Electronic Posting of Remedial Board Orders Should Apply, If At All, To Both Unions As Well As Employers After an Evidentiary Hearing During the Unfair Labor Practice Stage Prior to Compliance</u>.

If at all, the Board should require unions to post remedial Board Orders on union websites and email their members since, unlike the workplace where employees congregate everyday, most employees infrequently visit union halls. And, as we know from experience with the Board ordered posting of voluntary or involuntary Board settlements, unions strongly resist electronic posting on union websites or via email, even though that is the most common method and most "conspicuous" place unions communicate with their members.

In any event, the Board should only compel electronic posting of remedial Board Orders, including formal settlements, after an evidentiary hearing to determine the following:

• existence of a charged party's intranet and the frequency and types of postings included on that site.

• existence of a charged party's email system, the frequency of the use of that system to make broadcast emails to groups of employees and the subject matters covered.

• number and accessibility of traditional notice-posting areas at the worksite and the degree to which employees work off-site or would otherwise be unlikely to see traditional notices.

b. II. Electronic Posting of Remedial Board Orders Should Apply, If At All, Only to Decisions Involving Egregious Unfair Labor Practices By Employers and Unions Where Extraordinary Remedies Are Appropriate, and Not to Every Board Order.

The Chamber asserts that the Board should require the same electronic notice posting for union violations that it mandates for employer violations. The Board has long recognized that some union as well as employer violations of the Act are so egregious as to warrant extraordinary remedial measures. For example, in cases of "hallmark" violations by an employer which would preclude the holding of a fair election for union representation the Board has ordered so-called *Gissel* bargaining orders. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

Similarly, the Board will seek 10(j) injunctive relief in appropriate cases where, for example, unions engage in mass picketing which blocks ingress and egress to the plant or worksite, violence and threats thereof, and damage to property. See, e.g. *Frye v. District 1199,* 996 F.2d 141 (6th Cir. 1993); *Squillacote v. Local 248.Meat & Allied Food Workers*, 534 F.2d 735 (7th Cir. 1976). The Board will also seek Section 10(j) injunctive relief against a union in appropriate cases where the union strikes or pickets in contravention of the notice and waiting periods set forth in Section 8(d) and 8(g) of the Act. See, generally, *McLeod v. Compressed Air,*

etc., Workers, 292 F.2d 358 (2d Cir. 1961). Accord: *McLeod v. Communications Workers of America*, 79 LRRM 2532 (S.D. N.Y. 1971).

Section 10(j) injunctive relief is also sought against unions where the activity involves union insistence to impasse on permissive or illegal subjects of bargaining, or union conduct that amounts to restraint or coercion of the employer in its selection of representatives for the purpose of collective bargaining or grievance adjustment. See, generally, *Boire v. I.B.T.*, 479 F.2d 778 (5th Cir.1973), rhg. denied 480 F.2d 924. Accord: *Kobell v. United Paperworkers Int'l Union*, 965 F.2d 1401 (6th Cir. 1992); *D'Amico v. Industrial Union of Marine and Shipbuilding Workers*, 116 LRRM 2508 (D. Md. 1984). The Board will also seek Section 10(l) injunctive relief where unions engage in certain unlawful secondary activity. (e.g., union secondary boycotts). See, e.g., *Hirsch v. Building and Construction Trades Council*, 530 F.2d 298, 302 (3d Cir. 1976).

The Board places an even higher priority on charges alleging unlawful union secondary activity or recognitional picketing activity. In that regard, the Board is required under Section 10(l) of the Act to seek injunctive relief whenever a Regional office determines that there is reasonable cause to believe that an alleged violation of 8(b)(4)(A), (B), (C), 8(b)(7), or Section 8(e) of the Act has occurred.

The Board has determined that extraordinary relief is required in secondary activity and recognitional picketing cases because of the public policy concerns that are involved. See, e.g. *General Longshore Workers, ILA,* 235 NLRB 161, 169 (1978) (where Board described "the public policy to which Section 8(e) gives effect is concerned not simply with the interests of the employer party to an agreement offending such statutory policies, but also with the need to

protect all other persons who might be effected by such an agreement from the secondary consequences flowing therefrom.")

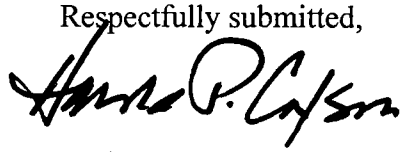
The Board has also recognized that extraordinary remedial measures may be warranted where a respondent, union or employer, proves to be a recidivist violator of the Act. When that is the case, the Board has at times required that such a respondent publish, at their own expense, the Board's remedial notice in a local newspaper of general circulation. See, e.g. *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473; See also, *Electrical Workers IBEW Local 3 (Hunts Point Elec.)* 271 NLRB 1580 (1984) (Board ordered union to publish Board order in newspaper of general circulation in the New York metropolitan area because union had demonstrated a "pattern" of unlawful secondary activity).

In light of the fact that the Board has long recognized that where unions as well as employers commit egregious and or repeated violations of the Act appropriate extraordinary remedial measures may become necessary. Therefore, if the Board decides to go down the path of requiring electronic posting of remedial orders, it should apply such a remedy equally to union unfair labor practices, especially where the union violations affect neutral employers and the public.

5. CONCLUSION

For all of the foregoing reasons, the Chamber of Commerce of the United States of America urges the National Labor Relations Board not to compel the electronic posting of its remedial Board Orders. If the Board decides to compel electronic posting, the Chamber urges that it be limited to egregious unfair labor practice cases where extraordinary remedies are deemed to be appropriate. The Board's policy of compelling the posting of remedial Board Orders should apply equally to union as well as employer violations, and only after an evidentiary hearing during the trial of the underlying Complaint as to whether electronic posting would be appropriate.

Respectfully submitted,



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APPENDIX

NLRB Case handling Manual

6. 10124 Settlements/Non-Board Adjustments

Unfair labor practice cases may be resolved through informal or formal Board settlement agreements or through non-Board adjustments. Regional Offices should seek to obtain an informal or, where appropriate, a formal settlement agreement, which carry with them the Agency's imprimatur, including compliance policed by the Agency. Non-Board adjustments, which are an important settlement tool, are agreements between the parties that result in the withdrawal of the charge.

10124.1 Policy

It is the policy of the Board and the General Counsel to actively encourage the parties to reach a **mutually satisfactory resolution** of issues at the earliest possible stage. Moreover, the Administrative Procedure Act (Sec. 5(b)) requires that the Agency consider "offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit." (5 U.S.C. § 554(c)(1)). Since voluntary remedial action is a high priority, diligent settlement efforts should be exerted in all meritorious cases. Settlement of a meritorious case is the most effective means to: (1) improve relationships between the parties; (2) effectuate the purposes of the Act; and (3) permit the Agency to concentrate.

10124.2 Principal Factor in Achieving Settlement

The principal factor affecting a Regional Office's success in achieving settlement is the confidence of the public in the ability, **impartiality** and integrity of the Regional Office. When the public is satisfied that the Regional Office, when proposing or negotiating settlement, has

fully investigated and considered the facts of the case and is convinced that the formal prosecution of the case would result in the finding of unfair labor practices, the chances of settlement are considerably increased.

10132.4 Posting/Dissemination of Notices

The appropriate method for traditional posting, electronic posting, mailing, and/or publication of notices depends on the type of charge and the circumstances as set forth below:

(a) *Traditional Posting:* During settlement discussions, the Board agent should obtain the charged party's commitment to post the notices at specific places consistent with posting requirements set forth in NLRB Form 4775, Settlement Agreement. The number of notices to be posted and the location of the posting will depend on various factors, including the size of the facility, the type of alleged violation and the extent to which knowledge of the alleged conduct was disseminated.

If the charged party is a union, notices should be posted by the union, both on bulletin boards located at its office and meeting halls, as well as at the facility of the employer involved, if possible. Signed copies of the notices should also be supplied for the employer to post at its facility, if willing.

Settlement agreements entered into in related CA and CB cases (where the employer and the union are jointly and severally liable) should provide for posting of both the charged union's notice and the charged employer's notice at the same places and under the same conditions.

(b) *Electronic Notice Posting:* In certain cases, it may be appropriate to seek electronic notice posting in addition to a traditional posting where the charged party customarily communicates with its employees or members electronically and/or where the charged party utilized its e-mail or intranet system in committing an unfair labor practice. OM

Memo 06-82. Under such circumstances, the electronic posting would be considered an additional site where the charged party normally posts work-related notices. The following factors should be considered in this regard:

- **existence of a charged party's intranet** and the frequency and types of postings included on that site.

- **existence of a charged party's e-mail system**, the frequency of the use of that system to make broadcast e-mails to groups of employees and the subject matters covered.

- number and accessibility of traditional notice-posting areas at the worksite and the **degree to which employees work off-site or would otherwise be unlikely to see traditional notices**.

Such a posting would require the charged party to disseminate the notice electronically in the same manner as it communicates with employees or members. For instance, if the charged party routinely sends broadcast e-mails to employees or members it should notify all employees or members of the electronic posting via e-mail with the Board notice attached. If issues arise which require further analysis (e.g., the extent of an appropriate electronic posting where the charged party has multiple locations, all privy to same intranet, and the violations did not occur at all facilities), the Regional Office should contact the Division of Advice.

(c) *Mailing of Notice:* If it is apparent that a posting will not effectively reach the employees or members, consideration should be given to requiring the mailing of the notice to them at the charged party's expense.

(d) *Publication of Notice:* In unusual circumstances, the posting and/or mailing of the notice may be viewed as insufficient. Examples of such cases include an unlawful hiring hall that affected employment of persons who are widely scattered or unidentified, or where the unlawful activities

involve general or widespread practices. In such cases, publication in a daily newspaper of general circulation, as opposed to publications serving only specialized groups of readers, should be required. Such publication should be at the charged party's expense and on 3 separate days within a 1-week period designated by the Regional Office. Such publication should be in addition to, not a substitute for, such other notice posting as is required by the circumstances.

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2010, I caused a true and accurate copy of the foregoing brief of *Amicus Curiae* Chamber of Commerce of the United States of America to be served on the following. See attached list.

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