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

---

ARKEMA, INC.

and Cases 16-CA-26371, 16-CA-26392

UNITED STEELWORKERS OF AMERICA, LOCAL 13-227

ARKEMA, INC.
Employer

and

Case 16-RD-1583

GREG SCHRULL
Petitioner

and

UNITED STEELWORKERS OF AMERICA, LOCAL 13-227
Union

STEVENS CREEK CHRYSLER JEEP DODGE, INC.

and Cases 20-CA-33367, 20-CA-33562, 20-CA-33655

MACHINISTS DISTRICT LODGE 190, MACHINISTS AUTOMOTIVE 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

and Case 28-CA-21229

FREEMAN'S CARPET SERVICE, INC.

and Case 28-CA-21230

FCS FLOORING, INC.

and Case 28-CA-21231

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

And Case 28-CA-21233

INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES DISTRICT COUNCIL 15

---

**GENERAL COUNSEL'S STATEMENT OF POSITION ON ELECTRONIC NOTICE-POSTING**

On May 13, 2010, the Board invited the parties to file briefs in the above-captioned cases addressing the issue of electronic notice-posting, which has been requested as a remedy in these cases. In *Arkema*, Inc., Case 16-CA-26371 et al., the General Counsel requested an order requiring the Employer, as an additional remedy, to e-mail the Board notice to employees. The General Counsel's request for an e-mailed notice was based on evidence of the Employer's customary e-mail communication with employees, under *Nordstrom, Inc.*, 347 NLRB 294 (2006), as well as on the Employer's use of e-mail to commit some of the alleged violations. *Public Service Co. of Oklahoma*, 334 NLRB 487 (2001), *enforced*, 318 F.3d 1173 (10th Cir. 2003). The Administrative Law Judge ("ALJ") found most of the violations alleged in the complaint, including those committed via e-mail, but did not address or order the e-mailed notice requested by the General Counsel. *Arkema, Inc.*, JD(ATL)-23-09. In *Stevens Creek Chrysler*, Case 20-CA-33367 et al., Charging Party Union, but not the General Counsel, requested an internet/intranet posting of the notice, which the ALJ granted in a supplemental decision on remand from the Board. *Stevens Creek Chrysler*, JD(SF)-25-09. No *Nordstrom* evidence was introduced in the unfair labor practice proceeding. In *Custom Floors, Inc. et al.*, Case 28-CA-21226 et al.,[1] the General Counsel did not request electronic posting and the issue was not litigated before the ALJ. The ALJ dismissed the complaint in its entirety. *Custom Floors, Inc., et al.*, JD(SF)-26-07. Charging Party Union, however, excepted to the lack of an internet/intranet notice posting as part of its exceptions to the Board.

[1] Although *Custom Floors, Inc.* remains the lead case in the Region 28 caption, Custom Floors and the Charging Party entered into a non-Board resolution of Case 28-CA-21226, and that case was severed per Board order dated January 4, 2008.

The questions on which the Board has requested briefing are:

1. Should the Board reconsider *Nordstrom*'s requirements for electronic posting ?
2. If so, what legal standard should apply?
3. At what stage of the proceeding should any necessary factual showing be required?

## I. Summary of the General Counsel's Position on Electronic Notice-Posting

The Board should abandon *Nordstrom*'s pleading and evidence requirements at the unfair labor practice stage and hold that the Board's standard requirement to post notices in conspicuous places, including all places where notices are customarily posted, extends to electronic notices where electronic communication with employees is customary. The remedial purpose of a notice is best achieved by posting in a manner that guarantees accessibility to employees, easy visibility, and a broad reach to all targeted employees. Given employers' and employees' increasing reliance on electronic communications and the concomitant decreasing prominence of paper notices and physical bulletin boards, electronic posting of notices will often be the best means to achieve such accessibility, visibility, and broad reach. Indeed, intranet/internet sites and e-mail have become the virtual meeting rooms and bulletin boards in many workplaces, and are taking the place of the physical bulletin boards. Therefore, the Board's standard notice-posting order — requiring posting in "conspicuous" places, including places where notices to employees are "customarily" posted — by the plain meaning of its language, encompasses electronic posting where that is a "customary" means of reaching employees.

Electronic posting is simply a new version of the physical posting, a "virtual bulletin board," and should be treated as such. Accordingly, there should be no requirement to specifically plead an electronic notice remedy, nor litigate it as part of the unfair labor practice proceeding. Any issues as to whether electronic notice and which type of electronic notice is

appropriate in a particular case should be resolved as part of compliance investigations and proceedings, in the same manner as any issue regarding the number or location of paper notices is currently resolved. In determining, at the compliance stage, whether some form of electronic posting is warranted, the relevant factor should be whether the respondent employer disseminates information to employees about their terms and conditions of employment, such as employee handbooks, benefits information, work rules, etc., via e-mail, intranet, or internet. In the case of a respondent union, similarly, the test should be whether the union disseminates membership or organizing information via electronic means.

Thus, in the instant cases, the Board should either clarify that the current standard notice-posting language extends to electronic posting, or amend the standard notice-posting order to explicitly include electronic posting via intranet, internet, or e-mail if that is a customary means of communicating information to employees.

## II. The Standard Notice-Posting Order Should Encompass Electronic Posting, if Customary

### 1. The Remedial Purposes of Notice Posting

The Board has broad powers under Section 10(c) of the Act, 29 U.S.C. Sec. 160(c), to fashion remedies, including affirmative orders, that will effectuate the policies of the Act. *NLRB v. Strong Roofing & Insulating*, 393 U.S. 357, 359 (1969); *Teamsters Local 115 v NLRB*, 640 F.2d 392, 399 (D.C. Cir. 1981). Congress contemplated that that broad power would include orders to post "appropriate bulletins." H. Rep. No. 1147, 74th Cong., 1st Sess. P. 24 (1935), *reprinted at* II *Legislative History of the National Labor Relations Act* 3074 (Government Printing Office 1985). Since the very first days of the Board, posting of a notice to employees has been a fundamental part of the Board's court-approved remedies. *See NLRB v. Pennsylvania*

*Greyhound Lines*, 303 U.S. 261, 268 (1938) (upholding the Board's very first order in *Pennsylvania Greyhound Lines*, 1 NLRB 1, 52 (1935), requiring the employer to, *inter alia*, "post notices in conspicuous places" informing employees of its violation and obligation to refrain from it in the future). *See also NLRB v. Express Pub. Co.*, 312 U.S. 426, 438 (1941); *NLRB v. Cutter Dodge, Inc.*, 825 F.2d 1375, 1380 (9th Cir.1987) (citing *NLRB v. Falk Corp.*, 308 U.S. 453, 462 (1940)).

The posting of notices serves important remedial purposes. *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 152 (2002) (noting that a conspicuous notice posting is a "significant" part of the Board's remedial scheme). Notices are intended to "inform employees of their statutory rights and the legal limits on the Employer's conduct." *Teamsters Local 115*, 640 F.2d at 400. *See also, Falk Corp.*, 308 U.S. at 462 (purpose of notice is to convey to employees knowledge of their rights and employer's obligation not to interfere with these rights); NLRB Case Handling Manual (Part III) Compliance ("CHM Part III"), Sec. 10518 (notice serves to inform employees of their rights and of the respondent's remedial obligations). Just as importantly, notices are also "a means of dispelling and dissipating the unwholesome effects" of the unfair labor practices. *Chet Monez Ford*, 241 NLRB 349, 351 (1979), *enforced*,624 F.2d 193 (9th Cir. 1980) (table). The "traditional posting of the notice has a therapy beyond mere communication." *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 539 (5th Cir. 1969). Beyond simply informing employees of their rights, the notice is intended to reassure employees that the Board will protect those rights and to convince employees that they can freely exercise them. *Teamsters Local 115*, 640 F.2d at 400-401 (notice should be disseminated in a manner that reassures employees that there will not be further violations and that convinces them "that the Employer has adopted an official policy of complying with its legal obligations");

*NLRB v. Union Nacional de Trabajadores*, 540 F.2d 1, 12 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977) (notice should be disseminated so as to have a "salutary effect of neutralizing the frustrating effects" of the violations; quoting *J.P. Stevens*, 417 F.2d at 540 (notice should provide "a warming wind of information and, more important, reassurance")).

In order to accomplish these remedial purposes, the Board seeks to make the notice easily available to the maximum number of targeted employees, requiring "conspicuous" postings, including in customary posting locations. Customary locations, such as bulletin boards, are among, but not necessarily the only, locations where notices may be required to be posted. *See* CHM Part III, Sec. 10518.2 (appropriate posting locations include, not just bulletin boards, but "timeclocks, department entrances, meeting hall entrances, and dues-payment windows"). Because the main focus of the notice posting is that it be conspicuous, the Board has adapted the means of dissemination as warranted by the circumstances in order to ensure the wide reach of the notice. *See generally Technology Service Solutions*, 334 NLRB 116, 117-18 (2001) (giving examples of how Board tailors posting remedy "to ensure that a respondent employer actually apprises its employees of the Board's decision and their rights under the Act"). For example, the Board has ordered notices to be read to employees, mailed to personal addresses, and published in newsletters or newspapers. *See, e.g.*, *Teamsters Local 115*, 640 F.2d at 400-401 (enforcing Board order requiring mailing and publication of notice); *Smithfield Packing Co.*, 344 NLRB 1, 14 (2004), *enforced*, 447 F.3d 821 (D.C. Cir. 2006) (ordering mailing and reading of notice).

These additional means of notice dissemination are limited to cases involving particular sets of circumstances because they are not the customary way in which respondents generally communicate information to employees and because they entail greater efforts or a higher burden on respondent than the customary posting methods. *See, e.g.*, *Expert Elec., Inc.*, 347 NLRB 18,

19-20 (2006) (declining to order mailing of notice because it was unduly burdensome in this case). However, those issues are not raised by electronic postings in cases where the respondent employer or union routinely uses electronic means of communications. If the respondent already uses intranet/internet sites or e-mail to communicate with employees, a posting via those methods is neither extraordinary nor burdensome. Moreover, the prevalence of e-mail, intranets, and internet sites in the workplaces of today warrants inclusion of electronic dissemination as part of the standard notice-posting order, rather than as a variation limited to special circumstances.

**2. Today's Workers Increasingly Rely on Electronic Communication**

Since the 1990's, the use of computers, intranet/internet, and e-mail at work has exploded. By 2003, 77 million workers in the United States (55.5 percent of employed persons) used a computer at work. *BLS Finds 55 Percent of Employees Used Computers at Work in October 2003*, Daily Labor Report No. 148, at D-24 (2005). The most common use of computers by workers is for connecting to the internet or e-mail. *Id.* Although there are no more recent nationwide surveys by the Bureau of Labor Statistics, it is safe to assume that the use of computers in the workplace has only increased since 2003 and is likely to stand at more than 55 percent today.

The widespread use of computer technology by employees goes hand in hand with employers' and unions' increased reliance on such technology to deliver information and services to employees. Employer surveys indeed suggest a significant increase in computer use beyond that described in the BLS survey of workers. A 2000 study showed that from 1998 to 2000 employers' use of intranet systems to deliver human resources services to employees increased dramatically from 50 percent of surveyed employers to 79 percent. *Most Employers*

*Use Intranets to Deliver HR Services, Watson Wyatt Study Finds*, Daily Labor Report No. 42, at A-5 (2000). A more recent survey revealed even greater reliance on intranet/internet. *The State of Electronic Communications in Compensation and Human Resources*, WorldatWork Survey Brief (WorldatWork and Buck Consultants), Oct. 2005, *available at* http://www.worldatwork.org/pub/E157963EC05.pdf. Among the over 500 respondents in a wide range of industries, including finance, manufacturing, healthcare, retail, construction, and wholesale trade, 93 percent had a website and 88 percent an employee intranet. *Id.* at 1, 13. The vast majority of surveyed employers use the internet or intranet to communicate important information to their employees about terms and conditions of employment: 90 percent post general benefits information (up from only 25 percent in 2001); 86 percent post health care and employee wellness information; 77 percent post savings plan information; 71 percent have online training programs; 53 percent post orientation information; 49 percent post pay information; and 40 percent have "virtual" meetings. *Id.* at 5-6. Employers even provide public computer stations to make online information available to employees who do not have regular access to their own computer at work. *Id.* at 2. Moreover, a large majority of employers indicated that website/intranet use is increasing. *Id.* at 11. These studies make "clear that employers are using electronic technology to communicate with their employees," *Id.* at 5, and that "[i]t does not appear that the extent of electronic communications will diminish in the near future." *Id.* at 2. Similarly, unions are increasingly relying on electronic communications to reach members and potential members. *See* Jeffrey M Hirsch, *The Silicon Bullet: Will the Internet Kill the NLRA?*, 76 Geo. Wash. L. Rev. 262, 274-76 (2008), and authorities cited therein.

The prevalence of electronic communications has been reflected in recent cases before the Board. For example, in *Pacific Bell*, 330 NLRB 271, 275 (1999), *enforced*, 259 F.3d 719

(D.C. Cir. 2001), the ALJ cited evidence of e-mail communication to employees as support for his recommended order, adopted by the Board, requiring that the notice be sent to employees "by the means of electronic transmission currently used" to send important information to employees. In *IBM Corp.*, 339 NLRB 966, 966-67, 968 (2003), there was ample evidence that IBM routinely posted information to employees on its intranet and e-mail system. *Frontier Tel. of Rochester, Inc.*, is replete with references to the company's use of internet and employees' use of e-mail and online message boards, leading the ALJ to note that the company's internal message board "functioned as a high-tech bulletin board" and the electronic forums as the equivalent of "group meetings." 344 NLRB 1270, 1314, 1317, 1318-19 & n. 155 (2004), *enforced*, 181 Fed. Appx. 85, 180 L.R.R.M. 2896 (2d Cir. 2006). Similarly, in one of the instant cases under review, *Arkema, Inc.*, Case 16-CA-26371 et al., there is evidence of numerous e-mail communications to employees of important work matters and the existence of a company intranet where the employer posts policies, procedures, forms, and other information. (Tr. 131-32; GC Ex. 2,3, 10,12, 13, 14, 16; U Ex. 1.) *See also Windstream Corp.*, 352 NLRB 510, 510 n. 3 (2008) (ordering notice posting via intranet and e-mail, citing evidence of employer's routine electronic communications to employees); *Texas Dental Ass'n*, 354 NLRB No. 57, slip op. at 1-2 & n. 4 (2009) (describing e-mails to employees; Members Schaumber and Liebman disagreed on whether there was sufficient evidence to establish routine electronic communication).

**3. Government Agencies and Courts Are Adopting Electronic Notices**

In recognition of this prominent role of internet and electronic communication, government entities are increasing their use of computer technology to deliver services and fulfill their regulatory functions. Agencies are moving beyond merely maintaining a website to, for example, using the internet for notice-and-comment rulemaking. *See* Beth Simone Noveck, *The*

*Electronic Revolution in Rulemaking*, 53 Emory L.J. 433, 470-72 (2004) (describing e-rulemaking by the Nuclear Regulatory Commission, OSHA, EPA, Department of Transportation, and Department of Labor). Many agencies are also requiring or accepting electronic posting of legal notices. Among the regulations calling for electronic posting of notices are:

- Notification of Employee Rights Under Federal Labor Laws, 29 C.F.R. Sec. 471.2(f): Requires a covered federal contractor to electronically post a notice of NLRA rights if it "customarily posts notices to employees electronically."

- No FEAR Act Notice, 5 C.F.R. Sec. 724.202: Requires federal agencies with internet websites to post the No FEAR Act Notice to employees on their website.

- FMLA Notice, 29 C.F.R. Sec. 825.300: Allows electronic posting of notice of employees' FMLA rights.

- 48 C.F.R. Sec. 52.203-14: Requires federal contractors that maintain a company website "as a method of providing information to employees" to display on the website an electronic version of the required "fraud hotline posters."

- 26 C.F.R. Secs. 1.402(f), 1.411(a)-11, 35.3405-1 T: allows for electronic transmission of certain notices by retirement plan sponsors and administrators.

- 20 C.F.R. Sec. 655.734: Allows employers seeking to hire H-1B non-immigrants via a Labor Condition Application to give notice of the application to its employees by electronic posting on website, e-mail, intranet, or electronic bulletin board.

Courts and agencies are also ordering electronic notices in various contexts. For example, a growing number of courts are ordering the electronic dissemination of class action notices. *See, e.g., Stoffels v. SBC Commc'ns, Inc.*, 254 F.R.D. 294, 299-300 (W.D. Tex. 2008); *Krzesniak v. Cendant Corp.*, No. C 05-0556, 2007 WL 4468678, *2 (N.D. Cal. 2007), and cases cited; *Martin v. Weiner*, No. 06CV94, 2007 WL 4232791, *3 (W.D.N.Y. 2007). *See also* Jordan S. Ginsberg, *Class Action Notice: The Internet's Time Has Come*, 2003 U. Chi. Legal F. 739, 741 n. 16 (2003). Internet posting of a temporary restraining order was part of a court remedy against an unlawful "sick-out" under the Railway Labor Act. *See American Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 578-79 (5th Cir. 2000) (upholding contempt of TRO). Electronic posting

by e-mail, internet, or intranet was also ordered as part of a consent decree providing remedies for racial discrimination under Title VII of the Civil Rights Act, 42 U.S.C. Secs. 2000e, et seq. *Lemons v. Pattonville-Bridgeton Fire Protection District*, No.Civ.A. 4:03CV00975, 2005 WL 2291621, *3 (E.D. Mo. 2005). The defendant in an action under the Americans with Disabilities Act was ordered to post a notice to patrons on its internet site. *United States v. AMC Entertainment, Inc.*, No. CV-99-01034, 2006 WL 224178, *24 (C.D. Cal. 2006). At least two agencies have ordered electronic posting of notices as part of their remedies. *See Blinick v. Dept. of Housing and Urban Dev.*, E.E.O.C. Appeal No. 07A20079, 2004 WL 290761, *8 (2004) (requiring agency to transmit remedial notice to employees "by electronic system of communication" in addition to paper posting); *City of Boston*, 35 MLC 289, 292 (2009), 2009 WL 1740195, *5 (Mass. Labor Relations Commission concludes that order requiring notice posting "in places where notices to employees are usually posted" includes electronic postings via e-mail or intranet in workplaces where the employer "customarily communicates to employees" via those means; citing Member Liebman's dissent in *Nordstrom*).

### 4. Electronic Board Notices Will Better Effectuate the Remedial Purpose By Improving Accessibility, Visibility, and Comprehension in the Computer-Connected Workplace

In order to make the notice-posting remedy relevant and effective in the computer-connected workplace of today, the Board should include electronic posting as part of its standard notice-posting orders. The Board has already recognized the prevalence of electronic documents and communications in the context of documentary subpoenas. *Bryant & Stratton Bus. Inst.*, 327 NLRB 1135, 1135 n. 3 (1999). The Board should extend that recognition to the remedial context and join the growing trend among courts and government agencies that treat electronic dissemination of notices as an important means of fulfilling the remedial purposes of notice-

posting in the workplaces of today. After all, the Board has a responsibility to adapt its enforcement of the Act to the "changing patterns of industrial life." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). By continuing to treat electronic posting as an extraordinary remedy, the Board fails to adapt to the "changing patterns" of communication in the workplace.

Moreover, given the prevalence of electronic means of communication today, only the addition of electronic posting will ensure that the Board's remedial notice reaches a wide swath of the targeted employees. In many companies where the physical bulletin boards are becoming obsolete, replaced by "virtual posting boards," a paper posting will have an unduly limited reach. It has been documented, even long before the explosion of computer technology in the workplace, that paper notices fail to reach numerous employees. Studies have shown that "not all employees consult company bulletin boards where such notices are typically placed," either because they do not visit those areas of the workplace or they are too busy to stand before a bulletin board and read the notice. John W. Teeter, Jr., *Fair Notice: Assuring Victims of Unfair Labor Practices that Their Rights Will Be Respected*, 63 UMKC L. Rev. 1, 5 n. 54 (1994), and studies cited therein. The proportion of employees who visit a bulletin board and take the time to inspect the documents posted is likely to be even smaller in workplaces today, where electronic communication is common and employees are accustomed to getting their information online.

Electronic posting will also reduce the risk that employees refrain from reading the notice out of fear, as it enables employees to inspect the notice in a more private and leisurely manner at their own computer workstation, even remotely and on their own time. Courts have recognized that one failing of a paper notice is that "[a]n employee who must scan the Board's notice hurriedly while at work, under the scrutiny of others, will not be able to absorb its meaning and hence understand his legal rights." *Teamsters Local 115*, 640 F.2d at 400 (quoting

*J.P. Stevens*, 380 F.2d at 304. By enabling a more private and thorough reading of the notice, electronic posting can lead to better comprehension, and consequently better provide a "warming wind" of information and reassurance.

Another reason for facilitating the use of electronic notice-posting is that adhering to only paper notices except in extraordinary cases where the issue is litigated in the unfair labor practice case, diminishes the impact of the Board notice in relation to the respondents' other communications. Where the employer or union customarily transmits important information to employees or members by electronic means, limiting Board notices to paper postings sends the message to employees that the Board notice is not as important as the respondent's other communications, or that the respondent employer or union is not as invested in getting the Board notice to employees. Such a message will inhibit the "salutary effects" of the Board notice and will not effectively convey to employees reassurance that their employer or union will not interfere with their rights under the Act.

In short, the prevalence of electronic communications in the workplace and the advantages that an electronic notice-posting provides in better fulfilling the remedial purposes of the Board notice strongly support making electronic posting the norm rather than the special exception. In fact, given the increasing number of employers and unions who customarily use electronic means to supply information to employees, excluding electronic means from the standard Board posting order is actually contrary to the plain language of the order requiring "conspicuous" notices using the "customary" means of posting.

## III. Electronic Posting Issues Should Be Resolved in Compliance

Intranets, internet sites, and e-mail are today's online versions of the physical notice boards. Electronic posting should be considered an extension of the standard paper posting; any

issues as to whether electronic posting is warranted, and in what manner, should be dealt with in the same way as issues related to the number, manner, and location of paper postings: in compliance proceedings. *See, e.g.*, *NLRB v. Ohmite Mfg. Co.*, 557 F.2d 577, 578-79 (7th Cir. 1977) (whether the number and manner of notice postings was sufficient was an issue properly considered in supplemental proceedings rather than in the unfair labor practice case), and cases cited. The Board's regional offices routinely investigate and monitor compliance with the Board's posting orders. The appropriate number and location of notice postings is determined by regional compliance officers. *See* CHM Part III, Section 10518.2. In the same manner, regional offices can determine whether posting "locations" should include an electronic forum. Regional offices have been determining compliance with electronic postings in cases involving violations committed by electronic communication, under *Public Serv. Of Oklahoma*, 334 NLRB 487 (2001). *See* CHM Part III, Section 10518.2. They have also been determining and monitoring electronic posting requirements under settlement agreements. *See* GC Memorandum 08-05, *Report on the Midwinter Meeting of the ABA Practice and Procedure Committee of the Labor and Employment Law Section*, at p. 6, 2008 WL 2484199 (through fiscal year 2008, Regions had obtained electronic posting remedies in settlements in approximately 50 cases).[2] Thus, regional offices are well-equipped to evaluate the propriety of electronic postings and seek such postings through supplemental compliance proceedings, if necessary.

Litigation of the issue in compliance proceedings is appropriate not only because electronic posting issues are analogous to paper posting issues but also because, except in cases involving violations committed by electronic communication, evidence regarding the use of

[2] *Also available* http://www.nlrb.gov/shared_files/GC%20Memo/2008/GC%20%2008-05%20Report%20on%20the%20Midwinter%20Mtg%20of%20the%20ABA%20P&P%20Committee.pdf.

electronic communication is likely to be extraneous to the merits issues litigated in the unfair labor practice case.

The guiding principle for determining whether electronic posting of notices should be sought in compliance proceedings should be whether the respondent normally uses electronic means, such as e-mail or intranet/internet postings, to disseminate information to employees/members about terms and conditions of employment, union membership, or organizing information, because such use inherently implies wide employee access to these electronic communications. *See, e.g.*, Notification of Employee Rights Under Federal Labor Laws, 75 Fed. Reg. 28638, 28388 (May 20, 2010) (discussing meaning of "customarily posts employee notices electronically" under new DOL regulations requiring electronic posting of NLRA rights notice).

## IV. Conclusion

The Board should abandon *Nordstrom*'s requirement that an electronic posting remedy be specifically sought and litigated before the ALJ in the unfair labor practice stage. Instead, the Board should hold that electronic posting is encompassed by the Board's standard notice language where, as that standard language states, that is a "customary" place where notices to employees are "posted." The Board should clarify its new interpretation of the notice-posting language via its decision in the instant cases, or by modifying the standard posting language to specifically add electronic posting, where that is customary.

Should the Board find violations in the three instant cases under its consideration and order the posting of Board notices, the Board should apply the new rule requiring electronic posting, if customary, in all three cases. The Board has the authority to consider remedial issues *sua sponte* and order the remedy that is warranted. *Sacramento Recycling and Transfer Station*,

345 NLRB 564, 564 n. 3 (2005) (citing *Indian Hills Care Center*, 321 NLRB 144, 144 n. 3 (1996)).[3]

If the Board declines to reconsider *Nordstrom*, the General Counsel respectfully reiterates that an electronic notice posting is warranted and should be ordered in *Arkema, Inc.*, Cases 16-CA-26371 and 16-CA-26392. In *Arkema*, the General Counsel specifically requested e-mail distribution of the Board notice and offered evidence of abundant e-mail communication with employees regarding terms and conditions of employment and of the existence of an intranet routinely used to make such information available to employees.[4] The evidence also supports the ALJ's conclusion that respondent used e-mail messages to violate Section 8(a)(1) and as part of its direct dealing in violation of Section 8(a)(5). *See* JD(ATL)-23-09, pp. 11, 14. Thus, in *Arkema*, electronic posting of the remedial Board notice is appropriate under both *Nordstrom* and *Public Serv. Of Oklahoma*. *See* General Counsel's Cross Exception, pp. 2-5.

Respectfully submitted,

s/ Laura T. Vázquez
Counsel for the General Counsel
National Labor Relations Board
Division of Advice
1099 14th Street, NW
Washington, DC 20570
Ph. (202) 273-3832
laura.vazquez@nlrb.gov

June 11, 2010

[3] Thus, Respondent J&R Flooring, Inc.'s contention that there is no proper request for electronic posting before the Board in Case 28-CA-21226 et al., is irrelevant. ((J&R Flooring's Motion for Leave to Supplement Answering Brief, filed May 26, 2010.)

[4] See evidence referenced *supra* and in General Counsel's Cross Exception to the Decision of the ALJ, filed November 10, 2009.

## CERTIFICATE OF SERVICE

I hereby certify that on this date, June 11, 2010, a true and correct copy of the foregoing *General Counsel's Statement of Position* was served by electronic mail on the following parties:

A. John Harper II,
A. John Harper III
Morgan, Lewis and Bockius
1000 Lousiana Street
Suite 4200
Houston, Texas 77002-5006
aharper@morganlewis.com
jharper@morganlewis.com
Counsel for Arkema, Inc.

Bernie Middleton
Provost Umphrey Law Firm
3730 Kirby Drive
Suite 1200
Houston, Texas 77008
blmiddleton@aol.com
Counsel for United Steelworkers of America, Local 13-227

Greg Schrull
2231 Haden
Houston, Texas 77015
Bigdawg051667@aol.com
R-Case Petitioner

David A. Rosenfeld,
Caren P. Sencer
Weinberg Roger & Rosenfeld
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501-1091
drosenfeld@unioncounsel.net
csencer@unioncounsel.net
Counsel for Painters District Council 15 and Machinists District Lodge 190, Local 1101

Daniel T. Berkley
Gordon & Rees LLP
Embarcadero Center West
275 Battery Street, Suite 2000
San Francisco, CA 94111
dberkley@gordonrees.com
Counsel for Stevens Creek Chrysler Jeep Dodge, Inc.

Gregory E. Smith
Lionel Sawyer & Collins
1700 Bank of America Plaza
300 South Fourth Street
Las Vegas, Nevada 89101
gsmith@lionelsawyer.com
Counsel for J&R Flooring, Inc.

Thomas A. Lenz
Atkinson, Andelson, Loya, Ruud and Romo
17871 Park Plaza Drive, Suite 200
Cerritos, CA 90703-2263
tlenz@aalrr.com
Counsel for Flooring Solutions of Nevada, Inc.

FCS Flooring, Inc.
6455 S. Industrial Road, Unit D
Las Vegas, NV 89118
bekki@fcsflooring.net

Freeman Carpet Services, Inc.
3150 Ponderosa Way
Las Vegas, NV 89118
freemancarpet@aol.com

s/ Laura T. Vázquez
Counsel for the General Counsel