UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

ARKEMA INC.

AND

CASES 16-CA-26371 AND
16-CA-26392

UNITED STEEL WORKERS OF
AMERICA, LOCAL 13-227

ARKEMA INC.,

Employer

AND

GREG SCHRULL,

CASE 16-RD-1583

Petitioner

AND

UNITED STEEL WORKERS OF
AMERICA,
LOCAL 13-227,

Union

ARKEMA INC.'S ANSWERING BRIEF IN OPPOSITION TO THE GENERAL COUNSEL'S CROSS EXCEPTION

Arkema Inc. ("Arkema") files this Answering Brief in Opposition to the General Counsel's Cross Exception and states:

ARGUMENT IN OPPOSITION TO DISTRIBUTION OF NOTICE VIA E-MAIL

Counsel for the General Counsel excepts to the Administrative Law Judge's ("ALJ's") Decision and Recommended Order because the ALJ failed to order that Arkema distribute a remedial notice to its Houston employees via e-mail. For all of the reasons stated in Arkema's Brief in Support of Exceptions and Reply in Support of

Exceptions, the ALJ erred in finding that Arkema violated the National Labor Relations Act ("Act"), and, therefore, no notice-posting should be ordered in this case. Even if the National Labor Relations Board ("Board") determines that Arkema did violate the Act, distribution of any notice to Arkema's Houston employees via e-mail should be considered an extraordinary remedy that is not warranted in this case.

A. E-mailing a Notice Constitutes Distribution, Not "Posting."

A long-standing remedy imposed by the Board for unfair labor practices is requiring the offending party to "post" a notice in conspicuous places, including all places where notices to employees are "customarily posted." *See, e.g., International Bus. Machines Corp.*, 339 NLRB 966, 966 (2003)(noting that the ALJ imposed a "standard notice-posting provision requiring IBM to post a notice 'in conspicuous places including all places where notices to employees are customarily posted.'") Here, in addition to this "standard notice posting" remedy, the General Counsel seeks to require Arkema to distribute a remedial notice to its Houston employees via e-mail. Such distribution is an extraordinary remedy, and the General Counsel has not established a need for it.

The primary definition of the verb "to post" is, "To fasten up (an announcement) in a place of public view….To cover (a wall, for example) with posters." AMERICAN HERITAGE DICTIONARY 967 (Second College ed. 1991). "To distribute" means, "To divide and dispense in portions….To supply (goods to retailers)….To deliver or pass out." *Id*. at 410. In other words, "to post" means to affix a notice to something, like a wall; "to distribute" means to pass out a notice. Under these common definitions, requiring Arkema to send a remedial notice to its employees via e-mail is a requirement that Arkema affirmatively distribute the notice to its employees as opposed to simply posting it on a wall.

B. Distribution of a Notice Via E-mail is an Extraordinary Remedy that is Unnecessary in this Case.

The affirmative distribution of a remedial notice by hand distribution, reading the notice, or mailing the notice to employees' homes[1] is a "special" or "extraordinary" remedy. *See, e.g., Fieldcrest Cannon, Inc*., 318 NLRB 470, 473 (1995) (setting forth various special notice remedies in addition to standard notice-posting); *see also American Standard Cos., Inc*., 352 NLRB 644, 647, 658 (2008) (the ALJ refused to order extraordinary remedies such as reading the notice to employees and mailing the notice to former employees despite finding numerous unfair labor practices where there was an absence of prior unfair labor practices and the employer and Union had a previous acceptable working relationship); *Ishikawa Gasket Am., Inc*., 337 NLRB 175, 176 (2001) (refusing to order that a notice be read to employees where the General Counsel did not argue that the case was egregious and the Board found that it was not an egregious case). Such special notice remedies are required only where an employer's unfair labor practices are "so numerous, pervasive and outrageous that special notice and access remedies are necessary to dissipate fully the coercive effects of the unfair labor practices found." *See Fieldcrest Cannon*, 318 NLRB at 473.

In this case, even if the Board adopts the ALJ's decision, the alleged unfair labor practices are not "so numerous, pervasive and outrageous" as to require an extraordinary distribution remedy. To the contrary, the evidence establishes that Arkema and the Union worked together for years, and there is no evidence of any prior unfair labor

[1] A part of the Board's "standard" notice posting order is a requirement that an employer mail the notice to employees if, during the pendency of the proceedings, the employer has gone out of business or closed the facility. *See, e.g., American Standard*, 352 NLRB at 660. Arkema has neither closed its Houston facility nor gone out of business and, therefore, such a mailing would be considered extraordinary.

practices at Arkema's Houston plant. *See American Standard*, 352 NLRB at 658. Furthermore, while Arkema does communicate with its Houston employees via e-mail, the record also establishes that Arkema communicates with its employees in face-to-face meetings and through the posting of bulletins as well.[2] There is no evidence that employees would not be adequately exposed to remedial notices posted in the traditional manner. *See Int'l Bus. Machines*, 339 NLRB at 967. Finally, nine mass e-mails sent over a two-month period is hardly sufficient to demonstrate Arkema "customarily" communicates with its employees via email.[3] *See Nordstrom, Inc*., 347 NLRB 294, 295 n.5 (2006) (setting forth the test of posting a remedial notice to an employer's intranet website).[4] Under these circumstances, there is simply no reason presented by the record to require Arkema to take the extraordinary step of distributing a remedial notice to each of its Houston employees via e-mail.

C. ***Nordstrom*** **Contemplates Posting a Notice on an Employer's Intranet, Not Distribution Via E-Mail.**

Finally, *Nordstrom,* 347 NLRB at 294-95, discusses whether an employer should be required to "post" a remedial notice on its internal, intranet website. While Arkema does not concede that posting a remedial notice to an intranet website is encompassed

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[2] Indeed, the record establishes that Arkema held a face-to-face training session regarding its anti-harassment policy (*E.g*., Tr. 82, 83, 85), met with Saltibus in a face-to-face meeting (*E.g*., Tr. 82), and met with Shepherd and other Union representatives on numerous occasions face-to-face regarding many workplace issues. (*E.g*., Tr. 29-30, 50-51, 159, 203). The record also establishes that Arkema posts notices to employees on company bulletin boards. (*E.g*., Tr. 264).

[3] The General Counsel states that the record contains nine mass e-mails, including Union Exhibit 1. The face of Union Exhibit 1 does not indicate how it was transmitted, however.

[4] Arkema does not concede that *Nordstrom* governs e-mail distribution of a remedial notice for all of the reasons discussed in the main text, but *Nordstrom* clearly does require that the General Counsel establish that Arkema customarily communicates with its employees electronically and this test is not satisfied in this case.

within the Board's standard notice-posting language,[5] it certainly comes closer to a "posting" than distributing the notice via e-mail because it is the electronic version of affixing a paper notice to a wall. In any event, the General Counsel did not request that Arkema post a remedial notice to an intranet website and thus, this remedy is not available in this case. *See Nordstrom*, 347 NLRB at 294; *Int'l Bus. Machines*, 339 NLRB at 966-67 (denying a union's request to post a remedial notice to an intranet site because such an order was not sought from the ALJ).

Only one post-*Nordstrom* ALJ decision has expanded *Nordstrom's* discussion about posting a remedial notice to an intranet website and required that an employer distribute such a notice via e-mail. *See Horizon Youth Services, LLC*, JD(SF)-27-09, slip op. at 9 (August 12, 2009). There was no discussion in *Horizon Youth Services* about how e-mail differs from posting a notice to an intranet website, and it is not clear whether the issue was argued to the ALJ.[6] Regardless, this case fails to take account of such differences and is, therefore, wrongly decided on this point.[7]

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[5] After all, there are some major differences between an intranet website and a bulletin board or similar posting area at a particular employer location. While the precise differences depend on the facts of each case, one such difference might be that items posted on an intranet website could be viewed by all employees within a company rather than just the employees at a location where unfair labor practices occurred. Such a difference once again takes us into the realm of extraordinary remedies. *See, e.g., Beverly Cal. Corp. v. NLRB*, 227 F.3d 817, 846 (7th Cir. 2000); *The Miller Group, Inc.*, 310 NLRB 1235 n.4 (1993) (relying on employer's recidivist history in ordering multi-plant posting).

[6] Similarly, the Board alluded to the distribution of a remedial notice via e-mail in *Texas Dental Ass'n*, 354 NLRB No. 57 (2009) and *Valley Hospital Med. Ctr., Inc*., 351 NLRB 1250 (2007). While these cases cite *Nordstrom* as authority for possibly e-mailing a remedial notice, *Nordstrom* does not support such a remedy given that it only discusses posting a remedial notice to an intranet website. Furthermore, neither of these cases takes into account the differences between "posting" a remedial notice on an intranet website and distributing the notice via e-mail.

Also, the General Counsel cites *Public Service Company of Oklahoma*, 334 NLRB 487, 491 (2001) in support of his request that Arkema be required to distribute a remedial notice via e-mail. There was no discussion or analysis of this remedy in *Public Service Company of Oklahoma,* and it is unclear whether any exception was taken to it. Furthermore, this case pre-dates *Nordstrom*, and to the extent that it fails to comply with *Nordstrom's* requirements, it is no longer good law.

D. The Board Should Not Modify Its Standard Notice Language

The General Counsel requests that the Board modify its standard notice language. The Board should reject this request for two reasons: (1) public policy and sound administrative decision making demand that the Board assess the facts of each case prior to ordering electronic notice posting, and (2) there is an insufficient record in this case to make such a fundamental change to decades of Board law.

First, a "one size fits all" approach to electronic notice posting does not and cannot fully take account of the realities of the electronic workplace today. Some employers may have a completely paperless workplace and others may not have e-mail at all. Some employers may have the capability to limit an intranet posting to certain locations or employees, others may not. Such considerations, which can only be explored on a case-by-case basis, may impact whether an electronic posting is appropriate and, if so, what form it should take. *See, e.g., Beverly Cal. Corp. v. NLRB*, 227 F.3d 817, 846 (7th Cir. 2000) (stating, "in the end the choice of a proper remedy is a highly contextual one that does not lend itself to easy formula"); *The Miller Group, Inc.*; 310 NLRB 1235 n.4 (1993) (relying on employer's recidivist history in ordering multi-plant posting). This consideration is but one example of how a uniform electronic notice posting requirement threatens to upset decades of well-settled law regarding when certain remedies will be ordered by the Board, and thereby undermines a fundamental goal of administrative rule-making, namely predictability.

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[7] In *United Parcel Service, Inc*., JD(SF)-12-09, slip op. at 6 (March 4, 2009), the ALJ ordered that the employer send a message to its employees via a hand-held device informing employees that a notice had been posted and in what locations. This decision is obviously very different than requiring the employer to send the notice itself to its employees. In any event, there is no evidence in this case that sending an e-mail to Arkema's employees informing them that a notice had been posted is necessary because, unlike the employees in *United Parcel Service*, Arkema's employees spend their entire work day at the plant and will see the notices during their daily travels through the plant.

Second, this is not an appropriate case in which to change the Board's standard notice posting language because there is insufficient evidence of Arkema's electronic communications with its employees, and its capabilities (and limitations) in this regard, to fully explore all of the issues associated with such a change. *See Int'l Bus. Machines*, 339 NLRB at 967 (noting that this issue should only be resolved after receipt of evidence and full briefing by the General Counsel, Respondent, and possibly amici).

E. Conclusion.

For all of the foregoing reasons, requiring Arkema to distribute a remedial notice via e-mail is an extraordinary remedy that is not justified by the facts of this case and the General Counsel has not requested posting a remedial notice to an intranet website. Furthermore, this case is an inappropriate vehicle through which to change decades of Board law regarding the posting of remedial notices to employees. As a result, Arkema respectfully requests that the General Counsel's Cross Exception be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this the 25th day of November, 2009, a true and correct copy of the foregoing was forwarded by electronic mail or certified mail, return receipt requested to:

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