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8 UNITED STATES OF AMERICA  
9 NATIONAL LABOR RELATIONS BOARD  
10 REGION 21

11 2 SISTERS FOOD GROUP, INC. and FRESH  
& EASY NEIGHBORHOOD MARKET, INC.,

12  
13 Employer,

14 And

15 UNITED FOOD AND COMMERCIAL  
16 WORKERS INTERNATIONAL UNION,  
17 LOCAL 1167,

18 Charging Party.

No. 21-CA-038915; 21-CA-038932

**EXCEPTIONS AND BRIEF IN  
SUPPORT EXCEPTIONS OF TO THE  
DECISION OF THE  
ADMINISTRATIVE LAW JUDGE**

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20 Charging Party hereby takes the following Exceptions to the Decision of the  
21 Administrative Law Judge (ALJ):

22 Exception 1	To the failure of the ALJ to grant additional remedies as requested by the Charging Party. See ALJ Decision, p. 8:20-9:7
23 24 25 26 27 28 Exception 2	To the specific failure of the ALJ to require the posting of the Board notice for a period of time from when the complaint was issued until the notice is actually posted. See ALJ Decision, p. 8:31-39.  It is time for the Board to recognize that its remedies are oftentimes inadequate. Here, Ms. Trespacios was terminated in 2009. The other unfair labor practices were committed at that time. None were remedied before 2 Sisters sold the plant to its captive purchaser, Fresh & Easy. It is not likely that there will be any remedy until 2013 or 2014 at the earliest. To post a notice 60 days 5 years after the events

<p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p>	<p>is virtually meaningless. In order to have an effective remedy and to discourage employers from delaying proceedings, the Board should adopt a new rule that notices should be posted for the length of time from the issuance of complaint by the Counsel for the General Counsel until the notice is actually posted. Thus, the posting period should last the equivalent time from when the unlawful conduct was the subject of an allegation of a complaint until it is remedied by the posting of the appropriate notice. Alternatively the Board should extend the period of posting from 60 days to a minimum of one year. We recognize the ALJ may not have had the power to change Board law. The Board is now presented with this argument has a right to determine that such remedy is appropriate.</p> <p>Here, the fact that Fresh &amp; Easy is a successor to 2 Sisters makes no difference. Fresh &amp; Easy has refused to post the notice in the plant even when it took over the plant in June of 2010. Thus, the fact that it did not operate the plant at the time these violations occurred is of no moment to extending the posting because it chose not to remedy the unfair labor practices of 2 Sisters.</p> <p>In summary, then, it is time for the Board to determine that the notice posting remedy of 60 days is meaningless, particularly where a respondent (and in this case, the Employer) delays that process for years.</p>
<p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p>	<p>Exception 3</p> <p>To the failure of the ALJ to recommend that the Employer be required to post the Board's proposed Employee Rights Notice. See ALJ Decision, p. 8:40-46.</p> <p>As the ALJ notes the Board by regulation has required employers to post an Employee Rights Notice. There is no reason why as a remedy in particular cases the Board can't require the posting of the Employee Rights Notice for a reasonable period of time. The fact that the Court of Appeals of the District of Columbia stayed the Board's rule is irrelevant. The only challenge in that case is to the Board's rulemaking authority, not the broad remedial power of the Board. The Court did not in any respect limit the Board's power to issue that remedy on a case by case basis as an adjudicative decision. Plainly, the Board has that power. See <i>NLRB v. Wyman-Gordon</i>, 394 U.S. 759 (1969) and <i>NLRB v. Bell Aerospace Co.</i>, 416 U.S. 267 (1974), (recognizing expansive adjudicatory power and right of Board to make decisions to adjudication).</p> <p>Here, the Board should require the Employee Rights Notice to be posted in addition to the normal remedial notice described above.</p>
<p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>26</p> <p>27</p> <p>28</p>	<p>Exception 4</p> <p>To the failure of the ALJ to require a meaningful employee education program. See ALJ Decision, p. 9:4-8.</p> <p>Notice posting is inadequate. The Employer should be required to engage in a worker education program of captive audience meetings to educate workers as to their rights under the National Labor Relations Act. The ALJ in this case declined that remedy only because 2 Sisters no longer operates the facility. Fresh &amp; Easy however has refused to remedy the violations of its predecessor. It has, in effect, adopted and ratified those unfair labor practices. Worker education is necessary.</p> <p>The program should consist of a one hour program every six months. It should be conducted by an agent of the NLRB or other person who is not employed by the employer. If the NLRB does not conduct the training, an NLRB agent should be present. Any written materials should be submitted to the Regional office.</p> <p>Additionally, as the ALJ detailed in the discussion of a broad remedy Fresh &amp; Easy has engaged in repeated misconduct at the store level. This repeated misconduct as we argue below should require a broad order. Additionally, worker education is an appropriate remedy where an employer has shown such proclivity to violate the</p>

1 2 3 4	<p>Act.</p> <p>For these reasons, the Decision of the ALJ should be modified in this regard and Fresh &amp; Easy should be required to develop an appropriate worker education program. If employers have the right to conduct captive audience meetings, the Board the right to require those captive audience meetings be part of any remedy for any unfair labor practices which it has committed.</p>
5 6 7 8 9 10 11 12	<p>Exception 5</p> <p>To the failure of the ALJ to recommend a broad order. See ALJ Decision, p. 9:10-20.</p> <p>The ALJ correctly noted that in a recent decision the Board denied a request for a broad order. See <i>Fresh &amp; Easy Neighborhood Market</i>, 358 NLRB No. 365 (2012). The change in circumstance is this additional case in which the employer, Fresh &amp; Easy has refused without justification to remedy the unfair labor practice as a <u>Golden State</u> successor. This is just an additional example of the employer’s refusal to abide by the National Labor Relations Act.</p> <p>There is no suggestion on this record that Fresh &amp; Easy will ever stop violating the Act. While the Board may have determined that a broad remedial order is not necessary in the previous case, the additional findings of this case justify the issuance of a broad order.</p>
13 14 15 16 17 18 19 20 21 22	<p>Exception 6</p> <p>To the failure of the ALJ to require that employees be given the opportunity to file claims of any kind with the rescission of the unlawful requirement that all employment disputes be submitted to binding arbitration. See ALJ Decision p. 11:5-28.</p> <p>One of the rules which the ALJ found unlawful required that employees submit all employment disputes and claims to binding arbitration. The employees should be specifically notified that that requirement has been abandoned and allowed an opportunity to file claims in court, before the Labor Commissioner or elsewhere without the necessity of being forced into binding arbitration. Employees may well have thought that there was no reason to file a claim because they were required to utilize the employer’s arbitration procedure. They should be afforded the opportunity to file whatever claims they want in whatever appropriate forum. Furthermore the employer should be required to toll the statute of limitations during the period when this unlawful condition existed which interfered with the right of employees to file these claims. Otherwise without a tolling requirement, most of these claims may well have been lost. Here, 2 Sisters and now its successor maintained an unlawful restriction on the filing of claims. The appropriate remedy, therefore, is to not only lift that restriction but to allow employees to file claims. They should be so notified by way of the letters which are sent to them as required by the ALJ. See ALJ Decision p. 8:49-9:2.</p>
23 24 25 26 27 28	<p>Exception 7</p> <p>To the failure of the ALJ to require that the Decision of the Board be mailed along with the Board Notice. See ALJ Decision p. 13:40-14:5.</p> <p>Although we agreed that the Notice should be mailed to employees and former employees, the notice in itself doesn’t tell the full story or apprise employees of why the Notice is even being mailed. The only way to do this is to require that the full Board decision be mailed to employees. Otherwise the notices are virtually meaningless. The Board should therefore modify its traditional mailing remedy to include a requirement that the Board Decision be mailed.</p>

1 2 3 4	Exception 8	To the failure of the ALJ to require that any notice be mailed by a Union carrier. Fresh & Easy should be required to mail the Notice by United Parcel Service or the United States Postal Service. It should not be allowed to use a non-union scab carrier such as FedEx. To use a scab carrier simply insults the employees, the Union and the National Labor Relations Board.
5 6 7 8 9	Exception 9	To the proposed notices, Appendix A and Appendix B. The proposed notices have the following language: "FEDERAL LAW GIVES YOU THE RIGHT TO...Choose not to engage in any of these protected activities." This "refrain" language is unnecessary since there is no allegation of any violation by the Charging Party of interference with rights guaranteed by Section 7 including the right (disability) to refrain. That language should not be used in Board Notices posted by employers unless such conduct was involved. It is confusing, misleading, unnecessary and irrelevant. The Board Notice should for that reason be modified.
10 11 12	Exception 10	To the failure of the ALJ to require that the Notice and the Decision be posted on the company's intranet. For some reason the ALJ ignored the Board's traditional remedy that a notice be posted on the company intranet. See <i>J&amp;R Flooring, Inc.</i> , 356 NLRB No. 9 (2010).
13 14	Exception 11	To the failure of the ALJ to require the reading of the appropriate notices. Another appropriate remedy would be to require Fresh & Easy to read the notice and appropriate excerpts from the Board Decision to the employees in the plant.

**CONCLUSION**

For the reasons suggested above, these exceptions should be granted. It is time for the Board to adopt more meaningful remedies.

Dated: December 19, 2012

Respectfully submitted,

WEINBERG, ROGER & ROSENFELD  
A Professional Corporation

By: /S/ DAVID A. ROSENFELD  
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**PROOF OF SERVICE  
(CCP §1013)**

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On December 19, 2012, I served the following documents in the manner described below:

**EXCEPTIONS AND BRIEF IN SUPPORT EXCEPTIONS OF TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

- (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Parcel Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.
- (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kshaw@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 19, 2012, at Alameda, California.

/s/ Katrina Shaw  
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Katrina Shaw