

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

**PHILLIPS 66 (Sweeny Refinery),**

**Respondent,**

**and**

**Cases 16-CA-087373  
16-CA-089250 and  
16-CA-089036**

**INTERNATIONAL UNION OF  
OPERATING ENGINEERS, LOCAL  
UNION NO. 564,**

**Charging Party.**

**RESPONDENT PHILLIPS 66'S ANSWERING BRIEF  
TO ACTING GENERAL COUNSEL'S CROSS EXCEPTION  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Respondent Phillips 66 ("Phillips") submits this Answering Brief to the Acting General Counsel's Cross Exception to the Decision of the Administrative Law Judge ("Decision") in the above-referenced cases, and requests the Board deny the General Counsel's cross exception for the reasons set forth below.

**ARGUMENT**

General Counsel has failed to establish any legal or factual basis in support of its request that the Board modify the Decision to require Phillips to distribute the remedial notice posting in an electronic format. Phillips maintains no notice posting is appropriate for the reasons set forth in its own exceptions to the Decision. However, even if the Board determines notice posting is necessary, Phillips asserts there is no legal or factual basis to require the notice posting to be in an electronic format.

The Board's authority to fashion remedies under the Act is generally broad, but it is not unlimited. See *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137, 142-43 (2002). Any remedy imposed must effectuate the policies of the Act, be appropriate and adapted to the matter which called for redress. *NLRB v. United Mine Workers of Am.*, 355 U.S. 453, 458 (1958) (to the extent the Board exceeds this limit, its order is punitive and is not enforceable). The Board has no authority to impose punitive measures. See *Local 60, United Bhd. of Carpenters & Joiners of Am. v. NLRB*, 365 U.S. 651, 655-56 (1961); *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11-12 (1940). Relief ordered "must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practices." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984).

Despite the foregoing principles, in *J. Picini Flooring*, 356 N.L.R.B. No. 9 (2010), *enforced on other grounds*, 656 F.3d 860 (9th Cir. 2011), the lone case General Counsel relies upon in support of its cross-exception, the Board created a new "standard" remedy requiring employees to post remedial notices electronically, in addition to traditional posting of notice at the facility involved, **if there is evidence that the employer customarily uses electronic postings, email, or other electronic means to communicate with its employees.** *Id.* at 3.

The traditional notice posting order required that a remedial notice be posted at the facility where the unfair labor practice took place for a period of 60 days. Also, prior to *J. Picini*, the Board developed several extraordinary or special notice remedies such as hand delivery of remedial notices to all affected employees or requiring that notices be read by a senior executive to employees assembled for that purpose. See, e.g., *Homer D. Bronson Co.*, 349 N.L.R.B. 512, 515 (2007), *enforced*, 273 F. App'x 32 (2d Cir. 2008); *Smithfield Foods, Inc.*, 347 N.L.R.B. 1225, 1232-33 (2006); *Domsey Trading Corp.*, 310 N.L.R.B. 777, 779-80 (1993).

These extraordinary remedies were reserved for the most egregious cases, and some substantial factual predicate for going beyond the standard notice posting remedy was required before they could be imposed. *See, e.g., Albertson's, Inc.*, 351 N.L.R.B. 254, 259-60 (2007); *Chinese Daily News*, 346 N.L.R.B. 906, 909, 911 (2006); *First Legal Support Servs., LLC*, 342 N.L.R.B. 350, 350 n.6 (2002). In stark contrast to the Board's traditional approach discussed above, the electronic notice posting rule makes extraordinary remedies ordinary.

Distributing a remedial notice via electronic means is very different than posting a remedial notice on a wall or bulletin board because ordering an electronic distribution imposes an affirmative requirement that an employer distribute a notice to each and every impacted employee at a facility. This remedy is therefore directly analogous to remedies that the Board has long considered to be extraordinary remedies. *See, e.g., First Legal*, 350 N.L.R.B. at 342 n.6; *Fieldcrest Cannon, Inc.*, 318 N.L.R.B. 470, 473 (1995), *enforced in part*, 97 F.3d 65 (4th Cir. 1996).

Furthermore, distributing a copy of a remedial notice electronically to employees may mean the notice will leave Phillips' and the Board's effective control, depending on Phillips' capabilities. Employees may be able to forward a copy of the notice outside the company, could electronically alter or deface the notice, and could republish the altered or defaced notice in any number of places, including on Facebook and YouTube. Such a situation would mean that not only would Phillips be unable to comply with the directive to take reasonable steps to ensure that the notice is not altered or defaced, but also Phillips and the Board could be faced with a situation where altered or defaced notices are in the public domain. For these reasons, ordering an electronic distribution of a remedial notice to each and every employee is a broad expansion

of the Board's traditional notice posting rather than a "mere effort" to conform that remedy to the modern electronic workplace.

Even if the Board determines electronic distribution of the remedial notice is appropriate in this instance, the evidence does not support such a requirement in this case. Contrary to the General Counsel's claim, the record is far from "replete" with evidence that Phillips customarily communicates with its employees via electronic means. General Counsel only cites to two instances in the record where electronic correspondence between Phillips and the witness are referenced. Winston Bush testified that employees have a company email account and that he receives scheduling updates and training notices via that account. (Tr. 100-01). Desiree Cromwell testified that she received an email regarding the Union's organizing efforts. (Tr. 117-188). Two instances of electronic communications is hardly sufficient to establish that Phillips "customarily" uses electronic means to communicate with employees. The record evidence simply does not support the Board's imposition of such an extraordinary remedy.

### **CONCLUSION**

For the reasons set forth above, Phillips requests that the Board deny General Counsel's cross-exception and grant Phillips such other and further relief to which it is entitled.

Respectfully submitted,

**OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.**

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**ATTORNEYS FOR RESPONDENT**

**CERTIFICATE OF SERVICE**

I certify that on June 4, 2013, a copy of the foregoing document was e-filed via NLRB.gov. A copy of this document was also served upon Dean Owens on behalf of General Counsel, 1919 Smith Street, Houston, Texas 77002, via Federal Express; and one copy to Charles Singletary via email @ [charlie@local564.com](mailto:charlie@local564.com).

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