

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

DATE: October 12, 2001

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Region 32

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SUBJECT: Western Insulation, Inc. 512-5081-7000  
Case 32-CA-18910-1 512-5090-2500

This case was submitted for advice as to whether the Employer's arbitration agreement is unlawfully overboard in that it allegedly prevents employees from seeking access to the Board.

### FACTS

Western Insulation, Inc. (the Employer) is an insulation contractor engaged in business throughout Northern California. A number of Carpenters Union entities have been engaged in a protracted organizing campaign among the Employer's employees, and this has led to numerous unfair labor practice charges being filed against the Employer. The Region has issued complaints in 19 cases, including this one, with a consolidated hearing presently scheduled on them for November 5, 2001. Among the complaint allegations in this case is the discharge of employee Robert Munoz for his union activities on October 17, 2000.

Munoz started work with the Employer on October 3 and was fired two weeks later. Among the documents that Munoz was required to sign as a condition of employment was a 2-page arbitration agreement (in both English and Spanish), which states:

To resolve disputes which might otherwise become civil court cases, Employee and Employer agree that the following disputes will be submitted to final and binding arbitration before a neutral arbitrator and not to any court:

- a. Claims of unlawful harassment or discrimination which cannot be resolved by the parties or during pan investigation by an administrative agency (such as the Department

of Fair Employment and Housing or the Equal Employment Opportunity Commission).

- b. Claims of unfair demotion or reduction in pay.
- c. Claims of wrongful discharge or termination.

. . .

Employee and Employer agree that this arbitration shall be the exclusive means of resolving any dispute(s) arising out of the termination of Employee's employment and/or any other claim(s) identified above allegedly occurring in the course of Employee's employment which are not resolved through internal processes or the DFEH or EEOC and that no other action will be brought by employee in any court or other forum.

THIS AGREEMENT IS A WAIVER OF ALL RIGHTS TO A CIVIL COURT ACTION FOR THE CLAIMS IDENTIFIED ABOVE ALLEGEDLY OCCURRING IN THE COURSE OF EMPLOYEE'S EMPLOYMENT; ONLY THE ARBITRATOR, NOT A JUDGE OR JURY, WILL DECIDE THE CLAIM OR DISPUTE.

#### **ACTION**

We agree with the Region that the Employer's arbitration agreement is overbroad since it precludes employees from seeking access to the Board. Thus, we conclude that the Employer violated Section 8(a)(4) and (1) by insisting that, as a term and condition of employment, employees agree to waive their statutory rights to file charges with the Board and by maintaining such an agreement.

Section 10(a) of the NLRA provides in relevant part that the Board

is empowered...to prevent any person from engaging in any unfair labor practice...This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise.<sup>1</sup>

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<sup>1</sup> The House Conference Report No. 510 on H.R. 3020 (the Taft-Hartley Act) reads:

From its inception, the NLRA has permitted the Board to treat individual contracts of employment, when used to frustrate the exercise of statutory rights, as either void or voidable. In National Licorice Co. v. NLRB,<sup>2</sup> after the union obtained majority status, the employer refused to grant the union recognition and instead circulated a petition for a bargaining committee. The bargaining committee negotiated individual contracts between the employer and every employee, in which the employees relinquished the right to strike and the right to demand a union-security clause or a written contract with any union. While the contracts granted employees the right to arbitration as to wages and hours, they expressly foreclosed arbitration as to discharge. The Supreme Court found that the individual employment contract imposed illegal conditions on the exercise of Section 7 and 8 rights. The effect of the clause barring arbitration of discharge was to "discourage, if not forbid," the presentation of grievances, by discharged employees to the employer through a union, or in any way except personally.<sup>3</sup>

Consistent with National Licorice, the Board has regularly held that an employer violates the Act when it insists that an employee waive his statutory right to file

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The Senate amendment [to Section 10(a)], because of its provisions authorizing temporary injunctions enjoining alleged unfair labor practices and because of its provisions making unions suable, omitted the language giving the Board exclusive jurisdiction of unfair labor practices, but retained that which provides that the Board's power shall not be affected by any other means of adjustment or prevention. The conference agreement adopts the provisions of the Senate amendment. 1 Legislative History of the Labor Management Relations Act of 1947, p.556.

<sup>2</sup> 309 U.S. 350 (1940).

<sup>3</sup> Id. at 360. See also J.I. Case v. NLRB, 321 U.S. 332, 337 (1944), where the Supreme Court held that individual employment contracts were not a bar to the selection of a collective-bargaining representative, noting, "Wherever private contracts conflict with [the Act's] functions, they must obviously yield or the Act would be reduced to a futility."

charges with the Board.<sup>4</sup> A union similarly violates the Act when it conditions use of the union's hiring hall on the signing of a form containing a waiver of an employee's right to sue the union regarding employment disputes.<sup>5</sup> Indeed, the Supreme Court in Marine & Shipbuilding Workers<sup>6</sup> found unlawful a union's fining and expulsion of a member for failing to exhaust internal union remedies before filing a Board charge against his union. The Court stated:

The Board cannot initiate its own proceedings; implementation of the Act is dependent 'upon the initiative of individuals persons.' [citation omitted]. The policy of keeping people 'completely free from coercion,' [ ] against making complaints to the Board is therefore important in the functioning of the Act as an organic whole. . . . A healthy interplay of the forces governed and protected by the Act means that there should be as great a freedom to ask the Board for relief as there is to petition any other department of government for a redress of grievances. [citation omitted]. Any coercion used to discourage, retard, or defeat that [Board] access is beyond the legitimate interests of a labor organization . . . and we agree that the overriding public interest makes unimpeded access to the Board the only healthy alternative . . . .<sup>7</sup>

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<sup>4</sup> See, e.g., Athey Products Corp., 303 NLRB 92 (1991) (insistence on waiver proposal in negotiations violates Section 8(a)(5)); Kinder-Care Learning Centers, 299 NLRB 1171, 1172 (1990) ("parent communications" rule violated Section 8(a)(1)) in that it unlawfully interfered with statutory right of employees to communicate employment related concerns to union or Board); Great Lakes Chemical Corp., 298 NLRB 615, 622 (1990) (employer violated Section 8(a)(4) by requiring employee to sign a waiver of all legal rights with respect to hire, tenure and all terms and conditions of employment).

<sup>5</sup> Construction and General Laborers, Local 304 (AGC of California), 265 NLRB 602, 606-607 (1982).

<sup>6</sup> NLRB v. Industrial Union of Marine & Shipbuilding Workers of America, 391 U.S. 418 (1968).

<sup>7</sup> Id. at 424.

The Court's decision in Circuit City<sup>8</sup> neither undermines the Court's teachings in Marine & Shipbuilding Workers nor specifically addresses the issue in this case. In Circuit City, an employee signed an arbitration agreement at the time he accepted employment with a company. Two years later he filed an employment discrimination lawsuit against the company in state court. The company filed a lawsuit to enforce the arbitration agreement and to enjoin the employee's state lawsuit. The Court held that the arbitration provision in the employment contract could be enforced under the Federal Arbitration Act, notwithstanding state antiarbitration laws, and thus that the employee could be enjoined from filing a suit in state court prior to arbitration.<sup>9</sup> However, the Court did not have before it the issue, as here, of whether an employee could be *forced* to sign an exclusive arbitration agreement. Further, Circuit City involved a state court discrimination claim, not a federal claim under the NLRA. Thus, the specific language of Section 10(a), enacted ten years after the FAA, that "This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise", was not addressed.<sup>10</sup>

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<sup>8</sup> Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 121 S.Ct. 1302 (2001).

<sup>9</sup> 121 S.Ct. at 1312-13. See also Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991), which held that an arbitration agreement contained in an employee's application to the New York Stock Exchange to be a registered securities representative was enforceable. Thus, an employer could compel an individual employee, under the Federal Arbitration Act, to arbitrate his Age Discrimination in Employment Act (ADEA) claim. Gilmer similarly did not address the issue of whether an arbitration clause in an *employment contract* would be enforceable for claims under the NLRA.

<sup>10</sup> A decision of the Supreme Court in EEOC v. Waffle House, 193 F.3d 805 (4<sup>th</sup> Cir. 1999), cert. granted, 121 S.Ct. 1401 (2001), will lend guidance to our Section 8(a)(4) analysis. In that case, EEOC contends that a private arbitration agreement, even if enforceable between an employee and an employer, does not bar EEOC from fulfilling its statutory role to seek injunctive relief as well as relief for specific victims. EEOC argues that it has a distinct duty

Here, the arbitration agreement specifically states that arbitration "shall be the exclusive means of resolving any dispute(s) arising out of the termination of Employee's employment ... which are not resolved through internal processes or the DFEH or EEOC and that no other action will be brought by Employee in any court of other forum." Thus, by its terms, the Board is not one of the administrative agencies employees can use instead of arbitration. Further, the Employer views the arbitration agreement as covering Board charges and has taken the position that the lawfulness of Munoz' termination should be decided through arbitration. Hence, a Section 8(a)(1) and (4) complaint is warranted, absent settlement, as to the Employer's maintenance of the arbitration agreement, as well as the requirement that employees must sign the arbitration agreement as a term and condition of employment.

We note that the complaint in Kinder-Care, above, alleged only a Section 8(a)(1) violation, not an additional Section 8(a)(4) violation. However, the rule in Kinder-Care, which stated that employees had to bring their employment-related disputes to the employer "immediately,"<sup>11</sup> did not explicitly bar employees from asserting their statutory rights, even though the Board construed the rule as having such an effect. On the other hand, in Great Lakes Chemical Corp., above, where employees were required to sign a statement waiving their rights to bring any legal action against the employer as a result of their layoff or termination, the Board affirmed the conclusion of the ALJ, 298 NLRB at 622, that the employer violated Section 8(a)(4), as well as Section 8(a)(1), by conditioning employment on the signing of the waiver. Like the waiver demand in Great Lakes Chemical, above, the arbitration agreement in this case explicitly requires an employee not

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to sue an employer to vindicate public rights that a private litigant cannot bargain away. EEOC further argues that because the agency is not a party to an agreement between the employee and the employer to resolve all disputes with arbitration, EEOC cannot be held to that agreement. The EEOC sought both a permanent injunction preventing discrimination and remedies for the employee, including reinstatement with backpay and damages. Id. at 807-08. The Fourth Circuit, however, found that EEOC was bound by that agreement and could seek only injunctive relief to fulfill its public interest role, and not victim-specific relief for the employee. Id. at 807, 812-13.

<sup>11</sup> 299 NLRB at 1171.

to assert his statutory rights before using the Employer's compulsory arbitration procedure. The rule thus deters employees from seeking to file charges with the Board, because the rule requires those employees to resort to the Employer's arbitration procedure instead of filing charges or otherwise seeking to vindicate their employment rights. Such an open attack on an employee's right to seek access to the Board is appropriately litigated through a Section 8(a)(4) allegation.<sup>12</sup> Hence, a Section 8(a)(4) complaint is warranted because the mere maintenance of the arbitration agreement violates the Act in that it chills access to the Board.

For all of the above reasons, we conclude that the Employer violated Section 8(a)(4) and (1) by insisting that, as a term and condition of employment, employees agree to waive their statutory rights to file charges with the Board and by maintaining such an agreement.

B.J.K.

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<sup>12</sup> Congress enacted Section 8(a)(4) to ensure that all persons would be "free from coercion against reporting [possible unfair labor practices] to the Board." Nash v. Florida Industrial Commission, 389 U.S. 235, 238 (1967).