

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

Advice Memorandum

DATE: November 15, 2004

TO : James J. McDermott, Regional Director
Region 31

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Utility Vault Co. 512-5090-2500
Case 31-CA-26812 512-5090-2517
530-6050-0120
530-6050-4100
530-6050-7100
530-6067-2050-3500

This case was submitted for advice as to whether the Employer may unilaterally require new employees to sign individual arbitration agreements that waive their right to bring employment-related discrimination and other claims in a judicial forum. We conclude that, while the waiver of an employee's right to bring statutory employment-related claims to a judicial forum is not a mandatory subject of bargaining, here that non-mandatory subject became so intertwined with the mandatory subjects of dispute resolution, discrimination, and other conditions of employment that it became a mandatory subject of bargaining. Thus, the Employer violated Section 8(a)(5) when it required new employees to sign individual arbitration agreements without first giving notice to and bargaining with the Union. We further conclude that the Employer violated Section 8(a)(1) because the Employer's arbitration agreement would restrict its newly hired employees from exercising their statutory right to file charges with the Board.

FACTS

Oldcastle Precast, Inc. d/b/a Utility Vault Company (the Employer) is located in Fontana, California and is engaged in the business of manufacturing a wide range of pre-cast concrete products. Wholesale Delivery Drivers, Salespersons, Industrial and Allied Workers, Local 848, International Brotherhood of Teamsters, AFL-CIO (the Union) has represented the Employer's production and maintenance employees and truck drivers for more than 20 years.

The parties conducted their most recent contract negotiations from January through April 2003. During those negotiations, the Employer orally proposed implementing a Dispute Resolution Process (DRP) policy for all "non-union" matters. The Union rejected the proposal and no further discussion took place regarding the implementation of the

policy. The Employer's last and final offer did not include the DRP proposal. The negotiations concluded with the ratification of the parties' current collective bargaining agreement, which covers the period from April 10, 2003 through March 31, 2006. The collective bargaining agreement includes a grievance/arbitration provision which states "[g]rievances shall be limited to matters concerning the provisions of this Agreement."

On April 26, 2004,¹ the Union obtained a copy of a memorandum the Employer was providing to new employees entitled "Dispute Resolution Process ["DRP"] of Oldcastle Precast, Inc." The memorandum stated that the Employer used the DRP because it provided a fair, final and binding resolution of any past, present or future legal disputes between the new employee and the Employer. The memorandum stated that as a condition of employment with the Employer the new employees had to agree to the DRP provisions described in the attached arbitration agreement. Both the memorandum and the arbitration agreement specifically stated that this was a condition of employment with the Employer. Both also further stated that new employees were to understand that their employment with the Employer would be terminated if they did not sign and return the Employee Acknowledgement and the Agreement by their third day of employment.

Claims covered by the DRP include:

- Breach of contract, agreement, or promise (except a union contract)
- Failure to pay wages, or to provide compensation or benefits
- Unlawful discrimination or harassment, including discrimination or harassment based on age, sex, race, national origin, marital status, sexual orientation, physical or mental disability or on-the-job-injury
- Retaliation for complaining or testifying about unlawful practices
- Wrongful termination of employment
- Violation of laws governing medical leave or other employment-related rights

¹ All dates are 2004 unless otherwise noted.

- Negligence, misrepresentation, infliction of emotional distress, or other tortious conduct
- A right to attorney fees, penalties or punitive damages.

The DRP also included the following statement:

By signing the Agreement, you and Oldcastle expressly agree that such claims shall not be filed or pursued in court, and that you are forever giving up the right to have those claims decided by a jury. If a covered claim is filed in court by you or Oldcastle, the other party shall be entitled to have that action dismissed by the court.

This agreement does not apply to:

- Claims for workers' compensation benefits
- Claims for unemployment compensation benefits
- Claims that are subject to the union contract.

On May 4, the Union and the Employer met regarding the implemented DRP. At the meeting the Employer made it clear that the DRP only applied to new employees, and that it never occurred to the Employer to give notice to the Union. The Union asserted that the implementation of the DRP violated the rights of newly hired bargaining unit employees. On May 12, the Union filed the Section 8(a)(5) charge in the instant case alleging that the Employer unilaterally implemented its DRP.²

² On May 17 during a meeting regarding another matter, the Union learned that the Employer actually implemented the DRP in August 2003, shortly after the parties ended their negotiations. However, it had not become an issue because the Employer had not hired any new employees at its Fontana facilities. At the time of this charge, the Employer had required 10 newly hired bargaining unit employees to sign off on the unilaterally implemented DRP.

ACTION

We conclude that the Employer violated Section 8(a)(5) when it unilaterally implemented its process of requiring new employees to sign individual arbitration agreements. While the waiver of an employee's right to bring statutory employment-related claims to a judicial forum is not a mandatory subject of bargaining, here, that non-mandatory subject became so intertwined with the mandatory subjects of dispute resolution, discrimination, and other conditions of employment that it became a mandatory subject of bargaining. Thus, the Employer violated Section 8(a)(5) when it required new employees to sign individual arbitration agreements without first giving notice to and bargaining with the Union. We further conclude that the Employer violated Section 8(a)(1) because the Employer's arbitration agreement would restrict its newly hired employees from exercising their statutory right to file charges with the Board.

I. The Individual Statutory Right of Access to the Courts

In Alexander v. Gardner-Denver Co.,³ the Court considered whether an employee could pursue a Title VII claim in federal court when the employee had already lost an arbitration proceeding over the same matter. That arbitration was conducted pursuant to the collective-bargaining agreement negotiated between the employer and the employee's collective-bargaining representative. In rejecting the employer's claim that the arbitration decision barred the employee from pursuing his judicial remedy, the Supreme Court not only stated that "there can be no prospective waiver of an employee's rights under Title VII," but also held that a collective bargaining representative could not, in any event, waive the employee's right of access to court. The Court reasoned that "[a]bsent congressional intent to the contrary, a union may not use the employees' individual statutory right to a judicial forum as a bargaining chip to be exchanged for some benefit to the group; the statutory right 'can form no part of the collective bargaining process.'"⁴ Thus, after Gardner-Denver, one could conclude that a purported waiver by a union of an individual's right to resolve Title VII claims in a judicial forum would not be enforced.

³ 415 U.S. 36, 51 (1974).

⁴ Ibid.

Subsequently, however, the Court held that the statutory right to resolve disputes in a judicial forum could be waived by the individual. In Gilmer v. Interstate/Johnson Lane Corp.,⁵ the Court stated that "[a]lthough all statutory claims may not be appropriate for arbitration, having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."⁶

The Court reexamined this issue again in Wright v. Universal Maritime Service Corp.⁷ In Wright, the Court was presented with the issue of whether a general arbitration clause in a collective-bargaining agreement could restrict a longshoreman from filing his discrimination claim brought pursuant to the Americans with Disabilities Act in court. The general arbitration clause required employees to arbitrate all matters covered by the collective-bargaining agreement. After the employee filed his claim the employer sought to have the case dismissed, claiming that the employee had waived his right to pursue such a claim outside of the general arbitration clause in the collective-bargaining agreement. The Court disagreed and held that such a general arbitration clause could not serve as a waiver of an employee's statutory rights to a judicial forum. Notwithstanding their earlier decision in Gardner-Denver, the court left open whether a clear and unmistakable waiver would be enforceable.⁸

Recently, the Court held that an employer could include a mandatory arbitration provision as part of an employment contract, thus conditioning employment on the employee's acceptance of the arbitration agreement. In Circuit City Stores, Inc. v. Adams,⁹ the Court held that arbitration agreements signed at the time of accepting employment are enforceable. In finding that the agreement to arbitrate could be enforced under the Federal Arbitration Act (FAA), the Court stressed that "arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactment giving employees specific protection

⁵ 500 U.S. 20 (1991).

⁶ 500 U.S. at 26 (citation omitted).

⁷ 525 U.S. 70 (1998).

⁸ 525 U.S. at 80.

⁹ 121 S.Ct. 1302 (2001).

against discrimination prohibited by federal law..."¹⁰ The Court stated, "[by] agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum."¹¹

II. Airline Pilots Ass'n Int'l v. Northwest Airlines, Inc.

Although the Court addressed the issue of an employer's right to use pre-employment arbitration agreements to get employees to waive their statutory right to file suit, the Court left unresolved the issue of whether an employer must bargain with the union if the agreement is required of employees represented by the union. The D. C. Circuit Court of Appeals addressed the issue in Airline Pilots Ass'n Int'l v. Northwest Airlines, Inc.¹² Northwest Airlines revised its "Conditions of Employment" agreement to include a binding arbitration clause for any claims that its probationary pilots¹³ might have against it regarding discrimination. The agreement specifically applied to claims arising under Title VII, the ADA and any other state or federal law prohibiting discrimination in employment.¹⁴

In 1997, when Northwest notified ALPA of its intent to terminate a probationary pilot, the union received a copy of the revised agreement signed by the employee. Prior to that time, ALPA had not been consulted with or advised of the revised agreement. ALPA immediately insisted that Northwest

¹⁰ Circuit City, 121 S.Ct. at 1313.

¹¹ Id., citing Gilmer, 500 U.S. at 26.

¹² 199 F.3d 477(1999), judgment vacated and reinstated en banc, 211 F.3d 1312 (D.C. Cir. 2000) (per curiam), cert. denied, 121 S.Ct. 565 (2000)(hereafter "ALPA").

¹³ When a pilot began training, he was not in the bargaining unit. However, upon completing his training and entering into "revenue service" the pilot automatically entered the bargaining unit.

¹⁴ The revised agreement also included provisions that set the probationary pilots' salary during training, required medical examinations if there was a question of the probationary pilots' ability to do their jobs, the right of the Employer to change various working conditions, and the acknowledgment that failure to follow company rules was grounds for termination.

cease using the agreement and nullify those signed by the "probationary pilots." However, Northwest refused and ALPA filed suit, alleging that Northwest was entering into individual contracts with the employees without bargaining with the union. Northwest insisted that it had the right to require, as a condition of employment, that the probationary pilots agree to arbitrate their claims not arising from the collective bargaining agreement.

The District Court ruled that the agreement was a mandatory subject of bargaining and that the employer had failed to notify or bargain with the union over the agreement as required under the Railway Labor Act. Therefore, the court enjoined Northwest from applying the agreement. However, Northwest appealed on the grounds that because the union did not have a right to waive the employees' statutory rights the arbitration agreements could not be a mandatory subject of bargaining. Therefore, it argued that it had the right to deal directly with the employees.

On appeal, the D. C. Circuit found no duty to bargain¹⁵ over Northwest's requirement that probationary pilots bind themselves to arbitrate their employment discrimination claims under the Railway Labor Act. The court read Gardner-Denver and Gilmer as establishing that "an individual may prospectively waive his own statutory right to a judicial forum, but his union may not prospectively waive that right for him."¹⁶ As to bargaining obligations, the court's analysis was premised on the notion of "mutuality:" Parties should be obligated to bargain only over proposals on which both sides have authority to offer and concede. Since a union has no authority to offer or concede an individual's statutory right of access to the courts, the D.C. Circuit concluded the statutory right cannot be a mandatory subject of bargaining.¹⁷

III. Waivers of Right to Sue under Board Law

The Board has considered whether individual contracts, in the form of releases used to waive employees' rights to

¹⁵ ALPA arose under the Railway Labor Act, but the court applied and considered cases construing the duty to bargain under the NLRA.

¹⁶ 199 F.3d at 484.

¹⁷ Id. at 485 (citations omitted).

sue, are mandatory subjects of bargaining. In Borden, Inc.,¹⁸ the Board held that whether such a release was a mandatory subject of bargaining depended on whether the release, a permissive subject of bargaining in isolation, exhibited interdependence with mandatory subjects of bargaining. In that case, the employer insisted on a general release of all future claims by employees during bargaining over severance pay during shut down negotiations. The Board concluded that there was not a sufficient nexus or interdependence between severance pay and the general release, given that the release was not part of the employer's initial severance pay proposal and that it was not added as a quid pro quo for any union concession. Thus, the non-mandatory release and the mandatory subject of severance pay were not "inextricably intertwined," and therefore the release was not a mandatory subject of bargaining.

In a more recent case, Regal Cinemas, Inc.,¹⁹ the Board found that a release linked to claims arising out of permanent layoffs was proposed as a quid pro quo for severance pay, and was therefore so intertwined with the mandatory subject of severance pay that the release became a mandatory subject. The Board distinguished the general release of all claims in Borden, concluding that "in this situation, bargaining over such a specific release and bargaining over severance go hand in hand."²⁰ The termination and its effects was the focus of the bargaining; "[t]hus, severance pay and claims arising from the termination (such as discriminatory discharge claims) are properly viewed as reciprocal effects: benefits to employees, costs to the employer."²¹

Thus, in Regal Cinemas the Board found that the severance pay and release were "inextricably intertwine[d]" so as to make the release a mandatory subject of bargaining. The Board has also indicated that it is the nature of the

¹⁸ 279 NLRB 396 (1986).

¹⁹ 334 NLRB 304 (2001), *enfd.* 317 F.3d 300 (D.C. Cir. 2003).

²⁰ *Id.* at 305. See general also, Sea Bay Manor Home for Adults, 253 NLRB 739 (1980), *enfd.* 685 F.2d 425 (2d Cir. 1982) (table) where the Board found that interest arbitration rose to the level of a mandatory subject where it had an immediate and significant effect on unit employees since it was so intertwined with mandatory subjects of bargaining.

²¹ *Id.*

right extinguished by a waiver that determines whether to treat the waiver as a mandatory subject of bargaining.²²

Mandatory Subjects which are implicated by Individual Arbitration Agreements

Under the Board law discussed above regarding whether releases are so intertwined with mandatory subjects as to make the releases mandatory subjects of bargaining, one must examine the subjects implicated by those releases. Although the D.C. Circuit in ALPA concluded that the statutory right of access to courts is not a mandatory subject of bargaining under the RLA, in construing the broad reach of the statutory language of Section 8(d) under the Nation Labor Relations Act (NLRA), the Board and courts have defined mandatory subjects as those that will "settle an aspect of the working relationship between the employer and the employee."²³ Not only must the issue address the relationship, but it must also "bear a 'direct, significant relationship to...conditions of employment,'"²⁴ or "vitally affect"²⁵ the employees' terms and condition of employment. As can be seen in Regal Cinemas, even an otherwise non-mandatory release can become mandatory if it is sufficiently intertwined with mandatory subjects.

Thus, the Board has long held that a mechanism for resolving disputes in the workplace is a mandatory subject of bargaining. In U. S. Gypsum Co.,²⁶ the Board affirmed the ALJ's holding that arbitration is a mandatory subject of bargaining. The ALJ reasoned that since an employer must

²² Borden, Inc., 279 NLRB at 400, n. 5 (finding that a waiver of a future right to sue based on an already completed period of employment is so attenuated as to not be a mandatory subject).

²³ See Mental Health Services, 300 NLRB 926, 927 (1990), citing Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 178 (1971).

²⁴ Id. citing NLRB v. Salvation Army Day Care Center, 763 F.2d 1, 7 (1st Cir. 1985), quoting NLRB v. Massachusetts Nurses Assn., 557 F.2d 894, 898 (1st Cir. 1977).

²⁵ Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. at 178-180.

²⁶ 94 NLRB 112, 129 (1951). See also Indiana v. Michigan, 284 NLRB 53, 58 (1987) (affirming that arbitration is a mandatory subject of bargaining).

bargain about grievances with the union, it must also bargain about the method of resolving grievances, and that arbitration is one of those methods. The ALJ considered that arbitration of workplace disputes would have the same type of effect on "rates of pay, wages, hours of employment or other conditions of employment" as seniority and union security.

Similarly, the elimination of discrimination from the workplace has been recognized as a "matter of highest priority" embodied in our national labor policy.²⁷ For this reason, the Board has held that discrimination in the workplace is a mandatory subject of bargaining.²⁸ The Board further held that unions as the collective-bargaining representatives of employees have a legitimate and important interest in a workplace free of discrimination.²⁹ These conclusions are driven, in part, by the Board's view that the elimination of discriminatory employment practices affects the entire bargaining unit, and not just the individual employee involved.³⁰

Under Section 9(a) of the Act, the designated bargaining representative of all the employees in an appropriate unit is the "exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to ... conditions of employment." Based on this statutory language, the Board and courts have established fundamental principles of bargaining in recognition of the primacy of the collective-bargaining representative. Of relevance here, Section 8(a)(5) of the Act prohibits an employer from bypassing a union and dealing directly with employees over mandatory subjects of bargaining.³¹ "To allow direct bargaining would eviscerate

²⁷ Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 66 (1975), citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974)

²⁸ See Jubilee Mfg. Co., 202 NLRB 272, 273 (1973), enfd. 504 F.2d 271 (D.C. Cir. 1974) (table) (employer must bargain over elimination of existing or alleged racial discrimination) (citations omitted). See also Emporium Capwell, 420 U.S. at 69 (elimination of discrimination and its vestiges is an appropriate subject of bargaining).

²⁹ Westinghouse Electric Corp., 239 NLRB 106 (1978) enf'd as modified sub nom. Electrical Workers IUE, 648 F.2d 18 (D.C. Cir. 1980).

³⁰ Jubilee Mfg. Co., 202 NLRB at 273.

³¹ Paul Mueller Co., 332 NLRB 332, 334 (2000).

the mandate of Section 9(a) of the Act..."³² Thus, since an employer may not deal directly with employees, individual contracts, "no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures proscribed by the National Labor Relations Act looking to collective bargaining. . . ."³³

V. ALPA under the NLRA

Initially we agree that the fundamental holding in ALPA is correct. The waiver of an individual's right to sue on statutory claims of discrimination is not in and of itself a mandatory subject of bargaining. We agree that a union should play no role in actually waiving an individual employee's statutory right. However, we take the position that the facts of ALPA would have resulted in a different conclusion under the NLRA. The union in ALPA should have had a role in what constituted the structure and framework of the arbitration agreement because it was part of or could have affected mandatory subjects of bargaining. Because the waiver there, and more so in the instant case, intertwined with mandatory subjects of bargaining, such as dispute resolution and the elimination of discrimination as discussed below, the union had an interest as the 9(a) representative in the scope and structure of the individual arbitration agreements. It should be noted that in comparing the instant case below to ALPA, the probationary pilots would be considered employees under Board law.³⁴

VI. The instant case under current Board law

As stated above, a mandatory subject and non-mandatory subject can become so intertwined that there is an obligation to bargain over the ostensibly non-mandatory subject.³⁵ As to the mandatory subject of dispute resolution in the instant case, the individual arbitration agreements would cover employee claims over mandatory subjects regarding employees' terms and conditions of employment that the contractual arbitration clause would not

³² Retlaw Broadcasting Co., 324 NLRB 138, 143 (1997), enfd. 172 F.3d 660 (9th Cir. 1999).

³³ J. I. Case v. NLRB, 321 U.S. 332, 337 (1944).

³⁴ Phillips Petroleum Co., 339 NLRB No. 111 (2003), citing General Battery Corp., 241 NLRB 1166, 1174(1979).

³⁵ Regal Cinemas, Inc., 334 NLRB at 305.

cover. Thus, while those individual agreements exclude "claims that are subject to the union contract," the contractual grievance and arbitration clause is limited to the provisions of the labor contract. Therefore, the individual arbitration agreements would arguably address employee claims over non-contractual terms and conditions of employment. We specifically note that the instant arbitration agreements are not limited to employees' statutory claims of discrimination, but include such claims as negligence, tort claims, wrongful termination, failure to provide wages or to provide benefits, and breach of promise.³⁶

For instance, the individual arbitration agreements would be controlling for employees' claims during a contract hiatus period, when the contract and its arbitration clause would not be in effect. Therefore, allowing the Employer to unilaterally implement the individual arbitration agreements would allow the Employer to unilaterally implement an additional dispute resolution process, not involving the Union, to address the very same issues that the contractual provision would normally address during the contract term. The Union should have an opportunity to bargain with the Employer over the scope of the individual arbitration agreements if they serve as a means of resolving employee disputes over mandatory subjects of terms and conditions of employment.³⁷ To allow employers to unilaterally implement such dispute-resolving agreements without bargaining with their employees' representatives could lead employers to seek a combination of the narrowest possible contractual grievance and arbitration clauses during bargaining and the "broadest" individual arbitration agreements.

We also note that even during the contract term, the individual arbitration agreements here would arguably serve as a dispute resolution procedure for non-contractual terms and conditions of employment that have been established by past practices. In addition, as in ALPA, the individual arbitration agreements would also affect the Section 7 rights of the employees to act in concert with regard to

³⁶ While the individual agreements in ALPA apparently included other types of claims, the courts focused on the statutory discrimination claims.

³⁷ As stated above, during the most recent contract negotiations, the Employer orally proposed implementing a Dispute Resolution Process (DRP) policy for all non-union matters. The Union rejected the proposal and there was no further discussion regarding the implementation of the policy.

group utilization of the DRP.³⁸ Presumably, the Union would have an interest in protecting the Section 7 rights of its represented employees to concertedly utilize the DPR and have their common claims before a single arbitrator rather than separate arbitration for each claim. Finally, the Union would have an interest regarding such "procedural" issues as the filing requirements for a grievance under the DRP, the timing for giving notice, and the amount of fees required by the employees, since they would affect the unit.

Thus, the Employer has an obligation to bargain with the Union over the individual arbitration agreements, which are expressly deemed a "condition of employment." Moreover, the Union has an interest in bargaining over the framework, procedure and subject matter coverage of the individual arbitration agreements, even though the Union has no right to waive the employees' right to go to court on statutory discrimination claims. Here the DRPs are not limited to those statutory discrimination claims. The individual arbitration agreements have a far reaching effect with regard to both dispute resolution and discrimination that impacts the Union in its role as the exclusive 9(a) representative. These are areas that the Board has previously said that employers must bargain over with unions.

³⁸ See, e.g., Trinity Trucking & Materials Corp., 221 NLRB 364, 364-65 (1975) (protected conduct for group of employees to sue employer); Le Madri Restaurant, 331 NLRB 269 (2000) (employees unlawfully discharged for engaging in variety of union and other protected concerted activities, including filing a FLSA lawsuit); See also, e.g., BE&K Construction Co., 329 NLRB No. 68, slip op. at 7-9 and n. 51 (1999), enfd. 246 F.3d 619 (6th Cir. 2001) (Section 7 protects employee lawsuits, legislative lobbying, etc., concerning employment conditions, and also protects unions that engage in such conduct on behalf of employees).

VII. This Case is Not Governed by Star Tribune

The bargaining obligation here is distinguishable from the Board's decision in Star Tribune,³⁹ where the Board held that the employer did not need to bargain with the union about implementing a one-time drug test for applicants for bargaining unit positions. Significantly, in Star Tribune the Board distinguished the applicants in that case from the "applicants" in Lockheed Shipbuilding Co.,⁴⁰ who were actually paid by the employer for at least four hours before their medical screening exams and were thus employees represented by the union, not mere applicants. In the instant case, new employees must sign the DPR within 3 days of starting work or they are "terminated;" they are, therefore, employees.

Additionally, the drug test in Star Tribune was only a pre-employment condition while the arbitration agreement in the instant case, like in ALPA, remained in effect as a "condition of employment" after the employees became fully employed.⁴¹ To excuse bargaining over the DPR even if those agreements were signed by "applicants," which they were not here, when it would affect employees during their employment in the represented unit "would in effect open a large loophole in Section 8(a)(5) by permitting the employer to unilaterally control terms and conditions of employment through commitments imposed on job applicants."⁴²

VIII. The 8(a)(1) Violation

Additionally, the DPR agreements in the instant case violate Section 8(a)(1) of the Act because they do not provide an exception for the employees' statutory right to file charges with the Board. Consistent with National

³⁹ 295 NLRB 543 (1989).

⁴⁰ 273 NLRB 171 (1984) (employer unlawfully unilaterally implemented new medical screening tests for the purpose of terminating new employees or refusing to hire applicants).

⁴¹ But see Kysor/Cadillac, 307 NLRB 598, 598-99, 602-03 (1992), enfd. 9 F.3d 108 (6th Cir. 1993) (table), indicating in dicta that there may be no obligation for an employer to bargain about implementing a drug testing policy requiring applicants to consent to testing to take place even after employment commenced; however, the Board indicated that such consent by applicants could not act as a waiver of the union's bargaining rights over later testing of employees.

⁴² Id. at 602-03.

Licorice,⁴³ the Board has regularly held that an employer violates the Act when it insists that an employee waive his statutory right to file charges with the Board.

Accordingly, complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) when the Employer failed to give notice to and to bargain with the Union before implementing its individual arbitration agreements. Additionally, the complaint should also allege that the Employer violated Section 8(a)(1) because the arbitration agreements restrict the employees who signed them from exercising their statutory right to file charges with the Board.

B.J.K.

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⁴³ National Licorice Co. v. NLRB, 309 U.S. 50 (1940); see, e.g., Great Lakes Chemical Corp., 298 NLRB 615, 622 (1990).