UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ADVANCED SERVICES, INC.

and

TABITA SHEPPARD HOWARD **Cases 26-CA-063184 & 26-CA-071805**

and

PRINCESS BALLARD

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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National Labor Relations Board
Region 26

Dated: September 10, 2012

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I. INTRODUCTION

The issues raised by this case, which involved violations of §8(a)(1) by imposing a mandatory arbitration procedure that prohibited class claims and required confidentiality, by promulgating confidentiality rules that prohibited employees from discussing disciplinary warnings or internal investigations, and by terminating Tabita Howard's employment, were litigated before Administrative Law Judge Margaret Brakebusch on March 26-28, 2012. The Consolidated Complaint in this matter issued on March 9, 2012 pursuant to a charge filed in Case 26-CA-063184 on August 24, 2011, an amended charge filed on October 27, 2011, a second amended charge filed on February 10, 2012, and a

charge filed in Case 26-CA-071805 on December 28, 2011 and an amended charge filed on January 19, 2012. The complaint also was amended at the hearing. (Tr. 12-15).[1] By its Answer, Respondent denied the commission of any unfair labor practices.

On July 2, 2012, Administrative Law Judge Margaret Brakebusch issued her Decision and Recommended Order, finding Respondent violated §8(a)(1) of the Act with respect to its rule which prohibited employees from discussing their discipline, and by its arbitration procedure that unlawfully prohibited class claims and unlawfully mandated confidentiality. Respondent excepted to each of the findings and conclusions that it violated the Act.

II. ISSUES PRESENTED BY RESPONDENT'S EXCEPTIONS

A. Whether the judge's finding that Respondent's mandatory arbitration procedure unlawfully prohibits class claims is supported by the record.

B. Whether the judge's finding that Respondent's mandatory arbitration procedure unlawfully requires confidentiality is supported by the record.

C. Whether the judge's finding that Respondent orally promulgated an unlawful rule that that prohibited employees from discussing terms and conditions of employment, including warnings, is supported by the record.

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[1] Tr. references are to pages of the hearing transcript. R's Brief refers to Respondent's Brief in Support of its Exceptions, and includes references to the specific page number designated. GCX and RX refer to the numbered exhibits of Counsel for the Acting General Counsel and Respondent, respectively, while Exh. refers to a particular exhibit within those numbered exhibits. JD refers to the decision of the administrative law judge, and includes references the specific page number and line numbers referenced.

III. FACTUAL SUMMARY

Advanced Services, Inc. (ASI) operates a call center in Memphis, Tennessee, where is employs approximately 400 employees. (Tr. 286). Respondent also operates a call center in Rapid City, South Dakota, a warehouse in Indiana, and an office in Louisville, Kentucky. (Tr. 385, 388, 400). ASI is a subsidiary of General Electric (GE) and sells parts to customers to call an 800 number. (T. 82, 356). Jill Sullivan is the call center's manager and senior vice-president, and is ultimately responsible for the center's operations. (Tr. 345-346). Trudie Dunlap, who reports to Sullivan, is the operations director for Respondent's parts sales and home delivery departments. (Tr. 518). Debbie Ulrich is Respondent's human resources manager. (Tr. 417).

Ulrich began working for ASI on April 18, 2011, shortly after the mandatory arbitration agreement was imposed and a few months before Tabita Howard was fired. (Tr. 417). At that time, there were no other employees in the department other than a receptionist. (Tr. 446). Ora Ford, Ulrich's predecessor, left her job in early February, 2011, after only a few months on the job. (Tr. 574). No one held the job between Ford and Ulrich. (Tr. 398, 574). Ulrich hired her first subordinate employee, Angie Settles, on June 13, 2011. (Tr. 507). At the time of the hearing in March, 2012, Ulrich had a staff of five employees. (Tr. 446).

Charging Party Princess Ballard worked as a sales agent for nine years, until Respondent terminated her employment on January 12, 2012.[2] (Tr. 290). Ballard was one of 16 parts sales agents who reported to Russ Clack, a supervisor

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[2] Ballard's discharge was not alleged as a violation of the Act.

in the parts sales department. (Tr. 54, 404, GCX 6, Exh. 1). Charging Party Tabita Howard was employed as a sales agent for 15 years until Respondent terminated her employment on August 11, 2011. (Tr. 44).

A. Respondent's Mandatory Arbitration Procedure

In January, 2011, Respondent decided to change its alternative dispute resolution procedure to a mandatory arbitration procedure which would apply to all employees and which would bind Respondent. (Tr. 350, 359, 361, 362). On January 22, 2011, Ora Ford announced the Solutions Policy Agreement in an email to all employees, which read:

> With the implementation of ASI Solutions, all employees receiving this letter will be required to take any covered claims they want to pursue to final, binding arbitration as individual claims, and may not go to court. The Company must do the same with covered claims it may have against employees. Employees who continue their employment after April 1, 2011 will be deemed covered by these revised procedures. Training on ASI Solutions will be provided to you and at the time you will be asked to sign an acknowledgement indicating your understanding of the procedure and the fact that you will be bound by its terms if you elect to continue your employment after April 1, 2011. If you have any questions, please contact your Developer or HR. (Tr. 361-362, GCX 8).

Employees received no documents other than a one-page "acknowledgment" to sign, saying they understood and agreed to be bound by whatever might be included in the Solutions procedure. (GCX 3, Exh. 8, Tr. 146). Although Center Manager Sullivan thought her subordinates organized discussions with groups of employees, he later learned this did not occur. (Tr. 360).

When Howard received the one-page document, she asked Operations Director Dunlap to explain it. Dunlap said Howard's supervisor, Andrea

Slaughter, would explain the procedure. (Tr. 137, 142). That never happened. (Tr. 138). Howard and Princess Ballard also discussed Ford's email, which caused them to think they would be fired if they did not agree to be bound by the agreement before April 2, as did a co-worker, Shirley Bowles. (Tr. 87, 138, 253, 307, 320, 363). Howard, Ballard, Bowles, and another sales agent, Nicole Nathan, refused to sign the acknowledgement that they had received training and would be bound by Solutions. (Tr. 246, 252-253, 285, 334). Sales agent Katina Powell signed the agreement, without discussing the terms of the agreement with any supervisors or managers and without understanding its terms. (GCX 3, Exh. 8, Tr. 207, 225-226). To Powell's understanding, the Solutions procedure required an employee to use Respondent's attorney if they wanted to make a claim against Respondent. (Tr. 226). Bowles also believed the Solutions procedure meant Respondent would be representing her if she had a claim against Respondent. (Tr. 259). Additionally, a number of employees emailed Center Manager Sullivan asking if they would be fired if they did not agree to be bound by the mandatory arbitration procedure. (Tr. 360). On February 18, 2011, Sullivan added her own email to Ford's to reassure employees they would not lose their jobs if they did not sign the one-page form. (GCX 9, GCX 3, Exh. 8, Tr. 254, 318-319). After Sullivan's email, Howard spoke to Supervisor Sharon Marshall, who told her she should forget about all of her arbitration questions. (Tr. 57, 142-143). Ballard sought information about Solutions from her supervisor, but he had no answers to her questions. (Tr. 320-321).

Despite this confused environment, Respondent imposed its mandatory arbitration procedure on April 1, 2011. (GCX 20, page VI-59, Policy 600

Solutions, Section II.). All ASI employees were covered by Solutions regardless of whether they received training or understood its provisions. (Tr. 367, 450, 609). Critically, employees were never provided with their own printed copy of the 27-page Solutions procedure itself. (GCX 10, Exh. 15, Tr. 144). Nevertheless, every word in the Solutions procedure binds Respondent's employees. (Tr. 609). Indeed, Respondent has never disavowed any part of the Solutions procedure. (Tr. 466).

After Human Resources Manager Ulrich was hired, she asked employees to sign a different form that said Solutions was explained to them, and applied to them "as a condition of employment." (GCX 10, Exh. 14, Tr. 412, 446, 448). Alternatively, employees could sign a statement saying they attended a meeting where Solutions was discussed. (GCX 10, Exh. 14). Ulrich left a printed copy of the 27-page Solutions document in a binder in the human resources office. (Tr. 450). Respondent presented no evidence that employees were aware of the document or its location. Furthermore, Solutions training was the responsibility of Anita Lewis, who was no longer employed by ASI at the time of the hearing. (Tr. 569). Clack, the only supervisor who testified, said no employees under his supervision received training on the Solutions procedure. (Tr. 411). Ballard tried unsuccessfully to get an explanation from Clack about the language on page 11 of the slideshow presentation, which provided that employees had 30 days to submit a claim. (Tr. 323). Howard sought an explanation of Respondent's mandatory arbitration procedure from the Urban League (Tr. 161). Nicole Nathan attended a meeting about Solutions presented by Ulrich, after which all she understood was that the mandatory arbitration procedure would be

"beneficial for us," and that it remained in an employee's file after they left Respondent's employment. (Tr. 278).

B. The Solutions Procedure Prohibits Collective Claims

The Solutions procedures precludes all collective or class claims, pursuant to the following language:

> Covered Employees and the Company waive their right to bring any Covered Claims as, or against a representative or member of a class or collective action (whether opt-in or opt-out) or a private attorney general capacity, unless all parties agree to do so in writing. All covered claims must be brought on an individual basis only in Solutions. Without waiving the Company's right to enforce this Procedure's provisions regarding class and collective action waivers, nothing in this Procedure prohibits employees from acting concertedly to challenge the terms of Solutions by pursing class or collective actions and they will not be subject to discipline or retaliation by the Company for doing so. (GCX 10, Exh. 15, page 7).

The Solutions procedure mandates that any employment-related claim be filed on an individual basis. Pursuant to Solutions, collective or class claims may not be filed in either judicial and arbitral forums. Furthermore, the Solutions procedure constitutes a waiver of employee rights to a judicial forum absent Respondent's waiver of its right to insist on arbitration. (Tr. 395). No document explains what circumstances would cause Respondent to waive its right to arbitrate a claim. With respect to access to the NLRB, Respondent's Solutions procedure provides that either party may ask the NLRB to defer processing a charge until it is resolved through mandatory arbitration. (GCX 10, Exh. 15, page 4, Item II, I). Nevertheless, claims that allege a violation of the Act must be filed and processed through the first two steps of Solutions. (GCX 10, Exh. 15, page 6, Item II, L).

C. The Solutions Procedure Requires Confidentiality

Pursuant to Respondent's Solutions procedure, the following confidentiality language is binding on Respondent's employees:

> I understand and agree that all proceedings under this Agreement . . . ., including the arbitration hearing and record, all documents exchanged in discovery or otherwise used, and all communications in connection with the resolution or arbitration of my covered claims shall be confidential and not disclosed to the public . . . . (GCX 10, Exh. 15).

This confidentiality restriction is repeated in Section III, Item A, 8 on page 11 of Solutions, mandating that *employees* keep confidential all statements by either party beginning with the first level of the procedure. (emphasis added). On the other hand, Respondent may reveal any information it deems relevant to any party so long as Respondent decides the party needs to know. (GCX 10, Exh. 15, Section III, Item A, 8, at p. 11). The same language applies to communications pursuant to the second level of the procedure. (GCX 10, Exh. 15 Section III, Item B, 8, at p 13). At level 3 of the procedure, Respondent may reject an employee's claim, and end the procedure, or Respondent may force the employee to mediate the dispute. (GCX 10, Exh. 15 Section III, Item C, 2, at p 13). If Respondent elects to mediate the dispute with its employee, the employee is again bound by confidentiality and Respondent is allowed to disclose evidence on a "need to know basis." (GCX 10, Exh. 15 Section III, Item C, 11, at p 15).

If the dispute proceeds to the fourth level, arbitration, the proceedings must be kept "strictly private" and parties may request protective orders that limit discovery and restrict dissemination of confidential evidence. (GCX 10, Exh. 15 Section III, Item D, 7(a) and 7(b), at p 18). After an arbitration

concludes, "neither party shall publish or disseminate the arbitrator's award or arrange for publication or dissemination of the award." (GCX 10, Exh. 15 Section III, Item D, 21 at p. 22). The Solutions procedure does not make any exceptions for dissemination to the NLRB of an arbitrator's decision pursuant to the NLRB's deferral policies. At the time of the hearing, the claims of at least two employees were pending pursuant to the terms of Respondent's mandatory arbitration procedure. (Tr. 469, 476).

D. Russ Clack's Warnings Are Confidential

Pursuant to a subpoena and the judge's ruling, Respondent produced three versions of its handbook on the second day of the hearing. (Tr. 269). The handbook issued on August 24, 2009 is in evidence as GCX 21. (Tr. 571). It was replaced by a handbook issued on January 20, 2011. (GCX 19, Tr. 571). A new handbook was issued on August 20, 2011, after Howard was fired, to reflect the implementation of the Solutions mandatory arbitration procedure. (GCX 20, Tr. 571). All three handbooks prohibit, without limitation, the disclosure of confidential information. (GCX 21, page V-4, policy number 501, Item 12; GCX 19, page V-39, Item 12; GCX 20, page V-42, Item 12; Tr. 572).

For employees, Respondent's handbook is only accessible via Respondent's intranet as a "read only" document. (Tr. 394). Once a new handbook is created, the previous version is deleted from Respondent's entire computer system. (Tr. 395). Employees may access the current version of the handbook at computers near their break room during their 15-minute break times, if they were able to log on to those computers. (Tr. 162, 164, 243, 282-283). However, employees are not allowed to review the handbook on work time,

and cannot remain at their work stations during their breaks. (Tr. 163, 243, 275-276). Only one of Respondent's supervisors testified at the hearing.

Russ Clack, who supervised 16 sales agents, communicated Respondent's rules to employees pursuant to Respondent's handbook. (Tr. 399, 412, 509). Clack possessed the authority to issue write-ups and implement Respondent's rules. (Tr. 510). At a birthday roundtable event, Princess Ballard, who reported to Clack, mentioned that a large number of employees were receiving performance improvement plans, or PIPs. (Tr. 290, 292). PIPs can lead to termination, as they did for Ballard. (Tr. 290. 327). The next day, Clack called Ballard to his desk, and told her the only people who would know if she was on a PIP would be the two of them and the human resources department, because the PIPs were confidential. (Tr. 294). Clack made it clear he did not want Ballard to talk to anyone about the discipline. (Tr. 294). When Ballard received her first PIP in October, 2011, Clack repeated to Ballard that the PIP was confidential. (Tr. 295). In November and December, Clack issued Ballard two more PIPs. (Tr. 295). In conversations beginning when he became her supervisor in March, 2011 until December, 2011, Clack emphasized to Ballard that he did not want her to repeat anything he said to her. (Tr. 296-297, 414).

On cross-examination, Respondent's counsel asked Ballard if Clack wasn't just cautioning her that it was not a good idea to share her private information. (Tr. 328). "No, he wasn't saying it that way, no. He didn't want anyone to know. He didn't say if you feel free with letting anybody know that you're on a PIP, that you can tell them. He told me "this is confidential," and watched to see if she spoke to anyone after leaving his desk. (Tr. 328-330). Because he was watching

her, Ballard did not believe she could freely discuss her warnings with her co-workers without getting them in trouble. (Tr. 329-330). If a co-worker asked Ballard why she had been at Clack's desk, she felt compelled to tell them she could not talk about it. (Tr. 329-330). From her perspective, Clack did not want the employees he supervised to discuss their PIPs, because he issued a large number of these warnings. (Tr. 209, 332).

In addition to Ballard, Clack advised other employees he supervised that their PIPs were confidential as well, including Cathleen Banum and Nicole Nathan. (Tr. 273-274, 333). Nathan received PIPs from Clack at his desk when her monthly average sales were below $250 per hour. (Tr. 273-274, 290). When he issued the PIPs, Clack told Nathan not to tell anyone she received the write-up. (Tr. 275). He told her not to share that information with anyone. (Tr. 281). He told her, "It's between me and you. This is confidential." (Tr. 275). On one occasion, Clack even wrote the word "confidential" on her warning. (Tr. 275). Nathan worked for Respondent for four years until she was fired in October, 2011, for failing to make sufficient sales per hour. (Tr. 280). When Clack testified, he acknowledged that he issued discipline one on one in a private area, but said he never "demanded" an employee not share information regarding their performance and discipline. (Tr. 410, 414).

IV. ARGUMENT

A. The record amply supports the judge's conclusion that Solutions unlawfully limits collective claims

It is undisputed that Respondent announced on January 22, 2011, that it would impose a mandatory arbitration procedure called Solutions on all

employees as of April 1, 2011. It also revised its employee handbook to include a reference to the arbitration procedure. Respondent's witnesses testified that Respondent did not disavow or repudiate any part of Solutions and that it applied to all employees as a condition of employment after April 1, 2011. Even though little training was provided to Respondent's employees, and Respondent knew its employees were upset and confused about the procedure, Respondent imposed the procedure as a condition of employment for its employees as scheduled.

The Solutions procedure requires all employees who file a claim do so as individuals. Respondent argues there are exceptions to this requirement in its procedure which make it different from the arbitration agreement found violative in *D. R. Horton*, 357 NLRB No. 184 (2012). Respondent's arguments are unavailing, because the language of the Solutions procedure clearly prohibits collective claims. Solutions specifically states: "All covered claims must be brought on an individual basis only in Solutions." (GCX 10, Exh. 15, p. 7). Such language unlawfully restricts employee rights to engage in collective action because the prohibition "would reasonably tend to chill employees in the exercise of their §7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. mem. 203 F.3d 52 (D. C. Cir. 1999).

1. Solutions Fails to Protect Employees' §7 Rights

Respondent argues that the Solutions procedure allows employees to engage in collective activity in a manner consistent with the principles of an earlier General Counsel Memo, GC 10-06. (R. Brief, pp. 6-10). As noted in counsel for the acting general counsel's brief to the administrative law judge, the decision in *D. R. Horton*, 357 NLRB No. 184 (2012) conflicts with certain

principles outlined in GC 10-06.[3] In *D. R. Horton*, Inc., the Board held that a mandatory arbitration procedure unlawfully restricts employees' §7 right to engage in concerted activity if it precludes filing employment-related collective or class claims against their employer in both arbitral and judicial forums. Id. Specifically, the Board found that an employer violates §8(a)(1) by imposing, as a condition of employment, a mandatory arbitration agreement that precludes employees "from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial."[4] Id., slip op. at 1.

The Board concluded that such an agreement contains an unlawful limitation on the §7 right "to engage in concerted action for mutual aid and protection, notwithstanding the Federal Arbitration Act (FAA), which generally makes employment-related arbitration agreements judicially enforceable." Ibid. The Board noted that precedent "has consistently held that a concerted legal action addressing wages, hours or working conditions is protected by §7," and held that "[c]ollective pursuit of a workplace grievance in arbitration is equally protected by the NLRA." Id., slip op. at 2. In the instant matter, the Solutions procedure unlawfully restricts employees in the exercise of rights guaranteed by §7 of the Act to engage in concerted activity for mutual aid and protection, because it unlawfully limits employees' §7 right to file collective claims. *D. R. Horton*, Inc., 357 NLRB No. 184 (2012). Even employment-related disputes that eventually are filed as a class claim must be filed through Solutions. As the Board

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3 A GC memo has no precedential value: *Pontiac Osteopathic Hospital*, 336 NLRB No. 101 (2001).

4 This language specifically rejects the relevant principles of Memorandum GC 10-06.

held in *D. R. Horton*, the policy enunciated in the above language unlawfully restricts and interferes with employees' §7 right to engage in protected concerted activity for their mutual aid or protection and violates §8(a)(1) of the Act.

Respondent argues that the Solutions procedure does not preclude class claims because employees can challenge the application of procedure in litigation, file a charge with the NLRB, seek an injunction to preserve the status quo during the Solutions process, and litigate class claims if Respondent agrees to do so. (R. Brief, pp. 6-10). Respondent's argument directly challenges the holding in *D. R. Horton* that an arbitration policy that interferes with employees' §7 right to file and participate in collective and class litigation violates §8(a)(1) of the Act. *D. R. Horton*, 357 NLRB No. 184 (2012).

Judge Brakebusch correctly noted that language which permits collective challenges to the Solutions agreement "does not eliminate the requirement for employees to bring their claims individually rather than collectively." (JD 6, LL 32-33). Thus, while Solutions allows group action to challenge the procedure itself, any claims pursuant to the procedure can only be heard individually. Thus, the Solutions procedure excludes all actions that would present a common claim through a common representative -- a procedure that is expressly protected by §7. See *J. H. Stone & Sons*, 33 NLRB 1014, 1023 (1941), enfd. in relevant part 125 F.2d 752 (7th Cir. 1942) (effect of restriction that prevented employee from dealing with employer through a representative until after the employee attempted to resolve a dispute by dealing directly with the employer as an unrepresented individual is that "at the earliest and most crucial stages of adjustment of any dispute, the employee is denied the right to act through a

representative and is compelled to pit his individual bargaining strength against the superior bargaining power of the employer.") The restriction on collective actions takes effect even before employees may be aware of other employees' efforts to act concertedly to address issues of collective concern. The Solutions procedures fails to protect employees who do not choose to file an individual claim – for any legitimate reason, including fear of reprisal. Pursuant to Board policy, those employees are entitled to designate a representative to act on their behalf to improve working conditions. *D. R. Horton*, 357 NLRB No. 184, slip op. at 3, fn. 5. The Solutions procedure denies those employees the right to designate a representative to discuss employee wages, hours and working conditions with Respondent and is therefore, contrary to the principles which form the foundation of the Act.

Respondent's claim that Solutions is lawful because it permits filing an NLRB charge is also without merit. (R. Brief, pp 8-10). The Solutions procedure requires that any claims that allege a violation of the National Labor Relations Act be filed and processed through the first two steps of Solutions. (GCX 10, Exh. 15, page 6, Item II, L). Aside from the issue of whether any charge would be timely filed with the NLRB once it reached the third step of Solutions, Respondent's procedure requires employees to waive their right to immediately file a charge with the NLRB when a violation of the Act takes place. Such interference with the right to file an NLRB charge chills access to the Board. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. mem. 203 F.3d 52 (D. C. Cir. 1999). The Supreme Court advised, "Congress has made it clear that it wishes all persons with information about [unfair labor] practices to be

completely free from coercion against reporting them to the Board." *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967).[5]

Respondent also argues that employees may seek an injunction pending resolution of their Solutions claims but fails to explain how that would protect employees' §7 rights. (R. Brief, p. 10). Respondent further asserts that the Solutions procedure allows class claims if Respondent agrees to an employee request for permission to litigate a class action. (R. Brief, pp. 10-11). The Solutions procedure omits any discussion regarding the framework for seeking Respondent's approval for class action litigation. As Judge Brakebusch found, "the assertion that class action or collective action is merely procedural and waivable negates the very purpose of the Act." (JD 6, LL 25-26).

2. The Board's Decision in *D. R. Horton* Was Correctly Decided and Should Stand

Respondent contends that *D. R. Horton* was wrongly decided and should be reversed. (R. Brief, pp. 11-26). Judge Brakebusch correctly found that the purpose of the Act is to protect the rights of employees to engage in protected concerted activity, and that the decision in *D. R. Horton* is consistent with that purpose. Judge Brakebusch explained that the Congressional intent in adopting the Act was to enable employees to engage in collective efforts to improve working conditions. (JD 6, LL 9-10). The Board explained that where mandatory arbitration agreements, like this one, restrict employee access to the NLRB or

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[5] If an employee filed a timely NLRB charge, Solutions permits Respondent to request deferral of the charge until the matter is resolved through Solutions. (GCX 10, Exh. 15, page 4, Item II, I). Of course, where there is no collective bargaining agreement or the other necessary elements for deferral, that option would not be available. See *Collyer Insulated Wire*, 192 NLRB 837 (1971). But if a charge was deferred, nothing that took place pursuant to the Solutions procedure could be disclosed to the NLRB, even after an arbitration decision. (GCX 10, Exh. 15, Item D, 21 at p. 22).

limit employee's ability to join together to discuss working conditions, that agreement is unlawful. *D. R. Horton*, 357 NLRB No. 184, slip op. at 2 (2012).

B. The record amply supports the judge's conclusion that Solutions unlawfully requires confidentiality

It is undisputed that Respondent's Solutions procedure also requires all communications "in connection with the resolution or arbitration" of covered claims be confidential. (GCX 10, Exh. 15, Section III, Item A, 8 at p. 11, Item B, 8 at p. 13, Item C, 11 at p. 15, Item D, 6 at p. 17). Judge Brakebusch appropriately analyzed whether Respondent could lawfully insist that employees maintain the confidentiality of all communications pursuant to the standards set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Applying those standards, Judge Brakebusch correctly found that the confidentiality language in Solutions would unlawfully restrict employee discussions of §7 rights. (JD 8, LL 8-10). Judge Brakebusch accurately noted that Respondent offered no legitimate business justification for its restriction on employee communications that would outweigh employees' §7 rights. (JD 8, LL 13-16).

Respondent's arbitration procedure applied to all employees, and for all employment claims. The procedure's confidentiality requirements are imposed at the time when it is most critical, and precludes employee discussion to determine the existence of common issues. Employees would be unable to disclose to other employees information about their employment dispute with Respondent, which would create an unlawful barrier to group action. See *Verizon Wireless*, 349 NLRB 640, 658 (2007) (unlawful prohibition on discussions of employee concerns regarding discipline or potential discipline).

Furthermore, the limitations on employee discussions are not limited to time or place in Solutions. The procedure requires that all communications must remain confidential even after a resolution or an arbitration and even as to parties outside the employment relationship. See *Claremont Resort & Spa*, 344 NLRB 832 (2005) (rule prohibiting "negative conversations about associates or managers" reasonably would be construed as prohibiting employee conversations about working conditions and would lead employees to refrain from protected concerted activity). Because a reasonable employee would interpret the Solutions confidentiality requirement as an unlawful instruction not to talk about their working conditions, Respondent's mandatory arbitration procedure violates §8(a)(1) of the Act.

C. The record amply supports the judge's conclusion regarding the entire Solutions procedure

Respondent argues that the decision in this case is defective because the Complaint refers to "Solutions Policy Agreement, Agreement to Resolve Employment Claims Under Advanced Services Incorporated's Solutions Policy" rather than simply to "ASI Solutions." (R. Brief, p. 27-34). Respondent contends the "Solutions Policy Agreement, Agreement to Resolve Employment Claims Under Advanced Services Incorporated's Solutions Policy" refers only to the acknowledgement form, not to the entire Solutions procedure, and thus no violation can be found with respect to the Solutions procedure. (R. Brief, p. 27-29). Respondent also sets forth arguments that the policy agreement does not violate the Act. (R. Brief, p. 29-34). A review of the record establishes that the parties litigated the provisions of the entire ASI Solutions procedure, and that

Respondent's counsel never suggested the hearing exhibits or testimony related to any other document. (Tr. 42, 88, 144-149, 465, 469, 476). Respondent was on notice pursuant to documentary and testimonial evidence that the entire Solutions procedure was at issue, despite slight variation in the language of the complaint. The issues regarding Respondent's mandatory arbitration procedure were fully and fairly litigated and are closely connected with the subject matter of the complaint. The Board may find and remedy the unfair labor practice as found by Judge Brakebusch. See *Gallup, Inc.*, 334 NLRB 366 (2001); *Letter Carriers Local 3825*, 333 NLRB 343, fn. 3 (2001); *Parts Depot*, 332 NLRB 733, fn. 5 (2000).

D. The record amply supports the judge's conclusion that Russ Clack unlawfully promulgated a rule against discussing warnings

Princess Ballard testified that her supervisor, Russ Clack, repeated to her on numerous occasions from March to December, 2011, that when he issued a PIP, which could and ultimately did, result in her discharge, she could not discuss the PIP with other employees. (Tr. 294-297). Ballard reasonably assumed Clack was articulating a work rule that she was obligated to follow. She testified that she did not let Clack see her talking to other employees after he issued discipline to her, because she thought she and those employees would be disciplined if she did. (Tr. 329-330). Nicole Nathan, who was also supervised by Clack, testified Clack also told her that the PIPs he issued to her were similarly confidential. (Tr. 275). Clack was merely verbally reinforcing Respondent's handbook rules regarding confidentiality. Thus, Respondent's employees, at least those who reported to Clack, were prohibited from discussing discipline or other terms and

conditions of employment with fellow employees or anyone else without fear of discipline. By prohibiting employee discussions of warnings that could lead to termination of their employment, Respondent's instructions to Ballard and Nathan unlawfully chilled their ability to engage in the type of conduct protected by §7 of the Act. See *SNE Enterprises*, 347 NLRB 472, 492-493 (2006), enfd. 257 Fed. Appx. 642 (4th Cir. 2007) (employer violated §8(a)(1) by prohibiting an employee from speaking to coworkers about a disciplinary incident and then discharging the employee for violating that prohibition). Although the confidentiality rule did not specify a consequence for employees who did not comply with the rule, the rule violates §8(a)(1) because it presents employees with the choice of sacrificing their §7 rights and obeying the rule, as Ballard did, or breaking the rule and risking further discipline. *NLRB v. Main Street Terrace Care Center,* 218 F.3d 531 (6th Cir. 2001) (supervisors' oral instructions not to discuss wages unlawful). Judge Brakebusch correctly found that Supervisor Clack unlawfully interfered with the rights of employees to discuss their discipline. (JD 20, LL 11-12). Her decision is consistent with Board precedent holding that the NLRA grants employees broad rights to discuss working conditions, and that rules prohibiting employees from engaging in protected discussions with their coworkers concerning working conditions violate §8(a)(1). *Cintas Corp. v. NLRB*, 482 F.3d 463, 466 (D.C. Cir. 2007); *Westside Community Health Center*, 327 NLRB 661, 666 (1999).

VI. CONCLUSION

The decision of Judge Brakebusch that found Respondent's mandatory arbitration procedure unlawful is amply supported by the record and relevant

Board law, as is the decision that Respondent's supervisor, Russ Clack, unlawfully promulgated a rule that prohibited employees from discussing their disciplinary warnings. Respondent presented no arguments or legal authority which would warrant a reversal of the judge's findings and conclusions with respect to these issues. Counsel for the Acting General Counsel urges the Board to find that Respondent's exceptions are without merit, and affirm the judge's findings and conclusions with regard to the mandatory arbitration procedure and the rule against employee discussions of discipline.

September 10, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2012, a copy of Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge was filed by e-filing with the NLRB Office of the Executive Secretary. I further certify that on September 10, 2012, a copy of Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge was served via email on the following:

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