

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

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ADVANCED SERVICES, INC.)	
)	
and)	CASES 26-CA-63184
)	26-CA-71805
TABITA SHEPPARD HOWARD, an)	
Individual)	
)	
and)	
)	
PRINCESS BALLARD, an Individual)	
_____)	

**ADVANCED SERVICES, INC.'S REPLY BRIEF IN SUPPORT OF
ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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INTRODUCTION

In her answering brief, counsel for the Acting General Counsel does not attempt to address the many reasons why the Board's decision in *D. R. Horton Inc.*, 357 NLRB No. 184 (2012), should be reconsidered and reversed in light of the overwhelming number of court decisions that have rejected it. Those arguments are set forth in detail in the exceptions brief submitted by Advanced Services, Inc. ("ASI" or the "Company") and need not be repeated here.

What bears repeating are important differences between the ASI Solutions procedure and the arbitration procedure in *D. R. Horton*. Counsel for the Acting General Counsel mischaracterizes several key provisions of the ASI Solutions procedure, in particular its class/collective action waiver provision. This provision specifically protects employees' right to challenge the Solutions procedure in court, without any fear of discipline or retaliation. The ASI Solutions procedure also specifically protects employees' right to file, either individually or as a group, unfair labor practice charges or other administrative agency charges. These provisions clearly differentiate the ASI Solutions procedure from the arbitration agreement at issue in *D. R. Horton*. Furthermore, unlike the cases cited by counsel for the Acting General Counsel, there is no evidence that the ASI Solutions procedure has the purpose or effect of interfering with employees' rights to organize and bargain collectively under the National Labor Relations Act ("NLRA" or "Act").

Counsel for the Acting General Counsel also mischaracterizes the confidentiality provisions of the ASI Solutions procedure. The confidentiality provisions are narrowly tailored to promote an effective dispute resolution system. These provisions do not, as counsel for the Acting General Counsel argues, prohibit employees from discussing terms or conditions of

employment generally. As such, they are fully enforceable under the Federal Arbitration Act (“FAA”) and do not violate the NLRA.

ARGUMENT

I. THE ASI SOLUTIONS PROCEDURE IS DIFFERENT FROM THE ARBITRATION AGREEMENT IN *D. R. HORTON*.

A. The ASI Solutions Procedure Contains No Threat of Reprisal.

Counsel for the Acting General Counsel ignores the narrow limits of *D. R. Horton*, a decision which the Board said would apply only to “a small percentage of arbitration agreements” governing the resolution of employment disputes. *D. R. Horton*, 357 NLRB No. 184, slip op. at 12. Ignoring this clear statement of intent, counsel for the Acting General Counsel asserts that *D. R. Horton* is applicable to the ASI Solutions merely because it “prohibits collective claims.” Answering Br. at 12. What counsel for the Acting General Counsel ignores, however, is that such an agreement implicates Section 7 rights (even assuming, *arguendo*, that class/collective action litigation of non-NLRA claims is Section 7 activity) only if the agreement carries with it a reasonable fear of reprisal – an implicit or explicit threat that employees “will be fired or not hired” if they refuse to enter into the agreement or fail to comply with its terms. *D. R. Horton*, slip op. at 7. It is the fear of reprisal that produces the “chilling effect” described in *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). And the absence of a fear of a reprisal is why the Board in *D. R. Horton* did not tackle the “more difficult question” of whether the NLRA can regulate arbitration agreements that are supported by consideration other than continued employment. *D. R. Horton*, slip op. at 13 n.28.

In an effort to bring the ASI Solutions procedure within the narrow confines of *D. R. Horton*, counsel for the Acting General Counsel asserts, incorrectly, that there is a “fear of reprisal” if employees pursue class/collective litigation instead of submitting their claims to

individual arbitration. Answering Br. at 15. This assertion is incorrect because the ASI Solutions procedure expressly disavows any threat of retaliation if employees challenge the procedure through class or collective action litigation:

[N]othing in this Procedure prohibits employees from acting concertedly to challenge the terms of Solutions by pursuing class or collective actions and they will not be subject to discipline or retaliation by the Company for doing so.

(GC-10 Exh. 15, at p. 7, Section II.M).

Nor does the ASI Solutions procedure contain any threat of reprisal if employees refuse to agree to be bound by the procedure in the first place. As the ALJ found, the Company told employees that “no one would be discharged for electing not to sign the Solutions Agreement form.” ALJD at 4. The Company takes the position that employees are bound to the procedure by virtue of their continued employment, but employees are free to challenge the enforceability of the procedure without any fear of retaliation. In the absence of any reasonable fear of retaliation, *D. R. Horton* simply does not apply.

B. The ASI Solutions Procedure Does Not Prohibit Employees from Presenting Common Claims Through a Common Representative.

Counsel for the Acting General Counsel further mischaracterizes the ASI Solutions procedure when she asserts that it prohibits “all actions that would present a common claim through a common representative” and denies employees “the right to designate a representative to discuss employee wages, hours and working conditions....” Answering Br. at 14, 15. The ASI Solutions procedure has nothing to do with the right to organize and bargain collectively or the right to designate a representative for such purposes. It only applies to claims “where a court in the jurisdiction in question would otherwise have the authority to hear and resolve the claim....” (GC-10 Exh. 15, at p. 5, Section II.K). Clearly, this does not encompass questions concerning the designation of a

union representative, which fall within the Board's jurisdiction under Section 9 of the Act. See *Minn-Dak Farmers Coop. Employee Org. v. Minn-Dak Farmers Coop.*, 3 F.3d 1199, 1201 (8th Cir. 1993). Claims arising under the NLRA are specifically excluded from mediation and arbitration under the ASI Solutions procedure. (GC-10 Exh. 15, at p. 6, Section II.L).

Counsel for the Acting General Counsel relies on the Board's decision in *J. H. Stone & Sons*, 33 NLRB 1014 (1941), as authority for invalidating the ASI Solutions procedure. But *J. H. Stone* involved agreements that were specifically intended to interfere with employees' rights under the NLRA; the Board found that the agreements "had the purpose of defeating unionization of their employees." *Id.* at 1023 (emphasis added). And in enforcing the Board's order in *J. H. Stone*, the Seventh Circuit noted that one of the stated purposes of these agreements was "to prevent strikes and labor troubles" and found that, through the agreement's arbitration provision, the employee "not only waived his right to collective bargaining but his right to strike or otherwise protest on the failure to obtain redress through arbitration." *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942). The ALJ made no such findings in this case. There is absolutely no evidence that the ASI Solutions procedure is intended to affect employees' rights to organize and bargain collectively. It is a procedure that is designed to resolve *non-NLRA* claims that would otherwise be litigated in court.

C. The ASI Solutions Procedure Does Not Restrict Employees' Right to File an Unfair Labor Practice Charge, Individually or Collectively.

There is no truth to the assertion that the ASI Solutions procedure "requires employees to waive their right to immediately file a charge with the NLRB when a violation of the Act takes

place.” Answering Br. at 15. The ASI Solutions procedure clearly protects employees’ right to file a charge with the NLRB or any other administrative agency:

Nothing in this procedure is intended to discourage or interfere with the parties becoming familiar with and or taking advantage of their rights to file administrative claims or charges with government agencies or authorities, such as the Equal Employment Opportunity Commission (www.eeoc.gov), the U.S. Department of Labor (www.dol.gov), the National Labor Relations Board (www.nlr.gov), the Office of Federal Contract Compliance Programs (www.dol.gov/esa/ofccp), and law enforcement authorities. Either party may request that an administrative agency or authority with which the other party has filed a claim or charge defer processing that claim or charge pending exhaustion of the Solutions process.

(GC-10 Exh. 15, at p. 4, Section III.)

Counsel for the Acting General Counsel misconstrues the last sentence of this provision, which states that either party may *request* that the agency defer processing of the charge pending exhaustion of the Solutions process. It defies logic to suggest that this provision can be read to prevent employees from filing a charge before any step of the Solutions process has been exhausted. *See* Answering Br. at 15. Deferral of a charge can be requested only if a charge has been filed in the first place.

For these and the other reasons discussed more fully in ASI’s exceptions and supporting brief, the ASI Solutions procedure is substantially different from the arbitration agreement at issue in *D. R. Horton*. *Compare D. R. Horton*, 357 NLRB No. 184, slip op. at 2 (finding violation because agreement could reasonably be read to prohibit filing of unfair labor practice charge). The ASI Solutions procedure protects employees’ rights to file unfair labor practice charges and other administrative agency charges, either individually or as a group, and to pursue class-wide remedies through the agency’s enforcement procedures. Therefore, even if *D. R.*

Horton is not overturned for the reasons set forth in ASI's exceptions brief, no violation should be found with respect to the ASI Solutions procedure.

II. THE CONFIDENTIALITY PROVISIONS IN THE ASI SOLUTIONS PROCEDURE AND ACKNOWLEDGEMENT FORM ARE LAWFUL AND SUPPORTED BY LEGITIMATE BUSINESS CONSIDERATIONS.

Counsel for the Acting General Counsel also mischaracterizes the confidentiality provisions in the ASI Solutions procedure and acknowledgement form. They do not “preclude[] employee discussion to determine the existence of common issues.” Answering Br. at 17. To the contrary, they are narrowly tailored to preclude only the disclosure of the “proceedings” or “communications” under the ASI Solutions process, including statements made in meetings and documents exchanged in discovery. (GC-3 Exh. 8; GC-10 Exh. 15, Section II.A.8).¹ These confidentiality provisions do not prevent employees from discussing whether they have common claims or issues, nor do they prevent employees from discussing their terms and conditions of employment generally. They only restrict disclosure of statements and information exchanged between the employee and the Company in an effort to resolve a claim through the ASI Solutions procedure.

Nor are these confidentiality commitments one-sided, as counsel for the Acting General Counsel suggests. *See* Answering Br. at 8. They are mutually binding commitments, made in an effort in order to foster the resolution of disputes without fear that statements or information exchanged in the process will be used for ulterior purposes. Confidentiality provisions such as these enforceable under the FAA because they are beneficial to the dispute resolution process. *See, e.g., Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175-76 (5th Cir.

¹ As we argued in our exceptions brief, the confidentiality language in the ASI Solutions procedure itself was not alleged to be unlawful in the complaint, even as amended at the hearing.

2004) (holding that a mutually applicable confidentiality provision was enforceable because confidentiality may be just as beneficial to individual litigants as it is to the employer).

The benefits of this narrowly tailored confidentiality requirement outweigh any alleged infringement on employees' Section 7 rights. The benefits of confidentiality are well-recognized and a matter of judicial notice. For instance, the EEOC's mediation process – a process designed to resolve the very same types of claims as the ASI Solutions process – requires that all parties sign a confidentiality agreement. *See* U.S. Equal Employment Opportunity Commission Fact Sheet, available at <http://www.eeoc.gov/eeoc/mediation/upload/facts-2.pdf>. The reason for the EEOC's confidentiality agreement is quite obvious: "Mediation provides a neutral and confidential setting where both parties can openly discuss their views on the underlying dispute." *Id.* The ALJ erred in rejecting this as a legitimate business justification for the confidentiality provisions in the ASI Solutions procedure and acknowledgement form.

III. SUPERVISOR RUSS CLACK DID NOT "VERBALLY REINFORCE" HANDBOOK RULES REGARDING CONFIDENTIALITY.

Counsel for the Acting General Counsel improperly raises an entirely new allegation in her Answering Brief – an allegation that supervisor Russ Clack, in brief and isolated conversations with employees Ballard and Nathan, was "verbally reinforcing Respondents' handbook rules regarding confidentiality." Answering Br. at 19. The confidentiality provisions in ASI's employee handbook were not alleged to be unlawful in complaint, nor was that issue litigated at the hearing. As such, any allegation with respect to the employee handbook is beyond the scope of this case and cannot be raised for the first time in an Answering Brief. *See* 29 C.F.R. § 102.46(d)(2) ("The answering brief to the exceptions shall be limited to the questions raised in the exceptions and in the brief in support thereof."); *Teddi of California*, 338

NLRB 1032, 1032 (2003) (refusing to consider issue first raised in answering brief, rather than as timely exception or cross-exception).

Furthermore, this new allegation is contrary to the ALJ's factual findings. The ALJ did not find that Clack "maintained" any sort of rule through his "brief and isolated" conversations with these two employees. ALJD at 19. To now assert that Clack was "reinforcing" rules set forth in the handbook is directly contrary to this finding and unsupported by any record evidence.

CONCLUSION

For the foregoing reasons and those set forth in ASI's exceptions and supporting brief, the Company respectfully urges the Board to find merit to its exceptions to the Administrative Law Judge's decision and to dismiss the Complaint in its entirety.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the Respondent's Reply Brief in Support of Its Exceptions to the Administrative Law Judge's Decision have been served upon the following this 24th day of September 2012 by e-mail:

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