

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16**

MASTEC SERVICES COMPANY, INC.

Respondent,

and

NOBLE HOBBS, an Individual,

Charging Party.

Case No. 16-CA-086102

**RESPONDENT MASTEC SERVICES COMPANY, INC.'S REPLY BRIEF IN
SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S
DECISION AND IN RESPONSE TO THE ACTING GENERAL COUNSEL'S
ANSWERING BRIEF**

Respectfully submitted,

LITTLER MENDELSON, P.C.

By: /s/ Stefan Marculewicz
Stefan J. Marculewicz
Steven E. Kaplan
1150 17th Street, N.W., Suite 900
Washington, D.C. 20036
202.842.3400 (telephone)
202.842.0011 (facsimile)
smarculewicz@littler.com
skaplan@littler.com

Date: August 23, 2013

Counsel for MasTec Services Company, Inc.

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I. INTRODUCTION

MasTec Services Company, Inc. (“MasTec,” “Company,” or “Employer”) submits this Reply to the Acting General Counsel’s (“AGC”) response to the Employer’s Exceptions to the Decision of the Administrative Law Judge (“ALJ”). As explained herein, the AGC has failed to sufficiently support the ALJ’s conclusion that MasTec’s bilateral, voluntary arbitration policy with an opt-out class action waiver violates Sections 7 and 8(a)(1) of the National Labor Relations Act (“NLRA” or “Act”).

First, the AGC’s attempt to characterize MasTec’s voluntary Dispute Resolution Policy (the “Arbitration Agreement” or the “Agreement”) as a mandatory condition of employment is unavailing because the AGC advanced this argument in its post-hearing brief, the ALJ did not make such a finding, and the AGC did not file any exceptions. Moreover, the Arbitration Agreement is unmistakably not a condition of employment, and, is, therefore, distinguishable from *D.R. Horton*, 357 NLRB No. 184 (January 3, 2012).

Second, the AGC’s support of the ALJ’s findings that: (a) some employees might be reluctant to opt-out for fear of retaliation; and (b) the Arbitration Agreement places employees at a “disadvantage” in their attempts to engage in concerted actions because of its non-disclosure provision is disingenuous because the AGC did not find those provisions unlawful in the Complaint or argue in its brief to the ALJ that they violated the Act. In addition, the ALJ’s findings are erroneous, as MasTec explained in its Brief in Support of its Exceptions.

Third, recent U.S. Supreme Court decisions make clear that when legislation contains no express provision evidencing Congress’s intent to restrict the enforcement of arbitration agreements as to that statute or where the statute is silent on whether claims can proceed in an arbitrable forum, the Federal Arbitration Act (“FAA”) requires the arbitration agreement be enforced according to its terms. The AGC’s attempt to distinguish those cases is futile because

the NLRA does not provide an exception for arbitral class waivers voluntarily assented to by employees. Indeed, relying on recent Supreme Court decisions, State and federal courts across the United States, including *three* U.S. Circuit Courts of Appeals, have rejected *D.R. Horton* in light of its irresolvable conflict with the FAA.

Fourth, the fact that the Board may currently have a quorum does not moot *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), because the Board, through the Administrative Law Judge, did not have the authority to act before it had a quorum. Fifth, even if the Board concludes the Agreement violated the Act in some manner, the Board cannot order the improper retroactive remedy requested by the AGC.

II. MASTEC'S EXCEPTIONS SHOULD BE SUSTAINED

A. MasTec's Agreement Is Not A Mandatory Condition Of Employment.

MasTec's Agreement is lawful under the Act, even assuming *D.R. Horton* was correctly decided (which it was not) because, unlike the agreement at issue in *D.R. Horton*, the Company's Agreement is voluntary and bilateral: each employee has the right to consider the Agreement and determine whether to submit all potential employment disputes to non-class arbitration. This distinguishing factor requires a different outcome than *D.R. Horton*.

Notably, the ALJ did not explicitly find employees involuntarily entered into the Arbitration Agreement, despite the AGC's numerous arguments to the contrary. Because the AGC has not filed exceptions to the AGC's findings, the Board should disregard these arguments. *See* Section 102.46(b)(2) ("Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived.").

When there is a mandatory class action waiver, as there was in *D.R. Horton*, any employee who rejects the agreement is deprived of the right to continued employment. Here, employees are presented with the option to submit employment disputes to non-class arbitration,

and if an employee refuses, he or she can do so without fear of retaliation or the fear of losing a job. If, on the other hand, the employee decides not to opt out, that employee has made the voluntary decision to litigate all workplace grievances in accordance with the Agreement.

Nonetheless, the AGC relies substantially on the argument that a waiver of class or collective actions for future employment disputes constitutes a prospective waiver of Section 7 rights. In so doing, the AGC misstates the effect of the class action waiver contained in the Agreement. When an employee decides not to opt out and agrees to submit future employment disputes to non-class or non-collective litigation, he or she is not waiving the *right* to litigate workplace grievances on behalf of his or her fellow workers, but merely the *form* in which that litigation must proceed.

The cases cited by the AGC in support of the “prospective waiver” argument are inapposite. In *Ishikawa Gasket* and *Mandel Security*, for example, neither of which involves the interpretation of the FAA, the employer asked the employee to agree to a blanket prohibition of future protected, concerted activities, including, in the case of *Mandel Security*, the right to seek administrative remedies from the NLRB. The agreements in these cases were mandatory—the employee would not benefit from those agreements (severance and reinstatement, respectively), unless they agreed to the prohibition. In contrast, MasTec’s Agreement gives employees the *option* to leave open all avenues of litigation, or forego certain, specified forms, but does not broadly prohibit employees from addressing workplace grievances through concerted litigation.¹

B. The Agreement Does Not Prohibit Concerted Activity.

An employee who opts out of the Agreement is still able to pursue a class action lawsuit

¹ For the first time, the AGC asserts that the Agreement is not voluntary because it is contained in an employee handbook and purportedly conveys a message to employees that they are expected to sign the Agreement. AGC’s Brief, at pp. 11-12. This assertion contradicts the facts to which the AGC stipulated. The handbook acknowledgement form expressly states that an employee will *not* be retaliated against if he or she opts-out of the Arbitration Agreement.

even if every other employee has agreed to arbitration with a class action waiver. Under all circumstances, the court administering the rules governing such class or collective actions determines whether or not the employee can bring a claim in that form. The Board cannot use its definition of concerted activity to outline the proper size and scope of a class under rules that are administered by the courts and outside of the Board's jurisdiction. The AGC concedes this fact in its response. AGC's Brief, at p. 23. Moreover, in situations where a class is deemed too small for the rules governing such proceedings, it can still proceed as a joint action. As such, contrary to the assertions of the AGC, the Agreement does not prohibit employees from engaging in concerted activity.

C. The Agreement Provides Sufficient Procedural Substitutes For Class and Collective Actions.

As stated above, it is not the form of the litigation that is protected, but rather the underlying "right" to access litigation for the benefit of one's self and others. This exact conduct could take the form of an individual case, multiple plaintiffs, a representative action, a collective action or a class action depending upon the forum, the underlying statutes, and the procedural rules. The Company's Agreement allows for concerted litigation through devices such as joinder and potential representative actions brought by administrative agencies such as the Department of Labor and the Equal Employment Opportunity Commission ("EEOC") on behalf of groups of employees. Even under *D.R. Horton*, the right to join claims or pursue administrative redress is sufficient to protect the right to concerted litigation by employees. *See Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013) (distinguishing an arbitration agreement from the agreement at issue in *D.R. Horton* because the agreement in *Owen* permitted employees to file agency claims, which could result in agencies bringing a claim on behalf of a group of employees).

As explained in the Company's Exceptions Brief, the availability of joinder allows

employees to work in concert with one another, thereby providing them a meaningful alternative to class or collective actions. The AGC argues that joinder is an insufficient substitute for class or collective actions because joinder is impracticable. However, the ability to bring or participate in a class or collective action is merely a procedural device, and not a substantive right.² See, e.g., *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980). The AGC's efforts to distinguish the procedural differences between class or collective actions and joinder simply re-enforces that class or collective actions are procedural options, and not substantive rights in and of themselves. In both class/collective actions and joint actions, employees may concertedly bring legal action against an employer based on common claims. The differences between the forums are merely those of a procedural nature.

Moreover, the Agreement plainly provides for civil discovery and motions, as provided by the state forum's civil procedure rules. Discovery affords employees the opportunity to obtain information from the employee regarding similar claims brought by other employees against the Company, when appropriate. Though the Agreement may restrict employees from disclosing the existence, contents, or results of any arbitration, the plain language of the Agreement in no way restricts employees from otherwise disclosing workplace complaints, disputes, or potential claims they may have against the Company. Employees are free to discuss their workplace concerns with one another and devise strategies regarding potential joint actions if employees desire to do so. Accordingly, parties to the Agreement have the ability to utilize joinder rules to join claims where appropriate. Finally, there is no evidence in the record

² Because the opportunity to bring or participate in a class action is a procedural device, and not a substantive right, prohibiting employers from including a class action waiver in voluntary arbitration agreements would directly conflict with the Rules Enabling Act ("REA"). The AGC's contention that the REA is inapplicable in the present matter is based on the mistaken premise that the ability to bring class or collective actions is elevated to a substantive right under the Act. This is precisely what the REA prohibits. But for court procedures creating class and collective actions, Section 7 would not by itself create such a substantive right. Expanding court procedures into substantive rights imbued from other statutes is exactly what the REA precludes. 28 U.S.C. § 2072(b); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845-846 (1999).

suggesting that the language in the nondisclosure provision, as interpreted and enforced, has inhibited employees from bringing joint claims against Respondent. Accordingly, the AGC's contention that the nondisclosure provision, a provision that it did not consider unlawful in its Complaint or in its Brief to the ALJ, renders the prospect of joinder illusory is without merit.

In addition to permitting joinder, the Agreement allows for administrative charges with agencies such as the Department of Labor and the EEOC. By permitting administrative charges, the Agreement also preserves the ability of employees to act concertedly and bring claims on behalf of themselves and their co-workers. For example, if a charge filed with the EEOC alleges that a "pattern or practice" of discrimination against a group of similarly situated employees, the EEOC can bring representative claims on behalf of those employees pursuant to 42 U.S.C. § 2000e-6. *See Owen*, 702 F.3d 1050; *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002) (holding that a private arbitration agreement between an individual and that individual's employer does not prevent the EEOC from filing a court action in its own name and recovering monetary damages). As such, the Agreement preserves employees' ability to engage in concerted litigation where appropriate.

D. Recent Supreme Court Rulings

The AGC attempts to distinguish *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740 (2011), *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012), and *American Express Co. v. Italian Colors Restaurant*, No. 12-133, __ U.S. __ (June 20, 2013) because they do not specifically address the NLRA. The AGC's arguments overlook the Board's obligation to defer to the decisions of the Supreme Court and heed to clear congressional intent. In these cases, the Supreme Court has repeatedly emphasized that questions of arbitrability under the FAA must be addressed with a healthy regard for federal policy favoring arbitration, and that the FAA establishes as a matter of federal law that any doubts concerning the scope of arbitrable issues

must be resolved in favor of arbitration.

Here, there is no “contrary Congressional command” in Section 7 of the NLRA – or anywhere else in the Act – that would permit the Board to abrogate otherwise lawful, voluntary, and enforceable arbitration agreements that contain class or collective action waivers. Moreover, there is nothing in the NLRA’s legislative history to support the proposition that Section 7 creates a substantive right for employees to bring or participate in class or collective actions. Indeed, relying on recent Supreme Court precedent, the U.S. Court of Appeals for the Second Circuit, Eighth Circuit, and Ninth Circuit have held that similar class action waivers *do not* violate the NLRA. *See, Sutherland v Ernst & Young, LLP*, 2013 U.S. App. LEXIS 16513 (2nd Cir. Aug. 9, 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. Jan. 3, 2013); *Richards v. Ernst & Young, LLP*, 2013 U.S. App. LEXIS 17488 (9th Cir. Aug. 21, 2013). While these cases may not be “controlling” on the Board in this case, they provide clear direction with respect to where the NLRA must defer to the provisions of the FAA.

E. The Board Did Not Have Authority To Assign the Case To An ALJ Under *Noel Canning*.

Section 10(b) and (c) of the NLRA confer upon the Board the authority to issue unfair labor practice complaints, to conduct hearings on those complaints, and to issue decisions finding that one or more unfair labor practices have been committed or dismissing the allegations in the complaint. Section 10(b) and (c) also permit the Board to designate one or more agents to issue unfair labor practice complaints, to conduct hearings on those complaints and to make recommended decisions on the allegations of the complaints. However, the Board has had no authority to take any action since at least January 4, 2012. It therefore follows that the Board’s agents, including Administrative Law Judges, have had no authority to take any actions since that time inasmuch as an agent can only exercise authority that resides in the agent’s master. *See*

National Labor Relations Board Organization and Functions Manual, Sec. 201.1 (“The Board’s staff consists of . . . the Office of the Executive Secretary, the Office of the Solicitor, and *the Division of Judges.*”) (emphasis added). Accordingly, the fact that the Board may now have a quorum does not moot MasTec’s *Noel Canning* argument.

F. The ALJ’s Retroactive Remedy In This Case Is Improper.

The AGC is requesting that MasTec move to vacate earlier order court orders compelling individual arbitration, even in cases which have since been dismissed. This is a retroactive remedy and there is no record evidence that such earlier orders even exist. Moreover, retroactive application of any remedy is improper where the basis for claiming such a remedy is the product of a major change in NLRB policy as is the case with *D.R. Horton*.

As explained by the Supreme Court in its recent decision rejecting retroactive application of an agency remedy, “where . . . an agency’s announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute.” *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012). The Court further noted, “while it may be ‘possible for an entire industry to be in violation of the [law] for a long time without the [governmental enforcement agency] noticing,’ the ‘more plausible hypothesis’ is that the [agency] did not think the industry’s practice was unlawful.” *Id.*, quoting *Yi v. Sterling Collision Centers, Inc.*, 480 F.3d 505, 510-511 (7th Cir. 2007). Here, the Board did not take its current position with respect to class action waivers until January of 2012. *See Alan Ritchey*, 359 NLRB No. 40, slip op. at p. 11 (2012) (retroactive application of NLRB’s change in the law did not warrant retroactive application because it would not have been unreasonable for the charged party to believe its conduct was permissible under existing Board precedent).

Notwithstanding this well-established law, AGC, relying on *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 950 (1942), argues that prohibiting employees’ collective legal action has long

been protected by the Act. However, the *Spandsco* case suggests only that the right of employees to access a legal forum to redress workplace grievances is protected, not that any specific manner of litigation is protected. *Id.* at 950 (employer violated Act by terminating three employees for instituting an overtime lawsuit and participating in union organizational activities). Moreover, if it is true that right to engage in collective litigation has been long-protected under the Act, then many General Counsels and Board members passed through the halls of Fourteenth Street are unaware of it. As mentioned in its Brief in Support of its Exceptions, the AGC issued a memorandum stating that employers may require individual employees to sign a waiver of their right to file a class or collective claim as part of an agreement to arbitrate all claims without per se violating the Act. (General Counsel Memorandum GC 10-06.) As such, prior to January 3, 2012, the date the Board issued *D.R. Horton*, there was no authority holding that class action waivers violated the Act *per se*. Moreover, there is still no NLRB precedent suggesting *voluntary, bilateral* arbitration agreements in which an employer and employee agree to resolve all claims through individual arbitration are unlawful, as the Board expressly declined to reach that question in *D.R. Horton*, 357 NLRB No. 184, slip op. at p. 13, n. 28.

G. The AGC's Procedural Objections to MasTec's Exceptions are Unfounded

At the outset of his brief, the AGC makes the assertion, albeit a perfunctory one, that somehow MasTec's Exceptions and supporting brief should be disregarded by the Board because the latter fails to conform to Section 102.46(c)(2) of the Board's Rules. It is unclear why the AGC would make this argument given that MasTec in fact made specific reference to the exceptions in its brief by either quoting or paraphrasing them as part of its statement of the questions involved and to be argued. Moreover, the AGC's fully-developed brief, which MasTec agreed to allow him more time to write, represents a comprehensive response to the

exceptions raised by the company which he now claims were not specifically referenced in the brief.

To the extent the AGC contends Section 102.46(c)(2) of the Board's Rules requires a brief to identify *by number* the exception to which each section of a brief refers, he fails to support it with language in the rule, or a cite to any case that would support it as a basis for the Board to disregard a party's arguments. In fact, there is ample precedent that the Board does not require the AGC's proffered reading of the rules and routinely rejects such arguments.³ MasTec's exceptions to the ALJ Decision, and the parties' respective arguments for them have been fully presented to the Board for a decision. As such, the AGC's procedural arguments should be rejected.

III. CONCLUSION

Respondent again respectfully requests that the Board reject the ALJ's Decision excepted to by the Employer, dismiss Hobbs' charge, and find that the Arbitration Agreement does not violate Sections 7 and 8(a)(1) of the National Labor Relations Act.

³ See *In re Sprain Brook Manor Nursing Home, LLC*, 2013 NLRB LEXIS 100 (2013) ("The Acting General Counsel's motion to strike the Respondent's exceptions and brief in support of exceptions for failure to comply with Sections 102.46(b)(1)(iv) and 102.46(c)(2) of the Board's Rules and Regulations is denied. Although Respondent's supporting brief may not be in precise compliance with the literal requirements of Section 102.46(c)(2) of the Board's Rules and Regulations, the supporting brief substantially complies with the relevant rules."); *Sea Mar Cmty. Health Ctrs.*, 345 NLRB 947, fn. 1 (2005) ("The General Counsel argues that the Respondent's Brief in Support of Exceptions fails to comply with Sec. 102.46(c)(2) of the Board's Rules and Regulations, because the brief does not contain '[a] specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate.' We find that the Respondent's exceptions and brief are in substantial compliance with the Board's Rule."); *The Buschman Company*, 334 NLRB No. 63, at n.1 (2001) ("The Charging Party argues that the Respondent's exceptions and brief should be disregarded for failing to comply with Sec. 102.46(c)(2) of the Board's Rules and Regulations, which provides that briefs shall specify the questions to be argued and the exceptions to which they relate. We find no merit in this contention. Although the Respondent's brief does not strictly comply with the Board's Rules, we do not find it so deficient as to warrant its rejection.")

Respectfully submitted,

LITTLER MENDELSON, P.C.

By: /s/ Stefan Marculewicz

Stefan J. Marculewicz

Steven E. Kaplan

1150 17th Street, N.W., Suite 900

Washington, D.C. 20036

202.842.3400 (telephone)

202.842.0011 (facsimile)

smarculewicz@littler.com

skaplan@littler.com

Counsel for MasTec Services Company, Inc.

Date: August 23, 2013

CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2013, a copy of Respondent MasTec Services Company, Inc.'s Reply Brief in Support of Exceptions to the Administrative Law Judge's Decision and Order was served on the following:

Via E-Filing	Executive Secretary National Labor Relations Board 1099 14th Street, N.W Washington, D.C. 20570
Via E-Filing:	Division of Judges National Labor Relations Board Division of Judges 410 West Peachtree Street, N.W. Suite 1708 Atlanta, GA 30308-3510
Via E-Filing:	Martha Kinard Regional Director, Region 16 National Labor Relations Board Room 8A24, Federal Office Bldg. 819 Taylor Street Fort Worth, TX 76102
Via E-Mail (and Certified Mail):	Trans Tran 3050 Post Oak Blvd. Suite 1720 Houston, TX 77056-6548
	<i>Charging Party's Counsel</i>
Via Certified Mail:	Noble Hobbs 4204 Golden Horn Lane Fort Worth, TX 76123-2568
	<i>Charging Party</i>

/s/ Steven Kaplan
Steven E. Kaplan