

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

DATE: January 22, 2013

TO: Karen P. Fernbach, Regional Director
Region 2

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

SUBJECT: JPMorgan Chase & Co. and 512-5012-0125
JPMorgan Chase Bank, N.A. 512-5012-9300
Case 02-CA-088471 512-5072-0100

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) by maintaining and enforcing a mandatory arbitration agreement that prohibits collective legal activity, and that is alleged to interfere with access to the Board.

We agree with the Region that the Employer violated Section 8(a)(1) of the Act by maintaining and enforcing its mandatory arbitration agreement, as it unlawfully precludes collective legal activity.¹ In *D.R. Horton, Inc.*, the Board held that a policy or agreement precluding employees from filing employment-related collective or class claims against their employer restricts employees' Section 7 right to engage in concerted action for mutual aid or protection, and therefore violates Section 8(a)(1) of the Act.²

In addition to the mere maintenance of the unlawful mandatory arbitration agreement, we further agree with the Region that it should also allege in any complaint, absent settlement, that the Employer's efforts to compel individual arbitration within the 10(b) period violate Section 8(a)(1) of the Act as a further interference with the employees' Section 7 right to engage in collective legal activity. In this regard, we note that the Employer's motion to compel arbitration is unlawful under Section 8(a)(1) of the Act, as it has an illegal objective as discussed in footnote 5 of *Bill Johnson's Restaurants v. NLRB*,³ and that, even if the trial court were to grant the Employer's motion, collateral estoppel principles would not preclude proceeding against the

¹ See, e.g., *Bloomingtons, Inc.*, Case 31-CA-071281, Advice Memorandum dated September 28, 2012, at 3-11; *The Neiman Marcus Group, Inc.*, Case 31-CA-074295, Advice Memorandum dated October 11, 2012, at 5-12.

² 357 NLRB No. 184, slip op. at 1-7 (2012).

³ 461 U.S. 731, 737 n.5 (1983).

Employer's motion.⁴ Even if an enforced Board order does not issue prior to a ruling on the Employer's motion to compel arbitration, the Board can still order the Employer to: (1) move the district court to vacate its order compelling arbitration pursuant to the unlawful agreement,⁵ if a motion to vacate can still be timely filed;⁶ and (2) reimburse the employees for any litigation expenses directly related to opposing the Employer's unlawful motion to compel individual arbitration (or any other legal action taken to enforce the agreement), in addition to appropriate cease-and-desist provisions and notice posting.⁷ Therefore, absent settlement, any complaint should also allege that the Employer unlawfully enforced its mandatory arbitration agreement.

Finally, we agree with the Region that the Employer's mandatory arbitration agreement does not unlawfully interfere with employees' access to the Board and its processes, given: (1) its limitation of the agreements coverage to "Covered Claims" in the first paragraph; (2) its definition of "Covered Claims" in the second paragraph, which excludes claims set forth in the third paragraph; and (3) its setting forth "any claim under the National Labor Relations Act" as an excluded claim in that third

⁴ See, e.g., *Bloomingtons, Inc.*, Case 31-CA-071281, Advice Memorandum dated September 28, 2012, at 6-11; *The Neiman Marcus Group, Inc.*, Case 31-CA-074295, Advice Memorandum dated October 11, 2012, at 6-12.

⁵ Such a motion should be made jointly with the affected employees, if they so request. In this regard, we note that the Board has in the past ordered a joint motion or petition where an employer has unlawfully used the legal system to interfere with an employee's Section 7 rights. See *Baptist Memorial Hospital*, 229 NLRB 45, 46 (1977) ("We shall also require Respondent to rectify the effects of its unlawful conduct by joining with [the employee] in petitioning the Memphis Municipal Court and Police Department to expunge any record of [the employee's] arrest and conviction").

⁶ We note that, depending on the jurisdiction, a motion for relief from judgment or order due to legal error, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, may be timely filed for a short period beyond the entry of final judgment. See, e.g., *Steinhoff v. Harris*, 698 F.2d 270, 275 (6th Cir. 1983) ("the vast majority of courts that have concluded that legal error comes within the meaning of Rule 60(b)(1)" and "the moving party must make his or her motion within the time limits for appeal"), and even beyond the expiration of the period for filing an appeal (see, e.g., *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 930-932 (5th Cir. 1976) (permitting a Rule 60(b) motion after the time limit for appeal had expired, but within one year of the judgment, where there had been a change in the underlying law)).

⁷ The Employer would be free to amend its motion to compel arbitration to seek lawful collective or class arbitration rather than a class or collective lawsuit, as long as employees were able to exercise their collective legal rights in some forum. This would be consistent with the General Counsel's long-standing position that employers may lawfully require employees to bring their claims in arbitration, rather than in court, as long as all of their substantive rights are preserved (including their statutory right to engage in collective legal activity). See, e.g., *O'Charley's Inc.*, Case 26-CA-19974, Advice Memorandum dated April 16, 2001, at 5-7 ("Section 7 does not provide a right to select any particular forum to concertedly engage in activities for mutual aid or protection").

paragraph. Taken together, these provisions make it clear that the arbitration agreement does not apply to NLRA claims and, in the absence of any contrary or ambiguous language, employees would not reasonably read the agreement to limit their filing unfair labor practice charges.⁸

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by maintaining and enforcing its mandatory arbitration agreement, as it unlawfully precludes collective legal activity.

/s/
B.J.K.

⁸ See, e.g., *The National Center for American Indian Economic Development*, Case 28-CA-080254, Advice Memorandum dated December 13, 2012, at 4-5.