

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.**

RALPHS GROCERY COMPANY

and

Case 21-CA-073942

TERRI L. BROWN, an Individual

**GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS**

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I. INTRODUCTION

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, General Counsel files this answering brief to Respondent's exceptions to the decision (ALJD) of Administrative Law Judge Eleanor Laws (ALJ), which issued on July 31, 2013.¹ The ALJ correctly found that Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA or Act) by maintaining and enforcing a mandatory and binding arbitration agreement which: 1) requires employees to resolve employment-related disputes exclusively through individual arbitration proceedings and relinquish their rights to resolve such disputes through collective or class action; 2) restricts employees from engaging in protected activity or leads them to conclude they are barred from filing charges with the National Labor Relations Board (Board); and, 3) requires individual employees to keep confidential the existence, content and outcome of all arbitration proceedings. (ALJD 13:25-42).

The instant case is controlled by the Board's decision in *D. R. Horton*, 357 NLRB No. 184 (2012). As such, the well thought-out ALJD is based on current Board law and must be

¹ The ALJ granted the parties' joint motion to submit the instant case entirely on their stipulation of facts. In this answering brief, the stipulation of facts will be referred to as Stip. and any reference to an exhibit attached to the Stip. will be referred to as Exhibit followed by its number.

affirmed in its entirety. Respondent's exceptions to the ALJD and arguments in support thereof raise no points which were not previously considered and rejected by the ALJ.

II. FACTS

A. Respondent's Arbitration Policy

The facts of the instant case are not at issue. Specifically, Respondent admits to its maintenance and enforcement efforts of its Mediation & Binding Arbitration Policy (MBAP). Moreover, the MBAP is a condition of employment. The MBAP language that the ALJ found unlawful states in pertinent part:

This Arbitration Policy is the exclusive mechanism for formal resolution of disputes and awards of relief that otherwise would be available to Employees or the Company in a court of law or equity or in an administrative agency.

* * * * *

For Employees whose terms and conditions of employment are determined by a CBA, this Arbitration Policy does not apply to claims or disputes arising out of the terms and conditions of the CBA (referred to in this Arbitration Policy as "Excluded Disputes"), but does apply to and require final and binding arbitration of such Employees' (and all other Employees') individual statutory claims or disputes. Except for Excluded Disputes, this Arbitration Policy applies to any and all other employment-related disputes that exist or arise between Employees and Ralphs (or any of them) **that would constitute cognizable claims or causes of action in a federal, state or local court or agency under applicable federal, state or local laws** (referred to in this Arbitration Policy as "Covered Disputes") Covered Disputes are employment-related disputes that are not Excluded Disputes which involve the interpretation or application of this Arbitration Policy, the employer/employee relationship, an Employee's actual or alleged employment with Ralphs (or any of them), the termination of such employment, or applying for or seeking such employment. (Emphasis in original).

* * * * *

If any Employee or Ralphs (or any of them) wishes to initiate or participate in formal proceedings to resolve any Covered Disputes, the Employee or Ralphs (or any of them) must submit those Covered Disputes to final and binding arbitration as described in this Arbitration Policy.

* * * * *

The Company and Employees waive any right that they have or may have to a judge or jury trial of any Covered Disputes, to have any formal dispute resolution proceedings concerning any Covered Disputes take place in a local, state or federal court or agency, and to have any formal dispute resolution proceedings concerning any Covered Disputes be heard or presided over by an active local, state or federal judge, judicial officer or

administrative officer. This Arbitration Policy requires that all Covered Disputes must be heard, determined and resolved only by a Qualified Arbitrator (as defined herein) through final and binding arbitration.

Arbitration as described in this Arbitration Policy is the sole and exclusive remedy for any and all Covered Disputes that exist or may arise. This Arbitration Policy requires, to the fullest extent permitted by law, the resolution of all Covered Disputes concerning the interpretation or application of this Arbitration Policy and/or any of the terms, conditions or benefits of employment (other than Excluded Disputes) by final and binding arbitration.

* * * * *

Covered Disputes subject to this Arbitration Policy include all Employees' individual statutory claims or disputes under federal, state and local laws including, for example and without limitation, any claims or disputes arising under the . . . the United States Code, as enacted and amended. Both Ralphs and Employees must submit any and all such Covered Disputes to final and binding arbitration before a neutral Qualified Arbitrator (as defined herein) under and pursuant to this Arbitration Policy. (Emphasis supplied).

This Arbitration Policy does not prevent or excuse any Employee or Ralphs (or any of them) from satisfying any applicable statutory conditions precedent or jurisdictional prerequisites to pursuing their Covered Disputes by, for example, filing administrative charges with or obtaining right to sue notices or letters from federal, state, or local agencies. However, final and binding arbitration as described in this Arbitration Policy is the sole and exclusive remedy or formal method of resolving the Covered Disputes. If there is no applicable statutory condition precedent or jurisdictional prerequisite to pursuing a Covered Dispute, all parties must proceed directly to arbitration under and pursuant to this Arbitration Policy. Notwithstanding any other provision of this Arbitration Policy, all Employees retain the right under the National Labor Relations Act ("NLRA") to file charges with the National Labor Relations Board ("NLRB"), and to file charges with the United States Equal Employment Opportunity Commission ("EEOC") under federal equal employment opportunity laws within the EEOC's administrative jurisdiction.

there is no right or authority for any Covered Disputes to be heard or arbitrated on a class action basis, as a private attorney general, or on bases involving claims or disputes brought in a representative capacity on behalf of the general public., of other Ralphs employees (or any of them), or of other persons alleged to be similarly situated.

* * * * *

there are no judge or jury trials and there are no class actions or Representative Actions permitted under this Arbitration Policy (Emphasis in original). (Stip. Exhibit 5).

* * * * *

(1) The MBAP's confidentiality provision found unlawful by the ALJ states in pertinent part:

Except and only to the extent it may be required by applicable law, the parties and the Qualified Arbitrator shall maintain the existence, content and outcome of any arbitration proceedings held pursuant to this Arbitration Policy in the strictest confidence and shall not disclose the same without the prior written consent of all the parties. (Stip. Exhibit 5).

B. Respondent's Enforcement of the MBAP

Charging Party-Terri Brown (Brown) was employed by Respondent from 2005 through 2009 as a security guard at its warehouse in Compton, California. As part of Brown's initial application for employment, she was required to agree to the MBAP. In about October 2009, after her separation from employment with Respondent, Brown filed a wage and hour class action lawsuit against Respondent on behalf of herself and other similarly situated members of the general public. In November 2009, Brown amended the civil complaint to assert a representative action under California's Private Attorney General Act (PAGA).² (Stip. Exhibit 6).

In response to Brown's wage and hour class action lawsuit, on about August 7, 2011, Respondent filed a motion to compel arbitration and dismiss or stay proceedings (Motion to Compel). Respondent based its Motion to Compel on Brown's signed, pre-employment, acknowledgement of the MBAP. (Stip. Exhibit 7). Respondent's Motion to Compel was litigated, and appealed in the state courts of California, until it was remanded to the Superior Court or trial court.³

On about May 2, 2012, after Respondent's Motion to Compel individual arbitration was granted; the trial court stayed Brown's PAGA claim based on Respondent's alleged failure to provide her and other employees off-duty meal and rest periods to which they

² PAGA gives a private citizen the right to pursue fines that would normally only be available to the state government. As a private attorney general, an aggrieved employee is allowed to seek civil penalties not only for violations that he personally suffered but also for violations of "other current or former employees." Cal. Lab. Code § 2699(a). PAGA provides a consequential mechanism for deterrent and enforcement of wage and hour claims.

³ Respondent's petition for certiorari was denied by the Supreme Court of the United States.

were entitled under California law. The Superior Court retained jurisdiction over the PAGA portion of the civil litigation, pending completion of the arbitration of Brown's other wage and hour claims; whereupon, on about October 16, 2012, Brown filed a Second Amended Complaint in Superior Court whereby she limited her claims to those available under PAGA. (Stip. Exhibit 17).

On about January 8, 2013, Respondent renewed its Motion to Compel by filing with the Superior Court a Notice of Renewed Petition and Renewed Petition to Compel Arbitration and Motion to Dismiss or Stay Proceeding, and a Memorandum of Points and Authorities in Support of its Renewed Petition to Compel Arbitration and Motion to Dismiss or Stay Proceedings. (Stip. Exhibits 18 and 19). And, on about January 8, 2013, the Los Angeles County Superior Court issued an Order denying Respondent's Renewed Motion to Compel. (Stip. Exhibit 20).

On about March 5, 2013, Respondent appealed the Order of the Superior Court Denying its Renewed Motion to Compel to the California Court of Appeal. (Stip. Exhibit 21). And, on about April 29, 2013, Brown filed a Motion to Dismiss the Respondent's Appeal to the California Court of Appeal. (Stip. Exhibit 22).

In February 2012, Brown filed the charge in the instant case, alleging that Respondent violated Section 8(a)(1) of the NLRA by maintaining an arbitration policy prohibiting employees from filing employment-related collective, representative, or class claims.⁴ (Stip Exhibit 1). Thereafter, in April 2012, Brown amended her charge to allege that Respondent violated Section 8(a)(1) by: 1) maintaining the MBAP; 2) seeking to enforce the MBAP against employees through legal action such as its Motions to Compel; and 3) restricting

⁴ There is no issue of bar under Section 10(b) because Respondent's actions are of a continuing nature. More important, in the Stip at ¶7, the parties agreed that: "[a]t all material times, and specifically within the six-month period before Brown filed her original charge, as part of the application for employment process, Respondent required employment applicants to execute a document acknowledging and agreeing to be bound by the provisions of the MBAP."

employee communications regarding their terms and conditions of employment unlawfully under the terms of the MBAP. (Stip. Exhibit 2).

III. ARGUMENT

A. Respondent's Noel Canning Argument Lacks Merit

In its exceptions, Respondent argues that this proceeding should be stayed pending the United States Supreme Court's decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 81 U.S.L.W. 3629 (U.S. June 24, 2013) (No. 12-1281) and that *Noel Canning* invalidated the Board's decision in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), *pending review*, No. 12-60031 (5th Cir. argued Feb. 5, 2013).

Noel Canning held that former Members Griffin and Block, then-current Board members serving with Chairman Pearce, were not validly appointed because they were appointed during an intrasession recess; however, the United States Supreme Court has granted the Board's petition for certiorari of *Noel Canning*. (Scheduled for oral argument on Jan. 13, 2014). Further, in *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at 1, n.1 (Mar. 13, 2013), the Board noted that in *Noel Canning*, the D.C. Circuit Court recognized that its conclusions concerning the presidential appointments at issue had been rejected by the other circuit courts that had addressed the issue. *Compare Noel Canning*, 705 F.3d at 505, 509-10 with *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). Thus, in *Belgrove*, the Board concluded that because the "question [of the validity of the recess appointments] remains in litigation," until such time as it is ultimately resolved, "the Board is charged to fulfill its responsibilities under the Act."⁵ *Belgrove*, 359 NLRB No. 77, slip

⁵ The Third Circuit's decision in *NLRB v. New Vista Nursing & Rehabilitation*, 719 F.3d 203 (3d Cir. 2013), *petition for reh'g filed*, Nos. 11-3440, 12-1027, 12-1936 (July 1, 2013) and the Fourth Circuit's decision in *NLRB v. Enterprise Leasing Co. Southeast, LLC*, 722 F.3d 609 (4th Cir. 2013), should not change this result.

op. at 1, n.1. Moreover, any subsequent Board decisions in this case will be made by a Board consisting of five fully confirmed members. *See* 159 Cong. Rec. S6049-S6051 (daily ed. July 30, 2013). All five members were sworn in as of August 12, 2013. *See* <http://www.nlr.gov/news-outreach/news-releases/national-labor-relations-board-has-five-senate-confirmed-members> (last visited Sept. 12, 2013). Accordingly, Judge Laws' denial of Respondent's request for a stay was appropriate.

Respondent further argues that the Board's decision in *D.R. Horton* is invalid because former Member Becker, who was appointed during an intrasession recess, participated in that decision. *D.R. Horton* is pending before the Fifth Circuit on a petition for review and is not a basis to disrupt these proceedings at this time. Inasmuch as *D.R. Horton* has not been overturned by the United States Supreme Court, the General Counsel may argue to the newly confirmed Board that, just as in *D.R. Horton*, Respondent's MBAP requires employees to forgo the right to engage in concerted activity. Accordingly, Respondent's *Noel Canning*-arguments as well as its argument challenging the legitimacy of Mr. Becker's participation in the *D.R. Horton* decision are without merit and should be rejected.

B. MBAP Denies Employees' Right to Act Collectively

In *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), 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 rights to engage in concerted action for mutual aid or protection, and therefore violates Section 8(a)(1) of the Act. The Board applied the test announced in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004), and found that an agreement requiring employees to waive their right to pursue collectively employment-related claims in all forums violates Section 8(a)(1) "because it expressly restricts Section 7 activity or, alternatively, because employees would reasonably read it as restricting

such activity.” *D.R. Horton*, 357 NLRB No. 184, slip op. at 7. Thus, in *D.R. Horton*, the Board definitively held that an employer violates Section 8(a)(1) by requiring employees “as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum.” *Id.*, slip op. at 1.

As found by the ALJ, the MBAP precludes employees’ employment-related collective or class claims against the Respondent and deprives employees of their Section 7 right to engage in collective action; and, thus is unlawful under *D.R. Horton*. Specifically, the MBAP repeatedly requires employees to bring any claim covered by the policy to arbitration and expressly states in Section 8 that “there is no right or authority for any Covered Disputes to be heard or arbitrated on a class action basis, as a private attorney general, or on bases involving claims or disputes brought in a representative capacity on behalf of the general public, of other Ralphs employees (or any of them), or of other persons alleged to be similarly situated,” and that “there are no class actions or Representative Actions permitted under this Arbitration Policy (Emphasis in original).

C. **NLRA Not Inconsistent with FAA**

Contrary to Respondent’s exceptions, the instant case does not present a conflict between the Federal Arbitration Act (FAA) and the NLRA for as the Board explained in *D.R. Horton*, “holding that an employer violates the NLRA by requiring employees, as a condition of employment, to waive their right to pursue collective legal redress in both judicial and arbitral forums accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible.” 357 NLRB No. 184, slip op. at 12. The Board’s explanation rings true because Section 2 of the FAA “provides that arbitration agreements may be invalidated in whole or in part” for the same reasons any contract may be invalidated, including if they are unlawful or

contrary to public policy. *Id.*, slip op. at 11. Inasmuch as the MBAP is unlawful under the NLRA and against public policy, it should not be enforceable under the FAA.⁶

In *D.R. Horton*, the Board also emphasized that finding an arbitration policy such as the MBAP unlawful does not conflict with the FAA because the “intent of the FAA was to leave substantive rights undisturbed.” *Id.* Thus, the MBAP is unlawful because it prohibits employees from exercising their Section 7 right to engage in concerted activity, a substantive right, which as the Supreme Court held in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567 (1978), includes employees “seek[ing] to improve working conditions through resort to administrative and judicial forums.”⁷

1. ALJD Accommodates the NLRA and FAA

As a condition precedent to their employment, Respondent’s would-be employees are required to execute the MBAP; thereby contractually waiving all rights to participate in class action lawsuits pertaining to their jobs. Clearly, the MBAP is not negotiable. Rather, the employee, who wants to work, must sign it “as is” or forego employment opportunities with Respondent. With minor exception, individual workplace contracts historically have been found inherently coercive. First, because the boss has the power of the paycheck and, second because such agreements diminish employees’ rights under the NLRA. See, e.g., *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337, 339 (1944). .

Here, just as in *D.R. Horton*, the MBAP requires Respondent’s employees to waive their right to engage in concerted activity for mutual aid or protection in that it prohibits all class or collective action in any forum. The FAA makes clear that an arbitration agreement

⁶ In its Brief on Exceptions at p. 17, Respondent shamelessly asserts that “no public policy argument can overcome the application of the FAA.” Inasmuch as the Supreme Court has not ruled on the interplay of the NLRA and the FAA, Respondent’s bald assertion is without support.

⁷ In its Brief on Exceptions at pp. 19, Respondent relies on *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) for its position that the abrogation of a substantive right does not override the FAA. As will be discussed below, Respondent’s reliance upon *American Express* is misplaced and not determinative in the instant case.

may be set aside on “grounds that exist at law or in equity for the revocation of any contract.” 9 USC §2. Inasmuch as the MBAP requires employees, as a condition of employment, to waive rights guaranteed under the NLRA, Respondent has drafted an agreement that may be revoked and should not be enforced under the FAA.

2. Supreme Court Decisions Upholding Individual Arbitration Not Dispositive

Respondent relies on *CompuCredit v. Greenwood*, 132 S. Ct. 655 (2011) and *American Express Co. v. Italian Colors Restaurant* 133 S. Ct. 2304 (2013), both of which issued after *D.R. Horton*, to support its argument that the MBAP is enforceable under the FAA, regardless of its apparent conflict with the NLRA. Moreover, Respondent cites *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011) to show the Supreme Court’s overwhelming approval of individual arbitration agreements, according to their terms.

Such prior pronouncements of the Supreme Court are not necessarily indicators of a slam-dunk for Respondent—particularly where two of the cases involved credit card privileges and the third a state statute. First, neither *CompuCredit* nor *AT&T* addressed substantive rights conferred on employees by an act of Congress. *AT&T* involved a law enacted by the State of California, which voided waivers of class arbitration of common-law claims under consumer contracts. The Supreme Court found that the state of California’s law was preempted by the FAA because it addressed only agreements to arbitrate, as opposed to contracts generally. 132 S. Ct. at 1745, 1746. Second, *CompuCredit* implicated the Credit Repair Organization Act, which is a piece of federal legislation addressing credit card abuse. In *CompuCredit* the issue was whether the Credit Repair Organization Act’s civil liability and non-waiver provisions together constituted a “congressional command” sufficient to override the FAA’s mandate that courts enforce arbitration agreements. 132 S. Ct. at 669. The Supreme Court held that because Congress, in drafting the Credit Repair Organization Act did not prohibit or restrict use of

arbitration, the FAA required judicial enforcement of the terms of the arbitration agreement at issue. *Id.* at 673. Clearly neither case addresses the right to engage in collective action in the workplace. Further, neither case involves legislation that clearly sets forth collective or group rights before the commencement of legal proceedings as is the case with the NLRA.⁸ Therefore, they are hardly dispositive of whether employees can be required to waive substantive Section 7 rights guaranteed by pantheonic federal enactment.

Respondent further argues the Supreme Court’s decision in that *American Express Co. v. Italian Colors Restaurant* 133 S. Ct. 2304 (2013) is controlling here. There, American Express’s arbitration agreement with signatory restaurateurs contained a class arbitration waiver. The restaurateurs brought an antitrust class action against American Express implicating the Sherman and Clayton Acts, which the Court considered as well as Federal Rule of Civil Procedure 23, and found that there was no entitlement to class proceedings.⁹ But the Court’s holding was based in sizable part on its rejection of the cognizable concept of effective vindication, i.e. litigation costs as opposed to substantive rights that guarantee collective action.¹⁰ As in the other Supreme Court FAA-decisions, upon which Respondent relies, *American Express*

⁸ As Justices Sotomayor and Kagan point out in their concurrence in *CompuCredit*, Congress need not explicitly state within a statute that arbitration of statutory claims are disallowed in order to find that a statute trumps the FAA. “We have never said as much and on numerous occasions have held that proof of Congress’ intent may also be discovered in the history or purpose of the statute in question. . . (‘If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an ‘inherent conflict’ between arbitration and the [statute’s] underlying purposes’); *Shearson/American Express v. McMahon*, 482 U.S. 220, 227 (1987) (‘if Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent “will be deducible from [the statute’s] text or legislative history,’ or from an inherent conflict between arbitration and the statute’s underlying purposes.” (quoting *Mitsubishi Motor Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 628 (1985). (Emphasis supplied). *CompuCredit* either explicitly or implicitly purported to narrow the basis on which statutory conflict would be assessed. In the instant case, Respondent’s mandatory class action waiver creates an inherent conflict between arbitration and Section 7 of the Act—not because the MBAP compels arbitration, but because it compels *individual* arbitration and prohibits collective action.

⁹ Because the ALJD is based on employees’ Section 7 right to engage in concerted activity, and not on Federal Rule of Civil Procedure 23, it is not affected by the Supreme Court’s holding that Rule 23 does not create an entitlement to class action procedures or undermine the effectiveness of individual litigation.

¹⁰ The ALJD does not implicate the effective vindication exception to the FAA and the ALJ’s findings were not based upon whether employees can effectively vindicate their underlying federal statutory claim. Accordingly, the Supreme Court’s decision in *American Express* which narrows the effective vindication exception to invalidate only agreements that curtail a party’s right to pursue a federal remedy is inapposite.

did not address employees' collective rights under the NLRA. Thus, *American Express* did not resolve, the key issues presented here—again whether the MBAP is invalid because it expressly restricts employees' substantive rights under the NLRA to pursue work related claims concertedly in any forum. Here, as in *D.R. Horton*, the ALJ's rationale for her decision arises from the MBAP's complete derogation of employees' rights to engage in collective action that the NLRA was enacted to protect. Thus, contrary to *American Express*, the question presented here is not whether a statute's explicit cause of action implicitly entails a subsidiary entitlement to effective vindication through particular forums or procedures.

Nonetheless, Respondent argues that under the recent Supreme Court cases discussed above, the MBAP class waiver must be enforced pursuant to its terms absent explicit contrary congressional command. However, *CompuCredit* and its antecedents apply the "contrary congressional command" test not to the class versus individual issue, but to the separate question of whether the parties have agreed to forego arbitration entirely. See, e.g., *Shearson/American Express, Inc.*, 482 U.S. at 226. Respondent's assertion that there is no "contrary congressional command" in the NLRA to establish that it trumps the FAA and undercuts the benefits of individual arbitration is misplaced. As the Board made clear in *D.R. Horton*, the right of employees to engage in collective arbitration and/or litigation has been a core precept of the Act since its enactment. It is only in recent years, since employers have sought to import judicial suspicion of class based commercial arbitration into the workplace arena that this core principle of labor law has been called into question.

Importantly, the GC does not take the position here that employees cannot be required to arbitrate their work-related disputes. Indeed, the Board has canons of precedent and policy favoring arbitration of labor disputes as an integral aspect of the statutory scheme. The MBAP, however, is cut from different cloth entirely in that it prohibits workers from exercising

their statutory rights to engage in collective legal action to protest their terms of employment. The illegality of the MBAP thus rests not on the requirement that claims be arbitrated, but rather that such claims must be arbitrated individually. When such a requirement is insisted upon, as a condition of employment, it contravenes the essential rights granted by Section 7.

Accordingly, the ALJ was absolutely correct with she concluded that *AT&T Mobility*, *CompuCredit* and *American Express v. Italian Colors* are distinguishable from the instant case because of the substantive rights granted in Section 7.¹¹

D. MBAP Overbroad and Precludes Filing Charges or Protected Conduct

Employees have an unqualified Section 7 right to file and pursue charges before the Board. *See Utility Vault Co.*, 345 NLRB 79, 82 (2005); *McKeeson Drug Co.*, 337 NLRB 935, 938 (2002). Moreover, in accord with its longstanding and court-approved test for evaluating work rules imposed as a condition of employment, the Board will invalidate a rule when "employees would reasonably construe the language to prohibit Section 7 activity." *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004); *see also Bill's Electric, Inc.*, 350 NLRB 292, 296 (2007) (arbitration policy that would reasonably be read by affected applicants and employees to bar access to Board processes violated Section 8(a)(1)); *U-Haul Co. of California*, 347 NLRB 375, 377-78 (2006) (same), enforced, 255 F. Appx. 527 (D.C. Cir. 2007). If the rule would reasonably tend to chill employees in the exercise of their Section 7 rights, it is suspect. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enforced 203 F.3d 52 (D.C. Cir.

¹¹ Respondent also cites various federal courts' decisions that have upheld class action waivers in mandatory arbitration agreements; however, the interpretation and enforcement of the NLRA is, in the first instance, accorded to the Board—not to the federal courts. As such, little weight should be accorded to *Richards v. Ernst & Young*, No. 11-17530, 2013 U.S. App. LEXIS 17488 (9th Cir. Aug. 21, 2013) or *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831 (N.D. Cal. 2012). Parenthetically, in *Morvant*, the district court judge conceded that "the NLRB's analysis in *D.R. Horton*, makes a somewhat compelling argument that agreements that require employees to submit to individual arbitration should not be enforced as against public policy. . . ." And, in *Richards*, the employee-plaintiff failed to raise unenforceability under the NLRA until after the parties had briefed, and the district court had denied, Ernst & Young's motion to compel.

1999). Further, the Board must give the rule under consideration a reasonable reading with any ambiguities to be construed against its promulgator. (ALJD 9:36-41) (citations omitted). In *D.R Horton*, the Board found that because employees would reasonably interpret the language of the operative arbitration agreement as impeding or preventing access to the Board, its maintenance was unlawful—a discreet violation of the NLRA, separate from the issue of the unlawful waiver of collective rights.

Here, the ALJ found that the MBAP *explicitly* restricts and has been applied to restrict rights protected by Section 7, i.e., wage and hour class action lawsuits. (ALJD 9:20). Alternatively, in accordance with the first prong of *Lutheran Heritage*, the ALJ found that a reasonable employee would read the MBAP, as a whole, as prohibiting her from filing charges with the Board, as well as restricting conduct protected by Section 7. (ALJD 9:25-45; 12:5-10).

In its exceptions, once again, Respondent attempts to distinguish the instant case from Board precedent and argues, as it did without success to the ALJ, that because buried deep inside the MBAP there's a "permission slip," whereby employees retain the right to file charges with the Board, the MBAP does not violate the Act. However, as the ALJ found, a reasonable employee would read the MBAP as a whole to prohibit the filing of charges with the Board. (ALJD 9:42-43). The ALJ's discussion in support of her finding is insightful: the opening provisions of the MBAP emphasize in pertinent part that covered disputes include "causes of action in a federal. . . agency under applicable federal. . . laws. . . ." The MBAP then describes covered disputes as those that are employment related and arise from the employer-employee relationship. This same section of the MBAP excludes disputes that arise out of a collective bargaining agreement, but makes no mention of protected-concerted activity. Since employers are not required to post employees' Section 7 rights at their workplaces, an employee who is not represented by a union or covered by a collective bargaining agreement would reasonably

conclude that her employment-related cause of action falls within the MBAP's covered disputes—even though it is in fact covered by the NLRA. In addition, the ALJ aptly recognized that non-NLRA employment-related claims may still implicate statutory considerations; for example, sexual harassment claims or wage and hour claims. Plus, the MBAP states that covered disputes include those arising under the United States Code which of course encompasses the NLRA. In what can only be described as a labyrinth of confusion, the ALJ cites the following language of the MBAP:

This Arbitration Policy does not prevent or excuse any Employee or Ralphs (or any of them) from satisfying any applicable statutory conditions precedent or jurisdictional prerequisites to pursuing their Covered Disputes by, for example, filing administrative charges with or obtaining right to sue notices or letters from federal, state, or local agencies. However, final and binding arbitration as described in this Arbitration Policy is the sole and exclusive remedy or formal method of resolving the Covered Disputes. If there is no applicable statutory condition precedent or jurisdictional prerequisite to pursuing a Covered Dispute, all parties must proceed directly to arbitration under and pursuant to this Arbitration Policy.

Only after this language does the MBAP arguably confer Respondent's employees the right to come to the NLRB or the EEOC. As such, the ALJ properly rejected the Respondent's reliance on such obfuscated and legalistic language, which purports to deliver essential rights atop a mound of confusion.¹² Employees would not understand that they have the right to file charges with the Board; much less that there would be any benefit to filing with the Board because the MBAP's language brings them back to mandatory individual arbitration. See *2 Sisters Food Group, Inc.*, 357NLRB No. 168 (2011).

¹² Only after repeated declarations expressing the requirement that all covered disputes be submitted to arbitration does the MBAP first state in Section 6 that “[n]otwithstanding any other provision of this Arbitration Policy, all Employees retain the right under the National Labor Relations Act (“NLRA”) to file charges with the National Labor Relations Board (‘NLRB’) . . .” Moreover, the actual meaning of even this statement is obfuscated, as it comes immediately language that refers employees “directly to Arbitration”.

Mandatory arbitration policies that interfere with employees' right to file an unfair labor practice charge are unlawful. *Dish Network Corp.*, 358 NLRB No. 29, slip op. at 7-8 (2012). For example, in *U-Haul Co. of California*, the Board held that an employer violated Section 8(a)(1) of the Act by maintaining a mandatory arbitration policy, which employees would reasonably construe to prohibit the filing of unfair labor practice charges, and which failed to clarify that the policy did not extend to the filing of unfair labor practice charges. *Id.* at 377-78.

Given the conflicting provisions of the MBAP, the policy is, at best, ambiguous and confusing as to whether employees are permitted to file charges with the Board; at worst, it was intended to prohibit employees' exercise of their Section 7 rights. Therefore, since Respondent's employees would reasonably read the policy to require arbitration of NLRA claims as "Covered Disputes," and thus to prohibit or impede them from utilizing the Board's processes, Respondent's maintenance of the MBAP violates Section 8(a)(1) on this basis independent of the *Horton*-violation. Accordingly, as the ALJ found, Respondent violated Section 8(a)(1) by maintaining the MBAP because it interferes with employees' access to the Board and its processes.

E. Confidentiality Requirement Unlawful

Contrary to Respondent's exceptions, the ALJ correctly found that Respondent further violated Section 8(a)(1) with regard to the MBAP because it contains an unlawful rule, which requires employees to maintain confidential the existence, content, and outcome of all arbitration proceedings. Under *Lutheran Heritage* such a rule is unlawful because it expressly restricts Section 7 activity and because an employee would reasonably read as restricting such activity. Moreover, it is well established that policies or rules precluding employees from discussing terms and conditions of employment without approval violate Section 8(a)(1). See,

e.g., *Double Eagle Hotel & Casino*, 341 NLRB 112, 114-115 (2004), *enfd.* 414 F.3d 1249 (10th Cir. 2005), *cert. denied* 546 U.S. 1170 (2006) (rule that expressly prohibited disclosure of wages and working conditions); *Bigg's Foods*, 347 NLRB 425, 425 n.4 (2006) (rule prohibiting employees from discussing their own or fellow employees' salaries with anyone outside the company); *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171-72 (1990) (rule prohibiting employees from discussing the condition of the employer's facilities or terms and conditions of employment with third parties violated Section 8(a)(1)).

Nonetheless, in its exceptions, Respondent argues, as it did unsuccessfully to the ALJ (ALJD 12:12-49; 13:1-25), that the MBAP's confidentiality provision is lawful because it contains the phrase "Except and only to the extent it may be required by law." Respondent's position should be rejected once again: the reasonable employee would have slim to no notion of the import of the "savings clause". Rather, the reasonable worker would be immediately restrained from engaging in Section 7 activity. Similarly, Respondent's contention that the MBAP's confidentiality requirement is lawful because it's triggered only once the parties have engaged in arbitration is both misplaced and disingenuous. So, too, Respondent's contention that affected employees will most likely have legal counsel to assist them at this point begs the violation entirely. Arbitrations of claims arising from employment relationships are substantially eviscerated if employees cannot discuss such claims with other employees throughout the process.

Here, Section 11 of the MBAP expressly requires employees to "maintain the existence, content and outcome of any arbitration proceedings held pursuant to this Arbitration Policy in the strictest confidence and [to] not disclose the same without the prior written consent of all the parties." Again employees are likely to construe such language as requiring them to "mug up" unless they receive a subpoena or some other official or legalistic instruction that

would allow them to discuss their terms and conditions of employment. (This conclusion would be particularly true if the employee prevailed in the arbitration and would not want to jeopardize her award.) In sum, as the ALJ rightly found, the Respondent violated Section (a)(1) by requiring employees to maintain the confidentiality of the existence, content and outcome of the arbitration proceedings.

IV. CONCLUSION

In light of the above and the record as a whole, General Counsel requests that the Board affirm the decision of the Administrative Law Judge and find that Respondent violated the National Labor Relations Act as alleged in the complaint and issue an appropriate remedial order.

Dated: 13 November 2013

Respectfully submitted,



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STATEMENT OF SERVICE

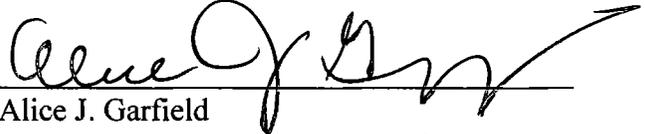
I hereby certify that a copy of General Counsel's Answering Brief to Respondent's Exceptions was submitted by E-filing to the NLRB on November 13, 2013. The following parties were served with a copy of the same document on November 13, 2013 by electronic mail.

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Dated at Los Angeles, California,
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