JD(NY)–15–14
Brooklyn, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

DOMINO'S PIZZA, LLC

and **Case No. 29-CA-103180**

FAST FOOD WORKERS COMMITTEE

Ashok C. Bokde and Jaime D. Cosloy, Esqs.
for the General Counsel
Michael D. Carrouth, Esq.
(Fisher and Phillips, LLP., Columbia, S.C.)
for the Respondent
Gwynne A. Wilcox and Michael R. Hickson, Esqs.
(Levy Ratner, P.C., New York, NY)
for the Charging Party

DECISION

Statement of the Case

Mindy E. Landow, Administrative Law Judge. The charge in this matter was filed by the Fast Food Workers Committee (the Charging Party) on April 19, 2013,[1] against Domino's Pizza, LLC (Respondent). A complaint issued on July 31. The sole remaining issue is whether Respondent's maintenance of an employment rule requiring employees to arbitrate their work-related complaints in an individual capacity, unless they opt out within 30 days of their employment, is unlawful under Section 8(a)(1) of the Act.[2] This case therefore raises issues contemplated but not fully addressed by the Board's decision in *D.R. Horton, Inc*., 357 NLRB No. 184 (2012), enf. granted in part and denied in part 737 F.3d 433 (5th Cir. 2013).

Respondent filed an answer denying the material allegations of the complaint and raising certain affirmative defenses, as discussed below. A hearing in this matter was held before me on December 19, in Brooklyn, New York and the parties have filed post hearing briefs. After considering the record and the briefs filed by the parties, I make the following

[1] All dates are in 2013 unless otherwise specified.

[2] On December 19, the Acting Regional Director of Region 29 approved an informal settlement agreement relating to other allegations of the complaint and severed the instant matter for my consideration.

Findings of Fact

Jurisdiction

At all material times Respondent, a domestic corporation with its principal office located at 30 Frank Lloyd Wright Drive, Ann Arbor Michigan, and places of business located throughout the United States, including 183 Graham Avenue, Brooklyn, New York (Respondent's Brooklyn facility), has been engaged in the business of selling food to the public. During the past year, a period which is representative of its annual operations generally, in the course and conduct of its business operations, Respondent has derived revenues in excess of $500,000 and has purchased and received at its Brooklyn facility goods and products valued in excess of $5,000 directly from suppliers located outside the State of New York. I find that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

I. Alleged Unfair Labor Practices

Facts

Beginning in November 2009, Domino's team members,[3] were asked to review and sign an arbitration agreement (the Agreement) the relevant portions of which are set forth below. According to Respondent, the Agreement has not been substantively modified or revised since that time. Prospective employees are advised that they must review and sign the Agreement "before commencing your employment." The initial section of the Agreement is entitled "Arbitration of Disputes" and provides as follows:

> Both Employee and Domino's Pizza LLC ("the Company") (the Company is defined herein as including its parents, subsidiaries, affiliates, predecessors, successors and assigns, their (including the Company's) respective owners, directors, officers, managers (both direct and indirect), employees, vendors, and agents), acknowledge that the Company has a system of alternative dispute resolution that includes the binding arbitration to resolve disputes that may arise out of the employment context. Because of the mutual benefits (such as reduced expense and increased efficiency) which private binding arbitration can provide both the Company and Employee, both the Company and Employee agree that any claim, dispute, and/or controversy that the Employee or the Company may have against the other shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act, 9 U.S.C. Sections 1-16. This specifically includes any claim, including any claim brought on an individual, class action, collective action, multiple-party, or private attorney general basis by Employee or on Employee's behalf, Employee may have against the Company, which would otherwise require or allow access to any court or other governmental dispute resolution forum arising from, related to, or having any relationship or connection whatsoever with Employee's seeking employment with, employment by, termination of employment, or other association with the

[3] The phrase "team members" refers to those individuals who have successfully completed the application and employment process.

> Company, whether in contract, or tort, pursuant to statute, regulation, or ordinance, or in equity or otherwise (including, but not limited to, any claims related to wages, reimbursements, discrimination, and harassment, whether based on state law, Title VII of the Civil Rights Act of 1964, as amended, as well as all other federal, state or local laws or regulations). It also specifically includes any claim, dispute, and/or controversy relating to the scope, validity, or enforceability of this Arbitration Agreement. Unless the parties agree or otherwise as to a particular dispute, any arbitration pursuant to this Arbitration Agreement shall be initiated with and conducted by the American Arbitration Association, whose rules may be obtained at http://www.adr.org or by calling (800)778-7879. The duty to arbitrate under this Arbitration Agreement survives any termination of Employee's employment with the Company. other federal, state or local laws or regulations). It also specifically includes any claim, dispute, and/or controversy relating to the scope, validity, or enforceability of this Arbitration Agreement. Unless the parties agree or otherwise as to a particular dispute, any arbitration pursuant to this Arbitration Agreement shall be initiated with and conducted by the American Arbitration Association, whose rules may be obtained at http://www.adr.org or by calling (800)778-7879. The duty to arbitrate under this Arbitration Agreement survives any termination of Employee's employment with the Company.

The Agreement also explains the manner in which disputes will be arbitrated under the Agreement and the section entitled "Form of Arbitration" provides as follows:

> In any arbitration, any claim shall be arbitrated only on an individual basis and not on a class, collective, multiple-party, or private attorney general basis. The employee and the Company expressly waive any right to arbitrate as a class representative, as a class member, in a collective action, or in or pursuant to a private Attorney General capacity, and there shall be no joiner or consolidation of parties.

While the Agreement contains the process and procedure for binding arbitration regarding employment related claims, it also contains certain exceptions. The section entitled "Claims Excepted From Binding Arbitration" identifies the following:

> The sole exceptions to the mandatory arbitration provision are claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under Workers' Compensation, Unemployment Compensation claims filed with the state, claims on an individual basis only which are brought properly in, and only to the extent they remain in, small claims court, and any claims or disputes arising out of any other written contract(s) between Employee and the Company where the contract specifically provides for resolution through the courts. Nothing herein shall prevent Employee from filing and pursuing administrative proceedings only before the U.S. Equal Employment Opportunity Commission or an equivalent state or local agency (although if Employee chooses to pursue a claim following the exhaustion of such administrative remedies, that claim would be subject to arbitration). Nothing herein shall prevent Employee or Company from obtaining from a court a temporary restraining order or preliminary injunctive relief to preserve the status quo or prevent any irreparable harm pending the arbitration of the underlying claim, dispute, and/or controversy.

The Agreement does not contain any confidentiality provisions and does not, by its

terms, limit team members' ability to discuss matters subject to arbitration.

The Agreement also allows Domino's team members to opt-out of the obligation to arbitrate claims. The ability for team members to retain this right is spelled out in the Agreement section entitled "Exclusive Opt-Out Right." This provision provides as follows:

> The Employee has the right to opt out of the obligation set forth herein to submit to binding arbitration. To opt out, the Employee must send via electronic mail or first-class mail, within **thirty (30) calendar days** of signing this Arbitration Agreement, an email to PeopleFirstSharedServices@dominos.com or a letter addressed to Domino's Pizza LLC, Attention: Manager-People First Shared Services, 30 Frank Lloyd Wright Drive, Post Office Box 997, Ann Arbor, Michigan 48106-0997, stating that the Employee has elected to opt out of the Arbitration Agreement. The email/letter must clearly state the Employee's name, employee id and a telephone number where the Employee can be reached. Absent the proper and timely exercise of this opt-out right, the Employee will be required to arbitrate all disputes covered by this Arbitration Agreement.

Domino's team members may use the Domino's computer system to learn about the Agreement and review it before signing it. In addition to the Agreement itself, team members have electronic access to related material that includes a cover letter explaining the basic framework for the Domino's arbitration process. Part of this electronic process involves providing team members a Spanish version of the Agreement, if needed. Depending on the legal requirements in certain states, Domino's uses a paper process to introduce and process the acceptance of the Agreement. This paper process provides hard copies of the same documents utilized in the electronic process.

All Domino's team members, including executives and managers, are required to accept the Agreement as a condition of employment.

At the hearing, Respondent made an offer of proof that since the Agreement began to be used in November 2009, over 254 of Domino's team members have selected the opt-out option. In addition, since the implementation of the Agreement, there have been in excess of 85 administrative claims filed against Respondent and there have been at least 10 unfair labor practices charges since 2009. There is no evidence as to how many employees have been hired since the Agreement went into effect or how many are currently affected by its provisions.

II. Analysis and Conclusions

The General Counsel and the Charging Party argue that this matter is controlled by the Board's holding in *D.R. Horton*, supra. In that case, the Board considered, in relevant part, an employer's implementation of a rule requiring employees to arbitrate employment disputes and which, as a feature of the rule, prohibited an employee from bringing or participating in any class or collective actions against the employer in any forum including before an arbitrator. The Board recognized that "these forms of collective efforts to redress workplace wrongs or improve workplace conditions are at the core of what Congress intended to protect by adopting the broad language of Section 7 [of the National Labor Relations Act]." *D.R. Horton*, supra, slip op. at 3. The Board found collective redress in legal or administrative settings are "not peripheral but central to the Act's purposes" Id. There, the Board concluded that an employer violates the Act by maintaining a prohibition on the maintenance of class or collective actions in all forums: a circumstance which, as discussed below, is one not presented by the instant case.

Respondent's Proffered Defenses

As an initial matter, Respondent argues that *D.R. Horton* was decided by an unconstitutionally appointed Board and cannot be considered precedent in this matter because the Board lacked a quorum when it issued the decision. This argument derives from the D.C. Circuit's decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). The Board has repeatedly rejected this argument, asserting that it will continue to discharge its statutory responsibilities in all respects pending the Supreme Court's resolution of this issue.[4] See e.g. *Universal Lubricants, LLC*, 359 NLRB No. 157, slip op. at 1 fn. 1 (2013); *Woodcrest Health Care Center*, 359 NLRB No. 129, slip op. at 1 fn. 1 (2013); *Bloomingdale's, Inc*., 359 NLRB No. 113 (2013); *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op at fn. 1 (2013).

In a related argument, Respondent further contends that the Regional Director lacked authority to issue the complaint in this matter because at the time he was appointed, the Board lacked the requisite authority to make such appointments, rendering them unconstitutional. Such challenges to the independent statutory authority of the then-Acting General Counsel and his designees (i.e. the agency's regional directors) to investigate and prosecute unfair labor practices have similarly been rejected by the Board. See e.g. *The Ardit Company* 360 NLRB No. 15, slip op. at 1 (2013); *Bloomingdale's*, supra. slip op. at 1.

Respondent further argues that *D.R. Horton* was wrongly decided and should not be controlling in this matter. As Respondent notes, on December 3, the Fifth Circuit Court of Appeals issued its decision denying, in part, enforcement of the Board's decision and order in *D.R. Horton*. Citing no authority to support such a contention, Respondent argues that the reasoning of the Fifth Circuit's analysis should obtain in this case. Any such arguments made by Respondent as to why *D.R. Horton* was wrongly decided, including its rejection by the courts, must be made directly to the Board and not to me. I am bound by *D.R. Horton* and until either the Board or the Supreme Court overturns it. *Waco Inc*., 273 LRB 746, 749 fn. 14 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981); *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004).

Respondent next attempts to distinguish *D.R. Horton* from the instant matter arguing that the Agreement is not unlawful because it specifically excludes claims "arising under the National Labor Relations Act which are brought before the National Labor Relations Board" and because its opt out provision renders the Agreement voluntary and thus does not violate the standard set by the Board in *D.R. Horton*.

As was noted by the Board in *D.R. Horton*, supra slip op. at 4, in evaluating whether a rule applied to all employees as a condition of continued employment, including the mandatory Agreement at issue here, violates Section 8(a)(1), the applicable test is set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), citing *U-Haul of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir 2007). Pursuant to this test, the Board has found that if a rule explicitly restricts activities protected by Section 7 of the Act, the rule is unlawful. If it does not explicitly restrict such conduct, the finding of a violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

[4] The Supreme Court granted certiorari and recently heard oral argument on this issue. *NLRB v. Noel Canning*, 133 S. Ct. 2816 (2013).

The Board has long held that concerted legal action addressing wages, hours and working conditions, whether in a courtroom setting, before an administrative agency or through arbitration, represents concerted protected activities under Section 7 of the Act. *D.R. Horton*, supra slip op. at 2-3. In *Eastex Inc. v. NLRB*, 437 U.S. 556, 565-566 (1978) the Court stated that: "It has been held that the 'mutual protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums."

In *D.R. Horton*, supra, the agreement at issue was deemed unlawful both because it restricted access to the Board and because it prohibited other collective legal action. However, the Board made clear that there were two distinct and independent bases for finding such agreements unlawful. In this regard, the Board noted that "[t]he right to engage in collective action – including legal action – is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest." *D.R. Horton*, supra, slip op. at 10.

Therefore, while it is true that the Board in *D.R. Horton* found that that employees could reasonably be restrained from filing charges before the Board, there was, as noted above, an independent ground for finding the provision at issue there to be unlawful. Here, while there appears to be no dispute that the ability of employees to seek redress before the Board is not prohibited, it is clear from its terms that the Agreement bans other forms of concerted, protected conduct: i.e. the pursuit of other claims concerning terms and conditions of employment on a collective basis. As the Board has made clear, it is sufficient to find this latter point to conclude that the provision in question runs afoul of the statute. Thus, the clause in the instant matter is unlawful not because it restricts or bars the filing of NLRB charges, but because it interferes with and restricts employees from engaging in other concerted, protected conduct. Therefore, and contrary to Respondent's apparent contentions, the inclusion of the clause concerning the right to file charges before the Board in no way effects the violation of the Act encompassed by the fact that employees are precluded from pursuing class actions in all other forums whether judicial or arbitral. Moreover, I find that reasonable employees would read the Agreement as prohibiting their ability to resolve in concert disputes related to their employment, a right which is clearly conduct protected by the Act. Thus, the Agreement still clearly inhibits and interferes with Section 7 conduct despite this exception.

Respondent further attempts to distinguish *D.R. Horton* on the basis of the Agreement's opt-out language. Respondent maintains that the existence of the opt-out provisions puts the Agreement within the category of voluntary arbitration agreements that the Board has determined presents a "more difficult question." In this regard, Respondent relies upon the following language contained in *D.R. Horton*, slip op. at 13 fn. 28:

> [W]hether, if arbitration is a mutually beneficial means of dispute resolution, an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve a particular dispute or all potential employment disputes through non-class arbitration rather than litigation in court.

The instant case does not present this sort of "more difficult question." Rather, such a contention misses the point that absent affirmative action on the part of the employee at the inception of their employment, a mandatory waiver of employee rights under the law is clearly, permanently and irrevocably required as a condition of employment, limiting those rights and remedies to which an employee is entitled under the Act.

The Act unambiguously confers to employees the right to engage in protected concerted activities without interference from his or her employer. It follows, therefore, that an employer

may not lawfully require its employees to affirmatively act (in this case, opt out, in writing within 30 days) in order to obtain or retain such rights. *Ishikawa Gasket America, Inc*., 337 NLRB 175-176 (2001); *Mandel Security Bureau, Inc*., 202 NLRB 117 (1973). Moreover, those employees who do choose to opt out are precluded from engaging in concerted activities with those who do not, further limiting their options for engaging in conduct protected by the Act. Additionally, the decision making process itself – of whether to consent to or opt out of the Agreement – is itself a mandatory condition of employment as it is required of employees and is not a ministerial matter devoid of consequences. Employees are required to make a decision, under time-sensitive constraints, regarding the relinquishment of certain class action rights they possess under federal law. Whatever choice they make impacts their employment relationship with their employer in perpetuity and, for those who choose not to opt out, precludes them irrevocably from engaging in certain conduct which the Act protects.

Moreover, requiring a new employee to decide whether to irrevocably waive certain core employment rights is an unreasonable burden. It presumes that employees will have considered and consciously relinquished a panoply of rights which might obtain in any variety of circumstances, many of which cannot be reasonably foreseen or anticipated at the outset of employment.

For the foregoing reasons, I find that Respondent's maintenance of and requirement that employees enter into its arbitration agreement, as set forth above, as a condition of employment, unlawfully restricts core rights granted to employees under Section 7 of the Act and is violative of Section 8(a)(1) as alleged in the complaint.

Conclusions of Law

(1) The Respondent, Domino's Pizza, is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

(2) At all material times, the Respondent has violated Section 8(a)(1) of the Act by maintaining an arbitration policy that waives the right to collective action in all arbitral and judicial forums, and is applicable to all employees who fail to opt out of coverage under the arbitration policy during a one-time initial opt out period permitted to each employee

(3) The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) f the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent's arbitration policy is unlawful, the Respondent shall be ordered to rescind or revise it to make clear to employees in all of its facilities in which the arbitration policy has been implemented that the policy does not require a waiver in arbitral or judicial forums of their right to maintain or participate in collective actions, and shall notify employees of the rescinded or revised policy by providing them a copy of the revised policy or specific notification that the policy has been rescinded. Additionally since the arbitration agreement has been maintained in locations throughout the country, it is appropriate to order that Respondent post the attached notice at all locations where the arbitration agreement has been or is in effect nationwide. *Target Co*., 359 NLRB No. 103, slip op. at 3 (2013), *MasTec Advanced Technologies*, 357 NLRB No. 17, slip op. at 7 (2011).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Domino's Pizza, its officers, agents and representatives shall

1. Cease and desist from

(a) Maintaining an arbitration agreement (the Agreement) that waives the right to maintain class or collective action in all arbitral or judicial forums and which applies irrevocably to those employees who fail to opt out.

(b) Requiring employees to sign binding arbitration agreements that prohibit collective and class litigation in all arbitral or judicial forums.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights under the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or revise the Agreement to make clear to employees that the Agreement does not constitute a waiver in all arbitral or judicial forums of their right to maintain employment-related class or collective actions.

(b) Within 14 days after service by the Region, post at its facilities where the Agreement has been or is in effect, copies of the attached notice marked Appendix. Copies of this notice, on forms provided by the Region Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting or intranet or an internet site, and/or other electronic means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 19, 2012.[6]

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board shall read "posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 27, 2014

_____
Mindy E. Landow
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT maintain a binding arbitration agreement (the Agreement) that waives the right for employees to maintain or engage in class or collective actions in all arbitral or judicial forums.

WE WILL NOT require employees to sign binding arbitration agreements that waive the right to maintain or engage in class or collective actions in all arbitral or judicial forums.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in their rights under the Act.

WE WILL rescind or revise the Agreement at all facilities where it has been implemented and is currently in effect and make it clear to employees that the Agreement does not constitute a waiver of their right to maintain or engage in employment-related class or collective actions.

WE WILL notify our employees of the rescinded or revised agreement by providing to them a copy of the revised Agreement or specific notification that it has been rescinded.

DOMINO'S PIZZA, LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Two MetroTech Center (North), Jay Street and Myrtle Avenue, 5th Floor
Brooklyn, New York 11201-4201
Hours: 9 a.m. to 5:30 p.m.
718-330-7713.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.