

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

**CPS SECURITY (USA), INC.,
a wholly owned subsidiary of
CPS SECURITY SOLUTIONS, INC.**

and

Case 28-CA-072150

DENNIS TALLMAN, an Individual

and

Case 28-CA-075432

DONALD MIKA, an Individual

and

Case 28-CA-075450

BERYL HARTER, an Individual

GENERAL COUNSEL'S ANSWERING BRIEF

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I. INTRODUCTION

The Exceptions filed by CPS Security (USA), Inc., a wholly owned subsidiary of CPS Security Solutions, Inc. (Respondent), to the Decision (ALJD) of Administrative Law Michael A. Marcionese (ALJ) are without merit and not supported by the evidence.¹ The ALJ properly found that: (1) Respondent maintained and enforced against employees a document titled Arbitration Agreement (Arbitration Agreement); (2) Respondent maintained and enforced against employees a document titled Offer to Participate in Arbitration of Disputes (Offer to Participate); (3) Respondent maintained in the State District Court of Clark County, Nevada, a motion to compel individual arbitration of employment claims pursuant to the

¹ The ALJD was issued on February 11, 2014.

Arbitration Agreement and the Offer to Participate (collectively, the Agreements); (4) the Agreements are a mandatory condition of employment; (5) the Arbitration Agreement unlawfully restricted employee rights to file unfair labor practices with the Board; (6) the complaint allegations were not time barred under Section 10(b) of the Act; (7) the Agreements waived employee rights to collectively pursue legal action; and (8) the Offer to Participate violates the Act under the Board's decision in *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012). Accordingly, the Board should adopt these findings in total.

Similarly without merit are Respondent's other arguments that: (1) finding the motions to compel arbitration to violate the Act would unlawfully interfere with Respondent's right of access to the courts; (2) offering employees the opportunity to arbitrate employment disputes on an individual basis while permitting opt-in collective actions under the Fair Labor Standards Act (FLSA) does not interfere with employee rights to engage in protected concerted activity; (3) the rights to file class actions is merely a procedural mechanism under Federal Rules of Civil Procedure Rule 23 and not a substantive right; (4) the suggested remedy to vacate the motions to compel arbitration is outside of the Board's authority and interferes with the judicial process of the State; and (5) the suggested remedy to pay attorney's fees to the Charging Parties' lawyers regarding State court proceedings is outside of the Board's authority. (RX 2-7)

Respondent's assertions which attempt to challenge the ALJ's credibility resolutions similarly lack merit. Respondent can only prevail on its exceptions if the Board chooses to ignore the record evidence and deviate from its established policy of not overruling an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that the administrative law judge's credibility

resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544, 545 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Furthermore, to succeed on Respondent's exceptions regarding the Remedy, the Board would have to abandon its standard remedies and leave the employees who were subjected to the unfair labor practices without any identifiable remedy. To prevail on Respondent's legal arguments, the Board would have to reverse its well-established precedents regarding protected concerted activities which were the basis of its decision in *D. R. Horton, Inc.*, and would have to narrow or overturn its holding in *D. R. Horton, Inc.* Respondent's exceptions are without merit and should be denied in their entirety.

II. FACTS

A. Respondent's Operations

Respondent CPS Security (USA), Inc. (Respondent), a wholly owned subsidiary of CPS Security Solutions, Inc. is a corporation which shares an office and place of business in Gardena, California, with CPS Security Solutions, Inc., and is engaged in the providing of security services in Nevada and other States. (ALJD 2:27-31)² Christopher Coffey is Respondent's chief executive officer while Jim Newman is Respondent's General Counsel. (ALJD 2:44-47) Respondent provides security guard services for construction companies at construction sites in Nevada and other States. (ALJD 2:40-42) Respondent employs "trailer guards," who are required to reside onsite in a trailer provided by Respondent, and whose presence is required 24 hours a day on the weekends and 16 hours per day during the week. (ALJD 3:4-7) The only time that the trailer guards are allowed to leave the construction site is Monday through Friday from 7 a.m. until 5 p.m. when construction workers are typically

² RX__ refers to Respondent's Exceptions followed by page. RB__ refers to Respondent's Brief in Support of Exceptions followed by the page. Transcript references are: (Tr. __:__) showing transcript page and line or lines. ALJD __:__ refers to JD(ATL)-04-14 issued by the ALJ on February 11, 2014, followed by page and line. GCX__ refers to General Counsel's Exhibit followed by exhibit number.

on-site. (ALJD 3:12-14) The trailer guards are typically paid the minimum wage and are compensated for work performed from 5 to 7 a.m. and 3 to 9 p.m. Monday through Friday and 5 a.m. to 9 p.m. on the weekends, but do not receive compensation during the remaining periods of time unless they are responding to alarms or other interruptions. (ALJD 3:7-14)

B. The Agreements

Charging Parties Tallman, Mika, and Harter were employed as trailer guards for Respondent on various dates, but none remains employed by Respondent.³ (ALJD 3:16-20) Each of the Charging Parties signed the Arbitration Agreement and the Offer to Participate.

The applicable Arbitration Agreement states, in relevant part:

Any controversy, dispute or claim (“Claim”) whatsoever between _____ (“EMPLOYEE”) on the one hand, and CPS Security (USA), Inc. (“COMPANY”), or any of its employees, officers, and agents (collectively “COMPANY PARTIES”) on the other hand, shall be settled by binding arbitration, at the request of either party[.] The claims covered by this agreement include, but are not limited to, claims for wages and other compensation, claims for breach of contract (express or implied), tort claims, claims for discrimination (including, but not limited to, race, sex, sexual orientation, religion, national origin, age, marital status, medical condition, and disability), harassment (including, but not limited to race, sex, sexual orientation, religion, national origin, age, marital status, medical condition, and disability) and claims for violation of any federal, state or other government law, statute, regulation, or ordinance, except for claims for workers’ compensation or unemployment insurance benefits. Nothing contained in this Agreement shall prohibit any current or former employee from filing a charge of discrimination with the Equal Employment Opportunity Commission and/or any state agency that investigates claims of discrimination and harassment, and cooperating with the investigation of such charge.

* * *

Both the COMPANY and EMPLOYEE understand and agree that by using arbitration to resolve any Claims between EMPLOYEE and COMPANY or any or all of the COMPANY PARTIES they are giving up any right that they may have to a judge or jury with respect to those Claims.

(GCX 8(a), (b); 12(a), (b))

³ All dates are 2012, unless otherwise noted.

The applicable Offer to Participate states, in relevant part:

I understand and agree that I am giving up rights I may otherwise have: (1) to have claims subject to this Mutual Agreement to Arbitrate Claims (“Agreement”) tried in a court of law before a judge or a jury; and (2) to initiate or to participate in representative actions, collection actions, and/or class actions.

1. Claims Covered by the Agreement

The Company and I mutually consent to the resolution by arbitration of all claims or controversies (“Claims”) that the Company may have against me or that I may have against the Company (or against its officers, directors, managers, employees or agents). Except for the claims specifically excluded in Paragraph 2 below, this Agreement shall govern all claims for...(c) discrimination (including, but not limited to, race, sex, religion, national origin, age, marital status, sexual orientation, or medical condition, handicap or disability); (d) harassment; (e) retaliation; (f) benefits (except where an employee benefit or pension plan specifies that its claims procedure shall include an arbitration procedure different from this one; and (g) violation of any federal, state, or governmental law, statute, regulation, or ordinance, except those listed in Paragraph 2 below. Any and all employment related claims shall be exclusively subject to the provisions of this Agreement, including (by way of example rather than limitation) those pertaining to the following subjects: recruitment, selection or non-selection, hiring, promotion, demotion, performance appraisals, working conditions, termination of employment, payment or non-payment of compensation, wages, overtime, commissions, bonuses, non-wage payments, penalties, reimbursement, benefits, and/or severance.

2. Claims Not Covered by the Agreement

Claims for Workers’ Compensation and claims for Unemployment Insurance Benefits are not covered by this Agreement.

6. Waiver of Right to Initiate or Participate in Collective or Class Action

The Arbitrator shall not consolidate Claims of different employees into one proceeding, nor shall the Arbitrator have the power to hear arbitration as a class action.

By entering into this Agreement, the Company and I are agreeing to waive rights we might otherwise have including, but not limited to, the rights (a) to initiate representative actions, collective actions, and/or class actions; and (b) to participate in representative actions, collective actions, or class actions initiated by others.

7. No Waiver Implied by Responding to Administrative Claims

In the event that I violate this Agreement by filing an administrative action or claim with a federal, state or municipal agency (including but not limited to administrative claims for alleged discrimination, unpaid wages and/or penalties, or unsafe working conditions), the Company may elect to participate in the administrative process without being deemed to have waived provisions of this Agreement and may assert this Agreement as a defense to the administrative action and/or as a defense to any lawsuit, whether preceding, following, arising from, or otherwise related in any way to such administrative action or claim.

(Tr. 111:13-25, 112:1-9; GCX 9(a)-(g); 10(a)-(g); 11(a)-(g))

C. The Lawsuits

On April 30, 2009, Tallman filed a hybrid class and collective action lawsuit against Respondent in a Nevada State court for violations of the Federal Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, et. seq., and for Nevada State wage and hour laws for uncompensated “personal time” spent on-site from 9 p.m. to 5 a.m. (ALJD 3:20-24) On May 27, 2009, Respondent petitioned to remove Tallmans’ actions to federal court based on the FLSA claim. (ALJD 3:24-25) The federal judge severed the FLSA claim and remanded the State law claims back to Nevada State court on or about March 22, 2011. (ALJD 3:25-27) On May 18, 2011, Respondent filed a motion to compel the arbitration of Tallman’s State law claims on an individual basis. (ALJD 3:27-28) The State court granted Respondent’s motion on October 4, 2011. (ALJD 3:28-29) Respondent has not sought to compel the arbitration of Tallman’s FLSA collective action which, at the time of hearing, was still pending in federal court. (ALJD 3:29-31)

On January 23, 2012, Mika and Harter filed a class action lawsuit against Respondent in Nevada State court. (ALJD 3:34-35) Respondent filed a motion to consolidate Mika's and Harter's claims with Tallman's State court litigation and to compel the arbitration of their claims on an individual basis; the State court granted the motion on June 18, 2012. (ALJD 3:35-37) Harter filed a collective FLSA action in federal court in 2012, and Respondent has not sought to compel arbitration of this FLSA claim. (ALJD 3:37-38)

III. RESPONDENT'S EXCEPTIONS

A. The ALJ's Credibility Findings

In its exceptions and supporting brief, Respondent makes arguments which challenge the ALJ's findings, some of which are based on credibility determinations or the conclusions based on those credibility determinations.

In considering the testimony of each witness and weighing the evidence presented at hearing, the ALJ assessed the credibility of witnesses based not only on a review of the record, but also gave consideration to reasonable probability and the demeanor of the witnesses. (ALJD 2:19-21) The ALJ had the advantage of observing each of the witnesses who testified, and the Board gives considerable weight to an ALJ's credibility findings. *Standard Dry Wall Products*, 91 NLRB 544, 545 (1950) enfd. 188 F.2d 362 (3d Cir. 1951). Indeed, the Board will not overrule an ALJ's credibility findings absent a showing that the clear preponderance of all the relevant evidence shows that those resolutions are incorrect. *Id.*

Here, Respondent's arguments do not raise the necessary level of doubt to the ALJ's credibility resolutions in order to have those conclusions reversed. Accordingly, the ALJ's findings should be adopted in full.

B. The ALJ's Findings Under *D. R. Horton, Inc.* (Exception 1)

Respondent makes a variety of arguments that it did not violate the Act, and claims the ALJ came to the wrong conclusions under the Board's decision in *D. R. Horton, Inc.* Respondent's arguments consist of two parts: (1) *D. R. Horton* is not controlling as to voluntary agreements involved here; and (2) federal policy in favor of arbitration compels a finding that the Agreements do not violate the Act. (RB 13-24) Both arguments are misplaced.

1. *D. R. Horton* is the Applicable Standard

a. The Agreements are mandatory conditions of employment.

Respondent claims that the ALJ improperly characterized the Agreements as mandatory conditions of employment, and argues that they are not unlawful under *D. R. Horton* which is limited to mandatory waivers which are a condition of employment, and not to voluntary agreements. (RB 14-17) Respondent relies on the language of the Offer to Participate which provides that it is not a condition of employment, that the employee has freely and voluntarily entered the agreement, and the ability to opt-out within 30 days after acceptance of the offer. (RB 13-14) Respondent also contends that the Charging Parties were hired before they received the Agreements, and that the Agreements could not have been mandatory or else they would not have been hired until they had entered into the Agreements. (RB 14) Respondent cites several non-Board cases in support of its contention that opt-out language demonstrates the voluntary nature of the Agreements, and cites the State court holding that the Agreements were voluntary. (RB 14-15) Respondent impliedly asserts that Charging Parties Mika and Tallman were afforded a meaningful opportunity to review the Agreements, and argues that the Charging Parties were not required to accept the Agreements based on notice and the ability to opt out of the Offer to Participate. (RB 15-16) Further,

Respondent argues that Section 7 rights may be waived in appropriate circumstances such as those involved here. (RB 18) Respondent relies, in part, on *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614 (2007), and *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), to assert that the Charging Parties lawfully and voluntarily waived their rights under the Agreements. (RB 19-20)

The ALJ found that the Agreements were mandatory conditions of employment and that the Offer to Participate violated the Act for the reasons enunciated in *D. R. Horton*. (ALJD 11:17-18; 12:20-22) The ALJ considered that Tallman and Mika were given little opportunity to review the Agreements before signing; neither received the keys to their trailer until after they signed; Respondent's human resources checklist indicated that it expected all employees to sign the Agreements; the Agreements were presented "along with all the other paperwork necessary to become an employee[,]" the Agreements were provided as part of a stack of documents that the employees were expected to sign; and that only one personnel file of approximately 160 did not contain a signed agreement. (ALJD 8:1-44, 9:1-19; 11:1-18; GCX 23, 26, 30)

The ALJ correctly concluded that the Agreements were mandatory conditions of employment and that *D. R. Horton* is the applicable standard. See, e.g., *Western Cartridge Co.*, 44 NLRB 1, 7 (1942), *enfd.* 134 F.2d 240 (7th Cir. 1943) ("[a]lthough acceptance of the contracts was theoretically optional with the employees, the record shows . . . that all employees were expected to sign contracts and that in fact all but three or four did so"). The finding is further reinforced by the lack of information provided to the employees. Cf. *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614 (2007) (finding that it effectuated the purposes of the Act to give effect to termination agreements where the unrepresented

employees were informed of the separation agreement content through informational meetings and encouraged to consult an attorney). The Agreements were mandatory conditions of employment, and *D. R. Horton* is controlling.

b. The employees did not waive their Section 7 rights.

First, regardless of the language in the Offer to Participate indicating that signing is not a condition of employment, once these irrevocable and binding agreements are signed and become effective, there can be no doubt that they also become conditions of employment. Once executed, these agreements severely limit, if not completely extinguish, employees' Section 7 right to choose to act concertedly or individually in any future legal dispute with Respondent. In this regard, the Agreements are not only conditions of employment for those employees who sign, but interfere with the statutory rights of all of Respondent's employees because even those employees who do not sign are prevented from acting concertedly with employees who do sign them. The Agreements are conditions of employment which affect the Section 7 rights of all of Respondent's current and former employees.

Second, even if these agreements were not conditions of employment, they would be unlawful. Section 7 protects each employee's "freedom of association" – or ability to *choose* concerted action – if, in the employee's judgment, that course appears warranted. Section 7 has long been understood to protect not only the filing of lawsuits, grievances, or administrative charges, but also participation in the adjudication of the same, such as attending hearings, providing affidavits, and testifying. See, e.g., *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 296-97 (5th Cir. 1976) (executing affidavits supporting lawsuit); *Dick Gidron Cadillac*, 287 NLRB 1107, 1110 (1988) (testifying at arbitration hearing); *Supreme Optical Co.*, 235 NLRB 1432, 1432-33 (1978) (testifying at

discharged employee's unemployment hearing), *enfd.* 628 F.2d 1262 (6th Cir. 1980); *El Dorado Club*, 220 NLRB 886, 887-88 (1975) (attending arbitration hearing, participating in arbitration). Consistent with those principles, the Board held in *D.R. Horton* that Section 7 vests employees with the right to invoke – without employer coercion, restraint, or interference – procedures generally available under state or federal law for concertedly pursuing employment-related legal claims. *D.R. Horton*, slip op. at 10, n.24. An irrevocable waiver of employees' prospective Section 7 rights eliminates employees' choice as to whether to engage in protected conduct, and an employer's solicitation and maintenance of such a waiver, even if on an ostensibly "voluntary" basis, necessarily interferes with employees' exercise of their statutory rights and violates Section 8(a)(1) of the Act.

Finally, these agreements cannot be justified because employees have a Section 7 right to refrain from engaging in collective legal activity. Such irrevocable waivers of employees' prospective Section 7 right to collective legal activity are unlawful, just as individual employment contracts that interfere with other prospective Section 7 rights are unlawful, because they are "a continuing means of thwarting the policy of the Act," and present an unjustifiable obstacle to the free exercise of the right to engage in concerted activity for mutual aid and protection. *National Licorice Co. v. NLRB*, 309 U.S. 350, 361 (1940), quoted in *D.R. Horton*, slip op. at 4. The Agreements "[seek] to erect 'a dam at the source of supply' of potential, protected activity" and "thereby interfere[] with employees' exercise of their Section 7 rights." *Parexel International*, 356 NLRB No. 82, slip op. at 4 (2011), quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941).

- c. ***National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), prevents Respondent from trying to avoid the Act’s obligations by seeking individual agreements with employees.**

Respondent cannot avoid the Act’s obligations simply by seeking individual agreements with its employees. The Board has long held, with court approval, that employers cannot avoid the Act’s obligations or obviate employees’ rights under the Act, through agreements with individual employees. See, e.g., *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337, 339 (1944), affirming, as modified 134 F.2d 70 (7th Cir. 1943), enfg., as modified 42 NLRB 85 (1942). As explained by the Supreme Court, “employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which it imposes.” *National Licorice Co. v. NLRB*, 309 U.S. 350, 364 (1940). Consistent with this principle, individual agreements requiring employees to adjust their grievances with their employer individually, rather than concertedly, “constitute[] a violation of the Act per se,” even when they are “entered into without coercion,” as they are a “restraint upon collective action.” *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942), enfg. *J.H. Stone & Sons*, 33 NLRB 1014 (1941), quoted in *D.R. Horton*, slip op. at 5. Pursuant to the same principle, the Board has regularly set aside settlement agreements which require employees to prospectively waive their right to act in concert with coworkers in disputes with their employer.⁴

⁴ See, e.g., *Bon Harbor Nursing & Rehab. Ctr.*, 348 NLRB 1062, 1073, 1078 (2006) (finding the employer unlawfully conditioned employees’ reinstatement, after discharges for non-union concerted protected protest, on agreement not to engage in further similar protests); *Bethany Medical Center*, 328 NLRB 1094, 1005-06 (1999) (same); *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 175-76 (2001), enfd. 354 F.3d 534 (6th Cir. 2004) (employer unlawfully conditioned discharged employee’s severance payments on agreement not to help other employees in disputes against employer or to act “contrary to the [employer’s] interests in remaining union-free,” as the Board held that “future rights of employees as well as the rights of the public may not be traded away in this manner”). Cf. *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 614-16 (2007) (upholding an informed settlement agreement).

d. The Agreements are worse than “yellow dog” contracts.

In *D.R. Horton*, the Board expressly found arbitration agreements prohibiting collective legal activity to be comparable to “yellow dog” contracts prohibiting employees from joining labor unions. *D.R. Horton*, slip op. at 5-6. Significantly, the Board has long found that an employer violates Section 8(a)(1) by soliciting such agreements, as this conduct “has an inherent and direct tendency to interfere with, restrain, and coerce employees in the exercise of their rights under Section 7 of the Act . . .”⁵

Here, the Agreements interfere with employees’ Section 7 rights even more than traditional yellow dog contracts, as the restrictions on protected activity remain in effect even after their employment has ended, and are intended to use judicial authority to prohibit protected concerted activity. The fact that the Offer to Participate recites “opt-out” language, especially under these circumstances, is not sufficient to render lawful the terms of the Agreements and the effects on employees’ Section 7 rights. In the instant case, as in *D.R. Horton* itself, the Agreements expressly require employees to arbitrate all disputes which might arise between the employee and Respondent, and prohibit representative, collective, and class actions. Therefore, Respondent violated Section 8(a)(1) of the Act by maintaining the arbitration agreements prohibiting collective legal activity.

⁵ *Hecks, Inc.*, 293 NLRB 1111, 1120-1121 (1989) (finding a violation by “requesting . . . employees to promise to be bound by the Respondent’s written policy that it does not want its employees to be represented by a union and that there is no need for a union or other paid intermediary to stand between the employees and the Company”); *Western Cartridge Co.*, 44 NLRB 1, 6-8 (invalidating individual employment contracts purportedly giving the right to fire any employee who “participated in a strike or any other concerted activity regarded as interfering with his ‘faithfully’ fulfilling ‘all his obligations,’” because they effectively restricted employees’ right to engage in concerted activity); *Superior Tanning Co.*, 14 NLRB 942, 951 (1939), enfd. 117 F.2d 881 (7th Cir. 1941) (finding unlawful the individual contracts which were part of the employer’s plan to discourage unionization).

2. The Federal Arbitration Act is Not Controlling

Respondent argues that federal policy in favor of arbitration compels a finding that the Agreements do not violate the Act. (RB 20-24) Respondent cites several non-Board cases in support of its assertions, and references *D. R. Horton*'s treatment of the matter.⁶ CPS relies on a quoted opinion that "a contractual waiver of class arbitration is enforceable even if the cost of arbitration exceeds the potential recovery" and asserts that this "makes clear that courts will not read a right to pursue claims as a class into federal statutes (such as the Act) absent express Congressional commands to the contrary."⁷ Respondent further denies that there is any substantive right under the Act to bring or join a class or collective action, asserting that it "does not categorically prohibit such claims in 'any' forum" and that forums are left open for those who opt out. (RB 22)

Respondent's assertions are contrary to the Board's holdings in *D.R. Horton* where it discussed the relationship between the Act and the Federal Arbitration Act and found that the Federal Arbitration Act is not controlling in agreements, such as these, which violate the Act. *Id.* slip op. at 9-11. The ALJ correctly relied upon the Board's holding in *D. R. Horton*, in which the Board squarely addressed an appropriate accommodation with the Federal Arbitration Act.

⁶ *American Express Co. v. Italian Colors Rest.*, __ S. Ct. __, No. 12-133, 2013 WL 3064410 (June 20, 2013); *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002); *Sure-Tan Inc. v. NLRB*, 467 U.S. 883, 902-04 (1984); *Moses H Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24-25 (1983); *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 634-35 (1975); *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942).

⁷ Citing *American Express Co. v. Italian Colors Rest.*, __ S. Ct. __, No. 12-133, 2013 WL 3064410 (June 20, 2013)

C. Section 10(b) (Exception 3)

Respondent asserts that the complaint based on Tallman's January 9, 2012 charge is time-barred by Section 10(b) of the Act because Tallman had notice as early as October 20, 2009, or alternately by the motion to compel individual arbitration which was filed on May 18, 2011, of the violation. (RB 24) Respondent asserts that the ALJ's "continuing violation" theory was flawed because the only continuing action within the 10(b) period was the action of the State court granting the motion to compel arbitration on an individual basis. (RB 24) CPS further asserts that this theory violates its constitutional right to due process and may violate the Eleventh Amendment. (RB 24)

The ALJ properly rejected Respondent's 10(b) arguments, noting that in situations, like here, where events initiated outside the 10(b) period were unlawfully enforced or otherwise administered within the 10(b) period, they are not time-barred. (ALJD 9:35-43, 10:1-10) Thus, the ALJ concluded that the complaint was not time-barred based on the continued utilization of at least one of the arbitration agreements and the enforcement of the agreement within the 10(b) period. (ALJD 10:14-16) Specifically, although Respondent initiated enforcement more than six months before Tallman's charge was filed, those efforts remained in effect and did not come to a conclusion until October 4, 2011, about three months before Tallman filed his charge, well within the 10(b) period. (ALJD 10:17-21)

As found by the ALJ, Respondent's arguments are not supported by precedent involving ongoing violations. It is well established that Section 10(b) does not preclude the pursuit of a complaint allegation based on the maintenance or enforcement of an unlawful rule or policy within the 10(b) period, even if the rule or policy was promulgated earlier. See, e.g., *Register Guard*, 351 NLRB 1110 fn. 2 (2007) (rejecting 10(b) argument where the rule was maintained within the 10(b) period); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998);

Control Services, 305 NLRB 435, 435 fn. 2, 442 (1991), enfd. mem. 961 F.2d 1568 (3d Cir. 1992). Respondent has maintained its Agreements during the Section 10(b) period as it has not retracted the unlawful Agreements with its current or former employees, and has thus maintained identical or substantially similar agreements against its current and former employees, including the Charging Parties, within the Section 10(b) period. Cf. *Arvin Industries*, 285 NLRB 753, 754-755 (1987) (unlawful maintenance of a super seniority clause notwithstanding the lack of evidence that such a clause was enforced during the 10(b) period; continued maintenance of such a clause was illegal even though enacted more than six months prior to the charge).

Further, Respondent has unlawfully enforced the Agreements within the Section 10(b) period. Respondent has relied on the language of the Offer to Participate on several occasions in its defense of the class action claims, and its ongoing enforcement of the Agreements has affected the right of all of Respondent's current and former employees to join the lawsuits within the Section 10(b) period. Each attempt to compel arbitration, and the ongoing refusal to revoke the reliance on the Agreements, brings Respondent's actions within the 10(b) period. *Teamsters Local 251 (Material Sand & Stone Corp.)*, 356 NLRB No. 35, slip op. at 1-2 (2011) (rejecting 10(b) defense based on reaffirmation of the unlawful agreement within the 10(b) period; an agreement which is unlawful on its face is timely if reaffirmed within the 10(b) period); *Richmond Times-Dispatch*, 346 NLRB 74, 75-76 (2005) (finding each incident of unlawful enforcement was "a separate and independent act for purposes of Section 10(b)" and notwithstanding clear and unequivocal notice of the unlawful enforcement before the 10(b) period). On each occasion, and by the ongoing defense based on the Agreements,

Respondent has violated the Act within the Section 10(b) period as correctly found by the ALJ.

D. Respondent's Arbitration Agreement Interferes with Employee Access to the Board and its Processes (Exception 2)

Respondent impliedly⁸ asserts that it replaced its Agreements, and that it did not violate the Act because a more recent agreement included provisions for Board charges. (RX 3) Respondent asserts that it did not seek to compel arbitration of any administrative charges including Board charges, and that the ALJ incorrectly concluded that employees would reasonably believe that they waived their rights to file unfair labor practices with the Board, claiming that the Charging Parties filing of charges undercuts the ALJ's conclusion. (RX 3)

The ALJ found that both of the Agreements included broad coverage, the more recent Offer to Participate specifically included "violation of any Federal . . . law, statute, regulation or ordinance[,]" and that neither of the Agreements included the National Labor Relations Board claims among those expressly excluded from the Agreements' coverage. (ALJD 11:21-29) Employees could therefore reasonably construe the Agreements to apply to the filing of Board charges as those charges are clearly a claimed violation of federal law. (ALJD 11:29-32) The ALJ further found that Respondent did not cure any unfair labor practices because: the new agreements had not been implemented in Nevada; newly-hired Nevada employees were still asked to sign the unlawful version; and Respondent had not taken steps to notify employees that the prior signed agreements were no longer in force, or that a new agreement had preserved employees' right of access to the Board. (ALJD 11:39-42, 12:1-8)

⁸ "CPS takes exception to the ALJ's conclusion that CPS's failure to replace the existing arbitration agreement with the revised agreement that expressly states that NLRB charges are among the types of administrative charges not subject to arbitration constitutes a violation of the Act." RX 3

The Board should affirm the ALJ's findings as employees would reasonably conclude that the Agreements restricted the ability to access the Board and its processes. The broad coverage of the Agreements which included claims under federal statutes, regulations, and ordinances, with no exception for claims under the Act, would logically include claims made to the Board. Respondent's maintenance of the Arbitration Agreement violates Section 8(a)(1) of the Act because it interferes with employees' access to the Board and its processes. Cf. *Supply Technologies, LLC*, 359 NLRB No. 38, slip op. at 1-2 (2012) (finding unlawful a mandatory grievance and arbitration program which required arbitration of all claims related to employment including those under federal state or local statutes with the exclusion of criminal matters, workers' compensation, and unemployment compensation benefits); *U-Haul of California*, 347 NLRB 375, 377 (2006) (finding unlawful the mandatory arbitration policy which included all claims "recognized by local, state or federal law or regulations").

E. Respondent's Agreements are Not Rendered Lawful Because the Charging Parties Maintain a Collective FLSA Claim (Exceptions 4, 5)

Respondent excepts to the ALJ's conclusion that the Agreements waived the Charging Parties' right to collectively pursue legal action regarding employment terms because the Charging Parties were able to actively pursue legal action in court on a collective basis (Exception 4), and that the Offer to Participate did not violate the Act under *D.R. Horton* because the Charging Parties were not precluded from collectively pursuing litigation of their wage claims. (Exception 5)

The ALJ noted that the Charging Parties' FLSA collective actions have proceeded without Respondent attempting to compel arbitration on an individual basis. (ALJD 12:37-41, 13:1-3) However, the ALJ found that the plain language of the Agreements included collective actions, which:

would lead an employee to reasonably believe that by signing the Offer to Participate, he would be waiving his right to file both federal collective and State class action lawsuits. The fact that the Respondent chose not to enforce this agreement in the Charging Parties' Federal lawsuits does not mean it could not seek to enforce the agreement in a future collective action filed by the Charging Parties or any other employee.” (ALJD 13:21-27)

The ALJ correctly found that Respondent violated the Act by the language of the Agreements in addition to its unlawful enforcement prohibiting class actions of the State claims notwithstanding that Respondent did not move to compel arbitration of the federal claims. While it is true that Respondent has not sought to compel arbitration in the FLSA claims, such a decision is motivated by the process under Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 201, et. seq. Under rule 16(b), where an individual brings a collective action claim, anyone who wishes to join the claim must “opt-in” by filing a consent to join the claim.⁹ Moreover, the fact that Respondent did not compel arbitration of the federal claims neither negates the unlawful language of the Agreements nor the unlawful motion to compel individual arbitration of the class action claims.

F. The ALJ's Conclusions of Law (Exceptions 6 through 8)

Respondent presents several arguments which assert that the Board incorrectly decided *D. R. Horton*. In its Exceptions, it asserts that: (1) its motion to compel arbitration in state court was protected by the First Amendment (Exception 6); (2) that *D. R. Horton* was wrongly decided, and offering “employees the opportunity to arbitrate employment disputes on an individual basis, especially while permitting opt-in collective actions under the FLSA, does not inherently interfere with their right to engage in protected concerted activities”

⁹ “An action to recover the liability prescribed . . . may be maintained against any employer . . . in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.” 29 U.S.C. § 216(b).

(Exception 7); and (3) that the rights to pursue wage claims by collective or class actions is merely a procedural mechanism under Rule 23 of the Federal Rules of Civil Procedure and not a substantive right (Exception 8) (RB 8).

Regarding its First Amendment claim, Respondent points to the Supreme Court's decision in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), arguing that the Board cannot interfere unless or until it is established that the lawsuit lacked a reasonable basis in law or fact, and that the lawsuit was brought with a retaliatory motive. (RB 9-10)

Respondent claims that its motion to compel cannot be an unfair labor practice because the State court granted the motion to compel arbitration. (RB 11) Respondent acknowledges that *Bill Johnson's* does not apply to suits which are beyond State court jurisdiction because of federal preemption, but asserts that federal preemption does not apply because the Charging Parties' lawsuits are based on State law. (RB 12) Respondent impliedly asserts that: (1) the Charging Parties lawsuits involve only State law claims; (2) Respondent's motions to compel arbitration involved state law claims which are not preempted by federal law; and (3) Respondent reasonably relied on federal law under the Federal Arbitration Act and Supreme Court precedent. (RB 13)

The ALJ addressed Respondent's *Bill Johnson's Restaurant* argument, finding that "the Respondent's motion to compel arbitration was an attempt to enforce an unlawful arbitration agreement, as well as an attempt to prevent employees' protected conduct. As such, it is not privileged by the rationale of *Bill Johnson's* [.]” (ALJD 13:39-41) The ALJ rejected Respondent's argument that an unfair labor practice finding based on the success of the motion to compel individual arbitration would violate its right of access to the courts under *Bill Johnson's Restaurants*. (ALJD 13:33-36)

The Board should adopt the ALJ's findings that Respondent's actions were not privileged under *Bill Johnson's Restaurants*. *Bill Johnson's Restaurants* does not preclude proceeding against Respondent's motion to compel individual arbitration. In footnote 5 of *Bill Johnson's Restaurants*, the Court stated that it did not intend to preclude the enjoining of suits that have "an objective that is illegal under federal law." *Bill Johnson's Restaurants v. NLRB*, 461 U.S. at 737 n. 5. The Board has made clear that it will apply footnote 5 to particular litigation tactics, as well as to entire lawsuits. *Wright Electric, Inc.*, 327 NLRB 1194, 1195 (1999), enfd. 200 F.3d 1162 (8th Cir. 2000). See also, e.g., *Dilling Mechanical Contractors*, 357 NLRB No. 56, slip op. at 2-3 (2011) (finding that employer's discovery requests had an illegal objective, although the lawsuit itself did not). Accordingly, a footnote 5 analysis applies to Respondent's motion here, despite it constituting a defense in the course of a lawful employee lawsuit.

A lawsuit has a footnote 5 illegal objective "if it is aimed at achieving a result incompatible with the objectives of the Act." *Manno Electric*, 321 NLRB 278, 297 (1996), enfd. per curiam mem. 127 F.3d 34 (5th Cir. 1997). In particular, an illegal objective may be found for two reasons relevant to the cases presented here. The first of these is where "the underlying acts constitute unfair labor practices and the lawsuit is simply an attempt to enforce the underlying act." *Regional Construction Corp.*, 333 NLRB 313, 319 (2001). This category includes the illegal union fine cases cited by the Court in footnote 5 itself. In those cases, the unions violated Section 8(b)(1)(A) by fining employee/members, and the lawsuits were merely the mechanism to enforce and collect the unlawful fines.

The second reason rests with a grievance or lawsuit aimed at preventing employees' protected conduct. In such cases, the lawsuit is not merely retaliatory for employees'

protected conduct, but also seeks to use the arbitrator or the court to directly interfere with the Section 7 activity. The relief sought would itself be unlawful under the Act. *Cf. Long Elevator*, 289 NLRB 1095, 1095 (1988) (finding unlawful a grievance filed to create a hot cargo provision) In these circumstances, the lawsuit has an unlawful objective, and *Bill Johnson's* does not bar current Board proceedings to enjoin Respondent's motion.

Here, both of these reasons apply. First, Respondent's motion to compel individual arbitration seeks to enforce arbitration agreements which are themselves unlawful since they expressly prohibit employees' collective legal activity, as discussed above. Thus, as in union fine cases, the underlying acts constitute unfair labor practices and the motion to compel is simply an attempt to enforce the underlying act. Moreover, Respondent's motion to compel arbitration also has an illegal objective because it is directly aimed at preventing employees' protected conduct. Indeed, the *only* objective of Respondent's motion is to prohibit employees from engaging in Section 7 activity; the motion would impose individual arbitration, and thus specifically attempts to prevent employees' protected collective legal activity. Therefore, Respondent's efforts to enforce the arbitration agreements through its motion have a footnote 5 illegal objective and are unlawful under Section 8(a)(1) of the Act.

Respondent incorrectly argues that the right to pursue wage claims through collective or class actions is merely a procedural rule or that *D. R. Horton* was wrongly decided. The Board addressed this in *D. R. Horton*. Section 7 vests employees with the right to invoke - without employer coercion, restraint, or interference - procedures generally available under state or federal law for concertedly pursuing employment-related legal claims. *D. R. Horton*, slip op. at 10. See, e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566-68 (1978).

G. The ALJ's Remedy and Order (Exceptions 9, 10)

Respondent argues that: it should not be ordered to ask the State court to reverse its decision compelling arbitration, and that the Board does not have the authority to interfere with the judicial process of any State unless the state action itself violates the federal constitution; and that the NLRB cannot order it to pay attorney's fees to the Charging Parties' lawyers for a State court lawsuit initiated by the Charging Parties. (Exceptions 9 and 10)

The ALJ, in the Remedy and Order, ordered Respondent to "cease and desist [from the unfair labor practices found] and to take certain affirmative action designed to effectuate the policies of the Act" which included a nationwide Remedy rescinding the Agreements; notifying its employees that it will no longer enforce the waiver of class and collective actions; post Notices; reimburse the Charging Parties for any litigation expenses incurred in opposing Respondent's motions; and Respondent "be ordered to seek to have the State court orders granting its motions to compel arbitration vacated, if the time for doing so has not expired." (ALJD 14:26-37, 15:17-18, 26-41)

By excepting to any requirement that it attempt to vacate the order compelling individual arbitration, Respondent asks the Board to allow it to continue its unlawful conduct against its current and former employees, including the Charging Parties, and asks the employees to bear the costs of defending from Respondent's unlawful motion to compel arbitration. The Board has "usually exercised its remedial discretion to require the respondent to reimburse opposing parties for the legal fees and expenses incurred in defending themselves." *J. A. Croson Co.*, 359 NLRB No. 2, slip op. at 10 (2012) It has also ordered a respondent to take actions to dismiss an ongoing preempted lawsuit. *Can-Am Plumbing*, 335 NLRB 1217 (2001), revd. and remanded 321 F.3d 145 (D.C. Cir. 2003), reaff'd. 350 NLRB 947 (2007). Respondent's arguments lack merit and are inconsistent with Board precedent.

IV. CONCLUSION

It is respectfully submitted that, based on the foregoing reasons, the credited record evidence, and applicable Board law, the Board should issue a Decision and Order adopting the ALJ's findings, conclusions, and recommended Order, and providing whatever other remedies deemed appropriate to address and remedy Respondent's violations of Section 8(a)(1) of the Act, including, but not limited to a nationwide Remedy and Order.

Dated at Las Vegas, Nevada, this 22nd day of April 2014.

/s/ Larry A. Smith

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CERTIFICATE OF SERVICE

I hereby certify that the GENERAL COUNSEL'S ANSWERING BRIEF in CPS Security (USA), Inc., a wholly owned subsidiary of CPS Security Solutions, Inc. Cases 28-CA-072150, 28-CA-075432, and 28-CA-075450, was served via E-Gov, E-Filing, and electronic mail, on this 22nd day of April 2014, on the following:

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