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

PROFESSIONAL JANITORIAL SERVICE OF HOUSTON, INC.

and **Case No. 16-CA-112850**

SERVICE EMPLOYEES INTERNATIONAL UNION

Becky Mata, Esq., Counsel for the General Counsel.
Elliot Becker, Esq., Counsel for the Charging Party.
G. Mark Jodon, Esq. and *Timothy Rybacki, Esq., Littler Mendelson, P.C.*, Counsel for the Respondent.

DECISION

Statement of the Case

Joel P. Biblowitz, Administrative Law Judge: The parties waived a hearing and submitted this case directly to me by way of a Joint Motion and Stipulation of Facts dated April 28, 2014. The Complaint herein, which issued on January 31, 2014, and was based upon an unfair labor practice charge that was filed on September 9, 2013 by Service Employees International Union, herein called the Union, alleges that Professional Janitorial Service of Houston, Inc., herein called the Respondent, maintained an employee rule book that contained a number of provisions that violated Section 8(a)(1) of the Act. On April 23 and April 25 the Union and the Respondent executed an informal Settlement Agreement with regard to the allegations contained in Paragraphs 10, 11 and 12 of the Complaint and this Agreement was approved by the Regional Director for Region 16 on April 28, and severed from the remaining allegation of the Complaint. The remaining issue, a *D.R. Horton* (357 NLRB No. 184 (2012)) issue is the sole remaining issue herein.

The Joint Motion and Stipulation of Facts provides as follows:

The charge in this proceeding was filed by Charging Party on September 9, 2013 and a copy was served by regular mail on Respondent the same day.

On January 31, 2014, the Regional Director for Region 16 of the National Labor Relations Board issued a Complaint and Notice of Hearing, and a copy was served by mail on Respondent and Charging Party on the same day.

Respondent filed an Answer on February 14, 2014.

At all material times, Respondent has been a Texas corporation with a facility located in Houston, Texas and has been engaged in the business of providing janitorial services to commercial office buildings.

In conducting its operations during the 12-month period ending December 31, 2013, Respondent purchased and received at its Houston, Texas facility goods valued in excess of $50,000 directly from points outside the State of Texas.

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.

At all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

At all material times, Floyd Mahanay held the position of Respondent's President and has been an agent of Respondent within the meaning of Section 2(13) of the Act.

At all material times, Respondent has maintained a dispute resolution policy (the Arbitration Policy) that requires employees to resolve all covered employment-related disputes by individual arbitration "in an individual capacity and not as part of a representative, collective, or class action."

At all material times, Respondent has maintained a dispute resolution policy (the Arbitration Policy) that excludes certain issues for review by arbitration such as: "any nonwaivable statutory claims, which may include wage claims within the jurisdiction of a local or state labor commission or administrative agency, charges before the Equal Employment Opportunity Commission, National Labor Relations Board, or similar local or state agencies."

At all material times, Respondent has maintained a dispute resolution policy (the Arbitration Policy) that requires employees to maintain all statements and information made or revealed during arbitration confidential, and neither the employee nor the Company may reveal any such statements or information, except on a "need to know" basis or as permitted or required by law.

At all material times, Respondent has required employees to sign an acknowledgement form, which provides the employee's agreement to be bound by the Arbitration Policy.

The issue presented in this case is:

Whether, under the facts of this case, the Respondent violated Section 8(a)(1) of the Act by maintaining an Arbitration Policy that interferes with employees' Section 7 rights to participate in collective and class litigation, interferes with employees' access to the Board and its processes, and restricts employees' abilities to discuss their terms and working conditions with one another.[1]

The Parties stipulate that Respondent engages in the promulgation, dissemination, and maintenance of the Arbitration Policy that is Record Exhibit 2.

This Joint Motion and Stipulation of Facts is made without prejudice to any argument or contention which any party may have as to the materiality or relevancy of any facts set forth herein or recorded in Exhibit Nos. 1, 2, 3, 4, 5 and 6.

The Parties executed an informal Settlement Agreement in Case 16-CA-112850 on April 23 and April 25, 2014 settling the allegations in paragraphs 10, 11, and 12 of the Complaint.

---

[1] By agreeing to the statement of issues set forth in paragraph 10, Respondent does not waive, and instead reserves the right to assert and argue the affirmative and other defenses set forth in Respondent’s Answer and Affirmative and other defenses.

The Settlement Agreement was approved by the Regional Director for Region 16 on April 28, 2014. An Order Severing these settled allegations from the Complaint issued on April 28, 2014.

The Respondent's Dispute Resolution and Arbitration Policy, at issue herein, states as follows:

> PJS (PJS or Company) believes that positive employee relations and morale can be best achieved and maintained in a working environment that promotes ongoing and open communication between supervisors and employees, including open and candid discussions of employee problems, concerns and disputes. PJS therefore utilizes an open door policy devised to encourage its employees to openly express their problems, concerns and opinions on any issue related to their employment.
>
> PJS sincerely hopes that you will never have a dispute relating to your employment with the Company. However, PJS recognizes that disputes sometimes arise between an employer and its employees relating to the employment relationship. PJS believes that it is in the best interests of both its employees and the Company to resolve those disputes in a forum that provides the fastest, least expensive and fairest method for resolving them. Therefore, if disputes cannot be resolved informally through the open door process, PJS. and its employees are required to resolve disputes through final and binding arbitration as discussed in this Dispute Resolution and Arbitration Policy ("DRAP"),
>
> Application and Coverage:
> The DRAP applies to all employees, regardless of length of service or status, and covers all disputes relating to or arising out of an employee's employment with the Company or the termination of employment. The only disputes or claims not covered by this policy are those described below in the Exclusions and Restrictions section. Examples of the type of disputes or claims covered by this policy and subject to final and binding arbitration include, but are not limited to, claims for wrongful termination of employment, breach of contract, employment discrimination, harassment or retaliation under the Texas Labor Code (including chapter 451), the Texas Commission on Human Rights Act, the Americans With Disabilities Act, the Age Discrimination in Employment Act, Title V11 of the Civil Rights Act of 1964 and its amendments or any state or local discrimination laws, tort claims, or any other legal claims and causes of action recognized by local, state or federal law or regulations. The claims covered by this policy can only be pursued in an individual capacity and not as part of a representative, collective or class action. Your decision to accept employment or to continue employment with the Company constitutes your agreement to be bound by this policy. Likewise, the Company agrees to be bound by this policy. This mutual agreement to arbitrate claims means that both you and the Company are required to use arbitration as the only means of resolving employment related disputes (unless they are otherwise informally resolved through the open door process) and to forego any right either may have to a jury trial on issues covered by this policy.
>
> The Arbitration Process:
>
> If you have not informally resolved a dispute through the open door process and wish to pursue your dispute further, you must make a written request for arbitration by submitting a document to the President of PJS entitled Request for Arbitration and identifying the nature of your claim. The arbitration will be heard by an independent and impartial arbitrator chosen by you and the Company.

The arbitrator's responsibility is to determine whether applicable laws have been complied with in the matter submitted for arbitration. In fulfilling this responsibility, the arbitrator may interpret Company policies and procedures, but will not have any power to change them. The arbitrator will be requested to render a decision on the matter within 30 days after the arbitration hearing is concluded and post-hearing briefs, if any, are submitted.

The arbitration will be administered by the American Arbitration Association ("AAA"), unless otherwise agreed by both you and the Company. The Company and you will share the cost of the AAA's filing fee and the arbitrator's fees and costs, but your share of such costs shall not exceed an amount equal the one day's pay (for exempt employees) or eight times your hourly rate (for nonexempt employees), or $250, whichever is less. You and the Company will be responsible for the fees and costs of your own respective legal counsel, if any, and any other expenses and costs, such as costs associated with witnesses or obtaining copies of hearing transcripts.

Either party may bring an action in any court of competent jurisdiction to compel arbitration under this Policy, to enforce an arbitration award, and to vacate an arbitration award. However, in an action seeking to vacate an award, the standard of review to be applied to the arbitrator's findings of fact and conclusions of law will be the same as that applied by an appellate court reviewing a decision, of a trial court sitting without a jury.

Exclusions and Restrictions:

Certain issues may not be submitted for review (or exclusive review) by arbitration.

Excluded Issues: Workers compensation' claims, any claim involving the construction or application of a benefit plan covered by ERISA (these types of claims may be orbital under the applicable ERISA plan and are governed by the plan documents for such plan), and claims for unemployment benefits are excluded from the DRAP. In addition, any non-waivable statutory claims, which may include wage claims within the jurisdiction of a local or state labor commission or administrative agency, charges before the Equal Employment Opportunity Commission, National Labor Relations Board, or similar local or state agencies, are not subject to exclusive review by arbitration. This means that you may file such non-waivable statutory claims with the appropriate agency that has jurisdiction over them if you wish, regardless of whether you decide to use arbitration to resolve them, However, if such an agency completes its processing of your action against the Company, you must use arbitration if you wish to pursue further your legal rights, rather than filing a lawsuit on the action. Arbitration also does not apply to claims by the Company for injunctive relief and/or other equitable relief for unfair competition and/or the use of unauthorized disclosure of trade secrets or confidential information, relief for which may be sought in court.

Other Important Information:

Applicable Law and Procedural Rules: The Federal Arbitration Act, 9 U.S.C. § 1, et seq., will govern arbitrations under this policy. The applicable Employment Dispute Resolution Rules of the AAA will govern the procedures to be used in such arbitrations, unless you and the Company agree otherwise.

Discovery and Amendment of Claims: If a dispute is submitted to arbitration, either you

or the Company may make a reasonable request for copies of relevant documents from each other, and both parties shall provide each other with a list of the witnesses they intend to call to testify at the arbitration at least ten days before the arbitration, unless otherwise provided by the arbitrator. Depositions and other discovery shall be taken in accordance with the arbitrator's orders. Disputes submitted for resolution under this policy may be amended as provided by the AAA rules.

Limitations Periods; Any request for arbitration must be made within one year after the event giving rise to the dispute. If the claim was submitted to a federal, state or local agency, then a request for arbitration of that claim must be made within 90 days of the receipt of the agency's decision. However, if a longer limitation period is provided by a statute governing your claim, then your claim will be subject to the longer limitation period provided by the statute.

Authority of Arbitrator: The arbitrator has the authority to award any remedy that would have been available to you had you litigated the dispute in court under applicable law. The arbitrator shall not have the authority to create causes of action or to award remedies not recognized under applicable law.

Locale of Arbitration: The locale of arbitration will be in the city/county of your employment with PJS, unless you and the Company agree otherwise.

Representation by Counsel: Both you and the Company may be represented by counsel at arbitration at each parties' own expense.

Confidentiality: All statements and information made or revealed during arbitration are confidential, and neither you nor the Company may reveal any such statements or information, except on a "need to know" basis or as permitted or required by law.

At-Will Employment Nothing in this policy shall be construed to create a contract of employment, express or implied, nor does this policy in any way alter the at-will nature of the employment relationship between you and the Company.

Modifications: The Company will not modify or change the agreement between you and the Company to use final and binding arbitration to resolve employment-related disputes without notifying you and obtaining your agreement to such changes.

Agreement to Arbitrate

I have reviewed and understand PJS's Dispute Resolution and Arbitration Policy and Agreement and agree to submit to final and binding arbitration any and all claims and disputes that are related in any way to my employment or the termination of ray employment with PJS. I understand that final and binding arbitration will be the sole and exclusive remedy for any such claim or dispute against PJS or any affiliated entities, and each of their employees, officers, directors or agents, and that by agreeing to use arbitration to resolve my dispute, both the Company and I *agree* to forego any right we each may have had to a jury trial on issues covered by the Dispute Resolution and Arbitration Policy and Agreement. I understand that I can only pursue claims in my individual capacity and not as part of a representative, collective or class action. I also agree that such arbitration will be conducted before an experienced arbitrator chosen by me and the Company, and will be conducted under the Federal Arbitration Act and the procedural rules of the American Arbitration Association (AAA").

> I further acknowledge that in exchange for my agreement to arbitrate, the Company also agrees to submit all claims and disputes it may have with me to final and binding arbitration, and that the Company further agrees that if I submit a request for binding arbitration, my maximum out-of pocket expenses for the arbitrator and the administrative costs of the arbitration will be an amount equal to one day's pay (if I am an exempt employee) or eight times my hourly rate of pay (if I am a nonexempt employee), or $250, whichever is less, and that the Company will pay all the remaining fees and administrative costs of the arbitrator and the AAA or other arbitration service. I further acknowledge that this mutual agreement to arbitrate may not be modified or rescinded except by a written statement signed by both me and the Company.

Analysis

The sole issue herein is the legality of the Respondent's Dispute Resolution Arbitration Policy (DRAP). The principal case on this subject is still *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012). Though much maligned by Respondents, and some courts, I am still bound by its findings, unless the Board reverses itself on the subject or the Supreme Court rules otherwise. In *Horton,* the Board applied the test as set forth in *Lutheran-Heritage Village- Livonia*, 343 NLRB 646 (2004), which stated that the inquiry is whether the rule at issue explicitly restricts activities that are protected by Section 7 of the Act; if so, it is unlawful. If not, the finding of a violation is dependent upon a showing of one of the following: employees would reasonably construe the rule to prohibit protected activity or the rule has been applied to restrict the exercise of this activity. The Board, in Horton, found that "employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums arbitral and judicial" as a condition of employment (slip opinion at p. 12). Respondent initially defends that as the DRAP specifically excludes claims before the Board and other governmental agencies it is, on its face, lawful. Counsel for the General Counsel, in her brief, argues that this exclusionary language is "vague," "ambiguous" and "…insufficient to clarify the inherent ambiguity created by only naming the NLRB and other federal and state agencies without explaining in the remainder of the policy that employees may file charges under the NLRB." I disagree. The Exclusions and Restrictions section of the DRAP states that "certain issues" may not be submitted for review (or exclusive review) by arbitration, mentioning Workmen's Comp and ERISA. It then states that

> …charges before the Equal Employment Opportunities Commission, National Labor Relations Board, or similar local or state agencies, are not subject to exclusive review by arbitration. This means that you may file such non-waivable statutory claims with the appropriate agency that has jurisdiction over them if you wish, regardless of whether you decide to use arbitration to resolve them.

Even though it is lay people who are reading these provisions, I believe that the Respondent made it reasonably clear that unfair labor practice charges with the Board are excluded from the DRAP coverage as the sentence cited above clearly states that employees may file individual claims with the Board and other agencies. However, even though DRAP allows employees to file claims with the Board and other agencies, that does not resolve the issue of whether it violates the Act. *Horton* states that collective action by employees is protected by the Act: "Both the Board and the courts have recognized that collective enforcement of legal rights in court or arbitration serves that congressional purpose [mutual aid and protection]." The Board (at p.3) also spoke of class actions or collective claims by employees, saying, "When multiple named-employee plaintiffs initiate the action, their activity is clearly concerted." I therefore find that even though DRAP excludes Board charges from its coverage, it still restricts employees in combining with other employees in the exercise of their substantive rights, and therefore

violates Section 8(a)(1) of the Act.

Counsel for the General Counsel also alleges that the Confidentiality provision of DRAP violates the Act. It states that employees may not reveal any statements or information made or revealed during the arbitration, except on a "need to know" basis or as permitted or required by law. Although this provision only prohibits the dissemination of information that was revealed during arbitration, it still improperly limits employees in freely discussing wages and other terms and conditions of employment. It is possible that during such an arbitration proceeding, a previously unknown facet of the Respondent's employment policy would be revealed and, yet, if the confidentiality provision of DRAP is upheld, the employees would be prohibited from discussing this subject with other employees, something that is clearly protected by Section 7 of the Act. Employees are entitled to discuss their terms of employment whether these terms are common knowledge, are set forth in a contract, or were discovered at an arbitration proceeding. Restricting the dissemination of information as it does, I find that this confidentiality provision also violates Section 8(a)(1) of the Act.

Conclusions of Law

1. Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. The Dispute Resolution and Arbitration Policy maintained by the Respondent, violates Section 8(a)(1) of the Act.

4. The Confidentiality provision contained in DRAP violates Section 8(a)(1) of the Act.

The Remedy

Having found that the Respondent has violated the Act by maintaining the Dispute Resolution and Arbitration Policy, I recommend that Respondent be ordered to cease and desist from enforcing this policy, and to post the Board Notice set forth below at each of its locations where it is in effect. As the Confidentiality provision which I found to be unlawful is contained in the DRAP, no additional remedy is required in order to remedy that situation. Further, I recommend that Respondent be ordered to notify all arbitral and judicial panels where it has attempted to enjoin, or otherwise prohibit, employees from bringing or participating in class or collective actions, that it is withdrawing these objections and that it no longer objects to such employee actions.

Upon the foregoing findings of fact, conclusions of law and based upon the entire record, I hereby issue the following recommended[2]

[2] 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.

ORDER

The Respondent, Professional Janitorial Service of Houston, Inc., its officers, agents, successors and assigns, shall

1. Cease and desist from:

(a) Maintaining or enforcing its Dispute Resolution and Arbitration Policy.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act

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

(a) Notify all employees at locations where the Program is in effect, that it will no longer maintain or enforce the provisions contained in the Dispute Resolution and Arbitration Policy that prohibits employees from bringing or participating in class or collective actions in an arbitral or judicial forum relating to wages, hours or terms and conditions of employment, and prohibits them from revealing any statements or information made during an arbitration proceeding.

(b) Notify arbitral or judicial panels, if any, where the Respondent has attempted to enjoin or otherwise prohibit employees from bringing or participating in class or collective actions that it is withdrawing those objections and that it no longer objects to such employee actions.

(c) Within 14 days after service by the Region, post at each of its facilities where the Dispute Resolution and Arbitration is maintained or enforced, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 16 , 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, 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 March 9, 2013.

(d) Within 21 days after service by the Region, file with the Regional Director 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. June 16, 2014

Joel P. Biblowitz
Administrative Law Judge

[3] 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."

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 or enforce the Dispute Resolution and Arbitration Policy as far as it prohibits you from bringing or participating in class or collective actions relating to your wages, hours or terms and conditions of employment in arbitrations or court actions and further prohibits you from revealing any information or statements that you learned during the course of an arbitration hearing.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of your exercise of rights guaranteed you by law.

WE WILL notify any arbitral or judicial panel where we have attempted to prevent or enjoin you from commencing, or participating in, joint or class actions relating to wages, hours or other terms and conditions of employment that we are withdrawing our objections to these actions, and **WE WILL** no longer object to you bringing or participating in such class or collective actions or revealing any information learned at an arbitration proceeding.

PROFESSIONAL JANITORIAL SERVICE OF HOUSTON, INC.
(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.

819 Taylor Street, Room 8A24
Fort Worth, Texas 76102-6178
Hours: 8:15 a.m. to 4:45 p.m.
817-978-2921.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-112850 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

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, 817-978-2925.