

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

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DIVA LIMOUSINE, :
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 RESPONDENT : Case 22-CA-091561
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 and :
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DAVID ABRAMS, Attorney at Law :
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 CHARGING PARTY :
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**COUNSEL FOR THE GENERAL COUNSEL’S OPPOSITION TO RESPONDENT’S
MOTION FOR SUMMARY JUDGMENT**

Pursuant to Section 102.24 of the Board’s Rules and Regulations, Counsel for the General Counsel respectfully urges that Respondent’s Motion for Summary Judgment to Dismiss the Complaint and underlying unfair labor practice charge, which was filed on June 2, 2014, (herein “Motion”), be denied.

In its Motion, Respondent contends that the Complaint and underlying unfair labor practice charge should be dismissed because (1) the Region’s reliance on *D.R. Horton*, 357 NLRB No. 184 (2012) is misplaced and, as such (2) its handbook provision, compelling employees, as a term and condition of employment, to waive their right to bring a claim against their employer as a member of a class or a class representative in any forum, does not violate the Act. Simply stated, Respondent is mistaken.

I. Respondent Is Not Entitled to Summary Judgment Because the Board is Not Bound by Appellate Court Decisions that Conflict with Board Law.

In its Motion, Respondent acknowledges that the arbitration provision contained in its employee handbook, is “substantively the same” and “the identical type of provision” as the

Mutual Arbitration Agreement clause that violated Section 8(a)(1) of the Act in *D.R. Horton, Inc.* 357 NLRB No. 184 (2012) (“an employer violate[s] the NLRA by requiring employees, as a condition of employment to waive their right to pursue collective legal redress in both judicial and arbitral forums). However, Respondent claims that the arbitration agreement in its employee handbook does not violate the Act. Respondent argues that the Board should dismiss the Complaint and underlying charge because the 5th Circuit Court of Appeals refused to enforce the relevant part of the Board’s holding in its *D.R. Horton* opinion. *D.R. Horton v. NLRB*, 737 F. 3d 244 (5th Cir. 2013). Further, in support of its contention, Respondent points to opinions reached by 2nd, 8th, and 9th Circuit Courts of Appeals in *Sutherland v. Ernst & Young, LLP.*, 726 F. 3d 290 (2nd Cir. 2013), *Owen v. Bristol Care, Inc.*, 702 F. 3d 1050 (8th Cir. 2013), and *Richards v. Ernst & Young, LLP*, 734 F. 3d 871 (9th Cir. 2013), respectively, arguing that those circuit courts either expressly, or by implication, refused to defer to the Board’s reasoning in *D.R. Horton*. Respondent’s Motion, at its foundation, asks the Board to subjugate its decision making power to Circuit Courts of Appeal and as such, must be dismissed.

A. The Legal Standard

Respondent’s assertion that summary judgment is proper because Federal Circuit Courts of Appeal have rejected the Board’s *D.R. Horton* decision is flawed. The power to grant relief under the National Labor Relations Act rests exclusively with the Board. 29 U.S.C. §160(a). In that regard, it is axiomatic that when confronted with decisions that conflict with Board law, the Board applies its “nonacquiescence policy,” where the Board has stated, and reiterated, that it is “for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals,” or whether “to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise.” *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963) see *Provenia Hospitals*, 350 NLRB 808, 814 (2007) (“the Board has a long-established policy of refusing to acquiesce in the adverse decision of the appellate courts (internal citations omitted)).

Here, Respondent argues solely that the Board is engaging in the disregard of judicial precedent by not dismissing the instant Complaint and underlying charge. Respondent’s

argument falls on infertile ground. As Respondent is undoubtedly aware of, the Board is bound by its own precedent unless and until the Supreme Court or the Board directs otherwise. See *Pathmark Stores*, 342 NLRB 378, 378 n.1 (2004); *Hebert Indus. Insulation Corp.*, 312 NLRB 602, 608 (1993); *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963). Indeed, the circuit courts themselves recognize that the Board is not bound by circuit court decisions. In *Neilson Lithographic Co. v. NLRB*, the employer petitioned for review of the a Board order permitting a union to examine the employer's books and other records in order to substantiate the employer's claim that it had to reduce wages and benefits to remain competitive. See *Neilson Lithographic Co. v. NLRB*, 854 F.2d 1063 (1988). There, the Honorable Richard Posner, writing for the 7th Circuit Court of Appeals, stated that it is "the Supreme Court, not this circuit or *even all twelve circuits* that have jurisdiction or review over orders of the Labor Board, is the supreme arbiter of the meaning of the laws enforced by the Board..." See *Nielson Lithographic Co.*, 854 F. 2d 1063, 1066 (7th Cir. 1988) (Emphasis added.)

In that vein, and directly on point, the Board in *W.A. Krueger Co.* (where the Board held that the employer violated Section 8(a)(1) & (5) of the Act when, in the context of a decertification election, it made unilateral changes before the issuance of the certification results) chose not to follow the holding of the 5th and 6th Circuit Courts of Appeals and instead applied Board law reasoning that it was "but a small price to pay for stability in Labor Relations." *W.A. Kruger*, 299 NLRB 914 (1990).

B. Argument

In its Motion, Respondent admits that its arbitration clause and the clause that the Board held to violate Section 8(a)(1) of the Act in *D.R. Horton* are virtually identical, but maintains that its arbitration clause does not violate the Act even though the Board has held otherwise. Respondent reaches this conclusion by pointing out that the 5th Circuit Court of Appeals failed to affirm the Board's order in *D.R. Horton v. NLRB*, and seeks to compel the Board to subjugate its remedial authority to the Circuit Court. Respondent, in arguing that the Board must defer to the Circuit's opinion, disregards the fact that the Board is empowered to decide what does and what does not violate the Act, subject solely to the contrary command of the Supreme Court of the United States. Interestingly, Respondent has completely failed to even address the Board's well settled "non-acquiescence policy."

Here, the Supreme Court has remained silent on the issue of whether mandatory pre-dispute waivers of an employee's right to bring a claim as a member of a class or class representative violates Section 8(a)(1) of the Act. The Board, however, has spoken, answering the question in the affirmative. Respondents insistence that the Board adhere to the opinion of the 5th Circuit is misplaced, stands in contrast to more than a half century of settled law and, therefore, its Motion is wholly without merit and should be dismissed forthwith.

C. Conclusion

For aforementioned reasons, Respondent has failed to provide grounds for summary judgment, and Counsel for the General Counsel respectfully requests that Respondent's Motion be denied.

Respectfully submitted,

/s/ Eric B. Sposito
Eric B. Sposito
Counsel for the General Counsel
National Labor Relations Board
20 Washington Place; Fifth floor
Newark, NJ 07104

Dated: June 25, 2014

CERTIFICATION OF SERVICE

This is to certify that a copy of the foregoing General Counsel's Opposition to Respondent's Motion for Summary Judgment has been served upon the party's as follows:

VIA E-FILE

Gary Shinnars, Acting Executive Secretary
National Labor Relations Board
Office of the Executive Secretary
1099 14th Street, N.W. Washington, D.C. 20570

BY ELECTRONIC MAIL

Reza Gharakhani, Esq. Rostow & Auster, LLP
2049 Century Park East, Suite 3850
Los Angeles, C.A. 90067
gharakhani@rostow.com

Bruce W. Padula, Esq.
Cleary Giacobbe Alfieri Jacobs LLC
5 Ravine Drive
P.O. Box 533
Matawan, N.J. 07747
dpadula@cgajlaw.com

David Abrams, Esq.
299 Broadway, Suite 1700
New York, N.Y. 10007
dnabrams@gmail.com

/s/ Eric B. Sposito
Eric B. Sposito
Field Attorney
National Labor Relations Board
Region 22
20 Washington Place; Fifth floor
Newark, NJ 07104