NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

CPS Security (USA), Inc., a wholly owned subsidiary of CPS Security Solutions, Inc. *and* Dennis Tallman *and* Donald Mika *and* Beryl Harter. Cases 28–CA–072150, 28–CA–075432, and 28–CA–075450

December 24, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On February 11, 2014, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order as modified and set forth in full below.[1]

The judge found, applying the Board's decision in *D. R. Horton*, 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing an arbitration policy that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. The judge also found, relying on *D. R. Horton* and *U-Haul Co. of California*, 347 NLRB 375, 377–378 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007), that maintaining the arbitration policy violated Section 8(a)(1) because employees reasonably would believe that it bars or restricts their right to file unfair labor practices with the Board.

In *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part No. 14-60800, 2015 WL 6457613, ___F.3d ____ (5th Cir. 2015), the Board reaffirmed the relevant holdings of *D. R. Horton*, supra. Based on the judge's application of *D. R. Horton* and on our subsequent decision in *Murphy Oil*, we affirm the judge's findings and conclusions,[2] and adopt the recommended Order as modified and set forth in full below.[3]

[1] We shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language, and shall substitute a new notice to conform to the Order as modified.

[2] The Respondent argues that the complaint is time-barred by Sec. 10 (b) with respect to Charging Party Dennis Tallman, asserting that his initial unfair labor practice charge was filed and served more than 6 months after he signed and became subject to the arbitration policy, and more than 6 months after the Respondent filed its State court motion to compel individual arbitration. We reject this argument, as did the judge, because the Respondent continued to maintain the unlawful arbitration policy during the 6-month period preceding the filing of Tallman's initial charge. The Board has long held that maintenance of an unlawful workplace rule constitutes a continuing violation that is not time-barred by Sec. 10(b). See *PJ Cheese, Inc.*, 362 NLRB No. 177, slip op. at 1 (2015); *Neiman Marcus Group, Inc.*, 362 NLRB No. 157, slip op. at 2 & fn. 6 (2015). It is equally well established that an employer's enforcement of an unlawful rule, like the arbitration policy here, independently violates Sec. 8(a)(1). See *Murphy Oil*, supra, slip op. at 19–21. The Respondent continued to enforce its arbitration policy until the State court ruled on the Respondent's motion to compel individual arbitration on October 4, 2011, within the 6-month period before Tallman's initial charge was filed on January 9, 2012.

The Respondent contends that its arbitration policy, which includes an opt-out provision, is voluntary and therefore does not fall within the proscriptions of *Murphy Oil USA* and *D. R. Horton,* which involved agreements that were imposed on employees as a condition of employment. See *D. R. Horton*, slip op. at 13 fn. 28. The Board has rejected this argument, holding that an opt-out procedure does not cure an otherwise unlawful arbitration policy. See *On Assignment Staffing Services*, 362 NLRB No. 189, slip. op at 1, 4–5 (2015). The Board further held in *On Assignment Staffing Services*, slip op. at 1, 5–8, that even assuming that an opt-out provision renders an arbitration policy not a condition of employment, an arbitration policy precluding collective action in all forums is unlawful even if entered into voluntarily, because it requires employees to prospectively waive their Sec. 7 right to engage in concerted activity.

In light of *On Assignment Staffing*, we need not pass on the judge's findings that the Respondent's agreement was not "truly voluntary" because employees were given little opportunity to review it before signing, the agreement was included in a stack of 21 documents, and there was no oral discussion regarding the voluntary nature of the agreement.

Our dissenting colleague argues that Sec. 8(a)(1) of the Act does not prohibit agreements that waive class and collective actions, especially when they contain an opt-out provision. We disagree, for the reasons set forth in *Murphy Oil,* supra, slip op. at 17–18, and *On Assignment Staffing*, supra, slip at 4, 9 & fns. 28, 29, 31. See also *Bristol Farms*, 363 NLRB No. 45 (2015).

[3] We shall order the Respondent to reimburse the Charging Parties and any other plaintiffs for all reasonable expenses and legal fees, with interest, incurred in opposing the Respondent's unlawful motion in State court to compel individual arbitration of their class or collective claims. See *Murphy Oil*, supra, slip op. at 21; *Bill Johnson's Restaurants v. NLRB*, 461 U. S. 731, 747 (1983) ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses" as well as "any other proper relief that would effectuate the policies of the Act."). Interest shall be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). See *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 fn. 10 (1991) ("[I]n make-whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses"), enfd. 973 F.2d 230 (3d Cir. 1992).

ORDER

The National Labor Relations Board orders that the Respondent, CPS Security (USA), Inc., a wholly owned subsidiary of CPS Security Solutions, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an arbitration policy that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

(b) Maintaining and/or enforcing an arbitration policy that requires employees to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

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

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

(a) Rescind the arbitration policy in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration policy does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not bar or restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all current and former employees who signed the arbitration policy or otherwise became bound to the arbitration policy in any form that it has been rescinded or revised and, if revised, provide them a copy of the Revised Agreement.

(c) Notify the District Court for Clark County, Nevada, in Case A-09-589249-C, that it has rescinded or revised the arbitration agreement upon which it based its motion to compel individual arbitration of the claims of Dennis Tallman, Donald Mika, and Beryl Harter, and inform the court that it no longer opposes the lawsuit on the basis of the Arbitration Agreement.

(d) In the manner set forth in this decision, reimburse Dennis Tallman, Donald Mika, Beryl Harter, and any other plaintiffs for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing the Respondent's motion to compel individual arbitration.

(e) Within 14 days after service by the Region, post at its Henderson, Nevada, facility copies of the attached notice marked "Appendix A," and at all other facilities where the unlawful arbitration policy is or has been in effect, copies of the attached notice marked "Appendix B."[4] Copies of the notices, on forms provided by the Regional Director for Region 28, 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 on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such 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 marked "Appendix A" to all current employees and former employees employed by the Respondent at any time since July 9, 2011.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 28 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. December 24, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

In this case, my colleagues find that the Respondent's Offer to Participate in Arbitration of Disputes and Arbitration Agreement (Outside CA) (collectively, the Agreement) violate Section 8(a)(1) of the National Labor Relations Act (the Act or the NLRA) because they waive the right to participate in class or collective actions regarding non-NLRA employment claims. Charging Party Dennis Tallman signed the Agreement and later filed a

We shall also amend the judge's remedy to order the Respondent to notify the State court that it has rescinded or revised the arbitration policy and to inform the court that it no longer opposes the Charging Parties' lawsuit on the basis of the arbitration policy.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices 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."

hybrid class-action and collective-action lawsuit against the Respondent in State court alleging violations of the Fair Labor Standards Act (FLSA) and State wage and hour laws. In reliance on the Agreement, the Respondent filed a motion to compel arbitration of Tallman's claims on an individual basis, which the court granted. Charging Parties Donald Mika and Beryl Harter also signed the Agreement and later filed a separate class-action lawsuit against the Respondent in State court alleging violations of State wage and hour laws. In reliance on the Agreement, the Respondent filed a motion to consolidate that action with Tallman's litigation and to compel arbitration of Mika's and Harter's claims on an individual basis. The court granted that motion as well. My colleagues find that by filing these motions, the Respondent unlawfully enforced its Agreement. I respectfully dissent from these findings for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*[1]

I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than NLRA.[2] However, I disagree with my colleagues' finding that Section 8(a)(1) of the NLRA prohibits agreements that waive class and collective actions, and I especially disagree with the Board's finding here, similar to the Board majority's finding in *On Assignment Staffing Services*,[3] that class waiver agreements violate the NLRA even when they contain an opt-out provision. In my view, Sections 7 and 9(a) of the NLRA render untenable both of these propositions. As discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."[4] This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;[5] (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class waiver agreements;[6] (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA);[7] and (iv) for the reasons stated in my dissenting opinion in *Nijjar Realty, Inc., d/b/a Pama Management*, 363 NLRB No. 38, slip op. at 3–5 (2015), the legality of such a waiver is even more self-evident when the agreement contains an opt-out provision, based

[1] 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority's holding in *Murphy Oil* invalidating class-action waiver agreements was recently denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, No. 14-60800, 2015 WL 6457613 (5th Cir. Oct. 26, 2015).

[2] I agree that non-NLRA claims can give rise to "concerted" activities engaged in by two or more employees for the "purpose" of "mutual aid or protection," which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7's statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. Id.; see also *Beyoglu,* 362 NLRB No. 152, slip op. at 1, 4–5 (2015) (Member Miscimarra, dissenting).

[3] 362 NLRB No. 189, slip op. at 1, 4–5 (2015).

[4] *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That *any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment." (Emphasis added.) The Act's legislative history shows that Congress intended to preserve every individual employee's right to "adjust" any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

[5] When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12-60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

[6] The Fifth Circuit has twice denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See *Murphy Oil USA, Inc. v. NLRB*, above; *D. R. Horton, Inc. v. NLRB,* above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil,* 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co., Inc*., 96 F.Supp.3d 71, 2015 WL 1433219 (S.D.N.Y. 2015); *Nanavati v. Adecco USA, Inc.,* 99 F.Supp.3d 1072, 2015 WL 1738152 (N.D. Cal. 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services, Inc.,* No. 1:12-cv-00062-BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated the NLRA).

[7] For the reasons expressed in my *Murphy* Oil partial dissent and those thoroughly explained in former Member Johnson's dissent in *Murphy Oil*, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil,* above, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 49–58 (Member Johnson, dissenting).

on every employee's 9(a) right to present and adjust grievances on an "individual" basis and each employee's Section 7 right to "refrain from" engaging in protected concerted activities.[8] Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.

Because I believe the Respondent's Agreement was lawful under the NLRA, I would find it was similarly lawful for the Respondent to file motions in State court seeking to enforce the Agreement. It is relevant that the State court that had jurisdiction over the non-NLRA claims *granted* the Respondent's motions to compel arbitration. That the Respondent's motions were reasonably based is also supported by the multitude of court decisions that have enforced similar agreements.[9] As the Fifth Circuit recently observed after rejecting (for the second time) the Board's position regarding the legality of class-waiver agreements: "[I]t is a bit bold for [the Board] to hold that an employer who followed the reasoning of our *D.R. Horton* decision had no basis in fact or law or an 'illegal objective' in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders."[10] I also believe that any Board finding of a violation based on the Respondent's meritorious State court motions to compel arbitration would improperly risk infringing on the Respondent's rights under the First Amendment's Petition Clause. See *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731 (1983); *BE & K Construction Co. v. NLRB,* 536 U.S. 516 (2002); see also my partial dissent in *Murphy Oil,* above, 361 NLRB No. 72, slip op. at 33–35. Finally, for similar reasons, I believe the Board cannot properly require the Respondent to reimburse the Charging Parties and any other plaintiffs for their attorneys' fees in the circumstances presented here. *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 35.

Accordingly, as to these issues,[11] I respectfully dissent.

Dated, Washington, D.C. December 24, 2015

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

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.

[8] The class-action waiver agreements were voluntarily signed, even though the Respondent was willing to hire employees or continue their employment only if they entered into the Agreements. For my colleagues, however, the voluntariness of such a waiver is immaterial. They believe that even if a waiver is nonmandatory, it is still unenforceable. See *On Assignment Staffing Services*, above (finding class-action waiver agreement unlawful even where employees are free to opt out of the agreement); *Bristol Farms*, 363 NLRB No. 45 (2015) (finding class-action waiver agreement unlawful even where employees must affirmatively opt *in* before they will be covered by a class-action waiver agreement, and where they are free to decline to do so). By definition, every agreement sets forth terms upon which each party may insist as a condition to entering into the relationship governed by the agreement. Thus, conditioning employment on the execution of a class-action waiver does not make it involuntary. However, the Board's position is even less defensible when the Board finds that NLRA "protection" operates in reverse—not to *protect* employees' rights to engage or refrain from engaging in certain kinds of collective action, but to *divest* employees of those rights by denying them the right *to choose* whether to be covered by an agreement to litigate non-NLRA claims on an individual basis. See *Bristol Farms*, above, slip op. at 2–4 (Member Miscimarra, dissenting).

[9] See, e.g., *Murphy Oil USA, Inc., v. NLRB,* above; *Johnmohammadi v. Bloomingdale's,* 755 F.3d 1072 (9th Cir. 2014); *D. R. Horton, Inc. v. NLRB*, above; *Owen v. Bristol Care, Inc.,* 702 F.3d 1050 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP,* 726 F.3d 290 (2d Cir. 2013).

[10] *Murphy Oil USA, Inc. v. NLRB,* above, slip op. at 6.

[11] I agree with the majority that the Agreement violates Sec. 8(a)(1) by interfering with the filing and resolution of NLRB charges. See *U-Haul Co. of California,* 347 NLRB 375, 377 (2006), enfd. mem. 255 Fed. Appx. 527 (D.C. Cir. 2007). I note that the judge misstated the first prong of the standard set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). The judge stated that a rule is unlawful if "employees *could* reasonably construe" it to prohibit Sec. 7 activity (emphasis added). Under *Lutheran Heritage* prong one, a disputed rule or policy is unlawful if a reasonable employee *would* construe it to restrict Sec. 7 activity. Id. at 647. As I explained in my partial dissenting opinion in *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 10 fn. 3 (2014), enfd. mem. No. 14-3284, 2015 WL 6161477 (2d Cir. Oct. 21, 2015), I would reexamine this standard in an appropriate future case, but even applying *Lutheran Heritage*, I would find the Agreement unlawful because employees would reasonably construe it to restrict their right to file unfair labor practice charges with the Board.

WE WILL NOT maintain an arbitration policy that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain and/or enforce an arbitration policy that requires our employees to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the arbitration policy in all of its forms, or revise it in all of its forms to make clear that the arbitration policy does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who signed or otherwise become bound to the arbitration policy in all of its forms that the arbitration policy has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised policy.

WE WILL notify the court in which Dennis Tallman, Donald Mika, and Beryl Harter filed their collective lawsuit that we have rescinded or revised the arbitration policy upon which we based our motion to compel individual arbitration of their claims and WE WILL inform the court that we no longer oppose their collective lawsuit on the basis of that policy.

WE WILL reimburse Dennis Tallman, Donald Mika, Beryl Harter, and any other plaintiffs for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing our motion to compel individual arbitration.

CPS SECURITY (USA), INC., WHOLLY OWNED SUBSIDIARY OF CPS SECURITY SOLUTIONS, INC.

The Board's decision can be found at www.nlrb.gov/case/28-CA-072150 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

APPENDIX B

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

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WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

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CPS SECURITY (USA), INC., WHOLLY OWNED SUBSIDIARY OF CPS SECURITY SOLUTIONS, INC.

The Board's decision can be found at www.nlrb.gov/case/28-CA-072150 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Larry A. Smith, Esq. and *Nathan A. Higley, Esq.,* for the Acting General Counsel.
Howard M. Knee, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Las Vegas, Nevada, on May 21 and 22, 2013. Dennis Tallman filed the charge in Case 28–CA–072150 on January 9, 2012.[1] Donald Mika and Beryl Harter filed the charges in Cases 28–CA–075432 and 28–CA–075450, respectively, on January 24. All three Charging Parties amended their respective charges on December 18. Based upon these charges, as amended, the Acting General Counsel issued the consolidated complaint on December 27.

The consolidated complaint, as amended, alleges, inter alia, that CPS Security (USA), Inc. (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining and enforcing arbitration agreements that unlawfully waived employees' Section 7 right to pursue collective and/or class-action litigation in any forum. The consolidated complaint further alleges that the Respondent violated the Act when it sought to enforce the allegedly unlawful arbitration agreements by filing and prosecuting motions to compel arbitration in lawsuits filed by the three individual Charging Parties in State and Federal court.

On January 9, 2013, the Respondent filed its answer denying the unfair labor practice allegations of the complaint and asserting several affirmative defenses. Among others, the Respondent asserted that the complaint's allegations were barred by Section 10(b) of the Act, that the arbitration agreements were voluntarily executed by the Charging Parties, and that the Respondent never sought to compel arbitration of any collective actions filed by the Charging Parties or any other employee.

The issues raised by the pleadings in this case are governed by the Board's decision in *D. R. Horton, Inc.,* 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013). On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

CPS Security Solutions, Inc.[2] is a Delaware corporation, with its principal office located in Gardena, California. Its subsidiary, the Respondent CPS Security (USA), Inc. (CPS), is a Nevada corporation whose principal office is located at the same address in Gardena, California. The Respondent provides security services at locations in Nevada and in other States of the United States and operates branch offices in several States, including Nevada. There is no dispute that the Respondent annually performs services valued in excess of $50,000 in States outside the State of California. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

Most of the facts relevant to deciding the issue in this case are undisputed. Respondent CPS provides security guard services for construction companies at construction sites in Nevada and several other States. While it shares a home office in Gardena, California, with its parent company, it operates a branch office in Henderson, Nevada, where it manages the services provided in Nevada, the site of the instant dispute. Christopher Coffey is Respondent's chief executive officer, a position he holds with the parent company as well. He testified at the hearing and acknowledged that he is responsible for setting corporate policy, including the human resources policies at issue here. Jim Newman is Respondent's general counsel. He also testified at the hearing and admitted that he drafted one of the two arbitration agreements in dispute.

The Respondent employs hourly guards and "trailer guards" to provide security at construction sites. A "trailer guard" is required to reside onsite in a stationary trailer provided by the Respondent. They are scheduled to be onsite 24 hours a day on the weekends and 16 hours a day during the week. Their regular "work" schedule requires them to patrol the site when no one else is around, i.e., from 5 to 7 a.m. and 3 to 9 p.m. Monday through Friday and from 5 a.m. to 9 p. m. on weekends. The period from 9 p.m. to 5 a.m. is designated as "personal time", when the trailer guard must remain in the trailer and is essentially on-call to respond to alarms and monitor access to the site. During this "personal time," the trailer guards are only compensated for time spent responding to an alarm or other interruption. The only time the guards are permitted to leave the

[1] All dates are in 2012, unless otherwise indicated.

[2] The name of the Respondent has been corrected to reflect a stipulation by the parties as to the correct identity of the Respondent. Based on that stipulation, counsel for the General Counsel withdrew complaint allegations against two other named Respondents. In formulating the caption, I agree with counsel for the Respondent that the relationship between CPS and CPS Security Solutions is not a "d/b/a" as counsel for the Acting General Counsel claimed.

construction site is Monday through Friday from 7 a.m. until 5 p.m. when construction workers are typically onsite. The trailer guards typically are paid minimum wage.

The three Charging Parties in this case all worked as trailer guards in Nevada. Tallman was hired July 23, 2007, and worked until September or October 2008. Mika was employed from March 2008 until March 2011 and Harter was hired on or about June 12, 2006.[3] Although Harter is no longer employed by the Respondent, there is no evidence in the record showing when her employment ended. On April 30, 2009, Tallman filed in a Nevada State court a hybrid class action and collective action lawsuit against the Respondent for a violation of the Federal Fair Labor Standards Act (FLSA) and Nevada State wage and hour laws. In both the Federal and State law actions, Tallman sought compensation for the "personal time" spent in his trailer from 9 p.m. to 5 a.m. On May 27, 2009, the Respondent petitioned to remove Tallman's actions from State to Federal court based on the Federal FLSA claim. On or about March 22, 2011, the Federal judge declined to assert supplemental jurisdiction over Tallman's State law claims and severed and remanded those to Nevada State court. On May 18, 2011, the Respondent filed its motion to compel arbitration of Tallman's State law claims on an individual basis. On October 4, 2011, the State court judge granted the Respondent's motion. The Respondent has not sought to compel arbitration of Tallman's Federal FLSA collective action and that case has progressed to trial. Although the trial commenced on December 11, 2012, it has not concluded.[4] Mika is an opt-in plaintiff in Tallman's ongoing Federal lawsuit.

Mika and Harter filed their own class-action lawsuit against the Respondent in Nevada State court on January 23, 2012. The Respondent filed a motion to consolidate this action with Tallman's State court litigation and to compel arbitration of their claims on an individual basis and the court granted the motion on June 18, 2012. Harter also filed a collective FLSA action in Federal court in 2012. As with Tallman's Federal court litigation, the Respondent has not sought to compel arbitration of this collective action. Harter's case is proceeding with no trial scheduled as of the hearing in this matter.

The Respondent's motions to compel arbitration of the State court lawsuits filed by Tallman, Mika, and Harter were based on documents each had signed while employed by the Respondent. The document, entitled, "Offer to Participate in Arbitration of Disputes" provides, in pertinent part:

> I, [employee name], recognize that differences may arise between [the Respondent] and me during or following my employment with the Company related to my employment, my compensation, and/or my working conditions. *I have been offered the opportunity to participate in a mandatory arbitration procedure* which has certain advantages and disadvantages and I have decided that the advantages outweigh the disadvantages. *I understand that my election to participate in this process is not a condition of my employment* and I acknowledge that by agreeing to arbitration, I may gain the benefits of a speedy, impartial dispute resolution procedure, with the administrative costs of arbitration and the professional fees of the arbitrator paid by the Company regardless of the outcome. *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, collective actions, and/or class actions.*
>
> MUTUAL AGREEMENT TO ARBITRATE CLAIMS
>
> 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* : (a) breach of any contract or covenant (express or implied); (b) torts; (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 any 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, reimbursements, 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 Actions*
>
> *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.*

[3] Only Tallman and Mika testified at the hearing. Harter did not appear at the hearing. Counsel for the Acting General Counsel represented that she had moved and he did not have a current address for her although he had communicated with her telephonically. Counsel represented further that she had told him she had some kind of medical issue but no evidence documenting a physical inability to appear and testify was offered.

[4] The Federal court declared a mistrial in that case and, at the time of the hearing here, it was scheduled for retrial commencing August 20, 2013.

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 admin-istrative 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 the 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. (Emphasis added.)

This document is eight pages long and contains 18 sections in all. The last page, after the signature page of the Agreement, contains the following three paragraphs, all capitalized and in bold type, which is also signed and dated by the employee:

VOLUNTARY AGREEMENT

I ACKNOWLEDGE THAT I HAVE CAREFULLY READ THIS AGREEMENT, THAT I UNDERSTAND ITS TERMS, THAT ALL UNDERSTANDINGS AND AGREEMENTS BETWEEN THE COMPANY AND ME RELATING TO THE SUBJECTS COVERED IN THIS AGREEMENT ARE CONTAINED IN IT, AND THAT I HAVE ENTERED INTO THIS AGREEMENT FREELY AND VOLUNTARILY AND NOT IN RELIANCE UPON ANY PROMISES OR REPRESENTATIONS BY THE COMPANY OTHER THAN THOSE CONTAINED IN THIS AGREEMENT ITSELF

RIGHT TO CONSULT COUNSEL

I FURTHER ACKNOWLEDGE THAT I HAVE BEEN GIVEN THE OPPORTUNITY TO DISCUSS THIS AGREEMENT WITH ADVISORS OF MY CHOICE AND THAT I HAVE AVAILED MYSELF OF THAT OPPORTUNITY TO THE EXTENT THAT I WISH TO DO SO.

30 DAY PERIOD TO OPT-OUT

I FURTHER ACKNOWLEDGE THAT I WAS ADVISED THAT CHOOSING TO SIGN THIS AGREEMENT IS NOT A CONDITION OF MY EMPLOYMENT. I HAVE BEEN GIVEN A COPY OF MY SIGNED AGREEMENT AND HAVE A FULL THIRTY (30) DAY PERIOD TO OPT-OUT OF THE AGREEMENT IF I CHANGE MY MIND. IN THE EVENT THAT I DECIDE THAT ARBITRATION IS NOT RIGHT FOR ME, I WILL MAIL WRITTEN NOTICE TO THE COMPANY BY CERTIFIED OR REGISTERED MAIL (AS SET FORTH IN PARAGRAPH 3) WITHIN 30 DAYS.

The documents in evidence signed by the Charging Parties all bear a notation indicating that the form was revised in May 2006. Tallman signed his "Offer to Participate" and arbitration agreement on his first day of employment, i.e., July 23, 2007. Mika also signed his on his first day, i.e., March 24, 2008. Harter, who as noted above started in June 2006, did not sign this document until March 9, 2007.

In addition to the above document, each of the Charging Parties signed a much shorter document entitled, "Arbitration Agreement (Outside CA)." All three signed on their first date of employment, i.e., Harter on June 12, 2006, Tallman on July 23, 2007, and Mika on March 24, 2008. This document reads as follows:

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, provided that this Arbitration Agreement shall not apply to claims that EMPLOYEE has violated statutory or contractual prohibiting solicitation, of the COMPANY'S customers or employees and/or prohibiting the misappropriation, use or disclosure of the COMPANY's confidential information. The parties shall agree on an arbitrator affiliated with a recognized alternative dispute organization and, if no agreement is reached, either party may petition any court having proper jurisdiction. 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.

The arbitrator shall apply state substantive procedural law to the proceeding. The demand for arbitration must be in writing and made with the applicable statute of limitations period. The arbitration shall take place in the County and state in which the employee provided services to the Company. The parties shall be entitled to conduct reasonable discovery, including conducting depositions and requesting documents. The arbitrator shall have the authority to resolve discovery disputes, including but not limited to determining what constitutes reasonable discovery. The arbitrator shall prepare in writing and provide to the parties a decision and award which

> includes factual findings and the reasons upon which the decision is based.
>
> The decision of the arbitrator shall be binding and conclusive on the parties, except as may otherwise be required by law. Judgment upon the award rendered by the arbitrator may be entered in any court having proper jurisdiction. The fees for the arbitrator shall be paid by COMPANY. Each party shall bear its or his own fees and costs incurred in connection with the arbitration except for any attorneys' fees or costs which were awarded to a party by the Arbitrator pursuant to a statute or contract which provides for recovery of such fees and/or costs from the other party.
>
> This Arbitration Agreement between EMPLOYEE and COMPANY constitutes the entire agreement between the parties with respect to the matters referenced herein. This Agreement can be modified only by a written instrument executed by EMPLOYEE and Chris Coffey, on behalf of the COMPANY.
>
> *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.*

The copies of this Arbitration Agreement that are in evidence bear a notation indicating it is the 2005 version of the document.

Newman, the Respondent's general counsel, testified that he drafted the Offer to Participate in 2006 and that the shorter Arbitration Agreement was already in existence when he began working for the Respondent in 2002. According to Newman, it was the Respondent's intent that the Offer to Participate would replace the shorter Agreement. Although he testified that new employees no longer sign the short-form Arbitration Agreement, he was unable to specify when the Respondent stopped using that version other than that it was sometime after he got involved in Tallman's lawsuit.

While the Offer to Participate signed by the Charging Parties, on its face, states that it was not a condition of employment, the circumstances surrounding the actual execution of these agreements, as shown by the credible testimony of Tallman and Mika, suggest otherwise. In addition, company records including new hire checklists maintained in employee personnel files, support the General Counsel's argument that the Arbitration Agreements utilized by the Respondent were in fact a mandatory term and condition of employment.

Tallman testified that, on his first day of employment, a woman who worked in the office gave him a 35-page stack of documents to review and sign. At the same time, a drug testing sponge was inserted in his mouth, where it remained while he reviewed and signed the documents. The maintenance employee who was supposed to drive Tallman to his trailer was waiting for him outside the office. Tallman testified that he was given about 5–10 minutes to sign all of the documents and that there was no discussion about any of them. According to Tallman, he went through the stack of papers and signed anywhere he saw a space for a signature without reading any of the documents. While he was doing this, the maintenance employee came into the office and asked the woman if Tallman was ready to go. Tallman testified that he felt "hurried." After Tallman finished going through all the documents, he was transported to his jobsite to start work. He was not given a copy of any of the documents he signed. Tallman acknowledged on cross-examination that no one from the Company told him he could not read the documents and admitted that he did not ask for more time to do so. Tallman also acknowledged that, in a deposition he gave in connection with his lawsuit, more than 2 years before the hearing here, he stated that it was his practice in 2007 to read documents before signing them and that he "did not recall" if he had time to read the documents he was given by the Respondent before signing them. He did state in the deposition, consistent with his testimony here, that he felt "rushed."

Mika testified that, a few days after he was hired, he went to the Respondent's office for an orientation. He recalled that there were about six other people going through orientation at the same time. After watching a video, getting his uniforms, and going over rules and regulations, he was given a bunch of documents to review and sign. The woman who gave him the documents then left the room. His new employee packet, which is in evidence, consists of about 38 pages. Mika testified that it took him about 20 minutes to go through all the pages and sign where indicated. He testified similarly to Tallman that there was no discussion of any of the documents. Although he testified that he tried to read the documents, including the two arbitration agreements described above, he did not understand them. He did not ask anyone for an explanation because no one from the Company was there when he went through the documents. According to Mika, after he finished going through and signing the paperwork, he followed the maintenance man out to the jobsite where his trailer was set up.[5]

The Respondent did not call any witnesses who were present for the signing of these documents by any of the Charging Parties or any other employee. The General Counsel did place in evidence the new hire checklist utilized by the Respondent in Nevada which lists all of the documents contained in the packet, including the above-Arbitration Agreements, and instructs its office staff how to process the paperwork. These instructions all include some version of the following:

> Please make sure the following documents are all signed and in the new hire package before sending to corporate . . . .
>
> Every document signed.
>
> Documents often missed are: Arbitration , . . .

The parties stipulated that, of 160 personnel files submitted to counsel for the Acting General Counsel in response to his subpoena duces tecum, only one did not contain a signed arbitration agreement, in either version.

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[5] As previously noted, Harter did not appear at the hearing. There is no evidence regarding the circumstances under which she signed the short-form arbitration agreement when first hired, or the long-form Offer to Participate almost a year later.

The Respondent's general counsel, Newman, testified that the Respondent has revised its Arbitration Agreement since the charges in this case were filed to specifically exclude unfair labor practice charges from those claims covered by the Agreement. According to Newman, the purpose of this revision was to make clear that Respondent did not intend to prohibit employees from going to the Board. Newman conceded that the Respondent has not started using the new version in Nevada and that the Respondent has not attempted to replace the existing Arbitration Agreements that employees had signed with the new version.

B. Analysis

1. Section 10(b)

The Respondent argued in its brief that the allegations based on Tallman's charge are barred by Section 10(b) of the Act's 6-month statute of limitations. The Respondent's argument is based on the fact that Tallman's charge was filed more than 2 years after the Respondent's counsel informed Tallman's lawyer in the wage and hour case that the Respondent intended to file a motion to compel arbitration of those claims and almost 8 months after the Respondent filed the motion in court.[6] Although a general 10(b) defense was raised in the Respondent's answer to the complaint, the Respondent did not argue on brief that the allegations regarding the maintenance of the Arbitration Agreement, or the Respondent's attempt to enforce that Agreement in the Mika and Harter lawsuit were untimely.

The seminal case applying Section 10(b) of the Act is *Bryan Mfg. Co*.[7] In that case, the Supreme Court held that Section 10(b) of the Act barred a complaint that a collective-bargaining agreement containing a union-security clause was unlawful because the union did not represent a majority of employees when it was recognized by the employer more than 6 months before the unfair labor practice charge was filed. The conduct relied upon to establish the illegality of the collective-bargaining agreement, i.e., recognition of a minority union, thus occurred outside the 10(b) period. The Court stated that "a finding of violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of the Section 10(b) proviso." Id. at 422. The Court recognized however that Section 10(b) would not bar allegations where a contract was invalid on its face or, although validly executed, was unlawfully enforced or administered within the 10(b) period. Id. at 423.

The Board has historically recognized that Section 10(b) of the Act does not bar allegations of unlawful conduct that, though it began more than 6 months before a charge was filed, would constitute a continuing violation. For example, Section 10(b) does not preclude pursuit of a complaint allegation based on the maintenance and/or enforcement of an unlawful rule or policy within the 10(b) period, even if the rule or policy was promulgated earlier. *Register Guard,* 351 NLRB 1110 fn. 2 (2007); *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).

The two Arbitration Agreements at issue here were clearly promulgated more than 6 months before the individual unfair labor practice charges were filed. Each of the Charging Parties signed the two Arbitration Agreements outside the 10(b) period. However, there is no question that the Respondent has continued to utilize at least one of the Arbitration Agreements and took steps to enforce that Agreement against Mika and Harter within the 10(b) period. Moreover, even though the Respondent may have initiated enforcement of the Agreement against Tallman more than 6 months before he filed his charge, those efforts did not come to a conclusion until the State court granted the Respondent's motion to compel arbitration of Tallman's wage and hour claims on October 4, 2011, about 3 months before Tallman filed his charge. Accordingly, I find that the continued maintenance of the Arbitration Agreements and the Respondent's enforcement of them against the Charging Parties are not barred by Section 10(b) of the Act.

2. The Arbitration Agreements

The General Counsel alleges that the two Arbitration Agreements utilized by the Respondent and signed by the individual Charging Parties are unlawful on two grounds. First, the language of both Agreements is overly broad and would lead employees to reasonably believe that by signing the Agreement they were giving up their right to file unfair labor practice charges with the Board. Second, consistent with the Board's decision in *D. R. Horton*, supra, the Offer to Participate, by waiving an employee's right to initiate or participate in class or collective actions, interferes with the employee's Section 7 right to engage in protected concerted activity for "mutual aid or protection."

In *D. R. Horton*, supra, the Board found that an employee who files a class or collective action regarding wages, hours, or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is therefore engaged in conduct protected by Section 7 of the Act. Consequently, an employer who seeks to interfere with, restrain, or coerce employees engaged in filing such legal actions would violate Section 8(a)(1) of the Act. The Board specifically held that *D. R. Horton* had violated the Act by requiring employees, as a condition of employment, to sign arbitration agreements waiving their right to engage in such activity. 357 NLRB No. 184 supra, slip op. at 7. The Board left open the question, raised here by the Respondent, whether voluntary arbitration agreements containing a waiver of collective and class actions violates the Act. Id., slip op. at 13 fn. 28.[8]

The first question to resolve is whether the Respondent required its employees to sign the Arbitration Agreements at

[6] The Respondent's motion to compel arbitration was not granted by the court until October 2011, within 6 months of the filing of Tallman's charge.

[7] *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB,* 362 U.S. 411 (1960).

[8] Counsel for the Acting General Counsel argued in his brief that the Respondent's arbitration agreements at issue here would violate Sec. 8(a)(1) even if voluntary because they would restrict the rights of employees who chose not to sign the agreement from acting in concert with those who did. As a result of my finding here that the agreements at issue were not truly "voluntary," I find it unnecessary to reach this argument.

issue as a "condition of employment." The older short-form Arbitration Agreement is silent on its face as to whether the signatory employee was required to sign it as a condition of employment. In contrast, the more recent Offer to Participate in Arbitration of Disputes contains explicit language stating that the signatory employee's "election to participate in this process is not a condition of my employment." In addition, the Agreement contains bold face provisions confirming the voluntary nature of the Agreement and providing the signatory with a 30-day period to change his or her mind and opt out of the Agreement. Despite this plain language, Tallman and Mika testified that they were given little opportunity to review the Agreement before signing it. The circumstances described by the two men were similar and suggest that their "decision" to execute the Agreement was not truly voluntary. The new hire checklist utilized by the Respondent's human resources personnel supports their testimony because it shows that the Respondent expected all employees to sign the Arbitration Agreement along with all the other paperwork necessary to become an employee. Finally, the fact that only one personnel file, out of 160, did not contain a signed Arbitration Agreement and that file contained no documents signed after 2004, confirms the finding that the Arbitration Agreements were in fact mandatory, notwithstanding the language used in the Agreement.

The next question is whether the Arbitration Agreements, in either version, unlawfully waived employees' right to file charges with the Board. Both versions of the Arbitration Agreement are broadly worded with respect to coverage. The older short-form Agreement covers "any controversy, dispute or claim" between the employee and the company or "company parties," including but not limited to "claims for violation of any federal . . . . law, statute, regulation, or ordinance, except claims for workers' compensation or unemployment insurance benefits." The more recent and longer version explicitly covers "all claims or controversies" between the parties, specifically including "violation of any Federal . . . law, statute, regulation, or ordinance." Neither Agreement includes the National Labor Relations Board among those claims expressly excluded from coverage. The quoted language could reasonably be construed to apply to unfair labor practice charges as such a charge is clearly a claim of violation of Federal law. Because employees could reasonably construe this language to include the filing of such charges, it is an unlawful restriction on the employees' exercise of their statutory rights. *Supply Technologies, LLC,* 359 NLRB No. 58, slip op. at 1–2 (2012); *U-Haul Co. of California,* 347 NLRB 375, 377–378 (2006); See generally *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004). Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act by requiring employees to sign Arbitration Agreements that would waive their right to file unfair labor practice charges with the Board.

The Respondent at the hearing offered evidence that it had revised the Offer to Participate in Arbitration of Disputes to specifically exclude from coverage unfair labor practice charges under the Act. However, the Respondent's general counsel, Newman, testified that this new version of the Agreement had not yet been "rolled out" in Nevada. In addition, counsel for the Acting General Counsel offered evidence that employees recently hired in Nevada were still being asked to sign the unlawful version. Finally, even if the Respondent had been able to show that newly hired employees were offered this latest version of the Agreement, the Respondent admits it has not notified employees who previously signed the unlawful Agreement that those Agreements are no longer in force and that there is a new Agreement that preserves their right of access to the Board. Under these circumstances, I must find that the Respondent has not effectively cured the unfair labor practice found here. *Passavant Memorial Area Hospital,* 237 NLRB 138 (1978).

The final question before me is whether the Offer to Participate in Arbitration of Disputes also violates the Act,[9] under *D. R. Horton,* supra, because it waives employees' right to initiate and participate in collective and class actions regarding wages, hours, and working conditions, and whether the Respondent violated the Act by seeking to enforce this Arbitration Agreement against the three Charging Parties. The plain language of the Offer to Participate, set forth above, explicitly waives a signatory employee's right "to initiate or to participate in representative actions, collective actions, and/or class actions." Section 6 of the Agreement further expressly waives not only the signatory employee's right to initiate or participate in such group litigation in court, but prohibits the arbitrator hearing any dispute pursuant to this Agreement from "consolidat[ing] Claims of different employees into one proceeding" or "hear[ing] arbitration as a class action." On its face, then, the Arbitration Agreement signed by the Charging Parties and currently used by the Respondent in Nevada and elsewhere violates Section 8(a)(1) under the principals enunciated by the Board in *D. R. Horton,* supra.

The Respondent raises a number of arguments in defending the Arbitration Agreement here, some of which I have already addressed. The Respondent argues that the Board's decision in *D. R. Horton,* supra, was wrongly decided and is inconsistent with Supreme Court cases and lower court cases upholding such waivers in private arbitration agreements, involving commercial and labor/employment issues. The court of appeals recent decision rejecting the Board's reasoning and denying enforcement to the Board's Order in *D. R. Horton* would seem to support the Respondent's case here. However, it is well established that it is my duty as an administrative law judge to apply established Board precedent which the Supreme Court has not reversed. It is the Board's, and not the judge's, prerogative to determine whether precedent should be varied. *Waco, Inc.,* 273 NLRB 746, 749 fn. 14 (1984). This is true even where, as here, the appellate courts have criticized Board precedent. *Pathmark Stores,* 342 NLRB 378 fn. 1 (2004).

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[9] The short-form Arbitration Agreement that predates the Offer to Participate does not, on its face, waive the employees' right to seek class or collective relief in court or before an arbitrator. Moreover, the Respondent did not rely on this earlier version of its Arbitration Agreement when it sought to compel arbitration of the State court lawsuits filed by the Charging Parties, even though each had signed this version of the agreement as well. For these reasons, I find that the short-form Arbitration Agreement did not violate Sec. 8(a)(1) under a *D. R. Horton* theory of a violation.

The Respondent also argues that it has not violated the Act because it has not prevented the Charging Parties, or any other employee, from bringing or joining collective actions in Federal court. As noted in the facts above, the Respondent only filed a motion to compel arbitration in the State court wage and hour class actions filed by Tallman, Mika, and Harter. There is no dispute that Tallman's and Harter's Federal lawsuits have proceeded without objection by the Respondent on the basis of the Arbitration Agreement. In addition, there is no dispute that other employees and former employees have opted in to these Federal collective actions. The Respondent relies on the following language from the Board's decision in *D. R. Horton,* supra:

> [W]e hold only that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial. So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of classwide arbitration. Employers remain free to insist that *arbitral* proceedings be conducted on an individual basis.

357 NLRB No. 184 supra, slip op. at 12 (emphasis in original).

I believe the Respondent is reading too much into this aspect of the Board's decision. I note that the Board used the conjunctive "and," rather than disjunctive "or," when referring to the types of claims employees have a Section 7 right to file, i.e., "class and collective." Collective actions under Federal law and class actions under State laws have different procedures, substantive law and remedies so that precluding one type of group legal action may still interfere with the right of employees to concertedly pursue relief regarding their wages, hours, and working conditions. In any event, the plain language of the Arbitration Agreement here includes "collective actions" among the rights being waived by signing the Agreement. This 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. Where the express language of the Arbitration Agreement waives the employee's right to collectively pursue litigation of employment claims in all forums, as it does here, a violation may be found even though the Respondent may choose in certain cases not to enforce the broad language of the Agreement. It is the chilling effect of the language itself that interferes with, restrains, and coerces employees in the exercise of their statutory rights.

The Respondent also argues that an unfair labor practice finding based on its successful pursuit of the motion to compel arbitration in the Charging Parties' State court lawsuits would interfere with its constitutional right of access to the courts under the Supreme Court's decision in *Bill Johnson's Restaurant v. NLRB,* 461 U.S. 731 (1983). Counsel for the Acting General Counsel argues that, even under *Bill Johnson's Restaurant,* the Board may find unlawful an employer's litigation that has "an objective that it is illegal under federal law." Id. at 737 fn. 5. In the present case, 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,* supra. See *Regional Construction Corp.,* 333 NLRB 313, 319 (2001) (a lawsuit which is an attempt to enforce an underlying unfair labor practice); *Long Elevator,* 289 NLRB 1095 (1988) (where the relief sought is prevention of protected employee conduct).

After careful consideration of the evidence and the arguments of the parties, I find that the Respondent's Offer to Participate in Arbitration of Disputes violates Section 8(a)(1) of the Act as alleged in the complaint because it requires employees, as a condition of employment to waive their Section 7 right to collectively pursue litigation of employment claims in all forums. *D. R. Horton, Inc.,* supra.[10] Because the underlying Arbitration Agreements were unlawful on their face, I find that the Respondent's efforts to enforce these Agreements through the motions to compel arbitration of the Charging Parties' lawsuits violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. By maintaining Arbitration Agreements that employees would reasonably believe waived their right to file unfair labor practice charges with the Board, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By maintaining Arbitration Agreements that waive its employees' right to collectively pursue legal action regarding their employment terms, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. By enforcing these unlawful Arbitration Agreements through motions to compel arbitration of State court class actions filed by the Charging Parties, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Because the Respondent uses the unlawful Arbitration Agreement at all of its facilities, I shall recommend a nationwide order requiring the Respondent to rescind the Agreement and to notify its employees that it will no longer enforce the waiver of class and collective actions that is part of the Agreement. A determination regarding the specific locations where such notice shall be posted will be left for the compliance stage of this proceeding. Because I have found that the Respondent's motions to compel arbitration of the Charging

[10] The Respondent, in its brief, argues that a decision in this case should be deferred until the Supreme Court has ruled on the legality of the recess appointment of Board Member Becker, who was involved in the *D. R. Horton* case. See *Noel Canning v. NLRB,* 705 F.3d 490 (D.C. Cir. 2013), cert. granted No. 12-1281 (June 24, 2013). The Board has consistently rejected similar arguments attacking its authority to Act in light of pending litigation over the recess appointment issue. I see no reason to deviate from this policy of the Board.

Parties' State court lawsuits was unlawful, I shall recommend that the Respondent be ordered to reimburse the Charging Parties for any litigation expenses incurred in opposing the Respondent's motions. I shall also recommend that the 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.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, CPS Security (USA), Inc., a wholly owned subsidiary of CPS Security Solutions, Inc., Gardena, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Requiring employees, as a condition of employment, to sign an Arbitration Agreement that would lead the employees to reasonably believe that they are waiving their right to file unfair labor practice charges with the Board.

(b) Requiring employees, as a condition of employment, to sign an Arbitration Agreement that waives the employees' right to collectively pursue legal action regarding their wages, hours, and working conditions in all forums.

(c) Enforcing the unlawful Arbitration Agreement through the filing of a motion to compel arbitration of any class and/or collective actions filed by employees.

(d) 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 necessary to effectuate the policies of the Act.

(a) Rescind or revise its Arbitration Agreements to make it clear to employees that the Agreement does not waive their right to file unfair labor practice charges with the Board or to collectively pursue legal actions regarding their employment conditions in all forums.

(b) Notify any employee who has already signed the unlawful Arbitration Agreements that these Agreements will no longer be enforced to prohibit them from filing unfair labor practice charges with the Board or pursuing collective and/or class actions regarding their employment conditions in any court.

(c) Reimburse Dennis Tallman, Donald Mika, and Beryl Harter for any legal expenses incurred in opposing the Respondent's motions to compel arbitration of their Nevada State court class actions.

(d) Take whatever steps are necessary, to the extent the Respondent is not time barred from doing so, to vacate the Nevada State court orders compelling Tallman, Mika, and Harter to arbitrate their class-action claims.

(e) Within 14 days after service by the Region, post at its Henderson, Nevada facility, and at all facilities where the unlawful arbitration agreements have been utilized, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 28, 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, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 July 9, 2011.

(f) 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. February 11, 2014

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 and enforce mandatory Arbitration Agreements that waive your right to file unfair labor practice charges with the National Labor Relations Board or to collectively pursue legal actions regarding your employment conditions.

WE WILL NOT enforce, through the filing of a motion to compel arbitration, that portion of our Arbitration Agreement that prohibits the filing of collective and/or class actions in all forums.

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[11] 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.

[12] 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."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reimburse Dennis Tallman, Donald Mika, and Beryl Harter for any litigation expenses incurred since July 9, 2011, directly related to opposing our efforts to compel individual arbitration of their class-action claims filed in State court.

WE WILL, if requested by Dennis Tallman, Donald Mika, and Beryl Harter, join with each of them in a motion to the appropriate State court in Nevada to vacate the orders compelling individual arbitration of their State law class actions, if such motions may be timely filed.

WE WILL rescind our Arbitration Agreements to the extent they waive your right to file unfair labor practice charges with the National Labor Relations Board or to collectively pursue legal actions regarding your employment conditions.

CPS SECURITY (USA), INC., A WHOLLY OWNED SUBSIDIARY OF CPS SECURITY SOLUTIONS, INC.