UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

RALPH'S GROCERY COMPANY

and Case 21–CA–073942

TERRI BROWN, an Individual

Alice J. Garfield for the Acting General Counsel.
Timothy F. Ryan and *Aurora Kaiser*
for the Respondent.

DECISION

STATEMENT OF THE CASE

Eleanor Laws, Administrative Law Judge. This is another case raising issues related to *D. R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012), petition for review filed No. 12-60031 (5th Cir. Jan. 13, 2012). It was tried based on a joint motion and stipulation of facts I approved on May 13, 2013. Terri Brown (Brown or the Charging Party) filed the original charge on February 6, 2012, and the first amended charge on April 20, 2012. The Acting General Counsel issued the complaint on January 28, 2013 and Ralph's Grocery Company (Ralph's or the Respondent) filed a timely answer on February 11, 2013 denying all material allegations and setting forth its affirmative defenses.

The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining and enforcing an unlawful arbitration policy precluding employees from acting collectively or as a class or otherwise exercising their § 7 rights and requiring employees to keep confidential the existence, content and outcome of all arbitration proceedings. The Respondent denies these allegations and further contends that the National Labor Relations Board (the Board) lacked a quorum when it decided *D.R. Horton*. As such, the Respondent argues *D.R. Horton* is void and not binding on me. The Respondent requests that, to the extent I follow *D.R. Horton*, I stay resolution of this decision pending the Supreme Court's resolution of *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted 81 U.S.L.W. 3695 (U.S. June 24, 2013) (No. 12-1281), where the Court will decide whether the Board members who decided *D.R. Horton* (and numerous other cases) were validly appointed. For the reasons the Board articulated in *Bloomingdale's, Inc*., 359 NLRB No. 113 (2013), this request is denied.

On the entire record and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Ralph's Grocery Company, a corporation engaged in the operation of retail grocery markets, has offices and places of business throughout California, including a warehouse in Compton, California. Ralph's annually derives gross revenues in excess of $500,000 and purchases and receives at its Compton warehouse, goods valued in excess of $50,000**,** directly from points 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. The Mediation and Binding Arbitration Policy

At all material times, the Respondent has maintained a Mediation and Binding Arbitration Policy (MBAP). The MBAP, which is four pages long and contains an introduction and 14 separate untitled paragraphs, is deemed accepted by an applicant upon submitting an application and by an employee upon acceptance or continuation of employment. The MBAP is binding on the employee and the Company. The introductory paragraph states, in relevant part:[1]

> This Arbitration Policy applies to all Employees' employment (or application for employment) and is aimed at resolving employment-related disputes quickly and fairly, to the benefit of everyone involved. This Arbitration Policy is not meant to supplant the purpose, role and effect of managers, supervisors, administrators, any applicable grievance and arbitration procedure contained in a collective bargaining agreement ("CBA") and applicable internal grievance and complaint/dispute resolution procedures available to Employees for resolving workplace issues, including, for example, complaints of unlawful harassment, discrimination or retaliation. Employees should continue to seek resolution of employment-related disputes through such channels to the extent they are applicable to their disputes. However, this Arbitration Policy is the exclusive mechanism for formal resolution of disputes and awards of relief that otherwise would be available to Employees or the Company in a court of law or equity or in an administrative agency.

The current MBAP, version 090304, expressly supersedes all previous versions.

The first paragraph sets forth the entities the Respondent considers to be part of the Company. Paragraph 2 partially defines the term "Covered Disputes" and states in full:

[1] The portions of the MBAP most relevant to my decision are reproduced for ease of reference, particularly taking into account the small print on the copy reproduced as Exhibit 5 of the Stipulated Record.

> For Employees whose terms and conditions of employment are determined by a CBA, this Arbitration Policy does not apply to claims or disputes arising out of the terms and conditions of the CBA (referred to in this Arbitration Policy as "Excluded Disputes"), but does apply to and require final and binding arbitration of such Employees' (and all other Employees') individual statutory claims or disputes. Except for Excluded Disputes, this Arbitration Policy applies to any and all other employment-related disputes that exist or arise between Employees and Ralphs (or any of them) that would constitute cognizable claims or causes of action in a federal, state or local court or agency under applicable federal, state or local laws (referred to in this Arbitration Policy as "Covered Disputes"). Covered Disputes are employment-related disputes that are not Excluded Disputes which involve the interpretation or application of this Arbitration Policy, the employer/employee relationship, an Employee's actual or alleged employment with Ralphs (or any of them), the termination of such employment, or applying for or seeking such employment. A person who has sought or applied for employment with Ralphs (or any of them), is employed by Ralphs (or any of them) or whose employment with Ralphs (or any of them) has terminated, and who wishes to initiate or participate in formal dispute resolution proceedings to resolve his or her Covered Disputes, is an Employee under this Arbitration Policy. If any Employee or Ralphs (or any of them) wishes to initiate or participate in formal proceedings to resolve any Covered Disputes, the Employee or Ralphs (or any of them) must submit those Covered Disputes to final and binding arbitration as described in this Arbitration Policy. The Company therefore agrees to arbitrate any Covered Disputes, whether initiated by an Employee or by the Company. Only Covered Disputes can be arbitrated under this Arbitration Policy. [Emphasis in original.]

The third paragraph begins by stating: "There are no Judge or Jury trials permitted under this Arbitration Policy." (Emphasis in original.) The paragraph then elaborates that this prohibition applies to Covered Disputes, and contains an option for claims under the jurisdiction of a small claims court to be decided by either the court or an arbitrator.

Paragraph 4 begins by stating that arbitration is the sole and exclusive remedy for present and future "Covered Disputes" and instructing that the MBAP requires "to the fullest extent permitted by law" resolution of all "Covered Disputes" by final and binding arbitration. It then further defines, by way of non-exclusive example, the term "Covered Dispute":

> Such Covered Disputes include, for example and without limitation, disputes having anything to do with the interpretation or application of this Arbitration Policy (including, without limitation, whether a dispute is a "Covered Dispute or "Excluded Dispute"), and disputes, claims or causes of action for unfair competition, unfair business practices, misappropriation of trade secrets, conversion, replevin, trespass, restitution, indemnity, contribution, disgorgement civil penalties, fraud, breach of contract, injunctive relief, unlawful harassment, unlawful discrimination, unlawful retaliation, failure to provide reasonable accommodation(s) for a disability or to engage in an interactive process about such accommodation(s), unpaid wages or failure to pay overtime or other compensation (or the computation thereof), failure to provide family or medical (or other required) leave, failure to consider for hiring, failure to hire for employment and actual or constructive termination of the employment relationship. Covered Disputes subject to this

> Arbitration Policy include all Employees' individual statutory claims or disputes under federal, state and local laws including, for example and without limitation, any claims or disputes arising under the California Fair Employment and Housing Act; the Illinois Human Rights Act; the Cook County Human Rights Ordinance; the Chicago Human Rights Ordinance; the Indiana Civil Rights Law; the Nevada Fair Employment Practices Act; the Civil Rights Act of 1964; the Americans With Disabilities Act; the Age Discrimination in Employment Act; the Family Medical Leave Act; the California Family Rights Act; the California Labor Code, Illinois Compiled Statutes, Indiana Code, or Nevada Revised Statutes (excluding workers' compensation and unemployment Insurance benefits claims); the Fair Labor Standards Act; the Employee Retirement Income Security Act; the California Unfair Competition Law; the Uniform Trade Secrets Act; the California Business & Professions Code; the California Civil Code; the California Government Code; and the United States Code, as enacted and amended. Both Ralphs and Employees must submit any and all such Covered Disputes to final and binding arbitration before a neutral Qualified Arbitrator (as defined herein) under and pursuant to this Arbitration Policy.

Paragraph 5 permits informal resolution of Covered Disputes under certain specified conditions, and describes the procedures for and parameters of informal resolution.

Paragraph 6 discusses the MBAP's effect on employees' access to administrative processes, and states in full:

> This Arbitration Policy does not prevent or excuse any Employee or Ralphs (or any of them) from satisfying any applicable statutory conditions precedent or jurisdictional prerequisites to pursuing their Covered Disputes by, for example, filing administrative charges with or obtaining right to sue notices or letters from federal, state, or local agencies. However, final and binding arbitration as described in this Arbitration Policy is the sole and exclusive remedy or formal method of resolving the Covered Disputes. If there is no applicable statutory condition precedent or jurisdictional prerequisite to pursuing a Covered Dispute, all parties must proceed directly to arbitration under and pursuant to this Arbitration Policy. Notwithstanding any other provision of this Arbitration Policy all Employees retain the right under the National Labor Relations Act ("NLRA") to file charges with the National Labor Relations Board ("NLRB"), and to file charges with the United States Equal Employment Opportunity Commission ("EEOC") under federal equal employment opportunity laws within the EEOC's administrative jurisdiction.

Paragraph 7 states that the MBAP is governed by the Federal Arbitration Act, and sets forth how the parties will appoint a qualified arbitrator. In turn, paragraph 8 states that the Federal Rules of Civil Procedure, as implemented by the applicable local federal district court, will govern any arbitration proceedings. It further states:

> [T]here is no right or authority for Covered Disputes to be heard or arbitrated on a class action basis, as a private attorney general, or on bases involving claims or disputes brought in a representative capacity on behalf of the general public, of other Ralph's employees (or any of them), or of other persons alleged to be similarly situated.

The paragraph then defines "Representative Action" as:

> Any action or proceeding brought against Ralphs (or any of them) by any person (whether an Employee bound by this Arbitration Policy or not) or entity in a representative capacity on behalf of or for the benefit of (in whole or in part) any Employee bound by this Arbitration Policy." Paragraph 8 concludes by stating that, while the Federal Rules of Civil Procedure apply, "there are no Judge or Jury trials and there are no class actions or Representative Actions permitted under this Arbitration Policy. [Emphasis in original.]

Next, paragraph 9 sets forth the procedures for initiating arbitration under the MBAP, including the applicable statute of limitations. Paragraph 10 covers attorneys' fees.

Paragraph 11 starts out by stating that the Federal Rules of Evidence apply to arbitrations conducted pursuant to the MBAP. It then discusses the arbitrators' authority to award remedies that would otherwise be available to the employee if litigated in court or an administrative forum, with the following qualification:

> However, the Qualified Arbitrator will have no power, authority or jurisdiction to hear or decide any Covered Dispute(s) as any type of Representative Action, to award any type of remedy or relief for any Covered Dispute(s) in connection with any type of Representative Action or to interpret, apply or modify this Arbitration Policy in any manner that would empower or authorize the Qualified Arbitrator to do so.

Next, it sets forth the requirements of the arbitrator to issue a written award, and sets some parameters for what the award needs to contain. Paragraph 11 goes on to state:

> Except and only to the extent it may be required by applicable law, the parties and the Qualified Arbitrator shall maintain the existence, content and outcome of any arbitration proceedings held pursuant to this Arbitration Policy in the strictest confidence and shall not disclose the same without the prior written consent of all the parties.

It concludes by permitting entry of judgment by a court of competent jurisdiction following the arbitrator's award, and noting that the arbitrator cannot issue an award contrary to the law at issue.

Stepping backwards in the process, paragraph 12 permits the parties to submit briefs to the arbitrator following the evidentiary hearing and prior to the arbitrator's decision. Paragraph 13 contains a zipper clause stating the MBAP is the complete and full agreement for "Covered Disputes" and notes that the employee accepts the agreement upon submitting an application for employment, accepting employment, and/or continuing employment. The MBAP concludes with paragraph 15, which states that noting in the agreement changes the status of at-will employees.

B. Enforcement of the MBAP

Terri Brown is a security guard for Ralph's and is covered by the MBAP. On November 30, 2009, Brown filed a class action and Private Attorney General Act (PAGA) lawsuit against

Ralph's in California Superior Court alleging various California Labor Code violations, including failure to pay wages for missed lunch and rest breaks. (Exh. 6.)[2] On February 11, 2011, Ralph's filed a petition to compel arbitration and motion to dismiss or stay the proceedings based on the MBAP. (Exh. 7.) The motion was litigated in the California state courts, resulting in a remand from the appeals court to determine whether the MBAP provision waiving the right to pursue a representative action under PAGA, which was unlawful, could be severed or whether it rendered the entire MBAP unenforceable.[3] (Exhs. 8–13.)

On October 16, 2013, Brown filed a second amended complaint in California Superior Court limiting her claims to those available under PAGA. (Exh. 17.) Ralph's renewed its petition to compel arbitration and motion to dismiss on January 8, 2013, which the Superior Court denied the following day. (Exhs. 18–20.) At the time of this decision, Ralph's appeal of the Superior Court's ruling, and Brown's motion to dismiss the appeal were pending.

III. Decision and Analysis

Under Section 8(a)(1), it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

A. Mandatory Waiver of Class Action Claims

The first issue, set forth in paragraphs 3(a), 4 and 5 of the complaint, is whether in view of the Board's decision in *D. R. Horton,* the Respondent's maintenance of, and efforts to enforce the terms of, the MBAP, which contains provisions requiring certain employees to resolve employment-related disputes exclusively through individual arbitration proceedings and to relinquish any right to resolve such disputes through collective or class action, violates Section 8(a)(1) of the Act by precluding employees from acting collectively or as a class or otherwise exercising their § 7 rights.

The Respondent first argues that *D.R. Horton*, discussed below, is void because the Board lacked a quorum when it issued the decision. This argument derives from the D.C. Circuit's decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), which the Board has rejected and so must I. See, e.g., *Bloomingdale's Inc*., 359 NLRB No. 113 (2013); *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at fn.1 (2013). Though the Fourth Circuit recently agreed with *Noel Canning* when it decided *NLRB v. Enterprise Leasing Co. Southeast, LLC*, Nos. 12–1514, 12–2000, 12–2065, 2013 WL 3722388 (4th Cir. 2013), the Board has noted that at least three courts of appeals have reached a different conclusion on similar facts. *Bloomingdales,* supra, (citing *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d

[2] The abbreviation "Exh." is used to identify exhibits attached to the stipulated facts. Though I have cited to certain exhibits I emphasize that my decision is based on the full record.

[3] The Supreme Court of California subsequently denied review and the U.S. Supreme Court denied Respondent's petition for *certiorari*. (Exhs. 14–16.)

704 (2d Cir. 1962)). Consistent with Board precedent, the Respondent's defense based on *Noel Canning* and a lack of quorum fails.

In *D.R. Horton*, slip op. at 1, the Board explained that an employer violates Section 8(a)(1) of the Act by imposing, as a condition of employment, a mandatory arbitration agreement that precludes employees from "filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial." Citing to *Spandsco Oil & Royalty Co*., 42 NLRB 942, 948-949 (1942), *Salt River Valley Water Users Ass'n*, 99 NLRB 849, 853-854 (1952), enfd. 206 F.2d 325 (9th Cir. 1953), and a string of other cases, the Board noted that concerted legal action addressing wages, hours, and working conditions has consistently fallen within Section 7's protections. *D.R. Horton* at fn.4. The Board stopped short of requiring employers to permit both classwide arbitration and classwide suits in a court or administrative forum, finding that "[s]o 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." Id. at 16.

In the instant case, there is no dispute that the MBAP is a condition of employment. It is self-executing upon submitting an application, accepting employment, and/or continuing employment. It is likewise clear that the MBAP prohibits class actions entirely. With regard to classwide or representative arbitration, paragraph 8 states:

> [T]here is no right or authority for Covered Disputes to be heard or arbitrated on a class action basis, as a private attorney general, or on bases involving claims or disputes brought in a representative capacity on behalf of the general public, of other Ralph's employees (or any of them), or of other persons alleged to be similarly situated.

Here, as in *D.R. Horton*, the arbitration agreement precludes an arbitrator from awarding any collective remedy. With regard to judicial or any other class or representative actions, paragraph 8 concludes, with underlined emphasis, "<u>there are no Judge or Jury trials and there are no class actions or Representative Actions permitted under this Arbitration Policy</u>." Because the MBAP conditions employment on employees' "waiving their right under the NLRA to take the collective action inherent in seeking class certification" or pursuing other representative actions, I find *D.R. Horton* is directly applicable. Id. at 12.

The Respondent argues that the Board's ruling in *D.R. Horton* interferes with the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 *et. seq.*, based on the Supreme Court's reasoning both in *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740, 1746 (2011), and *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp*., 130 S.Ct. 1758, 1775–1776 (2010). The Board, however, considered these arguments and precedents in *D.R. Horton* to support a different conclusion, by which I am bound.

The Respondent further argues that, absent a congressional command to excuse enforcement of the FAA, it must be enforced. Relying on *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 672 n.4 (2012), decided a week after *D.R. Horton*, the Respondent argues that the Board ignored the requirement of a "congressional command" to override the FAA. The crux of the Respondent's argument is that nothing in Section 7 (which was enacted prior to the FAA) excuses application of the FAA. Specifically, the Respondent argues that Section 7 provides no

substantive right to initiate a class action. Though the Board could not have applied *CompuCredit* when it issued *D.R. Horton*, it nonetheless addressed this argument, stating:

> Any contention that the Section 7 right to bring a class or collective action is merely "procedural" must fail. The right to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest. [Emphasis in original.]

D.R. Horton, supra.[4]

The Respondent argues that the recent Supreme Court decision, *American Exp. Co. v. Italian Colors Restaurant*, 133 S.Ct. 2034 (2013), makes clear that it is improper to find a congressional command where none exists. *American Exp. Co.* involved a group of merchants who were unhappy with the rates American Express charged them to use their cards at their respective businesses.[5] At issue before the Court was whether the merchants were bound by agreements mandating individual arbitration of these disputes and precluding a class action suit for violation of antitrust law. The merchants argued that without the ability to proceed collectively, it was not cost-effective to challenge American Express's rates. The Court noted that the laws at issue, the Sherman and Clayton Acts, fail to reference class actions, and found that the "antitrust laws do not guarantee an affordable procedural path to the vindication of every claim." Id. at 2309. The Board in *D.R. Horton* distinguished the NLRA, however, and found that Section 7 substantively guarantees employees the right to engage in collective action, including collective legal action, for mutual aid and protection concerning wages, hours, and working conditions. As such, I find this argument fails.

The Respondent's reliance on *NLRB v. City Disposal Systems Inc.*, 465 U.S. 822, 830 (1984), for the proposition that the term "concerted activities" is not defined in the Act, is unavailing. The Court in *City Disposal* went on to hold that the term "clearly enough embraces the activities of employees who have joined together in order to achieve common goals," and focused its analysis on the issue at hand, *i.e.*, whether an individual's invocation of a right rooted in collective bargaining is concerted activity. Id.

Accordingly, I find the Acting General Counsel has proved that the MBAP violates Section 8(a)(1) as alleged.

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[4] The Respondent notes that the Board's refusal to permit a class action waiver is contrary to the Supreme Court's decision in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009). The Board considered this argument, however, and distinguished *14 Penn Plaza*. *D.R. Horton,* supra at 12.

[5] It is a matter of common sense that the merchants could continue to operate their businesses without offering customers the ability to pay with an American Express card. Other forms of currency are available and using American Express was their choice. Likewise, it was the Charging Party's choice to work for Ralph's. Taken to its logical extreme, however, if waivers such as the MBAP are judicially sanctioned and become the norm for employers, employees will increasingly be faced with the option of foregoing class litigation for mutual aid and protection or not working.

B. Effect on Employees' Ability to file Board Charges or Engage in Protected Conduct

Paragraph 3(b) of the complaint alleges that at all material times, employees would reasonably conclude that the MBAP precludes them from filing unfair labor practice charges with the Board as well as from engaging in conduct protected by Section 7 of the Act.

The MBAP was imposed on all employees as a condition of hiring or continued employment by Ralph's, and it is therefore treated in the same manner as other unilaterally implemented workplace rules. When evaluating whether a rule, including a mandatory arbitration policy, violates Section 8(a)(1), the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007); *D.R. Horton*, supra. Under *Lutheran Heritage*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage* at 647.

In the instant case, the MBAP explicitly restricts and has been applied to restrict the exercise of rights the Board has found are protected by Section 7, *i.e.* the pursuit of classwide litigation regarding wages and hours. As such, it violates Section 8(a)(1) both because it restricts on its face and has been applied to restrict statutorily protected conduct.

The Acting General Counsel also asserts that the MBAP precludes employees from filing unfair labor practice charges with the Board. The Respondent argues that the MBAP does not and could not reasonably be read to prohibit employees from filing charges with the Board. Though I have already found the policy violates Section 8(a)(1) as discussed above, in the event a reviewing authority disagrees that the policy explicitly restricts Section 7 rights or has been applied to restrict those rights, I will address this argument.

In evaluating the impact of a rule on employees, the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), *enfd* 203 F.3d 52 (D.C. Cir. 1999). A rule does not violate the Act if a reasonable employee merely *could* conceivably read it as barring Section 7 activity. Rather, the inquiry is whether a reasonable employee *would* read the rule as prohibiting Section 7 activity. *Lutheran Heritage,* supra. The Board must give the rule under consideration a reasonable reading and ambiguities are construed against its promulgator. *Lafayette Lutheran Heritage*, supra at 647; *Lafayette Park Hotel*, 326 NLRB at 828; and *Cintas Corp. v. NLRB*, 482 F.3d 463, 467-470 (D.C. Cir. 2007). Moreover, the Board must "refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage* supra at 646.

Looking at the MBAP as a whole, I find a reasonable employee would read it as prohibiting him or her from filing unfair labor practice charges with the Board. The first section defining what types of disputes the policy covers is paragraph 2, which defines "Excluded Disputes" as "claims or disputes arising out of the terms and conditions of the CBA." The same section goes on to say, with underlined emphasis:

> Except for Excluded Disputes, this Arbitration Policy applies to any and all other employment-related disputes that exist or arise between Employees and Ralphs (or any of them) that would constitute cognizable claims or causes of action in a federal, state or local court or agency under applicable federal, state or local laws (referred to in this Arbitration Policy as "Covered Disputes"). Covered Disputes are employment-related disputes that are not Excluded Disputes which involve the interpretation or application of this Arbitration Policy, the employer-employee relationship, an Employee's actual or alleged employment with Ralphs (or any of them), the termination of such employment, or applying for or seeking such employment.

An employee who has read this far would certainly not think filing a charge with the NLRB falls within the definition of an "Excluded Dispute". Paragraph 2 clearly says otherwise, and in fact brings Board charges within the ambit of "Covered Disputes". But, as the Board warns, the MBAP's terms must not be read in isolation. Moving to paragraph 3, it starts out with the underlined sentence: There are no judge or jury trials permitted under this Arbitration Policy. That phrase is simple enough, and nothing else in paragraph 3 alters the term "Covered Disputes" as defined thus far.

Paragraph 4 begins by declaring that arbitration as defined in the policy is the sole and exclusive remedy for "Covered Disputes." Examples of "Covered Disputes" follow, including:

> [U]npaid wages or failure to pay overtime or other compensation (or the computation thereof), failure to provide family or medical (or other required) leave, failure to consider for hiring, failure to hire for employment and actual or constructive termination of the employment relationship.

Certainly many of these could also be examples of unfair labor practice claims. Other examples of "Covered Disputes" include "unlawful harassment, unlawful discrimination, unlawful retaliation, failure to provide reasonable accommodation(s) for a disability or to engage in an interactive process about such accommodation(s) . . ." These are all patently clear examples of claims that arise under the civil rights statutes the Equal Employment Opportunity Commission (EEOC) enforces, *i.e.*, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act.[6] Unlawful discrimination and retaliation based on activity protected by Section 7 of the Act likewise could be considered a "Covered Dispute" by some of these examples. In addition, "Covered Disputes" include dispute arising under "the United States Code" which of course encompasses the Act. Halfway through the MBAP, any possible reading, much less a reasonable one, leads to the conclusion that arbitration would be the employee's sole and exclusive remedy for an unfair labor practice dispute.

At the start of the third page, in paragraph 6, the MBAP states:

> This Arbitration Policy does not prevent or excuse any Employee or Ralphs (or any of them) from satisfying any applicable statutory conditions precedent or jurisdictional prerequisites to pursuing their Covered Disputes by, for example, filing administrative charges with or obtaining right to sue notices or letters from federal, state, or local

[6] These statutes are respectively codified at 42 U.S.C. 2000e *et seq.*; 42 U.S.C. 121-1 *et seq*; and 20 U.S.C. 633a.

> agencies. However, final and binding arbitration as described in this Arbitration Policy is the sole and exclusive remedy or formal method of resolving the Covered Disputes. If there is no applicable statutory condition precedent or jurisdictional prerequisite to pursuing a Covered Dispute, all parties must proceed directly to arbitration under and pursuant to this Arbitration Policy

It is difficult to grasp what this part of paragraph 6 means. It clearly recognizes that some "Covered Disputes," which by this point anyone who has read the MBAP thus far knows must be heard, determined and resolved by an arbitrator, may fall within the jurisdiction of federal, state, or local agencies. It seems to allow employees to meet jurisdictional prerequisites for pursuing such "Covered Disputes" in an administrative forum, yet in the end requires that those disputes be resolved only through final and binding arbitration under the policy rather than through whatever fruits filing a charge or other similar effort may bear.

The reader gets the first possible notion that there may be exclusions beyond the definition of "Excluded Disputes" set forth on the first page by way of paragraph 6's final sentence, which states:

> Notwithstanding any other provision of this Arbitration Policy all Employees retain the right under the National Labor Relations Act ("NLRA") to file charges with the National Labor Relations Board ("NLRB"), and to file charges with the United States Equal Employment Opportunity Commission ("EEOC") under federal equal employment opportunity laws within the EEOC's administrative jurisdiction.

The Respondent places strong reliance on this single sentence more than halfway through the MBAP to argue that it is clear one of the explicit exceptions to the MBAP's rule requiring arbitration of employment disputes is employees' right to file charges with the Board. As just discussed, however, this sentence is illusory, because even though an employee may file a charge, language in the same paragraph dictates that the dispute must nonetheless be resolved through arbitration per the policy. This begs the question: Why would any employee bother to file a charge? In addition, when paragraph 6 is read in conjunction with paragraph 4, which exemplifies "Covered Disputes" through numerous examples of the types of claims that fall within the EEOC and NLRB's jurisdiction, and includes disputes brought under the U.S. Code, the picture is confusing at best. This is particularly true since nowhere in the policy are disputes forming the basis for an NLRB charge defined, either by plain terms or by way of example, as "Excluded Disputes."[7]

The Respondent also relies on the following statement in paragraph 4:

> This Arbitration Policy requires, to the fullest extent permitted by law, the resolution of all Covered Disputes concerning the interpretation or application of the Arbitration Policy and/or any of the terms, conditions or benefits of employment (other than Excluded Disputes) by final and binding arbitration.

[7] Confusingly, the MBAP lists "Covered Disputes" as including "statutory claims or disputes" under "the Civil Rights Act of 1964; the Americans With Disabilities Act; the Age Discrimination in Employment Act" while simultaneously stating employees retain the right to file charges with the EEOC.

A reasonable employee reading this in the context of the rest of the document is not going to know that the phrase "to the fullest extent permitted by law" excuses disputes resulting in NLRB charges from mandatory binding arbitration. See *2 Sisters Food Group, Inc*. 357 NLRB No. 168, slip op. at 7 (2011).

Considering that ambiguities must be construed against the employer, I find the MBAP violates section 8(a)(1) because it explicitly interferes with rights protected by Section 7, it has been enforced to interfere with rights protected by Section 7, and it would cause employees to reasonably believe that filing charges with the Board would be futile. See *Aroostook County Regional Opthamology Center*, 317 NLRB 218 (1995),

C. Confidentiality Provision

The final issue, set forth in paragraph 3(a) of the complaint, is whether Respondent's maintenance of and efforts to enforce the MBAP violate Section 8(a)(1) of the Act inasmuch as the MBAP, by its terms, requires each employee to keep confidential the existence, content and outcome of all arbitration proceedings.

The Board has consistently held that a confidentiality provision which expressly prohibits employees from discussing among themselves, or sharing with others, information relating to wages, hours, or working conditions, or other terms and conditions of employment violates Section 8(a)(1) even if it was never enforced and was not unlawfully motivated. See, e.g., *Hyundai America Shipping Agency*, 357 NLRB No. 80 (2011); *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004).

The relevant MBAP provision states:

> Except and only to the extent it may be required by applicable law, the parties and the Qualified Arbitrator shall maintain the existence, content and outcome of any arbitration proceedings held pursuant to this Arbitration Policy in the strictest confidence and shall not disclose the same without the prior written consent of all the parties.

I find this provision would reasonably restrict employees from disclosing to other employees information about any employment disputes subject to the MBAP. Employees would reasonably construe this provision as barring them from discussing the existence or substance of an arbitration regarding their terms or conditions of employment, and it is therefore overly-broad. Moreover, the effect of this prohibition as applied to arbitrations concerning wages, hours and working conditions would be to create unlawful barrier to group action. Under the MBAP, employees are not only precluded from proceeding together in arbitration, they are precluded by the confidentiality provision from even telling each other they have initiated individual arbitration proceedings.

The Respondent argues that the phrase "Except and only to the extent it may be required by law" as a qualifier to the confidentiality provision saves it from being read as a restriction on Section 7 rights. I note there is no affirmative statement that the rule will not be used to restrict Section 7 activity. Without such a statement, employees would not reasonably know that the law, and particularly Section 7 of the Act, would render discussions of working conditions, even in the context of an arbitration, lawful.

The Respondent further asserts that because the rule is only triggered once the parties have engaged in arbitration, employees would likely have legal counsel or the aid of an arbitrator to understand their rights. First, the MBAP as a whole must be viewed from the employee's standpoint when it is effectuated, not when particular provisions are triggered. Moreover, the mere existence of an arbitration proceeding may not be disclosed. Employees cannot be deemed to have the benefit of counsel's explanation about what they may lawfully discuss with fellow employees when they first initiate an arbitration proceeding. In any event, it cannot be presumed employees will have the benefit of counsel, much less counsel who can with confidence sort out what the confidentiality clause does and does not prohibit, at any point in the process. The continuing litigation over the lawfulness of confidentiality rules drives home this point.

Finally, the Respondent asserts that no Board case has considered a confidentiality policy in the context of an arbitration agreement, but rather its jurisprudence is limited to broadly-defined confidentiality rules. This is unavailing. In *Double Eagle Hotel*, supra at 115, which the Respondent cites, confidential information was specifically defined to include "wages and working conditions such as disciplinary information, grievance/complaint information, performance evaluations, [and] salary information". Here, the confidentiality policy clearly includes information about employee complaints covered by the MBAP that have started the arbitration process.

Accordingly, because a reasonable employee would interpret the MBAP's confidentiality provision as an unlawful instruction not to talk about their working conditions, I find it violates Section 8(a)(1) of the Act as alleged.

CONCLUSIONS OF LAW

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

(2) The Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory and binding arbitration policy which required employees to resolve employment-related disputes exclusively through individual arbitration proceedings and to relinquish any right they have to resolve such disputes through collective or class action.

(3) The Respondent violated Section 8(a)(1) of the Act by maintaining a mandatory and binding arbitration policy that restricts employees' protected activity or that employees reasonably would believe bars or restricts their right to engage in protected activity and/or file charges with the National Labor Relations Board.

(4) The Respondent violated Section 8(a)(1) of the Act by requiring employees to maintain the confidentiality of the existence, content, and outcome of all arbitration proceedings.

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.

As I have concluded that the Mediation and Binding Arbitration Policy is unlawful, the recommended order requires that the Respondent revise or rescind it, and advise its employees in writing that said rule has been so revised or rescinded. Because the Respondent utilized the Mediation and Binding Arbitration Policy on a corporate-wide basis, the Respondent shall post a notice at all locations where the Mediation and Binding Arbitration Policy was in effect. See, e.g., *U-Haul Co. of California*, supra, n.2 (2006); *D.R. Horton,* supra, slip op. at 17.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Ralph's Grocery Company, Compton, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing a mandatory and binding arbitration policy that waives the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) Maintaining a mandatory and binding arbitration policy that restricts employees' protected activity or that employees reasonably would believe bars or restricts their right to engage in protected activity and/or file charges with the National Labor Relations Board.

(c) Maintaining a policy requiring employees to maintain the confidentiality of the existence, content, and outcome of all arbitration proceedings.

(d) 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 or revise the Mediation and Binding Arbitration Policy to make it clear to employees that the agreement does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions, does not restrict employees' right to file charges with the National Labor Relations Board or engage in protected activity, and does not require employees to keep information regarding their Section 7 activity confidential.

(b) Notify the employees of the rescinded or revised agreement to include providing them a copy of the revised agreement or specific notification that the agreement has been rescinded.

[8] 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.

(c) Within 14 days after service by the Region, post at all facilities where the Mediation and Binding Arbitration Policy applied copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 21, 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 August 7, 2011.

(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. July 31, 2013

Eleanor Laws
Administrative Law Judge

[9] 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 a mandatory and binding arbitration policy that waives the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT maintain a mandatory and binding arbitration policy that restricts employees' protected activity or that employees reasonably would believe bars or restricts their right to engage in protected activity and/or file charges with the National Labor Relations Board.

WE WILL NOT maintain a policy requiring employees to maintain the confidentiality of the existence, content, and outcome of all arbitration proceedings

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

WE WILL rescind or revise the Mediation and Binding Arbitration Policy to make it clear to employees that the agreement does not constitute a waiver of their right in all forums to maintain class or collective actions, does not restrict employees' right to file charges with the National Labor Relations Board or engage in other protected activity, and does not require employees to keep information regarding their Section 7 activity confidential.

WE WILL notify employees of the rescinded or revised agreement, including providing them with a copy of the revised agreement or specific notification that the agreement has been rescinded.

RALPH'S GROCERY COMPANY
(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.

888 South Figueroa Street, 9th Floor, Los Angeles, CA 90017-5449
(213) 894-5200, Hours: 8:30 a.m. to 5 p.m.

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, (213) 894-5184.