

Cellular Sales of Missouri, LLC and John Bauer.
Case 14–CA–094714

March 16, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON
AND MCFERRAN

On August 19, 2013, Administrative Law Judge Christine E. Dibble issued the attached decision. The Respondent filed exceptions and a supporting brief.¹ The Respondent also filed a motion to reopen the record, or, alternatively for administrative notice.²

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, brief and motion and has decided to affirm the judge's rulings,³ findings, and conclusions, and to adopt the recommended Order, as modified and set forth in full below.

The judge found that the Respondent violated Section 8(a)(1) by maintaining a mandatory and binding arbitration policy in its compensation schedule that restricts employees' rights to file charges with the Board.⁴ Ap-

plying the Board's decision in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013), the judge also found that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory and binding arbitration policy in the compensation schedule that waives the rights of employees to maintain class or collective actions in all forums, whether arbitral or judicial.

In *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), 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,⁵ and adopt the recommended Order and notice, as modified and set forth in full below.⁶

cided by arbitration. . . . Employee hereby agrees to arbitrate any such claims, disputes, or controversies only in an individual capacity and not as a plaintiff or class member in any purported class, collective action, or representative proceeding.

(Emphasis added.) Thus, this provision requires all employment-related disputes, without limit or exception, to be arbitrated as the exclusive means of resolution. In the absence of any limits to this broadly worded provision, we affirm the judge's conclusion that the Respondent's maintenance of this agreement violated Sec. 8(a)(1), because employees would reasonably believe it waived or limited their rights to file Board charges or to access the Board's processes. *Murphy Oil*, slip op. at 13, 19 fn. 98, 39 fn. 15; *U-Haul Co. of California*, 347 NLRB at 377–378.

⁵ Member Johnson agrees with his colleagues that the Respondent's arbitration agreement, as written, violates the Act insofar as employees would reasonably believe that the agreement restricted their rights to file a Board charge or access the Board's processes. See *Murphy Oil*, slip op. at 39 fn. 15; see also *U-Haul of California*, 347 NLRB at 377–378 (finding that, because employees would reasonably construe the broadly written language in the respondent's arbitration agreement to prohibit filing charges with the Board, the policy violated Sec. 8(a)(1)). Accordingly, he joins his colleagues only in ordering a remedy for that violation.

For the reasons set forth in detail in his dissent in *Murphy Oil*, slip op. at 35–58, however, Member Johnson would not find that the Respondent's maintenance or enforcement of the arbitration agreement violates the Act insofar as it prevents employees from pursuing class and other collective actions. Because he does not find these violations, Member Johnson finds it unnecessary to consider here whether or under what circumstances the remedies related to the enforcement violation would be appropriate. See *Murphy Oil*, at 812 fn. 15 (Member Johnson, dissenting); see generally *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002). Because he finds no merit to this allegation, he does not reach the Respondent's related argument that the charging party was not engaged in concerted activity when, as an individual plaintiff, he brought a collective FLSA claim in Federal district court. Nor does he pass on whether the enforcement violation was timely raised, or on his colleagues' broad assertion about the enforcement of unlawful rules in general.

⁶ Consistent with our decision in *Murphy Oil*, we amend the judge's remedy and shall order the Respondent to reimburse the Charging Party for all reasonable expenses and legal fees, with interest, incurred in opposing the Respondent's unlawful motion to compel individual arbitration in the collective FLSA action. See *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 747 (1983) ("If a violation is found, the Board

¹ The Respondent has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

² In that motion, the Respondent requested that the Board take administrative notice of a district court decision granting its motion to compel the Charging Party to arbitrate his wage claims under the Fair Labor Standards Act. *John Bauer v. Cellular Sales of Missouri, LLC.*, Case 12-05111-CV-SW-BP (W.D. Mo 2013). On September 20, 2013, the Board granted the request to take administrative notice of that court decision. We have considered the decision and find that it does not alter the result here.

³ The Respondent's argument that the General Counsel or the Administrative Law Judge acted without authority in this case because the Board lacked a valid quorum when the complaint issued is without merit. See *Benjamin H. Realty Corp.*, 361 NLRB 918 (2014); *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101, 101 fn. 1 (2014). We also reject, for the reasons stated by the judge, the Respondent's argument that the Board lacks jurisdiction because the charging party is not an employee under the Act.

⁴ Pursuant to longstanding Board precedent, the Board will find that a work rule that is required as a condition of employment, such as the arbitration policy in this case, violates Sec. 8(a)(1), if employees would reasonably believe the rule or policy interferes with their ability to file a Board charge or access to the Board's processes, even if the rule or policy does not expressly prohibit access to the Board. See *Murphy Oil USA, Inc.*, 361 NLRB 774, 786, 792 fn. 98, 39 fn. 15 (2014); *D. R. Horton, Inc.*, 357 NLRB 2277, 2278 fn. 2 (2011), enf. in relevant part 737 F.3d 344 (5th Cir. 2013); *U-Haul Co. of California*, 347 NLRB 375, 377–378 (2006), enf. mem. 255 Fed. Appx. 527 (D.C. Cir. 2007); *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Here, the parties stipulated, and the judge found, that the Respondent required employees to sign a compensation schedule as a condition of employment, which included, in relevant part, the following provision:

All claims, disputes or controversies arising out of, or in relation to this document or Employee's employment with Company shall be de-

As did the judge, we reject the Respondent's argument that the complaint is time barred under Section 10(b) of the Act because the Charging Party signed the compensation schedule more than 6 months before the initial unfair labor practice charge was filed and served. What matters, rather, is that the Respondent maintained and enforced the compensation schedule during the 10(b) period. Here, the parties stipulated that "[s]ince about January 1, 2012, Respondent has promulgated, maintained, and enforced" the compensation schedule. This time span includes, of course, the relevant 6-month period that preceded the filing of the charge on December 11, 2012, and its service on December 12, 2012. The Board has held repeatedly that the maintenance of an unlawful rule is a continuing violation, regardless of when the rule was first promulgated.⁷ It is equally well established that an employer's enforcement of an unlawful rule, including a mandatory arbitration policy like the one at issue here, independently violates Section 8(a)(1).⁸ The complaint was timely in this respect, as well.⁹

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 Corp.)*, 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).

We shall also amend the judge's remedy to order the Respondent to notify the district court that it has rescinded or revised the mandatory arbitration agreement and to inform the court that it no longer opposes the plaintiff's claims on the basis of the arbitration agreement.

⁷ See *Carney Hospital*, 350 NLRB 627, 627 (2007); *Eagle-Picher Industries*, 331 NLRB 169, 174 fn. 7 (2000); *Wire Products Mfg. Corp.*, 326 NLRB 625, 633 (1998), *enfd.* sub nom. *NLRB v. R. T. Blankenship & Associates, Inc.*, 210 F.3d 375 (7th Cir. 2000); *St. Luke's Hospital*, 300 NLRB 836 (1990). See also *Murphy Oil*, *supra*, 786 (the vice of maintaining a workplace rule that restricts Sec. 7 activity is that it reasonably tends to chill employees' exercise of their statutory rights); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999) (same). Cf. *Teamsters Local 293 (Lipton Distributing)*, 311 NLRB 538, 539 (1993) (finding violation for maintenance of unlawful contractual provision executed outside 10(b) period).

⁸ See *Murphy Oil*, *supra*, at 792–794 (citing *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16–17 (1962)); *Republic Aviation Corp.*, 324 U.S. 793 (1945); *Sahara Reno*, 262 NLRB 824, 824 fn. 2, 845 (1982), *enfd.* 722 F.2d 734 (3d Cir. 1983); *King Radio Corp., Inc.*, 166 NLRB 649, 649 fn. 2 (1966), *enfd.* 398 F.2d 14 (10th Cir. 1968). In adopting the judge's conclusion that the Respondent violated the Act by enforcing the compensation schedule, we rely solely on the principle that the enforcement of an unlawful provision is, in itself, an independent violation of Sec. 8(a)(1).

⁹ We reject the Respondent's alternative argument that the judge should not have treated its attempt to enforce its policy as within the 10(b) period, because, although alleged as unlawful in the complaint, it was not included in the charge or the amended charge. The Respond-

ORDER

The Respondent, Cellular Sales of Missouri, LLC, Pittsburg, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory and binding arbitration agreement that employees reasonably would believe bars or restricts employees' rights to file charges with the National Labor Relations Board or to access the Board's processes.

(b) Maintaining and/or enforcing a mandatory and binding arbitration agreement that requires employees, as a condition of employment, 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 mandatory and binding arbitration agreement in the compensation schedule in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration agreement 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 restrict employees' right to file charges with the National Labor Relations Board or to access the Board's processes.

(b) Notify all current and former employees who were required to sign the arbitration agreement in the compensation schedule in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Notify the United States District Court for the Western District of Missouri in Case 12-05111-CV-SW-BP that it has rescinded or revised the mandatory arbitration agreement upon which it based its motion to dismiss John Bauer's FLSA collective action and to compel individual arbitration of his claim, and inform the court that it no longer opposes the action on the basis of the arbitration agreement.

(d) In the manner set forth in this decision, reimburse John Bauer for any reasonable attorneys' fees and litiga-

ent's enforcement of its arbitration policy is part of the same class of violations as the allegation in the amended charge that it maintained an unlawful arbitration policy. The enforcement of the policy was dependent on, and therefore related to, its maintenance. Because the complaint allegation grew out of the charge-alleged matter while the proceeding was pending before the Board, the complaint allegation was sufficiently related to a timely charge. See *NLRB v. Fant Milling Co.*, 360 U.S. 301, 306–309 (1959); *Nickles Bakery of Indiana*, 296 NLRB 927 (1989).

tion expenses that he may have incurred in opposing the Respondent's motion to dismiss the wage claim and compel individual arbitration.

(e) Within 14 days after service by the Region, post at its Pittsburg, Kansas facility copies of the attached notice marked "Appendix A," and at all other facilities in Missouri and Kansas, copies of the attached notice marked "Appendix B."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 14, Subregion 17, 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 June 12, 2012, and any employees against whom the Respondent has enforced its mandatory arbitration agreement since June 12, 2012.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 14, Subregion 17, 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.

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.

WE WILL NOT maintain a mandatory and binding arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board or to access the Board's processes.

WE WILL NOT maintain and/or enforce a mandatory and binding arbitration agreement that requires our employees, as a condition of employment, 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 mandatory and binding arbitration agreement in the compensation schedule in all of its forms, or revise it in all of its forms to make clear that the arbitration agreement 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 or to access the Board's processes.

WE WILL notify all current and former employees who were required to sign the mandatory arbitration agreement in the compensation schedule in all of its forms that the arbitration agreement has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

WE WILL notify the court in which John Bauer filed his collective wage claim that we have rescinded or revised the mandatory arbitration agreement in the compensation schedule upon which we based our motion to dismiss his collective wage claim and compel individual arbitration, and WE WILL inform the court that we no longer oppose John Bauer's collective claim on the basis of that agreement.

WE WILL reimburse John Bauer for any reasonable attorneys' fees and litigation expenses that he may have

¹⁰ 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."

incurred in opposing our motion to dismiss his collective wage claim and compel individual arbitration.

CELLULAR SALES OF MISSOURI, LLC

The Board's decision can be found at www.nlr.gov/case/14-CA-094714 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



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

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory and binding arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board or to access the Board's processes.

WE WILL NOT maintain and/or enforce a mandatory arbitration agreement that requires our employees, as a condition of employment, 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 binding arbitration agreement in the compensation schedule in all of its forms, or revise it in all of its forms to make clear that the arbitration agreement 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 or to access the Board's processes.

WE WILL notify all current and former employees who were required to sign the mandatory arbitration agreement in the compensation schedule in all of its forms that the arbitration agreement has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

CELLULAR SALES OF MISSOURI, LLC

The Board's decision can be found at www.nlr.gov/case/14-CA-094714 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



Lyn Buckley, Esq., for the Acting General Counsel.

C. Larry Carbo III, Esq. and *Julie Offerman, Esq.*, for the Respondent.

Mark A. Kistler, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

CHRISTINE E. DIBBLE, Administrative Law Judge.¹ This case was tried in Overland Park, Kansas, on May 14, 2013. The

¹ The Respondent argues that any actions taken by this Board, including its agents and delegates, lacks authority because the court in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted 81 U.S.L.W. 3695 (2013) (No. 12-1281), found the recess appointments of Members Sharon Block and Richard Griffin were unconstitutional and invalid. Thus, the Board lacks a quorum. The Board does not accept the decision in *Noel Canning*, in part, because there is a conflict in the circuits regarding this issue. *Belgrove Post Acute Care Center*, 359 NLRB 633, 633 fn. 1 (2013).

Charging Party, John Bauer (Bauer), filed the charge in Case 14–CA–094714 on December 11, 2012.² On March 7, 2013, Bauer filed an amended charge in this case. The Regional Director for Region 14 Subregion 17 of the National Labor Relations Board (the Board) issued the complaint and notice of hearing on March 22, 2013. The Respondent filed a timely answer on April 5, 2013, denying all material allegations in the complaint.

The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA/the Act) when (1) since on or about January 1, 2012, the Respondent has required its current and former employees, including Bauer, as a condition of employment, to enter into individual arbitration agreements which fail to contain an exception for unfair labor practice allegations and requires employees to waive their right to pursue class-wide or collective-representative legal action in any forum, arbitral or judicial;³ and (2) on or about January 11, 2013, the Respondent filed a motion with the United States District Court for the Western District of Missouri (the District Court) in Case 12-05111-CV-SW-BP seeking an order to dismiss the lawsuit filed by Bauer on November 9, 2012, and compel arbitration and dismissal of the class or collective-action allegations, pursuant to the terms of the arbitration agreement described in paragraph 4(a) of the Board complaint.⁴ (GC Exh. 1.)⁵

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

The parties stipulated to the following fact on the nature of the Respondent's business and jurisdiction:

1. The Respondent is a limited liability company with an office and places of business in Missouri and has been operating retail stores selling cell phone equipment and cell phone services at various locations in Missouri and Kansas including Pittsburg, Kansas.

2. In conducting its operations described in paragraph 1 above, during the 12-month period ending December 31, 2012, the Respondent derived gross revenues in excess of \$500,000.

3. In conducting its operations described above in paragraph 1, during the 12-month period ending December 31, 2012, the Respondent purchased and received at its Pittsburg, Kansas facility goods valued in excess of \$5000 directly from points outside the State of Kansas.

4. During calendar year 2012, and through March 31, 2013, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

² All dates are in 2012, unless otherwise indicated.

³ This allegation is alleged in pars. 4(a), (b), and (c), and 5 of the complaint.

⁴ This allegation is alleged in pars. 4(e) and 5 of the complaint.

⁵ Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for Respondent's exhibit; "GC Exh." for General Counsel's exhibit; "GC Br." for the General Counsel's brief; "R. Br." for Respondent's brief; and "R. Ltr. Br." for Respondent's letter brief.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Background Facts

The parties stipulated to the following facts:

1. Since December 1, 2011, the following individuals have held the positions next to their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act: Hughes Bowen Hammon (Hammon), Regional Director; and Jose Ordonez (Ordonez), Regional Director. (GC Exh. 2)

2. Since approximately January 1, 2012, the Respondent has promulgated, maintained, and enforced individual agreements with its current and former sales representative employees that include the following provision:

All claims, disputes or controversies arising out of, or in relation to this document or Employee's employment with Company shall be decided by arbitration. . . . Employee hereby agrees to arbitrate any such claims, disputes, or controversies only in an individual capacity and not as a plaintiff or class member in any purported class, collective action, or representative proceeding. . . . The parties agree that no arbitrator has the authority to . . . order consolidation, class arbitration or collective arbitration. The right to arbitrate shall survive the termination of Employee's employment with the Company. [GC Exhs. 2, 3.]

3. Since approximately January 1, 2012, the Respondent has required sales representative employees to enter into the agreements described above in paragraph 2 as a condition of employment. (GC Exh. 2.)

4. In approximately January 2012, the Respondent and former employee, Bauer, entered into the individual arbitration agreement described above in paragraph 2. (GC Exhs. 2, 3.)

5. On approximately November 9, 2012, Bauer filed a complaint in the District Court captioned John Bauer on behalf of himself and all other persons similarly situated v. Cellular Sales of Knoxville, Inc., Cellular Sales of Missouri, LLC and Dane Scism, Case No. 12-CV-5111. (GC Exhs. 2, 4.)

6. On approximately January 11, 2013, the Respondent filed a motion with the District Court in the matter referenced above in paragraph 5, seeking an order to dismiss the lawsuit, compel arbitration, and dismiss class/collective action allegations, pursuant to the terms of the arbitration agreements described above in paragraphs 2 and 4. (GC Exhs. 2, 5.)

B. Respondent's Operations and Bauer's Employment History with Respondent

The evidence establishes that as of May 14, 2013, the Respondent employed approximately 106 sales representatives in its 21 retail stores in Missouri and Kansas. (Tr. 52–53.) The record is undisputed that on an unspecified date in November 2010, Bauer began working for the Respondent as an independent contractor. (Tr. 27.) During a meeting in December 2011, with independent contractors, Hammon and Ordonez notified them that they would be converted to "employee status." (Tr. 28, 42.) Bauer attended the meeting. Those in attendance were given a compensation schedule, which contained the arbitration

clause at issue, to sign. (GC Exh. 6.)⁶ Additionally, the compensation schedule included a sales commission schedule. The parties stipulated that on an unknown date in June, July, or August 2012, the language in the sales commission schedule that appears at General Counsel's Exhibit 3 and identified as Exhibit A was changed by the Respondent. The sales commission schedule revised language appears at General Counsel's Exhibit 7. The parties stipulated, however, that the language in the compensation schedule never changed. (Tr. 20–21.) Employees were informed that they had to sign the compensation schedule before they could be hired. (Tr. 28, 43.) On or about January 1, 2012, Bauer signed the compensation schedule and became an employee of the Respondent. (Tr. 25; GC Exh. 3.) Bauer worked as an employee in several of the Respondent's retail stores until about the end of May 2012. (Tr. 30.) The parties stipulated that Bauer's "last day at work was about the last day of May of 2012." (Tr. 25.)

III. DISCUSSION AND ANALYSIS

A. Does the Mandatory Arbitration Agreement Violate Section 8(a)(1) of the Act by Unlawfully Prohibiting Employees from Engaging in Protected Concerted Activities

The General Counsel argues that the Respondent violated Section 8(a)(1) of the Act because it requires employees covered by the Act, as a condition of employment, to sign an agreement that prevents them from filing joint, class, or collective claims addressing their wages, hours, or other terms and conditions of employment against the Respondent in any arbitral or judicial forum. Further, the General Counsel contends that because the arbitration agreement does not contain an opt-out provision, it has the effect of leading employees to reasonably believe that they cannot file charges with the NLRB. Accordingly, the "very language of this agreement coerces all signatory employees by prohibiting them from engaging in concerted activity protected by Section 7 of the Act." (GC Br. 4.)

The Respondent contends the complaint must be dismissed because: (1) the Board lacks jurisdiction over the case in light of the ruling in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted 81 U.S.L.W. 3695 (2013) (No. 12-1281); (2) the Charging Party was not an employee within the meaning of the Act during the 10(b) period; (3) the Charging Party has not engaged in "concerted activity"; and (4) *D. R. Horton, Inc.*, 357 NLRB 2330 (2012), is not applicable and assuming it is applicable, it is contrary to controlling Supreme Court precedent and the FAA.⁷

⁶ GC Exh. 6 is a list of sales employees that signed the compensation schedule agreement with the Respondent effective from January 1, 2012, to May 10, 2013. The parties entered into a stipulation agreeing to the description of the document at GC Exh. 6. The parties also agreed that GC Exh. 6 contains an alphabetical list of employee names and their approximate hire dates. (Tr. 17.)

⁷ On July 3 and 8, 2013, the Respondent filed letter briefs in addition to a posthearing brief. The letter brief filed on July 3, addressed the order issued by the United States District Court for the Western District of Missouri in Case 12-5111-CV-SW-BP. The letter brief filed by the Respondent on July 8, addressed the most recent Supreme Court ruling

Based on the evidence, I find that the Respondent's action violated Section 8(a)(1) of the Act when it mandated that employees covered by the Act had to waive, as a condition of employment, their right to file joint, class, or collective claims in any arbitral or judicial forum.

1. The Board's jurisdiction to issue the complaint at issue

The Respondent argues that the case should be dismissed because the Board did not have a valid quorum when the charges and complaint in this case were filed. *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010). The Respondent contends that any actions taken by this Board, including its agents and delegates, lack authority because the court in *Noel Canning v. NLRB*, found that the recess appointments of Members Sharon Block and Richard Griffin were unconstitutional and invalid.

I reject the Respondent's argument on this point. The Board does not accept the decision in *Noel Canning*, in part, because it is the decision of a circuit court and there is a conflict in the circuits regarding this issue. *Belgrove Post Acute Care Center*, 359 NLRB 633, 633 fn. 1 (2013). Although 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. *Bloomington, 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 704 (2d Cir. 1962)). Therefore, Respondent's argument fails.

2. The Charging Party is an employee within the meaning of the Act

The Respondent contends that the complaint must be dismissed because Bauer filed his initial charge more than 6 months after his execution of the compensation schedule, which contained the alleged discriminatory language. (R. Br. 9.) In addition, the Respondent posits that pursuant to Section 2(3) of the Act, Bauer is considered an "employee" during the 10(b) period *only* if his employment "ceased as a consequence of, or in connection with, any current labor dispute or because of an unfair labor practice." (R. Br. 10, quoting Sec. 2(3) of the Act.) The Respondent argues Bauer does not fit within this definition of employee on either point. The General Counsel counters that the Respondent had misinterpreted the meaning of the Act's definition of employee and Section 10(b).

Section 10(b) of the Act states in relevant part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." Although, the Respondent argues that Bauer was not an employee as defined by Section 2(3) of the Act during the 10(b) period, I find this argument fails. The Board defines "employee" broadly, including "former employees." The Respondent referenced *Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977), in its posthearing brief to support its argu-

ment on arbitration agreements. The General Counsel did not file responses. Although I did not authorize the parties to file additional briefs beyond the posthearing briefs, I have considered the Respondent's additional filings in my decisionmaking process.

ment that vaguely identifying an individual as “employee” does not cloak him or her with the protections of Section 7 of the Act.

Little Rock Crate & Basket Co., however, supports the General Counsel’s assertion that “a charging party need not be an employee nor one impacted during the 10(b) period by the unfair labor practices alleged.” (GC Br. 8.) *Little Rock Crate & Basket Co.* involved a charging party that was discharged in the morning but allowed to remain in the employer’s facility until his final paycheck was available at noon that same day. The charging party began to distribute union literature to other employees while he waited on his paycheck. His former supervisor told him distribution of the literature on the employer’s property was illegal and threatened to have him arrested. Despite his discharge the Board found the charging party was a statutory “employee” within the meaning of Section 2(3) of the Act. The Board noted it has “long held that that term [employees] means “members of the working class generally,” including “former employees of a particular employer.” *Little Rock Crate & Basket Co.*, supra at 1406. (See *Briggs Mfg. Co.*, 75 NLRB 569, 570, 571 (1947) (finding that Sec. 2(3) of the Act provides that the term “employees” includes any employee unless the Act explicitly states otherwise; and in its generic sense the term is broad enough to include “members of the working class generally”). Therefore, under this principal, Bauer is clearly an employee within the meaning of the Act.

Further, the compensation schedule was effective within the 10(b) period for current and past employees; and the Respondent’s attempt to enforce the collective and class restrictions of the compensation schedule in District Court was done during the 10(b) period. Thus, the Respondent’s effort to “interfere with, restrain, or coerce” employees (and Bauer) in the exercise of their protected concerted activity occurred during the 10(b) period. The impact of the terms of the arbitration impacted his ability to engage in the protected concerted activity of joining with past and current employees to litigate issues involving the wages, hours, and other terms and conditions of their employment with the Respondent. See *D. R. Horton; Bloomingdale’s Inc.*, Case JD(SF)-29-13 (2013) (the NLRB issued a complaint brought by a charging party approximately 8 months after her termination contesting the class action waiver clause of an arbitration agreement. The complaint was heard and decided by an administrative law judge).

I find that Bauer was an employee within the meaning of the Act during the 10(b) period. Consequently, the Respondent’s affirmative defense on this point fails.

3. *D. R. Horton*, Supreme Court precedent, and the FAA

The Respondent contends that *D. R. Horton* is contrary to the Federal Arbitration Act (FAA),⁸ 9 U.S.C. §§ 1 et. seq., and controlling Supreme Court precedent. The Respondent notes that the majority of lower courts have also declined to adopt the holding in *D. R. Horton*. See, e.g., *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Miguel v. JP Morgan Chase*

Bank, 2013 WL 452418 (C.C. Cal. Feb. 5, 2013); *Carey v. 24 Hour Fitness USA, Inc.*, 2012 WL 4754726 (S.D. Tex. Oct. 4, 2012), and cases cited therein. Moreover, on June 20, 2013, the Supreme Court issued *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, which the Respondent argues supports enforcement of the arbitration agreement at issue.

It is undeniable that increasingly the Supreme Court has shown great deference to enforcement of arbitration agreements. In *AT & T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1749 (2011), the Supreme Court emphasizes that its cases “place it beyond dispute that the FAA was designed to promote arbitration.” The Court and NLRB acknowledge that the provisions of the FAA evince a “liberal policy favoring arbitration agreements.” *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 103 S.Ct. 927 (1983). The Supreme Court explains that the “principal purpose” of the FAA is to “ensur[e] that private arbitration agreements are enforced according to their terms.” *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 109 S.Ct. 1248 (1989). Parties may agree to specify the issues that can be arbitrated and restrict “with whom a party will arbitrate its disputes.” *Stolt-Nielsen S.A. v. Animal Feeds International Corp.*, 130 S.Ct. 1758, 1763 (2010); *AT & T Mobility LLC*, supra.

American Express Co. involved merchants who accepted American Express cards and had agreements with American Express that contained an arbitration clause. The agreement included a provision precluding any claims from being arbitrated on a class action basis. Subsequently, the merchants filed a class action suit against American Express for violation of the Federal antitrust laws. The merchants argued the provision waiving class arbitration should render the agreement unenforceable because the cost of individually arbitrating a federal statutory claim would exceed their potential recovery. American Express moved to force individual arbitration under the FAA. The Supreme Court held that arbitration is a matter of contract and the FAA precludes courts from invalidating a contractual waiver of class arbitration because “the plaintiff’s cost of individually arbitrating a federal statutory claim exceeds the potential recovery.” *Id.* at 2307. The Supreme Court also held that “unless the FAA’s mandate has been “overridden by a contrary congressional command,” courts cannot invalidate arbitration agreements simply because the claim is based on the violation of a federal statute. *American Express Co.* at 2310; *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 668–669 (2012).

In *D. R. Horton*, the charging party was required, as a condition of employment, to sign an arbitration agreement that did not have an opt-out clause. In addition, the arbitration agreement contained a clause precluding Charging Party and other employees covered by the Act from filing joint, class, or collective claims in arbitral and judicial forums. The Board explained that an employer violates Section 8(a)(1) of the Act when it requires employees as defined by the Act, as a condition of their employment, to sign an arbitration agreement that prohibits them from “filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial.” *Id.* at 1.

⁸ The FAA was enacted in 1925, 43 Stat. 883, and reenacted and codified in 1947 as Title 9 of the United States Code.

I find that the Supreme Court does not expressly overrule the finding in *D. R. Horton*. The case at issue is distinguishable because the arbitration agreement precludes employees from exercising their substantive rights protected by Section 7 of the Act. The NLRA “protects employees’ ability to join together to pursue workplace grievances, including through litigation. *Id.* at 2331. By initiating arbitration on a classwide basis and filing a class action lawsuit in district court, both Bauer and the charging party in *D. R. Horton* were engaging in conduct that the Board has noted is “not peripheral but central to the Act’s purposes.” *D. R. Horton*, supra at 2333. The Board went on to find that there was no conflict between the NLRA and the FAA “[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 class-wide arbitration.” *D. R. Horton*, supra at 2346. The agreement in this matter does not provide for such an option.

The claim brought by the merchants in *American Express Co.*, is distinguishable in that it was for a violation of antitrust laws. Unlike *D. R. Horton* and the case at issue, the merchants were alleging not that they were precluded from pursuing their claim but rather the cost to do so individually would be prohibitive. *Id.* at 2309. However, the Supreme Court noted “antitrust laws do not guarantee an affordable procedural path to the vindication of every claim.” *American Express Co.*, supra at 2309.

The Respondent does not set forth an argument explaining why it believes the holding in *American Express Co.* overrules *D. R. Horton*, other than to note that it “supports enforcement of Cellular Sale’s arbitration agreement.” (R Ltr. Br. 2.) I find nothing in *American Express Co.* or the FAA to support the Respondent’s assertion. Consequently, I am bound by Board precedent unless and until it is reversed by the Supreme Court.

4. The Charging Party has engaged in concerted activity

The Respondent argues the Charging Party’s filing of the lawsuit in District Court is not protected activity under Section 7 of the Act because “there is absolutely no evidence that any employees are seeking to join, took part in, or authorized the filing of the lawsuit.” (R. Br. 13.)

Section 8(a)(1) of the Act provides that 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.” See *Brighton Retail, Inc.*, 354 NLRB 441, 441 (2009).

In *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), and in *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), the Board held that “concerted activities” protected by Section 7 are those “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity. Individual action is concerted if it is engaged in with the object of initiating or inducing group action. *Whitaker Corp.*, 289 NLRB

933 (1988). The “mutual aid or protection” clause of the Act includes employees acting in concert to improve their working conditions through administrative and judicial forums.

In assessing whether an employer has violated Section 8(a)(1) by unilaterally implementing a policy (in this case it is a mandatory arbitration agreement), the Board applies the test established in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). First, it must be determined whether the rule explicitly restricts activities protected by Section 7. If the rule does, it is unlawful. However, if there is not an explicit restriction of Section 7 rights, “the finding of a violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the rule 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*, supra at 647.

It is clear that under *Lutheran Heritage*, the arbitration agreement at issue explicitly restricts and has been applied to restrict the rights protected by Section 7. Further, under Board law, it is established that Bauer engaged in concerted protected activity as a result of the class action lawsuit he filed in District Court. The Board has held that filing a class action lawsuit to address wages, hours, and other terms and conditions of employment constitutes protected activity, unless done with malice or in bad faith. *Harco Trucking, LLC*, 344 NLRB 478 (2005); *Host International*, 290 NLRB 442,443 (1988); *D. R. Horton, Inc.*, supra. Consequently, the Respondent’s action to force Bauer, and other employees covered under the Act, to waive their right to file a classwide action in any forum, arbitral or judicial interferes with and restrains them in the exercise of their Section rights. Therefore, I find that the Respondent’s argument fails.

Accordingly, I find that the Respondent’s action violated Section 8(a)(1) of the Act when it mandated that employees covered by the Act had to waive, as a condition of employment, their right to file joint, class, or collective claims in any arbitral or judicial forum.

B. Does the Respondent’s Motion to Compel Arbitration Filed in District Court Violate Section 8(a)(1) of the Act

The General Counsel advances the same arguments and cited authority to this charge as it does to the charge contesting the arbitration agreement. Likewise, the Respondent sets forth the same defenses. (GC Br. 6; R. Br.; R. Ltr. Br.)

In addition to the previously cited defenses, the Respondent argues that I should defer to an order issued by the District Court on July 3, 2013, granting the Respondent’s motion to compel arbitration and dismissing Bauer’s collective and class claims. (R. Ltr. Br. Exh. C attached.) While the District Court’s order is instructive, it lacks precedential authority. I am bound by Board precedent. See *Pathmark Stores, Inc.*, 342 NLRB 378 fn. 1 (2004). Consequently, this matter requires me to follow Board law as set forth in *D. R. Horton* which is contrary to the District Court’s order.

Therefore, I find that the Respondent’s action violated Section 8(a)(1) of the Act when it attempted to restrict Bauer’s exercise of his Section 7 rights by filing a motion in District

Court to compel arbitration and dismissal of Bauer's collective and class claims.

CONCLUSIONS OF LAW

1. The Respondent, Cellular Sales of Missouri, LLC, 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 filing a motion in District Court to compel arbitration and dismissal of the Charging Party's collective and class claims.

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 arbitration policy contained within the compensation schedule 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 arbitration policy contained in the compensation schedule on a corporate wide basis, the Respondent shall post a notice at all locations where the arbitration policy contained in the compensation schedule was in effect. See, e.g., *U-Haul Co. of California*, supra at 1 fn. 2 (2006); *D. R. Horton*, supra at 2347.

[Recommended Order omitted from publication.]