

**Flyte Tyme Worldwide and Matthew D. Miller, Esq.**  
Case 04–CA–115437

March 30, 2015

ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA  
AND MCFERRAN

The Charging Party has filed a Motion to Withdraw Charge seeking withdrawal of the pending unfair labor practice charge in this case based on a settlement reached between the employees he represents and the Respondent, Flyte Tyme Worldwide. Because approving the Charging Party's motion would not effectuate the purposes of the National Labor Relations Act, the motion is denied.

This case is pending before the Board on the Respondent's exceptions and the General Counsel's cross-exceptions to the June 3, 2014 decision of Administrative Law Judge Robert Giannasi. The judge found that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing its Arbitration Agreement Policy (AAP), which requires employees to individually arbitrate all employment-related claims or disputes, and to waive their right to maintain collective or class actions in all forums, arbitral and judicial. The judge also found that the Respondent violated Section 8(a)(1) by filing a motion to dismiss the class action wage and hour lawsuit filed by the employees and to compel arbitration under the AAP. In finding the violations, the judge relied on 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).

To remedy these violations, the judge ordered the Respondent to: (1) rescind or revise the nationwide handbook provisions regarding the AAP to make it clear to employees that the AAP does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions; (2) notify employees of the rescinded or revised AAP by providing them a copy of the revised AAP or specific notification that the AAP has been rescinded; (3) file a motion with the federal district court asking to withdraw the Respondent's motion to dismiss the class action lawsuit and compel individual arbitration of the eight employee-plaintiffs' claims; (4) reimburse the eight employee-plaintiffs in the federal district court action for any legal and other expenses related to their opposing the Respondent's motion to dismiss and to compel individual arbitration; and (5) post a Notice to Employees.

The Charging Party seeks to withdraw the charge because the employees that he represents have reached a classwide agreement with the Respondent to settle the

related collective and class action lawsuit for alleged violations of Federal and State wage and hour laws, and the employee-plaintiffs and the Respondent have agreed to resolve the unfair labor practice case as part of the settlement agreement. The settlement agreement provides for the payment of \$900,000 to the eight named plaintiffs and other class members. In addition to settling the employees' wage claims, the money to be paid under the settlement covers attorneys' fees and litigation expenses, taxes, and interest. As part of the settlement, the individuals for whom the charge was filed agreed that the Charging Party would request withdrawal of the unfair labor practice charge in this case, and relinquished and revoked any right they may have had to receive any monetary recovery as a result of the charge. The settlement, however, is not contingent on the Board's approval of the withdrawal of the charge. The Board has been administratively advised that the Region does not oppose the Charging Party's motion.

In *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), the Board reaffirmed the Board's decision in *D. R. Horton, Inc.*, and found that an employer violated Section 8(a)(1) by requiring its employees to agree to resolve all employment-related claims through individual arbitration, and forgo their rights to pursue collective or class action to resolve employment-related disputes. The Board emphasized that employees' substantive right to engage in collective action to improve working conditions is "at the core of the Act," and is "the foundational principle that has consistently informed national labor policy as developed by the Board and the courts." *Murphy Oil USA, Inc.*, supra at 774, 775.

Although the Board is firmly committed to promoting the public interest in encouraging mutually agreeable settlements without litigation, "[i]t is well established that the Board's power to prevent unfair labor practices is exclusive, and that its function is to be performed in the public interest and not in vindication of private rights. Thus, the Board alone is vested with lawful discretion to determine whether a proceeding, when once instituted, may be abandoned." *Robinson Freight Lines*, 117 NLRB 1483, 1485 (1957) (footnote omitted), enf. 251 F.2d 639 (6th Cir. 1958). As explained below, we do not find that it would effectuate the policies of the Act to dismiss the charge in this case where the settlement agreement does not address, much less provide any remedy for, the violations alleged in the charge. 117 NLRB at 1485–1486.<sup>1</sup>

<sup>1</sup> Because the settlement agreement does not purport to relate in any way to the alleged unfair labor practices, we do not apply the standard established by *Independent Stave Co.*, 287 NLRB 740 (1987), as we would in the typical case involving the settlement of unfair labor practice charges.

The settlement agreement at issue addresses the employees' private rights under Federal and State wage and hour laws, but it does not address the public interest in protecting employees' statutory right to engage in collective action regarding terms and conditions of employment. Specifically, the settlement leaves in place the AAP's requirement that employees waive, as a condition of employment, the filing of class and collective action claims in all forums. The settlement also fails to rescind or modify in any way the waivers already executed by employees pursuant to the mandatory arbitration provi-

sion of the AAP. The AAP therefore will continue to have a chilling effect on employees' Section 7 rights to engage in collective action in the future. Where, as here, the parties' settlement does not address the continued maintenance of a policy mandating arbitration on an individual basis, approval of the agreement will not effectuate the purposes of the Act.

Accordingly, the Charging Party's Motion to Withdraw Charge is denied, and the Board will continue to consider the Respondent's exceptions to the judge's decision.