

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

JUSTIN L. SWIDLER,

Petitioner,

v.

NATIONAL LABOR RELATIONS
BOARD

Respondent.

PETITION FOR REVIEW

Pursuant to Section 10(f) of the National Labor Relations Act (“NLRA” or “Act”), 29 U.S.C. Section 160(f) and Rule 15 of the Federal Rules of Appellate Procedure, Justin L. Swidler (“Petitioner”) petitions the Court to review and modify the Decision and Order of the National Labor Relations Board (“Board”) in *U.S. Express Enterprises, Inc. and U.S. Xpress, Inc. and Justin L Swidler*, 363 NLRB No. 46 (Case No. 10-CA-141407) entered on November 30, 2015. Specifically, Petitioner seeks this Court award Petitioner’s reasonable attorneys’ fees and costs incurred as a consequence of the conduct of U.S. Xpress Enterprises, Inc. and U.S. Xpress, Inc., which the Board found unlawful. In all other respects, Petitioner does not appeal the Decision and Order. A copy of the Decision and Order is attached as “Exhibit A.”

DATED: December 10, 2015

Respectfully Submitted,

/s/ Justin L. Swidler

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**U.S. Xpress Enterprises, Inc., and U.S. Xpress, Inc.
and Justin L. Swidler. Case 10-CA-141407**

November 30, 2015

DECISION AND ORDER

**BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA**

On July 16, 2015, Administrative Law Judge Ira Sandron issued the attached decision. The Respondents filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondents filed a reply brief.

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

Applying the Board's decision in *D. R. Horton*, 357 NLRB No. 184 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied --F.3d-- (5th Cir. Oct. 26, 2015), the judge found that the Respondents violated Section 8(a)(1) of the Act by maintaining and enforcing an arbitration agreement that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial.

The Board has considered the decision and the record in light of the exceptions and briefs and, based on the judge's application of *D. R. Horton* and *Murphy Oil*, we affirm the judge's rulings, findings¹ and conclusions, and adopt the recommended Order as modified and set forth in full below.²

¹ We find that the judge properly declined to address certain arguments, including the argument that Tennessee state law provided an alternative ground of enforcing the arbitration agreement. The Respondents failed to assert these claims in their statement of position and they are not supported by facts or argument in the parties' joint motion and stipulation of facts.

The judge included a citation to *Trump Marina Associates*, 354 NLRB 1027 (2009), a case decided by a two-member Board. See *New Process Steel v. NLRB*, 130 S.Ct. 2635 (2010). We note that a three-member panel of the Board subsequently incorporated *Trump Marina Associates* by reference, and that decision has since been enforced. See 355 NLRB 585 (2010), enf. mem. 435 Fed.Appx.1 (D.C. Cir. 2011).

U.S. Xpress Enterprises, Inc. and U.S. Xpress, Inc. dispute the allegation that they constitute a single employer within the meaning of the Act, but they have stipulated that, should U.S. Xpress, Inc. fail to effectuate any remedy ultimately found appropriate, U.S. Xpress Enterprises, Inc. "guarantees that . . . it will enforce any remedial order." For this reason, we shall order both U.S. Xpress, Inc. and U.S. Xpress Enterprises, Inc. to take the actions set forth in the Order.

Consistent with our decision in *Murphy Oil*, supra, at 21, we shall order the Respondents to notify the district court that they have rescinded or revised the arbitration agreement and to inform the court that

1. The Respondents argue that the complaint is time-barred by Section 10(b) because the initial unfair labor practice charge was filed and served more than 6 months after the Charging Party learned of the Xpress Resolution Program and Rules for Arbitration ("arbitration agreement"). We reject this argument, as did the judge, because the Respondents continued to maintain the unlawful arbitration policy during the 6-month period preceding the filing of the initial charge. The Board has long held under these circumstances that maintenance of an unlawful workplace rule, such as the Respondents' arbitration policy, constitutes a continuing violation that is not time-barred by Section 10(b). See *PJ Cheese, Inc.*, 362 NLRB No. 177, slip op. at 1 (2015); *The Neiman Marcus Group*, 362 NLRB No. 157, slip op. at 2 & fn. 6 (2015); and *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 2 & fn. 7 (2015). It is equally well-established that an employer's enforcement of an unlawful rule, like the arbitration agreement here, independently violates Section 8(a)(1). See *Murphy Oil*, supra, at 19-21. We agree with the judge that, by asserting the arbitration agreement as an affirmative defense in a class-action lawsuit alleging that the Respondents violated the Fair Labor Standards Act (*Keith Salinas, et al. v. U.S. Xpress Enterprises, Inc. and U.S. Xpress, Inc.*, No. 1:13-cv-00245 (E.D. Tenn.)), the Respondents enforced their arbitration policy on November 20, 2014, within the relevant 6-month period before the charge was filed and served.

2. We reject the Respondents' contention that the opt-out provision of its arbitration agreement places it outside the scope of the prohibition against mandatory individual arbitration agreements under *Murphy Oil* and *D. R. Horton*. See *D. R. Horton*, slip op. at 13 fn. 28. The Board has rejected this argument, holding that an opt-out procedure still imposes an unlawful mandatory condition of employment that falls squarely within the rule set forth in *D. R. Horton* and affirmed in *Murphy Oil*. See *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. at 1, 4-5 (2015). The Board further held in *On Assignment*, slip op. at 1, 5-8, that even assuming that an opt-provision renders an arbitration agreement not a condition of employment (or nonmandatory), an arbitration agreement precluding collective action in all forums is unlawful even if entered into voluntarily because it requires employees to prospectively waive their Section 7 right to engage in concerted activity. In addition, the arbitration agreement at issue here contains an acknowl-

they no longer oppose the lawsuit on the basis of the arbitration agreement. We shall further modify the Order to conform to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

edgement provision for applicants, which states in part, "I understand that consideration of my application, as well as any offer of employment, is contingent on my agreement to be bound by the terms and conditions of [the arbitration agreement]." Although the acknowledgement form also contains an opt-out provision, an actual opt-out option would appear to be illusory, as an applicant who does not agree to be bound by the terms and conditions of the arbitration agreement will not be offered employment, further undermining the Respondents' argument that the opt-out provision renders the arbitration agreement voluntary.³

ORDER

The National Labor Relations Board orders that the Respondents, U.S. Xpress Enterprises, Inc. and U.S. Xpress, Inc., Chattanooga, Tennessee, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) 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.

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

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

(a) Rescind the mandatory arbitration agreement 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.

(b) Notify all applicants and current and former employees who were required to sign or otherwise became bound to the mandatory arbitration agreement 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 Eastern District of Tennessee in *Case Keith Salinas, et al. v. U.S. Xpress Enterprises, Inc. and U.S. Xpress, Inc.*, No. 1:13-cv-00245, that it has rescinded or revised the mandatory arbitration agreement and inform the court that it no longer opposes the action on the basis of that agreement.

(d) Within 14 days after service by the Region, post at their facilities in Chattanooga, Tennessee, copies of the

attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondents' authorized representative shall be posted by the Respondents 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 Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since May 21, 2014.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 10 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. November 30, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

In this case, my colleagues find that the Xpress Resolution Program and Rules for Arbitration ("Agreement") violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the Agreement waives the right to participate in class or collective actions regarding non-NLRA employment claims. Individuals who applied for employment with the Respondents signed the Agreement, and later they filed a class action lawsuit against the Respondents in the United States Dis-

³ Our dissenting colleague argues that Sec. 8(a)(1) of the Act does not prohibit agreements that waive class and collective actions, especially when, as here, they contain an opt-out provision. We disagree, for the reasons stated in *Murphy Oil*, supra, slip op. at 17-18, and *On Assignment*, supra, slip op. at 4, 9 & fns. 28, 29, 31.

⁴ If this Order is enforced by a judgment of the 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."

strict Court for the Eastern District of Tennessee alleging the Respondents violated the Fair Labor Standards Act by failing to pay class members statutory wages for hours worked during their orientation and training. The Respondents asserted the Agreement as an affirmative defense to the lawsuit. My colleagues find that the Respondents thereby unlawfully enforced the Agreement. I respectfully dissent from these findings for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*¹

I agree that an employee may engage in “concerted” activities for “mutual aid or protection” in relation to a claim asserted under a statute other than NLRA.² However, I disagree with my colleagues’ finding that Section 8(a)(1) of the NLRA prohibits agreements that waive class and collective actions, and I especially disagree with the Board’s finding here, similar to the Board majority’s finding in *On Assignment Staffing Services*,³ that class waiver agreements violate the NLRA even when they contain an opt-out provision. In my view, Sections 7 and 9(a) of the NLRA render untenable both of these propositions. As discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an “individual” to “present” and “adjust” grievances “at any time.”⁴ This aspect of Sec-

tion 9(a) is reinforced by Section 7 of the Act, which protects each employee’s right to “refrain from” exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;⁵ (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board’s position regarding class waiver agreements;⁶ (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA);⁷ and (iv) for the reasons stated in my dissenting opinion in *Pama Management*, 363 NLRB No. 38, slip op. at 3–5 (2015), the legality of such a waiver is even more self-evident when the agreement contains an opt-out provision, based on every employee’s Section 9(a) right to present and adjust grievances on an “individual” basis and each employee’s Section 7 right to “refrain from” engaging in protected concerted activities.

Because I believe the Respondent’s Agreement was lawful under the NLRA, I would find it was similarly lawful for the Respondent to assert that Agreement as an affirmative defense in a class action lawsuit filed against

¹ 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority’s holding in *Murphy Oil* invalidating class-action waiver agreements was recently denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, –F.3d–, No. 14–60800, 2015 WL 6457613 (5th Cir. Oct. 26, 2015).

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

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

⁴ *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: “Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment” (emphasis added). The Act’s legislative history shows that Congress intended to preserve every individual

employee’s right to “adjust” any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

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

⁶ The Fifth Circuit has twice denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See *Murphy Oil, Inc. USA v. NLRB*, above; *D.R. Horton, Inc. v. NLRB*, above. The overwhelming majority of courts considering the Board’s position have likewise rejected it. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); *id.*, slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Roymours Furniture Co., Inc.*, No. 14–CV–5882 (VEC), 2015 WL 1433219 (S.D.N.Y. Mar. 27, 2015); *Nanavati v. Adecco USA, Inc.*, No. 14–cv–04145–BLF, 2015 WL 1738152 (N.D. Cal. Apr. 13, 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services, Inc.*, No. 1:12–cv–00062–BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA).

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

it. That the Respondent's defense was reasonably based is supported by the multitude of court decisions that have enforced similar agreements.⁸ As the Fifth Circuit recently observed after rejecting (for the second time) the Board's position regarding the legality of class waiver agreements: "[I]t is a bit bold for [the Board] to hold that an employer who followed the reasoning of our *D. R. Horton* decision had no basis in fact or law or an 'illegal objective' in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders."⁹ I also believe that any Board finding of a violation based on the Respondent's assertion of this defense would improperly risk infringing on the Respondent's rights under the First Amendment's Petition Clause. See *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983); *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002); see also my partial dissent in *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 33-35.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. November 30, 2015

Philip A. Miscimarra,

Member

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.

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

⁹ *Murphy Oil USA, Inc. v. NLRB*, above, at fn. 6.

WE WILL NOT maintain and/or enforce 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.

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 Xpress Resolution Program and Rules for Arbitration ("mandatory arbitration agreement") in all of its forms, or revise it in all of its forms to make clear that it does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all applicants and current and former employees who were required to sign or otherwise became bound to the mandatory arbitration agreement that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

WE WILL notify the court in which Keith Salinas filed his collective lawsuit that we have rescinded or revised the mandatory arbitration agreement, and WE WILL inform the court that we no longer oppose the collective lawsuit on the basis of that agreement.

U.S. XPRESS ENTERPRISES, INC., U.S. XPRESS, INC.

The Board's decision can be found at www.nlr.gov/case/10-CA-141407 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



JD Elaine Robinson-Fraction, Esq., for the General Counsel.
Tracy Stott Pyles and Brendan J. Fitzgerald, Esqs. (Littler Mendelson, P.C.), for the Respondents.
Justin L. Swidler, Esq. (Swartz Swidler, LLC), for the Charging Party.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This case is before me on a complaint and notice of hearing issued on February 24, 2015 (the complaint), stemming from charges filed on

U.S. XPRESS ENTERPRISES

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November 21, 2014. The General Counsel alleges that U.S. Xpress Enterprises, Inc. (Xpress Enterprises) and U.S. Xpress, Inc. (Xpress Inc.) (the Respondents), as a single employer, have violated Section 8(a)(1) of the National Labor Relations Act (the Act) in connection with a mutual binding arbitration agreement (MAA).

On May 21, 2015, the parties filed a joint motion and stipulated record, requesting, pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations, that the matter be assigned directly to a judge for a decision in lieu of a hearing. On May 22, 2015, Associate Chief Judge William N. Cates issued a corrected order accepting stipulated record; waiver of hearing; cancelling of hearing date; assignment of judge and establishing briefing date. He assigned the case to me for decision.

Issue

Does the Respondents' maintenance and enforcement of an MAA with an opt-out provision, as a condition of employment, violate employees' Section 7 rights pursuant to *D. R. Horton, Inc.* (*D. R. Horton*), 357 NLRB No. 184 (2012), denied in relevant part, 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.* (*Murphy Oil*), 361 NLRB No. 72 (2014)?

The Respondents dispute the contention of the General Counsel and the Charging Party that they constitute a single employer with the meaning of the Act. However, for purposes of the stipulation, Xpress Enterprises guarantees that should Xpress Inc. fail to effectuate any remedy ultimately found appropriate in this matter, it will enforce any remedial order. Accordingly, the parties have agreed that I need not address the issue of the Respondents' single employer status. In light of this, and the concomitant absence of any evidence on the issue, I will treat them together rather than attempt to distinguish which of the entities engaged in the conduct alleged in the complaint. Further, I am unable to make a finding on whether they are in fact a single employer.

Facts

In the argument section of the Respondents' brief, certain alleged facts are averred that pertain to (1) Xpress Inc. employees as of February 2013 being "grandfathered" and not required to sign MAAs; and (2) Tennessee and Federal Arbitration Act (FAA) law relating to transportation workers. These purported facts are not contained in the stipulated facts or documents, and I therefore will not consider them. See *Ohio Brass Co.*, 261 NLRB 137, 137 fn. 1 (1982). To do otherwise would defeat the purpose of having a stipulated record in lieu of a hearing and deprive the General Counsel and the Charging Party of due process by not allowing them the opportunity of rebuttal. Similarly, I will not consider any arguments that are not based on stipulated facts or documents.

Based on the parties' stipulated record and the thoughtful posttrial briefs that the General Counsel and the Respondents filed, I find the following.

Pertinent stipulated facts

Both Respondents are Nevada corporations with offices and places of business in Chattanooga, Tennessee. Xpress Enterprises is a holding company for Xpress, Inc., which is engaged in hauling and delivering freight across the United States. The

Respondents have admitted Board jurisdiction as alleged in the complaint, and I so find.

Since about February 1, 2013, individuals, including, but not limited to, employees as defined under Section 2(3) of the Act, (herein, collectively, referred to as the participants) signed a document titled "Xpress Resolution Program and Rules for Arbitration" (herein referred to as the MAA).¹ The Respondents' brief distinguishes between participants who are "employees" and those who are not, but the General Counsel has never contended that any remedy in this case would apply to participants who are not employees within the meaning of the Act.

The MAA states, in part:

10. Class Actions. To the extent consistent with the National Labor Relations Act, no legal dispute may be made the subject of a class action in arbitration or in a court of law. Instead, a party must pursue a legal dispute only in arbitration and only on behalf of that party. The arbitrator may not mandate or grant a request for class action arbitration; nor may the arbitrator order the consolidation of multiple arbitration proceedings. Within thirty (30) days after becoming subject to this program, a party may inform the program director in writing that the party is electing to "opt out" of that portion of the program that would prohibit the party from pursuing a legal dispute through a class action in a court of law by delivering written notice to: U.S. Xpress, Inc., Attention: Lisa Pate, 4080 Jenkins Rd., Chattanooga, TN 37421. A Party exercising the "opt out" right may pursue a legal dispute through a class action in a court of law, without waiver of the right to a jury, on behalf of only those parties who also have exercised this "opt out" right. If such court denies class certification, the party's legal dispute must again be pursued in arbitration. By not exercising the "opt out" right, a party voluntarily agrees not to pursue a legal dispute through a class action in arbitration or in a court of law.

The Respondents have conducted a reasonable review of their business records and found no record of any participants having exercised their right to opt out of the MAA's class-action waiver provisions.

Since at least November 20, 2014, the Respondents have asserted the MAA as an affirmative defense in *Keith Salinas, et al. v. US Xpress Enterprises, Inc. and US Xpress, Inc.*, No. 1:13-cv-00245 (E.D. Tenn.), a class-action lawsuit alleging that the Respondents violated the Fair Labor Standards Act (FLSA) with regard to individuals, including Salinas, who participated in Xpress, Inc.'s orientation and training program.

Other relevant provisions of the MAA

The MAA further provides the following:²

3. Application and Coverage. This program applies to and binds the company, each participant, and the heirs, beneficiaries, and assigns of each participant. The program does not restrict or expand substantive legal rights of the Company or

¹ Ji. Exh. 8. Portions of the MAA that I will quote will omit the capitalization of certain words contained therein.

² *Id.* at 3-4.

any participant. The program does not prohibit (i) a participant from filing a charge with the Equal Employment Opportunity Commission, the National Labor Relations Board, or a similar government agency; (ii) any such agency from investigating any such charge; or (iii) any such agency from pursuing legal action on behalf of a participant.

11. National Labor Relations Act. The National Labor Relations Act ("NLRA") affords covered employees certain rights (nlrb.gov/rights-we-protect/Participant-rights). This program does not condition employment on a participant's waiving non-waivable rights under the NLRA. No participant will be retaliated against for exercising rights under the NLRA. This program does not prohibit a participant covered by the NLRA from filing a charge with the National Labor Relations Board ("NLRB") or from engaging in concerted activity for mutual aid or protection protected by the NLRA. The arbitrator shall have no authority to determine whether a party has committed an unfair labor practice as the NLRB has exclusive jurisdiction over such charges.

Finally, the MAA contains an acknowledgement provision for applicants, which provides in part:³

I understand that consideration of my application, as well as any offer of employment by U.S. Express is contingent on my agreement to be bound by the terms and conditions of U.S. Express's alternative dispute program [the MAA].

[W]ithout limitation, I confirm my understanding and agreement that work disputes in which I am involved that fall within the program's definition of "legal dispute" will be resolved exclusively through final and binding arbitration rather than before a judge or jury in court or before an administrative adjudicative body. Within thirty (30) days after becoming subject to the program, I may inform the program director in writing that I am electing to "opt out" of that portion of the program that would prohibit my pursuing a class action in a court of law. By not exercising the "opt out" right, I would voluntarily agree not to pursue a class action in arbitration or in a court of law.

Analysis and Conclusions

The Respondents contend as a threshold issue that the charges are barred by Section 10(b) of the Act. That defense aside, the Board's decisions in *D. R. Horton and Murphy Oil* are at the heart of this matter. The Respondents argue that these cases should not control because:

- (1) They were wrongly decided.⁴
- (2) The MAA does not violate *D. R. Horton and Murphy Oil* because employees are not "required" to enter into the MAA as a condition of employment, and waive any Section 7 rights, by virtue of the opt-out provision.

³ *Id.* at 6.

⁴ The Respondents also cite (R. Br. at 19 n. 5) *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), petition for cert. granted (U.S. June 20, 2013) (No.12-1281), for the proposition that *D. R. Horton* "may not be enforceable."

Finally, the Respondents contend that their assertion of the MAA as an affirmative defense in *Salinas v. US Xpress Enterprises and US Express, Inc.*, supra, a class-action lawsuit, did not constitute an attempt to compel arbitration and therefore did not amount to enforcement.

The Respondents' 10(b) defense

Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge."

The Respondents assert that Section 10(b) bars the General Counsel from pursuing a complaint inasmuch as the MAA program has been in effect since about February 1, 2013, and the charge was not filed until November 21, 2014.⁵

This argument ignores the fact that since at least November 20, 2014, the Respondents have asserted the MAA as an affirmative defense in *Salinas v. US Xpress Enterprises, Inc. and US Xpress, Inc.*, supra. Thus, the charge was filed almost immediately after the Respondent took action to invoke the MAA.

In any event, the Board has long recognized that Section 10(b) does not bar an allegation of unlawful conduct that began more than 6 months before a charge was filed but has continued within the 6-month period. More specifically, Section 10(b) does not preclude a complaint allegation based on the maintenance of a facially invalid rule or policy within the 10(b) period, even if the rule or policy was promulgated earlier and has not been enforced, since "[t]he maintenance during the 10(b) period of a rule that transgresses employee rights is itself a violation of Sec. 8(a)(1)." *Register-Guard*, 351 NLRB 1110, 1110 fn. 2 (2007), *enfd.* in part 571 F.3d 53 (D.C. Cir. 2009),⁶ citing *Eagle-Picher Industries, Inc.*, 331 NLRB 169, 174 fn. 7 (2000); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999) ("Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement"). See also *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 1 (2015) ("[M]aintenance of an unlawful rule is a continuing violation, regardless of when the rule was first promulgated." (fn. omitted)). The Respondent has cited no contrary precedent.

Therefore, I conclude that Section 10(b) does not bar the instant complaint.

The application of *D. R. Horton and Murphy Oil*

In *D. R. Horton*, the Board analyzed an MAA in the context of how the Board decides whether other unilaterally-implemented workplace rules violate Section 8(a)(1), under the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). The Board found that the MAA explicitly restricted the exercise of Section 7 rights and was therefore unlawful under the first inquiry set out in *Lutheran Heritage Village*. The Board held that an employer violates Section 8(a)(1) of the Act by "requiring employees to waive their right to collectively

⁵ I will not consider the Respondents' assertion that the Charging Party was notified of the MAA on November 21, 2013 (R. Br. 30), inasmuch as this was not stipulated.

⁶ The decision was reversed on other grounds in *Purple Communications, Inc.*, 361 NLRB No. 126 (2014).

pursue employment-related claims in all forums, arbitral and judicial,” because “[t]he 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.” D. R. Horton, *supra*, slip op. at 12 (emphasis in original).

The Board further concluded that finding such MAA unlawful was “consistent with the well-established interpretation of the NLRA and with core principles of Federal labor policy” and did not “conflict with the letter or interfere with, the policies underlying the Federal Arbitration Act (FAA) [9 U.S.C., § 1 *et seq.*].” *Id.*, slip op. at 10.

The Respondent argues that the Fifth Circuit Court of Appeals and other Federal appellate courts have rejected D. R. Horton to the extent that it found it to be a foul of the Act an MAA prohibiting class action. Thus, the Fifth Circuit concluded that neither the Act’s statutory text nor its legislative history contained a congressional command against application of the FAA and that, in the absence of an inherent conflict between the FAA and the Act’s purpose, an MAA should be enforced according to its terms. 737 F.3d at 361–363. Accordingly, the court denied enforcement of the Board’s order invalidating the MAA.⁷

In *Murphy Oil*, the Board acknowledged the Fifth Circuit’s rejection of the Board’s D. R. Horton decision on appeal, by a divided panel, as well as decisions of the Second and Eighth Circuits also indicating disagreement with D. R. Horton, but it cited the well-established rule that “[t]he Board is not required to acquiesce in adverse decisions of the Federal courts in subsequent proceedings not involving the same parties.” *Murphy Oil*, *supra*, slip op. at 2 fn. 17, citing *Enloe Medical Center v. NLRB*, 433 F.3d 834, 838 (D.C. Cir. 2005), and *Nielsen Lithographing Co. v. NLRB*, 854 F.2d 1063, 1066–1067 (7th Cir. 1988). Thus, the Board has explained that it is not required, on either legal or pragmatic grounds, to automatically follow an adverse court decision but will instead respectfully regard such ruling solely as the law of that particular case. See *Manor West, Inc.*, 311 NLRB 655, 667 fn. 43 (1993), *revd.*, 60 F.3d 1195 (6th Cir. 1995). See also *D. L. Baker, Inc.*, 351 NLRB 515, 529 at fn. 42 (2007); *Arvin Industries*, 285 NLRB 753, 757 (1987).

The Board in *Murphy Oil* expressly reaffirmed D. R. Horton, stating that “[t]he rationale of D. R. Horton was straightforward, clearly articulated, and well supported at every step.” *Murphy Oil*, *supra*, slip op. at 6, and that “[w]ith due respect to the courts that have rejected D. R. Horton, and to our dissenting colleagues, we adhere to its essential rationale for protecting workers’ core substantive rights under the National Labor Relations Act.” *Id.*, slip op. at 7.

Even assuming, arguendo that I agree with the rationales of the circuit courts that have rejected D. R. Horton, I am constrained to follow Board precedent that has not been reversed by the Supreme Court or by the Board itself, rather than contra-

ry courts of appeals precedent. See *Pathmark Stores*, 342 NLRB 378, 378 fn. 1 (2004), citing *Iowa Beef Packers, Inc.*, 144 NLRB 615 (1963), *enfd.* in part 331 F.2d 176 (8th Cir. 1964); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984).

The Supreme Court, in upholding the enforcement of individual MAAs in various contexts, has enunciated the general principal that the FAA was designed to promote arbitration. See, e.g., *AT & T Mobility LLC v. Conception*, 131 S.Ct. 1740, 1749 (2011). Moreover, the Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), held that a MAA signed by an employee waived his right to bring a Federal court action under the Age Discrimination in Employment Act. However, as the Board noted in D. R. Horton, *Gilmer* dealt with an individual claim, and the MAA contained no language specifically waiving class or collective claims; ergo, the Court in *Gilmer* addressed neither Section 7 nor the validity of a class-action waiver. D. R. Horton, *supra*, slip op. at 12. Inasmuch as the Supreme Court has not specifically addressed the issue of mandatory arbitration provisions that cover class and/or collective actions vis-à-vis the Act, it follows that the Court has not overruled the Board’s D. R. Horton decision, which I therefore must apply to determine whether the Respondents’ MAA violates Section 8(a)(1) of the Act.

The MAA requires that prospective employees sign it as a condition of employment, and it expressly precludes employees from seeking redress on a class-action basis in either courts of law or in arbitration. Accordingly, on its face, the MAA clearly contravenes the Board’s holdings in D. R. Horton and *Murphy Oil*.

The fact that the MAA specifically provides that employees may file charges with administrative agencies, including the NLRB, does not rectify this defect. Rather, this obviates the finding of a separate violation that employees could reasonably believe that the MAA bars or restricts their right to file NLRB charges.

The effect of the MAA’s opt-out provision

The Board has not addressed whether an opt-out provision in an MAA removes it from being a required condition of employment, as the Respondents argue, thereby curing its otherwise coercive nature under D. R. Horton and *Murphy Oil*.

The Respondents’ brief cites decisions of the Ninth Circuit Court of Appeals, two administrative law judges, and several district courts that answer this in the affirmative. On the other hand, the General Counsel’s brief cites four administrative law judges who held to the contrary. As I stated earlier, the Board is not required to adopt interpretations of the Act by courts other than the Supreme Court, and decisions of administrative law judges are not precedent. See, e.g., *Trump Marina Associates, LLC*, 354 NLRB 1027, 1027 fn. 2 (2009).

The opt-out provision needs to be analyzed in the context of the purpose of the Act: To balance the inequality of bargaining between employers and individual employees by fostering collective action by employees. See 29 USC § 102. This provision, which the Respondents presumably have formulated with the assistance of expert legal counsel, places the burden on employees to understand the legal complexities of the MAA and the ramifications of opting out, within the time frame of

⁷ The court did enforce the Board’s order that Sec. 8(a)(1) had been violated because an employee would reasonably interpret the MAA as prohibiting the filing of a claim with the Board. The General Counsel does not allege such a violation here.

only 30 days. This strikes me as patently skewed in favor of the employer and to make illusory any free choice on the part of employees to opt-out of the MAA. The employee must either accept the MAA or incur the burden of obtaining legal advice on short notice and running the risk that he or she might later be caught up in a dispute between legal experts over interpretation of the MAA and the opt-out provision.

Such a lopsided imbalance in the positions of the Respondents vis-à-vis employees undermines the Respondents' assertion that employees who agree to the MAA by failing to exercise the opt-out option do so "voluntarily" and not because the Respondents impose the MAA as a requirement for employment. In this regard, the Respondents' records do not establish that any employees have availed themselves of the opt-out provision. In sum, the MAA is essentially a fait accompli when employees are obliged to sign it as a condition of employment.

Accordingly, for all of the reasons stated above, I conclude that the Respondents violated Section 8(a)(1) by maintaining, as a condition of employment and continued employment, an MAA that requires employees to waive their right to pursue collective or class-action lawsuits and arbitrations.

Whether the Respondents' assertion of the MAA as an affirmative defense constituted enforcement

As the Board stated in *Murphy Oil*, supra at slip op. at 26-27, "It is well settled that an employer violates Section 8(a)(1) by enforcing a rule that unlawfully restricts Section 7 rights" citing *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16-17 (1962), and *Republic Aviation Corp.*, 324 U.S. 793 (1945).

In *Murphy Oil*, the employer, in response to a class-action lawsuit filed by employees claiming violations of the FLSA, relied on an unlawful MAA in filing a motion to dismiss and to compel the plaintiffs to arbitrate their claims on an individual basis. The Board found that filing this motion violated Section 8(a)(1) as enforcement of the unlawful MAA. *Id.* at 27.

Here, the Respondents asserted the MAA as an affirmative defense in a class-action lawsuit filed by employees claiming violations of the FLSA. I fail to see any meaningful distinction between the action of the Respondents and that of the employer in *Murphy Oil*. Regardless of using different procedural means, the Respondents and that employer similarly invoked an unlawful MAA as the basis for arguing that a court should reject an employees' class-action lawsuit, thereby forcing them to arbitrate on an individual basis.

Accordingly, I conclude that the Respondents enforced the unlawful MAA by raising it as an affirmative defense in litigation and so violated Section 8(a)(1).

CONCLUSIONS OF LAW

The Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

By the following conduct, the Respondents have engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act.

(a) Maintained, as a condition of employment and continued employment, a mandatory arbitration agreement (MAA) prohibiting employees from pursuing collective or class lawsuits

and arbitrations.

(b) Enforced the MAA by invoking it against employees who filed a class-action lawsuit against the Respondents concerning their wages under the Fair Labor Standards Act.

REMEDY

Because I have found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

ORDER

The Respondents, U.S. Xpress Enterprises, Inc. and U.S. Xpress, Inc., Chattanooga, Tennessee, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining, as a condition of employment and continued employment, a mandatory arbitration agreement (MAA) that prohibits employees from pursuing collective or class lawsuits and arbitrations.

(b) Asserting an MAA as an affirmative defense, or otherwise enforcing an MAA, to preclude employees from pursuing, on a collective or class basis, employment-related disputes with the Respondents.

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

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

(a) Withdraw the MAA currently in effect (the MAA) as an affirmative defense in *Keith Salinas, et al. v. US Xpress Enterprises, Inc. and US Xpress, Inc.*, No. 1:13-cv-00245 (E.D. Tenn.).

(b) Rescind the requirement that employees enter into or sign the MAA, or sign acknowledgements relating to it, as a condition of employment.

(c) Rescind the MAA or revise it to make it clear that the agreement does not constitute a waiver of the employees' right to initiate or maintain employment-related collective or class actions in arbitrations and in the courts.

(d) Notify all applicants and current and former employees who were required to agree to the MAA that the MAA has been rescinded or revised to comport with subparagraph (c), and provide them with any revised agreement.

(e) Within 14 days after service by the Region, post at their facilities in Chattanooga, Tennessee, and any other facilities where the MAA has been maintained as a condition of employment, copies of the attached notice marked "Appendix."⁹

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.

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 for the [] Circuit."

U.S. XPRESS ENTERPRISES

9

Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondents 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 set, and/or other electronic means, if the Respondents customarily communicate with its employees by such means. Reasonable steps shall be taken by the Respondents 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 Respondents have gone out of business or closed the facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since February 1, 2013.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, DC July 16, 2015

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.

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT maintain, as a condition of employment and continued employment, a mandatory arbitration agreement (MAA) that prohibits employees from pursuing collective or class lawsuits and arbitrations.

WE WILL NOT assert an MAA as an affirmative defense in litigation, or otherwise enforce it, to preclude employees from pursuing, on a collective or class basis, employment-related disputes with us.

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

WE WILL withdraw the affirmative defense that we asserted in *Keith Salinas, et al. v. US Xpress Enterprises, Inc. and US Xpress, Inc.*, No. 1:13-cv-00245 (E.D. Tenn.), that the employees' class-action lawsuit should be rejected because of the MAA that is currently in effect (the MAA).

WE WILL rescind the requirement that employees enter into or sign the MAA, or sign acknowledgements relating to it, as a condition of employment.

WE WILL rescind the MAA or revise it to make it clear that the agreement does not constitute a waiver of the employees' right to initiate or maintain employment-related collective or class actions in arbitrations and in the courts.

WE WILL notify all applicants and current and former employees who were required to agree to the MAA that the MAA has been so rescinded or revised, and provide them with any revised agreement.

U.S. XPRESS ENTERPRISES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/10-CA-141407 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



