



IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

	15-4092	Docket No. _____
THE ROSE GROUP d/b/a APPLEBEE'S RESTAURANT,		
Petitioner,		On Petition for Review of
v.		NLRB Case No. 05-CA-135360
NATIONAL LABOR RELATIONS BOARD,		
Respondent.		

PETITION FOR REVIEW

Petitioner, The Rose Group d/b/a Applebee's Restaurant, also known as Delaware Valley Rose, L.P., hereby petitions this Court under Federal Rule of Appellate Procedure 15(a) for review of the Decision and Order of the National Labor Relations Board (the "Board") entered on December 22, 2015 in NLRB Case No. 05-CA-135360 ("Decision and Order"). A copy of the Board's Decision and Order, reported at 363 NLRB No. 75, is attached hereto as Exhibit A.

This Court has jurisdiction because the Board's Decision and Order is a final order within the meaning of 29 U.S.C. § 160(f) of the National Labor Relations Act, and Petitioner is an aggrieved party. Venue properly lies in this Court under 29 U.S.C. § 160(f) because Petitioner maintains offices and transacts business within the geographical boundaries of this circuit.

Because the Board's Decision and Order is contrary to law, Petitioner respectfully requests that the Court grant the petition, review the Board's Decision and Order, and set it aside.

Respectfully submitted,

Dated: December 31, 2015

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By: 

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# Exhibit A

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**The Rose Group d/b/a Applebee's Restaurant and Jeff Armstrong, Case 05-CA-135360**

December 22, 2015

**DECISION AND ORDER**

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA  
AND MCFERRAN

On April 22, 2015, Administrative Law Judge Susan A. Flynn issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions,<sup>1</sup>

<sup>1</sup> The Respondent argues that the complaint is time-barred by Sec. 10(b) because the initial unfair labor practice charge was filed and served more than 6 months after the Charging Party, Jeff Armstrong, signed and became subject to the Respondent's arbitration program, as codified in its Dispute Resolution Program (DRP) and Agreement and Receipt for Dispute Resolution Program. We reject this argument, as did the judge, because the Respondent continued to maintain the unlawful arbitration program 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 Respondent's arbitration program, constitutes a continuing violation that is not time-barred by Sec. 10(b). See *PJ Cheese, Inc.*, 362 NLRB No. 177, slip op. at 1 (2015); *Neiman Marcus Group*, 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).

Having found that employees would not reasonably view the Respondent's arbitration program as providing unrestricted access to the Board, and, by inference, to other administrative agencies, we necessarily reject any argument by the Respondent that its arbitration policy is distinguishable from the policies found unlawful 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 in part \_\_\_ F.3d \_\_\_ (5th Cir. 2015), and lawful because it permits such access.

For the reasons stated in *Murphy Oil* and *Bristol Farms*, 363 NLRB No. 45, slip op. at 1-2 (2015), we disagree with our dissenting colleague's argument that mandatory arbitration programs do not violate the Act. In so doing, we reiterate that the elimination of employees' statutory rights to pursue collective action regarding the terms and conditions of their employment is unlawful, regardless of the procedures or scope of an available individual arbitration process.

Also unlike our dissenting colleague, we agree with the judge that employees would reasonably interpret the Respondent's arbitration program to restrict their right to file charges with the Board, notwithstanding the language in the DRP stating that "the Program will not prevent you from filing a charge with any state or federal administrative agency." See *PJ Cheese, Inc.*, supra, slip op. at 2 fn. 6; see also *Amex Card Services Co.*, 363 NLRB No. 40, slip op. at 2-3 (2015).

and to adopt the recommended Order, as modified and set forth in full below.<sup>2</sup>

**ORDER**

The National Labor Relations Board orders that the Respondent, The Rose Group d/b/a Applebee's Restaurant, Newtown, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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

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

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

(c) Within 14 days after service by the Region, post at its Rehoboth Beach facility and all other facilities where the unlawful arbitration program is or has been in effect copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notices, on forms provided by the Regional Director for Region 4, after being signed by the Re-

We reject our dissenting colleague's argument that the class action waiver agreement entails an exercise of an employee's right to refrain from pursuing collective actions and to present or adjust individual grievances with the Respondent. *Convergys Corp.*, 363 NLRB No. 51, slip op. at 1 fn. 3 (2015) (citing cases).

<sup>2</sup> We shall modify the judge's recommended Order to conform to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

<sup>3</sup> 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."

spondent'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" to all current employees and former employees employed by the Respondent at any time since April 6, 2013.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 4 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 22, 2015

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Mark Gaston Pearce, Chairman

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

In this case, my colleagues find that the Respondent's "Dispute Resolution Program" and "Agreement and Receipt for the Dispute Resolution Program" violate Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because they waive the right to participate in class or collective actions regarding non-NLRA employment claims. I respectfully dissent from this finding for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*<sup>1</sup> I also dissent from my colleagues' finding that the Dispute Resolution Program

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

violates Section 8(a)(1) based on interference with the right of employees to file charges with the Board. However, I agree that the Agreement and Receipt for the Dispute Resolution Program colorably restricts NLRB charge filing in violation of Section 8(a)(1).

#### Discussion

##### 1. *Legality of the class action waiver*

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.<sup>2</sup> However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class-type treatment of non-NLRA claims. To the contrary, 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."<sup>3</sup> This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of

<sup>2</sup> 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).

<sup>3</sup> *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).

non-NLRA claims;<sup>4</sup> (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;<sup>5</sup> and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).<sup>6</sup> Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.

## 2. Interference with NLRB charge-filing

I dissent from my colleagues' finding that the Respondent's Dispute Resolution Program violates Section 8(a)(1) based on interference with the right of employees to file charges with the Board. However, I agree with my colleagues that the Agreement and Receipt for the Dispute Resolution Program unlawfully interferes with the filing of NLRB charges, but I believe this presents a close question.<sup>7</sup>

<sup>4</sup> 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.").

<sup>5</sup> The Fifth Circuit has twice denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See *Murphy Oil USA, Inc. v. NLRB*, above; *D. R. Horton, Inc. v. NLRB*, above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); *id.*, slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co.*, 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.*, 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).

<sup>6</sup> For the reasons expressed in my *Murphy Oil* partial dissent, and those thoroughly explained in former Member Johnson's dissent in *Murphy Oil*, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil*, above, slip op. at 34 (Member Miscimarra, dissenting in part); *id.*, slip op. at 49-58 (Member Johnson, dissenting).

<sup>7</sup> I disagree with the judge's reliance on the principle that "ambiguity is held against the Respondent" as a basis for finding a violation under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). More generally, I have expressed my disagreement with the current Board standard regarding alleged overly broad rules and policies, set forth as

### (a) The "Program" does not unlawfully interfere with charge filing

The Dispute Resolution Program (hereinafter "Program") is set forth in a seven-page document that provides for no signatures.<sup>8</sup> The Program broadly requires arbitration of all legal claims, including those arising under the NLRA,<sup>9</sup> but I do not believe the scope of this arbitration provision violates the Act. The Supreme Court has broadly held that parties may lawfully agree to arbitrate statutory claims,<sup>10</sup> and the Board for many decades has held that NLRA claims may lawfully be subject to arbitration (although the Board, applying a deferential standard, may evaluate whether the resulting award is inconsistent with the Act).<sup>11</sup> Significantly, Respondent's

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the first prong of the *Lutheran Heritage* standard, under which rules and policies are deemed unlawful, even if they do not explicitly restrict protected activity and are not applied against or promulgated in response to such activity, where "employees would reasonably construe the language to prohibit Section 7 activity." 343 NLRB at 647. See, e.g., *Lily Transportation Corp.*, 362 NLRB No. 54, slip op. at 1 fn. 3 (2015); *Conagra Foods, Inc.*, 361 NLRB No. 113, slip op. at 8 fn. 2 (2014); *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 10 fn. 3 (2014), *affd.* sub nom. *Three D, LLC v. NLRB*, Nos. 14-3284, -3814, 2015 WL 6161477 (2d Cir. Oct. 21, 2015). I advocate a reexamination of this aspect of *Lutheran Heritage* in an appropriate future case.

<sup>8</sup> The Program states: "No signature shall be required for the policy to be applicable." *Jt. Exh. 2*, p. 7.

<sup>9</sup> The Program states that "THIS PROGRAM . . . IS THE MANDATORY AND EXCLUSIVE MEANS" by which covered "problems" will be resolved. In a section captioned, "Program Rules," the Program describes "Claims Subject to Arbitration" as encompassing "all those legal claims you may now or in the future have against the Company . . . except as expressly excluded under the 'Claims Not Subject to Arbitration' section below." In the section captioned, "Claims Not Subject to Arbitration," the Program's listed exclusions do not mention claims arising under the NLRA.

<sup>10</sup> In *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009), the Supreme Court held that a collective-bargaining agreement could lawfully provide for the arbitration of statutory claims, and the Court stated that "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative." See also *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132, slip op. at 33 (2014) (Member Miscimarra, dissenting in part). More generally, it is established Federal policy to provide for the final and binding resolution of grievances in arbitration as the agreed-upon method for resolving workplace disputes, see Labor Management Relations Act Sec. 203(c), and the Supreme Court has celebrated arbitration in the context of collective-bargaining agreements, see *Steehworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steehworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steehworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

<sup>11</sup> In *Babcock & Wilcox Construction Co.*, *supra*, a divided Board articulated new standards governing deferral to arbitration awards. As I noted in my *Babcock* partial dissent, *id.*, slip op. at 14-24, I would continue to apply the deferral standards previously articulated by the Board in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984). The Board's decision in *Babcock* leaves no doubt that NLRA claims can be made subject to a mandatory arbitration agreement. Indeed, the Board majority in *Babcock* stated that the

Program affords employees broader protection than what is available under the NLRA and Board procedures. For example, the NLRA contains a 6-month statute of limitations, and it provides for no prehearing discovery apart from the availability of subpoenas.<sup>12</sup> By comparison, the Program provides for the filing and service of claims up to 1 year after they arise (or within the applicable statute of limitations if longer than 1 year); it gives each party the right to take up to seven pre-hearing depositions; and parties exchange witness lists and copies of exhibits at least 30 days in advance of the arbitral hearing. All these procedural provisions are more generous to employee-claimants than what is available in Board litigation. Most importantly, the Program document states that “the Program will not prevent you from filing a charge with any state or federal administrative agency.”<sup>13</sup> In my view, therefore, the Program does not prohibit or interfere with NLRB charge filing.

I believe the judge erroneously concludes that the Program is ambiguous because it “very broadly define[s] the matters subject exclusively to resolution through arbitration,” and “the list of claims not subject to arbitration lists four specific claims [not including NLRA claims] as the only claims or disputes not subject to arbitration.” Again, however, it is not unlawful to make NLRA claims subject to arbitration (which I agree the Program does). Neither does the arbitration of NLRA claims constitute an unlawful restriction on the right to file charges with the Board, and any possible uncertainty about Board charge filing is eliminated by the Program’s explicit statement that the Program “will not prevent [employees] from filing a charge with any state or federal administrative agency.”

*(b) The “Agreement” interferes with charge filing in violation of Section 8(a)(1)*

The Program states that no signature is required for employees to be covered.<sup>14</sup> However, the Respondent also has a separate two-page “Agreement and Receipt for the Dispute Resolution Program” (hereinafter “Agreement”)<sup>15</sup> that various employees, including the Charging

Board would require, as a prerequisite to affording deference to any resulting arbitration award, that the parties “explicitly authorized” the arbitrator “to decide the unfair labor practice issue.” 361 NLRB No. 132, slip op. at 5.

<sup>12</sup> See Sec. 10(b) (providing a 6-month limitations period for the filing of Board charges); Sec. 11 (providing for Board issuance and court enforcement of subpoenas).

<sup>13</sup> Jt. Exh. 2 (emphasis added).

<sup>14</sup> Jt. Exh. 1, p. 7 (“The submission of an application, acceptance of employment or the continuation of employment by an individual shall be deemed to be acceptance of the Dispute Resolution Program. No signature shall be required for the policy to be applicable.”).

<sup>15</sup> Jt. Exh. 3.

Party, have signed. The Agreement is not a model of clarity, and I believe its legality under Section 8(a)(1) presents a close question. However, it is the only document that employees sign, and I believe it colorably restricts the right to file Board charges in violation of Section 8(a)(1).

Consistent with the scope of the Program, the Agreement broadly states: “The Company and I agree that all legal claims or disputes covered by the Agreement must be submitted to binding arbitration and that this binding arbitration will be the sole and exclusive final remedy for resolving any such claim or dispute.” The “Agreement” also contains the following lengthy paragraph:

Legally protected rights covered by this Arbitration Agreement are all legal claims, including claims for wages or other compensation, claims for breach of any contract, covenant or warranty (expressed or implied), tort claims (including, but not limited to, claims for physical, mental or psychological injury, but excluding statutory workers compensation claims), claims for wrongful termination, sexual harassment, discrimination (including, but not limited to, claims based on race, sex, sexual orientation, religion, national origin, age, medical condition or disability, whether under federal, state or local law), claims for benefits or claims for damages or other remedies under any employee benefit program sponsored by the Company (after exhausting administrative remedies under the terms of such plans), “whistleblower” claims under any federal, state or other governmental law, statute, regulation or ordinance, claims for a violation of any other non-criminal federal, state or other governmental law, statute, regulation or ordinance; and claims for retaliation under any law, statute, regulation or ordinance, including retaliation under any workers compensation law or regulation.

[Jt. Exh. 3 (emphasis added).]

Again, the Program document expressly provides that it “will not prevent [employees] from filing a charge with any state or federal administrative agency,” while the Agreement document—which employees sign—requires the arbitration of all claims or disputes covered by “the Agreement.” Regarding the right to file NLRB charges, an important question arises: does “the Agreement” include *both* the Program document and the Agreement document (in which case the Program’s charge-filing exclusion might apply to both)? Or does “the Agreement” *only* mean the Agreement document (which broadly states that all claims covered “by the Agreement” “must be submitted to binding arbitration,” with no exclusion applicable to agency charge filing)? For the reasons explained below, I think the second interpretation is

## APPLEBEE'S RESTAURANT

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the more reasonable one, which is bad news for the right to file Board charges.

The Agreement document contains a section captioned, "Sole and Entire Agreement," which appears to treat the Agreement document as a free-standing agreement separate from the Program:

This Agreement *and* the Dispute Resolution Program Booklet *are the complete agreement* of the parties on the subject of arbitration of disputes. *This Agreement* takes the place of any other verbal or written understanding on this subject. No party is relying on any statements, oral or written, on the subject of arbitration or the effect, enforceability or meaning of *this Agreement*, except as specifically stated in *this Agreement*.<sup>16</sup>

Even if read in the light most favorable to the Respondent, the first sentence in the above passage appears to be contradicted by the next two sentences. The first sentence states that "[t]his Agreement and the . . . Program are the *complete agreement* of the parties." That is, "this Agreement" is differentiated from "the . . . Program," and both together constitute "the complete agreement" between the parties. Yet the second sentence states that "[t]his Agreement takes the place of any other verbal or written understanding on this subject," and the third sentence states that no party relies on anything regarding the meaning of "this Agreement, except as specifically stated in *this Agreement*."

Perhaps the parties have a "complete agreement" (which includes a charge-filing exclusion) that is different from "this Agreement"—i.e., the Agreement document—standing alone. However, the Agreement document is the only document signed by employees, it broadly states all claims and disputes that are covered "by the Agreement" *must* be submitted to binding arbitration, and it contains no charge-filing exclusion. Moreover, sentences 2 and 3 in the above-quoted passage appear to make the Agreement document controlling above all else.<sup>17</sup>

The Board and the courts have recognized, though not consistently, the need to permit generalized language in

<sup>16</sup> Jt. Exh. 3, p. 2 (emphasis added).

<sup>17</sup> The precise contours of the "Agreement" actually become even more difficult to discern based on other language in the Agreement. Contrary to what is stated in the section captioned, "Sole and Entire Agreement" (quoted above in the text), an earlier passage in the Agreement states: "This *Policy* shall constitute the entire agreement between the Employee and Company for the resolution of Covered Claims" (Jt. Exh. 3, p. 1 (emphasis added)). It appears that the term "Policy" may be intended to refer to Respondent's "Dispute Resolution Program." However, it remains uncertain precisely what distinctions are contemplated between and among the terms "Program," "Policy" and "Agreement" (which are sometimes capitalized, other times not) in Respondent's Program and Agreement documents.

employment provisions even though the precise meaning may be unclear.<sup>18</sup> However, in the circumstances presented here, I believe the Agreement document goes too far beyond generalized language, and it can too readily be construed to preclude the filing of Board charges. Accordingly, I find the Agreement document unlawful under Section 8(a)(1) of the Act. See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), *enfd. mem.* 255 Fed. Appx. 527 (D.C. Cir. 2007).

## Conclusion

Accordingly, as set forth above, I respectfully dissent in part from, and concur in part with, the majority's decision.

Dated, Washington, D.C. December 22, 2015

Philip A. Miscimarra Member

NATIONAL LABOR RELATIONS BOARD

## APPENDIX

NOTICE O 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.

<sup>18</sup> As I have stated elsewhere: "It does not per se violate Federal labor law to use a general phrase to describe the type of conduct that may [result in discipline]. If it did, 'just cause' provisions contained in most collective-bargaining agreements that have been entered into since the Act's adoption nearly 80 years ago would be invalid. However, 'just cause' provisions have been called 'an obvious illustration' of the fact that many provisions 'must be expressed in general and flexible terms.' More generally, the Supreme Court has stated, in reference to collective-bargaining agreements, that there are 'a myriad of cases which the draftsmen cannot wholly anticipate,' and '[t]here are too many people, too many problems, too many unforeseeable contingencies to make the words . . . the exclusive source of rights and duties.'" *Triple Play Sports Bar & Grille*, supra, 361 NLRB No. 31, slip op. at 11 (Member Miscimarra, dissenting in part) (citations and footnotes omitted).

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

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

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

THE ROSE GROUP D/B/A APPLEBEE'S  
RESTAURANT

The Board's decision can be found at [www.nlr.gov/case/05-CA-135360](http://www.nlr.gov/case/05-CA-135360) 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.



*Andrew Andela, Esq.*, for the General Counsel.  
*Thomas Lewis and Jonathan A. Scobie, Esqs. (Stevens & Lee)*,  
for the Respondent.

## DECISION

### STATEMENT OF THE CASE

SUSAN A. FLYNN, Administrative Law Judge. This case was tried in Baltimore, Maryland, on February 26, 2015. The Charging Party filed the charge on August 25, 2014, and the General Counsel issued the complaint on November 28, 2014. The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining a Dispute Resolution Program containing a mandatory arbitration provision and prohibiting pursuit of class or collective actions.

No witnesses were presented at the hearing. The General Counsel and the Respondent reached stipulations that would obviate the need for a hearing. However, the Charging Party did not agree to waive a hearing. Therefore, we convened in order to afford the Charging Party the opportunity to state his objections on the record. The Charging Party did not appear, but expressed his objections to the General Counsel prior to the hearing, and the General Counsel reported those objections on the record. As I determined that those objections were either a matter of semantics or raised issues that are not material, I accepted the stipulations and granted the parties' motion to issue a decision on a stipulated record.

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

### FINDINGS OF FACT

#### I. JURISDICTION

The Respondent, The Rose Group, consists of several entities including one called Delaware Valley Rose LP, which has a principal place of business in Newtown, Pennsylvania. It operates public restaurants (Applebee's Neighborhood Bar and Grill) selling food and beverages in Pennsylvania, New Jersey, Maryland, and Delaware, including one in Rehoboth Beach, Delaware. In the 12-month period preceding the hearing, the Respondent derived gross revenues in excess of \$500,000, and purchased and received at its Rehoboth Beach facility goods valued in excess of \$5000 directly from points located outside the State of Delaware. Therefore I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

##### A. Stipulated Facts

##### Overview

The essential facts are recited in the Stipulation reached between the General Counsel and the Respondent, and are outlined herein. (Jt. Exh. 1.) Since about April 2013, the Respondent has maintained rules and regulations regarding the resolution of workplace disputes, entitled the Dispute Resolution Program. A copy of the booklet containing the terms of that program is issued to all new employees of restaurants operated by Delaware Valley Rose, including the Rehoboth Beach facility. (Jt. Exh. 2.) Since about April 2013, the Respondent has required all of its employees employed by Delaware Valley Rose, including those at the Rehoboth Beach facility, to sign an agreement and receipt for the Dispute Resolution Program as a

## APPLEBEE'S RESTAURANT

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condition of employment. (Jt. Exh. 3.)

Dispute Resolution Program

Under the Dispute Resolution Program, all covered workplace disputes must be resolved through arbitration. "THIS PROGRAM IS A CONDITION OF YOUR EMPLOYMENT AND IS THE MANDATORY AND EXCLUSIVE MEANS BY WHICH THOSE PROBLEMS MAY BE RESOLVED, SO READ THE INFORMATION IN THIS BOOKLET CAREFULLY." (Emphasis in original.) (Jt. Exh. 2, p. 1.) "This Program shall constitute the mandatory and exclusive means by which all covered workplace claims may be resolved. The submission of an application, acceptance of employment, or the continuation of employment by an individual shall be deemed to be acceptance of the Dispute Resolution Program. No signature shall be required for the policy to be applicable. This agreement applies and extends to all future employment with the company and shall survive any termination and/or resignation." (Jt. Exh. 2, p. 7.)

The section captioned, "Claims Subject to Arbitration" provides that:

Claims and disputes subject to arbitration include all those legal claims you may now or in the future have against the Company . . . or against its officers, directors, shareholders, employees or agents, including claims related to any Company employee benefit program . . . and all claims that the Company may now or in the future have against you, whether or not arising out of your employment or termination, except as expressly excluded under the 'Claims Not Subject to Arbitration' section below.

The legal claims subject to arbitration include, but are not to be limited to:

- claims for wages or other compensation;
- claims for breach of any contract, covenant or warranty (express or implied);
- tort claims (. . . but excluding statutory workers compensation claims);
- claims for wrongful termination;
- sexual harassment;
- discrimination (including but not limited to, claims based on race, sex, sexual orientation, religion, national origin, age, medical condition or disability whether under federal, state or local law);
- claims for benefits or claims for damages or other remedies under any employee benefit program sponsored by the Company (after exhausting administrative remedies under the terms of such plans);
- "whistleblower" claims under any federal, state or other governmental law, statute, regulation or ordinance;
- claims for a violation of any other non-criminal federal, state or other governmental law, statute, regulation or ordinance; and
- claims for retaliation under any law, statute, regulation or ordinance, including retaliation under any workers compensation law or regulation.

[Jt. Exh. 2, p. 4.]

The section captioned, "Claims Not Subject to Arbitration" provides that:

The only claims or disputes not subject to arbitration are as follows:

- any claim by an employee for benefits under a plan or program which provides its own binding arbitration procedure;
- any statutory workers compensation claim;
- unemployment insurance claims; and
- any lawful claim(s) brought under the Dodd Frank Act's whistleblower protection, pursuant to 15 U.S.C. Section 1514A, et seq., is exempted from this DRP plan.

[Ibid.]

Further, "[A]ny non-legal dispute is not subject to arbitration. Examples include disputes over a performance evaluation, issues with coworkers, or complaints about your worksite or work assignment which do not allege a legal violation." (Ibid.)

The program also expressly prohibits pursuit of class or collective claims. "The employee and company each agree, that there shall be no class or collective action arising from any employee's claim(s), and each employee may only maintain a claim under this plan on an individual basis and may not participate in a class or collective action." (Ibid.)

The booklet sets forth the procedures to be followed, beginning with internal steps. If the matter is not resolved internally, then either party may request mediation with a professional contract mediator. If that is unsuccessful, then binding arbitration by an American Arbitration Association arbitrator is the final step. (Jt. Exh. 2, p. 1-4.) Under the final section, "Not an Employment Contract/Exclusive Remedy," it states, "[t]his program will prevent you from filing a lawsuit in Court for individual relief for a legal claim subject to arbitration." (Jt. Exh. 2, p. 7.)

The program expressly permits aggrieved employees to file with Government entities. In that same final section of the booklet, it states, "(h)owever, the Program will not prevent you from filing a charge with any state or federal administrative agency." (Jt. Exh. 2, p. 7.)

Charging Party's Involvement

The Charging Party was hired by the Respondent as a server at its Rehoboth Beach facility on April 6, 2013. On that date, he electronically signed a copy of the dispute resolution agreement. (Jt. Exh. 3.) The Charging Party was, therefore, subject to the terms and conditions of that agreement from that date forward.

The Respondent has a policy, known as the 85-15 policy, which requires servers to certify when clocking out at the end of their shift whether they spent at least 85 percent of their work hours on guest-facing tasks related to serving customers. The policy serves the dual functions of being a customer service initiative as well as monitoring compliance with the Fair Labor Standards Act (FLSA). The Charging Party complained to the Respondent that, on June 15, 2014, he had been disciplined for failing to certify having spent 85 percent of his worktime on guest-facing tasks related to serving customers. He also complained to the Respondent in June 2014 that requiring him to call in on his day off, in accordance with company policy, was not in conformance with the FLSA.

The Charging Party filed a charge with the National Labor Relations Board on August 25, 2014, alleging that the Re-

spondent discriminated against him due to his protected concerted activities when it terminated his employment and gave him bad employment references, and that the Respondent maintains an unlawful mandatory arbitration policy. On October 31, 2014, the Regional Director for Region 4 dismissed the first and second allegations. (Jt. Exh. 4.)

There is no evidence that the Charging Party has ever engaged in protected concerted activity. Although the Charging Party no longer works for the Respondent, the Respondent did not formally terminate him. The Charging Party has never filed a legal claim, as defined in the Dispute Resolution Program and Agreement, against the Respondent in court or in arbitration. The Charging Party never requested arbitration. The Respondent has never enforced or attempted to enforce the arbitration or class action terms of the Dispute Resolution Program and Agreement against the Charging Party.

#### *B. The Parties' Positions*

Relying primarily on the Board's decisions in *D. R. Horton, Inc.*, 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), the General Counsel contends that the Respondent violated Section 8(a)(1) of the Act by maintaining the Dispute Resolution Program and Agreement, that mandates binding arbitration and precludes employees from filing class or collective actions. The General Counsel further asserts that employees would reasonably construe language in the agreement to preclude them from filing charges with the National Labor Relations Board, thus chilling the exercise of their Section 7 rights, also in violation of Section 8(a)(1).

The Respondent contends that the Board has no jurisdiction over the instant complaint since the Charging Party never exercised his Section 7 rights; he did not engage in any protected concerted activity; he raised no allegations regarding any other employee but only raised individual allegations in his charge to the Board (that were dismissed); his complaints to the Respondent involved the FLSA, not the NLRA; and the Respondent has never attempted to enforce the terms of the Dispute Resolution Program and Agreement against the Charging Party.

The Respondent asserts that the program and agreement is lawful under Federal circuit court law, including the Supreme Court's interpretation of the Federal Arbitration Act (FAA). It contends that there is no substantive right to bring a class action under the FLSA, which is the statute actually invoked by Charging Party. Further, it asserts that the NLRA does not fall within the statutory exceptions to the FAA (the FAA savings clause or a Congressional command to override the FAA). The Respondent argues that *D.R. Horton* and *Murphy Oil* were incorrectly decided and that therefore I should not follow the Board's decisions but, rather, Federal court decisions. The Respondent further contends that, even under the Board's decisions, the program and agreement is lawful since it explicitly allows employees to file charges with administrative agencies.

Finally, the Respondent maintains that the complaint is barred by Section 10(b) of the Act because the charge was filed more than 18 months after the Charging Party signed the arbitration agreement, and there has been no reaffirmation or enforcement of the agreement within that time period.

### III. LEGAL STANDARDS AND ANALYSIS

#### *A. Does the Board Have Jurisdiction Over This Complaint?*

The Respondent argues that the Board has no jurisdiction over this complaint since the Charging Party has never engaged in any protected concerted activity. He raised no allegations regarding any other employees, but only raised two individual allegations in his charge (that were dismissed); his complaints to the Respondent involved alleged violations of the FLSA, not the NLRA; and the Respondent has never attempted to enforce the terms of the Dispute Resolution Program against the Charging Party.

These arguments are without merit. The fact that there is no underlying unfair labor practice, and the only allegation pertains to maintenance (not enforcement) of a policy, is of no relevance. Maintenance of a rule that violates employees' Section 7 rights is in itself a violation of Section 8(a)(1). *Register-Guard*, 351 NLRB 1110, 1110 fn. 2 (2007), enf. in part 571 F.3d 53 (D.C. Cir. 2009), citing *Eagle-Picher Industries*, 331 NLRB 169, 174 fn. 7 (2000); see also *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998).

I find that the Board has jurisdiction over the complaint allegation, that is, whether the Dispute Resolution Program and Agreement violates Section 8(a)(1) of the Act.

#### *B. Is the Complaint Barred by the Statute of Limitations?*

Section 10(b) of the Act states in relevant part that "no complaint shall issue based upon on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." The Respondent contends that Section 10(b) bars the instant action since the charge was filed on August 25, 2014, more than 6 months after the Charging Party signed the agreement on April 6, 2013.

It is undisputed that the Charging Party filed the charge more than 6 months after executing the agreement. He never reaffirmed the agreement, and the Respondent has never sought to enforce the agreement against the Charging Party. It is also undisputed that the Dispute Resolution Program is still maintained by the Respondent.

It is well established that Section 10(b) does not bar allegations of unlawful practices that began more than 6 months before a charge was filed but have continued within the 6-month period. Specifically, it does not bar 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. *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27 (2015). "The Board has held repeatedly that the maintenance of an unlawful rule is a continuing violation, regardless of when the rule was first promulgated." (Id. at 2.)

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

#### *C. Does the Respondent's Dispute Resolution Program and Agreement Unlawfully Prohibit Employees From Engaging in Protected Concerted Activity?*

Section 7 of the Act confers on employees a substantive right to engage in concerted activity. See *Murphy Oil*, supra. Section 8(a)(1) makes it unlawful for an employer "to interfere with,

restrain, or coerce employees in the exercise of rights guaranteed" in Section 7.

The Respondent's Dispute Resolution Program and Agreement requires employees, as a condition of employment, to sign an agreement waiving their right to pursue claims on a collective or classwide basis in any forum. Only individual claims are permitted in the program. Binding arbitration is the final step in the program, and the program prohibits employees from then filing in court.

In *D. R. Horton*, the Board held that an employer violates Section 8(a)(1) when it requires employees who are covered by the Act, as a condition of employment, to sign an agreement that precludes 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. *D. R. Horton* at 12. The Board determined that this was an unlawful restriction of employees' Section 7 right to engage in concerted activity, notwithstanding the Federal Arbitration Act. The Board recently made a similar finding in *Cellular Sales of Missouri*, 362 NLRB No. 27, slip op. at 1 (2015).

The Respondent asserts that this case must be decided under the FAA. It relies upon a Federal court decision finding that "collective action waivers of the FLSA are not subjectively unconscionable here." *Porreca v. Rose Group*, No. Civ. A. 13-1674, 2013 WL 6498392 at 16 (E.D. Pa., Dec. 11, 2013), relying on *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740 (2011), and *Quilloin v. Tenet HealthSystem Philadelphia, Inc.*, 673 F.3d 221 (3d Cir. 2012). However, this case does not involve the FLSA, but the NLRA.

Most of the Respondent's myriad legal arguments merely rehash those addressed by the Board in *Murphy Oil*, and there is no need for me to repeat the Board's reasoning herein, as that decision powerfully speaks for itself. The Respondent's challenges to the validity of *D.R. Horton* and *Murphy Oil* are made in vain. I am aware of the various Federal circuit court decisions that have declined to adopt the Board's reasoning, holding instead that arbitration agreements requiring the waiver of class or collective actions do not violate Section 8(a)(1). However, the Board has not acquiesced to those contrary Federal court decisions. See *D. L. Baker, Inc.*, 351 NLRB 515, 529 fn. 42 (2007); *Pathmark Stores, Inc.*, 342 NLRB 378 fn. 1 (2004). The administrative law judge is required to apply established Board precedent that has not been reversed by the Supreme Court. See *Pathmark Stores*, supra; *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984); *Iowa Beef Packers*, 144 NLRB 615, 616 (1963), enf. granted in part 331 F.2d 176 (8th Cir. 1964). The Supreme Court has not ruled directly on the issue before me. Therefore, *D. R. Horton* and *Murphy Oil* are controlling, and the Respondent's arguments are more appropriately directed to the Board.

The Respondent further argues that, even if *D. R. Horton* and *Murphy Oil* are controlling, the instant situation is distinguishable. I disagree. The facts in the cases are not identical, but the legal theory is applicable.

The Respondent's Dispute Resolution Program and Agreement precludes employees from pursuing any class or collective claim in any forum. Therefore, I find that the Respondent's maintenance of the Dispute Resolution Program and Agreement

violates Section 8(a)(1), as alleged in the complaint.

*C. Would Employees Reasonably Construe the Dispute Resolution Program and Agreement to Prohibit Section 7 Activity?*

Employees' Section 7 right to engage in concerted activity includes the right to file charges with the Board. *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enf. 255 Fed. Appx. 527 (D.C. Cir 2007).

It is well settled that an employer's maintenance of a work rule which reasonably tends to chill employees' exercise of their Section 7 rights violates Section 8(a)(1) of the Act. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enf. mem. 203 F.3d 52 (D.C. Cir. 1999). A work rule which does not explicitly restrict Section 7 activity will nonetheless be found unlawful where the evidence establishes one of the following (i) employees would "reasonably construe" the rule's language to prohibit Section 7 activity; (ii) the rule was "promulgated in response" to union or protected concerted activity; or (iii) "the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).

Further, ambiguities in work rules are construed against the party which promulgated them. See *Supply Technologies, LLC*, 359 NLRB No. 38 (2012); *Lafayette Park*, supra at 828.

Although this case does not involve a work rule, per se, but a program and agreement signed by employees, the fact that the rule is in the form of an agreement is of no consequence since it is not voluntary but imposed as a condition of employment. It is therefore analyzed as any other unilaterally implemented workplace rule.

The program and agreement at issue does not explicitly prohibit filing a charge with the Board. It does, however, very broadly define the matters subject exclusively to resolution through arbitration. The booklet states that claims and disputes subject to arbitration include all legal claims against the Company, and lists a number of types of claims as examples. Significantly, the list of claims not subject to arbitration lists four specific claims as the only claims or disputes not subject to arbitration.

Similar policies have been found by the Board to be unlawful. *2 Sisters Food Group, Inc.*, 357 NLRB No. 168 at 1-2 (2011) (policy requiring that employees submit "all [employment] disputes and claims" to arbitration could be reasonably interpreted to preclude the filing of charges with the Board); *U-Haul Co. of California*, 347 NLRB 375 (2006) (agreement requiring arbitration of "all disputes relating to or arising out of an employee's employment . . . or the termination of that employment," including "any other legal or equitable claims and causes of action recognized by local, state, or federal law or regulations" is unlawful); *Cellular Sales of Missouri*, 362 NLRB No. 27, slip op. at 1 fn. 4 (2015) (work rule reasonably construed to interfere with ability to file charges with Board even if the rule did not expressly prohibit access to Board).

The General Counsel contends that the Respondent's Dispute Resolution Program and Agreement violate Section 8(a)(1) of the Act in that it may reasonably be interpreted to prohibit the filing of unfair labor practices charges and would, therefore, tend to chill the employees' exercise of their rights under Section 7. The Respondent counters that the program expressly

states, “[h]owever, the Program will not prevent you from filing a charge with any state or federal administrative agency.” It argues further that the unrepresented Charging Party nonetheless filed the instant charge, demonstrating that he understood the language and was not inhibited from filing with the Board. The General Counsel acknowledges that provision, but notes that it is on the last page of the booklet, under the heading “Not an Employment Contract/Exclusive Remedy,” and the disclaimer is immediately followed by a sentence reiterating that the program is the mandatory and exclusive means to resolve all covered workplace claims. I agree with the General Counsel. The language in the booklet repeatedly states that the program is the exclusive means of resolving workplace problems, and it defines the types of matters subject to the program very broadly, as “all legal claims.” The fact that one sentence is included, in an obscure section at the end of the booklet, that seems to state something different, does not change the outcome. That sentence would confuse employees, and that ambiguity is held against the Respondent.

Therefore, I find that employees would reasonably interpret the Respondent’s Dispute Resolution Program as prohibiting them from filing unfair labor practice charges with the Board, that constitutes a separate violation of Section 8(a)(1) of the Act.

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. By maintaining the Dispute Resolution Program and Agreement that requires as a condition of employment that employees waive their right to engage in class or collective action, the Respondent has engaged in an unfair labor practice in violation of Section 8(a)(1) of the Act.
3. By maintaining the Dispute Resolution Program and Agreement that employees would reasonably construe to discourage engaging in protected concerted activity, the Respondent has violated Section 8(a)(1) of the Act.
4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>1</sup>

#### ORDER

The Respondent, The Rose Group, Delaware Valley Rose LP, d/b/a/ Applebee’s Restaurant, located in Rehoboth Beach, Delaware, its officers, agents, successors, and assigns, shall

1. Cease and desist from

<sup>1</sup> 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.

(a) Maintaining a mandatory and binding arbitration program and agreement that requires employees, as a condition of employment, to waive the right to participate in any class or collective actions, in all forums, whether judicial or arbitral.

(b) Maintaining a mandatory and binding arbitration program and agreement that employees would reasonably believe bars or restricts employees’ right to file charges with the Board or to access the Board’s processes.

(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) Rescind the mandatory and binding arbitration program and agreement, or revise it, to make clear to employees that the program and agreement does not constitute a waiver of their right under the NLRA to participate in joint, class, or collective actions in all forums.

(b) Rescind the mandatory and binding arbitration program and agreement, or revise it, to make clear to employees that the program and agreement does not restrict employees’ right to file charges with the Board or to access the Board’s processes.

(c) Notify all current and former employees who were required to sign the Dispute Resolution Program and Agreement that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(d) Within 14 days after service by the Region, post at its Rehoboth Beach facility in Rehoboth Beach, Delaware, copies of the attached notice marked “Appendix.”<sup>2</sup> Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. The Respondent shall also mail copies of the attached notice marked Appendix, at its own expense, to all employees who were, but are no longer, employed by the Respondent at its Rehoboth Beach facility at any time from the onset of the unfair labor practices found in this case until the completion of these employees’ work at that jobsite, as well as to applicants for employment during that same time period. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent’s authorized representative. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall

<sup>2</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

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duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 6, 2013.

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

Dated, Washington, D.C. April 22, 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.

WE WILL NOT maintain a mandatory and binding arbitration program and agreement that requires employees, as a condition of employment, to waive the right to participate in any class or collective actions, in all forums, whether judicial or arbitral.

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

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

WE WILL rescind or revise the Dispute Resolution Program and Agreement to make clear to employees that the program and agreement does not constitute a waiver of their right under the NLRA to participate in joint, class, or collective actions in all forums.

WE WILL rescind or revise the Dispute Resolution Program and Agreement to make clear to employees that the program and agreement does not restrict employees' right to file charges with the Board or to access the Board's processes.

WE WILL notify all applicants and current and former employees who were required to sign the Dispute Resolution Program and Agreement that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

THE ROSE GROUP, DELAWARE VALLEY ROSE, D/B/A  
APPLEBEE'S RESTAURANTS

IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

THE ROSE GROUP d/b/a APPLEBEE'S RESTAURANT,	)	)	Docket No.	15-4092
	)	)		
Petitioner,	)	)	On Petition for Review of	
	)	)	NLRB Case No. 05-CA-135360	
v.	)	)		
	)	)		
NATIONAL LABOR RELATIONS BOARD,	)	)		
	)	)		
Respondent.	)	)		

CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2015, a true and correct date-stamped copy of the foregoing Petition for Review, with attachments, was served via electronic mail and Federal Express overnight delivery on the following:

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