Haynes Building Services, LLC[1] ***and*** **J. Tadeo Gomez-Flores.** Case 31–CA–093920

February 23, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On February 7, 2014, Administrative Law Judge Keltner W. Locke issued the attached decision. The General Counsel and Charging Party[2] filed exceptions and supporting briefs and the Respondent filed a reply brief. The Respondent filed exceptions[3] and a supporting brief and the General Counsel filed an answering 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 only to the extent consistent with this Decision and Order.

The judge found, applying the Board's decision in *D. R. Horton*,[4] that the Respondent violated Section 8(a)(1) of the Act by maintaining and requiring applicants for employment to sign a Notice to Applicant containing provisions that they would reasonably conclude precluded them from filing unfair labor practice charges with the Board. The judge, however, dismissed allegations that the Respondent violated Section 8(a)(1) by maintaining and requiring applicants to execute an Employment Agreement containing a provision entitled, "Agreement for Arbitrating Disputes" (hereinafter "Employment Agreement" or "Arbitration Agreement"), and by enforcing the Notice to Applicant and Arbitration Agreement against the Charging Party when it demanded that he submit to individual arbitration a class action wage and hour lawsuit he had filed in State court and threatened legal action if he did not do so.

In *Murphy Oil USA, Inc*.,[5] which issued after the judge's decision, the Board reaffirmed the relevant holdings of *D. R. Horton*, supra. Applying *Murphy Oil* and *D. R. Horton*, and for the reasons stated by the judge and below, we agree with the judge that the Respondent violated Section 8(a)(1) by maintaining and requiring applicants to sign the Notice to Applicant. However, we reverse the judge and find that the Respondent also violated Section 8(a)(1) by maintaining and threatening to enforce the Notice to Applicant and Arbitration Agreement in a manner that required employees to waive their right to collective action in all forums.[6]

Facts

The stipulated facts show that the Respondent requires all applicants to sign a Notice to Applicant before they begin working for the Respondent. This document, translated from its original Spanish, reads as follows:

> I agree to submit to an obligatory arbitration for all disputes and complaints that arise from the submission of this application. Furthermore, if I am hired by this Company, I am in agreement that all disputes or complaints that cannot be resolved within the Company and informally shall be submitted to obligatory arbitration conducted under the Association of Arbitration's rules.

After receiving an offer of employment but prior to commencing work for the Respondent, employees are presented with, and asked to sign, a two-page Employment Agreement that includes the following Arbitration Agreement:

> *Agreement for arbitrating disputes*. All disputes, controversies, or claims that arises [sic] from, involves, affects or is in some way related to the current agreement or is in breach [sic] that same agreement, or if it arises from, involves, affects, or is in some way related with

[1] We amend the caption to correct the name of the Respondent.

[2] The Respondent argues that we should reject the Charging Party's exceptions because the Charging Party filed only a brief and not a separate document enumerating specific exceptions to the administrative law judge's decision. The Board has the discretion to accept an otherwise compliant brief in the absence of proper exceptions. *Metta Electric*, 338 NLRB 1059 (2003), enfd. in relevant part *JHP & Associates v. NLRB*, 360 F.3d 904 (8th Cir. 2004). Because the Charging Party's brief proffers arguments pertaining to specific portions of the judge's decision, particularly the judge's case discussion, we accept the Charging Party's brief in the absence of enumerated exceptions.

[3] The Respondent's exceptions that the Board, Acting General Counsel, and Regional Director for Region 31 acted without authority in this case because the Board lacked a valid quorum when the complaint issued are without merit. *Neiman Marcus Group*, 362 NLRB No. 157, slip op. at 1 (2015). See also *Benjamin H. Realty Corp.*, 361 NLRB No. 103 (2014); *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 1 fn. 1 (2014); *Barstow Community Hospital*, 31–CA–129445 (2015) (Regional Director for Region 31), citing *Pallet Cos.*, 361 NLRB No. 33, slip op. at 1–2 (2014).

[4] 357 NLRB 2277 (2012), enf. denied in part 737 F.3d 344 (5th Cir. 2013).

[5] 361 NLRB No. 72 (2014), enf. denied in part 808 F.3d 1013 (5th Cir. 2015),

[6] We reject the judge's "Further Analysis" portion of his decision, which calls into question the continued viability of our decision in *D. R. Horton, Inc.*, supra. In *Murphy Oil*, the Board affirmed the holding of *D. R. Horton* that the National Labor Relations Act protects the substantive right of employees to take collective action, including the pursuit of collective legal action, and that this right is not extinguished by the Federal Arbitration Act.

> your employment or with the conditions of your employment, or with the termination of your employment, obligatory and definitive, in conformity with federal arbitration law, in agreement with the rules of the American Arbitration Association, of the state of California. The arbitrator shall have the right to award attorney fees and reasonable cost to the prevailing party. The award shall be in writing, signed by the arbitrator. And it shall carry the reasons for the award. The arbitrator's decision to award can be presented before any court with jurisdiction for enforcement. In conformity to the pertinent law, this agreement for arbitrating disputes will not prevent you from filing a charge or complaint with an administrative government agency.

The Employment Agreement cautions applicants to address any concerns that they may have before signing the document and to sign only after having read the document.

On October 11, 2012, the Charging Party, J. Tadeo Gomez-Flores, a former employee, filed a wage and hour lawsuit against the Respondent "on behalf of himself and all others similarly situated" in a California State court. In response, on November 19, 2012, the Respondent's attorney wrote Gomez-Flores' counsel, stating in relevant part:[7]

> Because this lawsuit was only recently filed, you may not be aware that Mr. Gamez-Flores signed the enclosed "Notice to Applicant" and "Employment Agreement" on January 27, 2009 and January 29, 2009, respectively (Bates Nos. DEFS-0000 I - DEFS-00002; collectively, the "Agreement"). As stated in the Agreement, Mr. Gamez-Flores has agreed to submit *all disputes and claims* arising out of his employment to final and binding arbitration under the rules of the American Arbitration Association.
>
> . . . .
>
> On behalf of the Company, we hereby demand that Mr. Gamez-Flores submit his individual claims alleged in the lawsuit to final and binding arbitration in accordance with the terms of the Agreement. Please let us know at your earliest convenience if Mr. Gamez-Flores intends to abide by the Agreement. If Mr. Gamez-Flores will not agree to dismiss the lawsuit and pursue his individual claims in arbitration, the Company will promptly move to compel arbitration.

[Emphasis in original.]

Discussion

1. The parties stipulated and the judge found that at all relevant times the Respondent required applicants, as a condition of employment, to execute the Notice to Applicant. The Notice specified that all unresolved employment-related disputes must be submitted to arbitration, and contains no exceptions or limiting language. As found by the judge, applicants (and, later, employees) reasonably would understand that, by signing the Notice to Applicant, they were precluded from filing unfair labor practice charges with the Board. Accordingly, we agree with the judge that the Respondent violated Section 8(a)(1) by maintaining the Notice to Applicant and requiring that all applicants sign it. See, e.g., *Chesapeake Energy Corp.,* 362 NLRB No. 80, slip op. at 2 (2015); *Murphy Oil*, above, slip op. at 19, fn. 98; *D. R. Horton*, above, 357 NLRB at 2278 fn. 2; *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. mem. 255 NLRB Fed.Appx. 527 (D.C. Cir. 2007).[8]

2. The parties further stipulated that, at all material times, the Respondent maintained the Employment Agreement that included the Arbitration Agreement.[9] The judge found, and the Respondent does not dispute, that, "at all material times, Respondent asked employees to sign the Employment Agreement" at the time of their

[7] The judge noted that the Respondent frequently spelled the Charging Party's name as "Gamez-Flores" but that the stipulation in this case listed his name as Gomez-Flores.

[8] In *U-Haul*, the Board found unlawful an Arbitration Policy requiring binding arbitration for "all disputes relating to or arising out of . . . employment . . . . or the termination of that employment," including federal statutes such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, "or any other legal or equitable claims and causes of action recognized by local, state, or federal law or regulations," because such a policy would reasonably be interpreted by employees as prohibiting the filing of charges with the Board. The Respondent argues that *U-Haul* and related cases were wrongly decided because they conflict with the Federal Arbitration Act, which encourages parties to fashion arbitration agreements as they see fit. As we explained in *Murphy Oil*, slip op. at 6, we see no such conflict.

As found by the judge, language in the Arbitration Agreement stating that "in conformity to the pertinent law, this agreement for arbitrating disputes will not prevent you from filing a charge or complaint with an administrative agency," fails as a defense to this *U-Haul* violation. That language is not included in the Notice to Applicant and the Arbitration Agreement does not reference the Notice to Applicant. Further, considered together, the language in the Notice to Applicant and Arbitration Agreement are inconsistent. Such inconsistency creates an ambiguity that is construed against the Respondent. See *PJ Cheese*, 362 NLRB No. 177, slip op at 2 fn. 6 (2015).

[9] As in *Countrywide Financial Corp.*, 362 NLRB No. 165, slip op. 3–4 (2015), the Notice to Applicant and Arbitration Agreement are silent on whether employees are prohibited from arbitrating their employment claims on a class or collective basis. Accordingly, the Notice to Applicant and Arbitration Agreement are not facially unlawful with respect to the right to pursue collective claims as in *D. R. Horton* and *Murphy Oil*, and the complaint does not so allege. See also *Leslie's Poolmart*, 362 NLRB No. 184, slip op. at 1 fn. 3 (2015).

hire. Although the judge further found that the Respondent thereby created the reasonable impression among employees that they were required to comply with the Agreement's requirements for arbitrating disputes as a condition of employment, he found that the record failed to establish that employees were actually required to sign the Agreement as a condition of employment. In support, the judge found that the Respondent's admission in its answer that "some" applicants executed the document permitted the inference that "some" applicants did not sign the Agreement or signed after striking out the Arbitration provision. Based on these conjectures and hypothetical possibilities, the judge concluded that the evidence supporting the General Counsel's allegation that the Respondent required its applicants to sign the Employment Agreement and Arbitration Agreement was insufficient to outweigh the Respondent's denial in its answer.

We disagree. We find that an applicant would reasonably understand that signing the Employment Agreement *was* a condition of hire. As the judge himself acknowledged, the Respondent "created the reasonable impression that agreeing to the agreement for arbitrating disputes was a condition of obtaining employment." By the time of their hire, the Respondent had already required the applicants to sign the Notice to Applicant, which included a sweeping arbitration provision applicable to disputes arising out of the application process *and* subsequent employment.[10] Nothing in the Employment Agreement which the Respondent presented to employees and asked them to sign states that it nullified the Notice to Applicant requirements. Nor does anything in the Employment Agreement indicate that signing the Agreement was optional. To the contrary, the Employment Agreement specifically instructs applicants to address any concerns *before signing it*, strongly indicating that such signatures were required.[11] In sum, we find that the stipulated record supports the complaint allegation that employees were required to sign the tendered Employment Agreement, including the Arbitration Agreement, as a condition of employment.[12]

Further, the Respondent interpreted and applied the Employment Agreement to require that all employment disputes be arbitrated on an individual basis. In response to the Charging Party's filing of a class action wage and hour lawsuit in State court on behalf of himself and other employees, the Respondent demanded that the Charging Party, having signed the Notice to Applicant and Arbitration Agreement (which the Respondent collectively termed the Agreement), must submit his claim to individual arbitration. Specifically, the Respondent wrote the Charging Party's counsel on November 12, 2012, stating that

> "[i]n *Stolt-Neilsen S.A. v. AnimalFeeds Int'l Corp*. (2010) 130 S.Ct. 1758, the U.S. Supreme Court held that where, as here, the arbitration agreement is silent on class arbitration, class arbitration is not permitted.
>
> . . .
>
> Several recent decisions by the California Court of Appeal have concluded that *Stolt-Nielson* …require[s] individual arbitration of wage and hour claims under arbitration agreements that are indistinguishable from the Agreement signed by [the Charging Party].
>
> . . .
>
> On behalf of the Company, we hereby demand that [the Charging Party] submit his individual claims alleged in the lawsuit to final and binding arbitration . . ."

The Respondent's letter further stated that if the Charging Party did not agree to dismiss the lawsuit in favor of individual arbitration, the Respondent would move to compel arbitration. By its written demand on the Charging Party, the Respondent made clear its interpretation and application of the Notice to Applicant and Arbitration Agreement: arbitration was the exclusive forum for resolving employment claims, and arbitration could only be conducted on an individual basis.

The Board has held that a workplace rule that does not explicitly restrict activities protected by Section 7 of the Act will be found unlawful under the third prong of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), where the "rule has been applied to restrict the exercise of Section 7 rights." Id. at 647. See, e.g., *Hitachi Capital America Corp*., 361 NLRB No. 19, slip op. at 3 (2014); *Albertson's Inc*., 351 NLRB 254, 259 (2007). In *Countrywide Financial Corp*., supra, 362 NLRB No. 165, slip op. at 3, the Board found that an arbitration agreement that did not specify that mandatory arbitration could proceed only on an individual basis was unlawful as applied where the employer filed a motion to compel individual arbitration of a collective suit. By this action, the employer "act[ed] to compel employees to follow a route that foreclosed them from collectively pursuing

[10] It is undisputed that all applicants were required to sign the Notice.

[11] There is no evidence in the stipulated record that any employee refused to sign the Employment Agreement.

[12] The Board has further held that an arbitration agreement that precludes collective action in all forums is unlawful whether mandatory or not. See *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. at 1, 5–8 (2015).

their employment claims in all forums, arbitral and judicial." Id., slip op. at 4. This is precisely what the Board enjoined in *D. R. Horton*. 357 NLRB 2277, 2289. Accord: *Employers Resource*, 363 NLRB No. 59, slip op. at 1 fn. 2 (2015).

Here, too, the Respondent coerced the Charging Party in the exercise of his Section 7 rights when it threatened to compel individual arbitration if the Charging Party did not withdraw his class action lawsuit and submit his individual claim to arbitration. Contrary to the judge, the fact that the Respondent had not yet filed a motion in court to dismiss the Charging Party's lawsuit does not preclude this finding. The Respondent's threatened court action was sufficient to coerce the Charging Party and his fellow employees in the exercise of their statutory rights.[13]

Further, were we to accept the Respondent's argument to the contrary, the success of the coercion would paradoxically establish its lawfulness, because the Charging Party's withdrawal of the class action lawsuit would eliminate the need for the Respondent to follow through on its threat with additional legal action. Such faulty logic severely undermines the Act's protection of employees' collective efforts to improve their terms and conditions of employment.[14]

Accordingly, and contrary to the judge, we find that by threatening to compel arbitration on an individual rather than class or collective basis, the Respondent has applied the Notice to Applicant and Arbitration Agreement to restrict Section 7 rights, in violation of Section 8(a)(1) under *Lutheran Heritage Village-Livonia*, supra. *Leslie's Poolmart*, supra, 362 NLRB No. 184, slip op. at 1 fn. 3; *Countrywide Financial Corp*., supra.[15]

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for the judge's Conclusion of Law 2.

"(2) By maintaining a mandatory Notice to Applicant that employees would reasonably conclude precludes them from filing unfair labor practice charges with the Board, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act, and has violated Section 8(a)(1) of the Act."

2. Substitute the following for the judge's Conclusion of Law 3.

"(3) By maintaining or threatening to enforce/apply its mandatory Notice to Applicant and Arbitration Agreement in a manner that requires employees, as a condition of employment, to waive the right to pursue class or collective actions in any forum, whether arbitral or judicial, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act, and has violated Section 8(a)(1) of the Act."

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order the Respondent to cease and desist and take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to rescind or revise the Notice to Applicant and Arbitration Agreement.[16]

ORDER

The Respondent, Haynes Building Services, LLC, Monrovia, California, its officers, agents, successors, and assigns, shall

[13] See, e.g., *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 1 fn. 3 (2014), affd. 2015 WL 6161477, ___Fed.Appx. ___ (2d Cir. 2015).

[14] We reject our dissenting colleague's view that the Respondent's stated intent to move to compel arbitration was protected by the First Amendment's Petition Clause. In *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), the Court identified two situations in which a lawsuit enjoys no such protection: where the action is beyond a State court's jurisdiction because of Federal preemption, and where "a suit . . . has an objective that is illegal under federal law." 461 U.S. at 737 fn. 5. Thus, the Board may properly restrain litigation efforts such as the Respondent's motion to compel arbitration that have the illegal objective of limiting employees' Sec. 7 rights and enforcing an unlawful contractual provision, even if the litigation was otherwise meritorious or reasonable. See *Murphy Oil*, supra, slip op. at 20–21; *Convergys Corp.*, 363 NLRB No. 51, slip op. at 2 fn. 5 (2015).

[15] Our dissenting colleague, relying on his dissenting position in *Murphy Oil*, supra, slip. op. at 22–35 (2015), would find that the Respondent's arbitration policy does not violate Sec. 8(a)(1). He observes that the Act does not "dictate" any particular procedures for the litigation of non-NLRA claims, and "creates no substantive right for employees to insist on class-type treatment" of such claims. This is all surely correct, as the Board has previously explained in *Murphy Oil*, supra, slip op. at 2 and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 fn. 2. (2015). But what our colleague ignores is that the Act does "create a right to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint." *Murphy Oil*, supra, slip. op. at 2 (emphasis in original). The Respondent's arbitration policy as set forth in the Notice to Applicants and Arbitration Agreement and as applied by the Respondent constitutes just such an unlawful restraint.

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, there is no merit to our colleague's view that finding its Notice to Applicant and Arbitration Agreement unlawful runs afoul of employees' Sec. 7 right to "refrain from" engaging in protected concerted activity. See *Murphy Oil*, supra. slip op. at 18; *Bristol Farms*, supra, slip op. at 3. Nor is he correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. See *Murphy Oil*, supra, slip op. at 17–18; *Bristol Farms*, supra, slip op. at 2.

[16] Following the close of the hearing, the Board was advised that the Respondent and Charging Party entered into a non-Board settlement agreement that resolved the wage and hour lawsuit.

1. Cease and desist from

(a) Maintaining a mandatory Notice to Applicant that employees reasonably would conclude bars or restricts their right to file charges with the National Labor Relations Board.

(b) Maintaining or threatening to enforce/apply a mandatory Notice to Applicant and Arbitration Agreement in the Employment Agreement in a manner that requires employees, as a condition of employment, to waive the right to pursue 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 Notice to Applicant in all of its forms, or revise it in all of its forms to make clear to employees that it does not restrict employees' right to file charges with the National Labor Relations Board, or constitute a waiver of your 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 become bound to the Notice to Applicant in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised Notice to Applicant.

(c) Rescind the Arbitration Agreement in the Employment 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.

(d) Notify all current and former employees who were required to sign or otherwise become bound to the Arbitration Agreement in the Employment Agreement in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised Notice to Applicant.

(e) Within 14 days after service by the Region, post at its Monrovia, California facility copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure 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 to all current employees and former employees employed by Respondent at any time since May 28, 2012.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 31 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. February 23, 2016

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Mark Gaston Pearce, Chairman

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Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

In this case, the Respondent required employees to sign two documents, a Notice to Applicant and an Employment Agreement containing an Arbitration Agreement (collectively, "the Agreement"), which provided for the arbitration of non-NLRA employment-related claims. The Agreement was silent regarding class arbitration. Charging Party J. Tadeo Gomez-Flores signed the Agreement and later filed a class action lawsuit against the Respondent in California state court alleging wage and hour violations. In reliance on the Agreement, the Respondent's counsel advised the Charging Party that, if he did not agree to dismiss the lawsuit and arbitrate his individual wage and hour claims, the Respondent would promptly move to compel arbitration.

My colleagues find that the Respondent violated NLRA Section 8(a)(1) under *Lutheran Heritage Village–Livonia*[1] on the basis that the Respondent applied the Agreement to require individual arbitration. In other

[17] 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."

[1] 343 NLRB 646 (2004).

words, it applied the Agreement as a waiver of class-type treatment of non-NLRA claims.[2] I respectfully dissent from this finding for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*[3] I concur, however, in my colleagues' finding that the Notice to Applicant violates the Act because employees would reasonably read it to restrict or preclude filing charges with the Board.

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.[4] 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."[5] 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 non-NLRA claims;[6] (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;[7] and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).[8] Although questions may arise regard-

[2] My colleagues rely on the Board's holding in *Lutheran Heritage*, which is sometimes referred to as *Lutheran Heritage* "prong three," that a policy, work rule or handbook provision will be unlawful if it "has been applied to restrict the exercise of Section 7 rights." Id. at 647. This differs from another holding in *Lutheran Heritage*, sometimes referred to as *Lutheran Heritage* "prong one," under which a policy, work rule or handbook provision is invalidated if "employees would reasonably construe the language to prohibit Section 7 activity." Id. I have expressed disagreement with *Lutheran Heritage* prong one, and I advocate that the Board formulate a different standard in an appropriate future case regarding facially neutral policies, work rules, and handbook provisions. 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). In the instant case, for the reasons noted in the text, I disagree with my colleagues' finding in reliance on *Lutheran Heritage* prong three that the Agreement has been unlawfully applied to restrict the exercise of Section 7 rights.

[3] 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part); see also *Philmar Care, LLC d/b/a San Fernando Post Acute Hospital*, 363 NLRB No. 57, slip op. at 3–5 (2015) (Member Miscimarra, dissenting). 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. Oct. 26, 2015).

[4] 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).

[5] *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).

[6] 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.").

[7] 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. Raymours Furniture Co.*, 96 F.Supp. 3d 71 (S.D.N.Y. 2015); *Nanavati v. Adecco USA, Inc.,* 99 F.Supp. 3d 1072 (N.D. Cal. 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).

[8] 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 (Mem-

ing 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.

Because I believe the Respondent's Agreement, as applied, was lawful under the NLRA, I would find it was similarly lawful for the Respondent to seek to enforce the Agreement by informing the Charging Party's attorney that if the Charging Party did not agree to dismiss the class action lawsuit and arbitrate his claims on an individual basis, the Respondent would file a motion to compel arbitration.[9] That such a motion would be reasonably based is supported by court decisions that have enforced similar agreements.[10] I also believe that any Board finding of a violation based on the Respondent's stated intent to file a motion to compel arbitration in the Charging Party's state court lawsuit 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, as to these issues, I respectfully dissent.[11]

Dated, Washington, D.C. February 23, 2016

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

ber Miscimarra, dissenting in part); id., slip op. at 49–58 (Member Johnson, dissenting).

[9] The Agreement was silent as to whether arbitration may be conducted on a class or collective basis. In finding the Respondent's letter to Charging Party's counsel unlawful, my colleagues rely on *Countrywide Financial Corp.*, 362 NLRB No. 165 (2015), and *Leslie's Poolmart, Inc.*, 362 NLRB No. 184 (2015). In these cases, a Board majority decided that the employer violated the Act by moving to compel individual arbitration based on an arbitration agreement that, like the Respondent's, was silent regarding the arbitrability of class and collective claims. For the reasons stated in former Member Johnson's dissent in *Countrywide Financial*, however, above, slip op. at 8–10, the Board's decisions in those cases are in conflict with the FAA and Supreme Court precedent construing that statute. The Court has held that a "party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen S. A. v. Animal Feeds International Corp.*, 559 U.S. 662, 684–685 (2010) (emphasis in original). Obviously, where an arbitration agreement is silent regarding class arbitration, there is no such contractual basis. Thus, because a motion to compel individual arbitration would have been "well-founded in the FAA as authoritatively interpreted by the Supreme Court," *Philmar Care, LLC d/b/a San Fernando Post Acute Hospital*, above, slip op. at 4 fn. 11 (Member Miscimarra, dissenting), it was not unlawful for the Respondent to inform the Charging Party that a motion to compel arbitration would be filed if he did not agree to dismiss his lawsuit and arbitrate his claims on an individual basis.

[10] See, e.g., *Murphy Oil, Inc., USA v. NLRB*, above; *Johnmohammadi v. Bloomingdale'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).

[11] For the following reasons, however, I concur with my colleagues' finding that the Respondent's Notice to Applicant unlawfully interferes with NLRB charge-filing in violation of Sec. 8(a)(1). All job applicants were required to sign the Notice to Applicant, which reads as follows:

> I agree to submit to an obligatory arbitration for all disputes and complaints that arise from the submission of this application. Furthermore, if I am hired by this Company, I am in agreement that all disputes or complaints that cannot be resolved within the Company and informally shall be submitted to obligatory arbitration conducted under the Association of Arbitration's rules.

For the reasons stated in my separate opinion in *Rose Group d/b/a Applebee's Restaurant,* 363 NLRB No. 75, slip op. at 3–5 (2015) (Member Miscimarra, dissenting in part), I believe that an agreement may lawfully provide for the arbitration of NLRA claims, and such an agreement does not unlawfully prohibit the filing of charges with the Board, particularly when the right to do so is expressly stated in the agreement itself. Here, however, the Notice to Applicant does not make clear that employees retain the right to file charges with the Board or, more generally, with administrative agencies. Moreover, the Notice to Applicant is not rendered lawful by the statement in the separate Arbitration Agreement that "[i]n conformity to the pertinent law, this agreement for arbitrating disputes will not prevent you from filing a charge or complaint with an administrative government agency." First, while there is no contention that the Arbitration Agreement itself interferes with NLRB charge-filing, that document was only provided to those applicants who were offered employment, so its statement preserving the right to file charges with an administrative agency would have no effect on applicants who signed the Notice to Applicant but were not offered employment. Second, by its terms the language quoted above only applies to "this agreement," i.e., the Arbitration Agreement. The separate Notice to Applicant does not refer to or incorporate the Arbitration Agreement. Rather, the Notice to Applicant is worded as a separate, free-standing agreement, and it does not similarly preserve employees' right to file charges with an administrative agency. For these reasons, I join my colleagues in finding that the Notice to Applicant interferes with NLRB charge-filing in violation of Sec. 8(a)(1). See *U-Haul Co. of California,* 347 NLRB 375, 377(2006), enfd. mem. 255 Fed.Appx. 527 (D.C. Cir. 2007); *Murphy Oil*, above, slip op. at 22 fn. 4 (Member Miscimarra, dissenting in part); *The Rose Group d/b/a Applebee's Restaurant*, above, slip op. at 4–5 (Member Miscimarra, dissenting in part). I also join my colleagues in rejecting the Respondent's view that such a finding is precluded by the Federal Arbitration Act. See Sec. 10(a) of the Act.

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 Notice to Applicant that employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain or threaten to enforce/apply a mandatory Notice to Applicant and Arbitration Agreement in our Employment Agreement in a manner that requires employees, as a condition of employment, to waive the right to pursue 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 Notice to Applicant in all of its forms, or revise it in all of its forms to make clear that the Notice to Applicant does not restrict your right to file charges with the National Labor Relations Board, and 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 become bound to the Notice to Applicant in all of its forms that the Notice to Applicant has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

WE WILL rescind the Arbitration Agreement in the Employment Agreement in all of its forms, or revise it in all of its forms to make clear that the Arbitration Agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

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

HAYNES BUILDING SERVICES, LLC

The Board's decision can be found at www.nlrb.gov/case/31–CA–093920 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Nicole Pereira, Esq., for the General Counsel.
Jeffrey P. Fuchsman, Esq. (Ballard, Rosenberg, Golper & Savitt), of Glendale, California, for the Respondent.
Ari E. Moss, Esq., of Sherman Oaks, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. Based on the parties' stipulated record, I conclude that the Respondent violated Section 8(a)(1) of the Act by including, in a notice to job applicants, language that applicants reasonably would understand to preclude them from filing unfair labor practices with the National Labor Relations Board. However, I recommend that the Board dismiss allegations that Respondent violated the Act by requiring employees to sign an "Agreement for Arbitrating Disputes" and enforcing it in a manner which excluded class actions.

Procedural History

This case began on November 28, 2012, when the Charging Party, J. Tadeo Gomez-Flores, filed an unfair labor practice charge against the Respondent, Haynes Building Services, LLP. Region 31 of the National Labor Relations Board docketed the charge as Case 31–CA–093920. On January 15, 2013, the Charging Party amended this charge.

On June 27, 2013, after an investigation, the Regional Director for Region 31, acting with authority delegated by the Board's General Counsel, issued a complaint against the Respondent. On July 3, 2013, the General Counsel issued a corrected complaint. (For brevity, the corrected complaint will be referred to simply as the "complaint.") Respondent filed a timely answer.

On November 14, 2013, the Respondent and the Charging Party, by counsel, executed a joint motion to transfer proceedings to the Division of Judges and stipulation of facts. On November 15, 2013, counsel for the General Counsel executed this same document. There, the parties expressly waived a hearing before an administrative law judge, submitted the matter directly to the Division of Judges for decision, and moved that the

administrative law judge set a deadline for filing briefs.

On November 21, 2013, I issued an order accepting stipulated record and waiver of hearing and establishing briefing date. Although that order set a December 23, 2013 deadline for receipt of briefs, a subsequent order extended that deadline to January 13, 2013.

I base the following findings of fact and conclusions of law on the parties' stipulation, considered in light of the arguments which counsel raised in their respective briefs.

Facts

The parties stipulated, and I find, that at all material times the Respondent, a corporation with an office and place of business in Monrovia, California, has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Further, based on the parties' stipulation that, during the calendar year ending December 31, 2012, Respondent performed services valued in excess of $50,000 in states other than California, I conclude that Respondent meets the Board's discretionary standards for the exercise of its jurisdiction.

At all material times, the Respondent has maintained a "Notice to Applicant" document which all applicants, including the Charging Party, have been required to sign before beginning work. The original "Notice to Applicant" is in Spanish. It includes a provision regarding submission of disputes to arbitration. In English translation, that provision states as follows:

> I agree to submit to an obligatory arbitration for all disputes and complaints that arise from the submission of this application. Furthermore, if I am hired by this Company, I am in agreement that all disputes or complaints that cannot be resolved within the Company and informally shall be submitted to obligatory arbitration conducted under the Association of Arbitration's rules.

At all material times, Respondent has maintained an employment agreement which includes a provision titled, "Agreement for Arbitrating Disputes." The original employment agreement is in Spanish. The following is an English translation of the "Agreement for Arbitrating Disputes" (with capitalization and grammar as rendered by the translator):

> *AGREEMENT FOR ARBIRTATING DISPUTES.* ALL DISPUTES, CONTROVERSIES, OR CLAILMS THAT ARISES FROM, INVOLVES/AFFECTS OR IS IN SOME WAY RELATED TO THE CURRENT AGREEMENT OR IS IN BREACH THAT SAME AGREEMENT, OR IF IT ARISES FROM, INVOLVES, AFFECTS, OR IS IN SOME WAY RELATED WITH YOUR EMPLOYMENT OR WITH THE CONDITIONS OF YOUR EMPLOYMENT, OR WITH THE TERMINATION OF YOUR EMPLOYMENT, OBLIGATORY AND DEFINITIVE, IN CONFORMITY WITH FEDERAL ARBITRATION LAW, IN AGREEMENT WITH THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION, OF THE STATE OF CALIFORNIA. THE ARBITRATOR SHALL HAVE THE RIGHT TO AWARD ATTORNEY FEES AND REASONABLE COST TO THE PREVAILING PARTY. THE AWARD SHALL BE IN WRITING, SIGNED BY THE ARBITRATOR. AND IT SHALL CARRY THE REASONS FOR THE AWARD. THE ARBITRATOR'S DECISION TO AWARD CAN BE PRESENTED BEFORE ANY COURT WITH JURISDICTION FOR ENFORCEMENT. IN CONFORMITY TO THE PERTINENT LAW, THIS AGREEMENT FOR ARBITRATING DISPUTES WILL NOT PREVENT YOU FROM FILING A CHARGE OR COMPLAINT WITH AN ADMINISTRATIVE GOVERNMENT AGENCY.

On October 11, 2012, the Charging Party, formerly employed by Respondent, filed a class action lawsuit against Respondent in the Superior Court for the State of California, County of Los Angeles. It alleged, among other things, that the Respondent did not provide accurate wage statements and committed other wage and hour violations of the California Labor Code.

On November 19, 2012, Respondent's attorney sent a letter to the lawyer representing the Charging Party in the wage and hour lawsuit.[1] That letter stated, in pertinent part, as follows:

> Because this lawsuit was only recently filed, you may not be aware that Mr. Gamez-Flores signed the enclosed "Notice to Applicant" and "Employment Agreement" on January 27, 2009 and January 29, 2009, respectively (Bates Nos. DEFS-0000 I - DEPS-00002; collectively, the "Agreement"). As stated in the Agreement, Mr. Gamez-Flores has agreed to submit *all disputes and claims* arising out of his employment to final and binding arbitration under the rules of the American Arbitration Association.
>
> In *Stolt-Nielsen S.A. v. AnimalFeeds Intl Corp.* (2010), 130 S.Ct. 1758, the U.S. Supreme Court held that where, as here, the arbitration agreement is silent on class arbitration, class arbitration is not permitted. More recently, in *AT & T Mobility v. Concepcion* (2011) 131 S.Ct. 1740, the U.S. Supreme Court held that California's "Discover Bank" rule which purports to prohibit class action waivers in arbitration agreements is preempted by the Federal Arbitration Act.
>
> Several recent decisions by the California Court of Appeal have concluded That *Stolt-Nielson* and *Concepcion* require individual arbitration of wage and hour claims under arbitration agreements that are indistinguishable from the Agreement signed by Mr. Gomez-Flores. *Kinecta Alternative Financial Solutions, Inc. v. Superior Court* (2012) 205 Cal.App.4th 506; *Reyes v, Liberman Broadcasting, Inc.* (2012) 2012 Cal.App. LEXIS 945; *Nelson v. Legacy Partners Residential, Inc.* (2012) 207 Cal.App.4th 1115; *Truly Nolen of America v. Superior Court* (20(2) 208 Cal.App.4th 487.
>
> On behalf of the Company, we hereby demand that Mr. Gamez-Flores submit his individual claims alleged in

[1] The letter from Respondent's attorney frequently, but not always, spelled the Charging Party's name as "Gamez–Flores" rather than "Gomez–Flores," and included a footnote stating that the complaint in the lawsuit "erroneously refers to Plaintiff as Gomez–Flores." However, various documents in the present case, including the stipulation of facts and the complaint, spell the Charging Party's name "Gomez–Flores" and I will follow that practice.

> the lawsuit to final and binding arbitration in accordance with the terms of the agreement. Please let us know at your earliest convenience if Mr. Gamez-Flores intends to abide by the agreement. If Mr. Gamez-Flores will not agree to dismiss the lawsuit and pursue his individual claims in arbitration, the Company will promptly move to compel arbitration.
>
> Please let us know if you have any questions regarding our clients' position, or would like to discuss further at this time. Thank you. [Footnote omitted.]

Alleged Violations

Complaint Allegations

Complaint paragraph 7 alleges that Respondent violated Section 8(a)(1) of the Act by engaging in certain conduct described in complaint paragraphs 4, 5, and 6. Complaint paragraph 4 states:

> At all material times, Respondent has maintained and required applicants to execute a Notice to Applicant, which contains provisions that employees would reasonably conclude preclude them from filing unfair labor practice charges with the Board.

In the stipulation discussed above, Respondent has admitted that at all material times it has maintained and required applicants to execute a Notice to Applicant, a copy of which is in the record. However, it denies that this document contains provisions that employees would reasonably conclude preclude them from filing unfair labor practice charges with the Board.

Accordingly, I must decide whether the notice to applicant includes provisions which employees reasonably would conclude preclude them from filing charges with the Board, and, if so, whether the Respondent thereby violated Section 8(a)(1) of the Act.

Complaint paragraph 5 states as follows:

> At all material times, Respondent has maintained and required applicants to execute an Employment Agreement, which contains a provision titled "Agreement for Arbitrating Disputes" (herein referred to as the "Arbitration Agreement").

The Respondent has stipulated that at all material times, it maintained an employment agreement containing a provision titled, "Agreement for Arbitrating Disputes" and I so find. A copy of this document is included in the stipulated record.

However, the Respondent has not stipulated that it required applicants to sign the employment agreement or the agreement for arbitrating disputes within it. Respondent's answer "admits that some applicants have executed a document entitled, 'Employment Agreement' which includes a provision which requires arbitration of certain employment disputes ("Arbitration Agreement"). Except as admitted herein, Respondent denies each and every remaining allegation set forth therein."

Based on the stipulated record, I cannot conclude that Respondent required job applicants to sign either the Employment Agreement or the Arbitration Agreement as a condition of being hired. Respondent's admission that *some* applicants executed the document would be consistent with a conclusion that other applicants did not sign the documents but were hired nonetheless. Similarly, the stipulation leaves open the possibility that Respondent may have hired one or more job applicants who signed the "Employment Agreement" but scratched out the "Arbitration Agreement."

The parties' stipulation did include a statement of the legal issues which seems to assume that Respondent required all job applicants to sign the Arbitration Agreement.[2] The parties' included among the legal issues the question of whether Respondent violated Section 8(a)(1) by "maintaining and requiring applicants to execute an Employment Agreement, which contains a provision titled 'Agreement for Arbitrating Disputes'. . ."

However, Respondent's answer denied that it required all job applicants to sign these provisions as a condition of employment and the language of the stipulation does not clearly establish the contrary. In these circumstances, and considering the possibility that a job applicant might have crossed out the arbitration agreement language yet still have been hired, I do not feel comfortable concluding that Respondent invariably required all job applicants to agree to this particular term. I find that at all material times, Respondent asked employees to sign these provisions, but do not find that Respondent denied employment to any applicant who refused to sign or who marked these provisions, by lining or scratching out, to signify that he or she did not agree to them.

Complaint paragraph 6 states, in pertinent part, as follows:

> Since at least November 19, 2012, Respondent has maintained and enforced its Arbitration Agreement described above in paragraph 5 by asserting it in a letter to Kenneth A. Goldman, Esq., Charging Party's attorney in his wage and hour class action lawsuit and demanding that the Charging Party submit his individual claims to arbitration per the Arbitration Agreement described above in paragraph 5.

In its answer, Respondent admitted these allegations. Additionally, the stipulated record includes the November 19, 2012 letter, which is quoted above.

It should be noted that the complaint does not allege that Respondent violated the Act by requiring that the Charging Party agree to the arbitration provisions. The Charging Party did so in 2009, which was more than 6 months before he filed the unfair labor practice charge. The 6-month "statute of limitations" in Section 10(b) of the Act would have barred the litiga-

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[2] In the "Statement of Issues" section of the stipulated record, the parties agreed that the legal issues to be resolved are whether the Respondent violated Sec. 8(a)(1) of the Act by:

> (1) maintaining and requiring applicants to execute a notice to applicant, which contains provisions that employees would reasonably conclude preclude them from filing unfair labor practice charges with the Board;
>
> (2) maintaining and requiring applicants to execute an employment agreement, which contains a provision titled "Agreement for Arbitrating Disputes;" and
>
> (3) maintaining and enforcing its employment agreement by asserting it in a letter to Charging Party's Attorney Kenneth A. Goldman, Esq., dated November 19, 2012, regarding his wage and hour class action lawsuit and demanding that Charging Party submit his individual claims to arbitration per the employment agreement.

tion of such an allegation.

However, as discussed above, the complaint does allege that Respondent violated the Act by maintaining and enforcing the arbitration agreement requirement. The General Counsel's Brief, citing *Control Services*, 305 NLRB 435, 435 fn. 2 (1990), 442 (1991), enfd. mem. 961 F.2d 1568 (3d Cir. 1992) and *Guard Publishing Co.*, 351 NLRB 1110, 1110 fn. 2 (2007), argues, in part, as follows:

> Here, although the arbitration policy as set forth in the Notice to Applicant and Employment Agreement had been promulgated more than six months before the charge was served, Respondent continued to maintain and enforce the arbitration policy into the Section 10(b) period as amply evidenced by Respondent's attempt to enforce it through its November 19, 2012 letter to the Charging Party. As such, the maintenance and enforcement of Respondent's arbitration policy within the Section 10(b) period was unlawful even though the Notice to Applicant and Employment Agreement were promulgated before then.

In agreement with the General Counsel, I conclude that Section 10(b) does not bar litigation of the allegations raised in complaint paragraphs 4, 5, and 6. *Guard Publishing Co.*, above; *Fluor Daniel, Inc.*, 333 NLRB 427 (2001).

Analysis

Complaint Paragraph 4

Complaint paragraph 4 alleges that at all times Respondent has required job applicants to execute a Notice to Applicant containing provisions that employees reasonably would conclude preclude them from filing unfair labor practice charges with the Board. The Notice to Applicant, set forth in full above, includes two sentences, each a separate agreement, which will be discussed individually.

The first sentence agrees to submit to arbitration all disputes arising from the *application process*. However, the notice to applicant includes no limiting language which would make clear that it does not preclude the filing of an unfair labor practice charge. I conclude that someone reading this notice reasonably would conclude that it applied to unfair labor practices such as a refusal to hire or a refusal to consider for hire because of the applicant's union activities or membership. Therefore, I further conclude that it violates Section 8(a)(1) of the Act. See *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. in pertinent part 737 F.3d 344 (5th Cir. 2013).

The second sentence of the notice to applicant amounts to the applicant's promise that, *if hired*, he or she would submit all employment-related disputes to arbitration. If considered in isolation, it also reasonably would lead to the conclusion that it precluded filing of a charge with the Board, but I must consider whether the Respondent has cured the problem through further communication.

This second sentence on the Notice to Applicant has no immediate effect but only applies to matters that arise after the applicant is hired. However, if an applicant is hired he or she receives another form to sign. This "Agreement for Arbitrating Disputes" includes the following sentence: "IN CONFORMITY TO THE PERTINENT LAW, THIS AGREEMENT FOR ARBITRATING DISPUTES WILL NOT PREVENT YOU FROM FILING A CHARGE OR COMPLAINT WITH AN ADMINISTRATIVE GOVERNMENT AGENCY." (Capitalization in original.)

Arguably, even if the applicant felt precluded from filing an unfair labor practice charge, this disclaimer would assure that such a misimpression would not continue. However, I reject that argument. The disclaimer specifically applies to "this agreement," namely the agreement for arbitrating disputes which the applicant receives when hired. It says nothing about the previous agreement, embodied in the second sentence of the notice to applicant. Someone reading the disclaimer reasonably would conclude that the previous agreement had not been repealed or superseded but remained in effect. Although the agreement for arbitrating disputes did not preclude the filing of an unfair labor practice charge, the agreement in the notice to applicant reasonably would be understood to continue to have that preclusive effect.

Accordingly I recommend that the Board find that Respondent, by the conduct alleged in complaint paragraph 4, violated Section 8(a)(1) of the Act.

Complaint Paragraphs 5 and 6

Complaint paragraph 5 alleges that, at all material times, Respondent required applicants to sign an employment agreement which included an agreement for arbitrating disputes. For the reasons discussed above, I do not believe that the stipulated facts are sufficient to contradict and overcome the denial in Respondent's answer.

The stipulated facts do support an inference that the Respondent routinely tendered the employment agreement to applicants at the time of hire and thereby created the reasonable impression that agreeing to the agreement for arbitrating disputes was a condition of obtaining employment. However, I stop short of finding that the Respondent denied employment to any applicant who refused to sign, because the stipulated facts do not address such a situation.

Complaint paragraph 6 pertains to a letter which Respondent's counsel sent to the Charging Party's lawyer, who had filed a wage and hour class action lawsuit against Respondent. This letter, set forth above, demanded that the Charging Party submit the wage and hour claims to arbitration, pursuant to the agreement which the Charging Party had signed in 2009 when he began work for Respondent. The complaint alleges that the Respondent "maintained and enforced" the arbitration agreement by sending this letter.

However, the complaint does not allege that the Respondent took any other action to "maintain and enforce" the agreement to arbitrate. The letter stated that if the Charging Party "will not agree to dismiss the lawsuit and pursue his individual claims in arbitration, the Company will promptly move to compel arbitration." However, the complaint does not allege that Respondent moved to compel arbitration or took any other step, apart from sending the letter, to enforce the agreement to arbitrate.

At the time Charging Party filed the class action wage and hour lawsuit, he no longer was working for Respondent. The complaint does not allege that the Respondent took any employment-related action against the Charging Party for filing

the lawsuit. Nonetheless, the General Counsel argues that the Respondent's letter sufficed to violate Section 8(a)(1). The General Counsel's brief states, in part, as follows:

> Under the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), specifically applied by the Board to mandatory arbitration agreements in *D. R. Horton*, a Section 8(a)(1) violation will be found where, as in this case, a rule or policy has been applied to restrict the exercise of Section 7 rights. Like the agreement in *D. R. Horton*, the Respondent's arbitration policy as invoked by the [Respondent's counsel's] November 19, 2012 letter, plainly limits Section 7 activity and, as a term or condition of employment, violates Section 8(a)(1).

The General Counsel thus argues that "a rule or policy has been applied to restrict the exercise of Section 7 rights." It is appropriate to ask what Section 7 rights have been restricted, and how?

Without doubt, by "exercise of Section 7 rights," the General Counsel refers to the Charging Party's class action wage and hour lawsuit against Respondent. As will be discussed below, the Government contends that this class action lawsuit constitutes concerted activity protected by Section 7. Moreover, the stipulated record reveals no other Section 7 activity.

The General Counsel's brief, quoted above, argues that the Respondent's November 19, 2012 letter invoked an arbitration *policy*. That is not strictly correct. The letter referred to a specific agreement, the one signed by the Charging Party in 2009. The government has not alleged that Respondent acted unlawfully when the Charging Party signed this agreement and, because of Section 10(b), litigation of such an allegation would be barred.

The Respondent did not threaten to take any action against the Charging Party except to respond to the lawsuit by seeking a court order to compel arbitration pursuant to the agreement. Moreover, there is no evidence that the Respondent did even that. In these circumstances, I conclude that Respondent took no action to interfere with, restrain, or coerce an employee in the exercise of Section 7 rights. Therefore, I recommend that the Board dismiss this allegation.

It is possible, of course, that the Board will disagree with this analysis and, if so, further questions must be addressed. Therefore, I include the analysis below. It is my conclusion that Supreme Court decisions, issued after the Board's decision in *D. R. Horton*, relieve that case's rationale of its vitality.

Further Analysis

For clarity, it is appropriate to begin by addressing some rather unusual aspects of this case. At first blush, the Charging Party's status as an employee may seem somewhat attenuated. He filed the lawsuit against Respondent after he stopped working for Respondent and had received his final pay, which was not as much as he believed he was owed. However, under established precedent, he continued to meet the statute's broad definition of employee and remained under the Act's protection. As the Board stated in *Waco, Inc.*, 273 NLRB 746, 747 (1984),

> The fact that these employees were no longer employed by the Respondent does not strip them of their Sec. 7 rights. It is well settled that employees are not protected merely for activity within the scope of their employment relationship, but may engage in other activities for mutual aid or protection. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). The Act provides in Sec. 2(3) that "The term 'employee' shall include any employee, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute. . . ." Thus, we have held that a discharged employee remains a statutory employee entitled to the full protection of the Act. *Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977), and cases cited therein.

Accordingly, I conclude that the Charging Party met the Act's definition of "employee" and was fully entitled to the Act's protection.

The Charging Party's protected activity also differs from the typical concerted activity often seen in unfair labor practice cases. Apart from cases involving union activity, one familiar form of protected activity involves two or more employees discussing a work-related problem. See, e.g., *Ellison Media Co.*, 344 NLRB 1112 (2005) (two employees talking about sexually suggestive comments by a supervisor). Another not uncommon form of protected concerted activity involves an employee voicing the concerns of other employees about terms or conditions of employment. See, e.g., *Five Star Transportation, Inc.*, 349 NLRB 42 (2007) (statements concerning employees' working conditions were protected but statements unrelated to working conditions and disparaging the employer were not).

In the present case, it is not so intuitive that the Charging Party's activities were concerted. The record does not establish that the Charging Party spoke with any other employee before going to the courthouse and filing the lawsuit. Moreover, although some activities, such as a picket line, have the "flavor" of concerted action, one person filing a lawsuit does not fit within that stereotype. Nonetheless, I conclude that it constituted concerted activity which the statute protects.

The Charging Party's class action lawsuit concerned an undisputed, and indeed central, term and condition of employment: Wages. Moreover, the pleadings filed by the Charging Party unequivocally identified him as seeking to represent not only himself but an entire class of Respondent's employees. Such seeking to represent a class of employees was, implicitly, an effort to enlist fellow employees in a common, work-related cause.

Clearly, filing the class action lawsuit constituted protected activity. Board precedent long has established that the "activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity." Such individual action is concerted as long as it is engaged in with the object of initiating or inducing group action. *Cibao Meat Products*, 338 NLRB 934 (2003); *Kvaerner Philadelphia Shipyard*, 347 NLRB 390 (2006).

The General Counsel's theory rests on the Board's decision

in *D. R. Horton, Inc.*, above, which, as the Board observed, involved an issue of first impression, whether an employer violates the Act by requiring an employee to sign an agreement which waives the right to bring claims against the employer in a court and also waives bringing class action claims before an arbitrator. The General Counsel's brief states:

> In *D. R. Horton*, the Board held that a policy or agreement that is imposed as a condition of employment and that precludes employees from pursuing employment-related collective claims in any court or arbitral forum unlawfully restricts employees' Section 7 right to engage in protected concerted activity. Such policies, therefore, violate Section 8(a)(1) of the Act. Just as in *D. R. Horton*, Respondent's arbitration program violates Section 8(a)(1) of the Act because it prohibits collective dispute resolution in any forum. As is true with any other protected concerted activity, Respondent may not require that employees waive their right to participate in such collective action.

In *D. R. Horton*, an employer required all employees, as a condition of employment, to sign an agreement which waived "the right to file a lawsuit or other civil proceeding relating to Employee's employment" and which also provided that all employment-related disputes (with certain exceptions the Board did not deem pertinent) would be decided by an arbitrator who only could hear individual claims. The agreement specifically provided that the arbitrator did not have authority to "fashion a proceeding as a class or collective action" and did not have authority "to award relief to a group or class of employees in one arbitration proceeding. . ."

The Board found that *D. R. Horton's* arbitration agreement requirement interfered with employees' statutory right to engage in concerted activities for their "mutual aid or protection." In reaching this conclusion, the Board relied on previous cases in which it had found that employees were engaged in protected concerted activity when they filed lawsuits against their employers on employment-related matters. See, e.g., *Trinity Trucking & Materials Corp.*, 221 NLRB 364, (1975), citing *Leviton Manufacturing Co.*, 203 NLRB 309 (1973) for the "applicable principle that the filing of the civil action by a group of employees is protected activity unless done with malice or in bad faith." See also *Le Madri Restaurant*, 331 NLRB 269, 275 (2000).

In *D. R. Horton*, an attorney had notified the respondent employer that his law firm had been retained to represent a particular employee "and a nationwide class of similarly situated" employees in a lawsuit under the federal wage and hour law. For reasons discussed above, the Board deemed that the Charging Party had engaged in "concerted activities" when he filed the class action lawsuit on behalf of other employees as well as himself. The Board cited *Meyers Industries*, 281 NLRB 882, 887 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988), for the principle that "concerted activity includes conduct by a single employee if he or she 'seek[s] to initiate or to induce or to prepare for group action.'" The Board further stated:

> Clearly, an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7.

357 NLRB 2277, 2279.

The Board thus concluded that the Act protected, among other things, an employee's filing of a class action lawsuit. The Board further found that the respondent's arbitration agreement, which employees had to sign as a condition of employment, prevented employees from engaging in this particular form of protected, concerted activity. By signing the agreement, employees waived the right to go to court and therefore could not engage in the concerted activity implicit in a class action lawsuit. The arbitration agreement also prevented the arbitrator from hearing a class action grievance or issuing an award granting relief to a class of employees.

The remaining logical steps in the *D. R. Horton* decision can be described concisely in a syllogism. The first premise of that syllogism flows from the Board's conclusion that D. R. Horton, by requiring employees to sign its arbitration agreement, prevented them from engaging in the protected concerted activity of filing a class action lawsuit in either a judicial or arbitral forum.

The second premise of the syllogism is simply that Section 8(a)(1) of the Act makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7" of the Act. 29 U.S.C. § 158(a)(1). The syllogism thus reasons as follows:

> (A) D. R. Horton prevented employees from exercising a right under the Act by requiring them to sign the arbitration agreement. (B) It is unlawful for an employer to interfere with the exercise of a right guaranteed by the Act. Therefore: Requiring employees to sign the arbitration agreement was unlawful.

If the National Labor Relations Act were the only star in the universe, this conclusion would meet no challenge. However, the Act lives in the United States Code, a galaxy of statutes, another of them being the Federal Arbitration Act (FAA). The FAA provides, in part, as follows:

> A written provision in any. . .contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction. . .shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

The *D. R. Horton* opinion noted that where a possible conflict exists between the National Labor Relations Act and the FAA,

> The Board is required, when possible, to undertake a "careful accommodation" of the two statutes. *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942). That does not mean, of course, that the Act must automatically yield to the FAA or the other way around. Instead, when two federal statutes "are capable of co-existence," both should be given effect "absent a clearly expressed congressional intention to the contrary." *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

357 NLRB 2277, 2284.

After an extensive analysis, the Board concluded that the FAA did not stand in the way of finding that D. R. Horton committed an unfair labor practice when it required employees to sign the arbitration agreement or ordering that the violation be remedied. The Board discussed and distinguished Supreme Court opinions regarding the application of the FAA, and it stressed the limited nature of its holding:

> We need not and do not mandate class arbitration in order to protect employees' rights under the NLRA. Rather, we hold only that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums, arbitral and judicial. So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of classwide arbitration. Employers remain free to insist that arbitral proceedings be conducted on an individual basis.

357 NLRB 2277, 2288.

The United States Court of Appeals for the Fifth Circuit disagreed with the Board's conclusion and denied enforcement of this portion of the Board's decision. *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). However, as the General Counsel's brief correctly points out, "it is well settled that the Board's administrative law judges are required to follow established Board precedent that the Supreme Court has not reversed. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979)." (G C Br. at 11.)

Both the Board's decision in D. R. Horton and the Charging Party's brief in the present case liken an agreement which requires arbitration on an individual-only basis to a "yellow dog contract." Indeed, the Charging Party's brief calls such pacts "classic 'yellow dog' agreements that constitute an unenforceable interference with Section 7 rights and the Board's mandate to protect such rights."

To those specializing in labor law and familiar with its history, the reference to "yellow dog contracts" carries a meaning laden with significance and even emotion. A century ago, some employers required each worker to sign an agreement promising not to become or remain a union member.

A number of states outlawed these "yellow dog contracts." For example, Kansas made it a misdemeanor for an employer to require an employee to sign such a contract. However, the United States Supreme Court held the Kansas law to be unconstitutional: "A state cannot, by designating as 'coercion' conduct which is not such in truth, render criminal any normal and essentially innocent exercise of personal liberty, for to permit this would deprive the Fourteenth Amendment of its effective force in this respect." *Coppage v. Kansas*, 236 U.S. 1, 2 (1915).

Needless to say, federal law on this point has changed, but the term "yellow dog contract" continues to signify a written waiver of federal rights which an applicant or employee must sign to obtain a job or keep it. When such an agreement requires the relinquishment of Section 7 rights, it is repugnant to the Act. Statutory rights would turn into mere toothless wishes if employers could insist that an applicant or employee forfeit them.

Respondent's "Agreement to Arbitrate Disputes" deprives employees not of the right to join a union but of the right to act in concert with other employees to challenge a term or condition of employment either in court of before an arbitrator.[3] An employee who signs this agreement waives his right to take his dispute with the employer to court, thereby precluding not just individual action in that forum but also concerted activity on behalf of other employees, through a class action lawsuit. Instead, the employee must take the dispute to an arbitrator, but can appear before the arbitrator only individually, and not as part of a class of employees.

If one accepts the conclusion that an employee filing a class action lawsuit on behalf of other employees is engaging in activity protected by the Act, then an agreement waiving this right, and also precluding a class action before an arbitrator, clearly would be a form of "yellow dog contract." It requires, as a condition of employment, the relinquishment of Section 7 rights recognized in Board precedent. However, to say that the Act protects an employee's right to file a class action lawsuit does not address how much weight a court might accord this form of protected activity when it strikes a balance between the Act and the FAA.

The Board's decision in *D. R. Horton* seeks to undo the limiting effect of the arbitration agreement and thereby protect the Section 7 right of employees to engage in concerted action in either an arbitral or judicial forum. However, after the Board decided *D. R. Horton*, the Supreme Court issued opinions which erode the foundation on which *D. R. Horton* is based.

The *D. R. Horton* decision issued on January 3, 2012. One week later, the Supreme Court issued its opinion in *CompuCredit Corp. v. Greenwood*, ___ U.S. ___, 132 S.Ct. 665, 181 L. Ed. 2d 586 (2012). That case focused on a potential clash between the FAA's strong proarbitration policy and some language in the Credit Repair Organization Act (CROA), which required certain companies to place a "disclosure statement" in contracts with their customers. One part of the disclosure statement informed customers "You have the right to sue a credit repair organization that violates the Credit Repair Organization Act." Another provision stated, "You have a right to sue a credit repair organization that violates the Credit Repair Organization Act." Still another stated that "Any waiver by any consumer of any protection provided by or any right of the consumer under this subchapter—(1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person."

Based on this language, lower courts concluded that Congress did not intend the FAA's proarbitration policy to apply to disputes arising under the CROA. The Supreme Court disagreed, concluding that these provisions were insufficient to overcome an arbitration clause in the contract customers signed. The "right to sue" did not necessarily mean a right to

[3] Unlike the arbitration agreement in the *D. R. Horton* case, which specifically precluded class arbitrations, the language of the arbitration agreement at issue here includes no such prohibition. However, the Respondent takes the position that recent court decisions, cited in the November 19, 2012 letter of Respondent's counsel, have that effect.

bring an action in court but also could refer to a proceeding before an arbitrator.

The Court compared the CROA's requirements with more specific language in certain other statutes. It quoted provisions which were quite specific about the right to sue in District Court but still had been insufficient to defeat the FAA's general proarbitration policy. For example, the Court noted that a provision of the Racketeer Influenced and Corrupt Organizations Act stated that a person injured by certain violations "may sue therefor *in any appropriate United States district court*. . ." 18 U.S.C. § 1964(c) (italics added). Similarly, the Court cited a section of the Clayton Act which provided that an injured party "may sue therefor *in any district court of the United States*. . ." 15 U.S.C. § 15(a) (italics added). Notwithstanding these quite specific references to suing in district court, the language was not strong enough to override a contractual agreement to arbitrate.

Although these statutes indeed created causes of action, and even though they referred to lawsuits in "district court," that language did not guarantee litigation before a federal judge. Parties could still enter into a contract providing for submission of the dispute to an arbitrator, and such contractual language would be binding.

To render an agreement to arbitrate unenforceable, the Supreme Court required that the statutory language go beyond a reference to a lawsuit in court. Rather, the statute must manifest a "Congressional command" that the FAA would not apply. With only slight exaggeration, I gather that to convey such a "command," a statute must speak very specifically, best ending with "that's an order, mister," in a raised voice.

The Supreme Court issued its *CompuCredit Corp.* opinion a week after the Board's *D. R. Horton* decision, but *CompuCredit* was not the Court's last word on the subject. Almost a year and a half later, the Court decided *American Express Co. v. Italian Colors Restaurant*, ___ U.S. ___, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013). For the reasons discussed below, I conclude that, as a result of the *American Express Co.* holding, the Board's *D. R. Horton* rationale no longer remains viable.

In *American Express Co.*, the Supreme Court forcefully applied the principle, articulated in earlier decisions, that courts must "rigorously enforce" arbitration agreements according to their terms. It further stressed that courts remain obligated to enforce an arbitration agreement even if the dispute concerns the alleged violation of a federal statute.

The Court noted one narrow exception to the principle that an arbitration agreement must be enforced. That exception arises when the FAA's arbitration mandate has been "overridden by a contrary congressional command." *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. at 2309. The word "command" again suggests that Congress must express clearly and unmistakably its intent to override the FAA's mandate. Leaving no doubt, the Court cited its previous *CompuCredit Corp.* decision.

As discussed above, the *CompuCredit Corp.* opinion pointed out that even a specific statutory authorization to bring suit in "district court" did not neutralize the parties' agreement to submit a dispute to arbitration and courts remained obligated to enforce that arbitration agreement. Thus, even when the law itself referred to litigation in district court, that language did not rise to the level of a "congressional command" contradicting the FAA's mandate.

The National Labor Relations Act does not include any language resembling a "congressional command" to lift the FAA's arbitration mandate. Therefore, I must conclude that the strong government policy favoring arbitration applies here. That conclusion is consistent with the Supreme Court's decision in an earlier case, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

In *Gilmer*, the Supreme Court considered whether an arbitration agreement should be honored in a dispute arising under the federal Age Discrimination in Employment Act (ADEA). Taking into account that the FAA "manifests a liberal federal policy favoring arbitration" and that neither the text nor the legislative history of the ADEA precluded arbitration, the Court found that the agreement to arbitrate was binding.

Although the Equal Employment Opportunity Commission plays a significant role in the enforcement of the ADEA, the Court held that the mere involvement of an administrative agency in the enforcement scheme was not sufficient to preclude arbitration. The Court cautioned that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. at 26, citing *Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983).

In *Gilmer*, the Court also noted that "the ADEA is designed not only to address individual grievances, but also to further important social policies." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. at 27, citing *EEOC v. Wyoming*, 460 U. S. 226, 460 U. S. 231 (1983). However, the Court did not perceive any inconsistency between these policies and the FAA policy favoring arbitration. It appears especially relevant here that the Court, as noted above, held that "an administrative agency's mere involvement in a statute's enforcement is insufficient to preclude arbitration." Id. at 21.

One other aspect of *Gilmer* also warrants mention. In its recent *American Express Co.* decision, the Supreme Court observed that, in *Gilmer*, "we had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions." *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct, at 2311.

The *D. R. Horton* decision sought to distinguish *Gilmer* by stressing that the arbitration agreement in *Gilmer* "contained no language specifically waiving class or collective claims."[4] However, the arbitration agreement need not specify such an exclusion. As the *D. R. Horton* decision itself noted, in *Stolt-Nielsen S. A. v. Animal Feeds International Corp.*, 559 U. S. 662 (2010), the Court held that imposing class arbitration on parties who had not agreed to authorize class arbitration was

[4] The Board also stated in *D. R. Horton*: "*Gilmer* addresses neither Section 7 nor the validity of a class action waiver. The claim in *Gilmer* was an individual one, not a class or collective claim, and the arbitration agreement contained no language specifically waiving class or collective claims." 357 NLRB 2277, 2285–2286.

inconsistent with the Federal Arbitration Act. Therefore, an arbitration agreement which says nothing about class action implicitly excludes it.

In its recent *American Express Co.* decision, the Supreme Court went beyond its requirement that a party must specifically agree to class arbitration. The Court questioned whether the concepts of arbitration and "class action" were even compatible:

> Truth to tell, our decision in *AT&T Mobility [LLC v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)] all but resolves this case. There we invalidated a law conditioning enforcement of arbitration on the availability of class procedure because that law "interfere[d] with fundamental attributes of arbitration." 563 U.S., at ___ (slip op., at 9). "[T]he switch from bilateral to class arbitration," we said, "sacrifices the principal advantage of arbitration-its informality-and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." Id., at ___ (slip op., at 14). We specifically rejected the argument that class arbitration was necessary to prosecute claims "that might otherwise slip through the legal system." Id., at ___ (slip op., at 17).

Id. at 2312. The Court's skepticism about the compatibility of arbitration and class action, and its opinion that combining the two was "more likely to generate procedural morass than final judgment," certainly suggest that should the Court balance the Section 7 right to engage in a class action arbitration and the FAA policy, class action arbitration would receive little weight.

It bears repeating that, in *D. R. Horton*, the Board stressed that it was *not* mandating class arbitration. "Rather, we hold only that employers may not compel employees to waive their NLRB right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial. So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of classwide arbitration." 357 NLRB 2277, 2288.

However, in view of its previous decisions, the Court might well conclude that the Board was affording only a Hobson's choice. A requirement to leave open a judicial forum neuters the effect of most arbitration agreements, and thus conflicts with the FAA's mandate. The alternative, to find unlawful all arbitration agreements except those specifically authorizing class action, would impose a form of arbitration which the Supreme Court considers likely to create a procedural morass. More than that, it would collide head-on with the strong FAA policy favoring arbitration.

The Supreme Court's recent decision in *American Express Co.,* considered in the context of its earlier opinions concerning the Federal Arbitration Act, leaves no doubt; the FAA policy would prevail. When all the recent Supreme Court decisions interlock, they create a space in which the *D. R. Horton* rationale has no oxygen.

One other matter should be included in this analysis because it may shed light on the tension between the policies embodied in the National Labor Relations Act and the mandate of the Federal Arbitration Act, as articulated in the Supreme Court's decisions discussed above. Those decisions do not treat an agreement to arbitrate as any different from other contracts, but focus instead on when a Federal court should be allowed to upset or modify its terms. The answer: Very rarely.

However, the agreement to arbitrate in this case, as in many other cases, was not the result of negotiations between two parties of roughly equal bargaining power. Rather, it was a "contract of adhesion" which an individual had to sign as a condition of obtaining or keeping employment. This kind of lopsided situation, in which a strong party can dictate and impose terms unilaterally, concerned Congress when it passed the National Labor Relations Act. Thus, it included the following in the Act's preamble:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

29 U.S.C. § 151. When Congress considered passage of the National Labor Relations Act, its sponsor, Sen. Robert Wagner, gave a similar explanation on the Senate floor:

> Caught in the labyrinth of modern industrialism and dwarfed by the size of corporate enterprise, [the employee] can attain freedom and dignity only by cooperation with [other employees].

Morris, *Developing Labor Law*, at 28 (5th ed. 1939), citing 79 Cong. Rec. 7565 (1935). Thus, concern about an employee's "actual liberty of contract" resides, as it were, in the Act's DNA. The Act itself creates a mechanism, collective bargaining, which employees can use to enhance their economic strength, but which also protects their right to choose whether or not to take this step.

Indeed, the Act seems to inoculate its practitioners with these values, producing distinctive antibodies. Any contract of adhesion seems antithetical to the world the Act's drafters contemplated: Parties of equal dignity working out their differences through the give and take of negotiations. However, whatever be labor lawyers' antibodies and allergies, they must yield to court precedent.

The Supreme Court's recent decision in *American Express Co. v. Italian Colors Restaurant*, above, involved a dispute between the credit card company and merchants that accepted the credit cards. The merchants filed a class action lawsuit alleging that the credit card company had violated Federal antitrust laws.

The merchants went to court even though each had entered into an arbitration agreement which purported to waive the right to a judicial forum and to require arbitration individually. The merchants decided to act concertedly, bringing a class action lawsuit, because they could not afford to act individually.

Pressing an antitrust claim against the credit card company

typically would require retaining an economist to prepare an expert analysis, costing hundreds of thousands of dollars and possibly more than a million dollars. An individual merchant lacked the economic wherewithal to bear this burden alone.

The credit card company moved to dismiss the class action lawsuit, asserting that each merchant had signed an agreement to arbitrate, and to arbitrate only on an individual basis. The federal district court granted the motion and dismissed the lawsuit. However, the Court of Appeals for the Second Circuit reversed. It reasoned that because of the prohibitive costs the merchants would face if they had to arbitrate the claims, their class-action waivers were unenforceable and arbitration could not proceed.

Reversing the Court of Appeals, the Supreme Court held that the Federal Arbitration Act did not permit courts to invalidate a contractual waiver of class arbitration on the ground that each plaintiff's cost of arbitrating a federal statutory claim individual would exceed the potential recovery.

The Supreme Court rejected the merchants' argument that enforcing their waivers of class arbitration barred effective vindication of their statutory rights. The Court held that the fact that it would not be worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy. *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. at 2311.

In a dissent joined by Justice Ginsburg and Justice Breyer, Justice Kagan wrote:

> Throughout, the majority disregards our decisions' central tenet: An arbitration clause may not thwart federal law, irrespective of exactly how it does so. Because the Court today prevents the effective vindication of federal statutory rights, I respectfully dissent.

Id. 133 S.Ct. at 2313. Although the Court's majority opinion took issue with portions of the dissent, and certainly did not concede that the decision "prevents the effective vindication of federal statutory rights," it still left no doubt that, absent a clear congressional order to the contrary, the duty to follow the terms of the arbitration agreement trumps other concerns:

> [C]ourts must "rigorously enforce" arbitration agreements according to their terms, *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 , 221 (1985), including terms that "specify with whom [the parties] choose to arbitrate their disputes," *Stolt-Nielsen*, supra, at 683, and "the rules under which that arbitration will be conducted," *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). That holds true for claims that allege a violation of a federal statute, unless the FAA's mandate has been "'overridden by a contrary congressional command.'" *CompuCredit Corp. v. Greenwood*, 565 U.S. ___ , ___ (2012) (slip op., at 2-3) (quoting *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987)).

Id., 133 S.Ct. 2310. As discussed above, the Court will find a "contrary congressional command" only when Congress has spoken in the clearest of terms. Congress has not done so with respect to the National Labor Relations Act.

In assessing how the *American Express Co.* decision will affect the viability of *D. R. Horton*, differences in the two cases should be taken into account. They decided different issues. The *American Express Co.* case focused on the effect of an agreement to arbitrate, not on the lawfulness of requiring someone to sign such an agreement. Moreover, different statutes would govern whether it would be lawful for a credit card company to require merchants to sign arbitration agreements and whether it would be lawful for employers to require employees to do so as a condition of employment.

Nonetheless, the *American Express Co.* decision reflects a strong public policy in favor of arbitration, and in light of this muscular policy, it seems quite unlikely that the Court would hold it unlawful for an employer to condition employment on the employee's signing an arbitration agreement. Moreover, the Court's decision in *American Express Co.* should be read in conjunction with its other opinions concerning the Federal Arbitration Act, including *Gilmer v. Interstate/Johnson Lane Corp.*, above.

The *Gilmer* decision and other Supreme Court precedent discussed by the Board in *D. R. Horton* did not shut the door on the *D. R. Horton* rationale. However, because of the two Supreme Court decisions which issued after *D. R. Horton*, that door no longer is ajar.

REMEDY

The Respondent's Notice to Applicant violates Section 8(a)(1) of the Act because a reader reasonably could conclude that the obligatory arbitration agreement in it restricted access to the Board or barred the filing of unfair labor practice charges. To remedy this violation, I recommend that the Board order the Respondent either to remove the arbitration agreement from the Notice to Applicant or else clarify it by adding explicit language informing applicants that they retained the right to contact the Board and to file unfair labor practice charges. Additionally, the Respondent should be required to provide copies of the revised notice to all employees or notify them that the obligatory arbitration agreement has been rescinded.

The Respondent also should be required to post the Notice to Employees attached to this decision as Exhibit A.

CONCLUSIONS OF LAW

1. The Respondent, Haynes Building Services, LLP, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent, at all material times here, has violated Section 8(a)(1) of the Act by maintaining an obligatory arbitration provision in a document given to and signed by job applicants, which they reasonably could believe bars access to or restricts their right to file charges with the National Labor Relations Board.

3. The Respondent did not violate the Act in any other manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[5]

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be

ORDER

The Respondent, Haynes Building Services, LLP, Monrovia, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an obligatory arbitration agreement which employees reasonably could believe bars access to or restricts their right to file charges with the National Labor Relations Board.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

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

(a) Within 14 days after service by the Region, post at its facilities in Monrovia, California, copies of the attached notice marked "Appendix A."[6] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, noticed shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB 11 (2010). In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 28, 2012. *Excel Container, Inc.*, 325 NLRB 17 (1997).

(b) Rescind the obligatory arbitration agreement in its notice to applicants or else revise it to make clear that it does not restrict or bar employees from contacting the National Labor Relations Board or from filing unfair labor practice charges.

(c) Notify each of its employees in writing that the obligatory arbitration agreement has been rescinded or revised and, if it has been revised, provide each of its employees a copy of the revised agreement.

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

Dated Washington, D.C. February 7, 2014

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.

Choose representatives to bargain with us on your behalf.

Act together with other employees for your benefit and protection.

Choose not to engage in any of these protected activities.

WE WILL NOT maintain an obligatory arbitration agreement that you reasonably could believe bars or restricts your right to file charges with the National Labor Relations Board.

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

WE WILL rescind or revise the obligatory arbitration agreement to make it clear the agreement does not in any manner bar or restrict your right to contact or file charges with the National Labor Relations Board.

WE WILL provide to you copies of the revised agreement or notify you in writing that we have rescinded the agreement.

HAYNES BUILDING SERVICES, LLP

adopted by the Board, and all objections to them shall be deemed waived for all purposes.

[6] 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."