UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Judges
San Francisco, California

INTER-COAST INTERNATIONAL TRAINING, INC. (DOING BUSINESS AS "INTERCOAST COLLEGES")

And **Case 31-CA-131805**

IRMA MALDONADO, an Individual

COUNSEL FOR THE GENERAL COUNSEL'S POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE

To: The Honorable Lisa D. Thompson
Administrative Law Judge
National Labor Relations Board
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Submitted by:

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I. INTRODUCTION

This case was submitted to the Honorable Lisa D. Thompson, on November 5, 2015 pursuant to a Joint Motion to Transfer Proceedings to the Division of Judges and Joint Stipulation of Facts.[1] The instant proceedings are based upon a Complaint and Notice of Hearing (Complaint) issued by the Regional Director of Region 31 on November 28, 2014, and a June 26, 2015 Amendment to Complaint and Notice of Hearing [GC Exhs. 1(g) and (o); Jt. Motion at §11(a)]. The Complaint alleges that Respondent Inter-Coast International Training, Inc. dba Intercoast Colleges (Respondent) violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration provision that requires employees to submit their employment-related claims to individual arbitration. The Complaint is based upon a charge filed by Charging Party Irma Maldonado (Charging Party) on June 30, 2014 and amended on September 5, 2014. [GC Exhs. 1(a) and (3)].

II. STATEMENT OF ISSUES[2]

1) Whether Respondent violated Section 8(a)(1) of the Act by maintaining an arbitration provision in a document titled "Employee Acknowledgement and Agreement" in its Employee Manual that it interpreted in a State Court action that concluded outside the Section 10(b) period as mandating individual arbitration?

2) Whether Respondent violated Section 8(a)(1) of the Act by seeking enforcement of the arbitration provision and arbitration agreements by asserting them in litigation via its January 2014 Motion to Strike Class Actions?

[1] References to the Record are abbreviated as follows: Jt. Motion at ¶ __ (Joint Motion to Transfer Proceedings to the Division of Judges and Joint Stipulation of Facts); GC Exh. at __ (General Counsel Exhibits).
[2] Jt. Motion at p.7.

3) Whether the unfair labor practices alleged in the Complaint and Amendment to Complaint are barred by the six month statute of limitations set forth in Section 10(b) of the Act?

III. FACTS

A. RESPONDENT'S EMPLOYMENT MANUAL CONTAINING THE ARBITRATION POLICY

Respondent is a private vocational educational institution with an office and place of business in Northridge, California. [Jt. Motion ¶10]. In the twelve-month period ending October 31, 2014, Respondent derived gross revenues in excess of $1,000,000 and purchased and received at its Northridge facility goods valued in excess of $5,000 directly from points outside the State of California. [Jt. Motion ¶10(b)-(c)].

Since at least March 14, 2012, Respondent's Employee Manual has contained an addendum, titled "Employee Acknowledgment and Agreement", that includes an arbitration provision which, if signed by employees, obligates them to submit their employment-related claims to binding arbitration when such claims cannot otherwise be heard before certain specified tribunals. [Jt. Motion ¶12(a)].[3] The "Employee Acknowledgment and Agreement" reads, in pertinent part:

> I understand that this handbook represents the current policies, regulations, benefits and terms and conditions of employment at the company. Any and all benefits, policies, practices and/or terms and conditions of employment may be changed, added or deleted at any time by the company, except for the "at-will" nature of my employment and the Arbitration Agreement I signed. My "at-will" status may not be changed.
> . . .

[3]At issue are: (1) The arbitration provision in a document titled "Employee Acknowledgement and Agreement," which is an addendum to Respondent's Employee Manual, which was revised March 1, 2012; and (2) the arbitration provision in a document titled "Employee Acknowledgment and Agreement," which is an addendum to Respondent's Employee Manual, which was revised December 26, 2012. [GC Exh. 1(o)].

> I also acknowledge that the Company utilizes a system of alternative dispute resolution which involves binding arbitration to resolve all disputes which may arise out of the employment context. Because of the mutual benefits (such as reduced expense and increased efficiency) which private binding arbitration can provide both the Company and myself, I and the Company both agree that any claim, dispute, and/or controversy that either party may have against one another (including, but not limited to, any claims of discrimination and harassment, whether they be based on the California -Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as amended, as well as all other applicable state or federal laws or regulations) which would otherwise require or allow resort to any court or other governmental dispute resolution forum between myself and the Company (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory, or equitable law, or otherwise, (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, and Employment Development Department claims), including wage and hour claims of any kind, including claims for unpaid overtime and unpaid breaks and meal periods, shall be submitted to and determined exclusively by binding arbitration. I understand and agree that nothing in this agreement shall be construed so as to preclude me from filing any administrative charge with, or from participating in any investigation of a charge conducted by, any government agency such as the Department of Fair Employment and Housing and/or the Equal Employment Opportunity Commission; however, after I exhaust such administrative process/investigation, I understand and agree that must pursue any such claims through this binding arbitration procedure. . . .

[GC Exh. 1(o) at Appendix A].[4]

Between March 2012 and January 2013, Respondent presented the "Employee Acknowledgment and Agreement" to its employees. [Jt. Motion ¶12(b)]. According to the sworn

[4] The above cited arbitration language is contained in both the Employee Manual revised March 1, 2012 and the Employee Manual revised December 26, 2012. [GC Exh. 1(o)].

declaration of Respondent's President, Geeta Brown, in 2012, "all personnel who commence or continue employment [at Respondent] are required to comply with the company's alternative dispute resolution policy, **which includes the mandatory arbitration of employment related claims**." [GC Exh. 10 p.6 ¶5]. While Respondent now contends that employees could voluntarily choose whether to sign the agreement, Respondent nevertheless acknowledges that those employees who did sign are bound by the terms of the Agreement. [Jt. Motion 12(b)-(c)].

B. RESPONDENT'S ENFORCEMENT OF ITS ARBITRATION AGREEMENT OUTSIDE THE SECTION 10(B) PERIOD

On May 31, 2012, Respondent filed in State Court a petition to compel arbitration of all claims against Respondent by members of the class who had signed arbitration agreements with Respondent, including Charging Party. [Jt. Motion ¶13(a); GC Exh. 10]. After the State Court denied Respondent's petition to compel arbitration, Respondent filed an appeal on January 3, 2013, in which it argued that the Employee Acknowledgment and Agreement required that employees individually arbitrate their claims. [Jt. Motion ¶13(d)-(e)]; GC Exh. 14 p.12]. In August 2013, the California Court of appeal affirmed the lower court's order denying Respondent's motion to compel arbitration. [Jt. Motion ¶13(f)]. All of the above actions occurred more than six months prior to the original filing of the charge on June 30, 2014.

C. RESPONDENT'S ENFORCEMENT OF ITS ARBITRATION AGREEMENT DURING THE SECTION 10(B) PERIOD

On January 29, 2014, less than five months before the filing of the original charge in this matter[5], Respondent filed a Notice of Motion and Motion to Strike Class Action Allegations from the Class Action Complaint in State Court. [Jt. Motion ¶13(g); GC Exh. 18]. In this Motion, Respondent pointed out that the Court of Appeals had found Respondent's earlier

[5] The original charge was filed on June 30, 2014 and served on July 1, 2014. The first amended charge was filed on September 5, 2014 and served on September 10, 2014. [JT Motion ¶9; GC Exhs. 1(a) and 1(d)].

attempt to compel arbitration to be premature. [GC Exh. 18 p.9]. Respondent asserted that there were new and material facts that warranted reconsideration. [GC Exh. 18 p.10]. Once again Respondent contended that employees who had signed its binding Arbitration Agreement should be excluded from the class. Along with employees who had signed settlement agreements or releases, Respondent argued that employees who had signed its Arbitration Agreement had signed a written agreement "which undermines their participation" in the case. [GC Exh. 18 p.11]. About September 21, 2015, the Superior Court Judge issued an Order granting Plaintiff's Motion for Class Certification. [Jt. Motion ¶13(h)]. On October 23, 2015, Respondent filed another Petition to Compel Arbitration in the State Court proceeding. [Jt. Motion ¶13(i); GC Exh. 21].

IV. ANALYSIS

A. RESPONDENT VIOLATED SECTION 8(A)(1) OF THE ACT BY MAINTAINING AND ENFORCING ITS ARBITRATION AGREEMENT

1. EMPLOYEES WERE REQUIRED TO SIGN THE "EMPLOYEE ACKNOWLEDGMENT AND AGREEMENT"

The parties dispute whether Respondent's "Employee Acknowledgment and Agreement" containing the Arbitration Agreement was a term and condition of employees' employment. The evidence, however, indicates that it was a term and condition of employment for many employees. The language of the "Employee Acknowledgment and Agreement" that was presented to employees does not indicate that employees had the option not to sign. Notably, the arbitration agreement is the only term and condition of employment, other than the at-will nature of employment, that the company cannot modify. Finally, Respondent's President Geeta Brown testified in her 2012 sworn declaration that all employees were required to comply with the

company's alternative dispute resolution policy, which includes the mandatory arbitration of employment related claims. [GC Exh. 10 p.6]. While it is clear that Respondent did not achieve 100% compliance by having all employees sign the "Employee Acknowledgment and Agreement", the evidence certainly establishes that this was required for a significant portion of Respondent's workforce.[6]

Based on the above, the evidence shows that employees were required to sign Respondent's "Employee Acknowledgment and Agreement" containing the Arbitration Agreement as a term and condition of her employment.

2. RESPONDENT MAINTAINED AND ENFORCED THE EMPLOYMENT AGREEMENT CONTAINING THE ARBITRATION POLICY BY FILING A MOTION TO STRIKE CLASS ACTION ALLEGATIONS FROM THE CLASS ACTION COMPLAINT IN VIOLATION OF THE ACT

In *D.R. Horton*, 357 NLRB No. 184, slip op. at 1-7 (2012), the Board held that a policy or agreement precluding employees from filing employment-related collective or class claims against the employer in both judicial and arbitral forums violates Section 8(a)(1) of the Act (the Act) because this type of agreement restricts employees' Section 7 right to engage in concerted action for mutual aid or protection. In particular, the Board held in *D.R. Horton* that an "employer violates Section 8(a)(1) of the National Labor Relations Act when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer." *Id.,* slip op. at 1. The Board recently reaffirmed *D.R. Horton's* holdings in *Murphy Oil*, 361 NLRB No. 72 (Oct. 28, 2014).

[6] President Geeta Brown's assertion in her October 23, 2015 Declaration that employees are given the option to voluntarily comply with the company's alternative dispute resolution program is self-serving and should not be credited. [GC Exh. 21 p.14]. Indeed, as set forth in Respondent's October 2015 motion to compel arbitration, a "significant portion of the 219 putative class members in this case along with approximately 120 new class members" executed binding arbitration agreements. [GC Exh. 21 p.8].

In *D.R. Horton,* the Board set forth the appropriate legal framework for considering the legality of employers' arbitration agreements that limit collective and class legal activity in judicial and arbitral forums. *D.R. Horton*, 357 NLRB slip op. at 1-7. In determining whether a rule or agreement applied to all employees, as a condition of employment, violates Section 8(a)(1), the Board applies the test set forth in *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004). Under that test, if the rule explicitly restricts activities protected by Section 7 of that Act, it is unlawful. *Id.* at 646. If the rule does not explicitly restrict protected activity, it violates the Act upon a showing of one of the following: (1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or, (3) the rule has been applied to restrict the exercise of Section 7 rights. *Id.* at 647.

In this matter the mandatory arbitration provision interferes with employees' Section 7 right to participate in collective or class litigation. Although Respondent's Arbitration Agreement is silent as to whether mandatory arbitration may be conducted on a collective or class basis, Respondent has explicitly taken the position that its Arbitration Agreement prohibits employees from proceeding on a collective or class basis. In its January 2013 appeal of the lower court's order denying its original petition to compel arbitration, Respondent asserted that its Arbitration Agreement required individual arbitration. Thereafter, the Respondent continued to maintain and enforce the arbitration agreements as evidenced by the Respondent's reliance on the arbitration agreements to argue against class certification in its January 29, 2014 Notice of Motion and Motion to Strike Class Action allegations from the Class Complaint. Although in this Motion the Respondent did not argue that the arbitration agreements required arbitration on an individual basis, the Respondent's invocation of and reliance on the arbitration agreements through the Motion constitutes further maintenance and enforcement of the arbitration provision

and the "Employee Acknowledgement and Agreement." Consequently, as the Arbitration Agreement precludes employees from filing employment-related collective or class claims in both judicial and arbitral forums, it has been applied to restrict the exercise of Section 7 rights. Employees have been effectively foreclosed from pursuing employment-related class claims against Respondent. Therefore, Respondent's Arbitration Agreement is unlawful as applied and violates Section 8(a)(1) of the Act. See *Lutheran Heritage Village-Livonia.* 343 NLRB at 647.

3. EVEN IF THE "EMPLOYEE ACKNOWLEDGMENT AND AGREEMENT" CONTAINING THE ARBITRATION AGREEMENT WERE CONSIDERED TO BE VOLUNTARY, IT VIOLATES THE ACT

Even if the Employee Acknowledgment and Agreement were not a term and condition of employment, and employees could voluntarily choose whether or not to sign it as Respondent asserts, it nevertheless violates the Act. In *On Assignment Staffing Services*, 362 NRLB No. 189 (2015), the Board made clear that individual arbitration agreements that prevent an employee from engaging in concerted legal activities must yield to the Act, whether or not they were a condition of employment. 362 NLRB slip op. at 7. "Whether those agreements are imposed on employees by employers, or whether employees are free to reject them, makes no difference either to the legality of such agreements under the NLRA or to any required accommodation between the NLRA and FAA." *Id*. Thus, even assuming, as the Respondent argues, that employees were not required to sign the "Employee Acknowledgement and Agreement" as a condition of employment, this agreement is still unlawful because it requires those employees who voluntarily signed the agreement to prospectively waive their Section 7 right to engage in concerted activity which is contrary to settled Board precedent and Federal law

B. THE ALLEGATIONS ARE NOT TIME-BARRED BY SECTION 10(B) OF THE ACT

Respondent may argue that that the allegations in the Amended Complaint are time-barred by Section 10(b) of the Act. It is undisputed that the litigation in which Respondent argued that employees who had signed the Employee Acknowledgment and Agreement were required to individually arbitrate their claims concluded in August 2013, more than six months before the filing of the charge. However, Respondent subsequently enforced and maintained the Arbitration Agreement by asserting it within the 10(b) period, in January 2014 . While Respondent's January 2014 Motion to Strike does not itself reiterate the Respondent's unlawful interpretation of its arbitration agreement, the Board has made it clear that the maintenance or enforcement of a rule or agreement will be found unlawful if it "has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). And, it is well established that Section 10(b) does not preclude pursuit of a complaint allegation based on the maintenance and enforcement of an unlawful rule, policy, or agreement within the Section 10(b) period, even if the rule, policy, or agreement was promulgated earlier. See, e.g., *Register Guard*, 351 NLRB 1110, 1110 n. 2 (2007); *Control Services*, 305 NLRB 435, 435 n. 2, 442 (1991), enfd. mem. 961 F.2d 1568 (3d Cir. 1992). Here, Respondent's January 2014 Motion to Strike is entirely consistent with its January 2013 assertions that the arbitration agreement at issue requires individual arbitration, and itself constitutes further maintenance and enforcement of the unlawfully-applied agreement.[7]

Accordingly, the evidence shows that Respondent maintained and enforced its Arbitration Agreement well within the Section 10(b) period, and Respondent's argument that the

[7] Further, Respondent's 2015 Notice of Hearing on Petition to Compel Arbitration and Stay Proceedings constitutes yet another attempt to enforce the arbitration agreements and evidences the Respondent's ongoing maintenance of these agreements.

charges are time-barred by Section 10(b) is unsupported by the record evidence and should be rejected.

C. THE REMEDIES SPECIFIED IN THE AMENDED COMPLAINT ARE APPROPRIATE

As specified in the Amended Complaint, the General Counsel seeks an order requiring Respondent to (among other things) rescind the unlawful portions of its arbitration provision, notify employees that this has been done and to reimburse Charging Party for any litigation expenses incurred within the 10(b) period directly related to opposing Respondent's efforts to enforce the arbitration provision, including litigation expense directly related to opposing Respondent's Notice of Motion and Motion to Strike Class Action Allegations filed in State Court.

The reimbursement of litigation expenses is an appropriate make-whole remedy in the instant case. Anthony Nguyen exercised a Section 7 right to engage in protected concerted activity by filing individually, and on behalf of other members of the general public similarly situated, a class action complaint in Superior Court and Respondent's attempts to enforce its arbitration policy unlawfully interfered with employees' Section 7 rights in that forum. The Board has deemed the reimbursement of litigation expenses to be appropriate in similar situations. See *Bill Johnson's Rest.*, 461 U.S. 731, 747 (1983) ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses" and "any other proper relief that would effectuate the policies of the Act"); *Columbia College Chicago,* 360 NLRB No. 122, slip op. at 3 (June 11, 2014) (recognizing that the Board has broad discretionary authority to tailor its remedies to the varying circumstances of a case)).

Here, as a result of Respondent's interference in Superior Court, Charging Party Maldonado incurred expenses to litigate the unlawful enforcement of the Employee Acknowledgment and Agreement containing the Arbitration Agreement. As such, the appropriate make-whole remedy in the instant case requires for Respondent to reimburse Charging Party Maldonado for these litigation expenses.

V. CONCLUSION

Based on the entire record in this matter and on the foregoing argument, Counsel for the General Counsel respectfully submits that Respondent violated Section 8(a)(1) as alleged in the Amended Complaint.

Dated at Los Angeles, California, this 15th day of January, 2016.

Respectfully submitted,

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