Ralph's Grocery Company *and* Terri Brown. Case 21–CA–073942

February 23, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On July 31, 2013, Administrative Law Judge Eleanor Laws issued the attached decision. The Respondent filed exceptions[1] and a supporting brief. 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, and to adopt the recommended Order, as modified and set forth in full below.[2]

1. Applying the Board's decision in *D. R. Horton*, 357 NLRB No. 184 (2012), enf. denied in part, 737 F.3d 344 (5th Cir. 2013), the judge found that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a Mediation and Binding Arbitration Policy ("MBAP") that required employees, as a condition of employment, to waive their rights to pursue class or collective actions in employment-related claims in all forums, whether arbitral or judicial. In *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), the Board reaffirmed the relevant holdings of *D. R. Horton*, supra. Based on the judge's application of *D. R. Horton*, and on our subsequent decision in *Murphy Oil*, we affirm the judge's findings.[3] For the reasons discussed in *Murphy Oil* and *Bristol Farms*, 363 NLRB No. 45 (2015), we disagree with our dissenting colleague's arguments on this issue.[4]

2. The judge also found that the MBAP violated Section 8(a)(1) by interfering with employees' right to file charges with the Board. We agree with the judge's finding.

Pursuant to longstanding precedent, and applying the test of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board will find that a policy upon which employment is conditioned violates Section 8(a)(1) if employees would reasonably believe the policy interferes with their ability to file a Board charge or otherwise access the Board's processes. See *SolarCity*, 363 NLRB No. 83, slip op. at 4 (2015); *Murphy Oil*, supra, 361 NLRB No. 72, slip op. at 13, 19 fn. 98, 39 fn. 15; *D. R. Horton,* supra, 357 NLRB No. 184, slip op. at 2 fn. 2, 4; *Bill's Electric*, 350 NLRB 292, 296 (2007); *U-Haul Co. of California,* 347 NLRB 375, 377–378 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007). "Preserving and protecting access to the Board is a fundamental goal of the Act," and so the Board must carefully examine employer rules that may interfere with this goal. *SolarCity*, 363 NLRB No. 83, slip op. at 4. In turn, the Board must recognize that "rank-and-file employees . . . cannot be expected to have the expertise to examine company rules from a legal standpoint." Id., slip op. at 5, quoting *Ingram Book Co.*, 315 NLRB 515, 516 fn. 2 (1994).

The Respondent argues that employees would not reasonably conclude that the MBAP prevents them from filing unfair labor charges with the Board because paragraph 6 on page 3 of the policy informs employees that they retain the right to file charges with the Board.[5] The

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[1] The Respondent argues that *D. R. Horton* is "void ab initio" because the three-member panel included Member Becker whose appointment was constitutionally invalid. For the reasons set forth in *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 2 fn. 16 (2014), we reject this argument. See also *Mathew Enterprise v. NLRB*, 771 F.3d 812, 813 (D.C. Cir. 2014) ("[T]he President's recess appointment of Member Becker . . . was constitutionally valid."); *Gestamp South Carolina, LLC v. NLRB*, 769 F.3d 254, 257–258 (4th Cir. 2014) (same). By extension, we reject the Respondent's related argument that Judge Laws should have stayed these proceedings.

[2] We have modified the judge's recommended Order to conform to her unfair labor practice findings. We shall substitute a new notice to conform to the Order as modified.

[3] We also observe that the MBAP has already been found unconscionable and unenforceable by the United States Court of Appeals for the Ninth Circuit because the policy grants the Respondent unfair control over the selection of arbitrators. *Chavarria v. Ralph's Grocery*, 733 F.3d 916 (9th Cir. 2013). Thus, there cannot be any risk of conflict between the Act and the Federal Arbitration Act in this case.

[4] Our dissenting colleague observes that the Act "creates no substantive right for employees to insist on class-type treatment of non-NLRA claims." This is surely correct, as the Board has previously explained in *Murphy Oil*, supra, slip op. at 2,16 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*, slip op. at 16–17. The Respondent's arbitration policy is 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 the arbitration policy unlawful runs afoul of employees' Sec. 7 right to "refrain from" engaging in protected activity. See *Murphy Oil*, slip op. at 18; *Bristol Farms*, 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. *Murphy Oil*, slip op. at 17–18; *Bristol Farms*, slip op. at 2.

[5] The full text of paragraph 6 states that:

> This Arbitration Policy does not prevent or excuse any Employee or Ralphs (or any of them) from satisfying any applicable statutory conditions precedent or jurisdictional prereq-

Respondent is correct that embedded in that paragraph is a sentence informing employees that they can file charges, but we disagree that this sentence saves the policy.

Paragraphs 2 and 4 of the policy emphasize that *all* employment-related disputes must be resolved through final and binding arbitration. Paragraph 6 reiterates this requirement, declaring in the second sentence that final and binding arbitration is the sole and exclusive remedy for Covered Disputes (which, as defined elsewhere in the document, would include disputes involving unfair labor practices under the Act), and commanding, in the third sentence, that "all parties must proceed directly to arbitration under and pursuant to this Arbitration Policy" after satisfying any statutory conditions or jurisdictional prerequisites regarding covered disputes. Thus, while the last sentence of paragraph 6 allows for charges to be filed with the Board, employees would reasonably be confused as to their possession of this statutory right when the sentence is read together with the previous two sentences that state explicitly that arbitration is the sole forum for the resolution of employment disputes. Adding to this confusion is the first sentence that suggests that the filing of such charges would be permissible when necessary to satisfy "any applicable statutory conditions precedent or jurisdictional prerequisites."

As this internal inconsistency in the MBAP illustrates, the policy as a whole is not written in a manner reasonably calculated to assure employees that their statutory right of access to the Board's processes remains unaffected. Indeed, the statement that employees can file charges appears halfway through six pages of fine print in a paragraph written for attorneys, not lay people—as reflected in phrases such as "statutory conditions precedent." This stands in stark contrast to the bolded, underlined, front page instruction that the MPAB applies to all claims before any court or agency. Reviewing the document as a whole, it is at best ambiguous whether employees retain the right to file a charge or to access the Board's processes. "[A]ny ambiguity in the rule must be construed against the Respondent as the promulgator of the rule." *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). Accord *SolarCity*, supra, slip op. at 6. Accordingly, the MPAB violates Section 8(a)(1) because employees would reasonably believe that it interferes with their right to file charges or to access the Board's processes.

The ambiguity surrounding the right to file Board charges is further demonstrated by an employment application that all employees were required to sign acknowledging that they read, understood, and agreed to follow the MBAP. The application contains a one-paragraph summary of the MBAP, but any reference to employees' right to file Board charges is conspicuously absent from that summary. Instead, the summary focuses exclusively on the requirement that employees waive the right to resolve employment-related disputes before any Federal court or agency. In these circumstances, we find that employees would reasonably believe that the MBAP interfered with their statutory right to have *the Board* determine whether their Section 7 rights have been violated. See, e.g., *Bill's Electric*, supra, 350 NLRB at 296 (finding unlawful policy that would "reasonably be read by affected applicants and employees as substantially restricting, if not totally prohibiting, their access to the Board's processes").[6]

Finally, we note that the MBAP could be reasonably read to suggest that the right to file charges with the Board is entirely illusory. While there is language in Paragraph 6 purporting to preserve the right to file charges with the Board, language in the same paragraph dictates that the dispute must nonetheless be resolved through arbitration per the policy, and not through the Board. Thus, despite representations that they "retain[ed] the right to file charges with the [Board]," employees would reasonably conclude that, in the end, exercising this right would be futile because the final resolution of the unfair labor practice dispute would lie with the arbitrator—and not the Board. By creating the im-

uisites to pursuing their Covered Disputes by, for example, filing administrative charges with or obtaining right to sue notices or letters from federal, state, or local agencies. However, final and binding arbitration as described in this Arbitration Policy is the sole and exclusive remedy or formal method of resolving the Covered Disputes. If there is no applicable statutory condition precedent or jurisdictional prerequisite to pursuing a Covered Dispute, all parties must proceed directly to arbitration under and pursuant to this Arbitration Policy. Notwithstanding any other provision of this Arbitration Policy, all Employees retain the right under the National Labor Relations Act ("NLRA") to file charges with the National Labor Relations Board ("NLRB"), and to file charges with the United States Equal Employment Opportunity Commission ("EEOC") under federal equal employment opportunity laws within the EEOC's administrative jurisdiction.

[6] See also *Amex Card Services Co.,* 363 NLRB No. 40, slip op. at 2–3 (2015) (finding language in one document permitting Board charges but omission of such language from accompanying document created unlawful ambiguity); *The Rose Group d/b/a Applebee's Restaurant*, 363 NLRB No. 75, slip op. at 1 fn. 1, 9–10 (2015) (same). Our dissenting colleague argues that the legality of the employment application was not encompassed in the General Counsel's complaint and therefore is not properly before the Board. Our colleague misunderstands our position. We do not find that the language of the application form constitutes an independent violation of the Act. Rather, employees would review the language in that form and be influenced in how they viewed the MBAP in its totality.

pression that it would be futile, the MBAP interferes with employees' right to file charges.

Our dissenting colleague argues that the MBAP would be lawful even if it required employees to arbitrate their unfair labor practice claims, insofar as it did not restrict employees' right to file charges with the Board. We disagree. To be meaningful, the right to file charges with the Board must entail the right to have the Board exercise its statutory powers under Section 10 of the Act: i.e., to investigate the charge, to determine its merits, and to pursue appropriate relief through the Act's procedures. An employer may *not* lawfully require individual employees to arbitrate unfair labor practice claims that would otherwise be resolved by the Board under the Act's procedures. To do so necessarily interferes with employees' statutory right of access to the Board.

Our colleague's contrary argument rests on a fundamentally mistaken premise: that a condition of employment imposed by the employer on individual employees is no different than an agreement reached between a labor union and an employer through collective bargaining. The Board has explained the distinction before—see *Murphy Oil*, supra, 361 NLRB No. 72, slip op. at 14–15—and we reaffirm it today. A union, as the exclusive bargaining representative of employees, may exercise its statutory authority to agree with an employer to arbitrate unfair labor practice claims—although such an agreement cannot limit the Board's ultimate authority, as Section 10(a) of the Act makes clear.[7] There is no statutory basis, in contrast, that would permit an employer to require individual, unrepresented employees to arbitrate their unfair labor practice claims against the employer. Indeed, such a requirement is completely contrary to the policies of the Act. In the Supreme Court's words, Congress sought "complete freedom" for employees to file charges with the Board, to participate in a Board investigation, or to testify at a Board proceeding. *NLRB v. Scrivener*, 405 U.S. 117, 121 (1972) (applying Section 8(a)(4) of the Act, which prohibits employers from discharging or discriminating against employees for coming to the Board). See also *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418 (1968) (union may not require member to exhaust internal union remedies before filing unfair labor practice charge with Board). Even if the Act's policies in this respect were not so clear, and the Board were somehow free to *permit* employer restrictions like the one at issue here, there can be no argument that the Board is statutorily *required* to do so. Even with respect to collectively-bargained arbitration agreements between employers and unions, the Board's doctrine of deferral to arbitration is a matter of discretion. See *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132, slip op. at 3–4 (2014). We see no sound policy reason at all why an employer should be permitted to impede an individual employee's access to the Board, which "performs [its] function in the public interest and not in vindication of private rights." Id. at 3.[8]

3. Finally, we agree with the judge that the confidentiality provision of the MBAP independently violates Section 8(a)(1). Any workplace rule that prohibits the discussion of terms and conditions of employment, as the confidentiality provision does here, by prohibiting employees from discussing matters regarding an arbitral proceeding, is unlawful. See, e.g., *Professional Janitorial Service of Houston*, 363 NLRB No. 35, slip op. at 1 fn. 3 (2015).[9]

[7] Sec. 10(a) of the Act provides unequivocally that the Board's authority to redress unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." 29 U.S.C. §160(a).

[8] We do not mean to imply that an agreement to arbitrate unfair labor practice claims that was *not* imposed on employees as a condition of employment would be lawful or that the Board would defer to the results of arbitration in such a case. Cf. *On Assignment Staffing Services, Inc.*, 362 NLRB No. 189, slip op. at 5–8 (2015) (agreement between individual employee and employer that requires individual arbitration of employment-related disputes is unlawful, even if not a condition of employment, in light of Supreme Court precedent and Norris-LaGuardia Act).

[9] Last, the judge found that the Respondent enforced the MBAP by petitioning to compel arbitration in litigation before the California Superior Court. The Respondent does not contest this finding, and it is clear from the record that the Respondent petitioned the court to compel arbitration based on the MBAP. The judge, though, did not order the appropriate remedy for the enforcement violation. Consistent with our opinion in *Murphy Oil*, we amend the judge's remedy and shall order the Respondent to reimburse Charging Party Terri Brown and any other plaintiffs for all reasonable expenses and legal fees, with interest, incurred in opposing the Respondent's unlawful motion to compel individual arbitration in the collective wage-and-hour litigation. Id. at 21; see *Bill Johnson's Restaurants v. NLRB*, 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 attorneys' fees and other expenses" as well as "any other proper relief that would effectuate the policies of the Act."). Interest shall be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). See *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 fn. 10 (1991) ("[I]n make-whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses."), enfd. 973 F.2d 230 (3d Cir. 1992).

We reject the position of our dissenting colleague that the Respondent's motion to compel arbitration was protected by the First Amendment's Petition Clause. In *Bill Johnson's*, 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

ORDER

The National Labor Relations Board orders that the Respondent, Ralph's Grocery Company, Compton, California, its officers, agents, successors and assigns, shall

1. Cease and desist from

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

(b) Maintaining and/or enforcing a mandatory arbitration policy that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(c) Maintaining a policy that requires employees to maintain the confidentiality of the existence, content, and outcome of all arbitration proceedings.

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

(b) Notify all current and former employees who were required to sign acknowledgements regarding the mandatory arbitration policy in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised policy.

(c) Notify the Superior Court of the State of California, Los Angeles, in Case BC423782, that it has rescinded or revised the mandatory arbitration policy upon which it based its motion to dismiss Terri Brown's collective action and to compel individual arbitration of her claim, and inform the court that it no longer opposes the action on the basis of the arbitration policy.

(d) In the manner set forth in this decision, reimburse Terri Brown and any other plaintiffs for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing the Respondent's motion to dismiss the wage claim and compel individual arbitration.

(e) Within 14 days after Service by the Region, post at all facilities where the Mediation and Binding Arbitration Policy applied copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 21, 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 that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix" to all current employees and former employees employed by the Respondent at any time since August 7, 2011.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 21 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

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

In this case, my colleagues find that the Respondent's Mediation and Binding Arbitration Policy ("the Arbitration Policy" or "the Policy") violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA)

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).

We shall also amend the judge's remedy to order the Respondent to notify the California Superior Court that it has rescinded or revised the MBAP and to inform the court that it no longer opposes the plaintiff's claims on the basis of the arbitration agreement.

[10] 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."

because the Policy waives the right to participate in class or collective actions regarding non-NLRA employment claims. Charging Party Terri Brown agreed to the Arbitration Policy, and later she filed a class action and Private Attorney General Act ("PAGA") lawsuit against the Respondent in California state court alleging various violations of the California Labor Code.[1] In reliance on the Policy, the Respondent filed a motion to compel arbitration of Brown's claims.[2] My colleagues find that the Respondent thereby unlawfully enforced its policy. I respectfully dissent from these findings for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*[3] I also dissent from my colleagues' finding that the Arbitration Policy violates Section 8(a)(1) on the basis that it interferes with the right of employees to file charges with the Board. However, I agree with my colleagues that a confidentiality provision in the Policy, which restricts employees from disclosing the existence, content, or outcome of any arbitration proceeding under the Policy without the prior written consent of all parties, is unlawful, but I would reach that conclusion under a different standard than my colleagues apply. Accordingly, I respectfully concur in part and dissent in part.

DISCUSSION

1. Legality of the class action waiver and Respondent's Motion to compel arbitration

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*, 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) en-

[1] Under California's PAGA statute, an "aggrieved employee"—an employee against whom one or more of the alleged violations was committed—may bring a civil action against the alleged violator to recover civil penalties for California Labor Code violations for himself or herself and other current or former employees. Cal. Lab. Code § 2699(a).

[2] The motion to compel arbitration of the class action claims was granted, and the PAGA claims were stayed pending completion of that arbitration. Brown filed a second amended complaint limited to the PAGA claims; those claims are still being litigated.

[3] 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority's holding in *Murphy Oil* invalidating class-action waiver agreements was recently denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 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 USA, Inc. v. NLRB*, above; *D. R. Horton, Inc. v. NLRB,* above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil,* 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co., Inc*., 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, Inc.,* No. 1:12–cv–00062–BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration

forcement 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 regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.

Because I believe the class-waiver provisions of the Respondent's Arbitration Policy are lawful under the NLRA, I would find it was similarly lawful for the Respondent to file a motion in state court to compel the Charging Party to arbitrate her claims. It is relevant that the state court that had jurisdiction over the non-NLRA claims *granted* the Respondent's motion to compel arbitration of Brown's class-action claims. That the Respondent's motion was reasonably based is also supported by court decisions that have enforced similar agreements.[9] As the Fifth Circuit recently observed after rejecting (for the second time) the Board's position regarding the legality of class waiver agreements: "[I]t is a bit bold for [the Board] to hold that an employer who followed the reasoning of our *D.R. Horton* decision had no basis in fact or law or an 'illegal objective' in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders."[10] I also believe that any Board finding of a violation based on the Respondent's meritorious state court motion to compel arbitration 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. Finally, for similar reasons, I believe the Board cannot properly require the Respondent to reimburse the Charging Party or any other plaintiffs for their attorneys' fees in the circumstances presented here. *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 35.

agreement violated NLRA); but see *Totten v. Kellogg Brown & Root, LLC*, No. ED CV 14–1766 DMG (DTBx), 2016 WL 316019 (C.D. Cal. Jan. 22, 2016).

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

[9] 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).

[10] *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d at 1021.

2. Alleged interference with NLRB charge filing

The judge also found that the Respondent violated Section 8(a)(1) by maintaining the Arbitration Policy because, in her view, "a reasonable employee would read it as *prohibiting* him or her from filing unfair labor practice charges with the Board" (emphasis added). See, e.g., *U-Haul Co. of California,* 347 NLRB 375, 377–378 (2006) (finding that employer violated the Act by maintaining an arbitration policy that employees would reasonably read as prohibiting them from filing unfair labor practice charges with the Board), enfd. mem. 255 Fed. Appx. 527 (D.C. Cir. 2007). My colleagues affirm the judge's finding that the Policy interferes with employees' right to file charges with the Board. I disagree, and I would reverse the judge's finding.

The Arbitration Policy is set forth in a four-page document. It broadly requires arbitration of all employment-related claims, which would encompass claims arising under the NLRA.[11] However, the scope of this arbitration provision does not render it unlawful. As I explained in *The Rose Group d/b/a Applebee's*,[12] the Supreme Court has broadly held that parties may lawfully agree to arbitrate statutory claims,[13] and the Board for

[11] The Arbitration Policy defines "Covered Disputes" to include all "employment-related disputes" other than those arising out of the terms and conditions of a collective-bargaining agreement for employees represented by a union. The Policy further states that it "is the sole and exclusive remedy for any and all Covered Disputes that exist or may arise." It is undisputed that Brown's claims constituted Covered Disputes.

[12] 363 NLRB No. 75, slip op. at 3–4 (2015) (Member Miscimarra, dissenting in part).

[13] In *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009), the Supreme Court held that a collective-bargaining agreement could lawfully provide for the arbitration of statutory claims, and the Court stated that "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative." See also *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132, slip op. at 33 (2014) (Member Miscimarra, dissenting in part). Thus, I disagree with my colleagues' assertion that a labor union may bind employees it represents to an agreement to arbitrate their unfair labor practice claims, but an individual employee may not lawfully enter into such an agreement. Contrary to my colleagues' claim that there is "no statutory basis" upon which employees may agree to arbitrate unfair labor practice claims with their employer, Sec. 9(a) and 10(a) furnish that statutory basis. In *Murphy Oil*, I explained that Sec. 9(a) guarantees the right of individual employees to adjust their non-NLRA disputes with their employer individually, 361 NLRB No. 72, slip op. at 30–34 (Member Miscimarra, dissenting in part), and nothing in that statutory provision excludes the adjustment of unfair labor practice disputes from that same guarantee. To the contrary, as explained below, by providing that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by *agreement*, law, or otherwise" (emphasis added), Sec. 10(a) of the Act confirms that Congress contemplated parties might enter into private agreements to resolve unfair labor practice disputes—and nothing in Sec. 10(a) suggests that such "agreements" are limited to agreements

decades has held that NLRA claims may lawfully be resolved in arbitration (although the Board, applying a deferential standard, may evaluate whether a resulting award is inconsistent with the Act).[14] Indeed, the Board's decision in *Babcock & Wilcox Construction* leaves no doubt that NLRA claims can be made subject to a mandatory arbitration agreement. The Board majority in *Babcock* stated that, as a prerequisite to affording deference to any resulting arbitration award, the Board would require the parties to have "explicitly authorized" the arbitrator "to decide *the unfair labor practice issue*." 361 NLRB No. 132, slip op. at 5 (emphasis added). If the Board defers to arbitration awards in part because parties have "explicitly" agreed to have statutory claims resolved in arbitration, this precludes a Board finding that it violates the NLRA when parties enter into such an arbitration agreement.

NLRA Section 10(a) also reveals that Congress contemplated parties might enter into agreements to adjust or resolve statutory issues by some means other than the Board. Section 10(a) states that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by *agreement*, law, or otherwise" (emphasis added). Therefore, arbitration agreements may lawfully encompass NLRA claims, and such agreements are *not* prohibited under the Act.[15] However, this is different from an agreement that interferes with the *right to file a Board charge*. The protection afforded to Board charge-filing is important because the filing of a charge is prerequisite to Board review of unfair labor practice issues.[16] Consequently, an agreement that prohibits Board charge-filing violates Section 8(a)(1) if entered into by an employer, and Section 8(b)(1)(A) if entered into by a union.[17] In short, the relevant principles make clear that (i) an agreement may lawfully provide for the arbitration of NLRA claims; (ii) such an agreement does not unlawfully interfere with Board charge-filing, at least where, as here, the agreement expressly preserves the right to file Board charges; and (iii) any agreement to arbitrate NLRA claims does not divest the Board of authority to evaluate the same claims if they are encompassed by a Board charge. See *The Rose Group d/b/a Applebee's*.[18] Again, regarding this last point, Section 10(a) of the Act guarantees that the Board always has authority to address and resolve unfair labor practice charges, even though a private agreement may provide for the adjustment or resolution of these claims in arbi-

between employers and unions. More generally, it is established Federal policy to provide for the final and binding resolution of grievances in arbitration as the agreed-upon method for resolving workplace disputes, see Labor Management Relations Act Sec. 203(c); the Supreme Court has celebrated arbitration in the context of collective-bargaining agreements, see *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); and again, the Supreme Court has stated that "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative," *14 Penn Plaza LLC v. Pyett*, 556 U.S. at 258.

[14] In *Babcock & Wilcox Construction Co*., supra, a divided Board articulated new standards governing deferral to arbitration awards. As I noted in my *Babcock* partial dissent, id., slip op. at 14–24, I would continue to apply the deferral standards previously articulated by the Board in *Spielberg Mfg. Co.,* 112 NLRB 1080 (1955), and *Olin Corp*., 268 NLRB 573 (1984).

[15] Sec. 10(a) preserves the Board's authority to adjudicate unfair labor practice claims, notwithstanding any "alternative means of adjustment or prevention that has been or may be established by agreement." However, Sec. 10(a) does not indicate that such an agreement violates the Act. Rather, the unfair labor practice provisions of the Act are set forth in Sec. 8(a) and 8(b), neither of which invalidates agreements that provide for the arbitration of NLRA issues. Although Sec. 8(a)(1) and 8(b)(1)(A) make it unlawful for employers and unions, respectively, to restrain or coerce employees in the exercise of NLRA-protected rights, the Board's longstanding deference to arbitration awards dealing with NLRA issues precludes a finding that it constitutes unlawful restraint or coercion to provide for the arbitration of those issues.

Significantly, unlike the version of the NLRA that was adopted by Congress, the original Wagner Act legislation contained language that would have expressly invalidated private agreements that were inconsistent with the legislation. Thus, Sec. 304(b) in the Senate and House versions would have provided that "[a]ny term of a contract or agreement of any kind which conflicts with the provisions of this Act is hereby abrogated." S. 2926, 73d Cong. § 304(b), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 14 (hereinafter referred to as __ NLRA Hist. __); H.R. 8434, 73d Cong. § 304(b), *reprinted in* 1 NLRA Hist. 1140. During Senate hearings, a "unanimous" consensus emerged among the legislation's proponents, including Senator Wagner, that the "agreement" abrogation provision should be "eliminated from the bill." 1 NLRA Hist. 394–395 (exchange among Senator Wagner, Chairman Walsh and witness James Emery). Thus, the agreement-abrogation provision was omitted from all subsequent versions of the legislation. *See* S. 2926, 73d Cong. (1934), 1 NLRA Hist. 1070 (reported May 26, 1934); S. 1958, 74th Cong. (1935), 1 NLRA Hist. 1295; H.R. 6187, 74th Cong. (1935), 2 NLRA Hist. 2445; H.R. 6288, 74th Cong. (1935), 2 NLRA Hist. 2459; H.R. 7978, 74th Cong. (1935), 2 NLRA Hist. 2857; S. 1958, 74th Cong. (1935), 2 NLRA Hist. 2944; S. 1958, 74th Cong. (1935), 2 NLRA Hist. 3032; S. 1958, 74th Cong. (1935), 2 NLRA Hist. 2416; S. 1958, 74th Cong (1935), 2 NLRA Hist. 3238; H.R. Rep. 74–1371 (1935), 2 NLRA Hist. 3252; S. 1958, 74th Cong. (1935), 2 NLRA Hist. 3270.

[16] *Chamber of Commerce of the United States v. NLRB*, 721 F.3d 152, 162, 163 (4th Cir. 2013) ("The NLRB serves expressly reactive roles: conducting representation elections and resolving ULP charges. . . . [The Board's] processes . . . are not set in motion until a party files a representation petition or a ULP charge.").

[17] Sec. 8(a)(1) makes it an unfair labor practice for any employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Sec. 8(b)(1)(A) makes it an unfair labor practice for any union "to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7."

[18] 363 NLRB No. 75, slip op. at 2–3 (Member Miscimarra, dissenting in part).

tration. And if a charge is filed that alleges violations that have been resolved in arbitration, the Board will apply a limited standard of review as described in *Babcock*, supra, to determine whether or not to defer to the arbitral decision.

In the instant case, it is clear that the Arbitration Policy does not prohibit NLRB charge-filing. To the contrary, the Policy makes crystal clear that employees *retain* the right to file charges with the Board. The Policy states: "Notwithstanding any other provision of this Arbitration Policy, all Employees retain the right under the National Labor Relations Act ('NLRA') to file charges with the National Labor Relations Board ('NLRB') . . . ."[19] My colleagues dismiss this clear language as "illusory" because, they say, even though an employee may file a charge, "language in the same paragraph dictates that the dispute must nonetheless be resolved through arbitration." I respectfully disagree with this analysis because, as explained in some detail above, there is no conflict between (i) an agreement that expressly preserves the right to file NLRB charges, and (ii) having NLRA disputes resolved in arbitration. To put it simply, the right to file NLRB charges is not rendered "illusory" by providing for the submission of NLRA claims to arbitration. If this were true, the Board would need to overrule decades of cases—and the Board majority's recent holding in *Babcock*—providing for Board deferral to the arbitration of NLRA claims, with the understanding that the Board, applying a narrow standard of review, may independently evaluate any unfair labor practice issues that are the subject of a Board charge, and the Board's authority to conduct such an evaluation is spelled out in Section 10(a).[20]

[19] Indeed, the Policy *requires* employees to file "administrative charges" where doing so is necessary to satisfy "any applicable statutory conditions precedent or jurisdictional prerequisites to pursuing their Covered Disputes."

[20] In further support of their conclusion, my colleagues also rely on a signed and initialed "summary." This refers to the Respondent's standard application for employment, which summarizes the Arbitration Policy and incorporates it by reference without specifically mentioning that employees retain the right to file charges with the Board. The General Counsel does not allege that the Respondent violated Sec. 8(a)(1) by maintaining that summary on its employment applications. In fact, the parties *stipulated* that the issue presented is limited to "[w]hether Respondent's maintenance of the MBAP [i.e., the Arbitration Policy] violates § 8(a)(1) of the Act because employees would reasonably conclude that the *provisions of the MBAP* . . . preclude them from filing unfair labor practice charges with the Board, as well as from engaging in conduct protected by Section 7 of the Act." Stipulation of Facts and Motion to Submit Case on Stipulation ¶ 10(b) (emphasis added). Consequently, the legality of Respondent's application for employment is not presently before the Board, and I do not pass on it. I disagree with the majority's suggestion that the employment application would cause employees to reasonably interpret the Arbitration Policy as prohibiting them from filing unfair labor practice charges. As explained above, the Arbitration Policy very clearly states that employees retain the right to file unfair labor practices. The employment application, which incorporates the Policy by reference, does not create any ambiguity on that issue.

3. Confidentiality clause

Finally, I concur in the majority's finding that the Arbitration Policy violates Section 8(a)(1) of the Act because it contains an overbroad confidentiality restriction. The confidentiality provision states, "Except and only to the extent it may be required by applicable law, the parties and the Qualified Arbitrator shall maintain the existence, content and outcome of any arbitration proceedings held pursuant to this Arbitration Policy in the strictest confidence and shall not disclose the same without the prior written consent of all the parties." I agree that the Policy's confidentiality provision violates Section 8(a)(1) because it would preclude discussion of employment-related matters in the course of concerted protected activities involving two or more employees, and the record reveals no countervailing interest that justifies the impact on NLRA-protected rights. Cf. *Banner Estrella Medical Center*, 362 NLRB No. 137, slip op. at 13–19 (2015) (Member Miscimarra, dissenting in part) (describing requirement that Board strike a proper balance between asserted business justifications and potential impact on NLRA rights).[21]

Accordingly, for the reasons stated above, I respectfully concur in part with and dissent in part from the majority's decision.

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

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

[21] In their analysis of the lawfulness of the confidentiality provision, my colleagues do not consider whether the Respondent demonstrated an interest that potentially justifies the impact of the provision on protected rights under the NLRA. In my view, the Board must do so, for the reasons I explained at length in my partial dissent in *Banner Estrella*, supra.

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

WE WILL NOT maintain and/or enforce a mandatory arbitration policy that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT maintain a policy that requires employees to maintain the confidentiality of the existence, content, and outcome of all arbitration proceedings

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 Mediation and Binding Arbitration Policy ("MBAP") in all of its forms, or revise it in all of its forms to make clear that the arbitration policy does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board and does not require you to keep confidential the existence, content, and outcome of all arbitration proceedings.

WE WILL notify all current and former employees who were required to sign acknowledgements regarding the mandatory arbitration policy in all of its forms that the arbitration policy has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised policy.

WE WILL notify the court in which Terri Brown filed her collective wage claim that we have rescinded or revised the mandatory arbitration program upon which we based our motion to dismiss her collective wage claim and compel individual arbitration, and WE WILL inform the court that we no longer oppose Terri Brown's collective claim on the basis of that policy.

WE WILL reimburse Terri Brown and any other plaintiffs for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing our motion to dismiss the collective wage claim and compel individual arbitration.

RALPH'S GROCERY COMPANY

The Board's decision can be found at www.nlrb.gov/case/21-CA-073942 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Alice J. Garfield, for the Acting General Counsel.
Timothy F. Ryan and *Aurora Kaiser,* for the Respondent.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This is another case raising issues related to *D. R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012), petition for review filed No. 12-60031 (5th Cir. Jan. 13, 2012). It was tried based on a joint motion and stipulation of facts I approved on May 13, 2013. Terri Brown (Brown or the Charging Party) filed the original charge on February 6, 2012, and the first amended charge on April 20, 2012. The Acting General Counsel issued the complaint on January 28, 2013 and Ralph's Grocery Company (Ralph's or the Respondent) filed a timely answer on February 11, 2013, denying all material allegations and setting forth its affirmative defenses.

The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining and enforcing an unlawful arbitration policy precluding employees from acting collectively or as a class or otherwise exercising their § 7 rights and requiring employees to keep confidential the existence, content and outcome of all arbitration proceedings. The Respondent denies these allegations and further contends that the National Labor Relations Board (the Board) lacked a quorum when it decided *D. R. Horton*. As such, the Respondent argues *D. R. Horton* is void and not binding on me. The Respondent requests that, to the extent I follow *D. R. Horton*, I stay in resolution of this decision pending the Supreme Court's resolution of *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted 81 U.S.L.W. 3695 (U.S. June 24, 2013) (No. 12-1281), where the Court will decide whether the Board members who decided *D. R. Horton* (and numerous other cases) were validly appointed. For the reasons the Board articulated in *Bloomingdale's, Inc.*, 359 NLRB No. 113 (2013), this request is denied.

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

FINDINGS OF FACT

I. JURISDICTION

Ralph's Grocery Company, a corporation engaged in the operation of retail grocery markets, has offices and places of busi-

ness throughout California, including a warehouse in Compton, California. Ralph's annually derives gross revenues in excess of $500,000 and purchases and receives at its Compton warehouse, goods valued in excess of $50,000, directly from points outside the State of California. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Mediation and Binding Arbitration Policy

At all material times, the Respondent has maintained a Mediation and Binding Arbitration Policy (MBAP). The MBAP, which is four pages long and contains an introduction and 14 separate untitled paragraphs, is deemed accepted by an applicant upon submitting an application and by an employee upon acceptance or continuation of employment. The MBAP is binding on the employee and the Company. The introductory paragraph states, in relevant part:[1]

> This Arbitration Policy applies to all Employees' employment (or application for employment) and is aimed at resolving employment-related disputes quickly and fairly, to the benefit of everyone involved. This Arbitration Policy is not meant to supplant the purpose, role and effect of managers, supervisors, administrators, any applicable grievance and arbitration procedure contained in a collective bargaining agreement ("CBA") and applicable internal grievance and complaint/dispute resolution procedures available to Employees for resolving workplace issues, including, for example, complaints of unlawful harassment, discrimination or retaliation. Employees should continue to seek resolution of employment-related disputes through such channels to the extent they are applicable to their disputes. However, this Arbitration Policy is the exclusive mechanism for formal resolution of disputes and awards of relief that otherwise would be available to Employees or the Company in a court of law or equity or in an administrative agency.

The current MBAP, version 090304, expressly supersedes all previous versions.

The first paragraph sets forth the entities the Respondent considers to be part of the Company. Paragraph 2 partially defines the term "Covered Disputes" and states in full:

> For Employees whose terms and conditions of employment are determined by a CBA, this Arbitration Policy does **not** apply to claims or disputes arising out of the terms and conditions of the CBA (referred to in this Arbitration Policy as "Excluded Disputes"), but does apply to and require final and binding arbitration of such Employees' (and all other Employees') individual statutory claims or disputes. Except for Excluded Disputes, this Arbitration Policy applies to any and all other employment-related disputes that exist or arise between Employees and Ralphs (or any of them**)** *that would constitute cognizable claims or causes of action in a federal, state or local court or agency under applicable federal, state or local laws (referred to in this Arbitration Policy as "Covered Disputes").* Covered Disputes are employment-related disputes that are not Excluded Disputes which involve the interpretation or application of this Arbitration Policy, the employer/employee relationship, an Employee's actual or alleged employment with Ralphs (or any of them), the termination of such employment, or applying for or seeking such employment. A person who has sought or applied for employment with Ralphs (or any of them), is employed by Ralphs (or any of them) or whose employment with Ralphs (or any of them) has terminated, and who wishes to initiate or participate in formal dispute resolution proceedings to resolve his or her Covered Disputes, is an Employee under this Arbitration Policy. If any Employee or Ralphs (or any of them) wishes to initiate or participate in formal proceedings to resolve any Covered Disputes, the Employee or Ralphs (or any of them) must submit those Covered Disputes to final and binding arbitration as described in this Arbitration Policy. The Company therefore agrees to arbitrate any Covered Disputes, whether initiated by an Employee or by the Company. *Only Covered Disputes can be arbitrated under this Arbitration Policy*. [Emphasis in original.]

The third paragraph begins by stating: "*There are no Judge or Jury trials permitted under this Arbitration Policy."* (Emphasis in original.) The paragraph then elaborates that this prohibition applies to Covered Disputes, and contains an option for claims under the jurisdiction of a small claims court to be decided by either the court or an arbitrator.

Paragraph 4 begins by stating that arbitration is the sole and exclusive remedy for present and future "Covered Disputes" and instructing that the MBAP requires "to the fullest extent permitted by law" resolution of all "Covered Disputes" by final and binding arbitration. It then further defines, by way of non-exclusive example, the term "Covered Dispute":

> Such Covered Disputes include, for example and without limitation, disputes having anything to do with the interpretation or application of this Arbitration Policy (including, without limitation, whether a dispute is a "Covered Dispute or "Excluded Dispute"), and disputes, claims or causes of action for unfair competition, unfair business practices, misappropriation of trade secrets, conversion, replevin, trespass, restitution, indemnity, contribution, disgorgement civil penalties, fraud, breach of contract, injunctive relief, unlawful harassment, unlawful discrimination, unlawful retaliation, failure to provide reasonable accommodation(s) for a disability or to engage in an interactive process about such accommodation(s), unpaid wages or failure to pay overtime or other compensation (or the computation thereof), failure to provide family or medical (or other required) leave, failure to consider for hiring, failure to hire for employment and actual or constructive termination of the employment relationship. Covered Disputes subject to this Arbitration Policy include all Employees' individual statutory claims or disputes under federal, state and local laws including, for example and without limitation, any claims or disputes arising under the California Fair Employment and Housing Act; the Illinois Human Rights Act; the Cook County Human Rights Ordinance; the Chicago Human Rights Or-

[1] The portions of the MBAP most relevant to my decision are reproduced for ease of reference, particularly taking into account the small print on the copy reproduced as Exh. 5 of the Stipulated Record.

> dinance; the Indiana Civil Rights Law; the Nevada Fair Employment Practices Act; the Civil Rights Act of 1964; the Americans With Disabilities Act; the Age Discrimination in Employment Act; the Family Medical Leave Act; the California Family Rights Act; the California Labor Code, Illinois Compiled Statutes, Indiana Code, or Nevada Revised Statutes (excluding workers' compensation and unemployment Insurance benefits claims); the Fair Labor Standards Act; the Employee Retirement Income Security Act; the California Unfair Competition Law; the Uniform Trade Secrets Act; the California Business & Professions Code; the California Civil Code; the California Government Code; and the United States Code, as enacted and amended. Both Ralphs and Employees must submit any and all such Covered Disputes to final and binding arbitration before a neutral Qualified Arbitrator (as defined herein) under and pursuant to this Arbitration Policy.

Paragraph 5 permits informal resolution of Covered Disputes under certain specified conditions, and describes the procedures for and parameters of informal resolution.

Paragraph 6 discusses the MBAP's effect on employees' access to administrative processes, and states in full:

> This Arbitration Policy does not prevent or excuse any Employee or Ralphs (or any of them) from satisfying any applicable statutory conditions precedent or jurisdictional prerequisites to pursuing their Covered Disputes by, for example, filing administrative charges with or obtaining right to sue notices or letters from federal, state, or local agencies. However, final and binding arbitration as described in this Arbitration Policy is the sole and exclusive remedy or formal method of resolving the Covered Disputes. If there is no applicable statutory condition precedent or jurisdictional prerequisite to pursuing a Covered Dispute, all parties must proceed directly to arbitration under and pursuant to this Arbitration Policy. Notwithstanding any other provision of this Arbitration Policy all Employees retain the right under the National Labor Relations Act ("NLRA") to file charges with the National Labor Relations Board ("NLRB"), and to file charges with the United States Equal Employment Opportunity Commission ("EEOC") under federal equal employment opportunity laws within the EEOC's administrative jurisdiction.

Paragraph 7 states that the MBAP is governed by the Federal Arbitration Act, and sets forth how the parties will appoint a qualified arbitrator. In turn, paragraph 8 states that the Federal Rules of Civil Procedure, as implemented by the applicable local federal district court, will govern any arbitration proceedings. It further states:

> [T]here is no right or authority for Covered Disputes to be heard or arbitrated on a class action basis, as a private attorney general, or on bases involving claims or disputes brought in a representative capacity on behalf of the general public, of other Ralph's employees (or any of them), or of other persons alleged to be similarly situated.

The paragraph then defines "Representative Action" as:

> Any action or proceeding brought against Ralphs (or any of them) by any person (whether an Employee bound by this Arbitration Policy or not) or entity in a representative capacity on behalf of or for the benefit of (in whole or in part) any Employee bound by this Arbitration Policy." Paragraph 8 concludes by stating that, while the Federal Rules of Civil Procedure apply, "*there are no Judge or Jury trials and there are no class actions or Representative Actions permitted under this Arbitration Policy*. [Emphasis in original.]

Next, paragraph 9 sets forth the procedures for initiating arbitration under the MBAP, including the applicable statute of limitations. Paragraph 10 covers attorneys' fees.

Paragraph 11 starts out by stating that the Federal Rules of Evidence apply to arbitrations conducted pursuant to the MBAP. It then discusses the arbitrators' authority to award remedies that would otherwise be available to the employee if litigated in court or an administrative forum, with the following qualification:

> However, the Qualified Arbitrator will have no power, authority or jurisdiction to hear or decide any Covered Dispute(s) as any type of Representative Action, to award any type of remedy or relief for any Covered Dispute(s) in connection with any type of Representative Action or to interpret, apply or modify this Arbitration Policy in any manner that would empower or authorize the Qualified Arbitrator to do so.

Next, it sets forth the requirements of the arbitrator to issue a written award, and sets some parameters for what the award needs to contain. Paragraph 11 goes on to state:

> Except and only to the extent it may be required by applicable law, the parties and the Qualified Arbitrator shall maintain the existence, content and outcome of any arbitration proceedings held pursuant to this Arbitration Policy in the strictest confidence and shall not disclose the same without the prior written consent of all the parties.

It concludes by permitting entry of judgment by a court of competent jurisdiction following the arbitrator's award, and noting that the arbitrator cannot issue an award contrary to the law at issue.

Stepping backwards in the process, paragraph 12 permits the parties to submit briefs to the arbitrator following the evidentiary hearing and prior to the arbitrator's decision. Paragraph 13 contains a zipper clause stating the MBAP is the complete and full agreement for "Covered Disputes" and notes that the employee accepts the agreement upon submitting an application for employment, accepting employment, and/or continuing employment. The MBAP concludes with paragraph 15, which states that noting in the agreement changes the status of at-will employees.

B. Enforcement of the MBAP

Terri Brown is a security guard for Ralph's and is covered by the MBAP. On November 30, 2009, Brown filed a class action and Private Attorney General Act (PAGA) lawsuit against Ralph's in California Superior Court alleging various California Labor Code violations, including failure to pay wages for

missed lunch and rest breaks. (Exh. 6.)[2] On February 11, 2011, Ralph's filed a petition to compel arbitration and motion to dismiss or stay the proceedings based on the MBAP. (Exh. 7.) The motion was litigated in the California state courts, resulting in a remand from the appeals court to determine whether the MBAP provision waiving the right to pursue a representative action under PAGA, which was unlawful, could be severed or whether it rendered the entire MBAP unenforceable.[3] (Exhs. 8–13.)

On October 16, 2013, Brown filed a second amended complaint in California Superior Court limiting her claims to those available under PAGA. (Exh. 17.) Ralph's renewed its petition to compel arbitration and motion to dismiss on January 8, 2013, which the Superior Court denied the following day. (Exhs. 18–20.) At the time of this decision, Ralph's appeal of the Superior Court's ruling, and Brown's motion to dismiss the appeal were pending.

III. DECISION AND ANALYSIS

Under Section 8(a)(1), it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

A. Mandatory Waiver of Class Action Claims

The first issue, set forth in paragraphs 3(a), 4 and 5 of the complaint, is whether in view of the Board's decision in *D.R. Horton,* the Respondent's maintenance of, and efforts to enforce the terms of, the MBAP, which contains provisions requiring certain employees to resolve employment-related disputes exclusively through individual arbitration proceedings and to relinquish any right to resolve such disputes through collective or class action, violates Section 8(a)(1) of the Act by precluding employees from acting collectively or as a class or otherwise exercising their § 7 rights.

The Respondent first argues that *D.R. Horton*, discussed below, is void because the Board lacked a quorum when it issued the decision. This argument derives from the D.C. Circuit's decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), which the Board has rejected and so must I. See, e.g., *Bloomingdale's Inc*., 359 NLRB No. 113 (2013); *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at fn. 1 (2013). Though the Fourth Circuit recently agreed with *Noel Canning* when it decided *NLRB v. Enterprise Leasing Co. Southeast, LLC*, Nos. 12–1514, 12–2000, 12–2065, 2013 WL 3722388 (4th Cir. 2013), the Board has noted that at least three courts of appeals have reached a different conclusion on similar facts. *Bloomingdales,* supra, (citing *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962)). Consistent with Board precedent, the Respondent's defense based on *Noel Canning* and a lack of quorum fails.

In *D.R. Horton*, slip op. at 1, the Board explained that an employer violates Section 8(a)(1) of the Act by imposing, as a condition of employment, a mandatory arbitration agreement that precludes employees from "filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial." Citing to *Spandsco Oil & Royalty Co*., 42 NLRB 942, 948–949 (1942), *Salt River Valley Water Users Assn.*, 99 NLRB 849, 853–854 (1952), enfd. 206 F.2d 325 (9th Cir. 1953), and a string of other cases, the Board noted that concerted legal action addressing wages, hours, and working conditions has consistently fallen within Section 7's protections. *D.R. Horton* at fn. 4. The Board stopped short of requiring employers to permit both classwide arbitration and classwide suits in a court or administrative forum, finding that "[s]o 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." Id. at 16.

In the instant case, there is no dispute that the MBAP is a condition of employment. It is self-executing upon submitting an application, accepting employment, and/or continuing employment. It is likewise clear that the MBAP prohibits class actions entirely. With regard to classwide or representative arbitration, paragraph 8 states:

> [T]here is no right or authority for Covered Disputes to be heard or arbitrated on a class action basis, as a private attorney general, or on bases involving claims or disputes brought in a representative capacity on behalf of the general public, of other Ralph's employees (or any of them), or of other persons alleged to be similarly situated.

Here, as in *D.R. Horton*, the arbitration agreement precludes an arbitrator from awarding any collective remedy. With regard to judicial or any other class or representative actions, paragraph 8 concludes, with underlined emphasis, "*there are no Judge or Jury trials and there are no class actions or Representative Actions permitted under this Arbitration Policy*." Because the MBAP conditions employment on employees' "waiving their right under the NLRA to take the collective action inherent in seeking class certification" or pursuing other representative actions, I find *D.R. Horton* is directly applicable. Id. at 12.

The Respondent argues that the Board's ruling in *D.R. Horton* interferes with the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 et. seq., based on the Supreme Court's reasoning both in *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740, 1746 (2011), and *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp*., 130 S.Ct. 1758, 1775–1776 (2010). The Board, however, considered these arguments and precedents in *D.R. Horton* to support a different conclusion, by which I am bound.

The Respondent further argues that, absent a congressional command to excuse enforcement of the FAA, it must be enforced. Relying on *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 672 n. 4 (2012), decided a week after *D.R. Horton*,

[2] The abbreviation "Exh." is used to identify exhibits attached to the stipulated facts. Though I have cited to certain exhibits I emphasize that my decision is based on the full record.

[3] The Supreme Court of California subsequently denied review and the U.S. Supreme Court denied Respondent's petition for certiorari. (Exhs. 14–16.)

the Respondent argues that the Board ignored the requirement of a "congressional command" to override the FAA. The crux of the Respondent's argument is that nothing in Section 7 (which was enacted prior to the FAA) excuses application of the FAA. Specifically, the Respondent argues that Section 7 provides no substantive right to initiate a class action. Though the Board could not have applied *CompuCredit* when it issued *D.R. Horton*, it nonetheless addressed this argument, stating:

> Any contention that the Section 7 right to bring a class or collective action is merely "procedural" must fail. The right to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest. [Emphasis in original.]

D.R. Horton, supra.[4]

The Respondent argues that the recent Supreme Court decision, *American Exp. Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013), makes clear that it is improper to find a congressional command where none exists. *American Exp. Co.* involved a group of merchants who were unhappy with the rates American Express charged them to use their cards at their respective businesses.[5] At issue before the Court was whether the merchants were bound by agreements mandating individual arbitration of these disputes and precluding a class action suit for violation of antitrust law. The merchants argued that without the ability to proceed collectively, it was not cost-effective to challenge American Express's rates. The Court noted that the laws at issue, the Sherman and Clayton Acts, fail to reference class actions, and found that the "antitrust laws do not guarantee an affordable procedural path to the vindication of every claim." Id. at 2309. The Board in *D.R. Horton* distinguished the NLRA, however, and found that Section 7 substantively guarantees employees the right to engage in collective action, including collective legal action, for mutual aid and protection concerning wages, hours, and working conditions. As such, I find this argument fails.

The Respondent's reliance on *NLRB v. City Disposal Systems Inc.*, 465 U.S. 822, 830 (1984), for the proposition that the term "concerted activities" is not defined in the Act, is unavailing. The Court in *City Disposal* went on to hold that the term "clearly enough embraces the activities of employees who have joined together in order to achieve common goals," and focused its analysis on the issue at hand, *i.e.*, whether an individual's invocation of a right rooted in collective bargaining is concerted activity. Id.

Accordingly, I find the Acting General Counsel has proved that the MBAP violates Section 8(a)(1) as alleged.

B. Effect on Employees' Ability to file Board Charges or Engage in Protected Conduct

Paragraph 3(b) of the complaint alleges that at all material times, employees would reasonably conclude that the MBAP precludes them from filing unfair labor practice charges with the Board as well as from engaging in conduct protected by Section 7 of the Act.

The MBAP was imposed on all employees as a condition of hiring or continued employment by Ralph's, and it is therefore treated in the same manner as other unilaterally implemented workplace rules. When evaluating whether a rule, including a mandatory arbitration policy, violates Section 8(a)(1), the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007); *D.R. Horton*, supra. Under *Lutheran Heritage*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language 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." *Lutheran Heritage* at 647.

In the instant case, the MBAP explicitly restricts and has been applied to restrict the exercise of rights the Board has found are protected by Section 7, *i.e.* the pursuit of classwide litigation regarding wages and hours. As such, it violates Section 8(a)(1) both because it restricts on its face and has been applied to restrict statutorily protected conduct.

The Acting General Counsel also asserts that the MBAP precludes employees from filing unfair labor practice charges with the Board. The Respondent argues that the MBAP does not and could not reasonably be read to prohibit employees from filing charges with the Board. Though I have already found the policy violates Section 8(a)(1) as discussed above, in the event a reviewing authority disagrees that the policy explicitly restricts Section 7 rights or has been applied to restrict those rights, I will address this argument.

In evaluating the impact of a rule on employees, the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). A rule does not violate the Act if a reasonable employee merely *could* conceivably read it as barring Section 7 activity. Rather, the inquiry is whether a reasonable employee *would* read the rule as prohibiting Section 7 activity. *Lutheran Heritage,* supra. The Board must give the rule under consideration a reasonable reading and ambiguities are construed against its promulgator. *Lafayette Lutheran Heritage*, supra at 647; *Lafayette Park Hotel*, 326 NLRB at 828; and *Cintas Corp. v. NLRB*, 482 F.3d 463, 467–470 (D.C. Cir. 2007). Moreover, the Board must "refrain from reading partic-

[4] The Respondent notes that the Board's refusal to permit a class action waiver is contrary to the Supreme Court's decision in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009). The Board considered this argument, however, and distinguished *14 Penn Plaza*. *D.R. Horton,* supra at 12.

[5] It is a matter of common sense that the merchants could continue to operate their businesses without offering customers the ability to pay with an American Express card. Other forms of currency are available and using American Express was their choice. Likewise, it was the Charging Party's choice to work for Ralph's. Taken to its logical extreme, however, if waivers such as the MBAP are judicially sanctioned and become the norm for employers, employees will increasingly be faced with the option of foregoing class litigation for mutual aid and protection or not working.

ular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage* supra at 646.

Looking at the MBAP as a whole, I find a reasonable employee would read it as prohibiting him or her from filing unfair labor practice charges with the Board. The first section defining what types of disputes the policy covers is paragraph 2, which defines "Excluded Disputes" as "claims or disputes arising out of the terms and conditions of the CBA." The same section goes on to say, with underlined emphasis:

> Except for Excluded Disputes, this Arbitration Policy applies to any and all other employment-related disputes that exist or arise between Employees and Ralphs (or any of them) *that would constitute cognizable claims or causes of action in a federal, state or local court or agency under applicable federal, state or local laws* (referred to in this Arbitration Policy as "Covered Disputes"). Covered Disputes are employment-related disputes that are not Excluded Disputes which involve the interpretation or application of this Arbitration Policy, the employer-employee relationship, an Employee's actual or alleged employment with Ralphs (or any of them), the termination of such employment, or applying for or seeking such employment.

An employee who has read this far would certainly not think filing a charge with the NLRB falls within the definition of an "Excluded Dispute". Paragraph 2 clearly says otherwise, and in fact brings Board charges within the ambit of "Covered Disputes". But, as the Board warns, the MBAP's terms must not be read in isolation. Moving to paragraph 3, it starts out with the underlined sentence: *There are no judge or jury trials permitted under this Arbitration Policy*. That phrase is simple enough, and nothing else in paragraph 3 alters the term "Covered Disputes" as defined thus far.

Paragraph 4 begins by declaring that arbitration as defined in the policy is the sole and exclusive remedy for "Covered Disputes." Examples of "Covered Disputes" follow, including:

> [U]npaid wages or failure to pay overtime or other compensation (or the computation thereof), failure to provide family or medical (or other required) leave, failure to consider for hiring, failure to hire for employment and actual or constructive termination of the employment relationship.

Certainly many of these could also be examples of unfair labor practice claims. Other examples of "Covered Disputes" include "unlawful harassment, unlawful discrimination, unlawful retaliation, failure to provide reasonable accommodation(s) for a disability or to engage in an interactive process about such accommodation(s) . . ." These are all patently clear examples of claims that arise under the civil rights statutes the Equal Employment Opportunity Commission (EEOC) enforces, *i.e.*, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act.[6] Unlawful discrimination and retaliation based on activity protected by Section 7 of the Act likewise could be considered a "Covered Dispute" by some of these examples. In addition, "Covered Disputes" include dispute arising under "the United States Code" which of course encompasses the Act. Halfway through the MBAP, any possible reading, much less a reasonable one, leads to the conclusion that arbitration would be the employee's sole and exclusive remedy for an unfair labor practice dispute.

At the start of the third page, in paragraph 6, the MBAP states:

> This Arbitration Policy does not prevent or excuse any Employee or Ralphs (or any of them) from satisfying any applicable statutory conditions precedent or jurisdictional prerequisites to pursuing their Covered Disputes by, for example, filing administrative charges with or obtaining right to sue notices or letters from federal, state, or local agencies. However, final and binding arbitration as described in this Arbitration Policy is the sole and exclusive remedy or formal method of resolving the Covered Disputes. If there is no applicable statutory condition precedent or jurisdictional prerequisite to pursuing a Covered Dispute, all parties must proceed directly to arbitration under and pursuant to this Arbitration Policy

It is difficult to grasp what this part of paragraph 6 means. It clearly recognizes that some "Covered Disputes," which by this point anyone who has read the MBAP thus far knows must be heard, determined and resolved by an arbitrator, may fall within the jurisdiction of federal, state, or local agencies. It seems to allow employees to meet jurisdictional prerequisites for pursuing such "Covered Disputes" in an administrative forum, yet in the end requires that those disputes be resolved only through final and binding arbitration under the policy rather than through whatever fruits filing a charge or other similar effort may bear.

The reader gets the first possible notion that there may be exclusions beyond the definition of "Excluded Disputes" set forth on the first page by way of paragraph 6's final sentence, which states:

> Notwithstanding any other provision of this Arbitration Policy all Employees retain the right under the National Labor Relations Act ("NLRA") to file charges with the National Labor Relations Board ("NLRB"), and to file charges with the United States Equal Employment Opportunity Commission ("EEOC") under federal equal employment opportunity laws within the EEOC's administrative jurisdiction.

The Respondent places strong reliance on this single sentence more than halfway through the MBAP to argue that it is clearly one of the explicit exceptions to the MBAP's rule requiring arbitration of employment disputes is employees' right to file charges with the Board. As just discussed, however, this sentence is illusory, because even though an employee may file a charge, language in the same paragraph dictates that the dispute must nonetheless be resolved through arbitration per the policy. This begs the question: Why would any employee bother to file a charge? In addition, when paragraph 6 is read in conjunction with paragraph 4, which exemplifies "Covered Disputes" through numerous examples of the types of claims that fall within the EEOC and NLRB's jurisdiction, and includes dis-

[6] These statutes are respectively codified at 42 U.S.C. 2000e et seq.; 42 U.S.C. 121-1 et seq; and 20 U.S.C. 633a.

putes brought under the U.S. Code, the picture is confusing at best. This is particularly true since nowhere in the policy are disputes forming the basis for an NLRB charge defined, either by plain terms or by way of example, as "Excluded Disputes."[7]

The Respondent also relies on the following statement in paragraph 4:

> This Arbitration Policy requires, to the fullest extent permitted by law, the resolution of all Covered Disputes concerning the interpretation or application of the Arbitration Policy and/or any of the terms, conditions or benefits of employment (other than Excluded Disputes) by final and binding arbitration.

A reasonable employee reading this in the context of the rest of the document is not going to know that the phrase "to the fullest extent permitted by law" excuses disputes resulting in NLRB charges from mandatory binding arbitration. See *2 Sisters Food Group, Inc*. 357 NLRB No. 168, slip op. at 7 (2011).

Considering that ambiguities must be construed against the employer, I find the MBAP violates section 8(a)(1) because it explicitly interferes with rights protected by Section 7, it has been enforced to interfere with rights protected by Section 7, and it would cause employees to reasonably believe that filing charges with the Board would be futile. See *Aroostook County Regional Opthamology Center*, 317 NLRB 218 (1995),

C. Confidentiality Provision

The final issue, set forth in paragraph 3(a) of the complaint, is whether Respondent's maintenance of and efforts to enforce the MBAP violate Section 8(a)(1) of the Act inasmuch as the MBAP, by its terms, requires each employee to keep confidential the existence, content and outcome of all arbitration proceedings.

The Board has consistently held that a confidentiality provision which expressly prohibits employees from discussing among themselves, or sharing with others, information relating to wages, hours, or working conditions, or other terms and conditions of employment violates Section 8(a)(1) even if it was never enforced and was not unlawfully motivated. See, e.g., *Hyundai America Shipping Agency*, 357 NLRB No. 80 (2011); *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004).

The relevant MBAP provision states:

> Except and only to the extent it may be required by applicable law, the parties and the Qualified Arbitrator shall maintain the existence, content and outcome of any arbitration proceedings held pursuant to this Arbitration Policy in the strictest confidence and shall not disclose the same without the prior written consent of all the parties.

I find this provision would reasonably restrict employees from disclosing to other employees information about any employment disputes subject to the MBAP. Employees would reasonably construe this provision as barring them from discussing the existence or substance of an arbitration regarding their terms or conditions of employment, and it is therefore overly-broad. Moreover, the effect of this prohibition as applied to arbitrations concerning wages, hours, and working conditions would be to create unlawful barrier to group action. Under the MBAP, employees are not only precluded from proceeding together in arbitration, they are precluded by the confidentiality provision from even telling each other they have initiated individual arbitration proceedings.

The Respondent argues that the phrase "Except and only to the extent it may be required by law" as a qualifier to the confidentiality provision saves it from being read as a restriction on Section 7 rights. I note there is no affirmative statement that the rule will not be used to restrict Section 7 activity. Without such a statement, employees would not reasonably know that the law, and particularly Section 7 of the Act, would render discussions of working conditions, even in the context of an arbitration, lawful.

The Respondent further asserts that because the rule is only triggered once the parties have engaged in arbitration, employees would likely have legal counsel or the aid of an arbitrator to understand their rights. First, the MBAP as a whole must be viewed from the employee's standpoint when it is effectuated, not when particular provisions are triggered. Moreover, the mere existence of an arbitration proceeding may not be disclosed. Employees cannot be deemed to have the benefit of counsel's explanation about what they may lawfully discuss with fellow employees when they first initiate an arbitration proceeding. In any event, it cannot be presumed employees will have the benefit of counsel, much less counsel who can with confidence sort out what the confidentiality clause does and does not prohibit, at any point in the process. The continuing litigation over the lawfulness of confidentiality rules drives home this point.

Finally, the Respondent asserts that no Board case has considered a confidentiality policy in the context of an arbitration agreement, but rather its jurisprudence is limited to broadly-defined confidentiality rules. This is unavailing. In *Double Eagle Hotel*, supra at 115, which the Respondent cites, confidential information was specifically defined to include "wages and working conditions such as disciplinary information, grievance/complaint information, performance evaluations, [and] salary information". Here, the confidentiality policy clearly includes information about employee complaints covered by the MBAP that have started the arbitration process.

Accordingly, because a reasonable employee would interpret the MBAP's confidentiality provision as an unlawful instruction not to talk about their working conditions, I find it violates Section 8(a)(1) of the Act as alleged.

CONCLUSIONS OF LAW

(1) The Respondent, Ralph's Grocery Company, is an employer within the meaning of Section 2(6) and (7) of the Act.

(2) The Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory and binding arbitration policy which required employees to resolve employment-related disputes exclusively through individual arbitration proceedings and to relinquish any right they have to resolve such disputes through collective or class action.

[7] Confusingly, the MBAP lists "Covered Disputes" as including "statutory claims or disputes" under "the Civil Rights Act of 1964; the Americans With Disabilities Act; the Age Discrimination in Employment Act" while simultaneously stating employees retain the right to file charges with the EEOC.

(3) The Respondent violated Section 8(a)(1) of the Act by maintaining a mandatory and binding arbitration policy that restricts employees' protected activity or that employees reasonably would believe bars or restricts their right to engage in protected activity and/or file charges with the National Labor Relations Board.

(4) The Respondent violated Section 8(a)(1) of the Act by requiring employees to maintain the confidentiality of the existence, content, and outcome of all arbitration proceedings.

REMEDY

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

As I have concluded that the Mediation and Binding Arbitration Policy is unlawful, the recommended order requires that the Respondent revise or rescind it, and advise its employees in writing that said rule has been so revised or rescinded. Because the Respondent utilized the Mediation and Binding Arbitration Policy on a corporate-wide basis, the Respondent shall post a notice at all locations where the Mediation and Binding Arbitration Policy was in effect. See, e.g., *U-Haul Co. of California*, supra, fn. 2 (2006); *D.R. Horton,* supra, slip op. at 17.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Ralph's Grocery Company, Compton, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing a mandatory and binding arbitration policy that waives the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) Maintaining a mandatory and binding arbitration policy that restricts employees' protected activity or that employees reasonably would believe bars or restricts their right to engage in protected activity and/or file charges with the National Labor Relations Board.

(c) Maintaining a policy requiring employees to maintain the confidentiality of the existence, content, and outcome of all arbitration proceedings.

(d) 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 or revise the Mediation and Binding Arbitration Policy to make it clear to employees that the agreement does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions, does not restrict employees' right to file charges with the National Labor Relations Board or engage in protected activity, and does not require employees to keep information regarding their Section 7 activity confidential.

(b) Notify the employees of the rescinded or revised agreement to include providing them a copy of the revised agreement or specific notification that the agreement has been rescinded.

(c) Within 14 days after service by the Region, post at all facilities where the Mediation and Binding Arbitration Policy applied copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. 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 August 7, 2011.

(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 Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 31, 2013

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce a mandatory and binding arbitration policy that waives the right to maintain class or collective actions in all forums, whether arbitral or judicial.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT maintain a mandatory and binding arbitration policy that restricts employees' protected activity or that employees reasonably would believe bars or restricts their right to engage in protected activity and/or file charges with the National Labor Relations Board.

WE WILL NOT maintain a policy requiring employees to maintain the confidentiality of the existence, content, and outcome of all arbitration proceedings

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL rescind or revise the Mediation and Binding Arbitration Policy to make it clear to employees that the agreement does not constitute a waiver of their right in all forums to maintain class or collective actions, does not restrict employees' right to file charges with the National Labor Relations Board or engage in other protected activity, and does not require employees to keep information regarding their Section 7 activity confidential.

WE WILL notify employees of the rescinded or revised agreement, including providing them with a copy of the revised agreement or specific notification that the agreement has been rescinded.

RALPH'S GROCERY COMPANY

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21-CA-073942 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.