Great Lakes Restaurant Management, LLC *and* Fast Food Workers Committee. Case 03–CA–143685

February 23, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

The General Counsel seeks summary judgment in this case on the grounds that there are no genuine issues of material fact as to the allegations of the complaint, and that the Board should find, as a matter of law, that the Respondent has violated Section 8(a)(1) of the Act by maintaining and enforcing an agreement that prohibits its employees from participating in collective or class litigation in all forums, and leads employees reasonably to believe that they are prohibited from filing and pursuing to conclusion charges with the Board.

Pursuant to a charge filed on December 31, 2014, and an amended charge filed on January 21, 2015, by Fast Food Workers Committee (the Union), the General Counsel issued a complaint on March 26, 2015. The complaint alleges that at all material times the Respondent has maintained a Dispute Resolution Program (the DRP) that employees are required to sign as a condition of employment. The DRP booklet, which is appended to the complaint, states on its first page that: **"THIS PROGRAM IS A CONDITION OF YOUR EMPLOYMENT AND IS THE MANDATORY AND EXCLUSIVE MEANS BY WHICH [COVERED] PROBLEMS MAY BE RESOLVED, SO READ THE INFORMATION IN THIS PROGRAM BOOKLET CAREFULLY."** (Bold in original.) The booklet describes a four-step dispute resolution process, ending with arbitration. The relevant portion of the Program booklet for the arbitration step reads as follows:

> **Claims Subject to Arbitration**
>
> Claims and disputes subject to arbitration include all those legal claims you may now or in the future have against the Company (and its successors or assigns) or against its officers, directors, shareholders, employees or agents, including claims related to any Company employee benefit program or against its fiduciaries or administrators (in their personal or official capacity), and all claims that the Company may now or in the future have against you, whether or not arising out of your employment or termination, except as expressly excluded under the "Claims Not Subject to Arbitration" section below.
>
> The legal claims subject to arbitration include, but are not to be limited to:
>
> - claims for wages or other compensation;
> - claims for breach of any contract, covenant or warranty (expressed or implied);
> - tort claims (including, but not limited to, claims for physical, mental or psychological injury, but excluding statutory workers compensation claims);
> - claims for wrongful termination;
> - sexual harassment;
> - discrimination (including, but not limited to, claims based on race, sex, sexual orientation, religion, national origin, age, medical condition or disability whether under federal, state or local law);
> - claims for benefits or claims for damages or other remedies under any employee benefit program sponsored by the Company (after exhausting administrative remedies under the terms of such plans);
> - "whistleblower" claims under any federal, state or other governmental law, statute, regulation or ordinance;
> - claims for a violation of any other non-criminal federal, state or other governmental law, statute, regulation or ordinance; and
> - claims for retaliation under any law, statute, regulation or ordinance, including retaliation under any workers compensation law or regulation.
>
> **Claims Not Subject to Arbitration**
>
> The only claims or disputes not subject to arbitration are as follows:
>
> - any claim by an employee for benefits under a plan or program which provides its own binding arbitration procedure;
> - any statutory workers compensation claim;
> - unemployment insurance claims; and
> - any lawful claim(s) brought under the Dodd Frank Act's whistleblower protection, pursuant to 15 U.S.C. Section 1514A, et. Seq., is exempted from this DRP plan.
>
> Neither the employee nor the Company has to submit the items listed under this "Claims Not Subject to Arbitration" caption to arbitration under this Program and may seek and obtain relief from a court or the appropriate administrative agency.

> The employee and company each agree, that there shall be no class or collective action arising from any employee's claim(s), and each employee may only maintain a claim under this plan on an individual basis and may not participate in a class or collective action.

The DRP booklet concludes with the following bolded language:

> **This Program shall constitute the mandatory and exclusive means by which all covered workplace claims may be resolved. The submission of an application, acceptance of employment or the continuation of employment by an individual shall be deemed to be acceptance of the Dispute Resolution Program. No signature shall be required for the policy to be applicable. This agreement applies and extends to all future employment with the company and shall survive any termination and/or resignation.**

This same self-executing provision is included in a separate document, the "Agreement for Receipt for Dispute Resolution Program" (the Agreement), that is distributed to all employees for their signature and which incorporates the provisions of the DRP. The Agreement also specifically reiterates the DRP's requirements in stating that "The Company and I agree that all legal claims or disputes covered by the Agreement must be submitted to binding arbitration and that this binding arbitration will be the sole and exclusive final remedy for resolving any such claim or dispute." Further, it specifically describes covered claims as including "claims for wrongful termination; . . . discrimination (including, but not limited to, claims based on race, sex, sexual orientation, religion, national origin, age, medical condition or disability, whether under federal, state or local law); [and] claims for a violation of any other non-criminal federal, state or other governmental law, statute, regulation or ordinance; and claims for retaliation under any law, statute, regulation or ordinance . . . ."

Paragraph VI of the complaint alleges that at all material times the Respondent has maintained the DRP that employee applicants are required to sign as a condition of employment, that by doing so the Respondent has maintained and enforced a mandatory arbitration agreement that prohibits employees from engaging in protected concerted activities, including class or collective action addressing terms and conditions of employment, and that maintenance and enforcement of the mandatory DRP leads employees reasonably to believe that they are prohibited from filing and pursuing to conclusion charges with the Board. Paragraph VII of the complaint alleges that the conduct described in paragraph VI violates Section 8(a)(1) of the Act.

On April 9, 2015, the Respondent filed an answer admitting that it maintains the DRP, stating that the DRP document "speaks for itself," and otherwise denying all other factual allegations in complaint paragraph VI. The answer further denies the legal conclusions in complaint paragraph VII that the Respondent has violated the Act.

On May 4, 2015, the General Counsel filed a Motion for Summary Judgment. On May 6, 2015, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On May 20, 2015, the Respondent filed a response.

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

Ruling on Motion for Summary Judgment

The Board held in *D. R. Horton, Inc.*, 357 NLRB 2277, 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and reaffirmed in *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 1 (2014), enf. denied 808 F.3d 1013 (5th Cir. 2015), that an employer violates Section 8(a)(1) "when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial." Additionally, an employer violates Section 8(a)(1) if employees would reasonably believe that its arbitration policy interferes with their ability to file a Board charge or to access the Board's processes. *U-Haul Co. of California*, 347 NLRB 375, 377–378 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007). If an employer's arbitration policy is unlawful, the Board will find that the employer also violates Section 8(a)(1) if it seeks to enforce the policy. *Murphy Oil*, supra, 361 NLRB No. 72, slip op. at 19 (citing *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16–17 (1962), and *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)).

The Respondent contends that summary judgment is not warranted because it has not admitted all material factual allegations in the complaint and because the Board's holding in *D. R. Horton* conflicts with certain judicial decisions, including the Fifth Circuit's denial of enforcement in *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), and the Second Circuit's holding in *Sutherland v. Ernst & Young, LLP*, 726 F.3d 290 (2d Cir. 2013) (class-action waiver in employment contract not invalid even where claim is not economically worth pursuing individually). The Respondent further argues that there are no facts in the record to support the General Counsel's allegation that the Respondent unlawfully en-

forced the DRP. With respect to the allegation of interference with employee access to the Board, the Respondent argues that the fact that two employees filed charges with the Board in this case shows that they believed that they were allowed to file and pursue such charges.

As to the maintenance allegations, we find no merit in the Respondent's arguments. There is no dispute as to any material fact. The Respondent admits that it maintains the DRP and that the program document speaks for itself. We agree. The DRP booklet describes in detail a mandatory arbitration agreement that explicitly requires employees to waive their right to maintain class or collective actions in any forum. Maintenance of such a requirement violates Section 8(a)(1) of the Act for the reasons set forth in *D. R. Horton* and reaffirmed in *Murphy Oil*.[1] In fact, the DRP at issue substantially mirrors the one found to be unlawfully maintained in *PJ Cheese, Inc.*, 362 NLRB No. 177 (2015).

We also find the DRP separately violates Section 8(a)(1) because employees would reasonably believe that it bars or restricts their right to file and pursue unfair labor practice charges with the Board. See *D. R. Horton*, above, slip op. at 2 and fn. 2; *Murphy Oil*, above, slip op. at 19 fn. 98, and *U-Haul Co. of California*, above, 347 NLRB at 377–378. Where maintenance of an arbitration agreement is alleged to restrict employee access to the Board, the Board applies the *Lutheran Heritage*[2] test for determining whether employer work rules interfere with employees' Section 7 rights. *Countrywide Financial Corp., Countrywide Home Loans, Inc., and Bank of America Corp.*, 362 NLRB No. 165, slip op. at 2 (2015). Thus, when, as here, the rule does not explicitly restrict Section 7 rights, an 8(a)(1) violation may be found if there is a showing that employees would reasonably construe the language to prohibit Section 7 activity. Id. Based on the undisputed language of the DRP, we find that employees would reasonably construe it to prohibit filing Board charges or otherwise accessing the Board's processes—activities that are protected by Section 7 of the Act.

As described above, the DRP booklet identifies legal claims subject to mandatory arbitration that "include, but are not limited to" those involving claims for wages or other compensation; contract breaches; wrongful termination; "discrimination [. . .] whether under federal, state or local law;" violations of "any other non-criminal federal, state, or other governmental law, statute, regulation or ordinance; and claims of retaliation under any law, statute, regulation or ordinance[.]" While the booklet does not explicitly restrict the filing of charges with the Board, it does not include unfair labor practice claims among the four types of specific claims or disputes that are not subject to mandatory arbitration. Thus, contrary to our dissenting colleague, we find that both the breadth of the DRP language encompassing claims under Federal statutes and regulations and the absence of unfair labor practice claims in the limited list of specific exclusions from mandatory arbitration would cause employees to reasonably construe the DRP as prohibiting them from filing Board charges, in violation of Section 8(a)(1) of the Act.[3]

[1] For the reasons we stated in *Murphy Oil*, above, slip op. at 6–11, we reject the Respondent's argument that the Board should apply the judicial holdings in *D. R. Horton, Inc. v. NLRB,* above, and *Sutherland v. Ernst & Young, LLP,* above, to the instant case.

Our dissenting colleague observes that the Act does not "dictate" any particular procedures for the litigation of non-NLRA claims, and "creates no substantive right for employees to insist on class-type treatment" of such claims. This is all surely correct, as the Board has previously explained in *Murphy Oil*, above, slip op. at 2, and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 and fn. 2 (2015). But what our colleague ignores is that the Act does "creat[e] a right to *pursue* joint, class, or collective claims if and as available without the interference of an employer-imposed restraint." Id., slip op. at 16–17. The Respondent's DRP and the Agreement are just such an unlawful restraint. Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, supra, there is no merit to our colleague's view that finding the Agreements unlawful runs afoul of employees' Sec. 7 right to "refrain from" engaging in protected concerted activity. See *Murphy Oil*, above, slip op. at 18; *Bristol Farms*, above, slip op. at 3.

[2] *Martin Luther Memorial Home, Inc. d/b/a Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).

[3] See, e.g., *U-Haul Co. of California*, above, 347 NLRB at 377 (finding phrase "any other legal or equitable claims and causes of action recognized by local, state, or federal law or regulations" reasonably includes the filing of unfair labor practice charges with the Board). We reject the Respondent's argument that the fact that two employees had filed charges with the Board shows that employees believed that they were allowed to file and pursue such charges. See *Scripps Health d/b/a Scripps Memorial Hospital Encinitas*, 347 NLRB 52, 52 (2006) (the Board applies an objective standard to determine whether communications from an employer to its employees violate Sec. 8(a)(1), and "does not consider either the motivation behind the remark or its actual effect.") quoting *Miller Electric Pump & Plumbing,* 334 NLRB 824, 824 (2001).

We note that there is a statement on the last page of the DRP, under the heading "Not an Employment Contract/Exclusive Remedy," that states this "Program will not prevent you from filing a charge with any state or federal administrative agency." An identical statement is also included on the second page of the Agreement, under the paragraph entitled "NOT AN EMPLOYMENT CONTRACT." For the reasons set forth in *The Rose Group d/b/a Applebee's Restaurant*, 363 NLRB No. 75, slip op. at 1 fn. 1, slip op. at 10 (2015), and *PJ Cheese*, above, slip op. at 2 fn. 6, both of which involved the same language, we disagree with our dissenting colleague that, in context, the inclusion of this language would eliminate any reasonable uncertainty about the right of employees to file charges with the Board to resolve claims specifically covered by the mandatory arbitration agreement described as the exclusive means for dispute resolution.

Finally, for the reasons stated in *Ralph's Grocery Co.*, 363 NLRB 128 (2016), we disagree with our dissenting colleague's argument that the DRP would be lawful even if it requires employees to arbitrate their

We reach a different finding as to the complaint's additional allegation that the Respondent unlawfully "enforced" the DRP by requiring applicants to sign the DRP. There is no claim or evidence that the Respondent ever sought to enforce the DRP in a judicial proceeding. We shall therefore dismiss the unlawful enforcement allegation. *Logisticare Solutions, Inc., a subsidiary of Providence Service Corp.*, 363 NLRB No. 85, slip op at 1 fn. 2 (2015).

Accordingly, the General Counsel's Motion for Summary Judgment is granted in part.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business in Buffalo, New York (the Respondent's facility), has been engaged in the retail sale of food and related products.

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations described above, derives gross revenues in excess of $500,000.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the Respondent has maintained a "Dispute Resolution Program" (the DRP) that employee applicants are required to sign as a condition of employment. As described above, the DRP requires employees to request arbitration for work-related problems that involve legally protected rights, including all discrimination, whistleblower, and retaliation claims under Federal, State, or local law. The Program also states that the "employee and company each agree, that there shall be no class or collective action arising from any employee's claim(s), and each employee may only maintain a claim under this plan on an individual basis and may not participate in a class or collective action."

We find the Respondent has violated Section 8(a)(1) of the Act by maintaining, as a condition of employment, a mandatory arbitration agreement, which prohibits employees from engaging in protected concerted activities, including class or collective action addressing terms and conditions of employment; and which leads employees to reasonably believe that they are prohibited from filing and pursuing charges with the Board.

unfair labor practice claims because, in his view, it does not restrict employees' right to file charges with the Board.

CONCLUSIONS OF LAW

1. The Respondent, Great Lakes Restaurant Management, LLC, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. By maintaining a mandatory arbitration agreement, which prohibits employees from engaging in protected concerted activities, including class or collective action addressing terms and conditions of employment; and which leads employees to reasonably believe that they are prohibited from filing and pursuing charges with the Board, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. The Respondent has not violated the Act in any other respect.

REMEDY

Having found that the Respondent has violated Section 8(a)(1) of the Act, we shall order it to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act. Specifically, we shall order the Respondent to rescind or revise the mandatory arbitration agreement; notify all applicants and current and former employees who were required to sign or otherwise become bound to the mandatory arbitration agreement about the rescission or revision and, if revised, provide them a copy of the revised agreement; and post a notice at all locations where the agreement was in effect. See *D. R. Horton*, above, slip op. at 13.

ORDER

The National Labor Relations Board orders that the Respondent, Great Lakes Restaurant Management, LLC, Buffalo, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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

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

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

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

(a) Rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration agreement does not bar or restrict employees' right to file charges with the National Labor Relations Board, nor constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

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

(c) Within 14 days after service by the Region, post at its Buffalo, New York facility, and at all other facilities where the unlawful arbitration agreement is or has been in effect, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 3, 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 July 1, 2014.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 3 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, dissenting in part.:

In this case, my colleagues grant the General Counsel's motion for summary judgment in relevant part and find that the Respondent's Dispute Resolution Program ("DRP"), including the "Agreement and Receipt for Dispute Resolution Program," violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the DRP waives the right to participate in class or collective actions regarding non-NLRA employment claims. I respectfully dissent from this ruling and finding for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*[1] Additionally, my colleagues grant the General Counsel's motion for summary judgment in relevant part and find that the DRP violates Section 8(a)(1) because employees would reasonably construe it to prohibit NLRB charge filing. I respectfully dissent from this ruling and finding for the reasons stated in my separate opinions in *The Rose Group d/b/a Applebee's Restaurant*[2] and *GameStop Corp., GameStop Inc., Sunrise Publications, Inc., and GameStop Texas Ltd. (L.P.).*[3] Although I agree that there are no genuine issues of material fact warranting a hearing,[4] I believe the General Counsel is not entitled to judgment as a matter of

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

[1] 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 denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

[2] 363 NLRB No. 75, slip op. at 3–5 (2015) (Member Miscimarra, concurring in part and dissenting in part).

[3] 363 NLRB No. 89, slip op. at 4–5 (2015) (Member Miscimarra, concurring in part and dissenting in part).

[4] I agree with my colleagues that the Respondent's contention that two employees filed charges with the Board does not create a dispute of material fact as to whether, under the applicable objective standard, employees would *reasonably* construe the DRP to prohibit NLRB charge filing.

law on either of these complaint allegations. To the contrary, the *Respondent* is entitled to judgment as a matter of law. Accordingly, I would enter summary judgment for the Respondent and against the General Counsel and dismiss the complaint.[5]

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.[6] However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class-type treatment of non-NLRA claims. To the contrary, as discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."[7] 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;[8] (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;[9] and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).[10] 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.

Applying the test set forth in *Martin Luther Memorial Home, Inc. d/b/a Lutheran Heritage Village-Livonia*,[11] my colleagues also find that the DRP violates Section 8(a)(1) of the Act on the basis that employees would reasonably construe it to prohibit them from filing charges with the NLRB.[12] I disagree and would deny the General

[5] It is well settled that summary judgment may be entered in favor of the party against whom the motion is filed even though that party has not filed a cross-motion for summary judgment. See 10A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 2720, at 347 (3d ed. 1998) ("The weight of authority . . . is that summary judgment may be rendered in favor of the opposing party even though the opponent has made no formal cross-motion under [Federal] Rule [of Civil Procedure] 56.") (citing cases). I join my colleagues in denying summary judgment on the complaint allegation that the Respondent unlawfully enforced the DRP.

[6] 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 *200 East 81st Restaurant corp. d/b/a Beyoglu,* 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting).

[7] *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).

[8] 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, Jackson, Miss. 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.").

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

[10] 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).

[11] 343 NLRB 646 (2004).

[12] I have expressed my disagreement with the current Board standard regarding alleged overly broad rules and policies, set forth as the first prong of the *Lutheran Heritage* standard, under which rules and policies are deemed unlawful, even if they do not explicitly restrict protected activity and are not applied against or promulgated in response to

Counsel's motion for summary judgment on this complaint allegation as well.

The DRP broadly requires arbitration of all legal claims, including those arising under the NLRA,[13] but I do not believe the scope of the DRP makes it violative of the Act. As I explained in *Applebee's Restaurant*, above, and *GameStop Corp.*, above, decades of case law—including the Board's recent decision in *Babcock & Wilcox Construction Co., Inc.*, 361 NLRB No. 132 (2014)—establish that parties may lawfully agree to submit NLRA claims to arbitration, provided they do not otherwise interfere with NLRB charge filing.[14] Such an agreement does not unlawfully prohibit the filing of charges with the NLRB, particularly when the right to do so is expressly stated in the agreement itself. In this case, the DRP and the separate "Agreement and Receipt for Dispute Resolution Program" each expressly provide that it "will not prevent you from filing a charge with any state or federal government administrative agency." This language eliminates any possible uncertainty about the right of employees to file charges with the Board.[15]

Accordingly, for the reasons set forth above, I respectfully dissent in part from the majority's decision. I would deny the General Counsel's motion for summary judgment. Moreover, since there are no issues of material fact warranting a hearing, and since I believe the Respondent is entitled to judgment as a matter of law, I would enter summary judgment for the Respondent and dismiss the complaint.

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

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.

such activity, where "employees would reasonably construe the language to prohibit Section 7 activity." 343 NLRB at 647. See, e.g., *Lily Transportation Corp.*, 362 NLRB No. 54, slip op. at 1 fn. 3 (2015); *Conagra Foods, Inc.*, 361 NLRB No. 113, slip op. at 8 fn. 2 (2014); *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 10 fn. 3 (2014), affd. sub nom. *Three D, LLC v. NLRB*, Nos. 14-3284, -3814, 2015 WL 6161477 (2d Cir. Oct. 21, 2015). I advocate a reexamination of this aspect of *Lutheran Heritage* in an appropriate future case.

[13] The DRP states that "[c]laims and disputes subject to arbitration include all those legal claims you may now or in the future have against the Company (and its successors or assigns) or against its officers, directors, shareholders, employees or agents, . . . except as expressly excluded under the 'Claims Not Subject to Arbitration' section below." An illustrative list of legal claims subject to arbitration includes "claims for a violation of any . . . non-criminal federal . . . law [or] statute." The DRP's listed exclusions under "Claims Not Subject to Arbitration" do not mention claims arising under the NLRA.

[14] Although NLRA claims may lawfully be made subject to arbitration, the Board in all cases retains the right, under Sec. 10(a) of the Act, to independently review any allegations of unfair labor practices made in a charge filed with the Board. See *GameStop Corp.*, 363 NLRB No. 89, slip op. at 4–5 fn. 10 (Member Miscimarra, concurring in part and dissenting in part); *Applebee's Restaurant*, 363 NLRB No. 75, slip op. at 3 & fn. 11 (Member Miscimarra, concurring in part and dissenting in part).

[15] See *Applebee's Restaurant*, above, slip op. at 4 (Member Miscimarra, concurring in part and dissenting in part) (finding no interference with NLRB charge filing based on virtually identical language).

My colleagues reject this rationale based on *PJ Cheese, Inc.*, 362 NLRB No. 177 (2015), and *Applebee's Restaurant*, above. Similar to the instant case, in *PJ Cheese* and *Applebee's Restaurant* the employer maintained a Dispute Resolution Program (the DRP) and also required employees to sign a separate agreement (titled, in *PJ Cheese*, "Agreement for Receipt for Dispute Resolution Program," 362 NLRB No. 177, slip op. at 2, and in *Applebee's Restaurant*, "Agreement and Receipt for Dispute Resolution Program," 363 NLRB No. 75, slip op. at 1 fn. 1). And like the DRP at issue here, the DRP in both *PJ Cheese* and *Applebee's Restaurant* stated that it "will not prevent you from filing a charge with any state or federal administrative agency." 362 NLRB No. 177, slip op. at 2 fn. 6; 363 NLRB No. 75, slip op. at 1 fn. 1. However, in this case, the DRP and separate "Agreement and Receipt for Dispute Resolution Program" *each* State that it "will not prevent you from filing a charge with any state or federal government administrative agency," whereas in *PJ Cheese* and *Applebee's Restaurant*, the parallel language appeared *only* in the DRP but was omitted from the separate agreement. 362 NLRB No. 177, slip op. at 2 fn. 6; 363 NLRB No. 75, slip op. at 4 (Member Miscimarra, concurring in part and dissenting in part). The majority in *PJ Cheese* found this difference between the two documents "create[d] an ambiguity" that precluded the employer from relying on the language of the DRP as a defense, 362 NLRB No. 177, slip op. at 2 fn. 6, and the majority in *Applebee's Restaurant* cited and relied on *PJ Cheese*, 363 NLRB No. 75, slip op. at 1 fn. 1. That rationale does not apply here.

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

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

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

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

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

GREAT LAKES RESTAURANT MANAGEMENT, LLC

The Board's decision can be found at www.nlrb.gov/case/03-CA-143685 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.