UnitedHealth Group, Inc. and UnitedHealth Care Services Inc. *and* Carlos Aviles, Seynabou Ba, Cherrie Blackman, Siro Brenes, Robert Burnett, Ruben Dejesus, Dennis Edwards, Victor Feliciano, Maria Fonseca, Claudie Foutika, Lisandro Galvan, Rosa Garcia, Mohamed Haque, Danielle Herard, Monika Krynska, Tamika Lewis, Fiordalisa Marte, Setou Mcclendon, Carmelita Ratna, Victor Serrano, Carmilo Suarez, Janira Torres, and Mirrian Zelaya. Case 02–CA–118724

February 25, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On August 5, 2014, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondents filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondents filed a reply brief. The General Counsel additionally filed a cross-exception.

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

Applying the Board's decision in *D. R. Horton, Inc.,* 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), the judge found that the Respondents violated Section 8(a)(1) of the Act by maintaining and enforcing an arbitration policy that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving 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*.

The Board has considered the decision and the record in light of the exceptions and briefs. Based on the judge's application of *D. R. Horton* and our subsequent decision in *Murphy Oil*, we affirm the judge's rulings, findings, and conclusions[1] as modified below, and we adopt the judge's recommended Order as modified and set forth in full below.[2]

The judge found that the Respondents violated Section 8(a)(1) by enforcing their unlawful arbitration policy in two lawsuits filed in federal district court: *Torres v. United Healthcare Services, Inc.*, 920 F.Supp.2d 368 (E.D.N.Y. 2013) (*Torres*), and *Litvinov v. UnitedHealth Group, Inc.*, No. 13 Civ. 8541 (KBF), 2014 WL 1054394 (S.D.N.Y. Mar. 11, 2014) (*Litvinov*). The Respondents contend that this finding is erroneous because (i) the complaint did not allege unlawful enforcement, and (ii) even assuming unlawful enforcement was alleged, the allegation is time-barred as to *Torres*. As explained below, we agree that Section 10(b) precludes finding that the Respondents unlawfully enforced the arbitration policy in *Torres*. The Respondents are also correct that the complaint did not allege an enforcement violation. Nonetheless, we affirm the judge's finding that the Respondents unlawfully enforced the arbitration policy in *Litvinov* because the enforcement issue is "closely connected to the subject matter of the complaint and has been fully litigated."[3]

In *Torres*, the Respondents filed a motion to compel arbitration on June 22, 2012, which the court granted on February 1, 2013. The plaintiffs appealed, but the Second Circuit issued an order granting the parties' stipu-

[1] The Respondents argue that the complaint's maintenance allegation is time-barred by Sec. 10(b) of the Act because the initial unfair labor practice charge was filed and served more than 6 months after any of the Charging Parties signed and became subject to the arbitration policy at issue here. We reject this argument, as did the judge, because the Respondents continued to maintain the unlawful arbitration policy during the 6-month period preceding the filing of the initial charge. The Board has long held under these circumstances that maintenance of an unlawful workplace rule, such as the Respondents' arbitration policy, constitutes a continuing violation that is not time-barred by Sec. 10(b). See *PJ Cheese, Inc.*, 362 NLRB No. 177, slip op. at 1 (2015); *The Neiman Marcus Group, Inc.*, 362 NLRB No. 157, slip op. at 2 & fn. 6 (2015); *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 2 & fn. 7 (2015).

The Respondents argue that their arbitration policy includes an exemption allowing employees to file charges with administrative agencies, including the Board, and thus does not, as in *D. R. Horton,* unlawfully prohibit them from collectively pursuing litigation of employment claims in all forums. In support of its argument, the Respondents cite *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053–1054 (8th Cir. 2013), in which the court stated, in dicta, that the arbitration agreement there did not bar all concerted employee activity in pursuit of employment claims because the agreement permitted employees to file charges with administrative agencies that could file suit on behalf of a class of employees. We reject this argument for the reasons set forth in *SolarCity Corp.*, 363 NLRB No. 83 (2015).

[2] The parties stipulated that "any order . . . shall apply equally to Respondents and all of their subsidiaries to which the Arbitration Policy applies." The General Counsel cross-excepts to the judge's failure to provide that all the Respondents' subsidiaries to which the arbitration policy applies are subject to the Order. Consistent with the parties' stipulation, we grant this unopposed cross-exception.

We shall modify the judge's recommended Order to conform to our findings and the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

[3] *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

lated withdrawal of the appeal on May 17, 2013.[4] The initial Board charge was filed and served more than 6 months later on December 10, 2013. Thus, the last date on which enforcement efforts remained pending in *Torres*—May 17, 2013—was outside 10(b)'s 6-month limitations period. Accordingly, we are precluded from finding that the Respondents unlawfully enforced their arbitration policy in *Torres*. Cf. *Ross Stores, Inc.*, 363 NLRB No. 79 (2015) (finding allegation that employer violated the Act by enforcing its unlawful arbitration policy timely, where employer filed motion to compel arbitration outside the 6-month limitations period but continued to litigate its motion within the 6-month limitations period).

In *Litvinov*, the Respondents filed a motion to compel arbitration on February 12, 2014. Again, the charge was filed December 10, 2013; the complaint issued January 31, 2014.[5] Neither the charge nor the complaint alleged that the Respondents unlawfully enforced their arbitration policy in *Litvinov*. Indeed, they could not have so alleged, given that the filing of the motion to compel arbitration in *Litvinov* postdated the charge and complaint. But "[i]t is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales*, supra; see also *SNE Enterprises, Inc.,* 347 NLRB 472, 473, 476, 481 (2006) (finding and remedying violation that postdated the charge and complaint and thus was alleged in neither), enfd. 257 Fed. Appx. 642 (4th Cir. 2007). The complaint alleged that the Respondents have maintained an unlawful arbitration policy. Further, the enforcement violation found by the judge flows from, and depends entirely on, the determination whether the maintenance of the arbitration policy enforced in *Litvinov* was unlawful. Consequently, the unlawful enforcement issue is closely connected to the complaint's unlawful maintenance allegation. Moreover, we find the enforcement issue was fully litigated. The Respondents stipulated that they filed the motion to dismiss and to compel individual arbitration in *Litvinov* pursuant to their arbitration policy. See *SNE Enterprises*, 347 NLRB at 473 (unalleged issue fully litigated where respondent effectively admitted the dispositive facts). Accordingly, we find that, under *Pergament*, the unlawful enforcement issue is properly before us. As the Act clearly prohibits an employer from enforcing an unlawful arbitration policy by filing a motion to compel arbitration based on that policy, we find that the Respondents violated Section 8(a)(1) when they moved to compel arbitration in *Litvinov*.[6] See, e.g., *Murphy Oil*, 361 NLRB No. 72, slip op. at 19–21.

[4] *Torres v. United Healthcare Services, Inc.*, Docket No. 13-707 (2d Cir. May 17, 2013) (available on PACER).

[5] An amended charge was filed April 11, 2014, but it did not allege unlawful enforcement of the Respondents' arbitration policy. The General Counsel did not issue an amended complaint.

[6] As in *Murphy Oil*, supra, slip op. at 21–22, because *Litvinov* has been dismissed, we find it unnecessary to order the Respondents to remedy this enforcement violation by notifying the court that it no longer opposes the lawsuit on the basis of its unlawful arbitration policy. However, consistent with our decision in *Murphy Oil*, supra, slip op. at 21, we amend the judge's remedy and shall order the Respondents to reimburse Maxim Litvinov, Charging Party Tamika Lewis, and any other plaintiffs who participated in *Litvinov* for all reasonable expenses and legal fees, with interest, incurred in opposing the Respondents' unlawful motion in United States District Court to compel individual arbitration of their class or collective claims. See *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 NLRB 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. 873 F.2d 230 (3d Cir. 1992).

Our dissenting colleague, relying on his dissenting position in *Murphy Oil*, 361 NLRB No. 72, slip op. at 22–35, would find that the Respondents' arbitration policy does not violate Sec. 8(a)(1). He observes that the Act does not "dictate" any particular procedures for the litigation of non-NLRA claims, and "creates no substantive right for employees to insist on class-type treatment" of such claims. This is all surely correct, as the Board has previously explained in *Murphy Oil*, supra, slip op. at 2, and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 & fn. 2. But what our colleague ignores is that the Act "does create a right to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint." *Murphy Oil*, supra, slip op. at 2 (emphasis in original). The Respondents' 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 concerted activity. See *Murphy Oil*, supra, slip op. at 18; *Bristol Farms*, supra, slip op. at 2. Nor is he correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. See *Murphy Oil*, supra, slip op. at 17–18; *Bristol Farms*, supra, slip op. at 2.

We also reject the position of our dissenting colleague that the Respondents' motions to compel arbitration were protected by the First Amendment's Petition Clause. In *Bill Johnson's Restaurants v. NLRB*, 461 U.S. at 747, 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 that have the illegal objective of limiting employees' Sec. 7 rights and enforcing an unlawful contractual provision (such as the Respondents' motion to compel arbitration in *Litvinov*), even if the litigation was otherwise meritorious or reasonable. See *Murphy Oil*, supra, slip op. at 20–21; *Convergys Corp.*, 363 NLRB No. 51, slip op. at 2 fn. 5 (2015).

ORDER

The National Labor Relations Board orders that the Respondents, UnitedHealth Group, Inc. and UnitedHealth Care Services Inc., New York, New York, their officers, agents, successors, and assigns, and the Respondents' subsidiaries to which the UnitedHealth Group Employment Arbitration Policy applies, shall

1. Cease and desist from

(a) 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.

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

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

(a) Rescind the mandatory arbitration policy in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration policy does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

(b) Notify all current and former employees who were required to sign or otherwise become bound to 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) In the manner set forth in this decision, reimburse Maxim Litvinov, Tamika Lewis, and any other plaintiffs for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing the Respondents' motion to compel individual arbitration and dismiss the complaint in *Litvinov v. UnitedHealth Group, Inc.*, No. 13 Civ. 8541 (KBF), 2014 WL 1054394 (S.D.N.Y. Mar. 11, 2014).

(d) Within 14 days after service by the Region, post at their offices nationwide where the arbitration policy is or has been in effect copies of the attached notice marked "Appendix."[7] Copies of the notices, on forms provided by the Regional Director for Region 2, after being signed by the Respondents' authorized representative, shall be posted by the Respondents 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 Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondents have gone out of business or closed the facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since June 10, 2013.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. February 25, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

In this case, my colleagues find that the Respondents' Arbitration Policy (the Policy) violates Section 8(a)(1) of the National Labor Relations Act (the Act or the NLRA) because the Policy waives the right to participate in class or collective actions regarding non-NLRA employment claims. Employees who had signed the Policy filed two collective-action lawsuits against the Respondents: *Torres v. United Healthcare Services, Inc.*, 920 F.Supp.2d 368 (E.D.N.Y. 2013) (*Torres*), and *Litvinov v. UnitedHealth Group, Inc.*, No. 13 Civ. 8541 (KBF), 2014 WL 1054394 (S.D.N.Y. Mar. 11, 2014) (*Litvinov*). The Respondents filed motions to compel arbitration and dismiss the complaints in both cases, which the courts granted. Based on Section 10(b), my colleagues find the Respondents did not violate Section 8(a)(1) by enforcing the Policy in *Torres*. My colleagues also find that although the complaint did not allege an enforcement violation, this issue was closely connected to the complaint's maintenance allegation and has been fully litigated. Accordingly, they find the Respondents did violate Section 8(a)(1) by enforcing the Policy in *Litvinov*. Even assuming that finding both enforcement violations would be consistent with Section 10(b) and due process, I dissent

[7] 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."

from my colleagues' findings that the Respondents' Policy and its enforcement in the *Litvinov* lawsuit was unlawful and concur in finding that its enforcement in the *Torres* lawsuit was lawful for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc*.[1]

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.[2] 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."[3] 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;[4] (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;[5] and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).[6] 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.[7]

Because I believe the Respondents' Policy was lawful under the NLRA, I would find it was similarly lawful for the Respondents to file motions in Federal district court seeking to enforce the Policy. It is relevant that the district courts that had jurisdiction over the non-NLRA claims granted the Respondents' motions to compel arbitration. That the Respondents' motions were reasonably based is also supported by court decisions that have en-

[1] *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015).

[2] 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).

[3] *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).

[4] 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.").

[5] 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*, 808 F.3d 1013 (5th Cir. 2015); *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); but see *Totten v. Kellogg Brown & Root, LLC*, No. ED CV 14-1766 DMG (DTBx), 2016 WL 316019 (C.D. Cal. Jan. 22, 2016).

[6] 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).

[7] Because I disagree with the Board's decisions in *Murphy Oil,* above and *D. R. Horton, Inc.,* 357 NLRB 2277 (2012), enf. denied in pertinent part 737 F.3d 344 (5th Cir. 2013), and I believe the NLRA does not render unlawful arbitration agreements that provide for the waiver of class-type litigation of non-NLRA claims, I find it unnecessary to reach whether such agreements should independently be deemed lawful to the extent they "leave[] open a judicial forum for class and collective claims," *D. R. Horton*, 357 NLRB at 2288, by permitting the filing of complaints with administrative agencies that, in turn, may file class- or collective-action lawsuits. See *Owen v. Bristol Care, Inc.,* 702 F.3d 1050 (8th Cir. 2013).

forced similar agreements.[8] 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."[9] I also believe that any Board finding of a violation based on the Respondents' meritorious federal court motions to compel arbitration would improperly risk infringing on the Respondents' 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 Respondents to reimburse Tamika Lewis and any other plaintiffs for their attorneys' fees in the circumstances presented here. *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 35.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. February 25, 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.

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 employment-related 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 policy 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.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the mandatory arbitration policy in any 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 reimburse Maxim Litvinov, Tamika Lewis, and any other plaintiffs in *Litvinov v. UnitedHealth Group, Inc.*, No. 13 Civ. 8541 (KBF), 2014 WL 1054394 (S.D.N.Y. Mar. 11, 2014), for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing our motion to dismiss their collective lawsuit and compel individual arbitration.

UNITEDHEALTH GROUP, INC. AND
UNITEDHEALTH CARE SERVICES INC.

The Board's decision can be found at http://www.nlrb.gov/case/02-CA-118724 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.

[8] See, e.g., *Murphy Oil USA v. NLRB,* above; *Johnmohammadi v. Bloomingdale's, Inc.,* 755 F.3d 1072 (9th Cir. 2014); *D. R. Horton v. NLRB*, above; *Owen v. Bristol Care,* above; *Sutherland v. Ernst & Young LLP,* 726 F.3d 290 (2d Cir. 2013).

[9] *Murphy Oil USA v. NLRB,* above at fn. 6.

Julie Polakoski-Rennie, Esq., for the the General Counsel.
Peter A. Walker, Esq., Christopher H. Lowe, Esq., and *Lori M. Meyers, Esq. (Seyfarth Shaw LLP),* for the Respondent.

DECISION

RAYMOND P. GREEN, Administrative Law Judge. This case was presented to me by way of a stipulated record.[1] The charge was filed by Outten & Golden LLP, counsel for the Charging Parties named above in the caption on December 10, 2013, and served on December 11, 2013. The amended charge was filed on April 11, 2014, and served on April 16, 2014. The complaint was issued by the Regional Director on January 31, 2014.

FINDINGS AND CONCLUSIONS

I. JURISDICTION

The Respondents admit and I find that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[2]

II. THE ALLEGED UNFAIR LABOR PRACTICE

The stipulated facts are as follows:

Since at least September 2007, the Respondents have promulgated and maintained individual arbitration agreements entitled "UnitedHealth Group Employment Arbitration Policy" with its current and former employees and the current and former employees or its subsidiaries. A copy of an exemplar agreement, at times referred to herein as the Arbitration Agreement, is attached to the Stipulation as Exhibit G.

In pertinent part, the Arbitration Policy as set forth in Exhibit G to the Stipulation; this being the document signed by Carlos J Aviles on April 3, 2012, states:

> Statement of Intent
> UnitedHealth Group… acknowledges that disagreements may arise between an individual employee and UnitedHealth Group or between employees in a context that involves UnitedHealth Group. UnitedHealth Group believes that the resolution of such disagreements is best accomplished through internal dispute resolution (IDR) and where that fails by arbitration administered through the American Arbitration Association (AAA)….
>
> This policy is a binding contract between UnitedHealth Group and its employees. **Acceptance of employment or continuation of employment with UnitedHealth Group is deemed to be acceptance of this Policy.** However, this Policy is not a promise that employment will continue for any specified period of time or end only under certain conditions. Employment at UnitedHealth Group is a voluntary (at will) relationship existing for no definite period of time and this Policy does not change that relationship
>
> Scope of Policy
> The agreement between each individual employee and UnitedHealth Group to be bound by the Policy creates a contract requiring both parties to resolve most employment-related disputes (excluded disputes are listed below) that are based on a legal claim through final and binding arbitration. Arbitration is the exclusive forum for the resolution of such disputes and the parties mutually waive their right to a trial before a judge or jury in federal or state court in favor of arbitration under the Policy.
>
> The disputes covered by this Policy include any dispute between an employee and any other person where (1) the employee seeks to hold UnitedHealth Group liable on account of the other person's conduct, or (2) the other person is also covered by this Policy and the dispute arises from or relates to employment, including termination of employment with UnitedHealth Group. The disputes covered under the Policy also include any dispute UnitedHealth Group might have with a current or former employee which arises or relates to employment.
>
> . . . .
>
> A dispute is based on a legal claim and is subject to this Policy if it arises from or involves a claim under any federal, state or local statute, ordinance, regulation or common law doctrine regarding or relating to employment discrimination, terms and conditions of employment, or termination of employment including, but not limited to the following: Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act and all applicable amendments and regulations, state human rights and non-discrimination laws; whistleblower or retaliation claims, breach of contract, promissory estoppels, or any other contract claim, and defamation, employment negligence, or any other tort claim. Claims excluded from arbitration under the Policy are claims for severance benefits under the UnitedHealth Group Severance Pay Plan, claims for benefits under UnitedHealth Group other ERISA benefit plans and claims for benefits under UnitedHealth Group's Short-Term Disability Plan. A separate arbitration policy applies to certain of these benefit-related claims. . . . .[3]
>
> Any dispute covered by this policy will be arbitrated on an individual basis. No dispute between an employee and UnitedHealth group may be consolidated or joined with a dispute

[1] By entering into the Stipulation, the parties agreed that the facts contained therein are true, albeit the parties do not concede the relevance of each fact recited. Each party reserved the right to make objections to the relevance of any fact stated.

[2] The Respondents and the General Counsel reserved their respective positions as to whether the Respondents and any subsidiaries applying the UnitedHealth Group Employment Arbitration Policy are or are not joint employers. They agree that in light of the stipulated record, it is unnecessary to litigate this issue or make any findings of fact or conclusions of law as to it.

[3] Exh. H to the Stipulation which is entitled "Employment Arbitration Policy" indicates that its effective date is October 2, 1995. It differs in some respects from Exh. G which was executed in 2013 by an employee. Among other things, it excludes from mandatory arbitration a number of claim types that are not excluded in Exh. G. For example it excludes from mandatory arbitration, inter alia, claims under Title VII of the Civil Rights Act of 1964, or any tort related to or arising out of sexual assault or harassment, false imprisonment claims, negligent hiring claims and claims arising pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act.

> between any other employee and UnitedHealth group, nor may an individual employee seek to bring his/her dispute on behalf of other employees as a class or collective action. Any arbitration ruling by an arbitrator consolidating the disputes of two or more employees or allowing class or collective action arbitration would be contrary to the intent of this Policy and would be subject to immediate judicial review.
>
> This Policy does not preclude an employee from filing a claim or charge with a governmental administrative agency, such as the National Labor Relations Board, the Department of Labor, and the Equal Employment Opportunity Commission, or from filing a workers' compensation or unemployment compensation claim in a statutorily specified forum In addition, this Policy does not preclude either an employee or UnitedHealth Group from seeking emergency or temporary injunctive relief in a court of law in accordance with applicable law. However, after the court has issued a ruling concerning the emergency or temporary injunctive relief, the employee and UnitedHealth Group are required to submit the dispute to arbitration pursuant to this Policy.

The Policy goes on to describe the procedures relating to the arbitration process. For example, it permits either side to compel pretrial disclosure in the form of interrogatories, requests for the production of documents, the taking of depositions, and the requirement for submission to mental and physical examinations. It also provides for the filing of posthearing briefs. Thus, in substantial respects, the procedure outlined in the Policy mimics that of a civil trial held in a Federal or State court. And unless we are exaggerating the knowledge or skill set of lawyers, we can assume that having competent legal counsel would be advisable for any individual who seeks to utilize this procedure.

As to costs, the Policy basically allows an individual who files with the AAA to pay only a $25 filing fee. In the event that the arbitration is initiated by the Employer, the Policy states that it will pay 100 percent of the administrative fees.[4] It further states (a) that expenses of witnesses for either side shall be paid by the party requiring the presence of such witness; and (b) that each side shall pay its own legal fees and expenses, except where such legal fees and expenses may be awarded under applicable law. The Policy goes on to state that all other expenses (except Postponement Fees or Additional Hearing Fees resulting from the actions or inactions of the employee or employee's representative), of the arbitration, such as required travel and other expenses of the arbitrator (including any witness produced at the direction of the arbitrator), and the expenses of a representative of AAA, if any, shall be paid completely by UnitedHealth Group. It goes on to state that if the arbitrator finds that either party's demand for arbitration is frivolous, or vexatious, or not filed in good faith, he may require the offending party to reimburse the other party for the arbitrator's expenses. Written in a manner perhaps understandable by persons having a legal degree, I don't think that this section of the Policy actually states or describes who will be responsible for paying the arbitrator's fee, typically at about a $1000 per day. (Expenses are not the same thing as fees.)

I don't know the wage scales of the employees who are required to sign this document as a condition of retaining their jobs, or the wage scales of those individuals who are the Charging Parties in this case. But, it seems obvious to me that unless they are highly paid individuals, such as high-level or senior-level managers, having annual earnings of at least six figures, the cost structure of the Policy would clearly place employees at a substantial disadvantage vis-a-vis the company, even assuming that such employee would even be able to pay for legal representation. As such, it is probable that many employees if they were compelled to arbitrate, on a nonclass basis, their employment-related claims, including wage and hour claims under Federal or State statutes, they would find themselves effectively precluded from vindicating statutory rights through nongovernmentally initiated legal action.

Nevertheless, considerations of cost or equity may not be a relevant consideration and in this respect, the Respondents cite *American Express Co. v. Italian Colors Rest.,* U.S., No. 12-133, 6/20/13, in which the Supreme Court held that a class-action waiver in a commercial arbitration agreement between American Express Co. and merchants accepting the company's credit cards is enforceable under the Federal Arbitration Act *even if individual arbitration claims of alleged antitrust violations would be too expensive to pursue*. The Court's majority opinion stated that the Federal Arbitration Act does not permit a court to invalidate a contractual waiver of class arbitration because a plaintiff's costs in individually arbitrating a Federal statutory claim would exceed any potential recovery.

Since at least September 2007 and currently, the Respondents have required their employees and the employees of their subsidiaries to enter into the Arbitration Agreements described above.

The following employees are among those of Respondents employees who signed the Arbitration Agreement.

[4] If an employee or group of employees files a lawsuit and the employer seeks to have the lawsuit dismissed and to compel arbitration under this Policy, does this mean that it is the employer which is initiating the arbitration?

Name	Hire date	Termination date	Date Arbitration Agreement signed
Aviles, Carlos	04/02/12	02/07/13	04/03/12
Ba, Senynabou	01/31/11	06/22/11	02/23/11
Blackman, Cherrie	02/21/11	Active	02/21/11
Brenes, Siro	10/15/07	03/26/11	10/22/07
Burnett, Robert	09/27/10	07/25/13	10/07/10
Dejesus, Reuben	06/07/10	12/16/10	06/08/10
Edwards, Dennis	12/17/12	06/30/13	12/17/12
Feliciano, Victor	11/05/07	10/15/11	11/09/07
Fonseca, Maria	11/29/10	07/20/11	12/20/10
Foutika, Claudie	01/03/11	03/20/12	01/24/11
Galvan, Lisandro	10/17/11	08/09/12	11/11/11
Garcia, Rosa	02/11/13	07/12/13	03/04/13
Hague, Mohamed	01/02/08	05/13/08	01/02/08
Herard, Danielle	02/07/11	07/01/11	02/07/11
Krynska, Monika	04/08/13	11/18/13	04/08/13
Lewis, Tamika	12/17/12	05/19/13	12/17/12
Marte, Fiordalisa (nee Martinez)	09/24/07	12/17/08	10/02/07
McClendon, Sekou	12/17/12	04/28/13	12/17/12
Ratna, Carmelita	05/21/12	02/02/13	05/31/12
Serrano, Victor	08/17/09	05/29/10	09/09/09
Suarez, Camilo	11/06/12	06/22/13	11/14/12
Torres, Janira	08/03/09	10/27/11	08/22/09
Zelaya, Miriam	04/08/13	Active	04/08/13

There are more than 100,000 current and former employees of the Respondents and their subsidiaries who have been covered by the Arbitration Agreement. Since 2011, there have been approximately 2500 cases which have begun the individual dispute resolution and been resolved both prior to and at arbitration, including cases involving supervisors and managers who are not covered by the National Labor Relations Act.

On or about February 1, 2013, the Honorable Dennis R. Hurley issued a Memorandum Decision & Order compelling arbitration in *Torres v. United Healthcare Services, Inc*., 920 F.Supp.2d 368 (E.D.N.Y. 2013).

On or about December 2, 2013, Maxim Litvinov filed a class-action complaint in the United States District Court for the Southern District of New York alleging violations of the Fair Labor Standards Act (FLSA). This is captioned *Maxim Litvinov, on behalf of himself and all others similarly situated, against UnitedHealth Group Inc*., Case 13-Civ.08541-KBF.

On January 3, 2014, Tamika Lewis, an employee, filed a written consent with the United States District Court for the Southern District of New York, to join in the law suit filed by Litvinov, described above.

On February 12, 2014, UnitedHealth Care Group, Inc. filed a Motion with the United States District Court for the Southern District of New York in the above-described matter seeking to dismiss the claim of Litvinov and the one opt-in plaintiff, Lewis, and to compel them to arbitrate their claims individually pursuant to the terms of the Arbitration Agreement.

On or about March 11, 2014, the Honorable Katherine B. Forrest issued a Memorandum Decision & Order enforcing the Arbitration Agreement and compelling arbitration of the Litvinov suit. 2014 WL 1054394 (S.D.N.Y. March 11, 2014).

III. ANALYSIS

It should be kept in mind what is *not* being decided here. We are not being asked to decide what would happen if a group of employees or a single employee on behalf of a group, disavowed the arbitration agreement, asserting that because it has no finite duration, it is terminable at will by either side. Nor are we being asked to decide what would happen if employees who file a class-action lawsuit (or disavow the arbitration agreement before doing so), are discharged on that account. Could the employer in such circumstance declare that by filing, or expressing an intention to file a class-action lawsuit, the employees involved had breached their employment agreements and therefore could be discharged without violating Section 8(a)(1) of the Act?

The Respondents contend that the complaint is barred by the Statute of Limitations set forth in Section 10(b) of the Act. In this regard, it is noted that the Policy was initiated more than 6 months before the charge was filed. Also, all of the individual employees cited in the charge executed arbitration agreements more than 6 months prior to the filing of the charge.

Nevertheless, the complaint alleges and the Respondents concede that the arbitration policy is currently in force and effect. Indeed, the evidence here shows that after the filing of

the charge, and before the issuance of the complaint, the Respondents have successfully sought to enforce the policy by filing Motions in the Federal District Courts to compel arbitrations on an individual basis.

The complaint essentially alleges a "continuing" violation of the Act and the Board has consistently held that an agreement entered into outside the 10(b) period may be found to be unlawful if the provisions are unlawful and are being enforced within the 10(b) period. *Control Services, Inc.*, 305 NLRB 435 fn. 2 (1991), enfd. 961 F.2d 1569 (3d Cir. 1992); *Teamsters Local 293 (R. L. Lipton Distributing*), 311 NLRB 538, 539 (1993); and *Whiting Milk Corp*., 145 NLRB 1035, 1037–1038 (1964).

Indeed, the Board has held that even where an employer's published rules restricting union or concerted activity, were enacted and not enforced within the 10(b) period, it will violate the Act merely by maintaining such rules in existence. *The Carney Hospital*, 350 NLRB 627, 640 (2007).

The Respondents assert that the provisions of the Policy are not illegal because among other things, various Circuit Courts have ruled that substantially similar provisions are not violative of the NLRA. This presents a chicken and egg problem because it is the General Counsel's position that the provisions of the Policy are facially illegal and the Respondents' position is that they are not. Thus, the two questions are inextricably linked and if the General Counsel is correct, then the Respondents' 10(b) defense cannot prevail. But if the Respondents are correct on the merits, then it need not rely on Section 10(b).

The Respondents argue that because two Federal District Judges have already concluded that the arbitration agreements are valid under the Federal Arbitration Act, the Board is collaterally estopped from challenging that conclusion in this case. I don't agree.

For one thing, the Board was not a party in those cases and therefore it is not bound by the legal conclusions of those cases. In *Field Bridge Associates*, 306 NLRB 322 (1992), the Board stated:

> The Board adheres to the general rule that if the Government was not a party to the prior private litigation, it is not barred from litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully. *Allbritton Communications*, 271 NLRB 201, 202 fn. 4. . . . Underlying this rule is the long-recognized principle that "Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief. The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce." *Amalgamated Utility Workers v. Consolidated Edison Co*., 309 U.S. 261, 265 (1940). See also *National Licorice Co., v. NLRB,* 309 U.S. 362–3364 (1940). . . . Thus the Board, as a public agency asserting public rights should not be collaterally estopped by the resolution of private claims asserted by private parties. . . . In this case, the Board was not a party to the New York State Court proceedings. Accordingly, we decline to give them a preclusive effect.

The Respondents assert that Board could have been a party to the private actions filed by Litvinov and Torres and therefore should be estopped. It is legally possible for the Board, through its General Counsel, to intervene in a lawsuit having been filed in a State or Federal court of first impression. But that has occurred in exceptionally few instances and only in the most compelling of circumstances. There is nothing in the Statute which would require the Board to intervene in any private law suit which could impact on issues covered by the NLRA.

The Respondents contend that by trying to prevent them from seeking judicial enforcement of the arbitration and nonclass action agreements, the Board is violating the Respondents' First Amendment rights to petition to the Government. In this regard, the Respondents cite *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731–743 (1983), and *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002).[5]

The immediate question before the Supreme Court in *BE & K* was whether an unsuccessfully completed lawsuit could be the basis for the Board to find that an employer violated 8(a)(1) of the Act. In *BE & K,* the employer responded to a union's campaign and lawsuits against it by filing a lawsuit of its own. Ultimately, all of the counts in the employer's lawsuit were dismissed or withdrawn. After the BE & K's suit was concluded, two of the union-defendants filed charges with the NLRB contending that by filing and maintaining the lawsuit, BE & K had violated Section 8(a)(1). The Board found that the employer had violated the Act and ordered it to reimburse the unions for their attorney fees.

The Supreme Court unanimously invalidated the Board's standard for imposing unfair labor practice liability on employers who file lawsuits against unions. It concluded that even if a lawsuit was motivated by retaliatory reasons and even if it was ultimately unsuccessful, a lawsuit could *not* be grounds for an unfair labor practice if it had some reasonable basis. That is, the Court indicated that in order to have a reasonable basis, the plaintiff in such a lawsuit needs to only show that he is trying to stop conduct he reasonably believes is illegal. The standard set out by the Court was that the plaintiff's belief be "genuine both objectively and subjectively." The only possible exception is a lawsuit that is shown to constitute "sham litigation."[6]

Notwithstanding the above, the Supreme Court at footnote 5 in *Bill Johnson*, made what it described as an exception to the above-described rule.[7] The Court stated:

---

[5] Somewhat ironically, the Respondent's main point is that through private agreements, it should be allowed to require employees to forego their right to petition the courts.

[6] This concise description of the Court's decision may be a bit abrupt inasmuch as there were three separate opinions by the Court. Justice O'Connor wrote the opinion of the Court. Justice Breyer wrote a concurrence on behalf of himself and Justices Souter, Ginsberg, and Stevens. Justice Scalia wrote a concurrence on behalf of himself and Justice Thomas.

[7] There is no indication in *BE & K* that the Court intended to overrule or eliminate the *Bill Johnson* fn. 5

> It should be kept in mind that what is involved here is an employer's lawsuit that the federal law would not bar except for its allegedly retaliatory motivation. We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law. Petitioner concedes that the Board may enjoin these latter types of suits. . . . Nor could it be successfully argued otherwise for we have upheld Board orders enjoining unions from prosecuting court suits for enforcement of fines that could not lawfully be imposed under the Act, *Granite State Joint Board, Textile Workers Union*, 187 NLRB 636, 637, enforcement denied 446 F.2d 369, revd. 409 U.S. 213; *Booster Lodge No. 405* 185 NLRB 380, 385, enforced 459 F.2d 1143, affd. 412 U.S. 84, and this Court has concluded that, at the Board's request, a District Court may enjoin enforcement of a state-court injunction "where [the Board's] federal power pre-empts the field." *NLRB v Nash-Finch Co*., 404 U.S. 138, 144.[8]

So how should we read footnote 5?

There is a category of cases where an employer, by means of a lawsuit, has directly sought to prevent employees from having access to the Board's processes. In such cases, it is typically alleged that a person or persons have maliciously filed charges with the NLRB or have furnished false statements or affidavits to the agency. Such lawsuits are almost always without merit and should be preempted by the supremacy clause of the Constitution. While such suits would typically be baseless and motivated by retaliatory considerations, their mere filing would reasonably be expected to have a chilling effect on the right of people to have access to the Board's processes.[9] In other words, such a lawsuit is a direct attempt to prevent the Board from carrying out its statutory mandate and can be viewed as an attempt by a private party to nullify the Board's jurisdiction insofar as it affects that party. See for example *LP Enterprises,* 314 NLRB 580 (1994), and *Manno Electric, Inc.,* 321 NLRB 278 (1996).

There is another category of cases which, in my opinion, would fit within the footnote 5 exception. These involve cases where the underlying acts constitute unfair labor practices and the lawsuit is simply an attempt to enforce the underlying act. The cases cited by the Supreme Court in footnote 5, involved situations where a union was alleged to have violated Section 8(b)(1)(A) of the Act by fining employee/members and the lawsuits were simply the mechanism to enforce and collect the fines. Along equivalent lines there are cases where a union is charged with violating Section 8(b)(4) and (e) of the Act when it seeks to enforce a contract provision that is itself illegal under the hot cargo provisions of the Act. In such cases, as the underlying contract is either facially illegal or would be illegal as enforced, a lawsuit or grievance seeking to enforce such an illegal contract provision would itself be illegal under the footnote 5 exception of *Bill Johnson's*. Thus, in *Elevator Constructors (Long Elevator*), 289 NLRB 1095, (1988), the Board held that a union violated Section 8(b)(4)(ii)(A) by filing a grievance that was predicated upon a reading of the collective-bargaining agreement that, if successful, would have resulted in a de facto hot cargo clause. That is, had the grievance been successful and had it been enforced by a court, the order issued would have been one that was a violation of Section 8(e). The Board stated:

> Because we have concluded that the contract clause as construed by the Respondent would violate Section 8(e), we may properly find the pursuit of the grievance coercive, notwithstanding the Supreme Court's decision in *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731 (1983). Although holding that the Board could not enjoin, as an unfair labor practice, the lawsuit at issue in that case, the Court expressly noted that it was not dealing with a "suit that has an objective that is illegal under federal law." 461 U.S. at 737 fn. 5. See also *Teamsters Local 705 v. NLRB (Emery Air Freight*), 820 F.2d 448 (D.C. Cir. 1987) (distinguishing between having an unlawful motive in bringing a lawsuit and seeking to enforce an unlawful contract provision).

Finally, there are cases involving an attempt by an employer, via a lawsuit, to prohibit peaceful picketing or solicitation. Three cases discussing this type of situation are *Makro, Inc. and Renaissance PropertiesCo., d/b/a Loehmann's Plaza*, 305 NLRB 663 (1991), *Riesbeck Food Markets, Inc.*, 315 NLRB 940 (1994), enfd. denied 91 F.3d 132 (4th Cir. 1996), and *Be-Lo Stores*, 318 NLRB 1, 12 (1995), enfd. denied 126 F.3d 268 (4th Cir. 1997).

In *Loehmann's Plaza*, supra, the Board dealt with two related issues. The first was whether the respondent's demands that union representatives cease engaging in area standards picketing and handbilling on private property in front of entrances of the target employer at a shopping mall, was a violation of Section 8(a)(1). In finding a violation, the Board applied the balancing test of *Jean Country*, 291 NLRB 11 (1988), and concluded that although the area standards picketing and handbilling was not at the strong end of Section 7 rights, it was worthy of accommodation. In that case, the Board found that the union's alternative means of communicating its message was not reasonable.

The second issue in *Loehmann's Plaza*, was whether the respondent violated Section 8(a)(1) by filing a State court lawsuit seeking injunctive relief. The General Counsel contended that the filing of the lawsuit was an unfair labor practice because under footnote 5 of *Bill Johnson's,* the lawsuit was a preempted case and therefore excluded from the general principles of *Bill Johnson's*. After discussing the Supreme Court's decisions in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), and *International Longshoremen's Assn., AFL–*CIO *v. Davis*, 476 U.S. 380 (1986)

[8] In *NLRB v Nash-Finch Co.*, 404 U.S. 138 (1971), the Supreme Court held that the NLRB has implied authority to obtain a Federal court injunction to enjoin enforcement of a State court injunction regulating peaceful picketing by a union on preemption grounds.

[9] Consider the time, expense, and anxiety of defending even a frivolous lawsuit that is ultimately dismissed by a judge before a trial. One must file an answer; file and respond to pretrial motions; answer interrogatories; produce documents; and give testimony under oath in pretrial depositions. When one considers the scope of the pretrial questions that may be posed in a civil suit, one can see that being a defendant in a civil action is no small matter.

(both dealing with the issue of preemption and peaceful picketing), the Board concluded that unless and until the NLRB's General Counsel issues a complaint alleging as an unfair labor practice, the filing of a lawsuit seeking a remedy against peaceful picketing, that lawsuit cannot be considered to be preempted within the meaning of footnote 5 and therefore the complaint should be dismissed unless the General Counsel can show that the lawsuit was baseless *and* motivated by retaliatory reasons. (That is, the complaint must be evaluated under the general *Bill Johnson's* standards and not the footnote 5 exceptions.) On the other hand, the Board also concluded that once the General Counsel issues a complaint alleging that the lawsuit is an unfair labor practice, the respondent will violate the Act by continuing to prosecute the lawsuit, because it is now on notice that the subject matter of the lawsuit is preempted. The Board stated:

> A different analysis is warranted with respect to the Respondent's post-complaint pursuit of the state court lawsuit. The Respondent's prosecution of the suit during that time period need not be evaluated under *Bill Johnson's* because the suit was preempted and thus fell within the footnote 5 exception to the Court's decision. For the reasons stated below, we find that there is a sound basis for applying a different rule to a preempted lawsuit alleged to violate Section 8(a)(1) of the Act.

As illustrated by that case, a respondent pursuing a State court action seeking to enjoin alleged trespassatory union picketing has a right, without being initially preempted, to seek adjudication of its property rights. However, once the General Counsel decides to initiate a formal adjudicatory proceeding, the Board's jurisdiction is invoked and it becomes the exclusive forum for an adjudication of a respondent's property rights. Because at that point the State court tribunal "has no power to adjudicate the [preempted] subject matter," any attempt to continue the litigation necessarily amounts to pure harassment, i.e., an effort to subject the defendant or defendants in the lawsuit to litigation costs and burdens before a tribunal that indisputably lacks jurisdiction over the matter at that time. (Footnotes omitted.)

In *Riesbeck Food Markets*, 315 NLRB 940 (1994), enfd. denied 91 F.3d 132 *(*4th Cir. 1996), the Board dealt with a situation similar to that in *Loehmann's Plaza* and which involved, inter alia, allegations that the respondent violated Section 8(a)(1) by (1) denying access to private property by union pickets and handbillers, and (2) prosecuting a State lawsuit seeking to limit peaceful picketing and handbilling activity to public property. In that case, a Board majority concluded that where a lawsuit involves a matter which is preempted, the respondent "has an affirmative duty to take action to stay the state court proceedings following issuance of the Board complaint."

In *Be-Lo Stores*, 318 NLRB 1, 12 (1995), the Board found, among other things, that the respondent violated the Act by denying union nonemployee picketers access to private property in order to engage in solicitation and also violated the Act by maintaining a state trespass lawsuit after the General Counsel issued a complaint alleging that the denial of access was unlawful. Citing *Loehmann's Plaza*, the Board found that the continuation of the lawsuit, after the complaint was issued violated Section 8(a)(1) and ordered the respondent to reimburse the union for litigation expenses incurred in the State Court proceeding. On appeal, the court refused to enforce this aspect of the Board's Order. *Be-Lo Stores v. NLRB*, 126 F.3d 268 (4th Cir. 1997). In this regard, the court held that the respondent did not violate Section 8(a)(1) by denying access for solicitation and picketing and therefore the lawsuit seeking an injunction could not violate the Act.

It seems to me that the bottom line in all of this is that if the arbitration agreements that the Respondents have required employees to execute are illegal on their face, then an attempt to enforce those agreements through legal proceedings, would be a violation of Section 8(a)(1) of the Act and would fit into the footnote 5 exception in *Bill Johnson's*. And like the discussion of Section 10(b), we have the same chicken and egg problem. If the agreements are lawful, then a lawsuit to enforce them would be lawful. But if the agreements are ultimately construed to be unlawful, then a lawsuit to enforce them would not be protected by the Supreme Court decisions in *Bill Johnson's* and *BE & K*.

The General Counsel argues that the present case is controlled by the Board's decision in *D. R. Horton Inc*., 357 NLRB 2277 (2012), enf. denied 737 F.3d 344 (5th Cir. 2013). And if it was decided at a time when there was a proper quorum, then the General Counsel would be correct because notwithstanding contrary Circuit Court decisions, I am bound to follow the Board's view of the law until such time as it either changes its collective mind or is compelled to alter its view in light of a contrary decision by the Supreme Court. *Pathmark Stores, Inc.*, 342 NLRB 378 fn. 1 (2004); *Waco Inc*., 273 NLRB 746, 749 fn. 14 (1984).

With respect to *D. R. Horton*, the Respondents assert that the decision in that case was issued on January 3, 2012, and that pursuant to the rationale in the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), there were only two validly appointed members of the Board and therefore there was no quorum as required in *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010). Specifically, it is argued that Member Becker's appointment to the Board had expired by that date.

In *Noel Canning,* supra, the Court's actual finding was that appointments made during a 3-day period beginning on January 4, 2012, were unconstitutional. That decision did not purport to decide the validity of the Board's composition at any time prior to that date and therefore it did not directly affect the composition of the Board at the time that the decision in *D. R. Horton* was issued; January 3, 2012.

It seems that the Respondents are not seriously challenging the initial appointment of Member Becker which was made on March 27, 2010, during an intracession recess during the Second Session of the 111th Congress, occurring from March 26 to April 12, 2010. What they are asserting is that this appointment would have expired at the end of the First Session of the 112th Congress on December 30, 2011. They argue that on December 30, the Senate adjourned until the Second Session of the 112th Congress was to reconvene at noon on January 3, 2012. In this regard, the Respondents cite Article II, Section 2 of the Constitution to the affect that, "the President shall have

the power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session." The question, as I see it, is how we define the words, "next session."

It seems to me that this is an issue that the Board and any reviewing courts will have to deal with, irrespective of my opinion as to the merits of this argument. Read literally, as a term of art, the constitutional provision could mean that Becker's term should have expired at the end of December 2011 and before the Board issued its decision in *D. R. Horton*. But read in more colloquial terms, it could be interpreted that the Senate's action by convening "pro forma sessions" during a hiatus, was in reality, extending the existing session so that Becker's term never actually expired.

However, interpreted, I think that even if not construed as binding precedent, the Board, with its current composition is likely to reaffirm the *D. R. Horton* decision. I therefore think that I should give it substantial if not controlling deference.

This brings us finally to the decision in *D. R. Horton* and the respective arguments as to whether the provisions of the Federal Arbitration Act trump the provisions of the NLRA insofar as allowing enforceable agreements whereby employees as a condition of continued employment, are required to waive certain rights to take collective actions. In this case, to file class action lawsuits relating to their wages and hours pursuant to yet another statute; the Fair Labor Standards Act.

Without weighing in on the arguments for or against the Board's decision in *D. R. Horton*, I nevertheless think that the Board's rationale is reasonable and likely to be reaffirmed. (What the Circuit Courts do is another matter.) Therefore, I am going to conclude that by maintaining its arbitration policy and by enforcing arbitration agreements through court proceedings, the Respondents have interfered with the rights of employees to engage in collective actions for their mutual aid and protection and that the Respondents have therefore violated Section 8(a)(1) of the Act.

REMEDY

As I concluded that the Respondents have unlawfully maintained an Arbitration Policy that precludes class or collective actions by employees, I shall recommend that they be ordered to rescind or revise that policy to make it clear to employees that the Policy and agreements made pursuant to the Policy do not constitute a waiver in all forums of their rights to maintain class or collective actions relating to their wages, hours, or other terms and conditions of employment. I shall also recommend that the Respondents be required to notify its employees of the rescinded or revised Policy.

Because the Arbitration Policy has been and continues to be maintained throughout the United States, it recommended that the Respondents be ordered to post the attached notice at all locations where the Policy has been or is still in effect.

To the extent that the Charging Parties have incurred litigation expenses relating to the Respondents' Motions to dismiss the class actions and to compel arbitration under those agreements made in conformance with the Arbitration Policy, it is recommended that the Respondents reimburse the Charging Parties for such expenses with interest as determined in *Kentucky River Medical Center*, 356 NLRB 6 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

Additionally, it is recommended that the Respondents be required to file Motions with the United States District Court in *Litvinov v. UnitedHealth Care Group Inc*., and *Torres v. United Healthcare Services Inc.*, requesting the withdrawal of their motions to dismiss those actions and to compel arbitration of the claims made in those lawsuits.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondents, UnitedHealth Group, Inc. and UnitedHealth Care Services Inc., New York, New York, their officers, agents, successor, and assigns, shall

1. Cease and Desist from

(a) Maintaining or enforcing the "UnitedHealth Group Employment Arbitration Policy" and any agreements made with employees pursuant to that Policy that waives the right to maintain class or collective action.

(b) Enforcing such agreements by filing Motions in Court to dismiss or stay collective action lawsuits and to compel individual arbitration, pursuant to the terms of such agreements.

(c) Requiring employees to sign binding arbitration agreements that prohibit collective or class litigation.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

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

(a) Rescind or revise the Arbitration Policy that requires employees to waive their right to maintain employment-related class and collective claims in all forums, whether arbitral or judicial.

(b) Withdraw any pending motions for individual arbitration in which Respondents seek enforcement of the Arbitration Policy's unlawful restriction on class or collective claims; or if such motions have already been granted, move the appropriate court to vacate any orders for individual arbitration and reimburse employees for any litigation expenses including attorney's fees, directly related to opposing Respondents' motions to compel individual arbitration.

(c) Within 14 days after service by the Region, post at its locations nationwide where the Arbitration Policy has been promulgated, maintained or enforced copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 2 after being

[10] 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.

[11] 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."

signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondents customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In addition, a copy of this notice will be made available to employees on the same basis and to the same group or class of employees as the Arbitration Policy was made available to them. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since July 10, 2012.

(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 Respondents has taken to comply.

Dated, Washington, D.C. August 5, 2014

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT maintain or enforce the "UnitedHealth Group Employment Arbitration Policy" and any agreements made with employees pursuant to that Policy that waives the right to maintain class or collective action.

WE WILL NOT pursuant to the terms of such agreements enforce them by filing Motions in Court to dismiss or stay collective action lawsuits and to compel individual arbitration.

WE WILL NOT require employees to sign binding arbitration agreements that prohibit collective and class litigation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL withdraw any pending motions for individual arbitration in which the Respondents seek to enforce the Arbitration Policy's unlawful restriction on class or collective claims; or if such motions have already been granted, move the appropriate court to vacate any orders for individual arbitration.

WE WILL reimburse employees for any litigation expenses including attorney's fees, directly related to opposing Respondents' motions to compel individual arbitration.

UNITEDHEALTH GROUP, INC. AND UNITEDHEALTH CARE SERVICES INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02-CA-118724 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.