AWG Ambassador, LLC *and* Steven Stroh. Case 28–CA–118801

February 25, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, AND MCFERRAN

On October 17, 2014, Administrative Law Judge Eleanor Laws issued the attached decision. The Respondent and the General Counsel each filed exceptions and supporting briefs, the Respondent filed a brief in opposition to the General Counsel's exceptions, and the General Counsel filed a reply brief.

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

The judge found, applying the Board's decision in *D. R. Horton*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing an arbitration agreement 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 part 808 F.3d 1013 (5th Cir. 2015), the Board reaffirmed the relevant holdings of *D. R. Horton*, supra.

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

[1] The Respondent argues that the complaint is time barred by Sec. 10(b) because the initial unfair labor practice charge was filed and served more than 6 months after the Charging Party, Steven Stroh, signed and became subject to the arbitration agreement. We reject this argument, as did the judge, because the Respondent continued to maintain the unlawful agreement 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 Respondent's arbitration agreement, 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); *Neiman Marcus Group*, 362 NLRB No. 157, slip op. at 2 fn. 6 (2015); and *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 2 fn. 7 (2015). It is equally well established that an employer's enforcement of an unlawful rule, like the arbitration agreement here, independently violates Sec. 8(a)(1). See *Murphy Oil*, supra, at 19–21. The Respondent enforced its arbitration agreement on September 18, 2013, within the relevant 6-month period before the charge was filed and served.

The Respondent argues that, because multiple employees have refused to sign its arbitration agreement and were not disciplined for doing so, its arbitration agreement is voluntary and therefore does not fall within the proscriptions of *D. R. Horton*, supra at 2289 fn. 28. The Board has rejected this argument, holding that an arbitration agreement that precludes collective action in all forums is unlawful even if entered into voluntarily because it requires employees to prospectively waive their Sec. 7 right to engage in concerted activity. See *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. at 1, 5–8 (2015).

The Respondent also emphasizes that its arbitration agreement includes an exemption allowing employees to file charges with administrative agencies including the Board, and also contains an assurance that an employee who exercises her Sec. 7 rights "will not be retaliated against." The Respondent argues that the arbitration agreement consequently does not, as in *D. R. Horton,* unlawfully prohibit them from collectively pursuing litigation of employment claims in all forums. We reject this argument for the reasons stated in *SolarCity Corp.*, 363 NLRB No. 83 (2015).

Our dissenting colleague, relying on his dissenting position in *Murphy Oil*, 361 NLRB No. 72, slip op. at 22–35 (2015), would find that the Respondent's arbitration agreement does not violate Sec. 8(a)(1). He observes that the Act does not authorize the Board to "dictate" any particular procedures for the litigation of non-NLRA claims, and "creates no substantive right for employees to insist on class-type treatment" of such claims. This is all surely correct, as the Board has previously explained in *Murphy Oil*, supra, slip op. at 2, and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 fn. 2 (2015). But what our colleague ignores is that the Act "does create a right to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint." *Murphy Oil*, supra, slip op. at 2 (emphasis in original). The Respondent's arbitration agreement 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 agreement unlawful runs afoul of employees' Sec. 7 right to "refrain from" engaging in protected concerted activity. See *Murphy Oil*, supra, slip op. at 18; Bristol Farms, supra, slip op. at 3. Nor is he correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. See *Murphy Oil*, supra, slip op. at 17–18; *Bristol Farms*, supra, slip op. at 2.

We reject the position of our dissenting colleague that the Respondent's motion to compel arbitration was protected by the First Amendment's Petition Clause. In *Bill Johnson's Restaurants v. NLRB*, 461 U. S. 731, 747 (1983), the Court identified two situations in which a lawsuit enjoys no such protection: where the action is beyond a State court's jurisdiction because of Federal preemption, and where "a suit . . . has an objective that is illegal under federal law." 461 U. S. at 737 fn. 5. Thus, the Board may properly restrain litigation efforts such as the Respondent's motion to compel arbitration that have the illegal objective of limiting employees' Sec. 7 rights and enforcing an unlawful contractual provision, even if the litigation was otherwise meritorious or reasonable. See *Murphy Oil,* supra, slip op. at 20–21; *Convergys Corp*., 363 NLRB No. 51, slip op. at 2 fn. 5 (2015).

[2] Consistent with our decision in *Murphy Oil*, supra at 21, we will amend the judge's remedy to order the Respondent to reimburse the plaintiffs in the underlying class action lawsuit initially brought by former employee Frank Cohn for any reasonable expenses and legal fees, with interest, incurred in opposing the Respondent's unlawful motion in United States District Court to compel individual arbitration of the class or collective claims. See *Bill Johnson's Restaurants v. NLRB*, 461 U. S. 731, 747 (1983) ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses" as well as "any other proper relief that would effectuate the policies of the Act."). Interest shall be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173

ORDER

The National Labor Relations Board orders that the Respondent, AWG Ambassador, LLC, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and/or enforcing a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions for employment-related claims 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 designed to effectuate the policies of the Act.

(a) Rescind the arbitration agreement in all of its forms, or revise it in all of its forms to make clear to employees that the agreement 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 arbitration agreement in any form that the agreement has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) In the manner set forth in this decision, reimburse the plaintiffs for any reasonable attorneys' fees and litigation expenses they may have incurred in opposing the Respondent's motion to dismiss the collective lawsuit and compel individual arbitration.

(d) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 12, 2013, and any current or former employees against whom the Respondent has enforced its mandatory arbitration agreement since September 18, 2013.

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

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

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.[1]

In this case, my colleagues find that the Respondent's Arbitration Agreement (Agreement) violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the Agreement waives the right to participate in class or collective actions regarding non-NLRA employment claims. Various employees, including Charging Party Steven Stroh, signed the Agreement and later joined a class action lawsuit pending against the Respondent in federal district court alleging violations of the Fair Labor Standards Act (FLSA) and Nevada wage law, breach of contract, and related tort claims. In reliance on the Agreement, the Respondent filed a motion to dismiss and/or compel arbitration and strike cass/collective claims as to the plaintiffs who had signed the Agreement, including Stroh. The court granted the Motion to Compel. My colleagues find that the Respondent thereby unlawfully enforced its Agreement. I respectfully dissent from these findings for the reasons explained in my partial dissenting

(1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). See *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 fn. 10 (1991) ("[I]n make-whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses"), enfd. 973 F.2d 230 (3d Cir. 1992).

Finally, we shall substitute a new notice to conform to the Order as modified.

[3] 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] I agree with my colleagues that the complaint is not time barred under Sec. 10(b) of the Act.

opinion in *Murphy Oil USA, Inc.*[2]

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.[3] 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."[4] 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.[5] Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;[6] (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class-waiver agreements;[7] and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).[8] Although questions may arise 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.[9]

Because I believe the Respondent's Agreement was

[2] 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).

[3] 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).

[4] *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).

[5] The Arbitration Agreements were voluntarily signed, even though the Acknowledgment and Agreement form that employees receive with the Arbitration Agreement states that the Arbitration Agreement is a condition of employment. By definition, every agreement sets forth terms upon which each party may insist as a condition to entering into the relationship governed by the agreement. Thus, conditioning employment on an agreement to be bound by a class-action waiver does not make the agreement involuntary. For my colleagues, however, the voluntariness of such an agreement is immaterial. They say "an arbitration agreement that precludes collective action in all forums is unlawful even if entered into voluntarily," citing *On Assignment Staffing Services*, 362 NLRB No. 189 (2015) (finding class-action waiver agreement unlawful even where employees are free to opt out of the agreement). I respectfully disagree for the reasons set forth in my dissenting opinion in *Nijjar Realty, Inc. d/b/a Pama Management*, 363 NLRB No. 38, slip op. at 3–5 (2015).

[6] When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12–60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

[7] The Fifth Circuit has twice denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See *Murphy Oil, Inc., USA v. NLRB*, above; *D.R. Horton, Inc. v. NLRB*, above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co.*, 96 F.Supp. 3d 71 (S.D.N.Y. 2015); *Nanavati v. Adecco USA, Inc.*, 99 F.Supp. 3d 1072 (N.D. Cal. 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services*, No. 1:12-CV-00062-BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA); but see *Totten v. Kellogg Brown & Root, LLC*, No. ED CV 14–1766 DMG (DTBx), 2016 WL 316019 (C.D. Cal. Jan. 22, 2016).

[8] For the reasons expressed in my *Murphy Oil* partial dissent and those thoroughly explained in former Member Johnson's dissent in *Murphy Oil*, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil*, above, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 49–58 (Member Johnson, dissenting).

[9] Because I disagree with the Board's decisions in *Murphy Oil,* above, and *D.R. Horton, Inc*., 357 NLRB 2277 (2012), enf. denied in pert. 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 2277, 2288, by permitting the filing of complaints

lawful under the NLRA, I would find it was similarly lawful for the Respondent to file a motion in Federal district court seeking to enforce the Agreement. It is relevant that the court that had jurisdiction over the non-NLRA claims *granted* the motion to compel. That the Respondent's motion was reasonably based is also supported by court decisions that have enforced similar agreements.[10] 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."[11] I also believe that any Board finding of a violation based on the Respondent's meritorious Federal court motion to compel arbitration would improperly risk infringing on the Respondent's rights under the First Amendment's Petition Clause. See *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983); *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002); see also my partial dissent in *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 33–35. Finally, for similar reasons, I believe the Board cannot properly require the Respondent to reimburse the 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 in part.

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 agreement 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 our arbitration agreement in all of its forms, or revise it in all of its forms to make it clear that the agreement does not constitute a waiver of your right to maintain employment-related 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 agreement that the agreement has been rescinded or revised and, if revised, WE WILL provide them with a copy of the revised agreement.

WE WILL reimburse the plaintiffs for any litigation expenses they incurred in opposing the Respondent's motion to dismiss and compel individual arbitration in Case No. 2:11-CV-1832, United States District Court for the District of Nevada.

AWG AMBASSADOR, LLC

The Board's decision can be found at www.nlrb.gov/case/28–CA–118801 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.

Larry A. Smith, Esq., for the General Counsel.

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).

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

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

Roger L. Grandgenett, Esq. and *Ethan D. Thomas, Esq. (Littler, Mendelson, P.C.),* for the Respondent.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This is another case raising issues related to *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. granted in part and denied in part 737 F.3d 433 (5th Cir. 2013). It was tried based on a joint motion and stipulation of facts I approved on August 26, 2014.

Steven Stroh (the Charging Party or Stroh) filed the original charge on December 12, 2013, the first amended charge on March 31, 2014, and the second amended charge on April 29, 2014. The General Counsel issued the complaint on April 30, 2014, and the AWG Ambassador, LLC (the Respondent or AWG) filed a timely answer on May 13, 2014, and an amended answer on August 19, 2014.

The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act), by maintaining and enforcing an arbitration agreement that precludes class or collective actions.

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

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a limited liability company with an office and place of business in Las Vegas, Nevada, has been engaged in providing limousine services, private tours, corporate charters, airport shuttles, hotel transportation, and other car services. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Since October 2011, the Respondent has maintained an arbitration agreement (AA) for its employees as part of its employee handbook.

The first section of the AA states:

> 1. Agreement to Arbitrate All Disputes. This Agreement is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq., and evidences a transaction involving interstate commerce. This Agreement applies to any dispute arising out of or related to your employment with AWG Ambassador, LLC, or one of its affiliates, subsidiaries or parent companies ("Company") or termination of employment and obligates both you and the Company to submit such matters to arbitration. Nothing in this Agreement shall be construed to prevent or excuse you from utilizing the Company's existing internal procedures for resolution of complaints, and this Agreement is not intended to be a substitute for the utilization of such procedures. This Agreement is intended to apply to the resolution of past, present and future disputes that otherwise would be resolved in a court of law and requires that all such disputes be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial, except as otherwise stated in this Agreement.
>
> This Agreement applies, without limitation, to disputes regarding the employment relationship, trade secrets, unfair competition, compensation, breaks and rest periods, termination, or harassment and claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans With Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act, Genetic Information Non-Discrimination Act, and state statutes, if any, addressing the same or similar subject matters, and all other state statutory and common law claims. This Agreement does not apply to disputes arising out of or relating to the enforceability, revocability, or validity of the Agreement or any portion of the Agreement.
>
> This Agreement does not prevent you from filing a charge with and obtaining remedies from the National Labor Relations Board, the U.S. Department of Labor, or the Equal Employment Opportunity Commission. This Agreement also does not prevent you from filing claims with similar state agencies if applicable law allows you to do so notwithstanding an agreement to arbitrate those claims. Nothing in this Agreement shall be deemed to preclude or excuse you or the Company from bringing an administrative claim before any agency in order to fulfill your/its obligation to exhaust administrative remedies before making a claim in arbitration.
>
> This Agreement does not cover disputes that may not be subject to predispute arbitration agreements as provided by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111–203). The Agreement also does not cover: claims for workers compensation, state disability or unemployment insurance benefits; any criminal complaint or proceeding filed by a governmental agency; claims for restitution or civil penalties owed by an employee for an act for which the Company sought criminal prosecution; and claims for benefits under any employee benefit plan sponsored by the Company and covered by the Employee Retirement Income Security Act of 1974, where the plan documents provide for a method of dispute resolution. Private attorney general representative actions are not covered within the scope of this Agreement and may be maintained in a court of law, but an employee must seek in arbitration individual remedies for him or herself under any applicable private attorney general representative action statute, and the arbitrator shall decide whether an employee is an aggrieved person under any private attorney general statute.

(Jt. Exh. 2(a).) The second section discusses selection of the arbitrator, and the third section covers how to make a demand for arbitration. Section 4 states:

> 4. *Arbitration Process and Procedures* In arbitration, the parties will have the right to conduct civil discovery, bring motions, and present witnesses and evidence as needed to present their cases and defenses. Any disputes regarding discovery, motions, witnesses and evidence shall be resolved by the arbitrator.
>
> **You and the Company agree there will be no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action, or as a class member in any purported class or collective proceeding ("Class Action**

> **Waiver"*).*** Disputes regarding the validity and enforceability of the Class Action Waiver may be resolved only by a civil court of competent jurisdiction and not by an arbitrator.
>
> The Class Action Waiver shall not be severable from this Agreement in any case in which (1) the dispute is filed as a class or collective and (2) there is an adjudication by a civil court of competent jurisdiction (including appellate courts) that the Class Action Waiver is unenforceable. In such instances, the class or collective action must be litigated in a civil court of competent jurisdiction.
>
> The Class Action Waiver, and any other provision of this Agreement, shall be severable in any case in which the dispute is filed as an individual action and severance is necessary to ensure that the individual action proceeds in arbitration.
>
> Although an employee will not be retaliated against, disciplined or threatened with discipline as a result of his or her exercising his or her rights under Section 7 of the National Labor Relations Act by the filing of or participation in a class or collective action in any forum, the Company may lawfully seek enforcement of this Agreement and the Class Action Waiver under the Federal Arbitration Act and seek dismissal of such class or collective action or claim.

[Id., emphasis in original.] Sections 5, 6, and 7 respectively address payment of fees, remedies, and the arbitrator's written decision. Section 8 is an anti-retaliation provision, stating:

> 8. *No Retaliation Against Employees For Exercising Rights.* It is against Company policy for any employee to be subject to retaliation if he or she exercises his or her right to assert claims under this Agreement. If any employee believes that he or she has been retaliated against by anyone at the Company, the employee should immediately report this to the Human Resources Department.

The AA concludes with a provision stating that it is a full and complete agreement, and specifically stating, "If the Class Action Waiver is deemed to be unenforceable, you and the Company agree that this Agreement is otherwise silent as to any party's ability to bring a class or collective action in arbitration." (Id.)

Upon receipt of AWG's employee handbook, employees sign the following acknowledgement and agreement, which states in pertinent part:

> I have read and understand the foregoing mandatory and binding Arbitration Agreement. I understand that the Arbitration Agreement will continue to apply even after my separation from the Company. I also understand that the Arbitration Agreement cannot be modified by any oral agreement or representation but can be modified only in writing. I understand and agree that nothing in this Arbitration Agreement alters my at-will employment relationship with the Company. Lastly, I understand the Arbitration Agreement is a condition of employment with the Company and that by accepting employment or continuing employment with the Company, the Company and I will be bound by the Arbitration Agreement.

(Jt. Exh. 4.) Charging Party Stroh agreed to be bound by the arbitration agreement on November 21, 2011. (Jt. Exh. 12, Exh. 30(cc).)

On October 26, 2011, Frank Cohn filed a class action lawsuit in the Eighth Judicial District for the State of Nevada, alleging State and Federal overtime violations under the Fair Labor Standards Act (FLSA), breach of contract and related tort claims arising from employment with the Respondent and other named defendants ("the defendants"). The case was removed to the United States District Court for the District of Nevada on November 15, and assigned Case No. 2:11-CV-1832. Cohn filed a motion to circulate notice of the FLSA class action, which was granted in February 2012. Approximately 66 individuals, 33 of whom had signed the AA, subsequently filed opt-in consents to join the lawsuit. Cohn filed a motion to include a retaliation claim on March 9, 2012, and this motion was granted on April 19, 2012.

The defendants filed an answer to the complaint on May 3, 2012, and asserted, inter alia, that Cohn's claims were barred by the AAs. The defendants filed a motion to dismiss the class claims of the 33 named plaintiffs who had signed the AAs, along with a motion to compel individual arbitration of their claims. This District Court granted this request on April 17, 2014, upon the recommendation of United States Magistrate Judge Nancy J. Koppe, who was fully briefed on the issues.

III. DECISION AND ANALYSIS

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

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

Paragraphs 4 and 5 of the complaint allege that the Respondent violated Section 8(a)(1) by maintaining the AA since October 2011, and enforcing it by its actions in U.S. District Court for the District of Nevada aimed at requiring the Charging Party to resolve his dispute through individual arbitration since September 18, 2013.

There is no dispute the AAs have been a condition of employment for the Respondent's employees since implantation of the employee handbook in October 2011. Both the AA and the acknowledgment expressly state this, and the Respondent does not

argue otherwise. As a mandatory condition of employment for these employees, the AA is evaluated in the same manner as any other workplace rule. *D. R. Horton*, supra at 2280.

When evaluating whether a rule, including a mandatory arbitration agreement, violates Section 8(a)(1), the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007); *D. R. Horton*, supra. Under *Lutheran Heritage*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to [Section 7] activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage,* supra at 647.

In the instant case, the rule explicitly restricts activities protected by Section 7, stating, in bold print:

> **You and the Company agree there will be no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action, or as a class member in any purported class or collective proceeding ("Class Action Waiver").**

Accordingly, I find it violates the Act because it expressly precludes any class or collective actions. Moreover, it is undisputed that the Respondent has enforced the agreement to preclude the Charging Party from pursuing his class action lawsuit, thereby restricting the exercise of his Section 7 rights.

The Respondent argues that the Board's ruling in *D. R. Horton* interferes with the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 et. seq., based on the Supreme Court precedent favoring enforcement of arbitration agreements. The Board, however, considered this argument in *D. R. Horton* to support a different conclusion by which I am bound. The Respondent points to Ninth Circuit decisions handed down after *D. R. Horton* to support its argument. However, *Davis v. Nordstrom*, 755 F.3d 1089 (9th Cir. 2014), did not address protected concerted activity under the Act, and *Johnmohammadi v. Bloomingdale's, Inc*., 755 F.3d 1072 (9th Cir. 2014), concerned an optional agreement to arbitrate individual claims, unlike the AA.[1] In any event, under Board law, I am required to follow Board precedent, not court of appeals precedent, unless and until it is overruled by the United States Supreme Court. See *Gas Spring Co*., 296 NLRB 84, 97 (1989) (citing, inter alia, *Insurance Agents (Prudential Insurance)*, 119 NLRB 768 (1957), revd. 260 F.2d 736 (D.C. Cir. 1958), affd. 361 U.S. 477 (1960)), enfd. 908 F.2d 966 (4th Cir. 1990), cert. denied 498 U.S. 1084 (1991).

Next, the Respondent asserts that courts have found claims under the Fair Labor Standards Act are arbitrable. Notwithstanding the fact that I am required to follow Board precedent, I will address the post-*D. R. Horton* case cited to support this argument. The Ninth Circuit in *Richards v. Ernst & Young, LLP*, 744 F.3d 1072 (2013), cert. denied 82 USLW 3661 (U.S. Oct 14, 2014), expressly declined to address whether the arbitration agreement at issue was unenforceable under the Act, because it was argued for the first time on appeal. It is therefore unpersuasive.

The Respondent further argues that *D. R. Horton* was wrongly decided and has been widely rejected. Essentially, the Respondent argues it should be overruled. Any arguments regarding the legal integrity of Board precedent, however, are properly addressed to the Board. Relying on the Supreme Court's decision in *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2034 (2013), the Respondent argues that the Court has, since *D. R Horton*, provided further instruction on regarding the breadth of the FAA. *American Express Co.* involved a group of merchants who were unhappy with the rates American Express charged them to use their cards at their respective businesses.[2] At issue before the Court was whether the merchants were bound by agreements mandating individual arbitration of these disputes and precluding a class action lawsuit for violation of antitrust law. The merchants argued that without the ability to proceed collectively, it was not cost-effective to challenge American Express' rates. The Court noted that the laws at issue, the Sherman and Clayton Acts, fail to reference class actions, and found that the "antitrust laws do not guarantee an affordable procedural path to the vindication of every claim." Id. at 2039. The Board in *D. R. Horton* distinguished the NLRA, however, and found that Section 7 substantively guarantees employees the right to engage in collective action, including collective legal action, for mutual aid and protection concerning wages, hours, and working conditions. As the Board stated, "the intent of the FAA was to leave substantive rights undisturbed." *D. R. Horton,* 357 NLRB at 2286. No such substantive statutory provision was asserted in *American Express Co.*, and therefore the decision is not sufficiently on point to warrant straying from Board precedent. See *Waco, Inc*., 273 NLRB 746, 749 fn. 14 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981).

The next argument the Respondent asserts is that the AA is different from the agreement in *D. R. Horton* because it expressly permits employees to file charges with the Board and other administrative agencies. Because the General Counsel does not assert in the complaint nor argue in his brief that the AA interferes with employees' right to file Board charges, this issue is not before me in the instant case.

Finally, the Respondent argues that the instant claim is untimely under Section 10(b) of the Act, which states in pertinent part:

> [N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the

[1] The Respondent also cites to a California State court opinion, which does not serve as binding precedent in this forum.

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

> charge with the Board and the service of a copy thereof upon the person against whom such charge is made[.]

29 U.S.C. § 160(b). Because Stroh executed the agreement on November 21, 2011, but did not file a charge until December 12, 2013, the Respondent argues it was untimely. This argument is without merit under controlling case law holding that a continuing violation exists as long as the rule is still being enforced at the time of the charge. See *American Cast Iron Pipe Co*., 234 NLRB 1126 fn. 1 (1978); *Alamo Cement Co*., 277 NLRB 1031, 1036−1037 (1985) (no time bar where enforcement allegation could not have been litigated sooner); *Guard Publishing Co*., 351 NLRB 1110, 1110 fn. 2 (2007) ("maintenance during the 10(b) period of a rule that transgresses employee rights is itself a violation of Sec. 8(a)(1).") In this case, the agreement mandated that Stroh arbitrate employment-related claims pursuant to the AA even after employment ended, so it was obviously in effect at the time of the charge. Moreover, the Respondent was clearly enforcing the AA against Stroh while the charge was pending.

CONCLUSIONS OF LAW

1. The Respondent, AWG Ambassador, Inc., is an employer within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration agreement and enforcing that agreement by moving to compel individual arbitration of the Charging Party's class action lawsuit pertaining to wages.

REMEDY

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

As I have concluded that the arbitration agreement is unlawful, the recommended Order requires that the Respondent revise or rescind it, and advise its employees in writing that said rule has been so revised or rescinded. The Respondent shall post a notice at all locations where the arbitration agreement, or any portion of it requiring all employment-related disputes to be submitted to individual binding arbitration, was in effect. See, e.g., *U-Haul Co. of California*, 347 NLRB 375 fn. 2 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007); *D. R. Horton,* supra, at 2290.

I recommend the Company be required to reimburse Charging Party Stroh for any litigation and related expenses, with interest, to date and in the future, directly related to the Company's filing its motion to compel arbitration in Case No. BC491186 in the Superior Court of California. Determining the applicable rate of interest on the reimbursement will be as outlined in *New Horizons*, 283 NLRB 1173 (1987) (adopting the Internal Revenue Service rate for underpayment of Federal taxes). Interest on all amounts due to Stroh shall be computed on a daily basis as prescribed in *Kentucky River Medical Center*, 356 NLRB 8 (2010).

The General Counsel requests an order requiring the Respondent to move the United States District Court of the District of Nevada to vacate its order compelling individual arbitration or striking class or collective claims pursuant to the unlawful agreements, making such motions jointly with Stroh if he so requests and if a motion to vacate can still be timely filed. The law does not require the employer to permit both class action lawsuits and arbitrations. Instead, *D. R. Horton* states that a forum for class or collective claims must be available. It is therefore beyond my authority to require the Respondent to take steps to permit the class claims in any specific forum. Instead, the Respondent is take to whatever steps are necessary to ensure employees are permitted to proceed with class action claims regarding wages, hours and/or working conditions in some forum, whether arbitral or judicial.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, AWG Ambassador, LLC, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an arbitration agreement precluding employees from maintaining class or collective actions.

(b) Enforcing the arbitration agreement to prohibit class actions.

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

(a) Rescind or revise the arbitration agreement to make it clear to employees that the agreement does not constitute a waiver in all forums of their right to maintain class or collective actions related to wages, hours, or other working conditions.

(b) Notify the employees of the rescinded or revised agreements to include providing them copies of the revised agreements or specific notification that the agreements have been rescinded.

(c) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, and in all facilities where it has maintained and/or enforced the arbitration agreement, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved

[3] 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.

[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."

in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 2011.

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

Dated, Washington, D.C. October 17, 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 Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.

Choose representatives to bargain with us on your behalf.

Act together with other employees for your benefit and protection.

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce an arbitration agreement that requires disputes related to wages, hours, or other working conditions to be submitted to individual binding arbitration.

WE WILL NOT enforce an arbitration agreement by conditioning employees' employment on signing the arbitration agreement.

WE WILL NOT enforce a mandatory arbitration program by asserting it in class-action litigation regarding wages the Charging Party Steven Stroh brought against us.

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

WE WILL rescind or revise the arbitration agreement to make it clear to employees that the agreement does not constitute a waiver of their right in all forums to maintain class or collective actions about wages, hours, or other working conditions.

WE WILL notify employees of the rescinded or revised arbitration agreement, including providing them with a copy of any revised agreements, acknowledgement forms or other related documents, or specific notification that the agreement has been rescinded.

WE WILL reimburse Charging Party Steven Stroh for any litigation expenses: (i) directly related to opposing the Respondent's motion to compel arbitration; and/or (ii) resulting from any other legal action taken in response to Respondent's efforts to enforce the arbitration agreement to require individual arbitration of his claims regarding wages, hours, or other working conditions.

WE WILL ensure the Charging Party Steven Stroh has a forum to litigate his class complaint.

AMG AMBASSADOR , LLC