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

KELLOGG BROWN & ROOT LLC and
MOLYCORP, INC.

Cases 31-CA-140948 and
and **31-CA-145896**

DAVID L. TOTTEN, and Individual

RESPONDENTS' BRIEF TO THE ADMINISTRATIVE LAW JUDGE

Respondents, Kellogg Brown & Root LLC (hereinafter "KBR") and Molycorp, Inc. (hereinafter "MCI") (collectively, "Respondents"), respectfully submit their Brief to the Administrative Law Judge.

STATEMENT OF THE CASE

Respondents hereby adopt, as if fully set forth herein, the stipulated facts and exhibits in the Joint Motion to Transfer Proceedings to the Division of Judges and Joint Stipulation of Facts, submitted by the General Counsel (the "GC"), the Charging Party and the Respondents in the consolidated cases referenced above.

As pertinent here, KBR requires new employees to agree to the KBR Dispute Resolution Plan ("DRP" or "Plan"), which provides,

> **4. Resolution of Disputes**
>
> A. All Disputes not otherwise settled by the Parties shall be finally and conclusively resolved through arbitration under this Plan and the Rules, instead of through trial before a court. The Parties forgo any right either may have to a jury trial on claims relating in any way to any Dispute.
>
> B. (i) Each Dispute shall be arbitrated on an

> individual basis. Neither the Company nor any Employee or Applicant may pursue any Dispute on a class action, collective action or consolidated basis or in a representative capacity on behalf of other persons or entities who are claimed to be similarly situated, or participate as a class member in such a proceeding. The arbitrator in any proceeding under this Plan shall have no authority to conduct the matter as a consolidated, class or collective action.
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> ****
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> **9. Administrative Proceedings**
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> A. This Plan shall apply to a Dispute pending before any local, state or federal administrative body or court unless prohibited by law. This Plan is not intended to limit any person's right to file an administrative complaint or charge with, or to participate in the investigation of an administrative complaint or charge by, any governmental agency if giving this Plan such effect would be contrary to law (e.g., this Plan does not limit a person's right to file a charge with the Equal Employment Opportunity Commission or National Labor Relations Board). This Plan also does not apply to any unfair labor practice proceedings before the National Labor Relations Board or subordinate tribunals.

Also, as pertinent here, Charging Party began employment with KBR on or about January 16, 2012, at which time he signed and agreed to the terms of the DRP. GC Exhibit 1(l), Joint Exhibit 2. Charging Party's employment with KBR ended on June 17, 2013, due to a reduction in force. *See* KBR's Statement of Position and Joint Motion to Transfer. His lawsuit against KBR and MCI was filed as a putative class action in California state court under various California wage-hour and failure-to-pay-properly statutes on June 16, 2014. Joint Exhibit 3. After removing the case to federal court on August 27, 2014, on grounds of diversity of citizenship Joint Exhibit 5, KBR moved to compel arbitration and dismiss the class and representative claims on September 25, 2014, on the grounds that the terms of the DRP required that his individual claim be tried

before an arbitrator. Joint Exhibit 6. The underlying unfair labor practice charge against KBR was filed on November 14, 2014. GC Exhibit 1(a). The unfair labor practice charge against MCI was filed on February 5, 2015. GC Exhibit 1(i).

ARGUMENT

I. KBR DID NOT VIOLATE SECTION 8(a)(1) OF THE NLRA BY MAINTAINING AND ENFORCING ITS DISPUTE RESOLUTION PROGRAM THAT PROHIBITS EMPLOYEES FROM PURSUING CLAIMS IN A CLASS OR REPRESENTATIVE CAPACITY IN BOTH JUDICIAL AND ARBITRAL FORUMS.

Region 31's Consolidated Complaint alleges that "KBR maintained a Dispute Resolution Plan and Rules policy that prohibits employees from pursuing claims in a class or representative capacity in both judicial and arbitral forums" and required Charging Party to sign KBR's DRP Agreement as a condition of employment. GC Exhibit 1(l), paragraphs 6(a) and (b). Further, according to the Complaint, Respondents enforced the DRP by asserting it in litigation brought against them in California state court, which action was removed to federal district court. GC Exhibit 1(l), paragraph 6(c). The Region did not assert that Charging Party was an employee of either Respondent (either KBR or MCI) [the latter having never employed Charging Party]. KBR answered the Complaint and averred that Charging Party "is not now and was not an employee of KBR within the meaning of the Act during any relevant time periods." GC Exhibit 1(n).

Section 8(a)(1) of the National Labor Relations Act ("NLRA") provides that it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the NLRA. 29 U.S.C. § 158(a)(1). Section 7, in turn, provides that employees shall have the right to self-organize and to engage in "other concerted activities." 29 U.S.C. § 157. Nothing in the NLRA addresses how employees' Section 7 rights to engage in "other concerted activities" may affect

substantive rights or procedural mechanisms under other federal, state or local laws.

As discussed below, the class and collective action waiver in KBR's DRP does not violate Section 8(a)(1) of the NLRA.

A. The Enforceability of KBR's Arbitration Agreement Must Be Given Effect Under the FAA.

The enforceability of the arbitration clause contained in the DRP is governed by the Federal Arbitration Act ("FAA"), and not the NLRA, or the Board's decisions in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) or *Murphy Oil USA, Inc.*, 361 NLRB No. 72, (2014), and similar Board decisions that have followed in recent months. While the Board has acknowledged it must "carefully accommodate" both the NLRA and the FAA when a conflict exists between the policies of the NLRA and another federal statute, *see Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454, at *9, the Board's decisions in *D.R. Horton* and *Murphy Oil*, and the GC's position herein, fail to give the required deference to the FAA as that statute has been interpreted by the United States Supreme Court and appellate courts.

The Supreme Court has expressed clear guidance for courts and administrative agencies regarding how the FAA and other federal statutes are to be accommodated. The FAA requires that class action waivers in arbitration agreements be enforced "according to their terms" unless another statute, here the NLRA, contains a clear "congressional command" to override the FAA. *Am. Express. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (citing *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012)). The NLRA contains no such command.

Nevertheless, the Board has previously asserted, to the extent the FAA conflicts with the NLRA, "the FAA would have to yield." *Murphy Oil USA, Inc.*, 361 NLRB No. 72,

2014 WL 5465454, at *7; *D. R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274, at *16. The Board's position conflicts with the Supreme Court's directive to enforce arbitration agreements according to their terms in the absence of a clear statutory command otherwise.

The required recognition of the preemptive application of the FAA is unquestionable. To this end, the Supreme Court has established four well-defined principles:

1. The FAA reflects an "emphatic policy in favor" of arbitration.

The FAA, which reflects an "emphatic federal policy in favor" of arbitration, declares that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law for the revocation of any contract." *KPMG, LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011) (internal citations omitted). *See also* 9 U.S.C. § 2. No such grounds exist or have been alleged here.

2. Arbitration agreements, including those containing class action waivers, are enforceable according to their terms.

The FAA "requires courts to enforce agreements to arbitrate according to their terms." *See CompuCredit*, 132 S. Ct. at 669. As arbitration is a matter of contract, the parties to an arbitration agreement can agree to waive class arbitration. Similarly, unions may contractually waive, on behalf of the employees it represents, rights under the NLRA. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) ("As in any contractual negotiation, a union may agree to the inclusion of an arbitration provision in a collective-bargaining agreement in return for other concessions from the employer.… Judicial nullification of contractual concessions ... is contrary to what the Court has recognized as one of the fundamental policies of the National Labor Relations Act—

freedom of contract.") (quoting *NLRB v. Magnavox Co.*, 415 U.S. 322, 328 (1974) (Stewart, J., concurring in part and dissenting in part)) (internal quotation marks omitted); *Omaha World-Herald & Teamsters Dist. Council 2, Local 543m, Affiliated with Int'l Bhd. of Teamsters*, 357 NLRB No. 156 (2011) (Union waived its right to bargain over changes to pension and 401(k) plan during the term of the collective bargaining agreement).

The parties to an arbitration agreement "may agree to limit the issues they choose to arbitrate," "may agree on [the] rules under which any arbitration will proceed," and "may specify with whom they choose to arbitrate their disputes." *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010) (internal citations omitted). Charging Party's waiver of such rights here is readily apparent.

3. Arbitration agreements involving federal statutory rights, including those containing class action waivers, are enforceable.

Agreements to arbitrate federal statutory rights, including those containing class action waivers, are enforceable "unless Congress itself has evinced an intention," when enacting the statute, to "override" the FAA mandate by a clear "contrary congressional command." *Mitsubishi*, 473 U.S. at 628 (internal citations omitted); *Italian Colors*, 133 S. Ct. at 2309. As long as the arbitral forum affords the parties the opportunity to vindicate any substantive statutory rights forming the basis of their claims, the parties will be held to their bargain to arbitrate, *CompuCredit*, 132 S. Ct. at 671, unless "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi*, 473 U.S. at 628; *Italian Colors*, 133 S. Ct. at 2309. The expression of congressional intent to preclude the waiver of judicial remedies must be clear and unequivocal. *See CompuCredit*, 132 S. Ct. at 673 (If a statute "is silent on whether claims

under [it] can proceed in an arbitr[al] forum, the FAA requires the arbitration agreement to be enforced according to its terms"). The NLRA is silent whether claims can or cannot proceed in an arbitral forum although the NLRA does encourage company-union collective bargaining agreements which routinely contain exclusive arbitration remedies.

4. Employment arbitration agreements are enforceable on the same terms as other arbitration agreements.

The FAA encompasses employment arbitration agreements, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001), including those containing class action waivers. *See, e.g.*, *Owen v. Bristol Care, Inc.,* 702 F.3d 1050, 1054 (8th Cir. 2013) (holding class waivers are enforceable in claims brought under the FLSA). The FAA requires enforceability of such agreements even if there may be "unequal bargaining power between employers and employees" and even if "the arbitration could not go forward as a class action." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32-33 (1991). As to this latter point, the Supreme Court in *Gilmer* implicitly recognized that a class action, as set forth in the Federal Rules of Civil Procedure, is simply a *procedural* device which, as the Rules Enabling Act makes clear, cannot "abridge, enlarge or modify any substantive right" -- and can, like the choice of a judicial forum, be waived. 28 U.S.C. § 2072(b).

Congress designed the FAA to "reverse the long-standing judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as with contracts." *Gilmer*, 500 U.S. at 24. The FAA establishes a "liberal federal policy favoring arbitration agreements" and embodies the "fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983)).

The FAA's overarching purpose is "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Concepcion*, 131 S. Ct. at 1748.

Under the FAA, parties may agree to procedures governing arbitration. *See, e.g.*, *Stolt-Nielsen S.A.*, 559 U.S. at 683. Parties "may agree to limit the issues arbitrated," "may agree on rules under which an arbitration will proceed," and "may specify *with whom* they choose to arbitrate their disputes." *Id.* at 683 (emphasis in original). The Supreme Court has made it abundantly clear that arbitration agreements must be enforced under the FAA "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator[.]" *Gilmer*, 500 U.S. at 32.

These principles, including the FAA's mandate that arbitration agreements must be rigorously enforced according to their terms, apply equally when federal statutory rights are implicated. In *Italian Colors*, the Supreme Court held that a class action waiver must be enforced according to its terms absent a "contrary congressional command" in the federal statute at issue. 133 S. Ct. at 2309. The Supreme Court further held that a class action waiver is not invalidated by the judge-made "effective vindication" exception. *Id.* at 2310-12. "[E]ven claims arising under a statute designed to further important social policies may be arbitrated because so long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum, the statute serves its functions." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91, 121 S. Ct. 513, 521 (2000).

This controlling authority makes it clear that the FAA governs and requires enforcement of the class and collective action waiver in KBR's arbitration agreement. The

Board's and the GC's position that the FAA yields to the NLRA with respect to the enforcement of class and collection action waivers minimizes, if it does not disregard entirely, Supreme Court precedent interpreting the FAA.

B. Numerous Circuit Courts of Appeals Have Rejected the Board's and the GC's Position.

Considering the FAA's goals and liberal policy favoring arbitration, U.S. Courts of Appeals have consistently refused to accept the Board's and the GC's position here. In fact, the Fifth Circuit expressly overturned the Board's holding in *D.R. Horton* that an employer violates the NLRA when it requires, as a condition of employment, an arbitration agreement that waives an employee's access to class or collective action procedures. *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344, 359 (5th Cir. 2013).

In holding that the class action waiver in D.R. Horton's arbitration agreement did not violate the NLRA, the Fifth Circuit rejected the central arguments the GC advances here. First, the Fifth Circuit found that filing class and collective actions is a *procedural*, *not a substantive*, right that *can* be waived. *Id.* at 357. Second, the Fifth Circuit rejected the Board's assertion that its rule falls within the FAA's saving clause. *Id.* at 359. Relying on *Concepcion*, the Fifth Circuit concluded that the FAA's saving clause is inapplicable because the Board's interpretation of the NLRA disfavors arbitration. *Id.* at 359-60.

Next, the Fifth Circuit found no congressional command in the NLRA overriding the FAA. *Id.* at 359-361. The Fifth Circuit also held there is no inherent conflict between the NLRA and the FAA because "courts repeatedly have understood the NLRA to permit and require arbitration" and "[h]aving worked in tandem with arbitration agreements in the past, the NLRA has no inherent conflict with the FAA." *Id.* at 361-62. Accordingly, the Fifth Circuit held that the NLRA does not override the FAA's strong federal policy favoring

the enforcement of arbitration agreements.

The Fifth Circuit reaffirmed its decision in *D.R. Horton* in *Murphy Oil USA, Inc. v. NLRB*, 808 F. 3d 1013 (2015). In *Murphy Oil*, the Fifth Circuit considered and affirmed the Board's holding that Murphy Oil's pre-March 2012 arbitration agreement language violated the NLRA because the arbitration agreement did not contain a "carve-out" addressing an employee's right to file a Board charge. *Id*. at 1019. Notwithstanding the pre-March 2012 arbitration agreement language, the Fifth Circuit recognized that Murphy Oil, in March 2012, following the Board's decision in *D.R. Horton*, added language to the Murphy Oil arbitration agreement which contained the proviso, "[N]othing in this Agreement precludes [employees] ... from participating in proceedings to adjudicate unfair labor practice[ ] charges before the [Board]." *Id*. at 1019-20. Accordingly, the Fifth Circuit concluded, "Reading the Murphy Oil contract as a whole, it would be unreasonable for an employee to construe the Revised Arbitration Agreement as prohibiting the filing of Board charges when the agreement says the opposite." *Id*. at 1020. *See also Chesapeake Energy Corp. v. NLRB*, ___ Fed. Appx. ___, 2016 Westlaw 573705 (Mem), 205 LRRM (BNA) 3429 (5th Cir. Feb. 12, 2016) (per curiam) (Board agreeing that enforcement of its order that respondent violated Section 8(a)(1) by maintaining and enforcing class and collective action waiver was precluded by Fifth Circuit's prior decision in *D.R. Horton* on theory that one panel cannot overrule another panel).

In this case, KBR's "carve-out" provision for Board charges is even stronger than that approved by the Fifth Circuit in *Murphy Oil*. KBR's DRP provides,

> This Plan is not intended to limit any person's right to file an administrative complaint or charge with, or to participate in the investigation of an administrative complaint or charge by, any governmental agency if giving this Plan such effect would be

> contrary to law (e.g., this Plan does not limit a person's right to file a charge with the Equal Employment Opportunity Commission or National Labor Relations Board). This Plan also does not apply to any unfair labor practice proceedings before the National Labor Relations Board or subordinate tribunals.

The language in the DRP could not be clearer, and the NLRB does not here contend otherwise. Under Fifth Circuit precedent, KBR's DRP does not violate the NLRA.[1]

The Fifth Circuit's decisions in *D.R. Horton* and *Murphy Oil* align with numerous other circuit courts of appeals that have either suggested or expressly stated that they did not agree with the Board's and the GC's rationale. Consistent with the "more than two decades of pro-arbitration Supreme Court precedent," every circuit court of appeals to have considered the issue has refused to follow the Board's recent holdings that the NLRA prohibits arbitration agreements that waive access to class action procedures. *Owen,* 702 F.3d at 1054-55 (rejecting plaintiff's invitation "to follow the NLRB's rationale in *D.R. Horton*" and joining the "fellow circuits that have held that arbitration agreements containing class waivers are enforceable in claims brought under the FLSA"). *See also Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1329-36 (11th Cir. 2014), *cert. denied*, 134 S. Ct. 2886 (2014); *Sutherland v. Ernst & Young, LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013) (declining to follow *D.R. Horton* or grant the NLRB's decision any deference); *Richards v. Ernst & Young, LLP*, 744 F. 3d 1072, 1075, n.3 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 355 (2014) (suggesting it would not follow the Board's *D.R. Horton* analysis).

Despite the Board's prior decisions in *D.R. Horton* and *Murphy Oil*, there is no

[1] KBR is headquartered in Houston, Texas.

legitimate basis for this Honorable Tribunal to depart from the view held by a majority of U.S. Circuit Courts of Appeals, in accord with the U.S. Supreme Court decisions, that class action waivers in employment agreements do not implicate or violate the NLRA when they contain a carve-out for Board charges.

C. The GC's Position Directly Conflicts With the FAA.

In finding that class action waivers in arbitration agreements violate the NLRA, the Board in *Murphy Oil* purports to rely on two exceptions to the FAA's requirement that arbitration agreements be enforced according to their terms: (1) an arbitration agreement may be invalidated on any ground that would invalidate a contract under the FAA's "saving clause" and (2) application of the FAA may be precluded by another statute's contrary congressional command. *See Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454, at **11-14.

Contrary to the Board's decisions and the GC's position here, neither exception under the FAA applies in this case.

1. The Board Cannot Use the FAA's Saving Clause to Prohibit Class or Collective Action Waivers in Arbitration Agreements.

The FAA's saving clause does not support invalidating the class action waiver in KBR's DRP. The saving clause provides that arbitration agreements are to be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Supreme Court has explained that the FAA's "saving clause permits arbitration agreements to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 131 S. Ct. at 1746 (internal quotations omitted). A rule that is neutral on its

face but would have a disproportionate impact on arbitration agreements is not grounds for the "revocation of any contract" within the meaning of the saving clause. *Id.* at 1747.

The Supreme Court has made clear that a rule requiring class-wide litigation is precisely the type of defense to which the FAA's saving clause does not apply. *Id.* at 1746-52. In *Concepcion*, the Supreme Court held that the FAA's saving clause was inapplicable to a California statute that prohibited class action waivers in arbitration agreements. *Concepcion*, 131 S. Ct. at 1746. The Supreme Court observed that the "overarching purpose" of the FAA was to "facilitate streamlined proceedings" and that "[r]equiring the availability of class wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748. In reaching this conclusion, the Supreme Court noted the numerous differences between class and traditional arbitration and found that "class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 1751. Consequently, requiring the availability of class procedures would give companies less incentive to resolve claims on an individual basis. *Id.* at 1750.

Under *Concepcion*, the FAA's saving clause does not apply because requiring that employees have access to class or collective procedures is inconsistent with the FAA and would have a disproportionate impact on arbitration agreements. Consistent with *Concepcion*, the Fifth Circuit in *D.R. Horton* rejected the Board's assertion that its rule applies equally to arbitration and non-arbitration agreements and explained:

> While the Board's interpretation is facially neutral—requiring only that employees have access to collective procedures in an arbitral or judicial forum—the effect of this interpretation is to disfavor arbitration. As the *Concepcion* Court remarked,

> "there is little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process. And faced with inevitable class arbitration, companies would have less incentive to continue resolving potentially duplicative claims on an individual basis." It is no defense to say there would not be any class arbitration because employees could only seek class relief in court. Regardless of whether employees resorted to class procedures in an arbitral or in a judicial forum, employers would be discouraged from using individual arbitration.

D.R. Horton, Inc., 737 F.3d at 359 (internal citations omitted). The Board also attempted to distinguish *Concepcion* on the grounds that its decision does not require class arbitration and, instead, only requires the availability of class procedures in some forum. *See D. R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274 at *16. This is a distinction without merit. Under the Board's reasoning, employers would be forced to either allow class arbitration, which is contrary to the FAA, or forgo arbitration so an employee could invoke class procedures in court. Either way, like the state law nullified by *Concepcion*, the Board's decision "condition[s] the enforceability of certain arbitration agreements" on the availability of class procedures. *Concepcion*, 131 S. Ct. at 1744.

No matter how the Board frames the issue, "[r]equiring a class mechanism is an actual impediment to arbitration and violates the FAA." *D.R. Horton, Inc.*, 737 F.3d at 360. Because the Board's rule disfavors arbitration in practice, it does not fit within the FAA's saving clause.

2. The NLRA Does Not Contain a Congressional Command to Override the Federal Arbitration Act.

Nor does the NLRA contain a contrary congressional command to override the FAA's mandate that courts rigorously enforce arbitration agreements according to their terms. Arbitration agreements involving statutory rights, including those containing class

waivers, are enforceable "unless Congress itself has evinced an intention" to override the FAA by a clear, contrary congressional command. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S. Ct. 3346, 3355 (1985). If such a command exists, it will "be discoverable in the text," the statute's "legislative history," or "an 'inherent conflict' between arbitration and the [statute's] underlying purposes." *Gilmer*, 500 U.S. at 26; *see also CompuCredit*, 132 S. Ct. at 672 ("When [Congress] has restricted the use of arbitration . . . it has done so with clarity."). Arbitration agreements are enforceable whether the underlying statutory right arises under federal or state law. *See Southland Corp. v. Keating*, 465 U.S. 1, 13-14 (1984).

The Board, as the party challenging the arbitration agreement, has the burden to show Congress intended to preclude the waiver of class or collective action procedures. *See Gilmer*, 500 U.S. at 26; *Owen*, 702 F.3d at 1052. When addressing whether a contrary congressional command exists, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer*, 500 U.S. at 26 (internal quotations omitted).

There is no congressional command in the NLRA to override the FAA's mandate. Section 7 provides that "[e]mployees shall have the right to self-organization, 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 and protection." 29 U.S.C. § 157. The Board has conceded that nothing in the NLRA's statutory text expressly creates a right to initiate class or collective actions or provides for the override of arbitration agreements limiting the use of class procedures. *See Murphy Oil USA Inc.*, 361 NLRB No. 72, 2014 WL

5465454, at *13 (“To be sure, the NLRA does not explicitly override the FAA . . . .”). Instead, in *Murphy Oil*, the Board concluded that the NLRA need not explicitly provide for a right to file a class or collective action in order to override the FAA because the right to engage in “concerted activity” is authorized by the broad language of Section 7 of the Act. *Id.* at *12. To support this contention, the Board relied on Section 10(a) of the NLRA, which provides that the Board’s authority to prevent unfair labor practices “shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.” *Id.* (citing 29 U.S.C. § 160(a)). According to the Board, this language, taken together with Section 7’s protection of “concerted activity,” supplies a congressional command to vitiate an otherwise enforceable class action waiver. *Id.*

The Board’s interpretation is incorrect for several reasons. Under Supreme Court jurisprudence, such general language in Section 7 and Section 10(a) of the NLRA is insufficient to express a statutory command to override the FAA. “In every case the Supreme Court has considered involving a statutory right that does not explicitly preclude arbitration, it has upheld the application of the FAA.” *D.R. Horton,* 737 F.3d at 357n.8 (emphasis added). Even statutes that provide *explicit* procedures for collective actions will not *necessarily* override the FAA. For example, although the Age Discrimination in Employment Act and the Fair Labor Standards Act explicitly offer employees collective actions, the mere availability of these procedures in the statutes was insufficient to override the FAA. *Gilmer*, 500 U.S. at 32 (“[T]he fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.”); *Owen*, 702 F.3d at 1052 (“Owen identifies

nothing in either the text or legislative history of the FLSA that indicates a congressional intent to bar employees from agreeing to arbitrate FLSA claims individually.").

The Supreme Court's decision in *CompuCredit* further illuminates what does not constitute a "contrary congressional command." In *CompuCredit*, the Supreme Court found that the provision of the Credit Repair Organizations Act ("CROA"), 15 U.S.C. § 1679f(a), which treats as void "any waiver by any consumer of any protection provided by or any right of the consumer," did not supply a "congressional command" to preclude arbitration agreements waiving the right to bring an action in court. *CompuCredit*, 132 S. Ct. at 670-71. In reaching this conclusion, the Supreme Court observed that when Congress "has restricted the use of arbitration in other contexts, it has done so with a clarity that far exceeds the claimed indications in the CROA." *Id.* at 672. Statutory references to causes of action, filing in court, allowing suits, and pursuing class actions have been insufficient to override the FAA. *Id.* at 670-71. As the Supreme Court observed, if such "commonplace" statutory provisions could perform the "heavy lifting" required to override the FAA, valid arbitration agreements encompassing federal causes of action would be rare, which "is not the law." *Id.*

More recently, in *Italian Colors*, the Supreme Court also found that antitrust laws do not contain a congressional command to override the FAA and preclude class action waivers. As the Supreme Court explained:

> The Sherman and Clayton Acts make no mention of class actions. In fact, they were enacted decades before the advent of Federal Rule of Civil Procedure 23, which was "designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." The parties here agreed to arbitrate pursuant to that "usual rule," and it would be remarkable for a court to erase that expectation.

Italian Colors Rest., 133 S. Ct. at 2309 (internal citations omitted).

The NLRA does not contain the requisite clarity to supply a congressional command to override the FAA. Nothing in Section 7 or Section 10(a) of the NLRA mentions arbitration, class and/or collective action procedures, or class action waivers. In fact, the term "concerted activity" is not even defined in the Act. *See N.L.R.B. v. City Disposal Sys. Inc.*, 465 U.S. 822, 830 (1984). Likewise, nothing remotely provides for the override of arbitration agreements limiting class or collective actions. When statutory language explicitly providing for class mechanisms does not evince a congressional command, then surely the NLRA's general references to "concerted activities" and "mutual aid or protection" do not supply a sufficiently clear congressional command to override the FAA. In short, the general statutory language on which the Board relies cannot perform the "heavy lifting" necessary to override the FAA. *See CompuCredit*, 132 S. Ct. at 670-71.

The legislative history of the NLRA also lacks any congressional command to override the FAA. Section 1 declares that it is the policy of the United States "to protect[] the exercise by workers of full freedom of association . . . for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151; *see Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157, 166 (1971) (the NLRA "is concerned with the disruption to commerce that arises from interference with the organization and collective-bargaining rights of 'workers'").

The legislative history of the NLRA, however, does not discuss the right to file class, collective, or consolidated claims against employers or the use of any certain

procedural device to adjudicate claims arising under non-NLRA statutes. *See D.R. Horton, Inc.*, 737 F.3d at 36. In fact, the NLRA "was enacted and reenacted prior to the advent in 1966 of modern class action practice." *D.R. Horton, Inc.*, 737 F.3d at 362; *see Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (noting that Rule 23 "gained its current shape in an innovative 1966 revision"). As the Supreme Court reasoned in *Italian Colors*, the fact that the federal statutes at issue were enacted decades before the advent of Federal Rules of Civil Procedure Rule 23 undermines the argument that the federal statutes contain a congressional command to reject the waiver of class arbitration. *See Italian Colors Rest.* 133 S. Ct. at 2309.

In sum, the NLRA's text and legislative history do not contain any indication that Congress intended to override the FAA's mandate that arbitration agreements be enforced according to their terms. Had Congress meant for the NLRA to override the FAA, "it would have done so in a manner less obtuse" than what the Board suggests. *CompuCredit Corp.*, 132 S. Ct. at 667.

3. There is No Inherent Conflict Between the NLRA and the FAA.

A congressional command to override the FAA also cannot be inferred from an inherent conflict between the FAA and the NLRA's purpose. To the contrary, "arbitration has become a central pillar of Federal labor relations policy and in many different contexts the Board defers to the arbitration process both before and after the arbitrator issues an award." *D.R. Horton, Inc.*, 737 F.3d at 361. Indeed, the Supreme Court has understood the NLRA to permit and require arbitration. *See, e.g.*, *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257-58 (2009) (arbitration provision in collective-bargaining agreement must be honored unless ADEA removes such claims from NLRA's scope); *Blessing v. Freestone*,

520 U.S. 329, 343 (1997) ("[W]e discern[] in the structure of the [NLRA] the very specific right of employees to complete the collective-bargaining process and agree to an arbitration clause.") (Internal quotation marks and citations omitted). "Having worked in tandem with arbitration agreements in the past, the NLRA has no inherent conflict with the FAA." *D.R. Horton, Inc.*, 737 F.3d at 361.

In an effort to distinguish these cases in *Murphy Oil*, the Board has asserted there is a distinction between the treatment of collectively bargained arbitration provisions and mandatory individual arbitration agreements imposed by an employer:

> An individual arbitration agreement, imposed by employers on their employees as a condition of employment and restricting their rights under the NLRA, is the antithesis of an arbitration agreement providing for union representation in arbitration that was reached through the statutory process of collective bargaining between a freely chosen bargaining representative and an employer that has complied with the statutory duty to bargain in good faith.

Murphy Oil USA, Inc., 361 NLRB No. 72, 2014 WL 5465454, at *13. However, there is no legitimate basis for distinguishing between a unionized and non-unionized context in this case. The Supreme Court has explained that "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative." *14 Penn Plaza*, 556 U.S. at 258; *Gilmer, supra* at 32-33 ("unequal bargaining power between employers and employees" is no bar to FAA's enforceability of arbitration provisions).

Even if there were an irreconcilable conflict between the FAA and the NLRA, the FAA must control. Where statutes irreconcilably conflict, the statute later in time prevails. *See Chi. & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 582 n. 18, 91 S. Ct. 1731 (1971). The FAA was re-enacted twelve years *after* the passage of the NLRA. *Owen*,

702 F.3d at 1053. Congress's decision to re-enact the FAA, by itself, suggests that Congress intended the FAA's arbitration protections to remain intact even in light of the earlier enactment of the NLRA. *Id.*

There is no "inherent conflict" between the FAA and the NLRA. "[T]he Board has not been commissioned to effectuate the policies of the [NLRA] so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *Southern S.S. Co. v. N.L.R.B.*, 316 U.S. 31, 47 (1942). Because the Board's rule prohibiting class action waivers does not fall within the FAA's "saving clause," and the NLRA does not contain a congressional command to override the FAA, KBR's arbitration agreement must be enforced according to its terms.

D. The Class and Collective Action Waiver Does Not Require Employees to Forgo "Substantive Rights."

The right to bring or participate in a class or collective action is not a substantive right. Federal court proceedings are governed by procedural rules, including Rule 23 which creates the availability of class actions for certain claims, and Section 216 of the FLSA, which allows plaintiffs to bring claims under a collective action on behalf of themselves and others similarly situated. FRCP 23; 29 U.S.C. § 216(b). It is well-settled that the class and collective action mechanisms provided under these rules are *procedural devices*, not substantive rights. *Deposit Guar. Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims."); *D.R. Horton, Inc.*, 737 F.3d at 357 ("The use of class action procedures . . . is not a substantive right" and "there are numerous decisions holding that there is no right to use class procedures under

various employment-related statutory frameworks").[2] The Board's analysis in *D.R. Horton* is fundamentally inconsistent with Supreme Court precedent. The Board's decision is also wrong for an even more basic reason: the NLRA does not grant employees a non-waivable, substantive right to invoke class or collective procedures.

The *Gilmer* Supreme Court observed that "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by *the statute*; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628) (emphasis added). The Court confirmed that claims under federal statutes may be arbitrated so "long as the prospective litigant effectively may vindicate [the] statutory cause of action in the arbitral forum[.]" *Id.* at 28, 111 S. Ct. at 1653 (quoting *Mitsubishi*, 473 U.S. at 637, 105 S. Ct. at 3359). *Gilmer* also explained that the party opposing enforcement of an arbitration agreement bears the burden to "show that Congress intended to preclude a waiver of a judicial forum" for the claim at issue. *Gilmer*, 500 U.S. at 26. Because no contrary congressional command appeared in the statute at issue, the Supreme Court "had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue . . . expressly permitted collective actions." *Italian Colors Rest.*, 133 S. Ct. at 2311.

Thus, under *Gilmer*, the appropriate questions are whether Charging Party could vindicate his California statutory rights in an arbitral forum and whether a congressional command in the NLRA precludes the waiver of a judicial forum. As Member Johnson

[2] The Board's treatment in *D.R. Horton* of access to Rule 23 class and collective actions as a substantive right also runs afoul of the Rules Enabling Act, which makes clear that federal procedural rules such as Rule 23 cannot "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

observed in his *Murphy Oil* dissent, "[t]he Supreme Court has never held that an agreement to arbitrate a statutory claim is invalid to the extent that it divests a party of substantive rights under *any* statute . . . ." *Murphy Oil USA*, Inc., 361 NLRB No. 72, 2014 WL 5465454 (Member Johnson, dissenting) (emphasis in original).

Notwithstanding *Gilmer*, the Board has concluded that "[m]andatory arbitration agreements that bar employees from bringing joint, class, or collective workplace claims in any forum restrict the exercise of the *substantive* right to act concertedly for mutual aid or protection that is central to the National Labor Relations Act." *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454, at *6 (emphasis in original); *D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274, at *3-5. However, while the NLRA protects employees collectively *asserting* legal rights, the authorities cited by the Board do not hold that employees have a substantive right to *adjudicate* claims collectively through class or collective actions.

For example, the Board has relied on the Supreme Court decision *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) as holding that the right to engage in collective legal action is a core right protected by the NLRA. *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454, at *12. However, the *Eastex* Court did not address whether filing a class action is protected or, more particular to this case, whether the NLRA prohibits an employer from contractually agreeing with employees that employment-related claims be arbitrated individually. The Court noted only that lower courts have interpreted the "mutual aid or protection" clause as protecting employees from retaliation when they seek to improve work conditions "through resort to administrative and judicial forums." *Eastex, Inc.*, 437 U.S. at 565-66. The Court declined to address the bigger question "of what may constitute

'concerted' activities in this context." *Id.* at 566 n.15.

In addition, the Board has concluded that arbitration agreements waiving class and collective actions constitute agreements that "purport to restrict Section 7 rights." *See D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274, at *5. However, the Board cites no authority supporting its conclusion. Instead, the cases on which the Board relied in *D.R. Horton* and *Murphy Oil* involved "yellow-dog" contracts intended or used to impede well-recognized Section 7 rights, namely, active union organizational efforts. *See J.I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 334 (1944) (company attempted to use individual contracts to "impede employees" from organizing); *Nat'l Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 360-61 (1940) (company required employees to sign contract relinquishing the right to strike and the right to demand a closed shop or a signed agreement with any union); *N.L.R.B. v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942) (company's contract with employee "not only waived employee's right to collective bargaining but his right to strike or otherwise protest on the failure to obtain redress through arbitration").

None of these cases are comparable to KBR's arbitration agreement requiring employees to individually arbitrate California statutory claims and other non-NLRA employment disputes.

E. The Norris–LaGuardia Act Does Not Apply to Arbitration Agreements.

The Board has also asserted that the Norris–LaGuardia Act ("NLGA") repealed the FAA to the extent the FAA compels courts to enforce mandatory individual arbitration agreements. *D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274, at *16. According to the Board, in the event of a conflict between the NLGA and the FAA, the NLGA would prevail because it was enacted seven years after the FAA and expressly repeals all

conflicting acts. *Id.*

The Board's interpretation of the NLGA as prohibiting class action waivers is without foundation. *D.R. Horton, Inc.*, 737 F.3d at 362 ("It is undisputed that the NLGA is outside the Board's interpretive ambit."). The NLGA is an anti-injunction statute that restricts the power of federal courts to issue injunctions under certain circumstances. 29 U.S.C. § 101. The NLGA specifically defines the contracts to which it applies (commonly referred to as "yellow-dog contracts") as limited to contracts in which the employee "promises not to join, become, or remain a member of any labor organization" or to quit his employment if the employee becomes a member of a labor organization. 29 U.S.C. § 103(a), (b).

The NLGA does not apply because this case is not an injunction proceeding and KBR's arbitration agreement does not prohibit employees from joining a union or compel employees to forego employment if they become a union member. Indeed, the Board's decisions fail to cite a single case holding that an individual-specific arbitration agreement violates the NLGA. To the contrary, the NLGA "specifically defines those contracts to which it applies" and it is clear that an "agreement to arbitrate is not one of those contracts to which the [NLGA] applies." *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 844 (N.D. Cal. 2012) (citing 29 U.S.C. § 103(a), (b)). *See also Local 205, United Elec., Radio & Mach. Workers of Am. (UE) v. Gen. Elec. Co.*, 233 F.2d 85, 91 (1st Cir. 1956) ("[J]urisdiction to compel arbitration is not withdrawn by the Norris-La- Guardia Act.").

Furthermore, to the extent any tension exists between the NLGA and the FAA, there is no congressional command under which the FAA must yield to the NLGA. The

FAA was reenacted fifteen years *after* the passage of the NLGA and, as noted above, twelve years *after* the NLRA. *See Owen*, 702 F.3d at 1053. As the Fifth Circuit explained previously, "[t]he decision to reenact the FAA suggests that Congress intended its arbitration protections to remain intact even in light of the earlier passage of three major labor relations statutes [including the NLGA and the NLRA]." *Id.* Thus, the NLRA and the NLGA provide no basis for concluding that the class action waiver in the arbitration agreement is unlawful.

F. The Allegations Based on KBR's Motion to Compel Arbitration Are Barred Because Charging Party Was Not an "Employee" When KBR Sought to Enforce the Agreement.

The Board's allegation that KBR violated the Act by attempting to enforce the DRP by filing a motion to compel arbitration in the district court is also without foundation because Charging Party has not been an employee of KBR since June 17, 2013. Charging Party did not bring his action in California state court until nearly one year later on June 16, 2014, and KBR did not move to compel arbitration until August 24, 2014, long after Charging Party's employment ended in June of 2013.

The protections of Section 7 and Section 8 of the NLRA only cover "employees." 29 U.S.C. §§ 157–158; 29 U.S.C. § 152(3) (defining "employee"). *See also Int'l Longshoremen's Ass'n, AFL–CIO v. Davis*, 476 U.S. 380, 394-95, 106 S. Ct. 1904 (1986) (holding that in order for NLRA preemption to apply, the claimant must have "arguably" been an employee covered by the NLRA). Specifically, Section 8(a)(1) of the NLRA provides that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]." 29 U.S.C. § 158(a)(1) (emphasis added). Similarly, Section 7 provides "[e]mployees shall

have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities . . . ." 29 U.S.C. § 157 (emphasis added).

In turn, Section 2(3) of the NLRA defines "employee" as follows and clarifies that, generally, the NLRA, including Section 7 and Section 8, do not encompass actions taken by a former employer with respect to former employees:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . . .

29 U.S.C. § 152. As Section 2(3) makes clear, the only way Charging Party could be deemed to have been an "employee" under the NLRA when he filed his lawsuit was if his employment "ceased as a consequence of, or in connection with" a labor dispute or because of an unfair labor practice. *Id.* However, there is no evidence, nor are there any allegations, that the termination of Charging Party's employment was in any way related to a labor dispute or an unfair labor practice. In fact, there are no allegations that Charging Party engaged in any protected activity at all during his employment or, indeed, that he was an employee (evidence, perhaps, that the Region either did not consider "employee" status to be critical, or the Region would not assert what it could not prove, or both). Neither does the Region assert that Charging Party is an "employee" of *any* employer or that he seeks to be employed by any employer.

Recent cases involving the *D.R. Horton* "employee" status issue have cited *Briggs Manufacturing Co.*, 75 NLRB 569 (1947) as the seminal support for the proposition that

a former employee is an employee under Section 2(3) for purposes of Section 8(a)(1) of the NLRA. *For example,* the Board in *Cowabunga, Inc.,* 363 NLRB No. 133*,* slip op. p. 2, states:

> We also reject the Respondent's argument that [Charging Party] does not meet the definition of an "employee" under the Act because he was no longer employed by the Respondent at the time the Respondent filed its motion to compel. The Board has long held that the broad definition of "employee" contained in Section 2(3) of the Act covers former employees. *See Briggs Mfg. Co.,* 75 NLRB 569, 571 (1947). Accord: *Leslie's Poolmart, Inc.,* 362 NLRB No. 184 slip op. at fn. 2 (2015); *PJ Chase, Inc.,* 362 NLRB No. 177, slip op. at fn. 9 (2015).

The Board in *Briggs Mfg. Co.* held, relevant here, that: "The Act then provides for the use of the term 'employee' both in the broad generic sense as defined in Section 2(3) of the Act, and also in a more limited sense whenever the Act explicitly so provides. In its generic sense, the term is broad enough to include members of the working class generally [citing to *Phelps Dodge Corporation v. N.L.R.B.,* 313 U.S. 177 (1941)]." 75 NLRB 569, 570 fn. 3. The employee in question in *Briggs* was a former supervisor whose employment was not discriminatorily terminated and was now an applicant for a supervisory position. The Board wrote: "He [the applicant] was a member of the working class when he applied for a job. He did not acquire the status of a supervisory employee . . . until he was hired *after* the discrimination which violated Section 8(4) took place." (Emphasis in original.) Thus, while the applicant was a former employee, it was his action in applying for work which made him a "member of the working class generally." The Act does not define the term "employee" as "any person" but as "any employee," signifying the desire to work. There must be an allegation that the individual filing a charge or on whose behalf a charge is filed is at minimum a "member of the working class generally"

at the time the charge is filed.[3]

The Supreme Court in *Phelps Dodge Corporation* was confronted with a case in which two individuals who had left employment with Phelps before a strike at the company, but sought employment after the strike's conclusion were denied reemployment. Refusal to hire the two applicants, Curtis and Daugherty, solely because of their union affiliation was found by Mr. Justice Frankfurter, who wrote for the Court, to be an unfair labor practice. Justice Frankfurter, as a threshold matter, held that the applicants were "employees."

Citation to *Briggs,* which in turn cited *Phelps Dodge,* became a regular feature in the Board's discussions of Section 2(3). *See, e.g., Wood, Wire and Metal Lathers' International Union, Local No. 238,* 156 NLRB 997 (1966) (the Board in the context of a Section 8(b)(1)(A) allegation where respondent union argued that "no evidence was introduced to show that *any member* of Respondent was employed by or had sought employment from any of the named employers" held, nonetheless, "[t]he mere existence of [charging party's] membership in a labor organization underscores his intention to be a participating member of the general work force, entitled to the rights assured by Section

[3] Moreover, *Briggs Mfg*. is factually distinguishable on the grounds that it involved a refusal to employ an applicant because the company wanted him to withdraw an 8(b)(3) charge. The respondent there argued that the alleged discriminatee had been previously terminated for good cause and thus was not an employee entitled to the NLRA's protection. That factual scenario is distinctly different from the enforcement of an arbitration clause involving a former employee who was terminated as the result of a garden-variety reduction in force and has no current or even recent alleged relationship with the employer or, indeed, any employer. Nor is there any alleged prospect for a resumption of that relationship. *See NLRB v. Elias Bros. Big Boy, Inc*., 327 F.2d 421 (6th Cir. 1964) (evidence established that waitress, who had been discharged by employer, was not bona fide employee and was therefore not entitled to reinstatement and back pay, and that she gave notice of her intent to leave employment and that employer did not discharge her discriminatorily or commit unfair labor practice in replacing her.)

7 . . . ." at 997-98). The Board in *Cowabunga* and the other cases cited therein, *i.e., Leslie's Poolmart, Inc.,* 362 NLRB No. 184 slip op. at 1, fn. 2 (2015) and *PJ Cheese, Inc.,* 362 NLRB No. 177, slip op. at 3 fn. 9 (2015), parrot the same formula, namely: "The Board has long held that the broad definition of 'employee' contained in Section 2(3) of the Act covers former employees." 363 NLRB No. 133, slip op. 2. Notwithstanding the mantra, quoted in the preceding sentence, the Supreme Court in *Phelps Dodge* and the Board in *Briggs,* at a minimum, spoke of membership in the "working class generally" not a simple formula of - - if once employed, always an "employee."

The distinction has a difference and is one which the Supreme Court discerned in *Chemical Workers v. Pittsburgh Glass (NLRB v. Pittsburgh Plate Glass Co., Chemical Division, et al.),* 404 U.S. 157 (1971). The Court in considering the NLRB's finding that retirees' medical insurance benefits were mandatory subjects of bargaining held, to the contrary, that the Board's determination that retirees are "employees" under Section 2(3) had no reasonable basis in the law. Mr. Justice Brennan wrote on behalf of the Court:

> In this cause we hold that the Board's decision is not supported by the law. The Act, after all, as 1 makes clear, is concerned with the disruption to commerce that arises from interference with the organization and collective-bargaining rights of "workers" – not those who have retired from the work force. The inequality of bargaining power that Congress sought to remedy was that of the "working" man, and the labor disputes that it is ordered to be subjected to collective bargaining were those of employers and their active employees. Nowhere in history of the National Labor Relations Act is there any evidence that retired workers are to be considered as within the ambit of the collective-bargaining obligations of the statute.
>
> To the contrary, the legislative history of 2 (3) itself indicates that the term "employee" is not to be stretched beyond its plain meaning embracing only those who work for another for hire. In *NLRB v. Hearst Publications, supra,* we sustained the

Board's finding that newsboys were "employees" rather than independent contractors. We said that "the broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as 'employee,' …leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications." The term "employee" "must be understood with reference to the purpose of the Act and the facts involved in the economic relationship." 322 U.S., at 129. Congress reacted by specifically excluding from the definition of "employee" "any individual having the status of an independent contractor." The House, which proposed the amendment, explained:

"An 'employee' according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone,….means someone who works for another for hire. But in the case of *National Labor Relations Board v. Hearst Publications, Inc*…., the Board…held independent merchants who bought newspapers from the publisher and hired people to sell them to be 'employees.' The people the merchants hired to sell the papers were 'employees' of the merchants, but holding the merchants to be 'employees' of the publisher of the papers was most far reaching. It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between 'employees' and 'independent contractors.' 'Employees' work for wages or salaries under direct supervision….It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings." H.R. Rep. No. 245, 80th Cong., 1st Sess., 18 (1947) (emphasis added).

See also 93 Cong. Rec. 6441-6442; H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 32-33 (1947). The 1947 Taft-Hartley revision made clear that general agency principles could not be ignored in distinguishing "employees" from independent contractors. *NLRB v. United Insurance Co.,* 390 U.S. 254, 256 (1968). Although *Hearst Publications* was thus

> repudiated, we do not think its approach has been totally discredited. In doubtful cases resort must still be had to economic and policy considerations to infuse 2 (3) with meaning. But, as the House comments quoted above demonstrate, this is not a doubtful case. The ordinary meaning of "employee" does not include retired workers; retired employees have ceased to work for another for hire. The decisions on which the Board relied in construing 2 (3) to the contrary are wide of the mark. The Board enumerated "unfair labor practice situations where the statute has been applied to persons who have not been initially hired by an employer or whose employment has terminated. Illustrative are cases in which the Board has held that applicants for employment and registrants at hiring halls – who have never been hired in the first place – as well as persons who have quit or whose employers have gone out of business are 'employees' embraced by the policies of the Act." 177 N.L.R.B., at 913 (citations omitted). Yet all of these cases involved people who, unlike the pensioners here, were members of the active work force available for hire and at least in that sense could be identified as "employees." No decision under the Act is cited, and none to our knowledge exists, in which an individual who has ceased work without explanation of further employment has been held to be an "employee."

404 U.S. at 166-69.

The Supreme Court wrote again on the issue of applicants as "employees" in *N.L.R.B. v. Town & Country Electric, Inc.,* 516 U.S. 85 (1995) holding that paid union organizers who are applicants for employment are "employees" within the meaning of Section 2(3). In arriving at this conclusion the Court turned, as it often does, to a dictionary and wrote: "The ordinary dictionary definition of 'employee' includes any 'person who works for another in return for financial or other compensation.' American Heritage Dictionary 604 (3d ed. 1992)." 516 U.S. at 90.

The emphasis on an economic nexus in efforts to capture the intent of what it means to be a Section 2(3) "employee" was certainly present in *Phelps Dodge* (applicants

for employment), *Briggs* (applicants for employment), but not present in *Pittsburgh Plate Glass* (retirees), and present again in *Town & Country Electric* (applicants for employment). These cases set the stage for the Board's decision in *WBAI Pacifica Foundation,* 328 NLRB 1273 (1999). There, unpaid, volunteer staff produced a majority of the radio station's programming. The Regional Director found that unpaid staff were Section 2(3) employees based upon *NLRB v. Town & Country Electric, supra.* The Regional Director opined that requiring the receipt of wages, in view of the applicant (not yet hired or paid) line of cases, notably *Phelps Dodge, supra,* would be defining "employee" narrowly and restrictively. The Board panel wisely concluded that the two Supreme Court cases were both binding authority and, while *Town & Country Electric* did not overrule *Phelps Dodge, Town & Country* was then the Court's most recent detailed treatment of Section 2(3) employee status. The Board applied the teachings of both binding Supreme Court decisions:

> While the Court rejected arguments in both cases that would have narrowed the Section 2(3) definition to exclude paid union organizers or job applicants, it did not suggest that the definition should be so broad as to include individuals, like members of unpaid staff at issue here, whose relationship with the employer was devoid of any form of compensation, current or contemplated.

328 NLRB at 1274.

The *WBAI* decision, based upon *Phelps Dodge, Pittsburgh Plate Glass,* and *Town & Country* stands, at the very minimum, for the proposition that a Section 2(3) employee must be alleged and shown to be a person who is a member of the working class generally and whose relationship with the employer is filled with, at least, a thought of current or contemplated compensation. The volunteer staff members were clearly working and may

have been willing to work for remediation, but in *WBAI* that was insufficient to categorize the volunteers as "members of the working class generally." The Region has not alleged that Charging Party in the present case is a member of the working class generally or has a thought of current or contemplated compensation for work to be performed. Relying upon the *WBAI* Board: It has not been alleged and there is no evidence that Charging Party plans to work for Respondents for hire or is a member of the working class and "thus the Act's concern with balancing the bargaining power between employer and employees does not extend to" him. 328 NLRB at 1276.

Charging Party is very much like a retiree. He is not on the payroll, performs no services, is under no restrictions on re-employment, is not seeking rehire, and may or may not be working for another employer since his termination in June 2013. It is well established that retirees and others not working or seeking work are not employees entitled to protection under the NLRA. *Pittsburgh Plate Glass Co., Chemical Division v. NLRB*, 427 F.2d 936 (6th Cir. 1970), *affirmed sub nom. Allied Chemical and Alkali Workers of America , Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

In *Seattle Opera,* 331 NLRB 1072 (2000), the Board, relying on the *WBAI* analysis, found that "auxiliary choristers" of the opera company met the statutory definition of employee. However, the choristers were paid on a per performance basis and received free tickets to performances, had to sign an agreement regarding attendance and decorum requirements, and were given the Opera's handbook. The Board distinguished this set of facts from *WBAI,* but quoted with approval from *WBAI* that employee status required that "a rudimentary economic relationship" between employer and employee must exist. *Id*. 331 NLRB at 1073. The District of Columbia Circuit Court enforced a later

bargaining order proceeding in a 2-1 decision. *Seattle Opera v. NLRB,* 292 F.3d 757 (D.C. Cir. 2002). Charging Party, in the instant matter, is shown to have been compensated since his separation from employment more than a year earlier and Respondents have no control over the work performance, if any, of Charging Party. In short, there is not and has not been even a rudimentary economic relationship, current or anticipated, and no evidence that Charging Party is employed or seeking employment.

Finally, in *Toering Electric Company,* 351 NLRB No. 18 (2007), the Board, after an exhaustive study of controlling Supreme Court authority, including *Phelps Dodge Corporation, Town & Country Electric, Sure-Tan v. NLRB,* 467 U.S. 883 (1984), and Board cases, including *Brevard Achievement Center,* 342 NLRB 982 (2004) (disabled workers having a primarily rehabilitative relationship with their employer are not statutory employees) and *WBAI Pacifica Foundation, supra,* ruled that not all applicants are Section 2(3) employees. In order to be protected as a Section 2(3) employee-applicant, the Board held, one must have a "genuine interest in seeking to establish an employment relationship with the employer." 351 NLRB No. 18 slip op. 4. There must be "at least a rudimentary economic [working] relationship, actual or anticipated, between employer and employee." *WBAI Pacifica Foundation,* 328 NLRB at 1274. To hold otherwise would render Congress's definition of employee in Section 2(3) without meaning. There are limits to Section 2(3) employee status as the Supreme Court and NLRB cases demonstrate. It bears repeating that the Region's Complaint in the instant case makes no assertion that Charging Party was an "employee," either of the applicant variety or even of the "working class" variety and certainly not of the Respondent's current payroll variety. Charging Party is not a Section 2(3) employee and, therefore, is not entitled to

the NLRA's Section 8(a)(1)'s protection.[4]

G. Any Finding That KBR Violated Section 8(a)(1) By Attempting To Enforce the Arbitration Agreement in Court Violates KBR's First Amendment Rights.

The right of access to the courts is found in the First Amendment right to petition. *Bill Johnson's Rests., Inc. v. N.L.R.B.*, 461 U.S. 731, 741 (1983). The Supreme Court explained in *Bill Johnson's* that this First Amendment protection is only lost if the litigation both (1) lacked any reasonable basis and (2) was retaliatory. *Id.* at 748. An exception to this rule is that the NLRB may also issue remedies where the action is beyond a state court's jurisdiction because of federal preemption or "has an objective that is illegal under

[4] The General Counsel may attempt to rely on *Little Rock Crate & Basket Co.,* 227 NLRB No. 192 (1977) and *Oak Apparel, Inc.,* 218 NLRB 701 (1975) to claim, in essence, "once an employee, forever an employee" is the proper standard. However, there are factual distinctions apparent from these two cases, and the rationale in the latter case has been seriously limited if not rejected. In *Little Rock Crate,* the "employee" had been discharged at 7:45 a.m., began distributing union handbills and a NLRB brochure, and was the subject of a coercive comment uttered in front of other employees a few hours later while still on the company premises waiting to receive his final paycheck. The Board concluded that the individual was a member of the working class generally, citing *Briggs supra*, and *Oak Apparel*. *Oak Apparel* involved what were in essence union "salts" assigned by the union to work for the company and to determine whether the employer's employees had any interest in union representation. Today, under *Toering Electric*, these "salts" would certainly not be Section 2(3) employees. Here, Charging Party had no contact with the Respondent for close to a year after he was laid off and the record is void of any evidence as to his status at the time he filed his charges or currently. Proof, not assumption, is necessary to show that Charging Party was a member of the working class generally. In *Cellular Sales of Missouri, LLC,* 362 NLRB No. 27 (2105), the Board adopted an Administrative Law Judge's analysis that any person who once was employed by an employer and who apparently is still capable of working fits the definition of "employee" for purposes of the Act citing *Little Rock Crate.* Neither the Board nor the ALJ took the Board's decision in *WBAI,* which conflicts with this reasoning, into account. Moreover, in *Cellular Sales*, the charging party (Bauer) filed his complaint in district court within 6 months of his "last day at work" and, while the reported case is silent concerning the evidence relied upon, the administrative law judge, citing *Little Rock Crate*, *supra*, and *Briggs*, made a specific finding that Bauer was "clearly an employee" and a member of the working class generally. 362 NLRB at ship op. 7. There is no evidence and it cannot be presumed that Charting Party here is, at the very least, a member of the working class.

federal law."[5] *Id.* at 737 n.5.

The general rule permitting sanctions for meritless, retaliatory litigation does not apply in this case. KBR filed its removal petition and motion to compel arbitration in the Federal District Court in response, and as a valid defense, to the lawsuit Charging Party initiated, and not for any frivolous or retaliatory purpose.

Further, there is no evidence that KBR had "an objective that is illegal under federal law." Instead, according to the Board in *Murphy Oil*, an "illegal objective" exists *any time* an employer seeks to enforce an agreement that violates the NLRA. *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454, at *28. However, if this were the case, then the other exceptions the Supreme Court articulated in *Bill Johnson's* would be meaningless. The Supreme Court explained that even lawsuits brought for the express purpose of retaliating against employees for exercising rights under the Act do not fall outside of the First Amendment's protections: "[T]he filing of a meritorious law suit, even for a retaliatory motive, is not an unfair labor practice." *Bill Johnson's Rests., Inc.*, 461 U.S. at 747. The Supreme Court further recognized that "if the employer's case in the state court ultimately proves meritorious and he has judgment against the employees, the employer should also prevail before the Board, for the filing of a meritorious law suit, even for a retaliatory motive, is not an unfair labor practice." *Id.* at 747 (emphasis added). *See also BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 537 (2002) (Scalia, J., concurring) ("[T]he implication of our decision today is that, in a future appropriate case, we will construe the [Act] . . . to prohibit only lawsuits that are both objectively baseless and

[5] Because KBR sought to compel arbitration under the FAA in federal court, this is not a case in which state-law preemption would apply.

subjectively intended to abuse process."). Thus, the *Bill Johnson's* exception for litigation that has an "an objective that is illegal under federal law" does not support the Board's proposition that it can preclude employers from filing motions to compel arbitration (and award employees attorneys' fees and costs). In any event, even under the Board's interpretation, KBR did not file its motion to compel to further any "illegal objective."

As discussed at length above, KBR's position in the federal lawsuit was entirely consistent with the FAA, Supreme Court precedent, and the holdings of numerous courts finding that class actions waivers are enforceable in wage-related lawsuits. Consequently, KBR's motion to compel arbitration in the Federal District Court did not fall outside the First Amendment's protection. *See also Murphy Oil*, 361 NLR No. 72, pp. 33-34 (Member Miscimarra, dissenting) ("In my view, therefore, Respondent's 'well-founded' motion to dismiss based on the class waiver 'may not be enjoined as an unfair labor practice,' and I believe my colleagues' finding infringes on Respondent's 'First Amendment right to petition the Government for redress of grievances.'") (quoting *Bill Johnson's Rest.*, 461 U.S. at 741, 743).

H. Charging Party Did Not Engage in Concerted Activity.

Any decision by the Board's finding 8(a)(1) liability on the part of KBR would be unenforceable in its entirety because there is no evidence Charging Party engaged in "concerted activity." It is well-settled that Section 7 of the Act does not protect individual employee activity. Instead, Section 7 protection arises only when two or more employees "engage in" activities that are "concerted" and have the purpose of "mutual aid or protection." 29 U.S.C. § 157. To fall within Section 7's "concerted activity," the employee must act "with or on the authority of other employees, and not solely by and on behalf of

the employee himself." *Rockwell Intern. Corp. v. N.L.R.B.*, 814 F.2d 1530, 1534 (11th Cir. 1987). *See also E.I. Du Pont De Nemours & Co. v. NLRB*, 707 F.2d 1076, 1078 (9th Cir. 1983) ("The requirement of 'concert' denies protection to activity that, even if taken in pursuit of goals that would meet the test of 'mutual aid or protection,' is only the isolated conduct of a single employee.").

The mere fact that Charging Party labeled his lawsuit in California as a proposed class and collective action is not sufficient. The filing of a "class" action complaint by a single employee "does not inherently involve protected concerted activity." *See Murphy Oil USA, Inc.*, 361 NLRB No. 72 (N.L.R.B. Oct. 28, 2014) (Member Miscimarra, dissenting). Indeed, there is no evidence that Charging Party acted with, on behalf of, or on the authority of other employees in filing the lawsuit. It is also undisputed that no other former or current employees of KBR were named in, joined, or sought to join the lawsuit. In fact, there is no evidence that Charging Party did anything to involve or enlist the support of other employees.

The Board's decision in the case of *Meyers Industries* made it clear that to constitute "concerted activity," the employee must have engaged in the activity "with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Indus.*, 281 NLRB 882, 885, 1986 WL 54414, at *5 (N.L.R.B. 1986) (emphasis added).

Styling a lawsuit as a class or collective action does not constitute "concerted activity." Because there is no evidence Charging Party engaged in concerted activity within the meaning of Section 7, the Administrative Law Judge should recommend dismissal of the Complaint.

I. This Case Falls Within the "Voluntariness" Carve-Out in *D.R. Horton*.

Footnote 28 of the Board's decision in *D.R. Horton* states:

> Moreover, we do not reach the more difficult questions of ... (2) whether, if arbitration is a mutually beneficial means of dispute resolution, an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute, or all potential employment disputes through a non-class arbitration rather than litigation in court.

D.R. Horton, 357 NLRB at p. 13, n. 28.

This language limits the reach of the Board's decision to situations where the employee has no meaningful choice to accept or reject an arbitration agreement, such as when an arbitration agreement is implemented for existing employees. This was not the case with Charging Party. He could have declined to accept employment with KBR and pursued opportunities with employers without arbitration agreements or whose arbitration agreements did not contain class or collective action waivers.

Charging Party's situation is unlike that of the charging party in *D.R. Horton* who was already an employee when the company implemented its arbitration program. Accordingly, Charging Party chose to accept employment with KBR having full knowledge he would be agreeing to settle any disputes with KBR by individual, as opposed to group, arbitration. Clearly, any applicant has to make a number of choices when applying for a job: a choice to accept or reject the position offered, the pay rate, the hours, the vacation program, the benefits package, and so forth. A dispute resolution procedure with an arbitration agreement is just one more choice. The applicant does not have to accept the job if he or she does not want to be covered by the arbitration agreement. Charging Party assented to arbitration by electing to accept an offer of employment with KBR.

II. MCI DID NOT VIOLATE SECTION 8(a)(1) OF THE NLRA BY MAINTAINING AND ENFORCING KBR'S DISPUTE RESOLUTION PROGRAM THAT PROHIBITS EMPLOYEES FROM PURSUING CLAIMS IN A CLASS OR REPRESENTATIVE CAPACITY IN BOTH JUDICIAL AND ARBITRAL FORUMS.

There is no allegation or stipulation of fact that Charging Party was ever a direct employee of MCI, nor is there any allegation that MCI was a joint-employer with KBR with respect to Charging Party's employment with KBR. The charge against MCI should be dismissed because Charging Party was never an employee of MCI. Additionally, even if he were to be considered an employee of MCI, the charge against MCI should be dismissed for the same reasons as stated in the previous Section I and the following Section III.

III. CHARGING PARTY'S CLAIM IS TIME-BARRED BY SECTION 10(b) OF THE NATIONAL LABOR RELATIONS ACT.

The allegations that KBR violated the NLRA by requiring Charging Party to enter into the arbitration agreement and seeking to enforce the arbitration agreement are time-barred under Section 10(b) of the NLRA. Section 10(b) provides that a complaint cannot be based on conduct occurring more than six months prior to the filing of the charge with the Board: "[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . ." 29 U.S.C. § 160(b). Here, the ***only*** factual allegations are that "KBR required the Charging Party to sign the KBR Dispute Resolution Agreement as a condition of his employment" and that "Respondents jointly filed a Motion to Compel Arbitration of Individual and Dismiss Class and Representative Claims."

A. The Statute of Limitations Began To Run As of January 16, 2012, When the DRP Was Signed.

Charging Party ***voluntarily*** signed the DRP on January 16, 2012, when he began

employment with KBR. KBR did not enforce the DRP as a work rule subsequent to the beginning of his employment. If he did not want to execute the DRP, he surely had that option in that he could have declined employment with KBR. Thus, the six-month statute of limitations for challenging the formation of the contract expired in July of 2012. However, the underlying unfair labor practice charge was not filed until November 14, 2014, some ***thirty-four months*** after he executed the DRP. Because the initial charge was filed more than six months after the alleged unfair labor practice purportedly occurred, any allegations based on Charging Party's execution of the DRP are time-barred. 29 U.S.C. § 160(b).

The same result follows with respect to the Board's finding that KBR and MCI violated the NLRA by filing the motion to compel arbitration. Because Charging Party did not file a timely unfair labor practice charge by July of 2012 to contest the lawfulness of the arbitration agreement, he could not do so in 2014 when the motion was filed.

The GC will argue that the statute of limitations did not run from the date of the execution of the DRP because (1) the arbitration clause was a "work rule" that KBR "maintained" during the 10(b) period and (2) KBR's motion to compel arbitration independently violated Section 8(a)(1) of the Act. *See Cowabunga and Chadwick Hines*, 363 NLRB No. 133, p. 2 (February 26, 2016). The ALJ should reject this unsupported interpretation of the Section 10(b) limitations period which shrivels it virtually to the point of extinction.

The cases on which the Board previously has relied for the proposition that the mere maintenance of a workplace rule constitutes a continuing violation do not apply to the arbitration agreement between Charging Party and KBR. Indeed, the decisions cited

by the Board all involved *workplace rules* that were *unilaterally* promulgated and maintained by the employer—namely, policies prohibiting the distribution of union literature or solicitation of union membership *during working time* or *on the employer's premises*.

Unlike in the cases previously cited by the Board, the "continuing violation" theory does not apply here because this case does not involve the "maintenance" of a workplace rule unilaterally promulgated by the employer. To the contrary, the DRP is a ***voluntary, mutually binding contract*** between Charging Party and KBR only. It is nonsensical to suggest that KBR "maintained" the contract. Unlike a workplace rule promulgated and maintained by an employer, a contract requires a specific agreement between two or more parties. Thus, the concept that the "mere maintenance" of a workplace rule extends the limitations period should not apply to a mutual arbitration agreement between an employer and an employee that binds both parties during and after the employment relationship.

For the same reasons, the GC's argument that "an employer's enforcement of an unlawful rule . . . independently violates Section 8(a)(1)" also does not apply in this context. Indeed, the cases on which the Board has previously relied are also inapposite because those cases all involved the enforcement of a ***workplace rule*** against employees ***during*** the employees' employment. *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 805 (1945) (employee discharged for soliciting union membership on employer's premises); *Sahara Reno*, 262 NLRB 824, 824 n.2 & 825 (N.L.R.B. 1982), *enfd.*, 722 F.2d 734 (3d Cir. 1983) (employees discharged for engaging in union activity during company time); *King Radio Corp., Inc.*, 166 NLRB 649, 649 n.2 (N.L.R.B. 1966),

enfd., 398 F.2d 14 (10th Cir. 1968) (company discharged employees for violating no-talking rule while working).

Simply put, the "maintenance" or "independent" violation theory makes sense when applied to workplace rules an employer *unilaterally* promulgates a contract to which the employee was not even a party. Indeed, it would be inequitable to hold that the statute of limitations runs from the date a contract went into effect when the employee was not a party to the contract and may not have even been employed when the rule or contract was initially created. However, there is simply no legitimate reason to apply the continuing violation theory to the arbitration agreement between Charging Party and KBR. Charging Party, in his individual capacity, was a party to the contract and was fully aware of the contract's terms. Thus, there is nothing inequitable about the Section 10(b) statute of limitations running from the date he entered into the agreement with KBR.

Taking the Board's rulings to their ultimate conclusion, the Section 10(b) limitations period to file an unfair labor practice charge relating to an arbitration agreement would ***never*** expire and would continue long after the individual's employment so long as the parties remain bound by the contract, or the statute would restart any time a party seeks to enforce the contract. Such an interpretation would render Section 10(b) meaningless.

B. At the Very Least, the Statute of Limitations Began To Run When Charging Party Lost His Employee Status.

As argued above, *supra* pp. 26-36, Charging Party lost his status as an employee of KBR no later than June 17, 2013, when his employment with KBR ended as the result of a reduction-in-force which was ***not*** the consequence of any alleged unfair labor practice under the NLRA. Accordingly, the very latest that Charging Party could have filed a charge with the Board was December 17, 2013. He did not do so until November

14, 2014, nearly eleven months after the statute of limitations expired.

The Act expressly provides that no complaint shall issue based on an unfair practice occurring more than six months prior to the filing of the charge. 29 U.S.C. § 160(b). Under the plain language of Section 10(b), Charging Party could not wait ***thirty-five*** months after he signed the agreement, or ***seventeen*** months after he lost employee status, to file a charge claiming the arbitration agreement was unlawful. Thus, the charge should be dismissed in its entirety.

CONCLUSION

For the foregoing reasons, this Honorable Tribunal should find that neither KBR nor MCI violated Section 8(a)(1) of the NLRA by maintaining and enforcing KBR's DRP that prohibits employees from pursuing claims in a class or representative capacity in both judicial and arbitral forums and that Charging Party's claims are barred by Section 10(b) of the NLRA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The above and foregoing Respondent's Brief to the Administrative Law Judge has been e-filed this 24th day of March, 2016, on the NLRB's website at www.nlrb.gov, and has been served on Nikki N. Cheaney, Esquire, Counsel for the General Counsel, National Labor Relations Board, Region 31, 11500 W. Olympic Blvd., Suite 600, Los Angeles, CA 90064 via email (nikki.cheaney@nlrb.gov) and U.S. Mail, postage prepaid, and Leonard Sansanowicz, Esquire, Counsel for the Charging Party, Feldman Browne Olivares, APC, 10100 Santa Monica Blvd., Suite 2490, Los Angeles, CA 90067-4144 via email (leonard@leefeldmanlaw.com) and U.S. Mail, postage prepaid.

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