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.

and

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

DAVID L. TOTTEN, an Individual

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

To: **The Honorable Jeffrey D. Wedeking**
Administrative Law Judge
National Labor Relations Board
901 Market Street, Suite 300
San Francisco, CA 94103

Submitted by:
Nikki N. Cheaney, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 31
11500 W. Olympic Blvd., Suite 600
Los Angeles, CA 90064-1524

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I. INTRODUCTION

The instant proceedings are based upon an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (Complaint) issued by the Regional Director of Region 31 on May 29, 2015. (GC Exh. 1(l)).[1] The Complaint was based on unfair labor practice charges filed by Charging Party David L. Totten (Charging Party). The Complaint alleges that Respondent Kellogg Brown & Root, LLC (Respondent KBR) violated Section 8(a)(1) of the Act by maintaining a Dispute Resolution Program, which emcompasses Respondent KBR's Dispute Resolution Plan and Rules policy, that prohibits employees from pursing claims in a class or representive capacity in both judicial and arbitral forums. The Complaint further alleges that Respondent KBR and Respondent Molycorp, Inc. (Respondent Molycorp) (collectively, Respondents) violated Section 8(a)(1) of the Act by enforcing the Dispute Resolution Program by asserting it in litigation in federal court.

On February 25, 2016, counsel for Respondents, counsel for the Charging Party, and counsel for the General Counsel (jointly, the Parties) submitted to the Division fo Judges a Joint Motion to Transfer Proceedings to the Division of Judges and Joint Stipulation of Facts (Joint Motion or Joint Stipulation) dated December 31, 2015. On February 26, 2016, granted the Parties' Joint Motion and transferred proceedings to the Division of Judges.

II. STATEMENT OF ISSUES

As set forth in the Joint Stipulation, the Parties have agreed that the legal issues to be resolved in this matter are the following:

[1] Citations to the evidentiary record are as follows: Joint Stipulation of Facts (Joint Stip., ¶ #); General Counsel Exhibits (GC Exh. # at page #); and Joint Exhibits (Joint Exh. # at page #).

(1) whether Respondent KBR violated Section 8(a)(1) of the Act by maintaining and enforcing Respondent KBR's Dispute Resolution Program that prohibits employees from pursuing claims in a class or representative capacity in both judicial and arbitral forums;

(2) whether Respondent Molycorp violated Section 8(a)(1) of the Act by enforcing Respondent KBR's Dispute Resolution Program that prohibits employees from pursuing claims in a class or representative capacity in both judicial and arbitral forums; and

(3) Whether the unfair labor practice charges filed by the Charging Party are barred by Section 10(b) of the Act, 29 U.S.C. Sec. 160(b).

III. STATEMENT OF FACTS

Respondent is engaged in engineering, procurement, construction and service operations. (Joint Stip., ¶ 10(a)). Respondent Molycorp is engaged in the manufacturing of custom rare earth and rare metal products. (Joint Stip., ¶ 11(a)). Since at least January 2012, and at all material times, Respondent KBR has 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. (Joint Stip., ¶ 13(a); Joint Exh. 1 at 7). In this regard, the Dispute Resolution Plan and Rules Policy clearly states,

> The Plan is designed to provide a program for the quick, fair, accessible, and inexpensive resolution of all Disputes, as defined hereafter, between the Company and the Company's present and former Employees and Applicants for employment, including but not limited to those Disputes related to or arising out of a current, former or potential employment relationship with the Company. …
>
> …
>
> All Disputes not otherwise settled by the Parties shall be finally and conconclusively 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.
>
> 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 person or entities who are claimed to be similarly situated, or participated as a class member in such a proceeding.

(Joint Exh. 1 at 3-7). Since at least January 2012 through the present, Respondent KBR has required employees to sign the KBR Dispute Resolution Agreement, which incorporates Respondent KBR's Dispute Resolution Plan and Rules policy described above (collectively, the Dispute Resolution Program), as a condition of employment. (Joint Stip., ¶ 13(b); Joint Exh. 2). Specifically, about January 16, 2012, Respondent KBR required the Charging Party to sign the KBR Dispute Resolution Agreement as a condition of his employment; the Charging Party's employment ended in June 2013. (Joint Stip., ¶ 13(b)).

About June 16, 2014, the Charging Party filed a Complaint for Damages against Respondents in *David Totten, an individual, and all others similarly situated, Plaintiffs vs. Kellogg Brown & Root, LLC, a Delaware Corporation; Molycorp, Inc., a Delaware Corporation; and Does 1 through 100, inclusive, Defendants,* Case No. CIVDS 1408596, in Superior Court of the State of California for the County of San Bernardino (State Superior Court Case). (Joint Stip., ¶ 13(c); Joint Exh. 3). About July 22, 2014, the Charging Party filed a First Amended Complaint for Damages in the State Superior Court Case. (Joint Stip., ¶ 13(d); Joint Exh. 4). About August 27, 2014, Respondents filed a Notice of Removal in *David L. Totten, an individual, and all others similarly situated, Plaintiffs vs. Kellogg Brown & Root, LLC, a Delaware Corporation; Molycorp, Inc., a Delaware Corporation; and Does 1 through 100, inclusive, Defendants,* Case No. 5:14-cv-01766-DMG-DTBx in United States District Court for the Central District of California Eastern Division (Federal District Court Case) to remove the State Superior Court Case to United States District Court. (Joint Stip., ¶ 13(e); Joint Exh. 5). Since about September 2014, Respondents have enforced the Dispute Resolution Program,

which – as noted above – prohibits employees from pursuing claims in a class or representative capacity in both judicial and arbitral forums, by asserting it in the Federal District Court Case. (Joint Stip., ¶ 13(f)). Specifically, about September 25, 2014, Respondents jointly filed a Motion to Compel Arbitration of Individual and Dismiss Class and Representative Claims (Motion to Compel). (Joint Stip., ¶ 13(f); Joint Exh. 6).

IV. ANALYSIS

A. Respondent KBR violated Section 8(a)(1) of the Act by maintaining the Dispute Resolution Program because it prohibits employees from pursuing claims in a class or representative capacity in both judicial and arbitral forums.

Section 8(a)(1) of the Act provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." The Board has consistently held that collective legal action involving wages, hours, and/or working conditions is protected concerted activity under Section 7. Moreover, in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), the Board reaffirmed its ruling in *D. R. Horton*, 357 NLRB No. 184, slip op. at 1-7 (2012), where it held that mandatory arbitration agreements required as a condition of employment which preclude the filing of joint, class, or collective claims addressing wages, hours, or other working conditions – which constitute protected, concerted activity – in any forum, arbitral or judicial, unlawfully restrict employees' Section 7 rights in violation of Section 8(a)(1) of the Act. See also *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27 (2015); *Chesapeake Energy Corporation*, 362 NLRB No. 80 (2015).

In *D.R. Horton*, the Board set forth the appropriate legal framework for considering the legality of employers' arbitration agreements that limit collective and class legal activity in judicial and arbitral forums. *D.R. Horton*, 357 NLRB slip op. at 1-7. In determining whether a rule or agreement applied to all employees, as a condition of employment, violates Section 8(a)(1), the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Under this test, the Board first considers whether the rule explicitly restricts activities protected by Section 7 and if it does, it is unlawful. *Id*. at 646. If the rule does not explicitly restrict activity protected by Section 7, the Board then examines whether: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Id*. at 647.

Applying this legal framework to the instant matter, the Dispute Resolution Program here clearly violates the Act. As set forth in the Joint Stipulation, the Dispute Resolution Plan and Rules policy, which is incorporated in the Dispute Resolution Program, prohibits employees from pursuing claims in a class or representative capacity in both judicial and arbitral forums. In this regard, as noted above, after outlining numerous kinds of claims that touch upon terms and conditions of employment and after establishing that all such claims must be resolved through arbitration – not litigation in court – if not settled, the Dispute Resolution Plan and Rules policy clearly states:

> 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 person or entities who are claimed to be similarly situated, or participated as a class member in such a proceeding.

As such, the Dispute Resolution Program – through its incorporation of the Dispute Resolution Plan and Rules policy – explicitly restricts activities protected by Section 7 of the Act because, as noted by the Board in *D.R. Horton*, "employees who join together to bring employment-related claims on a class wide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA," and the Dispute Resolution Program here expressly prohibits such class or collectively claims in both judicial and arbitral forums. *D.R. Horton*, 357 NLRB slip op. at 3; *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014); *Lutheran Heritage Village-Livonia*, 343 NLRB at 646. Accordingly, Respondent KBR has violated Section 8(a)(1) of the Act by maintaining the Dispute Resolution Program as alleged.

B. Respondents KBR and Molycorp violated Section 8(a)(1) of the Act by enforcing the Dispute Resolution Program.

In addition to Respondent KBR's underlying Dispute Resolution Program, itself being unlawful, Respondents KBR's and Molycorp's efforts to enforce the Dispute Resolution Program through their Motion to Compel Arbitration of Individual and Dismiss Class and Representative Claims also violates Section 8(a)(1) of the Act. In *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), the Supreme Court dealt with the issue of when lawsuits may be enjoined as violations of Section 8(a)(1). In *Bill Johnson's*, the employer sued employees in state court alleging they engaged in mass picketing, harassed customers, blocked access, and hand-billed libelous material. The Supreme Court, in finding that the suit could not be enjoined as a violation of Section 8(a)(1), set forth the framework for evaluating violations of Section 8(a)(1) in cases where the lawsuit is ongoing and cases where the suit is concluded. The Court held that the Board may enjoin an ongoing suit brought for retaliatory reasons and that lacks a reasonable basis in fact or law. *Id*. at 748-749. As to concluded suits, the Court held that if it were unsuccessful or withdrawn by the plaintiff, the Board could find a violation if the suit was

brought in retaliation for protected activity. *Id*. at 747, 749. *Bill Johnson's* is instructive here because of what the Court stated in the oft-cited footnote 5. The Court there took pains to make clear that the principle it was enunciating did not reach those suits that have "…an objective that is illegal under federal law," as such suits could be enjoined as violations of Section 8(a)(1). *Id*. at 737. As the Court put it, "…Petitioner concedes that the Board may enjoin these latter types of suits…Nor could it be successfully argued otherwise for we have upheld Board orders enjoining unions from prosecuting suits for enforcement of fines that could not lawfully be imposed under the Act." A lawsuit has an impermissible unlawful object where it seeks an end or result incompatible with Board law. *Id*. at fn. 5. Cf. *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832 (1991).

The Board has applied the *Bill Johnson's* footnote 5 exception for the filing of suits with an illegal object in a broad swath of cases. As detailed in the *Bill Johnson's* decision itself, the exception has been applied in cases where unions sued in state court to collect fines that were otherwise prohibited by the Act. See *Granite State Joint Board, Textile Workers Union*, 187 NLRB 636, 637 (1972), enf. denied 446 F.2d 369, revd. 409 U.S. 213 (1972); *Booster Lodge No. 405*, 185 NLRB 380, 385 (1973), enfd. 459 F.2d 1143, affd. 412 U.S. 84 (1973). More importantly, the Board has applied the exception to the instant situation and has now repeatedly held that efforts to enforce unlawful arbitration agreements which preclude class or collective claims in both judicial and arbtral forums are unlawful. See *D.R. Horton*, supra, slip op. at 1-7; *Murphy Oil*, supra, slip op. at 20-21; *Century Fast Foods, Inc.*, 363 NLRB No. 97 at 1 fn. 3 (Jan. 20, 2016) ('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 the litigation was otherwise

meritorious or reasonable."). Such is the situation here where Respondents, through their Motion to Compel Arbitration of Individual and Dismiss Class and Representative Claims, have sought to enforce Respondent KBR's Dispute Resolution Program to preclude employees from pursuing class or representative claims in both judicial and arbitral forums. As such, Respondents' litigation in Federal District Court has the illegal objective of limiting employees' Section 7 rights and enforcing an unlawful contractual provision. Accordingly, Respondents' Motion to Compel Arbitration of Individual and Dismiss Class and Representative Claims constitutes unlawful enforcement of the Dispute Resolution Program in violation of Section 8(a)(1) of the Act as alleged.

C. The unfair labor practice charges filed by the Charging Party are not barred by Section 10(b) of the Act.

It is well-established that Section 10(b) of the Act does not preclude the pursuit of a complaint allegation based on the maintenance and/or enforcement of an unlawful rule within the Section 10(b) period, even if the rule was promulgated earlier. See *Control Services,* 305 NLRB 435, fn. 2 & 442 (1991), enfd. mem., 961 F. 2d 1568 (3d Cir. 1992). The Board has also held repeatedly that maintenance of an unlawful workplace rule, such as the arbitration policy here, constitutes a continuing violation that is not time barred by Section 10(b), regardless of when the rule was first promulgated. 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); *Chesapeake Energy Corp.*, 362 NLRB No. 80, slip op. at 1, fn, 3 (2015); and *Cellular Sales of Missouri, LLC,* 362 NLRB No. 27, slip op. at 2, fn. 7 (2015).

Here, althought Respondent KBR promulgated the Dispute Resolution Program at some point prior to January 2012, the Parties have stipulated that at all material times since then and through the present, Respondent KBR has maintained the Dispute Resolution Program. (Joint

Stip., ¶¶ 13(a)-(b)). Accordingly, by stipulating that Respondent KBR has maintained the Dispute Resolution Program through the present, Respondents have no basis to argue that the unlawful maintenance allegation is time-barred by Section 10(b) of the Act. Moreover, Respondents have clearly sought to enforce the Dispute Resolution Program within the Section 10(b) period as they filed their Motion to Compel Individual and Dismiss Class and Representative Claims on September 25, 2014 – less than two months before the filing of the charge against Respondent KBR on November 14, 2014, and less than five months before the filing of the amended charge against Respondent KBR and the charge against Respondent Molycorp on February 5, 2015. (Joint Stip., ¶¶ 9(a)-(c) and 13(f)). Thus, the unlawful enforcement allegation is also not time-barred by Section 10(b) of the Act.

Finally, the fact that the Charging Party's employment with Respondent KBR ended in June 2013 is irrelevant to the timeliness of the alleged unfair labor practices. To the extent that Respondents may argue that the Charging Party was not an "employee" of Respondents within the Section 10(b) period and that, therefore, the allegations should be dismissed, such argument is without merit. 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 *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 1 fns. 3, 7 (2015). In *Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977), the Board noted it has "long held that that term [employee] means "members of the working class generally," including "former employees of a particular employer." See *Briggs Mfg. Co.*, 75 NLRB at 571 (finding that Sec. 2(3) of the Act provides that the term "employees" includes any employee unless the Act explicitly states otherwise; and in its generic sense the term is broad enough to include

"members of the working class generally"). Therefore, under this principal, the Charging Party is clearly an employee within the meaning of the Act.

D. The remedies specified in the Complaint are appropriate.

As specified in the Complaint, the General Counsel seeks an order requiring Respondent KBR and/or Respondent Molycorp to (among other things) cease and desist from enforcing the Dispute Resolution Program to prohibit class or collective actions in all forums; to rescind or revise the Dispute Resolution Program to make clear that the Dispute Resolution Program does not constitute a waiver of employees' right to maintain employment-related joint, class, or collective actions in all forums; to notify all current and former employees who were required to sign the Dispute Resolution Program that the Dispute Resolution Program has been rescinded or revised, and if revised, provide them with a copy of the revised Dispute Resolution Program. These remedies are standard remedies in this type of case. See, e.g., *Century Fast Foods, Inc.*, 363 NLRB No. 97, slip op. at 2 (Jan. 20, 2016).

Furthermore, the Board has the authority to order Respondents to reimburse Charging Party for all reasonable litigation expenses directly related to opposing Respondents' efforts to enforce the Dispute Resolution Program, including litigation expenses related to opposing Respondents' Motion to Compel Arbitration of Individual and Dismiss Class and Representstive Claims. The reimbursement of litigation expenses is an appropriate make-whole remedy in the instant case. The Charging Party exercised a Section 7 right to engage in protected concerted activity and Respondents' attempt to compel individual action pursuant to the Dispute Resolution Program unlawfully interfered with Charging Party's Section 7 right. The Board has deemed the reimbursement of litigation expenses to be appropriate in similar situations. See *Bill Johnson's Restaurant*, 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 attorney's fees and other expenses" and "any other proper relief that would effectuate the policies of the Act"); *Columbia College Chicago*, 360 NLRB No. 122, slip. op. at 3 (2014) (recognizing that the Board has broad discretionary authority to tailor its remedies to the varying circumstances of a case); *Century Fast Food, Inc.*, supra, slip op. 2 (Board ordered reimbursement of litigation expenses to the charging party that may have been incurred in opposing the respondent's efforts to enforce an unlawful arbitration agreement). Accordingly, Respondents should be held jointly and severally liable for reimbursing the Charging Party for his litigation expenses related to opposing Respondents' Motion to Compel Arbitration of Individual and Dismiss Class and Representstive Claims.

V. CONCLUSION

Based on the entire record in this matter and on the foregoing argument, counsel for the General Counsel respectfully submits that the Respondents violated Section 8(a)(1) of the Act as alleged in the Complaint.

Dated at Los Angeles, California, this 25th day of March, 2016.

Respectfully submitted,

/s/ Nikki N. Cheaney
Nikki N. Cheaney, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 31
11500 W. Olympic Blvd., Suite 600
Los Angeles, California 90064