

No. 15-60860

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

CONVERGYS CORPORATION

Petitioner/Cross Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross Petitioner

**ON PETITION FOR REVIEW AND CROSS-
APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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STATEMENT REGARDING ORAL ARGUMENT

The Board believes that oral argument would assist the Court in evaluating the important legal issues presented in this case.

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**BRIEF FOR
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JURISDICTIONAL STATEMENT

This case is before the Court on the petition for review of Convergys Corporation (“Convergys”), and the cross-application for enforcement of the National Labor Relations Board (“the Board”), of a Board Order issued against Convergys. The Board’s Decision and Order, reported at 363 NLRB No. 51 (Nov. 30, 2015), is final under Section 10(e) and (f) of the National Labor Relations Act (“the NLRA”), as amended, 29 U.S.C. § 151, et seq., 160(e) and (f).

The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the NLRA, which empowers the Board to prevent unfair labor practices. *Id.* § 160(a). Convergys's petition for review and the Board's cross-application for enforcement are timely, as the NLRA places no time limitation on such filings. This Court has jurisdiction over these proceedings pursuant to Section 10(e) and (f) of the NLRA because Convergys transacts business in Texas.

STATEMENT OF ISSUES

1. Whether the Board reasonably found that Convergys violated Section 8(a)(1) of the NLRA by imposing on employees, as a condition of their employment, a provision waiving their right to concertedly pursue work-related legal claims.
2. Whether the Board reasonably found that Convergys violated Section 8(a)(1) of the NLRA by seeking enforcement of the unlawful waiver provision.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

Convergys is an Ohio corporation that operates call centers in various locations across the country. (ROA.272; ROA.22.)¹ Since August 23, 2011, Convergys has required all job applicants to sign the following waiver provision as a condition of employment:

I further agree that I will pursue my claim or lawsuit relating to my employment with Convergys (or any of its subsidiaries or related entities) as an individual, and will not lead, join, or serve as a member of a class or group of persons bringing such a claim or lawsuit.

(ROA.272; ROA.23-24.) On September 16, 2011, charging party Hope Grant applied to work at a Convergys call center in Hazelwood, Missouri, and signed a form containing the waiver provision. Convergys hired Grant as a customer-service representative later that month. (ROA.272; ROA.23.)

On March 16, 2012, Grant filed a civil suit in her individual capacity, and on behalf of other call-center employees, in the United States District Court for the Eastern District of Missouri, alleging that Convergys had violated the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201, et seq. (ROA.272; ROA.24, 39-67.)

On June 22, Convergys moved to strike the lawsuit’s class and collective

¹ “ROA” refers to the administrative record, filed on January 21, 2016. Where applicable, references preceding a semicolon are to the Board’s findings; those following are to the supporting evidence. “Br.” refers to Convergys’s opening brief.

allegations on the ground that Grant and other call-center employees had waived their right to bring any collective claims or suits pertaining to their employment.² (ROA.272; ROA.24, 68-74.)

II. PROCEDURAL HISTORY

Based on two unfair-labor-practice charges filed by Grant (ROA.1-4), the Board's General Counsel issued a complaint (ROA.5-12) alleging that Convergys violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by maintaining and enforcing an unlawful requirement that employees waive their right to pursue concerted legal claims related to their employment. The parties waived a hearing and submitted the case to the Board on a stipulated record. (ROA.272; ROA.20-27.) On October 25, 2012, Administrative Law Judge Arthur J. Amchan issued a decision finding that Convergys violated the NLRA as alleged, based on the Board's decision in *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), *enforcement denied in part*, 737 F.3d 344 (5th Cir. 2013), *reh'g denied*, No. 12-60031 (Apr. 16, 2014). (ROA.272-74.)

² The district court denied Convergys's motion (ROA.268 (citing *Grant v. Convergys Corp.*, No. 4:12-CV-496, 2013 WL 781898 (E.D. Mo. Mar. 1, 2013))), and later certified for interlocutory appeal the question of whether the concerted-action waiver was enforceable. (ROA.268 n.4.) In the interim, the parties agreed to settle their dispute. Grant then sought to withdraw her Board charges against Convergys. The Board denied that request because the settlement did not remedy the unfair labor practices found by the judge. (ROA.268 n.6.)

III. THE BOARD'S DECISION AND ORDER

The Board (Chairman Pearce and Member McFerran; Member Miscimarra, dissenting) issued a Decision and Order adopting as modified the judge's rulings, findings, conclusions and remedy. (ROA.267-72.) In finding Convergys's maintenance of the waiver provision unlawful, the Board specifically noted that the provision was not part of an arbitration agreement and did not, therefore, implicate the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq. (ROA.267 n.3 (distinguishing *Horton*, 357 NLRB at 2277, and *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014), *enforcement denied in part*, 808 F.3d 1013 (5th Cir. 2015), *pet. for en banc reh'g filed*, No. 14-60800 (Apr. 18, 2016))). Member Miscimarra disagreed with the panel majority for reasons set forth in his partial dissenting opinion in *Murphy Oil*. (ROA.269-71.)

The Board's Order requires that Convergys cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the NLRA, 29 U.S.C. § 157. (ROA.268.) Affirmatively, the Order requires Convergys to: rescind the waiver provision from its job applications nationwide; notify all applicants, and current and former employees, of the change;

reimburse Grant's attorneys' fees and expenses incurred in opposing Convergys's motion to strike;³ and post a remedial notice. (ROA.268-69.)

SUMMARY OF ARGUMENT

The single issue before the Court is whether the Board correctly found that Convergys's maintenance and enforcement of the waiver provision violates Section 8(a)(1) of the NLRA because the waiver infringes upon the protected Section 7 right of Convergys's employees to concertedly pursue work-related legal claims against their employer. The Board reasonably found that Section 7 of the NLRA protects employees' right to engage in concerted legal action. That determination, which falls squarely within the Board's recognized expertise to interpret the NLRA, is supported by well-established labor-law principles and a long line of Supreme Court and circuit precedent, which Convergys does not even attempt to question. There is similarly no dispute—indeed, Convergys admits—that the waiver provision abrogates employees' ability to concertedly pursue work-related legal claims against their employer. Accordingly, by maintaining the waiver provision as a condition of their employment, and by enforcing it through a motion to strike the concerted portions of Grant's lawsuit, Convergys interfered with its employees' protected Section 7 rights and, in so doing, violated Section 8(a)(1).

³ This applies only to the extent that the July 31, 2013 settlement did not already cover Grant's fees and expenses. (ROA.268 n.6.)

Convergys's entire defense relies on claiming that this case is governed by this Court's *Horton* decision, 737 F.3d at 344, even though the waiver provision in this case, unlike the one in *Horton*, is not part of an arbitration agreement governed by the FAA. Convergys responds to NLRA caselaw, which recognizes the right of employees to join together to enforce workplace statutes benefiting them as employees, by referring the Court to inapposite caselaw under the FLSA, Federal Rule of Civil Procedure 23, and (again) the FAA. All the while, Convergys ignores the fundamental point that the only relevant statute here is the NLRA, so cases principally interpreting other statutes do not alter the result. With respect to the violation based on Convergys's motion to strike, the Court does not have jurisdiction to consider Convergys's constitutional defense which is, in any event, without merit.

STANDARD OF REVIEW

When Congress enacted the NLRA, it conferred upon the Board the primary authority to interpret and apply the statute. *See Garner v. Teamsters Chauffeurs & Helpers Local 776*, 346 U.S. 485, 490 (1953); *Horton*, 737 F.3d at 349 (recognizing "Board's expertise in labor law"). The Board's exercise of its primary authority to interpret the NLRA is entitled to affirmance so long as it is reasonable, even if the Court might decide the issue differently *de novo*. *See City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1868-71 (2013) (to reject agency

interpretation of statute within its expertise requires showing that “statutory text forecloses” agency’s interpretation (reaffirming *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996) (courts “must respect” Board’s reasonable judgment; “it need not show that its construction is the *best* way to read the statute”); *Murphy Oil*, 808 F.3d at 1017 (“This court reviews the Board’s legal conclusions *de novo*, but [w]e will enforce the Board’s order if its construction of the statute is reasonably defensible.” (internal quotation and citation omitted)). For the same reason, the Court defers to the Board’s plausible inferences, findings of fact, and application of the statute. *Horton*, 737 F.3d at 349, 356.

ARGUMENT

I. CONVERGYS VIOLATED SECTION 8(a)(1) OF THE NLRA BY IMPOSING ON ITS EMPLOYEES A PROVISION WAIVING THEIR SECTION 7 RIGHT TO CONCERTEDLY PURSUE WORK-RELATED LEGAL CLAIMS

A. The Concerted-Action Waiver Unlawfully Restricts Employees’ NLRA Right to Pursue Work-Related Legal Claims on a Joint, Collective, or Class Basis

Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), prohibits employers from engaging in conduct that “reasonably tends to interfere with, restrain or coerce employees” in the exercise of rights guaranteed by Section 7 of the NLRA, *id.* § 157. *NLRB v. Laredo Coca Cola Bottling Co.*, 613 F.2d 1338, 1340-41 (5th Cir. 1980). Section 7 guarantees employees “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 or protection*, and . . . to refrain from any or all of such activities.” 29 U.S.C. § 157 (emphasis added). Under well-established Board precedent, approved by this Court, a work rule is unlawful if it explicitly restricts, or is applied to restrict, activities protected by Section 7. *Lutheran Heritage Vill.-Livonia*, 343 NLRB 646, 646-47 (2004); *Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 208-09 (5th Cir. 2014); *see also Horton*, 737 F.3d at 363 (applying *Lutheran Heritage* to assess whether arbitration agreement interfered with employees’ right to file Board charges).⁴

As explained below, courts have upheld the Board’s construction of Section 7 as protecting concerted pursuit of work-related legal claims, consistent with the language and purposes of the NLRA. That construction falls squarely within the Board’s expertise and its responsibility for delineating federal labor law generally, and Section 7 in particular. *See NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 829 (1984) (noting that “the task of defining the scope of [Section] 7 ‘is for the Board to perform in the first instance as it considers the wide variety of cases that come before it.’” (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568

⁴ A rule is also unlawful if employees would reasonably construe its language to prohibit Section 7 activity or if it was promulgated in response to Section 7 activity. *Flex Frac*, 746 F.3d at 209 (citing *Lutheran Heritage*, 343 NLRB at 647). Neither of these legal theories is implicated here.

(1978)); accord *Horton*, 737 F.3d at 356; *Reef Indus., Inc. v. NLRB*, 952 F.2d 830, 838 (5th Cir. 1991). Because Convergys’s waiver provision “plainly and unambiguously” abrogates employees’ Section 7 right to participate in such protected activities, the Board properly found that maintaining the provision violates Section 8(a)(1). (ROA.267.)

Central to this case is the Board’s holding that the right of employees to engage in concerted activity for mutual aid or protection is a core, substantive NLRA right—the “basic premise” upon which our national labor policy has been built. *Murphy Oil*, 2014 WL 5465454, at *1. The reasonableness of the Board’s view was confirmed by the Supreme Court in *Eastex*, 437 U.S. at 565-66 & nn.15-16. In that case, the Court recognized that Section 7 encompasses not only collective bargaining but also other concerted activity, both in the workplace and in legislative and judicial forums. *Id.*

Eastex specifically notes that the Board has protected concerted legal activity for decades. *Id.* at 565-66 & n.15. That line of cases dates back to *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-50 (1942), in which the Board found three employees’ joint FLSA suit protected. It continues, unbroken and with court approval, through modern NLRA jurisprudence. See, e.g., *Brady v. Nat’l Football League*, 644 F.3d 661, 673 (8th Cir. 2011) (“[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of

employment is ‘concerted activity’ under [Section] 7”); *Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1188-89 (D.C. Cir. 2000) (concerted petitions for injunctions against workplace harassment); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) (“Generally, filing by employees of a labor related civil action is protected activity under Section 7 of the NLRA unless the employees acted in bad faith.”).⁵ Indeed, this Court recognized in *Horton* that the Board’s interpretation of Section 7 is supported by Supreme Court and circuit precedent. 737 F.3d at 356-57 (citing *City Disposal*, 465 U.S. at 831-32, 835-36; *Brady*, 644 F.3d at 673; *127 Rest. Corp.*, 331 NLRB 269, 275-76 (2000)).⁶

The Board’s holding that Section 7 protects concerted legal activity furthers the policy objectives that guided Congress in passing the NLRA. The NLRA protects collective rights “not for their own sake but as an instrument of the

⁵ *Accord, e.g., Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) (“[F]iling of a labor related civil action by a group of employees is ordinarily a concerted activity protected by § 7, unless the employees acted in bad faith.” (citation omitted)); *Harco Trucking, LLC*, 344 NLRB 478, 478-79 (2005) (wage-related class action); *127 Rest. Corp.*, 331 NLRB 269, 275 (2000) (concerted lawsuit alleging unlawful pay policies); *United Parcel Serv., Inc.*, 252 NLRB 1015, 1018, 1026 & n.26 (1980) (wage-related class action), *enforced*, 677 F.2d 421 (6th Cir. 1982); *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975) (concerted lawsuit for contract violation and unpaid wages), *enforced mem.*, 567 F.2d 391 (7th Cir. 1977).

⁶ Convergys’s narrow focus on Rule 23 class actions and FLSA collective actions should not create the impression that concerted legal action is a recent development anachronistically imported into labor law. Joint and collective claims of various forms long predate those two particular mechanisms, as do the Board’s earliest decisions finding that Section 7 protects the collective legal pursuit of work-related claims.

national labor policy of minimizing industrial strife.” *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975). Protecting employees’ ability to resolve workplace disputes collectively in an adjudicatory forum effectively serves that purpose, because collective lawsuits are an alternative to strikes and other disruptive protests. *Horton*, 357 NLRB at 2279-80. Denying employees access to concerted litigation, as an alternative to exercising their right to walk out in protest, “would only tend to frustrate the policy of the [NLRA] to protect the right of workers to act together to better their working conditions.” *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962).

Salt River Valley Water Users’ Association v. NLRB aptly illustrates how concerted legal activity functions as a safety valve when a labor dispute arises. 206 F.2d 325 (9th Cir. 1953). There, unrest over the employer’s wage policies prompted an employee to circulate a petition among co-workers designating him as their agent to seek back wages under the FLSA. *Id.* at 328. Recognizing that concerted activity “is often an effective weapon for obtaining [benefits] to which [employees] . . . are already ‘legally’ entitled,” the court upheld the Board’s holding that Section 7 protected the employees’ effort to exert group pressure on the employer to redress their work-related claims through resort to legal processes. *Id.*

The Board's holding that Section 7 protects employees' concerted pursuit of legal claims also advances the congressional objective of "restoring equality of bargaining power between employers and employees." 29 U.S.C. § 151; *accord Murphy Oil*, 2014 WL 5465454, at *1. Employees covered by the NLRA, recognizing the strength in numbers, have long exercised their Section 7 right to band together to take advantage of the evolving body of laws and procedures that legislatures have provided to redress their grievances. *See Eastex*, 437 U.S. at 565-66 & n.15; *Moss Planing Mill Co.*, 103 NLRB 414, 418 (1953) (concerted wage claim before administrative agency), *enforced*, 206 F.2d 557 (4th Cir. 1953). Collective action of that sort seeks to unite employees generally and to lay a foundation for more effective collective bargaining. *Eastex*, 437 U.S. at 569-70. That result, in turn, furthers the NLRA's objective to enable employees, through collective action, to increase their economic well-being. *See Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 753-54 (1985) (Congress sought to remedy "the widening gap between wages and profits" by enacting the NLRA (quoting 79 Cong. Rec. 2371 (1935))).

Finally, in order to preserve the full freedom of employees to decide for themselves whether to join or refrain from participating in concerted activity when a concrete labor dispute arises, the Board and the courts have long held that Section 7 rights may not be prospectively waived in agreements between

employers and individual employees. In *National Licorice Co. v. NLRB*, for example, the Supreme Court held that individual contracts, in which employees relinquished their rights to strike and negotiate closed-shop agreements, amounted to a “renunciation by the employees of rights guaranteed by the [NLRA], and were a continuing means of thwarting the policy of the [NLRA].” 309 U.S. 350, 361 (1940). The Court further explained that “employers cannot set at naught the [NLRA] by inducing their workmen to agree not to demand performance of the duties which [the statute] imposes.” *Id.* at 364. And in *NLRB v. Stone*, the Seventh Circuit, agreeing with the Board, held that individual contracts requiring employees to adjust their grievances with their employer individually “constitute[] a violation of the [NLRA] per se,” even when “entered into without coercion.” 125 F.2d 752, 756 (7th Cir. 1942).⁷

⁷ *Accord J.I. Case Co.*, 321 U.S. 332, 337 (1944) (individual contracts that conflict with Board’s function of preventing unfair labor practices “obviously must yield or the [NLRA] would be reduced to a futility”); *W. Cartridge Co.*, 134 F.2d 240 (7th Cir. 1943) (invalidating individual contracts giving employer right to fire employee who participated in strike or other concerted activity); *On Assignment Staffing Servs.*, 362 NLRB No. 189, 2015 WL 5113231, at *11 (Aug. 27, 2015) (explaining that prospective waivers of Section 7 rights are invalid even if voluntary); *Bon Harbor Nursing & Rehab. Ctr.*, 348 NLRB 1062, 1073, 1078 (2006) (employer unlawfully conditioned employees’ reinstatement, after dismissal for non-union concerted protected protest, on agreement not to engage in further similar protests); *Ishikawa Gasket Am., Inc.*, 337 NLRB 175, 175-76 (2001) (employer unlawfully conditioned discharged employee’s severance on contract not to help other

In sum, the Board has reasonably construed Section 7 as guaranteeing employees the option of resorting to concerted pursuit of legal claims to advance work-related concerns. That construction is supported by longstanding Board and court precedent. It also reflects the Board's sound judgment that concerted legal activity is a particularly effective means to advance Congress's goal of avoiding labor strife and economic disruptions. That reasonable judgment falls squarely within the Board's area of expertise and responsibility, *see City Disposal*, 465 U.S. at 829, and therefore merits affirmance by this Court, *see City of Arlington*, 133 S. Ct. at 1868-71. Convergys's waiver provision facially and indisputably infringes upon its employees' Section 7 rights because it prohibits them from pursuing *any* concerted legal claims, without exception. Therefore, Convergys violated Section 8(a)(1) of the NLRA by maintaining that provision.

employees in disputes against employer or to act "contrary to the [employer's] interests in remaining union-free"), *enforced*, 354 F.3d 534 (6th Cir. 2004).

For similar reasons, the Board and the courts have struck down prospective waivers in individual agreements in which union members promise not to resign their membership or return to work during an authorized strike. *See Pattern Makers' League of N. Am. v. NLRB*, 724 F.2d 57, 60 (7th Cir. 1983) ("[B]ecause League Law 13 completely suspends an employee's right to choose not to be a union member and thus no longer subject to union discipline, it frustrates the overriding policy of labor law that employees be free to choose whether to engage in concerted activities."), *aff'd*, 473 U.S. 95, 99 (1985); *NLRB v. Granite State Board, Textile Workers*, 409 U.S. 213, 217-18 (1972) ("[T]he vitality of [Section] 7 requires that the member be free to refrain in November from the actions he endorsed in May.").

B. FAA Jurisprudence Does Not Prevent Application of the NLRA To a Waiver Provision Unrelated to Any Arbitration Agreement

Convergys's entire argument is premised on its assumption that this case is governed by this Court's decision in *Horton*, 737 F.3d at 344, and Supreme Court and other circuit decisions enforcing arbitration agreements. (*See* Br. 5-8.) That betrays a deep misunderstanding of *Horton* and its kin. Those cases apply the FAA as an inextricable part of their analyses. By contrast, the waiver provision in this case does not mention arbitration (ROA.272; ROA.23-24), and even Convergys admits (Br. 12) that the FAA is inapplicable. There is thus no support for Convergys's attempt to import holdings and policy considerations stemming from the FAA into this labor-law case.

In *Horton*, this Court recognized from the beginning that, because the concerted-action waiver at issue was part of an arbitration agreement, the case would have to be decided in accordance with FAA as well as NLRA principles.⁸ Immediately after noting that Supreme Court and circuit precedent support the Board's view that Section 7 protects employees' right to engage in concerted legal

⁸ As the Court recognized in *Murphy Oil*, 808 F.3d at 1018, the Board respectfully disagrees with this Court's *Horton* decision. *See* Pet. for reh'g en banc, *Murphy Oil USA, Inc. v. NLRB*, No. 14-60800 (5th Cir. Apr. 18, 2016). Therefore, any argument distinguishing *Horton* from this case should not be construed as endorsing its reasoning.

action, *Horton*, 737 F.3d at 356-57, the Court considered the impact of the FAA on that construction of Section 7, stating:

To stop here, though, is to make the NLRA the only relevant authority. The [FAA] has equal importance in our review. Caselaw under the FAA points us in a different direction than the course taken by the Board.

Id. at 357. The Court devoted the rest of its opinion to the central question before it, *i.e.*, whether the Board’s interpretation of the NLRA conflicts, *when applied to arbitration agreements*, with the FAA’s requirement that such agreements be enforced according to their terms. *Id.* at 358.

First, the Court examined whether the Board’s rule fit within the FAA’s savings clause, which exempts from enforcement arbitration agreements that are unenforceable “upon such grounds as exist at law or in equity for the revocation of any contract.” *Id.* at 359 (quoting 9 U.S.C. § 2). The Court found that, under the Supreme Court’s reasoning in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341-44 (2011), the savings clause did not apply because the Board’s rule disfavored arbitration. *Horton*, 737 F.3d at 358-60. The Court did not hold that a concerted-action waiver never violates the NLRA; it held only that the NLRA rule and the FAA could not be reconciled—and both fully effectuated—under the savings clause.

Second, the Court found that the NLRA did not embody a congressional command “overrid[ing]” the FAA’s mandate to enforce arbitration agreements. *Id.*

at 360. Approaching that question with “a healthy regard for the federal policy favoring arbitration,” the Court concluded that the FAA required enforcement of agreements waiving employees’ right to pursue collective legal action *in favor of individual arbitration*. *Id.* at 360-62 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).

It is quite apparent, therefore, that *Horton* depends entirely for its holding on federal arbitration law.⁹ The congressional-command analysis, in particular, applies only in cases, like *Gilmer*, *Horton*, and this Court’s *Carter v. Countrywide Credit Industries, Inc.*, 362 F.3d 294 (5th Cir. 2004), which pit the FAA against another coequal federal statute. It has no application where, as here, the NLRA is “the only relevant authority.” *Horton*, 737 F.3d at 357; *see also id.* at 356 (noting that Board cannot “effectuate the policies of the [NLRA] so single-mindedly that it may wholly ignore other and equally important Congressional objectives.” (quoting *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942))).

Another circuit has already concluded, as the Board found here, that the FAA has no application to waiver provisions that, like the one in Convergys’s employment application, contain no mutual promise to arbitrate. In *Killion v. KeHE Distributors, LLC*, 761 F.3d 574, 592 (6th Cir. 2014), the Sixth Circuit

⁹ Without exception, the cases listed in footnote 2 of Convergys’s brief (Br. 9) as enforcing concerted-action waivers involve arbitration agreements. Therefore, they are equally irrelevant to this case.

declined to apply FAA cases, including *Horton, Gilmer, Carter*, and *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), outside of the arbitration context. The court reasoned that “[b]ecause no arbitration agreement is present in the case before us, we find no countervailing federal policy that outweighs the policy articulated in the FLSA.” *Killion*, 761 F.3d at 592. On that basis, the Sixth Circuit invalidated a collective-action waiver in severance agreements that were interposed to justify dismissal of a collective FLSA suit. *Id.* For similar reasons, this Court should find that the collective-action waiver in Convergys’s employment application is unlawful under the NLRA.

Convergys (Br. 12-13) attempts to avoid the conclusion that the FAA provides no basis for legitimating its interference with NLRA rights with the following syllogism: (1) *Concepcion* holds that the FAA places arbitration agreements on an equal footing with other contracts, 563 U.S. at 339; (2) *Concepcion* holds that arbitration agreements waiving class-action procedures are lawful and enforceable according to their terms, *id.* at 340, 352; (3) therefore all other agreements requiring employees to waive class-action procedures are also lawful and enforceable according to their terms. As the Supreme Court observed of a similar effort, “this is a bit of verbal logic from which the meaning of things has evaporated.” *Phelps Dodge v. NLRB*, 313 U.S. 177, 191 (1941).

In *Concepcion*, the Supreme Court held that the FAA preempted a judicial interpretation of state unconscionability law that, when applied to arbitration agreements, barred class-action waivers in most consumer contracts of adhesion. That interpretation, the Court ruled, “interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA.” 563 U.S. at 344, 346-52. The Court found that the unconscionability doctrine had been “applied in a fashion that disfavors arbitration.” *Id.* at 341; *see also id.* at 342 (noting that “California’s courts have been more likely to hold contracts to arbitrate unconscionable than other contracts”). But *Concepcion* did not hold or imply that state courts could not apply their unconscionability doctrine, or the rule barring class-action waivers in contracts of adhesion, to contracts that did not involve arbitration.

In *Horton*, this Court used similar reasoning in relying on *Concepcion* to preclude enforcement of the Board’s rule vindicating the Section 7 right of employees to litigate concerted in a judicial forum if denied that right in arbitration. 737 F.3d at 359-60. In this Court’s view, the Board’s rule diminished employers’ incentive to resolve claims in individual arbitration. *Id.* But, like the Supreme Court, this Court did not hold or imply that the Board was not free to apply its longstanding interpretation of Section 7 in contexts that do not disfavor arbitration.

In sum, the only statutory imperatives or policy considerations applicable in this case are those embodied in the NLRA.¹⁰ As shown, while applying FAA jurisprudence to decide *Horton*, this Court left untouched the NLRA principles at the heart of the Board’s decision in this case. Indeed, the Court acknowledged that the Board’s view that the NLRA protects collective legal action is reasonably supported by the language of Section 7 and a variety of Board, Supreme Court, and circuit precedent. *Horton*, 737 F.3d at 356-57. The Court also recognized that, under established Board law, private contracts that conflict with federal law are unlawful and unenforceable. *Id.* at 358; *see also, e.g., Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83-86 (1982) (noting that courts cannot enforce private agreements that conflict with federal law, and refusing to enforce contract that violated Section 8(e) of the NLRA). Those principles are dispositive here.

C. Convergys Fails To Confront Controlling NLRA Caselaw Prohibiting Prospective Waivers of Employees’ Right To Pursue Work-Related Claims Concertedly

Because of its exclusive focus on inapposite FAA caselaw, Convergys does not acknowledge or confront NLRA precedent supporting the Board’s unfair-labor-practice finding. But, to the extent Convergys argues that the NLRA, considered

¹⁰ While this case also implicates the FLSA, Convergys does not, and could not, claim that FLSA policy objectives clash with the NLRA’s protection of concerted litigation. *See* 29 U.S.C. § 216(b) (“An action to recover [under the FLSA] may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.”).

independently, either (1) does not protect concerted pursuit of work-related legal claims or (2) does not prohibit employer restriction of such protected activity, its arguments are unavailing. Specifically, there is no merit to Convergys's claims (Br. 10-12) that the Section 7 right to engage in concerted legal activity is either waivable because it is procedural in nature or does not extend to all types of legal activity. Nor is there any basis for Convergys's assertion (Br. 13, 16-17) that a partial restriction of Section 7 rights is permissible under Section 8(a)(1).

Principally, Convergys relies on *Horton*'s "recogni[tion] that 'use of class action procedures . . . is not a substantive right' under Section 7 of the [NLRA]." (Br. 11 (quoting *Horton*, 737 F.3d at 357, 360-62; citing *Murphy Oil*'s identical characterization of *Horton*, 808 F.3d at 1016).) What Convergys's argument overlooks is that *Horton*'s pronouncement is not based on a construction of the NLRA that is independent of the FAA. For that reason, as demonstrated above, *Horton* is manifestly inapplicable where there is no agreement to arbitrate. After all, this Court has long recognized, in accordance with controlling Supreme Court precedent, that Section 7 protects concerted legal activity outside of the FAA context,¹¹ and bars employers from insisting that individual employees waive their

¹¹ See *Altex*, 542 F.2d at 297 ("Generally, filing by employees of a labor related civil action is protected activity under section 7 of the NLRA unless the employees acted in bad faith."); accord *Eastex*, 437 U.S. at 565-66 & n.15.

Section 7 rights.¹² *Horton* did not question those established principles; it held that their application to arbitration agreements is foreclosed by FAA caselaw. 737 F.3d at 361 (citing *Gilmer*, 500 U.S. at 32; *Carter*, 362 F.3d at 298). Since Convergys's concerted-action waiver is not in an arbitration agreement, this case is controlled not by *Horton* but by the settled NLRA law protecting employee efforts to enforce their workplace rights through concerted litigation and barring prospective waivers by individual employees of their collective rights under the NLRA.

Equally without force is Convergys's insistence (Br. 14, 17-18) that Federal Rule of Civil Procedure 23 and Section 216(b) of the FLSA, 29 U.S.C. § 216(b), create procedural devices rather than substantive rights. The Board does not dispute that proposition. As the Board has repeatedly explained, the substantive right at issue is the Section 7 right of employees to avail themselves of whatever collective-litigation procedures legislative bodies have made available to workers seeking to secure their rights as employees. *Murphy Oil*, 2014 WL 5465454, at *18. The Board's concern is that employees acting in concert should be able to use such available procedures "without the interference of an employer-imposed restraint." *Id.* at *2, 22; *see also Horton*, 357 NLRB at 2286 & n.24.

¹² *See NLRB v. Port Gibson Veneer & Box Co.*, 167 F.2d 144, 146 (5th Cir. 1948) (employers "may not require individual employees to sign employment contracts which, though not unlawful in their terms, are used to deter self-organization"); *accord Nat'l Licorice*, 309 U.S. at 364 ("Obviously employers cannot set at naught the [NLRA] by inducing their workmen to agree not to demand performance of the duties which [the statute] imposes. . .").

Moreover, as a factual matter, Convergys's waiver provision is not confined to Rule 23 or FLSA collective-action lawsuits, as Convergys's repeated references to those procedures suggest. The waiver bans *every* form of concerted pursuit of legal claims, even as basic as two coworkers jointly seeking redress from an accident in which they were both injured.

While acknowledging that Section 7 protects at least some forms of concerted legal activity (Br. 15), Convergys seeks to limit (Br. 15-17) the provision's scope to encompass only the collective assertion of legal claims, and not their adjudication. It is not clear where Convergys would cut off Section 7 protection. More importantly, nothing in the NLRA suggests such a distinction. To the contrary, Section 7's expansive language has long been understood to protect all forms of concerted legal activities, including the filing of lawsuits, grievances, or administrative charges, and participation in the adjudication of the same.¹³ Indeed, the Supreme Court has recognized that the leeway employees enjoy, to choose how to aid or protect one another and advance their mutual interests, is key to furthering the NLRA's objectives. *See Eastex*, 437 U.S. at 565-68 (failing to protect concerted activity outside of workplace would frustrate the

¹³ *See, e.g., Altex*, 542 F.2d at 296-97 (executing affidavits supporting lawsuit); *Dick Gidron Cadillac*, 287 NLRB 1107, 1110 (1988) (testifying at arbitration hearing); *Supreme Optical Co.*, 235 NLRB 1432, 1432-33 (1978) (testifying at discharged employee's unemployment hearing), *enforced*, 628 F.2d 1262 (6th Cir. 1980); *El Dorado Club*, 220 NLRB 886, 887-88 (1975) (attending and participating in arbitration).

NLRA’s policy of protecting employees’ right “to act together to better their working conditions” (quoting *Wash. Aluminum*, 370 U.S. at 14)); *City Disposal*, 465 U.S. at 835 (no indication Congress intended to limit Section 7’s protection to some concerted-activity combinations and not others). Moreover, preventing the adjudication of joint or collective claims—the undisputed effect of the waiver provision—would not only directly restrict protected concerted lawsuits but would also deter employees from *asserting* any concerted claim in the first place, which Convergys concedes they have a Section 7 right to do. That alone supports the Board’s unfair-labor-practice finding, for an employer may not lawfully use a work rule to chill employees in the exercise of their Section 7 rights any more than it may restrict those rights directly. *See Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (explaining that Board may strike down rules that are “likely to have a chilling effect on Section 7 rights”), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999).

For those same reasons, Convergys misses the point when it argues (Br. 13, 16-17) that the waiver provision does not violate Section 8(a)(1) because it does not completely foreclose employees’ ability to engage in collective action. Just as Section 7 protection is not limited to particular avenues of mutual aid or protection, Section 8(a)(1) does not prohibit only certain types of employer interference. Convergys offers no support for its suggestion that so long as employees are permitted some measure of collective action—presumably one their employer finds

acceptable—their Section 7 rights remain intact. *See Horton*, 357 NLRB at 2282 (explaining that “if the [NLRA] makes it unlawful for employers to require employees to waive their right to engage in one form of activity, it is no defense that employees remain able to engage in *other* concerted activities”). That construction of Section 8(a)(1) is not only divorced from the statutory text but would frustrate the policies underlying the NLRA: it would effectively empower employers to decide which activities are suitable for collective action and which ones must be pursued alone, depriving employees of their right to choose the type of conduct that best suits their objectives. *See* 29 U.S.C. § 157 (reserving to employees right to choose whether to engage in—or refrain from—any or all protected concerted activities).¹⁴

¹⁴ To the extent Convergys claims that the waiver provision constitutes a lawful exercise of employees’ right to refrain from concerted activity (Br. 6, 10), the Court lacks jurisdiction to consider that argument. Section 10(e) of the NLRA states that “[n]o objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.” 29 U.S.C. § 160(e); *see Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (10(e) bar is jurisdictional); *accord NLRB v. Houston Bldg. Servs., Inc.*, 128 F.3d 860, 863 (5th Cir. 1997) (10(e) bar is “mandatory, not discretionary”). Convergys did not raise that argument in its exceptions to the Board. (ROA.136-39, 173-83).

In any event, this argument fails. As the Board found (ROA.267 n.3), the waiver is not voluntary but imposed as a condition of employment. As it further explained (*id.* (citing *On Assignment*, 2015 WL 5113231, at *11)), the prospective waiver of Section 7 rights would still violate the NLRA as detailed above (pp. 13-14 & n.7). And, finally, barring employers from preventing employees—at the time of a particular dispute or by way of a blanket, prospective waiver—from engaging in protected concerted activity in no way restricts employees’ ability to

In sum, the only question before the Court is whether the Board correctly found that the waiver provision violates the NLRA. That question more closely resembles the one answered in *National Licorice*, 309 U.S. 350 (whether the Board correctly found that an agreement waiving Section 7 rights violated the NLRA), than in *Horton*, 737 F.3d at 355-62 (whether the Board's finding that an arbitration agreement waiving Section 7 rights violated the NLRA conflicted with FAA principles and policies). The relevant labor-law principles are well established, and the Board reasonably applied them to the straightforward, undisputed facts to find that Convergys's maintenance of the concerted-action waiver as a mandatory term of employment violates Section 8(a)(1).

D. Maintenance of a Work Rule Restricting Section 7 Rights Is Unlawful; In Any Event, Applicants Are Statutory Employees

Convergys contends (Br. 18-19) that Section 8(a)(1) does not protect Grant's right to engage in concerted legal action because she signed the waiver provision as a job applicant, not as an employee under Section 2(3) of the NLRA, 29 U.S.C. § 152(3). But as found by the Board (ROA.267), it was Convergys's continuing *maintenance* of the waiver provision that violated the NLRA; in other words, the violation is tied to the waiver's existence and continuing application to all Convergys employees, not the moment Grant or any other applicant signed it. In

refrain from such activity if that is their choice. (ROA.267 n.3 (citing *Bristol Farms*, 363 NLRB No. 45, 2015 WL 7568339, at *2 (Nov. 25, 2015)).)

any event, as the Board further found (ROA.273), applicants are employees within the meaning of Section 2(3), protected under Section 8(a)(1).

The Supreme Court has often noted the “striking” breadth of the statutory definition of “employee.” *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984); *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 91-92 (1995). In *Phelps Dodge Corp. v. NLRB*, a refusal-to-hire case, it roundly rejected the argument that Section 8(a)(3)’s protection against union-based discrimination did not extend to applicants for employment. 313 U.S. 177, 186-87 (1941). Applying the principles animating *Phelps Dodge*, the Board has long recognized that protecting job applicants from employer interference under Section 8(a)(1) is consistent with the NLRA’s language and purpose. *See Mason & Hanger-Silas Mason Co.*, 179 NLRB 434, 441 (1969), *enforcement denied on other grounds*, 449 F.2d 425, 427 (8th Cir. 1971) (agreeing that applicants were employees for purposes of Section 8(a)(1)). This Court also extends Section 8(a)(1)’s protections to job applicants, notably to bar coercive interrogations by employers seeking to discern applicants’ union sentiments. *See, e.g., NLRB v. Borden Co.*, 392 F.2d 412, 413-14 & n.1 (5th Cir. 1968); *ADCO Elec. Inc.*, 307 NLRB 1113, 1117 (1992), *enforced*, 6 F.3d 1110 (5th Cir. 1993).¹⁵ The Court has similarly held that Section 8(a)(4) of

¹⁵ All other circuits to have considered this issue also treat applicants as employees for purposes of Section 8(a)(1). *See, e.g., W & M Props. of Conn., Inc. v. NLRB*, 514 F.3d 1341, 1344, 1348-49 (D.C. Cir. 2008) (questioning applicants about

the NLRA, 29 U.S.C. § 158(a)(4), which has comparable operative language to Section 8(a)(1), also protects prospective employees. *See NLRB v. Lamar Creamery Co.*, 246 F.2d 8, 10 (5th Cir. 1957); *accord John Hancock Mutual Life Ins. Co. v. NLRB*, 191 F.2d 483, 485 (D.C. Cir. 1951) (same, and observing, “in the absence of specific limitation,” the NLRA’s definition of employee “includes . . . , in a generic sense, members of the working class” (footnote omitted)).

Those decisions all flow from the same policy concern, namely that an employer’s coercive conduct during the hiring process may chill applicants’ willingness to exercise their Section 7 rights after they are hired. *See, e.g., Gilberton Coal Co.*, 291 NLRB 344, 348 (1988) (finding that employer’s statements “would reasonably lead [an employee] to conclude that his hire and continued employment required him to refrain from expressly supporting the Union” (footnote omitted)). That consideration applies with equal force here.

Finally, *Star Tribune*, on which Convergys relies (Br. 18-19), made no finding with regard to Section 8(a)(1)’s protections of job applicants. 295 NLRB 543 (1989). Instead, the Board simply found that an employer’s obligation to bargain with its employees’ union under Section 8(a)(5) of the NLRA, 29 U.S.C.

union membership); *Centerline Constr. Co. v. NLRB*, 247 F. App’x 432, 433 (4th Cir. 2007) (interrogating applicants about union affiliation; threatening not to rehire former employees who worked for union contractors); *Kessel Food Mkts., Inc. v. NLRB*, 868 F.2d 881, 883-86 (6th Cir. 1989) (coercively interrogating applicants); *Time-O-Matic, Inc. v. NLRB*, 264 F.2d 96, 99 (7th Cir. 1959) (telling prospective employees employment was conditioned on not belonging to union).

§ 158(a)(5), does not extend to persons (including applicants) outside the unit that the union was certified to represent. *Id.* at 546; *cf. Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) (holding that employer was not required to bargain over retirement benefits of former employees). Therefore, *Star Tribune* has no bearing on this case.

II. CONVERGYS VIOLATED SECTION 8(a)(1) OF THE NLRA BY ENFORCING THE UNLAWFUL WAIVER

Convergys enforced the waiver provision through its motion to strike the class and collective allegations from Grant’s lawsuit. (ROA.273; ROA.24, 68-74.) Because the waiver provision restricts Section 7 rights, as shown above (pp. 8-15), the Board reasonably found (ROA.268) that Convergys’s efforts to enforce it violated Section 8(a)(1) of the Act, which makes it unlawful for employers to “interfere with, restrain, or coerce employees in the exercise of” their Section 7 rights. 29 U.S.C. § 158(a)(1).

Before this Court, Convergys argues for the first time (Br. 19-23) that the Board’s finding violates its First Amendment right to petition the Government for redress of grievances. However, Convergys failed to raise that claim before the Board. In its exceptions to the judge’s decision, Convergys argued only that enforcing the waiver did not violate the Act because the provision itself was lawful. (ROA.138-39, 179-80.) And even after the Board majority *sua sponte* addressed the issue in response to Member Miscimarra’s dissent, Convergys failed

to challenge the Board’s rationale in a motion to reconsider. Accordingly, this Court has no jurisdiction to hear Convergys’s belated First Amendment defense. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.”); *Woelke & Romero*, 456 U.S. at 665-66 (holding that Section 10(e) applies even when Board addresses issues *sua sponte*); *HealthBridge Mgmt. v. NLRB*, 798 F.3d 1059, 1069 (D.C. Cir. 2015) (“[S]ection 10(e) bars review of any issue not *presented* to the Board, even where the Board has discussed and decided the issue.” (citation omitted)); *NLRB v. U.S. Postal Serv.*, 477 F.3d 263, 270 n.1 (5th Cir. 2007) (explaining that failure to petition Board for reconsideration precludes Court from hearing issue). That jurisdictional bar applies as well to constitutional challenges. *See Sure-Tan*, 467 U.S. at 897 n.7; *Horton*, 737 F.3d at 351 n.5.

In any event, the Board’s unfair-labor-practice finding based on the motion to strike does not violate Convergys’s constitutional right to petition.¹⁶ The Supreme Court has recognized that the First Amendment does not protect petitioning that “has an objective that is illegal under federal law.” *Bill Johnson’s Rests. v. NLRB*, 461 U.S. 731, 737 n.5 (1983). Under that exception, court action

¹⁶ In *Murphy Oil*, this Court held that an employer’s motion to enforce a contract preventing concerted litigation was protected by the First Amendment. 808 F.3d at 1020-21. However, as discussed below (note 18), there are significant differences between *Murphy Oil* and this case.

constitutes an unfair labor practice if “[o]n the surface” it “seek[s] objectives which [are] illegal under federal law.” *Teamsters Local 776 v. NLRB*, 973 F.2d 230, 236 (3d Cir. 1992); *see also Wright Elec., Inc. v. NLRB*, 200 F.3d 1162, 1166-67 (8th Cir. 2000) (holding Board could enjoin employer’s discovery request seeking union-authorization cards in state-court misrepresentation suit, for request interfered with employees’ rights to organize under NLRA and thus had illegal objective). That is true regardless of the merits of the underlying lawsuit. *See Teamsters Local 776*, 973 F.2d at 236.¹⁷

Consequently, under settled law, the Board may restrain litigation that has the objective of enforcing an illegal contract, even if the suit is otherwise meritorious. *Id.*; *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 151 (D.C. Cir. 2003); *see also Murphy Oil*, 2014 WL 5465454, at *27-28 (and cases cited therein). Convergys sought, through its motion to dismiss, both to enforce an unlawful contract provision, and to limit Grant’s exercise of her Section 7 rights. The Board thus reasonably found (ROA.268 & n.5) that Convergys’s motion to strike had an illegal objective and fell outside the protection of the First

¹⁷ In the absence of an illegal objective, retaliatory motive does not suffice to remove constitutional protection from a reasonably based lawsuit. *See Teamsters Local 776*, 973 F.2d at 235 (quoting *Bill Johnson’s*, 461 U.S. at 743). In retaliatory-motive cases, the Board may find a lawsuit unlawful only if it is objectively baseless. *BE & K Const. Co. v. NLRB*, 536 U.S. 516, 531 (2002). Having found that Convergys proceeded from an illegal objective, the Board did not reach that issue.

Amendment. *See Manno Elec., Inc.*, 321 NLRB 278, 296-97 (1996) (halting employer lawsuit alleging that employees violated state law by engaging in Section 7-protected conduct), *enforced mem.*, 127 F.3d 34 (5th Cir. 1997).¹⁸

¹⁸ The Board's decision on this point is not inconsistent with this Court's finding in *Murphy Oil*, 808 F.3d at 1021, that a defensive motion to enforce an agreement barring concerted litigation did not have an "illegal objective" within the meaning of *Bill Johnson's* because the agreement had previously been enforced in a court of law. Unlike *Murphy Oil*, Convergys's motion was not supported by a controlling, on-point circuit decision. Thus, as discussed above (pp. 16-19), the waiver in this case is materially different from the waivers in *Concepcion*, *Murphy Oil*, and *Horton*, where arbitration agreements were at issue. The one district court to have enforced Convergys's waiver failed to appreciate that dispositive distinction. *See Palmer v. Convergys Corp.*, No. 7:10-cv-145 (HL), 2012 WL 425256, at *2-3 (M.D. Ga. Feb. 9, 2012) (citing cases enforcing concerted-action waivers *in arbitration agreements* in enforcing Convergys's waiver). In that case, moreover, the plaintiffs did not assert that the waiver violated the NLRA. We also note that whether a favorable court decision precludes a finding of an illegal objective ultimately turns on the correctness of that court decision. *See, e.g., Sheet Metal Workers Int'l Ass'n Local Union No. 27, AFL-CIO v. E.P. Donnelly, Inc.*, 737 F.3d 879, 892-99 (3d Cir. 2013) (upholding the Board's illegal-objective finding and reversing district-court decision finding otherwise).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying Convergys's petition for review and enforcing the Board's Order in full.

Respectfully submitted,

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May 2016

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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CONVERGYS CORPORATION)	
)	
Petitioner/Cross Respondent)	No. 15-60860
)	
v.)	Board Case Nos.
)	14-CA-075249
NATIONAL LABOR RELATIONS BOARD,)	14-CA-083936
)	
Respondent/Cross Petitioner)	
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 8,224 words of proportionally spaced, 14-point type, and the word-processing software used was Microsoft Word 2010.

s/ Linda Dreeben

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Dated at Washington, DC
this 11th day of May 2016

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2016, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

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this 11th day of May 2016