

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**KELLOGG BROWN & ROOT LLC and  
MOLYCORP, INC.**

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

and

**DAVID L. TOTTEN, and Individual**

**RESPONDENTS' EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER**

Respondents, Kellogg Brown & Root LLC (hereinafter "KBR") and Molycorp, Inc. (hereinafter "MCI") (collectively, "Respondents"), pursuant to §102.46 of the National Labor Relations Board's Rules and Regulations, respectfully submit the following exceptions to the Decision and Order issued by the Administrative Law Judge (ALJ), Jeffrey D. Wedekind, on April 4, 2016.

No.	Page(s)	Lines	Exception
1	2	17-26	Respondents except to the ALJ's non-acquiescence to the Fifth Circuit's decisions in <i>D.R. Horton</i> and <i>Murphy Oil</i> and his failure to follow Supreme Court precedent.
2	2	29-30	Respondents except to the ALJ's finding and conclusion that Respondents' arguments are contrary to Board precedent and his failure to find that Respondent's arguments are in accord with U.S. Circuit Court and binding Supreme Court precedents.
3	2	32-41	Respondents except to the ALJ's finding and conclusion that a Section 8(a)(1) violation may be found when a policy has been maintained and/or enforced within 6 months of an unfair labor practice charge, regardless of when the policy became effective or was acknowledged by the employee.

4	3	1-11	Respondents except to the ALJ's finding and conclusion that former employees are protected by the National Labor Relations Act (the "Act") and may file unfair labor practice charges outside Section 10(b)'s 6-month statute of limitations as a result of their former employer's post-termination maintenance and enforcement of an individual arbitration policy, even if they were terminated for reasons unrelated to any labor dispute or unfair labor practice.
5	3	17-29	Respondents except to the ALJ's finding and conclusion that Respondents failed to establish that Totten worked as a "supervisor," as that term is defined by the Act, throughout his employment with KBR and that Totten worked as a Rigging Foreman.
6	3 4	31-41 1-16	Respondents except to the ALJ's failure to find and conclude that Totten was not an "employee" subject to protection under the Act because the General Counsel failed to allege and prove that Totten continues to seek paid employment.
7	4	18-23	Respondents except to the ALJ's finding and conclusion that Totten engaged in concerted activity protected by the Act.
8	4	25-32	Respondents except to the ALJ's failure to find and conclude that MCI was not an "employer" subject to the Act because Totten was never actually employed by MCI.
9	4	32-36	Respondents except to the ALJ's finding and conclusion that MCI violated the Act because it is an "employer" subject to the Act and because it joined in KBR's motion to dismiss Totten's class and representative claims.
10	4 5	40-41 1-3	Respondents except to the ALJ's finding and conclusion that KBR violated Section 8(a)(1) of the Act by maintaining, as a condition of employment, a mandatory individual arbitration policy and agreement that prohibits employees from pursuing claims in a class or representative capacity in both judicial or arbitral form (collectively, the "DRP").
11	5	5-6	Respondents except to the ALJ's finding and conclusion that KBR violated Section 8(a)(1) of the Act by seeking to enforce the DRP against Totten since September 2014.
12	5	8-10	Respondents except to the ALJ's finding and conclusion that MCI violated Section 8(a)(1) of the Act by seeking to enforce KBR's DRP against Totten since September 2014.
13	5 6	14-47 1-20	Respondents except to the ALJ's remedy to the extent that it exceeds the statute of limitations set forth in Section 10(b) of the Act.
14	5	14-16	Respondents except to the ALJ's remedy that KBR shall be required to rescind or revise its DRP.
15	5	16-18	Respondents except to the ALJ's remedy that KBR shall notify Totten and current and former employees who signed

			or were subject to the DRP that it has rescinded or revised the DRP.
16	5	32-36	Respondents except to the ALJ's remedy that Respondents will be required to notify the Ninth Circuit Court of Appeals that KBR has revised or rescinded the DRP and that Respondents no longer oppose Totten's class or representative claims on the basis that they are barred by the mandatory individual arbitration provision contained in the DRP.
17	5	38-42	Respondents except to the ALJ's remedy that Respondents will be required to reimburse Totten for all reasonable expenses and legal fees, with interest incurred, compounded daily, in opposing the motion to dismiss the class and representative claims and Respondent's appeal from the District Court's adverse ruling on the motion to compel arbitration.
18	5	44-46	Respondents except to the ALJ's remedy that KBR will be required to post a Notice ("Appendix A") to employees at all locations where the DRP has been in effect and MCI shall post the Notice at its facility at Mountain Pass, California.
19	5 6	47 1-4	Respondents except to the ALJ's remedy that Respondents will be required to distribute the Notice electronically and by e-mail.
20	6	2-4	Respondents except to the ALJ's remedy that Respondents will be required to mail the Notice if either of their businesses have closed or have ceased providing services at a particular facility covered by the Order.
21	6	30-34	Respondents except to the ALJ's Order that KBR shall cease and desist from maintaining and/or enforcing a mandatory arbitration provision that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forms, whether arbitral or judicial.
22	6	36-37	Respondents except to the ALJ's Order that KBR shall in any like, or related manner interfering with, restraining or coercing employees in exercise of the rights guaranteed to them by Section 7 of the Act.
23	6	39-43	Respondents except to the ALJ's Order that KBR shall rescind the mandatory arbitration provision in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration provision does not constitute a waiver of their right to main employment-related joint, class or collection actions in all forms.
24	7	2-4	Respondents except to the ALJ's Order that KBR shall notify all current and former employees who were required to sign or otherwise to become bound to the mandatory arbitration

			provision in any form that it has been rescinded or revised, and, if revised, provide them a copy of the revised provision.
25	7	6-9	Respondents except to the ALJ's Order that KBR shall notify the U.S. Court of Appeals for the 9th Circuit in <i>Totten v. Kellogg Brown &amp; Root, LLC, et al.</i> , that it has rescinded or revised the mandatory arbitration provision upon which it based its motion to dismiss Totten's class and representative claims, and informed the Court that it no longer opposes the claims on the basis of the arbitration provision.
26	7	11-13	Respondents except to the ALJ's Order that KBR shall reimburse Totten for any reasonable attorney's fees and litigation expenses that he may have incurred in the this action and in opposition to the Respondents' motion to dismiss in the class and representative claims and Respondents' appeal of the District Court's denial of that motion to dismiss.
27	7	15-19	Respondents except to the ALJ's Order that KBR shall post for 60 days, in conspicuous places, the Notice marked as "Appendix A" at all of its facilities where the arbitration provision has been maintained, including all places where Notices to employees are customarily posted.
28	7	19-22	Respondents except to the ALJ's Order that the Notice shall be distributed electronically and by e-mail or by posting on an intranet or internet site or other electronic means.
29	7	22-24	Respondents except to the ALJ's Order that KBR shall take reasonable steps to ensure that the Notices are not altered, defaced, or covered by any other material.
30	7	24-29	Respondents except to the ALJ's Order that KBR shall duplicate and mail at its own expense a copy of the Notice marked as Appendix A to all current and former employees employed by KBR at any facility covered by the Order whether or not such facility has closed or ceased doing business at any time since April 17, 2014.
31	7	29-31	Respondents except to the ALJ's Order that KBR shall, within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.
32	7 8	37 1-3	Respondents except to the ALJ's Order that MCI shall cease and desist from enforcing a mandatory arbitration provision that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forms, whether arbitral or judicial.
33	8	5-6	Respondents except to the ALJ's Order that MCI shall in any like or related manner cease and desist from interfering with,

			restraining, or coercing employees in exercise of the rights guaranteed to them by Section 7 of the Act.
34	8	10-13	Respondents except to the ALJ's Order that MCI shall inform the U.S. Court of Appeals for the 9th Circuit in <i>Totten v. Kellogg Brown &amp; Root, LLC, et al.</i> , that it no longer opposes Totten's class and representative claims on the basis of the mandatory arbitration provision maintained by Kellogg Brown & Root, LLC.
35	8	15-17	Respondents except to the ALJ's Order requiring MCI to reimburse Totten for any reasonable attorney's fees and litigation expenses that he may have incurred in this action opposing the Respondents' motion to dismiss his class and representative claims and Respondents' appeal to the District Court's denial of that motion.
36	8	19-20	Respondents except to the ALJ's Order requiring MCI within 14 days after service by the Region to post at its Mountain Pass, California facility copies of the Notice marked as "Appendix B."
37	8	20-23	Respondents except to the ALJ's Order requiring MCI to post copies of the Notice, after being signed by MCI's authorized representative, for 60 consecutive days in conspicuous places, including all places where Notice to employees are customarily posted.
38	8	23-26	Respondents except to the ALJ's Order requiring MCI to distribute Notices electronically, by e-mail, by posting on an intranet or internet site and/or by any other electronic means.
39	8	26-27	Respondents except to the ALJ's Order that MCI shall take reasonable steps to ensure that the Notices are not altered, defaced, or covered by any other material.
40	8	27-31	Respondents except to the ALJ's Order that MCI shall duplicate and mail at its own expense a copy of the Notice marked as "Appendix B" to all current and former employees employed by the Respondent at any facility that has closed or ceased doing business at any time since September 25, 2014.
41	8	33-35	Respondents except to the ALJ's Order that, within 21 days after service by the Region, MCI shall file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that MCI has taken to comply.
42			Respondents except to the ALJ's failure to find and conclude that the Region did not plead that Totten was an employee of either KBR or MCI.
43			Respondents except to the ALJ's failure to find and conclude that KBR's DRP is governed by the Federal Arbitration Act

			("FAA"), and not the Act, or the Board's decisions in <i>D.R. Horton, Inc. or Murphy Oil USA, Inc.</i>
44			Respondents except to the ALJ's failure to find and conclude that the Board's decisions in <i>D.R. Horton</i> and <i>Murphy Oil</i> failed to defer to the FAA as that statute has been interpreted by the United States Supreme Court and the Appellate Courts.
45			Respondents except to the ALJ's failure to find and conclude that KBR's DRP is a bilateral and voluntary agreement.
46			Respondents except to the ALJ's failure to find and conclude that KBR's DRP does not require employees to forego substantive rights.
47			Respondents except to the ALJ's failure to find and conclude that Totten was not an employee when KBR sought to enforce the Agreement or when Totten filed his charge.
48			Respondents except to the ALJ's failure to find and conclude that the Respondents' removal petition and motion to compel arbitration in the California District Court is protected by the First Amendment to the United States Constitution.
49			Respondents except to the ALJ's failure to find and conclude that Totten did not engage in concerted activity.
50			Respondents except to the ALJ's failure to find and conclude that Totten's claim is time-barred by Section 10(b) of the Act because the statute of limitations began to run as of January 16, 2012, when the DRP was signed.
51			Respondents except to the ALJ's failure to find and conclude that Totten's claim is time-barred by Section 10(b) of the Act because the statute of limitations began to run when Totten's employment ended on June 17, 2013.
52	1	--	Respondents except to the ALJ's finding that "... Respondents unlawfully maintained and/or enforced the subject arbitration provision as alleged."
53	3	13-29	Respondents except to the ALJ's failure to find that Respondents' Answer, paragraph 3, placed squarely at issue Totten's "employee" status and was not limited to Respondents' paragraph 6 argument that Totten was a "supervisor" at the time of his separation from employment.
54	3 4	31-41 1-16	Respondents except to the ALJ's failure to find that Counsel for the General Counsel (GC) did not allege that Totten was an "employee" at the time the charge was filed.
55	4	1-16	Respondents except to the ALJ's failure to find that the Answer in which Respondents asserted Totten was not an "employee" at any relevant time placed in question his "employee" status consistent with the cited case law and the

			ALJ's failure to find that it was then incumbent upon the GC to produce evidence of "employee" status.
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Dated: April 29, 2016

Respectfully submitted,

**/s/Howard S. Linzy**

HOWARD S. LINZY  
The Kullman Firm, PLC  
4605 Bluebonnet Blvd.  
Suite A  
Baton Rouge, Louisiana 70809  
Telephone: (225) 906-4250  
Facsimilia: (225) 906-4230  
[hsl@kullmanlaw.com](mailto:hsl@kullmanlaw.com)

**/s/ Thomas J. Woodford**

THOMAS J. WOODFORD  
The Kullman Firm, PLC  
Post Office Box 1287  
Mobile, Alabama 36633  
Telephone: 251-432-1811  
Facsimile: 251-433-1230  
[tjw@kullmanlaw.com](mailto:tjw@kullmanlaw.com)

## CERTIFICATE OF SERVICE

The above and foregoing Respondent's Exceptions to the Administrative Law Judge's Decision and Order has been e-filed this 29<sup>th</sup> day of April, 2016, on the NLRB's website at [www.nlr.gov](http://www.nlr.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](mailto: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](mailto:leonard@leefeldmanlaw.com)) and U.S. Mail, postage prepaid.

***/s/ Thomas J. Woodford*** \_\_\_\_\_  
THOMAS J. WOODFORD