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UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

TARLTON AND SON, INC. Petitioner, vs. NATIONAL LABOR RELATIONS BOARD Respondent.	16-1141 PETITION FOR REVIEW; CORPORATE DISCLOSURE STATEMENT; NOTICE OF RELATED CASES

PETITION FOR REVIEW

Pursuant to Section 10(f) of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. 160(f), and Rule 15(a) of the Federal Rules of Appellate Procedure, Petitioner TARLTON AND SON, INC. petitions this Court for review of the Decision and Order of the National Labor Relations Board ("Board") dated

April 29, 2016 in Tarlton and Son, Inc. and Robert Munoz, Board Cases 32-CA-119054 and 32-CA-126896, reported at 363 N.L.R.B. No. 175. A copy of the Board's Decision and Order is attached as "Exhibit A."

WHEREFORE, Petitioner TARLTON AND SON, INC. prays that its Petition for Review of the Board's Decision and Order be granted; that upon such review the Board's Decision and Order be set aside and denied enforcement; and that Petitioner TARLTON AND SON, INC. be granted such other and further relief as this Court deems appropriate.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure, Petitioner TARLTON AND SON, INC. respectfully submits its corporate disclosure statement. Petitioner TARLTON AND SON, INC. does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

NOTICE OF RELATED CASES

There are no cases pending before this Court related to the instant Petition for Review.

HILL, FARRER & BURRILL
James A. Bowles, Esq.
Richard S. Zuniga, Esq.

Dated: May 3, 2016

By _____
James A. Bowles
Attorneys for Tarlton and Son, Inc.

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Tarlton and Son, Inc. *and* Robert Munoz. Cases 32–CA–119054 and 32–CA–126896

April 29, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On January 27, 2015, Administrative Law Judge Amita Baman Tracy issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed an answering brief,[1] and the Respondent filed reply briefs responding to each answering brief. The Charging Party also filed exceptions and a supporting brief,[2] and the Respondent filed an answering brief.[3]

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[4] and conclusions and to adopt the recommended Order as modified and set forth in full below.[5]

1. Applying the Board's decisions in *D. R. Horton*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), the judge found that the Respondent violated Section 8(a)(1) of the Act by maintaining a mutual arbitration policy (MAP) that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. We reject the Respondent's argument that the judge erred by applying *D. R. Horton* and *Murphy Oil*. In *Murphy Oil*, the Board, in reaffirming the relevant holdings of *D. R. Horton*, considered and rejected arguments identical to those the Respondent makes here. Based on the judge's application of *D. R. Horton* and *Murphy Oil*, we affirm the 8(a)(1) maintenance violation found by the judge.[6]

The Respondent excepts to the judge's finding that maintenance of the MAP violated Section 8(a)(1) with respect to employees represented by the Northern California Carpenters Union and the Southern California Carpenters Union (together, the Carpenters Union). According to the Respondent, Tony Canale, a representative of the Northern California Carpenters Union, agreed to the implementation of the MAP, thereby waiving the Section 7 right of Carpenters-represented employees to engage in collective legal action. Assuming arguendo that the Carpenters Union could waive bargaining-unit

[1] While styled a reply brief, the Charging Party's brief responds to the Respondent's exceptions and supporting brief.

[2] The Respondent argues that the Charging Party's exceptions should be disregarded because they do not comply with Sec. 102.46 of the Board's Rules and Regulations. Although we agree that the Charging Party's exceptions are not compliant with the requirements of 102.46 (See *Metta Electric*, 338 NLRB 1059, 1059 (2003), enfd. in part 360 F.3d 904 (8th Cir. 2004), even considering these exceptions and brief, we find that they lack merit. The Charging Party's exceptions raise substantive arguments that are wholly outside the scope of the General Counsel's complaint. It is well settled that a charging party cannot enlarge upon or change the General Counsel's theory of a case. *Kimtruss Corp.*, 305 NLRB 710, 711 (1991). We also decline to award the extraordinary remedies requested by the Charging Party. We find that the Board's traditional remedies are sufficient to remedy the unfair labor practices found. See, e.g., *AT&T*, 362 NLRB No. 105, slip op. at 1 fn. 3 (2015).

[3] In addition, pursuant to *Reliant Energy*, 339 NLRB 66 (2003), the Charging Party filed four postbrief letters calling the Board's attention to recent case authority.

[4] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[5] Because there is no allegation or finding that the Respondent sought to enforce its mutual arbitration policy by filing a motion to dismiss the class-action lawsuit in California Superior Court, we shall modify the judge's remedy to delete the requirement that the Respondent reimburse the Charging Party and other plaintiffs for legal fees and expenses they incurred in defending against a motion to dismiss. See generally, *MasTec Services Co.*, 363 NLRB No. 81, slip op. at 2 fn. 5 (2015).

We shall modify the judge's recommended Order and substitute a new notice to conform to our amended remedy and the Board's standard remedial language.

[6] Our dissenting colleague, relying on his dissenting position in *Murphy Oil*, 361 NLRB No. 72, slip op. at 22–35 (2015), would find that the Respondent's MAP does not violate Sec. 8(a)(1). He observes that the Act does not "dictate" any particular procedures for the litigation of non-NLRA claims, and "creates no substantive right for employees to insist on class-type treatment" of such claims. This is all surely correct, as the Board has previously explained in *Murphy Oil*, above, slip op. at 2, and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 & fn. 2 (2015). But what our colleague ignores is that the Act "does create a right to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint." *Murphy Oil*, above, slip op. at 2 (emphasis in original). The MAP is just such an unlawful restraint.

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, there is no merit to our colleague's view that finding the MAP unlawful runs afoul of employees' Sec. 7 right to "refrain from" engaging in protected concerted activity. See *Murphy Oil*, above, slip op. at 18; *Bristol Farms*, above, slip op. at 3. Nor is he correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. See *Murphy Oil*, above, slip op. at 17–18; *Bristol Farms*, above, slip op. at 2.

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employees' Section 7 right to engage in collective legal action, we nevertheless find no merit to the Respondent's argument. The judge discredited the testimony of Thomas Oliver Tarlton, the Respondent's president, about his conversations with Canale. Canale himself did not testify, and no other evidence was introduced to show that the Carpenters Union agreed to implementation of the MAP. As a result, we find that the Respondent has failed to demonstrate that the Carpenters Union actually agreed to implementation of the MAP.[7]

2. The judge also found that the MAP independently violated Section 8(a)(1) because it was promulgated in response to employees' protected concerted activity, namely the filing of a class-action complaint by Robert Munoz and two other employees against the Respondent in California Superior Court, alleging, among other things, violations of the California Labor Code related to the calculation and payment of their wages. We agree.

The judge properly analyzed the MAP as a work rule subject to the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), for determining whether a rule reasonably tends to chill employees in the exercise of their Section 7 rights.[8] Under this test, a rule is unlawful if it explicitly restricts activities protected by Section 7 or, alternatively, upon a showing of one of the following: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 646–647. Although *Lutheran Heritage* speaks of a rule being promulgated in response to "union activity," we agree with the judge that a rule promulgated in response to other protected concerted activity is also unlawful under the *Lutheran Heritage* test.[9] A rule violates Section 8(a)(1) if it would reasonably tend to chill employees in the exercise of their Section 7 rights. See, e.g., *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 6 (2014), affd. sub nom. *Three D, LLC v. NLRB*, 629 Fed.Appx. 33 (2d. Cir. 2015); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). Section 7 includes the right not only to engage in a variety of "union activity" (such as, for example, to form, join, or assist labor organizations and to bargain collectively), but also the right to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Thus, a rule promulgated in response to protected concerted activity would reasonably tend to chill employees' exercise of their Section 7 rights, just as would a rule promulgated in response to union activity. See, e.g., *Hawaii Tribune Herald*, 356 NLRB 661, 661 (2011) (affirming judge's finding that rule promulgated in response to protected concerted activity of safeguarding employees' *Weingarten* rights was unlawful), enfd. sub nom. *Stephens Media, LLC v. NLRB*, 677 F.3d 1241 (D.C. Cir. 2012).

The judge found that the Respondent promulgated the MAP in response to Munoz' and other employees' filing of the class-action lawsuit, activity which was clearly protected concerted activity. See *Murphy Oil*, above, slip op. at 14; *D. R. Horton*, above at 2278. The judge found that the timing of the Respondent's decision was suspicious,[10] and she discredited Tarlton's testimony that his decision to implement the MAP was unrelated to the filing of the class-action complaint. The judge further found that the Respondent failed to articulate a business justification for implementing its MAP that was unrelated to the filing of the class-action complaint.[11] The judge's finding that the Respondent promulgated the MAP in response to the filing of the class-action lawsuit is supported by the record, and we affirm her finding that the MAP was independently unlawful on this basis.[12]

[7] In making this finding, we do not rely on the judge's statement that Tarlton's testimony was hearsay or on her analysis of whether Tarlton's testimony, if credited, would meet the Board's "clear and unmistakable" waiver standard.

[8] See *D. R. Horton*, above at 2280; *Murphy Oil*, above, slip op. at 13 fn. 79, 19.

[9] Indeed, the Board often uses the terms "union activity" and "protected concerted activity" interchangeably, including in *Lutheran Heritage* itself. 343 NLRB at 647 (finding no evidence that the rules at issue were "adopted . . . in response to *protected* activity") (emphasis added).

[10] The class-action complaint was filed on November 7, 2013, and the Respondent was served with a copy of the complaint sometime between November 7 and 19. Although Tarlton testified that he had discussed implementing an arbitration policy for several years prior to the filing of the class action complaint, he admitted that he had not had any such discussions in the six months before the class-action complaint was filed and that he decided to implement the mandatory arbitration policy after receiving the complaint. In late November or early December, the Respondent presented the MAP to its employees and, since December 2013, the Respondent has required all employees to sign the MAP as a condition of employment.

[11] Contrary to the Respondent's argument on exceptions, the judge did not base her finding that the Respondent promulgated the MAP in response to the filing of class-action lawsuit solely on the suspicious timing of the Respondent's decision, but instead examined the testimony and all of the surrounding circumstances.

[12] In affirming the judge's finding, we do not rely on her findings that the Respondent's position statement submitted in response to a separate charge was an admission against interest, or that language in the MAP stating that the MAP applies to all employment disputes "whether those disputes already exist today or arise in the future" shows that the Respondent intentionally drafted the MAP to include the class-action lawsuit.

The Respondent argues that it did not promulgate the MAP in response to its employees' protected concerted activity because there is no evidence that Charging Party Munoz or the other plaintiffs were

EXHIBIT A

Our dissenting colleague agrees that employees were engaged in protected concerted activity when they filed the California class action lawsuit. However, he finds that the Respondent did not adopt the MAP in response to that activity but, instead, to the "class-action nature of the lawsuit itself." We fail to see a principled basis for the distinction that our dissenting colleague attempts to draw. The salient point is that employees engaged in protected concerted activity when they filed a class-action lawsuit and, in response, the Respondent promulgated a rule prohibiting that exact conduct. Such a rule, by its very nature, interferes with employees' exercise of their Section 7 rights and constitutes a straightforward violation of Section 8(a)(1). See, e.g., *Hawaii Tribune Herald*, above, 356 NLRB at 661 (finding rule promulgated in response to protected concerted activity unlawful); *Nashville Plastic Products*, 313 NLRB 462, 462 (1993) (finding rule promulgated in response to employees' union handbilling unlawful).

Our dissenting colleague further finds that, even assuming that the Respondent promulgated the MAP in response to employees' protected concerted activity, the Respondent's justifications for adopting the MAP outweigh any potential impact on employees' Section 7 rights.[13] We reject this argument. First, as discussed above, the Respondent has failed to show that it had actually had a legitimate business justification for implementing its MAP that was unrelated to employees' protected concerted activity itself. Second, the Board in *Murphy Oil* rejected the same argument made by our dissenting colleague here. 361 NLRB No. 72, slip op. at 14. As explained in *Murphy Oil*, the proper balancing of the respective rights of employees and employers is reflected in *D. R. Horton*'s recognition "that employees have no Section 7 right to class certification and, in turn, that employers may lawfully oppose class certification on any legally available ground *other* than an unlawful waiver in a mandatory arbitration agreement." Id. (emphasis in original). See also *D. R. Horton*, above at 2286 fn. 24. Moreover, it is untenable to claim, as our dissenting colleague does, that completely precluding employees from pursuing their workplace claims collectively through litigation has "virtually no impact" on Section 7 rights, when it actually extinguishes that Section 7 right.[14] See *Murphy Oil*, above, slip op. at 14.

ORDER

The National Labor Relations Board orders that the Respondent, Tarlton and Son, Inc., Fresno, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mutual arbitration policy that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, and promulgating such a policy in response to employees' protected concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Rescind the mutual arbitration policy in all its forms, or revise it in all its forms to make clear to employees that the mutual arbitration policy does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

(b) Notify all current and former employees who were required to sign or otherwise become bound to the mutual arbitration policy in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised policy.

(c) Within 14 days after service by the Region, post at its Fresno, California facility copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to

employed by the Respondent when the MAP was implemented. We, like the judge, reject this argument. It is undisputed that all three individuals were at one time employed by the Respondent, and their employment status at the time the MAP was implemented is irrelevant. The Board has long held that the broad definition of "employee" contained in Sec. 2(3) of the Act covers former employees. See *Briggs Mfg. Co.*, 75 NLRB 569, 571 (1947); accord *Leslie's Poolmart, Inc.*, 362 NLRB No. 184, slip op. at 1 fn. 2 (2015).

[13] The only justification offered by the Respondent at the hearing was Tarlton's testimony that he needed a way to avoid "a long, drawn-out process in solving problems."

[14] The Board has long held, with uniform judicial approval, that the Act protects the right of employees to act together to improve their terms and conditions of employment through litigation. *Convergys Corp.*, 363 NLRB No. 51, slip op. at 1 (2015).

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 1, 2013.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 29, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

In this case, the Charging Party and two other employees filed a class action lawsuit against the Respondent in California state court alleging violations of the California Labor Code related to the Respondent's calculation and payment of wages. After the Respondent was served with the class action complaint, it adopted a mutual arbitration policy (MAP), which all the Respondent's employees signed. My colleagues find that the Respondent's MAP violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because (i) the MAP waives the right to participate in class or collective actions regarding non-NLRA employment claims, and (ii) the MAP was promulgated in response to the class action lawsuit. For the reasons set forth below, I respectfully dissent.

1. *The Class-Action Waiver*. I believe the MAP's class- and collective-action waiver is lawful for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*[1] I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than NLRA.[2] However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class-type treatment of non-NLRA claims. To the contrary, as discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."[3] This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;[4] (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject

[1] 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority's holding in *Murphy Oil* invalidating class-action waiver agreements was denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

[2] I agree that non-NLRA claims can give rise to "concerted" activities engaged in by two or more employees for the "purpose" of "mutual aid or protection," which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23–25 (Member Miscimarra, dissenting in part). Indeed, such was the case here, as I explain below. However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7's statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. Id.; see also *Beyoglu*, 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting).

[3] *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That *any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment" (emphasis added). The Act's legislative history shows that Congress intended to preserve every individual employee's right to "adjust" any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

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

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the Board's position regarding class-waiver agreements;[5] and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).[6] Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.[7]

2. *Promulgation in Response to the Class Action Lawsuit.* My colleagues find that the Respondent violated Section 8(a)(1) of the Act by promulgating the MAP in response to protected concerted activity. I believe the record supports a finding that employees engaged in protected concerted activity in connection with the California state court class action lawsuit. However, I do not believe that the Respondent adopted the MAP in response to that activity.[8] Rather, I believe the MAP was adopted in response to the class-action nature of the lawsuit itself, which is not protected under the NLRA. But even assuming otherwise, in my view the Respondent's justifications for adopting the MAP outweigh any potential impact on employees' Section 7 rights.

Section 7's "'mutual aid or protection' clause protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums," *Eastex v. NLRB*, 437 U.S. 556, 565–566 (1978), and I agree that some protected concerted activity occurred in connection with the state court lawsuit. But unlike my colleagues and the judge, I believe it is immaterial whether or not class-type procedures were applicable to the lawsuit. Rather, Section 7 protection existed because Section 7's statutory requirements were met: at least three employees engaged in concerted activity (jointly initiating and pursuing the state court lawsuit) with the purpose of mutual aid or protection (challenging the Respondent's wage practices). See *Murphy Oil*, above, slip op. at 23–25 (Member Miscimarra, dissenting); see also *Beyoglu*, above, slip op. at 4–5.

Moreover, although the Respondent promulgated the MAP shortly after the three employees jointly initiated the state court lawsuit, I do not believe the promulgation of the MAP constituted unlawful restraint or coercion of or interference with NLRA-protected activity in violation of Section 8(a)(1) of the Act. In my view, the record fails to establish that the MAP was adopted in response to NLRA-protected employee activity. As noted above, the "protected concerted activity" issue (whether two or more employees engaged in lawsuit-related concerted activity for mutual aid or protection) is distinct from the "class action procedures" issue (whether or not class-type procedures applied to the non-NLRA lawsuit). Although the record suggests that the Respondent, in promulgating the MAP, was motivated by a desire to provide an alternative to class action procedures, there is no evidence that the MAP would preclude employees from engaging in NLRA-protected activity associated with non-NLRA claims.[9]

The judge found that the Respondent decided to adopt the MAP "*because* of the class action complaint," based

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

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

[7] Because I would find lawful the MAP's class- and collective-action waiver as to all the Respondent's employees, I do not reach or pass on the narrower question whether the waiver was lawful with respect to the Respondent's employees represented by the Carpenters Union. Assuming, however, that the Union agreed to the implementation of the MAP—the judge did not credit the testimony that may have established such an agreement—persuasive authority exists to conclude that this agreement would be enforceable in court. See *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009) (holding that a collective-bargaining agreement could lawfully provide for the arbitration of statutory claims).

[8] I agree with my colleagues that although the Board in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), phrased the second prong of the *Lutheran Heritage* standard as whether a challenged rule or policy is unlawful on the basis that it was "promulgated in response to union activity," a rule promulgated in response to other protected concerted activity is also unlawful under the second prong of the *Lutheran Heritage* standard. For the reasons explained in the text, however, I would find that the Respondent did not promulgate the MAP in response to employees' protected concerted activity.

[9] See *City Market, Inc.*, 340 NLRB 1260, 1260 (2003) (rule promulgated in context of Sec. 7 activity not unlawful if the timing can be explained by matters apart from the Sec. 7 activity); see also *NLRB v. Roney Plaza Apartments*, 597 F.2d 1046, 1049 (5th Cir. 1979) ("Reasonable restrictions . . . are not per se invalid because imposed during [Sec. 7 activity]. The Act does not require an employer to anticipate all problems and provide for them by written rule."), enfg. 232 NLRB 409 (1977).

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on testimony that the Respondent's president, Thomas Tarlton, implemented the MAP to avoid a "long, drawn-out process in solving problems" (emphasis in original). The judge also found that the "long, drawn-out process" Tarlton referenced meant the state court class action lawsuit. However, I believe this evidence establishes, at most, that the MAP was adopted in response to the "class action procedures" issue. There is no evidence that the Respondent was motivated by protected activity—i.e., by the fact that, in connection with the non-NLRA state court lawsuit, employees also happened to engage in NLRA-protected concerted conduct. In this regard, my colleagues, like the judge, conflate class litigation procedures with NLRA-protected activity. However, as explained above and in my partial dissent in *Murphy Oil*, when employees pursue non-NLRA claims, the applicability of class action procedures in litigating those claims does not necessarily mean employees are engaged in NLRA-protected activity, and the unavailability of class action procedures does not preclude employees from engaging in NLRA-protected activity. See *Murphy Oil*, above, slip op. at 24–26 (Member Miscimarra, dissenting in part).

Moreover, even if the Respondent adopted the MAP in response to NLRA-protected activities associated with the class action lawsuit, this does not automatically mean the Respondent has violated Section 8(a)(1). In *Eastex v. NLRB*, the Supreme Court stated that, when determining whether an employer's adverse action taken in response to employee conduct violated Section 8(a)(1), "[t]wo distinct questions" must be considered: first, whether the employee conduct is protected by Section 7, and second, whether the employer's "countervailing interest . . . outweighs the exercise of § 7 rights." 437 U.S. at 563; see also *City Market*, 340 NLRB at 1260 fn. 2 (employer may demonstrate that "'promulgation of a [new rule] upon the commencement of [Section 7 activity] . . . was justified because the [Section 7 activity] brought about substantial work disruption'") (quoting *NLRB v. Roney Plaza Apartments*, 597 F.2d at 1049). Thus, even if the MAP was implemented in response to NLRA-protected activity in connection with the lawsuit, the Board must assess the legality of that action under Section 8(a)(1) by taking into account not only the potential impact on NLRA rights, but also relevant justifications unrelated to NLRA-protected activity. See *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 229 (1963) (stating that the Board must discharge the "delicate task" of "weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner").[10]

Here, as noted above, the MAP has virtually no impact on rights afforded under the NLRA. The MAP does not impose job-related consequences on the three employees who filed the California state court class action lawsuit or on any other employees who concertedly file a lawsuit covered by the MAP. Nor does the MAP penalize the employees for or prevent them from pursuing their non-NLRA claims against the Respondent.[11] Although the MAP requires employees to pursue their claims in arbitration, the Supreme Court has held that electing an arbitral rather than a judicial forum does not unlawfully prevent litigants from effectively vindicating their claims.[12] Questions may exist regarding whether the MAP can be relied upon by the Respondent as a defense in the pending non-NLRA lawsuit,[13] but these questions should be resolved by the California state court that, unlike the NLRB, has jurisdiction over the claims asserted in that litigation.[14] It is true that the MAP precludes employees from using class- or collective-action procedures when

[10] See also *Republic Aviation v. NLRB*, 324 U.S. 793, 797–798 (1945); *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33–34 (1967); cf. *Banner Estrella Medical Center*, 362 NLRB No. 137, slip op. at 13–18 (2015) (Member Miscimarra, dissenting in part).

[11] Under the MAP, employees are free to engage in a broad range of concerted activities for the purpose of mutual aid or protection in connection with non-NLRA legal claims. The MAP in no way interferes with the right of employees, among other things, to meet with one another to identify evidence supporting non-NLRA employment-related claims; to engage in work stoppages (if not prohibited by a collective-bargaining agreement) or otherwise express solidarity and mutual support for one another in connection with non-NLRA employment-related claims; to concertedly meet with an attorney or attorneys regarding non-NLRA employment-related proceedings; or to publicize and/or raise funds for non-NLRA employment-related agency or court cases. The right of employees to engage in these types of protected concerted activities is central to the NLRA—in contrast to the procedural treatment afforded non-NLRA claims, which does not implicate the NLRA.

[12] See *14 Penn Plaza*, 556 U.S. at 249 (agreement to arbitrate ADEA claims did not prevent their effective vindication because agreement does not "waive the statutory right to be free from workplace age discrimination; it waives only the right to seek relief from a court in the first instance"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) ("'By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)).

[13] The record contains no evidence that the Respondent has sought to enforce the MAP in the California state court lawsuit.

[14] As I stated in *Beyoglu*, we are not permitted to "'tak[e] it upon ourselves to assist in the enforcement of other statutes. The Board was not intended to be a forum in which to rectify all the injustices in the workplace.'" *Beyoglu*, 362 NLRB No. 152, slip op. at 5 (Member Miscimarra, dissenting) (quoting *Meyers Industries*, 281 NLRB 882, 888 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988)).

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pursuing non-NLRA claims. Again, however, the existence or unavailability of class-type procedures has no bearing on whether employees can engage in NLRA-protected activity.[15] In *Eastex*, for example, the Supreme Court cited numerous cases where employees were found to have engaged in NLRA-protected activity in connection with an agency or court proceeding involving a non-NLRA claim or complaint,[16] and *none* of the cases involved or turned on the availability of class-type procedures.

It also appears that the Respondent had legitimate and substantial justifications for adopting the MAP. Contrary to the views expressed by my colleagues and the judge, who fault the Respondent for its desire to avoid class action lawsuits, the Supreme Court has recognized that it is entirely legitimate to use arbitration agreements, including those that prohibit class claims, as a means to avoid class action litigation in courts.[17] Class action lawsuits may result in high costs, lengthy proceedings, and "'in terrorem' settlements."[18] Arbitration agreements that include restrictions on class claims may permit legal disputes to be resolved more efficiently in a streamlined manner that is tailored to the type of dispute,[19] increasing the speed of dispute resolution and substantially reducing the costs.[20] Moreover, the availability of arbitration as an alternative to court litigation may also substantially benefit employees, who may lack the resources or time required to litigate their non-NLRA claims in court.[21] For these reasons, even if the MAP's adoption were found to have some adverse impact on NLRA-protected activity, in the circumstances presented here I believe such an impact would be outweighed by legitimate justifications unrelated to NLRA-protected activity. These considerations, and those discussed above, warrant a finding that the Respondent did not violate Section 8(a)(1) when it adopted the MAP.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. April 29, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

[15] See above fns. 2–5 and accompanying text.

[16] See *Eastex*, 437 U.S. at 565, citing *Walls Mfg. Co.*, 137 NLRB 1317, 1319 (1962) (employee's discharge in retaliation for letter to "State regulatory agency"—the state health department—complaining about unsanitary conditions violated Sec. 8(a)(1)), enfd. 321 F.2d 753 (D.C. Cir. 1963), cert. denied 375 U.S. 923 (1963); *Socony Mobil Oil Co.*, 153 NLRB 1244, 1245, 1248 (1965) (employee suspension in retaliation for alleged insolent and insubordinate behavior "during the Coast Guard investigation aboard ship" and "complaint to the Coast Guard" violated Sec. 8(a)(1)), enfd. 357 F.2d 662 (2d Cir. 1966); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) (two employee discharges based on alleged failure to read affidavits filed in union's state court injunction proceeding violated Sec. 8(a)(1); court finds that "filing by employees of a labor related civil action is protected activity under section 7"), enfg. 223 NLRB 696 (1976); *Wray Electric Contracting, Inc.*, 210 NLRB 757, 761 (1974) (employee discharge for filing "a complaint with OSHA" on behalf of union violated Sec. 8(a)(3) and (1)); *King Soopers, Inc.*, 222 NLRB 1011, 1018 (1976) (employee discharge in retaliation for employee's filing of "civil rights charges" with EEOC and state EEO agency violated Sec. 8(a)(1)); *Triangle Tool & Engineering, Inc.*, 226 NLRB 1354, 1357 (1976) (employee discharge in retaliation for union activity and "soliciting the aid of the Wage and Hour Division" of the U.S. Dept. of Labor violated Sec. 8(a)(3) and (1)); *Alleluia Cushion Co.*, 221 NLRB 999 (1975) (employee discharge in retaliation for employee's filing of "letter of complaint to the California OSHA office" violated Sec. 8(a)(1)). The Board's decisions in *Alleluia Cushion* and its progeny—where the conduct of a solitary employee was deemed "concerted" whenever the purpose of that activity was one the Board wished to protect—was overruled in *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[17] See *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2312 (2013) (arbitration agreement containing class-action waiver enforceable); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345–346 (2011) (the Federal Arbitration Act "was designed to promote arbitration" and "embod[ies] a national policy favoring arbitration").

[18] *Concepcion*, above at 350.

[19] Id. at 344 (arbitration "allow[s] for efficient, streamlined procedures tailored to the type of dispute").

[20] Id. at 345 ("[T]he informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution."); *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 685 (2010) (benefits of arbitration include "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes"); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.").

[21] Arbitration provisions in collective bargaining agreements have been celebrated by Congress and the courts. See, e.g., Labor Management Relations Act Sec. 203(d) ("Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement . . ."); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960) ("arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties"). As I stated in *Murphy Oil*, our statute does not render individual arbitration agreements "inherently suspect or unenforceable, particularly when the agreements relate exclusively to non-NLRA legal rights," and the Supreme Court has stated that "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative." *Murphy Oil*, above, slip op. at 33 (Member Miscimarra, dissenting in part) (quoting *14 Penn Plaza*, above, 556 U.S. at 258).

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APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mutual arbitration policy that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, and WE WILL NOT promulgate such a policy in response to our employees' protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the mutual arbitration policy in all its forms, or revise it in all its forms to make clear that the mutual arbitration policy does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the mutual arbitration policy in all its forms that the mutual arbitration policy has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised policy.

TARLTON AND SON, INC.

The Board's decision can be found at www.nlrb.gov/case/32-CA-119054 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Gary Connaughton, Esq., for the General Counsel.
James A. Bowles, Esq. (Hill, Farrer & Burrill LLP), for the Respondent.
David A. Rosenfeld, Esq. (Weinberg, Roger & Rosenfeld), for the Charging Party.

DECISION

STATEMENT OF THE CASE

AMITA BAMAN TRACY, ADMINISTRATIVE LAW JUDGE. This case was tried in Fresno, California, on October 15, 2014. Robert Munoz (Charging Party or Munoz) filed the charge and first-amended charge in case 32–CA–119054 on December 12, 2013, and January 14, 2014, respectively. Munoz filed the charge and first-amended charge in case 32–CA–126896 on April 17, 2014, and June 5, 2014, respectively. The General Counsel issued the consolidated complaint (the complaint) on July 23, 2014.

The complaint alleges that Tarlton and Son, Inc. (Respondent or the Company) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by requiring its employees since early December 2013, as a condition of acceptance or continuation of employment, to sign agreements that compel the employees to mandatory binding arbitration. The complaint further alleges that Respondent implemented the mandatory binding arbitration policy because the employees engaged in protected concerted activities, including by participating in a State court class action wage and hour complaint against Respondent.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and Charging Party, I make the following[1]

[1] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's exhibit; "R Exh." for Respondent's exhibit; "CP Exh." for Charging Party's exhibit; "GC Br." for the General Counsel's brief; "R. Br." for the Respondent's brief; and "CP Br." for the Charging Party's brief. On January 22, 2015, the Charging Party submitted a letter to me with copies to the General Counsel and Respondent calling to my attention a recent Board decision, *Purple Communications, Inc.*, 361 NLRB No. 126 (2014), issued after the briefing period in this case ended. I have considered this additional Board decision in this case. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based my review and consideration of the entire record.

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FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent, a California corporation, provides subcontractor construction services in the construction industry in the State of California from its office and place of business in Fresno, California, where it annually derives gross revenues in excess of $50,000. Respondent purchased and received goods at its facility in California valued in excess of $50,000 directly from sources outside the State of California. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent provides specialty subcontractor construction services to private and public properties in the State of California. Respondent employs approximately 150 to 250 painters, plasterers, dry wall hangers, tapers and finishers as well as 3 to 4 nonsupervisory clerical and administrative staff employees (Tr. 26–27, 181). Thomas (Tommy) Oliver Tarlton is Respondent's president, and has been responsible for labor relations at the Company since 1999 (Tr. 115). Tommy Tarlton maintains an open-door policy where an employee or group of employees may come to him with concerns about workplace problems (Tr. 106–107).

The Northern California Carpenters Union and the Southern California Carpenters Union (collectively, the Carpenters Union) represents many of the occupations employed by Respondent including dry wall hangers, tapers or dry wall finishers, lathers, plaster tenders and possibly laborers depending on the type of job being performed (Tr. 34–35, 51, 117–118). Several other occupations employed by Respondent are represented by other labor organizations or not represented (R. Exh. 7). Respondent and the Carpenters Union are bound by 2 collective-bargaining agreements: the Southwest Drywall/Lathing Master Agreement, and the Northern California Drywall/Lathing Master Labor Agreement (Tr. 34; R. Exh. 1, 2).[2]

B. The Class Action Wage and Hour Complaint

On November 7, 2013,[3] Munoz and two other employees (the plaintiffs) filed, in the Superior Court of the State of California, a collective action (the class action complaint) pursuant to various California Labor Codes on behalf of themselves and other employees similarly situated.[4] The class action complaint alleged that Respondent and other companies engaged in unfair business practices and violations of the California Labor Code including failure to compensate the plaintiffs for overtime and for various work-related activities performed off the clock such as driving to and from the job sites and traveling to paint stores (GC Exh. 2). The plaintiffs served Respondent with the class action complaint shortly after its filing (Tr. 21–22). After Respondent received a copy of the class action complaint, sometime between November 7 and November 19, Respondent contacted its attorneys regarding the class action complaint (Tr. 22, 57–60).

C. The Mutual Arbitration Policy

On November 19, Respondent's attorneys emailed Tommy Tarlton a draft mutual arbitration policy along with an employee agreement to arbitrate (collectively, the MAP) with specific language to assure the Carpenters Union that Respondent was not trying to avoid complying with the collective bargaining agreements (GC Exh. 3). Respondent's attorneys drafted the MAP after receiving a copy of the class action complaint from the Company (GC Exh. 4). That same day, November 19, Tarlton forwarded the draft MAP to Tony Canale, a representative of the Northern California Carpenters Union (GC Exh. 3; Tr. 60, 78). Tarlton asked Canale to review the draft MAP and "hopefully" approve the document.[5]

Tarlton testified that in addition to his email to Canale, he spoke to Canale several times regarding the MAP (Tr. 77, 84, 139). Tarlton testified that he asked Canale if he had forwarded the MAP to the Southern California Carpenters Union officials, to which Canale responded he had (Tr. 140). Tarlton testified that Canale "agreed it was okay for our company to implement [MAP]" as it did not supersede the collective bargaining agreement applicable to its members (Tr. 86, 140).

Tarlton testified that for several years prior to the filing of the class action complaint, he had discussed implementing a mutual arbitration policy at the Company but did not take steps to implement the MAP until November 2013 (Tr. 25–26). Tarlton gave conflicting testimony as to whether the implementation of the MAP occurred due to the class action complaint filed against Respondent. On cross-examination, Tarlton admitted that the decision to implement the MAP came within a few days after receiving the class action complaint (Tr. 59). However, Tarlton denied that the class action complaint prompted him to implement the MAP (Tr. 60). Tarlton also acknowledged that he had not spoken to anyone including his counsel in the 6 months prior to the filing of the class action complaint regarding implementation of a mutual arbitration policy at the Company (Tr. 60).

In late November or early December, Respondent presented to all its employees, both unrepresented and represented by labor organizations, with the MAP.[6] According to Tarlton,

[2] Respondent apparently does not pay into the trust fund for the Northern California Carpenters Union (Tr. 34–50; 153–154, 174–176). The General Counsel argues that since Respondent does not pay into the trust fund, the employees are not actually represented by the Carpenters Union (GC Br. 3). However, based on my findings in this decision, sorting out the representation issue is not necessary.

[3] All dates contained herein are in 2013, unless otherwise indicated.

[4] According to the class action complaint, Respondent employed Munoz as a painter at the time of the filing (GC Exh. 2). Respondent, for the first time in its brief, alleges that it did not employ Munoz at the time of the implementation of the MAP. There is no evidence in the record to support this statement, and regardless, it is not relevant.

[5] The record does not contain a written response to Tarlton's November 19, 2013 email to Canale (GC Exh. 3). Canale did not testify at the hearing.

[6] At the time of the issuance of the MAP to its employees, Respondent also requested its employees complete a survey regarding the allegations raised in the class action complaint (Tr. 192). Respondent also gave its employees a "release," "settlement agreement," or "waiver" to

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only a few employees expressed concern with the MAP but eventually every employee signed it (Tr. 184). Since December 2013, Respondent has required all employees, both represented and unrepresented by a labor organization, to sign, as a condition of their employment, the MAP (Tr. 33, 172–174). The MAP, 5 pages single-spaced in length, requires the employees to submit most legal claims arising out of their employment to binding arbitration.

The MAP states, in relevant part:

> Notice to Employees About Our Mutual Arbitration Policy
>
> Tarlton & Son, Inc. ("the Company") has adopted and implemented a new arbitration policy, requiring mandatory, binding arbitration of all disputes, for all employees, regardless of length of service. This memorandum explains the procedures, as well as how the arbitration policy works as a whole. Please take the time to read this material. IT APPLIES TO YOU. It will govern any existing and all future disputes between you and the Company that relate in any way to your employment.
>
> Arbitration Policy & Procedures
>
> The Company sincerely hopes that you will never have a dispute relating to your employment here. However, we recognize that disputes sometimes arise between an employer and its employees relating to the employment relationship. We also recognize that not every dispute can be successfully resolved informally. The Company believes that it is in the best interests of the employees and the Company to resolve those disputes in a forum that provides the fastest and fairest method for resolving them based on the individual facts of your situation. Therefore, the Company has adopted and implemented this Mutual Arbitration Policy ("MAP") as a mandatory condition of employment.
>
> The MAP applies to all Company employees, regardless of length of service or status, and covers all disputes relating to or arising out of or in connection with employment at the Company or the termination of that employment, whether those disputes already exist today or arise in the future. Examples of the type of disputes or claims covered by the MAP include, but are not limited to, claims against employees for fraud, conversion, misappropriation of trade secrets, or claims by employees for wrongful termination of employment, breach of contract, fraud, employment discrimination, harassment or retaliation under the Americans With Disabilities Act, the Age Discrimination in Employment Act, the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964 and its amendments, the California Fair Employment and Housing Act or any other state or local anti-discrimination laws, tort claims, wage or overtime claims or other claims under the Labor Code, or any other legal or equitable claims and causes or action recognized by local, state or federal law or regulations. The MAP does not cover workers' compensation claims, unemployment insurance claims or any claims that could be made to the National Labor Relations Board. The MAP also does not cover claims that are subject to the grievance and arbitration provisions of any collective bargaining agreement between the Company and a duly recognized labor Union representing you. Because it changes the forum in which you may pursue claims against the Company and effects your legal rights, you may wish to review the MAP with any attorney or other advisor of your choice. The Company encourages you to do so.
>
> Your decision to accept employment or to continue employment with the Company constitutes your agreement to be bound by the MAP. Likewise, the Company agrees to be bound by the MAP. This mutual obligation to arbitrate claims means that both you and the Company are bound by use of the MAP as the only means of resolving any employment-related disputes covered by the policy. By agreeing to arbitrate, both you and the Company are agreeing to use procedures to arbitrate that may be materially different from the procedures that would apply in court. This mutual agreement to arbitrate claims also means that both you and the Company forgo any right either may have to a jury trial on claims related in any way to your employment. Because the arbitration proceeding will be a traditional, bilateral arbitration, it also means that both you and the Company forego and waive any right to join or consolidate claims in arbitration with others or to make collective or class claims in arbitration, either as a representative or a member of a class, unless such procedures are agreed to by both you and the Company. No substantive remedies that otherwise would be available to you individually or to the Company in a court of law, however, will be forfeited by virtue of this agreement to use and be bound by the MAP.

[Emphasis in original.] Employees sign a separate form titled, "Employee Agreement to Arbitrate" which states in relevant part:

> I acknowledge that I have received and reviewed a copy of Tarlton & Son. Inc.'s Mutual Arbitration Policy ("MAP") and have been provided an opportunity to request and review a Spanish translation as well, and I understand that the MAP is a condition of my employment. I agree that it is my obligation to make use of the MAP and to submit to final and binding arbitration any and all claims and disputes, whether they exist now or arise in the future, that are related in any way to my employment or the termination of my employment with Tarlton & Son, Inc., except as otherwise permitted by the MAP. I understand that final and binding arbitration will be the sole and exclusive remedy for any such claim or dispute against Tarlton & Son, Inc. or any affiliated companies or entities, and all of their owners, employees, officers, directors or

sign regarding the class action lawsuit filed by the plaintiffs (Tr. 194–202). However, the complaint before me focuses on the implementation of the MAP at the Company, and not on what the employees were asked to sign once the MAP was implemented; apparently, that charge was dismissed prior to the hearing. The General Counsel admitted as such at the hearing, and the Charging Party objected, seeking to introduce this "release," "settlement agreement," or "waiver." I sustained the objection at the hearing, and rejected this document. Based upon my review of the complaint, my ruling stands. In addition, per Charging Party's request in his brief, I decline to order Respondent to rescind the class action complaint waivers signed by the employees since that issue is not before me.

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> agents ("the Company") and that, by agreeing to use arbitration to resolve my disputes, both the Company and I agree to forego any right we each may have had to a jury trial on issues covered by the MAP, and forego any right to bring claims on a class or collective basis. I also agree that such arbitration will be conducted before an arbitrator chosen by me and the Company, and will be conducted before an arbitrator chosen by me and the Company, and will be conducted under the Federal Arbitration Act and the applicable procedural rules of the American Arbitration Association ("AAA"). which I have been provided an opportunity to request and review. The Company and I agree that nothing herein will prevent me or a Union representing me from filing a grievance and pursuing arbitration under a collective bargaining agreement between the Company and Union representing me.

[GC Exh. 1(e), 1(p), 3.][7]

In summary, and relevant to this matter, Respondent requires that all employment-related disputes with its employees be resolved as individual claims exclusively through final arbitration. In other words, parties to a dispute cannot pursue claims related to the dispute, individually or collectively, or by class, in any judicial or court forum

III. ANALYSIS

A. Respondent's Requirement That Employees' Are Bound By the MAP Violates Section 8(a)(1) of the Act

The complaint alleges, at paragraph 4, that since early December 2013, Respondent has required employees to be bound by the MAP which precludes class or collective litigation in any forum in violation of Section 8(a)(1).

(1) Respondent's MAP violates the Act by precluding class and/or collective actions.

Respondent requires employees to agree to the MAP as a condition of employment. The MAP applies to all employees, regardless of length of service or status, and governs all disputes relating to or arising from employment with the Company. Beginning in December 2013, Respondent required all employees to sign the MAP to continue employment with the Company. Thus, I find that the MAP was a mandatory rule imposed by Respondent, and as such the MAP should be evaluated in the same manner as any workplace rule. See *D.R. Horton*, 357 NLRB 2277, 2292 (2012).

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. See, e.g., *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 949–950 (1942); *United Parcel Service*, 252 NLRB 1015, 1018, 1022 fn. 26 (1980), enfd. 677 F.2d 421 (6th Cir. 1982); *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in part 737 F.3d 344 (5th Cir. 2013), petition for rehearing en banc denied (5th Cir. No. 12–60031, April 16, 2014). In *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), the Board reaffirmed its ruling in *D. R. Horton*, where they held that mandatory arbitration agreements which preclude the filing of joint, class, or collective claims addressing wages, hours, or other working conditions in any forum, arbitral or judicial, is protected concerted activity and unlawfully restrict employees' Section 7 rights, which violates Section 8(a)(1) of the Act.

Since the Board's issuance of *D.R. Horton* there are have been several decisions issued by the Federal courts of appeal disagreeing with the Board's analysis regarding mandatory arbitration agreements. *Sutherland v. Ernst & Young*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Richards v. Ernst & Young, LLP*, 744 F.3d 1072 (9th Cir. 2014). Then, on October 28, 2014, the Board clearly and carefully reaffirmed its decision in *D.R. Horton. Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014). The Board in *Murphy Oil* reexamined *D.R. Horton*, and determined that its reasoning and results were correct. The Board found that Section 8(a)(1) of the Act is violated when an employer requires its employees to agree to resolve all employment-related claims through individual arbitration. Mandatory arbitration agreements which bar employees from bringing joint, class, or collective actions regarding the workplace in any forum restrict employees' substantive right established by Section 7 of the Act to improve their working conditions through administrative and judicial litigation.

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

> This mutual agreement to arbitrate claims also means that both you and the Company forgo any right either may have to a jury trial on claims related in any way to your employment.

and

[7] GC Exh. 3 include the English and Spanish versions of the MAP. However, to receive a Spanish version of the Company's MAP, the employee must request the Spanish version. It is unclear from the record whether this requirement posed a challenge to English illiterate employees who obviously would not be able to read the English version of the MAP to know to ask for a Spanish version of the MAP.

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> Because the arbitration proceeding will be a traditional, bilateral arbitration, it also means that both you and the Company forego and waive any right to join or consolidate claims in arbitration with others or to make collective or class claims in arbitration, either as a representative or a member of a class, unless such procedures are agreed to by both you and the Company.

Respondent's MAP also requires employees to sign a statement certifying, "I understand that final and binding arbitration will be the sole and exclusive remedy for any such claim or dispute against Tarlton & Son, Inc. [...] and forego any right to bring claims on a class or collective basis." Thus, the MAP clearly prohibits class actions in both judicial and arbitral forums.

Applying the Board's decisions in *D.R. Horton* and *Murphy Oil*, Respondent's MAP violates Section 8(a)(1) of the Act by requiring employees as a condition of employment to agree to resolve all employment-related claims through individual arbitration. Accordingly, I find that Respondent's maintenance of the MAP, as a condition of employment, prohibits employees from bringing forth claims against Respondent in a concerted manner which thereby violates Section 8(a)(1) of the Act as set forth in *D.R. Horton* and *Murphy Oil*.[8]

2. The defenses raised by Respondent are without merit.

Respondent raises several arguments why I should not follow *Murphy Oil* and *D.R. Horton*. Respondent argues that I should instead follow the various Federal courts of appeals which have rejected the Board's rationale in *D.R. Horton* as well as the dissenting opinions in *Murphy Oil*. I find none of these arguments persuasive. Respondent failed to provide any argument distinguishing its mandatory arbitration agreement with the ones found in *D.R. Horton* and *Murphy Oil*. Because *Murphy Oil* and *D.R. Horton* are Board precedents that have not been overturned by the Supreme Court, I must follow them. *Manor West, Inc.*, 311 NLRB 655, 667 fn. 43 (1993); see also *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) ("We emphasize that it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed. It is for the Board, not the judge, to determine whether precedent should be varied."). The arguments made by Respondent as to why *D.R. Horton* and *Murphy Oil* were wrongly decided, including its rejection by the courts, must be made directly to the Board.

Respondent alleges that Section 7 of the Act does not include the right to pursue class action complaint, and does not constitute protected concerted activity. Respondent relies upon the dissent in *Murphy Oil* to support its position. However, as the majority reaffirmed in *Murphy Oil*, "the NLRA does not create a right to class certification or the equivalent, but as the *D.R. Horton* Board explained, it does create a right to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint." *Murphy Oil*, supra, slip op. at 2 (citing *D.R. Horton*, supra, slip op. at 10 fn. 24). Here, Respondent's MAP, as a condition of employment, precludes employees from pursuing claims concertedly and thus "amounts to a prospective waiver of a right guaranteed by the NLRA." *Murphy Oil*, supra, slip op. at 9 (citing *National Licorice Co. v. NLRB*, 309 U.S. 350, 361 (1940), and *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944)). This preclusion infringes on employees' Section 7 rights, and thus violates Section 8(a)(1) of the Act.

Respondent argues that even if the MAP restricts the employees' Section 7 rights, this restriction is not a violation of Section 8(a)(1) of the Act because the rights of the employees must be balanced with the business justification of the employer. Again, the *Murphy Oil* Board rejected this argument. The Board stated, "It is untenable to claim, as Member Johnson does, that prohibiting employees from pursuing their workplace claims collectively results only in 'relatively slight' interference with Section 7 rights, when it actually extinguishes them." *Murphy Oil*, supra, slip op. at 14. Again, this argument is rejected.

Respondent alleges that the Board's rationale in *Murphy Oil and D.R. Horton* conflict with the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 et. seq. However, the Board clearly set forth its reasons why the National Labor Relations Act does not conflict with or undermine the FAA. See *Murphy Oil*, supra, slip op. at 6. First, the Board found that mandatory arbitration agreements are unlawful under the FAA's savings clause because they extinguish rights guaranteed by Section 7. Second, Section 7 amounts to a "contrary congressional command" overriding the FAA. Finally, the Board found that the Norris-LaGuardia Act indicates that the FAA should yield to accommodate Section 7 rights. The Norris-LaGuardia Act prevents enforcement of private agreements that prohibit individuals from participating in lawsuits arising out of labor disputes.

Furthermore, Respondent argues that *AT & T Mobility v. Concepcion*, 131 S.Ct. 1740, 1746 (2011), *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 672 fn. 4 (2012), *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013), Supreme Court decisions issued after *D.R. Horton*, and other related case law,[9] support the argument that *D.R. Horton* must be rejected. Again, the Board in *Murphy Oil* addressed those arguments, distinguishing that Section 7 of the Act substantively guarantees employees the right to engage in collective action, including collective legal action, for mutual aid and protection concerning wages, hours, and working conditions. See *Murphy Oil*, supra, slip op. at 7–9.

Respondent alleges that the Carpenters Union agreed to the implementation of the MAP thereby waiving the relevant statutory right of the employees whom it represents. However, I reject this defense as well. First, the Carpenters' Union does not represent all the employees of Respondent, and thus, could not have waived the rights of non-Carpenters' Union represent-

[8] At the hearing, under cross-examination, Tarlton, who testified he was responsible for labor relations at the Company since 1999 (Tr. 115), admitted that even he did not know which disputes required mandatory arbitration and which did not (Tr. 88–103). Where language "creates an ambiguity," that ambiguity "must be construed against the Respondent as the drafter of the [rule]." *Murphy Oil*, 361 NLRB No. 72, slip op. at 26 (2014).

[9] Respondent requests that I follow the decision of Administrative Law Judge Keltner Locke in *Haynes Building Services, LLP*, No. 31–CA–093920 (February 7, 2014). This decision is not precedential, however, and to the extent it conflicts with the Board's case law, I am precluded from following it.

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ed employees. Furthermore, putting aside the preliminary issue of whether a union can waive the Section 7 right involved here, an issue I do not reach,[10] Respondent has not established such a waiver on the facts of this case. Respondent's only evidence presented at trial regarding the agreement by the Carpenters Union was the uncorroborated hearsay testimony of Tarlton.[11] I do not credit Tarlton's testimony. Tarlton provided different versions of the discussions with Canale regarding the implementation of the MAP. On direct examination, Tarlton testified that Canale did not object to the implementation of the MAP in the very first conversation he had with him after the MAP had been emailed to Canale (Tr. 139–142; GC Exh. 3). Tarlton spoke with Canale before he emailed him the MAP in a conversation that lasted longer than the subsequent conversation after Canale reviewed the MAP (Tr. 145–147). In contrast, under cross-examination, Tarlton testified that he had three to five conversations with Canale before Canale agreed to the implementation of the MAP (Tr. 77). Tarlton testified that before Canale agreed to the implementation of the MAP, Canale reviewed the MAP. Thereafter, Canale and he had more conversations regarding the MAP and its impact on the negotiated grievance procedure (Tr. 84–86). Moreover, Respondent also failed to call Canale as a witness or provide any documentary evidence that the Carpenters Union waived its right to bargain over the implementation of the MAP.

Even assuming, however, that I could accept Tarlton's testimony set forth above, it does not meet the Board's standard for establishing a waiver of Section 7 rights. Under the Board's long settled "clear and unmistakable waiver" standard, the party asserting waiver has to establish that the parties "unequivocally and specifically express[ed] their mutual intention to permit unilateral employer action with respect to a particular employment term." *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007). The proof of a clear and unmistakable waiver is a fact specific inquiry. Respondent cites to *Berkline Corp.*, 123 NLRB 685 (1959), and *Shipbuilders (Bethlehem Steel)*, 277 NLRB 1548 (1986), to support its argument that the Carpenters Union waived their right to bargain regarding the MAP. Again, in those decisions, whose facts are not comparable to the fact-pattern presented in this case, the Board concluded that the evidence sufficiently showed that the union waived their rights to bargain. Here, the evidence, or lack of it, shows that Respondent informed the Carpenters Union of the planned change (GC Exh. 3). However, Respondent did not prove its heavy burden because the evidence presented is insufficient to show that the Carpenters Union *thereafter* agreed to the implementation of the MAP. Respondent failed to prove that it fully discussed the mandatory arbitration agreement with the Carpenters Union and that the Carpenters Union "consciously yielded its interest in the matter." *Alison Corp.*, 330 NLRB 1363, 1365 (2000).

In this case, it is clear under Board law that Munoz engaged in protected concerted activity when he filed his class action complaint in State court. See *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975); *Host International*, 290 NLRB 442, 443 (1988) (filing a collective action to address wages, hours, and other terms and conditions of employment constitutes protected activity unless done with malice or in bad faith); *Harco Trucking, LLC*, 344 NLRB 478 (2005). Even without class member status, the evidence demonstrates that, by filing his class wide complaint, Munoz and the other plaintiffs sought to enlist the support of fellow employees in mutual aid and protection and intended to initiate or induce group action regarding alleged overtime pay violations and other labor violations against Respondent. Respondent implemented the MAP only after the employees filed a collective action in State court concerning working conditions. By implementing the MAP, Respondent sought to prevent the employees from working together in the future and had an illegal objective. Consequently, Respondent's action to force Munoz and other employees covered under the Act, to waive their right to file a class wide action in any arbitral or judicial forum, interfered with and restrained them from exercising their Section 7 rights. Respondent promulgated the mandatory arbitration agreement for all current and future employees only after the employees engaged in protected concerted activity.

Based on the foregoing, I find that Respondent's requirement as a condition of employment that employees are bound by the MAP violates Section 8(a)(1) of the Act as alleged in the Complaint.

B. Respondent's Implementation of the MAP Was Based on Protected Concerted Activity of Filing Class Action Matters, and Thus, Independently Violates Section 8(a)(1) of the Act

The Complaint alleges, at paragraph 5, that Respondent implemented the MAP after the employees filed a State class action wage and hour complaint. The MAP is a condition of employment, and is therefore treated in the same manner as other unlawfully implemented workplace rules. As set forth previously, when evaluating whether a rule, including a mandatory arbitration policy, violates Section 8(a)(1), the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, supra. See *U-Haul Co. of California*, supra at 377 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007); *D.R. Horton, Inc.*; *Murphy Oil*. In undertaking this analysis, the Board must refrain from reading particular phrases in isolation, and must not presume improper interference with employee rights. *MCPc, Inc.*, 360 NLRB No. 39, slip op. at 7 (2014). The inquiry here is whether the second prong of the *Lutheran Heritage* test, if the rule was promulgated in response to protected concerted activity, is met. Although there are no Board cases directly on point with the facts of this case, the Board has found in many cases that implementation of a facially valid rule in response to the exercise of Section 7 rights violates the Act. See *Hyatt Regency Memphis*, 296 NLRB 259, 260 (1989); *Nashville Plastic Products*, 313 NLRB 462 (1993); *Jordan Marsh Stores*, 317 NLRB 460, 462 (1995); *Lincoln Center*, 340 NLRB 1100, 1110 (2003);

[10] See GC Br. 15–18 (arguing that the union cannot waive employees' Sec. 7 right to file class actions); and R. Br. 42–48 (arguing that the union can waive employees' Sec. 7 right to file class actions).

[11] At the hearing, over the Charging Party's objection, I permitted Tarlton to testify regarding his conversation with Canale. However, Tarlton's testimony was hearsay, and I give it only little weight since it was not supported by corroborating evidence.

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Jensen Enterprises, 339 NLRB 877 (2003); *N. Hills Office Services*, 346 NLRB 1099, 1113 (2006).[12]

Respondent argues that Munoz and the other employees involved in the class action complaint were not employed by the Company at the time the MAP was implemented, and thus those employees Section 7 rights were not affected. First, Respondent did not present any evidence of the employment status of the plaintiffs or the Charging Party at the trial. Secondly, it is irrelevant whether the plaintiffs were actually employed by the Company at the time the MAP was implemented. An "employee" includes "former employees of a particular employer." *Briggs Mfg. Co.*, 75 NLRB 569, 571 (1947); see also Sec. 2(3) of the Act; *Waco, Inc.*, 273 NLRB 746, 747 fn. 8 (1984); *Redwood Empire, Inc.*, 296 NLRB 369, 391 (1989). The Act does not place limitations on who may file a charge. See Sec. 10 of the Act; *NLRB v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 17 (1943).

Even if they were not employed by the Company in December 2013, when they are re-hired by Respondent, which is likely in the construction industry, as a condition of employment, they must agree to the MAP. All employees since December 2013 must agree to and sign the MAP which violates Section 8(a)(1) of the Act as set forth above.

Respondent implemented the MAP after the employees' worked in concert to file a class action lawsuit in State court. Although Tarlton testified that Respondent implemented the MAP not because of the class action and the topic of implementing a mandatory arbitration had been discussed by the Company's management for several years, the timing of the implementation is suspicious and points to an improper motive.[13] Although Tarlton provided generally sincere, specific and detailed testimony, I do not find him credible regarding the impetus and timing for the implementation of the MAP. A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589–590 (1996)), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all—or nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, supra at 622.

Tarlton's own testimony essentially confirms that he made the decision to implement the MAP because of the class action complaint. Tarlton testified:

> Q. And to the best of your recollection, what was said by you and Mr. Canale during that conversation?
>
> A. I explained to him what it was that I was wanting to send him and why I wanted to send it to him, and I explained to him that typically I was always able to go through the grievance procedure and arbitration procedure set out in their agreement and it's worked great.
>
> And I realize now that I need to have that same ability for things that aren't in their ability to help me get quickly resolved. And so I said it's a mutual arbitration agreement that's going to allow us to deal with matters as they come up from time to time and not have it -- and be able to get resolution for my employees quickly no matter what it be so there's not a long, drawn-out process in solving problems in the future that typically went through the carpenters union, and they would have helped us get it resolved because they get stuff done quick. Like sometimes the same day that a problem arises, we get it resolved.
>
> If for some reason, there's a disagreement, it's within three, four weeks, you get a resolution of what to do and what's going to happen.

[Tr. 145–146.]

Tarlton testified that he realized he needed the MAP so he could "get resolution for my employees quickly no matter what it be so there's not a long, drawn-out process in solving problems in the future that typically went through the carpenters union [. . .]". Tarlton seems to suggest that after the class action complaint was filed he decided to implement the MAP. His denial that the implementation of the new rule was not due to the class action complaint is not believable. He must have been referring to the class action complaint as the "long, drawn-out process" he sought to avoid which is why he implemented the MAP. The Company clearly promulgated the MAP because it sought to chill employees from working together to file class action complaints in State court.

Moreover, Respondent drafted the MAP to include the class action complaint filed by the plaintiffs. The MAP states, "The MAP applies to all Company employees, regardless of length of service or status, and covers all disputes relating to or arising out of or in connection with employment at the Company or the termination of that employment, *whether those disputes already exist today or arise in the future*." When reviewing the entire chain of events, it seems clear from the record that Respondent implemented the MAP, or promulgated the new rule, in response to the employees' protected concerted activity. Respondent sought to squelch the employees' pursuit of class action lawsuits in forums other than individual arbitration or the negotiated grievance process. Hence, Respondent promulgated the new rule in response to the employees' Section 7 activity, which violates Section 8(a)(1) of the Act.

[12] Respondent argues that the second prong of *Lutheran Heritage* only applies to "union activity" not protected concerted activity. However, Respondent narrowly reads *Lutheran Heritage*. Protected concerted activity is a necessary precursor to union activity which are employees Sec. 7 rights. Contrary to Respondent's argument, the Board has applied the second prong of *Lutheran Heritage* to protected concerted activity, not only union activity. See e.g., *Triple Play Sports Bar & Grille*, 361 NLRB No. 31 (2014).

[13] Respondent argues that timing of the MAP's implementation alone would be insufficient to conclude that the mandatory arbitration agreement was promulgated in reaction to protected concerted activity (R. Br. at 53). As set forth above, my decision is not based simply on the timing of events but as a credibility analysis of the entire set of circumstances.

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Furthermore, Respondent's counsel during the investigatory stage of charge 32–CA–119054, states in its position statement to the General Counsel, "The MAP and Employee Agreement to Arbitrate were prepared by our office shortly after the lawsuit filed against Tarlton on November 7, 2013 by Robert Munoz [. . .]" (GC Exh. 4). Charge 32–CA–119054 concerned an allegation that Respondent promulgated the MAP in response to union activity.[14] Respondent's counsel further explains in the position statement that it recommends mandatory arbitration agreements for many of its clients, and that the Company was unaware of "any union activity regarding the lawsuit." It may be that Respondent was unaware of any involvement in the class action complaint but Respondent was clearly on notice of the class action complaint which was filed by its employees. As stated above, the class action complaint falls within the ambit of protected concerted activity. This position statement is an admission against interest, albeit by Respondent's counsel, and thus persuasive evidence that Respondent implemented the MAP due to the filing of the class action complaint. The Board has held that "[a]n admission against interest may be used as evidence as well as to impeach and thus includes assertions made in position statements of counsel." *United Technologies Corp.*, 310 NLRB 1126, 1127 fn. 1 (1993), enfd. mem. sub nom. *NLRB v. Pratt & Whitney*, 29 F.3d 621 (2d Cir. 1994); see also *United Scrap Metal Inc.*, 344 NLRB 467, 468 fn. 5 (2005) (submission statements submitted by counsel are admissions against interest by a party). Although Respondent prepared this response to the General Counsel in another charge which was later dismissed, this statement serves to corroborate the allegation that Respondent implemented the MAP in response to protected concerted activity by the employees.

Based on the foregoing, I find that Respondent promulgated and implemented the MAP after employees engaged in protected concerted activity by filing a state court class complaint which violates Section 8(a)(1) of the Act as alleged in the Complaint.

Conclusions of Law

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

2. By soliciting employees to sign and maintaining, since December 2013, a mandatory arbitration policy under which employees are compelled, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act, and has violated Section 8(a)(1) of the Act.

3. By promulgating the mandatory arbitration policy in December 2013 at the Company in response to employees' protected concerted activity when they filed a state class action complaint, Respondent violated Section 8(a)(1) of the Act.

[14] The General Counsel dismissed this charge, and thus, the issue of whether the Respondent promulgated the MAP in response to union activity is not before me.

Remedy

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

As I have concluded that the MAP is unlawful, the recommended Order requires that Respondent revise or rescind it, and advise its employees in writing that the MAP has been revised or rescinded. Because Respondent utilized the MAP on a company-wide basis, Respondent shall post a notice in all locations where the MAP, or any portion of it requiring all and/or enumerated employment-related disputes to be submitted to individual arbitration, was in effect. See, e.g., *U-Haul of California*, supra, fn. 2; *D.R. Horton*, supra, slip op. at 17; *Murphy Oil*, supra, slip op. at 22. Respondent is also ordered to distribute appropriate remedial notices to its employees electronically, such as by email, posting on an intranet or internet site, and/or other appropriate electronic means, if it customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB 11 (2010).

If applicable, I recommend Respondent be required to reimburse the Charging Party and any other plaintiffs for all reasonable expenses and legal fees, with interest, incurred in opposing any litigation and related expenses, with interest, to date and in the future, directly related to any motion to dismiss filed by Respondent related to the plaintiff's class action complaint. See *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731, 747 (1981) ("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."). Interest shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). See *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 fn. 10 (1991) ("[I]n make whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses."), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993).

The Charging Party requests the following additional remedies: (1) rescission of the waivers signed by the employees in December 2013; (2) reporting to the Department of Labor the conduct of both Respondent and its counsel to ensure the filing of specific reports "as the persuader who was paid money 'to persuade employees to exercise or not to exercise…their right to organize'"; (3) reading of the notice to the employees by a Board agent who can explain the scope and effect of the remedy; and (4) mailing the Board decision to all employees. I shall not recommend any of these remedies. As stated previously, the issue of the waivers allegedly signed by the employees is not within the scope of the complaint, and thus, I will not recommend the requested remedy. Requiring an owner or high official of a company or a Board agent, to read aloud the notice to its assembled employees has not been typically required except in unusual circumstances. The reading aloud of a notice is an "extraordinary" remedy, and has been ordered in egregious circumstances. *Federated Logistics & Operations*, 340 NLRB 255, 256–257 (2003); see also *McAllister Towing &*

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Transportation Co., 341 NLRB 394, 400 (2004) (ordered remedy included Board agent to read aloud notice to the employees to "ensure a free and fair rerun election"). In my opinion, the conduct of Respondent in this case does not warrant the recommendation of an "extraordinary" remedy. This rationale also supports my recommendation not to order either of the other remedies the Charging Party requests. Although Respondent maintains and promulgated an illegal workplace rule, it has not in any other manner, engaged in conduct designed to threaten, restrain or coerce its employees. Nor has it been shown that Respondent has violated the Act previously or that it will likely violate the Act in the future.

On these findings of fact and conclusions of law and the entire record, I issue the following recommended[15]

ORDER

The Respondent, Tarlton and Son, Inc., Fresno, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting employees to sign and maintaining a mandatory arbitration policy that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) Promulgating, in response to employees engaged in class or collective legal action, a mandatory arbitration policy, as a condition of employment, that prohibits class or collective actions in all forums, whether arbitral or judicial.

(c) Enforcing (or attempting to enforce) the mandatory arbitration policy to prohibit class or collective actions.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

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

(a) Rescind the mutual arbitration policy and the employee agreement to arbitrate (collectively, "MAP") in all of its forms, or revise it in all of its forms to make clear to employees that the does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

(b) Notify all current and former employees who were required to sign the MAP in any form that the MAP has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Reimburse Munoz and all plaintiffs for all reasonable expenses and legal fees, with interest, if any, incurred in opposing any litigation and related expenses, with interest, to date and in the future, directly related to any motion to dismiss filed by Respondent related to the plaintiff's class action complaint.

(d) Within 14 days after service by the Region, post at its facility in Fresno, California, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since December 1, 2013.

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

Dated, Washington, D.C. January 27, 2015

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT solicit employees to sign and maintaining a mandatory arbitration policy that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT promulgate, in response to employees engaged in class or collective legal action, a mandatory arbitration policy, as a condition of employment, that prohibits class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT enforce the mandatory arbitration policy to prohibit class or collective actions by asserting it in the class action complaint filed by Charging Party Munoz and other plaintiffs against us.

WE WILL NOT in any like or related manner interfere with, re-

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

EXHIBIT A

strain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the mutual arbitration policy and the employee agreement to arbitrate (collectively, "MAP") in all its forms, or revise it in all its forms to make clear that the MAP does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all current and former employees who were required to sign the MAP in any of its forms that the MAP has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

WE WILL reimburse Charging Party Munoz and all plaintiffs for all reasonable expenses and legal fees, with interest, if any, incurred in opposing any litigation and related expenses, with interest, to date and in the future, directly related to any motion to dismiss filed by the Company related to the plaintiff's class action complaint.

TARLTON AND SON, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/32-CA-119054 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

EXHIBIT A

CERTIFICATE OF SERVICE
(F.R.A.P. Rule 15)

I am a resident of the state of California and over the age of eighteen years, and not a party to the within action; my business address is Hill, Farrer & Burrill LLP, One California Plaza, 300 S. Grand Avenue, 37th Floor, Los Angeles, California 90071-3147.

I hereby certify that pursuant to Rule 15, Federal Rules of Appellate Procedure, on May 4, 2016, I served the foregoing document described as PETITION FOR REVIEW; CORPORATE DISCLOSURE STATEMENT; NOTICE OF RELATED CASES on the interested parties in this action by placing true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as follows:

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Regional Director
National Labor Relations Board,
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Oakland, CA 94612-5211
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Linda.Dreeben@nlrb.gov

I declare under penalty of perjury under the laws of the United States that the above is true and correct.

Executed this 4th day of May 2016 at Los Angeles, California.

Josefina Perez

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