

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

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

**and**

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

**DAVID L. TOTTEN, an Individual.**

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**RESPONDENTS' REPLY BRIEF IN SUPPORT OF THEIR EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER**

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## I. INTRODUCTION

Respondents, Kellogg, Brown & Root, LLC (“KBR”), and Molycorp, Inc. (“MCI”) (collectively, “Respondents”) submit this Reply Brief in further support of their exceptions to the decision and recommended Order of Administrative Law Judge Jeffrey Wedekind (the “ALJ”) issued on April 4, 2016, in which he found that Respondent KBR’s Dispute Resolution Program Plan & Rules (the “DRP”), even though it contains a carve-out for the filing of Board charges, violates the Act, based in large part on the Board’s overruled decisions in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) and *Murphy Oil USA, Inc.* 361 NLRB No. 72 (2014).

The gist of the General Counsel’s Answering Brief is that *D.R. Horton* and *Murphy Oil* remain valid Board law until such time as the U.S. Supreme Court, or the Board itself, expressly overrules them. (Answering Brief, pp. 2-6.) However, as discussed in Respondents’ Supporting Brief, the Board’s decisions in *D.R. Horton* and *Murphy Oil* are substantively incorrect, as found by the Fifth Circuit, which denied enforcement of the decisions in pertinent part. The Board’s *D.R. Horton* and *Murphy Oil* decisions have also been rejected by the majority of federal courts to consider them. The Board’s continued pursuit of its nonacquiescence policy in the face of near universal rejection of the rationale behind those decisions is misguided, undermines the very goal the Board is purportedly trying to serve, and is not in the best interest of employees or employers.

In a single sentence without substantive explanation, the General Counsel discounts Respondents’ arguments that (1) any finding that Respondents violated Section 8(a)(1) by attempting to enforce the arbitration agreement in a California federal district court violates Respondents’ First Amendment rights, (2) Charging Party was not an “employee” within the meaning of Section 2(3) the Act, (3) MCI was not an “employer” subject to the Act, and (4) the

KBR DRP falls within the “voluntariness” carve out in *D.R. Horton*. The General Counsel completely ignores Respondents’ arguments that (1) the charge was filed outside the Section 10(b) limitations period under the Act and (2) that Charging Party did not engage in “concerted activity.” Each of these arguments, whether given short shrift by the General Counsel or completely ignored, demonstrates that Respondents did not violate the Act.

Under the circumstances at hand, consideration of all of the relevant facts and law compels dismissal of the Complaint and reversal of the ALJ’s decision.

## II. ARGUMENT

### A. *D.R. Horton and Murphy Oil Were Wrongly Decided.*

Respondents’ Supporting Brief sets forth in detail why *D.R. Horton* and *Murphy Oil* progeny were wrongly decided. The Board’s continued pursuit of its nonacquiescence policy is untenable in light of the near universal rejection of *D.R. Horton*, *Murphy Oil* and their progeny,<sup>1</sup> undermines the Board’s stated goal of defining a national labor policy, and serves no one but itself. Continued pursuit of the Board’s nonacquiescence policy is particularly troublesome given that the ability to pursue the issue to the U.S. Supreme Court lies in the Board’s hands. Yet, to date, it has deliberately chosen not to pursue the issue even though it has had, and remains to have, opportunities to do so.

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<sup>1</sup> In addition to the Fifth Circuit’s decisions in *D.R. Horton* and *Murphy Oil*, Respondents cited at p. 14 of their Supporting Brief numerous decisions of other circuit courts of appeals that have distanced themselves from the Board’s rationale in those two overruled decisions. Now, the Eighth Circuit can be added as a firm “no vote” to the Board’s decisions in *D.R. Horton* and *Murphy Oil*. See *Cellular Sales of Missouri, LLC*, \_\_ F.3d \_\_, 2016 Westlaw 3093363 (8th Cir. June 2, 2016) (ascribing to its earlier decision in *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1054 (8th Cir. 2013) and declining to follow the Board’s decisions in *D.R. Horton* and *Murphy Oil*). Only the Seventh Circuit in *Lewis v. Epic Systems Corp.*, \_\_ F.3d \_\_, 2016 Westlaw 3029464 (6th Cir. May 26, 2016) has reached a contrary result.

Simply put, arbitration agreements that include class action waivers, whether mandatory or optional, do not violate the Act when the waiver preserves employees' ability to file a Board charge. As such, *D.R. Horton, Murphy Oil* and their progeny should be overruled.

**B. The Use Of Class Action Procedures Is Not A Substantive Right.**

Rather than address the U.S. Supreme Court authority Respondents cited for the proposition that the use of class action procedures is not a substantive right but a procedural device, the General Counsel resorts to the default argument that the Board found otherwise in *D.R. Horton, Murphy Oil* and their progeny. (GC's Answering Brief at 3-4.)

This argument is contrary to binding precedent. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997); *Deposit Guar Nat'l 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."). See also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32-33 (1991); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 357 (5th Cir. 2013). The General Counsel has offered no valid reason why the Board should ignore this precedent.

**C. The Board's Interpretation of the NLRA, As Expressed in *D.R. Horton* and *Murphy Oil*, Conflicts With the Federal Arbitration Act.**

Again, the General Counsel does little more than argue, because the Board in *Murphy Oil* held that its finding that mandatory arbitration agreements with class action waivers (like the KBR DRP) violate Section 8(a)(1) of the Act does not conflict with the Federal Arbitration Act ("FAA"), that Respondents' arguments regarding the interplay between the FAA and the Act must be rejected. (GC's Answering Brief, pp. 4-6.) However, as the Fifth Circuit made clear in *D.R. Horton Inc.*, neither the Act nor its legislative history contains a congressional command to override the FAA. *D.R. Horton, Inc.*, 737 F.3d at 360-61. In addition, the Board's interpretation

of the FAA's savings clause and its interpretation of the Norris-LaGuardia Act as prohibiting class action waivers are without precedent or foundation and have been roundly rejected by the Fifth Circuit. *D.R. Horton, Inc.*, 737 F.3d at 360, 362. As such, KBR's DRP does not violate the Act and should be properly enforced according to its terms.

**D. Respondents' Motion to Compel Arbitration Is Protected By The First Amendment And Did Not Have An Unlawful Objective.**

Respondents' filing of a motion to compel arbitration cannot form the basis for finding that an unfair labor practice has been committed. As set forth in its Supporting Brief at pp. 30-32, Respondents' motion cannot be found to have an unlawful objective within the meaning of *Bill Johnson's Restaurant, Inc. v. NLRB*, 461 U.S. 731, 747 n. 5 (1983). Thus, Respondents' motion to compel arbitration is protected activity under the First Amendment.

This case does not involve a situation in which Respondents filed a state court lawsuit asserting claims that were preempted by federal law. Rather, in a case initiated by Charging Party in California state court, Respondents, after removing the case to federal court, filed a motion in the district court, relying upon controlling federal law in the FAA and binding U.S. Supreme Court precedent, in which it properly requested that the federal district court enforce the DRP as written and require Charging Party to arbitrate his California wage and hour claims. Since the Act does not preempt the FAA, the Supreme Court's pronouncements in *Bill Johnson's* apply here and provide a constitutional protection for Respondents' filing of their motion to compel arbitration in federal district court. The Board cannot find a violation of the Act based on the motion to compel or award any remedy based thereon, including requiring Respondents to withdraw its motion and pay Charging Party's legal fees incurred as a result of such motion in federal district court.

**E. MCI Is Not an “Employer” Subject to the Act.**

As stated in Respondents’ Supporting Brief, there is no allegation or stipulation of fact in this proceeding that Charging Party was ever an employee of MCI or that MCI was a joint-employer with KBR. Even if Charging Party was an “employee” of MCI under Section 2(3) of the Act, KBR’s maintenance of the DRP and the Respondents’ enforcement of the mandatory arbitration provision does not violate Section 8(a)(1) of the Act, and the charge against MCI should be dismissed, and the ALJ’s recommended order and remedies should not be adopted by the Board.

**F. Charging Party Was Not an “Employee” Within the Meaning of Section 2(3) of the Act When the Charge Was Filed.**

As argued extensively in Respondents’ Supporting Brief at pp. 34-42, Charging Party undoubtedly was an employee of KBR until the time his employment was terminated on June 17, 2013, but he most assuredly was not an “employee” for purposes of Section 2(3) when the underlying unfair labor practice charge was filed.

The Board’s decisions in *Briggs Manufacturing Co.*, 75 NLRB 569 (1947) and *Cowabunga, Inc.*, 363 NLRB No. 133, do not compel a different result. The Supreme Court’s decision in *Phelps Dodge Corporation v. NLRB*, 313 U.S. 177 (1941), which formed the basis of the Board’s decisions in *Briggs* and *Cowabunga*, concerned applicants for employment who were discriminated against on the basis of union affiliation, and that decision is inapposite here.

The Supreme Court’s decisions in *Chemical Workers v. Pittsburgh Glass (NLRB v. Pittsburgh Plate Glass Co., Chemical Division, et al.)*, 404 U.S. 157 (1971), and *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995), are relevant here. Those decisions set the stage for the Board’s decision in *WBAI Pacifica Foundation and United Electrical, Radio & Machine Workers of America (UE) and its Local 404*, 328 NLRB 1273 (1999), in which the Board held

that a Section 2(3) “employee” must be alleged and shown to be a person who is currently a member of the working class generally and whose relationship with the employer is filled with, at least, a thought of current or contemplated compensation. No allegation has been made in this case that Charging Party was a member of the working class generally or had a thought of current or contemplated compensation for work to be performed when the charge was filed. Thus, the “Act’s concern with balancing the bargaining power between employer and employees does not extend to” Charging Party. *WBAI Pacifica Foundation*, 328 NLRB at 1276.

**G. The Limitations Period Set Forth in Section 10(b) Precludes Charging Party’s Claims.**

As argued in Respondents’ Supporting Brief at pp. 43-45, Charging Party signed the DRP on January 16, 2012, at the inception of his employment. As the DRP is a contract rather than a workplace rule, the statute of limitations for violations of the Act regarding that contract expired six months after its execution. *See Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 415-16, 426, 80 S. Ct. 822 (1960).

Moreover, Charging Party’s employment with KBR was terminated on June 17, 2013, as the result of a reduction-in-force and not as a result of an unresolved labor dispute or unfair labor practice which might have extended the 10(b) limitations period. Thus, his status as an “employee” under the Act for purposes of Section 10(b) would have ended at the very least on December 17, 2013, and any charge filed after that date was and remains untimely.

Viewed another way, any wage claim that Charging Party had against either KBR or MCI became ripe no later than June 17, 2013, and the statute of limitations on any wage-related claim began to run on that date. Similarly, Charging Party could have filed, but did not file, a charge with the Board within the Section 10(b) limitations period, which likewise began on June 17, 2013 and ended on December 17, 2013. However, Charging Party waited until nearly eleven

months after the Section 10(b) limitations period ended to file his charge against KBR and nearly fourteen months after the Section 10(b) limitations period to file a charge against MCI. Whatever repercussions resulted from Charging Party's delay, they were of his own making, not the Respondents, and the Board should find Charging Party committed unreasonable delay akin to the doctrine of laches. Any other finding by the Board in this case would render Section 10(b) meaningless.

#### **H. Charging Party Did Not Engage in “Concerted Activity.”**

Section 7 does not protect individual employee activity. To fall within Section 7's “concerted activity,” an employee must act “with or on the authority of other employees, and not solely by and on behalf of the employee himself.” *Rockwell Intern. Corp. v. NLRB*, 814 F.2d 1530, 1534 (11th Cir. 1987); *Super Market Serv. Corp. and Stephen L. Heller*, 227 NLRB 1919, 1927 (1977) (finding no concerted activity based in part on fact that co-employees mentioned in the letter had “no part in writing the letter, no notice when it was to be written [and] no opportunity to make suggestions as to its contents ...”); *See also E.I. Du Pont De Nemours & Co. v. NLRB*, 707 F.2d 1076, 1078 (9th Cir. 1983) (“The requirement of ‘concert’ denies protection to activity that, even if taken in pursuit of goals that would meet the test of ‘mutual aid or protection,’ is only the isolated conduct of a single employee.”)

The mere filing of a “class” action complaint by a single employee “does not inherently involve protected concerted activity.” *Meyers Indus.*, 281 NLRB 882, 885, 1986 WL 54414, at \*5 (NLRB 1986) (to constitute “concerted activity,” the employee must have engaged in the activity “with or on the authority of other employees, and not solely by and on behalf of the employee himself.”). *See also Murphy Oil USA, Inc.*, 361 NLRB No. 72 (NLRB Oct. 28, 2014) (Member Miscimarra, dissenting).

Because there is no evidence Charging Party engaged in concerted activity within the meaning of Section 7, the Board should be reverse the ALJ's finding in that regard and dismiss the Charge.

**I. The DRP Is Not a Mandatory Term and Condition of Employment.**

Respondents explained in detail in their Supporting Brief why KBR's DRP is not a mandatory arbitration agreement like those at issue in *D.R. Horton* and *Murphy Oil*. Charging Party was presented the option of signing the DRP at the beginning of his employment, not during it. Charging Party could have opted to, but did not, seek other employment if he chose not to sign the DRP.

The General Counsel has failed to satisfy his burden of establishing that that Charging Party or any other Respondents employee was required to sign the DRP as a mandatory condition of employment. The KBR DRP thus does not violate Section 8(a)(1) of the Act under the "voluntariness" carve-out in *D.R. Horton*. The fact that the Board in *On Assignment Staffing Services*, 362 NLRB No. 189 (2015), noted by the General Counsel at p. 6 of her Answering Brief, may have ostensibly eliminated the carve-out does not save what are otherwise unsupportable Board decisions in *D.R Horton* and *Murphy Oil*.

**J. The ALJ's Recommended Remedy and Order Are Overbroad and/or Beyond the Board's Authority to Order.**

Respondents took exception to the entirety of the ALJ's recommended Remedy and Order. Between its Exceptions and Brief in Support of Exceptions, Respondents have made numerous valid arguments regarding the inappropriate provisions included in the ALJ's recommended Remedy, Order, and Appendices. (Respondents' Supporting Brief, pp. 47-49.)

### III. CONCLUSION

For the foregoing reasons, as well as those expressed in its Supporting Brief, the ALJ incorrectly found that Respondents violated Section 8(a)(1) of the Act. Accordingly, Respondents respectfully request that the Board refuse to adopt the ALJ's decision and recommended order and remedies and dismiss the Complaint in its entirety.

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Respectfully submitted,

/s/Howard S. Linzy

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### CERTIFICATE OF SERVICE

The above and foregoing Respondents' Reply Brief In Support of Their Exceptions to the Administrative Law Judge's Decision and Order has been e-filed on June 16, 2016, on the NLRB's website at [www.nlr.gov](http://www.nlr.gov), and has been served on Nikki N. Cheaney, Esquire, Counsel for the General Counsel, National Labor Relations Board, Region 31, 11500 W. Olympic Blvd., Suite 600, Los Angeles, CA 90064 via email ([nikki.cheaney@nlrb.gov](mailto:nikki.cheaney@nlrb.gov)) and U.S. Mail, postage prepaid, and Leonard Sansanowicz, Esquire, Counsel for the Charging Party, Feldman Browne Olivares, APC, 10100 Santa Monica Blvd., Suite 2490, Los Angeles, CA 90067-4144 via email ([leonard@leefeldmanlaw.com](mailto:leonard@leefeldmanlaw.com)) and U.S. Mail, postage prepaid.

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