

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

CELLULAR SALES OF MISSOURI, LLC)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	Nos. 15-1620, 15-1860
)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	

**NATIONAL LABOR RELATIONS BOARD’S
OPPOSITION TO CELLULAR SALES’S PROPOSED JUDGMENT**

To the Honorable, the Judges of the United States
Court of Appeals for the Eighth Circuit:

The National Labor Relations Board, by its Deputy Associate General Counsel, opposes the proposed judgment that Cellular Sales of Missouri, LLC (“the Company”) filed pursuant to Federal Rule of Appellate Procedure 19, and the arguments set forth in an accompanying letter dated June 27 (“Co. letter”), and maintains that the Board’s proposed judgment effectuates the portion of the Board’s Order enforced by this Court.

On June 2, 2016, the Court enforced the portion of the Board’s Order finding that the Company violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §§ 151, 158(a)(1), by maintaining an arbitration agreement that employees would reasonably construe as prohibiting them from filing unfair-labor-

practice charges with the Board and accessing the Board's processes, and remedying that violation. The Court denied enforcement of the Board's findings that the Company's maintenance and enforcement of mandatory arbitration agreements waiving all class or collective actions in all forums interferes with employees' Section 7 right to engage in concerted legal activity, in violation of Section 8(a)(1).

The Board's proposed judgment faithfully implements the enforced portion of the Board's Order while removing those portions applicable only to the violations as to which the Court denied enforcement.¹ By contrast, the Company's proposed judgment seeks to rewrite, or altogether eliminate, several key provisions of the Board's Order. In effect, it seeks to modify the Board's selection of remedies for the enforced violation, which the Company did not challenge before the Board or the Court, and which the Court did not purport to modify in any respect.² In particular, the Company seeks to evade the requirement that it rescind

¹ The Company maintains that the judgment should reflect, in its opening recital, that the Court granted its petition in part. The Board does not object to the inclusion of the Company's proposed language.

² If the Company had challenged the specific remedies in the enforcement proceeding, the Court would have been jurisdictionally barred from considering that challenge because the Company did not object to the specific remedies in the Order before the Board. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (Section 10(e) bar on judicial consideration of issues not raised before Board is jurisdictional); *accord NLRB v. Cornerstone Builders, Inc.*, 963 F.2d 1075, 1077 (8th Cir. 1992).

or revise its agreement so that employees would not reasonably construe the agreement as prohibiting them from filing Board charges or accessing the Board's processes. The Company also seeks to eliminate the affirmative requirements that it "[c]ease and desist from" interfering with employees' rights "[i]n any like or related manner," and that it post a notice. Those proposed changes find no support in the Court's decision which enforces without modification the Board's remedial order with respect to the violation found.

In any event, the Company's attempt to perform an end-run around the Board's court-enforced Order by removing certain aspects of the Board's remedy from this Court's judgment must fail, for the provisions the Company challenges are not only in accord with this Court's opinion but also well within the Board's discretion. Section 10(c) of the NLRA, 29 U.S.C. § 160(c), provides that, upon finding that a person has engaged in an unfair labor practice, the Board "shall issue ... an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action ... as will effectuate the policies" of the NLRA. The Supreme Court has explained that the Board's power to fashion remedies is "a broad discretionary one, subject to limited judicial review."

Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 216 (1964); accord *Pace Indus., Inc. v. NLRB*, 118 F.3d 585, 593 (8th Cir. 1997) (The "Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must

therefore be given special respect by reviewing courts.”) (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n.32 (1969)). The Board’s choice of remedy must be enforced unless a respondent shows that “the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the [NLRA].” *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943); accord *Pace Indus.*, 118 F.3d at 593.

The Company (Co. Letter, p. 2) first challenges the Board’s injunctive requirement ordering the Company to cease and desist not only from maintaining an arbitration agreement that employees would reasonably construe as prohibiting them from accessing the Board’s processes (Paragraph 1(a)), which it does not challenge, but also from “[i]n any like or related manner” interfering with employees’ Section 7 rights (Paragraph 1(b)). That “like or related manner” language does not, as the Company suggests “extend[] far beyond the Court’s limited grant of the Board’s cross-application,” but rather is in keeping with the Board’s long-established, Court-approved authority. See *NLRB v. Express Pub. Co.*, 312 U.S. 426, 436 (1941) (explaining that once the Board determines that a party has violated the NLRA, it “is free to restrain the practice and other like or related unlawful acts”) (emphasis added); accord *Fremont Newspapers, Inc. v. NLRB*, 436 F.2d 665, 675 (8th Cir. 1970).

The Board's authority to proscribe "like or related manner" conduct also supports the Board's language, in paragraph 2(a), ordering the Company to rescind or revise its arbitration agreements "in all of its forms." While the Company argues that the Court's judgment should only impact the "2012 Compensation Schedule," the Board is empowered to ensure that its chosen remedy cannot be circumvented through an overly restrictive description.

The Company (Co. letter p. 3) also seeks to restrict the reach of the enforced Order by arguing, based on a mischaracterization of the Court's opinion, that the Court "only" grants relief for employees who "remain subject" to the agreement. The opinion does not provide any such restriction, but rather states that the Court "enforce[d] the Board's order with respect to this issue, including corrective action with respect to any employees who remain subject to the arbitration agreement." 2016 WL 3093363, at *4 (emphasis added). That specific reference to one aspect of the Board's remedial order does not excise other aspects of the Board's chosen remedy, such as the requirements that the Company notify current and former employees that the agreement was unlawful and has been rescinded or revised and, if revised, provide them with a copy.

The Company's attempt (Co. letter p. 3) to eliminate the Board's traditional notice-posting requirement is also unwarranted because it is based on a

misconception of the notice’s purpose.³ The Supreme Court has characterized the Board’s remedial notice as a “significant” part of the Board’s remedial scheme. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 152 (2002); *see also J & R Flooring, Inc.*, 356 NLRB No. 9, 2010 WL 4318372 at *2 (Oct. 22, 2010) (explaining notice posting has been “an essential element of the Board’s remedies for unfair labor practices since the earliest cases under the [NLRA]”). Remedial notices are not designed to merely notify victims of unfair labor practices that an ongoing violation is being committed, but also “serve a number of important functions in advancing the Board’s mission of enforcing employee rights and preventing unfair labor practices.” *J & R Flooring, Inc.*, 2010 WL 4318372, at *2. Notices help to counteract the effect of unfair labor practices on employees by informing them of their rights under the NLRA and of the Board’s role in protecting the free exercise of those rights; inform employees of steps to be taken by the respondent to remedy its violations of the NLRA; provide assurances that future violations will not occur; and deter future violations. *Id.* (citing *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 399-401 (D.C. Cir. 1981); *NLRB v. Falk Corp.*,

³ Alternatively, the Company suggests (Co. letter p. 3-4) the notice should only be posted at facilities where there are employees who remain subject to the agreement. But based on the Company’s earlier assertion that no current employees remain subject to that agreement – though they may have been subjected to it in the past – it is evident that this supposed concession would also result in the Company evading the notice posting entirely.

308 U.S. 453, 462 (1940); *Chet Monez Ford*, 241 NLRB 349, 351 (1979), *enforced mem.*, 624 F.2d 193 (9th Cir. 1980)). The Company has failed to establish any grounds to eliminate that well-founded and important part of the Board’s remedy, much less to show that it is an unenforceable “patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the [NLRA].” *Virginia Elec. & Power Co.*, 319 U.S. at 540.

Finally, the Company seeks (Co. letter p. 2-3) to limit the scope of the judgment by asserting that it has already revised its arbitration agreement. But the Board has not reviewed, much less endorsed, any such revision. Nor is it part of the record in this case.⁴ The Board determined that the Company’s agreement violates the NLRA, and it set forth certain steps that the Company must take to remedy that violation in an Order that this Court enforced.⁵ Even if the Company could substantiate its assertions that it has come into full compliance with the Board’s Order, that would not impact this enforcement proceeding. *See NLRB v. Mexia Textile Mills*, 339 U.S. 563, 569 (1950) (compliance “clearly irrelevant” to

⁴ Though the Company suggests (Co. letter, p. 2-3) this case is similar to *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015), the Board and the Fifth Circuit in that case, specifically reviewed the legality of the employer’s revised agreement in the enforcement proceeding, as the Company acknowledges.

⁵ The Company will have the opportunity, in a subsequent compliance proceeding before the appropriate Board regional office, to establish that it has come into compliance with the Board’s order, but this does not impact the Board’s ability to secure a judgment reflecting those aspects of the Board’s Order that this Court has enforced.

enforcement); *accord NLRB v. Decker*, 296 F.2d 338, 342 (8th Cir. 1961)

(“Compliance may not be raised as a bar to the enforcement of a Board order.”).

WHEREFORE, the Board respectfully submits that the Court should reject the Company’s proposed judgment and enter the proposed judgment submitted by the Board.

Respectfully submitted,

s/ Linda Dreeben

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Dated at Washington, DC
this 1st day of July 2016

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CERTIFICATE OF SERVICE

I certify that on July 1, 2016, the foregoing opposition to Cellular Sale’s proposed judgment was filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system, and that all counsel are registered CM/ECF users.

s/ Linda Dreeben
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Dated at Washington, DC
this 1st day of July 2016