No. 16-60029

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LOGISTICARE SOLUTIONS, INCORPORATED

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT REGARDING ORAL ARGUMENT

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

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BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

This case is before the Court on the petition for review of LogistiCare Solutions, Inc. ("LogistiCare"), and the cross-application for enforcement of the National Labor Relations Board ("the Board"), of a Board Order issued against LogistiCare and reported at 363 NLRB No. 85 (Dec. 24, 2015). The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the National Labor Relations Act ("NLRA"), as amended, 29 U.S.C. § 151, et seq., 160(a),

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

STATEMENT OF ISSUES

1. Whether the Board reasonably found that LogistiCare violated Section 8(a)(1) of the NLRA by requiring employees, as a condition of their employment, to waive their right to concertedly pursue work-related legal claims.
2. Whether the Board reasonably found that LogistiCare violated Section 8(a)(1) of the NLRA by maintaining a collective-action waiver that employees would reasonably construe as prohibiting unfair-labor-practice charges.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

LogistiCare is a Delaware limited liability company with an office and place of business in Austin, Texas. (ROA.92; ROA.3.)[1] LogistiCare arranges transportation for Medicare patients in Austin and various other locations across the country. (ROA.92-93; ROA.3, 5-6.) Since about March 4, 2014, LogistiCare has required applicants and employees at all of its locations to sign the following waiver, contained in its new-employee packet, as a condition of their employment:

> **Class Action and Collective Action Waiver**:
>
> Class and Collective Action lawsuits have been abused recently by trial lawyers forcing American companies to pay large settlements, not because the cases have merit or because the Company violated any laws, but because the suits are too expensive to litigate and the company is left with no reasonable alternative. Class and collective action suits primarily benefit the trial lawyers and rarely accomplish any other objective. There are more effective ways to protect your individual employment related rights than through a Class and Collective action lawsuit. Your signature on this document indicates that you agree to waive any right you may have to be a member of a Class and Collective action lawsuit against the company. I hereby acknowledge and understand that as a condition of my employment:
>
> . . .
>
> *I am waiving my right to participate as a member of a Class or Collective action lawsuit and/or serve as a class representative of similarly situated employees in any lawsuit against the Company.

[1] "ROA" refers to the administrative record, filed on February 23, 2016. Where applicable, references preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." refers to LogistiCare's opening brief.

(ROA.92-93; ROA.4.) LogistiCare also maintains an abbreviated version of the Class and Collective Action Waiver ("collective-action waiver") in its employee handbook. (ROA.93; ROA.5.)

II. PROCEDURAL HISTORY

Acting on an unfair-labor-practice charge filed by Katherine Lee (ROA.8, 14), the Board's General Counsel issued a complaint alleging that LogistiCare violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by maintaining a rule that: (1) unlawfully prohibits employees from engaging in activity protected by Section 7 of the NLRA, 29 U.S.C. § 157; and (2) employees would reasonably understand as barring or restricting their right to file charges with the Board.[2] (ROA.93; ROA.18-20.) The parties waived a hearing and submitted the case to Administrative Law Judge Joel P. Biblowitz on stipulated facts. (ROA.92; ROA.1-7.) On April 15, 2015, the judge issued a decision (ROA.92-95) finding the violations alleged, based on the Board's decision in *D.R. Horton, Inc.*, 357 NLRB

[2] The complaint also alleged that LogistiCare's jury-waiver clause violated Section 8(a)(1) of the NLRA because employees would reasonably construe that provision to restrict their ability to engage in Section 7-protected activities. (ROA.93; ROA.20.) The administrative law judge recommended dismissing that allegation (ROA.94), and the Board affirmed (ROA.87 n.1).

2277 (2012), *enforcement denied in part*, 737 F.3d 344 (5th Cir. 2013), *reh'g denied*, No. 12-60031 (Apr. 16, 2014) and related cases. (ROA.93-94.)[3]

III. THE BOARD'S DECISION AND ORDER

The Board (Chairman Pearce and Member McFerran; Member Miscimarra, dissenting) issued a Decision and Order adopting as modified the judge's rulings, findings, conclusions, and remedy. (ROA.87-88.) In finding LogistiCare's maintenance of the collective-action waiver unlawful, the Board specifically noted that the waiver was not part of an arbitration agreement and was not, therefore, analogous to cases like *Horton*, which implicate the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq. (ROA.87.) Instead, the Board found the collective-action waiver unlawful for reasons explained in its decision in *Convergys Corp.*, 363 NLRB No. 51, 2015 WL 7750753 (Nov. 30, 2015), *pet. for review filed*, No. 15-60860 (5th Cir. Dec. 9, 2015), which similarly did not involve arbitration. (*Id.*)

The Board's Order requires that LogistiCare cease and desist from the unfair labor practices found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the NLRA, 29 U.S.C. § 157. (ROA.88.) Affirmatively, the Order requires LogistiCare to: rescind the collective-action waiver from its new-

[3] The judge also found that LogistiCare violated Section 8(a)(1) by enforcing the collective-action waiver, but the Board rejected that finding because no such violation had been alleged or proven. (ROA.87 n.2.)

employee packets and employee handbooks nationwide; notify all applicants, and current and former employees, of the change; and post a remedial notice. (ROA.88, 91-92.)

SUMMARY OF ARGUMENT

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

LogistiCare's entire defense relies on claiming that this case is governed by this Court's decision in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013),

even though the collective-action waiver in this case, unlike the one in *Horton*, is not part of an arbitration agreement governed by the FAA. LogistiCare's argument ignores the fundamental point that the only relevant statute here is the NLRA, so cases principally interpreting other statutes do not alter the result. Instead, controlling NLRA caselaw, of which this Court approves, dictates that private contracts requiring employees to relinquish their Section 7 right to engage in concerted legal activity over their terms and conditions of employment are unlawful and unenforceable.

The Board also found, as a distinct unfair labor practice, that LogistiCare's maintenance of the collective-action waiver violates Section 8(a)(1) because employees reasonably would construe the waiver to bar them from exercising their Section 7 right to file charges before the Board. Well-established Board law regarding non-lawyer employees' interpretation of legalese, together with the collective-action waiver's ambiguous language, support the Board's finding.

STANDARD OF REVIEW

When Congress enacted the NLRA, it conferred upon the Board the primary authority to interpret and apply the statute. *See Garner v. Teamsters Chauffeurs & Helpers Local 776*, 346 U.S. 485, 490 (1953); *Horton*, 737 F.3d at 349 (recognizing "Board's expertise in labor law"). The Board's exercise of its primary authority to interpret the NLRA is entitled to affirmance so long as it is

reasonable, even if the Court might decide the issue differently *de novo*. *See City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1868-71 (2013) (to reject agency interpretation of statute within its expertise requires showing that "statutory text forecloses" agency's interpretation (reaffirming *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984))); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996) (courts "must respect" Board's reasonable judgment; "it need not show that its construction is the *best* way to read the statute"); *NLRB v. PDK Invs., LLC*, 433 F. App'x 297, 300 (5th Cir. 2011) ("We review the Board's legal conclusions *de novo*, but we will uphold its construction of a statute if it is reasonably defensible." (internal quotation and citation omitted)). For the same reason, the Court defers to the Board's plausible inferences, findings of fact, and application of the statute. *Horton*, 737 F.3d at 349, 356.

ARGUMENT

I. LOGISTICARE VIOLATED SECTION 8(a)(1) OF THE NLRA BY REQUIRING ITS EMPLOYEES TO WAIVE THEIR SECTION 7 RIGHT TO PURSUE WORK-RELATED LEGAL CLAIMS ON A CLASS OR COLLECTIVE BASIS

A. The Collective-Action Waiver Unlawfully Restricts Individual Employees' NLRA Rights Prospectively

Section 7 of the NLRA guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other concerted activities*

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

As explained below, courts have upheld the Board's construction of Section 7 as protecting concerted pursuit of work-related legal claims, consistent with the language and purposes of the NLRA. That construction falls squarely within the Board's expertise and its responsibility for delineating federal labor law generally, and Section 7 in particular. *See NLRB v. City Disposal Sys. Inc.*, 465

[4] A rule is also unlawful if it was promulgated in response to Section 7 activity, or if it was applied to restrict the exercise of Section 7 rights. *Flex Frac*, 746 F.3d at 209 (citing *Lutheran Heritage*, 343 NLRB at 647). Neither of these legal theories is implicated here.

U.S. 822, 829 (1984) (noting that "the task of defining the scope of [Section] 7 'is for the Board to perform in the first instance as it considers the wide variety of cases that come before it.'" (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 568 (1978))); *accord Horton*, 737 F.3d at 356; *Reef Indus., Inc. v. NLRB*, 952 F.2d 830, 838 (5th Cir. 1991). Because LogistiCare's collective-action waiver plainly and unambiguously restricts employees' Section 7 right to participate in such protected activities, the Board properly found that maintaining the waiver violates Section 8(a)(1). (ROA.87.)

Central to this case is the Board's holding that the right of employees to engage in concerted activity for mutual aid or protection—the "basic premise" upon which our national labor policy has been built—includes concerted *legal* activity. *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454, at *1 (Oct. 28, 2014), *enforcement denied in part*, 808 F.3d 1013 (5th Cir. 2015), *reh'g denied*, No. 14-60800 (May 13, 2016). The reasonableness of the Board's view was confirmed by the Supreme Court in *Eastex*, 437 U.S. at 565-66 & nn.15-16. In that case, the Court recognized that Section 7's broad guarantee reaches beyond immediate workplace disputes to encompass employees' efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employer-employee relationship," including "through resort to administrative and judicial forums." *Id*. at 565-66.

As *Eastex* notes, the Board has protected concerted legal activity for decades. *Id*. at 565-66 & n.15. That line of cases dates back to *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-50 (1942), in which the Board found protected three employees' joint lawsuit filed under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, et seq. It continues, unbroken and with court approval, through modern NLRA jurisprudence. *See, e.g.*, *Lewis v. Epic Sys. Corp.*, ___ F.3d ___, 2016 WL 3029464, at *1 (7th Cir. 2016) ("[F]iling a collective or class action suit constitutes 'concerted activit[y]' under Section 7."); *Brady v. Nat'l Football League*, 644 F.3d 661, 673 (8th Cir. 2011) ("[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment *is* 'concerted activity' under [Section] 7 . . . ."); *Mohave Elec. Coop., Inc. v. NLRB*, 206 F.3d 1183, 1188-89 (D.C. Cir. 2000) (concerted petitions for injunctions against workplace harassment); *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) ("Generally, filing by employees of a labor related civil action is protected activity under Section 7 of the NLRA unless the employees acted in bad faith.").[5] Indeed, this Court recognized in *Horton* that the Board's

[5] *Accord, e.g.*, *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) ("[F]iling of a labor related civil action by a group of employees is ordinarily a concerted activity protected by § 7, unless the employees acted in bad faith." (citation omitted)); *Harco Trucking, LLC*, 344 NLRB 478, 478-79 (2005) (wage-related class action); *127 Rest. Corp.*, 331 NLRB 269, 275 (2000) (concerted lawsuit alleging unlawful pay policies); *United Parcel Serv., Inc.*, 252 NLRB 1015, 1018, 1026 & n.26 (1980) (wage-related class action), *enforced*, 677 F.2d

interpretation of Section 7 is supported by Supreme Court and circuit precedent. 737 F.3d at 356-57 (citing *City Disposal*, 465 U.S. at 831-32, 835-36; *Brady*, 644 F.3d at 673; *127 Rest. Corp.*, 331 NLRB 269, 275-76 (2000)).[6]

The Board's holding that Section 7 protects concerted legal activity furthers the policy objectives that guided Congress in passing the NLRA. The NLRA protects collective rights "not for their own sake but as an instrument of the national labor policy of minimizing industrial strife." *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 62 (1975). Protecting employees' ability to resolve workplace disputes collectively in an adjudicatory forum effectively serves that purpose because collective lawsuits are an alternative to strikes and other disruptive protests. *Horton*, 357 NLRB at 2279-80. Conversely, denying employees access to concerted litigation "would only tend to frustrate the policy of the [NLRA] to protect the right of workers to act together to better their working conditions." *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962).

Salt River Valley Water Users' Association v. NLRB aptly illustrates how concerted legal activity functions as a safety valve when a labor dispute arises.

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421 (6th Cir. 1982); *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975) (concerted lawsuit for contract violation and unpaid wages), *enforced mem.*, 567 F.2d 391 (7th Cir. 1977).

[6] It is worth noting that various types of collective-litigation procedures long predate class actions under Federal Rule of Civil Procedure 23, as do the Board's earliest decisions finding that Section 7 protects the collective legal pursuit of work-related claims.

206 F.2d 325 (9th Cir. 1953). There, unrest over the employer's wage policies prompted an employee to circulate a petition among co-workers designating him as their agent to seek back wages under the FLSA. *Id.* at 328. Recognizing that concerted activity "is often an effective weapon for obtaining [benefits] to which [employees] . . . are already 'legally' entitled," the court upheld the Board's holding that Section 7 protected the employees' effort to exert group pressure on the employer to redress their work-related claims through resort to legal processes. *Id.*

Protecting employees' concerted pursuit of legal claims also advances the congressional objective of "restoring equality of bargaining power between employers and employees." 29 U.S.C. § 151; *Murphy Oil*, 2014 WL 5465454, at *1. Recognizing the strength in numbers, statutory employees have long exercised their Section 7 right to band together to take advantage of the evolving body of laws and procedures that legislatures have provided to redress their grievances. *See, e.g.*, *Eastex*, 437 U.S. at 565-66 & n.15; *Moss Planing Mill Co.*, 103 NLRB 414, 418 (1953) (concerted wage claim before administrative agency), *enforced*, 206 F.2d 557 (4th Cir. 1953). Such collective action seeks to unite employees generally and to lay a foundation for more effective collective bargaining. *Eastex*, 437 U.S. at 569-70. That result, in turn, furthers the NLRA's objective of enabling employees, through collective action, to increase their

economic well-being. *See Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 753-54 (1985) (Congress sought to remedy "the widening gap between wages and profits" by enacting the NLRA (quoting 79 Cong. Rec. 2371 (1935))).

Finally, in order to preserve the full freedom of employees to decide for themselves whether to join, or refrain from participating in, concerted activity when a concrete labor dispute arises, the Board and the courts have long held that Section 7 rights may not be prospectively waived in agreements between employers and individual employees. In *National Licorice Co. v. NLRB*, for example, the Supreme Court held that individual contracts, in which employees relinquish their right to present grievances "in any way except personally," or otherwise "stipulate[] for the renunciation . . . of rights guaranteed by the [NLRA]," are unenforceable and are "a continuing means of thwarting the policy of the [NLRA]." 309 U.S. 350, 360-61 (1940). As the Court further explained, "employers cannot set at naught the [NLRA] by inducing their workmen to agree not to demand performance of the duties which [the statute] imposes." *Id*. at 364. Similarly, in *NLRB v. Stone*, the Seventh Circuit, agreeing with the Board, held that individual contracts requiring employees to adjust their grievances with their employer individually "constitute[] a violation of the [NLRA] per se," even when "entered into without coercion." 125 F.2d 752, 756 (7th Cir. 1942); *see also J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) (individual contracts conflicting with

Board's function of preventing NLRA violations "obviously must yield or the [NLRA] would be reduced to a futility").

Applying that principle, the Board has found unlawful a variety of individual agreements under which employees or job applicants forfeit their Section 7 rights. *See, e.g.*, *First Legal Support Servs., LLC*, 342 NLRB 350, 362-63 (2004) (unlawful to have employees sign contracts stripping them of right to organize); *Eddyleon Chocolate Co.*, 301 NLRB 887, 887 (1991) (unlawful to ask job applicant to agree not to join union). It has also regularly set aside settlement agreements that require such waivers as conditions of reinstatement. *See, e.g.*, *Bon Harbor Nursing & Rehab. Ctr.*, 348 NLRB 1062, 1073, 1078 (2006) (employer unlawfully conditioned employees' reinstatement, after dismissal for non-union concerted protest, on agreement not to engage in further similar protests); *Bethany Med. Ctr.*, 328 NLRB 1094, 1105-06 (1999) (same); *cf. Ishikawa Gasket Am., Inc.*, 337 NLRB 175, 175-76 (2001) (employer unlawfully conditioned employee's severance payments on agreement not to help other employees in workplace disputes or act "contrary to the [employer's] interests in remaining union-free"), *enforced*, 354 F.3d 534 (6th Cir. 2004). And it has found unlawful agreements in which employees have prospectively waived their Section 7 right to access the Board's processes. *See, e.g.*, *McKesson Drug Co.*, 337 NLRB 935, 938 (2002) (finding employer violated Section 8(a)(1) by conditioning return to work from

suspension on broad waiver of rights, both present and future, to invoke Board's processes for alleged unfair labor practices); *Reichhold Chems., Inc.*, 288 NLRB 69, 71 (1988) (explaining that "in futuro waiver" of right to access Board processes is contrary to NLRA).[7] Indeed, all individual contracts that prospectively waive Section 7 rights violate Section 8(a)(1) "no matter what the circumstances that justify their execution or what their terms." *J.I. Case*, 321 U.S. at 337.

In sum, the Board has reasonably construed Section 7 as guaranteeing employees the option of resorting to concerted pursuit of legal claims to advance work-related concerns. That construction is supported by longstanding Board and court precedent. It also reflects the Board's sound judgment that concerted legal activity is a particularly effective means to advance Congress's goal of avoiding labor strife and economic disruptions. That reasonable judgment falls squarely within the Board's area of expertise and responsibility, *see City Disposal*, 465 U.S. at 829, and therefore merits affirmance by this Court, *see City of Arlington*, 133 S.

[7] Because LogistiCare "requires all employees as a condition of employment" to waive their collective-action rights, the waiver is not voluntary. (ROA.93; ROA.5.) Even if it were, such prospective waivers are not permissible, even as exercises of employees' Section 7 right to refrain from concerted activity. Like the right to engage in such activity, the right to refrain belongs to the employee alone, to exercise in the context of a specific workplace dispute. Finding that employers cannot prevent employees from engaging in protected concerted activity—at the time of a particular dispute or by way of a blanket, prospective waiver—in no way restricts employees' ability to refrain from such activity if that is their choice. *Convergys*, 2015 WL 7750753, at *1 n.3 (citing *Bristol Farms*, 363 NLRB No. 45, 2015 WL 7568339, at *2 (Nov. 25, 2015)).

Ct. at 1868-71. LogistiCare's collective-action waiver facially and indisputably infringes upon its employees' Section 7 rights because it prohibits them from pursuing legal claims on a class or collective basis. Therefore, LogistiCare violated Section 8(a)(1) of the NLRA by maintaining that waiver.

B. FAA Jurisprudence Does Not Prevent Application of the NLRA to a Collective-Action Waiver Unrelated to Any Arbitration Agreement

LogistiCare's entire argument is premised on its assumption (Br. 7, 9-13) that this case is governed by the Court's decisions in *Horton*, 737 F.3d at 344, and its sister cases, *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), and *Chesapeake Energy Corp. v. NLRB*, 633 F. App'x 613 (5th Cir. 2016) (per curiam), which upheld certain collective-action waivers. LogistiCare's analysis betrays a deep misunderstanding of *Horton* and its kin. Those cases apply the FAA as an inextricable part of their analyses. By contrast, the collective-action waiver in this case does not mention arbitration at all. (ROA.87; ROA.4-5.) There is thus no support for LogistiCare's attempt to import holdings and policy considerations stemming from the FAA into this labor-law case.

In *Horton*, this Court recognized from the beginning that, because the waiver at issue was part of an arbitration agreement, the case would have to be decided in

accordance with FAA as well as NLRA principles.[8] Immediately after noting that Supreme Court and circuit precedent support the Board's view that Section 7 protects employees' right to engage in concerted legal action, *Horton*, 737 F.3d at 356-57, the Court considered the impact of the FAA on that construction of Section 7, stating:

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

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

First, the Court examined whether the Board's rule fit within the FAA's savings clause, which exempts from enforcement arbitration agreements that are unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* at 359 (quoting 9 U.S.C. § 2). The Court found that, under the Supreme Court's reasoning in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341-44 (2011), the savings clause did not apply because the Board's rule

[8] As the Court recognized in *Murphy Oil*, 808 F.3d at 1018, the Board respectfully disagrees with this Court's *Horton* decision. Therefore, any argument distinguishing *Horton* from this case should not be construed as endorsing its reasoning.

disfavored arbitration. *Horton*, 737 F.3d at 358-60. Specifically, the Court found that the Board's rule would reduce employers' incentive to resolve claims through arbitration, contrary to the pro-arbitration policies embodied in the FAA. *Id.* at 359-60. The Court did not hold that a concerted-action waiver never violates the NLRA; it held only that the NLRA rule and the FAA could not be reconciled—and both fully effectuated—under the savings clause.

Second, the Court found that the NLRA did not contain a congressional command "overrid[ing]" the FAA's mandate to enforce arbitration agreements. *Id.* at 360. Approaching that question with "a healthy regard for the federal policy favoring arbitration," the Court concluded that the FAA required enforcement of agreements waiving employees' right to pursue collective legal action *in favor of individual arbitration*. *Id.* at 360-62 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).

It is quite apparent, therefore, that *Horton* depends entirely for its holding on federal arbitration law. The congressional-command analysis, in particular, applies only in cases, like *Gilmer*, *Horton*, and this Court's *Carter v. Countrywide Credit Industries, Inc.*, 362 F.3d 294 (5th Cir. 2004), which pit the FAA against another coequal federal statute. It has no application where, as here, the NLRA is "the only relevant authority." *Horton*, 737 F.3d at 357; *see also id.* at 356 (noting that Board cannot "effectuate the policies of the [NLRA] so single-mindedly that it

may wholly ignore other and equally important Congressional objectives" like those of the FAA (quoting *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942))).

Equally important, *Horton* left untouched the NLRA principles at the heart of the Board's decision in this case. Indeed, the Court acknowledged that the Board's view that the NLRA protects collective legal action is reasonably supported by the language of Section 7 and a variety of Board, Supreme Court, and circuit precedent. *Horton*, 737 F.3d at 356-57; *accord Eastex*, 437 U.S. at 565-66 & n.15; *Altex*, 542 F.2d at 297 ("Generally, filing by employees of a labor related civil action is protected activity under section 7 of the NLRA unless the employees acted in bad faith."). The Court also recognized that, under established Board law, private contracts that conflict with federal law are unlawful and unenforceable. *Id.* at 358; *see also, e.g.*, *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83-86 (1982) (noting that courts cannot enforce private agreements that conflict with federal law, and refusing to enforce contract that violated Section 8(e) of the NLRA, 29 U.S.C. § 158(e)); *Nat'l Licorice*, 309 U.S. at 364 ("Obviously employers cannot set at naught the [NLRA] by inducing their workmen to agree not to demand performance of the duties which [the statute] imposes. . . ."); *NLRB v. Port Gibson Veneer & Box Co.*, 167 F.2d 144, 146 (5th Cir. 1948) (employers "may not require individual employees to sign employment contracts which, though not unlawful in their terms, are used to deter self-organization"). Those principles are dispositive

here. *Horton* did not question them; it held that their application to arbitration agreements is foreclosed by FAA caselaw. 737 F.3d at 361 (citing *Gilmer*, 500 U.S. at 32; *Carter*, 362 F.3d at 298).

Another circuit has already concluded, as the Board found here (ROA.87), that the FAA has no application to collective-action waivers that contain no mutual promise to arbitrate. In *Killion v. KeHE Distributors, LLC*, 761 F.3d 574, 592 (6th Cir. 2014), the Sixth Circuit declined to apply FAA cases, including *Horton*, *Gilmer*, *Carter*, and *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), outside of the arbitration context. Specifically, the Sixth Circuit invalidated a collective-action waiver in severance agreements that were interposed to justify dismissal of a collective suit under the FLSA. *Killion*, 761 F.3d at 592. The court reasoned that "[b]ecause no arbitration agreement is present in the case before us, we find no countervailing federal policy that outweighs the policy articulated in the FLSA." *Id.* Like *Killion*, this case does not involve any "countervailing federal policy" in favor of arbitration. Instead, the NLRA provides the only statutory imperatives or policy considerations to guide this Court's decision, just as the FLSA did in *Killion*. Accordingly, this Court should reject LogistiCare's reliance on FAA jurisprudence to challenge the Board's determination that the collective-action waiver is unlawful under the NLRA.

In sum, since LogistiCare's collective-action waiver is not part of an arbitration agreement, the only question before the Court is whether the Board correctly found that the collective-action waiver violates the NLRA. That question more closely resembles the one answered in *National Licorice*, 309 U.S. at 350 (whether the Board correctly found that an agreement waiving Section 7 rights violated the NLRA), than in *Horton*, 737 F.3d at 355-62 (whether the Board's finding that an arbitration agreement waiving Section 7 rights violated the NLRA conflicted with FAA principles and policies). The relevant labor-law principles are well established, this Court has accepted them outside of the FAA context, and the Board reasonably applied them to the straightforward, undisputed facts of this case to find that LogistiCare's maintenance of the collective-action waiver as a mandatory term of employment violates Section 8(a)(1).

II. THE COLLECTIVE-ACTION WAIVER VIOLATES SECTION 8(a)(1) BECAUSE EMPLOYEES WOULD REASONABLY CONSTRUE IT TO PROHIBIT FILING UNFAIR-LABOR-PRACTICE CHARGES WITH THE BOARD

Employees have an unquestionable Section 7 right to file and pursue charges before the Board. *See Util. Vault Co.*, 345 NLRB 79, 82 (2005); *McKesson Drug*, 337 NLRB at 938. Accordingly, even the mere maintenance of a rule that employees reasonably would construe as prohibiting filing Board charges violates Section 8(a)(1). *See supra* p. 9; *Murphy Oil*, 808 F.3d at 1019; *Horton*, 737 F.3d at 363. To determine whether a rule would lend itself to an unlawful interpretation,

the Board reads the rule from the position of non-lawyer employees. *U-Haul Co. of Cal.*, 347 NLRB 375, 378 (2006), *enforced mem.*, 255 F. App'x 527 (D.C. Cir. 2007).

The Board reasonably found (ROA.87-88) that employees would construe the collective-action waiver's ban on all "Class and Collective action lawsuit[s] against the company" (ROA.4) to prohibit them from filing unfair-labor-practice charges with the Board. The Board has previously found that layperson employees may reasonably understand references to lawsuits or court actions as encompassing administrative claims and proceedings, regardless of the technical meaning a lawyer might attribute to them. In *U-Haul*, for example, the Board found an arbitration agreement covering all disputes unlawful despite a side memo clarifying that the agreement applied only "to disputes, claims or controversies *that a court of law would be authorized to entertain*." 347 NLRB at 377 (emphasis added). Similarly, in *Utility Vault*, the Board found unlawful an agreement that required employees to arbitrate "any . . . legal claims" and further provided that "such claims shall not be filed or pursued in court, and . . . [employees] forever giv[e] up the right to have those claims decided by a jury." 345 NLRB at 81; *accord Murphy Oil*, 808 F.3d at 1019 ("The problem is that broad 'any claims' language can create '[t]he reasonable impression . . . that an employee is waiving not just [her] trial rights, but [her] administrative rights as well.'" (quoting *Horton*,

737 F.3d at 363) (alterations in *Murphy Oil*)). Moreover, as the Board observed, it is not uncommon for employees to refer to Board proceedings as "lawsuits."[9] That is hardly surprising, given that administrative proceedings share with their judicial counterparts an entire nomenclature, including terms like judge, case, trial, attorney, lawyer, witness, subpoena, and testimony.

LogistiCare does not contest the applicable law, but argues (Br. 14) that "any reader would necessarily understand" from the reference to "lawsuits" that the waiver covers only claims filed in courts of law, not before administrative agencies. As just detailed, LogistiCare's interpretation is too technical to attribute to non-lawyer employees. *See* ROA.87 n.5 (citing *Ingram Book Co.*, 315 NLRB 515, 516 n.2 (1994) ("Rank-and-file employees . . . cannot be expected to have the expertise to examine company rules from a legal standpoint.")). Indeed, the mere fact that both types of proceeding involve *trials* and *lawyers* demonstrates the fallacy of LogistiCare's argument that no layperson employee would construe the waiver's references to "trial lawyers" as barring collective unfair-labor-practice claims before the Board.

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[9] *See* ROA.87 & n.6 and cases cited therein; *see also, e.g.*, *Landgrebe Motor Transp. Inc.*, 295 NLRB 1040, 1046 (1988) (citing company official's testimony that employee "filed a lawsuit with the Labor Relations Board"); *Norris Concrete Materials, Inc.*, 282 NLRB 289, 298 (1986) (citing company official's reference to employee's "Labor Board suit"); *Majestic Weaving Co. of N.Y.*, 147 NLRB 859, 870 (1964) (citing employees' statement of intent to "file suit with the National Labor Relations Board").

Moreover, the prominent headings of the waiver provisions in the new-employee packet and employment handbook omit any reference to lawsuits or trials. To the extent such terms might be understood to exclude administrative proceedings, the Board reasonably found (ROA.88 & n.7) that the broader waiver headings create an ambiguity in the mind of a non-lawyer employee as to whether she could file class or collective charges with the Board. (ROA.88.) Any such ambiguity must be construed against LogistiCare as the drafter. *See Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999). Finally, even viewed from a sophisticated, legal perspective, Board charges may eventually end up in court, as shown by the present appeal. *See U-Haul*, 347 NLRB at 377-78 ("[I]nasmuch as [Board decisions] can be appealed to a United States court of appeals, the reference to a 'court of law' does nothing to clarify that the arbitration policy does not extend to the filing of unfair labor practice charges."); *accord Horton*, 737 F.3d at 364.

For all those reasons, the Board acted reasonably in finding that non-lawyer employees would interpret the collective-action waiver to restrict their Section 7 right to file concerted unfair-labor-practice charges with the Board.

CONCLUSION

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

Respectfully submitted,

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June 2016

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LOGISTICARE SOLUTIONS, INCORPORATED,	)	
Petitioner/Cross-Respondent	)	No. 16-60029
v.	)	
NATIONAL LABOR RELATIONS BOARD,	)	Board Case No. 16-CA-134080
Respondent/Cross-Petitioner	)	

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2016, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

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Dated at Washington, DC
this 3rd day of June, 2016

UNITED STATES COURT OF APPEALS
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Petitioner/Cross-Respondent	)	No. 16-60029
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NATIONAL LABOR RELATIONS BOARD,	)	Board Case No. 16-CA-134080
Respondent/Cross-Petitioner	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 5,904 words of proportionally spaced, 14-point type, and the word-processing software used was Microsoft Word 2010. The Board further certifies that the electronic version of the Board's brief filed with the Court in PDF form is identical to the hard copy of the brief that has been filed with the Court and served on opposing counsel, and that the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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