

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

THE SCHERZINGER CORPORATION

and

Case 09-CA-165460

ROBERT COLLEY, AN INDIVIDUAL

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION**

I. INTRODUCTION:

Pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, Counsel for the General Counsel files this answering brief to Respondent's exceptions to the decision of Administrative Law Judge Paul Bogas, which issued on June 17, 2016. Judge Bogas correctly concluded that Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing, as a condition of employment and continued employment, the Scherzinger Complaint Procedures which mandates that employees agree to individually arbitrate employment-related complaints.

The instant case is controlled by the Board's decisions in *D.R. Horton*, 357 NLRB 2277 (2012) and *Murphy Oil USA, Inc*, 61 NLRB No. 72 (2014). Furthermore, many of the arguments raised by Respondent in its exceptions were previously argued in its brief to the Administrative Law Judge, and were summarily rejected. Consequently, because Respondent's exceptions have no merit, Judge Bogas' decision concerning the unlawfulness of Respondent's mandatory arbitration agreement should be affirmed.

II. SUMMARY OF THE RELEVANT FACTS:

The facts are not in dispute. Since at least August 2015, Respondent has maintained the Scherzinger Complaint Procedures (hereinafter “SCP”), a policy which governs how employees are expected to handle employment-related complaints. (Jt. M. ¶ 3(a); Jt. Ex. C) ^{1/} Respondent has issued to its employees the SCP and has required employees to execute and be bound by it as a condition of their continued employment with Respondent. *Id.* Respondent acknowledges that it has not only maintained the SCP since August 2015, but has enforced the SCP as well. (Jt. M. ¶ 3(b); Jt. Ex. C)

Respondent’s SCP contains, in part, a mandatory Agreement to arbitrate employment related claims. (Jt. Ex. C) Once a complaint proceeds beyond the initial four-step internal review, and then non-binding mediation, the SCP requires, aside for certain claims that cannot be waived under applicable law, that all unresolved issues “be solely, finally, exclusively and conclusively adjudicated through Arbitration before [the] American Arbitration Association.” *Id.* Furthermore, pursuant to the SCP, employees are required to “[waive] any right [they] have to seek relief by or through a collective or class action,” and “claims may not be joined or consolidated unless agreed to in writing by all parties.” *Id.*

Additionally, “[a]rbitration shall proceed solely on an individual basis without the right for any claims to be arbitrated on a class action basis or on bases involving claims brought in a purported representative capacity on behalf of others.” *Id.* By requiring employees to be bound by the SCP, Respondent additionally requires employees to “[give] up their constitutional right to have a trial by jury, and [give] up their normal rights of appeal following the rendering of a

^{1/} References to the Administrative Law Judge’s Decision will be designated as (ALJD, p. ____); references to Respondent’s Brief in Support of Exceptions will be designated as (Exc. Br. ____); references to the Joint Motion and Stipulation of Facts, specifically the enumerated paragraphs, will be designated as (Jt. M. ¶ ____) and references to Joint Exhibits will be designated as (Jt. Ex. ____).

decision.” (Jt. Ex. C) Lastly, as stated above, employees are required to sign the SCP, and “agree to rely on [the] Complaint Procedures to resolve issues related to [their] employment with Scherzinger Termite and Pest Control, both during and after [their] employment.” *Id.*

On November 8, 2015, through private counsel, Colley, a former employee of Respondent, filed a class and collective action complaint in the United States District Court for the Southern District of Ohio. (Jt. M. ¶ 4(a); Jt. Ex. I) Colley alleges that Respondent has violated the Fair Labor Standards Act, as well as wage and hour laws of the State of Ohio and the Commonwealth of Kentucky. *Id.* The class complaint explicitly states that it is being filed “on behalf of [Colley] and all those similarly situated” employees. (Jt. Ex. I) In its answer to Colley’s class complaint, Respondent sought enforcement of the SCP by stating in its twenty-sixth affirmative defense that the class complaint is barred to the extent “that Plaintiff or any member of the proposed classes has executed a release of any claims asserted in this lawsuit or an agreement to arbitrate any claims asserted in this lawsuit.” (Jt. M. ¶ 4(b); Jt. Ex. J)

Subsequent to the class complaint being filed, Respondent’s employee Steven Davenport opted in to Colley’s class complaint, thereby joining the lawsuit and asserting his status as a similarly situated employee. (Jt. M. ¶ 5(a); Jt. Ex. K) Shortly thereafter, Respondent sought further enforcement of the SCP by filing a Motion to Dismiss Davenport from the lawsuit, citing Davenport’s execution of the SCP as the sole reason for the dismissal motion. (Jt. M. ¶ 5(b); Jt. Ex. L)

III. ARGUMENT:

A. Judge Bogas correctly concluded that Respondent’s maintenance and enforcement of its SCP clearly violates Section 8(a)(1) of the Act.

1. **The instant matter was appropriately analyzed under current Board precedent which does not conflict with the Federal Arbitration Act (FAA) or United States Supreme Court precedent. [Exceptions 1-3, 5-11, 14-15, 17]**

Respondent argues that the Board's decision in *D.R. Horton*, 357 NLRB 2277 (2012), denied in relevant part, 737 F.3d 344 (5th Cir. 2013), should not be controlling precedent in this case, but maintains rather that the instant matter should be determined under the FAA.

(Exc. Br., p. 4) Respondent questions whether this issue is even appropriate to be judged through the lenses of the National Labor Relations Act (NLRA) at all. *Id.* In support of its argument, Respondent cites purported strong federal policy favoring enforcement of arbitration agreements, specifically, the principles enumerated in the FAA. *Id.* at 4-8.

The Board has appropriately weighed the "liberal policy favoring arbitration agreements" alongside Section 7 of the Act's clear mandate that employees be permitted to engage in concerted action for mutual aid and protection, which includes filing and pursuit of class-action claims as a form of protected concerted activities. *D.R. Horton*, 357 NLRB at 2284.

Acknowledging the interplay between the FAA and the NLRA, the Board reasoned in *D.R. Horton* that its decision was consistent with Supreme Court precedent which found the FAA inapplicable when an arbitration agreement precluded employees from exercising a substantive right. Indeed, the Board explained that finding the mutual arbitration agreement "unlawful, consistent with the well-established interpretation of the NLRA and with core principals of Federal labor policy, does not conflict with the letter or interfere with the policies underlying the FAA." *Id.* The Board further noted that "nothing in the text of the FAA suggests that an arbitration agreement that is inconsistent with the NLRA is nevertheless enforceable." *Id.* at 2287. Instead, "Section 2 of the FAA provides that arbitration agreements may be invalidated in whole or in part upon any 'grounds as exist at law or in equity for the revocation of any contract.'" *Id.* Accordingly, it is clear that Respondent's SCP, inasmuch as it prescribes

employees from pursuing collective and class actions, is exempted from coverage under the FAA.

Moreover, the United States Supreme Court has not overruled *D.R. Horton* or any subsequent decisions following *D.R. Horton*'s instruction. It therefore remains controlling law; law that the Board specifically affirmed in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015). Respondent, as it did in its Brief to the Administrative Law Judge, cites to a string of United States Circuit Court decisions which set aside Board cases invalidating mandatory arbitration agreements, particularly the Fifth Circuit's decisions in *D.R. Horton* and *Murphy Oil USA, Inc.* Yet, as Judge Bogas' astutely observed, in Respondent's Brief to the Administrative Law Judge, it failed to mention the Seventh Circuit's recent decision in *Lewis v. Epic Systems Corp.*, 2016 WL 3029464 (7th Cir. 2016), "which agrees with the Board's conclusion" to invalidate mandatory arbitration agreements. (ALJD, p. 5, ll. 38-40) Now, in excepting to the Judge's decision, Respondent dismisses any mention of the Seventh Circuit's decision as merely being in the minority camp. (Exc. Br. p. 10, fn. 7) Respondent can continue to argue, *ad nauseum*, that different United States Circuit Courts, or Federal District Judges, have explicitly or implicitly reversed the Board's conclusion that mandatory arbitration agreements are unlawful. However, as Judge Bogus correctly surmised, he was "bound to follow Board precedent that has not been *reversed by the Supreme Court.*" (ALJD, p. 5, l. 26) (emphasis added)

Furthermore, Judge Bogas properly cites to United States Supreme Court precedent of significant importance in this matter. (ALJD, p. 5, ll. 32-36) In *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-566 (1978), the Supreme Court recognized that employees are engaged in protected action when they concertedly seek vindication of their rights through "resort to administrative

and judicial forums” or other “channels outside the immediate employee-employer relationship.” (ALJD, p. 4, ll. 25-28) Judge Bogas also cites significant precedent which supports the proposition that employees are engaged in protected concerted activity in pursuing class and collective action. (ALJD, p. 3. fn. 3) Accordingly, Respondent has failed to show that Judge Bogas improperly relied upon *D.R. Horton*, and subsequent decisions, in finding Respondent’s SCP to violate Section 8(a)(1) of the Act. As such, Respondent’s exceptions on this point must be rejected.

2. Judge Bogas appropriately relied upon the Board’s affirmation of *D.R. Horton in Murphy Oil USA, Inc.* in finding Respondent’s class action waivers to be unlawful. [Exception 1-15, 17]

Try as it might to advocate for the Board to overturn its *D.R. Horton* decision in light of the Fifth Circuit’s reversal, Respondent’s argument that the Board improperly validated *D.R. Horton* in its *Murphy Oil USA, Inc.* decision is unavailing. (Exc. Br., p. 13) Respondent initially argues that the Board’s decision in *Murphy Oil USA, Inc.* “ignored that the Board has no authority to interpret the FAA or the NGLA, much less to make judgment calls as to which statutes prevail when there is an arguable conflict.” *Id.* In making said argument, Respondent relies mostly on the dissent of Member Miscimarra, summarily concluding that Member Miscimarra’s dissent should have been the “correct” result. Unfortunately for Respondent, Member Miscimarra’s arguments in dissent are only that; a dissenting view of the majority’s controlling decision. Respondent does not set forth any support for defending Member Miscimarra’s dissent, and as the Board specifically rejected his dissent in its majority opinion, Respondent’s equally unavailing argument must be rejected for those very same reasons.

Next, Respondent launches yet another attack on the *Murphy Oil USA, Inc.* and *D.R. Horton* decisions by citing the intersection of the FAA and the NLRA. For the many

reasons stated above, the Board, upon which Judge Bogas correctly relied on in the instant case, properly analyzed the relevant portions of the individual statutes, as well as the vast legislative history of both, and determined that nothing in the text of the FAA, nor any United States Supreme Court precedent, precluded the Board from finding mandatory arbitration agreements unlawful. Indeed, Respondent attempts to evade the notion that the United States Supreme Court has never explicitly overturned the Board's *D.R. Horton* decision, nor has it ever proscribed the principles for which *D.R. Horton* stands. Respondent instead questions whether the Board's position in *D.R. Horton* and *Murphy Oil USA, Inc.* "could co-exist with the Supreme Court's clear FAA jurisprudence." (Exc. Br., p. 16) The Board, for its part, has reconciled the issue of whether its findings can co-exist with FAA policy and jurisprudence; it has concluded that the FAA does not impede its ability to strike-down mandatory arbitration agreements that clearly prevent employees from exercising rights most certainly protected by Section 7 of the Act. And equally of importance, the United States Supreme Court has yet to decide that the Board is wrong in its interpretation. Moreover, as the Board has made abundantly clear through its citation of several sources, "[t]he Board is not required to acquiesce in adverse decisions of the Federal courts in subsequent proceedings not involving the same parties." *Murphy Oil USA, Inc.*, 361 NLRB. No. 72, slip op. at 2, fn 17.

Moreover, the Board appropriately reaffirmed its articulation of employees' substantive, core right to collectively pursue betterment of their working conditions. *Id.* at 2. Respondent challenges the Board's position here, chiding it as the creation of substantive rights not found in the legislative history. (Exc. Br., p. 18) However, as the Board explained, "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

interference of an employer-imposed restraint.” *Murphy Oil USA, Inc.*, 361 NLRB. No. 72, slip op. at 2. (emphasis in original) Whether Respondent chooses to ignore this distinction is immaterial; it is a distinction with a significant difference, and one that cannot be overlooked.

Further, Respondent’s attempt to distinguish the instant matter, as well as the Board’s decision in *Murphy Oil USA, Inc.*, from matters contemplated by the FAA’s savings clause, has already been dismissed by the Board. (Exc. Br., pp. 19-20) In setting forth its argument, Respondent relies only upon Member Johnson’s dissent in *Murphy Oil USA, Inc.* as well as the Fifth Circuit’s decision in *D.R. Horton*. Similar to arguments made above, Member Johnson’s dissent is simply a contrary view to the majority, controlling opinion, and the Board is not required to acquiesce here to the Fifth Circuit’s decision in *D.R. Horton*.

Additionally, Respondent contends that certain United States Supreme Court decisions undermine the holdings of *D.R. Horton* and *Murphy Oil USA, Inc.* on the basis that the NLRA does not contain the required congressional command to override the FAA. (Exc. Br., pp. 20-22) Consequently, Respondent argues that Judge Bogas’ decision, which rests on the Board’s decisions in *D.R. Horton* and *Murphy Oil USA, Inc.*, is without merit. Respondent’s argument must be rejected.

The United States Supreme Court decisions’ cited by Respondent did not present the precise legal issue involved herein. Those cases did not involve the issue of concerted activity or any other NLR Act right specifically at issue here. Respondent argues that *American Express v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013) held that arbitration agreements with class action waivers are enforceable under the FAA notwithstanding any policy arguments to the contrary. (Exc. Br., p. 20) *American Express*, however, reaffirms the principal that the FAA does not authorize the prospective waiver of substantive rights. *American Express*, 133 S. Ct.

at 2310. Moreover, *American Express* confirms that whether an arbitration agreement has the prohibited effect of prospectively waiving substantive rights is determined on a statute-by-statute basis. *Id.* at 2310-2311. The cases cited by Respondent do not involve the NLRA. Because, as cited above, Respondent's SCP does require employees to waive substantive rights guaranteed to them by the NLRA, *American Express* is inapplicable to the instant matter, and Respondent's reliance on it is misguided.

Respondent's additional attempt to discourage support for the Board's decisions in *D.R. Horton and Murphy Oil USA, Inc.*, whereby it likens employer mandated arbitration agreements to collectively-bargained arbitration procedures in unionized contexts, is equally unpersuasive. (Exc. Br., pp. 22-23) The statutorily-protected right to pursue collective action for the betterment of employees' terms and conditions of employment is not somehow limited by a union's theoretical ability to collectively-bargain an arbitration procedure which guarantees fewer rights than a non-unionized employer may offer its employees. Simply because a union, in a theoretical sense, can negotiate a collective bargaining agreement which contains an arbitration procedure that may be more restrictive, does not, *ipso facto*, support an argument that employer mandated class action waivers, which by definition are not collectively negotiated, are lawful. Such argument ignores the likely scenario in which a bargaining representative chooses to agree to a more restrictive arbitration procedure in return for better conditions of employment in other respects. Further, it glaringly disregards the fact that employer mandated arbitration agreements are not collectively bargained for; they are a tool for employers to prevent employees from engaging in rights guaranteed to them by Section 7 of the NLRA.

Respondent's commentary on the implication of *Salt River Valley Water Users' Assoc. v. NLRB*, 206 F.2d 325 (9th Cir. 1953) does not support a finding that *D.R. Horton and Murphy Oil*

USA, Inc. were incorrectly decided. (Exc. Br., pp. 23-24) Respondent argues that the Ninth Circuit found that “a voluntary agreement to arbitrate only individual claims, such as the arbitration agreement at issue here, is tantamount to an employee’s exercise of his or her right to ‘refrain’ from participating in class/collective action litigation and cannot, standing alone, give rise to an unfair labor practice.” *Id.* It uses the facts of *Salt River Valley*, wherein an employee chose to remove his name from a petition authorizing the filing of a Fair Labor Standards Act collective action, to make its point. *Id.* Incredibly, Respondent makes the argument that an employee’s statutorily-protected right to, in a particular moment, decide not to participate in collective action, is akin to an employer mandated restriction on all future pursuits of collective and class action to arbitrate workplace complaints. In the latter, the employer removes employees’ free choice to decide whether to pursue collective legal action; it makes the choice for them. There is a substantial difference between allowing an employee to choose, on a case-by-case basis, whether to engage in collective action, and requiring an employee, as a condition of employment, to give up his right to ever pursue protected, collective legal action against his employer. Respondent’s attempt at arguing otherwise is ludicrous and cannot be supported.

Although it is true that a union may waive certain Section 7 rights, the Board has consistently held that an employer cannot require that individual employees waive their Section 7 rights. See *Hecks, Inc.*, 293 NLRB 1111, 1121 (1989); *Superior Tanning Co.*, 14 NLRB 942, 951 (1939), *enfd.* 117 F.2d 881, 888-91 (7th Cir. 1941); See also *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (NLRB) (“individual contracts may not be availed to defeat or delay procedures prescribed by the National Labor Relations Act Whenever private contracts conflict with [the Boards] functions, they must obviously yield or the Act would be reduced to futility.”) A union may do so because the negotiation process where waivers are agreed to is itself concerted

protected activity. Conversely, employer mandated arbitration clauses which proscribe collective/class action lack the important element of being collectively negotiated. For all the reasons stated above, the Board should affirm Judge Bogas' reliance on *Murphy Oil USA, Inc.* in finding Respondent's mandatory arbitration clause unlawful.

3. Judge Bogas correctly relied upon *Murphy Oil USA, Inc.* in finding that Respondent's motion to dismiss employee Davenport on the basis of his executing the unlawful arbitration agreement to be violative of Section 8(a)(1) of the Act. [Exception 15]

In arguing that the *Murphy Oil USA, Inc.* majority incorrectly held that the employer unlawfully filed a motion to compel arbitration, and incorrectly awarded plaintiff's attorneys fees for defending that motion, Respondent again relies on Members Johnson and Miscamarra's dissents in *Murphy Oil USA, Inc.* While the dissents may support Respondent's view of the legal issue involved herein, they do not comport with current and controlling Board law. By seeking to enforce the unlawful arbitration agreement through its dismissal motion with the United States District Court for the Southern District of Ohio, Respondent further violated Section 8(a)(1) of the Act. The Board should affirm Judge Bogas' conclusion in this regard.

B. Judge Bogas' Order is proper and does not run afoul of the FAA nor Respondent's First Amendment right to petition the government. Exceptions 16, 17]

Except for Judge Bogas' failure to require Respondent to file a motion to vacate the District Court's Order granting Respondent's motion to dismiss, as articulated in Counsel for the General Counsel's Exceptions to the Administrative Law Judge's Decision, Judge Bogas' Order is consistent with numerous Board decisions governing this area of Board law. Respondent argues that the remedial Order issued by Judge Bogas runs contrary to the FAA's "broad preemptive effect." (Exc. Br., p. 29) As explained in detail above, Respondent's arguments

regarding the perceived conflict between the NLRA and the FAA were properly rejected by Judge Bogas, and thus do not stand in the way of the recommended Order.

Furthermore, Respondent relies on *BE & K Construction Co.*, 536 U.S. 516 (2002) and *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983) to argue that the ordered remedy is unsupportable. It does so in error. In *Murphy Oil USA, Inc.*, the Board specifically addressed an identical argument raised in that matter. As the Board stated, “[u]nder settled law, a party acts with an illegal objective when it seeks to enforce an agreement that is unlawful under the Act.” *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 28. Consequently, the Board found that the employer “acted with an illegal objective when it moved to compel arbitration of the plaintiffs FLSA claims and to dismiss their collective action,” further noting that the “motion had the illegal objective of ‘seeking to enforce an unlawful contract provision.’” *Id.* Notwithstanding the fact that the District Court may have granted Respondent’s motion, its motion was grounded on an unlawful objective, and thus can be enjoined. Accordingly, Judge Bogas did not err in issuing his remedial Order, excluding the limited exception raised by Counsel for the General Counsel, and the Board should affirm the relevant portions.

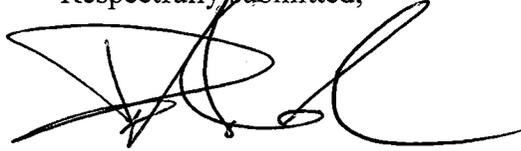
IV. CONCLUSION:

Based on the above and the record as a whole, Counsel for the General Counsel respectfully requests that the Board affirm the decision of the Administrative Law Judge and find that Respondent violated the act as alleged in the complaint and issue an appropriate remedial

order consistent with that recommended by the Administrative Law Judge and Counsel for the General Counsel's limited exceptions.

Dated: July 29, 2016

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Goode', with a large, sweeping flourish extending to the right.

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CERTIFICATE OF SERVICE

July 29, 2016

I hereby certify that I served the attached Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision on all parties by electronic mail today to the following at the email addresses listed below:

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