

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

RIM HOSPITALITY

and

Case 21-CA-137250

NELSON CHICO, an Individual

**GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S
EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S
RECOMMENDED DECISION AND ORDER**

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I. INTRODUCTION

The General Counsel files this answering brief in response to Rim Hospitality, Inc.'s (Respondent) exceptions to the decision (JD) of Administrative Law Judge Jeffrey D. Wedekind (Judge Wedekind), which issued on June 15, 2016. In his decision, Judge Wedekind correctly held that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151, et seq., by unlawfully maintaining a mandatory arbitration agreement that, as applied, compels employees to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial. Judge Wedekind also correctly held that the Respondent violated Section 8(a)(1) of the NLRA by seeking to enforce the mandatory arbitration agreement against employee Nelson Chico in his employment-related court suit.

The present case is controlled by current Board precedent, including *D.R. Horton*, *Murphy Oil USA*, and other similar cases. *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013); *Murphy Oil USA, Inc.*, 361 NLRB No. 72, enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015). As discussed below, *D.R. Horton* and *Murphy Oil* remain the relevant legal framework for analyzing mandatory arbitration agreements despite the Court of Appeals for the Fifth Circuit's decisions to deny enforcement in those cases, as neither the U.S. Supreme Court nor the Board itself has overturned them. Accordingly, Judge Wedekind properly applied Board precedent in the present case, and his decision should be affirmed in its entirety. Furthermore, the Respondent does not raise any issues or arguments not already considered and rejected by Judge Wedekind, or previously ruled on by the Board.

II. STATEMENT OF FACTS

A. Respondent's Business and Chico's Employment with Respondent

At all material times, Respondent, a California corporation with its headquarters located at 915 Seventeenth Street, Modesto, California, has been engaged in the business of hotel management. (Jt. Exh. 1, para. 5(a).¹) Since October 2011, Respondent has managed the DoubleTree by Hilton, a hotel located at 120 S. Los Angeles Street, Los Angeles, California ("the Hotel"). Id. During the 12-month period ending November 24, 2014, a representative period, Respondent, in conducting its business operations, derived gross revenues in excess of \$500,000, and purchased and received at its California facilities goods valued in excess of \$5,000, directly from points outside the State of California. (Jt. Exh. 1, para. 5(b).) Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (Jt. Exh. 1, para. 6.)

From about October 2011, through about October 24, 2012, Chico was employed by Respondent at the Hotel. (Jt. Exh. 1, para. 7.)

B. Chico's Signing of Respondent's Acuerdo

Chico worked at the Hotel as a dishwasher, under different management companies, from 2004 until his termination in 2012. (Tr. 19.) About October 5, 2011, when Respondent had taken over management of the Hotel, employees that already worked in various departments at the Hotel were brought into meetings with Respondent's representatives to receive an orientation and sign application paperwork. (Tr. 20, 47-48; Jt. Exh. 7.) According to Chico, the meeting that he attended was held in a conference room at the Hotel with approximately ten other employees,

¹ References to joint exhibits will be referred to as "Jt. Exh." followed by the appropriate exhibit number. References to the Trial Transcript will be referred to as "Tr." Followed by the appropriate page number. References to the Administrative Law Judge Decision will be referred to as "JD" followed by citations to the appropriate page and line numbers.

and was led by a human resources representative, John Jetty (“Jetty”),² along with several other representatives from Respondent. (Tr. 20-21.) Chico recognized Jetty, who had previously worked for the prior hotel management company and continued to work for Respondent for a short time after Respondent took over the Hotel. (Tr. 21, 22.) According to Chico, Jetty led the meeting in English, and someone else interpreted in Spanish. (Tr. 21.)

Chico testified that at the meeting, Jetty told the employees, through the interpreter, that under Respondent, everything pertaining to the employees’ seniority and benefits would remain the same. (Tr. 22.) Chico testified that Jetty also told the employees that they had to sign all of the paperwork that was given to them, and if they did not, they would be let go.³ (Tr. 22, 32.) The paperwork was distributed to the employees after they arrived at the meeting; the packet included an employment application, and in total was made up of about eight or ten pages. (Tr. 22, 23.) Chico’s packet of paperwork was in Spanish. (Tr. 23.)

Included in this packet of paperwork was a document entitled “Acuerdo para Atar Arbitrate,” (“Acuerdo”). (Tr. 23.) The General Counsel and Respondent, in Joint Exhibit 1, stipulated that Respondent’s English-language version of the Acuerdo, entitled “Agreement for

² There was some confusion as to John Jetty’s name on the record, with Counsel for the General Counsel mistakenly referring to him as “Getty.” The parties agreed to refer to him as Chico had referred to him, as Jetty. (Tr. 63.)

³ During cross-examination of Chico, Respondent brought up the fact that in a declaration Chico had signed as part of his lawsuit against Respondent and filed, as part of his papers, in the United States District Court, Central District of California, Chico did not say that anyone from Respondent had told him to sign the arbitration agreement or he would be out of the company, as Chico had done in a declaration concerning the circumstances of the distribution of another arbitration agreement by the previous management company, Crestline. (Tr. 27-32; Jt. Exh. 14(b); 16(f).) However, in that very same declaration regarding Respondent’s distribution of the arbitration agreement, Chico *did* state that he “was told to fill out all the paperwork in order to continue working for Rim.” (Jt. Exh. 14(b), para. 5, ln. 11-12). He also referred to the paperwork in that same paragraph as “paperwork I was ordered to sign.” (Jt. Exh. 14(b), para. 5, ln. 9-11.)

Chico also testified that the situation where he signed the agreement for Crestline was different than that with Respondent: he signed Crestline’s arbitration agreement during a one-on-one conversation with Crestline’s human resources representative. (Tr. 41.) Further, both declarations that Chico provided were prepared by Chico’s attorney, and Chico answered the questions that were asked. (Tr. 41.) He testified that during his declaration concerning Respondent, he had not been asked whether employees had been told that they needed to sign the documents or they would be fired. (Tr. 41.)

Binding Arbitration,” (“Agreement”) is an accurate translation of its Spanish version. (Jt. Exh. 1, para. 8(b); Jt. Exh. 8.) The Agreement reads as follows:

“In consideration of my employment with the company, its promise to arbitrate all employment-related disputes, and my receipt of the compensation and other benefits paid to me by the company, at present and in the future, I agree that any and all controversies, claims, or disputes with anyone (including the company and any employee, officer, director, shareholder or benefit plan of the company in their capacity as such or otherwise) arising out of, relating to, or resulting from my employment with the company, or the termination of my employment with the company, shall be subject to binding arbitration under the rules set forth in the California Code Of Civil Procedure section 1280 through 1294.2, including section 1283.05 (the “Rules”) and specifically including, but not limited to, those sections therein providing the parties the right to discovery. I understand and agree that the relief and remedies in arbitration I may seek, and that the Arbitrator may award, are the same as those available in civil court and that the same statutes of limitation will apply. Disputes which I agree to arbitrate, and thereby agree to waive any right to a trial by jury, include any statutory claims under state or federal law, including, but not limited to, claims under Title VII of the Civil Rights Act of 1964, the Americans With Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, the Older Workers Benefit Protection Act, the California Fair Employment and Housing Act, the California Labor Code, claims of harassment, discrimination or wrongful termination and any statutory claims. I further understand that this agreement to arbitrate also applies to any disputes that the

company may have with me and that the company is also giving up its right to a trial by jury for all claims covered by this agreement.”

“I agree that any arbitration will be administered by the American Arbitration Association (“AAA”) and that a neutral arbitrator will be selected in a manner consistent with its national rules for the resolution of employment disputes. I agree that the arbitrator shall have the power to decide any motions brought by any party to the arbitration that could otherwise be brought in court. I also agree that the arbitrator shall have the power to award any remedies, including attorneys’ fees and costs, available under applicable law. I understand the company will pay for any fees charged by the arbitrator or AAA and that I shall not be required to pay any fees in excess of those I would have had to pay if my disputes with the company had been filed in court. I agree that the arbitrator shall administer and conduct any arbitration in a manner consistent with the Rules and that to the extent that the AAA’s national rules for the resolution of employment disputes conflict with the Rules, the Rules shall take precedence. I agree that the decision of the arbitrator shall be in writing.”

“Except as provided by the Rules and this agreement, arbitration shall be the sole and exclusive forum for any dispute between the Company and me. Accordingly, except as provided for by the rules and this agreement, neither the Company nor I will be permitted to pursue court action regarding claims that are subject to arbitration. Notwithstanding, the arbitrator will not have the authority to disregard or refuse to enforce any lawful company policy, and the arbitrator shall not order or require the company to adopt a policy not otherwise required by law.”

“I understand that this agreement does not prohibit me from pursuing an administrative claim with a local, state or federal administrative body such as the Department of Fair Employment and Housing, the Equal Employment Opportunity Commission or the Workers’ Compensation Board. This agreement does, however, preclude me from pursuing court action regarding any such claim.”

“I acknowledge and agree that I am executing this agreement voluntarily and without any duress or undue influence by the Company or anyone else. I further acknowledge and agree that I have carefully read this agreement and that I have asked any questions needed for me to understand the terms, consequences and binding effect of this agreement and fully understand it, including that I am waiving my right to a jury trial. Finally, I agree that I have been provided an opportunity to seek the advice of an attorney of my choice before signing this agreement.”(Jt. Exh. 7 and 8.)

Chico signed the Acuerdo.⁴ (Tr. 24.) Chico testified that the agreement was in Spanish, but he could read Spanish “a little bit,” and so he only read some of the Acuerdo. (Tr. 23, 24-26, 33, 35.) He read to approximately the first half of the first paragraph, around where the California Code of Civil Procedure was mentioned. (Tr. 40.) He did not, he testified, read the last paragraph of the Acuerdo. (Tr. 40.) Chico also testified that he did not know what the word “arbitration” meant when he was presented with the Acuerdo, and did not understand what it meant to waive his right to a jury trial. (Tr. 34, 36; Jt. Exh. 14(b).) He further testified that of

⁴ The Acuerdo, as noted, is the Spanish-language version of the Arbitration Agreement included above.

what he did read of the Acuerdo, he did not understand, and found it overall to be confusing.⁵
(Tr. 25, 33.)

Chico testified that he did not ask any questions about the meaning of the arbitration agreement, and neither did any of the other employees that he was with. (Tr. 25, 33.) In Chico's declaration, referenced above, that was submitted by Chico's attorneys to the United States District Court, Central District of California, he stated that no one who worked for Respondent said at that meeting that employees could ask questions about any of the documents that they were ordered to sign, and (as mentioned above) that he was told that he had to sign the agreement in order to keep his job. (Jt. Exh. 14(b), para. 5, ln. 9-11.) In that same declaration, he stated that he was not given any time to consult with an attorney about his rights. (Jt. Exh. 14(b), para. 5, ln. 5-9.)

Further, no one either during or after the meeting ended explained anything about what the Acuerdo meant. (Tr. 25.) Chico also testified that at no time during this meeting did anyone state that he did not have to sign any part of the paperwork. (Tr. 23.) Nothing was said about taking the paperwork home, and neither Chico nor any employees that he could see took the paperwork home before signing it. (Tr. 23, 33, 41, 42.) In fact, Respondent's Regional Director of Human Resources at the time, Kari Schlagheck ("HR Director Schlagheck"), testified that when she held these orientation meetings for Respondent, employees would only be given the opportunity to take the paperwork home, including the arbitration agreements, if an employee asked for more time to fill the paperwork out, such as "if they needed to get to an appointment or something." (Tr. 60.) In a situation where an employee would request time to take the paperwork

⁵ Respondent's cross-examination of Chico exemplified the confusion created by the language of the Acuerdo: when Respondent questioned Chico on the first section of the Acuerdo, ALJ Wedekind noted on the record, twice, that the sentence was very long. (Tr. 34.) Further, the Spanish-language interpreter provided for Chico at the Hearing could not locate in the Acuerdo the language in the first long paragraph where it states that the employee waives his or her right to a jury trial. (Tr. 34-35.)

home, Schlagheck testified that she would want to know why the employee needed to leave or what kind of help that employee needed. (Tr. 60-61.) Employees were not given copies of the forms once they were signed. (Tr. 25.) Instead, the forms were collected at the end of the meeting. (Tr. 42.) Though Chico testified that he did not understand what he had read, he signed it anyway because he believed that everything would stay the same and that there would be no problems. (Tr. 25.) The entire meeting, according to Chico, lasted approximately half an hour. (Tr. 25.) Chico did not learn what he had signed until after his employment with Respondent ceased, and his attorney informed him. (Tr. 26.)

Respondent's HR Director Schlagheck testified that for the three-and-a-half years that she worked for Respondent, she was personally present for the transition from other management companies to Respondent for over one hundred hotels. (Tr. 46.) This included handling the orientation process for employees at the Hotel. (Tr. 46-47.) Contrary to Chico's testimony, she testified that John Jetty did not run Respondent's orientation meetings at the Hotel during the transition; instead, she and two others from the corporate office, Charlene Proche ("Proche") and Dale Wielgus ("Wielgus"), and onsite payroll supervisor Eileen Babow ("Babow"), ran the orientation meetings at the Hotel. (Tr. 50-51.) However, though she testified that Jetty was not at any of the employee meetings, she remembered that he worked at the Hotel and continued to work for Respondent after Respondent had taken over from the previous management company. (Tr. 51, 57.) Respondent did not call Babow, Proche, Wielgus, or Jetty to testify.

HR Director Schlagheck testified about what happened at the meetings generally: that employees, who number between ten and thirty at each meeting, are told that not much is going to change, everyone is currently going to keep working, and that they will maintain their seniority. (Tr. 47-48.) She testified that at the end of the orientation process, the employees

received new hire packets to complete. (Tr. 48.) Though she testified that employees were told that only the I9 and W4 forms were necessary to complete, she never stated at any of these meetings that employees did *not* have to complete the arbitration agreements; she testified that this is because the document itself says that it is voluntary. (Tr. 54-55, 56, 58-59.) Further, she testified that while she explained what the arbitration agreement was, she would only go into detail about the agreement if employees had questions about it. (Tr. 59.) To that end, she could not recall whether any employees at the orientation meetings that she conducted for Respondent at the Hotel ever had any questions on the arbitration agreements, either in English or in Spanish. (Tr. 59.)

HR Director Schlagheck also testified that at the end of each meeting, as she collected the forms from each employee, she went through them to make sure that they were signed and dated, while the employee was still standing in front of her. (Tr. 61.) Though HR Director Schlagheck testified that the process at each of the meetings held at every hotel she has presided over the transition for has been generally the same, she could not recall the meeting that Chico attended. (Tr. 49-50, 53.) She also was only able to state generally how many people “probably” attended each meeting. (Tr. 52.)

Respondent stipulated in Joint Exhibit 1 that, at all material times since at least March 23, 2014,⁶ it has presented to employees to sign, and maintained in its files as part of the course of its business, the Acuerdo, and its accurate counterpart, the English-language Agreement, referenced above. (Jt. Exh. 1, para. 8.) Further, Respondent stipulated in Joint Exhibit 1 that since October 2011, 342 out of 367 employees who work at the Hotel have executed Acuerdos or the English-language version of the arbitration agreement. (Jt. Exh. 1, para. 9.) Respondent presented another witness, Jeanette Garcia (“Garcia”), who is the current Human Resources Manager at the Hotel,

⁶ This is the preceding six months from the date of the filing of the original charge.

and has been since March 2012 (after Respondent had its transition taking over the Hotel). (Tr. 65.) She testified that employees are offered a position at the Hotel before they are asked to come in to complete any employment paperwork, including the arbitration agreements. (Tr. 66, 74.) She testified that no one who works at the Hotel tells new employees that signing the arbitration agreements is mandatory, and that there were no consequences at all to an employee who declined to sign the arbitration agreement.⁷ (Tr. 74, 77.) She testified that when going through the paperwork to sign with each employee, during one-on-one meetings, when going over the arbitration agreement, she tells the employee the title of the form, but would only go into detail about what the form is if the employee had questions about it. (Tr. 80-81.) She also testified that she had never had any questions about the arbitration agreement, as far as what the employee was signing and whether they should be signing it. (Tr. 81.) Finally, she has never told new employees that they can take the paperwork home to evaluate and turn them in later. (Tr. 83.)

While Garcia testified that she does not know whether Respondent has attempted to enforce its arbitration agreement against anyone other than Chico, she also testified that she did not know whether there were any class-action lawsuits against the hotel after the one that Chico pursued, before he was required to individually arbitrate his claims, and that such a lawsuit was a fact that she would only “possibly” be aware of. (Tr. 77, 78.)

⁷ Garcia testified that the first page of all new-employee hire packets is a checklist that consists of everything that the employee is given. (Tr. 67; R. Exh. 1.) The checklist has a box next to each document listed stating whether the document is mandatory or not, and a box for employees to initial whether they have signed the respective form or not. (Tr. 84; R. Exh. 1.) Garcia also testified that she was not present during the transition from the previous hotel management company to Respondent at the Hotel, and so could not be sure whether the employees who transitioned from the previous management company to Respondent at the Hotel were given this checklist. (Tr. 68, 70, 79.) She testified that these checklists, along with all new-employee paperwork, are maintained by Respondent in its files. (Tr. 72-73.) This includes arbitration agreements that new employees sign. (Tr. 73.)

C. Respondent's Application and Enforcement of the Acuerdo to Preclude Class or Representative Actions

As noted above, Chico ceased to be employed by Respondent about October 24, 2012. Approximately two years later, about April 1, 2014, Chico filed a class-action complaint on employment-related claims against Respondent and other parties in the Superior Court of California, Los Angeles County ("Superior Court"), Case Number BC541043 ("the Class Action"). (Jt. Exh. 1, para. 10(a); Jt. Exh. 10.) About July 23, 2014, Respondent and others removed the Class Action Complaint in Case Number BC541043, described above in Joint Exhibit 10, from the Superior Court to the United States District Court for the Central District of California, Case No.: 2:14-cv-05750-JFW-SS ("the Federal Court Action"). (Jt. Exh. 1, para. 10(b); Jt. Exh. 11.)

Then, about July 28, 2014, Respondent sought to enforce the Acuerdo that Chico had signed about October 5, 2011, by sending a letter to Chico's attorneys demanding arbitration on an individual basis. (Jt. Exh. 1, para. 11(a); Jt. Exh. 12.) It was then that, for the time since signing the Acuerdo, Chico learned from his attorney what exactly it was that he had signed. (Tr. 26.) Further, about July 31, 2014, Respondent filed a Petition to Compel Arbitration and Stay Action and a Memorandum of Points and Authorities in Support of its Petition, with supporting declarations ("Petition to Compel Arbitration"), in the Federal Court Action, seeking an order compelling Chico to pursue individual arbitration of all disputes between him and Respondent and staying litigation pending completion of the individual arbitration. (Jt. Exh. 1, para. 11(b); Jt. Exh. 13(a)-(d).) In its petition, Respondent argued that the order must seek individual arbitration, as the Federal Arbitration Act maintained that unless the parties to an arbitration agreement had expressly contemplated class arbitration, arbitration on an individual basis was required. (Jt. Exh. 13(a)-(d).)

About August 25, 2014, Chico's attorneys filed an opposition, with supporting declarations, to Respondent's Petition to Compel Arbitration. (Jt. Exh. 1, para. 11(c); Jt. Exh. 14(a)-(c).) About August 29, 2014, Respondent filed a reply brief in support of its Petition to Compel Arbitration. (Jt. Exh. 1, para. 11(d); Jt. Exh. 15.) About September 22, 2014, Chico's attorneys filed a Board charge on his behalf alleging, among other issues, that Respondent had violated Section 8(a)(1) of the Act by seeking to enforce an unlawful arbitration agreement. (Jt. Exh. 1, para. 2; Jt. Exh. 2.)

About October 7, 2014, the United States District Court for the Central District of California granted the relief Respondent requested by issuing a Civil Minute Order ("Order") compelling Chico to individually arbitrate his class-action claim. (Jt. Exh. 1, para. 12(a); Jt. Exh. 17.)

About February 3, 2016, Chico and Respondent executed a non-Board settlement agreement and general release that resolved all claims Chico had against Respondent, including the claims alleged in the Federal Court Action, and provided for Respondent to make a settlement payment to Chico. (Jt. Exh. 1, para. 13; Jt. Exh. 18.) About February 10, 2016, the Federal Court Action was dismissed without prejudice, as both parties failed to file a timely joint-status report. (Jt. Exh. 1, para. 14, Jt. Exh. 19.) To date, Respondent has not sought to have the Order issued by the United States District Court for the Central District of California compelling Chico to individually arbitrate his class-action claim, revoked or repealed. (Jt. Exh. 1, para. 12(b).)

About February 12, 2016, Chico submitted a Withdrawal Request (Form NLRB-601) to the Regional Director of Region 21, requesting withdrawal of the instant charge against

Respondent. (Jt. Exh. 1, para. 15(a); Jt. Exh. 20.) The Regional Director, after reviewing the non-Board settlement agreement, did not approve the withdrawal request. (Jt. Exh. 1, para. 15(b).)

III. ARGUMENT

A. Judge Wedekind Correctly Held that the Acuerdo Unlawfully Restricted Chico's Right to Pursue Employment Claims on a Class or Collective Basis, and that Respondent Unlawfully Sought to Enforce the Acuerdo

Judge Wedekind correctly held that Respondent's Acuerdo and corresponding English-language Agreement is unlawful even though it is silent on whether it prohibits class or collective actions. (JD 6:32-35.)

Respondent argues that Chico was not engaged in protected concerted activity by filing a class-action complaint. However, Section 7 of the NLRA, provides, in relevant part, that employees have the right to "engage in...concerted activities for the purpose of collective bargaining or other mutual aid or protection...." 29 U.S.C. § 157. It is well settled that "mutual aid or protection" includes employees' efforts to "improve terms and conditions of employment or otherwise improve their lot through channels outside the immediate employee-employer relationship." *D.R. Horton, Inc.*, 357 NLRB 2277, 2278 (2012) (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978)), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013).

Thus, the Board has held that an employer violates Section 8(a)(1) of the NLRA when it requires employees, as a condition of employment, to sign an agreement that precludes them from filing joint, class, or collective claims against the employer addressing their wages, hours, or other working conditions, in all forums, arbitral or judicial. *D.R. Horton*, above, at 2277; *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 2-3 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015). In *D.R. Horton* and *Murphy Oil*, the Board held that the right to engage in collective action, including collective legal action, is not merely a procedural right, but

“is the core substantive right protected by the NLRB and is the foundation on which the [NLRA] and Federal labor policy rest.” *D.R. Horton*, above, at 2286; *Murphy Oil*, above, slip op. at 2. Thus, Chico was engaged in protected concerted activity protected by the Act when he filed his class-action complaint in 2014 with the Superior Court.

Respondent also excepts to Judge Wedekind’s finding that the Acuerdo restricted Chico’s rights to pursue employment claims on a class or collective basis even though the Acuerdo itself does not expressly state that it does so. In evaluating whether an employer violated Section 8(a)(1) of the NLRA, the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). *Id.* (citing *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), *enfd.* 255 Fed.Appx. 527 (D.C. Cir. 2007)).

Under *Lutheran Heritage Village*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7 of the Act. If so, the rule is unlawful. If the rule does not, the finding of a violation depends on a showing of one of the following: “(1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” *Lutheran Heritage Village*, above, at 646-47.

In the present case, the Acuerdo does not expressly prohibit class or collective claims. However, under *Lutheran Heritage Village*’s third prong, an employer violates the NLRA by arguing that the “only fair reading of the [arbitration agreement] is that the parties contemplated only individual arbitration,” thereby applying the agreement to restrict Section 7 rights. See *Countrywide Financial Corp.*, 362 NLRB No. 165, slip op. at 3-5 (2015) (holding that employers, in defending a collective employment lawsuit, unlawfully applied an arbitration agreement in federal district court by arguing that class or collective arbitration was not

permitted); *Employers Resource*, 363 NLRB No. 59, slip op. at 1 fn. 2 (2015); *SF Markets, LLC*, 363 NLRB No. 146, slip op. at 2 (2016). Therefore, Respondent violated Section 8(a)(1) of the NLRA when it sought to enforce the Acuerdo against Chico in District Court. It is undisputed that Respondent interpreted the Acuerdo as requiring individual arbitration of all disputes covered by the Acuerdo.

B. Judge Wedekind Correctly Held that Chico and other Similarly Situated Employees were Required to Sign the Acuerdo and Corresponding Agreement as a Condition of Employment

Respondent contends that Chico voluntarily signed the Acuerdo, and that the Act does not prohibit voluntary, bilateral arbitration agreements that do not expressly require employees to waive their rights to pursue class actions. However, Judge Wedekind found that the Acuerdo does not clearly state that signing it is not required as a condition of employment, and that Chico did not understand that it was voluntary. (JD 4:4-5, 5:14-17.) As a mandatory rule imposed on Chico and other employees as a condition of hiring or continued employment, the Acuerdo was properly treated by Judge Wedekind as the Board treats other unilaterally implemented workplace rules. *D.R. Horton*, above, at 2280.

C. Judge Wedekind Correctly Held That the Acuerdo is Unlawful Regardless of Whether it was a Condition of Employment

Judge Wedekind found that even when not a mandatory condition of employment, the Acuerdo and related English-language Agreement are unlawful under the Act. (JD 6:14-17.) The Board has repeatedly held that arbitration agreements are unlawful when such agreements require employees to prospectively waive their Section 7 rights to engage in concerted activity. See, e.g., *Bloomington's, Inc.*, 363 NLRB No. 172, slip op. at 3-4 (2016) (holding that even assuming an arbitration agreement's "opt-out" provision renders the agreement voluntary, the agreement is nevertheless unlawful because employees prospectively waive their Section 7

rights); *Bristol Farms*, 363 NLRB No. 45, slip op. at 1 (2015) (rejecting employer’s argument that its arbitration agreement is made lawful by inserting a provision stating “SIGNING THIS AGREEMENT IS OPTIONAL”) (emphasis in original); *Nijjar Realty, Inc.*, 363 NLRB No. 38, slip op. at 2 (2015); *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. at 1, 5-8 (2015).

D. Judge Wedekind Correctly Determined that Respondent’s Arguments Concerning Whether the Allegations Should Be Dismissed for Other Reasons Lack Merit

Respondent makes several other contentions as to why Judge Wedekind’s decision should not be adopted and why the Complaint should be dismissed. Respondent contends that Chico lacks standing to pursue the NLRB charge based on Section 10(b). However, the Board has repeatedly held that a violation may be found where an unlawful provision has been maintained or enforced within six months of the charge, regardless of when the provision became effective or was first acknowledged by or enforced against the employee. See, e.g., *Bloomington’s*, 363 NLRB No. 172, slip op. at 1 fn. 1; *Cowabunga, Inc.*, 363 NLRB No. 133, slip op. at 3 (2016); *Fuji Food Products, Inc.*, 363 NLRB No. 118, slip op. at 1 fn. 1 (2016); *PJ Cheese*, 362 NLRB No. 177, slip op. at 1, 3 fn. 9; *The Neiman Marcus Group*, 362 NLRB No. 157, slip op. at 1 fn. 6 (2015). Here, Respondent filed its Petition to Compel Arbitration in the Federal Court Action with the District Court about July 31, 2014, and Chico’s attorneys filed the charge against Respondent on September 22, 2014. Thus, there is no standing or statute of limitations bar on the instant proceeding.

Respondent also argues that Judge Wedekind’s decision disregarded the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1, et seq. The present case does not present a conflict between the NLRA and the FAA because, as the Board explained in *D.R. Horton*, “holding that

an employer violates the NLRA by requiring employees, as a condition of employment, to waive their right to pursue collective legal redress in both judicial and arbitral forums accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible.” *D.R. Horton*, above, at 2288. Furthermore, 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 equity for the revocation of any contract.’” *Id.*, at 2287. As the Board noted, “nothing in the text of the FAA suggests that an arbitration agreement that is inconsistent with the NLRA” and against public policy is enforceable. *Id.*

Respondent further argues that its petitioning of the District Court to compel Chico to arbitration is protected under the First Amendment’s petition clause, citing *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983); and *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002). However, as the Board in *Murphy Oil* noted, the Supreme Court in *Bill Johnson’s* identified two situations in which lawsuits enjoy no such constitutional protections: when the action is beyond a state court’s jurisdiction because of federal preemption, and when the action “has an objective that is illegal under federal law.” *Murphy Oil*, 361 NLRB No. 72, slip op. at 27. Here, Respondent’s efforts to preclude class or collective legal actions by interpreting and enforcing the Acuerdo in District Court to compel individual arbitration fall within the unlawful-objective exception in *Bill Johnson’s*.

Similarly, the Board has repeatedly held that the Supreme Court’s opinion in *BE & K Construction* did not alter the Board’s authority to find court proceedings that have an illegal objective under federal law to be an unfair labor practice. *Dilling Mechanical Contractors, Inc.*, 357 NLRB 544, 545 (2011); *Plasterers Local 200 (Standard Drywall, Inc.)*, 357 NLRB 2212, 2214 fn. 7 (2011), *enfd.* 547 Fed.Appx. 812 (9th Cir. 2013), and 357 NLRB 1921, 1923 (2011),

enfd. 547 Fed.Appx. 809 (9th Cir. 2013); *Manufacturers Woodworking Association of Greater New York Incorporated*, 345 NLRB 538, 540 fn. 7 (2005); *Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 151 (D.C. Cir. 2003).

Accordingly, ALJ Wedekind properly found that Respondent's arguments are contrary to Board precedent, and Respondent's exceptions should be disregarded.

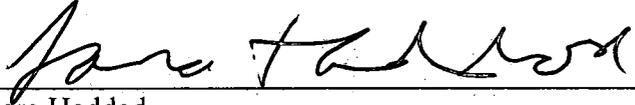
E. Judge Wedekind Correctly Ordered that Attorneys' Fees Be Paid to Chico by Respondent as Part of the Remedy

Respondent contends that no attorneys' fees were paid by Chico and therefore Respondent owes him none. The determination of whether and how much Chico paid or owes in attorneys' fees is a compliance matter, and need not be addressed by the Board here. The inclusion of attorneys' fees in Judge Wedekind's remedy was proper, based on Board decisions that have provided the remedy of legal fees even where a non-Board settlement purportedly covers legal expenses. See, e.g., *Flyte Time Worldwide*, 362 NLRB No. 46 (2015), final decision, 363 NLRB No. 107 (2016).

IV. CONCLUSION

For the reasons described above, it is respectfully requested that Respondent's exceptions be rejected and that Judge Wedekind's decision be affirmed and his recommended order adopted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lara Haddad", is written over a horizontal line.

Lara Haddad
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DATED at Los Angeles, California, this 19th day of August, 2016.

STATEMENT OF SERVICE

I hereby certify that a copy of **General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Recommended Decision and Order** in Case 21-CA-137250 was submitted by E-filing to the Executive Secretary of the National Labor Relations Board in Washington, D.C., on August 19, 2016. The following parties were served with a copy of the same document by electronic mail:

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Mara Estudillo
National Labor Relations Board, Region 21

DATED at Los Angeles, California, this 19th day of August, 2016.