

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

BRIAD WENCO, LLC

and

Case No. 29-CA-165942

FAST FOOD WORKERS COMMITTEE

**BRIEF OF RESPONDENT BRIAD WENCO, LLC ANSWERING
CHARGING PARTY'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE
LAW JUDGE'S DECISION AND ORDER IN**

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I. INTRODUCTION

Pursuant to 29 C.F.R. Section 102.46(f)(1), Respondent Briad Wenco, LLC (“Respondent” or “Briad”) submits this answering brief to Charging Party Fast Food Workers Committee’s (the “FFWC”) cross-exceptions to the Decision and Order (the “Decision”) of Administrative Law Judge (“ALJ”) Joel P. Biblowitz, dated July 6, 2016.¹

II. RESPONSE

The FFWC’s two exceptions focus on the remedial section of the Decision. Both of these exceptions should be denied because, as further set forth below, they each seek remedies that are inconsistent with the Board’s standard remedial practices and would result in unduly burdensome and/or impermissibly punitive obligations for Briad. To be certain though, Briad’s position is that notwithstanding this answering brief, and as set forth in its exceptions and accompanying brief, the Decision was wrongfully decided as a matter of law and therefore no remedies of any kind are warranted in this matter.

A. **The ALJ Did Not Err In Failing to Recommend that Briad Notify Former Employees of its Rescission of the Arbitration Agreement**

In its first exception, the FFWC argues that the ALJ erred by failing to adequately remedy Briad’s (alleged) NLRA violation by recommending only that Briad notify current employees and applicants for employment that the Arbitration Agreement has been rescinded, and therefore failing to recommend that Briad also be required to notify *former* employees who were employed at any time since the Arbitration Agreement has been promulgated. This exception should be overruled because it is inconsistent with the NLRB’s standard remedial orders and, indeed, is inconsistent with the Board’s seminal decision in *D.R. Horton*.

¹ The Counsel for the General Counsel (the “CGC”) conspicuously failed to file exceptions to the Decision.

The NLRB's standard notice remedy in cases where an employment policy or rule is found to be overbroad is to order the employer to notify current employees of the Board's order, and former employees *only where the employer has gone out of business or closed the facility involved in the proceedings*. In fact, in *D.R. Horton*, the Board ordered that notice be provided to former employees only in the event that, during the pendency of the proceedings, the employer "has gone out of business or closed the facility involved in [the] proceedings." *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2290 (2012).

Under these circumstances, the FFWC's first exception should be denied as even the Board in *D.R. Horton* did not believe it to be an appropriate remedy.

B. The ALJ Did Not Err In Failing to Recommend that Briad Be Required To Reimburse Opposing Parties for Reasonable Legal Fees

In its second exception, the FFWC argues that the ALJ erred by failing to adequately remedy Briad's (alleged) NLRA violation by not recommending that Briad reimburse opposing parties in legal actions for reasonable legal fees and expenses incurred by such parties as a result of any attempt by Briad to prohibit class or collective actions based upon the Arbitration Agreement.² This exception should be overruled based on the U.S. Supreme Court's holding in *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731 (1983), which holding remains good law today.

In *Bill Johnson's Restaurants*, the Court held that the awarding of attorney's fees and other expenses to an employee on the theory that an employer violated the Act by prosecuting an action in court for an improper purpose is only appropriate where the judgment in court goes

² As noted by the FFWC in its cross-exceptions, the instant case was adjudicated on stipulated facts, none of which disclose facts regarding specific legal actions, *if any*, in which Briad may previously have sought to enforce the Arbitration Agreement and/or the class action waiver contained therein.

against the employer and the action in court otherwise is shown to be without merit. *See id.* at 747. In this case, even if, assuming *arguendo*, Briad previously has sought in court to compel arbitration under the Arbitration Agreement, any such action by Briad necessarily would be *with* merit since a plethora of courts, including the Second Circuit (which is likely the court that would hear the appeal from any enforcement order in this action), have enforced class action waivers and expressly rejected the Board’s *D.R. Horton* decision invalidating class action waivers. *See Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297-98, n.8 (2d Cir. 2013) (“[W]e decline to follow the decision in *D.R. Horton*. Even assuming that *D.R. Horton* addressed the more limited type of class waiver present here, we still would owe no deference to its reasoning.”) (internal quotations and citation omitted); *see also Patterson v. Raymours Furniture Co.*, 96 F. Supp. 3d 71, 80 (S.D.N.Y. 2015) (“Drawing upon the Second Circuit’s analysis, this Court finds that the NLRA does not stand in the way of the FAA’s command to enforce arbitration agreements ‘according to their terms.’”)(citation omitted).

As the Board has no proper basis to award attorney’s fees or costs as a remedial measure in this matter, the FFWC’s second exception should be denied.

III. CONCLUSION

For all the foregoing reasons, Briad respectfully requests that the Board deny both of the FFWC’s exceptions.

Dated: New York, NY

August 31, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 2016, a true and correct copy of the forgoing was filed with the Board via the Board's electronic filing system, and served by electronic mail upon the following:

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