

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21

RIM HOSPITALITY,

Respondent,

and

NELSON CHICO, an Individual

Charging Party.

Case 21-CA-137250

**REPLY BRIEF IN SUPPORT OF
RESPONDENT RIM HOSPITALITY'S
EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

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I. INTRODUCTION

General Counsel's Answering Brief misconstrues the evidence adduced at the hearing of this matter, Respondent's Arbitration Agreement, and the precedential effect of *D.R. Horton* and its progeny. Contrary to General Counsel's arguments, Respondent did not require Nelson Chico or any of its employees to—as a condition of employment—execute Arbitration Agreements that ran afoul of the National Labor Relations Act (“NLRA”). Moreover, Respondent did not have a rule—i.e., “an established and authoritative standard or principle”¹—which precluded its employees from pursuing all type of collective claims in all forums.

As detailed in Respondent's opening brief and herein, Respondent presented new employees—individuals it had already hired—with voluntary arbitration agreements at the time they completed “new hire” paperwork. If an employee refused to sign the arbitration agreement he or she would nonetheless retain employment. This was true for Chico and all employees. Charging Party presented no competent evidence at the hearing that Chico, or anyone else employed with Respondent, was required to sign its Arbitration Agreement as a condition of employment.

Nor did General Counsel present evidence that Respondent's Arbitration Agreement precluded employees from pursuing collective claims in all forums or that it chilled employees from exercising their rights under the NLRA. In fact, General Counsel concedes that the Agreement is unlike others in typical *D.R. Horton* cases in that it did not contain a class-action waiver or expressly limit employees' rights (indeed, Respondent's Arbitration Agreement did not “chill” Chico from pursuing his wage claims on a collective basis). Rather, unlike the cases General Counsel cites in her Answering Brief, Respondent's Agreement permitted a broad range of collective activity to vindicate wage claims. Chico could have sought to consolidate multiple claims and could have pursued several other courses of collective action. That Chico chose not to do so does not render Respondent's Agreement any less lawful, valid, or enforceable.

¹ *Black's Law Dictionary* (10th ed. 2014).

The remainder of General Counsel's arguments fall equally flat, including the argument that Respondent must pay Chico additional attorneys' fees for having to oppose Respondent's motion to compel. As Respondent's Agreement did not violate the NLRA, it should not be required to pay Chico anything. In any event, Respondent already paid close to \$49,000 to cover Chico's attorneys' fees. Chico is not entitled to a windfall or double recovery.

In sum, for the reasons stated in Respondent's opening brief and herein, the Board should not adopt the Administrative Law Judge's ("ALJ") decision and should dismiss the complaint against Respondent.

II. LEGAL ARGUMENT²

A. Execution of Respondent's Arbitration Agreement was not Required as a Condition of Employment

General Counsel argues that Judge Wedekind correctly held that Respondent's Arbitration Agreement violates the NLRA because Chico was required to execute it "as a condition of employment" and because it precluded Chico from pursuing "joint, class, or collective claims...." (Answering Brief p. 13-15) General Counsel is wrong on both counts.

Respondent's Arbitration Agreement was not mandatory and was not required as a "condition of employment." This fact is determinative of all issues in this case. (*Bloomington, Inc.* (2016) 363 NLRB No. 172, fn. 2 [holding that, "[u]nder established law in *Horton* and the many cases following it, the material question is whether the employees were required to sign the waiver agreements 'as a condition of their employment.'"].)

² Respondent acknowledges the Ninth Circuit's recent decision in *Morris v. Ernst & Young*, ___ F.3d ___, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), but notes that several of the arguments Respondent raises in its opening brief and here were not raised or addressed by the Court in *Morris*. Moreover, it was undisputed that the arbitration agreement at issue in *Morris* was mandatory and presented as a condition of employment. Execution of Respondent's Arbitration Agreement, on the other hand, was not a condition of employment. Finally, the Ninth Circuit's decision is at odds with a majority of the Circuit Court decisions addressing this issue. (*See Cellular Sales of Missouri, LLC v. NLRB*, ___ F.3d ___, 2016 WL 3093363, at *2 (8th Cir. 2016); *D.R. Horton v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2nd Cir. 2013)).

As detailed in Respondent's opening brief, execution of the Arbitration Agreement was not required as a condition of employment and it expressly so stated. Notwithstanding the ALJ's strained interpretation of the Agreement's "voluntariness,"—or alleged lack thereof—General Counsel had the burden of proof that Chico was required to sign the Agreement as a condition of employment (i.e., that he would not have been hired if he refused to sign the Agreement). General Counsel failed in this regard. Rather, Chico presented confusing testimony about being told he had to sign various non-descript documents by non-RIM personnel—John Jetty.

Chico's testimony about what Jetty allegedly said, however, does not establish that the Agreements were presented as a condition of employment. First, the statements Chico attributes to Jetty are inadmissible hearsay. (Fed. Rules of Evid. 801(c).) And no exceptions apply. In particular, since Chico failed to establish that Jetty was a RIM employee, manager, or agent at the time of the alleged statement(s), the party-admission exception does not apply. (Fed. Rules of Evid. 801(d)(2).)

Setting aside the inadmissibility of Jetty's alleged statements, RIM also established through admissible testimony that Jetty was not present during the employee orientations and that he thus could not have made any statements about the Arbitration Agreement. (JE 14(b); R.T. 50:22-52:2, 57:16-24.) The undisputed evidence thus establishes that Chico was not told during Respondent's employee orientation that he had to sign the Arbitration Agreement and that the Arbitration Agreement itself stated it was "voluntary"—a word Chico admitted he understood. (R.T. 36:13-17.)

As execution of the Agreement was not required as a condition of employment, Chico was free to reject it and to continue working at the Hotel (in fact, Chico was already deemed an employee by the time he was presented with and signed the Agreement). (R.T. 47:14-48:21, 49:2.) Indeed, some employees did reject the agreement, and they were retained nonetheless. (R.T. 55:10-18 ["Q. Were there employees at the orientation of the Doubletree who did not sign the arbitration agreement? A. [Schlagheck] There's always some that don't sign it. Q. And I— are they nevertheless allowed to maintain employment at the hotel? A. Everyone's hired and

everyone will continue working unless their I9 process doesn't pass."].) In sum, the undisputed evidence establishes that execution of Respondent's Arbitration Agreement at the orientation was not required as "a condition of employment."³ As such, the Board should not conclude RIM's Arbitration Agreement and/or its presentation to employees violated the NLRA.

B. Respondent's Arbitration Agreement did not Contain a Class-Action Waiver and Did not Preclude Employees from Pursuing Collective Action in All Forums

In addition to not being forced to sign the Arbitration Agreement to obtain or maintain employment, Respondent's Agreement did not expressly require Chico waive his right to pursue collective action under the NLRA. General Counsel concedes this fact. (Answering Brief pp. 13-15.) Nevertheless, General Counsel argues that the Arbitration Agreement is unlawful because the agreement, as enforced by the District Court on this one occasion, precluded Chico and other employees from pursuing all "joint, class, or collective claims...in all forums." (Id. at 13.) But this is not accurate and is not supported by the evidence.

First, the Arbitration Agreement expressly permitted Chico to pursue "an administrative claim with a local, state or federal administrative body..." (JE 8.) And no restrictions were placed on his ability to do so on a joint, class, or collective basis.

Moreover, Respondent's Agreement did not present a complete bar to all collective activities. Respondent's Arbitration Agreement is much like the agreement at issue in *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348—but without the express class-action waiver. Rejecting the Plaintiff's argument that his employer's arbitration agreement ran afoul of the NLRA, the California Supreme Court noted that "the arbitration agreement in the present case, apart from the class waiver, still permits a broad range of collective activity to vindicate wage claims." (Id. at 348 [emphasis added].)

³ General Counsel also contends without much argument or discussion that Judge Wedekind correctly found that "other similarly situated employees were required to sign" the Arbitration Agreement as a condition of employment. (Answering Brief p. 15.) But no other employees testified that they were required to sign Respondent's Arbitration Agreement. Chico was General Counsel's only witness. To the contrary, Respondent presented evidence that employees were not required to sign the Agreement. (R.T. 55:10-25; 56:13-17, 74:23-75:1; JE 1, ¶ 9.)

The Supreme Court's holding in *Iskianian* is particularly apt in this case. Even more so than the agreement there (which contained a class-action waiver), Respondent's Arbitration Agreement "is less restrictive than the one considered in *Horton*: The arbitration agreement does not prohibit employees from filing joint claims in arbitration, does not preclude the arbitrator from consolidating the claims of multiple employees, and does not prohibit the arbitrator from awarding relief to a group of employees. The agreement does not restrict the capacity of employees to 'discuss their claims with one another, pool their resources to hire a lawyer, seek advice and litigation support from a union, solicit support from other employees, and file similar or coordinated individual claims.'" (*Id.*) Nor did Respondent argue otherwise in its motion to compel arbitration. (See JE 13B, p. 10 [contending only that the arbitration agreement did not contemplate use of class-action civil procedures].) More to the point, Chico never attempted to consolidate his claims with others' during arbitration; and there is no evidence he tried or was precluded from jointly pursuing claims with other employees or that he was chilled from discussing his claims with other employees. Chico never even pursued arbitration. Rather, he elected to individually settle his claims and abandon further collective action.

As Chico was not precluded from engaging in concerted activities in all forums, Respondent's Arbitration Agreement and its enforcement thereof cannot be deemed to have violated the NLRA.

C. General Counsel Failed to Prove that Respondent Maintained a "Rule" Which Restricted Employees Section 7 Rights

General Counsel incorrectly argues that Respondent maintained a "rule" which explicitly restricted employees' activities under Section 7 of the NLRA. (Answering Brief p. 14.) Respondent, however, maintained no such "rule" and General Counsel presented no evidence that it did. Rather, the evidence established that Respondent's attorneys in Chico's wage lawsuit pursued and presented a valid defense, which Respondent had a constitutionally protected right to assert. (Opening Brief pp. 6-7, 18-20.)

In this regard, General Counsel's reliance on *Lutheran Heritage Village*, 343 NLRB 646

(2004) is misplaced. Its application depends on the existence of “a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights.” (*Id.* at 343 NLRB 646 [emphasis added]; *see also Lafayette Park Hotel*, 326 NLRB 824 (1998) [addressing employer promulgated “standards of conduct” for its employees].)

At issue in *Lutheran Heritage Village* was a “rule” prohibiting employees from using “abusive or profane language” in the work place, as well as “no solicitation,” “no loitering,” and “no unlawful strikes, work stoppages, slowdowns, or other interference” rules. Here, however, there is no evidence that Respondent had a “work rule” which precluded Plaintiff from asserting his rights under the NLRA or from collectively pursuing claims with other employees.⁴ Chico obviously did not believe that such a rule existed; he filed a putative class action lawsuit against Respondent. In no way was he “chilled” from taking action. And, as noted, Respondent’s Arbitration Agreement did not contain a class-action waiver and it did not preclude Plaintiff from joining together with other employees to advance their interests together. At most, it could be construed—as the Federal Court did—as limiting use of one type of procedural mechanism in civil lawsuits.

Here, Respondent defended itself in one particular lawsuit brought by one employee, asserting only that, based on the terms of its Arbitration Agreement and US Supreme Court precedent, the agreement did not contemplate use of class-action civil procedures in litigation between the parties. This does not a “rule” make. General Counsel has thus failed to submit evidence or establish that Respondent had a “rule” that violated the NLRA or restricted Chico’s rights thereunder. *Lutheran Heritage Village* and its progeny are therefore inapposite.

D. General Counsel Wrongfully Analogizes this Case to Cases Involving “Opt Out” Arbitration Agreements with Restrictive Class-Action Waivers

General Counsel argues that, even if the Arbitration Agreement was not required as a condition of employment (as the evidence establishes), it still violates the NLRA. In support

⁴ Black’s Law Dictionary defines a “rule” as “an established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation.” Black’s Law Dictionary (10th ed. 2014)

thereof, General Counsel cites, without any substantive discussion or analysis, *Bloomingtondales, Inc.* 363 NLRB No. 172 (2016), *Bristol Farms*, 363 NLRB No. 45 (2015), *Nijjar Realty, Inc.* 363 NLRB No. 38, and *On Assignment Staffing Services*, 362 NLRB No. 189⁵. These decisions, which General Counsel misconstrues, are distinguishable.

In *Bloomingtondales*, *On Assignment*, and *Nijjar Realty*, execution of the arbitration agreements were mandatory and required as a condition of employment and the agreements controlled unless and until employees “opted out.” The Agreements in those cases also contained broad, express class-action waivers that prohibited all types of collective action in all forums. The agreement in *Bloomingtondales*, for example, prohibited the arbitrator from “consolidate[ing] claims of different Associates [i.e., employees] into one proceeding.” (*Bloomingtondales, supra*, at fn. 1.) Based on its wording, the Board found that the Agreement “clearly precludes joinder of claims, and the definition of ‘class action’ is broadly worded so as to make clear that the second clause prohibits all forms of concerted arbitration and not just class-action arbitration properly so called.” (*Id.*) The agreement in *On Assignment* was similarly broad, precluding arbitration or litigation of “class, collective, or representative actions or claims” in all forums. (*On Assignment Staffing Services, supra*, at p. 3; see also *Nijjar Realty, supra*, at 2 [finding, as it did in *On Assignment*, that the opt-out procedure did not save the agreement and that the “agreement preclude[ed] collective action in all forums.”] [emphasis added].)⁶

⁵ The Fifth Circuit recently reversed the Boards decision in *On Assignment*. (*On Assignment Staffing Services, Incorporated v. National Labor Relations Board* (5th Cir., June 6, 2016) 2016 WL 3685206, at *1.)

⁶ The class action waiver in *Nijjar Realty* extensively limited employees’ rights to collectively seek relief, stating:

“This binding arbitration agreement shall not be construed to allow or permit the consolidation or joinder of other claims or controversies involving any other employees, and will not proceed as a class action, collective action, private attorney general action or any similar representative action. No arbitrator shall have the authority under this agreement to order any such class of representative action. I further understand and acknowledge that the terms of this Agreement include a waiver of any substantive or procedural rights that I may have to bring an action on a class, collective, private attorney general, representative or other similar basis. However, due to the nature of this waiver, the Company has provided me with the ability to choose to retain these rights by affirmatively checking the box at the end of this paragraph.” (*Nijjar Realty, Inc.* (Nov. 20, 2015) 363 NLRB No. 38.)

Bristol Farms is also distinguishable. Once again, the Arbitration Agreement contained a class-action waiver that precluded collective action in all forums. Under the Bristol Farms Agreement, employees explicitly waived their “right to ‘commence, be a party to, or act as a class member in any class or collective action against the other party relating to employment issues [...and the] right to commence or be a party to any group, class, or collective action in arbitration or any other forum.’” (*Bristol Farms, supra*, at fn. 1.)

Here, Respondent’s Arbitration Agreement contained no class-action waiver, was not presented as a condition of employment, expressly stated it was “voluntary,” did not require employees opt out to avoid its terms, and did not (as discussed above) preclude employees from pursuing joint or collection action in all forums. As such, it does not run afoul of the NLRA as did the agreements in the cases relied upon by General Counsel.

E. Charging Party was Compensated for Attorneys’ Fees and is not Entitled to Double Recovery

General Counsel contends that the issue of the ALJ’s award of Chico’s attorneys’ fees is a “compliance matter” that “need not be addressed by the board here.” Nevertheless, General Counsel cites *Flyte Time Worldwide*, 362 NLRB No. 46 (2015) and argues that an award of fees is proper.

The issue before the Board here, however, was not addressed in *Flyte Tyme* at 362 NLRB No. 46. At issue there was the Charging Party’s motion to withdraw in light of a private settlement agreement between the parties. The Board denied the motion because the settlement did not “address, much less provide any remedy for,” the alleged NLRA violations. (*Id.* at 2.) The Board did not address the propriety of what would amount to a “double-recovery” of fees in the context of this case.⁷ General Counsel cites no authority which stands for the proposition that Chico is entitled to additional fees after he was already paid through a private settlement

As noted, Respondent’s Agreement contained no such waiver or limitation on Chico’s rights.

⁷ Nor was this issue squarely addressed in the Board’s final decision, *Flyte Tyme Worldwide* 363 NLRB No. 17 (2016). While the Board found that reimbursement of fees was required, it did so without discussion. It simply cited *Bill Johnson’s Restaurants v. NLRB*, 461 U.S. 731, 747 (1983). *Bill Johnson’s*, however, does not authorize the ALJ or Board to award additional fees where such a claim has already been settled and fees have been paid.

negotiated by the parties' respective counsel.

The ALJ's decision recognized such a lack of authority, stating that Respondent would only be required to pay Chico's fees for opposing the motion to compel arbitration "to the extent the February 3, 2016 non-Board settlement did not fully reimburse him for such amounts." (Decision, p. 8.) The parties' \$55,000 settlement more than fully reimbursed Chico for all fees. In fact, 90% of the settlement—\$49,500—was allocated to "interest, penalties, attorneys' fees and costs." (JE 17, p. JE001105, ¶ 2.1). There is no evidence in the record that Chico was not fully reimbursed for fees incurred opposing Respondent's motion to compel.⁸ And to reiterate, Chico was represented by counsel who negotiated this agreement on his behalf—the very same attorneys who submitted the NLRB charge on Chico's behalf. Under the circumstances, Chico should not be permitted an award of additional fees that would amount to a windfall.

F. Remaining Issues

General Counsel gives short shrift to the remainder of Respondent's arguments. In sum, General Counsel fails to adequately address Respondent's arguments. For the independent and separate reasons specified in Respondent's opening brief, the ALJ's decision should therefore be reversed.

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⁸ Chico's counsel informed Respondent's counsel by e-mail on August 18, 2016 that \$17,170.00 in fees and costs were incurred opposing Respondent's motion. (See Exhibit "A.") This amount was more than covered by the \$55,000 settlement agreement.

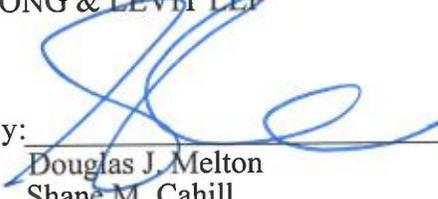
III. CONCLUSION

For the reasons set forth herein, the Board should not adopt the ALJ's decision. Instead, it should dismiss all charges against RIM.

Respectfully submitted,

Dated: September 1, 2016

LONG & LEVIT LLP

By: 

Douglas J. Melton
Shane M. Cahill

ATTORNEYS FOR RESPONDENT
RIM HOSPITALITY

Exhibit A

Cahill, Shane M.

From: Dalia Khalili <DKhalili@maternlawgroup.com>
Sent: Thursday, August 18, 2016 3:48 PM
To: Cahill, Shane M.; Roy Suh
Cc: Matthew Matern
Subject: RE: Chico - fees

Thanks, Shane.

The amount of attorneys' fees incurred for Plaintiff's costs in opposing the motion to compel are \$17,170.00.

Best,

Dalia

MATERN LAW GROUP

DALIA KHALILI

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From: Cahill, Shane M. [<mailto:scahill@longlevit.com>]
Sent: Tuesday, August 16, 2016 12:53 PM
To: Roy Suh; Dalia Khalili
Subject: Chico - fees

Roy and Dalia:

Part of the ALJ's order requires RIM reimburse Chico for reasonable attorneys' fees and costs opposing its motion to compel arbitration. Can you please advise as to that amount?

Thanks.

Shane M. Cahill
415-438-4594

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1 **PROOF OF SERVICE**

2 I, the undersigned declare:

3 I am a citizen of the United States and employed in San Francisco County, California. I
4 am over the age of eighteen years and not a party to the within-entitled action. My business
5 address is 465 California Street, 5th Floor, San Francisco, California 94104.

6 On September 1, 2016, I served the within document(s):

7 **REPLY BRIEF IN SUPPORT OF RESPONDENT RIM HOSPITALITY'S
8 EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

9 by transmitting via e-mail or electronic transmission the document(s) listed above
10 to the person(s) at the e-mail address(es) set forth below.

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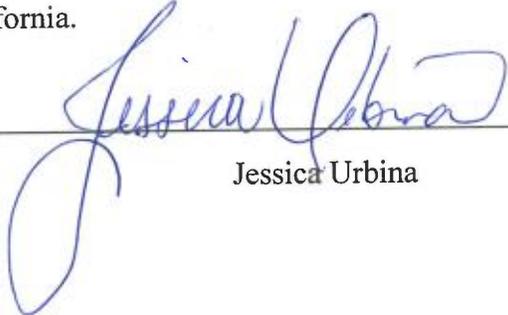
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I hereby certify that a copy of the above-mentioned document in Case 21-CA-137250 was
submitted by E-filing to the Executive Secretary of the National Labor Relations Board. Executed
on September 1, 2016, at San Francisco, California.



Jessica Urbina