

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Administrative Law Judges
San Francisco, California**

**NORTHROP GRUMMAN SYSTEMS
CORPORATION**

And

Case 31-CA-167294

PORFIRIA VASQUEZ, an Individual

**COUNSEL FOR THE GENERAL COUNSEL'S
BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

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I INTRODUCTION, BACKGROUND, AND SUMMARY OF ARGUMENT

By order dated September 2, 2016, this case was transferred to the Division of Judges pursuant to a Joint Motion to Transfer Proceedings to the Division of Judges and Stipulation of Facts and Issues Presented. The underlying Complaint and Notice of Hearing in the case was issued by the Regional Director for Region 31 on June 27, 2016 (Complaint). The Complaint alleges that Northrop Grumman Systems Corporation (Respondent), violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining and enforcing a mandatory arbitration provision/Dispute Resolution Program as set forth in its “Employee Mediation/Binding Arbitration Program” (hereinafter DRP) that restricts Section 7 activity by expressly precluding employees from pursuing employment-related collective claims in any forum, arbitral or judicial. Respondent has maintained the mandatory arbitration provision at issue since September 2006, superseding/amending it in 2010, and has, since December 17, 2015, by the filing of a Motion to Compel Binding Arbitration, enforced and maintained such provision requiring employees to forego the resolution of employment-related disputes by collective or class action.

The instant case is governed by the Board’s decisions in *D.R. Horton, Inc.*, 357 NLRB No. 184, slip op. at 1-7, (2012), *enf granted in part*, 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (October 28, 2014).¹ In *D.R. Horton*, the Board held that a policy or agreement that is imposed as a condition of

¹ In *Murphy Oil USA, Inc.*, *supra*, the Board independently re-examined *D.R. Horton*, considered adverse judicial decisions, and reaffirmed that decision.

employment and that precludes employees from pursuing employment-related collective claims in any forum, arbitral or judicial, unlawfully restricts employees' Section 7 right to engage in protected concerted activity. Such policies, therefore, violate Section 8(a)(1) of the Act.

Just as in *D.R. Horton*, here, Respondent's DRP, signed and executed by employees, including Charging Party Porfiria Vasquez (Vasquez) as a condition of employment, violates Section 8(a)(1) of the Act because it *expressly* prohibits collective claims in both arbitral and judicial forums in mandating that employees "waive the right to bring any covered claim under this Program as a class action." Although the DRP states that the class-action waiver only applies in "jurisdictions" where such "waivers" are "permitted by law," a reasonable employee would not understand such jargon to permit collective action in any forum in that such waiver is vague, confusing and unclear. Thus, just as in *D.R. Horton*, Respondent's maintenance of its DRP violates Section 8(a)(1) of the Act as employees would reasonably interpret it as requiring them to forego the resolution of collective or class action employment-related disputes in any forum.

Further, since December 17, 2015, Respondent violated Section 8(a)(1) of the Act by enforcing and maintaining the DRP when it filed its Motion to Compel Binding Arbitration to restrict Vasquez' collective or class action. Two of Vasquez' claims in the wage and hour lawsuit were filed as collective claims on behalf of herself and "others... similarly aggrieved employees." As is true with any other protected concerted activity, Respondent may not require that employees waive their right to participate in such collective action, nor take action aimed at preventing such

protected conduct as Respondent did here through its Motion to Compel Binding Arbitration.

II. STIPULATED FACTS

The following pertinent facts are not in dispute as they have been stipulated by all parties as referenced in the Joint Stipulation of Facts made a part the Joint Motion to Transfer in these proceedings.²

The charge in this proceeding was filed by Vasquez on January 7, 2016, and a copy was served on Respondent by U.S. mail on or about January 11, 2016. (Joint Stip., ¶ 5(a))

At all material times, Respondent has been a Delaware corporation with operations throughout the United States, including an office and place of business in Redondo Beach, California, where Respondent engages in aerospace and defense contracting. Annually, Respondent performed services valued in excess of \$50,000 for customers located in States other than the State of California. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (Joint Stip., ¶ 5(b)-(d).)

Since at least about September 15, 2006, and at all materials times, Respondent has maintained a corporate procedure regarding an “Employee Mediation/Binding Arbitration Program,” and amended that Program on February 15, 2010 (collectively referred to as the “DRP” for the remainder of this Brief). (Joint Stip., ¶ 5(e) - and Exhibits 2 and 3.)

² All references to the Joint Stipulation of Facts are noted as “Joint Stip.” followed by the paragraph (¶) No. All references to Exhibits contained in the Join Stip. of Facts are noted as “Exhibit ___ to Joint Stip.”

The DRP³ reads in part:

Claims Covered: This Program does not apply to or cover claims . . . [a]s to which an agreement to arbitrate such claims is prohibited by law; [or that are] [c]overed under the National Labor Relations Act and within the exclusive jurisdiction of the National Labor Relations Board. . . .⁴

...

Class Action Claims: To the extent it is permissible to do so in the jurisdiction where the arbitration is held and (if applicable) the jurisdiction where the parties' obligation to arbitrate claims under this Program is enforced, *both you and the Company waive the right to bring any covered claim under this Program as a class action*. In jurisdictions where this is permissible, the arbitrator will not have authority or jurisdiction to consolidate claims of different employees into one proceeding, nor shall the arbitrator have the authority or jurisdiction to hear the arbitration as a class action.

In any jurisdiction where the class action waiver described above is not permitted by law or is not enforceable, the issue of whether to certify any alleged or putative class for a class action proceeding must be decided by a court of competent jurisdiction. The arbitrator will not have authority or jurisdiction to decide class certification issues. Until any class certification issues are decided by the court, all arbitration proceedings shall be stayed, and the arbitrator shall take no action with respect to the matter. However, once any issues regarding class certification have been decided by the court, the arbitrator will have authority to decide the substantive claims on an individual or a class basis, as may be determined and directed by the court. (Joint Stip., ¶ 5(f).) (emphasis added)

³ Both the 2006 and 2010 DRPs contain the same language referenced herein.

⁴ It is anticipated that Respondent will argue the DRP's "carve out" language excluding applicability of its terms to the filing of charges with the NLRB as a factor in determining the DRP's legality. However, it is noted that the instant Complaint does not allege the DRP language at issue to restrict access to the Board and its processes (commonly referred to as a "*U-Haul* violation" for its seminal case in *U-Haul Co.*, 347 NLRB 375 (2006)). As such, the General Counsel takes the position that this "carve out" language and any arguments therefrom are not relevant to the instant dispute and therefore will not be substantively addressed in this Brief.

Vasquez worked for Respondent from about 2004 until her employment ended on or about October 25, 2012. (Joint Stip., ¶ 5(g).)

Since on or about September 15, 2006, and at all material times, Respondent has required employees, including Vasquez, to acknowledge that compliance with the DRP was a condition of employment. (Joint Stip., ¶ 5(h).) Respondent ensured that employees, including Vasquez received the DRP and acknowledged online that they had read and understood the DRP. (Exh. 6, Motion to Compel, Bate Stamps SFF0130-131, 133-135)

On or about August 5, 2015, Vasquez filed a Complaint for Damages and Injunctive Relief against Respondent captioned *Porfiria Vasquez v. Northrop Grumman Systems Corporation, Does 1-50*, case 2:15-CV-05926-AB-AFM (United States District Court, Central District of California) (the “Federal Court Action”). (Joint Stip., ¶ 5(i), and Exhibit 4.)

On or about October 6, 2015, Vasquez filed a First Amended Complaint in the Federal Court Action. (Joint Stip., ¶ 5(j), and Exhibit 5.)

Vasquez’ Federal Court Action alleges nine causes of action against Respondent. Of these, while seven are individual claims filed on Vasquez’ behalf only, two of her claims, one for “Failure to Pay For Meal and Rest Breaks” and the other for “Violation of Unfair Business Practices” (respectively, Sixth and Ninth causes of Action), seek collective remedy for herself and “other ... similarly aggrieved employees ... [who] have been deprived of lawful wages to which ... they were entitled....” (Joint Stip., ¶ 5(j), Exhibit 5 (Federal Court Action Complaint paragraphs 61, 64, 65, 81, and 82, Bate Stamps SOF-110, 112-113))

On or about December 17, 2015, Respondent filed a Motion to Compel Binding Arbitration in the Federal Court Action (Motion to Compel Arbitration or Motion to Compel). Respondent's Motion to Compel was filed concurrently with declarations from Lori Ullmer-McCallum, Gina Piellush, Monica Krause, Alexis Goubran, Lizbeth Aleman, James Carpenter and Taraneh Fard. (Joint Stip., ¶ 5(k), and Exhibit 6.)

Respondent's Motion to Compel moved the Federal Court to require Vasquez to submit the entirety of her Federal Court Action to binding arbitration pursuant to the terms of Respondent's DRP. (Joint Stip., Exh. 6, Motion to Compel, Bate Stamps SFF0130-131, 133-135)

On or about January 4, 2016, Charging Party filed an Opposition to Respondent's Motion to Compel Binding Arbitration. (Joint Stip., ¶ 5(l), and Exhibit 7.)

On or about March 4, 2016, the Court granted Respondent's Motion to Compel Arbitration in the Federal Court Action. (Joint Stip., ¶ 5(m), and Exhibit 8.)

Vasquez is pursuing her claims against Respondent in an arbitral forum and an arbitration hearing is scheduled to begin on April 24, 2017. (Joint Stip., ¶ 5(n), and Exhibit 9.)

III. ISSUES PRESENTED

As agreed by the parties, the following are the issues presented:

1. Whether Respondent violated Section 8(a)(1) of the Act by maintaining the DRP?
2. Whether Respondent violated Section 8(a)(1) of the Act by enforcing the DRP by filing its December 17, 2015 Motion to Compel in the Federal Court Action?

IV. ARGUMENT AND ANALYSIS

A. Respondent’s Mandatory Arbitration Provision/DRP, and Maintenance Thereof, Violates Section 8(a)(1) of the Act Because It Precludes Employees From Filing Class or Collective Claims in Any Forum.

In *Murphy Oil* the Board reiterated its holding in *D.R. Horton* that an employer violates Section 8(a)(1) of the Act by maintaining a mandatory arbitration agreement that waives employees’ right to maintain class or collective actions and requires individual arbitration of employees’ legal claims. The Board in *Murphy Oil* emphasized that such agreements are unlawful because “[f]or almost 80 years, Federal labor law has protected the right of employees to pursue their work-related legal claims *together*, i.e., with one another, for the purpose of improving their working conditions.” 361 NLRB No. 72, slip op. at 1.

The Board in *D.R. Horton* applied the *Lutheran Heritage Village* test,⁵ and found that an agreement requiring employees to waive their right to collectively pursue employment-related claims in all forums violates Section 8(a)(1) “because it expressly restricts Section 7 activity or, alternatively, *because employees would reasonably read it as restricting such activity.*”⁶ (emphasis added) In sum, the Board, definitively held in *D.R. Horton*, as affirmed by *Murphy Oil*, that an employer violates Section 8(a)(1) by requiring employees “as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing

⁵ *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004).

⁶ 357 NLRB No. 184, slip op. at 7.

their wages, hours or other working conditions against the employer in any forum, arbitral or judicial.”⁷

Here it is undisputed that Respondent required employees, including Vasquez, to acknowledge that compliance with the DRP was a condition of employment. (Joint Stip., ¶ 5(h).) Respondent ensured that employees, including Vasquez received the DRP and acknowledged online that they had read and understood the terms of the DRP. (Exh. 6, Motion to Compel, Bate Stamps SFF0130-131, 133-135.) There is likewise no dispute that the DRP contains a class action waiver *expressly* asserting that “both you and the Company waive the right to bring any covered claim under this Program as a class action.”

The DRP’s class action waiver violates section 8(a)(1) because employees would reasonably construe it to prohibit the filing of collective action in any forum. Respondent’s defense that the class action waiver does not violate *D.R. Horton* because it only applies “in any jurisdiction where the class action waiver described above is not permitted by law or is not enforceable” is unavailing. The Board has consistently held that “savings clauses” such as the one issue here do not cure an unlawful overly broad provision.⁸

Here, the DRP’s class action waiver starts with confusing language that reads: “To the extent it is permissible to do so in the jurisdiction where the arbitration is held

⁷ *Id.*, slip op. at 1.

⁸ See *Allied Mechanical*, 349 NLRB 1077, 1084 (2007) (employer’s unlawful conditioning of settlement of employee wage claims upon the requirement that employees not engage in protected activity was not saved by clause stating “unless ... permitted by federal or state law including but not limited to the National Labor Relations Act.”).

and (if applicable) the jurisdiction where the parties' obligation to arbitrate claims under this Program is enforced...". However, the Board has held, that general references to "applicable law," i.e., in this instance, choice of jurisdictions, do not cure the overly broad language in the waiver at issue because there is no way an employee is likely to know to which jurisdictions such waiver would apply to.⁹ Neither would the statement in the "Claims covered" section of the DRP carving out individual or collective claims arising under the Act cure the explicit waiver of collective action provision that follows it.¹⁰

In other words, applying the aforementioned principles, although the DRP states that the class-action waiver only applies in jurisdictions where such waivers are permitted by law, a reasonable employee would not understand such language to permit collective action in any forum and would elect to refrain for engaging in conduct protected by the Act. Thus, at best, the DRP's class action waiver is ambiguous and confusing as to whether employees are still permitted to file collective or class actions in any forum; at worst, the DRP is intended to prohibit employees' exercise of these Section 7 rights as Respondent has sought to do so here through its

⁹ *Ingram Book Co.*, 315 NLRB 515, 516 & 516, n.2 (1994) (finding maintenance of a disclaimer that "[t]o the extent any policy may conflict with state or federal law, the Company will abide by the applicable state or federal law" did not salvage the employer's overbroad no-distribution policy; "[r]ank-and-file employees ... cannot be expected to have the expertise to examine company rules from a legal standpoint.").

¹⁰ See *Allied Mechanical*, 349 NLRB at 1077, n.1 (Member Kirsanow concurring) (agreeing with ALJ that problem with settlement release was that "it assumes employees 'are knowledgeable enough to understand that the Act permits the very thing prohibited in the first portion' of the release."). See also *McDonnell Douglas Corporation*, 240 NLRB 794, 802 (1979) ("employees would not know what conduct is protected by the National Labor Relations Act and, rather than take the trouble to get reliable information on the subject, would elect to refrain from engaging in conduct that is in fact protected by the Act."). See also *Solar City Corporation*, 363 NLRB No. 83 (2015). (Board holding that that access to administrative agencies is not the equivalent of access to a judicial forum where employees themselves may seek to litigate.)

Motion to Compel Arbitration.¹¹ Because employees “*would reasonably read [the class action waiver]... as restricting such [collective action] activity*” the DRP violates Section 8(a)(1) under *D.R. Horton*. *Supra*, 357 NLRB No. 184, slip op. at 7

Therefore, just as in *D.R. Horton*, Respondent’s maintenance of its DRP’s class action waiver, which Respondent required employees to enter into as a condition of employment, violates Section 8(a)(1) of the Act as employees would reasonably interpret it as requiring them to forego the resolution of collective or class actions employment-related disputes in any forum.

B. Respondent’s Enforcement of Its Mandatory Arbitration Provision/DRP by Its Motion to Compel Arbitration also Violates Section 8(a)(1) of the Act

In *Murphy Oil*, the Board reiterated *D.R. Horton*’s holding that an employer violates Section 8(a)(1) of the Act when it enforces its unlawful arbitration provision through a motion to compel arbitration to prevent employees’ collective claims. 361 NLRB No. 72, slip op. at 19-21. In so holding, the Board found that the employer’s motion to compel individual arbitration was not protected by the First Amendment because it had the illegal objective of seeking to enforce an unlawful contract provision. *Id.* See also *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 737 n.5 (1983). Under the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), specifically applied by the Board to mandatory arbitration agreements in *D.R. Horton* and *Murphy Oil*, a Section 8(a)(1) violation will be found where, as in

¹¹ See, e.g., *Bill’s Electric, Inc.*, 350 NLRB 292, 296 (2007); *Dish Network Corp.*, 358 NLRB No. 29, slip op. at 7-8 (2012); *U-Haul Co. of California*, 347 NLRB 375, 377-78 (2006), enfd. mem. 255 F. Appx. 527 (D.C. Cir. 2007).

this case as further noted below, Respondent DRP’s class action waiver has been applied to restrict the exercise of collective concerted action. *See, e.g., Countrywide Financial Corp.*, 362 NLRB No. 165 (2015), slip op. at 3.

It is clear that Vasquez’s Federal Court Action constituted protected concerted activity. As to collective litigation initiated by an individual, the Board has held that an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7. *D.R. Horton*, supra, 357 NLRB at 2279. The Board further explained its rationale for finding the filing of a class or collective action to be protected concerted activity in *Murphy Oil*.

By definition, such an action is predicated on a statute that grants rights to the employee’s coworkers, and it seeks to make the employee the representative of his colleagues for the purpose of asserting their claims, in addition to his own. Plainly, the filing of the action contemplates—and may well lead to—active or effective group participation by employees in the suit, whether by opting in, by not opting out, or by otherwise permitting the individual employee to serve as a representative of his coworkers. It is this potential ‘to initiate or to induce or to prepare for group action,’ in the phrase of *Meyers II* [*Meyers Industries*, 281 NLRB 882, 887 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988)]—collectively seeking legal redress—that satisfies the concert requirement of Section 7.

Murphy Oil USA, supra, 361 NLRB slip op. at 13.

In *Beyoglu*, 362 NLRB No. 152, slip op. at 2 (2015), the Board specifically found that an individual employee’s employment related action, similar to that of Vasquez in this case, can be protected, concerted activity. The Board in *Beyoglu* applied the principles articulated in *Meyers II*, *D.R. Horton* and *Murphy Oil USA*, and held that, “we hold that the filing of an employment-related class or collective action by an

individual employee is an attempt to initiate, to induce, or to prepare for group action and is therefore conduct protected by Section 7.” See *RPM Pizza, LLC*, 363 NLRB No. 82 (December 22, 2015), at fn. 4. See also *SF Markets, LLC*, 363 NLRB No. 146, *supra*, slip op. at 2 (rejecting dissenting colleague’s argument that charging party was not engaged in concerted activity in filing class action wage-and hour lawsuit, citing *Beyoglu*); *Bloomingtons, Inc.*, 363 NLRB No. 172 (April 29, 2016), slip op. at 4, (unlawful enforcement of arbitration policy where employer filed motion to compel individual arbitration in response to a state law wage-and-hour class action complaint)

Here, in Vasquez’ Federal Court Action, two of her claims, one for “Failure to Pay For Meal and Rest Breaks” and the other for “Violation of Unfair Business Practices” (respectively, Sixth and Ninth causes of Action), seek collective remedy for herself and “other ... similarly aggrieved employees ... [who] have been deprived of lawful wages [by Respondent] to which ... they were entitled...” (Joint Stip., ¶ 5(j), Exhibit 5 (Federal Court Action Complaint paragraphs 61, 64, 65, 81, and 82; Bate Stamps SOF-110, 112-113)). As such, based on the above-noted principles, Vasquez’ prayer of relief on said two claims on behalf of similarly situated employees is sufficient to establish that Vasquez was engaged in collective or class litigation as an “attempt to initiate, to induce, or to prepare for group action ... [which is] conduct protected by Section 7.” 362 NLRB No. 152, slip op. at 2.

As to Respondent’s Motion to Compel Arbitration, it is undisputed that Respondent moved the Federal Court to have Vasquez submit her Federal Court Action, including her collective litigation as noted above, to binding arbitration pursuant to the terms of Respondent’s DRP, which as noted in the first Section of this

brief, is facially unlawful. The Federal Court granted Respondent's Motion and Vasquez is now compelled to pursue all her claims in an arbitration hearing scheduled to occur on April 2017. Although Respondent's Motion to Compel does not specifically call for individual arbitration, Respondent through such Motion nevertheless applied the DRP's class action waiver to restrict those portions of Vasquez Federal Court Action, which as noted above, qualify as collective or class litigation. Therefore, because Respondent's Motion To Compel Arbitration had the illegal objective of seeking to enforce the DRP's unlawful class action waiver to prevent Vasquez' class action claims, Respondent, by the filing of such Motion, violated Section 8(a)(1) of the Act.

C. Respondent's Remaining Anticipated and Affirmative Defenses Should Be Rejected

1. *D.R. Horton* Remains Board Law

Respondent cannot escape well-settled law that the Board's administrative law judges are required to follow established Board precedent that the Supreme Court has not reversed. *Waco, Inc.*, 273 NLRB 746, 749 n.14 (1984); *Los Angeles New Hosp.*, 244 NLRB 960, 962 n.4 (1979), *enforced* 640 F.2d 1017 (9th Cir. 1981). As noted herein, the Board independently reexamined *D.R. Horton*, considered adverse judicial decisions, and reaffirmed that decision in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014). Consequently, as *D.R. Horton* has not been overturned by the Supreme Court, it is binding precedent and the controlling case law for the issue at hand.

2. Section 10(b) Is No Bar Because the Mandatory Arbitration Policy Has Been Maintained and Enforced Within the Section 10(b) Period

The Administrative Law Judge also should reject Respondent's affirmative/anticipated defense that the Board has no jurisdiction over the alleged unfair labor practices set forth in the Complaint because they are barred by Section 10(b) of the Act. Section 10(b) does not preclude the pursuit of a complaint allegation based on the maintenance and/or enforcement of an unlawful rule or policy within the Section 10(b) period, even if the rule was promulgated earlier. See *Control Services*, 305 NLRB 435, 435 fn. 2, 442 (1991), *enfd. mem.* 961 F.2d 1568 (3d Cir. 1992); see also *The Guard Publishing Co.*, 351 NLRB 1110, 1110, fn.2 (2007). Here, while Respondent may assert that this charge is time-barred because Vasquez signed the employment application outside of the Section 10(b) period, the operative action establishing the alleged violation, Respondent's Motion to Compel Arbitration, occurred on December 17, 2015. The charge in this proceedings was filed about 3 weeks later, on January 7, 2016, clearly within six months of the filing of the Motion to Compel. In other words, although the DRP had been promulgated more than six months before the charge was served, the ramifications of the DRP provision continue into the Section 10(b) period as amply evidenced by Respondent's attempts to enforce it. All Respondent's employees, who were covered by the DRP provision have had their Section 7 rights infringed upon. At any time, the mandatory arbitration provision may be enforced against them. As such, the maintenance of Respondent's DRP within the Section 10(b) period was unlawful even though the rule was promulgated before then.

3. The Board Does Not Lack Jurisdiction to Order Reimbursement for Litigation Expenses

The Administrative Law Judge also should reject Respondent's anticipated defense that the Complaint is barred because the Board lacks jurisdiction to order Respondent to reimburse Vasquez for litigation expenses incurred in connection with addressing the Motion to Compel in the Federal Court Action. Consistent with the Board's usual practice in cases involving unlawful legal actions, Respondent should be ordered to reimburse employees for any attorney's fees and litigation expenses directly related to opposing Respondent's unlawful Motions To Compel Arbitration. *Murphy Oil USA, supra*, 361 NLRB No. 72, slip op. at 30. *See also Bill Johnson's Restaurants*, 461 U.S. at 747 ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses" and "any other proper relief that would effectuate the policies of the Act"), on remand, 290 NLRB 29, 30 (1988); *Phoenix Newspapers*, 294 NLRB 47, 51 (1989); *Summitville Tiles, Inc.*, 300 NLRB 64, 67, 77 (1990).

4. The Board May Seek Status Quo Ante

The Administrative Law Judge also should reject Respondent's anticipated defense that the Complaint is barred because the Board lacks jurisdiction to order Respondent to take action in connection with Vasquez' Federal Court Action.

As part of the remedy sought in this matter, the General Counsel seeks to remedy the legal consequences of Respondent's unlawful Motion, and return employees to the *status quo ante*. Thus, because Respondent's Motion to Compel Arbitration has already been granted, Respondent should be required to move the

appropriate court to vacate its order for individual arbitration, if such can be timely filed.¹² *Murphy Oil USA, supra*, 361 NLRB No. 72, slip op. at 30.

5. Principles of Collateral Estoppel and Res Judicata Do Not Preclude Proceeding Against Respondent’s Motion to Compel Arbitration

Respondent’s anticipated defense that previous litigation and rulings in Vasquez’s underlying Federal Court Action is a bar to the instant proceedings is misplaced. The doctrine of collateral estoppel, or “issue preclusion,” provides that “once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.” *Montana v. United States*, 440 U.S. 147, 153 (1979). Thus, collateral estoppel bars not only the decision-making court, but also any other court, from reconsidering the same issue. *United States v. Stauffer Chemical*, 464 U.S. 165 (1984). It is well established that three elements must be satisfied in order for collateral estoppel to apply: (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated in the prior litigation by the party against whom preclusion is asserted; and (3) the determination of the issue must have been a critical and necessary part of the final judgment in the earlier action. *Town of North Bonneville v.*

¹² We note that, depending on the jurisdiction, a motion for relief from judgment or order due to legal error, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, may be timely filed for a short period beyond the entry of final judgment (see, e.g., *Steinhoff v. Harris*, 698 F.2d 270, 275 (6th Cir. 1983) (“the vast majority of courts that have concluded that legal error comes within the meaning of Rule 60(b)(1) have also determined that . . . the moving party must make his or her motion within the time limits for appeal”), and even beyond the expiration of the period for filing an appeal (see, e.g., *Lairsey v. Advance Abrasives Co.*, 542 F. 2d 928, 930-932 (5th Cir. 1976) (permitting a Rule 60(b) motion after the time limit for appeal had expired, but within one year of the judgment, where there had been a change in the underlying law).

Callaway, 10 F.3d 1505, 1508 (9th Cir. 1993) (quoting *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320 (9th Cir. 1992)).

As a general rule, the Federal Government is not barred from subsequently litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully, unless the Federal Government was a party in the prior litigation. *United States v. Mendoza*, 464 U.S. 154, 162 (1984); *Field Bridge Associates*, 306 NLRB 322 (1992), *enfd. sub nom. Local 32B-32J Service Employees Intern. Union, AFL-CIO v. NLRB*, 982 F.2d 845 (2d Cir. 1993), *cert. denied* 509 U.S. 904 (1993). The Board has long held that “if the Government was not a party to the prior private litigation, it is not barred from litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully.” *Field Bridge Associates*, 306 NLRB at 322, citing *Allbritton Communications*, 271 NLRB 201, 202 *fn.4* (1984), *enfd.* 766 F.2d 812 (3d Cir. 1985), *cert denied* 474 U.S. 1081 (1986); see also, e.g., *Precision Industries*, 320 NLRB 661, 663 (1996), *enfd.* 118 F.3d 585 (8th Cir.1997), *cert. denied* 523 U.S. 1020 (1998). As the Board has stated, “Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief,” and the Board is “the public agency . . . chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce.” *Field Bridge Associates*, 306 NLRB at 322, quoting *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 265 (1940).

The General Counsel recognizes that two circuit court decisions *have* applied collateral estoppel principles to the Board and denied enforcement of Board orders in

unfair labor practice cases that turned on the existence of a contract. *Donna-Lee Sportswear*, 836 F.2d 31 (1st Cir. 1987); *NLRB v. Heyman*, 541 F.2d 796 (9th Cir. 1976). In *Donna-Lee Sportswear*, the First Circuit held that the Board was precluded from finding an effective contract because a court had already ruled that no binding contract was in existence. 836 F.2d at 35. The court emphasized there that: (1) it was not unusual for a court to determine whether there was a valid contract; and (2) the private interests of the disputants predominated in that case, rather than any public rights at issue. *Id.* at 36-38. In *NLRB v. Heyman*, the Ninth Circuit denied enforcement of a Board order that the employer had unlawfully repudiated a collective-bargaining agreement and refused to bargain with the union. Instead, the court held that the Board was bound by a previous federal district court decision in a Section 301 lawsuit that rescinded the collective-bargaining agreement due to the union's lack of majority status. The Ninth Circuit wrote that "[a]n implicit collateral attack, launched through the filing of charges premised on the contract, may not be entertained by the Board under the guise of different policy considerations." 541 F.2d at 799. The Board has noted that, in both of those cases, the issue in the unfair labor practice case – whether there was a contract or not – was the same issue as the one that had been decided in the court proceeding. See, e.g., *Precision Industries*, 320 NLRB at 663 n.13.

In the instant case, of course, the Board was not a party to any of the private court actions in Vasquez' Federal Court Action. Therefore, under established Board law, it is clear that the Board is not precluded from proceeding against the unlawful Respondent's Motion to Compel at issue here. Moreover, the issue at stake in the

instant case is not identical to any decided in any prior litigation – this case deals with whether Respondent’s class action waiver found in its DRP unlawfully interferes with employees’ Section 7 rights under the NLRA, while the courts have considered whether to compel individual arbitration pursuant to a mandatory arbitration provision under the FAA. Finally, the issue here does not concern a private dispute about the mere existence of a contract in which the particular interests of the disputants predominate, and as to which the courts may be at least as capable of determining as the Board. Rather, this case deals with whether Respondent’s enforcement of its DRP violates employees’ Section 7 rights – an issue regarding a public right that is within the exclusive authority and expertise of the Board. Thus, even under the rationale of *Donna-Lee Sportswear*, the Board is not precluded from finding that Respondent violated Section 8(a)(1) of the Act by Moving to Compel Arbitration pursuant to its DRP in preventing collective action, even after a state or federal court has granted such a motion.

Similarly, any argument by Respondent that the doctrine of res judicata bars the instant complaint is without merit. The concept of res judicata applies only to a “final judgment” on the merits and bars further claims by parties based on the same cause of action. *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326 (1955). Here, there was no final decision on the merits rendered in the Federal Court Action that could preclude the Board from proceeding with this Complaint.

V. CONCLUSION

Respondent's class action waiver contained in its DRP since September 2006 entered into by employees including Vasquez as a condition of employment and maintained and enforced through Respondent's December 17, 2015 Motion to Compel Arbitration, violates Section 8(a)(1) because it interferes with employees' Section 7 right to participate in collective and class litigation. Further, Respondent's Motion to Compel Arbitration is itself unlawful as having the illegal objective of preventing Section 7 activity.

A remedial Order is respectfully requested ordering Respondent to (1) rescind the unlawful class action waiver in its DRP at issue and notify all employees who were subjected to same from September 2006 onward of the rescission; (2) post a notice at all locations where the DRP provision has been in effect; (3) cease and desist from maintaining the unlawful provisions; (4) cease and desist from enforcing that portion of its DRP prohibiting collective and class actions; (5) reimburse Vasquez for any litigation expenses directly related to opposing Respondent's unlawful Motion to Compel Arbitration; and (6) move the District Court, jointly with the Charging Party upon request, to vacate its order compelling the Charging Party to arbitration, if a motion to vacate can still be timely filed.

DATED AT Los Angeles, California, this 21st day of October 2016.

Respectfully Submitted,

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