

UNITED STATES OF AMERICA NATIONAL  
LABOR RELATIONS BOARD REGION 31

NORTHROP GRUMMAN  
SYSTEMS CORPORATION,

Respondent

And

PORFIRIA VASQUEZ,

Charging Party

Case 31-CA-167294

CHARGING PARTY'S

POST-TRIAL BRIEF

VIDA M. HOLGUIN, Attorney

2230 E. Maple Avenue

El Segundo, CA 90245

Attorney for Charging Party

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*Lewis v. Epic-Systems Corp*, 823 F.3d 1147 (7th Cir. 2016)

*Morris et al. v. Ernst & Young, LLP*, 2016 WL 4433080 (9th Cir. 2016)

*Teamsters Local 776 v. NLRB* 973 F.2d 230 (3d Cir. 1992)

### FEDERAL RULES

National Labor Relations Act, 29 U.S.C. §§ 151 - 169

## **I. INTRODUCTION**

This matter was tried without a formal hearing, on the basis of a JOINT MOTION TO TRANSFER PROCEEDINGS TO THE DIVISION OF JUDGES AND STIPULATION OF FACTS, STATEMENT OF ISSUES PRESENTED, AND PARTIES' BRIEF STATEMENT OF POSITION.

The issues presented are:

1. Did Northrop Grumman Systems Corporation ("Northrop") violate Section 8(a)(1) of the National Labor Relations Act ("Act") by maintaining its Dispute Resolution Procedure ("DRP")?

2. Did Northrop violate Section 8(a)(1) of the Act by enforcing the DRP by filing its December 17, 2015 Motion to Compel Binding Arbitration of Charging Party's Federal Court Action?

## **II. STIPULATED FACTS**

1. At all material times, Respondent Northrop has been a Delaware corporation with a place of business in Redondo Beach, CA, performing services in excess of \$50,000 in other states, and an employer engaged in commerce within the meaning the Act.

2. The Charging Party Porfiria Vasquez worked for Respondent Northrop from about 2004 until her employment ended on or about October 25, 2012.

3. Since at least September 15, 2006, and at all material times, Respondent Northrop maintained a corporate procedure regarding an "Employee Mediation/Binding Arbitration Program," aka DRP, which it amended on or about February 15, 2010.

Respondent has required employees, including Charging Party, to acknowledge that compliance with the DRP was a condition of employment.

4. The DRP provided in relevant part that:

**“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...

**“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 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 any 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 or directed by the court.”**

5. On or about August 5, 2015, Charging Party Vasquez filed a complaint for damages and injunctive relief against Respondent Northrop in the U.S. District Court, Central District of California, case 2:15-CV-05926-AB-AFM (“Federal Court Action”). On October 6, 2015, Charging Party Vasquez filed a 1<sup>st</sup> amended complaint.

6. On or about December 17, 2015, Respondent Northrop filed a motion to compel binding arbitration in the federal court action with supporting declarations.

7. On or about January 4, 2016, Charging Party Vasquez filed an opposition to Respondent Northrop’s motion to compel. On or about March 4, 2016, the court granted Respondent Northrop’s motion to compel binding arbitration in the federal court action.

8. Currently, the Charging Party is pursuing her claims against Respondent Northrop in in our patrol forum, and an arbitration hearing is scheduled to begin for April 24, 2017.

9. Respondent Northrop did not discipline or terminate Charging Party Vasquez because she filed a class, collective, or joint action or complaint.

### **III. SUMMARY OF ARGUMENT**

It is undisputed that the DRP was a condition of employment. Respondent Northrop asserts that it emailed and mailed the 2010 DRP to Charging Party Vasquez. Vasquez asserts that she could not access general email because she worked in a high security area prohibiting such access; also that she did not receive any DRP in the mail, which was not mailed by Northrop but by a third party vendor<sup>1</sup>. The DRP required arbitration of all

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<sup>1</sup> Northrop’s mail argument was raised only in its Reply, not in its moving papers, curtailing Vasquez’ ability to address the hearsay evidence.

employment disputes, even class and representative actions. Respondent Northrop considered Charging Party's continued employment as acceptance of its DRPs. Charging Party Vasquez filed her complaint in the U.S. Central District of California; Respondent Northrop filed a motion to compel arbitration, and the Court granted the motion. See, Stipulated Facts. These facts support a finding that Respondent Northrop violated the NLRA.

#### **IV. ARGUMENT**

##### **A. Respondent Northrop's DRPs Violate the NLRA.**

On August 22, 2016, the Ninth Circuit in *Morris et al. v. Ernst & Young, LLP*, 2016 WL 4433080 (9th Cir. 2016) followed the NLRB lead as well as the Seventh Circuit in finding that an arbitration agreement which required employees to bring claims in "separate proceedings," thereby prohibiting class and collective actions, violated the employees' right to engage in concerted activity under the NLRA. See also, *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013); *Lewis v. Epic-Systems Corp*, 823 F.3d 1147 (7th Cir. 2016). The NLRB will and should continue to find that class or collective action waivers, such as in Respondent's DRPs, violate the NLRA. Both 2006 and 2010 DRPs restrict employees from bringing collective claims in court as well as in arbitration. By prohibiting employees from bringing collective claims in both court and arbitration, Respondent Northrop's DRPs at issue unlawfully restrict and interfere with employees' Section 7 right to engage in concerted action for mutual aid or protection in violation of Section 8(a)(1) of the Act.

While the Ninth Circuit has held that an arbitration agreement requiring individual arbitration may be enforceable, it may be upheld only if the employee has the right to opt

out of the agreement without penalty, ensuring the employer did not “interfere with, restrain, or coerce” an employees’ rights in violation of Section 8 of the Act.

*Johnmohammadi v. Bloomingdale’s, Inc.*, 755 F.3d 1072, 1077 (9th Cir. 2014). Charging Party Vasquez did not have that luxury under the DRPs. Both of Respondent Northrop's DRPs fall squarely within the Board's holdings in *Morris et al. v. Ernst & Young* and *D.R. Horton* because employees are required, as a condition to continue their employment, to agree to these terms, which precludes them from filing collective claims in any forum in violation of Section 8(a)(1) of the Act, thus rendering the DRPs unenforceable.

**B. Respondent Northrop’s DRP Prohibited the Filing of ULP Charges.**

Additionally, as worded, Respondent Northrop’s employees could reasonably construe the DRPs to prohibit even the filing of unfair labor practice charges with the Board. The language of the arbitration provisions in the DRPs is broad, confusing, and unclear. The language in the 2006 DRP provided:

“[T]his Program covers and applies to *any claim, controversy, or dispute, past, present, or future*: which in any way arises out of, relates to, or is associated with your employment with the Company, the termination of your employment.... By accepting or continuing employment on or after 1 November 2006, all covered employees agree to submit any covered disputes to binding arbitration, rather than to have such disputes heard by a court or jury” (Emphasis provided).

The 2010 DRP, which revised and superseded Northrop’s 2006 DRP, provided similar language:

“By accepting or continuing employment...all covered employees agree to submit any covered claims to binding arbitration, rather than to have such claims heard by a court or jury.”

The 2010 DRP also set forth examples of **employment claims** which are covered including claims for: “**Any violation of applicable federal, state, or local law, statute, ordinance, or regulation.**”

Both DRPs are ambiguous and confusing as to whether employees are permitted to file charges with the Board; at worst, they are intended to prohibit employees' exercise of these Section 7 rights to do so.<sup>2</sup>

C. Bill Johnson's Restaurants Supports a Finding That Respondent Northrop's Efforts to Enforce Its Current DRP by Filing Its December 17, 2015 Motion Violate Section 8(a)(1).

Respondent's efforts to enforce its 2010 DRP through its December 17, 2015 motion also violated Section 8(a)(1) of the Act under *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 737 n.5 (1983). In footnote 5 of *Bill Johnson's Restaurants*, the Court stated that it did not intend to preclude the enjoining of suits that have "an objective that is illegal under federal law." In such circumstances, "the legality of the lawsuit enjoys no special protection under *Bill Johnson's*." *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 834 (1991), *enfd.* 973 F.2d 230 (3d Cir. 1992), *cert. denied* 507 U.S. 959 (1993). Respondent Northrop's December 17, 2015 motion at issue here has an illegal objective because it was directly

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<sup>2</sup> 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).

aimed at preventing employees' protected conduct. Indeed, the only objective of Respondent's motion was to prohibit employees from engaging in Section 7 activity.

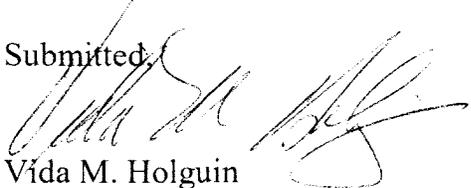
## V. CONCLUSION

Both of Respondent Northrop's DRPs violate Section 8(a)(1) of the Act because they are unlawful under the recent Ninth Circuit's *Morris et al. v. Ernst & Young, LLP* decision as well as *D.R. Horton*, as these policies expressly prohibit the exercise of substantive rights protected by Section 7 of the Act, *i.e.*, bringing collective or class actions in any forum. In addition, both DRPs lead employees to reasonably conclude that they are precluded from filing ULP charges or otherwise accessing the Board's processes, and, thereby, violates Section 8(a)(1) of the Act on those grounds as well. Finally because both DRPs are unlawful, Respondent's December 17, 2015 motion to compel arbitration is itself unlawful.

Because both of Respondent's DRPs clearly violate the Act, it is respectfully requested that an Order is issued in due course mandating that Respondent Northrop comply with all remedial relief requested in the Complaint as just and proper to remedy the proven unfair labor practices alleged.

DATED AT Los Angeles, California, this 21<sup>st</sup> day of October 2015.

Submitted:



Vida M. Holguin  
Counsel for Charging Party  
Porfiria Vasquez

Re: NORTHROP GRUMMAN SYSTEMS  
Cases: Case 31-CA-16729

**CERTIFICATE OF SERVICE**

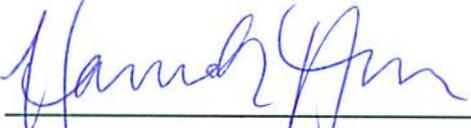
I hereby certify that I served the attached CHARGING PARTY'S POST TRIAL BRIEF on the parties listed below on the 21<sup>st</sup> day of October 2016:

**SERVED VIA E-FILING**

Chief Administrative Law Judge  
National Labor Relations Board  
Division of Judges  
[www.nlr.gov](http://www.nlr.gov)

**SERVED VIA E-MAIL**

Thomas M. Stanek, Esquire  
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.  
2415 East Camelback Road, Suite 800  
Phoenix, AZ 85016  
[Thomas.Stanek@ogletreedeakins.com](mailto:Thomas.Stanek@ogletreedeakins.com)

  
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**HANNAH DUNN**