

Oral Argument Not Yet Scheduled

**No. 15-60856**

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**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

**CITIGROUP TECHNOLOGY, INC., and CITICORP BANKING  
CORPORATION (parent), a subsidiary of CITIGROUP, INC.**

**Petitioners/Cross-Respondents**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION  
FOR ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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## STATEMENT REGARDING ORAL ARGUMENT

Because this case involves issues decided by the Court in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), the Board does not request oral argument.

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**BRIEF FOR  
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**STATEMENT OF SUBJECT MATTER AND  
APPELLATE JURISDICTION**

This case is before the Court on the petition of Citigroup Technology, Inc. and Citicorp Banking Corporation (“the Company”) for review, and the cross-application of the National Labor Relations Board (“the Board”) for enforcement, of a Board Decision and Order issued against the Company on December 1, 2015,

and reported at 363 NLRB No. 55. (ROA. 218-28.)<sup>1</sup> The Board had subject-matter jurisdiction over the proceeding below under Section 10(a), 29 U.S.C. § 160(a), of the National Labor Relations Act, as amended (“NLRA”), 29 U.S.C. § 151, et seq. The Court has jurisdiction over this proceeding under Section 10(e) and (f) of the NLRA, 29 U.S.C. § 160(e) and (f), because the Board’s Order is final and the Company transacts business in this circuit. The Company’s petition and the Board’s cross-application were timely because the NLRA places no time limit on the initiation of review or enforcement proceedings.

### **STATEMENT OF THE ISSUE**

Whether the Board reasonably found that the Company violated Section 8(a)(1) of the NLRA by maintaining, as a condition of employment, an arbitration agreement that requires employees to waive their right to maintain class or collective actions in any forum, arbitral or judicial.

### **STATEMENT OF THE CASE**

#### **I. THE BOARD’S FINDINGS OF FACT**

The Company is a global financial services institution that employs thousands of employees nationwide. (ROA. 221; 2.) It is undisputed that since December 2012, the Company has required, as a condition of employment, that all

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<sup>1</sup> “ROA.” references are to the record on appeal. “Br.” references are to the Company’s opening brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

newly hired employees agree to and accept its Employment Arbitration Policy (“EAP”). By signing the EAP, employees agree to resolve “all disputes arising out of or in any way related to employment based on legally protected rights” exclusively through individual arbitration. (ROA. 221; 20-21, 49-54, 68-73.) The EAP specifically states that it applies “only to claims brought on an individual basis. Consequently neither [the Company] nor any employee may submit a class action, collective action, or other representative action for resolution under [the EAP].” (ROA. 221; 50.)

In early 2013, the Company hired Darlene Echevarria and Andrea Smith as antimoney laundering operations analysts in its Tampa, Florida office. It required both to consent to the EAP. (ROA. 221-22; 2, 56-61, 66, 74.) Echevarria worked for the Company until August 2013. (ROA. 221; 2.) Smith worked for the Company until March 2014. (ROA. 222; 3.)

On March 28, 2014, Echevarria filed a demand for arbitration with the American Arbitration Association (“the AAA”) “on her own behalf and others similarly situated,” including Smith and three other former employees who had consented to join the arbitration. (ROA. 222; 75, 84, 90.) The demand asserted that the Company had failed to pay overtime wages as required by the Fair Labor Standards Act (“FLSA”) to antimoney laundering

operations analysts. (ROA. 222; 75-76.) The demand requested designation of the arbitration as a collective action. (ROA. 82-83.)

After receiving the demand, the AAA requested a copy of the arbitration agreement in order to determine whether to proceed with the class action. (ROA. 92.) The following day, the Company responded and asked the AAA to reject the action because Echevarria “explicitly waived her right to bring a collective, class or any other form of representative action in arbitration or otherwise.” (ROA. 222; 94.) The AAA agreed, and notified the parties that it could not administer the matter as a class action “since the [EAP] prohibits class claims.” (ROA. 222; 97.)

## **II. PROCEDURAL HISTORY**

Based on a charge filed by Smith, the Board’s General Counsel issued a complaint alleging that the Company had violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by maintaining and enforcing a mandatory arbitration agreement that interfered with, restrained, and coerced employees in the exercise of their rights guaranteed in Section 7 of the NLRA, 29 U.S.C. § 157. (ROA. 218, 222; 19-39.) Following the parties’ joint motion to waive a hearing and their submission of a statement of issues, stipulation of facts, and record exhibits, an administrative law judge found that the Company had violated Section 8(a)(1) of the NLRA by maintaining the EAP. (ROA. 222-23.) The judge also found that the

Company violated Section 8(a)(1) by enforcing the EAP because, after the demand for class arbitration was filed with the AAA, the Company informed the AAA that the EAP did not provide for class treatment of arbitration demands. (ROA. 223.)

### **III. THE BOARD'S CONCLUSIONS AND ORDER**

The Board (Members Hirozawa and McFerran; Member Miscimarra, concurring in part and dissenting in part) affirmed the judge's finding that the Company violated Section 8(a)(1) of the NLRA by maintaining an arbitration agreement that required employees to waive their right to concerted legal action, pursuant to its decisions in *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), *enforcement denied in relevant part*, 737 F.3d 344 (5th Cir. 2013), *petition for reh'g en banc denied*, 5th Cir. No. 12-60031 (April 16, 2014), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *petition for reh'g en banc denied*, 5th Cir. No. 14-60800 (May 13, 2016), *petition for cert. pending*, No. 16-307 (filed Sept. 9, 2016). The Board dismissed (ROA. 218 n.3) the allegation that the Company further violated the NLRA by enforcing the EAP.<sup>2</sup>

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<sup>2</sup> In dismissing that allegation, the Board (ROA. 218) explained that because the former employees filed a demand for arbitration, not an action in court, the Company's invocation of the EAP in the arbitration proceeding did not foreclose employees from pursuing a collective claim in a judicial forum. As a result, the Company's reliance on the EAP did not amount to unlawfully enforcing a waiver of employees' right to pursue class or collective actions in *all* forums. *See D.R. Horton*, 357 NLRB at 2288 (emphasis in original) (“[E]mployers may not compel

The Board's Order requires the Company to cease and desist from the unfair labor practice found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the NLRA. (ROA. 218, 226-27.) Affirmatively, the Order requires the Company to rescind or revise the EAP and to make clear to employees that the policy does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums. (ROA. 226.) The Order further requires the Company to notify employees that the EAP has been rescinded or revised, and, if revised, to provide them a copy of the revised agreement. (ROA. 226.) Finally, the Order requires that the Company post a remedial notice at its Tampa, Florida, facility and at all other facilities where the EAP is or has been in effect. (ROA. 226.)

### **SUMMARY OF ARGUMENT**

The Board applied its *D.R. Horton* and *Murphy Oil* decisions to find that the Company violated Section 8(a)(1) of the NLRA by maintaining the EAP, which bars employees from pursuing work-related claims on a joint, class, or collective basis in any forum. The Board acknowledges, however, that this Court's decisions in *D.R. Horton* and *Murphy Oil* rejected the Board's rationale and found that the Federal Arbitration Act (FAA) mandates enforcement of agreements like the EAP.

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employees to waive their NLRA right to pursue litigation of employment claims in *all* forums, arbitral and judicial.”)

The Board also acknowledges that those cases are dispositive of the issue on review and currently preclude enforcement of the Board's Order. Nevertheless, the Board seeks to preserve the issue in the event of possible *en banc* or Supreme Court review.

In addition to arguing that *D.R. Horton* and *Murphy Oil* require the Court to grant its petition for review, the Company asserts (Br. 39-47) several affirmative defenses to justify its unlawful agreement. First, the Company argues that Smith, as a former employee, was not engaged in protected concerted activity when she joined the demand for arbitration. But Smith's employee status and the concerted nature of her conduct are irrelevant to whether the Company unlawfully maintained the EAP. The Company also argues that Smith's unfair labor practice charge was untimely under the NLRA's 6-month time limitation for filing unfair-labor-practice charges. That argument disregards well-established Board precedent finding that the maintenance of an unlawful workplace rule, such as the EAP, constitutes a continuing violation that is not time-barred. Finally, the Company's argument that the Board unlawfully treated the EAP as a work rule instead of a contract is contrary to the Court's precedent which has applied the Board's work-rule standard to assess whether an employer's arbitration agreement interferes with employees' rights under the NLRA.

## ARGUMENT

### **THE COMPANY VIOLATED SECTION 8(a)(1) OF THE NLRA BY MAINTAINING AN AGREEMENT THAT BARS EMPLOYEES FROM PURSUING WORK-RELATED CLAIMS CONCERTEDLY**

#### **A. Introduction**

Applying its *D.R. Horton/Murphy Oil* rule, the Board found that the Company violated Section 8(a)(1) of the NLRA by maintaining the EAP, which requires that employees bring employment-related claims exclusively in individual arbitration, unlawfully precluding collective action in any forum, whether arbitral or judicial. The Board recognizes that this Court rejected that rule in *D.R. Horton Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil, USA v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), which held that the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1, et seq., mandates enforcement of arbitration agreements as written. The Board has petitioned the Supreme Court for certiorari in *Murphy Oil. NLRB v. Murphy Oil USA, Inc.*, No. 16-307 (filed Sept. 9, 2016).<sup>3</sup>

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<sup>3</sup> Four other circuits have also ruled on this issue. The Second and Eighth Circuits joined this Court in rejecting the Board’s rationale and the Seventh and Ninth Circuits agreed with the Board. Petitions for certiorari have been filed with respect to the Second, Seventh, and Ninth Circuit decisions. See *Patterson v. Raymours Furniture Co.*, No. 15-2820-CV, 2016 WL 4598542 (2d Cir. Sep. 7, 2016), *petition for cert. pending*, No. 16-388 (filed Sep. 22, 2016); *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *petition for cert. pending*, No. 16-285 (filed Sept. 2, 2016); *Morris v. Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), *petition for cert. pending*, No. 16-300 (filed Sept. 8, 2016).

The Board acknowledges that unless this Court reconsiders those decisions en banc, or the Supreme Court grants the Board's petition for certiorari in *Murphy Oil* (or another petition presenting the same issue) and rules in the Board's favor, it is precluded from enforcing the Board's Order. See *United States v. Darrington*, 351 F.3d 632, 634 (5th Cir. 2003) ("one panel of this court cannot overrule the decision of another panel").<sup>4</sup> Accordingly, the Board will not reiterate at length the rationale in support of its *D.R. Horton/Murphy Oil* rule.

Nonetheless, for the reasons set forth in the Board's decisions in *D.R. Horton* and *Murphy Oil*, and in accordance with the decisions of the Seventh Circuit in *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), and the Ninth Circuit in *Morris v. Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), and the dissent of Judge Graves in *D.R. Horton*, the Board respectfully maintains that it is entitled to enforcement of its order in this respect. The Board reasonably determined that an arbitration agreement that violates

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Cases involving the *D.R. Horton/Murphy Oil* rule are pending in five additional circuits. See, e.g., *Rose Grp. v. NLRB*, Nos. 15-4092 and 16-1212 (3d Cir.) (argued Oct. 5, 2016); *AT&T Mobility Servs., LLC v. NLRB*, Nos. 16-1099 and 16-1159 (4th Cir.) (argument set on Dec. 7, 2016); *NLRB v. Alternative Entm't, Inc.*, No. 16-1385 (6th Cir.) (argument set on Nov. 30, 2016); *Franks v. NLRB, Samsung Elec. Am., Inc. v. NLRB*, Nos. 16-10644, 16-10788, 16-11377 (11th Cir.) (argument tentatively set for week of Jan. 9, 2017); *Price-Simms, Inc. v. NLRB*, Nos. 15- 1457 and 16-1010 (D.C. Cir.) (briefing completed).

<sup>4</sup> While circuit law stands in the way of the panel's acceptance of the Board's arguments, it is open to the panel to suggest to the full Court the appropriateness of *en banc* review to reconsider circuit law. See 5th Cir. IOP 35.

Section 8(a)(1) of the NLRA by precluding employees from acting in concert to enforce their employment rights before either a court or an arbitrator is illegal under general contract law, and thus falls within the exception to enforcement delineated in the FAA's saving clause.

**B. The Company's Challenges To Smith's Employee Status and the Nature of her Conduct Are Irrelevant and Lack Merit**

In defending against the Board's finding that the EAP is unlawful, the Company claims (Br. 43-47) that Smith, as a former employee, did not engage in concerted activity when she joined the demand for class arbitration. This argument, however, is irrelevant to whether the Company unlawfully maintained the EAP, and, in any event, is contrary to both precedent and the undisputed facts.

The Company's attempt to challenge the Board's unfair labor practice finding by questioning Smith's employee status and whether she engaged in concerted activity demonstrates the Company's misunderstanding of the maintenance violation. The Board, applying the standard set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004), which provides that a work rule or policy violates Section 8(a)(1) if it explicitly restricts Section 7 activities, found that the EAP, which "expressly precludes any class or collective actions," was unlawful. (ROA. 223.) It was the Company's continuing and undisputed maintenance of the EAP, "from December 26, 2012 to the present," that violated the NLRA. (ROA. 222.) In other words, the violation is tied to the

EAP's existence and the Company's continued application of it to all of its employees; Smith's status as a statutory employee and whether she engaged in concerted activity by joining the arbitration demand are irrelevant to whether the Company unlawfully maintains the EAP.<sup>5</sup>

In any event, there is no merit to the Company's argument that Smith was not engaged in concerted activity because she was a former employee who "no longer had any stake in the working conditions of [the Company's] employees" and therefore did not join the class action "for the purpose of mutual aid or protection." (Br. 46.) Smith's status as a former employee does not deprive her of the NLRA's protection. Section 2(3) of the NLRA provides that "[t]he term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer . . . ." 29 U.S.C. § 152(3). The Supreme Court has acknowledged that the breadth of the term is "striking," stating that it "squarely applies to 'any employee.'" *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984). Indeed, the Board has uniformly interpreted "employee" in the "broad generic sense" to "include members of the working class generally." *Briggs Mfg. Co.*, 75 NLRB 569, 570-71 (1947).

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<sup>5</sup> While Smith's employee status and the concerted nature of her joining the arbitration demand may be relevant inquiries to the alleged enforcement violation, the Board dismissed that allegation. (*See* p. 5.)

Given the breadth of the term “employee,” the Board properly found (ROA. 225) that Smith’s former employee status did not preclude her from engaging in concerted activity.<sup>6</sup> In doing so, the Board explained (ROA. 225), that “it is well established that the term ‘employee’ under the [NLRA] includes former employees of the employer.” (ROA. 225 (citing Section 2(3); *Redwood Empire, Inc.*, 296 NLRB 369, 391 (1989); *Waco, Inc.*, 273 NLRB 746, 747 n.8 (1984)). Indeed, the Supreme Court has agreed with the Board on this issue. *See Allied Chem. & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168 (1971) (employees protected under the NLRA include former employees).

The Board properly rejected (ROA. 225) the Company’s claim (Br. 46-47) that *Stationary Engineers Local 39*, 346 NLRB 336 (2006), requires a different result. To support its argument that Smith is not a statutory employee, the Company relies on findings in that case to which no exceptions were filed. *Id.* at 336 n.1. It is well settled that the Board's adoption of a portion of a judge's decision to which no exceptions are filed is not precedent for any other case. *See Colgate-Palmolive Co.*, 323 NLRB 515, 515 (1997) (finding of administrative law judge adopted by Board in absence of exceptions has no precedential value); *ESI*,

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<sup>6</sup> Notably, although the arbitration demand was not filed until March 2014, Smith was employed by the Company when she consented to join the demand in October 2013. (ROA. 90.)

*Inc.*, 296 NLRB 1319, 1319 n.3 (1989) (same). To the extent that the Company relies on *Stationary Engineers* to argue that employees who have not lost their job due to a labor dispute or unfair labor practice are not statutory employees, as the administrative law judge there suggested, *id.* at 347 n.9, this argument lacks merit. Although Section 2(3) provides that “any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice” is a statutory employee, Congress included that language to ensure that an employer cannot discharge an employee and then claim that the discharged employee is unprotected by the NLRA. *See* S. REP. NO. 73-1184, at 3-4 (1934) (“[w]ithout this provision it is possible that an employer might contend that a worker he had unlawfully discharged had no remedy”). Therefore, whether Smith left her employment voluntarily has no relevancy to her status as an employee.

The Company contends that there is insufficient evidence to support the Board’s finding (ROA. 225) that Smith engaged in concerted legal action by joining the arbitration demand. The Court will uphold the Board’s findings if they are supported by substantial evidence, which is “such relevant evidence that a reasonable mind would accept to support a conclusion.” *NLRB v. Allied Aviation Fueling of Dallas LP*, 490 F.3d 374, 378 (5th Cir. 2007) (internal quotation marks and citation omitted). Concerted activity is conduct which is “engaged in with or

on the authority of other employees, and not solely by and on behalf of the employee himself.” *Meyers Indus.*, 281 NLRB 882, 885 (1986), *affirmed sub nom.*, *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). Applying that definition here, the Board did not simply “presume” concerted activity, as the Company claims (Br. 45-46). Rather, substantial evidence supports the Board’s finding that by joining a “nationwide class action” filed “on behalf of other similarly situated employees[,]” Smith was not acting on her own behalf” or filing a personal lawsuit. (ROA. 222.) *See Eastex v. NLRB*, 437 U.S. 556, 565-66 nn.15-16 (1978) (Section 7 protects employees “when they seek to improve working conditions through resort to administrative and judicial forums”); *Amerisave Mortgage*, 363 NLRB No. 174, n.17, 2016 WL 1743246, \*1,\*2 (Apr. 29, 2016) (former employees engaged in concerted activity by jointly initiating and pursuing legal action with the purpose of challenging their former employer’s overtime practices); *Harco Trucking, LLC*, 344 NLRB 478, 479, 481 (2005) (former employee engaged in “protected concerted activity” by “filing and maintaining the class action lawsuit” against employer).<sup>7</sup>

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<sup>7</sup> In contending that Smith’s conduct was not concerted, the Company relies (Br. 44-45) on General Counsel Memorandum 10-06. The Board has expressly disavowed that memorandum. *See D.R. Horton*, 357 NLRB at 2282. Moreover, General Counsel memoranda are nonbinding. *See Midwest Television, Inc.*, 343 NLRB 748, 762 n.21 (2004) (“Advice memoranda from the General Counsel do not constitute precedential authority and are not binding on the Board”); *Lee’s*

### C. The Charge Was Not Time-Barred

The Board properly rejected the Company's argument (Br. 39-40) that Smith failed to meet the 6-month time limitation for filing unfair-labor-practice charges under Section 10(b) of the NLRA, 29 U.S.C. § 160(b).<sup>8</sup> Although Smith signed the EAP in February 2013 and did not file her charge until June 2014, that time frame is irrelevant. Smith did not challenge the EAP's formation, but rather the Company's continued maintenance of the agreement, so her charge of that ongoing conduct was timely. Indeed, as the Board explained (ROA. 226), "it is undisputed that [the Company's] EAP has been maintained as a condition of the newly hired employees' employment from December 26, 2012, and continuing to the present." (ROA. 222.) Under well-established and judicially approved Board precedent, the maintenance of an unlawful workplace rule, such as the EAP here, constitutes a continuing violation that is not time barred by Section 10(b). *See Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, 2015 WL 1205241, at \*1 n.7 (Mar. 16, 2015) ("The Board has held repeatedly that the maintenance of an unlawful rule is a continuing violation, regardless of when the rule was first promulgated"), *enforced, in relevant part*, 824 F.3d 772, 778 (8th Cir. 2016); *Control Servs.*, 305 NLRB

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*Roofing & Insulation*, 280 NLRB 244, 247 (1986) ("the General Counsel's legal position is not the equivalent of Board precedent").

<sup>8</sup> Section 10(b), in relevant part, states "[t]hat no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . ."

435, 435 n.2, 442 (1991) (maintenance or enforcement of unlawful rule timely alleged, even if promulgated outside 10(b) period), *enforced mem.*, 961 F.2d 1568 (3d Cir. 1992); *see also Guard Publ'g Co.*, 351 NLRB 1110, 1110 n.2 (2007) (same), *enforced*, 571 F.3d 53, 59 (D.C. Cir. 2009).

#### **D. The EAP Functioned as a Work Rule**

Equally unavailing is the Company's defense (Br. 41-43) that the EAP is a contract and not a work rule, and that the Board erred in applying its work-rule standard set forth in *Lutheran Heritage*, 343 NLRB at 646 (*see pp.* 10-11) to find that the Company unlawfully maintained its EAP. The Company's argument fails to recognize that because restrictions on employee rights are effectively the rules of the workplace for signatory employees, it makes no difference that the unlawful restriction is in the form of an agreement. Indeed, as the Board found, "the EAP was a mandatory rule imposed by the [Company] as a condition of employment." (ROA. 223.) Because the Company required employees to be bound by the EAP as a condition of employment, which carries an "implicit threat" that failure to comply will result in loss of employment, the Board appropriately applied the work-rule standard.<sup>9</sup> *D.R. Horton*, 357 NLRB at 2280, 2283. *See also NLRB v.*

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<sup>9</sup> The Company's contention (Br. 42-43) that the Board's work-rule standard does not apply because Smith and the Company "were the only parties to the EAP" misunderstands the underlying premise of the maintenance violation. The Company required *all* employees, not just Smith, to be bound by the EAP. As

*Ne. Land Servs., Ltd.*, 645 F.3d 475, 481-83 (1st Cir. 2011) (applying work-rule analysis to terms of employment contract); *U-Haul Co.*, 347 NLRB 375, 377-78 (2006) (same), *enforced*, 255 F. App'x 527 (D.C. Cir. 2007). Indeed, this Court has applied the Board's work-rule standard to assess arbitration agreements' interference with employees' right to file Board charges. *See D.R. Horton*, 737 F.3d at 363; *accord Murphy Oil*, 808 F.3d at 1018-19.<sup>10</sup>

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such, the EAP was a condition of employment unlawfully maintained against all employees, not just Smith.

<sup>10</sup> The Board's remedies are not contrary to the public policy favoring arbitration, as the Company claims (Br. 47-49.) In any event, if the EAP is found to be an unlawful contract exempt from enforcement under the FAA, the Company's concerns that the FAA preempts the Board's remedy will be rendered irrelevant.

**CONCLUSION**

The Board respectfully reaffirms its view that the Court should enter a judgment enforcing the Board’s Order but acknowledges that, unless circuit law is reconsidered en banc or reversed by the Supreme Court, the panel is obliged to deny enforcement of the Board’s Order.

Respectfully submitted,

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National Labor Relations Board  
October 2016

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

CITIGROUP TECHNOLOGY, INC., and	)	
CITICORP BANKING CORPORATION	)	
(parent), a subsidiary of CITIGROUP, INC.	)	
	)	
Petitioners/Cross-Respondents	)	No. 15-60856
	)	
v.	)	Board Case No.
	)	12-CA-130742
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on October 24, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC  
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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 4,121 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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