

**No. 15-60386**

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

**JACK IN THE BOX, INCORPORATED**

**Petitioner/Cross-Respondent**

**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

The Board does not believe that oral argument would be of any assistance to the Court in this matter. The Board's unfair-labor-practice finding based on the concerted-action waiver in the Company's arbitration agreement is indisputably controlled by *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 remaining two unfair-labor-practice findings involve the application of well-settled legal principles to uncontested facts. However, if the Court believes that argument is necessary, the Board requests to participate and submits that 10 minutes per side would be sufficient.

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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 Jack in the Box, Inc. (“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 May 24, 2016, and reported at 364 NLRB No. 12.

(ROA.148.)<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 (“the 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 venue is proper because the Company transacts business in Texas. 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 ISSUES**

1. Whether the Board reasonably found that the Company violated Section 8(a)(1) of the NLRA by maintaining a mandatory arbitration agreement waiving employees’ right to maintain class or collective actions in any forum, arbitral or judicial.

2. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the NLRA by maintaining a mandatory arbitration agreement that employees would reasonably understand to restrict their right to file unfair-labor-practice charges.

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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.

3. Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the NLRA by maintaining in its mandatory arbitration agreement an overly broad confidentiality provision that unlawfully restricts employee discussion of the terms and conditions of employment.

## **STATEMENT OF THE CASE**

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

The Company operates fast food restaurants on a nationwide basis. (ROA.152; ROA.4.) Since July 26, 2014, the Company has required employees, as a condition of employment, to sign a “Dispute Resolution and Arbitration Agreement” (“the Agreement”) at the time of hiring. (ROA.152-53; ROA.4.) Through various provisions, the Agreement requires employees to resolve all employment-related claims by individual, binding arbitration. (ROA.153-54; ROA.22-23.)

The Agreement defines “Claims Covered by the Agreement” as:

disputes and claims for relief Employee may presently or in the future have against the Company or against its officers, directors, employees, or agents in any way related to Employee’s employment or termination of employment including, but not limited to, claims for wrongful discharge under statutory and common law; claims for discrimination based on [specifically enumerated bases not including NLRA] or any other claim of discrimination. This Agreement also applies to claims brought under state or federal laws including, but not limited to [specifically enumerated bases not including NLRA] or any other present or future laws; any claims for retaliatory discharge . . . and any other statutory and common law claims under any law of the

United States or State or local agency are also covered by this Agreement. . . .

(ROA.153; ROA.22.) The coverage provision also contains a saving clause, clarifying:

Nothing in this Agreement precludes Employee from filing a charge or from participating in an administrative investigation of a charge before an appropriate government agency, including the Equal Employment Opportunity Commission or similar state Agency.

(ROA.153; ROA.23.) In the subsequent section, “Claims Not Covered by this Agreement,” the Agreement lists various types of claims, not including NLRA charges, and then specifies that arbitration must be individual, stating:

Neither Employee nor Company shall be entitled to join or consolidate in arbitration claims not covered by this Agreement or arbitrate a representative action or a claim as a representative or member of a class.

*(Id.)*

Under the heading “Exclusive, Final and Binding Remedy for Eligible Disputes,” the Agreement makes clear that “[i]f Employee or Company is seeking to resolve claims covered by this Agreement, they must use binding arbitration.” *(Id.)* And in the “No Loss of Rights” section, the Agreement affirms that it “does not create or destroy any individual legal rights; it only changes the forum in which those rights will be resolved.” (ROA.153; ROA.26.) Finally, with respect to confidentiality, the Agreement provides:

The Arbitrator's decision is confidential. Neither Employee nor the Company may publicly disclose the terms of the award unless:

- Agreed to in writing by the other party, or
- Subpoenaed by a court to testify, or
- Required by law.

*(Id.)*

## **II. PROCEDURAL HISTORY**

Based on a charge filed by Dana Ocampo, the Board's General Counsel issued a complaint alleging that the Company had committed multiple violations of Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by maintaining an 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.152; ROA.10, 16.)

Following the parties' joint motion to waive a hearing and proceed on a stipulated record, and 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) by maintaining and enforcing an arbitration agreement that:

1) waives employees' right to maintain class or collective actions in any forum, arbitral or judicial; 2) employees would reasonably understand to restrict their right to file unfair-labor-practice charges; and 3) contains an overly broad confidentiality provision that unlawfully restricts employee discussion of the terms and conditions of employment. (ROA.156; ROA.2-8.)

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

Based on the foregoing facts, the Board (Members McFerran and Hirozawa; Member Miscimarra, dissenting) affirmed the judge's finding that the Company unlawfully maintained the Agreement requiring individual arbitration of work-related claims, 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 certiorari filed*, No. 16-307 (Sept. 9, 2016).<sup>2</sup> It further affirmed (Member Miscimarra, dissenting) the judge's finding that maintaining the Agreement was unlawful because employees would reasonably understand it to restrict their right to file charges with the Board. (ROA.148.) Finally, the Board unanimously affirmed the judge's finding that the Company unlawfully maintained the confidentiality provision in the Agreement. (ROA.148-50.)

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<sup>2</sup> Because the complaint did not allege that the Company had unlawfully enforced the Agreement, and there was no evidence to that effect, the Board amended the judge's conclusions of law and recommended Order and notice to omit the references to enforcement. (ROA.148 n.2.)

The Board's Order requires the Company to cease and desist from the unfair labor practices 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 Act, 29 U.S.C. § 157. Affirmatively, the Order requires the Company to rescind the Agreement in all its forms, or revise it in all its forms, to make clear to employees that it does not: 1) constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums; 2) restrict their right to file charges with the Board; or 3) require them to maintain the confidentiality of arbitration proceedings. The Order further requires the Company to notify all current and former employees who were required to sign acknowledgments regarding the Agreement in any form that it has been rescinded or revised, and, if revised, to provide them a copy of the revised agreement. The Company must also post a remedial notice. (ROA.149.)

### **SUMMARY OF ARGUMENT**

Applying its *Horton/Murphy Oil* rule, the Board found that the Company violated Section 8(a)(1) of the NLRA by maintaining a mandatory agreement that requires employees to bring employment-related claims exclusively in individual arbitration, unlawfully precluding collective action in any forum, whether arbitral or judicial. This Court has rejected the foregoing rule, and the Board has petitioned the Supreme Court for certiorari. The Board recognizes that the Court

cannot enforce that aspect of the Board's Order unless the en banc Court reconsiders, or the Supreme Court rejects, the Court's *Murphy Oil* decision.

The Board also found that, under well-established principles prohibiting the maintenance of work rules that employees would reasonably construe as restricting their Section 7 rights, the Company's maintenance of the Agreement independently violates Section 8(a)(1) because employees would reasonably construe it as restricting their right to file charges with the Board. As the Board found, employees would reasonably construe the Agreement's broad language stating that any employment-related claim is subject to arbitration as prohibiting them from filing charges with the Board, and they would not understand either the Agreement's specific and limited exemptions from coverage, or the ambiguity of the saving clause, as allowing such charges. Contrary to the Company's claims, the Board's finding does not conflict with the Court's rejection of a similar violation in *Murphy Oil*, because the language of the agreement in that case is materially distinguishable.

Pursuant to the same principles, the Board also found that the Company violated Section 8(a)(1) by maintaining, in the Agreement, an overly broad confidentiality provision that employees would reasonably construe as restricting their Section 7 right to discuss terms and conditions of employment. As the Board found, employees would reasonably construe language prohibiting disclosure of

arbitration decisions and awards as barring discussions of facts and arguments discussed in, or underlying, those decisions and awards. Such topics plainly encompass and potentially affect terms and conditions of employment. The Board's finding is consistent with its precedent, notwithstanding the Company's claim that the cited decisions are not comparable.

### **STANDARD OF REVIEW**

The Board's findings of fact are conclusive if supported by substantial evidence on the record as a whole. 29 U.S.C. § 160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Valmont Indus., Inc. v. NLRB*, 244 F.3d 454, 463 (5th Cir. 2001). The "substantial evidence" test requires the degree of evidence that could satisfy a reasonable factfinder. *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 377 (1998); *Valmont Indus.*, 244 F.3d at 463. Under this test, a reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court [may] justifiably have made a different choice had the matter been before it de novo." *Universal Camera*, 340 U.S. at 488. *Accord NLRB v. Allied Aviation Fueling*, 490 F.3d 374, 378 (5th Cir. 2007) (court does not reweigh evidence in determining whether factual findings supported by substantial evidence). As this Court observed, "[o]nly in the most rare and unusual cases will an appellate court conclude that a finding of fact made by the . . . Board is not supported by substantial evidence." *Merchants Truck Line v. NLRB*, 577

F.2d 1011, 1014 n.3 (5th Cir. 1978). The Court’s “deference extends to [its] review of both the Board’s findings of fact and its application of the law.”

*J. Vallery Elec., Inc. v. NLRB*, 337 F.3d 446, 450 (5th Cir. 2003).

## ARGUMENT

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

Applying its *Horton/Murphy Oil* rule, the Board found that the Company violated Section 8(a)(1) of the NLRA by maintaining a mandatory agreement that required employees to 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 Sept. 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 its *Horton/Murphy Oil* holding 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, the Court is precluded from enforcing the aspect of the Board's Order finding unlawful the concerted-action waiver in the Agreement pursuant to the *Horton/Murphy Oil* rule. *United States v. Darrington*, 351 F.3d 632, 634 (5th Cir. 2003).<sup>4</sup> Accordingly, the Board will not reiterate at length here the rationale in support of its *Horton/Murphy Oil* rule.

Nonetheless, for the reasons set forth in the Board's decisions in *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), 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 *Horton*, 737 F.3d at 364, the Board respectfully

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Cases involving the *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.

maintains that it is entitled to enforcement of its Order in this respect. The Board reasonably determined that an arbitration agreement that violates 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.

**II. THE COMPANY VIOLATED SECTION 8(a)(1) OF THE NLRA BY MAINTAINING AN ARBITRATION AGREEMENT THAT EMPLOYEES WOULD REASONABLY UNDERSTAND TO RESTRICT THEIR RIGHT TO FILE BOARD CHARGES**

Section 7 of the NLRA, 29 U.S.C. § 157, protects the right of employees “to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .” In turn, Section 8(a)(1), 29 U.S.C. § 158(a)(1), prohibits employers from engaging in conduct that “reasonably tends to interfere with, restrain or coerce employees” in the exercise of rights guaranteed by Section 7. *NLRB v. Laredo Coca Cola Bottling Co.*, 613 F.2d 1338, 1340-41 (5th Cir. 1980). Employees have an unquestionable Section 7 right to file and pursue charges before the Board. *See Murphy Oil*, 808 F.3d at 1018-19; *Util. Vault Co.*, 345 NLRB 79, 82 (2005). Under well-established Board precedent, approved by this Court, the mere maintenance of a workplace rule that employees would

“reasonably construe” as restricting that right is unlawful. *See Murphy Oil*, 808 F.3d at 1018-19 (assessing whether arbitration agreement interfered with employees’ right to file Board charges); *Horton*, 737 F.3d at 363 (same); *see also Lutheran Heritage Vill.-Livonia*, 343 NLRB 646 (2004) (setting forth Board’s “reasonably construe” inquiry).<sup>5</sup>

To determine whether a rule would lend itself to an unlawful interpretation, the Board reads the rule from the position of non-lawyer employees. *U-Haul Co. of Cal.*, 347 NLRB 375, 378 (2006), *enforced mem.*, 255 F. App’x 527 (D.C. Cir. 2007). In addition, “Board law is settled that ambiguous employer rules—rules that reasonably could be read to have a coercive meaning—are construed against the employer.” *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1132 (2012), *enforced*, 746 F.3d 205 (5th Cir. 2014); *see also Lafayette Park Hotel*, 326 NLRB 824, 828 (1998) (any ambiguity in a work rule is construed against the employer as the rule’s promulgator), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999). “This principle follows from the [NLRA’s] goal of preventing employees from being chilled in the exercise of their Section 7 rights—whether or not that is the intent of the employer.” *Flex Frac Logistics*, 358 NLRB at 1132. As the Board explained, it need not “wait[] until that chill is manifest, . . . [to] undertake the difficult task of

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<sup>5</sup> A rule is also unlawful if it was promulgated in response to Section 7 activity, or if it was applied to restrict the exercise of Section 7 rights. *Lutheran Heritage*, 343 NLRB at 647. Neither of those legal theories is implicated here.

dispelling it.” *Id.*; see also *NLRB v. Ne. Land Servs., Ltd.*, 645 F.3d 475, 483 (1st Cir. 2011) (affirming that “the Board’s rule is intended to be prophylactic and . . . is subject to deference”).

The Board reasonably found (ROA.155-56) that employees would construe the Agreement to prohibit them from filing unfair-labor-practice charges with the Board.<sup>6</sup> In making that finding, the Board relied on several aspects of the Agreement. It cited the breadth of the Agreement’s coverage, the specificity and limited nature of the exemptions from coverage, and the ambiguity of the one exemption (the saving clause) that might be read to encompass Board charges.

First, the Board observed (ROA.155) that the Agreement broadly provides that “all claims or disputes covered by this Agreement must be submitted to binding arbitration,” which is “the sole and exclusive remedy for resolving any such claim or dispute.” And, as noted, the Agreement covers, by its terms, “disputes and claims for relief Employee may presently or in the future have against the Company or against its officers, directors, employees, or agents in any way related to Employee’s employment or termination of employment. . . .”

(ROA.22.) The Board’s finding that the foregoing language is overly broad, and

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<sup>6</sup> Because the Board applied the *Lutheran Heritage* framework to find that employees would reasonably understand the Agreement as prohibiting them from filing charges, it is of no moment that the Agreement, “[b]y its bare language,” (Br. 20) does not expressly preclude employees from filing charges with the Board.

would be construed by employees as barring Board charges, comports with prior Board and court decisions finding similar language overly broad, and with decisions from this Court. For instance, in *Murphy Oil*, this Court agreed with the Board that requiring employees to arbitrate “any and all disputes or claims [employees] may have . . . which relate in any manner . . . to . . . employment” would be construed as barring employees from filing Board charges. 808 F.3d at 1019 (“[t]he problem is that broad ‘any claims’ language can create ‘[t]he reasonable impression . . . that an employee is waiving not just [her] trial rights, but [her] administrative rights as well’”) (quoting *Horton*, 737 F.3d at 363-64) (alterations in original). Likewise, the Board found similar “all claims” language overly broad where the employer required employees to submit “all [employment] disputes and claims” to binding arbitration. *See 2 Sisters Food Grp., Inc.*, 357 NLRB 1816, 1817 (2011); *see also Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772, 777-78 (8th Cir. 2016) (deferring to Board’s finding that requirement that employees individually arbitrate “[a]ll claims, disputes, or controversies” was overly broad under work-rule standard); *U-Haul*, 347 NLRB at 377 (finding overly broad an employer’s arbitration policy mandating arbitration of “all disputes relating to or arising out” an employee’s employment or termination).

Second, the Agreement enumerates several explicit, limited exceptions to its broad coverage, but none of those exceptions mentions or encompasses Board

charges. Specifically, the exempted claims are: unemployment insurance benefits, workmen's compensation benefits, monetary claims for less than \$15,000, and claims without a basis in law. (ROA.155.) Since Board charges were not included in the express list of exemptions to mandatory arbitration, employees would reasonably construe the Agreement as covering them. *See Hooters of Ontario Mills*, 363 NLRB No. 2, 2015 WL 5143098, at \*1-2 (2015) (employees would reasonably construe arbitration agreement to prohibit filing charges where it broadly defined all disputes subject to arbitration, and sole exception to mandatory arbitration did not clarify that charges with Board were exempted), *petition & cross-application filed*, Nos. 15-72839, 15-72931 (9th Cir.) (briefing completed July 20, 2016).

Third, the Board reasonably found that the Agreement's saving clause would not "eliminate any reasonable uncertainty about the right of employees to file charges with the Board to resolve claims specifically covered by the mandatory arbitration agreement described as the exclusive means for dispute resolution." (ROA.148 n.2.) That clause is the only provision in the Agreement that could arguably be read to exempt Board charges from mandatory arbitration. It provides that "[n]othing in this Agreement precludes Employee from filing a charge or from participating in an administrative investigation of a charge before an appropriate government agency, including the Equal Employment Opportunity Commission or

similar state Agency.” (ROA.155.) But the clause singles out the EEOC, an agency employees may or may not see as analogous to the Board, to illustrate exempted charges. Moreover, as the Board observed, the clause’s applicability to the Board is further muddied because the EEOC illustration confines the analogy to a “similar *state* Agency.” (ROA.148 n.2.)

Indeed, as the Board found (ROA.148 n.2 (citing *Applebee’s Rest.*, 363 NLRB No. 75, 2015 WL 9315531 (2015), *petition & cross-application filed*, Nos. 15-4092, 16-1212 (3rd Cir.) (oral argument Oct. 5, 2016))), the Agreement’s saving clause resembles other provisions that the Board has found insufficient to make clear to employees that they retain their right to file Board charges. *See Applebee’s Rest.*, 2015 WL 9315531, at \*1 n.1, \*3 (finding employees would reasonably construe agreement as barring Board charges despite provision stating agreement “will not prevent you from filing a charge with any state or federal administrative agency”); *PJ Cheese, Inc.*, 362 NLRB No. 177, 2015 WL 5001023, at \*1, \*5 (2015) (finding employees would reasonably construe arbitration policy as barring Board charges despite language stating that policy “will not prevent you from filing a charge with any state or federal administrative agency”), *enforced in relevant part*, No. 15-60610 (5th Cir. Aug. 25, 2016) (per curiam); *Amex Card Servs. Co.*, 363 NLRB No. 40, 2015 WL 6957289, at \*3 (2015) (employees would reasonably construe arbitration policy as barring Board charges although

arbitration policy stated that “[a]ny claim under the [NRLA]” is not covered and that it “does not preclude an individual from filing a claim or a charge with a governmental administrative agency . . . such as the [Board]” because the accompanying form contained no such exceptions), *petition filed*, No. 15-60830 (5th Cir.) (case in abeyance).

At best, the saving clause’s applicability to Board charges is ambiguous, particularly when read by non-lawyer employees. As noted, *see* p. 14, such ambiguity must be construed against the Company. The Agreement’s saving clause is thus inadequate to overcome its sweeping coverage language and unqualified statements that arbitration is employees’ sole avenue for pursuing work-related disputes. *See Countrywide Fin. Corp.*, 362 NLRB No. 165, 2015 WL 4882655, at \*1-3 (2015) (employers would reasonably understand arbitration agreement to prohibit filing charges where it broadly defined all disputes subject to mandatory arbitration; savings clause did not save agreement because it failed to expressly exclude Board proceedings in language understandable to non-lawyer employees), *petition & cross-application filed*, Nos. 15-72700, 15-73222 (9th Cir.) (briefing completed Aug. 2, 2016).

Contrary to the Company’s claims (Br. 20, *see also id.* at 16), the Board’s finding is not “completely at odds” with the Court’s decision in *Murphy Oil*. In that case, the Court held that a provision expressly stating that “nothing in this

Agreement precludes [employees] . . . from participating in proceedings to adjudicate unfair labor practice[] charges before the [Board]” made it “unreasonable for an employee to construe the Revised Arbitration Agreement as prohibiting the filing of Board charges.” *Murphy Oil*, 808 F.3d at 1019-20. In so finding, the Court also relied on the fact that “[t]he other clauses of the agreement d[id] not negate that language.” *Id.* As just described, however, the language of the Agreement’s saving clause is not, as the Company claims (Br. 20), “[c]omparable” to the language the Court cited in *Murphy Oil*: it contains no such unambiguous carve-out for employees filing charges with the Board.

Finally, Ocampo’s unfair-labor-practice charge did not, as the Company argues (Br. 21), provide “evidence” of how the Agreement would reasonably be construed. The Section 8(a)(1) standard is objective, measuring the reasonable tendency of the challenged language to restrict or coerce Section 7 rights. As this Court explained in upholding a similar finding in *Murphy Oil*, “the actual practice of employees is not determinative” of whether an employer has committed an unfair labor practice. *Id.* at 1019 (employee’s filing of Board charges challenging rule does not establish that rule cannot reasonably be interpreted as preventing Board charges) (quoting *Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 209 (5th Cir. 2014)).

In sum, the Board's finding that employees would reasonably construe the Company's Agreement as restricting their right to file charges with the Board is supported by substantial evidence and consistent with the Board's and the Court's findings in similar cases.

### **III. THE COMPANY VIOLATED SECTION 8(a)(1) OF THE NLRA BY MAINTAINING AN OVERLY BROAD CONFIDENTIALITY PROVISION IN ITS ARBITRATION AGREEMENT**

Employees' rights under Section 7 of the NLRA to organize or to engage in concerted activities for mutual aid or protection "are not viable in a vacuum; their effectiveness depends . . . on the ability of employees to learn the advantages and disadvantages of organization from others." *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972) (noting "importance of freedom of communication to the free exercise of organization rights."); *see also Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978) (Section 7 "necessarily encompasses the right effectively to communicate with one another"). It is therefore firmly established that Section 7 protects the rights of employees to communicate with others regarding the terms and conditions of their employment. *Flex Frac Logistics*, 746 F.3d at 208-10; *Cintas Corp. v. NLRB*, 482 F.3d 463, 465 (D.C. Cir. 2007); *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359, 362 (5th Cir. 1990).

Applying the established principles governing the analysis of work rules, described above (pp. 13-15), the Board found (ROA.156) that the Company

violated Section 8(a)(1) of the NLRA by maintaining, in its Agreement, an overly broad confidentiality provision that employees would reasonably construe as restricting their Section 7 right to discuss terms and conditions of employment. That unfair-labor-practice finding is supported by substantial evidence.

As the Board found, the Company's "confidentiality clause explicitly requires that employees not divulge the terms of any arbitration award." Such "language reasonably implies that employees cannot discuss with each other the facts of the case, the respective merits of the parties positions, their motivation in seeking relief, or the award rendered regarding any arbitration proceeding." (ROA.156.) Those topics plainly encompass and potentially affect terms and conditions of employment when the arbitration concerns a work-related dispute like those covered by the Company's Agreement. Consequently, as the Board determined (ROA.156), the confidentiality rule runs afoul of the "right of employees to discuss such matters with each other," a right that "lies at the core of Section 7, which protects concerted activity for mutual aid and protection." That finding is consistent with its precedent finding other broadly worded confidentiality rules unlawful. *See Prof'l Janitorial Serv. of Houston, Inc.*, 363 NLRB No. 35, 2015 WL 7568340, at \*1 n.3 (2015) (confidentiality provision unlawfully overbroad where it prohibited employees from discussing statements and information made or revealed during arbitration), *petition & cross-application*

*filed*, No. 15-60858 (5th Cir.) (employer’s brief due Nov. 23, 2016); *Rocky Mountain Eye Ctr., P.C.*, 363 NLRB No. 34, 2015 WL 6735641, at \*1 n.1, (2015) (confidentiality agreement unlawfully overbroad where it prohibited employees from discussing broadly defined “confidential information” about other employees), *petition & cross-application filed*, Nos. 15-1420, 16-1001 (D.C. Cir.) (employer’s brief due Oct. 31, 2016); *see also Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004) (handbook rule unlawfully prohibited disclosure of “confidential information,” including “grievance/complaint information”), *enforced*, 414 F.3d 1249 (10th Cir. 2005).

The Company misses the mark (Br. 23-24) in arguing that its rule is distinguishable from those found unlawful in the Board’s confidentiality-rule cases because the rule here covers “only the actual decision of the arbitrator” and “carves out the terms of the award itself—not the underlying evidence”—as confidential. The rule actually refers first to the arbitral *decision*, then to the arbitral *award*, without describing either term or explaining whether or how they differ. As described (p. 22), the Board found that employees—who read workplace rules as non-lawyers, *see* p. 14—would reasonably construe the blanket prohibition to bar discussions of the evidence, facts, and arguments presented during the arbitration. Such topics—which might well be discussed at length in an arbitral decision, and presumably form the basis of the arbitral award—could include a wide array of

terms and conditions of employment. And the rule contains no exclusion based on subject matter whatsoever, much less one clarifying that potentially protected information referenced in or supporting arbitral decisions or awards may be disclosed.

Furthermore, contrary to the Company's (Br. 25) contention, the overly broad confidentiality provision is not saved because it permits disclosures "required by law." *See Prof'l Janitorial Serv.*, 2015 WL 7568340, at \*1, \*6 (finding confidentiality rule applying to arbitrations overly broad, despite exclusion for disclosures "permitted or required by law"). Fundamentally, as the Board has remarked in reviewing overly broad confidentiality rules, "employees should not have to decide at their own peril what information is not lawfully subject to such a prohibition." *Hyundai Am. Shipping Agency, Inc.*, 357 NLRB 860, 871 (2011), *enforced in relevant part*, 805 F.3d 309 (D.C. Cir. 2015). The same holds true for deciphering what information may be disclosed under the Company's confidentiality rule because the disclosure is "required by law." Such a determination requires specialized legal knowledge and is, at best, ambiguous to the non-lawyer employee. *See U-Haul*, 347 NLRB at 378 (in determining whether a rule lends itself to an unlawful interpretation, the Board reads the rule from the position of non-lawyer employees); *see also supra* p. 14. More to the point, the "required by law" exception would not reasonably be read by either a lawyer or

layperson to protect the bulk of casual employee-to-employee Section 7-protected statements about arbitration proceedings.

There is also no merit to the Company's claim (Br. 22) that the confidentiality provision "should be analyzed in light of" two extraneous documents—the code of professional conduct for arbitrators and an Operations-Management memorandum ("OM memo") issued by the Board's General Counsel. Context is important in construing a work rule under *Lutheran Heritage*, as the Company asserts, *see* Br. 22, but only to the extent that context—namely, related parts of the challenged rule—colors the non-lawyer *employee's* understanding of the operative language. *See Fresh & Easy Neighborhood Mkt.*, 361 NLRB No. 8, 2014 WL 3778347, at \*3 (2014) (in determining reasonable construction, Board reviewed challenged language in "context," i.e., entire confidentiality section of 20-page code of business conduct); *see generally Lutheran Heritage*, 343 NLRB at 646 (in determining whether rule is unlawful, Board does not read particular phrases in isolation from overall rule). The Company does not suggest, and there is no reason to believe, that its employees would be familiar with either the arbitrators' code of conduct or the OM memo, much less reasonably interpret the Agreement's confidentiality provision in light of those technical, wholly extraneous, documents. In any event, the code of professional conduct for arbitrators solely governs *arbitrators'* professional conduct—it has no bearing on

employees' rights under the NLRA. And the OM memo, similar to other memoranda issued by divisions of the agency under the auspices of the Board's General Counsel, does not constitute Board law and is not binding precedent. *See Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1077 (D.C. Cir. 2002) (General Counsel memoranda); *Midwest Television, Inc.*, 343 NLRB 748, 762 n.21 (2004) (Advice memoranda).

In sum, the Board's finding that employees would reasonably construe the Agreement's confidentiality provision as restricting their right to discuss the terms of an arbitrator's decision, and thus terms and conditions of employment, is supported by ample evidence in the record and consistent with the Board's findings in similar cases.

### CONCLUSION

The Board respectfully requests that the Court enter a judgment enforcing the portions of the Board's Order remedying the Company's unlawful maintenance of an arbitration agreement that employees reasonably would construe as barring resort to Board processes and its unlawful maintenance of an overly broad confidentiality rule within the arbitration agreement. The Board respectfully reaffirms its view that the Court should enter a judgment enforcing the portions of the Board's Order remedying violations based on the Board's *Horton/Murphy Oil* rule but acknowledges that, unless circuit law is reconsidered en banc or reversed

by the Supreme Court, the panel is obliged to deny enforcement of those portions 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**

JACK IN THE BOX, INCORPORATED	)	
	)	
Petitioner/Cross-Respondent	)	No. 16-60386
	)	
v.	)	Board Case No.
	)	32-CA-145068
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on October 27, 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  
this 27th day of October, 2016

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	)	
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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 5,826 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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