

**Case No. 16-60386**

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

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**JACK IN THE BOX INC.,  
Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD,  
Respondent/Cross-Petitioner**

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**On Petition for Review of the Order of the  
National Labor Relations Board**

Case No. 32-CA-145068

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**REPLY OF PETITIONER/CROSS-RESPONDENT  
JACK IN THE BOX INC.**

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## **SUMMARY OF PROCEEDINGS**

On September 6, 2016, Jack in the Box Inc. (“JIB”) filed its Opening Brief in support of its Petition for Review of the National Labor Relations Board’s (“NLRB” or the “Board”) Decision and Order (the “Decision”) regarding JIB’s Arbitration Agreement (the “Agreement”). (*See* ROA.148-158).<sup>1</sup> On October 27, 2016 the Board filed its Opposition to JIB’s Petition for Review (the “Opposition”).<sup>2</sup>

## **REPLY ARGUMENT**

### **I. REQUIRING JIB’S EMPLOYEES TO SIGN ITS AGREEMENT DOES NOT INTERFERE WITH EMPLOYEES’ SECTION 7 RIGHTS TO ENGAGE IN COLLECTIVE ACTIVITY.**

As it must, the Board’s Opposition admits that its Decision that JIB’s Agreement interfered with employees’ Section 7 rights to engage in collective action is counter to the precedent of this Court. *See, e.g., D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013); *Murphy Oil USA v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). The Board’s Opposition raised no new arguments and acknowledges that the Court is precluded from enforcing this aspect of the Board’s Decision. Accordingly, as this Court has rejected the Board’s reasoning, requiring

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<sup>1</sup> References to “ROA” are to the NLRB’s certified administrative record.

<sup>2</sup> The Board filed a Cross-Application for Enforcement of its Decision and Order in this case on July 29, 2016. For the reasons set forth in its Opening brief and this Reply, this Cross-Application should be denied.

JIB's employees to sign its Agreement does not interfere with employees' Section 7 rights to engage in collective activity. *See Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) ("It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our *en banc* court").

**II. REQUIRING JIB'S EMPLOYEES TO SIGN ITS AGREEMENT DOES NOT INTERFERE WITH EMPLOYEES' ACCESS TO THE BOARD**

JIB's Agreement provides that employees have a right to file and pursue charges before the Board. The Agreement specifically states that employees are not precluded from "filing a charge" or "participating in an administrative investigation of a charge" before a government agency. (ROA.36). Despite the existence of this provision, the Board's Opposition references several inapplicable decisions in an attempt to support its position that JIB's Agreement might be read to preclude employees from filing unfair labor practice charges with the Board. Based on this Court's *Murphy Oil* decision, basic contract interpretation, and even the Board's decisions, JIB's Agreement does not interfere with employees' access to the Board.

The Opposition largely relies on several Board decisions that focus on the breadth of the Agreement's coverage and the specificity and limited nature of the

exemptions from coverage. These decisions are simply not applicable, as JIB’s Agreement has an express exemption, or savings clause, for employees to pursue claims with government agencies. *See, e.g., 2 Sisters Food Grp. Inc.*, 357 NLRB 1816, 1817 (2011) (where agreement covered all claims “that may be lawfully [] resolve[d] by arbitration” and had no savings clause); *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772, 777-778 (8th Cir. 2016), (where agreement covered “[a]ll claims, disputes, or controversies arising out of, or in relation to” employment, with no savings clause); *U-Haul Co. of Ca.*, 347 NLRB 375, 377-378 (2006), *enforced mem.*, 255 Fed.App’x 527 (D.C. Cir. 2007) (where agreement provided that the arbitration process was “limited to disputes, claims or controversies that a court of law would be authorized to entertain or would have jurisdiction over to grant relief”)<sup>3</sup>; *Hooters of Ontario Mills*, 363 NLRB No. 2, 2015 WL 5143098, at \*1-2 (2015) (where arbitration agreement only had limited exemption for any dispute “that cannot be arbitrated as a matter of law”). None of these above decisions examined an arbitration agreement that, like JIB’s, included an express savings clause exempting charges with government agencies.

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<sup>3</sup> Furthermore, the Board’s decision in *U-Haul* suggests that an agreement that excludes administrative proceedings would be lawful. In finding the employer’s agreement unlawful in *U-Haul*, the Board noted that the agreement did not “exclude an action governed by an administrative proceeding . . .” JIB’s Agreement does explicitly exclude actions with administrative agencies. *See* ROA.23 (“[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** . . .) (emphasis added).

Next, the Opposition asserts that the Agreement's savings clause does not eliminate uncertainty about employees' rights to file charges with the Board. The Board again cites its own decisions, and takes the Fifth Circuit's enforcement of one such decision out of context, in an attempt to bolster its argument.<sup>4</sup> In *PJ Cheese Inc.*, the only decision enforced by this Court, the employer distributed a Dispute Resolution Program ("DRP") and a separate Agreement for Receipt of the DRP ("Agreement for Receipt") that set forth its arbitration policy. 362 NLRB No. 177, 2015 WL 5001023 at \*2 (2015), *enforced in part*, No. 15-60610 (5th Cir. Aug. 25, 2016) (per curiam). Employees signed only the Agreement for Receipt. *Id.* The DRP contained a sentence that it did not "prevent [employees] from filing a charge with any state or federal agency." *Id.*, note 6. This sentence did not appear in the Agreement for Receipt, which employees signed. *Id.* In its decision finding the arbitration policy unlawful, the Board concluded that the two separate

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<sup>4</sup> Even the Board's attempt to stretch its own decisions to cover JIB's Agreement is misguided. For example, in *Applebee's Restaurant*, the agreement at issue provided that it "will not prevent you from filing a charge with any state or federal administrative agency" but was buried at the end of a 7-page booklet, underneath a vague heading. 363 NLRB No. 75, 2015 WL 9315531 at \*2. In *Amex Card Servs. Co.*, similar to *PJ Cheese*, the employer had a 14-page policy stating that employees were not precluded from filing a charge with the Board and a separate acknowledgment form without the savings clause. 363 NLRB No. 40, 2015 WL 6957289, at \*2. The Board found that when the documents were read together, it was ambiguous as to whether the savings clause applied, and therefore determined that the policy unlawfully restricted employees' access to the Board. *Id.* at \*3.

documents created a conflict and an ambiguity “that likely would confuse employees and applicants as to whether [the savings clause] is applicable at all.”

*Id.* Further, the Board noted that the employer had waived any defense based on its savings clause, because it failed to raise the defense in its exceptions to the Board. *Id.* Without question, this decision is distinguishable; JIB’s Agreement, which was contained in a single document, does not pose the same dangers of confusion over the applicability of the savings clause.

The Opposition further claims that the savings clause lists only one example of a government agency with which employees can file claims, the Equal Employment Opportunity Commission (“EEOC”) or similar state agency, and does not list the NLRB. In fact, the Agreement states that it exempts procedures with “an appropriate government agency *including* the Equal Employment Opportunity Commission or similar state agency.” (ROA.36) (emphasis added). The use of the word “including” “indicates that the specified list . . . that follows is illustrative, not exhaustive.” *Cox v. City of Dallas*, 256 F.3d 281, 293 (5th Cir. 2001) (internal citations and quotations omitted); *United States v. Canada*, 110 F.3d 260, 263 (5th Cir. 1997) (stating that the term “includes” indicates a non-exhaustive list). The Agreement’s listing of the EEOC or similar state agency simply provides a specific example of the broader language above; by the Agreement’s verbiage, this list is not exhaustive and need not define each and every government agency.

Finally, this Court has implied that employers need not explicitly list the Board in a savings clause in order to be lawful. In *Murphy Oil*, the employer's arbitration agreement provided that employees were not precluded from participating in administrative proceedings before the Board. *Id.* at 1019-1020. In declining to enforce the Board's Order that this was unlawful, this Court stated that it "[did not] hold that an express statement must be made that an employee's right to file Board charges remains intact before an employment arbitration is lawful" and suggested only that a specific provision "would assist [. . .] if incompatible or confusing language appears in the contract." *Id.* at 1019. In line with this reasoning, although JIB's Agreement doesn't specify the Board in particular, this does not render the Agreement unlawful.

Given JIB's savings clause, it would be "unreasonable for an employee to construe [the Agreement] as prohibiting the filing of Board charges." *Id.* at 1020. Accordingly, the Agreement does not interfere with employees' access to the Board.<sup>5</sup>

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<sup>5</sup> Although an employee's actual practice may not determine whether an employer has committed an unfair labor practice, this case suggests at the very least that an employee would reasonably construe JIB's Agreement as providing for his or her ability to file an unfair labor practice charge with the Board. *See Murphy Oil*, 818 F.3d at 1019.

### **III. JIB'S CONFIDENTIALITY AGREEMENT DOES NOT INTERFERE WITH EMPLOYEES' SECTION 7 RIGHTS.**

The Board's Opposition attempts to expand the breadth of JIB's confidentiality provision and warn of its perilous effect on employees' rights. Despite this effort, employees would not reasonably read JIB's confidentiality provision as interfering with their right to discuss terms and conditions of employment. The confidentiality provision in the Agreement is not unlawful.

The Board's Decision and the Opposition greatly expand the scope of coverage for JIB's confidentiality provision. JIB's provision covers only "[t]he Arbitrator's decision" and the "terms of the award." (ROA.39). It does not purport to cover the facts of the case or merits of the parties' positions, as the Opposition contends. Similarly, the Opposition's claim that employees might read the provision as including this information, or that employees would not know what it could discuss based on the "as required by law" exemption, ignores the fact that generally, any employee involved in an arbitration would be represented by counsel or a union—either of which could clear up any confusion regarding that employee's desire to discuss the decision. Moreover, even if not represented by counsel or a union, the employee could easily ask the arbitrator about any potential disclosure. JIB's confidentiality provision does not place employees' rights to discuss terms and conditions of their employment in peril.

The Opposition's continued reliance on Board decisions discussing confidentiality rules with broader coverage remains unpersuasive. *See, e.g. Professional Janitorial Services of Houston, Inc.*, 363 NLRB No. 35, slip op. at 6, n.3 (November 24, 2015); *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004), *enf'd* 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006). Again, JIB's confidentiality covers only the actual decision of the arbitrator—*i.e.*, the terms of the award—and not the evidence adduced during the arbitration.

Further, the Board's Opposition provides no explanation for why or how it has changed its view, as stated in its own Operations Memorandum, that “confidentiality clauses that prohibit an employee from disclosing the financial terms of [a non-Board] settlement to anyone other than the person's family, attorney and financial advisor are normally acceptable.” *See* NLRB, Operations Memorandum 07-27 (Dec. 27, 2006), *available at* <https://www.nlr.gov/reports-guidance/operations-management-memos>). This OMM carves out “financial terms” just as JIB's Agreement carves out the “decision” and “terms.” If the Board can simply disregard its own guidance without explanation, it is unclear how and to what extent its guidance should be relied upon.

Based on the language of the confidentiality provision in the Agreement and the Board's precedent and guidance, the Board's Decision finding that JIB's confidentiality rule violated the NLRA is not supported by substantial evidence.

## **CONCLUSION**

As demonstrated by its Opening Brief and the foregoing, the Board erred in its Decision, which is not supported by substantial evidence. JIB's Agreement does not interfere with employees' rights to engage in collective activity, restrict employees' access to the NLRB, or interfere with employees' ability to discuss terms and conditions of employment. Accordingly, JIB respectfully requests that its Petition for Review be granted, and the Board's Order not be enforced.

Respectfully submitted,

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DATED: November 14, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that on November 14, 2016, I electronically filed the foregoing brief of petitioner/cross-respondent with the Clerk of the Court for the U.S. Court Appeals for the Fifth Circuit using the appellate CM/ECF system, which constitutes service upon the following registered CM/ECF users:

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**CERTIFICATE OF COMPLIANCE**

Pursuant to the 5th Cir. R. 32.3, undersigned counsel certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,024 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Professional Plus 2010 in Times New Roman font size 14.

3. Upon request, undersigned counsel will provide an electronic version of this brief and/or copy of the word printout to the Court.

4. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5<sup>th</sup> Cir. R. 32.2 may result in the Court's striking this brief and imposing sanctions against the person who signed it.

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DATED: November 14, 2016