

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 12**

TBC CORPORATION and  
TBC RETAIL GROUP, INC.,  
a wholly-owned subsidiary of  
TBC CORPORATION<sup>1</sup>

Cases 12-CA-157478  
12-CA-170543

and

LUIS RODRIGUEZ, an Individual

**COUNSEL FOR THE GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENTS' EXCEPTIONS  
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, Counsel for the General Counsel herein files the following Answering Brief to the Respondents' Exceptions to the Decision of Administrative Law Judge (ALJ) Michael A. Rosas.<sup>2</sup> On October 14, 2016, Administrative Law Judge Michael A. Rosas (the ALJ) issued a Decision and Order in the above cases finding that Respondents, as a single employer, violated Section 8(a)(1) of the Act by maintaining and enforcing an arbitration agreement containing a class and collective action waiver, and a no solicitation policy. [ALJD p. 10, lines 36-45].<sup>3</sup>

**I. Introduction**

The facts of the cases are fully set forth in the parties' Joint Motion and Stipulated Record. [ALJD p. 2, lines 4-6 and JX 1]. The issues in dispute pertain to the lawfulness of the Respondents' Mutual Agreement to Arbitrate Claims and Waiver of Class/Collective Action, herein Arbitration

---

<sup>1</sup> The caption of these cases differs from the Consolidated Complaint and the Corrected Index and Description of Formal Documents, but is consistent with the parties' correction made in the Joint Motion and Stipulated Record and the General Counsel's Cross-Exceptions to the Administrative Law Judge Decision.

<sup>2</sup> In addition to this reply brief, the General Counsel has separately filed with the Board his Cross-Exceptions to the Administrative Law Judge's Decision, which seek to (1) correct the ALJ's identification of the Respondents, (2) correct certain provisions within the ALJ's Conclusions of Law, (3) supplement the ALJ's recommended Order and (4) add appropriate remedial language to the Appendix – Notice to Employees.

<sup>3</sup> As used herein, "ALJD" refers to the Decision of ALJ Rosas and "JX" refers to Joint Exhibits, followed by the exhibit number and, where appropriate, the page and/or paragraph number.

Agreement, the lawfulness of the Respondents' no solicitation policy and the effectiveness of Respondents' efforts to repudiate an earlier version of the no solicitation policy. The ALJ determined that the Respondents, as a single employer, violates Section 8(a)(1) of the Act by maintaining and enforcing the Arbitration Agreement, which requires employees to resolve all employment related claims against the Respondents by binding arbitration and further waiving employees' right to initiate or maintain such claims in a class, collective or representative basis. Moreover, the ALJ determined that Respondents maintained and failed to effectively repudiate an overly broad and presumptively invalid no solicitation policy that violates Section 8(a)(1) of the Act because it precludes employees from engaging in protected activity within lawful places, is inclusive of their non-work times, and requires supervisory permission.

## **II. THE ISSUES**

- a. Whether the ALJ's Decision properly cited and relied upon certain facts set forth in the parties' Joint Motion and Stipulated Record for his findings and conclusions.
- b. Whether the ALJ properly concluded that Respondents, as a single employer, engaged in the business of operating a chain of retail tire and auto maintenance stores throughout Florida.
- c. Whether the ALJ properly concluded that the Respondents' maintenance and enforcement of the Arbitration Agreement violated the Act.
- d. Whether the ALJ properly concluded that the remedy for Respondents' maintenance and enforcement of an unlawful Arbitration Agreement should include a Respondent Corporation motion to vacate the federal district court's order compelling arbitration, issued pursuant to its enforcement efforts, and that Respondents should reimburse the Plaintiffs their litigation expenses spent defending against Respondents' Arbitration Agreement enforcement action in federal district court.
- e. Whether the ALJ properly concluded that the Respondents' maintenance of its no solicitation policy, between November 1, 2010 and April 4, 2016, violated the Act.
- f. Whether the ALJ properly concluded that Respondents' earlier efforts to repudiate the no solicitation policy was not effective under *Passavant Memorial Hospital*, 237 NLRB 138 (1978) and its progeny.

### III. ARGUMENT

- a. **The ALJ erroneously cited and failed to cite or rely upon certain facts from the parties' Joint Motion and Stipulated Record into his findings and conclusions. [Respondents' Exceptions I(1), (2), (5), II(1), (20), (21) and (25)]<sup>4</sup>**

Consistent with his cross-exceptions to the ALJD, the General Counsel agrees with Respondents that the ALJ erred by referring to Respondents as “TBC – Tire & Battery Corporation d/b/a TBC Corporation and TBC Retail Group, Inc., a wholly-owned subsidiary of TBC – Tire & Battery Corporation d/b/a TBC Corporation,” and by failing to correctly state Respondents’ names, as set forth in the Joint Motion and Stipulated Record, as “TBC Corporation and TBC Retail Group, Inc., a wholly owned subsidiary of TBC Corporation” in all places where they appear in his Decision.<sup>5</sup> [ALJD pages 1, 10 (lines 31-34), 11 (lines 38-40)]

Despite the stipulated record, the ALJ erroneously stated that his decision was based “[o]n the entire record, *including my observations of the demeanor of the witnesses*, and after considering the briefs filed by the General Counsel and the Respondent, I make the following [...]” [ALJD p. 2, lines 12-14 (italicization provided for emphasis)].

Moreover, the ALJ erroneously stated that during the period of November 1, 2010 through April 14, 2016, Respondents maintained a 2010 Associate Handbook that included the no solicitation policy which is a subject of these cases. The parties’ Joint Motion and Stipulated Record establishes that the correct applicable period during which the Respondents maintained the unlawful no solicitation policy is from November 1, 2010 through April 4, 2016 and not April 14, 2016, as the ALJ erroneously stated. [ALJD page 7, paragraph 30]

---

<sup>4</sup> Respondents’ exceptions to the ALJD are divided in two (2) sections comprised of subsections for each of its exceptions: Section I – Exceptions to the ALJ’s Findings of Fact and Section II - Exceptions to the ALJ’s Conclusions of Law. Accordingly, Respondents’ exceptions are referred to herein as “I(1)” and “II(1)” etc.

<sup>5</sup> The same issue has been raised by the General Counsel in his cross-exception 1. Although the names for Respondents used by the ALJ were used in the Consolidated Complaint, the parties corrected those names in the Joint Motion and Stipulated Record. [JX 1, page 1 and fn. 1].

The ALJ erroneously stated that “[s]ince March 13, 2014, the Respondents have violated Section 8(a)(1) of the Act by maintaining and enforcing an Arbitration Agreement requiring employees to resolve employment-related disputes exclusively through individual arbitration, and forego any right they have to resolve such disputes through class or collective action.” [ALJD page 10, lines 36-39] However, as set forth in the General Counsel’s cross-exception 2, the ALJ erred by referring to an incorrect start-date on which Respondents began maintaining and enforcing the Arbitration Agreement; consistent with the parties’ Joint Motion and Stipulated Record the correct date was October 16, 2013. [ALJD pages 2 (lines 32-34), 10 (lines 36-39), JX 1, paragraph 12]. The undisputed evidence establishes that since October 16, 2013, Respondents have required all newly hired employees to sign the Arbitration Agreement. Thereafter, beginning on March 13, 2014, Respondents began requiring all employees hired before October 16, 2013, to sign the Arbitration Agreement as a condition of those employees’ continued employment. [ALJD p. 2, lines 30-43; JX 1 paragraphs 12 and 14].

**b. The ALJ properly concluded that Respondents, as a single employer, engaged in the business of operating a chain of retail tire and auto maintenance stores throughout Florida. [Respondents’ Exception I(3)]**

The parties’ Joint Motion and Stipulated Record establish that Respondent Corporation and Respondent Retail Group constitute a single employer for purposes of these proceedings and have, at all material times, been employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. [JX 1, paragraphs 6 and 7]. Respondent Retail Group is a wholly-owned subsidiary of Respondent Corporation. [JX 1, paragraph 3]. Respondent Corporation has, at all material times, been a Delaware corporation engaged in the business of marketing tires to the automotive replacement market and the wholesale sale and distribution of tires. [JX 1, paragraph 4] As a wholly-owned subsidiary of Respondent Corporation, Respondent Retail Group has been engaged in the business of operating a chain of retail tire and auto maintenance stores throughout Florida, including the store “Tire Kingdom,” which employed the Charging Party. [JX 1, paragraphs 2 and 10] Moreover, at all material times, Respondent Retail Group, operating as “Tire Kingdom” has been engaged in the retail and wholesale

sale of tires and related products and the provision of auto maintenance services at approximately 250 stores located within the additional states of Georgia, Mississippi, Louisiana, Ohio, Texas, Missouri, Maryland, North Carolina, South Carolina, and Vermont. [JX 1 paragraph 3]

Contrary to Respondents' exception to the contrary, the undisputed facts establish that the ALJ properly concluded that, as a single employer, Respondents have been engaged in the business of operating a chain of retail tire and auto maintenance stores throughout Florida. [ALJD page 2, lines 20-26]

**c. The ALJ properly concluded that the Respondents' maintenance and enforcement of the Arbitration Agreement violated the Act. [Respondents' Exceptions I(4), (6), (7), II(2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12) and (13)]**

Since on or about October 16, 2013, Respondents have required all newly hired employees to sign the disputed Arbitration Agreement, which has been a condition of their employment. [JX 1, paragraph 12, JX 2, JX 3, JX 11]. The Arbitration Agreement states, in relevant part, the following:

**As a condition of my employment and/or continued employment with TBC Corporation or one of its affiliated entities, and for the mutual promises herein, Applicant/Employee (referred to in this Agreement as "Associate", "you") and the Company (collectively "the parties") agree that:**

1. [...] any and all disputes, claims, complaints or controversies ("Claims") between you and [Respondents] [...] that in any way arise out of or relate to your employment, the terms and conditions of your employment, your application for employment and/or the termination of your employment will be resolved by binding arbitration and NOT by a court or jury. As such, the Company and you agree to forever waive and relinquish their right to bring claims against the other in a court of law.
2. [...] To the maximum extent permitted by law, the parties agree that this Agreement is equally binding on any person who represents or seeks to represent you or the Company in a lawsuit against the other in a court of law. That is, **the parties agree that no Claims may be initiated or maintained on a class action basis, collective action basis, or representative action basis either in court or arbitration. Any Claims must be brought in a party's individual capacity, and such claim may not be joined or consolidated in arbitration with Claims brought by other individuals.** [...].

**Survival; Modification; and Termination**

This Agreement will survive the termination of your employment with the Company, as well as the termination or expiration of any benefit of such employment. In the event that your

employment with the Company is severed or terminated and you are subsequently re-employed by the Company, this Agreement will remain in full force and effect during such subsequent employment and will survive the termination of such subsequent employment.

This Agreement supersedes any prior agreement between the parties concerning the subject matter of dispute resolution, **This Agreement may only be modified, revoked and/or terminated by a subsequent written agreement that specifically states the parties' intent to modify, revoke and/or terminate this Agreement and that is signed by you and an Executive Vice President of the Company.** [JX 2, emphasis in bold added]

The language of the Arbitration Agreement, as reflected in JX 2, has remained the same at all times since on or about October 16, 2013. [JX 1, paragraph 12]. It is undisputed that the Arbitration Agreement expressly prohibits employees, as a condition of their employment, from engaging in protected concerted activity through class or collective action. [ALJD page 7, lines 8-10]

The General Counsel has argued, and the ALJ has determined, that by its terms Respondents' maintenance and enforcement of the foregoing Arbitration Agreement violates Section 8(a)(1) of the Act because it unlawfully infringes upon employees Section 7 right to class or collective action for improvement of their working conditions. [General Counsel's post-trial brief to ALJ, ALJD page 10, lines 36-39 (as modified herein to reflect October 16, 2013, rather than March 13, 2014 as the beginning date of the Respondents' violation)] In contrast to Respondents' exceptions, the ALJ properly applied extant Board law to examine the lawfulness of Respondents' maintenance and enforcement of the Arbitration Agreement.

The Supreme Court has not yet ruled upon the interplay of the FAA and the NLRA's protection of employees' Section 7 activity from waivers made a condition of employment, which would have been relevant to the ALJ's analysis of this issue. Nonetheless, Respondents argue in exceptions that the ALJ erred by failing to apply and adhere to *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010) when determining that Respondents' Arbitration Agreement violates the Act. The Supreme Court in *Rent-A-Center*, did not interpret the interplay of the Federal Arbitration Act (FAA) and the NLRA but, instead, focused exclusively upon the interplay between the FAA and the authorities of the federal district courts.

Specifically, the issue before the Court was whether a U.S. District Court may decide a claim that an arbitration agreement is unconscionable, where the agreement explicitly assigns that decision to the arbitrator. 561 U.S. 63 (2010), slip op. at 3. Therein, the Court held that under the FAA, where an arbitration agreement includes language that the arbitrator will determine the enforceability of the agreement, if a party challenges the enforceability of that particular agreement, then the district court considers the challenge, but if a party challenges the enforceability of the agreement as a whole, then such challenge is for the arbitrator to decide. 561 U.S. 63 (2010), slip op. at 3-12. The Respondents' argument that the ALJ should have relied upon the *Rent-A-Center* case herein is misplaced. Because the *Rent-A-Center* case does not either implicitly or explicitly bar or limit the Board's authority to protect Section 7 activity, it is not binding and Respondents' argument is without merit.

In *D.R. Horton*, relevant case law, the Board made clear that the proper test for determining whether class action waivers contained in arbitration agreements constitute a rule that violates Section 8(a)(1) of the Act is that set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Under the *Lutheran Heritage Village-Livonia* test, a policy such as Respondents' violates Section 8(a)(1) if it expressly restricts Section 7 activity or, alternatively, when (1) employees would reasonably read it as restricting such activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. 343 NLRB at 646-647, cited in *D.R. Horton* at 357 NLRB No. 184, slip op. at 7.

Respondents' mandated Arbitration Agreement expressly restricts employees from exercising substantive Section 7 rights under the Act by prohibiting them from participating in employment-related class, or collective, action lawsuits or arbitration cases, which effectively strips employees of their Section 7 right to engage in these forms of concerted activity for their mutual aid and protection. See, e.g., *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. at 4-5, enf. denied No. 15-60642,

2016 WL 3685206 (5th Cir. June 6, 2016); *Grill Concepts Services*, 364 NLRB No. 36, slip op. at 1-2, fn. 7 (2016).

Not only does Respondents' maintenance of the Arbitration Agreement on its face constitute a violation of the Act under the *Lutheran Heritage* test, Respondents' have enforced the Arbitration Agreement to restrict the exercise of Section 7 activity in violation of the Act. The Board has long held that enforcement of an unlawful rule constitutes a separate violation from the mere unlawful maintenance of the rule. *Murphy Oil*, supra, slip op at 19; *Bristol Farms*, 364 NLRB No. 34 (2016). The record convincingly demonstrates that Respondents enforced the class, collective and representative action waiver in the Arbitration Agreement by successfully moving to compel arbitration of the class action lawsuit filed by employees Desimoni and Reiter, and joined by employee Rodriguez, the Charging Party.

**1. The Board's decisions in *D.R. Horton*, *Murphy Oil* and their progeny are controlling.**

Although the Fifth and Eighth Circuit Courts of Appeals have denied enforcement of Board orders which rely upon the Board's well-reasoned position that class action waivers do restrict such activity by preventing employees from exercising the "core substantive right" of the Act – to act together for their mutual aid and protection, including through the filing of class and collective action suits against their employers – the Seventh and Ninth Circuits have recently agreed with the Board's reasoning in refusing to dismiss an FLSA collective action pending before it. *Lewis v. Epic Systems*, 823 F.3d 1147, 2016 WL 3029464 (7th Cir. May 26, 2016); *Morris v. Ernst & Young*, \_\_\_ F.3d \_\_\_, (9th Cir. August 22, 2016); cf. *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5<sup>th</sup> Cir. 2013); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5<sup>th</sup> Cir. 2015); *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772, (8th Cir. June 2, 2016).

Furthermore, the ALJ was not entitled to diverge from Board precedent in these circumstances, notwithstanding the split among the circuit courts. See, e.g., *Pathmark Stores*, 342 NLRB 378 n.1

(2004); *Chesapeake Energy Corp.*, 362 NLRB No. 80 (2015), enf. denied in relevant part 633 Fed.Appx. 613 (5th Cir. 2016). The ALJ must continue to follow the Board's controlling precedent unless and until the Board's interpretation of the *D.R. Horton* issue and the ensuing circuit split is resolved by the Supreme Court. In *Pathmark Stores*, the Board reiterated this principle:

[i]t has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise ... **[I]t remains the [judge's] duty to apply established Board precedent which the Supreme Court has not reversed.** Only by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved.

342 NLRB 378 n. 1 (2004) (emphasis added), quoting *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963), enf. in part 331 F.2d 176 (8th Cir 1964), quoting *Insurance Agents' International Union, AFL-CIO*, 119 NLRB 768, 773 (1957).

On April 30, 2015, the Board reversed an ALJ, who, after the Board's decision issued in *D.R. Horton*, but before it decided *Murphy Oil*, sought to apply the holding of *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) to reverse *D.R. Horton* and foreclose further findings that class and collective action waivers contained in an employment arbitration agreement could, in and of themselves, violate the Act. *Chesapeake Energy*, supra, slip op. at 1-3. The Board expressly rejected the ALJ's arguments for the deference of the NLRA to the Federal Arbitration Act (FAA) and held, once again, that arbitration policies violate Section 8(a)(1) when their class and collective action waivers fail the *Lutheran Heritage* test. *Id.* at 3.

**2. Section 7 of the Act creates a substantive right for employees to pursue collective legal actions regarding their employment.**

In contrast to the Respondents' exceptions to the contrary, the Board has held time and again, the NLRA's core substantive right is the Section 7 right of employees to act collectively for their mutual aid or protection. See, e.g., *Murphy Oil*, 361 NLRB No. 72, slip op. at 6; *Bristol Farms*, 364 NLRB No. 34 (2016). The statement of purpose set forth in Section 1 of the Act establishes that the NLRA was

enacted to correct “the inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and [corporate] employers,” and to remove the impediments which that same inequality presents to the free flow of commerce. “[T]he *D.R. Horton* Board was clearly correct when it observed that the ‘right to engage in collective action – including collective *legal* action – is the *core* substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest.’” *Murphy Oil*, supra, slip op. at 7, quoting *D.R. Horton*, supra, slip op. at 10 (emphasis original to *Murphy Oil*). Thus, the Board has long held that the specific collective activity of jointly pursuing legal claims related to the terms and conditions of employment is a form of protected, concerted Section 7 activity. Moreover, the Board has repeatedly determined that agreements barring employees from collectively pursuing such legal claims constitute a patently unlawful waiver of their substantive Section 7 right to act together for their mutual aid and protection. *Id.* at 7 (“The [Fifth Circuit’s] first step was to determine that pursuit of legal claims concertedly is not a substantive right under Section 7 of the NLRA. We cannot accept that conclusion; it violates the long-established understanding of the Act and national labor policy, as reflected, for example, in the Supreme Court’s decision in *Eastex ...*”).

In *Beyoglu*, 362 NLRB No. 152 (2015), the Board made clear that “the filing of an employment-related class or collective action by an individual is an attempt to initiate, to induce, or to prepare for group action and is therefore conduct protected by Section 7.” *Id.*, slip op. at 2. See also *Nijjar Realty, Inc., d/b/a Pama Management*, 363 NLRB No. 38 (2015) and *D. R. Horton*, supra, slip op. at 3.

Respondents argue, through exceptions, that employees have the right, through mandatory arbitration agreements, to waive statutorily protected rights to engage in class or collective actions, including the ability to jointly initiate or jointly enter lawsuits or arbitrations related to their working conditions. The ALJ considered that federal courts and the Board have recognized the employee’s right to waive statutorily protected rights. *BE & K Constr. Co. v. NLRB*, 23 F.3d 1459, 1462 (8<sup>th</sup> Cir. 1994)

(holding that the right to refrain from joining or assisting a union is an equally protected right with that of joining or forming a union). [ALJD page 8, lines 4-7] However, an employee exercising a choice that is not made a condition of employment involves different considerations and values than waivers in a mandatory arbitration agreement the acceptance of which dictates whether one remains employed or not. In light of Respondents' false equivalence, the ALJ correctly relied upon the Board's analysis in *MasTec Services Co.*, to conclude that the *BE & K* rationale is not applicable to the facts of this case. 363 NLRB No. 81 (2015), enf. denied No. 16-60011 (per curiam) (5<sup>th</sup> Cir. July 11, 2016) [ALJD page 8, lines 7-11]. The Board, in *MasTec*, rejected the argument that an opt-out provision to an arbitration agreement afforded employees the freedom to enter into a class waiver, or to refrain from doing so. *Id.* Although the Fifth Circuit Court of Appeals granted the petitioner a reversal of the Board's decision, the case remains enforceable Board law until either subsequently overruled by either the Board or by the Supreme Court. See, *Pathmark Stores*, 342 NLRB 378 n.1 (2004).

Furthermore, in contrast to Respondents' exceptions, the Board has emphasized in *D.R. Horton* that finding an arbitration agreement unlawful does not conflict with the FAA because "the intent of the FAA was to leave substantive rights undisturbed." 357 NLRB No. 184, slip op. at 11.

### **3. The Board's decisions in *D.R. Horton* and *Murphy Oil* correctly accommodate the NLRA and FAA.**

In contrast to Respondents' exceptions, the ALJ properly determined that in *Murphy Oil* the Board reaffirmed the applicability of the FAA's savings clause exception and congressional intent that the NLRA's mandate to protect employees' substantive Section 7 rights overrides the FAA's interest in enforcing private agreements. 361 NLRB No. 72, slip op. at 9-10. [ALJD page 8, lines 23-26]

Moreover, in *Murphy Oil*, the Board found that, even if there is a conflict between the NLRA and the FAA, the Norris-LaGuardia Act prevents enforcement of any private agreement inconsistent with the statutory policy of protecting employees' concerted activity, including an agreement that seeks to prohibit a "lawful means [of] aiding any person participating or interested in a" lawsuit arising out of

a labor dispute. 361 NLRB No. 72, slip op. at 10. Therefore, applying existing Board law in the event of a conflict, the FAA would therefore have to yield to the NLRA insofar as necessary to accommodate employees' substantive Section 7 rights. *Id.*

**4. Maintenance and enforcement of class and collective action waivers contained in individual arbitration agreements constitute separate violations of the Act.**

As in *D.R. Horton*, the Board found in *Murphy Oil* and subsequent cases, up through its recent decision issued in *Bristol Farms*, supra, it is “well-established that an employer’s enforcement of an unlawful rule, including a mandatory arbitration policy like the one at issue here, independently violates Section 8(a)(1).” *Cellular Sales*, 362 NLRB No. 27, slip op. at 2 (2015) (emphasis added), enf. denied *Cellular Sales of Missouri v. NLRB*, 15-1620, 15-1860, 2016 WL 3093363 (8th Cir. June 2, 2016), citing *Murphy Oil*, 361 NLRB No. 72, slip op. at 19-21; see also *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16-17 (1962) and other authorities cited by the Board in n. 9 of the *Cellular Sales* decision.

In contrast to the Respondents’ exceptions, the ALJ properly concluded that under current Board law court judgments such as the order compelling arbitration issued in the matter of *Corey Desimoni & James Reiter, individually & on behalf of all similar situated, vs. TBC Corporation*, Case No. 2:15-cv-366-UA-CM (M.D. Fla. 2015) (herein referred as the “Lawsuit”), are not given collateral estoppel effect in Board proceedings. See *Field Bridge Associates*, 306 NLRB 322 (1992) enf. 982 F.2d 845 (2d Cir. 1993). If the Board was not a party to the prior private litigation, then it is not barred from litigating an issue involving enforcement of Federal law which the private plaintiff has unsuccessfully litigated. *Roadway Express, Inc.*, 355 NLRB 197 (2010). [ALJD page 8, lines 28-35]

- d. The ALJ properly concluded that the remedy for Respondents’ maintenance and enforcement of an unlawful Arbitration Agreement should include Respondent Corporation motioning to vacate the federal district court’s order compelling arbitration, issued pursuant to its enforcement efforts, and that Respondents should reimbursement to Plaintiffs their reasonable litigation expenses and attorneys’ fees spent defending against Respondents’ enforcement action. [Respondents’ Exceptions I(6), II(14), (23) and (24)]**

Respondents, by their exceptions, essentially argue that an appropriate remedy for their maintenance and enforcement of the unlawful Arbitration Agreement should only require rescission of the unlawful Arbitration Agreement and the posting of a Notice to Employees with appropriate “cease and desist” language. In contrast, the General Counsel sought, and the ALJ properly recommended, a substantially more meaningful remedy for these violations of the Act. [General Counsel’s post-hearing brief to ALJ and ALJD pages 9 (lines 7-13), 11 (lines 19-31), 12 (lines 21-31)] The ALJ properly imposed Board-approved remedies for similar violations of the Act, which include Respondents’ payment of reasonable litigation expenses and attorneys’ fees, with interest, incurred for opposing the Respondents’ motion to compel arbitration in the Lawsuit. *Murphy Oil*, supra at 21 and *Nijjar Realty, Inc. d/b/a Pama Management*, 363 NLRB No. 38 (2015).

In *Murphy Oil*, the Board also considered and rejected the employer’s argument that its motion to dismiss the class action lawsuit and compel arbitration was protected by its First Amendment right to petition the government, as construed by the Supreme Court in *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002). The Board found the motion unlawful because it had an illegal objective under federal law, i.e. to enforce an unlawful restriction against protected Section 7 activity. 361 NLRB No. 72, slip op. at 19-21. Accordingly, the Board ordered the employer therein to reimburse the plaintiffs for any reasonable attorneys’ fees and litigation expenses that they may have incurred in opposing the employer’s unlawful motion to dismiss. *Id.* at 21, citing *Bill Johnson’s Restaurants v. NLRB*, 461 U.S. 731, 747 (1983).

Accordingly, Respondent’s successful motion to enforce the Arbitration Agreement against Charging Party Rodriguez, his fellow employee plaintiffs Corey Desimoni and James Reiter and all other employees who joined in their collective action lawsuit(s) constitutes a separate violation of Section 8(a)(1) that must be remedied. Consistent with established Board law, the collective action plaintiffs herein are entitled to recover all reasonable attorney fees and litigation expenses that they

incurred for opposing Respondent Corporation's motion to compel arbitration in the FLSA Lawsuit(s). *Nijjar Realty, Inc., d/b/a Pama Management*, supra, slip op. at 2.; see also *UnitedHealth Group, Inc.*, 363 NLRB No. 134 (2016), slip op. at 3 and *Beena Beauty Holding, Inc.*, 364 NLRB No. 3 (2016), slip op. at 2.

Moreover, the Board in *SolarCity Corp.*, recently required the offending employer to file a notice with the court that it had rescinded or revised its mandatory arbitration program upon which it had based its earlier motion to dismiss the collective lawsuit and to compel individual arbitration. The Board also required the employer therein to present an affirmative statement to the court that it no longer opposed the plaintiffs' lawsuit on the grounds of its enforcement of the unlawful mandatory arbitration program. Finally, the Board ordered the employer to reimburse plaintiffs for their reasonable litigation expenses and attorneys' fees spent defending the employer's enforcement efforts. *SolarCity Corp.*, 363 NLRB No. 83 (2015), slip op. at 12.<sup>6</sup>

Where, as in the instant case, Respondents have already successfully obtained a federal district court order compelling individual arbitrations, a remedy providing for mere notice to the court that Respondents no longer support the previously granted motion, as recommended by the ALJ, is wholly ineffective because Respondents would still benefit from their own unlawful deeds.<sup>7</sup> [JX 15]

Finally, based upon the long-standing Board precedent followed by the ALJ, the plaintiffs to the Lawsuit are also entitled to the payment of interest on their reimbursements for reasonable litigation expenses and attorneys' fees expended for opposing the Respondents' enforcement of its mandatory Arbitration Agreement before the federal district court. See *New Horizons*, 283 NLRB 1173 (1987). The Board has previously determined that interest on all amounts due to the Charging Party shall be

---

<sup>6</sup> Through his cross-exceptions 3 and 4 (and Appendix A thereof), the General Counsel has separately sought the Board's adoption of the affirmative actions ordered in *SolarCity Corp.*

<sup>7</sup> Plaintiffs have not appealed the federal district court's Order on Motion to Compel Arbitration. [JX 1, paragraph 29]

computed based upon a daily basis, as prescribed in *Kentucky River Medical Center*, 356 NLRB 8 (2010). [ALJD page 11, lines 19-26]

e. **The ALJ properly concluded that the Respondents' maintenance of its no solicitation policy, between November 1, 2010 and April 4, 2016, violated the Act. [Respondents' Exceptions II(17), (19) and (22)]**

and

f. **The ALJ properly concluded that Respondents' earlier efforts to repudiate the no solicitation policy was not effective under *Passavant Memorial Hospital*, 237 NLRB 138 (1978) and its progeny. [Respondents' Exceptions II(15), (16), (18) and (22)]**

Respondents' exceptions challenge the ALJ's findings that Respondents violated Section 8(a)(1) of the Act by maintaining an overly broad no solicitation policy. Moreover, Respondents challenge the ALJ's finding that its self-remediation efforts failed to meet the Board's standard required by *Passavant Memorial Hospital*, 237 NLRB 138 (1978) and its progeny. These ALJ findings and determinations are all proper and supported by Board law.<sup>8</sup>

From November 1, 2010 until April 4, 2016, Respondents maintained the 2010 TBC Corporate Associate Handbook (the "2010 Associate Handbook"), which includes the following no solicitation policy statement, in its entirety:

**No Solicitation**

TBC provides a solicitation free work environment in order to prevent workplace distractions or misunderstandings that can result from solicitation. **This means that we do not allow Associates or non-employees to solicit in our buildings, on our property or during work hours, unless that solicitation is approved in advance by the respective Senior Executive in conjunction with Human Resources.** [bolded emphasis added]

[ALJD, p. 4, lines 31-39, p. 5, lines 1-3, JX 1, paragraph 30, JX 16] Respondents admittedly provided the 2010 Associate Handbook, and/or made it available, to all employees. [ALJD, p. 5, lines 34-35, JX 1, paragraph 30]

---

<sup>8</sup> However, the General Counsel has urged the Board to issue a Notice to Employees, which more clearly and fully remedies Respondents' unfair labor practices, rather than the ALJ's recommended Notice to Employees: [General Counsel's cross-exception 4, Appendix A and ALJD, Appendix].

Since January 18, 2012, Respondents have maintained Human Resources Policies and Procedures Policy No. 406 regarding Solicitation and Distribution (“HR Solicitation Policy”), which states, in relevant part, the following. [ALJD, p. 5, 6, JX 1, paragraph 31, JX 17]

TBC Corporation limits Associates from engaging in solicitation or distribution during work time or in work areas, that may interfere with TBC Corporation's operations. [ALJD, p. 5, lines 6-8, JX 17]

There is no evidence that Respondents disseminated the 2012 HR Solicitation Policy to employees. [ALJD, p.9, fn. 18]

On April 4, 2016, Respondents revised the Associate Handbook that had been in effect since 2010. [ALJD, p. 5, lines 33-34, JX 1, paragraph 32 and 34; JX 18] Since April 4, 2016, Respondents have provided the revised handbook, and/or made it available, to all employees. [ALJD, p. 5, lines 34-36, JX 1, paragraph 32, JX 18] On April 5 and 6, 2016, Respondents distributed a notice to employees regarding solicitation which was posted on the associate information bulletin boards located in each of Respondent Retail Group’s stores doing business as “Tire Kingdom” within the states of Florida, Georgia, Mississippi, Louisiana, Ohio, Texas, Missouri, Maryland, North Carolina, South Carolina and Vermont. [ALJD, p. 6, lines 6-9, JX 1, paragraphs 3 and 33, JX 19] The April 2016 version of the no solicitation policy is facially valid. There is no evidence to establish that Respondents posted the April 2016 notice of the revised no solicitation policy at other affiliates of Respondent Corporation. [ALJD, p. 6, lines 19-24, JX 1].

**1. Respondents’ no solicitation policy violates Section 8(a)(1) of the Act because it unlawfully restricts employees’ activities protected by Section 7 of the Act.**

In contrast to the Respondents’ exceptions, the Board has routinely determined that a rule or policy violates Section 8(a)(1) of the Act either if it *explicitly* restricts activities protected by Section 7 or if it can reasonably be read by employees to chill their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999); *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Respondents’ no solicitation policy that was publicized to all employees and maintained in

the Respondent Corporation Associate Handbook throughout the period of over five years from November 1, 2010 until April 4, 2016, included a blanket prohibition against solicitation by employees anywhere on company property during “working hours,” absent express permission granted from management. The Board has long held that “solicitation, being oral nature, impinges upon the employer's interest only to the extent that it occurs on working time [...]” *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 619 (1962). Board law also establishes that a rule prohibiting solicitation during “working hours” (as opposed to “working time”) is overly broad and presumptively invalid, as it could reasonably be construed as prohibiting solicitation during break times or periods when employees are not actually working. *Our Way, Inc.*, 268 NLRB 394 (1983). Restricting employees’ solicitations on company property is likewise overly broad and presumptively invalid. *Mediaone of Greater Florida, Inc.*, 340 NLRB 277, 277-278 (2003). Moreover, a rule requiring employees to request, and receive, permission from management before engaging in Section 7 activity is antithetical to the Act because it reasonably tends to chill employees’ exercise of their protected rights. *UPMC*, 362 NLRB No. 191 (2015), slip op. at 30, citing *J.W. Marriott Los Angeles*, 359 NLRB No. 8 (2012) (managers' discretion over application of the rule is unlawful because it requires management permission to engage in Section 7 activity and leads employees to reasonably conclude that they are required to disclose to management the nature of the activity for which they seek permission, a compelled disclosure that would certainly tend to chill the exercise of Section 7 rights). The ALJ properly relied upon the foregoing Board precedent to conclude that Respondents’ no solicitation policy as set forth in the 2010 Associate Handbook is overly broad and presumptively invalid because it (1) prohibits employees’ solicitations anywhere on company property; (2) prohibits employee solicitations during “working hours,” which includes their breaks and meal periods rather than “working times,” which exclude those non-work times, and; (3) because it prohibits employees’ solicitations unless management has first considered and approved them. [ALJD pages 9 (lines 24-44), 10 (lines 1-4)]

**2. Respondents' effort to repudiate and remedy its unlawful no solicitation policy is not effective under *Passavant Memorial Hospital* and its Progeny.**

Through its exceptions, Respondents argue that its remedial actions in April 2016 effectively repudiated and remedied the earlier version of its no solicitation policy previously disseminated and maintained in its 2010 Associate Handbook. For the following reasons the Respondents' April 2016 actions were insufficient.

For effective repudiation and remedy, Respondents must demonstrate that they met the Board's stringent standard in *Passavant Memorial Hospital*, 237 NLRB 138 (1978) and its progeny. The Board has determined that for an employer's efforts at self-repudiation and remedy to be effective "such repudiation must be 'timely,' 'unambiguous,' 'specific in nature to the coercive conduct,' and 'free from other proscribed illegal conduct.'" *Douglas Division, The Scott & Feltzer Company*, 228 NLRB 1016 (1977), and cases cited therein at 1024. There must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer's part after the publication. *Pope Maintenance Corp.*, 228 NLRB 326, 340 (1977). Such repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights. See *Fashion Fair, Inc.*, et al., 159 NLRB 1435, 1444 (1966); *Harrah's Club*, 150 NLRB 1702, 1717 (1965)." *Id* at 138-139. *Rivers Casino*, 356 NLRB No. 142, slip op. at 2 (2011) and *DirectTV*, 359 NLRB No. 54 (2013). Finally, as the Board cited, in *Boch Industries*, 362 NLRB No. 83, fn.3 (2015) and *Lily Transportation Corp.*, 362 NLRB No. 64 (2015), slip op. at 1, for effective repudiation the employer must have also explained to its employees the reasons for issuing a revised handbook, including notice of its unfair labor practices and assurances that future violations will not occur. See also, *River's Bend Health & Rehabilitation Services*, 350 NLRB 184, 193 (2007) and *Broyhill Co.* 260 NLRB 1366, 1366 (1982). The Board also considers whether efforts to repudiate the unfair labor practice occurred before or after the issuance of the complaint. *IBEW, Local 1316*, 271 NLRB 338, 341 (1984).

Respondents' efforts to repudiate and remedy the unlawful 2010 no solicitation policy are ineffective because Respondents neither notified employees of the unfair labor practices being remedied nor were their actions free from other proscribed illegal conduct – specifically the ongoing unlawful interference with Section 7 rights by maintaining and enforcing the mandatory Arbitration Agreement. Additionally, Respondents' efforts to repudiate and remedy this violation occurred more than four (4) months after the Board's issuance of its original Complaint.

Respondents failed to explain to employees the underlying reasons for issuing the 2016 Associate Handbook, including “the background circumstances surrounding the distribution of the modified handbook.” *Lily Transportation Corp.*, supra, slip op. at 1 (Respondent's efforts therein to repudiate its unfair labor practices were found ineffective where it failed to explain to employees its reasons for issuing a revised handbook). Similarly, in *Casino San Pablo*, the Board determined that the employer's attempted repudiation therein was ineffective where it simply issued a revised handbook that deleted unlawful rules that had appeared in its previous version and failed to explain the reasons for doing so. 361 NLRB No. 148, slip op. at 4-5 (2014); cf. *Broyhill Co.*, 260 NLRB 1366 (1982) (employer therein successfully repudiated its supervisor's unlawful conduct by posting notices stating that the conduct was “improper,” in addition to assuring employees that it would not interfere with their Section 7 rights and explaining those rights).

In the instant case, because the Respondents' April 2016 efforts to repudiate and remedy this violation occurred in the context of continuing unremedied unfair labor practices its action was ineffective. See *Passavant Memorial Hospital*, supra and *Douglas Division, The Scott & Feltzer Company*, supra, and cases cited therein at 1024. The Board should also consider that Respondents have never conceded that the earlier no solicitation policy was unlawful, which further aggravates a finding of effective repudiation. Accordingly, a remedial Board order, as proposed by the General Counsel at Appendix A of his cross-exceptions, is warranted to remedy Respondents' unlawful no solicitation rule.

#### **IV. CONCLUSION**

For the foregoing reasons, Counsel for the General Counsel respectfully urges the Board adopt the ALJ's Findings of Fact, Legal Analysis, Conclusions of Law and recommended Order, as amended herein.

DATED this 28th day of November 2016.

Respectfully submitted,

/s/ Dallas L. Manuel II

Dallas L. Manuel II, Esq.  
Counsel for the General Counsel  
National Labor Relations Board, Region 12  
201 E. Kennedy Boulevard, Suite 530  
Tampa, FL 33602

**CERTIFICATE OF SERVICE**

I certify that a copy of Counsel for the General Counsel's Answering Brief to the Respondents' Exceptions to the Administrative Law Judge's Decision, in TBC Corporation and TBC Retail Group, Inc., a wholly-owned subsidiary of TBC Corporation, Cases 12-CA-157478 and 12-CA-170543, has been served upon the persons named below by the following electronic means on this 28th day of November 2016:

**Gary W. Shiners**  
Executive Secretary  
National Labor Relations Board  
1015 Half Street SE  
Washington, D.C. 20570-0001

By electronic filing: [www.nlr.gov](http://www.nlr.gov)

**Nicole Bermel Dunlap, Esq. and  
Shane Munoz, Esq.**  
Ford & Harrison, LLP  
Counsel for Respondent  
101 E. Kennedy Boulevard, Suite 900  
Tampa, FL 33602-7800

By electronic mail:  
[ndunlap@fordharrison.com](mailto:ndunlap@fordharrison.com) and  
[smunoz@fordharrison.com](mailto:smunoz@fordharrison.com)

**Bernard Mazaheri, Esq.**  
Morgan & Morgan  
Counsel for Charging Party  
333 West Vine Street, Suite 1200  
Lexington, KY 40507

By electronic mail:  
[bmazaheri@forthepeople.com](mailto:bmazaheri@forthepeople.com)

Signed:

/s/ Dallas L. Manuel II

Dallas L. Manuel II  
Counsel for the General Counsel  
National Labor Relations Board, Region 12  
Fifth Third Bank Building  
201 E. Kennedy Boulevard, Suite #530  
Tampa, FL 33602-5824  
[dallas.manuel@nlrb.gov](mailto:dallas.manuel@nlrb.gov)