

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16

SOUTHERN STAR, INC.

Respondent

and

RICHARD L. WILLIS

Charging Party

Case No. 16-CA-168143

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE
NATIONAL LABOR RELATIONS BOARD

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I. INTRODUCTION

The Charging Party, Richard L. Willis, filed the instant charge on January 19, 2016. (Record Exh. 1(a)). On May 3, 2016, the charge was amended. (Record Exh. 1(c)). On May 26, 2016, the Regional Director for Region 16 issued a Complaint and Notice of Hearing on behalf of the General Counsel. (Record Exh. 1(e)). On July 8, 2016, the General Counsel, Charging Party and Respondent filed a Joint Motion and Stipulation of Facts, waiving a hearing and jointly moved to transfer the case to the Board. On October 20, 2016, the parties' Joint Motion and Stipulation of Facts was approved, establishing a briefing date of November 10, 2016. Thereafter, upon request of Respondent, the date for filing of briefs was extended to December 1, 2016. Pursuant to that Order, Counsel for the General Counsel hereby submits this brief.

II. STATEMENT OF FACTS

The facts are undisputed. Respondent, an Oklahoma corporation with an office and place of business in Longview, Texas, is engaged in the installation and repair of satellite television and internet equipment. (Jt. Mot. and Stip. ¶6).¹ Respondent's employees are not represented by a labor organization. Respondent requires its employees to sign its Arbitration Agreement upon

¹ All references to the Joint Motion and Stipulation of Facts are noted as "Jt. Mot. and Stip."

commencement of their employment with Southern Star, Inc. (Record Exh. 2). The Arbitration Agreement states, in relevant part:

THE PARTIES AGREE TO PURSUE THEIR RIGHTS AND REMEDIES EXCLUSIVELY THROUGH BINDING ARBITRATION, INDIVIDUALLY AND NOT AS A MEMBER OR REPRESENTATIVE OF A CLASS, AND WAIVE THEIR RIGHT TO A TRIAL BY JUDGE OR JURY, BUT THEY DO NOT WAIVE ANY OTHER RIGHTS OR REMEDIES AVAILABLE UNDER APPLICABLE LAW.

(Record Exh. 3).

This paragraph at the onset of the policy requires employees to forgo their rights to resolution of employment-related disputes by collective or class action. (Jt. Mot. and Stip. ¶ 9).

The Arbitration Agreement remains in full-force and effect, and is a mandatory term and condition of employment. (Jt. Mot. and Stip. ¶ 9; Record Exh. 3).

III. ARGUMENT AND ANALYSIS

Counsel for the General Counsel submits that Respondent's Arbitration Agreement violates Section 8(a)(1) of the Act. As such, Respondent's affirmative defenses should be rejected.

A. Respondent's Arbitration Agreement Violates Section 8(a)(1) of the Act

The Arbitration Agreement violates Section 7 of the Act: It is a mandatory agreement requiring that employees forgo any rights they have to resolution of disputes by collective or class action.

The Board's decision in *D.R. Horton*, 357 NLRB No. 184, slip op. at 1-7 (2012), controls the discussion of class action arbitration under the Act. The Board reaffirmed its *D.R. Horton* decision in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 slip op. at 2 (2014). In *D.R. Horton*, the Board held that a policy or agreement precluding employees from filing employment-related collective or class claims in both arbitral and judicial forums against their employer restricts

employees from exercising their Section 7 rights to engage in concerted action for mutual aid or protection, and therefore violates Section 8(a)(1) of the Act. In *D.R. Horton*, the employer required each new and current employee to execute a mutual arbitration agreement as a condition of employment, which required employees to agree, as a condition of employment, that they would not pursue class or collective litigation in arbitration or court. *Id.* The Board held that the mutual arbitration agreement clearly and expressly barred employees “from exercising substantive rights that have long been held protected by Section 7 of the Act,” and “implicate[d] prohibitions that predate the NLRA and are central to modern Federal labor policy.” *Id.*, slip op at 4, 6.

As a mandatory condition of employment, Respondent requires employees to sign its Arbitration Agreement. (Record Exh. 3). Respondent’s Arbitration Agreement explicitly prohibits employees from pursuing claims as a member or representative of a class. *Id.* Such irrevocable waivers of employees’ prospective Section 7 right to collective legal activity are unlawful, just as individual employment contracts that interfere with other prospective Section 7 rights are unlawful, because they are “a continuing means of thwarting the policy of the Act,” and present an unjustifiable obstacle to the free exercise of the right to engage in concerted activity for mutual aid and protection. *National Licorice Co. v. NLRB*, 309 U.S. 350, 361 (1940), quoted in *D.R. Horton, Inc.*, 357 NLRB No. 184, slip op. at 4; *Bristol Farms & Konny Renteria*, 364 NLRB No. 34 (July 6, 2016) (prohibiting employees from filing joint, class or collective claims, as a condition of employment, violates Section 8(a)(1)).

Like the agreement in *D.R. Horton*, the Arbitration Agreement squelches employees’ ability to engage in concerted activities for mutual aid and protection as guaranteed under Section 7 of the Act. In sum, the Board definitively held in *D.R. Horton* that an employer

violates Section 8(a)(1) by requiring employees “as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial.” *D.R. Horton*, slip op. at 1. To permit Respondent to limit its employees’ rights to act collectively, in the guise of protecting employees’ right to refrain from engaging in collective legal activity, would be to stand Section 7 on its head. Thus, Respondent has violated Section 8(a)(1) of the Act by maintaining a policy restricting employees’ right to bring class actions.

B. Respondent’s disclaimer does not relieve it of liability under the Act

An employer does not negate unlawful language when it has a general disclaimer in its policy whereby employees do not waive any other rights or remedies under the law. See *Allied Mechanical*, 349 NLRB 1077, 1084 (2007) (“an employer may not specifically prohibit employee activity protected by the Act and then seek to escape the consequences of the specific prohibition by a general reference to rights protected by law”); accord *Ingram Book Co.*, 315 NLRB 515, 516 (1994); *McDonnell Douglas Corp.*, 240 NLRB 794, 802 (1979). Respondent’s general disclaimer at the conclusion of its arbitration paragraph that employees “do not waive any other rights or remedies available under applicable law” fails to act as a safeguard of employees’ Section 7 rights. Employees cannot reasonably interpret Respondent’s disclaimer to discern whether they may pursue claims as a member or representative of a class. Thus, employees would reasonably construe this language to prohibit them from acting collectively to file unfair labor practice charges together or otherwise access the Board’s processes. The Board has found that class action waivers in arbitration agreements restrict employees’ rights to engage in concerted activity and are therefore unlawful. Thus, the Board has held that unless the language specifically excludes NLRB proceedings, most employees without specialized legal

knowledge will assume it prohibits access to the Board. *Jack in the Box, Inc. & Dana Ocampo*, 364 NLRB No. 12 (May 24, 2016). As such, Respondent's disclaimer fails to negate the unlawful provision prohibiting class actions.

As the Board held in *Bill's Electric, Inc.*, an employer violates Section 8(a)(1) of the Act when it maintains a grievance and arbitration procedure providing it is the exclusive method to resolve disputes and carves out a waiver for NLRB charges. 350 NLRB 292, 296 (2007). The Board found, notwithstanding the express reference to the Board charges, that employees would reasonably read the policy "as substantially restricting, if not totally prohibiting," access to the Board's processes. Similarly, in *U-Haul Co. of California*, the Board found that employees would reasonably construe the employer's mandatory arbitration policy as prohibiting them from filing unfair labor practice charges, especially where the policy failed to clarify that it did not extend to the filing of unfair labor practice charges. 347 NLRB 375, 377-78 (2006), *enfd.* mem. 255 F. Appx. 527 (D.C. Cir. 2007). Thus, Respondent's general disclaimer is insufficient to clarify to employees that they may act jointly in exercising their Section 7 rights. See *D.R. Horton v. NLRB*, 737 F.3d 344, 363-364 (5th Cir. 2013).

C. Respondent's Affirmative Defenses Should be Rejected

Respondent's affirmative defenses should be rejected. Respondent incorrectly contends that the Arbitration Agreement is lawful because the Federal Arbitration Act overrides the concerns in the Act. It also contends that the Fifth Circuit controls issues pertaining to class or collective waiver claims.

1. There is no conflict between the Federal Arbitration Act and the NLRA.

Respondent claims that its mandatory class action waiver provision is lawful pursuant to the Fifth Circuit's decision in *D.R. Horton*. However, *D.R. Horton* does not present a conflict

between the Federal Arbitration Act (FAA), 9 U.S. C. §1, et seq., and the Act. In *D.R. Horton*, the Board explained: “[H]olding that an employer violates the NLRA by requiring employees, as a condition of employment, to waive their rights to pursue collective legal redress in both judicial and arbitral forums accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible.” 357 NLRB No. 184, slip op. at 12. Section 2 of the FAA “provides that arbitration agreements may be invalidated in whole or in part” for the same reasons any contract may be invalid, including if it is unlawful or contrary to public policy. *Id.*, slip op. at 11. Inasmuch as the Arbitration Agreement is inconsistent with the NLRA, it is not enforceable under the FAA.

The Board in *D.R. Horton* also emphasized that finding an arbitration policy, such as the one presented here, unlawful does not conflict with the FAA because “the intent of the FAA was to leave substantive rights undisturbed.” *Id.* Although Respondent has indicated in its position statement that it will argue that the waiver is not of substantive right, the Arbitration Agreement requires employees to forgo substantive rights under the NLRA---namely, employees’ rights to pursue claims as a member or representative of a class---and the Board has so held. *Id.*, slip op. at 10-11. Thus, the Arbitration Agreement is unlawful, not because it involves arbitration or specifies particular litigation procedures, but because it prohibits employees from exercising their Section 7 rights to engage in collective legal activity in any forum.

Furthermore, adherence to *D.R. Horton* does not compel class arbitration, as Respondent is free to limit its arbitration program to individual arbitration, so long as employees remain free to exercise their Section 7 rights to engage in collective legal activity in court and are not compelled to only act individually. Any such policy would be entirely permissible under the FAA and would not run afoul of several Supreme Court cases: *American Express v. Italian*

Colors Restaurants, 133 S. Ct. 2304 (2013); *CompuCredit v. Greenwood*, 132 S. Ct. 665 (2012); *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011); or *Stolt-Nielsen SA. v. Anima/Feeds Int'l Corp.*, 559 U.S. 662, 130 S. Ct. 1758 (2010). While *Stolt-Nielsen* and *AT&T* make clear that bilateral arbitration is favored under the FAA, neither of these decisions suggests that it is compelled. Indeed, *Stolt-Nielsen* makes explicit that an agreement to arbitrate on a class basis is enforceable under the FAA. 130 S.Ct. at 1774-1775. Likewise, *American Express* and *CompuCredit*, held that the FAA requires the parties' arbitration agreement be enforced according to its terms. However, neither case involved unilaterally imposed arbitration agreements in an employer-employee context and the issue of exclusive arbitration over class and collective actions.

For this reason, even in the face of other Federal circuit decisions to the contrary, *D. R. Horton* represents current Board precedent that must be followed. See *Manor West Inc.*, 311 NLRB 655, 667 fn. 43 (1993); *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004). Thus, any claimed infringement upon the FAA by protecting employees' Section 7 rights in these circumstances is entirely illusory.

In contrast, permitting an employer to require employees to limit their legal claims to individual arbitration vitiates the right to collective action that lies at the heart of the NLRA. It is axiomatic that an employer may not force employees to forgo that right. It therefore follows that prohibiting employers from doing so protects the values inherent in the NLRA without offending those inherent in the FAA. Thus, requiring an employer to adhere to the NLRA is consistent with the FAA.

2. The Fifth Circuit does not control the outcome of this case.

Respondent argues that numerous courts across the country have enforced class or collective action waivers in arbitration agreements. In particular, the Fifth Circuit holds that arbitration provisions precluding class actions are enforceable. *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d at 362. Yet, the Seventh Circuit subsequently held that an arbitration provision that precluded “employees from seeking any class, collective, or representative remedies to wage-and-hour disputes. . .violates Section 7 and 8 of the [National Labor Relations Act]” and was not saved by the Federal Arbitration Act. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1161 (7th Cir. 2016). The Ninth Circuit has also adopted this view. *Morris v. Ernst & Young, LLP*, 834 F. 3d 975 (9th Cir. 2016). Despite the varying positions across the courts, the Board’s position – not the federal district courts – controls: class action prohibitions in arbitration agreements are unlawful. *Waco, Inc.*, 273 NLRB 746, 749 n.14 (1984); *Los Angeles New Hosp.*, 244 NLRB 960, 962 n.4 (1979), *enfd* 640 F.2d 1017 (9th Cir. 1981). As *D.R. Horton* has not been overturned by the Supreme Court, it is the General Counsel’s position that, just as in *D.R. Horton*, Respondent’s Arbitration Agreement prohibits employees from being a member or representative of a class thereby restricting their right to engage in concerted activity.

IV. CONCLUSION AND REQUESTED RELIEF

Counsel for the General Counsel urges the Board to find that Respondent violated the Act as alleged and that Respondent be ordered to cease and desist from engaging in its maintenance of its Arbitration Agreement prohibiting employees from being a member or representative of a class. The undersigned also requests the Judge order the posting of a notice. Counsel for the General Counsel further seeks any other relief deemed appropriate, including a posting at all

locations where the Arbitration Agreement is in effect,² direct notification to employees that it is rescinding the unlawful provision, and an affirmative order requiring Respondent to notify all judicial and arbitral forums, in which it has taken the position that employees are prohibited from pursuing a collective or class action by virtue of the Arbitration Agreement, that Respondent no longer opposes the seeking of collective or class action type relief.

DATED at Fort Worth, Texas, this 1st day of December 2016.

Respectfully Submitted,



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² The Board has “consistently held that, where an employer’s overbroad rule is maintained as a companywide policy, we will generally order the employer to post an appropriate notice at all of its facilities where the unlawful policy has been or is in effect.” *Longs Drug Stores California*, 347 NLRB 500, 501 (2006), citing *Guardsmark, LLC*, 344 NLRB 809, 812 (2005). See also *Dish Network Corp.*, 359 NLRB No. 108, slip op. at 7 (2013); *Albertson’s, Inc.*, 300 NLRB 1013 fn. 2 (1990), *enf. denied on other grounds sub nom. NLRB v. Albertson’s, Inc.*, 17 F.3d 395 (9th Cir. 1994).

CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of December 2016, a copy of General Counsel's Brief to the National Labor Relations Board was electronically served upon each of the following:

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