No. 16-60367

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ACUITY SPECIALTY PRODUCTS, INCORPORATED,
doing business as Zep, Incorporated

Petitioner/Cross Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross Petitioner

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

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 Zep's arbitration policy 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 unfair-labor-practice finding involves 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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UNITED STATES COURT OF APPEALS
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doing business as Zep, Incorporated

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

This case is before the Court on the petition for review of Acuity Specialty Products, Incorporated, doing business as Zep, Incorporated ("Zep"), and the cross-application for enforcement of the National Labor Relations Board ("the Board"), of a Board Order issued against Zep. The Board's Decision and Order, reported at 363 NLRB No. 192 (May 16, 2016), is final under Section 10(e) and (f)

of the National Labor Relations Act ("the NLRA"), as amended, 29 U.S.C. § 151, et seq., 160(e) and (f).

The Board had jurisdiction over the proceedings below pursuant to Section 10(a) of the NLRA, which empowers the Board to prevent unfair labor practices. *Id.* § 160(a). Zep's petition for review and the Board's cross-application for enforcement are timely, as the NLRA places no time limitation on such filings. This Court has jurisdiction over these proceedings pursuant to Section 10(e) and (f) of the NLRA, and venue is proper because Zep transacts business within the geographical boundaries of the Fifth Circuit.

STATEMENT OF ISSUES

1. Whether the Board reasonably found that Zep violated Section 8(a)(1) of the NLRA by promulgating, maintaining, and enforcing an arbitration policy that requires employees to waive their right to pursue class or collective actions in any forum, arbitral or judicial, and by conditioning employees' eligibility to participate in a bonus program on their acceptance of that policy.
2. Whether substantial evidence supports the Board's finding that Zep violated Section 8(a)(1) of the NLRA by maintaining an arbitration policy that employees would reasonably understand to restrict their right to file unfair-labor-practice charges with the Board.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

Zep is a Georgia corporation engaged in the non-retail sale and distribution of various product lines, including cleaning products and equipment, which it sells to customers around the country through a network of sales representatives. (ROA.755; ROA.6 ¶ 14(a).)[1] Zep's representatives receive compensation based on sales commissions. (ROA.760; ROA.7 ¶ 19.) They can also earn bonuses if they satisfy certain annual performance standards. (ROA.760; ROA.7-8 ¶¶ 20-21.)

Since 1990, Zep has employed Lynn Woodford as an outside sales representative in Northern California. (ROA.760; ROA.7 ¶ 17.) Doug Heffernan worked for Zep as an outside sales representative in Northern California from 1983 until June 30, 2013. (ROA.760; ROA.7 ¶ 18.)

In December 2010, employee Keith Britto filed a putative class action against Zep ("the *Britto* Action") in the Superior Court of the State of California, Alameda County ("the Superior Court"), alleging violations of California's Labor Code with respect to the sales representatives' expense reimbursements and pay structure. (ROA.760; ROA.8 ¶ 22.) The *Britto* Action involved a putative class of

[1] "ROA" refers to the administrative record, filed on September 21, 2016. Where applicable, references preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br." refers to Zep's opening brief.

approximately 175 current and former Zep sales representatives, including Woodford and Heffernan. (*Id.*)

In November 2011, Zep launched a nationwide alternative-dispute-resolution program for sales representatives. (ROA.760; ROA.8 ¶ 23.) Employees could participate in the program by executing the "Alternative Dispute Resolution Policy and Agreement for Disputes between a Sales Rep and Acuity Specialty Products, Inc., doing business as Zep Sales and Service" ("the Policy"). (ROA.760; ROA.8 ¶ 23, 90-112.) The Policy, which remains in force, requires employees to submit any "Covered Claim" related to their employment to individual arbitration. (ROA.756-59; ROA.90-95.) The Policy's coverage provision contains an exhaustive list of "Covered Claims," which includes the following:

> - Claims of discrimination or harassment on the basis of race, sex, religion, national origin, age, disability or other unlawful basis.
> - Claims of retaliation for complaining about discrimination or harassment.
> - Claims of violations of any common law or constitutional provision or federal, state, county, municipal or other governmental statute, ordinance, regulation or public policy relating to workplace health and safety, voting, state service letters, minimum wage and overtime, pay days, holiday pay, vacation pay, severance/separation pay, whistleblowing and payment at termination.
>
> . . . .

- Claims of retaliation for filing a protected claim for benefits (such as workers' compensation) or exercising your protected rights under any statute.
- Claims of wrongful termination or constructive discharge.

(ROA.756; ROA.90-91.) The Policy contains an additional, nonexclusive list of federal statutes covered by the Policy, which includes the Taft-Hartley Act, a component of the NLRA.[2] (ROA.756; ROA.91.)

Under the heading "The Role of Government Agencies Concerning Certain Covered Claims," the Policy states that, for "claims that may be filed with a governmental agency, such as the Equal Employment Opportunity Commission (EEOC) or an equivalent state agency . . . [employees] may either file a complaint with these agencies or proceed to use [Zep]'s dispute resolution process." (ROA.757; ROA.92.) It also excludes a small number of defined categories of "non-covered" claims, including "[m]atters within the jurisdiction of the National Labor Relations Board." (ROA.757; ROA.93.)

When the Policy was introduced, sales representatives were not required to sign it as a condition of continued employment; however, those who declined to do so were not eligible to participate in the annual bonus program for 2012.

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[2] Congress enacted the Labor Management Relations Act of 1947, 61 Stat. 136, or "Taft-Hartley Act," as an amendment to the National Labor Relations Act of 1935, 49 Stat. 449, also known as "the Wagner Act." *See generally* 1 John E. Higgins, Jr., *The Developing Labor Law* 36-47 (6th ed. 2012) (recounting the enactment of the Taft-Hartley Act).

(ROA.760; ROA.8 ¶ 24, 9 ¶ 26, 90.) Woodford and Heffernan both signed the Policy, which included a provision allowing California sales representatives to participate in the *Britto* Action. (ROA.761; ROA.10 ¶ 33, 115-30.)

In May 2012, the Superior Court denied class certification in the *Britto* Action. (ROA.761; ROA.10 ¶ 33.) Subsequently, the Superior Court granted a motion filed by approximately 55 California sales representatives, including Woodford and Heffernan, to intervene in the *Britto* Action. (ROA.761; ROA.10-11 ¶ 34.) On August 30, Zep notified Woodford and Heffernan by letter that their intervention in the *Britto* Action constituted a breach of the Policy, such that they could no longer participate in the 2012 bonus program. However, the letter continued, if Woodford and Heffernan notified Zep within a week that they were prepared to withdraw their complaint and proceed to arbitration, Zep would reconsider their eligibility for the bonus program. (ROA.761; ROA.11 ¶ 35, 131, 133.)

On December 20, 2012, the California Court of Appeal reversed the Superior Court's decision to grant the motion to intervene in the *Britto* Action. (ROA.761; ROA.10-11 ¶ 34.) Four days later, Woodford, Heffernan and 52 other California sales representatives filed another lawsuit ("the *Aguilar* Action") in the U.S. District Court for the Northern District of California, alleging the same or similar claims as in *Britto*. (ROA.761; ROA.12 ¶ 39, 157-66.) Zep moved to

compel arbitration as to Woodford, Heffernan, and six other plaintiffs on grounds that they had signed the Policy. (ROA.761; ROA.12 ¶ 40, 178-88.) The district court granted the motion, whereupon Woodford and Heffernan proceeded to individually arbitrate their claims against Zep. (ROA.761; ROA.12 ¶ 40.) Zep ultimately paid both employees 2012 bonuses. (ROA.761; ROA.13 ¶¶ 41-42, 388-89.)

II. PROCEDURAL HISTORY

Woodford and Heffernan filed separate unfair-labor-practice charges with the Board's Regional Office in Oakland. (ROA.755; ROA.3-4 ¶¶ 1-8, 23-29, 55-58.) After an investigation, the Board's General Counsel consolidated those charges and issued a complaint alleging that Zep violated Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), by promulgating and maintaining a policy requiring employees to resolve all employment-related disputes through individual arbitration, and which employees would reasonably understand as restricting their right to file charges with the Board. (ROA.755; ROA.5 ¶ 9, 63.) The complaint alleged further that Zep violated Section 8(a)(1) by conditioning employee participation in the annual bonus program on signing the Policy, and by enforcing that policy by moving in federal district court to compel Woodford, Heffernan, and their co-plaintiffs to individually arbitrate their class-wide claims. (ROA.746 n.2,

755; ROA.64.) By agreement of the parties, the case was transferred to an administrative law judge on a stipulated record. (ROA.755; ROA.2.)

On July 21, 2014, the judge issued a recommended decision finding that Zep violated Section 8(a)(1) of the NLRA as alleged. (ROA.755-69.) In finding the violations based on the Policy's requirement of individual arbitration, the judge relied on the Board's decisions in *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), *enforcement denied in relevant part*, 737 F.3d 344 (5th Cir. 2013), *petition for rehearing en banc denied*, No. 12-60031 (5th Cir. Apr. 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 certiorari filed*, No. 16-307 (U.S. Sept. 9, 2016). (ROA.762-65.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On May 16, 2016, the Board (Chairman Pearce and Member Hirozawa; Member Miscimarra, concurring in part and dissenting in part) issued a Decision and Order affirming the judge's rulings, findings, and conclusions, and adopting her recommended order as modified. (ROA.746-47.) Specifically, the Board found that Zep violated Section 8(a)(1) of the NLRA by promulgating, maintaining, and enforcing a policy requiring employees to resolve all employment-related disputes through individual arbitration, by maintaining a policy that employees would reasonably understand as restricting their right to file

unfair-labor-practice charges with the Board, and by conditioning employees' eligibility to participate in a bonus program upon signing that policy. (ROA.746-47.) Member Miscimarra concurred in the majority's finding that employees would reasonably construe the Policy as interfering with their right to file unfair-labor-practice charges with the Board. (ROA.750-53.)

The Board's Order requires that Zep 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 NLRA, 29 U.S.C. § 157. (ROA.747.) Affirmatively, the Order requires Zep to: rescind the Policy in all of its forms, or revise it in all of its forms to make clear that the Policy does not constitute a waiver of employees' right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict employees' right to file charges with the Board; notify all current and former employees who signed the Policy of the change; notify the U.S. District Court for the Northern District of California of the change, and that Zep no longer relies on the Policy to oppose the lawsuit filed by Woodford, Heffernan, and others; reimburse attorneys' fees and expenses incurred by Woodford, Heffernan, and any other plaintiff in opposing Zep's motion to compel arbitration; restore eligibility to participate in the annual bonus program to all employees whose

participation or compensation was curtailed because they either did not sign, or did not comply with, the Policy; and post a remedial notice. (ROA.747-48.)

SUMMARY OF ARGUMENT

Applying its *Horton/Murphy Oil* rule, the Board found that Zep violated Section 8(a)(1) of the NLRA by promulgating, maintaining, enforcing, and conditioning participation in a bonus program on a policy requiring employees to bring employment-related claims exclusively in individual arbitration, thereby unlawfully precluding collective action in any forum, whether arbitral or judicial. And applying its *On Assignment* decision, the Board rejected Zep's argument that the Policy falls outside the scope of *Horton* and *Murphy Oil* because it contains an opt-in procedure. 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 those aspects 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 Zep's maintenance of the Policy independently violated Section 8(a)(1) because employees would reasonably construe the Policy as restricting their right to file unfair-labor-practice charges with the Board. Under well-established Board law, it is unlawful for employers to maintain work rules that employees would reasonably construe as restricting their Section 7 rights. In this case, substantial evidence supports the Board's finding that employees would

reasonably construe the Policy's sweeping language, which subjects virtually all employment-related claims to arbitration, as prohibiting them from filing Board charges. The Policy's exemption for "matters within the jurisdiction" of the Board is contradicted by its requirement that claims under the Taft-Hartley Act must be arbitrated, leaving employees to guess at their peril whether they can file charges with the Board. Moreover, the Board's unfair-labor-practice finding does not conflict with this Court's rejection of a similar violation in *Murphy Oil* because Zep's Policy is materially distinguishable from the agreement in that case.

STANDARD OF REVIEW

The Board's findings of fact are conclusive if they are 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). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera*, 340 U.S. at 477; *Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 207 (5th Cir. 2014). Under that 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; *see also El Paso Elec. Co. v. NLRB*, 681 F.3d 651, 656-57 (5th Cir. 2012) ("We may not reweigh the evidence, try the case de

novo, or substitute our judgment for that of the Board, 'even if the evidence preponderates against the [Board's] decision.'" (quoting *Brown v. Apfel*, 192 F.3d 492, 496 (5th Cir. 1999))). 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. ZEP VIOLATED SECTION 8(a)(1) OF THE NLRA BY PROMULGATING, MAINTAINING, ENFORCING, AND CONDITIONING PARTICIPATION IN A BONUS PROGRAM ON A POLICY BARRING EMPLOYEES FROM CONCERTEDLY PURSUING EMPLOYMENT-RELATED CLAIMS

Applying its *Horton/Murphy Oil* rule, the Board found that Zep violated Section 8(a)(1) of the NLRA by promulgating, maintaining, enforcing, and conditioning participation in a bonus program on a policy that required employees to bring employment-related claims exclusively in individual arbitration, thereby unlawfully precluding collective action in any forum, whether arbitral or judicial. (ROA.746 nn.1 & 5, 762-65.) 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.[3] The Board has petitioned the Supreme Court for certiorari in *Murphy Oil*. *NLRB v. Murphy Oil USA, Inc.*, No. 16-307 (U.S. Sept. 9, 2016).[4]

The Board acknowledges that unless this Court reconsiders its *Horton/ Murphy Oil* holding *en banc*, or the Supreme Court rules for the Board in *Murphy*

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[3] Unlike the arbitration agreements at issue in *Horton* and *Murphy Oil*, Zep's Policy is not a mandatory condition of employment. The Board reasonably held (ROA.746 n.2), for the reasons articulated in *On Assignment Staffing Services, Inc.*, 362 NLRB No. 189, 2015 WL 5113231, at *1, 5-11 (Aug. 27, 2015), that the Policy nonetheless violates Section 8(a)(1). *On Assignment* clarified that the *Horton/Murphy Oil* rule applies even when the arbitration agreement is voluntary. *Id*. at *1. This Court summarily reversed *On Assignment* but did not reach the voluntariness issue given its rejection of the Board's underlying rule. *See On Assignment Staffing Servs., Inc. v. NLRB*, No. 15-60642, 2016 WL 3685206 (5th Cir. June 6, 2016) (per curiam).

[4] Four other circuits have also ruled on this issue. The Seventh and Ninth Circuits agreed with the Board, while the Second and Eighth Circuits joined this Court in rejecting the Board's rationale. Petitions for certiorari have been filed with respect to the Second, Seventh, and Ninth Circuit decisions, but not the Eighth Circuit decision. *See Patterson v. Raymours Furniture Co.*, No. 15-2820-CV, ___ F. App'x ___, 2016 WL 4598542 (2d Cir. Sept. 14, 2016), *cert. pet. filed*, No. 16-388 (U.S. Sept. 22, 2016); *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert. pet. filed*, No. 16-285 (U.S. Sept. 2, 2016); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), *cert. pet. filed*, No. 16-300 (U.S. Sept. 8, 2016).

Cases involving the *Horton/Murphy Oil* rule are pending in five additional circuits. *See, e.g.*, *Rose Grp. v. NLRB*, Nos. 15-4092 & 16-1212 (3d Cir.) (argued Oct. 5, 2016); *AT&T Mobility Servs., LLC v. NLRB*, Nos. 16-1099 & 16-1159 (4th Cir.) (argued Dec. 7, 2016); *NLRB v. Alternative Entm't, Inc.*, No. 16-1385 (6th Cir.) (argued Nov. 30, 2016); *Franks v. NLRB*, *Samsung Elec. Am., Inc. v. NLRB*, Nos. 16-10644, 16-10788 & 16-11377 (11th Cir.) (arg. set for Jan. 24, 2017); *Price-Simms, Inc. v. NLRB*, Nos. 15-1457 & 16-1010 (D.C. Cir.) (briefing completed).

Oil (or another petition presenting the same issue), the Court is precluded from enforcing the aspects of the Board's Order that depend on the Board's finding that the Policy is unlawful pursuant to the *Horton/Murphy Oil* rule. *United States v. Darrington*, 351 F.3d 632, 634 (5th Cir. 2003).[5] Accordingly, the Board will not reiterate at length here the rationale for its *Horton/Murphy Oil* rule or for its related findings that Zep separately violated the NLRA by seeking to enforce the Policy and by conditioning participation in a bonus program on acceptance of the Policy.

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*, 834 F.3d 975 (9th Cir. 2016), and the dissent of Judge Graves in *Horton*, 737 F.3d at 364, the Board respectfully maintains that it is entitled to enforcement of the portions of its Order based on Zep's promulgation, maintenance, and enforcement of the Policy and on its conditioning participation in a bonus program on signing the Policy. 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

[5] The Board does note, however, that 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.

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 POLICY VIOLATES SECTION 8(a)(1) OF THE NLRA BECAUSE EMPLOYEES WOULD REASONABLY CONSTRUE IT TO PROHIBIT THEM FROM FILING UNFAIR-LABOR-PRACTICE CHARGES WITH THE BOARD

Section 7 of the NLRA protects the right of employees "to self-organization, to form, join, or assist labor organizations . . . , and engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157. For its part, Section 8(a)(1) of the NLRA 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. *Id.* § 158(a)(1); *NLRB v. Laredo Coca Cola Bottling Co.*, 613 F.2d 1338, 1340-41 (5th Cir. 1980).

Among the rights protected by Section 7 is the right to file and pursue unfair-labor-practice charges before the Board. *See Util. Vault Co.*, 345 NLRB 79, 82 (2005); *McKesson Drug Co.*, 337 NLRB 935, 938 (2002). In enacting the NLRA, Congress sought "complete freedom" for employees to file such charges. *NLRB v. Scrivener*, 405 U.S. 117, 121 (1972); *accord SolarCity Corp.*, 363 NLRB No. 63, 2015 WL 9315535, at *6 (Dec. 22, 2015) ("Preserving and protecting access to the Board is a fundamental goal of the [NLRA]."), *review pet. filed*, No. 16-60001 (5th Cir. Jan. 4, 2016) (stayed pending Supreme Court proceedings in

Murphy, *Lewis*, and *Morris*, discussed *supra*, note 4). The "vital employee right" to file and pursue Board charges is "designed to safeguard the procedure for protecting all other employee rights guaranteed by Section 7." *Mesker Door, Inc.*, 357 NLRB 591, 596 (2011). Therefore, an employer violates Section 8(a)(1) when it maintains a rule that interferes with or restricts employees' Section 7 right to file Board charges. *See Murphy Oil*, 808 F.3d at 1018-19; *Horton*, 737 F.3d at 363. The mere maintenance of an unlawful rule, even absent enforcement, constitutes an unfair labor practice. *Lutheran Heritage Vill.-Livonia*, 343 NLRB 646, 649 (2004).

Under both well-established Board law and the law of this Circuit, a workplace rule will be found unlawful if employees would reasonably construe it to restrict their Section 7 rights. *See id.* at 646 (setting forth Board's "reasonably construe" inquiry); *accord Murphy Oil*, 808 F.3d at 1018-19 (applying *Lutheran Heritage* to assess whether arbitration agreement interfered with employees' right to file Board charges); *Horton*, 737 F.3d at 363 (same). 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). Furthermore, the Board has long held that "employees should not have to decide at their own peril"

whether an ambiguous employment rule bans protected conduct.[6] *Hyundai Am. Shipping Agency, Inc.*, 357 NLRB 860, 871 (2011), *enforced in relevant part*, 805 F.3d 309 (D.C. Cir. 2015). Therefore, any ambiguity in the rule, which could lead employees to draw from it a coercive meaning, must be construed against the employer. *See Flex Frac Logistics, LLC*, 358 NLRB 1131, 1132 (2012), *enforced*, 746 F.3d 205 (5th Cir. 2014); *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999).

The Board reasonably found that, given the sheer breadth of the Policy's coverage provision, employees would construe the Policy to prohibit the filing of unfair-labor-practice charges. (ROA.746, 765-66.) That provision contains a lengthy enumeration of "covered claims" that must be resolved through arbitration, including claims of "discrimination or harassment on [an] unlawful basis," "retaliation for complaining about discrimination or harassment," "retaliation for . . . exercising your protected rights under any statute," "wrongful termination or constructive discharge," and "violations of any . . . federal . . . statute." (ROA.765; ROA.90-91.) As the Board observed, all of those categories of claims can be the

[6] As the Board has explained, "[t]his 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—instead of waiting until that chill is manifest, when the Board must undertake the difficult task of dispelling it." *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1132 (2012), *enforced*, 746 F.3d 205 (5th Cir. 2014); *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").

subject of unfair-labor-practice charges before the Board. (ROA.746, 765.) Furthermore, the Policy specifically covers "claims of violations of . . . The Taft-Hartley Act" (ROA.91), which, as shown in note 2 above, is part and parcel of the NLRA. As such, the Policy expressly requires signatory employees to submit NLRA-related claims to individual arbitration. That requirement alone supports the Board's finding that the Policy is unlawfully overbroad.

The Board also reasonably determined (ROA.746 n.2, 765-66) that the Policy's exemption from coverage of "[m]atters within the jurisdiction of the National Labor Relations Board" (ROA.91, 93) does not clearly preserve employees' right to file Board charges. As the Board noted, the exemption directly conflicts with the coverage provision's specific inclusion of claims under the Taft-Hartley Act and of several categories of claims that are often charged as unfair labor practices. (ROA.765.) Such directly contradictory language creates an inherent ambiguity that is rightly construed against Zep as the Policy's drafter. *See, e.g.*, *Quicken Loans, Inc. v. NLRB*, 830 F.3d 542, 550 (D.C. Cir. 2016) ("[An employer cannot] compel employees to hazard potentially career-imperiling guesses about whether [an agreement] means what it says and says what it means.").

Furthermore, even in the absence of directly contradictory language like the Policy's reference to the Taft-Hartley Act, generalized language preserving NLRA

rights (or, here, the Board's jurisdiction) is not, as the Board explained (ROA 765), necessarily sufficient to remedy the confusion caused by an otherwise overbroad rule. That is because layperson employees cannot be expected to know the precise contours of the NLRA's protection or the Board's authority, much less that the NLRA protects their right to engage in concerted activity for mutual protection even when a workplace rule expressly forbids the particular conduct. For instance, in *Allied Mechanical*, employees were given releases by which they "agree[d] not to initiate, assist, join, participate in, or actively cooperate in the pursuit of any Wage Claims . . . unless . . . otherwise permitted by . . . the [NLRA]." 349 NLRB 1077, 1084 (2007). In finding those releases unlawful, the Board reasoned that "[a]n employer may not *specifically* prohibit employee activity protected by the [NLRA] and then seek to escape the consequences of the specific prohibition by a *general* reference to rights protected by law." *Id.* (emphases added) (citations omitted).

Zep's Policy follows the same model as the *Allied Mechanical* releases. On the one hand, it waives the signatory employees' Section 7 right to jointly or collectively pursue a litany of specifically identified employment-related claims that may be brought as unfair-labor-practice charges while, on the other hand, it purports to cancel that waiver with a general reference to the Board's jurisdiction. But, just as in *Allied Mechanical*, the Board here reasonably found "no basis to

assume that a reasonable employee, unversed in labor and employment law, would necessarily glean from the competing terms of the Policy that he or she retained the right to invoke the Board's processes and procedures." (ROA.766.) *See also Ralph's Grocery Co.*, 363 NLRB No. 128, 2016 WL 737041, at *2 (Feb. 23, 2016) (finding unlawful policy "not written in a manner reasonably calculated to assure employees that their statutory right of access to the Board's processes remains unaffected"), *review pet. filed*, No. 16-71422 (9th Cir. May 12, 2016).[7]

For essentially those same reasons, the Policy's section on "the role of government agencies concerning certain covered claims" (ROA.92-93) also does not adequately clarify that employees may freely file Board charges. That section does not mention the Board, but refers specifically to "the Equal Employment Opportunity Commission (EEOC) or an equivalent state agency." (ROA.92.) While that description alone does not exclude the Board, it does not clearly include the Board either. *See Applebee's Rest.*, 363 NLRB No. 75, 2015 WL 9315531, at *1 n.1, 3 (Dec, 22, 2015) (finding employees would reasonably construe agreement as barring Board charges despite provision stating agreement "will not prevent you

[7] Zep's claim (Br. 32) that the facts of *U-Haul*, 347 NLRB at 375, and *Horton* "do not support" the Board's conclusion is off the mark. The Board cited *U-Haul*—and *2 Sisters Food Group, Inc.*, 357 NLRB 1816 (2011)—for the basic principle that it will not assume "employees [to] have specialized legal knowledge or experience which they would bring to bear on an arbitration agreement's language." (ROA.765.) By contrast, the Board drew a direct factual parallel between this case and *Allied Mechanical*, which Zep tellingly chose to ignore.

from filing a charge with any state or federal administrative agency"), *review pet. filed sub nom. Rose Grp. v. NLRB*, Nos. 15-4092 & 16-1212 (3d Cir.) (argued Oct. 5, 2016); *PJ Cheese, Inc.*, 362 NLRB No. 177, 2015 WL 5001023, at *1, 5 (Aug. 20, 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). The rest of the provision is equally unhelpful, as it describes administrative procedures that are substantially different from the Board's unfair-labor-practice proceedings.

Moreover, even if the exemption for government agencies were construed to apply to the Board, the Policy would remain ambiguous in scope due to its explicit coverage of Taft-Hartley-Act claims. *See Amex Card Servs. Co.*, 363 NLRB No. 40, 2015 WL 6957289, at *3 (Nov. 10, 2015) (finding that employees would reasonably construe policy as barring Board charges, despite disclaimers that NLRA claims were not covered and employees were not precluded from filing claims "with a governmental administrative agency . . . such as the [Board]," because those disclaimers were absent from the acknowledgment form employees were required to sign), *review pet. filed*, No. 15-60830 (5th Cir. Nov. 24, 2015) (stayed pending Supreme Court proceedings in *Murphy*, *Lewis*, and *Morris*, discussed *supra*, note 4).

Contrary to Zep's claim (Br. 29-30), its Policy differs significantly from the arbitration agreement found lawful in *Murphy Oil*, 808 F.3d at 1019-20. There, the Board found that language waiving employees' right "to commence or be a party to any group, class or collective action claim in . . . any other forum" could be construed to prohibit filing unfair-labor-practice charges in which the Board might decide to seek classwide relief. *Id.* at 1020. The Court disagreed, holding that the language in question did not "negate" another provision stating, "nothing in this Agreement precludes [employees] . . . from participating in proceedings to adjudicate unfair labor practice[] charges before the [Board]." *Id.* Compared to the exemption in the *Murphy Oil* agreement, the references in Zep's policy to "[m]atters within the jurisdiction of the . . . Board" and to the availability of administrative proceedings before certain agencies are much more oblique, and require some legal knowledge to decipher *which* matters are exempted from the Policy's coverage. More importantly, unlike the agreement in *Murphy Oil*, the Policy's coverage provision "negates" its exemptions, 808 F.3d at 1020, by expressly requiring arbitration of claims under the Taft-Hartley Act, which is integral to the NLRA. As shown above, that inherent, irreconcilable contradiction compounds the confusion created by the Policy's broad scope of covered claims, many of which can form the basis of Board proceedings in their own right.

Finally, the reasonableness of the Board's determination is unaffected by the fact that the Policy did not deter Woodford and Heffernan from filing their unfair-labor-practice charges. (ROA.765 n.22.) It is well established that "the Board is merely required to determine whether employees *would reasonably* construe the disputed language to prohibit Section 7 activity, and not whether employees *have* thus construed the rule." *Cintas Corp. v. NLRB*, 482 F.3d 463, 467 (D.C. Cir. 2007) (internal brackets, quotation marks, citations and footnote omitted). Indeed, Zep concedes, as it must, that Woodford's and Heffernan's conduct is not determinative. (Br. 31.)

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the portions of the Board's Order remedying Zep's unlawful maintenance of an alternative-dispute-resolution policy that employees reasonably would construe as barring resort to Board processes. 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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December 2016

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ACUITY SPECIALTY PRODUCTS, INCORPORATED, doing business as Zep, Incorporated,	)	
Petitioner/Cross-Respondent	)	No. 16-60367
v.	)	Board Case Nos. 32-CA-075221 32-CA-102838
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2016, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

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Dated at Washington, DC
this 19th day of December 2016

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 5,418 words of proportionally spaced, 14-point type, and the word-processing software used was Microsoft Word 2010. The Board further certifies that the electronic version of the Board's brief filed with the Court in PDF form is identical to the hard copy of the brief that has been filed with the Court and served on opposing counsel, and that 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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