

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

ETS OILFIELD SERVICES, L.P.

and

Case 16-CA-172847

LLOYD W. OSTER, AN INDIVIDUAL

Roberto Perez, Esq.

for the General Counsel

Mike S. Moore and Mitchell Clark, Esqs.,

for the Respondent.

**RESPONDENT'S EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGE'S DECISION**

Pursuant to Section 102.46 of the Board's Rules and Regulations, Respondent ETS Oilfield Services, L.P., (hereinafter the "Company") files these Exceptions to the Decision ("Decision") of the Administrative Law Judge ("ALJ").

Exception 1: The ALJ erred in concluding that the Mutual Agreement to Arbitrate violated Section 8(a)(1) of the National Labor Relations Act. (Bench Decision, pp. 1-6).

BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS
TO THE ALJ'S DECISION Judge

Jurisdiction

At all material times, Respondent has been a limited partnership doing business as ETS Oilfield Services, L.P. ETS Services Management, LLC has been the general partner and Devin W. Nevilles has been the limited partner. Respondent has maintained a principal office and place of business in Robstown, Texas and shop in Seguin, Poteet, Laredo, Marshall and Odessa Texas well as Watford, North Dakota and Rock Springs, Wyoming. Its services include testing fluids and motors for oil companies. In conducting its operations for the 12-month period ending April 11, 2016, Respondent performed services valued in excess of \$50,000 in States other than the State of Texas. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Arbitration Agreement

Respondent's Mutual Agreement to Arbitration (the "Agreement") was entered into evidence as GC Exh. 3. Respondent and General Counsel stipulated that all employees are required to sign the Mutual Agreement to Arbitrate and it has been in effect since August 2014. On March 29, 2016 Charging Party filed a charge with the NLRB alleging that the Agreement violated Section 8(a)(1).

The Agreement contains the following language that is in question:

As such, I agree that I am waiving my right to file, participate or proceed in class or collective actions (including a Fair Labor Standards Act ("FLSA") collective action) in any civil court or arbitration proceeding, including but not limited to receiving or requesting notice from a pending collective action. Therefore, agree that I cannot file or opt-in to a collective action under this Agreement unless agreed upon by me and the Company in writing.

On the very same day, Charging Party also filed an arbitration action with the American Arbitrator Action alleging violations of the Fair Labor Standards Act. On November 21, 2016, Charging Party, who is no longer employed by Respondent, filed a Motion for Conditional Collective Action Certification in that case. Charging Party did not appear at the hearing conducted by the Administrative Law Judge. His attorney represented that the General Counsel had told him not to appear. “Given that the government did not want Mr. Oster’s attendance.”

(Exhibit A)

Under the Agreement, employees may not join together in any judicial forum to pursue certain actions involving wages, hours and terms and conditions of employment, including but not limited to, statutory claims such as wage claims under the FLSA. However, the agreement specifically permits employees to file charges under the National Labor Relations Act.

Analysis

Section 7 of the NLRA states that employees have the right to engage in certain rights, or refrain from them. Those rights include the right ... to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection.

“In determining whether a work rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights.” *Hyundai America Shipping Agency*, 357 NLRB 860 (2011). “Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement.” *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (footnote omitted), *enfd.* 203 F.3d 52 (D.C. Cir. 1999). “In determining whether

a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation.” *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

If the rule explicitly restricts Section 7 rights, it is unlawful. *Id.* at 646. If it does not, “the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 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.” *Id.* at 647. Ambiguous rules are construed against the drafter of the rule. *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1132(2012), remanded on other grounds, 360 NLRB No. 120 (2014), *enfd.* 746 F.3d 205 (5th Cir. 2014).

The Agreement at issue only limits an employee’s rights to seek relief only through arbitration, rather than a judicial forum. It specifically provides that employees can file complaints with any state or local agency, and the agreement does not prohibit the Department of Labor Wage and Hour Division from conducting any investigation or seeking any relief on behalf of any employee. The Agreement does not limit a sister agency’s right to seek full relief. It does not keep a group of employees from going to the Department of Labor together and having the Department of Labor investigate and seek relief on a class basis, as it does all the time.

Charging Party made the claim to the NLRB that the agreement violates his rights to seek relief. He then sought relief through the agreement, filing a matter for arbitration, and just a week before the hearing filed a motion for conditional collective action certification in that arbitration matter. Then he failed to appear at the hearing to explain how or even whether, the Agreement chilled his attempt to exercise any of the rights.

The Federal Arbitration Act provides arbitration agreements like the Agreement in this case, “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. The statute reflects an “emphatic federal policy in favor of arbitral dispute resolution.”) *KPMG LLP v. Cocchi*, 565 U.S. 18, 21, 132 S. Ct. 23, 25 (2011) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)). The “overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 1748 (2011).

Under the FAA, parties are generally free, as a matter of contract, to agree to the procedures governing their arbitrations. *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (parties to an arbitration may “specify by contract the rules under which that arbitration will be conducted”); *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) (“Indeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes.”). The Fifth Circuit (where Respondent’s headquarters is) holds that class actions are “procedural device[s].” *Reed v. Fla. Metro. Univ., Inc.*, 2012 WL 1759298. At *11 (5th Cir. May 18, 2012) (collecting cases).

Pursuant to Section 2 of the FAA, a court may deem an arbitration agreement invalid only on grounds as exist “for the revocation of any contract,” such as “fraud, duress, or unconscionability.” *Concepcion*, 131 S. Ct. at 1746. For instance, complaints about the “[m]ere inequality in bargaining power” between an employer and employee are insufficient to void an arbitration agreement. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991).

Similarly, the Supreme Court repeatedly has rejected challenges to the “adequacy of arbitration procedures,” concluding such attacks are “out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.” *Id.* at 30. A party to an arbitration agreement “trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.” *Id.* at 31 (citation omitted). Thus, an arbitration agreement is enforceable even if it permits less discovery than in federal courts, and even if a resulting arbitration cannot “go forward as a class action or class relief [cannot] be granted by the arbitrator.” *Id.* at 31-33 (internal quotations and citation omitted).

State and federal courts “must enforce the [FAA] with respect to all arbitration agreements covered by that statute.” *Marmet Health Care Ctr. v. Brown*, 565 U.S. 530, 132 S. Ct. 1201, 1202 (2012) (per curiam). “That is the case even when the claims at issue are federal statutory claims, unless the FAA’s mandate has been ‘overridden by a contrary congressional command.’” *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 132 S. Ct. 665, 669 (2012) (citation omitted). There is no such congressional command for class procedures.

Disregarding the extensive case law to the contrary, the ALJ ruled the Agreement is unenforceable because it prohibits class procedures. To reach this result, the ALJ reasoned employees’ right to engage in protected concerted activity includes the “right” to bring a class or collective action. The ALJ’s decision is wrong and barred by clear Fifth Circuit precedent.

Respondent is not attempting to use the Agreement as a basis to avoid collective bargaining with a union because there is no union at issue. The only Section 7 right identified by the ALJ is the generalized right “to engage in . . . concerted activities for the purpose of . . . other mutual aid or protection.” There is no allegation or evidence that Respondent created the Agreement for an improper purpose under the law. To the contrary, the law recognizes the value

and legitimacy of arbitration agreements like the Agreement and *encourages* them. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-23 (2001) (“there are real benefits to the enforcement of arbitration provisions”). The Supreme Court has recognized that class-arbitration waivers, in particular, are legitimate and reasonable. *See Concepcion*, 131 S. Ct. at 1748.

Furthermore, the Agreement at issue does not in any way forbid employees engaging in concerted activities to express or enforce their rights under the Fair Labor Standards Act. Rather, it only states that one of the three (or four) possible means of doing so is unavailable.

The Fifth Circuit Court of Appeals, the Circuit in which Respondent’s primary place of business is and the circuit in which the hearing before the ALJ was conducted, has consistently held that agreements such as the instant Agreement are enforceable, and do not, in any way, violate the National Labor Relations Act. The Fifth Circuit first made this holding in *D.R. Horton v. National Labor Relations Board*, 737 F.3d 344 (5th Cir. 2013).

It should be noted that the Fifth Circuit in *D. R. Horton* stated that it was in violation of § 8(a)(1)(4) of the National Labor Relations Act to the extent its language could lead employees to a reasonable belief that they were prohibited from filing unfair labor practice charges. *Id.* at 349. The Agreement here differs from that in *D.R. Horton* in that it specifically provides at page 3, “in no way does this Agreement serve to preclude me from bringing an unfair labor practices claim against a company pursuant to the National Labor Relations Act.”

The Fifth Circuit has continued to affirm the holding of *D.R. Horton*, most notably in *Murphy Oil USA, Inc. v. National Labor Relations Board*, 808 F.3d 1013 (5th Cir. 2015).

The Fifth Circuit regularly issues per curiam decisions affirming this position because the Board has refused to accept the rulings, and continues to argue that mutual arbitration agreements are unlawful. *See, 24 Hour Fitness USA v. National Labor Relations Board*, 2016

WL 3668038 (5th Cir. 2016); *Citi Trends, Inc. v. National Labor Relations Board*, No. 15-60913, 2016 WL 4245458 (5th Cir. Aug. 10, 2016) (per curiam) (unpublished).

The Board's continued insistence upon bringing employers within the Fifth Circuit into litigation and costing them thousands of dollars, in light of the clear precedence against the Board's approach, is clearly unreasonable and it is time for that practice to stop.

Respectfully submitted,

Michael S. Moore (AR Bar #82112)
Friday, Eldredge & Clark, LLP.
400 West Capitol Ave., Suite 2000
Little Rock, AR 72201
Phone: (501) 370-1526
Facsimile: (501) 244-5348
Email: mmoore@fridayfirm.com

By: 
Michael S. Moore

and

LAW OFFICES OF J. MITCHELL CLARK
J. Mitchell Clark
P.O. Box 2701
Corpus Christi, Texas 78403
Telephone: (361) 887-8500
Facsimile: (361) 882-4500
mitchell@txverdict.com

By: **J. Mitchell Clark (w/permission)**
J. Mitchell Clark
Texas Bar No.: 04283900
Tenn. BPR No: 008898

CERTIFICATE OF SERVICE

I, Michael S. Moore, hereby certify that a copy of the foregoing document was electronically filed with the **NLRB by using the electronic filing system**. A notice of filing was sent to the following on this **19th** day of January, 2017:

Virginia Stevens Crimmins – **Via Email** – v.crimmins@crimminslawfirm.com
Laura C. Fellows – **Via Email** - l.fellows@crimminslawfirm.com
214 S. Spring Street
Independent, Missouri 64050

Lloyd W. Oster – **CERTIFIED MAIL**
419 Isley Blvd.
Excelsior Springs, MO 64024-2425

Sharon Levinson Steckler – **Via Facsimile 214-880-9869**
Administrative Law Judge
National Labor Relations Board
Division of Judges
700 North Pearl Street, Suite 600
Dallas, TX 75201

National Labor Relations Board – **Via Federal Express**
Office of Executive Secretary
1015 Half Street SE
Washington, DC 20570

Roberto Perez – Via Email – Roberto.Perez@nlrb.gov
United States Government
National Labor Relations Board
615 E. Houston Street, Suite 559
San Antonio, TX 78205-2039

/s/ 
Michael S. Moore