

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

ETS OILFIELD SERVICES, L.P.

Respondent

and

Case 16-CA-172847

LLOYD W. OSTER, an Individual

Charging Party

**GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46(d) of the Board's Rules and Regulations, Counsel for the General Counsel submits this Answering Brief to Respondent's Exceptions to the Decision and Recommended Order of Administrative Law Sharon Levinson Steckler (JD-121-16) dated December 23, 2016.¹

I. STATEMENT OF THE CASE

This is a class action arbitration waiver case. The Complaint alleges that Respondent has violated Section 8(a)(1) of the Act by maintaining a mandatory arbitration policy titled "Mutual Agreement to Arbitrate" (Arbitration Agreement) that is unlawful on its face. Thus, the mere maintenance of the policy violates the Section 8(a)(1) Act. (GC Exh. 1(c)).

The evidence is undisputed that Respondent's Arbitration Agreement contains, in relevant part, the following class or collective actions waiver provision:

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

¹ Citations are "JD slip op." for the Judge's Decision, "Tr." for transcript, "GC Exh." for General Counsel exhibits and "R Exh." for Respondent exhibits.

proceeding, including but not limited to receiving or requesting notice from a pending collective action. Therefore, I 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.

(JD slip op at 2, GC Exh. 3 and 4; Tr. 10-11).

In her Decision, the Judge concluded that under Respondent's policy, "in short, employees may not join together in any 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." (JD slip op. at 3). Respondent's class action arbitration preclusion infringes on employees' Section 7 rights, and thus violates Section 8(a)(1) of the Act. (JD slip op. at 5).

General Counsel fully concurs with the Judge's findings and legal conclusions in this matter. The Judge's decision is correct in light of the Board's well established precedent including, but not limited to, *D.R. Horton*, 357 NLRB No. 184 (2012), *enforcement denied* 737 F.3d 344 (5th Cir. 2013); *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), *enforcement denied in relevant part* 808 F.3d 1013 (5th Cir. 2015), No. 16-307 (*cert granted* January 17, 2017); *California Commerce Club, Inc.*, 364 NLRB No. 31 (2016) and *Solarcity Corp.*, 363 NLRB No. 83 (2015).

II. RESPONDENT'S EXCEPTIONS

On January 19, 2017, Respondent timely filed one broad exception to the Judge's Decision contending that the "Judge erred in concluding that the Mutual Agreement to Arbitrate violated Section 8(a)(1) of the National Labor Relations Act." (R Exception 1).² In support, Respondent advances the now familiar arguments and defenses, all previously rejected by the Board, in class action arbitration waiver cases. Respondent argues that language in its Arbitration

² Respondent's exceptions were due no later than January 20, 2017.

Agreement provides exceptions permitting employees to bring claims under the NLRA or with other federal, state or local agencies, including the U.S. Department of Labor Wage and Hour Division. Respondent affirmatively defends that the Federal Arbitration Act (FAA) overrides the concerns in the NLRA and that the Fifth Circuit precedent controls issues pertaining to class or collective waiver claims. Finally, Respondent avers that the Charging Party failed to appear at the hearing to explain how or even whether the Arbitration Agreement chilled his attempt to exercise any rights. (R Exceptions at 4-8).

As elaborated below, the Judge's decision and findings are fully supported by the record. The Judge's rulings and recommended order are fully consistent with and supported by Board precedent. Respondent raises no exception or argument warranting the Board to overturn the Judge's decision. General Counsel respectfully requests that the Board affirm the Judge's decision in entirety.

III. STATEMENT OF FACTS

The facts are undisputed. Respondent is a limited partnership doing business as ETS Oilfield Services, L.P. ETS Services Management, LLC is the general partner and Devin W. Nevilles is the limited partner. Respondent maintains a principal office and place of business in Robstown, Texas and shops in Seguin, Poteet, Laredo, Marshall and Odessa, Texas well as Watford, North Dakota and Rock Springs, Wyoming. Respondent's business services include testing fluids and motors for oil companies. (JD slip op at 2; Tr. 8-9; R Exceptions at 2).

The at-issue Arbitration Agreement is pled verbatim at paragraph 6 of the Complaint and is set forth in its entirety at Appendix A of the Judge's decision. (GC Exh. 1(c); JD slip op at 9-11). Respondent stipulated that it maintains the at-issue Arbitration Agreement, which has been in effect since August 2014. (JD slip op at 2, Tr. 10-11; R Exceptions at 2).

Respondent further stipulated that since August 2014 it has required all employees to sign the Arbitration Agreement as part of their employment. (JD slip op. at 2; Tr. 10-11; R Exceptions at 2).

IV. ARGUMENT ANSWERING RESPONDENT'S EXCEPTIONS

A. The Judge properly determined that Respondent's Arbitration Agreement violates Section 8(a)(1) of the Act. (R Exception 1)

In one broad Exception, Respondent argues that the Judge erred in concluding that the Mutual Agreement to Arbitrate violates Section 8(a)(1) of the Act. (R Exception 1) Respondent's Exception and the underlying argument is contrary to Board precedent and must be rejected.

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.

Here, as a condition of employment, Respondent requires all employees to sign its Arbitration Agreement. Respondent's Arbitration Agreement explicitly prohibits employees from pursuing class or collective action claims as a member or representative of a class. 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 (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. 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*, 357 NLRB No. 184, 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, as in *D.R. Horton*, Respondent has violated Section 8(a)(1) of the Act by maintaining a policy restricting employees' right to bring class actions.

B. The Arbitration Agreement's allowance for employee claims with Federal agencies does not relieve Respondent of liability under the Act

Respondent contends that language in the Arbitration Agreement provides exceptions and does not preclude employees from bringing unfair labor practice claims under the NLRA or with other federal, state or local agencies, including the U.S. Department of Labor Wage and Hour Division. However, such defenses have been considered and soundly rejected by the Board.

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 or allowance for federal agency claims 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).

Similarly, as cited by the Judge (JD slip op at. 5), in *Solarcity Corp.*, 363 NLRB No. 83, slip op at 3-6 (2015), the Board expressly considered whether the at-issue arbitration agreements were lawful because employees were permitted under the agreements to file employment claims or charges with federal administrative agencies such as the EEOC, the NLRB, and the DOL. The contention was that because such agencies "can prosecute [an employee's] claim against the

employer and seek a remedy on behalf of all affected employees,” the agreements provide “an adequate substitute for class or collective action litigation brought by the employees.” The Board soundly rejected this argument and held that an agreement that permits the filing of claims or charges with administrative agencies does not satisfy the requirement of an alternative judicial forum for the pursuit of joint, class, or collective claims. *Id.*

In *Solarcity*, the Board first explained that there are a wide range of employment-related claims such as common-law claims that are not within the purview of any administrative agency. For these claims, resorting to an administrative agency is meaningless as the agency has no authority to pursue employees’ collective claims on their behalf in a judicial forum or anywhere else. Second, even if the administrative agency has the authority to pursue employees’ claims, it typically also has the discretion to decline to do so (whether for lack of resources, a different view of the legal merits, or some other reason), or to do so only on the agency’s terms. Thus, access to the agency, in short, is not access to a forum for adjudication of employee claims. Employees cannot control whether the agency will pursue their claims, much less when, where, and how they will be pursued—these are all matters that employees do control when they are free to exercise their Section 7 right to bring their own group claims to court. *Id.* Finally, even with respect to claims that do fall within the authority of an administrative agency and which the agency does choose to pursue, a typical administrative agency is simply not a “judicial forum” in the sense contemplated by *D. R. Horton*. Unlike a court, administrative agencies like the EEOC and DOL cannot *adjudicate* employment-related claims. *Id.*

After carefully considering the issue, the Board in *Solarcity* held that filing a charge with an administrative agency is not an adequate substitute for filing a lawsuit asserting a joint, class, or collective claim—either as a practical matter or for the purposes of *D. R. Horton*, which

sought to preserve employees' statutory right to engage in concerted legal activity to the fullest extent consistent with the Federal policy favoring arbitration. *Id.* Here, Respondent's Arbitration Agreement, notwithstanding the language that permits claims or charges to be filed with administrative agencies, fails to provide employees with such a forum to pursue joint, class, or collective claims.

Respondent's arguments herein have been rejected by the Board and do not relieve it of liability under the Act.

C. Respondent's Additional Affirmative Defenses Should be Rejected

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

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 decisions including *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344 (5th Cir. 2013) and *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015). 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.* 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. Animal 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, the Board's *D.R. Horton* decision 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 cannot 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 substantially argues that the Fifth Circuit holds that arbitration provisions precluding class actions are enforceable. *D.R. Horton, Inc. v. N.L.R.B.*, *supra*. 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), No. 16-285 (*cert. granted* January 13, 2017). The Ninth Circuit has also adopted this view. *Morris v. Ernst & Young, LLP*, 834 F. 3d 975 (9th Cir. 2016), No. 16-300 (*cert granted* January 13, 2017). 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.

D. Charging Party's failure to attend the hearing does not alter the analysis or change the Respondent's unlawful policy

Contrary to any Respondent contention, the failure of the Charging Party to attend the hearing does not alter the outcome of this case. Respondent's Arbitration Agreement is unlawful on its face and Charging Party's subjective interpretation is irrelevant to the analysis or determination.

As the Judge properly held, "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. An ambiguous rule can chill employees’ Section 7 protected activities by creating “a cautious approach” to the activities because of fears of employer retaliation. *Whole Foods Market, Inc.*, 363 NLRB No. 87, slip op. at 3 fn. 11 (2015). Therefore, all rules are examined to determine whether an employee would reasonably construe the language to prohibit Section 7 activities. *Lily Transportation Corp.*, 362 NLRB No. 54 (2015). The test for Section 8(a)(1) violations is not subjective, but objective: “[W]hether [it] would reasonably have a tendency to interfere with, restrain or coerce employees in the exercise of their Section 7 rights

” See generally *Multi-Ad Services, Inc.*, 331 NLRB 1226, 1227-1228 (2000), *enfd.* 255 F.3d 363 (7th Cir. 2001). Also see *Whole Foods Market*, 363 NLRB No. 87, slip op. at 2, citing *Triple Play Sports Bar*, 361 NLRB No. 31, slip op. at 7 (2014), *enfd.* 629 Fed. Appx. 33 (2d Cir. 2015).

Any contention by Respondent to argue that it was somehow prejudiced by Charging Party’s failure to attend the hearing is baseless. Respondent failed to subpoena or call Charging Party as a witness at the hearing. Even if the Charging Party had testified, the standard for reviewing the validity of the Arbitration Agreement, on its face, is objective instead of subjective. The Charging Party’s subjective interpretation of such agreement would not have altered the outcome of the case. The Board has long recognized that typical “nonlawyer employees” do not have specialized legal knowledge to analyze these agreements. See *2 Sisters Food Group, Inc.*, 357 NLRB 1816 (2011). As the Board stated in *Ingram Book Co.*, 315 NLRB 515, 516 fn. 2 (1994), “rank and file employees do not generally carry law books to work or apply legal analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint.” The fact that the Charging Party

signed the arbitration policy and thereafter initiated an arbitration action is not in any manner dispositive to whether the language explicitly on its face restricts Section 7 activities. Respondent's arguments here are baseless and should be rejected.

V. CONCLUSION

The Judge's Decision is fully supported by the record evidence and legal authority. The Judge properly determined that Respondent violated Section 8(a)(1) of the Act. Respondent has raised no exception or argument that warrants the Board overturning the Judge's decision. General Counsel respectfully requests that the Board affirm the Judge's decision. Counsel for the General Counsel also requests any such further relief that the Board deems appropriate.

DATED at Fort Worth, Texas, this 3rd day of February 2017.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing General Counsel's Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge has been electronically filed and served, via electronic mail, this 3rd day of February 2017 upon each of the following:

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