

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: February 27, 2017

TO: William B. Cowen, Regional Director
Region 21

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Brinderson Constructors, Inc.; BP America, Inc.; 512-5012-9300
BP Corporation North America, Inc. 512-5072-0100
Cases 21-CA-180992; -180993; -180994 512-7587

These cases were submitted for advice as to whether the Employer violated the Act by maintaining and enforcing a mandatory arbitration provision in its collective-bargaining agreement with the Union. We conclude that the Employer has not violated the Act because the mandatory arbitration provision at issue is facially lawful, and the Employer has not unilaterally applied it to preclude class or collective legal activity.

FACTS

The collective-bargaining agreement between Brinderson Constructors, Inc. (the Employer) and the Union of Petroleum and Industrial Workers - United Steel Workers, Local 1945 (the Union) contains the following provision:

The parties hereby acknowledge that it has always been understood and agreed between the parties that any dispute or grievance regarding overtime, meal periods, rest periods or any other subject matter covered by any and all wage orders issued by the State of California including Industrial Wage Order 16-2001 . . . has been, and will be, processed under and in accordance with the dispute and grievance procedure set forth in the collective bargaining agreement between the parties.

The parties agree that the express incorporation of wage orders into the collective bargaining agreement may require covered employees to arbitrate, rather than litigate, claims arising under those statutes. The arbitrators hearing such statutory claims have full authority to remedy any violations in the manner provided for by the statute at issue. Covered employees are entitled to file charges with federal, state or

local administrative agencies even with respect to claims that are subject to arbitration.

Where the Union takes an employee's statutory claim to arbitration under the Grievance and Arbitration procedure . . . of this Agreement, that remedy shall constitute the employee's exclusive remedy for the arbitrated claim. With regard to his/her statutory claim, the employee will be allowed to have individual representation of his/her own choosing in the arbitration with the employee bearing the cost of such individual representation.

Statutory claims that the Union does not take to arbitration, either because the employee has not requested that the Union do so or because the Union has declined a request to do so, may be pursued by the employee acting on his/her own under the AAA Employment Arbitration Rules applicable to Company-promulgated plans ("individual arbitration procedure") and the award of the arbitrator shall be final and binding on the Company and the employee. . . . The Union may intervene in the arbitration or may be joined as a party on the same bases as would apply in a lawsuit brought in federal court. The Union shall not be bound by any arbitration award where it was not a party and no such award may be cited by the Company or the Union in any other arbitration proceeding under the collective bargaining agreement.

The Company shall inform all covered employees that arbitration is the exclusive means of bringing claims under the named statutes and of their rights and obligations with respect to arbitrating such claims. In particular, the Company shall inform employees that claims subject to the individual arbitration procedure will be processed in accordance with the AAA Employment Arbitration Rules and shall inform employees of how they may review a copy of those rules. The Company shall give each new employee notice that arbitration is the exclusive means of pursuing claims under the named statutes and of the means for invoking arbitration. In addition, the Company shall periodically give notice to all covered employees of the requirement to arbitrate certain statutory claims and the means of doing so- either through the employee handbook or through other equally effective means. Failure of the Company to so notify a particular employee of his/her rights and obligations in this regard shall waive the Company's right to insist on arbitration as a defense to any lawsuit brought by an employee who has not in fact received notice."

In June 2014, a former employee of the Employer (the Charging Party) filed a California state class action lawsuit against the Employer, as well as two other entities that are not parties to the collective-bargaining agreement, alleging various wage-and-hour violations related to pay and breaks. In October 2015, the Employer and the other defendants filed a Petition to Compel Arbitration and to Stay Proceedings seeking to require the Charging Party to submit (b) (6), (b) (7)(C) claims to arbitration based on the collective-bargaining agreement provision quoted above. In its Petition, the Employer did not assert that the collective-bargaining agreement required that any arbitration be on an individual basis, and did not address whether arbitration could be on a class or collective basis. The Charging Party filed an Opposition to the Petition to Compel Arbitration arguing, *inter alia*, that the Employer had waived its right to compel arbitration because it had failed to comply with the provision's notice requirements. In January 2016, the California state court granted the Petition to Compel Arbitration and submitted the issue of waiver to the arbitrator to decide.¹ The court stayed the lawsuit pending arbitration. The parties have since selected an arbitrator but have not yet selected a date for the arbitration.

In July 2016, the Charging Party filed the charges in the instant cases against the Employer and the two other defendants in the lawsuit, alleging that they violated Section 8(a)(1) of the Act by making a mandatory arbitration agreement a necessary condition of employment, and by requiring employees to waive their right to participate in class and/or representative actions. The Region's investigation has adduced no evidence that would indicate that the Employer: (1) ever took the position during bargaining that the provision at issue prohibits class or collective arbitration; (2) has ever formally taken such a position before a court or arbitrator; (3) has previously attempted to apply the provision in that manner; or (4) has ever stated such a position to employees. Nonetheless, the Employer has indicated in its position statements to the Region and the Division of Advice that it believes that the provision precludes class arbitration. The Union asserts that the provision at issue does not waive the right of employees to arbitrate statutory claims on a class or collective basis, and that it would not have agreed to the provision if it restricted these rights.

ACTION

We conclude that the Employer has not violated the Act because the mandatory arbitration provision at issue is facially lawful, and the Employer has not unilaterally applied it to preclude class or collective legal activity.

¹ The employee appealed the decision, but the appeal was dismissed on procedural grounds.

Initially, we conclude that the provision at issue is facially lawful. As we have previously concluded elsewhere,² even arbitration provisions precluding class and collective arbitration are mandatory subjects of bargaining and may be included in collective-bargaining agreements. In this regard, we particularly note that it is well established that a union can waive employees' Section 7 rights during collective bargaining, if it does so clearly and unmistakably,³ and that the Board has expressly distinguished lawful arbitration agreements agreed to by a union from unlawful arbitration agreements imposed on unrepresented employees. For example, in *Murphy Oil USA, Inc.*,⁴ the Board noted that "courts have understood the NLRA to permit *collectively bargained* arbitration provisions."⁵ When Member Johnson noted in dissent that "a union's undisputed power to waive rights employees otherwise would possess,"⁶ the Board majority accepted this proposition and explained: "[t]hat an employer may collectively bargain a particular grievance-and-arbitration procedure with a union is not to say that it may unilaterally impose any dispute-resolution procedure it wishes on unrepresented employees, including a procedure that vitiates Section 7 rights."⁷

Similarly, in *D.R. Horton, Inc.*,⁸ the Board acknowledged that the Supreme Court has held that unions may agree to arbitration clauses in collective bargaining that waive employees' rights to bring actions in court, and underscored that "[i]t is well settled . . . that a properly certified or recognized union may waive certain Section 7 rights of the employees it represents—for example, the right to strike—in exchange for concessions from the employer." The Board stressed that:

² See, e.g., *Henry Mayo Newhall Memorial Hospital*, Case 31-CA-145452, Advice Memorandum dated July 31, 2015, at 2-9.

³ *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

⁴ 361 NLRB No. 72 (Oct. 28, 2014), *enforcement denied*, 808 F.3d 1013 (5th Cir. 2013), *cert. granted*, 2017 WL 125666 (Jan. 13, 2017).

⁵ *Id.*, slip op. at 10 (emphasis in original).

⁶ *Id.*, slip op. at 48 n.68.

⁷ *Id.*, slip op. at 15.

⁸ 357 NLRB 2277, 2286 (2012), *enforcement denied*, 737 F.3d 344 (5th Cir. 2013).

[t]he negotiation of such a waiver stems from an *exercise* of Section 7 rights: the collective-bargaining process. Thus, for purposes of examining whether a waiver of Section 7 rights is unlawful, an arbitration clause freely and collectively bargained between a union and an employer does not stand on the same footing as an employment policy . . . imposed on individual employees by the employer as a condition of employment.⁹

Indeed, in contrast to unrepresented employees, as to which a unilaterally-imposed mandatory individual arbitration agreement acts to extinguish employees' right to act collectively, such a provision agreed to in collective bargaining vindicates and embodies the exercise of such rights. For these reasons, even if the Union had clearly and unmistakably waived employees' rights to class or collective legal activity in the collectively-bargained provision at issue here, the provision would have been lawful.

We conclude, however, that the provision at issue does not preclude class or collective arbitration, and that the Union did not clearly and unmistakably waive employees' rights to class or collective arbitration. The provision itself is silent as to whether it precludes class or collective arbitration, and it requires that employee-initiated arbitration proceed under the "AAA Employment Arbitration Rules applicable to Company-promulgated plans ('individual arbitration procedure')." Significantly, these rules expressly provide for the possibility of class arbitration.¹⁰

We recognize that the provision also states that employees participating in an arbitration brought by the Union may have "individual representation" with regard to their statutory claims, and that claims not brought by the Union "may be pursued by the employee acting on his/her own" in an "individual arbitration procedure." In the context of the entire provision, however, in which the employees' rights to go to arbitration and to be represented privately are being contrasted to the right of the Union itself to proceed to arbitration, this language may reasonably be read as merely distinguishing those respective rights, and not specifying anything about the nature of any arbitration proceedings pursuant to them. This is particularly the case considering that any ambiguity inherent in the provision was never resolved by the parties, as the Employer never took the position during bargaining or with the Union

⁹ *Id.*

¹⁰ See *Employment Arbitration Rules and Mediation Procedures*, American Arbitration Association, at 41, available at: https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004362&revision=latestreleased.

at any other time that the provision prohibits class or collective arbitration.¹¹ Therefore, we conclude that the provision at issue does not preclude class or collective arbitration, and that the Union did not clearly and unmistakably waive employees' rights to class or collective arbitration.

Finally, we conclude that the Employer has not violated the Act by unlawfully applying the provision at issue. The Employer has never formally taken the position before a court or arbitrator that class or collective arbitration is prohibited by the provision at issue, has not otherwise attempted to apply the provision in that manner, and has never stated such a position to employees. In this regard, the Board has made it clear that, even if a mandatory arbitration rule does not explicitly preclude protected activity such as class or collective litigation, a violation will still be found where: (1) employees would reasonably construe the rule 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.¹² In the instant cases, there is no evidence indicating that any of these conditions have occurred. While the Employer has indicated in its position statements to the Region and the Division of Advice that it believes that the facially-lawful provision at issue precludes class arbitration, it has never actually applied the rule to restrict the exercise of Section 7 rights, or made any statement to employees that it would do so. Therefore, for all these reasons, we conclude that the Employer has not violated the Act.¹³

¹¹ Indeed, the Union asserts that the provision does not waive the right of employees to arbitrate statutory claims on a class or collective basis, and that it would not have agreed to the provision if it restricted these rights.

¹² *D.R. Horton*, 357 NLRB at 2280 (citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004)).

¹³ However, if a subsequent charge is filed and the Region adduces evidence that demonstrates that the Employer has taken the position before a court or arbitrator that class or collective arbitration is prohibited by the provision at issue, has otherwise attempted to apply the provision in an unlawful manner, or has stated to employees that it would do so, such conduct would establish a violation of the Act, and complaint would appropriately issue at that time.

Accordingly, the Region should dismiss the charges in the instant cases, absent withdrawal.

/s/
B.J.K.

ADV.21-CA-180992.Response.Brinderson. (b) (6), (b) (7)