

Oral Argument Not Yet Scheduled

**No. 17-60368**

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**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT****DISH NETWORK, L.L.C.****Petitioner/Cross-Respondent**

v.

**NATIONAL LABOR RELATIONS BOARD****Respondent/Cross-Petitioner**

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

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**APPELLEE BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT REGARDING ORAL ARGUMENT**

The Board believes that oral argument would assist the Court in evaluating the issues presented in this case.

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**No. 17-60368**

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**Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD**

**Respondent/Cross-Petitioner**

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

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**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF JURISDICTION**

This case is before the Court on the petition of Dish Network, L.L.C. (“DISH”) to review an order issued by the National Labor Relations Board (“the Board”) against DISH, and the Board’s cross-application to enforce that order. The Board’s Decision and Order issued on April 13, 2017, and is reported at 365 NLRB No. 47. (ROA. 175-82.)

The Board had jurisdiction over the proceeding below under Section 10(a) of the National Labor Relations Act (the “Act,” 29 U.S.C. §§ 151, 160(a)). The Court has jurisdiction over this appeal because the Board’s Order is final under Section 10(e) and (f) of the Act. 29 U.S.C. § 160(e) and (f). Venue is proper because DISH transacts business in this circuit. The petition and application were both timely; the Act imposes no time limits on such filings.

### **STATEMENT OF ISSUES**

1. Did the Board reasonably find that DISH violated Section 8(a)(1) of the Act by maintaining an arbitration agreement that employees would reasonably construe as restricting their right to file charges with the Board.

2. Did the Board reasonably find that DISH violated Section 8(a)(1) of the Act by maintaining an arbitration agreement that requires employees to maintain the confidentiality of all arbitration proceedings.

3. Does substantial evidence support the Board’s finding that DISH violated Section 8(a)(1) of the Act by telling employee Brett Denney not to discuss with other employees any discipline issued to him or matters under investigation.

4. Did the Board properly exercise its broad remedial authority by issuing an order requiring DISH to cease and desist from instructing employees not to discuss discipline or matters under investigation and by requiring DISH to notify

all former employees who signed the arbitration agreement that it has been rescinded or revised.

## **STATEMENT OF THE CASE**

### **I. THE BOARD’S FINDINGS OF FACT**

DISH is a satellite television company headquartered in Englewood, California. (ROA. 175; 5.)<sup>1</sup> DISH operates a sales center in Littleton, Colorado. (ROA. 175; 5, 27, 37, 55.) Since October 24, 2013, DISH has required, as part of its hiring process, its applicants to sign a “Mandatory Arbitration of Disputes-Waiver of Rights Agreement” (“the Agreement”). The Agreement states, in relevant part:

In consideration of the Employee’s employment by DISH (and/or any of its affiliates) as good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Employee and DISH agree that any claim, controversy and/or dispute between them, arising out of and/or in any way related to Employee’s application for employment, employment and/or termination of employment, whenever and wherever brought, shall be resolved by arbitration. The Employee agrees that this Agreement is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq., and is fully enforceable.

. . . . Regardless of what the above-mentioned Rules state, all arbitration proceedings, including but not limited to hearings, discovery, settlements, and awards shall be confidential and shall be held in the city in which the Employee performs services for DISH as of the date of the demand for arbitration, or in the event the Employee is no longer employed by DISH, in the city in which the Employee last performed services for

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<sup>1</sup> “ROA.” cites in this brief are to the Record on Appeal. References preceding a semicolon are to the Board’s findings; cites following a semicolon are to supporting evidence. “Br.” cites are to the Company’s opening brief to the Court.

DISH. The arbitrator's decision shall be final and binding, and judgment upon the arbitrator's decision and/or award may be entered in any court of competent jurisdiction.

(ROA. 175; 8, 70.) Since at least March 1, 2015, DISH has maintained the Agreement, or a similar version, with all current and former employees at all of its locations nationwide.

(ROA. 175; 9.)

DISH employed Brett Denney at its Littleton center from November 1, 2013, through March 11, 2015. (ROA. 175; 6.) Before Denney was hired, he was required to sign the Agreement. (ROA. 175; 8-9, 70-71.)

DISH also maintains a workplace policy entitled "Direct Sales Call Experience Expectations," which Denney signed after he was hired. (ROA. 175, 176 n.2; 6-7, 66-68.) This policy sets forth three tiers of expectations for employees when dealing with DISH's customers. (ROA. 175; 7, 66-68.) On March 3, 2015, General Manager Emily Evans suspended Denney for a suspected Tier Three violation of the policy.<sup>2</sup> (ROA. 175, 176 n.2; 7, 27, 37, 55.) At that time, DISH was investigating Denney for the suspected infraction, and Evans told Denney not to discuss his suspension with his coworkers. (ROA. 176; 7.) Evans

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<sup>2</sup>The stipulated facts do not disclose any specifics regarding Denney's purported infraction.

also instructed Denney not to discuss the circumstances surrounding his discipline while it was being investigated.<sup>3</sup> (ROA. 7.)

On August 7, pursuant to the Agreement, DISH filed a Demand for Arbitration with the American Arbitration Association. (ROA. 176; 73-75.) The filing describes DISH’s allegations against Denney as “[c]onversion, unjust enrichment, and breach of contract.” (ROA. 176; 74.)

## **II. PROCEDURAL HISTORY**

Denney filed unfair labor practice charges against DISH, and the Board’s General Counsel issued a complaint and amended complaint alleging that DISH violated Section 8(a)(1) of the Act (29 U.S.C. 158(a)(1)) by maintaining and enforcing the Agreement. The complaint also alleged that DISH violated Section 8(a)(1) by prohibiting Denney from discussing his suspension with coworkers. (ROA. 175; 4-6, 9, 13, 17, 21, 26-35.) The parties filed a joint motion seeking to waive a hearing and a decision by an administrative law judge, which the Board granted. (ROA. 175; 1-11.) The proceedings were transferred to the Board for a decision based on a stipulated record. (ROA. 175.)

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<sup>3</sup> The stipulated facts state that DISH “does not dispute” that Evans “may have” told Denney not to discuss the circumstances surrounding his suspension pending investigation. (ROA. 7 par. 18.) Before the Court (Br. 43-50), however, DISH’s argument rests on the premise that Evans gave this instruction.

### III. THE BOARD'S DECISION AND ORDER

On April 13, 2017, the Board (Members Pearce and McFerran, Chairman Miscimarra (concurring))<sup>4</sup> issued a Decision and Order. (ROA. 175-82.) The Board found that DISH's maintenance of the Agreement violated Section 8(a)(1) of the Act in two independent ways. First, the Board found that the Agreement was unlawful because employees would reasonably believe that it bars or restricts them from filing unfair-labor-practice charges with the Board or accessing the Board's processes. (ROA. 176.) Second, the Board found that the Agreement's confidentiality provision, which applied to "all arbitration proceedings," was unlawfully overbroad because it prohibited employees from discussing the terms and conditions of their employment. (ROA. 176.)

The Board, however, found that the Agreement did not run afoul of the rule first set forth in *D.R. Horton, Inc.*, 357 NLRB 2277, 2280, 2288-89 (2012), *enforcement denied in relevant part*, 737 F.3d 344 (5th Cir. 2013), which provides that arbitration agreements requiring employees to prospectively waive their right to engage in collective legal activity violate Section 8(a)(1). (ROA. 176-77.) In finding no violation, the Board explained that the Agreement "does not explicitly restrict class or collective claims," and noted that there was no evidence that DISH

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<sup>4</sup> Phillip A. Miscimarra was named Chairman in April 2017 after having served as Acting Chairman since January 2017.

sought to “preclude employees from pursuing class or collective actions in any forum.” (ROA. 176-77.)

Apart from the Agreement, the Board further found that DISH violated Section 8(a)(1) by telling Denney not to discuss with other employees any discipline issued to him or matters under investigation. (ROA. 177.)

The Board’s Order requires that DISH 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 Act, 29 U.S.C. § 157. (ROA. 178.) Affirmatively, the Order requires DISH to rescind or revise the Agreement to make clear that it does not restrict employees’ right to file charges with the Board or require employees to maintain the confidentiality of all arbitration proceedings. (ROA. 178.) The Order also requires DISH to notify all applicants, and current and former employees who were required to sign the Agreement, of the rescission or revision. (ROA. 178.) Finally, the Order requires DISH to post a remedial notice at all of its facilities where the Agreement is, or has been, in effect. (ROA. 178, 181.)

### **SUMMARY OF ARGUMENT**

1. DISH violated Section 8(a)(1) by maintaining an agreement that employees would reasonably read to restrict their Section 7 right to file charges with the Board. The Board reasonably found that employees would construe the

Agreement's broad language informing employees that they had to arbitrate "any claim," "in any way related to" employment "whenever, and wherever brought" (ROA. 70) as prohibiting the filing of Board charges. The Board's finding is consistent with the Court's precedent as well as with other court-enforced Board orders. The Court lacks jurisdiction to consider DISH's reliance on other language in the Agreement and, in any event, that language does not detract from the Board's finding. The fact that DISH has not enforced the Agreement to prohibit employees from filing charges, or that employees have actually filed charges, has no bearing on the matter. The rule is unlawful if it has a reasonable tendency to coerce; actual coercion is unnecessary.

2. The Board also reasonably found that DISH violated Section 8(a)(1) by maintaining, in the Agreement, a confidentiality provision stating that "all arbitration proceedings, including but not limited to hearings, discovery, settlements, and awards shall be confidential." By encompassing within its broad prohibition discussions of matters related to wages and other terms and conditions of employment that are revealed during arbitration proceedings, including arbitral awards, the rule interferes with employees' exercise of Section 7 activity. That finding is reasonable and consistent with both the Board's and this Court's caselaw. While DISH insists that its provision is necessary to protect against disclosure of private information such as medical documentation and proprietary

business information, those legitimate goals can be met with a narrowly tailored rule that does not sweep within its breadth information that employees have a statutory right to discuss. And nothing in the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1 *et seq.*, arbitral rules, or court precedent renders an unlawfully broad confidentiality provision inviolable, as DISH suggests.

3. Substantial evidence supports the Board’s finding that the Company also violated Section 8(a)(1) by prohibiting Denney from discussing his discipline and the related investigation with his co-workers. The stipulated facts show that DISH told Denney not to discuss his discipline, and include no justification for that instruction. DISH’s proffered justification, contained in its brief to the Board, offers only general claims of wanting to protect employees, to prevent rumors, and to prevent speculation about a car that DISH apparently awarded to Denney at some undetermined time. The Board properly found these general and unsubstantiated allegations insufficient to outweigh the interference with Denney’s statutory right to discuss discipline. The Board’s finding that DISH must provide a substantial justification for its instruction is consistent with Board precedent, which requires employers to show, on a case-by-case basis, a justification for restricting discussion of discipline by providing objective evidence that such an instruction is necessary to prevent interference with its investigation—a burden that DISH failed to meet.

4. The Board’s remedial order is entitled to enforcement. The Court lacks jurisdiction to consider DISH’s challenge to the Board’s Order requiring DISH to cease and desist from telling employees that they cannot discuss discipline or disciplinary investigations with fellow employees and, in any event, such an order is consistent with precedent. DISH’s additional contention that it should not have to notify all former employees who signed the Agreement that it has been rescinded or revised ignores the undisputed facts showing that those employees remain subject to its terms. DISH’s proffered alternative remedy, asking that only employees who worked for DISH in the six-month period preceding the Board’s Order is arbitrary, has no legal support, and fails to fully remedy the violation.

#### **STANDARD OF REVIEW**

The Board bears “primary responsibility for developing and applying national labor policy.” *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990). Thus, when the Board engages in the “difficult and delicate responsibility of reconciling conflicting interests of labor and management, the balance struck by the Board is subject to limited judicial review.” *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975) (internal quotation marks omitted). Courts must “respect the judgment of the agency empowered to apply the law ‘to varying fact patterns,’ . . . even if the issue ‘with nearly equal reason [might] be

resolved one way rather than another.’” *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996) (internal citation omitted) (quoting *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 302, 304 (1977)).

The Board’s findings of fact are conclusive if 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); *UNF West, Inc. v. NLRB*, 844 F.3d 451, 456 (5th Cir. 2016). The “substantial evidence” test requires the degree of evidence that could satisfy a reasonable factfinder. *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 377 (1998); *Flex Frac Logistics v. NLRB*, 746 F.3d 205, 207 (5th Cir. 2014). Under this 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. *Accord El Paso Elec. Co. v. NLRB*, 681 F.3d 651, 657 (5th Cir. 2012.)

## ARGUMENT

### **I. THE BOARD REASONABLY FOUND THAT DISH VIOLATED SECTION 8(a)(1) BY MAINTAINING AN AGREEMENT THAT EMPLOYEES WOULD REASONABLY CONSTRUE AS RESTRICTING THEIR RIGHT TO FILE CHARGES WITH THE BOARD**

#### **A. An Employer Violates the Act by Maintaining a Work Rule that Restricts Employees' Section 7 Rights**

Section 7 of the Act grants employees the “right to self-organization, to form, join, or assist labor organizations, . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .” 29 U.S.C. § 157. In turn, Section 8(a)(1) makes it an unfair labor practice for employers “to interfere with, restrain, or coerce employees” in the exercise of such rights. 29 U.S.C. § 158(a)(1). An employer thus violates Section 8(a)(1) by maintaining a workplace rule that would reasonably tend to chill employees in the exercise of their Section 7 rights. *Flex Frac*, 746 F.3d at 208-09; *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999).

Under the Board’s governing framework, a rule is unlawful if it “‘explicitly restricts activities protected by Section 7.’” *Flex Frac*, 746 F.3d at 209 (quoting *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004)). If the rule does not explicitly restrict protected activities, it is nonetheless unlawful if: “(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 209 (quoting *Lutheran Heritage*, 343 NLRB at 647).

Under the first prong, in determining whether employees would reasonably construe a given rule as prohibiting protected activities, the Board will “give the rule a reasonable reading” and will “refrain from reading particular phrases in isolation.” *Lutheran Heritage*, 343 NLRB at 646. The Board’s analysis turns on whether a reasonable employee “would” be chilled in the exercise of his or her statutory rights by the language in a given rule, not whether the rule “could be interpreted that way.” *Id.* at 647. 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). In addition, any ambiguity in the rule must be construed against the employer as the promulgator of the rule. *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1132 (2012), *enforced*, 746 F.3d 205 (5th Cir. 2014); *Lafayette Park Hotel*, 326 NLRB at 828. As the Board has explained, its approach “follows from the Act’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*, 358 NLRB at 1132; *see also NLRB v. Ne. Land Servs., Ltd.*, 645 F.3d 475, 483 (1st Cir. 2011) (affirming that “Board’s rule is intended to be prophylactic and . . . is subject to deference”).

**B. Employees Would Reasonably Believe that the Agreement Restricts Their Right To File Charges with and Their Access to the Board**

Employees have an unquestionable Section 7 right to file and pursue charges before the Board. *See Util. Vault Co.*, 345 NLRB 79, 82 (2005). An employer violates Section 8(a)(1) by maintaining a policy that employees reasonably would construe as prohibiting them from doing so. *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772, 774, 777-79 (8th Cir. 2016); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1018-19 (5th Cir. 2015), *cert. granted on other grounds* No. 16-307 (Jan. 13, 2017) (oral argument heard Oct. 2, 2017); *D.R. Horton Inc. v. NLRB*, 737 F.3d 344, 363-64 (5th Cir. 2013); *U-Haul*, 347 NLRB at 377-78. Here, the Board properly applied the first prong of *Lutheran Heritage* to find that employees would reasonably read the Agreement to restrict their right to file charges with the Board.

As the Board described (A. 176), “[t]he Agreement specifies in broad terms” that it requires arbitration for “‘any claim, controversy and/or dispute between [the employee and DISH], arising out of and/or in any way related to Employee’s application for employment, employment and/or termination of employment, whenever, and wherever brought.’” (ROA. 176; 70.) In finding DISH’s maintenance of the Agreement unlawful, the Board relied on the “breadth of the policy language,” noting that it encompassed “any claim . . . in any way related to

. . . employment . . . whenever and wherever brought.” Given these unquestionably broad terms, the Board was warranted in finding that employees would reasonably construe the Agreement as requiring them to resort to arbitration—and forgo the filing of unfair labor practice charges with the Board—to vindicate complaints that they would normally seek to pursue through filing Board charges or otherwise accessing the Board’s processes. (ROA. 176.)

The Board’s finding is consistent with the Court’s precedent. In *D.R. Horton*, 737 F.3d at 348, 363-64, for instance, the Court agreed with the Board that requiring employees to sign an arbitration agreement under which they “waiv[ed] all rights to trial in court before a judge or jury on all claims between them[,]” and agreed that “all disputes and claims” would “be determined exclusively by final and binding arbitration” could reasonably be construed as barring employees from filing Board charges. Similarly, in *Murphy Oil*, 808 F.3d at 1019, the Court upheld the Board’s finding that an arbitration agreement requiring employees to arbitrate “any and all disputes or claims [employees] may have . . . relat[ed] in any manner . . . to . . . employment” could reasonably be construed as barring employees from filing Board charges. As the Court there explained , “[t]he problem is that broad ‘any claims’ language can create ‘[t]he reasonable impression . . . that an employee is waiving not just [her] trial rights, but [her] administrative rights as well.’” *Id.* at 1019 (quoting *D.R. Horton*, 737 F.3d at 363-64); *see also Chesapeake Energy*

*Corp. v. NLRB*, 633 F. App'x 613, 614-15 (5th Cir. 2016) (enforcing Board's finding that agreement providing that employees "must pursue any claims . . . solely on an individual basis through arbitration" unlawful).

The Board's decision is also consistent with other court decisions upholding Board findings that employees would reasonably interpret language in arbitration agreements as interfering with their access to the Board. For example, in *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772, 774, 777-79 (8th Cir. 2016), the Eight Circuit agreed with the Board's finding that the employer violated the Act by requiring employees to individually arbitrate "[a]ll claims, disputes, or controversies" related to their employment. Similarly, in *U-Haul Co. of Cal.*, 347 NLRB 375, 377-78 (2006), *enforced mem.*, 255 App'x 527 (D.C. Cir. 2007), the District of Columbia Circuit deferred to the Board's finding that the employer's requirement that employees individually arbitrate "any other legal or equitable claims and causes of action recognized by local, state or federal law or regulations" was unlawful.<sup>5</sup>

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<sup>5</sup> The Agreement's broad "any claim . . . whenever and wherever brought" language distinguishes it from the arbitration agreement at issue in *Logisticare Solutions, Inc. v. NLRB*, which required waiver of an employee's "right to have a trial by jury to resolve any lawsuit related to my application or employment with the [employer]." 866 F.3d 715, 718 (5th Cir. 2017) As this Court noted, such language "does not contain generic references to 'claims' or 'disputes'" and is "far less expansive" than the provisions in *D.R. Horton* and *Murphy Oil*. *Id.* at 720.

In sum, the Board’s finding that employees would reasonably believe that the Agreement restricts their rights before the Board is amply supported by both the record evidence and precedent.

**C. DISH’s Arguments Are Unavailing**

DISH raises several arguments (Br. 31-34) challenging the Board’s finding that employees would reasonably believe that the Agreement restricts their right to access the Board. As explained below, none of the arguments has merit.

DISH claims (Br. 31-32) that the Board erred by reading the provision in isolation and failing to consider other so-called “limiting” language contained in the Agreement. Specifically, DISH (Br. 31, ROA. 71) points to language in the Agreement that states “[o]ther than potential rights to a trial, a jury trial, and common law claims for punitive and/or exemplary damages, nothing in this Agreement limits any statutory remedy to which the Employee may be entitled to under law.” DISH argues that this provision sufficiently limits the “any claim” language in a manner that employees would reasonably construe the Agreement as allowing access to the Board and the filing of Board charges. But the Court lacks jurisdiction to consider this claim because DISH failed to make this argument before the Board. *See* 29 U.S.C. § 160(e) (“No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure . . . to urge such objection shall be excused because of extraordinary circumstances”); *Woelke*

& *Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (stating that Section 10(e) precludes court of appeals from reviewing claim not raised to the Board); accord *NLRB v. Catalytic Indus. Maint. Co.*, 964 F.2d 513, 521 (5th Cir. 1992).

In any event, the language on which DISH now relies (Br. 31, ROA. 71) does not compel the conclusion that the Board acted unreasonably in finding that employees would construe the Agreement—with its broad “any claims” language—as precluding them from filing charges. As an initial matter, the language does not, as DISH misleadingly suggests (Br. 31-33), immediately follow the “any claim” language contained in the opening lines of the Agreement. Rather, the ostensibly “limiting” sentence comes near the end of the Agreement, five full paragraphs after the broad “any claim” “whenever and wherever” brought language. DISH (Br. 33) further asserts that the language “makes it clear that any limitations of rights is limited to trials, not agency or administrative proceedings.” But references to “trials” do not overcome the breadth of the Agreement’s language, which includes “any claim . . . in any way related to [the employee’s] application or employment.” (ROA. 175.) A reasonable employee would understand a Board unfair-labor-practice hearing, over which an administrative law judge presides and both parties present testimony, to be a trial. In these circumstances, as in *D.R. Horton*, “[t]he reasonable impression could be created

that an employee is waiving not just his trial rights, but his administrative rights as well.” 737 F.3d at 363. Moreover, even if the subsequent language could be viewed as creating an ambiguity, such ambiguities are, as shown p. 13, resolved against DISH.<sup>6</sup>

DISH’s reliance (Br. 32) on the Agreement’s lack of an express prohibition on filing Board charges is misplaced because *Lutheran Heritage* provides that maintenance of a rule violates the Act if it either explicitly restricts concerted protected activity or would be “reasonably construed” by employees as doing so. 343 NLRB at 646; *Cellular Sales*, 824 F.3d at 777-78; *Murphy Oil*, 808 F.3d at 1019, *Flex Frac*, 746 F.3d at 209. In light of that objective standard, DISH’s arguments (Br. 32) that no employee has ever interpreted the Agreement as precluding the filing of Board charges, or that it has not enforced the Agreement to prevent an employee from filing Board charges, are also irrelevant. As shown, the question under Section 8(a)(1) is whether the employer’s action (here, maintenance of the Agreement) has a reasonable tendency to restrict or coerce Section 7 rights, not whether a particular employee is actually coerced. *See Flex Frac*, 746 F.3d at

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<sup>6</sup> DISH’s argument regarding the purported limiting language ignores the Agreement’s requirement that the party who files an “administrative” action asserting “claims subject to this Agreement,” which is subsequently successfully stayed pending arbitration, must “pay the other party’s reasonable attorneys’ fees and costs incurred in obtaining a stay and or compelling arbitration.” (ROA. 71.) Such language arguably suggests that administrative claims regarding employment must be resolved solely in the arbitral forum, and adds to the Agreement’s ambiguity.

209 (employee’s actual interpretation of rule not determinative). Accordingly, as the Court explained in rejecting a similar claim in *Murphy Oil*, ““the actual practice of employees is not determinative”” of whether an employer has committed an unfair labor practice. 808 F.3d at 1019 (quoting *Flex Frac*, 746 F.3d at 209) (employee’s filing of Board charges challenging rule does not establish that rule cannot reasonably be interpreted as preventing Board charges).

DISH also claims (Br. 33) that because it has revised the Agreement the Board’s unfair labor practice finding is essentially moot. DISH’s argument asserts, without any support, that its new language is lawful.<sup>7</sup> Moreover, even assuming that the Agreement’s new language does not violate the Act, the matter is not moot. The Supreme Court and this Court have held that full compliance with a Board order is no barrier to enforcement and “does not render the cause moot.” *NLRB v. Mexia Textile Mills*, 339 U.S. 563, 567-68 (1950); accord *Raven Servs. Corp. v. NLRB*, 315 F.3d 499, 510 (5th Cir. 2002). Further, even if an employer has discontinued or revised an unlawful policy, that employer is not relieved of unfair labor practice liability absent repudiation of its prior unlawful conduct, and DISH makes no claim of repudiation. See *Boch Imports, Inc. v. NLRB*, 826 F.3d 558, 565-71 (1st Cir. 2016); *Passavant Mem’l Area Hosp*, 237 NLRB 138, 138

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<sup>7</sup> Neither the record nor DISH’s brief sets forth when DISH changed the Agreement, making it unclear whether DISH was required to have first raised this argument to the Board under Section 10(e) of the Act.

(1978). Accordingly, the Board is entitled to enforcement of this portion of its Order regardless of whether DISH has revised the Agreement in a manner that would not violate the Act.

Finally, DISH claims (Br. 33-34) that the Board is requiring the parties to insert terms into the Agreement. To the contrary, the Board's Order simply requires DISH to rescind or revise the Agreement "to make clear to employees that the . . . [A]greement does not restrict employees' right to file charges with [the Board] or to access the Board's processes." Moreover, this Court has enforced similar Board Orders requiring employers to revise arbitration agreements to make clear that employees' right to file Board charges is not restricted. *See Murphy Oil USA, Inc.*, 361 NLRB 774, 794 (2014), *enforcement denied, in part, on other grounds*, 808 F.3d 1013 (5th Cir. 2015); *D.R. Horton, Inc.*, 357 NLRB 2277, 2289 (2012), *enforcement denied, in part, on other grounds*, 737 F.3d 355 (5th Cir. 2013).

**II. DISH’S AGREEMENT UNLAWFULLY REQUIRES EMPLOYEES TO MAINTAIN THE CONFIDENTIALITY OF ALL ARBITRATION PROCEEDINGS**

**A. An Employer May Not Maintain A Rule Restricting Employees’ Section 7 Right To Communicate With One Another About the Terms and Conditions of Their Employment**

The Supreme Court has “long accepted the Board’s view that the right of employees to self-organize and bargain collectively established by [Section] 7 of the Act necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.” *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 & n.9 (1978); *accord Alcoa, Inc. v. NLRB*, 849 F.3d 250, 259 (5th Cir. 2017); *Cintas Corp. v. NLRB*, 482 F.3d 463, 466 (D.C. Cir. 2007). Section 7 protects discussions on a range of topics related to terms and conditions of employment, including wages, disciplinary matters, and grievances over working conditions. *See Flex Frac*, 746 F.3d at 208 (confidential wage information); *Mobil Oil Exploration and Producing*, 200 F.3d 230, 240 (5th Cir. 1999) (ongoing disciplinary investigation).

The Board, with court approval, has long found that confidentiality rules “which expressly prohibit employees from discussing among themselves, or sharing with others, information relating to wages, hours, or working conditions, or other terms and conditions of employments, restrain and coerce employees in violation of Section 8(a)(1) of the Act.” *Hyundai Am. Shipping Agency, Inc.*, 357

NLRB 860, 871 (2011), *enforced in relevant part*, 805 F.3d 309 (D.C. Cir. 2015).

This Court has confirmed, for instance, that a “workplace rule that forbids the discussion of confidential wage information between employees . . . patently violates section 8(a)(1).” *Flex Frac*, 746 F.3d at 208 (quoting *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359, 363 (5th Cir. 1990)). The same is true of rules that prohibit employees from discussing discipline or other employment conditions with one another. *See SNE Enters., Inc.*, 347 NLRB 472, 492 (2006) (collecting cases), *enforced*, 257 F. App’x 642 (4th Cir. 2007) (employer unlawfully maintained rule prohibiting employees from discussing disciplinary action); *Phoenix Transit Sys.*, 337 NLRB 510, 510, 513-14 (2002), *enforced mem.*, 63 F. App’x 524 (D.C. Cir. 2003) (employer unlawfully maintained rule prohibiting employees from discussing their sexual harassment complaints among themselves). A blanket confidentiality rule plainly sweeps within its reach disputes related to wages, discipline, and other terms and conditions of employment, in violation of Section 8(a)(1) of the Act.

**B. DISH’s Confidentiality Rule Interferes with Employees’ Protected Right To Communicate about Terms and Conditions of their Employment**

The Board’s finding that DISH’s confidentiality provision interferes with employees’ Section 7 activity, in violation of Section 8(a)(1) of the Act, is based on a straightforward reading of the provision’s language, and is consistent with

both the Board's and this Court's caselaw. DISH, in turn, has offered no sufficient justification for its overly broad rule.

**1. The confidentiality provision prohibits employees from discussing terms and conditions of employment**

The Agreement (ROA. 70) requires that DISH and each of its employees resolve in arbitration “any claim, controversy and/or dispute between them, arising out of and/or in any way related to [each employee's] application for employment, employment and/or termination of employment . . . .” Accordingly, by its terms, it encompasses all disputes related to wages, discipline, and other terms and conditions of employment. The Agreement also includes a confidentiality provision (ROA. 70) requiring that “all arbitration proceedings, including but not limited to hearings, discovery, settlements, and awards shall be confidential.” Read in context that provision, at a minimum, prohibits employees from discussing with others any information pertaining to employment disputes learned during arbitration proceedings, as well as the outcome of those disputes as set forth in arbitral awards. For instance, the provision would prohibit Denney, the charging party before the Board, from discussing with others any information he may learn about the terms and conditions of his employment during the arbitration proceeding, initiated by DISH after his suspension. The same would be true with respect to an arbitral dispute over wages or other terms and conditions of employment.

Attempting to narrow the broad language of its provision, DISH insists (Br. 13) that its rule “makes no express, or implied, references to employee communication or disclosure, nor specific wages, discipline, personal information, or handbooks.” But DISH’s rule would clearly bar employees from discussing with one another any information about any of those subjects, at least to the extent that such information was learned in an arbitration proceeding. Nor is there merit to DISH’s claim (Br. 25) that there is “no basis” to conclude that the rule would prohibit employees “from discussing the terms and conditions of employment, including the circumstances that led to the arbitration proceedings.” Those circumstances could be the subject of discovery or hearings, proceedings that are covered by the confidentiality clause. *See Cal. Commerce Club, Inc.*, 364 NLRB No. 31, 2016 WL 3361191, at \*1 n.2, \*3 (June 16, 2016) (finding that confidentiality clause in arbitration provision prohibiting disclosure of “any evidence or award/decision” precluded disclosure of “the very events or circumstances that gave rise to arbitration proceedings”).

None of DISH’s additional arguments about the provision’s language establish that the Board’s finding here was unreasonable. DISH insists (Br. 19-22) that the Board failed to read the confidentiality rule in context, but offers no explanation as to how the provision, in any context, could be read to as permitting employees to discuss protected terms and conditions of employment that are

learned through an arbitration proceeding or award. *See Cal. Commerce Club*, 2016 WL 3361191, at \*3 (explaining confidentiality rule failed to specify what information may and may not be shared). DISH also points out (Br. 20) that the arbitration agreement does not “limit[] any statutory remedy to which the Employee may be entitled to under law,” but it does not explain how that limitation protects employees’ Section 7 rights. Finally, though the confidentiality provision is “nested” in a sentence of the agreement referencing arbitration rules and the location where arbitration is to occur, that in no way limits, as DISH implies (Br. 21), the provision’s absolute requirement that “all arbitration proceedings . . . shall be confidential.”

## **2. Board’s findings are consistent with caselaw**

The Board’s analysis is consistent with its caselaw, including *Professional Janitorial Service of Houston, Inc.*, 363 NLRB No. 35, 2015 WL 7568340, at \*1 n.3 (Nov. 24, 2015), *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, 2015 WL 5113232, at \*2 (Aug. 27, 2015), and *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004), *enforced*, 414 F.3d 1249 (10th Cir. 2005), cited by the Board here (ROA. 176). These cases reflect the settled precedent of both this Court and the Board that rules can be proscribed either because they are facially overbroad or because a reasonable employee could read the rule as barring protected activity, *see pp. 12-13*. In both *Professional Janitorial* and *Double Eagle*, the Board found

that confidentiality rules that explicitly bar employees from discussing terms and conditions of employment were facially unlawful. In *Professional Janitorial*, the Board illustrated how an overbroad confidentiality rule in an arbitration agreement would explicitly interfere with Section 7 activity. It explained that if, for instance, an employee learned “a previously unknown facet” of an employment policy during an arbitration proceeding, the rule would prohibit disclosing that information and thereby “improperly limit[] employees in freely discussing wages and other terms and conditions of employment.” 2015 WL 7568340, at \*6; see also *Century Fast Foods, Inc.*, 363 NLRB No. 97, 2016 WL 245558, at \*1 n.4, 5 (Jan. 20, 2016) (broad confidentiality rule in arbitration agreement interferes with the right of employees, which “lies at the very core of Section 7,” to discuss employment-related matters with one another).

DISH (Br. 14-17) claims that in both *Professional Janitorial* and *Double Eagle*, the Board did not find the confidentiality rules’ language explicitly unlawful but instead determined their respective illegality by how a reasonable employee would construe the language. DISH’s contention that the Board erred by not applying the same analysis here misreads both cases. In *Professional Janitorial*, the judge articulated the *Lutheran Heritage* “reasonably construe” standard, 2015 WL 7568340, at \*6, as DISH quotes (Br. 17), but explained that the rule violated the Act on its face, which the Board affirmed, *id.* at 1 n.3. Likewise,

in *Double Eagle*, while the Board referenced the reasonable person standard in describing earlier Board decisions, it found that the confidentiality provision at issue “explicitly restrict[ed] discussion of terms and conditions of employment.” 341 NLRB at 114. Similarly, here, because DISH’s rule prohibits such activity on its face, it was unnecessary for the Board to determine how reasonable employees would construe it.

While the Board applied the reasonable-employee standard in analyzing a confidentiality rule in *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, 2015 WL 5113232, at \*2 (Aug. 27, 2015), that does not, as DISH argues (Br. 11-13) compel application of that standard here. As the Board explained in *Rio All-Suites*, in that case the General Counsel did not *allege* that the employer’s “extraordinarily broad” confidentiality rule explicitly restricted protected activities and that “[w]ithout more, th[e] sweeping provision clearly implicates terms and conditions of employment that the Board has found to be protected by Section 7.” 2015 WL 5113232, at \*2. For that reason, the Board assessed the complaint allegations under the reasonable employee standard and found that the rule’s various illustrations of confidential information would themselves lead employees to reasonably conclude that the rule prohibits protected activity. *Id.*<sup>8</sup>

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<sup>8</sup> DISH maintains (Br. 13 n.6) that its rule is akin to a second confidentiality rule at issue in *Rio All-Suites*, which the Board found lawful, that provided “[e]mployees will not reveal confidential company information to unauthorized persons.” 2015

This Court's unpublished decision in *Jack in the Box, Inc. v. NLRB*, 671 F. App'x. 316, 2016 WL 7235648 (5th Cir. Dec. 13, 2016) (mem.), is not, as DISH suggests (Br. 26, 32 n.16), precedent for its position here, nor does it undermine the caselaw discussed above. The Court granted review of the Board's findings that the employer violated the Act by maintaining both an arbitration agreement requiring the individual arbitration of work-related disputes, and a confidentiality provision prohibiting disclosure of an arbitrator's decision unless required by law. *Id.* It explained that the Board had conceded that its finding *with respect to the class-action waiver provision* in the arbitration agreement was based on the Board's decisions in *D.R. Horton* and *Murphy Oil* finding such waivers unlawful—decisions that the Court had rejected—and without further analysis granted the employer's petition for review. It is significant both that the Board made no concession with respect to its finding that the confidentiality provision violated the Act, for that finding was not grounded in its *D.R. Horton/Murphy Oil* class-action

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WL 5113232, at \*3 n.6. But unlike that rule, which distinguished employees from unauthorized persons, and specified that the subject matter being protected was “company information,” DISH's rule bars disclosure of all information related to the arbitration proceeding to any nonparty.

Although the policies in *Rio All-Suites*, 2015 WL 5113232, at \*3, as well as *Double Eagle*, 341 NLRB at 115, provided that employees would be subject to discipline for breaching its policy, the lack of such a provision in DISH's rule does not, as DISH seems to suggest (Br. 13 n.7), lessen the rule's express interference with employees' right to discuss employment terms.

waiver rationale, and that the Court did not discuss or reject the Board's reasoning on the confidentiality issue. Moreover, even the employer in *Jack in the Box* acknowledged that a rule prohibiting disclosure of evidence presented in arbitration, which would likely include discussions of terms and conditions of employment, would violate the Act. Brief for Jack in the Box, Inc. at \*24, No. 16-60386, 2016 WL 4709681 (Sep. 6, 2016). DISH's confidentiality provision is such a rule.

**3. DISH has offered no legitimate justification for its overbroad confidentiality provision**

DISH asserts that its rule is justified by the need to keep certain information revealed during arbitration confidential and to protect confidentiality in alternative dispute mechanisms. But the fault of its rule lies not in prescribing confidentiality per se, but in its overbreadth. DISH's concern that the Board's Order adversely affects confidentiality in non-judicial resolutions of claims is likewise overstated.

It is well established under Board law that an employer may protect against the disclosure of private information, including "medical documentation" and "proprietary business information" (Br. 23-24). See, *Lafayette Park Hotel*, 326 NLRB 824, 826 (1998) ("businesses have a substantial and legitimate interest in maintaining the confidentiality of private information, including guest information, trade secrets, contracts with suppliers, and a range of other proprietary

information”); *see also Mediaone of Greater Fla., Inc.*, 340 NLRB 277, 279 (2003) (employees would understand nondisclosure agreement as “designed to protect the confidentiality of the Respondent’s proprietary business information rather than to prohibit discussion of employee wages”); *K-Mart*, 330 NLRB 263, 263-64 (1999) (same). As this Court has explained, however, there is a “substantial difference” between the disclosure of business-related information and documents that were at issue in those cases, and information related to employees’ wages and other terms and conditions of employment. *Flex Frac*, 746 F.3d at 209-10.<sup>9</sup> There is no language in DISH’s agreement suggesting that it is limited to protecting those types of information.<sup>10</sup>

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<sup>9</sup> DISH also asserts (Br. 23) a need to protect the disclosure of information related to comparator employees. But the Board, with approval of the courts, has recognized that comparator data is often relevant to adjudicating workplace disputes, including in assessing claims of disparate treatment in disciplinary proceedings. *See NLRB v. U.S. Postal Serv.*, 888 F.2d 1568, 1571-73 (11th Cir. 1989) (rejecting host of defenses asserting privacy and confidentiality of comparator information pertaining to discipline); *see also NLRB v. Pfizer, Inc.*, 763 F.2d 887, 891 (7th Cir. 1985).

<sup>10</sup> DISH claims that the Board’s decision is inconsistent with a guidance memorandum issued by the Board’s General Counsel. Memorandum GC 15-04, *Report of the General Counsel Concerning Employer Rules*, 2015 WL 1278780 (Mar. 18, 2015). But in the example DISH references, the seemingly broad confidentiality provision contained language limiting the type of information that was encompassed, whereas here the context offers no such limiting principle. In any event, General Counsel memoranda are not binding on the Board. *See NLRB v. Pier Sixty, LLC*, 855 F.3d 115, 123 n.36 (2d Cir. 2017) (citing *Midwest Television, Inc.*, 343 NLRB 748, 762 n.21 (2004) (“Advice memoranda from the General Counsel do not constitute precedential authority and are not binding on the

DISH's provision is more analogous to the overly broad rule, which prohibited all photography and audio or video recording on employer premises, found unlawful by this Court in *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 274-75 (2017). As the Court explained, the employer's claim that it had a legitimate business interest in protecting confidential information "d[id] not alter the fact that the operative language of the rule on its face prohibit[ed] protected Section 7 activity, including Section 7 activity wholly unrelated to [the employer's] stated interests." *Id.* at 275. Here, too, DISH's blanket confidentiality rule requiring that "all arbitration proceedings, including but not limited to hearings, discovery, settlements, and awards shall be confidential" (ROA. 70), fails to differentiate between any valid interests DISH may have in preventing disclosure of sensitive information and its employees right to engage in protected Section 7 activity. *See Flex Frac*, 746 F.3d at 209 (citing *Cintas Corp.*, 482 F.3d at 469 ("because the [employer] made no effort in its [confidentiality] rule to distinguish section 7 protected behavior from violations of company policy . . . the Board's determination [that the rule was unlawful] [wa]s reasonably defensible and therefore entitled to considerable deference) (internal quotation omitted)).

DISH next attempts an ill-founded portrayal of its rule as simply encompassing the same confidentiality as that generally provided in common

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Board")); *see also Lee's Roofing & Insulation*, 280 NLRB 244, 247 (1986) ("General Counsel's legal position is not the equivalent of Board precedent").

arbitration rules and other alternative-dispute-resolution proceedings. Rules governing arbitration (*see* Br. 25 & n.12) generally require that *the arbitrator* maintain confidentiality of proceedings, and authorizes the arbitrator to safeguard confidentiality.<sup>11</sup> They impose no similar duty on parties to arbitral proceedings, who remain free, absent a lawful confidentiality agreement, to disclose information pertaining to arbitration hearings, discovery, settlements, and awards. *See* Christopher R. Drahozal, *Confidentiality In Consumer and Employment Arbitration*, 7 Y.B. ON ARBITRATION AND MEDIATION 28, 30-31 (2016). The Board's Order, accordingly, will not impair those proceedings, as DISH claims (Br. 26), but will simply require that if parties desire to include confidential provisions in arbitration proceedings, they agree to a provision that, unlike DISH's, respects employees' statutory rights under Section 7 of the Act.

DISH's attempt (Br. 28-30) to analogize its confidentiality provision to blanket protective orders, settlement agreements, and mediation proceedings fares

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<sup>11</sup> Indeed the American Arbitration Association's "Statement of Ethical Principles" provides the following:

An arbitration proceeding is a private process. In addition, AAA staff and AAA neutrals have an ethical obligation to keep information confidential. However, the AAA takes no position on whether parties should or should not agree to keep the proceeding and award confidential between themselves. The parties always have a right to disclose details of the proceeding, unless they have a separate confidentiality agreement. Where public agencies are involved in disputes, these public agencies routinely make the award public.

<https://www.adr.org/StatementofEthicalPrinciples> (last visited Nov. 27, 2017).

no better. The issuance of a blanket protective order, for instance, must be based on “good cause,” which requires “a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements.” *In re Terra Int’l, Inc.*, 134 F.3d 302, 306 (5th Cir. 1998); *see also* Fed. Rule Civil Proc. 26(c)(1) (“court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense”).<sup>12</sup> DISH’s rule, by contrast, does not differentiate between disclosure of that sort of information and employee’s statutorily protected discussion of terms and conditions of employment.

Finally, DISH’s hyperbolic claim that the Board’s prohibition of DISH’s overbroad confidentiality provision will change the nature of arbitration and alternative dispute resolution, including that fostered by the Board in its own proceedings, manifests a misunderstanding of the Board’s position. The Board does not object to parties voluntarily engaging in alternative dispute resolution, subject to confidentiality and other rules imposed by the relevant body, including

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<sup>12</sup> For instance, in *Gillard v. Boulder Valley School District*, 196 F.R.D. 382, 386 (D. Colo. 2000), relied on by DISH (Br. 28), the court found that good cause existed to issue a blanket protective order to protect against the disclosure of information “including personnel records, school records with personally identifiable information about students, and juvenile delinquency record all of which normally are required to be maintained confidentially.” Moreover, the party opposing the blanket protective order conceded that certain material should be kept confidential. *Id.*

those governing the Board's own ADR program.<sup>13</sup> The Board's rule prohibits only *employer-imposed* restrictions of employees' Section 7 activity. And, with respect to the settlement of claims involving terms and conditions of employment, as recently explained in *S. Freedman & Sons, Inc.*, “[t]he Board favors private, amicable resolution of labor disputes, whenever possible.” 364 NLRB No. 82, 2016 WL 4492371, at \*2 (Aug. 25, 2016) (internal quotation omitted), *enforced* No. 16-2066, 2017 WL 5197406 (4th Cir. Nov. 7, 2017). To that end, it “has found that an employer may condition a settlement on an employee’s waiver of Section 7 rights if the waiver is narrowly tailored to the facts giving rise to the settlement and the employee receives some benefit in return for the waiver.” *Id.* DISH’s rule goes far beyond such efforts to protect against disclosure of sensitive information in particularized circumstances, banning as it does employee disclosure of all information learned throughout arbitral proceedings.

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<sup>13</sup> Memorandum OM 16-02, *NLRB ADR Program for Settling Unfair Labor Practice Cases Pending Before the Board* (Oct. 15, 2015), available at <https://apps.nlr.gov/link/document.aspx/09031d4581e3c60d> (last visited Nov. 27, 2017) (explaining “participation in the Board’s ADR program is voluntary,” and that “[d]iscussions between the mediator and the participants are confidential”).

**C. DISH’s Inclusion of Its Otherwise Unlawful Confidentiality Provision in Its Arbitration Agreement Does not Render that Provision Inviolable**

DISH also maintains (Br. 27-30) that its confidentiality provision must be enforced as written based on public policy considerations favoring arbitration and the enforcement of arbitration agreements established by the FAA. This Court, however, has effectively rejected that position in *D.R. Horton* and *Murphy Oil*. In those cases, the Court agreed with the Board that arbitration-agreement provisions that violate the Act—there, by interfering with employees’ right to file Board charges and otherwise access the Board’s processes—could not be enforced, and that the Board’s orders requiring that employers rescind or revise the offending language were “valid.” *D.R. Horton*, 737 F.3d at 364; *Murphy Oil*, 808 F.3d at 1019. This case is no different; DISH’s overbroad confidentiality provision interferes with employees’ Section 7 right to discuss matters learned in arbitration proceedings, including those related to their wages and other terms and conditions of employment. Accordingly, the Board’s finding of a violation and order to rescind or revise the agreement (ROA. 177-78), like its orders in *D.R. Horton* and *Murphy Oil*, constitute a valid exercise of its remedial authority.<sup>14</sup>

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<sup>14</sup> As Board Chairman Miscimarra explained in his concurring opinion here (ROA. 179), DISH’s overbroad confidentiality rule would prohibit employees from revealing to the Board, either in an unfair-labor-practice charge or a subsequent Board investigation, evidence learned either during the course of an arbitration proceeding or from an arbitrator’s award. That result would run contrary to the

The Court should disregard DISH's attempt (Br. 27-28) to inject the FAA into the issue. DISH's position that its confidentiality provision is immune from attack because it is contained in an arbitration agreement finds no support in the text of the FAA, the Supreme Court's FAA jurisprudence, or this Court's caselaw. The text of the FAA is silent on the issue of confidentiality in arbitration. And while the Supreme Court has mentioned the issue of confidentiality in arbitral proceedings, it did so to make clear that confidentiality is necessary to protect parties' interests with respect to sensitive information, including "trade secrets." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011). Moreover, the Court has never characterized confidentiality as an attribute of arbitration that must remain inviolate at all costs regardless of its impingement on employees' Section 7 rights.

Likewise, this Court's decision in *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004), fails to further DISH's cause.

Although this Court stated that confidentiality is part of the "character of arbitration itself," it did so in the context of determining whether a confidentiality

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Supreme Court's teaching, in *NLRB v. Scrivener*, that ensuring employees have unrestricted freedom to communicate with the Board is necessary "to prevent the Board's channels of information from being dried up . . . ." 405 U.S. 117, 122 (1972) (quoting *John Hancock Mut. Life Ins. Co. v. NLRB*, 191 F.2d 483, 485 (D.C. Cir. 1951)). These are the same kinds of considerations that led this Court to hold in *D.R. Horton* and *Murphy Oil* that the arbitration agreements at issue there unlawfully interfered with the Section 7 right of employees to pursue unfair labor practice claims before the Board.

clause in a consumer contract was unconscionable under Louisiana law because it gave “an information advantage to the repeat-player companies” and deprived consumers of “the ability to establish precedent.” *Id.* at 175; *but see Ting v. AT&T*, 319 F.3d 1126, 1135-47 (9th Cir. 2003) (finding that a confidentiality provision in a consumer arbitration agreement was substantively unconscionable under California law).<sup>15</sup> Here, the Board does not seek to advance those general concerns, nor does it maintain that DISH’s confidentiality provision violates a state-law policy. Rather, consistent with long-established caselaw, it seeks to enjoin and remedy a straightforward violation of the Act. Thus, the Board’s Order does not challenge arbitration as DISH implies; on the contrary, the Board’s Order extends only to DISH’s overbroad confidentiality provision, and neither prohibits DISH’s use of arbitration as a dispute-resolution mechanism nor precludes parties’ ability to enter into an appropriately tailored confidentiality provision.

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<sup>15</sup> Similarly misplaced is DISH’s reliance (Br. 28) on *Guyden v. Aetna, Inc.*, 544 F.3d 376, 384-85 (2d Cir. 2008). There, the court noted that “confidentiality is a paradigmatic aspect of arbitration” in the context of determining whether a confidentiality provision conflicted with the general purposes of the Sarbanes–Oxley Act (“SOX”). The court explained that such a provision, which lessens the likelihood of publicity, “might reduce” an incentive for potential whistleblowers but otherwise found no definitive interference with SOX’s general policies. *Id.* at 385. The court was not grappling with the issue presented here of whether a confidentiality provision violates the Act’s prohibition against employer interference with employees’ core Section 7 right to discuss terms and conditions of employment.

**III. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT DISH VIOLATED SECTION 8(a)(1) OF THE ACT BY PROHIBITING DENNEY FROM DISCUSSING DISCIPLINE ISSUED TO HIM OR MATTERS UNDER INVESTIGATION**

**A. An Employer Cannot Prohibit Employees From Discussing Discipline Absent a Legitimate Business Reason**

As discussed above (p. 12), Section 7 of the Act protects “an employee’s right to discuss terms and conditions of her employment with other employees and with non-employees.” *Inova Health Sys. v. NLRB*, 795 F.3d 68, 85 (D.C. Cir. 2015) (quoting *Cintas*, 482 F.3d at 468); accord *Caesar’s Palace*, 336 NLRB 271, 272 (2001). Discipline is an “undeniably significant term[] of employment,” *Westside Cmty Mental Health Ctr.*, 327 NLRB 661, 666 (1999) (internal quotation and citation omitted), and “[i]t is important that employees be permitted to communicate the circumstances of their discipline to their co-workers so that colleagues are aware of the nature of discipline being imposed, how they might avoid such discipline, and matters which could be raised on their own defense.” *Verizon Wireless*, 349 NLRB 640, 658 (2007); *Banner Estrella Med. Ctr. v. NLRB*, 851 F.3d 35, 43 (D.C. Cir. 2017) (right to discuss discipline is considered a “quintessential” Section 7 activity). Accordingly, it is well established that Section 7 of the Act protects the rights of employees “to discuss discipline or disciplinary investigations with fellow employees.” *Inova Health Sys.*, 795 F.3d at 85; accord *Caesar’s Palace*, 336 NLRB at 272.

Because employees have a Section 7 right to discuss discipline and disciplinary investigations, “[a]n employer may prohibit such discussion only when a substantial and legitimate business justification outweighs the infringement on employees’ rights.” *Inova Health*, 795 F.3d at 85 (internal quotations omitted); *see also Caesar’s Palace*, 336 NLRB at 272. To meet its burden of justifying requests for confidentiality, an employer must show that confidentiality was “necessary based on events peculiar to” the particular investigation. *SNE Enters.*, 347 NLRB at 493. Absent such a showing, an employer violates Section 8(a)(1) of the Act. *Inova Health*, 795 F.3d at 85.

**B. DISH Unlawfully Prohibited Denney From Discussing His Discipline and the Related Investigation with His Co-Workers**

Substantial evidence supports the Board’s finding (ROA. 177) that DISH violated Section 8(a)(1) of the Act by directing employee Denney not to discuss his suspension with other employees. The stipulated facts establish that after General Manager Evans suspended Denney and told him he was under investigation for a violation of DISH’s policy, Evans instructed Denney not to discuss his suspension with his coworkers, and not to discuss the circumstances surrounding that discipline while under investigation. As the Board explained, the stipulated facts do not show that DISH “offered any justification for its instruction.” (ROA. 177.) Instead, the facts are noticeably “silent” about “the existence of any . . . concern” that prompted Evans’ broad prohibition of all discussion regarding the suspension.

(ROA. 177, n.9.) Given Evans’ undisputed instruction and the lack of any proffered justification for the restriction, the Board reasonably found that the instruction violated Section 8(a)(1) of the Act. *See Cast-Matic Corp*, 350 NLRB 1349, 1355 (2007) (employer unlawfully instructed employee “not to discuss her discipline with anyone”); *see generally Mobil Oil Exploration & Producing, U.S., Inc.*, 325 NLRB 176, 178-79 (1997) (employer failed to demonstrate substantial confidentiality interest where target of investigation had already been informed of investigation).

DISH claims (Br. 37 n.18, 40-43), that there is no substantial evidence showing that its instruction to Denney not to discuss his suspension interfered with Denney’s Section 7 rights because his suspension was for reasons unrelated to the Act. DISH, however, never raised this argument to the Board, and as set forth above (pp. 17-18), Section 10(e) of the Act precludes the Court from considering it.

In any event, DISH’s claim (Br. 42) that Evan’s instruction to Denney did not implicate or affect Denney’s Section 7 rights, or that the Board “automatically assumed” interference, ignores the well-settled principle—which DISH does not contest (Br. 34)—that employees have the Section 7 right to discuss discipline with their co-workers. Evans’ instruction on its face plainly interfered with that right. Contrary to DISH’s assertions (Br. 42), it is not at all “murky” how an explicit

instruction to refrain from “quintessential” Section 7 activity interfered with Denney’s statutory right to discuss discipline with his co-workers. *See Inova Health*, 795 F.3d at 85 (enforcing Board’s finding that oral instruction to employee not to discuss suspension for several alleged violations of hospital policy violated Section 8(a)(1)).<sup>16</sup> Thus, the Board did not “presume” interference; it applied well-settled principles to the stipulated facts and reasonably determined that an instruction not to discuss discipline and matters under investigation, unaccompanied by any explained justification, interfered with Denney’s Section 7 rights.<sup>17</sup>

Nor did the Board act contrary to precedent, as DISH claims (Br. 35-40), because it found a violation despite determining (ROA. 177 n.8) that the instruction to Denny did not constitute a work “rule.” The Board has regularly

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<sup>16</sup> DISH misplaces its reliance (Br. 42-43) on *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014), to support its claim that the Board assumed DISH’s conduct implicated Section 7 activity. In that case, the Board considered the different inquiry of whether one employee seeking assistance in raising a sexual harassment claim to her employer was engaged in “concerted” activity for “mutual aid or protection” or was merely raising a personal complaint. Here, discussion of discipline falls well within the ambit of Section 7 protected activity.

<sup>17</sup> DISH (Br. 43) does not further its argument by pointing to Chairman Miscimarra’s concurring opinion discussing occasions when an employer may lawfully restrict discussion of investigations because those investigations are unrelated to protected activity. DISH conveniently ignores Miscimarra’s agreement with the Board majority that the instruction to Denney “unlawfully interfered with a central aspect of many if not most [of the Act’s] protected activities: communications with other workers regarding their treatment by their employer.” (ROA. 180.)

found that a one-time instruction to a single employee restricting discussion of discipline is unlawful. *See Inova Health*, 795 F.3d at 85 (employer unlawfully told employee “not to discuss her suspension with anyone else”); *Aliante Gaming, LLC*, 364 NLRB No. 80, slip op. at 1 (2016), 2016 WL 4524107 \*1 (employer unlawfully told employee “go home and don’t tell anybody” about suspension); *Desert Springs Hosp. Med. Ctr.*, 363 NLRB No. 185, slip op. at 1 (2016), 2016 WL 275332020 \*1 (employer unlawfully directed employee not to discuss discipline). Indeed, as the Board explained, it applies the same balancing of an employer’s “business justification against employee rights in evaluating the lawfulness of a confidentiality rule . . . to determine whether a confidentiality instruction issued to a single employee violates the Act.” (ROA. 177 n. 8 (quoting *Inova Health Sys.*, 360 NLRB 1223, 1229 n.16 (2014))). The Board’s reliance, therefore, on precedent involving unlawful rules does not, contrary to DISH (Br. 39-40), undercut the Board’s argument. On its face, DISH’s argument essentially contends that the Act does not prohibit an employer from instructing an employee to refrain from engaging in Section 7 activity as long as those instructions are directed at a single employee, or are not part of an overall established policy. Such a claim is frivolous and, not surprisingly, DISH has no precedent to support it.<sup>18</sup>

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<sup>18</sup> DISH’s assertion (Br. 35) that Denney was never disciplined “for any communications he may have had with co-workers” regarding his discipline or the related investigation is irrelevant to the Board’s finding that the instruction was

**C. The Board Properly Required DISH To Provide a Justification for Its Instruction and DISH Failed To Meet that Burden**

There is no merit to DISH's claim (Br. 47-50) that the Board erred by failing to find that DISH established a substantial business justification for its instruction to Denney to not discuss his discipline and its related investigation. DISH's proffered justification (Br. 47-49) relies on an unsubstantiated need to avoid any "unfounded rumors" and "speculation among coworkers" over the impact of Denney's suspension on a new car Denney was awarded by DISH and to protect employees, including Denney, from damage to their reputations. That claim, however, was first raised by DISH in its briefs to the Board. DISH claims (Br. 49), without providing record support, that the "facts" it references are contained in the stipulated facts or "derived" from the joint exhibits. But, as the Board found, "the stipulated facts . . . do not show that [DISH] offered any justification for its instruction." (ROA. 177.) Moreover, the Board should not be required to piece together an argument from facts not included in the stipulation. Given the lack of any proffered justification in the agreed-upon facts, the Board correctly found that DISH failed to provide one.

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unlawful. *See Westside Cmty. Health*, 327 NLRB at 666 (employer's instruction to employee to not discuss suspension is unlawful even if unaccompanied by discipline or threat of discipline).

In any event, even taking into account the justification first raised by DISH in its briefs to the Board, the Board properly found that such a concern “would not justify the infringement of Denney’s Sec[ti]on 7 right to discuss discipline.” (ROA. 177 n.9.) In rejecting DISH’s proffered justification, the Board reasonably equated DISH’s asserted reason to the justification it rejected in *Hyundai American Shipping Agency, Inc.*, 357 NLRB 860 (2011), *enforced in relevant part*, 805 F.3d 309 (D.C. Cir. 2015). As the Board explained here (ROA. 177 n.9), in *Hyundai*, it found “routine cautioning of employees not to discuss matters under investigation [was] not justified by [the] employer’s assertion that doing so is necessary for protection of parties involved in the matter being investigated.” 357 NLRB at 874. Similarly, here, the Board rejected DISH’s general assertion that it simply wanted to avoid speculation by employees regarding the status of a car awarded to Denney and to protect Denney’s reputation. DISH offers no evidentiary support for this proffered justification, which conveys a general concern that does not warrant depriving Denney of his Section 7 right to discuss his discipline or its related investigation with his co-workers. *See Hyundai Am. Shipping Agency v. NLRB*, 805 F.3d 309, 314 (D.C. Cir. 2015) (an employer’s stated reason for requesting confidentiality cannot be “broad and undifferentiated”); *Phoenix Transit Sys. v. NLRB*, 63 F. App’x 524, 525 (D.C. Cir. 2003) (employer’s prohibition on employees’ discussion of sexual harassment investigation was “unduly broad,” and

the proffered justification that confidentiality was necessary for success of harassment policy “lack[ed] evidentiary support”).

Having failed to timely assert, let alone establish, a legitimate business justification, DISH argues (Br. 43-47) that the Board unfairly requires employers, on a case-by-case basis, to justify a need for confidentiality. DISH further claims that the Board wrongly applies a “heightened” standard, and that such a standard should not be applied here, where the confidentiality restriction was not a rule but instead an individual manager’s one-time instruction to a single employee. These claims ignore and misinterpret precedent.

In each case involving investigative confidentiality requests, the Board has consistently looked at an employer’s proffered justification for the request. For example, in *Caesar’s Palace*, the Board found the employer’s confidentiality instruction lawful when, “*in the circumstances of the case,*” the employer’s proffered justification for the instruction (possible management retaliation and threats of violence) “outweigh[ed] the rule’s infringement on employees’ rights.” 336 NLRB at 272 (emphasis added). In contrast, in *Hyundai*, the Board found that the employer violated Section 8(a)(1) by maintaining a policy requiring investigative confidentiality “without any individual review to determine whether such confidentiality is truly necessary.” 357 NLRB at 874. And in rejecting the employers asserted confidentiality claim in *Mobil Oil Exploration*, 325 NLRB 176,

178 (1997), the Board found the purported need for confidentiality in that particular situation (to avoid alerting others to the investigation) was “exceedingly minimal.” Thus, as the above cases illustrate, the Board has regularly examined the specific circumstances of each case to determine whether an employer has sufficiently justified its request for confidentiality.

DISH supports its claim (Br. 46) that the Board’s case-by-case approach is contrary to precedent by comparing the Board’s approach to that in *IBM Corp.*, 341 NLRB 1288 (2004), where the Board determined that unrepresented employees did not have a right to a co-worker present during investigatory interviews. DISH also points to (Br. 46-47) the Board’s Supreme-Court-endorsed practice of protecting investigative witness affidavits from pre-hearing disclosure. Neither comparison is persuasive. Regarding the former, the presence of a co-worker, chosen on an ad-hoc basis, in an employee’s investigative interview with an employer that may lead to discipline, is an entirely different matter and raises different concerns than prohibiting employees from discussing with each other discipline or disciplinary investigations. As to the latter, DISH rightly notes (Br. 46) that the Board’s restriction on pre-hearing disclosure of investigative affidavits does not require a particularized showing of intimidation or harm to employees. What DISH fails to recognize, however, is the rationale underlying that rule. As the Supreme Court has explained, sharing such affidavits contains “obvious

risk[s]” because most Board witnesses are employees “over whom the employer, by virtue of the employment relationship, may exercise intense leverage,” exposing employees to heightened risks of reprisal and harassment. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 239-40 (1978). Indeed, as this Court has recognized, providing witness affidavits would “necessarily interfere” with the Board’s processes. *NLRB v. Brookwood Furniture*, 701 F.2d 452, 469 (1983). Again, no such similar concerns justify a blanket prohibition on co-workers freely sharing information with each other.

DISH’s criticism of the Board for requiring it to meet a “heightened” standard to justify its one-time oral instruction is unfounded. First, as discussed above (p. 43), whether the employer’s restriction was a formal rule or a one-time instruction, in determining the legality of the employer’s conduct the Board applies the same balancing of an employer’s asserted justification for confidentiality against the employee’s statutory rights. DISH provides no support its claim that a different standard should apply when an employer’s restriction is an oral instruction and not a formal rule.

Second, citing *Banner Estrella Medical Center*, 362 NLRB No. 137 (2015), 2015 WL 4179691, *enforcement denied in part*, 851 F.3d 35 (2017), and *Hyundai*, DISH wrongly claims (Br. 44) that the Board requires an employer to demonstrate a panoply of specific circumstances in order to prove it has a legitimate and

substantial business justification for instructing employees not to discuss discipline or investigations. This argument misreads both decisions. *Hyundai* and *Banner Estrella* addressed employers' rules prohibiting discussion of workplace investigations. In both cases, the Board required employers to justify a need for confidentiality by presenting objective evidence demonstrating that "the integrity of the investigation will be compromised without confidentiality." *Banner Estrella*, 362 NLRB No. 137, slip op. 3, 2015 WL 4179691 \*5; *see also Hyundai*, 357 NLRB at 874 (employer must show in each case that "corruption of its investigation would likely occur without confidentiality").<sup>19</sup> Neither case required a showing of specific kinds of interference, as DISH claims. And, in both cases, the employers, like DISH, failed to provide any evidence demonstrating that confidentiality was required to preserve the integrity of the investigation.

#### **IV. THE BOARD PROPERLY EXERCISED ITS BROAD REMEDIAL AUTHORITY**

Section 10(c) of the Act (29 U.S.C. § 160(c)) directs the Board to order remedies for unfair labor practices, and the Board enjoys broad discretion in crafting those remedies. *See, e.g., Fibreboard Paper Prods. Corp. v. NLRB*, 379

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<sup>19</sup> DISH gains no ground by noting (Br. 45) the D.C. Circuit's reluctance to embrace the Board's discussion of what could constitute objective evidence sufficient to demonstrate a compromised workplace investigation. *Hyundai*, 805 F.3d at 314. The D.C. Circuit did not address those requirements because the employer's rule, which banned discussions of all investigations, was overbroad regardless of any asserted justification.

U.S. 203, 216 (1964) (Board’s authority to issue remedies is a “broad discretionary one, subject to limited judicial review”); accord *NLRB v. Int’l Ass’n of Bridge Structural & Ornamental Iron Workers*, 864 F.2d 1225, 1235 (5th Cir. 1989) (“The Board has broad discretion in its choice of remedies.”). The Court should not alter the Board’s remedial order unless it is a “patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Va. Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943); accord *NLRB v. Delchamps, Inc.*, 653 F.2d 225, 228 (5th Cir. 1981).

DISH challenges the Board’s cease-and-desist order regarding its unlawful instruction to Denney, and the Board’s requirement that DISH notify all former employees that the Agreement has been rescinded or revised. DISH has failed to show that the Board abused its discretion in ordering either remedy.

**A. The Board Properly Required DISH to Cease and Desist From Telling Employees that They Cannot Discuss Discipline**

The Board’s Order requires DISH to cease and desist from “[p]rohibiting employees from discussing with other employees any discipline issued to them or matters under investigation,” and to post a notice at its Littleton center that, among other things, states that DISH “will not prohibit” employees from such discussions. (ROA. 178, 181.) DISH argues (Br. 51-52) that the Board’s order is overbroad because the notice should not contain any reference to DISH’s unlawful instruction to Denney. The Court has no jurisdiction to consider that claim because DISH

failed to seek reconsideration of the Board's decision on the grounds that it presents for the first time to the Court. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (stating that Section 10(e) precludes court of appeals from reviewing claim not raised to the Board that could have been raised in a motion for reconsideration); *NLRB v. U.S. Postal Serv.*, 477 F.3d 263, 270 n.1 (5th Cir. 2007) (same).

In any event, DISH has offered no support for its novel proposition that a Board Order and notice should refrain from referencing an unfair practice finding simply because the employer committed the unfair labor practice against one employee or because that employee did not suffer any independent discipline based on that unfair labor practice. Indeed, such an argument fails to recognize that one of the remedial purposes of the notice is to “dispe[l] and dissipate[e] the unwholesome effects of [an employer’s] unfair labor practices.” *Chet Monez Ford*, 241 NLRB 349, 351 (1979), *enforced mem.* 624 F.2d 193 (9th Cir. 1980). Moreover, the Board’s language in its cease-and-desist order and notice is fully consistent with its language in similar cases where an employer instructed a single employee to refrain from discussing discipline. *See Cast-Matic Corp*, 350 NLRB at 1366; *Desert Springs Hosp. Med. Ctr.*, 363 NLRB No. 185, slip op. at 3-4 (2016), 2016 WL 275332020 \*3, 5. And the Board’s language in its order and notice is tailored to the unfair labor practice found, an overbroad instruction by

DISH to an employee to not discuss discipline or investigatory matters with fellow employees.

**B. The Board Properly Required DISH to Notify All Former Employees**

The Board's Order requires DISH to "[n]otify all applicants and current and former employees who were required to sign the mandatory arbitration agreement in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement." (ROA. 178.) That Order, requiring notification to all who signed the Agreement, is well within the Board's discretion. First, the Order provides a remedy to all those adversely affected by DISH's unfair labor practice. Second, the Order is fully consistent with orders contained in prior Board decisions enforced by the Court. Indeed, in remedying arbitration agreements that unlawfully precluded the filing of Board charges, the Board's orders, enforced in relevant part by this Court, in *Murphy Oil*, 361 NLRB at 794 and *Chesapeake Energy Corp.*, 362 NLRB No. 80, slip op. at 4, 2015 WL 1956197 \*4, contain language virtually identical to the Board's Order here. The Board's Order is also fully consistent with an order contained in a prior Board decision enforced by the Eighth Circuit. See *Cellular Sales Of Missouri, LLC*, 362 NLRB No. 27 (2015), slip op. at 3, 2015 WL 1205241 \*2, *enforced*, 824 F.3d 772 (8th Cir. 2016). In sum, having acted well within its discretion by requiring DISH to provide notice to

all those who signed the unlawful Agreement, the Board's Order is entitled to affirmance.

DISH asserts (Br. 51-53) that the Board abused its discretion by requiring DISH to notify all former employees who were required to sign the Agreement that the Agreement has been rescinded or revised. Citing Section 10(b) of the Act (29 U.S.C. § 160(b)), DISH argues (Br. 51) that the notification requirement should instead be limited “to current and former employees who were terminated or resigned within the six-month period preceding the date of the Board issuing a decision.” As an initial matter, DISH's argument ignores the stipulated facts of this case—namely that it is uncontested that DISH, since “October 24, 2013 to the present . . . has required all applicants nationwide” to sign the Agreement, and that “since at least March 2015 and continuing to the present, . . . has maintained [the] Agreement . . . with all current and former employees who are and/or were employed by [DISH] at its nationwide locations.” (ROA. 8 par. 22, ROA. 9 par. 25.) The Board's Order simply requires DISH to notify all employees who undisputedly signed the Agreement and remain subject to it. The limited reach of DISH's proposed remedy is contrary to the notice's remedial purpose, which is to convey to employees information about their rights and the employer's obligation not to interfere with those rights. *NLRB v. Falk Corp.*, 308 U.S. 453, 462 (1940). In order to achieve that purpose, “notices must be adequately communicated to the

employees . . . affected by the unfair labor practices found.” *J. Picini Flooring, Inc.*, 356 NLRB 11, 12 (2010). DISH’s proposed remedy falls far short of that purpose.

DISH’s argument also misconstrues Section 10(b) of the Act which in relevant part, states, “[t]hat no complaint shall issue based upon an unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . .” 29 U.S.C. § 160(b)). That Section, by its terms, is designed to prevent untimely complaints. Here, DISH is not arguing that the complaint is untimely. Nor could DISH validly make such a claim because under well-established precedent, the maintenance or enforcement of an unlawful workplace rule, such as the Agreement here, constitutes a continuing violation that is not time barred by Section 10(b).<sup>20</sup> *See Cellular Sales*, 824 F.3d at 779 (“[t]he Board has repeatedly held that an employer commits a continuing violation of the [Act] throughout the period during which an unlawful agreement is maintained”); *Control Servs., Inc.*, 305 NLRB, 435 n.2, 442 (1991) (maintenance or enforcement of unlawful rule timely alleged, even if the rule was promulgated outside the 10(b) period). In sum,

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<sup>20</sup> DISH makes the puzzling claim that “even if those former employees were signatories to the challenged arbitration provision, they would have no right *to bring a complaint*” (Br. 53, emphasis added). Only the Board’s General Counsel can issue a complaint. 29 U.S.C. § 153(d). To the extent DISH means that former employees who left over six months before the Board’s decision issued could not file charges, that claim is erroneous, for the reasons discussed above.

DISH's linking the notification requirement to the issuance of the Board's decision has no legal support, is completely arbitrary, and fails to fully remedy the violation.

## CONCLUSION

The Board respectfully requests that the Court enter a judgment denying DISH's petition for review and enforcing the Board's Order in full.

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December 2017

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

DISH NETWORK, L.L.C.	)	
	)	
Petitioner/Cross-Respondent	)	
	)	No. 17-60368
v.	)	
	)	Board Case No.
NATIONAL LABOR RELATIONS BOARD	)	27-CA-158916
	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on December 1, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC  
this 1st day of December, 2017

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 12,944 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and 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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