

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

DATE: February 13, 2012

TO: Mary L. Bulls, Acting Regional Director,
Region 10

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

SUBJECT: Murphy Oil USA
10-CA-38804

506-6085
506-6090-7700
506-6090-8200
512-5012-9300

This case was submitted for advice as to whether to accept a settlement under which the Employer's mandatory arbitration agreement would continue to require employees to waive their right to file and participate in collective and class actions in both judicial and arbitral forums. We conclude that the proposed settlement should not be accepted, as the Employer's mandatory arbitration agreement would continue to interfere with employees' Section 7 right to file and participate in collective and class litigation, in violation of Section 8(a)(1) of the Act.

FACTS

Murphy Oil USA, Inc. (the Employer) requires all of its employees, who are not represented by a labor organization, to sign a mandatory arbitration agreement as a condition of employment. The required agreement provides that all employment-related disputes will be subject to arbitration, and waives employees' right to bring any employment related disputes in court. The agreement expressly specifies that all disputes will be arbitrated individually, and it waives any right to file or participate in any collective or class legal action in both judicial and arbitral forums.

On March 31, 2011, the Region issued complaint alleging that the Employer violated Section 8(a)(1) of the Act by requiring employees to sign the mandatory arbitration agreement as a condition of employment, because it unlawfully interferes with employees right to concertedly file or participate

in collective and class legal actions.¹ After the complaint issued, the Region obtained an informal settlement agreement with the Employer that was consistent with the approach articulated in Memorandum GC 10-06, “*Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Employee Waivers in the Context of Employers’ Mandatory Arbitration Policies*” (June 16, 2010).² Under the proposed settlement, the Employer agreed to add the following language to its mandatory arbitration agreement, but would continue to require employees to waive their right to file or participate in any collective or class legal action in both judicial and arbitral forums:

Notwithstanding the group, class or collective action waiver set forth in the preceding paragraph, Individual and Company agree that Individual is not waiving his or her right under Section 7 of the National Labor Relations Act (“NLRA”) to file a group, class or collective action in court and that Individual will not be disciplined or threatened with discipline for doing so. The Company, however, may lawfully seek enforcement of the group, class or collective action waiver in this Agreement under the Federal Arbitration Act and seek dismissal of any such class or collective claims.

The Charging Party has objected to the proposed settlement, arguing that it does not protect employees’ right to concertedly file and participate in collective and class legal actions.³

¹ The outstanding complaint also alleged that the mandatory arbitration agreement unlawfully leads employees reasonably to believe that they are prohibited from filing unfair labor practice charges with the Board.

² Memorandum GC 10-06 expressly recognized employees’ Section 7 right to concertedly file and participate in collective or class legal actions, but nevertheless permitted employers to require employees to individually waive their right to file or participate in employment-related court actions, and to require that they resolve such claims in individual arbitration proceedings.

³ The outstanding complaint also alleged that the mandatory arbitration agreement was unlawful because it leads employees reasonably to believe that they are prohibited from filing unfair labor practice charges with the Board. The proposed settlement would add language to the agreement expressly preserving employees’ rights to participate in unfair labor practice proceedings. The Charging Party has not objected to this aspect of the proposed settlement, and it has not been submitted for advice.

ACTION

We conclude that the proposed settlement should not be accepted, as the Employer's mandatory arbitration agreement would continue to interfere with employees' Section 7 right to file and participate in collective and class litigation, in violation of Section 8(a)(1) of the Act.

In *D.R. Horton, Inc.*,⁴ the Board set forth the appropriate legal framework for considering the legality of employers' mandatory arbitration policies and agreements in non-union settings. The Board held that a policy or agreement precluding employees from filing employment-related collective or class claims against the employer in both arbitral and judicial forums unlawfully restricts the employees' Section 7 right to engage in concerted action for mutual aid or protection, and violates Section 8(a)(1) of the Act.⁵ In so holding, the Board expressly rejected the approach articulated in Memorandum GC 10-06.⁶

In the instant case, even under the proposed settlement, it is undisputed that the Employer's mandatory arbitration agreement requires employees to waive their right to file or participate in collective or class legal actions in both judicial and arbitral forums. Such an agreement is clearly unlawful under *D.R. Horton*. While the proposed settlement was consistent with the approach articulated in Memorandum GC 10-06, that approach was expressly rejected by the Board. Thus, while the language added to the mandatory arbitration agreement would assure employees that they may file a collective or class lawsuit and not be disciplined for doing so, it also would allow the Employer to use the waiver in the agreement as a defense to any collective litigation and fails to address the agreement's primary wrong -- the required waiver of employees' statutory right to engage in concerted litigation.

⁴ 357 NLRB No. 184 (2012).

⁵ In *D.R. Horton*, the Board declined to address whether an employer can lawfully require employees to waive their right to pursue class or collective action in court at all, regardless of whether the employees retain the right to pursue such claims in arbitration. *Id.*, slip op. at 13, n.28. We note that the General Counsel has long taken the position that employers may lawfully require employees to bring their claims in arbitration, rather than in court, as long as all of their substantive rights are preserved (including their statutory right to engage in collective legal activity). See, e.g., *O'Charley's Inc.*, Case 26-CA-19974, Advice Memorandum dated April 16, 2001, at 5-7 ("Section 7 does not provide a right to select any particular forum to concertedly engage in activities for mutual aid or protection").

⁶ *D.R. Horton*, 357 NLRB No. 184, slip op. at 6-7.

As the Board stated in *D.R. Horton*, “[i]f a Section 7 right to litigate concerted exists, then it defies logic to suggest, as GC Memo 10–06 does, that requiring employees to waive that right does not implicate Section 7.”⁷ Therefore, the proposed settlement should not be accepted, as the Employer’s mandatory arbitration agreement would continue to interfere with employees’ Section 7 right to file and participate in collective and class litigation.

Accordingly, absent an acceptable settlement, the Region should proceed on its outstanding complaint allegation that the Employer’s mandatory arbitration agreement violates Section 8(a)(1) of the Act by requiring the waiver of collective and class actions in both judicial and arbitral forums.

B.J.K.

ROF(s) – 0

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⁷ *Id.*, slip op. at 7.