

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

Advice Memorandum

DATE: September 28, 2012

TO: Claude T. Harrell, Jr., Regional Director
Region 10

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

SUBJECT: Murphy Oil USA, Inc.
Case 10-CA-038804

512-5012-9300
512-5072-0100

This case was resubmitted for advice as to whether the Employer violated the Act by maintaining a motion to compel arbitration pursuant to a mandatory arbitration agreement that prohibits employees from engaging in collective and class litigation. We agree with the Region that the Employer violated Section 8(a)(1) of the Act by maintaining its motion to compel arbitration.

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, pursuant to our authorization, 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 complaint issued, we instructed the Region not to accept a proposed informal settlement agreement with the Employer, and to proceed on the

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. This allegation was not submitted for advice.

outstanding complaint. *Murphy Oil USA, Inc.*, Case 10-CA-038804, Advice Memorandum dated February 13, 2012.

The allegation currently submitted for advice involves the Employer's motion to compel arbitration and dismiss collective action, filed on July 26, 2010, in response to a Fair Labor Standards Act collective action lawsuit filed by the Charging Party and three other current and former employees of the Employer. In that motion, based entirely on the unlawful mandatory arbitration agreement, the Employer seeks to "compel the Plaintiffs to arbitrate their claims on an individual basis and dismiss the collective action in its entirety." The Employer's motion is pending before the court.

On January 28, 2011, slightly more than six months after the Employer's motion, the Charging Party filed the charge in the instant case, which was amended on April 11, 2011. The charge alleges that, in addition to maintaining the unlawful mandatory arbitration agreement, the Employer violated Section 8(a)(1) of the Act by having "attempted to enforce its agreements requiring the unlawful waiver of employees' Section 7 right to engage in class or collective actions."

ACTION

We agree with the Region that the Employer violated Section 8(a)(1) of the Act by maintaining its motion to compel arbitration.

I In particular, we agree with the Region that the Employer's motion to compel arbitration is unlawful as an interference with the employees' Section 7 right to engage in collective legal activity. Since the underlying arbitration agreement is unlawful under the Act, as we previously found in our February 13, 2012 memorandum, we note that nothing in the Federal Arbitration Act (FAA) precludes proceeding against the Employer's motion. In *D.R. Horton*, the Board held that finding a mandatory arbitration agreement to be unlawful, "consistent with the well established interpretation of the NLRA and with core principles of Federal labor policy, does not conflict with the letter or interfere with the policies underlying the FAA and, even if it did, that the finding represents an appropriate accommodation of the policies underlying the two statutes."² Initially, the Board noted that: (1) under the FAA, "arbitration may substitute for a judicial forum only so long as the litigant can effectively vindicate his or her statutory rights through arbitration;" and (2) mandatory individual arbitration agreements prohibit employees from exercising their substantive statutory right to engage in collective legal action.³ Thus, the Board emphasized that "nothing in the text of the FAA suggests that an arbitration agreement that is

² *D.R. Horton, Inc.*, 357 NLRB No. 184, slip op. at 8 (2012).

³ *Id.*, slip op. at 9, 9-11.

inconsistent with the NLRA is nevertheless enforceable.”⁴ Rather, a refusal to enforce a mandatory arbitration agreement’s class action waiver would directly further core policies underlying the NLRA, and is consistent with the FAA.⁵ Therefore, “holding that an employer violates the NLRA by requiring employees, as a condition of employment, to waive their right to pursue collective legal redress in both judicial and arbitral forums accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible.”⁶ Finally, the Board noted in *D.R. Horton* that even if there were a direct conflict between the NLRA and the FAA, the terms of the Norris-LaGuardia Act and the rules of statutory interpretation strongly indicate that the FAA would have to yield.⁷

In *D.R. Horton*, the Board specifically addressed two recent Supreme Court decisions which stated that a party cannot be required, without its consent, to submit to arbitration on a classwide basis.⁸ Significantly, these cases establish that an arbitrator cannot order class arbitration unless there is a contractual basis for concluding that the parties affirmatively agreed to do so. The Board found that these cases did not affect its application of the Act, as it was not holding that employers were *required* to permit, participate in, or be bound by a class-wide or collective arbitration proceeding. Instead, the Board held only that employers may not compel employees to waive their Section 7 right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial. Thus, so long as the employer leaves open a judicial forum for class and collective claims, employees’ NLRA rights are preserved without requiring the availability of classwide arbitration, and employers remain free to insist that *arbitral* proceedings be conducted on an individual basis.⁹ For all these reasons, the Board in *D.R. Horton* made clear that nothing in the FAA precludes finding mandatory arbitration agreements that prohibit collective and class litigation to be unlawful. Accordingly, as we had previously concluded that the agreement here is unlawful (Advice Memorandum dated February 13, 2012), it follows that nothing in the FAA

⁴ *Id.*, slip op. at 11.

⁵ *Ibid.*

⁶ *Id.*, slip op. at 12.

⁷ *Ibid.*

⁸ *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, ___ U.S. ___, 130 S.Ct. 1758, 1775–1776 (2010) (arbitration panel exceeded its authority by permitting class antitrust claim when commercial shipping charter agreement’s arbitration clause was silent on class arbitration); *AT&T Mobility v. Concepcion*, ___, U.S. ___, 131 S.Ct. 1740, 1751–1753 (2011) (claim that class-action waiver in consumer arbitration agreement was unconscionable under state law was preempted by FAA).

⁹ 357 NLRB No. 184, slip op. at 12.

precludes proceeding against the Employer's motion to compel arbitration that seeks to enforce the unlawful agreement.

Bill Johnson's Restaurants

We further conclude that *Bill Johnson's Restaurants v. NLRB*¹⁰ does not preclude proceeding against the Employer's motion to compel arbitration. In footnote 5 of *Bill Johnson's Restaurants*, the Court stated that it did not intend to preclude the enjoining of suits that have "an objective that is illegal under federal law."¹¹ In such circumstances, "the legality of the lawsuit enjoys no special protection under *Bill Johnson's*."¹²

The Board has made clear that it will apply footnote 5 to particular litigation tactics, as well as to entire lawsuits. Thus, for example, in *Wright Electric, Inc.*, the Board found that an employer's discovery request had an illegal objective and violated the Act, even though the lawsuit itself could not be enjoined.¹³ Accordingly, a footnote 5 analysis is properly applied to the Employer's motion here, despite it constituting a defense in the course of a lawful employee lawsuit.

A lawsuit has a footnote 5 illegal objective "if it is aimed at achieving a result incompatible with the objectives of the Act."¹⁴ In particular, an illegal objective may be found for two reasons relevant to the cases presented here. The first of these is where "the underlying acts constitute unfair labor practices and the lawsuit is simply an attempt to enforce the underlying act."¹⁵ This category includes the illegal union fine cases cited by the Court in footnote 5 itself.¹⁶ In those cases, the unions violated Section 8(b)(1)(A) by fining employee/members, and the lawsuits were the mechanism to

¹⁰ 461 U.S. 731 (1983).

¹¹ *Id.* at 737 n.5.

¹² *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 834 (1991), *enfd.* 973 F.2d 230 (3d Cir. 1992), *cert. denied* 507 U.S. 959 (1993).

¹³ 327 NLRB 1194, 1195 (1999), *enfd.* 200 F.3d 1162 (8th Cir. 2000). See also, e.g., *Dilling Mechanical Contractors*, 357 NLRB No. 56, slip op. at 2-3 (2011) (finding that employer's discovery requests had an illegal objective, although the lawsuit itself did not).

¹⁴ *Manno Electric*, 321 NLRB at 297.

¹⁵ *Regional Construction Corp.*, 333 NLRB 313, 319 (2001).

¹⁶ *Granite State Joint Board, Textile Workers Union*, 187 N.L.R.B. 636, 637 (1970), *enforcement denied*, 446 F.2d 369 (1st Cir. 1971), *rev'd*, 409 U.S. 213 (1972); *Booster Lodge No. 405, Machinists & Aerospace Workers*, 185 N.L.R.B. 380, 383 (1970), *enforced in relevant part*, 459 F.2d 1143 (D.C. Cir. 1972), *aff'd*, 412 U.S. 84 (1973).

enforce and collect the unlawful fines.

The second reason is where a grievance or lawsuit is itself aimed at preventing employees' protected conduct. In such cases, the lawsuit is not merely retaliatory for employees' protected conduct, but instead also seeks to use the arbitrator or the court to directly interfere with the Section 7 activity.¹⁷ Thus, for example, in *Manno Electric, Inc.*, the Board found that an employer's judicial cause of action attacking employee statements made to the Board was not only preempted, but also had an illegal objective.¹⁸

Here, both of these reasons apply. First, the Employer's motion to compel arbitration in the instant case seeks to enforce an arbitration agreement that is itself unlawful as it expressly prohibits employees' collective legal activity, as discussed above. Thus, as in union fine cases, the underlying acts constitute unfair labor practices and the motion is simply an attempt to enforce the underlying act. Moreover, the Employer's motion to compel arbitration here also has an illegal objective because it is directly aimed at preventing employees' protected conduct. Indeed, the *only* objective of the Employer's motion is to prohibit employees from engaging in Section 7 activity. The Employer's motion would impose individual arbitration, which specifically attempts to prevent employees' protected collective legal activity. Therefore, the Employer's motion has a footnote 5 illegal objective and is unlawful under Section 8(a)(1) of the Act.

Collateral Estoppel

Nor would collateral estoppel principles preclude proceeding against the Employer's motion to compel arbitration, even if the court were to grant the Employer's motion. The doctrine of collateral estoppel, or "issue preclusion," provides that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation."¹⁹ Thus, collateral estoppel bars not only the decision-making court, but also any other court, from reconsidering the same issue.²⁰ It is well established that three elements must be satisfied in order for collateral estoppel

¹⁷ See, e.g., *Great Western Bank*, Case 12-CA-17724, Advice Memorandum dated August 15, 1996, at 6 ("Thus, the relief sought, like the relief sought in *Long Elevator*, [289 NLRB 1095 (1988)] would itself be unlawful under the Act. In these circumstances, the lawsuit has an unlawful objective, and *Bill Johnson's* does not bar current Board proceedings to enjoin the Employer's lawsuit").

¹⁸ 321 NLRB at 297.

¹⁹ *Montana v. United States*, 440 U.S. 147, 153 (1979).

²⁰ *United States v. Stauffer Chemical*, 464 U.S. 165 (1984).

to apply: (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated in the prior litigation by the party against whom preclusion is asserted; and (3) the determination of the issue must have been a critical and necessary part of the final judgment in the earlier action.²¹

As a general rule, the Federal Government is not barred from subsequently litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully, unless the Federal Government was a party in the prior litigation.²² The Board has long held that “if the Government was not a party to the prior private litigation, it is not barred from litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully.”²³ As the Board has stated, “Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief,” and the Board is “the public agency . . . chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce.”²⁴

We recognize that two circuit court decisions *have* applied collateral estoppel principles to the Board and denied enforcement of Board orders in unfair labor practice cases that turned on the existence of a contract.²⁵ In *Donna-Lee Sportswear*, the First Circuit held that the Board was precluded from finding there to be an effective contract because a court had already ruled that no binding contract was in existence.²⁶ The court emphasized there that: (1) it was not unusual for the court to determine whether there was a valid contract; and (2) the private interests of the disputants, rather than any public rights at issue, predominated in that case.²⁷ In *NLRB v. Heyman*, the Ninth

²¹ *Town of North Bonneville v. Callaway*, 10 F.3d 1505, 1508 (9th Cir. 1993) (quoting *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320 (9th Cir. 1992)).

²² *United States v. Mendoza*, 464 U.S. 154, 162 (1984); *Field Bridge Associates*, 306 NLRB 322 (1992), *enfd. sub nom. Local 32B-32J Service Employees Intern. Union, AFL-CIO v. NLRB*, 982 F.2d 845 (2d Cir. 1993), *cert. denied* 509 U.S. 904 (1993).

²³ *Field Bridge Associates*, 306 NLRB at 322, citing *Allbritton Communications*, 271 NLRB 201, 202 fn.4 (1984), *enfd.* 766 F.2d 812 (3d Cir. 1985), *cert denied* 474 U.S. 1081 (1986). See also, e.g., *Precision Industries*, 320 NLRB 661, 663 (1996), *enfd.* 118 F.3d 585 (8th Cir.1997), *cert. denied* 523 U.S. 1020 (1998).

²⁴ *Field Bridge Associates*, 306 NLRB at 322, quoting *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 265 (1940).

²⁵ *Donna-Lee Sportswear*, 836 F.2d 31 (1st Cir. 1987); *NLRB v. Heyman*, 541 F.2d 796 (9th Cir. 1976).

²⁶ 836 F.2d at 35.

²⁷ *Id.* at 36-38.

Circuit denied enforcement of a Board order that the employer had unlawfully repudiated a collective-bargaining agreement and refused to bargain with the union. Instead, the court held that the Board was bound by a previous federal district court decision in a Section 301 lawsuit that rescinded the collective-bargaining agreement due to the union's lack of majority status. The Ninth Circuit wrote that "[a]n implicit collateral attack, launched through the filing of charges premised on the contract, may not be entertained by the Board under the guise of different policy considerations."²⁸ The Board has noted that, in both of those cases, the issue in the unfair labor practice case -- whether there was a contract or not -- was the same issue as the one that had been decided in the court proceeding.²⁹

In the instant case, of course, the Board is not a party in the private court action between the employees and the Employer. Therefore, under established Board law, it is clear that the Board would not be precluded from proceeding against the unlawful Employer's motion at issue here. Moreover, the issue here does not concern a private dispute about the mere existence of a contract in which the particular interests of the disputants predominate, and as to which the courts may be at least as capable of determining as the Board. Rather, this case deals with whether the existing arbitration agreement violates employees' Section 7 rights, a public rights issue within the exclusive authority and expertise of the Board. Thus, even under the rationale of *Donna-Lee Sportswear*, the Board is not precluded from finding that the Employer violated Section 8(a)(1) of the Act by moving to compel arbitration based on an unlawful mandatory arbitration agreement, even if the court were to grant the Employer's motion. For all these reasons, we agree with the Region that the Employer's motion to compel arbitration unlawfully interfered with the employees' Section 7 right to engage in collective legal activity.

Remedy

The Region should seek a remedial order requiring that the Employer: (1) rescind the unlawful provisions of the arbitration agreement, and notify all employees subject to the agreement of the rescission; (2) post a notice at all locations where the arbitration agreement has been in effect; (3) cease and desist from requiring the unlawful provisions of the arbitration agreement, and cease and desist from enforcing that portion of its arbitration agreement prohibiting collective and class actions; (3) reimburse the employees for any litigation expenses expended in the 10(b) period directly related to opposing the Employer's unlawful motion to compel arbitration (or any other legal action taken to enforce the unlawful agreement); and (4) withdraw its

²⁸ 541 F.2d at 799.

²⁹ See, e.g., *Precision Industries*, 320 NLRB at 663 n.13.

motion to compel arbitration based on the unlawful agreement or, if the court has already granted the Employer's motion, move the district court to vacate any order compelling individual arbitration pursuant to the unlawful agreement,³⁰ if a motion to vacate can still be timely filed.³¹ In this regard, we note that the Employer would be free to amend its motion to compel arbitration to seek lawful collective or class arbitration rather than a class or collective lawsuit, as long as employees were able to exercise their collective legal rights in some forum.³²

Accordingly, the Region should issue an additional complaint allegation, absent settlement, alleging that the Employer violated Section 8(a)(1) of the Act by maintaining its motion to compel arbitration pursuant to the mandatory arbitration agreement.³³

³⁰ Such a motion should be made jointly with the affected employees, if they so request. In this regard, we note that the Board has in the past ordered a joint motion or petition where an employer has unlawfully used the legal system to interfere with an employee's Section 7 rights. See *Baptist Memorial Hospital*, 229 NLRB 45, 46 (1977) ("We shall also require Respondent to rectify the effects of its unlawful conduct by joining with [the employee] in petitioning the Memphis Municipal Court and Police Department to expunge any record of [the employee's] arrest and conviction").

³¹ We note that, depending on the jurisdiction, a motion for relief from judgment or order due to legal error, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, may be timely filed for a short period beyond the entry of final judgment (see, e.g., *Steinhoff v. Harris*, 698 F.2d 270, 275 (6th Cir. 1983) ("the vast majority of courts that have concluded that legal error comes within the meaning of Rule 60(b)(1)" and "the moving party must make his or her motion within the time limits for appeal")), and even beyond the expiration of the period for filing an appeal (see, e.g., *Lairsey v. Advance Abrasives Co.*, 542 F. 2d 928, 930-932 (5th Cir. 1976) (permitting a Rule 60(b) motion after the time limit for appeal had expired, but within one year of the judgment, where there had been a change in the underlying law)).

³² This would be consistent with the General Counsel's long-standing 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").

³³ We agree with the Region that Section 10(b) presents no bar to proceeding against the Employer's maintenance of its motion to compel arbitration within the Section 10(b) period. Section 10(b) does not preclude the pursuit of a complaint allegation based on the maintenance and/or enforcement of an unlawful rule or agreement within the 10(b) period, even if the rule or agreement was promulgated earlier. See *Control Services*, 305 NLRB 435, 435 fn. 2, 442 (1991), *enfd. mem.* 961 F.2d 1568 (3d Cir. 1992); see also *The Guard Publishing Co.*, 351 NLRB 1110, 1110, fn.2 (2007). In the instant case, while the Employer's July 26, 2010 filing of its motion to compel arbitration was outside the 10(b) period, the further maintenance of that motion to enforce the unlawful agreement was within the 10(b) period, including all of the parties' subsequent legal

/s/
B.J.K.

ROF(s) -- 0 (NxGen)

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argument over it. The Employer's continuing maintenance of that motion not only directly interferes with the Section 7 rights of the current and former employees involved in that particular FLSA case, but also sends a clear message to all other employees that they are prohibited from exercising their Section 7 rights because of the unlawful arbitration agreement.