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

DATE: September 18, 2012

TO: Mori Rubin, Regional Director
Region 31

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

SUBJECT: Labor Ready Southwest,
a subsidiary of TrueBlue, Inc.
Case 31-CA-072914

This case was submitted for advice as to whether the Employer violated the Act by maintaining and enforcing an arbitration agreement that prohibits employees from engaging in collective legal activity and interferes with employees' access to the Board and its processes. We agree with the Region that the Employer violated Section 8(a)(1) of the Act by maintaining and enforcing the arbitration agreement, because it interferes with employees' Section 7 right to participate in collective and class litigation, and because it interferes with employees' access to the Board and its processes.

FACTS

For many years, Labor Ready Southwest, Inc., (the Employer) has required its applicants for employment to sign employment applications that include a mandatory arbitration agreement. In May 2007, the former employee of the Employer on whose behalf the charge in the instant case was filed was required to sign an application that stated, in relevant part:

> I agree that any disputes arising out of my application for employment or employment that I believe I have against Labor Ready or its agents or representatives, including, but not limited to, any claims related to wage and hour laws, discrimination, harassment or wrongful termination, and all other employment related issues (excepting only actions arising under the NLRA) will be resolved by final and binding arbitration under the Federal Arbitration Act. Except where prohibited by law, I agree to bring any disputes I may have as an individual and I waive any right to bring or join a class, collective, or representative action.

After (b) (6), left the Employer in early 2009, the former employee filed a state wage and hour class action lawsuit against the Employer on behalf of (b) (6), (b) (7)(C) and all other similarly situated employees. In September 2011, after extensive litigation of a number of motions from each side in the lawsuit, the Employer filed a motion to compel arbitration based on the employee's employment application, seeking "an order compelling the arbitration of Plaintiff's claims against it on an individual basis." In November 2011, the state trial court granted the Employer's motion, and ordered individual arbitration of the employee's class action claim.[1]

In January 2012, the attorney for the former employee filed the charge in the instant case, alleging that the Employer violated: (1) Section 8(a)(1) of the Act by maintaining its mandatory arbitration agreement and moving to compel individual arbitration, thereby preventing its employees from engaging in the protected concerted activity of filing joint, class, or collective employment-related claims in any forum, arbitral or judicial; and (2) Section 8(a)(1) and (4) of the Act by maintaining the agreement, thereby impermissibly restricting employees' access to the Board and its processes.

ACTION

We agree with the Region that the Employer violated Section 8(a)(1) of the Act by maintaining and enforcing the arbitration agreement, because it interferes with employees' Section 7 right to participate in collective and class litigation, and because it interferes with employees' access to the Board and its processes.[2]

The arbitration agreement violates Section 8(a)(1) of the Act because it interferes with employees' Section 7 right to participate in collective and class litigation.

Initially, we agree with the Region that the agreement violates Section 8(a)(1) because it interferes with employees' Section 7 right to participate in collective and class litigation. In *D.R. Horton*, the Board set forth the appropriate legal framework for considering the legality of employers' policies and agreements that limit collective and class legal activity in non-union settings.[3] The Board held that a policy or agreement

[1] The trial court denied the Employer's motion to compel arbitration as to a claim made under California's Private Attorney General Act.

[2] We note that the former employee is clearly an employee within the meaning of Section 2(3) of the Act. See, e.g., *Briggs Mfg. Co.*, 75 NLRB 569, 570 (1947) (the Board interprets "employee" "in the broad generic sense…to include members of the working class generally"); *Little Rock Crate & Basket Co.*, 227 NLRB 1406, 1406 (1977) (Section 2(3) of the Act "means 'members of the working class generally,' including 'former employees of a particular employer'").

[3] *D.R. Horton, Inc.,* 357 NLRB No. 184, slip op. at 1-7 (2012).

precluding employees from filing employment-related collective or class claims against the employer restricts the employees' Section 7 right to engage in concerted action for mutual aid or protection, and therefore violates Section 8(a)(1) of the Act.

In particular, the Board held in *D.R. Horton* that "an employer violates Section 8(a)(1) of the National Labor Relations Act when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer."[4] The Board stated that such an agreement unlawfully restricts employees' Section 7 right to engage in concerted action for mutual aid or protection.[5] The Board reviewed its precedent that "has consistently held that concerted legal action addressing wages, hours or working conditions is protected by Section 7."[6] In addition, the Board made clear that "the applicable test is that set forth in *Lutheran Heritage Village*, and under that test, a policy such as Respondent's violates Section 8(a)(1) because it expressly restricts Section 7 activity or, alternatively, because employees would reasonably read it as restricting such activity."[7] In sum, the Board definitively held in *D.R. Horton* that an employer "violates Section 8(a)(1) by requiring employees to waive their right to collectively pursue employment-related claims."[8]

In the instant case, the Employer's mandatory arbitration agreement expressly requires employees to resolve all employment-related disputes by individual arbitration, and to waive their rights to bring their claims in a class, collective, or representative action. Thus, the Employer's agreement has effectively foreclosed all collective employment-related litigation by employees in any forum. Under *D.R. Horton*, such agreements unlawfully restrict and interfere with employees' Section 7 right to engage in concerted action for mutual aid or protection, and violate Section 8(a)(1) of the Act.

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[4] *Id.*, slip op. at 1.

[5] *Ibid.* (n. omitted).

[6] *Id*, slip op. at 2.

[7] *Id*, slip op. at 7, citing *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004).

[8] 357 NLRB No. 184, slip op. at 13.

The Employer's efforts to enforce the arbitration agreement through its motion to compel arbitration also violated Section 8(a)(1) of the Act.

As the Employer's arbitration agreement is unlawful, we agree with the Region that the Employer's motion to compel arbitration is also unlawful as a further interference with the employees' Section 7 right to engage in collective legal activity. Since the underlying arbitration agreement is unlawful under the Act, 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."[9] 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.[10] Thus, the Board emphasized, "nothing in the text of the FAA suggests that an arbitration agreement that is inconsistent with the NLRA is nevertheless enforceable."[11] 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.[12] 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."[13] 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.[14]

In *D.R. Horton*, the Board specifically addressed two recent Supreme Court

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[9] *Id.*, slip op. at 8.

[10] *Id.*, slip op. at 9, 9-11.

[11] *Id.*, slip op. at 11.

[12] Ibid.

[13] *Id.*, slip op. at 12.

[14] *Ibid.*

decisions which stated that a party cannot be required, without its consent, to submit to arbitration on a classwide basis.[15] 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.[16] 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 have concluded that the agreement here is unlawful, it follows that nothing in the FAA precludes proceeding against the Employer's motion to compel arbitration seeking to enforce the unlawful agreement.

Bill Johnson's Restaurants

Moreover, *Bill Johnson's Restaurants* does not preclude proceeding against the Employer's' motion. 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."[17] In such circumstances, "the legality of the lawsuit enjoys no special protection under *Bill Johnson's*."[18]

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

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[15] *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).

[16] 357 NLRB No. 184, slip op. at 12.

[17] 461 U.S. at 737 n.5.

[18] *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).

the Act, even though the lawsuit itself could not be enjoined.[19] 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.[20]

A lawsuit has a footnote 5 illegal objective "if it is aimed at achieving a result incompatible with the objectives of the Act."[21] 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."[22] This category includes the illegal union fine cases cited by the Court in footnote 5 itself.[23] In those cases, the unions violated Section 8(b)(1)(A) by fining employee/members, and the lawsuits were merely the mechanism to enforce and collect the unlawful fines.

The second of these 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 itself to directly interfere with the Section 7 activity.[24] 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

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[19] 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).

[20] We note that legal actions that have an illegal objective are unlawful *ab initio*, in contrast to legal actions against "arguably protected" conduct, which are only unlawful to the extent they are continued after the General Counsel issues complaint, pursuant to *Loehmann's Plaza*, 305 NLRB 663 (1991), rev. denied 74 F.3d 292 (D.C. Cir. 1996). See, e.g., *Manno Electric*, 321 NLRB 278, 298 (1996), enfd. per curiam mem. 127 F.3d 34 (5th Cir. 1997).

[21] *Manno Electric*, 321 NLRB at 297.

[22] *Regional Construction Corp.*, 333 NLRB 313, 319 (2001).

[23] *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).

[24] 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").

objective.[25]

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 lawsuit 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, specifically attempting 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 do collateral estoppel principles preclude proceeding against the Employer's motion to compel arbitration. 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."[26] Thus, collateral estoppel bars not only the decision-making court, but also any other court, from reconsidering the same issue.[27] It is well established that three elements must be satisfied in order for collateral estoppel 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.[28]

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

[25] 321 NLRB at 297.

[26] *Montana v. United States*, 440 U.S. 147, 153 (1979).

[27] *United States v. Stauffer Chemical*, 464 U.S. 165 (1984).

[28] *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)).

litigation.[29] 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."[30] 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."[31]

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.[32] 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.[33] 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 predominated in that case, rather than any public rights at issue.[34] In *NLRB v. Heyman*, the Ninth 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."[35] The Board has noted that, in both of those cases, the issue in the unfair labor practice

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[29] *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).

[30] *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).

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

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

[33] 836 F.2d at 35.

[34] *Id.* at 36-38.

[35] 541 F.2d at 799.

case -- whether there was a contract or not -- was the same issue as the one that had been decided in the court proceeding.[36]

In the instant case, of course, the Board was 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 is not precluded from proceeding against the unlawful Employers' motions 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, public rights issues 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 after the state trial court granted the 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.

The arbitration agreement also violates Section 8(a)(1) of the Act because it interferes with employees' access to the Board and its processes.

We further agree with the Region that the Employer's maintenance of the arbitration agreement also violates Section 8(a)(1) of the Act because the agreement interferes with employees' access to the Board and its processes. The Board has made clear that mandatory arbitration policies that interfere with employees' right to file an unfair labor practice charge are unlawful.[37] Thus, for example, in *U-Haul Co. of California*, the Board held that an employer violated Section 8(a)(1) of the Act by maintaining a mandatory arbitration policy that employees would reasonably construe to prohibit the filing of unfair labor practice charges, and that did not clarify that the policy did not extend to the filing of unfair labor practice charges.[38]

In the instant case, the language of the Employer's arbitration agreement is similarly broad, confusing, and unclear, so that employees would reasonably conclude that they are precluded from filing unfair labor practice charges. The agreement broadly states that "*any disputes*" arising out of employees' employment must be

[36] See, e.g., *Precision Industries*, 320 NLRB at 663 n.13.

[37] See, e.g., *Bill's Electric, Inc.*, 350 NLRB 292, 296 (2007); *Dish Network Corp.,* 358 NLRB No. 29, slip op. at 7-8 (2012); *U-Haul Co. of California*, 347 NLRB 375, 377-78 (2006), enfd. mem. 255 F. Appx. 527 (D.C. Cir. 2007).

[38] 347 NLRB at 377-78.

resolved by individual arbitration, excepting only "*actions*" arising under the NLRA. The filing of an unfair labor practice charge would not ordinarily be considered as the commencement of a legal "action," as would a civil lawsuit, and employees would not clearly understand this language to protect their right to file a ULP charge with Board. Moreover, as the agreement explicitly requires employees to bring any disputes "as an individual" and to "waive any right to bring or join a class, collective, or representative action," employees would reasonably construe the agreement to prohibit them from acting collectively to file unfair labor practice charges together. Thus, at best, the arbitration agreement is confusing and ambiguous as to whether employees are permitted to file charges with the Board; at worst, it is intended to prohibit or limit employees' exercise of these Section 7 rights. Therefore, as employees would reasonably read the mandatory arbitration agreement to prohibit the filing of unfair labor practice charges with the Board, we agree with the Region that the Employer's maintenance of the agreement violates Section 8(a)(1) of the Act on this basis as well.[39]

Remedy

Finally, 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 directly related to opposing the Employer's unlawful motion to compel arbitration (or any other legal action taken to enforce the agreement); and (4) move the district court to vacate its order compelling arbitration pursuant to the unlawful agreement,[40] if a motion to vacate can still be

[39] While the Charging Party has alleged that the agreements also violate Section 8(a)(4) of the Act, the mere requirement and maintenance of the agreements at issue here only violates Section 8(a)(1), in the absence of any efforts to enforce a limitation on, or otherwise to interfere with, employees' access to the Board. Thus, the Board has made clear that an unlawful rule or policy which employees would reasonably construe to prohibit the filing of unfair labor practice charges violates Section 8(a)(1) of the Act, while only employer efforts to enforce such a rule or policy, or otherwise to coerce employees into refraining from exercising their Section 7 right of access to the Board, also violates Section 8(a)(4). See, e.g., *Bill's Electric, Inc.*, 350 NLRB at 296, 307 (employer's maintenance of its unlawful policy violated Section 8(a)(1); its letters to employees seeking to enforce the policy and intimidate the employees violated Section 8(a)(4)).

[40] 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

timely filed.[41] 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.[42]

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer's maintenance and enforcement of the mandatory arbitration agreement violates Section 8(a)(1) of the Act, as set forth above. [43]

/s/
B.J.K.

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employee] in petitioning the Memphis Municipal Court and Police Department to expunge any record of [the employee's] arrest and conviction").

[41] 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)).

[42] 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").

[43] We note that Section 10(b) presents no bar to proceeding here. 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, the Employer's September 2011 motion to compel individual arbitration, which sought to enforce the unlawful agreement, is well within the 10(b) period. The Employer's motion not only directly interfered with the Section 7 rights of the former employee involved in that particular case, but also sent a clear message to all other employees that they were prohibited from exercising their Section 7 rights because of the unlawful arbitration agreement.