

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

## Advice Memorandum

DATE: September 28, 2012

TO: Mori Rubin, Regional Director  
Region 31

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

SUBJECT: Bloomingdales, Inc. 512-5012-9300  
Case 31-CA-071281 512-5072-0100  
512-5081-7000

This case was submitted for advice as to whether the Employer violated the Act by maintaining and enforcing an arbitration program 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 program, because the program interferes with employees' Section 7 right to participate in collective and class litigation, and because the program's brochure interferes with employees' access to the Board and its processes.

### FACTS

The Charging Party was employed by Bloomingdales, Inc. (the Employer) from 2005 through 2010. While the specific documents have changed in some respects over the years, all applicants for employment with the Employer for many years have been required to execute an application for employment that stated that, if the applicants are hired, they will be given thirty days "to decide if you want to participate in the final step of the Company's early dispute resolution program, Solutions InSTORE, which is final and binding arbitration." Applicants have been told to "read all materials and ask any questions you have so that you are fully informed about what Solutions InSTORE has to offer." When hired, employees have been given the Employer's Employee Handbook, which includes a section which referenced Solutions InSTORE as an early dispute resolution program with a four-step process, the final step being arbitration. The Employee Handbook states, "For further details on the program, please refer to your Solutions InSTORE booklet." The Employee Handbook makes no reference to any other Solutions InSTORE plan documents.

The Solutions InSTORE booklet states that, unless employees opt-out within 30 days, "you and the Company agree to use arbitration as the sole and exclusive means to resolving any dispute regarding your employment; we both waive the right to civil

action and a jury trial.” The booklet also provides that employees may not bring a class action in arbitration.

A separate Solutions InSTORE “plan document” states that: “Except as otherwise limited, all employment-related legal disputes, controversies or claims arising out of, or relating to, employment or cessation of employment, whether arising under federal, state or local decisional or statutory law (“Employment-Related Claims”), shall be settled exclusively by final and binding arbitration.” That document later states that, “Claims by Associates . . . under the National Labor Relations Act are [ ] not subject to Arbitration.” The Solutions InSTORE plan document also states that, “The Arbitrator shall not consolidate claims of different associates into one proceeding, nor shall the Arbitrator have the power to hear an arbitration as a class action (a class action involves representative members of a large group, who claim to share a common interest seeking relief on behalf of the group).”

In July 2011, the Charging Party filed a state law wage-and-hour class action complaint against the Employer, individually and on behalf of other persons similarly situated, in California state court. In August 2011, the Employer removed the case to federal district court and filed an answer that included an affirmative defense stating that the complaint “should be dismissed or stayed because [Charging Party] entered into a voluntary arbitration agreement that requires her to submit any employment-related dispute to final and binding arbitration. The voluntary arbitration agreement precludes collective actions.” In November 2011, the Employer filed a motion to compel arbitration, moving the Court “to require [the Charging Party] to honor her arbitration agreement and (1) to compel her individual claims to arbitration, (2) to dismiss her representative allegations, and (3) to stay this action pending the resolution of her arbitration.” In February 2012, the district court granted the Employer’s motion to compel, finding that the arbitration program was enforceable notwithstanding the Charging Party’s argument that the program was unlawful under *D.R. Horton*.<sup>1</sup>

In December 2011, the Charging Party filed the charge in the instant case, alleging that the Employer violated Section 8(a)(1) of the Act by maintaining and invoking an illegal contract provision that purports to preclude protected concerted activities, including preventing the Charging Party and other current and former employees from bringing class-action representative actions, and violated Section 8(a)(1) and (4) of the Act by maintaining and invoking an illegal contract provision that interferes with employees’ access to the National Labor Relations Board and its processes.

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<sup>1</sup> 357 NLRB No. 184 (2012). The court noted that, if the Board rules contrarily, “then Plaintiff might be able to seek a vacation of any arbitration award issued contrary to the NLRB’s findings.”

**ACTION**

We agree with the Region that the Employer violated Section 8(a)(1) of the Act by maintaining and enforcing the arbitration program, because the program interferes with employees' Section 7 right to participate in collective and class litigation, and because the program's brochure interferes with employees' access to the Board and its processes.<sup>2</sup>

The arbitration program 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 Employer's arbitration program 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.<sup>3</sup> The Board held that a policy or agreement 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."<sup>4</sup> The Board stated that such an agreement unlawfully restricts employees' Section 7 right to engage in concerted action for mutual aid or protection.<sup>5</sup> The Board reviewed its precedent that "has consistently held that concerted legal action addressing wages, hours or working conditions is protected by Section 7."<sup>6</sup> In addition, the Board made clear that "the applicable test is that set forth

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<sup>2</sup> We agree with the Region that the former employee Charging Party 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'").

<sup>3</sup> *D.R. Horton, Inc.*, 357 NLRB No. 184, slip op. at 1-7 (2012).

<sup>4</sup> *Id.*, slip op. at 1.

<sup>5</sup> *Ibid.*.

<sup>6</sup> *Id.*, slip op. at 2.

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."<sup>7</sup> 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."<sup>8</sup>

In the instant case, the Employer's Solutions InSTORE program expressly requires employees to resolve all employment-related disputes by individual arbitration, and prohibits employees from bringing their claims in a class, collective, or representative action. Thus, the Solutions InSTORE plan document states that: "Except as otherwise limited, all employment-related legal disputes, controversies or claims arising out of, or relating to, employment or cessation of employment, whether arising under federal, state or local decisional or statutory law ("Employment-Related Claims"), shall be settled exclusively by final and binding arbitration," and that "The Arbitrator shall not consolidate claims of different associates into one proceeding, nor shall the Arbitrator have the power to hear an arbitration as a class action." Therefore, the Employer's program has effectively foreclosed all collective employment-related litigation by employees in any forum. Under *D.R. Horton*, such a program unlawfully restricts and interferes with employees' Section 7 right to engage in concerted action for mutual aid or protection, and violates Section 8(a)(1) of the Act.

We further agree with the Region that the Employer's Solutions InSTORE program is unlawful notwithstanding that it includes a limited "opt-out" procedure by which the employee could escape the requirement of individual arbitration by affirmatively notifying the Employer within 30 days. In this regard, as to employees who do not act immediately to opt out upon receiving the agreement, the Employer's policy unlawfully interferes with their Section 7 right to engage in collective legal activity by establishing an irrevocable waiver of any future exercise of their Section 7 rights. Thus, in analogous circumstances, the Board has found unlawful and unenforceable employer-employee agreements that condition employment on the employee's waiver of prospective Section 7 rights, concluding that "future rights of employees as well as the rights of the public may not be traded away in this manner."<sup>9</sup>

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<sup>7</sup> *Id.*, slip op. at 7, citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

<sup>8</sup> 357 NLRB No. 184, slip op. at 13.

<sup>9</sup> *Ishikawa Gasket American, Inc.*, 337 NLRB 175, 175 (2001), *enfd.* 354 F.3d 534 (6th Cir. 2004) (finding unlawful a separation agreement prohibiting the departing employee from engaging in union and other protected activities for a 1-year period); *Mandel Security Bureau, Inc.*, 202 NLRB 117, 119 (1973) (finding unlawful an employer's conditioning reinstatement on the employee's refraining from future concerted activities and unfair labor charges, in addition to requesting withdrawal of pending charges).

Moreover, the requirement here that employees affirmatively preserve their Section 7 rights by opting out of the Employer's policy is clearly an unlawful burdening of the employees' right to engage in collective litigation.<sup>10</sup> Just as we would not permit an employer to require employees to affirmatively preserve their Section 7 rights to discuss terms and conditions of employment amongst themselves, to strike, or to engage in other union or concerted activities, an employer cannot be permitted to restrict the right to engage in collective and class legal actions unless employees affirmatively preserve that right.<sup>11</sup> By placing the burden on employees to take immediate steps in order to retain their Section 7 rights, or lose them forever, the Employer necessarily interferes with its employees' exercise of those statutory rights.

In addition, by virtue of an opt-out procedure's necessary requirement that employees publicly self-identify themselves as choosing to preserve their right to engage in Section 7 activity -- and do so at the highly vulnerable time when they are new employees -- an opt-out procedure itself is antithetical to the representative aspect of collective action, and the protection it affords employees from fear of reprisal.<sup>12</sup>

Finally, the Employer's arbitration policy not only prohibits employees *who do not* act within the 30-day opt-out window from exercising their own Section 7 rights to file and join collective and class legal actions, but also interferes with the collective action rights of employees *who have* opted out. Thus, those employees are prevented from acting concertedly with employees who have not timely completed the requisite opt-out procedure. For all these reasons, we agree with the Region that the Employer's

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<sup>10</sup> We are aware of no cases in which the Board or courts have privileged such a requirement, and the Employer has identified none. We note that cases addressing the separate issue of whether an arbitration agreement is procedurally or substantively unconscionable, such as *Circuit City v. Mantor*, 335 F.3d 1101 (9th Cir. 2003) and *Davis v. O'Melvany & Meyers*, 485 F.3d 1066 (9th Cir. 2007), are not dispositive of the legality of such agreements under the Act. Thus, they do not address employees' Section 7 right to act concertedly, including their substantive statutory right to bring collective or class claims, or whether that right can be irrevocably waived with respect to all future claims.

<sup>11</sup> Cf., e.g., *D.R. Horton*, 357 NLRB No. 184., slip op. at 3: "These forms of collective efforts to redress workplace wrongs or improve workplace conditions are at the core of what Congress intended to protect by adopting the broad language of Section 7. Such conduct is not peripheral but central to the Act's purposes. After all, if the Respondent's employees struck in order to induce the Respondent to comply with the FLSA, that form of concerted activity would clearly have been protected."

<sup>12</sup> See, e.g., *Special Touch Home Care Services*, 357 NLRB No. 2, slip op. at 7 (2011) ("The premises of the Act . . . and our experience with labor-management relations all suggest that permitting an employer to compel employees to provide individual notice of participation in collective action would impose a significant burden on the right . . .").

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

The Employer's efforts to enforce its Solutions InSTORE arbitration program through its motion to compel arbitration also violates Section 8(a)(1) of the Act.

As the Employer's arbitration program 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 program 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."<sup>13</sup> 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.<sup>14</sup> Thus, the Board emphasized that "nothing in the text of the FAA suggests that an arbitration agreement that is inconsistent with the NLRA is nevertheless enforceable."<sup>15</sup> 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.<sup>16</sup> 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."<sup>17</sup> 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.<sup>18</sup>

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<sup>13</sup> *Id.*, slip op. at 8.

<sup>14</sup> *Id.*, slip op. at 9, 9-11.

<sup>15</sup> *Id.*, slip op. at 11.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Id.*, slip op. at 12.

<sup>18</sup> *Ibid.*

In *D.R. Horton*, the Board also 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.<sup>19</sup> 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.<sup>20</sup> For all these reasons, the Board in *D.R. Horton* made clear that nothing in the FAA precludes finding mandatory arbitration agreements and programs that prohibit collective and class litigation to be unlawful. Accordingly, as we have concluded that the program 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 program.

### *Bill Johnson's Restaurants*

We further conclude that *Bill Johnson's Restaurants v. NLRB*<sup>21</sup> 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."<sup>22</sup> In such circumstances, "the legality of the lawsuit enjoys no special protection under *Bill Johnson's*."<sup>23</sup>

The Board has made clear that it will apply footnote 5 to particular litigation

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<sup>19</sup> *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).

<sup>20</sup> 357 NLRB No. 184, slip op. at 12.

<sup>21</sup> 461 U.S. 731 (1983).

<sup>22</sup> *Id.* at 737 n.5.

<sup>23</sup> *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).

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.<sup>24</sup> 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.<sup>25</sup>

A lawsuit has a footnote 5 illegal objective "if it is aimed at achieving a result incompatible with the objectives of the Act."<sup>26</sup> 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."<sup>27</sup> This category includes the illegal union fine cases cited by the Court in footnote 5 itself.<sup>28</sup> 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 to directly interfere with the Section 7 activity.<sup>29</sup> Thus, for example, in *Manno Electric, Inc.*, the Board found that an employer's judicial cause of action attacking employee

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<sup>24</sup> 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).

<sup>25</sup> 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).

<sup>26</sup> *Manno Electric*, 321 NLRB at 297.

<sup>27</sup> *Regional Construction Corp.*, 333 NLRB 313, 319 (2001).

<sup>28</sup> *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).

<sup>29</sup> 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").

statements made to the Board was not only preempted, but also had an illegal objective.<sup>30</sup>

Here, both of these reasons apply. First, the Employer's motion to compel arbitration in the instant case seeks to enforce an arbitration program that is itself unlawful since 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, 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 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."<sup>31</sup> Thus, collateral estoppel bars not only the decision-making court, but also any other court, from reconsidering the same issue.<sup>32</sup> 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.<sup>33</sup>

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

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<sup>30</sup> 321 NLRB at 297.

<sup>31</sup> *Montana v. United States*, 440 U.S. 147, 153 (1979).

<sup>32</sup> *United States v. Stauffer Chemical*, 464 U.S. 165 (1984).

<sup>33</sup> *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.<sup>34</sup> 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.”<sup>35</sup> 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.”<sup>36</sup>

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.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup> 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.”<sup>40</sup> The Board has noted that, in both of those cases, the issue in the unfair labor practice

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<sup>34</sup> *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).

<sup>35</sup> *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).

<sup>36</sup> *Field Bridge Associates*, 306 NLRB at 322, quoting *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 265 (1940).

<sup>37</sup> *Donna-Lee Sportswear*, 836 F.2d 31 (1st Cir. 1987); *NLRB v. Heyman*, 541 F.2d 796 (9th Cir. 1976).

<sup>38</sup> 836 F.2d at 35.

<sup>39</sup> *Id.* at 36-38.

<sup>40</sup> 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.<sup>41</sup>

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 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 program 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 program, 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 Employer's Solutions InSTORE arbitration program also violates Section 8(a)(1) of the Act because the program's booklet interferes with employees' access to the Board and its processes.

We further agree with the Region that the Employer's maintenance of its Solutions InSTORE arbitration program also violates Section 8(a)(1) of the Act because the program's booklet 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.<sup>42</sup> 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.<sup>43</sup>

In the instant case, the language of the Employer's Solutions InSTORE booklet expressly states that, unless employees opt-out within 30 days, "you and the Company agree to use arbitration as the sole and exclusive means to resolving any dispute

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<sup>41</sup> See, e.g., *Precision Industries*, 320 NLRB at 663 n.13.

<sup>42</sup> 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).

<sup>43</sup> 347 NLRB at 377-78.

regarding your employment . . .” No exception is made in the booklet for filing unfair labor practice charges with the Board, or otherwise having access to the Board’s processes for “disputes regarding your employment.” Thus, by its explicit terms, the Employer’s Solutions InSTORE booklet would lead employees to reasonably conclude that they are precluded from filing unfair labor practice charges or otherwise accessing the Board’s processes.

We recognize that a separate Solutions InSTORE plan document states that: “Claims by Associates . . . under the National Labor Relations Act are [ ] not subject to Arbitration.” Employees who read the broad prohibition in the Solutions InSTORE booklet may well not read the plan document, however, particularly as the Employee Handbook specifically directs employees to the Solutions InSTORE booklet for the details of the program, and makes no reference to any other Solutions InSTORE plan documents. Thus, employees are not likely to see the exception set forth in the Solutions InSTORE plan document, and are left with only the express prohibition of access to the Board and its processes set forth in the Solutions InSTORE booklet. In any case, the conflicting language of the two documents is confusing and ambiguous as to whether employees are permitted to file charges with the Board, and employees would reasonably understand the program to prohibit the filing of unfair labor practice charges with the Board. Therefore, we agree with the Region that the Employer’s maintenance of its Solutions InSTORE arbitration program also violates Section 8(a)(1) of the Act because the program’s booklet interferes with employees’ access to the Board and its processes.<sup>44</sup>

### Remedy

Finally, the Region should seek a remedial order requiring that the Employer: (1) rescind the unlawful provisions of its arbitration program, and notify all employees subject to the program of the rescission; (2) post a notice at all locations where the arbitration program has been in effect; (3) cease and desist from requiring the unlawful provisions of the arbitration program, and cease and desist from enforcing that portion of its arbitration program prohibiting collective and class actions; (3) reimburse the

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<sup>44</sup> While the Charging Party has alleged that the Employer’s maintenance of its Solutions InSTORE program also violates Section 8(a)(4) of the Act, the mere requirement and maintenance of the program 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, 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)).

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 program); and (4) move the district court to vacate its order compelling arbitration pursuant to the unlawful program,<sup>45</sup> if a motion to vacate can still be timely filed.<sup>46</sup> 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.<sup>47</sup>

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<sup>45</sup> 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").

<sup>46</sup> 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)).

<sup>47</sup> 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").

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer's maintenance and enforcement of its Solutions InSTORE arbitration program violates Section 8(a)(1) of the Act, as set forth above.<sup>48</sup>

/s/  
B.J.K.

ROF(s) -- 0 (NxGen)

ADV.31-CA-071281.Response.Bloomingtondales. (b) (6), (b) (7)

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<sup>48</sup> 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 policy within the 10(b) period, even if the rule or policy 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 November 2011 motion to compel arbitration, which sought to enforce the unlawful program on an individual basis, 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 program.