No. 16-800

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

PJ CHEESE, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether arbitration agreements with individual employees that bar them from pursuing work-related claims on a collective or class basis in any forum are prohibited as an unfair labor practice under 29 U.S.C. 158(a)(1), because they limit the employees' right under the National Labor Relations Act to engage in "concerted activities" in pursuit of their "mutual aid or protection," 29 U.S.C. 157, and are therefore unenforceable under the saving clause of the Federal Arbitration Act, 9 U.S.C. 2.

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PETITION FOR A WRIT OF CERTIORARI

The National Labor Relations Board respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals granting summary reversal of the National Labor Relations Board's decision (App., *infra*, 1a) is not published in the *Federal Reporter* but is available at 2016 WL 3457261. The decision and order of the Board (App., *infra*, 2a-41a) are reported at 362 N.L.R.B. No. 177.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 42a-45a) was entered on August 25, 2016. On November 14, 2016, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and

including December 23, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this petition. App., *infra*, 61a-64a.

STATEMENT

1. a. The National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," and "to refrain from any or all of such activities." 29 U.S.C. 157. This Court has described the rights under Section 157 as including employees' efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship," including "through resort to administrative and judicial forums." *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565-566 (1978). An employer that "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in section 157" commits an unfair labor practice. 29 U.S.C. 158(a)(1). The National Labor Relations Board (Board) "is empowered * * * to prevent any person from engaging in any unfair labor practice * * * affecting commerce." 29 U.S.C. 160(a).

b. The Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*, provides that any written contract "evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and en-

forceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2.

c. In decisions issued in 2012 and 2014, the Board held that an employer could not, as a condition of employment, require its employees to limit the resolution of employment-related claims to individual arbitration and thereby prevent them from pursuing class or collective actions about such claims in any forum. See *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012), enforcement denied in relevant part, 737 F.3d 344 (5th Cir. 2013); *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (2014), enforcement denied in relevant part, 808 F.3d 1013 (5th Cir. 2015), petition for cert. pending, No. 16-307 (filed Sept. 9, 2016).

In both of those cases, the Fifth Circuit denied enforcement of the Board's orders in relevant part, holding that the NLRA does not override the FAA and that the use of class-action or collective procedures is not a substantive right under the NLRA. See App., *infra*, 46a-60a (reprinting the Fifth Circuit's decision in *Murphy Oil*); *id.* at 46a-47a, 49a-50a, 52a-53a (describing, and treating as controlling, the Fifth Circuit's prior holding in *D.R. Horton*).

2. The material facts in this case are similar to those in *Murphy Oil*. Since 2010, respondent has required its employees, as a condition of employment, to agree to a Dispute Resolution Program. App., *infra*, 5a-6a, 14a-15a, 18a-19a. That program provides, as relevant here, that employment-related disputes are to be resolved exclusively in arbitration and that "any claim subject to arbitration will not be arbitrated on a collective or a class-wide basis, provided however, that this provision shall not apply to any prospective class or collective action based on alleged violations of wage

and hour laws if, and only if, such claim should cause the agreement to arbitrate to be unenforceable under the prevailing law." *Id.* at 21a; see *id.* at 22a (quoting employee's Agreement and Receipt for Dispute Resolution Program as providing that "any arbitration between the Company and me is of an individual claim and that any claim subject to arbitration will not be arbitrated on a multi-claimant, a collective or a class-wide basis"). In 2013, in response to a class-action complaint filed by one employee, respondent sought to compel the employee to arbitrate his claim on an individual basis. *Id.* at 15a, 23a-26a.

a. In January 2014, the Board's General Counsel issued an administrative complaint alleging that respondent's maintenance of its arbitration policy and its effort to compel individual arbitration constituted unfair labor practices in violation of Section 158(a)(1) because they interfered with employees' Section 157 right to engage in concerted legal activity. App., *infra*, 14a-15a.

b. In August 2015, the Board held that respondent's class-action ban is invalid in light of the Board's own decisions in *D.R. Horton* and *Murphy Oil*. App., *infra*, 3a-4a. The Board also held that respondent's effort to enforce the arbitration policy by compelling individual arbitration was an unlawful restriction on Section 157 rights. *Id.* at 6a-8a.

c. Member Johnson noted that, for the reasons expressed in his dissent from the Board's decision in *Murphy Oil*, he would not have found that respondent's "maintenance or enforcement of its arbitration agreement violates the [NLRA] insofar as it has been applied to prevent employees from pursuing class and other collective actions." App., *infra*, 3a n.2.

3. Respondent elected to file its petition for review of the Board's decision in the Fifth Circuit. See 29 U.S.C. 160(f). The Board moved to stay proceedings pending resolution of its petition for rehearing en banc in *Murphy Oil*. On October 7, 2015, the court of appeals granted the Board's motion. On June 6, 2016, after the court had decided *Murphy Oil* and denied rehearing in that case, respondent filed a motion for summary disposition in light of the court of appeals' decisions in *D.R. Horton*, *Murphy Oil*, and *Chesapeake Energy Corp.* v. *NLRB*, 633 Fed. Appx. 613 (5th Cir. 2016). The Board opposed summary disposition on the ground that *Murphy Oil* was still subject to potential review by this Court.

On June 16, 2016, the court of appeals granted respondent's motion for summary disposition. App., *infra*, 1a. On August 25, 2016, the court entered its judgment. *Id.* at 42a-45a.[1]

4. On September 9, 2016, this Office filed, on behalf of the Board, a petition for a writ of certiorari to review the Fifth Circuit's decision in *Murphy Oil*. See *NLRB* v. *Murphy Oil USA, Inc.*, No. 16-307. As that petition explains (at 19-24), there is an acknowledged conflict in the courts of appeals about the invalidity of arbitration agreements that would preclude employees from pursuing class or collective actions that assert employment-related claims. The respondent in *Murphy Oil* agrees with the Fifth Circuit's decision on the merits but supports the Board's petition for a writ

[1] On agreement of the parties, the court of appeals enforced the portions of the Board's order corresponding to the Board's finding that the agreement could be reasonably construed as prohibiting employees from filing unfair-labor-practice charges with the Board. App., *infra*, 43a.

of certiorari and agrees that "the Board's petition provides an appropriate vehicle for the Court to resolve the issue that has caused the courts of appeals to issue conflicting opinions." Br. for Resp. in Support of Granting Pet. at 11, *Murphy Oil*, *supra* (No. 16-307).

Several additional petitions for writs of certiorari—arising from other cases in the circuit split—are also pending in this Court. The Seventh and Ninth Circuits have expressly rejected the Fifth Circuit's analysis in *Murphy Oil*, and the employers in those two cases are seeking this Court's review. See *Morris* v. *Ernst & Young, LLP*, 834 F.3d 975, 990 n.16 (9th Cir. 2016), petition for cert. pending, No. 16-300 (filed Sept. 8, 2016); *Lewis* v. *Epic Sys. Corp.*, 823 F.3d 1147, 1157 & n.† (7th Cir. 2016), petition for cert. pending, No. 16-285 (filed Sept. 2, 2016). Meanwhile, the Second Circuit has reaffirmed an earlier decision that declined to follow the Board's approach in *D.R. Horton*, and the employees in that case are seeking this Court's review. See *Patterson* v. *Raymours Furniture Co.*, No. 15-2820, 2016 WL 4598542, at *2-*3 (Sept. 14, 2016), petition for cert. pending, No. 16-388 (filed Sept. 22, 2016).[2] The petitions in *Murphy Oil* and the other three cases have all been distributed for consideration at this Court's conference of January 6, 2017.[3]

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[2] After *Murphy Oil*, the Eighth Circuit also reaffirmed an earlier decision rejecting the Board's position. See *Cellular Sales of Mo., LLC* v. *NLRB*, 824 F.3d 772, 776 (2016). The Board did not seek further review of that decision.

[3] The Board recently filed another petition for a writ of certiorari presenting the same question as in *Murphy Oil* and in this case. See *NLRB* v. *24 Hour Fitness USA, Inc.*, No. 16-689 (filed Nov. 23, 2016). The Board suggested that the Court hold the petition in *24 Hour Fitness* pending its disposition of *Murphy Oil* and the other three petitions that were filed in September. It is making

REASONS FOR GRANTING THE PETITION

In this case, the court of appeals granted a motion for summary reversal of the Board's decision in light of its earlier decisions in *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344 (5th Cir. 2013); *Murphy Oil USA, Inc.* v. *NLRB*, 808 F.3d 1013 (5th Cir. 2015), petition for cert. pending, No. 16-307 (filed Sept. 9, 2016); and *Chesapeake Energy Corp.* v. *NLRB*, 633 Fed. Appx. 613 (5th Cir. 2016). App., *infra*, 1a. There is a clear conflict in the courts of appeals regarding the validity, in light of the NLRA, of arbitration agreements that would preclude employees from pursuing class or collective actions that assert employment-related claims. See pp. 5-6, *supra*. The Board has already filed an unopposed petition for a writ of certiorari seeking this Court's review of the decision in *Murphy Oil*, on which the decision below relies.

The Court should hold the petition in this case pending its disposition of *Murphy Oil* and the other petitions presenting variants of the same question presented (*i.e.*, *Patterson* v. *Raymours Furniture Co.*, No. 16-388; *Ernst & Young, LLP* v. *Morris*, No. 16-300; and *Epic Systems Corp.* v. *Lewis*, No. 16-285) and then dispose of this case accordingly.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of the petition for a writ of certiorari in *NLRB* v. *Murphy Oil USA, Inc.*, No. 16-307, as well as those in *Patterson* v. *Raymours*

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the same suggestion in another petition for a writ of certiorari that is being filed concurrently with this one. See *NLRB* v. *SF Markets, L.L.C., dba Sprouts Farmers Market*, No. 16-___ (filed Dec. 22, 2016).

Furniture Co., No. 16-388; *Ernst & Young, LLP* v. *Morris*, No. 16-300; and *Epic Systems Corp.* v. *Lewis*, No. 16-285, and then be disposed of as appropriate.

Respectfully submitted.

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DECEMBER 2016

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* The Acting Solicitor General is recused in this case.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-60610

PJ CHEESE, INCORPORATED,
PETITIONER CROSS-RESPONDENT

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT CROSS-PETITIONER

Filed: June 16, 2016

Petition for Review of an Order of the
National Labor Relations Board

Before: HIGGINBOTHAM, SMITH, and OWEN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the motion of petitioner cross-respondent PJ Cheese, Incorporated, for summary disposition is GRANTED. *See D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 355-364 (5th Cir. 2013); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015); *Chesapeake Energy Corp. v. NLRB*, 633 F. App'x 613, 614-15 (5th Cir. 2016) (per curiam).

APPENDIX B

NATIONAL LABOR RELATIONS BOARD

Case 10-CA-113862

PJ CHEESE, INC. AND JAMES SULLIVAN

Aug. 20, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS
JOHNSON AND MCFERRAN

On June 6, 2014, Administrative law Judge William Nelson Cates issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2]

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[1] The Respondent argues that the charges and amended charges supporting the complaint are invalid because they were filed by Sullivan's attorney, without evidence that Sullivan authorized the filings. The judge correctly rejected this argument, noting that under Sec. 102.9 of the Board's Rules & Regulations, a charge can be filed by "any person" and that "person" is defined in Sec. 2(1) of the Act to include "legal representatives." Contrary to the Respondent's argument, there is no requirement in the Rules that a charging party authorize a legal representative to file a charge on his or her behalf.

and to adopt his recommended Order as modified and set forth in full below.[3]

1. Applying the Board's decision in *D. R. Horton*,[4] the judge found that Respondent PJ Cheese violated Section 8(a)(1) of the Act by maintaining a mandatory arbitration policy that requires its employees, as a condition of employment, to submit their employment-related

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[2] For the reasons set forth in detail in his dissent in *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 35-58 (2014), Member Johnson would not find that the Respondent's maintenance or enforcement of its arbitration agreement violates the Act insofar as it has been applied to prevent employees from pursuing class and other collective actions. Because he does not find these violations, Member Johnson finds it unnecessary to consider here whether or under what circumstances the remedies related to the maintenance or enforcement violations would be appropriate. See *Murphy Oil*, slip op. at 39 fn.15 (Member Johnson, dissenting); see generally *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002). Further, because he finds no merit to these allegations, he does not reach the Respondent's related argument that the charging party was not engaged in concerted activity when, as an individual plaintiff, he brought a collective FLSA claim in Federal district court. Nor does he pass on the Respondent's other defenses.

Finally, Member Johnson finds it unnecessary to pass on the merits of whether the Respondent maintained a mandatory arbitration policy that employees would reasonably believe prohibits them from filing charges with the Board because the Respondent did not raise in its exceptions the Dispute Resolution Program's language stating that the arbitration policy "will not prevent you from filing a charge with any state or federal administrative agency." Thus, he agrees with his colleagues that any argument or defense based on that language is waived.

[3] We shall substitute a new notice to conform to the Order as modified.

[4] 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013).

claims for resolution by individual arbitration, thereby compelling them to waive their Section 7 right to pursue such claims through class or collective action in all forums, arbitral and judicial. The judge further found, again relying on *D. R. Horton*, that maintenance of the arbitration policy also violates Section 8(a)(1) by leading employees to reasonably believe that they are prohibited from filing unfair labor practice charges with the Board. See also, *U-Haul Co. of California*, 347 NLRB 375 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007). In *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), which issued after the judge's decision, the Board affirmed the relevant holdings of *D. R. Horton*. Based on the judge's application of *D. R. Horton*, and the subsequent decision in *Murphy Oil*, we affirm both of the Section 8(a)(1) maintenance violations found by the judge.[5]

The Respondent contends that the maintenance violations are time-barred by Section 10(b) because the arbitration policy was implemented and signed by Charging Party, James Sullivan, more than 6 months before the initial unfair labor practice charge was filed. We reject this contention, as did the judge, because the Respondent continued to maintain the unlawful policy throughout the 6-month period preceding the filing of the charge. The Board has long held under these circumstances that maintenance of an unlawful workplace rule, such as the arbitration policy here, constitutes a continuing violation that is not time-barred by Section 10(b). See *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 2

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[5] For the reasons set forth in fn.16 of *Murphy Oil*, we reject the Respondent's assertion that the decision in *D. R. Horton* was issued by an invalidly constituted majority and is thus null and void.

and fn.7 (2015); *The Neiman Marcus Group*, 362 NLRB No. 157, slip op. at 2 fn.6, and cases cited therein.

We also reject the Respondent's argument that the complaint should be dismissed because Sullivan acknowledged in writing that he voluntarily agreed to the arbitration policy. In footnote 28 of *D. R. Horton*, the Board left open the question whether an agreement to resolve employment disputes only by arbitration and only on an individual basis, would violate the Act if it was not imposed by the employer. Specifically, the Board stated that it did not reach the question:

> whether, if arbitration is a mutually beneficial means of dispute resolution, an employer can enter into an agreement **that is not a condition of employment** with an individual employee to resolve either a particular dispute or all potential employment disputes through non-class arbitration rather than litigation in court. (emphasis added).

Here, however, the Respondent's arbitration policy, the Dispute Resolution Program (DRP), states prominently, in capitalized and bolded letters, that it is a "**CONDITION OF YOUR EMPLOYMENT AND IS THE EXCLUSIVE MEANS BY WHICH THOSE PROBLEMS MAY BE RESOLVED**." The DRP further specifies that it is a self-executing document and that "submission of an application, acceptance of employment or the continuation of employment by an individual shall be deemed to be acceptance of the Dispute Resolution Program. No signature shall be required for the policy to be applicable." This same self-executing provision is included in a separate document, the "Agreement for Receipt for Dispute Resolution Program" (Agreement), that is dis-

tributed to all employees for their signature and which incorporates the unlawful provisions of the DRP.

Together, both documents make explicit that the arbitration policy is a condition of employment and that employees are bound to it regardless of whether they sign the Agreement. As such, neither the DRP nor the Agreement presents the "not a condition of employment" issue left open in *D. R. Horton*.[6]

2. The judge also found, and we agree, that the Respondent, through its parent company, PJ United, Inc. (PJU), violated Section 8(a)(1) by enforcing the arbitration policy in response to a lawsuit that Sullivan filed

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[6] We note that there is a statement on the last page of the DRP, under the heading "Not an Employment Contract/Exclusive Remedy," that states this "Program will not prevent you from filing a charge with any state or federal administrative agency." The Respondent did not raise any defense to either of the 8(a)(1) maintenance allegations that was predicated on this language, either to the judge or in exceptions to the Board. Therefore any potential defense is waived under Sec. 102.46 (b)(2) of the Board's Rules and Regulations.

In any event, we find that the language does not render the arbitration policy lawful. First, the DRP specifies under the heading "Claims Not Subject to Arbitration," that only three claims or disputes are not covered by the policy. The sentence referencing charges filed with State or Federal administrative agencies is not a specified exclusion in that section. Second, the sentence appears only in the DRP, but is omitted from the Agreement that employees are given to sign. As a result, there is a conflict both within the DRP itself, and between the DRP and the Agreement, that creates an ambiguity that likely would confuse employees and applicants as to whether the sentence is applicable at all. Such ambiguity, properly construed against the Respondent as drafter of the arbitration policy, precludes reliance on the sentence as a defense to the maintenance violations. *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).

against PJU. Sullivan filed the collective action lawsuit in the United States District Court for the Northern District of Alabama, on behalf of himself and similarly situated employees, alleging that PJU and its CEO committed wage violations under the Fair Labor Standards Act (FLSA). In response, PJU filed a motion with the court to stay the lawsuit "until arbitration of Sullivan's dispute with the Company has been had on a single-claimant/noncollective or class-wide basis in accordance with the terms of the Agreements and the [DRPs]." PJU averred in its motion that the DRP defines the "Company" to include PJU as well as Sullivan's employer, the Respondent.[7]

In *Murphy Oil*, the Board found that a respondent's motion in Federal district court in response to an FLSA collective action, to compel employees to individually arbitrate their wage disputes as required by its unlawful arbitration agreement, violated Section 8(a)(1) based on established precedent that enforcement of an unlawful rule is itself unlawful because it interferes with the exercise of Section 7 rights. 361 NLRB No. 72, slip op. at 19. As in *Murphy Oil*, we find that the Respondent enforced its arbitration policy in violation of Section 8(a)(1), by the district court motion filed by PJU to compel Sullivan and similarly situated employees to arbitrate their employment claims individually.[8]

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[7] The court granted the motion, but deferred to the arbitrator the question of whether the wage claims should be arbitrated individually or collectively.

[8] To the extent the Respondent argues that Sullivan was not engaged in concerted activity in filing the FLSA suit in Federal district court, we reject that argument. As the Board made clear in *Beyoglu*, 362 NLRB No. 152 (2015), "the filing of an employment-

The Respondent argues that it cannot be found to have committed the enforcement violation because PJU alone filed the district court motion. We disagree. The arbitration policy on which PJU relied in support of its motion specifies that it is a "contract between the employee and the Company" and the DRP defines the Company as PJU and its subsidiaries, including the Respondent. And as noted above, PJU acknowledged in its motion that the "Company" included the Respondent. Thus, by PJU making clear to the court that the Company seeking enforcement of the arbitration contract between Sullivan and the Company included the Respondent, it was, as the judge correctly found, a "direct participa[nt]" in that court enforcement action. We conclude, therefore, that the Respondent is appropriately held accountable for the 8(a)(1) enforcement violation committed against Sullivan and his fellow employees.[9]

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related class or collective action by an individual is an attempt to initiate, to induce, or to prepare for group action and is therefore conduct protected by Section 7." Id., slip op. at 2. See also, *D. R. Horton*, 357 NLRB No. 184, slip op. at 2.

[9] The Respondent also argues that the enforcement violation is foreclosed because Sullivan was no longer employed at the time the court motion was filed. We reject this argument, first because former employees are not stripped of their Sec. 7 rights, *Waco, Inc.*, 273 NLRB 746, 747 (1984), and second because the arbitration policy here specifically states that it "survives the termination of [Sullivan's] employment."

ORDER[10]

The Respondent, PJ Cheese, Inc., Birmingham, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory and binding arbitration agreement that employees reasonably would believe bars or restricts employees' rights to file charges with the National Labor Relations Board or to access the Board's processes.

(b) Maintaining and/or enforcing a mandatory and binding arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unlawful arbitration agreement in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict employees' right to file charges

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[10] Consistent with our decision in *Murphy Oil*, we amend the judge's remedy to order the Respondent to notify the district court that it has rescinded or revised the unlawful aspects of its arbitration policy, and to inform the court that it no longer opposes Sullivan's FLSA lawsuit on the basis of the unlawful policy.

with the National Labor Relations Board or to access the Board's processes.

(b) Notify all current and former employees who were required to sign the unlawful arbitration agreement that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Notify the United States District Court for the Northern District of Alabama that it has rescinded or revised the unlawful arbitration agreement upon which it based its motion to stay the collective FLSA lawsuit of James Sullivan and to compel individual arbitration of his claim, and inform the court that it no longer opposes the action on the basis of the unlawful arbitration agreement.

(d) In the manner set forth in the remedy section of the judge's decision, reimburse James Sullivan for any reasonable attorneys' fees and litigation expenses that he may have incurred in opposing the Respondent's motion to stay his collective lawsuit and compel individual arbitration.

(e) Within 14 days after service by the Region, post at its Birmingham, Alabama facility copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employ-

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[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix" to all current employees and former employees employed by the Respondent at any time since January 17, 2013, and any employees against whom the Respondent has enforced its mandatory arbitration agreement since July 17, 2013.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 10, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. Aug. 20, 2015

_____

Mark Gaston Pearce, Chairman

_____

Harry I. Johnson, III, Member

_____

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory and binding arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board or to access the Board's processes.

WE WILL NOT maintain and/or enforce a mandatory and binding arbitration agreement that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the unlawful arbitration agreement in all of its forms, or revise it in all of its forms to make clear that the unlawful arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board or to access the Board's processes.

WE WILL notify all current and former employees who were required to sign the unlawful arbitration agreement that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

WE WILL notify the court in which we have moved to stay the collective lawsuit filed by James Sullivan that we have rescinded or revised the unlawful arbitration agreement upon which we based our motion, and WE WILL inform the court that we no longer oppose Sullivan's collective lawsuit on the basis of that agreement.

WE WILL reimburse James Sullivan for any reasonable attorneys' fees and litigation expenses that he may have incurred in opposing our motion to stay his collective lawsuit and compel individual arbitration.

PJ CHEESE, INC.

The Board's decision can be found at www.nlrb.gov/case/10-CA-113862 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E. Room 5011, Washington, D.C. or by calling (202) 273-1940.

[QR CODE OMITTED]

Kerstin I. Meyers, Esq., for the Government.[1]

William K. Handcock, Esq., for the Company.[2]

Mark Potashnick, Esq., for the Charging Party.[3]

DECISION

STATEMENT OF THE CASE

WILLIAM NELSON CATES, Administrative Law Judge. This case was tried before me on April 28, 2014, in Birmingham, Alabama. The charge initiating this matter was filed on September 23, 2013,[4] and amended on November 15 and 17 and again on December 27. The General Counsel issued a complaint and notice of hearing (complaint) on January 3, 2014. The Government alleges the Company, since on or about January 2010, has maintained a mandatory arbitration policy which contains provisions that unlawfully prohibits employees from engaging in protected concerted activities and that leads employees reasonably to believe they are prohibited from filing charges with the National Labor Relations Board (Board). It is stipulated that Charging Party Sullivan, on November 30, 2010, signed the Company's Agreement and Receipt for Dispute Resolution Program in which Sullivan agreed, as a condition of his employment, that all

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[1] I shall refer to counsel for the General Counsel as counsel for the Government and the General Counsel as the Government.

[2] I shall refer to counsel for the Respondent as counsel for the Company and shall refer to the Respondent as the Company. It is noted that in the parties partial stipulation of facts, set forth elsewhere here, the Company is referred to as the Respondent.

[3] I shall refer to James Sullivan as the Charging Party and counsel for Sullivan as counsel for the Charging Party.

[4] All dates herein are 2013, unless stated otherwise.

work place disputes would be submitted to final and binding arbitration on an individual basis and not on a class-wide basis. It is stipulated that on July 9, Charging Party Sullivan filed a fair labor standards complaint against the Company in the United States District Court for the Northern District of Alabama, Western Division, captioned *James Sullivan v. PJ United, Inc.,* and *Douglas Stephens Civil Action No. 7:13-cv-01275-LSC*. It is alleged that since on or about July 17, the Company, in response to Sullivan's suit, has sought to enforce the arbitration agreement by filing with the court a Motion to Stay the Trial of This Civil Action and require the matter be arbitrated on an individual basis. The Government alleges, that by the conduct just described, the Company has been interfering with, restraining, and coercing employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act (the Act) and is in violation of Section (8)(a)(1) of the Act.

In essence, this is another case raising issues concerning arbitration policies that effect collective bargaining and representational rights related to *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in pertinent part 737 F.3d 344 (2013).

The Company, in its answer to the complaint, and at trial, denies having violated the Act in any manner alleged in the complaint.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Only one witness was called (by the Company) and the parties were able to stipulate to the matters about which the witness testified. I have studied the whole record including the parties partial written stipulations of fact which, I received in

evidence, as Joint Exhibits 1-9, and based on the detailed findings and analysis below, I conclude and find the Company violated the Act essentially as alleged in the complaint.

FINDINGS OF FACT

The Charge

The Company in its posttrial brief contends the complaint was not preceded by a valid charge. The Company correctly notes the original and each of the three amended charges were filed by the Charging Party's attorney on behalf of the Charging Party. The Company asserts no evidence was presented at trial to establish Charging Party Sullivan authorized Charging Party Attorney Potashnick to file and amend the charges on his behalf. The Company also contends the charge was not "sworn to" as required by the Board's Rules and Regulations Section 102.11.

I find the original and each of the amended charges were validly filed. See *Appex Investigation & Security Co.*, 302 NLRB 815, 818-819 (1991). In *Appex*, such a procedural defense was addressed, in part, as follows:

> Section 102.9 of the Board's Rules and Regulations provides that a charge may be filed "by any person" . . . .
>
> "The simple fact is that anyone for any reason may file charges with the Board." *Operating Engineers Local 39 (Kaiser Foundation)*, 268 NLRB 115, 116 (1983).

It is clear the Charging Party's attorney may validly file a charge on behalf of the Charging Party. Section 102.1 of the Board's Rules and Regulations defines the

term "person" as inter alia a "representative" for the person. Charging Party Attorney Potashnick signed the charge, and amended charges, with the following "Declaration" which states: "I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief."

I conclude and find the Company's contention that the complaint here was not preceded by a valid charge is without merit.

I. JURISDICTION AND SUPERVISORY STATUS

The Company is an Alabama corporation with an office and place of business in Birmingham, Alabama, from which it operates a number of retail restaurant facilities in Alabama, Louisiana, Texas, Mississippi, Tennessee, Illinois, Missouri, Ohio, Virginia, and Utah. During the calendar year ending December 1, the Company in conducting its business operations derived gross revenues in excess of $500,000, and purchased and received at its Alabama facilities goods and products valued in excess of $50,000 directly from points located outside the State of Alabama. The parties admit and I find the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties do not contest that Company Director of Human Resources Becky Gwarjanski is a supervisor of the Company within the meaning of Section 2(11) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

The principle issues in this proceeding are whether the Company has violated, and is violating, Section 8(a)(1) of the Act by maintaining a mandatory arbitration

agreement which contains provisions that unlawfully prohibits employees from engaging in protected concerted activities; and whether the language of the mandatory agreement also leads employees reasonably to believe that they are prohibited from filing charges with the Board.

B. Facts

The stipulated facts (on the record and by exhibits) are, in pertinent part, as follows:

1. Sullivan voluntarily ended his employment with the Company in early January 2012.[5] (Tr. p. 23, LL. 20-23.)

2. Company Director of Human Resources Becky Gwarjanski, in a written declaration given under oath (Jt. Exh. 2)[6] and in trial testimony here (Tr. p. 26, LL. 13-14), indicated the Company is a wholly- owned subsidiary of PJ United, Inc. Gwarjanski also indicated PJ United developed the Dispute Resolution Program (DRP) which covers all of the Company's employees, and has been modified from time to time, with the most recent modified version being in 2010. A copy of the 2010 modification of the DRP was received in evidence (Jt. Exh. 3). Relevant portions of the DRP read as follows:

DISPUTE RESOLUTION PROGRAM

This Dispute Resolution Program is adopted for PJ United, Inc., PJ Cheese, Inc., PJ Louisiana, LLC, PJ

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[5] I shall refer to the transcript as Tr. with "p. or pp." indicating the page(s) and "L. or LL." as the line(s).

[6] I shall refer to the "joint exhibits" as Jt. Exh. with the number assigned each joint exhibit.

Chippewa, LLC, PJ Utah, LLC, and Ohio Pizza Delivery Company, all of which are collectively hereinafter referred to as the "Company."

. . . .

THIS PROGRAM IS A CONDITION OF YOUR EMPLOYMENT AND IS THE MANDATORY AND EXCLUSIVE MEANS BY WHICH THOSE PROBLEMS MAY BE RESOLVED, SO READ THE INFORMATION IN THIS PROGRAM BOOKLET CAREFULLY.

Program Rules

Claims Subject to Arbitration

Claims and disputes subject to arbitration include all those legal claims you may now or in the future have against the Company (and its successors or assigns) or against its officers, directors, shareholders, employees or agents, including claims related to any Company employee benefit program or against its fiduciaries or administrator (in their personal or official capacity), and all claims that the Company may now or in the future have against you, whether or not arising out of your employment or termination, except as expressly excluded under the "Claims Not Subject to Arbitration" section below.

The legal claims subject to arbitration include, but are not to be limited to:

- Claims for wages or other compensation,
- Claims for breach of any contract, covenant or warranty (expressed or implied);

- Tort claims (including, but not limited to, claims for physical, mental or psychological injury, but excluding statutory workers compensation claims);
- Claims for wrongful termination,
- Sexual harassment,
- Discrimination (including, but not limited to, claims based on race, sex, sexual orientation, religion, national origin, age, medical condition or disability whether under federal, state or local law);
- Claims for benefits or claims for damages or other remedies under any employees benefit program sponsored by the Company (after exhausting administrative remedies under the terms of such plans);
- "Whistleblower" claims under any federal, state or other governmental law, statute, regulation or ordinance;
- Claims for a violation of any other noncriminal federal, state or other governmental law, statute, regulation or ordinance, and
- Claims for retaliation under any law, statute, regulation or ordinance, including retaliation under any workers compensation law or regulation.

Claims Not Subject to Arbitration

The only claim or disputes not subject to arbitration are as follows:

- Any claim by an employee for benefits under a plan or program which provides its own binding arbitration procedure.

- Any statutory workers compensation claim; and
- Unemployment insurance claims.

Neither the employee nor the Company has to submit the items listed under this "Claims Not Subject to Arbitration" caption to arbitration under this Program and may seek and obtain relief from a court or the appropriate administrative agency.

The parties also agree that any arbitration between the employee and the Company is their individual claim and that any claim subject to arbitration will not be arbitrated on a collective or a class-wide basis, provided however, that this provision shall not apply to any prospective class or collective action based on alleged violations of wage and hour laws if, and only if, such claim should cause the agreement to arbitrate to be unenforceable under the prevailing law.

Also, any nonlegal dispute is not subject to arbitration. Examples include disputes over a performance evaluation, issues with co-workers, or complaints about your work site or work assignment which do not allege a legal violation.

3. Charging Party Sullivan signed the Agreement and Receipt for Dispute Resolution Program on November 30, 2010, which was received in evidence (Jt. Exh. 4). Relevant portions of the Receipt reads as follows:

Agreement And Receipt For
Dispute Resolution Program

MUTUAL PROMISE TO RESOLVE CLAIMS BY BINDING ARBITRATION. The Company and I agree that all legal claims or disputes covered by the Agreement must be submitted to binding arbitration

and that this binding arbitration will be the sole and exclusive final remedy for resolving any such claim or dispute. I also agree that any arbitration between the Company and me is of an individual claim and that any claim subject to arbitration will not be arbitrated on a multi-claimant, a collective or a class-wide basis.

The mutual obligations set forth in this Agreement shall constitute a contract between the Employee and the Company but shall not change an Employee's at-will relationship or any term of any other contract or agreement between the Company and Employee. This Policy shall constitute the entire agreement between the Employee and Company for the resolution of Covered Claims. The submission of an application, acceptance of employment or the continuation of employment by an individual shall be deemed to be acceptance of the dispute resolution program. No signature shall be required for the policy to be applicable.

Legally protected rights covered by this Dispute Resolution Program are all legal claims, including claims for wages or other compensation, claims for breach of any contract, covenant or warranty (expressed or implied); that claims (including, but not limited to, claims for physical, mental or psychological injury, but excluding statutory workers compensation claims); claims for wrongful termination, sexual harassment; discrimination (including, but not limited to, claims based on race, sex, religion, national origin, age, medical condition or disability, whether under federal, state or local law); claims for benefits or claims for damages of other remedies under any employee benefit program sponsored by the Company (after ex-

hausting administrative remedies under the terms of such plans); "whistleblower" claims under any federal, state or other governmental law, statute, regulation or ordinance, and claims for retaliation under any law, statute, regulation or ordinance, including retaliation under any workers compensation law or regulation.

I understand and agree that by entering into this Agreement, I anticipate gaining the benefits of a speedy, impartial dispute resolution procedure. This procedure is explained in the Dispute Resolution Program Booklet, which I acknowledge I have received and read or have had an opportunity to read.

MULTI-STATE BUSINESS. I understand and agree the Company is engaged in transactions involving interstate commence and that my employment involves such commerce. I agree that the Federal Arbitration Act shall govern the interpretation, enforcement, and proceedings under this Agreement.

4. Sullivan, on July 9, filed a Complaint in United States District Court, Northern District of Alabama, Western Division, against the Company in *James Sullivan v. PJ United, Inc., and Douglas Stephens Civil Action No. 7:13-cv-1275-LSC*. (Jt. Exh. 5.) Relevant portions of the Complaint read as follows:

COMPLAINT

> Plaintiff James Sullivan, individually and on behalf of all other similarly situated delivery drivers, for his Complaint against defendants PJ United, Inc. and Douglas Stephens, alleges as follow:
>
> 2. Plaintiff James Sullivan, and all other similarly situated delivery drivers, work or previously worked as delivery drivers at Papa John's restau-

rants owned and operated by Defendants. This lawsuit is brought as a collective action under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq*., to recover unpaid minimum wages owed to Plaintiff and all other similarly situated workers employed by Defendants.

Collective Allegations

38. Plaintiff Sullivan brings this FLSA claim as an "opt-in" collective action on behalf of similarly situated delivery drivers who opt-in to this case pursuant to 29 U.S.C. § 216(b).

39. Plaintiff, individually and on behalf of other similarly situated employees, seeks relief on a collective basis challenging Defendants' practice of failing to pay employees federal minimum wage. The number and identity of other plaintiffs yet to opt-in may be ascertained from Defendants' records, and potential class members may be notified of the pendency of this action by regular mail.

5. In response to Sullivan's Complaint the Company filed with the Federal District Court a Motion to Stay the Trial of this Civil Action on July 17. (Jt. Exh. 6.) Relevant portions of the Motion read as follows:

1. The Company has adopted a Dispute Resolution Program (the "Program"). (Gwarjanski Dec., Exh. 1.)

2. Sullivan twice signed an Agreement and Receipt for Alternative Dispute Resolution (the "Agreement"), once on November 30, 2010 and once on May 28, 2008. (Gwarjanski Dec., Exhs. 2 and 3.)

3. The Program reflects that all legal claims, including claims for wages, that arise from employment with the Company shall be resolved through arbitration as provided in the Program. (Gwarjanski Dec., Exh. 1.)

4. The Program defines the Company to include PJ United, Inc.; certain related companies, including Sullivan's employer, PJ Cheese, Inc. ("PJ Cheese"); and the Company's officers, directors, shareholders, and employees, including Douglas Stephens. (Gwarjanski Dec., Exh. 1, p. 6; Doc. 1, par. 6.)

5. Each signed Acknowledgement reflects that Sullivan received a copy of the Program; that he read or had the opportunity to read the Program; that he agreed that all legal claims between himself and the Company, including claims for wages, "must be submitted to binding arbitration," that the mutual obligations set forth in the Agreement constitute a contract between Sullivan and the Company; that "the Company is engaged in transactions involving interstate commerce and that [Sullivan's] employment involves such commerce," and that Sullivan voluntarily entered into the Agreement. (Gwarjanski Dec., Exhs. 2 and 3.)

. . . .

6. In each signed Agreement, Sullivan unambiguously stated: "I also agree that any arbitration between the Company and me is of an individual claim and that any claim subject to arbitration will not be arbitrated on a multi-claimant, a collective or a class-wide basis." (Gwarjanski Dec., Exhs. 2

and 3.) The Program contains the same provision. (Gwarjanski Dec., Exh. 1, p. 6.)

7. Each signed agreement constitutes a written agreement to arbitrate within the meaning of Section 3 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 3.

8. Sullivan's Complaint reflects a dispute concerning wages, which dispute arises from his employment with the Company. (Doc. 1.)

8. [9.] Section 3 of the FAA requires this Court to stay the trial of this civil action "until such arbitration has been had in accordance with the terms of the agreement."

. . . .

11. The Company has submitted an arbitration demand to the American Arbitration Association seeking arbitration of Sullivan's individual claims against the Company and therefore is not in default in proceeding with arbitration under the signed Agreements.

WHEREFORE, the Company respectfully moves this Court to enter an order staying the trial of this civil action until arbitration of Sullivan's dispute with the Company has been had on a single-claimant/noncollective or class-wide basis in accordance with the terms of the Agreements and the Programs.

6. On August 5, the Company filed a Response to Sullivan's Attempt to Show Cause. (Jt. Exh. 7.)

7. On September 10, United States District Court Judge L. Scott Coogler issued a Memorandum of

Opinion (Jt. Exh. 8) in which Judge Coogler concluded the Company's Motion to Stay Trial Pending Arbitration would be granted, but, the Company's request to the Court to order Sullivan to pursue his arbitration only on a single claimant basis would be denied because Judge Coogler concluded the arbitrator must decide whether the collective action waiver applies in this case.

8. On September 10 United States District Court Judge Coogler issued an Order (Jt. Exh. 9) in accordance with the Memorandum of Opinion set forth above.

I first address the issue of whether the allegations of the complaint are time-barred. The Company contends the entire complaint should be dismissed because it is time-barred by Section 10(b) of the Act in that the complaint is based on events that occurred outside the applicable limitations period. Section 10(b) of the Act in part provides ". . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charges with the Board . . . ." It is undisputed Charging Party Sullivan signed the most recent Agreement and Receipt for Dispute Resolution Program containing the mandatory arbitration policy, at issue here, on November 30, 2010, well outside the 10(b) period. As noted elsewhere, here the original charge was filed on September 23. It is alleged the Company, about July 17, has enforced the mandatory arbitration policy, by filing a Motion to Stay Trial in the United States District Court for the Northern District of Alabama, Western Division, and, by subsequent responsive pleading. The allegations are within the 10(b) limitations period, but, are they inescapably grounded in

pre-10(b) events? They are not. The Company's July 17, filing of its Motion to Stay Trial of this (Sullivan's) civil action in which the Company sought to stay the proceedings until Sullivan's dispute with the Company has been decided on a single-claimant/noncollective or class-wide basis pursuant to the mandatory arbitration policy signed by Sullivan, is clearly within the 10(b) limitation period. The enforcement action by the Company, based on Sullivan's signed mandatory arbitration policy agreement, took place approximately 2 months before the charge here was filed. This action, by the Company, demonstrates it was enforcing its mandatory agreement policy within the applicable time period.

More specifically, I find the Company's 10(b) defense without merit. While it is clear Sullivan signed the mandatory arbitration agreement policy on November 30, 2010, well outside the 10(b) period, the Company continued to maintain and enforce the mandatory arbitration policy well into the 10(b) period. The Government's allegation the Company has, since July 17, 2013, a time within the 10(b) period, continued to maintain its mandatory arbitration policy is established. The Company's motion filing on July 17, a time clearly within the 10(b) period, was grounded on Sullivan's having signed the mandatory arbitration policy in which he agreed to arbitration on an individual basis. In these circumstances, the date Sullivan signed the mandatory arbitration policy is not controlling or relevant. What is controlling and relevant is the Company continued to maintain and enforce Sullivan's signed mandatory arbitration policy agreement within the 10(b) period. By continuing to maintain and enforce the mandatory arbitration policy within the 10(b) period establishes the conduct and action by the Company is not inescapably grounded in pre-10(b)

events. The Board, in *Lafayette Park Hotel*, 326 NLRB 824 (1998), held an employer commits a continuing violation of Section 8(a)(1) of the Act throughout the period an unlawful rule, is maintained and enforcement is sought. Stated differently, the Board has held that, where an employer, as here, enforces an unlawful rule during the 10(b) period it violates Section 8(a)(1) of the Act. Such is a continuing violation. See: *Teamsters Local 293 (R. L. Lipton Distributing)* 311 NLRB 538, 539 (1993). The continuing violation I find here precludes the Company from a valid 10(b) defense.

I reject the Company's contention that Charging Party Sullivan was not an employee of the Company at the time the Company filed its Motion to Stay in response to his *James Sullivan v. PJ United, Inc.*, and *Douglas Stephens Civil Action No. 7:13-cv-01275-LSC*, case. The Company's argument that since Sullivan voluntarily terminated his employment with the Company outside the 10(b) limitations period his right to engage in concerted activities or file actions related thereto had long ended when the Company filed its Motion to Stay. I find Sullivan remained an employee within the meaning of the Act at all times, material herein. The Company, for example, still considered him an employee when it filed its Motion to Stay because the Motion to Stay was grounded on documents signed by Sullivan as an employee of the Company.

The Company asserts Sullivan was not engaging in "protected concerted activity" when he filed his litigation in *James Sullivan v. PJ United, Inc.,* and *Douglas Stephens Civil Action No. 7:13-cv-01275-LSC*. The Company asserts Sullivan was not involved in any group action when he filed his class action lawsuit because he

did not seek support of others before filing his suit. The Company's argument is without merit. The Board in *D. R. Horton, Inc.* held that filing a class action lawsuit is protected concerted activity. The Board in so holding relied on *Meyers Industries*, 281 NLRB 882, 887 (1986), for the proposition that the actions of a single employee, such as Sullivan here, are protected, if the employee "seek[s] to initiate or to induce or to prepare for group action." *D. R. Horton, Inc.*, slip op. at 4. The Board further held "an individual who files a class or collective action . . . in court . . . seeks to initiate or induce group action and is engaged in conduct protected by Section 7." The filing of a class action lawsuit to address wages, hours, and other terms and conditions of employment, as is the case here, constitutes concerted protected activity, unless done with malice or in bad faith of which there is none demonstrated here.

As noted elsewhere, here the complaint alleges the Company has violated Section 8(a)(1) of the Act by, since about January 2010, maintaining and enforcing its mandatory arbitration policy that unlawfully prohibits employees from engaging in protected concerted activities, and, that leads employees reasonably to believe that they are prohibited from filing charges with the Board.

The arbitration policy here is mandatory. The policy in all capital letters states; "THIS PROGRAM IS A CONDITION OF YOUR EMPLOYMENT AND IS THE EXCLUSIVE MEANS BY WHICH THOSE PROBLEMS MAY BE RESOLVED, SO READ THE INFORMATION IN THIS PROGRAM BOOKLET CAREFULLY." Some of the specifically stated claims subject to the *mandatory* arbitration policy includes, in limited part; wages, legal claims regarding termination,

discrimination based on sex, sexual orientation, religion, national origin, age, medical condition or disability whether under Federal, State, or Local law; and, claims for a violation of any other noncriminal Federal, State, or other governmental law, statute, regulation, or ordinance. The only claims not subject to arbitration are; any claim by an employee for benefits under a plan or program which provides its own binding arbitration procedure; any statutory workers compensation claims; and, unemployment insurance claims. In the Agreement and Receipt for Dispute Resolution Program that employees are required to sign, reads in part; "The Company and I agree that all legal claims or disputes covered by the Agreement must be submitted to binding arbitration and that this binding arbitration will be the sole and exclusive final remedy for resolving any such claim or dispute. I also agree that any arbitration between the Company and me is of an individual claim and that any claim subject to arbitration will not be arbitrated on a multiclaimant, a collective or a class-wide basis."

In looking at the overall content of the mandatory arbitration policy here, it is necessary to review the rules the Board has established for doing so.

In evaluating whether a rule applied to all employees, as a condition of continued employment, including the mandatory arbitration policy at issue here, violates Section 8(a)(1) of the Act, the Board, as noted in *D. R. Horton, Inc.*, at 4-6, applies its test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), citing *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007). Pursuant to *Lutheran Heritage* the inquiry, or test to be applied, is whether the rule explicitly restricts activities protected

by Section 7 of the Act. If so, the rule is unlawful. If it does not explicitly restrict protected activity, the finding of a violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

The Company's mandatory arbitration policy *explicitly* restricts activities protected by Section 7 of the Act and, as such, is unlawful under Section 8(a)(1) of the Act. In this regard the Board in *D. R. Horton, Inc.,* supra slip op. at 13, held an employer violates Section 8(a)(1) of the Act "by requiring employees [as here] to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial." The Board noted at 10 "The right to engage in collective action—including collective legal action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rests." Stated differently, the Board in *D. R. Horton, Inc.,* supra determined that as a condition of employment "employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums arbitral and judicial." *D. R. Horton, Inc.*, slip op. at 12.

The General Counsel also alleges the mandatory arbitration policy leads employees reasonably to believe that they are prohibited from filing charges with the Board. I agree. The agreement language, which in part, states: "The Company and I agree that all legal claims and disputes covered by the agreement must be submitted to binding arbitration and that this binding arbitration will be the sole and exclusive final remedy for resolving any such claim or dispute" would lead employees to reasona-

bly believe that employment, wage, discrimination, and termination issues must be submitted exclusively to binding arbitration and not to the Board. The only employment issues not subject to the mandatory arbitration policy here involves workers compensation and unemployment insurance claims or any benefit plan that has its own arbitration procedure. Simply stated the language of the mandatory arbitration policy here may reasonably be construed, by employees, to restrict them from, concertedly or individually, filing charges under the NLRA and such interferes with the employees Section 7 rights and violates Section 8(a)(1) of the Act.

The Company, in its posttrial, brief notes the Government seeks, as party of any remedy, the Company reimburse Charging Party Sullivan for his reasonable litigation expenses related to the Company's Motion to Stay in his civil action *James Sullivan v. PJ United, Inc.*, and *Douglas Stephens Civil Action No. 7:13-cv-01275-LSC*. The Company contends the requested relief cannot be granted because PJ Cheese, the Company here, did not file the Motion to Stay in the civil action but rather PJ United, which is not named as a party in this proceeding, filed the action.

I find no merit in the Company's contention. First, I note PJ Cheese is a wholly-owned subsidiary of PJ United. PJ United adopted the Dispute Resolution Program for its PJ Cheese employees. The Acknowledgement and Receipt for the Dispute Resolution Program that Charging Party Sullivan signed was used by the Company in its defense to the civil action brought by Sullivan against PJ United. In fact, without the Company's (PJ Cheese) active participation in the civil suit PJ United would not have had, or been able to advance, the defense

it did in Charging Party Sullivan's civil suit. Stated differently, PJ United lacked any agreement with Charging Party Sullivan and in order to prevail in the civil suit, as it did, PJ United needed, and obtained, the Company here, PJ Cheese's, direct participation in its legal defense based on provisions of the Dispute Resolution Program. I note Company (PJ Cheese) Director of Human Resources Becky Gwarjanski provided a sworn declaration in PJ United's defense outlining the fact Charging Party Sullivan had signed and was bound by the Dispute Resolution Program for employees of the Company here (PJ Cheese). The Company's actions directly caused the accrual of legal fees and I conclude Charging Party Sullivan should be compensated for those expenses as explained in the Remedy section of the decision.

CONCLUSIONS OF LAW

1. The Company, PJ Cheese, Inc., Birmingham, Alabama, is, and has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By maintaining a mandatory arbitration policy, that waives the right of its employees to maintain class or collective actions in all forums, judicial or arbitral, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violates Section 8(a)(1) of the Act.

3. By maintaining a mandatory arbitration policy, that leads employees reasonably to believe they are prohibited from filing charges with the National Labor Relations Board the Company has engaged in unfair labor practices affecting commerce within the meaning of

Section 2(6) and (7) of the Act and violates Section 8(a)(1) of the Act.

4. By, on July 17, 2013, enforcing the mandatory arbitration agreement by asserting the provisions thereof in litigation brought against the Company in *James Sullivan v. PJ United, Inc.,* and *Douglas Stephens Civil Action No. 7:13-cv-01275-LSC* and by filing a motion to, in essence, compel plaintiffs to individually arbitrate their class-wide wage and hour claims against the Company, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and has violated Section 8(a)(1) of the Act.

REMEDY

Having found the Company has engaged in certain unfair labor practices, I shall recommend it cease and desist therefrom and take certain affirmative action designated to effectuate the policies of the Act.

I recommend the Company be ordered to rescind, modify or revise its mandatory arbitration policy to clearly inform its employees the agreement does not constitute a waiver, in all forums, of their right to maintain employment-related class or collective actions and/or to prohibit them from filing charges with the National Labor Relations Board, and, to notify its employees the mandatory arbitration policy has been rescinded, modified or revised and provide a copy of any modified or revised agreement to all employees.

I recommend the Company be required to reimburse Charging Party James Sullivan for any litigation and related expenses, with interest to-date, and in the future, directly related to the Company's filings in *James Sulli-*

van v. PJ United, Inc., and *Douglas Stephens Civil Action No. 7:13-cv-01275-LSC*. See: *Federal Security, Inc.*, 359 NLRB No. 1, slip op. at 14 (2012). Determining the applicable rate of interest on the reimbursement will be as outlined in *New Horizons for the Retarded*, 283 NLRB 1173 (1987) (adopting the Internal Revenue Service rate for underpayment of Federal taxes). Interest on all amounts due to Charging Party Sullivan shall be computed on a daily bases as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

I recommend the Company be required upon request, to file a joint motion with Charging Party James Sullivan to vacate United States District Court Judge L. Scott Coogler's Order of September 10, 2013, granting the Company's motion to stay the trial of Sullivan's civil action in *James Sullivan v. PJ United, Inc., and Douglas Stephens Civil Action No. 7:13-cv-01275-LSC*. See *Federal Security, Inc.*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Company, PJ Cheese, Birmingham, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[7] If no exceptions are filed provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 201.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Maintaining a mandatory arbitration policy, that waives employees' right to maintain class or collective actions in all forums; whether arbitral or judicial.

(b) Maintaining a mandatory arbitration policy that leads employees reasonably to believe that they are prohibited from filing charges with the National Labor Relations Board.

(c) Seeking to enforce its mandatory arbitration policy by filings in any court to compel individual arbitration pursuant to the terms of its mandatory arbitration policy.

(d) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their right under the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Within 7 calendar days after the Board enters its Decision, and upon request of Charging Party James Sullivan, file a joint motion with Sullivan to vacate United States District Court Judge L. Scott Coogler's Order of September 10, 2013, granting the Company's motion to stay the trial of Sullivan's civil action in *James Sullivan v. PJ United, Inc., and Douglas Stephens Civil Action No. 7:13-cv-01275-LSC*.

(b) Reimburse Charging Party James Sullivan for any legal and related expenses incurred, to-date and in the future, with respect to *James Sullivan v. PJ United, Inc.,* and *Douglas Stephens Civil Action No. 7:13-cv-01275-LSC,* with interest, as described in the remedy section of this decision.

(c) Rescind, modify or revise its mandatory arbitration policy to ensure its employees the mandatory ar-

bitration policy does not contain or constitute a waiver, in all forums, of their right to maintain employment- related class or collective actions.

(d) Rescind, modify or revise its mandatory arbitration policy to ensure its employees the mandatory arbitration policy does not prohibit them from filing charges with the National Labor Relations Board.

(e) Notify its employees of the rescinded, modified or revised mandatory arbitration policy and provide a copy of any modified or revised policy to each employee.

(f) Within 14 days after service by the Region, post at its Birmingham, Alabama facility, copies of the notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as email, posting on an intranet or an internet site, or other electronic means, if the Company customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Company has gone out of business or

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[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since July 17, 2013.

Dated at Washington, D.C. June 6, 2014

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce a mandatory arbitration policy that waives employees' right to maintain class or collective action in all forums, arbitral or judicial.

WE WILL NOT maintain or enforce a mandatory arbitration policy that prohibits you from filing charges with the National Labor Relations Board.

WE WILL NOT enforce, or attempt to enforce, any agreement, by filing petition(s) in any court, to compel you to individually arbitrate your work related concerns.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights under the Act.

WE WILL within 7 days after the Board Order, and, upon request of Charging Party James Sullivan, file a joint motion to vacate United States District Court Judge L. Scott Coogler's Order of September 10, 2013, granting the Company's motion to stay the trial of Sullivan's civil action in *James Sullivan v. PJ United, Inc., and Douglas Stephens Civil Action No. 7:13-cv-01275-LSC.*

WE WILL reimburse Charging Party James Sullivan any reasonable legal and other expenses incurred related to our various responses to his civil action in *James Sullivan v. PJ United, Inc., and Douglas Stephens Civil Action No. 7:13-cv-01275-LSC,* plus interest.

WE WILL rescind, modify or revise our mandatory arbitration policy to make clear to you our policy does not constitute a waiver in all forums of your right to maintain employment-related class or collective actions and to make clear to you our policy does not prohibit filing charges with the National Labor Relations Board.

WE WILL notify our employees we have rescinded, modified or revised our mandatory arbitration policy and provide each of you a copy of any revised or modified policy.

PJ CHEESE, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/10-CA-113862 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[QR CODE OMITTED]

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-60610

PJ CHEESE, INCORPORATED,
PETITIONER/CROSS-RESPONDENT

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT/CROSS-PETITIONER

[Aug. 25, 2016]

Petition for Review of an Order of the
National Labor Relations Board
No. 10-CA-113862

Before: HIGGINBOTHAM, SMITH, and OWEN, Circuit Judges.

PER CURIAM:

PJ Cheese, Inc. ("PJ Cheese"), petitioned for review, and the National Labor Relations Board (the "Board") cross-petitioned for enforcement, of an order of the Board reported at 362 NLRB No. 177 (Aug. 20, 2015). That order determined that PJ Cheese's arbitration policy contained a collective action waiver that required employees to arbitrate claims arising out of their employment with PJ Cheese on an individual basis and not on a collective or class basis and that that waiver constituted an unfair labor practice under Section 8(a)(1) of the

National Labor Relations Act. The Board ordered corresponding relief. PJ Cheese moved for summary disposition and agreed that part of the Board's cross-application should be enforced. This court granted the motion. IT IS ORDERED that the petition for review with regard to the collective action waiver is GRANTED.

The Board's order also determined that the Agreement and Receipt for Dispute Resolution Program (the "Agreement") signed by James Sullivan, as well as a related Dispute Resolution Program Booklet (the "DRP"), led employees reasonably to believe that they were prohibited from filing unfair labor practice charges with the Board, so in that regard PJ Cheese's maintenance of the Agreement constituted an unfair labor practice. IT IS ORDERED that the Board's order is ENFORCED with regard to the charge-filing prohibition.

Accordingly, it is ORDERED that to the extent it has not already done so, PJ Cheese is directed to:

1. Cease maintaining the Agreement in the form signed by James Sullivan and the corresponding DRP;

2. Rescind the Agreement or revise it and the DRP to make clear that the Agreement does not restrict the employees of PJ Cheese in their right to file charges with the Board or to have access to the Board's processes;

3. Notify all current and former employees who were required to sign the Agreement that it has been rescinded or revised and, if it has been revised, a copy of the revision.

4. Within 14 days after service by the Region, conspicuously post, for 60 consecutive days at its Birmingham, Alabama, facility, the attached notice marked "Appendix."

5. Within 21 days after service by the Region, file with the Region 10 Director a sworn certification of a responsible official, on a form provided by the Region, attesting to the steps that PJ Cheese has taken to comply with this court's order.

IT IS SO ORDERED.

No. 15-60610

* * * * *

APPENDIX

NOTICE TO EMPLOYEES
POSTED AS DIRECTED BY AN ORDER OF
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
ENFORCING AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board ("Board") has found that we violated federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union;

Choose representatives to bargain with us on your behalf;

Act together with other employees for your benefit and protection; and

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory and binding arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the Board or to access the Board's processes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the unlawful arbitration agreement in all of its forms, or revise it in all of its forms to make clear that the unlawful arbitration agreement does not restrict your right to file charges with the Board or to access the Board's processes.

WE WILL notify all current and former employees who were required to sign the unlawful arbitration agreement that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

PJ CHEESE, INC.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-60800

MURPHY OIL USA, INCORPORATED,
PETITIONER/CROSS-RESPONDENT

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT/CROSS-PETITIONER

Oct. 26, 2015

On Petitions for Review of an Order of the
National Labor Relations Board

Before: JONES, SMITH, and SOUTHWICK, Circuit Judges.

LESLIE H. SOUTHWICK, Circuit Judge:

The National Labor Relations Board concluded that Murphy Oil USA, Inc., had unlawfully required employees at its Alabama facility to sign an arbitration agreement waiving their right to pursue class and collective actions. Murphy Oil, aware that this circuit had already held to the contrary, used the broad venue rights governing the review of Board orders to file its petition with this circuit. The Board, also aware, moved for en banc review in order to allow arguments that the prior decision should be overturned. Having failed in that motion

and having the case instead heard by a three-judge panel, the Board will not be surprised that we adhere, as we must, to our prior ruling. We GRANT Murphy Oil's petition, and hold that the corporation did not commit unfair labor practices by requiring employees to sign its arbitration agreement or seeking to enforce that agreement in federal district court.

We DENY Murphy Oil's petition insofar as the Board's order directed the corporation to clarify language in its arbitration agreement applicable to employees hired prior to March 2012 to ensure they understand they are not barred from filing charges with the Board.

FACTS AND PROCEDURAL BACKGROUND

Murphy Oil USA, Inc., operates retail gas stations in several states. Sheila Hobson, the charging party, began working for Murphy Oil at its Calera, Alabama facility in November 2008. She signed a "Binding Arbitration Agreement and Waiver of Jury Trial" (the "Arbitration Agreement"). The Arbitration Agreement provides that, "[e]xcluding claims which must, by . . . law, be resolved in other forums, [Murphy Oil] and Individual agree to resolve any and all disputes or claims . . . which relate . . . to Individual's employment . . . by binding arbitration." The Arbitration Agreement further requires employees to waive the right to pursue class or collective claims in an arbitral or judicial forum.

In June 2010, Hobson and three other employees filed a collective action against Murphy Oil in the United States District Court for the Northern District of Alabama alleging violations of the Fair Labor Standards Act ("FLSA"). Murphy Oil moved to dismiss the collective action and compel individual arbitration pursuant to the

Arbitration Agreement. The employees opposed the motion, contending that the FLSA prevented enforcement of the Arbitration Agreement because that statute grants a substantive right to collective action that cannot be waived. The employees also argued that the Arbitration Agreement interfered with their right under the National Labor Relations Act ("NLRA") to engage in Section 7 protected concerted activity.

While Murphy Oil's motion to dismiss was pending, Hobson filed an unfair labor charge with the Board in January 2011 based on the claim that the Arbitration Agreement interfered with her Section 7 rights under the NLRA. The General Counsel for the Board issued a complaint and notice of hearing to Murphy Oil in March 2011.

In a separate case of first impression, the Board held in January 2012 that an employer violates Section 8(a)(1) of the NLRA by requiring employees to sign an arbitration agreement waiving their right to pursue class and collective claims in all forums. *D.R. Horton, Inc.*, 357 N.L.R.B. 184 (2012). The Board concluded that such agreements restrict employees' Section 7 right to engage in protected concerted activity in violation of Section 8(a)(1). *Id.* The Board also held that employees could reasonably construe the language in the *D.R. Horton* arbitration agreement to preclude employees from filing an unfair labor practice charge, which also violates Section 8(a)(1). *Id.* at *2, *18.

Following the Board's decision in *D.R. Horton*, Murphy Oil implemented a "Revised Arbitration Agreement" for all employees hired after March 2012. The revision provided that employees were not barred from "participating in proceedings to adjudicate unfair labor practice[]

charges before the" Board. Because Hobson and the other employees involved in the Alabama lawsuit were hired before March 2012, the revision did not apply to them.

In September 2012, the Alabama district court stayed the FLSA collective action and compelled the employees to submit their claims to arbitration pursuant to the Arbitration Agreement.[1] One month later, the General Counsel amended the complaint before the Board stemming from Hobson's charge to allege that Murphy Oil's motion to dismiss and compel arbitration in the Alabama lawsuit violated Section 8(a)(1) of the NLRA.

Meanwhile, the petition for review of the Board's decision in *D.R. Horton* was making its way to this court. In December 2013, we rejected the Board's analysis of arbitration agreements. *D.R. Horton, Inc. v. NLRB,* 737 F.3d 344 (5th Cir. 2013). We held: (1) the NLRA does not contain a "congressional command overriding" the Federal Arbitration Act ("FAA");[2] and (2) "use of class action procedures . . . is not a substantive right" under Section 7 of the NLRA. *Id.* at 357, 360-

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[1] The employees never submitted their claims to arbitration. In February 2015, the employees moved for reconsideration of the Alabama district court's order compelling arbitration. The district court denied their motion and ordered the employees to show cause why their case should not be dismissed with prejudice for failing to adhere to the court's order compelling arbitration. The district court ultimately dismissed the case with prejudice for "willful disregard" of its instructions in order to "gain [a] strategic advantage." *Hobson v. Murphy Oil USA, Inc.*, No. CV-10-S-1486-S, 2015 WL 4111661, at *3 (N.D. Ala. July 8, 2015), *appeal docketed,* No. 15-13507 (11th Cir. Aug. 5, 2015). The employees timely appealed. The case is pending before the Eleventh Circuit.

[2] 9 U.S.C. § 1 *et seq.*

62. This holding means an employer does not engage in unfair labor practices by maintaining and enforcing an arbitration agreement prohibiting employee class or collective actions and requiring employment-related claims to be resolved through individual arbitration. *Id.* at 362.

In analyzing the specific arbitration agreement at issue in *D.R. Horton*, however, we held that its language could be "misconstrued" as prohibiting employees from filing an unfair labor practice charge, which would violate Section 8(a)(1). *Id.* at 364. We enforced the Board's order requiring the employer to clarify the agreement. *Id.* The Board petitioned for rehearing en banc, which was denied without a poll in April 2014.

The Board's decision as to Murphy Oil was issued in October 2014, ten months after our initial *D.R. Horton* decision and six months after rehearing was denied. The Board, unpersuaded by our analysis, reaffirmed its *D.R. Horton* decision. It held that Murphy Oil violated Section 8(a)(1) by "requiring its employees to agree to resolve all employment-related claims through individual arbitration, and by taking steps to enforce the unlawful agreements in [f]ederal district court." The Board also held that both the Arbitration Agreement and Revised Arbitration Agreement were unlawful because employees would reasonably construe them to prohibit filing Board charges.

The Board ordered numerous remedies. Murphy Oil was required to rescind or revise the Arbitration and Revised Arbitration agreements, send notification of the rescission or revision to signatories and to the Alabama district court, post a notice regarding the violation at its facilities, reimburse the employees' attorneys' fees in-

curred in opposing the company's motion to dismiss and compel arbitration in the Alabama litigation, and file a sworn declaration outlining the steps it had taken to comply with the Board order.

Murphy Oil timely petitioned this court for review of the Board decision.

DISCUSSION

Board decisions that are "reasonable and supported by substantial evidence on the record considered as a whole" are upheld. *Strand Theatre of Shreveport Corp. v. NLRB,* 493 F.3d 515, 518 (5th Cir. 2007) (citation and quotation marks omitted); *see also* 29 U.S.C. § 160(e). "Substantial evidence is such relevant evidence as a reasonable mind would accept to support a conclusion." *J. Vallery Elec., Inc. v. NLRB,* 337 F.3d 446, 450 (5th Cir. 2003) (citation and quotation marks omitted). This court reviews the Board's legal conclusions *de novo,* but "[w]e will enforce the Board's order if its construction of the statute is reasonably defensible." *Strand Theatre,* 493 F.3d at 518 (citation and quotation marks omitted).

I. Statute of Limitations and Collateral Estoppel

Murphy Oil asserts that Hobson filed her charge too late after the execution of the Arbitration Agreement and the submission of Murphy Oil's motion to compel in the Alabama litigation. By statute, "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. § 160(b). Murphy Oil also contends that the Board is collaterally estopped from considering whether it was lawful to enforce the Arbitration Agreement because the district court had already decided that issue in the Alabama litigation.

Both of these arguments were raised in Murphy Oil's answer to the Board's complaint. They were not, though, discussed in its brief before the Board. "No objection that has not been urged before the Board . . . shall be considered by the court. . . ." 29 U.S.C. § 160(e), (f). Similarly, we have held that "[a]ppellate preservation principles apply equally to petitions for enforcement or review of NLRB decisions." *NLRB v. Catalytic Indus. Maint. Co. (CIMCO),* 964 F.2d 513, 521 (5th Cir. 1992). While Murphy Oil may have properly pled its statute of limitations and collateral estoppel defenses, it did not sufficiently press those arguments before the Board. Thus, they are waived. *See* 29 U.S.C. § 160(e), (f).

II. D.R. Horton *and Board Nonacquiescence*

The Board, reaffirming its *D.R. Horton* analysis, held that Murphy Oil violated Section 8(a)(1) of the NLRA by enforcing agreements that "requir[ed] . . . employees to agree to resolve all employment-related claims through individual arbitration." In doing so, of course, the Board disregarded this court's contrary *D.R. Horton* ruling that such arbitration agreements are enforceable and not unlawful. *D.R. Horton,* 737 F.3d at 362.[3] Our

[3] Several of our sister circuits have either indicated or expressly stated that they would agree with our holding in *D.R. Horton* if faced with the same question: whether an employer's maintenance and enforcement of a class or collective action waiver in an arbitration agreement violates the NLRA. *See Walthour v. Chipio Windshield Repair, LLC,* 745 F.3d 1326, 1336 (11th Cir. 2014), *cert. denied,* — U.S. —, 134 S. Ct. 2886, 189 L. Ed. 2d 836 (2014); *Richards v. Ernst & Young, LLP,* 744 F.3d 1072, 1075 n.3 (9th Cir. 2013), *cert. denied,* — U.S. —, 135 S. Ct. 355, 190 L. Ed. 2d 249 (2014); *Owen v. Bristol Care, Inc.,* 702 F.3d 1050, 1053-55 (8th Cir.

decision was issued not quite two years ago; we will not repeat its analysis here. Murphy Oil committed no unfair labor practice by requiring employees to relinquish their right to pursue class or collective claims in all forums by signing the arbitration agreements at issue here. *See id.*

Murphy Oil argues that the Board's explicit "defiance" of *D.R. Horton* warrants issuing a writ or holding the Board in contempt so as to "restrain [it] from continuing its nonacquiescence practice with respect to this [c]ourt's directive." The Board, as far as we know, has not failed to apply our ruling in *D.R. Horton* to the parties in that case. The concern here is the application of *D.R. Horton* to new parties and agreements.

An administrative agency's need to acquiesce to an earlier circuit court decision when deciding similar issues in later cases will be affected by whether the new decision will be reviewed in that same circuit. *See* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 735-43 (1989). Murphy Oil could have sought review in (1) the circuit where the unfair labor practice allegedly took place, (2) any circuit in which Murphy Oil transacts business, or (3) the United States Court of Appeals for the District of Columbia. 29 U.S.C. § 160(f). The Board may well not know which circuit's law will be applied on a petition for review. We do not celebrate the Board's failure to follow our *D.R. Horton* reasoning, but neither do we condemn its nonacquiescence.

2013); *Sutherland v. Ernst & Young LLP,* 726 F.3d 290, 297 n.8 (2d Cir. 2013).

III. The Agreements and NLRA Section 8(a)(1)

The Board also held that Murphy Oil's enforcement of the Arbitration Agreement and Revised Arbitration Agreement violated Section 8(a)(1) of the NLRA because employees could reasonably believe the contracts precluded the filing of Board charges. Hobson and the other employees involved in the Alabama litigation were subject to the Arbitration Agreement applicable to employees hired before March 2012. The Revised Arbitration Agreement contains language that sought to correct the possible ambiguity.

A. The Arbitration Agreement in Effect Before March 2012

Section 8(a) of the NLRA makes it unlawful for an employer to commit unfair labor practices. 29 U.S.C. § 158(a). For example, an employer is prohibited from interfering with employees' exercise of their Section 7 rights. *Id.* § 158(a)(1). Under Section 7, employees have the right to self-organize and "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Id.* § 157.

The Board is empowered to prevent unfair labor practices. This power cannot be limited by an agreement between employees and the employer. *See id.* § 160(a). "Wherever private contracts conflict with [the Board's] functions, they . . . must yield or the [NLRA] would be reduced to a futility." *J.I. Case Co. v. NLRB,* 321 U.S. 332, 337, 64 S. Ct. 576, 88 L. Ed. 762 (1944). Accordingly, as we held in *D.R. Horton,* an arbitration agreement violates the NLRA if employees would reasonably construe it as prohibiting filing unfair labor practice charges with the Board. 737 F.3d at 363.

Murphy Oil argues that Hobson's choice to file a charge with the Board proves that the pre-March 2012 Arbitration Agreement did not state or suggest such charges could not be filed. The argument misconstrues the question. "[T]he actual practice of employees is not determinative" of whether an employer has committed an unfair labor practice. *See Flex Frac Logistics, L.L.C. v. NLRB,* 746 F.3d 205, 209 (5th Cir. 2014). The Board has said that the test is whether the employer action is "likely to have a chilling effect" on employees' exercise of their rights. *Id.* (citing *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998)). The possibility that employees will misunderstand their rights was a reason we upheld the Board's rejection of a similar provision of the arbitration agreement in *D.R. Horton.* We explained that the FAA and NLRA have "equal importance in our review" of employment arbitration contracts. *D.R. Horton*, 737 F.3d. at 357. We held that even though requiring arbitration of class or collective claims in all forums does not "deny a party any statutory right," an agreement reasonably interpreted as prohibiting the filing of unfair labor charges would unlawfully deny employees their rights under the NLRA. *Id.* at 357-58, 363-64.

Murphy Oil's Arbitration Agreement provided that "any and all disputes or claims [employees] may have . . . which relate in any manner . . . to . . . employment" must be resolved by individual arbitration. Signatories further "waive their right to . . . be a party to any group, class or collective action claim in . . . any other forum." The problem is that broad "any claims" language can create "[t]he reasonable impression . . . that an employee is waiving not just [her] trial rights, but [her] administrative rights as well."

D.R. Horton, 737 F.3d at 363-64 (citing *Bill's Electric, Inc.*, 350 N.L.R.B. 292, 295-96 (2007)).

We do not hold that an express statement must be made that an employee's right to file Board charges remains intact before an employment arbitration agreement is lawful. Such a provision would assist, though, if incompatible or confusing language appears in the contract. *See id.* at 364.

We conclude that the Arbitration Agreement in effect for employees hired before March 2012, including Hobson and the others involved in the Alabama case, violates the NLRA. The Board's order that Murphy Oil take corrective action as to any employees that remain subject to that version of the contract is valid.

B. The Revised Arbitration Agreement in Effect After March 2012

In March 2012, following the Board's decision in *D.R. Horton*, Murphy Oil added the following clause in the Revised Arbitration Agreement: "[N]othing in this Agreement precludes [employees] . . . from participating in proceedings to adjudicate unfair labor practice[] charges before the [Board]." The Board contends that Murphy Oil's modification is also unlawful because it "leaves intact the entirety of the original Agreement" including employees' waiver of their right "to commence or be a party to any group, class or collective action claim in . . . any other forum." This provision, the Board said, could be reasonably interpreted as prohibiting employees from pursuing an administrative remedy "since such a claim could be construed as having 'commence[d]' a class action in the event that the [Board] decides to seek classwide relief."

We disagree with the Board. Reading the Murphy Oil contract as a whole, it would be unreasonable for an employee to construe the Revised Arbitration Agreement as prohibiting the filing of Board charges when the agreement says the opposite. The other clauses of the agreement do not negate that language. We decline to enforce the Board's order as to the Revised Arbitration Agreement.

IV. Murphy Oil's Motion to Dismiss and NLRA Section 8(a)(1)

Finally, the Board held that Murphy Oil violated Section 8(a)(1) by filing its motion to dismiss and compel arbitration in the Alabama litigation. As noted above, Section 8(a) prohibits employers from engaging in unfair labor practices. 29 U.S.C. § 158(a). Section 8(a)(1) provides that an employer commits an unfair labor practice by "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise" of their Section 7 rights, including engaging in protected concerted activity. *Id.* §§ 157, 158(a)(1).

The Board said that in filing its dispositive motion and "eight separate court pleadings and related [documents] . . . between September 2010 and February 2012," Murphy Oil "acted with an illegal objective [in] . . . . 'seeking to enforce an unlawful contract provision'" that would chill employees' Section 7 rights, and awarded attorneys' fees and expenses incurred in "opposing the . . . unlawful motion." We disagree and decline to enforce the fees award.

The Board rooted its analysis in part in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983). That decision discussed the balance between an employer's First Amend-

ment right to litigate and an employee's Section 7 right to engage in concerted activity. In that case, a waitress filed a charge with the Board after a restaurant terminated her employment; she believed she was fired because she attempted to organize a union. *Id.* at 733, 103 S. Ct. 2161. After the Board's General Counsel issued a complaint, the waitress and several others picketed the restaurant, handing out leaflets and asking customers to boycott eating there. *Id.* In response, the restaurant filed a lawsuit in state court against the demonstrators alleging that they had blocked access to the restaurant, created a threat to public safety, and made libelous statements about the business and its management. *Id.* at 734, 103 S. Ct. 2161. The waitress filed a second charge with the Board alleging that the restaurant initiated the civil suit in retaliation for employees' engaging in Section 7 protected concerted activity, which violated Section 8(a)(1) and (4) of the NLRA. *Id.* at 734-35, 103 S. Ct. 2161.

The Board held that the restaurant's lawsuit constituted an unfair labor practice because it was filed for the purpose of discouraging employees from seeking relief with the Board. *Id.* at 735-37, 103 S. Ct. 2161. The Supreme Court remanded the case for further consideration, stating: "The right to litigate is an important one," but it can be "used by an employer as a powerful instrument of coercion or retaliation." *Id.* at 740, 744, 103 S. Ct. 2161. To be enjoinable, the Court said the lawsuit prosecuted by the employer must (1) be "baseless" or "lack[ing] a reasonable basis in fact or law," and be filed "with the intent of retaliating against an employee for the exercise of rights protected by" Section 7, or (2) have "an objective that is illegal under federal law." *Id.* at 737 n.5, 744, 748, 103 S. Ct. 2161.

We start by distinguishing this dispute from that in *Bill Johnson's*. The current controversy began when three Murphy Oil employees filed suit in Alabama. Murphy Oil defended itself against the employees' claims by seeking to enforce the Arbitration Agreement. Murphy Oil was not retaliating as Bill Johnson's may have been. Moreover, the Board's holding is based solely on Murphy Oil's enforcement of an agreement that the Board deemed unlawful because it required employees to individually arbitrate employment-related disputes. Our decision in *D.R. Horton* forecloses that argument in this circuit. 737 F.3d at 362. Though the Board might not need to acquiesce in our decisions, it is a bit bold for it to hold that an employer who followed the reasoning of our *D.R. Horton* decision had no basis in fact or law or an "illegal objective" in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders.

Moreover, the timing of Murphy Oil's motion to dismiss when compared to the timing of the *D.R. Horton* decisions counsels against finding a violation of Section 8(a)(1). The relevant timeline of events is as follows:

(1) July 2010: Murphy Oil filed its motion to dismiss and sought to compel arbitration in the Alabama litigation;

(2) January 2012: the Board in *D.R. Horton* held it to be unlawful to require employees to arbitrate employment-related claims individually, and the D.R. Horton agreement violated the NLRA because it could be reasonably construed as prohibiting the filing of Board charges;

(3) October 2012: the Board's General Counsel amended the complaint against Murphy Oil to allege that Murphy Oil's motion in the Alabama litigation violated Section 8(a)(1); and

(4) December 2013: this court granted D.R. Horton's petition for review of the Board's order and held that agreements requiring individual arbitration of employment-related claims are lawful but that the specific agreement was unlawful because it could be reasonably interpreted as prohibiting the filing of Board charges.

In summary, Murphy Oil's motion was filed a year and a half before the Board had even spoken on the lawfulness of such agreements in light of the NLRA. This court later held that such agreements were generally lawful. Murphy Oil had at least a colorable argument that the Arbitration Agreement was valid when its defensive motion was made, as its response to the lawsuit was not "lack[ing] a reasonable basis in fact or law," and was not filed with an illegal objective under federal law. *See Bill Johnson's*, 461 U.S. at 737 n.5, 744, 748, 103 S. Ct. 2161. Murphy Oil's motion to dismiss and compel arbitration did not constitute an unfair labor practice because it was not "baseless." We decline to enforce the Board's order awarding attorneys' fees and expenses.

* * *

The Board's order that Section 8(a)(1) has been violated because an employee would reasonably interpret the Arbitration Agreement in effect for employees hired before March 2012 as prohibiting the filing of an unfair labor practice charge is ENFORCED. Murphy Oil's petition for review of the Board's decision is otherwise GRANTED.

APPENDIX E

1. 9 U.S.C. 2 provides:

Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

2. 29 U.S.C. 151 provides:

Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the

market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

3. 29 U.S.C. 157 provides:

Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

4. 29 U.S.C. 158(a)(1) provides:

Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;