Professional Janitorial Service of Houston, Inc. *and* Service Employees International Union. Case 16–CA–112850

November 24, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On June 16, 2014, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs. The General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering 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 briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order and to adopt his recommended Order as modified and set forth in full below.[1]

The judge found, applying the Board's decision in *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in part, 737 F.3d 344 (5th Cir. 2013), that the Respondent violated Section 8(a)(1) of the Act by maintaining a Dispute Resolution and Arbitration Policy (Arbitration Policy) that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. In *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in part, *Murphy Oil USA, Inc. v. NLRB*, No. 14–60800, ___ F.3d ___, 2015 WL 6457613 (5th Cir. Oct. 26, 2015), the Board reaffirmed the relevant holdings of *D. R. Horton*, supra. Based on the judge's application of *D. R. Horton*, and on our subsequent decision in *Murphy Oil*, we affirm the judge's conclusion that the Respondent's maintenance of the Arbitration Policy violated Section 8(a)(1) in this regard.[2] We also agree with the judge that the confidentiality provision of the Respondent's Arbitration Policy independently violated Section 8(a)(1).[3]

The judge dismissed the allegation that the maintenance of the Arbitration Policy separately violated Section 8(a)(1) because employees would reasonably construe it to interfere with their access to the Board and its processes. For the reasons stated below, we disagree with the judge and find the violation.

The four-page Arbitration Policy, which is set forth in full in the judge's decision, includes the following language:

[On the front page:]

> **Application and Coverage:**
>
> The [Arbitration Policy] applies to all employees, regardless of length of service or status, and covers all disputes relating to or arising out of an employee's employment with the Company or the termination of employment. The only disputes or claims not covered by this policy are those described below in the Exclusions and Restrictions section. Examples of the type of disputes or claims covered by this policy . . . include but are not limited to, claims for wrongful termination of employment, breach of contract . . . or any other legal claims and causes of action recognized by local, state or federal law or regulations.

[On the second page:]

> **Exclusions and Restrictions:**
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> Certain issues may not be submitted for review (or exclusive review) by arbitration.

[1] The judge ordered that the Respondent cease and desist from "maintaining *or enforcing*" (emphasis added) its Arbitration Policy and that the Respondent "[n]otify arbitral or judicial panels, if any, where the Respondent has attempted to enjoin or otherwise prohibit employees from bringing or participating in class or collective actions that it is withdrawing those objections and that it no longer objects to such employee actions." However, there is no allegation that the Respondent ever enforced the policy in any arbitral or judicial proceeding. Accordingly, we shall omit the language referred to from the Order and notice. We shall further modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

[2] Accordingly, we disagree with our dissenting colleague for the reasons discussed in our decisions in *Murphy Oil* and *Bristol Farms*, 363 NLRB No. 45 (2015).

[3] A workplace rule that prohibits the discussion of terms and conditions of employment, as the Respondent's confidentiality provision does by prohibiting employees from discussing any "statements and information made or revealed during arbitration," is unlawfully overbroad. See, e.g., *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 1–3 (2015) (finding unlawful rule that prohibited disclosure of "any information about the Company which has not been shared by the Company with the general public"); see also *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004), enfd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006) (finding unlawful handbook rule that prohibited disclosure of "confidential information," including "grievance/complaint information").

> *Excluded Issues*: . . . In addition, any non-waivable statutory claims, which may include wage claims within the jurisdiction of a local or state labor commission or administrative agency, charges before the Equal Employment Opportunity Commission, National Labor Relations Board, or similar local or state agencies, are not subject to exclusive review by arbitration. This means that you may file such non-waivable statutory claims with the appropriate agency that has jurisdiction over them if you wish, regardless of whether you use arbitration to resolve them. However, if such an agency completes its processing of your action against the Company, you must use arbitration if you wish to pursue further your legal rights, rather than filing a lawsuit on the action.

[And, on the final page, above a signature line:]

> **Agreement to Arbitrate:**
>
> I . . . agree to submit to final and binding arbitration any and all claims and disputes that are related in any way to my employment or the termination of my employment with PJS. I understand that final and binding arbitration will be the sole and exclusive remedy for any such claim or dispute against PJS or any affiliated entities, and each of their employees, officers, directors or agents . . . .

The Respondent's mandatory Arbitration Policy is a work rule properly analyzed under the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).[4] Under this test, a rule is unlawful if it explicitly restricts activities protected by Section 7 or, alternatively, upon a showing of one of the following: (1) employees would reasonably construe the rule as prohibiting 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. 343 NLRB at 647.

The Board applied these principles in *D. R. Horton* and *Murphy Oil* and found that the mandatory arbitration policies in both cases violated Section 8(a)(1) because, in addition to the policies' facial restrictions on class or collective actions, the language of the policies reasonably would lead employees to believe that they were prohibited from filing unfair labor practice charges with the Board. *D. R. Horton*, supra, slip op. at 2 & fn. 2; *Murphy Oil*, supra, slip op. at 19 fn. 98.

As set forth above, the Respondent's Arbitration Policy states on its first page that, with the exception of claims described in the policy's Exclusions and Restrictions section, the policy covers "all disputes relating to or arising out of an employee's employment . . . . [including] any . . . legal claims and causes of action recognized by local, state or federal law or regulations." And the final page requires employees to "agree to submit to final and binding arbitration any and all claims and disputes that are related in any way to my employment or the termination of my employment with PJS" without indicating any exceptions to this broad requirement. Thus, the policy includes broadly worded language that all employment-related disputes with the Employer, including those involving matters such as wrongful termination claims and matters "recognized" by Federal law and regulations, must be arbitrated.

Turning to the Exclusions and Restrictions section of the Arbitration Policy, we find, contrary to the judge, that that section does not clearly except from coverage all disputes that could form the basis of Board charges. As set forth above, the policy exempts from mandatory individual arbitration "*non-waivable statutory claims*, which *may* include . . . charges before . . . the National Labor Relations Board." (Emphasis added). This language does not tell employees that all disputes and claims covered by the Act are exempt from the mandatory arbitration policy. It tells them that such a dispute *might* be exempt, *if* it constitutes a "non-waivable statutory claim." The language describes only a limited exclusion of indeterminate scope.

The suggestion that the exemption *may* include Board charges is misleading in that it implies that some claims that are cognizable under Board law may nevertheless be subject to mandatory arbitration under the Respondent's policy. It would be reasonable for an employee to believe that by agreeing to the policy as a condition of employment, he or she has waived the right to bring certain disputes before the Board, even if there may be some claims that cannot be so waived. Furthermore, while an employer may not *require* arbitration of disputes arising under the Act, it is not clear that an existing unfair labor practice claim would be considered a "non-waivable statutory claim" excluded from the Arbitration Policy's scope.[5] Thus, the reference to non-waivable statutory claims, in this context, cannot be expected to convey any clear meaning to employees, even for those who have

[4] See *D. R. Horton*, above, slip op. at 4; *Murphy Oil*, above, slip op. at 13 fn. 79, 19.

[5] Compare *Murphy Oil*, above, slip op. at 18 (questioning whether exemption for claims that "must, by statute or other law, be resolved in other forums" has any content, given that "[e]ven unfair labor practice claims, which must be *filed* in an administrative forum, may be *resolved* in an arbitral forum" (emphasis in original)).

some knowledge of the types of disputes that may be brought before the Board in the first instance.[6]

In addition, the Arbitration Policy strongly suggests to employees that even if they file charges with the Board, they might ultimately be required to proceed by arbitration. The policy recites that "if such an agency [i.e., the Board] completes its processing of your action against the Company, you must use arbitration if you wish to pursue further your legal rights, rather than filing a lawsuit on the action." Employees, particularly those unfamiliar with the Board's procedures, would reasonably read this language to state that even if access to the Board is permitted initially, their unfair labor charge can be resolved only through arbitration under the Respondent's policy.

In sum, absent a sufficiently clear statement that all claims arising under the National Labor Relations Act, without limitation or qualification, are excluded from the policy's coverage, employees would reasonably conclude that the Respondent's Arbitration Policy required the arbitration of claims that might otherwise form the basis of charges filed with the Board.[7] Contrary to the judge, we find that the Exclusions and Restrictions provision is not such a statement. Rather, the provision is ambiguous and misleading insofar as it suggests that some charges that could otherwise be filed with the NLRB might nevertheless be subject to mandatory arbitration. We therefore find that employees would reasonably construe the Arbitration Policy to limit or restrict their access to the Board and its processes.[8] Accordingly, the Respondent's maintenance of the policy violated Section 8(a)(1) of the Act for this reason as well as those found by the judge.

ORDER

The National Labor Relations Board orders that the Respondent Professional Janitorial Service of Houston, Inc., Houston, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration policy that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

(b) Maintaining a mandatory arbitration policy 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) Maintaining a rule that prohibits the discussion of terms and conditions of employment by prohibiting employees from discussing matters regarding an arbitral proceeding.

(d) 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 Dispute Resolution and Arbitration Policy (Arbitration Policy) in all of its forms, or revise it in all of its forms to make clear to employees that the Arbitration Policy does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, that it does not bar or restrict employees' right to file charges with the National Labor Relations Board, and that it does not prohibit employees' discussion of terms and conditions of employment by prohibiting them from discussing matters regarding an arbitral proceeding.

(b) Notify all applicants and current and former employees who were required to sign or otherwise become bound to the Arbitration Policy in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised policy.

(c) Within 14 days after service by the Region, post at its Houston, Texas facility copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 16, 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 employees 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

[6] We cannot presume that employees are knowledgeable about the Act or the scope of its coverage. *McDonnell Douglas Corp.*, 240 NLRB 794, 802 (1979) (facially overbroad no-distribution rule with exception for "matter the distribution of which is protected by Section 7 of the National Labor Relations Act" unlawful because "it can reasonably be foreseen that employees would not know what conduct is protected by the National Labor Relations Act and, rather than take the trouble to get reliable information on the subject, would elect to refrain from engaging in conduct that is in fact protected by the Act").

[7] See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006) (finding phrase "any other legal or equitable claims and causes of action recognized by local, state, or federal law or regulations" reasonably includes the filing of unfair labor practice charges with the Board), enfd. mem. 255 Fed.Appx. 527 (D.C. Cir. 2007).

[8] Where employees would reasonably read an ambiguous rule to restrict their Section 7 rights, the Board construes the ambiguity in the rule against the rule's promulgator. See *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).

[9] 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 of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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 to all current employees and former employees employed by the Respondent at any time since March 9, 2013.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 16 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., November 24, 2015

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

In this case, my colleagues find that the Respondent's Dispute Resolution and Arbitration Policy violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the Policy waives the right to participate in class or collective actions regarding non-NLRA employment claims. I respectfully dissent from this finding for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*[1]

I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than NLRA.[2] However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class-type treatment of non-NLRA claims. To the contrary, as discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."[3] This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;[4] (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class waiver agreements;[5] and (iii)

[1] 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority's holding in *Murphy Oil* invalidating class-action waiver agreements was recently denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, No. 14–60800, 2015 WL 6457613 (5th Cir. Oct. 26, 2015).

[2] I agree that non-NLRA claims can give rise to "concerted" activities engaged in by two or more employees for the "purpose" of "mutual aid or protection," which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7's statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. Id.; see also *Beyoglu,* 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting).

[3] *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That *any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment" (emphasis added). The Act's legislative history shows that Congress intended to preserve every individual employee's right to "adjust" any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

[4] When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12–60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

[5] The Fifth Circuit has twice denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See *Murphy Oil, Inc., USA v. NLRB*, above; *D. R. Horton, Inc. v. NLRB,* above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil,* 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co., Inc*., No. 14–CV–5882 (VEC), 2015 WL 1433219

enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).[6] Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.

Accordingly, as to this issue,[7] I respectfully dissent.

Dated, Washington, D.C. November 24 , 2015

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

(S.D.N.Y. Mar. 27, 2015); *Nanavati v. Adecco USA, Inc.,* No. 14–cv–04145–BLF, 2015 WL 1738152 (N.D. Cal. Apr. 13, 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services, Inc.,* No. 1:12–cv–00062–BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA).

[6] Even if a conflict existed between the NLRA and an arbitration agreement's class waiver provisions, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil,* above, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 49–58 (Member Johnson, dissenting).

[7] Putting aside the validity of the class waiver provisions, I concur with my colleagues' finding that other provisions in the Policy violate the Act. I agree that the Policy's confidentiality provision, which prohibits the disclosure of "all statements and information made or revealed during arbitration, . . . except on a 'need to know' basis or as permitted or required by law," violates Sec. 8(a)(1) because it would preclude discussion of employment-related matters in the course of concerted protected activities involving two or more employees, see fn.2, above, and the record reveals no countervailing interest that justifies the impact on NLRA-protected rights. Cf. *Banner Estrella Medical Center*, 362 NLRB No. 137, slip op. at 13–19 (Member Miscimarra, dissenting in part) (describing requirement that Board strike a proper balance between asserted business justifications and potential impact on NLRA rights). Unlike my colleagues, however, I do not rely on *Rio All-Suites Hotel & Casino,* 362 NLRB No. 190 (2015).

Additionally, I agree that the policy violates Sec. 8(a)(1) by interfering with the filing and resolution of NLRB charges. Unlike my colleagues, I believe the policy's definition of excluded claims makes reasonably clear that NLRB charges are not subject to the policy's mandatory arbitration requirements. However, this exclusion is contradicted by unqualified language, appearing over the employee's signature line in the "Agreement to Arbitrate," that states signatory employees "have reviewed and understand [the policy] *and agree to submit to final and binding arbitration any and all claims and disputes that are related in any way to [their] employment or the termination of [their] employment*" (emphasis added). See *U-Haul Co. of California,* 347 NLRB 375, 377 (2006), enfd. mem. 255 Fed. Appx. 527 (D.C. Cir. 2007).

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 arbitration policy that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain a mandatory arbitration policy 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 maintain a rule that prohibits the discussion of terms and conditions of employment by prohibiting employees from discussing matters regarding an arbitral proceeding.

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 Dispute Resolution and Arbitration Policy (Arbitration Policy) in all of its forms, or revise it in all of its forms to make clear that the Arbitration Policy does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, that it does not restrict your right to file charges with the National Labor Relations Board, and that it does not prohibit your discussion of terms and conditions of employment by prohibiting you from discussing matters regarding an arbitral proceeding.

WE WILL notify all applicants and current and former employees who were required to sign or otherwise become bound to the Arbitration Policy in all of its forms that the Arbitration Policy has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised policy.

PROFESSIONAL JANITORIAL SERVICE OF HOUSTON, INC.

The Board's decision can be found at www.nlrb.gov/case/16-CA-112850 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.

Becky Mata, Esq., for the General Counsel.
G. Mark Jodon, Esq. and *Timothy Rybacki, Esq., Littler Mendelson, P.C.*, for the Respondent.
Elliot Becker, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. The parties waived a hearing and submitted this case directly to me by way of a Joint Motion and Stipulation of Facts dated April 28, 2014. The complaint herein, which issued on January 31, 2014, and was based upon an unfair labor practice charge that was filed on September 9, 2013 by Service Employees International Union, herein called the Union, alleges that Professional Janitorial Service of Houston, Inc., herein called the Respondent, maintained an employee rule book that contained a number of provisions that violated Section 8(a)(1) of the Act. On April 23 and 25, the Union and the Respondent executed an informal Settlement Agreement with regard to the allegations contained in paragraphs 10, 11 and 12 of the complaint and this agreement was approved by the Regional Director for Region 16 on April 28, and severed from the remaining allegation of the complaint. The remaining issue, a *D. R. Horton* (357 NLRB No. 184 (2012)), issue is the sole remaining issue herein.

The Joint Motion and Stipulation of Facts provides as follows:

The charge in this proceeding was filed by Charging Party on September 9, 2013 and a copy was served by regular mail on Respondent the same day.

On January 31, 2014, the Regional Director for Region 16 of the National Labor Relations Board issued a complaint and Notice of Hearing, and a copy was served by mail on Respondent and Charging Party on the same day.

Respondent filed an answer on February 14, 2014.

At all material times, Respondent has been a Texas corporation with a facility located in Houston, Texas, and has been engaged in the business of providing janitorial services to commercial office buildings.

In conducting its operations during the 12-month period ending December 31, 2013, Respondent purchased and received at its Houston, Texas facility goods valued in excess of $50,000 directly from points outside the State of Texas.

At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act.

At all material times, Floyd Mahanay held the position of Respondent's president and has been an agent of Respondent within the meaning of Section 2(13) of the Act.

At all material times, Respondent has maintained a dispute resolution policy (the arbitration policy) that requires employees to resolve all covered employment-related disputes by individual arbitration "in an individual capacity and not as part of a representative, collective, or class action."

At all material times, Respondent has maintained a dispute resolution policy (the arbitration policy) that excludes certain issues for review by arbitration such as: "any nonwaivable statutory claims, which may include wage claims within the jurisdiction of a local or state labor commission or administrative agency, charges before the Equal Employment Opportunity Commission, National Labor Relations Board, or similar local or state agencies."

At all material times, Respondent has maintained a dispute resolution policy (the arbitration policy) that requires employees to maintain all statements and information made or revealed during arbitration confidential, and neither the employee nor the Company may reveal any such statements or information, except on a "need to know" basis or as permitted or required by law.

At all material times, Respondent has required employees to sign an acknowledgement form, which provides the employee's agreement to be bound by the arbitration policy.

The issue presented in this case is:

Whether, under the facts of this case, the Respondent violated Section 8(a)(1) of the Act by maintaining an arbitration policy that interferes with employees' Section 7 rights to participate in collective and class litigation, interferes with employees' access to the Board and its processes, and restricts employees' abilities to discuss their terms and working conditions with one another.[1]

The Parties stipulate that Respondent engages in the promulgation, dissemination, and maintenance of the arbitration policy that is Record Exhibit 2.

This Joint Motion and Stipulation of Facts is made without prejudice to any argument or contention which any party may have as to the materiality or relevancy of any facts set forth herein or recorded in Exhibit Nos. 1, 2, 3, 4, 5, and 6.

The Parties executed an informal Settlement Agreement in Case 16–CA–112850 on April 23 and 25, 2014 settling the allegations in paragraphs 10, 11, and 12 of the complaint. The Settlement Agreement was approved by the Regional Director for Region 16 on April 28, 2014. An Order severing these settled allegations from the complaint issued on April 28, 2014.

[1] By agreeing to the statement of issues set forth in par. 10, Respondent does not waive, and instead reserves the right to assert and argue the affirmative and other defenses set forth in Respondent's answer and affirmative and other defenses.

The Respondent's dispute resolution and arbitration policy, at issue herein, states as follows:

> PJS (PJS or Company) believes that positive employee relations and morale can be best achieved and maintained in a working environment that promotes ongoing and open communication between supervisors and employees, including open and candid discussions of employee problems, concerns and disputes. PJS therefore utilizes an open door policy devised to encourage its employees to openly express their problems, concerns and opinions on any issue related to their employment.
>
> PJS sincerely hopes that you will never have a dispute relating to your employment with the Company. However, PJS recognizes that disputes sometimes arise between an employer and its employees relating to the employment relationship. PJS believes that it is in the best interests of both its employees and the Company to resolve those disputes in a forum that provides the fastest, least expensive and fairest method for resolving them. Therefore, if disputes cannot be resolved informally through the open door process, PJS, and its employees are required to resolve disputes through final and binding arbitration as discussed in this Dispute Resolution and Arbitration Policy ("DRAP"),
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> Application and Coverage:
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> The DRAP applies to all employees, regardless of length of service or status, and covers all disputes relating to or arising out of an employee's employment with the Company or the termination of employment. The only disputes or claims not covered by this policy are those described below in the Exclusions and Restrictions section. Examples of the type of disputes or claims covered by this policy and subject to final and binding arbitration include, but are not limited to, claims for wrongful termination of employment, breach of contract, employment discrimination, harassment or retaliation under the Texas Labor Code (including chapter 451), the Texas Commission on Human Rights Act, the Americans With Disabilities Act, the Age Discrimination in Employment Act, Title V11 of the Civil Rights Act of 1964 and its amendments or any state or local discrimination laws, tort claims, or any other legal claims and causes of action recognized by local, state or federal law or regulations. The claims covered by this policy can only be pursued in an individual capacity and not as part of a representative, collective or class action. Your decision to accept employment or to continue employment with the Company constitutes your agreement to be bound by this policy. Likewise, the Company agrees to be bound by this policy. This mutual agreement to arbitrate claims means that both you and the Company are required to use arbitration as the only means of resolving employment related disputes (unless they are otherwise informally resolved through the open door process) and to forego any right either may have to a jury trial on issues covered by this policy.
>
> The Arbitration Process:
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> If you have not informally resolved a dispute through the open door process and wish to pursue your dispute further, you must make a written request for arbitration by submitting a document to the President of PJS entitled Request for Arbitration and identifying the nature of your claim. The arbitration will be heard by an independent and impartial arbitrator chosen by you and the Company.
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> The arbitrator's responsibility is to determine whether applicable laws have been complied with in the matter submitted for arbitration. In fulfilling this responsibility, the arbitrator may interpret Company policies and procedures, but will not have any power to change them. The arbitrator will be requested to render a decision on the matter within 30 days after the arbitration hearing is concluded and post-hearing briefs, if any, are submitted.
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> The arbitration will be administered by the American Arbitration Association ("AAA"), unless otherwise agreed by both you and the Company. The Company and you will share the cost of the AAA's filing fee and the arbitrator's fees and costs, but your share of such costs shall not exceed an amount equal the one day's pay (for exempt employees) or eight times your hourly rate (for nonexempt employees), or $250, whichever is less. You and the Company will be responsible for the fees and costs of your own respective legal counsel, if any, and any other expenses and costs, such as costs associated with witnesses or obtaining copies of hearing transcripts.
>
> Either party may bring an action in any court of competent jurisdiction to compel arbitration under this Policy, to enforce an arbitration award, and to vacate an arbitration award. However, in an action seeking to vacate an award, the standard of review to be applied to the arbitrator's findings of fact and conclusions of law will be the same as that applied by an appellate court reviewing a decision, of a trial court sitting without a jury.
>
> Exclusions and Restrictions:
>
> Certain issues may not be submitted for review (or exclusive review) by arbitration.
>
> *Excluded Issues:* Workers compensation' claims, any claim involving the construction or application of a benefit plan covered by ERISA (these types of claims may be orbital under the applicable ERISA plan and are governed by the plan documents for such plan), and claims for unemployment benefits are excluded from the DRAP. In addition, any nonwaivable statutory claims, which may include wage claims within the jurisdiction of a local or state labor commission or administrative agency, charges before the Equal Employment Opportunity Commission, National Labor Relations Board, or similar local or state agencies, are not subject to exclusive review by arbitration. This means that you may file such nonwaivable statutory claims with the appropriate agency that has jurisdiction over them if you wish, regardless of whether you decide to use arbitration to resolve them, however, if such an agency completes its processing of your action against the Company, you must use arbitration if you wish to pursue further your legal rights, rather than filing a lawsuit on the action. Arbitration also does not apply to claims by the Company for injunctive relief and/or other equitable relief for unfair compe-

tition and/or the use of unauthorized disclosure of trade secrets or confidential information, relief for which may be sought in court.

Other Important Information:

Applicable Law and Procedural Rules: The Federal Arbitration Act, 9 U.S.C. § 1, et seq., will govern arbitrations under this policy. The applicable Employment Dispute Resolution Rules of the AAA will govern the procedures to be used in such arbitrations, unless you and the Company agree otherwise.

Discovery and Amendment of Claims: If a dispute is submitted to arbitration, either you or the Company may make a reasonable request for copies of relevant documents from each other, and both parties shall provide each other with a list of the witnesses they intend to call to testify at the arbitration at least ten days before the arbitration, unless otherwise provided by the arbitrator. Depositions and other discovery shall be taken in accordance with the arbitrator's orders. Disputes submitted for resolution under this policy may be amended as provided by the AAA rules.

Limitations Periods: Any request for arbitration must be made within one year after the event giving rise to the dispute. If the claim was submitted to a federal, state or local agency, then a request for arbitration of that claim must be made within 90 days of the receipt of the agency's decision. However, if a longer limitation period is provided by a statute governing your claim, then your claim will be subject to the longer limitation period provided by the statute.

Authority of Arbitrator: The arbitrator has the authority to award any remedy that would have been available to you had you litigated the dispute in court under applicable law. The arbitrator shall not have the authority to create causes of action or to award remedies not recognized under applicable law.

Locale of Arbitration: The locale of arbitration will be in the city/county of your employment with PJS, unless you and the Company agree otherwise.

Representation by Counsel: Both you and the Company may be represented by counsel at arbitration at each parties' own expense.

Confidentiality: All statements and information made or revealed during arbitration are confidential, and neither you nor the Company may reveal any such statements or information, except on a "need to know" basis or as permitted or required by law.

At-Will Employment: Nothing in this policy shall be construed to create a contract of employment, express or implied, nor does this policy in any way alter the at-will nature of the employment relationship between you and the Company.

Modifications: The Company will not modify or change the agreement between you and the Company to use final and binding arbitration to resolve employment-related disputes without notifying you and obtaining your agreement to such changes.

Agreement to Arbitrate

I have reviewed and understand PJS's Dispute Resolution and Arbitration Policy and Agreement and agree to submit to final and binding arbitration any and all claims and disputes that are related in any way to my employment or the termination of ray employment with PJS. I understand that final and binding arbitration will be the sole and exclusive remedy for any such claim or dispute against PJS or any affiliated entities, and each of their employees, officers, directors or agents, and that by agreeing to use arbitration to resolve my dispute, both the Company and I *agree* to forego any right we each may have had to a jury trial on issues covered by the Dispute Resolution and Arbitration Policy and Agreement. I understand that I can only pursue claims in my individual capacity and not as part of a representative, collective or class action. I also agree that such arbitration will be conducted before an experienced arbitrator chosen by me and the Company, and will be conducted under the Federal Arbitration Act and the procedural rules of the American Arbitration Association (AAA").

I further acknowledge that in exchange for my agreement to arbitrate, the Company also agrees to submit all claims and disputes it may have with me to final and binding arbitration, and that the Company further agrees that if I submit a request for binding arbitration, my maximum out-of pocket expenses for the arbitrator and the administrative costs of the arbitration will be an amount equal to one day's pay (if I am an exempt employee) or eight times my hourly rate of pay (if I am a nonexempt employee), or $250, whichever is less, and that the Company will pay all the remaining fees and administrative costs of the arbitrator and the AAA or other arbitration service. I further acknowledge that this mutual agreement to arbitrate may not be modified or rescinded except by a written statement signed by both me and the Company.

Analysis

The sole issue herein is the legality of the Respondent's dispute resolution arbitration policy (DRAP). The principal case on this subject is still *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012). Though much maligned by Respondents, and some courts, I am still bound by its findings, unless the Board reverses itself on the subject or the Supreme Court rules otherwise. In *Horton,* the Board applied the test as set forth in *Lutheran-Heritage Village- Livonia*, 343 NLRB 646 (2004), which stated that the inquiry is whether the rule at issue explicitly restricts activities that are protected by Section 7 of the Act; if so, it is unlawful. If not, the finding of a violation is dependent upon a showing of one of the following: employees would reasonably construe the rule to prohibit protected activity or the rule has been applied to restrict the exercise of this activity. The Board, in Horton, found that "employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums arbitral and judicial" as a condition of employment. (Slip op. at p. 12). Respondent initially defends that as the DRAP specifically excludes claims before the Board and other governmental agencies it is, on its face,

lawful. Counsel for the General Counsel, in her brief, argues that this exclusionary language is "vague," "ambiguous" and ". . . insufficient to clarify the inherent ambiguity created by only naming the NLRB and other federal and state agencies without explaining in the remainder of the policy that employees may file charges under the NLRB." I disagree. The exclusions and restrictions section of the DRAP states that "certain issues" may not be submitted for review (or exclusive review) by arbitration, mentioning Workmen's Comp and ERISA. It then states that

> . . . charges before the Equal Employment Opportunities Commission, National Labor Relations Board, or similar local or state agencies, are not subject to exclusive review by arbitration. This means that you may file such non-waivable statutory claims with the appropriate agency that has jurisdiction over them if you wish, regardless of whether you decide to use arbitration to resolve them.

Even though it is lay people who are reading these provisions, I believe that the Respondent made it reasonably clear that unfair labor practice charges with the Board are excluded from the DRAP coverage as the sentence cited above clearly states that employees may file individual claims with the Board and other agencies. However, even though DRAP allows employees to file claims with the Board and other agencies, that does not resolve the issue of whether it violates the Act. *Horton* states that collective action by employees is protected by the Act: "Both the Board and the courts have recognized that collective enforcement of legal rights in court or arbitration serves that congressional purpose [mutual aid and protection]." The Board (at p.3) also spoke of class actions or collective claims by employees, saying, "When multiple named-employee plaintiffs initiate the action, their activity is clearly concerted." I therefore find that even though DRAP excludes Board charges from its coverage, it still restricts employees in combining with other employees in the exercise of their substantive rights, and therefore violates Section 8(a)(1) of the Act.

Counsel for the General Counsel also alleges that the confidentiality provision of DRAP violates the Act. It states that employees may not reveal any statements or information made or revealed during the arbitration, except on a "need to know" basis or as permitted or required by law. Although this provision only prohibits the dissemination of information that was revealed during arbitration, it still improperly limits employees in freely discussing wages and other terms and conditions of employment. It is possible that during such an arbitration proceeding, a previously unknown facet of the Respondent's employment policy would be revealed and, yet, if the confidentiality provision of DRAP is upheld, the employees would be prohibited from discussing this subject with other employees, something that is clearly protected by Section 7 of the Act. Employees are entitled to discuss their terms of employment whether these terms are common knowledge, are set forth in a contract, or were discovered at an arbitration proceeding. Restricting the dissemination of information as it does, I find that this confidentiality provision also violates Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.
3. The dispute resolution and arbitration policy maintained by the Respondent, violates Section 8(a)(1) of the Act.
4. The confidentiality provision contained in DRAP violates Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has violated the Act by maintaining the dispute resolution and arbitration policy, I recommend that Respondent be ordered to cease and desist from enforcing this policy, and to post the Board notice set forth below at each of its locations where it is in effect. As the confidentiality provision which I found to be unlawful is contained in the DRAP, no additional remedy is required in order to remedy that situation. Further, I recommend that Respondent be ordered to notify all arbitral and judicial panels where it has attempted to enjoin, or otherwise prohibit, employees from bringing or participating in class or collective actions, that it is withdrawing these objections and that it no longer objects to such employee actions.

Upon the foregoing findings of fact, conclusions of law and based upon the entire record, I hereby issue the following recommended[2]

ORDER

The Respondent, Professional Janitorial Service of Houston, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or enforcing its dispute resolution and arbitration policy.

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

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

(a) Notify all employees at locations where the program is in effect, that it will no longer maintain or enforce the provisions contained in the dispute resolution and arbitration policy that prohibits employees from bringing or participating in class or collective actions in an arbitral or judicial forum relating to wages, hours, or terms and conditions of employment, and prohibits them from revealing any statements or information made during an arbitration proceeding.

(b) Notify arbitral or judicial panels, if any, where the Respondent has attempted to enjoin or otherwise prohibit employees from bringing or participating in class or collective actions that it is withdrawing those objections and that it no longer objects to such employee actions.

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days after service by the Region, post at each of its facilities where the dispute resolution and arbitration is maintained or enforced, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 16, 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 employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, 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 to all current employees and former employees employed by the Respondent at any time since March 9, 2013.

(d) Within 21 days after service by the Region, file with the Regional Director 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. June 16, 2014

[3] 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 of the United States Court of Appeals Enforcing an Order of the 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 or enforce the dispute resolution and arbitration policy as far as it prohibits you from bringing or participating in class or collective actions relating to your wages, hours or terms and conditions of employment in arbitrations or court actions and further prohibits you from revealing any information or statements that you learned during the course of an arbitration hearing.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your exercise of rights guaranteed you by law.

WE WILL notify any arbitral or judicial panel where we have attempted to prevent or enjoin you from commencing, or participating in, joint or class actions relating to wages, hours, or other terms and conditions of employment that we are withdrawing our objections to these actions, and WE WILL no longer object to you bringing or participating in such class or collective actions or revealing any information learned at an arbitration proceeding.

PROFESSIONAL JANITORIAL SERVICE OF HOUSTON, INC.