Bristol Farms *and* Konny Renteria. Case 21–CA–103030

November 25, 2015

ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

The Respondent has filed a Motion to Approve Unilateral Settlement, seeking a Board Order approving its proposed Settlement Agreement, Notice, and revised Arbitration Agreement. The General Counsel, responding to the Board's issuance of a Notice to Show Cause why the Respondent's motion should not be granted, opposes the Respondent's motion.

The National Labor Relations Board has delegated its authority in this matter to a three-member panel. The Board has reviewed the submissions of the parties and the proposed settlement agreement and finds that approving the Respondent's motion would not effectuate the purposes of the National Labor Relations Act. The motion is therefore denied.

This case was transferred to the Board after Administrative Law Judge Lisa Thompson issued her October 17, 2014 decision. The judge found that the Respondent violated Section 8(a)(1) of the Act by: (1) maintaining and enforcing a mandatory Mutual Agreement to Arbitrate (MAA), and enforcing the MAA by moving to compel individual arbitration of the Charging Party's class-action lawsuit pertaining to wages, and (2) maintaining the MAA, which employees would reasonably construe to restrict their right to file charges with the Board. In finding the violations, the judge relied on the Board's decisions in *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013), and *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

To remedy these violations, the judge ordered the Respondent to: (1) rescind or revise the MAA to clarify to employees that it does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions, and that the MAA does not bar or restrict their right to file charges with the Board; (2) notify employees of the rescinded or revised agreements; (3) reimburse the Charging Party for litigation expenses directly related to the Respondent's filing of its motion to compel arbitration; and (4) post a notice.

Thereafter, the Respondent and the Region participated in the Board's Alternative Dispute Resolution Program. The Respondent proposed a Settlement Agreement, in which it agrees to post a Notice and offers a revised Arbitration Agreement (AA). The AA differs from the MAA by including in the AA document: (1) "SIGNING THIS AGREEMENT IS OPTIONAL," (2) an explicit class and collective action waiver,[1] and (3) language clarifying that employees may access the Board and its processes. The Region rejected the Respondent's proposed settlement, contending that "the General Counsel's current position on this issue is that an employer cannot maintain in effect for its current employees an arbitration agreement which waives the right to engage in class litigation, even if the agreement is entered into voluntarily." The Respondent then filed its Motion to Approve Unilateral Settlement Agreement.

The Respondent contends that because its proposed AA is "truly optional," it does not fall within the proscriptions of *Murphy Oil USA, Inc*., 361 NLRB No. 72 (2014), enf. denied ___ F.3d ___(5th Cir. 2015), and *D. R. Horton, Inc*., above, which addressed the lawfulness of "mandatory" class waivers, "imposed upon" employees and "required" by employers "as a condition of employment." See *D. R. Horton*, slip op. at 13 fn. 28. Deciding an issue left open by *D. R. Horton*, the Board has now rejected this argument, holding that an arbitration agreement that precludes collective action in all forums is unlawful even if entered into voluntarily, because it requires employees to prospectively waive their Section 7 right to engage in concerted activity. See *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. at 1, 5–8 (2015). The Board there held that "such nonmandatory agreements are contrary to the National Labor Relations Act and to fundamental principles of federal labor policy." Id., slip op. at 6.

We are not persuaded by our dissenting colleague's view that *D. R. Horton*, *Murphy Oil*, and *On Assignment*, were wrongly decided and thus that the Respondent's motion should be granted. Because the Board has addressed our colleague's current arguments before—in responding to his dissent and then-Member Johnson's dissent in *Murphy Oil* and to then-Member Johnson's dissent in *On Assignment Staffing*—our response here can be brief.

The main premise of our colleague's position—that the right to pursue joint, class, or collective claims arising in

[1] The proposed AA makes binding arbitration the "exclusive remedy" for employment-related claims except for certain enumerated claims (now including "claims arising under the [NLRA]") and explicitly waives an employee's right to "commence, be a party to, or act as a class member in any class or collective action against the other party relating to employment issues [….and the] right to commence or be a party to any group, class, or collective action in arbitration or any other forum."

the workplace is not a *substantive* right under Section 7 of the Act—contradicts longstanding Board and judicial precedent, as demonstrated at length in *D. R. Horton* and *Murphy Oil*.[2] Nor is our colleague correct when he insists that Section 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Section 7 right to engage in concerted legal activity. As the *Murphy Oil* Board carefully explained, the Section 9(a) proviso has no bearing in cases like this one. It merely permits an employer to entertain individual grievances without violating its duty to bargain collectively under Section 8(a)(5) of the Act—where a collective-bargaining agreement permits as much.[3] Contrary to our colleague, the Section 7 right to refrain from engaging in protected concerted activity is not implicated here. In preventing *employers* from enforcing agreements by individual employees not to exercise their statutory rights to engage in concerted activity, the Board does not require *employees* to act collectively. Rather, it permits them to do so in cases (like this one) where they have chosen to do so, notwithstanding their prior (invalid) agreement.[4]

It is a bedrock principle of federal labor law and policy that agreements in which individual employees purport to give up the statutory right to act concertedly for their mutual aid or protection are void. As the Board explained in *On Assignment Staffing*,[5] that principle is reflected not simply in the Board's case law, but also in the decisions of the Supreme Court[6] and in the Norris-LaGuardia Act, which broadly proscribes "any undertaking or promise . . . in conflict with the public policy" of that statute and which anticipated the National Labor Relations Act in guaranteeing the right of employees to engage in "concerted activities for the purpose of . . . mutual aid or protection," including "[b]y all lawful means aiding any person participating or interested in any labor dispute who . . . is prosecuting any action or suit."[7] Accordingly, and notwithstanding other provisions of the Respondent's proposed Settlement Agreement intended to comply with the judge's Order, we deny its motion. The due date for filing exceptions to the judge's decision is 28 days from the date of this Order.[8]

Dated, Washington, D.C. November 25, 2015

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

I would grant the Respondent's motion and approve its proposed Settlement Agreement, Notice, and revised Arbitration Agreement. As explained in my partial dissent in *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 22–35 (2014), enf. denied in pert. part __ F.3d __, 2015 WL 6457613 (5th Cir. Oct. 26, 2015), I believe Section 8(a)(1) of the National Labor Relations Act (NLRA or 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 entitle employees to class-type treatment of such claims. Whether an agreement to waive class or collective litigation of non-NLRA claims is or is not enforceable is an issue exclusively within the province of the courts or other tribunals that are vested with jurisdiction over such claims. Id.[1]

Not only does the Board lack jurisdiction over procedural issues pertaining to non-NLRA claims, several other considerations make it particularly inappropriate for

[2] See, e.g., *Murphy Oil*, 361 NLRB No. 72, slip op. at 7–8; *D. R. Horton*, 357 NLRB No. 184, slip op. at 2–4, 10. Our colleague states that "it is clear the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims." To be sure, the Board consistently has taken care to point out that what Sec. 7 protects is the right to "*pursue* . . . such claims of a class or collective nature as may be available to them under Federal, State or local law." *D. R. Horton*, slip op. at 10 fn. 24 (emphasis added). "[T]here is no Section 7 right to class certification . . ." Id. at 10. See also *Murphy Oil*, 361 NLRB No. 72, slip op. at 2, 5 fn. 30, 9 fn. 44.

[3] 361 NLRB No. 72, slip op. at 17–18, citing *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975) (Sec. 7 did not protect effort by union-represented minority employees to bargain separately with employer).

[4] Cf. *Murphy Oil*, supra, 361 NLRB No. 72, slip op. at 18 (prohibition of mandated individual arbitration does not implicate right to refrain).

[5] 362 NLRB No. 189, slip op. at 5–8.

[6] *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944) (holding that individual employees' agreements pre-dating certification of union did not limit scope of employer's statutory duty to bargain with union); *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940) (invalidating agreement that effectively required employees to present grievances to employer individually).

[7] 29 U.S.C. §§102–104.

[8] We reject the General Counsel's argument that the Respondent, by pursuing its motion, failed to timely file exceptions.

[1] In addition, where, as here, a class-waiver provision is part of an agreement to arbitrate disputes, the Federal Arbitration Act (FAA) applies. For the reasons expressed in my *Murphy Oil* partial dissent, and those thoroughly explained in former Member Johnson's partial dissent in *Murphy Oil*, the FAA requires that the arbitration agreement be enforced according to its terms. See 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op at 49–58 (Member Johnson, dissenting in part).

the Board to declare unlawful the revised Arbitration Agreement in this case.

First, as my colleagues acknowledge, the revised Agreement explicitly states that employees may file Board charges or otherwise access the Board's processes, and it excludes from mandatory arbitration any claims arising under the NLRA.

Second, the revised Agreement has no effect whatsoever unless an employee voluntarily chooses to sign it. Employees may freely elect *not* to sign the Agreement. Because the revised Agreement merely offers employees the opportunity to "opt in" to the Agreement and has no effect unless an employee chooses to do so, it is even more clearly lawful under the NLRA than the voluntary "opt-out" arrangement at issue in *On Assignment Staffing Services*, 362 NLRB No. 189 (2015),[2] and the class waiver agreement at issue in *Murphy Oil* (which employees voluntarily signed, although the agreement contained no "opt-out" provision and employees were not given the choice of being employed without signing the agreement).

Certainly, as my colleagues state, the Board has now held (in divided opinions) that an "arbitration agreement that precludes collective action in all forums is unlawful even if entered into voluntarily." However, I believe Sections 7 and 9(a) of the NLRA render this proposition untenable. As discussed in my partial dissenting opinion in *Murphy Oil*,[3] NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."[4] 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.[5] This right clearly encompasses agreements as to *procedures* that will govern the adjustment of such disputes, including agreements to waive class-action treatment. 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.

I believe it is clear that the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims,[6] and a class-waiver agreement pertaining to non-NLRA claims does not implicate any NLRA rights or obligations (provided it contains no provision that interferes with the right to engage in concerted activity for the purpose of mutual aid or protection).[7] The Respondent's revised Arbitration Agreement is lawful under Section 8(a)(1) for these reasons alone. However, even if employees were deemed to have an NLRA-protected right to insist on the class-type treatment of non-NLRA claims, the Respondent's revised Agreement is clearly lawful because (i) Section 7 gives every employee the right "to refrain" from NLRA-protected activity; (ii) Section 9(a) gives every employee the right "at any time" to adjust his or her non-NLRA disputes on an individual basis and thus the right to agree to waive class-type dispute-adjustment procedures;[8] and (iii) the Respondent's revised Agreement does not have any effect on any employee unless he or she affirmatively

[2] For the reasons expressed in my partial dissenting opinion in *Murphy Oil* and in former Member Johnson's dissenting opinions in *Murphy Oil* and *On Assignment Staffing Services*, I believe an "opt-out" arrangement involving non-NLRA class waivers, such as the agreement at issue in *On Assignment Staffing Services*, is also lawful under NLRA Sec. 8(a)(1).

[3] *Murphy Oil*, 361 NLRB No. 72, slip op. at 30–34 (Member Miscimarra, dissenting in part).

[4] 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.)

[5] See *Murphy Oil*, 361 NLRB No. 72, slip op. at 31–32 (Member Miscimarra, dissenting in part).

[6] 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); *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.").

[7] 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 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.

[8] It is significant that Sec. 9(a) protects the right of every employee to present and adjust his or her own individual grievances, even in a unionized work setting. The Act states that individual employees may adjust their grievances "*without the intervention of the bargaining representative*" (provided that the adjustment is not "inconsistent with the terms of a collective-bargaining contract or agreement then in effect" and that "the bargaining representative has been given opportunity to be present at such adjustment"). Sec. 9(a) (emphasis added). Given that employees have a protected right to agree to resolve employment disputes on an individual basis even when they are represented by a union, it is even clearer that individual employees have the same right when they are not represented by a union. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 33–34 (Member Miscimarra, dissenting in part).

chooses to sign it, and employees are free to decline to do so.

It is worth noting that the courts have been nearly uniform in rejecting the Board's invalidation of mandatory arbitration agreements containing class action waivers, even when those agreements contain neither an "opt-in" procedure (as in the Respondent's revised Agreement here) nor an "opt-out" procedure (as in *On Assignment Staffing Services*).[9] The Board's position is even less defensible when the Board finds that NLRA "protection" operates in reverse—not to *protect* employees' rights to engage or refrain from engaging in certain kinds of collective action, but to *divest* employees of those rights by denying them the right *to choose* whether to be covered by an agreement to arbitrate non-NLRA claims on an individual basis.[10] Moreover, the Board finds that Congress intended to divest employees of this right even when employees are unrepresented by a union, when they are free to sign or not sign such an agreement, and when choosing not to sign such an agreement has no adverse impact on their employment. Indeed, when an individual's potential claim is covered by a lawsuit that has been certified as a class or collective action, the individual has the right either to opt out (for example, where the lawsuit is subject to Rule 23 of the Federal Rules of Civil Procedure) or opt in (for example, in a wage-hour collective action under the Fair Labor Standards Act). In my view, it makes no sense to find that Congress intended, when enacting the NLRA, to make these same choices unlawful.

As explained above, I believe the Act itself renders these findings untenable. Rather than divesting employees of these rights, Congress twice expressed its intention to protect the right of employees to make such a choice: in Section 7, which guarantees employees the right to "refrain" from collective action, and in Section 9(a), which guarantees every employee the right "at any time" to present and adjust his or her grievances individually, and thus to enter into agreements with employers providing for their adjustment on an individual basis.

Accordingly, for these reasons, I respectfully dissent.

Dated, Washington, D.C. November 25, 2015

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

[9] The Fifth Circuit denied enforcement of the Board's order in *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), the first case in which the Board invalidated a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). 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).

[10] Of course, employees may favor agreements providing for arbitration of non-NLRA claims, even if such agreements require the resolution of claims on an individual basis, based on the speed, informality and certainty associated with arbitration, among other advantages. Such potential benefits were among the reasons that Congress adopted the Federal Arbitration Act, which the overwhelming majority of courts have broadly enforced in cases involving class action waivers, notwithstanding the Board's contrary position. See fn. 9, supra.