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Kelly Services, Inc. and T. Jason Noye. Case 04–CA–171036

December 12, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN,
EMANUEL, AND KAPLAN

On May 23, 2017, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations 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 conclusions¹ only to the extent consistent with this Decision and Order.²

On March 30, 2017, pursuant to Section 102.35(a)(9) of the Board’s Rules and Regulations, the parties submitted a joint motion and stipulation of facts, in which they jointly moved to waive a hearing and authorize the judge to issue a decision based on the stipulation of facts and the parties’ briefs. By order dated March 31, 2017, Judge Giannasi granted the parties’ joint motion. Based

¹ Applying the Board’s decisions in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), the judge found that the Respondent violated Sec. 8(a)(1) of the Act by maintaining and enforcing a mandatory 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. On May 21, 2018, the Supreme Court issued a decision in *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612, a consolidated proceeding including review of court decisions below in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). *Epic Systems* concerned the issue, common to all three cases, whether employer-employee agreements that contain class- and collective-action waivers and require individualized arbitration violate the Act. *Id.* at ___, 138 S. Ct. at 1619–1621, 1632. The Supreme Court held that such employment agreements do not violate the Act and that the agreements must be enforced as written pursuant to the Federal Arbitration Act (FAA). *Id.* at 1619, 1632. In light of the Supreme Court’s decision in *Epic Systems*, which overrules the Board’s holding in *Murphy Oil USA, Inc.*, we conclude that the complaint allegation that the arbitration agreement is unlawful based on *Murphy Oil* must be dismissed.

² We shall modify the recommended Order to conform to the violations found and in accordance with *Excel Container, Inc.*, 325 NLRB 17 (1997). We shall substitute a new notice to conform to the Order as modified.

on the factual stipulations, the parties agreed that the legal issue to be resolved was, in relevant part, whether the Respondent’s maintenance of a mandatory arbitration agreement violates Section 8(a)(1) of the Act because it “interferes with and restricts employee[s]’ access to Board processes by prohibiting [them] from receiving backpay or other monetary compensation through Board proceedings.” The judge answered that question in the affirmative, and we agree for the reasons set forth below.³

Since on or about September 5, 2015, the Respondent has maintained, as a condition of employment for all employees, a corporate-wide policy called the Dispute Resolution and Mutual Agreement to Binding Arbitration (“arbitration agreement” or “agreement”). In pertinent part, the agreement contains the following provisions:

1. Agreement to Arbitrate. Kelly Services, Inc. (“Kelly Services”) and I agree to use binding arbitration, instead of going to court, for any “Covered Claims” that arise between me and Kelly Services, its related and affiliated companies, and/or any current or former employee of Kelly Services or any related or affiliated company.

2. Claims Subject to Agreement. The “Covered Claims” under this Agreement shall include all common-law and statutory claims relating to my employment, including, but not limited to, any claim for breach of contract, unpaid wages, wrongful termina-

³ The judge also found that the agreement violated Sec. 8(a)(1) because it was ambiguous as to whether employees retained the right to file charges with the Board. In our view, that finding is outside the scope of the stipulated issue; therefore, we do not pass on it. We express no opinion whether *Ralph’s Grocery Co.*, 363 NLRB No. 128 (2016), on which the judge and our colleague rely, was correctly decided, but we note that the parties in that case broadly stipulated that the issue to be decided was whether the employer’s maintenance of the arbitration agreement “violate[d] . . . the Act because employees would reasonably conclude that [its] provisions . . . preclude them from filing unfair labor practice charges with the Board . . .” *Id.*, slip op. at 8 fn. 20 (Member Miscimarra, concurring in part and dissenting in part). Here, in contrast, the stipulated issue is much narrower: whether the arbitration agreement interferes with employees’ access to the Board *in a particular way*.

Member McFerran would affirm the judge’s finding on this point. In her view, the stipulation fairly encompasses the question whether the arbitration policy interfered with employees’ right to file charges. As her colleagues recognize, an express limit on employees’ ability to obtain a Board remedy reasonably inhibits those employees from filing charges at all. See, e.g., *Ralph’s Grocery Co.*, 363 NLRB No. 128, slip op. at 2 (2016) (policy language stating that arbitration was the “sole and exclusive remedy” for covered disputes reasonably cast doubt on employees’ ability to file unfair labor practice charges, notwithstanding additional policy language purporting to preserve access to the Board). That connection suffices both to bring the charge-filing issue within the scope of the stipulated issue and to affirm the judge’s finding.

tion, unfair competition, and for violation of laws forbidding discrimination, harassment, and retaliation on the basis of race, color, religion, gender, age, national origin, disability, and any other protected status. **I understand and agree that arbitration is the only forum for resolving Covered Claims, and that both Kelly Services and I hereby waive the right to a trial before a judge or jury in federal or state court in favor of arbitration for Covered Claims.** [Emphasis in original.]

3. Exclusions from Agreement. The Covered Claims under this Agreement do not include claims for employee benefits pursuant to Kelly Services' ERISA plans, worker's compensation claims, unemployment compensation claims, unfair competition claims, and solicitation claims. Any claim that cannot be required to be arbitrated as a matter of law also is not a Covered Claim under this Agreement. Furthermore, nothing in this Agreement prohibits me or Kelly Services from seeking emergency or temporary injunctive relief in a court of law in accordance with applicable law (however, after the court has issued a ruling concerning the emergency or temporary injunctive relief, both I and Kelly Services are required to submit the dispute to arbitration pursuant to this Agreement). I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB"), the Department of Labor ("DOL"), and the Equal Employment Opportunity Commission ("EEOC") or similar state agencies, *but I understand that I am giving up the opportunity to recover monetary amounts from such charges (e.g., NLRB or EEOC). In other words, I must pursue any claim for monetary relief through arbitration under this Agreement.* [Italics added.]

The Judge's Findings

The judge found, in relevant part, that the agreement's restriction on monetary relief violated Section 8(a)(1) by precluding full recourse to the Board. He reasoned that it was difficult to envision how the Board could be precluded from exercising its full statutory powers, including its remedial authority, once its processes have been invoked. The judge noted that the Board's remedies often provide for backpay to make employees whole, and that backpay is "a specific statutory remedy set forth in Section 10(c) of the Act." The judge also observed that "[b]ecause the Board enforces public, not private, rights, it is doubtful that any private rule could preclude the Board from providing a monetary remedy authorized by a statute of the United States."

The Parties' Arguments

The Respondent argues that the section of the agreement's Exclusions paragraph that prohibits employees from recovering backpay or other monetary compensation through Board proceedings is lawful because (1) although Board law prohibits restricting access to the Board's processes, backpay is a remedy, not a process; (2) claims arising under a statute can be resolved through arbitration; (3) Section 10(a) of the Act recognizes the existence of agreed-upon methods of resolving unfair labor practices, and Section 9(a) preserves employees' right, as individuals, to present and adjust grievances at any time; (4) Board precedent embraces deferral to arbitration; and (5) Board practices allow for Board and non-Board settlements, which are the outcome of negotiations and which often result in discriminatees' receiving less than full backpay.

The General Counsel and the Charging Party argue that the waiver of the right to a monetary recovery through Board proceedings and the requirement that employees "pursue any claim for monetary relief through arbitration under this Agreement" would lead reasonable employees to believe that filing unfair labor practice charges with the Board is futile. They further argue that the Board's remedies for unfair labor practices are not separate from, but are part and parcel of, the Board's processes. Finally, they dispute the Respondent's contentions that the Board's deferral and settlement policies support a finding that the Exclusions paragraph is lawful.

Applicable Law

The judge analyzed the arbitration agreement under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which was extant law at the time the judge issued his decision. However, in *Boeing Co.*, 365 NLRB No. 154 (2017), the Board overruled the "reasonably construe" prong of *Lutheran Heritage* and held that in considering whether an employer has lawfully maintained a facially neutral policy, rule, or handbook provision, the Board will evaluate (1) the nature and extent of the rule's potential impact on NLRA rights, and (2) legitimate justifications associated with the rule. *Id.*, slip op. 3. In so doing, the Board will "'strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy,'" viewing the rule from the employees' perspective. *Id.* (quoting *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33–34 (1967) (emphasis omitted). "As the result of this balancing, . . . the Board will delineate three categories" of work rules:

- *Category I* will include rules that the Board designates as lawful to maintain, either because (i)

the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule

- *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
- *Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.

Id., slip op. at 3–4 (emphasis in original).

Recently, in *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10 (2019), the Board applied *Boeing* and found that although the arbitration agreement at issue did not explicitly prohibit the filing of a charge, “when reasonably interpreted, [it] interfere[d] with the exercise of the right to file charges with the Board.” *Id.*, slip op. at 6. Further, the Board concluded that “as a matter of law, there is not and cannot be any legitimate justification for provisions, in an arbitration agreement or otherwise, that restrict employees’ access to the Board or its processes.” *Id.* Finally, the Board placed provisions that restrict employees’ access to the Board by making arbitration the exclusive forum for the resolution of all claims in *Boeing* Category 3, which designates rules and policies that are unlawful to maintain. *Id.* at 7.

Analysis

We find that the Respondent’s arbitration agreement is unlawful on two grounds. First, applying *Boeing* and *Prime Healthcare*, we find that the agreement restricts access to the Board and its processes by prohibiting employees from receiving backpay or other monetary compensation through Board proceedings.⁴ For this reason, the agreement violates Section 8(a)(1) as alleged. Second, the agreement is contrary to policies embedded in Section 10 of the Act. It impermissibly seeks to limit the Board in effectuating the policies of the Act, in the public interest, through the exercise of its remedial powers under Section 10(c). Moreover, because the agreement seeks to limit the Board’s exercise of its remedial powers

and those powers are part of the Board’s broader power to prevent unfair labor practices, the agreement is also contrary to Section 10(a) of the Act. We consider these grounds in turn.

Preliminarily, we recognize that the Respondent’s agreement differs from the arbitration agreement at issue in *Prime Healthcare*, which, when reasonably interpreted, restricted the filing of charges with the Board by making arbitration the exclusive forum for claims arising under the NLRA. In contrast, the agreement at issue here expressly allows employees to file charges with the Board.⁵ Recently, we found lawful an arbitration agreement that contained a sufficiently prominent “savings clause” preserving employees’ rights to file a Board charge or participate in any Board investigation or proceeding. *Briad Wenco, LLC d/b/a Wendy’s Restaurant*, 368 NLRB No. 72 (2019). We need not determine, however, whether the “savings clause” in the instant case passes muster under *Briad Wenco* because the agreement at issue here contains other language that renders it materially different from the arbitration agreement in that case.

The Respondent’s agreement requires employees to “giv[e] up the opportunity to recover monetary amounts from [unfair labor practice] charges In other words, [they] must pursue any claim for monetary relief through arbitration under this Agreement.” Under the agreement, the Respondent’s employees are prohibited from recovering backpay or other monetary remedies ordered by the Board. In *Prime Healthcare*, however, we held that “Section 7 of the Act protects the right of employees to utilize the Board’s processes,” 368 NLRB No. 10, slip op. at 4, and the right to utilize those processes includes the right to invoke the exercise of the Board’s statutory powers under Section 10 of the Act, including its power to determine appropriate relief for violations found. Section 10(c) of the Act grants the Board “broad, discretionary” authority to order remedies that will “effectuate the policies” of the Act, including backpay. See 29 U.S.C. §160(c); *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262–263 (1969) (citing *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964)). By making it impossible to receive Board-ordered backpay, the agreement interferes with employees’ access to this aspect of the Board’s processes.

Moreover, we agree with the General Counsel and Charging Party that because the agreement makes it impossible to obtain a monetary remedy from the Board, it undermines the incentive to file a charge in the first

⁴ Member McFerran acknowledges that *Boeing* is currently governing law and joins the majority for institutional reasons, but she adheres to and reiterates her dissent in that case.

⁵ On the other hand, by prohibiting employees from securing any monetary remedy from the Board, the agreement removes much of the incentive to file a charge in the first place.

place, notwithstanding language in the agreement that employees are not barred from doing so. And for the reasons we explained in *Prime Healthcare*, any interference with Board charge filing is unacceptable because without a charge, the Board is powerless to issue complaint. See 368 NLRB No. 10, slip op. at 4-5; *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967) (“Implementation of the Act is dependent upon the initiative of individual persons who must . . . invoke its sanctions through filing an unfair labor practice charge.”); *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 424 (1968) (“The policy of keeping people ‘completely free from coercion’ [] against making complaints to the Board is . . . important in the functioning of the Act as an organic whole.”) (quoting *Nash*, 389 U.S. at 238). For this reason as well, we find that the agreement interferes with employees’ access to the Board and its processes.

Even assuming that under the Respondent’s agreement, arbitrators would invariably award employees the same compensation the Board would order,⁶ employees’ right to utilize the Board’s processes would still be impaired. A Board order awarding backpay is enforceable in the Federal courts of appeals, and a court-enforced Board order may furnish the basis for a petition to hold a noncomplying employer in civil contempt. Under the Respondent’s agreement, employees would not have the benefit of these further processes.

For these reasons, the language in the Exclusions paragraph at issue here belongs squarely within Category 3 of *Boeing* because, as we stated in *Prime Healthcare*, “it significantly impair[s] employee rights, the free exercise of which is vital to the implementation of the statutory scheme established by Congress in the National Labor Relations Act[, and n]o legitimate justification outweighs, or could outweigh, the adverse impact of such provisions on employee rights and the administration of the Act.” *Id.*, slip op. at 7.

Additionally, the agreement’s prohibition on employees receiving Board-ordered remedies also carries with it a reciprocal limitation on the Board’s exercise of its power to award those remedies: even if the filing of a

charge ultimately resulted in a Board-ordered backpay remedy, the Board would order that remedy in vain if the charging party cannot accept it. Further, this limitation is not a merely private matter affecting only the private rights of the Respondent’s employees. Although a backpay remedy compensates employees for losses caused by unfair labor practices, Board-awarded backpay is unlike court-awarded damages in litigation. In the latter, plaintiffs seek to vindicate private rights by securing compensation for their injuries, including lost income resulting from employment discrimination. In contrast, Board proceedings, and Board-ordered remedies, serve a public purpose. Section 10(c) of the Act empowers the Board, among other things, to require violators “to take such affirmative action including reinstatement of employees with . . . backpay, *as will effectuate the policies of this Act*” (emphasis added). In turn, Section 1 of the Act declares it “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 protecting the exercise by workers” of their rights under Section 7 of the Act. Consistent with these statutory provisions, the Supreme Court has recognized that “[m]aking . . . workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941); see also *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 175 (2d Cir. 1965) (stating that Board-ordered backpay “has the twofold purpose of reimbursing employees for actual losses suffered as a result of a discriminatory discharge and of furthering the public interest in deterring such discharges”).⁷ And the Board itself has long recognized that it performs its function “in the public interest and not in vindication of private rights.” *Robinson Freight Lines*, 117 NLRB 1483, 1485 (1957). It is therefore apparent that the Exclusions paragraph of the Respondent’s arbitration agreement does not merely entail loss of access by employees to Board-ordered monetary remedies. It also constitutes an attempt to limit the Board’s exercise of its powers in the public interest under Section 10(c) of the Act.⁸

⁶ The arbitration agreement does not state that the remedies available under that agreement would differ from those available pursuant to the statutes under which claims submitted to arbitration would arise, including the NLRA, and we do not assume that such statutory remedies are unavailable in the Respondent’s arbitral forum. We do note, however, that if and to the extent they are, the arbitration agreement would present another difficulty, since the Federal Arbitration Act does not compel enforcement of arbitration agreements that require a prospective waiver of a party’s right to pursue statutory remedies. See *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 235-236 (2013) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 fn. 19 (1985)).

⁷ See also *Amalgamated Utility Workers v. Consolidated Edison Co. of New York*, 309 U.S. 261, 265 (1940) (“The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce.”).

⁸ We are aware that arbitration agreements often contain provisions, like the one at issue here, that make damages recoverable in the arbitral forum only. But such a provision as applied to the Board raises issues that do not arise with respect to other Federal agencies, such as the

Moreover, the Board's remedial powers are an aspect of its broader power to prevent unfair labor practices, and Congress has provided that this broader power "shall not be affected by any other means of adjustment or prevention that has been or may be established by *agreement*, law, or otherwise." Sec. 10(a) of the Act (emphasis added). Accordingly, the portion of the Exclusions paragraph at issue here contravenes Section 10(a) as well as Section 10(c).

Based on the foregoing, we find that the Exclusions paragraph of the Respondent's arbitration agreement is unlawful because it restricts employees' access to the Board and its processes, it purports to circumscribe the exercise of the Board's remedial powers in the public interest under Section 10(c) of the Act, and it seeks to limit the Board's power to prevent unfair labor practices contrary to Section 10(a) of the Act. Inherent in these findings are both our rejection of the Respondent's arguments that backpay is a "remedy, not a Board process," and our understanding that Section 10(a) of the Act recognizes the existence of agreed-upon methods of resolving unfair labor practices. Indeed, as shown, Section 10(a) militates against the Respondent's position.⁹

We find equally unavailing the Respondent's reliance on Section 9(a) of the Act. That section preserves the individual right of an employee to present a grievance directly to the employer despite being represented by an exclusive collective-bargaining representative and de-

spite the existence of a collectively-bargained agreement, so long as certain conditions are met. It has nothing to do with an arbitration agreement between an employer and its unrepresented employees and is therefore inapposite to the Exclusions paragraph.

Finally, we reject the Respondent's attempts to justify the Exclusions paragraph based on the Board's discretionary practice of deferring to arbitration¹⁰ and its practice of permitting parties to settle unfair labor practice charges. Nothing in that paragraph or elsewhere in the arbitration agreement allows for Board review of an arbitral decision; to the contrary, the agreement provides for "binding" arbitration. In contrast, under its deferral precedent, the Board has long and consistently reserved to itself the right to review arbitral decisions to ensure certain criteria have been met. See *Babcock & Wilcox Construction Co.*, 361 NLRB 1127 (2014) (postarbitral deferral); *Olin Corp.*, 268 NLRB 573 (1984) (same); *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955) (same); *Collyer Insulated Wire*, 192 NLRB 837 (1971) (providing for pre-arbitral deferral but retaining jurisdiction to ensure conformity with the standards set forth in *Spielberg*).¹¹ In the case of settlements, the settling parties effectively negotiate a resolution, but the Board retains jurisdiction and applies a reasonableness standard to ensure the vindication of Section 7 rights. See *Independent Stave*, 287 NLRB 740 (1987). The procedures set forth in the Respondent's arbitration agreement, and imposed as a condition of employment, are not analogous.¹²

Accordingly, we find that the Respondent violated Section 8(a)(1) of the Act by maintaining the arbitration agreement.

Equal Employment Opportunity Commission (EEOC) or the Wage and Hour Division of the Department of Labor (WHD). This stems from the fact that laws administered by these agencies (such as Title VII of the Civil Rights Act and the Fair Labor Standards Act) provide aggrieved individuals a private right of action and vindicate private rights in addition to public rights; whereas there is no private right of action under the NLRA, and the General Counsel litigates a charging party's claim—if he deems it to have merit—"in the public interest and not in vindication of private rights." *Robinson Freight Lines*, supra. Thus, as applied to claims within the purview of the EEOC or WHD, a provision like the one at issue here merely substitutes an arbitral for a judicial forum as the venue within which to seek a private monetary remedy. But as applied to claims arising under the NLRA, the Respondent's agreement substitutes a private remedy for one that Congress intended would primarily serve the public interest, and an arbitral remedy for one ordered by the Board as the "instrument" created by Congress "to assure protection from . . . unfair conduct in order to remove obstructions to interstate commerce." *Amalgamated Utility Workers*, supra.

⁹ We have no quarrel with the Respondent's contention that claims arising under a statute can be resolved through arbitration. It is not the fact that the Respondent's agreement requires claims arising under the Act to be arbitrated that renders it unlawful. The arbitration agreement at issue in *Briad Wenco*, supra, also required as much, but that agreement was found lawful based on a sufficiently prominent "savings clause" that preserved employees' rights to file a Board charge or participate in any Board investigation or proceeding. The Respondent's agreement also contains a savings clause, which is not at issue. Nevertheless, for the reasons explained above, we have found that the agreement as currently drafted may not be lawfully maintained.

¹⁰ The Board's policy of deferring to certain labor arbitration decisions is informed by Section 203(d) of the Labor-Management Relations Act, which states that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 U.S.C. §173(d). Here, there is no collective-bargaining agreement to apply or interpret.

¹¹ In *Babcock & Wilcox* the Board changed the standards under which arbitral decisions are reviewed and shifted the burden of proof from the opponent to the proponent of deferral, overruling *Olin* and *Spielberg*. We are willing to reconsider *Babcock & Wilcox* in a future appropriate case.

¹² The Respondent's observation that particular backpay amounts may be "subject to negotiation" both inside and outside of the Board's processes misses the point. The Respondent's agreement is unlawful because it restricts employees' access to the Board's processes, including Board-ordered monetary remedies, and in doing so, effectively restricts the Board's remedial authority. That negotiation of specific remedial amounts may occur in settlement discussions once the Board's processes have been engaged plainly does not justify precluding employees' full access to those processes.

AMENDED CONCLUSIONS OF LAW

1. The Respondent violated Section 8(a)(1) of the Act by maintaining a mandatory arbitration policy that bars or restricts the right of employees to obtain remedies, including backpay where appropriate, from the National Labor Relations Board.
2. The above violation constitutes an unfair labor practice within the meaning of the Act.

ORDER

The Respondent, Kelly Services, Inc., East Brunswick, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Maintaining a mandatory arbitration policy that bars or restricts the right of employees to recover backpay or other monetary remedies from the National Labor Relations Board.

- (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 necessary to effectuate the policies of the Act.

- (a) Rescind the Dispute Resolution and Mutual Agreement to Binding Arbitration, or revise it to make it clear to employees that the Agreement does not constitute a waiver of their right to recover backpay or other monetary remedies from the National Labor Relations Board.

- (b) Notify all current and former employees who were required to sign or otherwise became bound to the Dispute Resolution and Mutual Agreement to Binding Arbitration in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

- (c) Within 14 days after service by the Region, post at all facilities where the Dispute Resolution and Mutual Agreement to Binding Arbitration applies copies of the attached notice marked "Appendix."¹³ Copies of the notice, on forms provided by the Regional Director for Region 4, 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, the notices shall be distributed electronically, such as by email, posting on an intranet or an in-

¹³ If this Order is enforced by a judgment of the 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."

ternet 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 any 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 the closed facility or facilities at any time since September 5, 2015.

- (d) Within 21 days after service by the Region, file with the Regional Director for Region 4 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. December 12, 2019

John F. Ring, Chairman

Lauren McFerran, Member

Marvin E. Kaplan, Member

William J. Emanuel 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 arbitration policy that bars or restricts your right to recover backpay or other monetary remedies from the National Labor Relations Board.

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

WE WILL rescind the Dispute Resolution and Mutual Agreement to Binding Arbitration, or revise it to make clear to all employees that the agreement does not restrict their right to recover backpay or other monetary remedies from the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise became bound to the Dispute Resolution and Mutual Agreement to Binding Arbitration in any form that it has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

KELLY SERVICES, INC.

The Board's decision can be found at www.nlr.gov/case/04-CA-171036 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.



Lea Alvo-Sadiky, Esq., for the General Counsel.
Gerald L. Maatman, Jr., Esq. (Seyfarth Shaw LLP), for the Respondent.

Marielle Macher, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was submitted to me by virtue of a joint motion and stipulation pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations. The complaint alleges that Respondent violated Section 8(a)(1) of the Act by maintaining as a condition of employment for all employees an arbitration agreement that (1) requires employees to waive their right to maintain class or collective actions in all forums, whether arbitrator or judicial,

with respect to their wages, hours or other terms and conditions of employment; and (2) restricts employee access to Board processes by prohibiting employees from receiving back pay or other monetary compensation through Board proceedings. Respondent filed an answer denying the essential allegations in the complaint. All parties filed briefs in support of their positions.¹

Based on the stipulation and the stipulated record, as well as the briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with facilities located throughout the United States, including an office and place of business in East Brunswick, New Jersey, and has been engaged in providing temporary staffing to employers. In conducting its operations during the past 12-month period, Respondent provided services valued in excess of \$50,000 to customers located outside the State of New Jersey. At all times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Since at least September 5, 2015, Respondent, on a corporate-wide basis, has maintained as a condition of employment for all employees a "Dispute Resolution and Mutual Agreement to Binding Arbitration" (herein Arbitration Agreement, and in the record as Joint Exhibit 6) which includes, inter alia, the following provisions:

1. **Agreement to Arbitrate.** Kelly Services, Inc. ("Kelly Services") and I agree to use binding arbitration instead of going to court, for any "Covered claims that arise between me and Kelly Services, its related and affiliated companies, and/or any current or former employee of Kelly Services or any related or affiliated company.
2. **Claims Subject to Agreement.** The "Covered Claims" under this Agreement shall include all common-law and statutory claims relating to my employment, including, but not limited to, any claim for breach of contract, unpaid wages, wrongful termination, unfair competition, and for violation of laws forbidding discrimination, harassment, and retaliation on the basis of race, color, religion, gender, age, national origin, disability, and any other protected status. **I understand and agree that arbitration is the only forum for resolving Covered Claims, and that both Kelly Services and I hereby waive the right to a trial before a judge or jury in federal or state court in favor of arbitration for Covered Claims.** (Emphasis in original)
3. **Exclusions from Agreement.** The Covered Claims under this Agreement do not include claims for employee benefits pursuant to Kelly Services' ERISA plans, workers' compensation claims, unemployment compensation claims, unfair

¹ The parties agreed that their Stipulation of Facts, with attached exhibits, constitutes the entire record in this case and that no oral testimony is necessary or desired.

competition claims, and solicitation claims. Any claim that cannot be required to be arbitrated as a matter of law also is not a Covered Claim under this Agreement. Furthermore, nothing in this Agreement prohibits me or Kelly Services from seeking emergency or temporary injunctive relief in a court of law in accordance with applicable law (however, after the court has issued a ruling concerning the emergency or temporary injunctive relief, both I and Kelly Services are required to submit the dispute to arbitration pursuant to this Agreement). I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board (“NLRB”), the Department of Labor (“DOL”) and the Equal Employment Opportunity Commission (“EEOC”) or similar state agencies, but I understand that I am giving up the opportunity to recover monetary amounts from such charges (e.g., NLRB or EEOC). In other words, I must pursue any claim for monetary relief through arbitration under this Agreement.

8. Waiver of Class and Collective Claims. Both Kelly Services and I also agree that all claims subject to this agreement will be arbitrated only on an individual basis, and that both Kelly Services and I waive the right to participate in or receive money or any other relief from any class, collective, or representative proceeding. No party may bring a claim on behalf of other individuals, and no Arbitrator hearing any claim under this agreement may: (i) combine more than one individual’s claim or claims into a single case; (ii) order, require, participate in or facilitate production of class-wide contact information or notification of others of potential claims; or (iii) arbitrate any form of class, collective, or representative proceeding.

16. Savings Clause & Conformity Clause. If any provision of this Agreement is determined to be unenforceable or in conflict with a mandatory provision of applicable law, it shall be construed to incorporate any mandatory provision and/or the unenforceable or conflicting provision shall be automatically severed and the remainder of the Agreement shall not be affected. Provided, however, that if the Waiver of Class and Collective Claims is found to be unenforceable, then any claim brought on a class, collective or representative action basis must be filed in a court of competent jurisdiction, and such court shall be the exclusive form for such claims.

All documents attached as exhibits are true and correct copies of the documents described. The parties agree to the authenticity of the exhibits.

STATEMENT OF ISSUES

Based on the above factual stipulations, the parties agree that the legal issues to be resolved in this matter are whether Respondent’s maintenance of the Arbitration Agreement described above violates Section 8(a)(1) of the Act because it (i) interferes with Respondent’s employees’ rights to engage in protected concerted activity by requiring them to waive their right to maintain class or collective actions in all forums, whether arbitral or judicial, with respect to their wages, hours

or other terms and conditions of employment; and (ii) interferes with and restricts employees access to Board processes by prohibiting Respondent’s employees from receiving backpay or other monetary compensation through Board proceedings.

ANALYSIS

Waiver of Collective Actions

The Board has held that employer rules prohibiting employees, as a condition of employment, from pursuing collective actions in arbitrations or law suits violate Section 8(a)(1) of the Act because they interfere with collective rights set forth in Section 7 of the Act. *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part, 737 F. 3d 344 (5th Cir. 2013); and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014) enf. denied 808 F. 3d 1013 (5th Cir. 2015), cert. granted 137 S.Ct. 809 (2017). See also *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), cert. granted 137 U.S. 809 (2017).

Paragraph 8 of the Arbitration Agreement, which is a condition of employment, clearly precludes employees from pursuing employment-related class or collective actions both in arbitrations and in court proceedings. Thus, the Board’s rulings in *D.R. Horton* and *Murphy Oil* require me to find that the Arbitration Agreement violates Section 8(a)(1) of the Act.²

Restriction Against Filing Board Charges That Could Provide Monetary Remedies

The Board has held that a mandatory arbitration policy such as the one in this case discussed above also violates Section 8(a)(1) if employees “would reasonably believe that the policy interferes with their ability to file a Board charge or otherwise access the Board’s processes.” *Ralph’s Grocery Co.*, 363 NLRB No. 128, slip op. 1 (2016). In that case, the employer argued, as Respondent does here, that another part of the policy provided an adequate defense to the alleged violation because it permitted employees to file charges with the Board. But the Board rejected that defense because, overall, the policy broadly required arbitration for all employment-related disputes, and the reference to filing charges made the policy ambiguous. The Board noted that any ambiguity had to be construed against the promulgator of the policy, particularly because employees reading the policy are lay people, not lawyers able to make sophisticated distinctions such as those set forth in the policy. Thus, in finding a violation, the Board concluded that employees could reasonably read the retention of the right to file Board charges as “illusory.” *Id.* slip op. 2. As the Board further stated (*Id.* slip op. 3):

To be meaningful, the right to file charges with the Board must entail the rights to have the Board exercise its statutory powers under Section 10 of the Act: i.e., to investigate the charge, to determine its merits, and to pursue appropriate relief through the Act’s procedures. An employer may *not* lawfully require individual employees to arbitrate unfair labor

² I am bound by existing Board law unless reversed by the Board itself or by the Supreme Court. See *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004). I am also bound by the Board’s rejection, in *Murphy Oil* and *D.R. Horton* of the arguments made in Respondent’s brief to me in support of the dismissal of this aspect of the complaint.

practice claims that would otherwise be resolved by the Board under the Act's procedures. To do so necessarily interferes with employee's statutory right of access to the Board.

Ralph's Grocery governs this case. Here, as in *Ralph's Grocery*, the sweep of the broad mandatory arbitration language trumps any preservation of the right to file Board charges. The mandatory arbitration language is set off in bold type, unlike the rest of the policy. The ambiguity in the reading of the broad overall policy by the lay person employees here is the same as it was in *Ralph's Grocery*. Thus, here, as in *Ralph's Grocery*, the Arbitration Agreement's token recognition of the right to file Board charges is "illusory." And the overall Agreement can reasonably be read to inhibit the filing of Board charges. See also *Lincoln Eastern Management*, 364 NLRB No. 16, slip op. 2-3 (2016).

This is an even stronger case for a violation than *Ralph's Grocery*. Paragraph 3 of the Arbitration Agreement permits employees to file Board charges, as it did in *Ralph's Grocery*, but it also explicitly prohibits them from recovering money damages in a Board proceeding, a restriction that was not present in *Ralph's Grocery*. It is difficult to envision how, once the Board's processes have been invoked, the Arbitration Agreement could preclude the Board from exercising its full statutory powers, including its remedial authority. The Board's remedies, of course, often provide for back pay to make employees whole for discrimination and other unfair labor practices found by the Board. Back pay is a specific statutory remedy set forth in Section 10(c) of the Act. Because the Board enforces public, not private, rights, it is doubtful that any private rule could preclude the Board from providing a monetary remedy authorized by a statute of the United States. But the bottom line here is that a reasonable reading of the Arbitration Agreement's prohibition against monetary remedies from the Board is an added inhibition against the filing of charges. Why file a charge in a case where back pay is the normal remedy if you cannot get monetary relief? Accordingly, I find that the Arbitration Agreement precludes full recourse to the Board and thus violates Section 8(a)(1) of the Act in this additional respect.

Although it lists four alleged reasons for the legality of the Arbitration Agreement, Respondent's brief does not provide a persuasive defense to this part of the complaint. All of its reasons run contrary to *Ralph's Grocery*. Its first reason is hard to understand, but, to the extent that it suggests that if "no back pay is sought" in a Board proceeding the Arbitration Agreement is "lawful" (Br. 11-12), it fails to account for the restriction of a full Board remedy in those cases where back pay is a normal remedy. The second reason—that the Agreement allows for the filing of charges (Br. 12-13)—is likewise contrary to the rationale of *Ralph's Grocery* that preservation of the right to file charges is illusory where the thrust of the unlawful policy is to require arbitration in all employment-related disputes. The significance of Respondent's third reason—that denying statutory back pay relief to employees is permissible because back pay is a remedy and not a procedure (Br. 13-14)—escapes me. Respondent seems to allege that because a backpay remedy is not guaranteed its denial to employees who are nevertheless free to file charges does not interfere with

Board processes. But, although nothing in life is guaranteed, a backpay remedy is the normal remedy where an appropriate violation is found and circumstances warrant it. Nor is there any distinction in Board jurisprudence that permits access to Board processes and exclusion of Board remedies where appropriate. This is made clear by the Board's language in *Ralph's Grocery*, set forth above, that access to Board processes includes the right to "pursue appropriate relief" through the Board. A backpay remedy is thus part of Board processes. Respondent final reason—that because deferral to arbitration is permitted in some circumstances, it should be permitted here (Br. 14-19) is without merit. As the Board made clear in *Ralph's Grocery*, deferral to arbitration is a discretionary policy of the Board that has been used only when the arbitration provision has been the result of a collectively bargained agreement, which is not the case here. 363 NLRB No. 128, slip op. 3.

CONCLUSIONS OF LAW

1. The Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory and binding arbitration policy which required employees to resolve employment-related disputes exclusively through individual arbitration proceedings and to relinquish any right they have to resolve such disputes through collective or class action.
2. The Respondent violated Section 8(a)(1) of the Act by maintaining a mandatory and binding arbitration policy that employees reasonably would believe bars or restricts their right to file charges and seek remedies, including back pay where appropriate, before the National Labor Relations Board.
3. The above violations constitute unfair labor practices within the meaning of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act. As I have concluded that the Arbitration Agreement is unlawful, the recommended order requires that the Respondent revise or rescind it, and advise its employees in writing that said rule has been so revised or rescinded.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, Kelly Services, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Maintaining or enforcing a mandatory arbitration policy that waives the right of employees to maintain class or collective actions in all forms, whether arbitral or judicial.
 - (b) Maintaining or enforcing a mandatory arbitration policy that employees reasonably would believe bars or restricts the right of employees to file charges and seek remedies, including

³ 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.

backpay where appropriate, before the National Labor Relations Board.

(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 or revise the Arbitration Agreement to make it clear to employees that the agreement does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions, or to file charges and seek remedies, including backpay where appropriate, before the National Labor Relations Board.

(b) Notify the employees of the rescinded or revised Arbitration Agreement to include providing them a copy of the revised agreement or specific notification that the agreement has been rescinded.

(c) Within 14 days after service by the Region, post at all facilities where the Dispute Resolution and Mutual Agreement to Binding Arbitration applied copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 4, 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, the 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any 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 4, 2016.

(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. May 23, 2017

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.

⁴ If this Order is enforced by a judgment of the 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."

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 your right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT maintain a mandatory arbitration policy that you reasonably could believe bars or restricts your right to file charges and seek remedies, including back pay where appropriate, before the National Labor Relations Board.

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

WE WILL rescind or revise the Dispute Resolution and Mutual Agreement to Binding Arbitration to make it clear to all employees that the agreement does not constitute a waiver of their right in all forums to maintain class or collective actions and does not restrict their right to file charges and seek remedies including back pay where appropriate, before the National Labor Relations Board.

WE WILL notify all employees of the rescinded or revised Dispute Resolution and Mutual Agreement to Binding Arbitration, and WE WILL provide them with a copy of the revised agreement or specific notification that the agreement has been rescinded.

KELLY SERVICES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/18-CA-142795 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.

