AT&T Mobility Services, LLC *and* Eudora Brooks. AT&T Mobility Services, LLC *and* Juan Figuereo. Cases 22–CA–127746 and 22–CA–127781

January 21, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On June 26, 2015, Administrative Law Judge Mindy E. Landow issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply 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,[1] and conclusions as modified below, and to adopt the recommended Order, as modified and set forth in full below.[2]

1. The Respondent contends that the complaint is time barred by Section 10(b) because the initial unfair labor practice charges were filed and served more than 6 months after the Charging Parties, Eudora Brooks and Juan Figuereo, signed and became subject to the Management Arbitration Agreement (Agreement). We reject this argument, as did the judge, because the Respondent continued to maintain the unlawful Agreement during the 6-month period preceding the filing of the initial charges. The Board has long held under these circumstances that maintenance of an unlawful workplace rule, such as the Respondent's Agreement, constitutes a continuing violation that is not time barred by Section 10(b). See *PJ Cheese, Inc.*, 362 NLRB No. 177, slip op. at 1 (2015); *Neiman Marcus Group*, 362 NLRB No. 157, slip op. at 2 & fn. 6 (2015); and *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 2 & fn. 7 (2015).

2. We also reject the Respondent's and our dissenting colleague's contention that the opt-out provision of its Agreement places it outside the scope of the prohibition against mandatory individual arbitration agreements under *Murphy Oil USA, Inc*., 361 NLRB No. 72 (2014), enf. denied in part, *Murphy Oil USA, Inc. v. NLRB*, No. 14-60800 (5th Cir. Oct. 26, 2015), and *D. R. Horton*, 357 NLRB No. 184 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013). See *D. R. Horton*, slip op. at 13 fn. 28. The judge rejected this contention, and we do as well for the following reasons. The Board has held that an opt-out procedure still imposes an unlawful mandatory condition of employment that falls squarely within the rule of *D. R. Horton* and affirmed in *Murphy Oil*. See *On Assignment Staffing Services*, 362 NLRB No. 189, slip. op at 1, 4–5 (2015); see also *Nijjar Realty, d/b/a Pama Management*, 363 NLRB No. 38, slip op. at 2 (2015) (rejecting the employer's assertion that the opt-out provision of its arbitration agreement made the agreement lawful); *Bristol Farms*, 363 NLRB No. 45, slip op. at 1 (2015) (same); *U.S. Xpress Enterprises, Inc.,* 363 NLRB No. 46, slip op. at 1 (2015) (same). The Board further held in *On Assignment*, slip op. at 1, 5–8, that even assuming that an opt-out provision renders an arbitration agreement not a condition of employment (or non-mandatory), an arbitration agreement precluding 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. Indeed, the Board there stated that "such non-mandatory agreements are contrary to the National Labor Relations Act and to fundamental principles of federal labor policy." Id., slip op. at 6.[3]

[1] The consolidated complaint alleged that the Respondent violated Sec. 8(a)(1) of the Act both by maintaining its arbitration agreement and by enforcing it to compel individual arbitration. The General Counsel's posthearing brief, however, limited the scope of the allegations presented and the remedy sought to whether the maintenance of the arbitration agreement violated Sec. 8(a)(1).

In affirming the judge's findings, we do not rely on her citation to *Saigon Gourmet Restaurant*, 353 NLRB 1063, 1064 (2009), a case decided by a two-member Board. See *New Process Steel v. NLRB*, 560 U.S. 674 (2010).

[2] We shall modify the judge's recommended Order to conform to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

[3] The Respondent argues that *On Assignment* is distinguishable from this case because it involved a 10-day opt-out period and an onerous process to opt-out that required employees to either hand-deliver or send, physically or electronically, a completed opt-out form to the address specified by the employer. The Respondent notes that here, by contrast, the employees had 2 full months to choose to opt-out, and the process could be done quickly. We find this distinction immaterial. As the Board in *On Assignment* explained, "[r]egardless of the procedures required, the fact that employees must take any steps to preserve their Section 7 rights burdens the exercise of those rights." Slip op. at 4. The employees here, as in *On Assignment,* must "make an observable choice that demonstrates their support for or rejection of concerted activity." Id. [internal quotes omitted].

Our dissenting colleague observes that the Act "creates no substantive right for employees to insist on class-type treatment of non-NLRA claims." This is surely correct, as the Board has previously explained in *Murphy Oil*, 361 NLRB No. 72, slip op. at 2, 16 and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 and fn. 2 (2015). But what our colleague ignores is that the Act does "creat[e] the right to pursue joint, class, or collective claims in and as available without the interference of

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 2.

"2. Respondent has violated Section 8(a)(1) of the Act by maintaining an arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial."

ORDER

The National Labor Relations Board orders that the Respondent, AT&T Mobility Services, LLC, Paramus, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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

(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 Management Arbitration Agreement in all of its forms, or revise it in all of its forms to make clear to employees that the agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

(b) Notify all current and former employees who were required to sign or otherwise became bound to the Management Arbitration Agreement 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 its facilities where the Management Arbitration Agreement is or has been in effect copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 22, 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 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 November 1, 2013.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 22 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. January 21, 2016

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

In this case, my colleagues find that the Respondent's Management Arbitration Agreement (Agreement) violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the Agreement 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

an employer-imposed restraint." *Murphy Oil,* slip op. at 16–17 (emphasis in original). The Respondent's Agreement is just such an unlawful restraint.

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, there is no merit to our colleague's view that finding the Agreement unlawful runs afoul of employees' Sec. 7 right to "refrain from" engaging in protected activity. See *Murphy Oil,* supra, slip op. at 18; *Bristol Farms*, 363 NLRB No. 45, slip op. at 3. Nor is he correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. *Murphy Oil*, 361 NLRB No. 72, slip op. at 17–18; *Bristol Farms*, 363 NLRB No. 45, slip op. at 2.

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

[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).

claim asserted under a statute other than NLRA.[2] However, I disagree with my colleagues' finding that Section 8(a)(1) of the NLRA prohibits agreements that waive class and collective actions, and I especially disagree with the Board's finding here, similar to the Board majority's finding in *On Assignment Staffing Services*,[3] that class-waiver agreements violate the NLRA even when they contain an opt-out provision. In my view, Sections 7 and 9(a) of the NLRA render untenable both of these propositions. 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."[4] 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;[5] (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;[6] (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA);[7] and (iv) for the reasons stated in my dissenting opinion in *Nijjar Realty, Inc. d/b/a Pama Management,* 363 NLRB No. 38, slip op. at 3–5 (2015), the legality of such a waiver is even more self-evident when the agreement contains an opt-out provision, based on every employee's Section 9(a) right to present and adjust grievances on an "individual" basis and each employee's Section 7 right to "refrain from" engaging in protected concerted activities. 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, I respectfully dissent.

Dated, Washington, D.C. January 21, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

[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] 362 NLRB No. 189, slip op. at 1, 4–5 (2015).

[4] *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).

[5] 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.").

[6] 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*., 96 F. Supp. 3d 71 (S.D.N.Y. 2015); *Nanavati v. Adecco USA, Inc.,* 99 F. Supp. 3d (N.D. Cal. 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).

[7] For the reasons expressed in my *Murphy Oil* partial dissent and those thoroughly explained in former Member Johnson's dissent in *Murphy Oil*, 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).

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

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

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

WE WILL rescind the Management Arbitration Agreement in all of its forms, or revise it in all of its forms to make clear that it does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

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

AT&T MOBILITY SERVICES, LLC

The Board's decision can be found at www.nlrb.gov/case/22-CA-127746 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.

Evamaria Kartzian and *Michael Silverstein, Esqs.,* for the General Counsel.

Stephen J. Sferra and *Meredith C. Shoop, Esqs. (Littler Mendelson),* of Cleveland Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

MINDY E. LANDOW, Administrative Law Judge. Based upon charges filed by Nikki Amari,[1] Eudora Brooks and Juan Figuereo, as individuals, the Regional Director, Region 22, issued an order consolidating cases, consolidated complaint and notice of hearing (complaint) alleging that AT&T Mobility Services, LLC, (Mobility, Employer or Respondent) violated Section 8(a)(1) of the Act by promulgating, maintaining and enforcing individual arbitration agreements thereby interfering with employees' Section 7 right to engage in collective legal activity by binding employees to an irrevocable waiver of their rights to participate in collective and class litigation in all forums, arbitral and judicial. Respondent filed an answer denying the material allegations of the complaint and raising certain affirmative defenses, as will be discussed below. A hearing in this matter was held before me on February 6, 2015, in Newark, New Jersey.

On the entire record,[2] including the stipulations reached by the parties, my observation of and evaluation of the testimony and the demeanor of the witnesses, and after considering the briefs filed by Counsel for the General Counsel and the Respondent I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, and continuing to date, Respondent has been a limited liability company with an office and place of business in Paramus, New Jersey and has provided wireless telecommunications services. Annually, the Respondent derives gross revenues in excess of $100,000 from its business operations, and purchases and receives equipment and other goods and materials valued in excess of $50,000 directly from suppliers located outside the State of New Jersey. Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

This case presents an issue, left unresolved, by the Board's decisions in *D. R. Horton*, 357 NLRB No. 184 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA Inc.*, 361 NLRB No. 72 (2014). The issue is whether an arbitration agreement between an employee and an employer, which includes a class action waiver and also includes a limited opt out provision, violates Section 8(a)(1) of the Act.

Relevant Facts

The Respondent employs approximately 44,000 employees who are represented by the Communication Workers of America (CWA). These employees are not at issue here. The two charging parties, Brooks and Figuereo, are statutory employees in a classification not represented by CWA: Brooks worked for

[1] Amari subsequently withdrew her charge and is not a party to the instant proceeding.

[2] Respondent's unopposed motion to amend the transcript dated March 3, 2015, is hereby granted and made a part of the record herein.

Respondent from November 2008 until December 2013, as a national retail account executive (NRAE). Figuereo, who has been employed by Respondent since 2004, has been an NRAE since about May 2009.

The testimony of these witnesses establishes that NRAE's spend the majority of their time in the field away from their assigned office, promoting sales and marketing to retail store accounts. In the course and furtherance of their duties, NRAEs are provided with laptop computers, tablets (iPads), and a smartphone, which are used to communicate not only with their employer but with clients or potential clients.

Beginning in late-November 2011, Respondent began sending, via email, notice of a Management Arbitration Agreement (Agreement) to 24,000 of its nonbargaining-unit employees, including managerial employees and NRAE's. This Agreement offered employees the option to have employment-related disputes with Mobility resolved through third-party arbitration.[3] Mobility also provided instructions for employees to electronically register their decision to opt out and to not participate in the Agreement by February 6, 2012. Employees were advised that their failure to opt out by that deadline would constitute an agreement to the arbitration process, as set forth in the Agreement.

In particular, the email initially sent to employees was entitled, "Action Required: Notice Regarding Arbitration Agreement" and stated in relevant part:

> The decision on whether or not to participate is yours to make. To help you make your decision, it is very important for you to review the Management Arbitration Agreement linked to this email. It provides important information on the process and the types of disputes that are covered by the Agreement.
>
> Again, the decision is entirely up to you. To give you time to consider your decision, the company has established a deadline of no later than 11:59 p.m. Central Standard Time on Monday, Feb. 6, 2012 to opt out – that is, to decline to participate in the arbitration process – using the instructions below.
>
> If you do not opt out by the deadline, you are agreeing to the arbitration process as set forth in the agreement.

Each email additionally contained specific instructions for opting out of the Agreement. Employees were further advised that there were no adverse consequences for opting out of the Agreement; that they could and should contact a hotline number of they believed they experienced pressure or retaliation in connection with their decision and were also provided with a toll-free number to call should they have any questions. This was a telephone number that Employer management designated to coordinate its response, through its human resources department, to any such inquiries, rather than rely upon the responses of individual managers to employee questions about the terms or application of the Agreement.

[3] The Agreement stated that it enabled "employees and AT&T to use independent third-party arbitration rather than courts or juries to resolve legal disputes," and that it would apply "to any dispute to which this Agreement applies" and that class arbitrations and class actions were not permitted.

The intranet page containing the text of the Agreement contained an electronic button marked "Review Completed." This was an acknowledgement that an employee had reviewed the Agreement.

Employees were advised that:

> Regardless of any other terms of this Agreement, you may still bring certain claims before administrative agencies or government offices or officials if applicable law permits access to such agency, office or official, notwithstanding the existence of an agreement to arbitrate. Examples **would i**nclude, but not be limited to, claims or charges brought before the Equal Employment Opportunity Commission …, the U.S. Department of Labor…. The National Labor Relations Board…, or the Office of Federal Contract Compliance Programs…. Nothing in this Agreement shall be deemed to preclude or excuse a party from bringing an administrative claims before any agency or employee benefit plan in order to fulfill the party's obligation to exhaust administrative remedies before making a claim in arbitration.

The class and collective action waiver contained in the Agreement provides, in relevant part:

> To the maximum extent permitted by law, you hereby waive any right to bring on behalf of persons other than yourself, or to otherwise participate with other persons in: any class action; collective action; or representative action, including but not limited to any representative action under the California Private Attorneys General Act ("PAGA") or other, similar state statute. You retain the right, however, to bring claims in arbitration, including PAGA claims, but only for yourself as an individual. If a court determines that you cannot waive your right to bring a representative action under PAGA, any such claim may only be brought in court and not in arbitration.

From late-November through the opt-out deadline, various corporate compliance officials including Kathy Matyola and Susan Bounds (who both testified herein) monitored and reviewed reports indicating those employees who had accessed and completed a review of the Agreement. Employees who had not done so were sent reminders on or about December 15, 2011, and January 18, 2012.

There is no current dispute that Brooks and Figueroa received this email, and acknowledged that they had so received it.

In particular, the evidence adduced at trial established that:

> On December 1, 2011, an email with a link to the Agreement was sent to Figuereo, and received by him; on December 8, Figuereo accessed the Agreement and completed the "Review Completed" button; and on January 10, 2012, Figuereo again accessed the Agreement and clicked the "Review Completed" button.

The evidence further shows that Brooks was sent the email designated "Action Required: Arbitration Agreement" on December 5 and 16, 2011, and again on January 17, 2012. After this latter transmission, Brooks accessed the Agreement and clicked the "Review Completed" button.

There is also no dispute that both Figuereo and Brooks failed to opt out of the Agreement by the terms and within the time frame established by Respondent.

On June 20, 2013, Brooks, along with two other plaintiffs, Nikki Amari and Lisa Locurto, filed a class action lawsuit against Respondent in the United States District Court for the Southern District of New York alleging violations of the Fair Labor Standards Act (FLSA), and New York and New Jersey wage and hour statutes. The lawsuit specifically alleged that the Respondent failed to pay the named plaintiffs and all similarly situated NRAEs proper overtime premiums for hours worked beyond their regular 40-hour workweek. By letter dated July 8, 2013, Mobility's counsel, Patrick Shea, responded to the class action and wrote a letter to Paul Rooney, counsel for the Plaintiffs, in relevant part, as follows:

> Pursuant to a Management Arbitration Agreement, Ms. Brooks and Ms. Amari are each required to arbitrate their claims in this lawsuit on an individual basis rather than pursuing those claims in court. . . . Neither Ms. Brooks nor Ms. Amari opted out of the [Agreement], although each had the option to do so over an extended period of time, during which each received multiple emails explaining the process. Accordingly, both are bound by the terms of the [Agreement], and each must arbitrate her respective claims on an individual basis if she wishes to pursue such claims.

Shea additionally noted that as Locurto had opted out of the Agreement, she was not bound to arbitrate her wage and hour claims but that she "will not, however, be able to assert claims on behalf of any of the individuals in the purported class who declined to opt out and who must therefore arbitrate any dispute they have with AT&T on an individual basis."

Shea continued:

> AT&T Mobility Services (AT&T) hereby requests that Ms. Brooks and Ms. Amari voluntarily dismiss their claims. If either wishes to pursue a claim, she should file a request for arbitration under the [Agreement]. If they do not dismiss their claims, AT&T will file a motion with the District Court to compel arbitration. Please advise me if Ms. Brooks and Ms. Amari will be dismissing their claims.

Thereafter, Brooks and Amari voluntarily dismissed their federal class-action lawsuit on July 23, 2013.[4] On September 5, 2013, the Judicial Arbitration and Mediation Service (JAMS) advised Mobility that Brooks had commenced arbitration with regard to her wage and hour claims.

In November 2013, Brooks retained new counsel: Steven Adler and Arla Cahill, replacing Rooney. Arbitrator Michael D. Young was selected to hear the Brooks and Amari arbitration claims. On December 23, 2013, Brooks' counsel and Shea participated in a conference call with Arbitrator Young, at which time, Adler announced his intention to amend Brooks' statement of claim to assert class and collective claims against Mobility. Shea replied that class and collective actions were foreclosed by the Agreement and Second Circuit precedent. The Arbitrator directed Adler to submit any amended claim by January 8, 2014, and requested that the parties confer regarding the scope of the arbitration and the procedures and schedule to be followed. Absent such agreement, the Arbitrator directed each counsel to submit a letter of position regarding unresolved issues. Thereafter, Shea wrote to Adler stating that he believed Brooks' class and collective actions were foreclosed and that the issue of the Agreement's enforceability on that point was a matter for a federal court to decide.

On December 30, 2013, Shea sent an email to Adler which stated in part:

> We were surprised to learn last week of your intention to amend Ms. Brooks' Statement of Claims to include allegations on behalf of a class/collective under federal and state law. As you know the Management Arbitration Agreement (MAA) Ms. Brooks entered into expressly waives the right to bring any such claim, but you stated on our call that the waiver is unenforceable because it conflicts with your client's rights under the National Labor Relations Act (NLRA). We were equally surprised to learn of your position that this challenge to the class action waiver would be a question for resolution by the arbitrator. Before you file such an amended Statement of Claims, and we are forced to file an action in federal court to stay arbitration of the class portion of your claims, we wanted you to be aware that both of the above arguments are foreclosed by controlling precedent.[5]

In January 2014, Brooks' counsel notified Mobility and the arbitrator that they had been retained by Amari to represent her in her arbitration, they intended to file additional arbitration claims similar in nature to Brooks' claims, and that they wished to consolidate these claims with Brooks' claim. On January 22, 2014, Shea confirmed that Mobility was unwilling to consolidate such claims.

During the months of January and February 2014, Adler, Shea and Arbitrator Young exchanged a series of email correspondences regarding the filing of new individual arbitration claims and the deadline for the filing of such claims. On about February 19, 2014, Brooks' counsel reiterated its request that Mobility consent to consolidate Amari and Nelson Lopez' arbitration claims with Brooks' claim. On February 21, 2014, Shea responded to the request by again informing Brooks' counsel that: "in our view the Management Arbitration Agreement does not authorize consolidation of separate claims . . . absent the consent of the parties."

On March 10, 2014, Arbitrator Young conducted a telephone conference, and subsequently issued an order confirming the agreements reached. In pertinent part, the parties agreed that Brooks' arbitration claims would be consolidated for discovery purposes with the pending arbitration claims of Amari and Lopez. The parties additionally agreed that at the end of discovery, absent an agreement between the parties, the arbitrator would decide whether any of the claims would be consolidated for purposes of a hearing on the merits applying the standards set forth in the JAMS Employment Arbitration Rules and Pro-

[4] Counsel of record for Brooks and Amari made no claim that they were not bound by the Agreement.

[5] Shea went on to discuss both Second Circuit and Supreme Court law which, it asserted, supported the above stated position.

cedures and such other legal authority as may be appropriate.

On March 10, 2014, Adler notified Shea that he intended to file a wage and hour claim on behalf of Figuereo and requested to consolidate his claims with those of Brooks, Amari and Lopez in the event Figuereo had not opted out of the Agreement. Adler sought confirmation on the latter point. Shea subsequently confirmed that Figuereo did not opt out of the Agreement and Adler requested that his arbitration claims be consolidated with the claims of others for discovery purposes. Shea agreed to do so, if Adler would agree not to add additional claimants. Adler did not agree to this request.

On March 25, 2014, Figuereo filed with JAMS a statement of claim and demand for arbitration asserting wage and hour claims under the FLSA and New York and New Jersey law, the same claims raised by Brooks and Amari. By email dated March 31, 2014, Mobility represented to JAMS Case Manager George R. Cuervos that it objected to consolidating Figuereo's claims with the Brooks and Amari claims for purposes of discovery. However, on June 16, 2014, the parties ultimately agreed that Figuereo's claims would be consolidated with the Brooks and Amari claims for purposes of discovery as reflected in an order issued by Arbitrator Young.

Figuereo's claims have since proceeded in arbitration. After discovery, Figuereo and Mobility filed cross motions for summary judgment on his claims, still under submission at the time of the hearing. The "LoCurto" action in which Brooks was initially named as a plaintiff has continued in her absence. On August 18, 2014, District Judge Torres issued a memorandum and order granting conditional certification to a class including NRAEs. The Judge's Order excluded from the conditionally certified class, all individuals who had reached a prior agreement with Mobility and those who had consented to arbitrate their claims pursuant to the Agreement. Those employees who had opted out of the Agreement were given notice and an opportunity to join the collective action, approximately 175 employees. Of that number, approximately 20 exercised their right to participate in the LoCurto action.

Contentions of the Parties

In its posthearing brief, the General Counsel concedes that, notwithstanding the contentions of Brooks and Figueroa that they did not recall receiving the email introducing the Agreement, based upon the evidence adduced by the Respondent at the hearing, it is apparent that the charging parties had, in fact, received the email and failed to opt out of the Agreement. Thus, as framed by the General Counsel in its brief, the sole remaining issue in this matter is whether the maintenance of the Agreement itself violates Section 8(a)(1) of the Act.

Respondent has advanced a number of defenses to the remaining allegation. As an initial matter, it is argued that it did not violate Section 8(a)(1) of the Act because it did not require the charging parties to participate in the Agreement as a mandatory condition of employment; therefore the Board's decisions in *D. R. Horton* and *Murphy Oil* are neither applicable nor dispositive of the issue. The Respondent has further argued that the doctrine of the above-cited cases is inapposite because the charging parties voluntarily consented to the Agreement without coercion or interference. It is further urged that existing Board law does not warrant invalidating such a voluntary agreement to arbitrate employment disputes with an employer.

Respondent further argues that the lawfulness and validity of the Agreement must be determined by the Federal Arbitration Act (FAA) and Supreme Court law and not under Board doctrine as set forth in *D. R. Horton* and *Murphy Oil*. Moreover, the Respondent argues that the charges and complaint are barred by the 6-month limitations period under Section 10(b) of the Act.[6]

Analysis and Conclusions

Respondent's ADR policy violates Section 8(a)(1) of the Act.

It is well-settled that an employer's maintenance of a work rule which reasonably tends to chill employees' exercise of their Section 7 rights violates Section 8(a)(1) of the Act. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). A particular work rule which does not explicitly restrict Section 7 activity will be found unlawful where the evidence establishes one of the following: (i) employees would "reasonably construe the rule's language" to prohibit Section 7 activity; (ii) the rule was "promulgated in response" to union or protected concerted activity; or (iii) "the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). The Board has cautioned that rules must be afforded a "reasonable" interpretation, without "reading particular phrases in isolation" or assuming "improper interference with employee rights." *Lutheran Heritage Village-Livonia*, supra at 646. Ambiguities in work rules are construed against the party which promulgated them. *See Supply Technologies, LLC*, 359 NLRB No. 38 slip op. at p. 3; *Lafayette Park Hotel*, supra at 828.

The Board has held that mandatory arbitration agreements that bar employees from bringing joint, class or collective workplace actions in any forum restrict the exercise of the Section 7 right to act concertedly for mutual aid or protection, *Murphy Oil*, supra, slip op. at 5–6; *D. R. Horton*, supra, slip op. at 1–2 fn. 4. In *D. R. Horton*, the rationale of which was affirmed in *Murphy Oil*, the Board, relying upon cases dating back to its earliest days as a decisional body, found that concerted legal action addressing wages, hours and working conditions has consistently fallen within the protections of Section 7 of the Act.

For example, in *Trinity Trucking & Materials Corp*., 221 NLRB 364, 365 (1975), enfd. mem. 567 F.2d 391 (7th Cir. 1977) cert. denied 438 U.S. 914 (1978), the Board held that the filing of a lawsuit by a group of employees alleging that their employer had failed to pay them contract scale was protected activity. ("It is settled that the filing of a civil action by employees is protected activity unless done with malice or is in

[6] There are other arguments raised by Respondent which, based upon the General Counsel's apparent limitation of the scope of the violations alleged and remedy sought, are no longer of relevance here. In particular, the Respondent has urged that it did not unlawfully seek to enforce the Agreement by taking action consistent with the charging parties' voluntary agreement to arbitrate employment disputes and that the charging parties' claims are barred by waiver. In view of the limitations of the General Counsel's theory of the case, as set forth above, I find it unnecessary to address such defenses.

bad faith . . .[B]y joining together to file the lawsuit [the employees] engaged in concerted activity"). *In Le Madri Restaurant*, 331 NLRB 269, 275–276 (2000), the Board found that an employer unlawfully discharged two employees for engaging in protected concerted activity, which included filing a lawsuit in federal court on behalf of 17 other employees. The lawsuit alleged violations of federal and state labor laws. In *Novotel New York*, 321 NLRB 624, 633–636 (1996), the Board found that an "opt-in" class action lawsuit alleging employer violations of the FLSA was protected concerted activity. In *United Parcel Service, Inc*., 252 NLRB 1015, 1018, 1022 and fn. 26 (1980), enfd. 677 F.2d 421 (6th Cir. 1982), the Board found that an employer unlawfully discharged an employee for bringing a class action lawsuit regarding employee rest breaks. In *Saigon Gourmet Restaurant*, 353 NLRB 1063, 1064 (2009), the Board concluded that the employer violated the Act when it promised to raise delivery workers' wages if they abandoned their plan to file a wage and hour lawsuit and by discharging employees because they engaged in protected concerted activities. See also *D. R. Horton*, slip op. at 2, fn. 4 (and additional authority cited therein).

Respondent contends, in the first instance, that the decision as to whether to agree to the Agreement is entirely voluntary, rendering it lawful under the Act. In my view, the purported "voluntary" nature of any employee's decision as to whether to abide by such a policy, promulgated and endorsed by their employer, is open to question. More significantly, there are difficulties as to whether employees are fully apprised, in a manner they may appreciate, of the consequences of any such decision and whether the burden of having to decide as to whether one should irrevocably relinquish rights which are, after all, afforded to employees under the Act is an unreasonable one. There is also a question as to whether an employer's promulgation and apparent endorsement of such a waiver would reasonably tend to interfere, restrain or coerce employees in the exercise of those rights. In this regard, I note that employees were instructed to direct any inquiries relating to the Agreement or its terms to representatives chosen by their employer (in particular, its human resources personnel) rather than to an independent third party.[7] There is also the undeniable fact that unless an employee affirmatively chose to opt out of the Agreement, rather than affirmatively agree to it, the scope and nature of the legal options available to enforce or alter the terms and conditions of any such employee would change irrevocably.

Thus, the question is not simply whether an employee may choose to forego participation in the program. The issue, rather, is whether an employer and an individual employee may enter into an agreement to waive, irrevocably, future rights protected by the Act, thereby implicating a substantive right to engage in the collective redress of grievances, which the Board has long recognized as being at the core of Section 7 and central to the Act's purposes.

Here, there seems to be little dispute that participation in the policy initially was not mandatory: employees were provided with a specific period of time during which they choose to opt out of participation in the Agreement.[8] However, once an employee failed to exercise this option, certain "core" features of that employee's Section 7 rights were irrevocably waived prospectively and Respondent retained the option seek to enforce such a waiver, as happened in the instant case. There is no opportunity for an employee to reconsider his or her decision, assuming it was consciously and knowingly made, in light of changed employment circumstances.[9] It is solely the employee who is relinquishing his or her rights--rights which are granted by virtue of extant federal law.

The Board has found that such rights are substantive, as contrasted with merely procedural:

> For almost 80 years, Federal labor law has protected the right of employees to pursue their work-related legal claims together, i.e., with one another, for the purpose of improving their working conditions. The core objective of the National Labor Relations Act is the protection of workers' ability to act in concert, in support of one another. Section 7 implements that right by guaranteeing employees the "right …to engage in… concerted activities for the purpose of collective bargaining or other mutual aid or protection." Our national labor policy – aimed at averting "industrial strife and unrest" and "restoring equality of bargaining power between employer and employees" – has been built on this basic premise. In protecting a substantive right to engage in collective action – the basic premise of Federal labor policy – the National Labor Relations Act is unique among workplace statutes.

Murphy Oil, supra, slip op. at 1.

While the Board, in *D. R. Horton* or *Murphy Oil*, did not have to consider the issue of individual agreements containing an opt-out provision such as exists here, in other contexts, the Board has had the occasion to consider such waivers and, has found that an employer's offer to an employee of an individual waiver of core Section 7 rights, central to the purposes of the Act, to be unlawful. For example, in *Ishikawa Gasket America, Inc*., 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004), the Board found unlawful a separation agreement between an employee and the employer that restricted for a 1-year period the employee from attempting "to hire, influence, or otherwise direct any employee of the Company to leave employment of the Company or to engage in any dispute or work disruption with the Company, or to engage in any conduct which is contrary to the Company's interests in remaining union-free." As the Board found:

> In our view, this separation agreement is overly broad in that it forces [the employee] to prospectively waive her lawful Section 7 rights. "Future rights of employees as well as the

[7] There is no evidence in the record as to any such inquiry on the part of an employee and the human resources department's response thereto.

[8] The record is silent as to how Mobility addresses this issue with its employees hired and subject to the Agreement after the February 2012.

[9] There is no evidence that employees were apprised, in layman's terms, of the "real-life" consequences of the choice they were being asked to make; in particular what they were being asked to relinquish. Rather, as is evident from the excerpts cited above, and the Agreement as a whole, it is couched in terms that are best interpreted by a legal professional.

> rights of the public may not be traded away in such a manner." *Mandel Security Bureau, Inc*., 202 NLRB 117, 119 (1973) (release used by employer was overly broad and unlawfully prohibited filing of unfair labor charges concerning future incidents. See generally *Metro Networks, Inc*. 336 NLRB 63 (2001).

See also, *Goya Foods of Florida*, 358 NLRB No. 43, slip op. at 2–3 (2012), where the Board concluded that settlement agreements which prohibited employees from engaging in union activity relating to the employer and/or its employees were unlawful.

It should be noted that, from its earliest days, the Board has adhered to this fundamental construction of the Act. In *J. H. Stone & Sons*, 33 NLRB 1014 (1941), enfd. in relevant part, 125 F.2d 752 (7th Cir. 1942), the Board found individual employment contracts that required employees to attempt to resolve employment disputes individually with the employer and then provided for arbitration to be unlawful: "The effect of this restriction, is that, at the earliest and most crucial stages of adjustment of any dispute, the employee is denied the right to act through a representative and is compelled to pit his individual bargaining strength against the superior bargaining power of the employer." In affirming the Board's holding, the Seventh Circuit found that the contract clause as a per se violation of the act even if "entered into without coercion," because "it obligated [the employee] to bargain individually and was a "restraint upon collective action." *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942).

The foregoing precedents and policy considerations which underlie the Act from its earliest days warrant the conclusion that the Agreement violates the Act, notwithstanding the fact that employees may, for a proscribed and limited period of time, choose not to enter into such an agreement with their employer.

Respondent has further argued that the validity of the Agreement must be evaluated under the Federal Arbitration Act (FAA) and controlling Supreme Court precedent decided after the Board's *D. R. Horton* decision; and that such precedent has discredited the framework principle that Section 7 ostensibly creates a substantive right for employees to pursue employment claims on a collective basis. In support of these contentions, Respondent relies initially upon the refusal of the Fifth Circuit to enforce *D. R. Horton*, *D. R. Horton, Inc., v. NLRB*, 737 F.3d 344 (5th Cir. 2013), and notes that other Federal courts have rejected *Horton* to the extent it found the Board's decision to run afoul of the FAA. See *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013) and *Owens v. Bristol Care, Inc*., 702 F.3d 1050 (8th Cir. 2013).

In *Horton*, on review, the Fifth Circuit concluded that neither the Act's statutory text nor its legislative history contained a congressional command against application of the FAA and that, in the absence of an inherent conflict between the FAA and the Act's purpose, an arbitration agreement, such as the one at issue here, should be enforced according to its terms, 737 F.3d at 361–363. Accordingly, the Court denied enforcement of the Board's order invalidating the arbitration provision at issue in *D. R. Horton*.

In *Murphy Oil*, the Board acknowledged the Fifth Circuit's rejection of the Board's *Horton* decision on appeal, by a divided panel, as well as decisions of the Second and Eighth Circuits also indicating disagreement with *Horton*, but cited the well-established rule that "[t]he Board is not required to acquiesce in adverse decisions of the Federal courts in subsequent proceedings not involving the same parties." *Murphy Oil*, supra, slip op. at 2 fn. 17 (citations omitted). In *Murphy Oil,* a Board panel majority expressly reaffirmed *Horton* stating that "[t]he rationale of *D. R. Horton* was straightforward, clearly articulated and well supported at every step," *Murphy Oil*, supra, slip op. at 6 and that "[w]ith due respect to the courts that have rejected *D. R. Horton*, and to our dissenting colleagues, we adhere to its essential rationale for protecting workers' core substantive rights under the National Labor Relations Act." Id., slip op. at 7.

Respondent, relying on the Supreme Court's decisions in *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013), *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 669 (2012) and *AT&T Mobility v. Concepcion,* 131 S.Ct 24, 24 (2001), additionally argues that *D. R. Horton* and *Murphy Oil* were wrongly decided and should not be controlling in this matter. In particular, it is contended that these cases demonstrate that the FAA proclaims a strong policy in favor of arbitration and, accordingly, that statute requires the enforcement of arbitration agreements according to their terms. It is further contended that where the FAA's goals clash with those of another Federal statute, the FAA's mandate in favor of arbitration prevails unless it has been overridden by a contrary congressional command see e.g. *American Express v. Italian Colors Restaurant*, supra. In addition, Respondent references numerous other cases which have examined this issue and concluded that waivers of class or collective actions are enforceable.

The Board has recently rejected such arguments. In *Chesapeake Energy Corp*., 362 No. 80 (2015), the Board considered the determination of the administrative law judge that *D. R. Horton's* holding "cannot be sustained" because it is contrary to Supreme Court precedent under the FAA enforcing arbitration agreements that waive class arbitration of state and federal statutory claims.[10]

In *Chesapeake*, the Board noted that in *Murphy Oil,* it had reiterated that no post-*Horton* decision of the Supreme Court speaks directly to that issue. To the contrary, the Board found:

> Insofar as an arbitration agreement prevents employees from exercising their Section 7 right to pursue legal claims concertedly – by, as here, precluding them from filing joint, class or collective claims addressing their working conditions in *any* forum, arbitral or judicial – the arbitration agreement amounts to a prospective waiver of a right guaranteed by the NLRA. (The Act, of course, does not create an entitlement to class certification or the equivalent; it protects the right to *seek* that result.) Being required to proceed individually is no proper substitute for proceeding together, insofar as otherwise legally

[10] That case involved a mandatory waiver. I conclude, however, that the rationale applied by the Board insofar as it relates to any potential conflict with the FAA and related Court precedent would be applicable to the circumstances here.

> permitted, and only channels employee collective activity into disruptive forms of action. The "remedial and deterrent" function of the NLRA, which protects the right to concerted legal action, cannot possibly be served by an *exclusive* arbitral forum that denies the right of employees to proceed collectively.

Murphy Oil, supra, slip op. at 8–9 (footnotes omitted)(emphasis in original).

The Board further concluded that there is no conflict between the FAA and the NLRA because Section 2 of the FAA provides that arbitration agreements may be invalidated in whole or in part pursuant to its savings clause for the same reason that any contract may be invalidated, including that it is unlawful or contrary to public policy. *Murphy Oil*, supra slip op. at 9. Here the General Counsel urges, in essence, that the arbitration agreement at issue is unlawful because it interferes, restrains or coerces employees from the exercise of their substantive right to engage in Section 7 conduct. I agree.

The *Murphy Oil* Board further found that Section 7 of the Act presents a "contrary congressional command" overriding the FAA. Id at 9. In this regard, the Board stated, "[w]e see no compelling basis for the [Fifth Circuit's] conclusion that to override the FAA, Section 7 was required to explicitly provide for a private cause of action for employees, a right to file collective legal action and the procedures to be employed. That standard . . . reflects a fundamental misunderstanding of the NLRA and the collective, substantive rights it creates for the Board to enforce." Id.

As has been observed by numerous administrative law judges evaluating claims brought under *D. R. Horton* and its progeny, I am bound by Board law until either the Board or the Supreme Court mandates otherwise. *Waco, Inc*., 273 NLRB 746, 729 fn. 14 (1984) (it is the judge's duty to apply Board precedent which the Supreme Court has not reversed and for the Board and not the judge to determine whether precedent should be varied). In this regard, any argument raised by the Respondent that the Board's actions are misguided, do not comport with applicable precedent, do not fall within the FAA's savings clause and that there is no contrary congressional command that employees' substantive rights under the NLRA trump the FAA are appropriately addressed to the Board for its consideration or reconsideration, as the case may be.

Respondent additionally contends that the charges in this matter are barred by the 6-month limitations period under Section 10(b) of the Act. In support of these contentions, Respondent asserts that the Agreement is a binding, bilateral agreement between Mobility and an individual employee and not a work rule maintained during the limitations period. It is argued that the charges filed by the charging parties are barred because they agreed to be bound more than 2 years prior to filing their respective charges. Additionally, Respondent cites to attorney Shea's letter in July, 2013, where he notified counsel for Brooks about her agreement to arbitrate her wage and hour claims, which was sent 10 months prior to the filing of the charge. I do not agree with such contentions.

As the General Counsel has noted, the complaint alleges and it is urged that Respondent, since December 2011, and at all material times, has promulgated, maintained and enforced the Agreement, with the terms set forth, in relevant part, above. Respondent has admitted that the charging parties consented to the terms of the agreement containing, among other things, the terms set forth above. The evidence shows, and there can be no genuine dispute, that Respondent continues to maintain the Agreement and has done so during the relevant limitations period. I further find that the Agreement is tantamount to a work rule insofar as it affects terms and conditions of employment, and limits its employees' efforts to enforce or change them.

The Board has repeatedly held that the maintenance of an unlawful rule is a continuing violation, regardless of when the rule was first promulgated. *Chesapeake Energy Corp*, supra slip op. at 1 fn. 3 (and cases cited therein).

Here, Respondent first distributed the Agreement to employees in November 2011. It is clear, however that Respondent continued to maintain and enforce the Agreement and the policy contained therein within the 10(b) period. In this regard, Shea's December 30, 2013 email to Adler specifically referenced the Agreement and Respondent's position that it prohibits the filing of class or collective actions. As discussed above, Shea reiterated Respondent's position in subsequent communications dated January 22, 2014, February 21, 2014, and March 31, 2014. There is no evidence or any contention by Respondent that the Agreement has been rescinded.

As the charging parties filed their respective charges on May 1, 2014, it is apparent that the Agreement was maintained during the 10(b) period. I therefore find that Respondent's affirmative defense regarding the timeliness of the charges and complaint must be rejected.

CONCLUSIONS OF LAW

1. The Employer, AT&T Mobility Services, LLC, is an employer within the meaning of Section 2(2), (6) and (7) of the Act.
2. At all material times, Respondent has violated Section 8(a)(1) of the Act by maintaining an arbitration policy that waives the rights of its employees to file and maintain class and collective actions in all forums, arbitral and judicial and is applicable to those employees who have failed to opt out of coverage under the arbitration policy during a one-time initial opt out period permitted to each employee.
3. The above violations are unfair labor practices within the meaning of the Act
4. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent's Management Arbitration Agreement (Agreement) is unlawful, Respondent shall be ordered to rescind or revise it to make clear to employees (in all of its facilities in which the Agreement has been implemented), that the Agreement does not constitute or require a waiver in all forums of their right to maintain or participate in collective and/or class actions, and shall notify employees of the rescinded or revised Agreement by

providing them a copy of the revised policy or specific notification that the Agreement has been rescinded. Respondent is also ordered to distribute appropriate remedial notices to its employees electronically, such as by email, posting on an internet or intranet site, and/or other appropriate electronic means, if it customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB No. 9 (2010).[11]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, AT&T Mobility Services, LLC, Paramus, New Jersey, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining any arbitration agreement or policy that waives the right of employees to file and maintain class or collective actions in all forums, arbitral and judicial, and which applies irrevocably to those employees who fail to opt out.

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

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

(a) Rescind or revise the Management Arbitration Agreement (Agreement) currently applied to its employees, at all locations where it is in effect, to make clear to employees that the Agreement does not constitute or require a waiver in all arbitral or judicial forums of their right to maintain employment-related class or collective actions.

(b) Notify employees of the rescinded or revised Agreement by providing them a copy of the new revised Agreement and/or specific written notification that the Agreement has been rescinded.

(c) Within 14 days after service by the Region, post at its facilities where the Agreement has been in effect copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 22, 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 addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on internet or intranet site, and/or other electronic means. In the event that, 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 such facility or facilities at any time since November 2011.

(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 26, 2015

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 any arbitration agreement or policy that waives the right of employees to file and maintain class or collective actions in all forums, arbitral and judicial, and which applies irrevocably to those employees who fail to opt out.

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

WE WILL rescind or revise the Management Arbitration Agreement (Agreement) currently applied to our employees, at all locations where it is in effect, to make clear to employees that such an agreement does not constitute or require a waiver in all arbitral or judicial forums of their right to maintain employment-related class or collective actions.

WE WILL notify employees of the rescinded or revised Agreement by providing them a copy of the new revised Agreement and/or specific written notification that the Agreement has been rescinded.

AT&T MOBILITY SERVICES, LLC

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[11] The record here so indicates.

[12] 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.

[13] 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."