TBC Corporation and TBC Retail Group, Inc., a wholly-owned subsidiary of TBC Corporation[1] ***and*** **Luis Rodriguez.** Cases 12–CA–157478 and 12–CA–170543

October 15, 2018

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

On October 14, 2016, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondents filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondents filed a reply brief. The General Counsel filed cross-exceptions and a supporting brief, and the Respondents filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

1. The judge found, 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), that the Respondents violated Section 8(a)(1) of the National Labor Relations Act by maintaining and enforcing a Mutual Agreement to Arbitrate (the "arbitration agreement") 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.

Recently, the Supreme Court issued its decision in *Epic Systems Corp. v. Lewis*, 584 U.S. __, 138 S.Ct. 1612 (2018), 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 stipulate that employment disputes are to be resolved by individualized arbitration violate the National Labor Relations Act. Id. at__, 138 S.Ct. at 1619–1621, 1632. The Supreme Court held that such employment agreements do not violate this Act and that the agreements must be enforced as written pursuant to the Federal Arbitration Act. Id. at__, 138 S.Ct. at 1619, 1632.

In light of the Supreme Court's ruling in *Epic Systems*, which overrules the Board's holding in *Murphy Oil*, we conclude that the complaint allegations based on *Murphy Oil* must be dismissed.[2]

2. The judge also found that the Respondents violated Section 8(a)(1) of the Act by maintaining, in their 2010 employee handbook, an overly broad no-solicitation rule that prohibited employees from soliciting on company property and during nonwork hours. However, for the reasons explained below, we find that the Respondents successfully repudiated the unlawful rule.

A. Facts

The Respondents operate a chain of retail tire and automaintenance stores. On November 10, 2010, the Respondents promulgated the 2010 Associate Handbook, which included the following no-solicitation provision (the "2010 rule"):

> [The Respondents provide] a solicitation free work environment in order to prevent workplace distractions or misunderstandings that can result from solicitation. This means that we do not allow Associates or non-employees to solicit in our buildings, on our property or during work hours, unless that solicitation is approved in advance by the respective Senior Executive in conjunction with Human Resources.

On February 25, 2016, the Charging Party filed a charge alleging that the 2010 rule was unlawful. On April 4, 2016, the Respondents revised the 2010 rule and provided the 2016 Associate Handbook, with a revised rule, to all employees, or made it available to all employees. There is no dispute that the revised rule contained in the Respondents' 2016 handbook is facially lawful.

On April 5 and 6, 2016, the Respondents distributed a notice to employees regarding solicitation and posted it on the employee information bulletin boards located in each of Respondents' locations in Florida, Georgia, Mississippi, Louisiana, Ohio, Texas, Missouri, Maryland, North

[1] The judge incorrectly referred to the Respondents as TBC—Tire & Battery Corporation d/b/a TBC Corporation and TBC Retail Group Inc., a wholly-owned subsidiary of TBC—Tire & Battery Corporation d/b/a TBC Corporation, in contradiction to the parties' joint stipulation of facts. We have substituted the Respondents' correct names in the caption.

[2] We therefore find no need to address other issues raised by the Respondents' exceptions to the judge's disposition of the *Murphy Oil* allegations.

Carolina, South Carolina and Vermont. The notices stated as follows:

> FEDERAL LAW GIVES YOU THE RIGHT TO:
> • Form, join, or assist a union;
> • Choose representatives to bargain with us on your behalf;
> • Act together with other employees for your benefit and protection; and
> • Choose not to engage in any of these protected activities.
>
> **WE WILL NOT** do anything that interferes with these rights.
> Specifically:
>
> **WE WILL NOT** promulgate or maintain Written Work rules prohibiting you from:
>
> 1) Soliciting in our buildings, on our property, or during work hours. We will continue to have a work rule that prohibits you from soliciting during an employee's working time or with another employee during that employee's working time. "Working time" does not include such time as breaks, lunch, or rest periods, or before and after work.
>
> ***
>
> **WE HAVE** rescinded and given no effect to the rules described above. **WE HAVE** posted the revised Written Work Rules in the Associate Handbook. Also, Human Resources Policy 406 contains a more detailed description of the Company's no-solicitation and no-distribution policy, and remains in effect.

The Respondents' human resources managers confirmed, either from visual inspection or through communications with store managers, that the notices had been posted on the employee information bulletin boards located in each store.

B. Discussion

The judge found that the Respondents' 2010 no-solicitation rule was unlawfully broad. This finding is not in dispute.[3] The judge also found that the Respondents failed to repudiate the unlawful 2010 rule by its April 4, 2016 revision to the handbook and its posted notices because they did not adequately explain the Respondents' reasons for revising the 2010 rule. The judge further noted that the Respondents continued to engage in unfair labor practices after repudiation by maintaining their arbitration agreement.

We find, contrary to the judge, that the Respondents successfully repudiated the 2010 rule. When considering whether an employer has effectively repudiated an unfair labor practice, the Board applies the standard set forth in *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). Under *Passavant*, "repudiation must be timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed illegal conduct." Id. at 138 (internal quotations omitted). As in *Atlas Logistics Group Retail Servs. (Phoenix)*, 357 NLRB 353 (2011), a case with very similar facts, we find here that the Respondents' efforts met the *Passavant* standard.[4]

Similar to this case, in *Atlas* the employer revised an unlawful rule about a month after the initial charge alleging that the rule was unlawful and before the issuance of a complaint, and posted notices that were functionally equivalent to the notices posted by the Respondents. Significantly, as required by *Passavant*, the notices in *Atlas* and in this case were timely posted, unambiguous, and specific, notifying the affected employees of the rescinded rules and providing them with assurances regarding their Section 7 rights. *Atlas Logistics*, 357 NLRB at 357–358; see *Boch Imports*, 362 NLRB No. 83, slip op. at 1 fn. 3 (2015) (explaining that a notice notifying employees of an employer's unfair labor practices and giving employees assurances that the employer will not interfere with their Section 7 rights in the future is a standard and venerable Board remedy and required by *Passavant*), enfd. 826 F.3d 558 (1st Cir. 2016).

Moreover, contrary to the judge's decision, employers are not required to explain why they are repudiating an unlawful act. In *Lily Transportation Corp.*, 362 NLRB No. 54 (2015), the case relied upon by the judge in this regard, the Board simply found—consistent with longstanding precedent—no effective repudiation where the employer revised its prior handbook and removed the unlawful rules without giving its employees notice that it had done so. Id., slip op. at 1, 9; see, e.g., *Casino San Pablo*, 361 NLRB 1350, 1353 (2014) (finding that the employer did not effectively repudiate its unlawful handbook rules simply by issuing a revised handbook that deleted the rules); *DaNite Sign Co.*, 356 NLRB 975, 981 (2011) (affirming the judge's finding that the employer did not

[3] Although the Respondents' exceptions include the assertion that the 2010 rule was lawful, the Respondents provided no argument in their brief to support this exception. Accordingly, we disregard the bare exception under Sec. 102.46(b)(2) of the Board's Rules and Regulations. See, e.g., *New Concept Solutions, LLC*, 349 NLRB 1136, 1136 fn. 2 (2007); *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006).

[4] Chairman Ring and Member Kaplan express no opinion with respect to whether the *Passavant* requirements represent a proper standard for effective repudiation of unlawful conduct, but they agree that the Respondents' actions met the *Passavant* standard in this case.

cure its violation by merely issuing a revised handbook that deleted the unlawful rule). As the Board explained in *Lily Transportation*, it revised the order and notice so that the remedy would more accurately reflect the *particular facts of that case*—i.e, that the employer had already rescinded the unlawful rules but had not notified affected employees of the rescission or the circumstances surrounding the rescission. 362 NLRB No. 54, slip op. at 2. By contrast, and as described above, the Respondents here—consistent with the requirements of *Passavant*—revised the 2010 rule and timely circulated notices notifying the affected employees of the rescinded rules and providing them with assurances that the Respondents would not interfere with their Section 7 rights in the future.

Finally, we reject the judge's finding that the Respondents failed to successfully repudiate the 2010 rule because they continued to engage in unfair labor practices. Here, the only unlawful post-repudiation conduct found by the judge was the Respondents' maintenance of their arbitration agreement. As previously stated, in light of *Epic Systems* we have reversed this finding and dismissed the complaint in this respect.[5] Furthermore, there is no evidence that the Respondents have interfered with their employees' lawful solicitation activities since repudiating the 2010 rule.

Accordingly, we find that that the Respondents' successfully repudiated the unlawful 2010 rule. Therefore, we reverse the judge and dismiss this allegation as well.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. October 15, 2018

John F. Ring, Chairman

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[5] We therefore do not pass on whether conduct of this type would undermine the Respondents' repudiation of their no-solicitation rule.

Dallas Manuel, Esq., for the General Counsel.
Nicole Bermel Dunlap, Esq. and *Shane T. Munoz (Ford & Harrison, LLP),* of Tampa, Florida for the Respondent.
Bernard Mazaheri, Esq., (Morgan & Morgan) of Lixington, Kentucky for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This matter is before me on a stipulated record. The Charging Party, Luis Rodriguez, timely filed unfair labor practice charges and amended charges in the above-captioned cases against the Respondents, TBC—Tire & Battery Corporation d/b/a TBC Corporation and TBC Retail Group, Inc., a wholly-owned subsidiary of TBC—Tire & Battery Corporation d/b/a TBC Corporation (the Respondents). The complaints that followed allege that the Respondents violated Section 8(a)(1) of the National Labor Relations Act (the Act)[1] by maintaining and enforcing: (1) an agreement requiring its employees to resolve all employment related claims against the Respondents by binding arbitration and further waiving employees' rights to initiate or maintain such claims in a class, collective or representative basis and (2) a no solicitation rule precluding employees from engaging in protected activity. The Respondents deny that the arbitration agreement and no solicitation rule at issue, as well as the enforcement of the arbitration agreement, violate the Act. With respect to the arbitration agreement, they further contend that the Act does not grant employees a right to access class procedures created by other laws, including the Federal Arbitration Act (FAA) and Fair Labor Standards Act (FLSA).

The hearing opened telephonically on August 18, 2016. The formal documents were received in evidence.[2] Thereafter, I adjourned the hearing indefinitely to allow the parties additional time to file a joint motion for a decision on a stipulated record. On September 1, 2016, the parties submitted a Joint Motion and Stipulated Record pursuant to Section 102.35(a)(9) of the National Labor Relations Board's (the Board) Rules and Regulations. The joint motion requested that I issue a decision in this proceeding without a hearing based solely on a stipulated record. On September 2, 2016, I granted the joint motion, received into the record the stipulated facts and exhibits, and ordered the submission of briefs by September 21, 2016. A joint request for an extension of time to file briefs was granted and briefs were filed on October 7, 2016.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondents, corporations with places of business at facilities in Palm Beach Gardens, Florida, have been engaged in the business of operating a chain of retail tire and auto maintenance stores throughout Florida. In conducting their business as a single employer within the meaning of the Act, the Respondents annually derive gross revenues in excess of $500,000 and purchase and receive at their Florida facilities goods and values

[1] 29 U.S.C. §§ 158(a)(1), et seq.
[2] GC Exh. 1 through 1(cc) and Jt. Exh. 2 through 19.

in excess of $50,000 directly from points located outside the State of Florida. The Respondents admit, and I find, that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Arbitration Agreement

Since October 16, 2013, the Respondents have required all newly hired employees to sign the Respondents' "Mutual Agreement to Arbitrate Claims and Waiver of Class/Collective Actions" (the Arbitration Agreement) as a condition of employment. The language of the Arbitration Agreement has remained the same at all times since October 16, 2013.

On March 13, 2014, the Respondents further required all of their employees hired before October 16, 2013 to sign the Arbitration Agreement as a condition of continued employment. Although the Respondents requested that their current employees sign the Arbitration Agreement by March 21, 2014, this was not a strict deadline. Some of the Respondents' current employees did not sign the Arbitration Agreement until after March 21, 2014, but the Respondents eventually required all current employees to sign the Arbitration Agreement as a condition of employment.

Since March 13, 2014, the Respondents have implemented and maintained an Employee Self-Service Portal, which gives their employees the ability to review and acknowledge policies, processes and documents, including the Arbitration Agreement.[3] After employees execute the Arbitration Agreement, the record is electronically maintained by the Respondents.

The Arbitration Agreement includes two basic premises. The first binds employees to arbitration as their exclusive method of recourse in any dispute against the Respondent. The second part prohibits employees from bringing or participating in any group action. The agreement also provides a mechanism for judicial enforcement to compel arbitration and enforce or vacate an arbitration award if permitted by applicable law.

Matters excluded from the Agreement include claims for workers' compensation or unemployment compensation benefits, claims expressly precluded from arbitration by federal or state statutes or regulations not otherwise preempted from arbitration by the FAA, and proceedings before federal, state or local administrative agencies, including the Board. The agreement states, in pertinent part:

> [D]isputes, claims, complaints or controversies ("Claims") between [the employee and the Company] . . . that in any way arise out of or relate to your employment . . . will be resolved by binding arbitration and NOT by a court or jury. As such, the Company and you agree to forever waive and relinquish their right to bring claims against the other in a court of law.
>
> To the maximum extent permitted by law, the parties agree that this Agreement is equally binding on any person who represents or seeks to represent you or the Company in a lawsuit against the other in a court of law. That is, the parties agree that no Claims may be initiated or maintained on a class action basis, collective action basis, or representative action basis either in court or arbitration. Any Claims must be brought in a party's individual capacity, and such claim may not be joined or consolidated in arbitration with Claims brought by other individuals. . .

B. The Charging Party Executes the Arbitration Agreement

Between August 11, 2014 and mid-February 2015, the Respondents employed the Charging Party as an employee within the meaning of Section 2(3) of the Act, at its Tire Kingdom store in Kissimmee, Florida. In accordance with the Respondents' requirement as a condition of employment since October 16, 2013, the Charging Party electronically signed the Arbitration Agreement on August 9, 2014.[4]

On April 29 and May 12, 2015, Bernard Mazaheri, Esq., on behalf of the Charging Party and other employees, notified in the Respondents regarding alleged violations of the overtime provisions of Section 7(a) of the FLSA.[5] On June 3, 2015, Brian Maciak, the Respondents' Senior Vice President and a statutory supervisor within the meaning of Section 2(11) of the Act, responded that "[b]eginning in October 2013, associates have signed mandatory arbitration agreements. [Charging Party] did so as well. Further, these agreements contain a class action waiver."[6]

On June 19, 2015, the Respondents' former employees, Corey Desimoni and James Reiter, individually and on behalf of an alleged class of all similarly situated employees, filed a complaint in the United States District Court for the Middle District of Florida in the matter of *Corey Desimoni & James Reiter, individually & on behalf of all similar situated v. TBC Corporation,* Case No. 2:15-cv-366-UA-CM (M.D. Fla. 2015) (the FLSA Lawsuit), also alleging violations of the FLSA.[7] The Charging Party's signed Consent to Join the Florida Lawsuit as an opt-in plaintiff was filed the same day.[8] On July 28, 2015, the Plaintiffs in the FLSA Lawsuit filed a motion for conditional class certification and notice of the lawsuit to all putative class members.[9]

C. Court Enforcement of the Arbitration Agreement

On August 20, 2015, the Respondents sought dismissal or a stay of the FLSA Lawsuit by filing a motion to compel arbitration of the claims pursuant to the FAA. The motion to compel was supported by the Declaration of Megan Filoon, the Respondents' Vice President for Human Resources.[10] On September 8, 2015, Plaintiffs filed their opposition to the motion to compel arbitration. On September 14, 2015, the Respondents filed opposition to the Plaintiffs' motion for class certification.[11]

On June 9, 2016, Magistrate Judge Carol Mirando entered a Report and Recommendation to compel arbitration. On July 7,

[3] Jt. Exh. 3.

[4] While noting that the Charging Party denies signing the Arbitration Agreement, the parties stipulated, and the General Counsel reaffirmed, that the Charging Party electronically signed the agreement on August 9, 2014. (Stipulation 13; Joint Exh. 2.)

[5] Jt. Exh. 4–5.

[6] Jt. Exh. 6.

[7] Jt. Exh. 7.

[8] Jt. Exh. 8.

[9] Jt. Exh. 9.

[10] Jt. Exh. 10–11.

[11] Jt. Exh. 12–13.

2016, United States District Judge Sheri Polster Chappell entered an Order accepting and adopting the Report and Recommendation. The Plaintiffs have not appealed the order compelling arbitration.[12]

C. The Respondents' No Solicitation Provision

From November 1, 2010 until April 14, 2016, the Respondents maintained a 2010 Associate Handbook, which includes a no solicitation provision. During that period, the Respondents provided the 2010 Associate Handbook to, and/or made it available to, all of their employees. The no solicitation provision states as follows:

> [The Respondents provide] a solicitation free work environment in order to prevent workplace distractions or misunderstandings that can result from solicitation. This means that we do not allow Associates or non-employees to solicit in our buildings, on our property or during work hours, unless that solicitation is approved in advance by the respective Senior Executive in conjunction with Human Resources.[13]

Since January 18, 2012, the Respondents have maintained Human Resources Policies and Procedures, Policy No. 406 regarding Solicitation and Distribution. The policy "limits Associates from engaging in solicitation or distribution during work time or in work areas, that may interfere with [the Respondents'] operations."[14] Solicitation and distribution are defined as:

> a. Engaging in solicitation for subscriptions, memberships, money to purchase gifts or flowers, or other outside activities is not permitted during an associate's working time or with another associate during that associate's working time.
> b. Distribution of pamphlets or other printed materials of any kind is not permitted in the work areas of the facility at any time.
> c. Distribution of pamphlets or other printed materials of any kind is not permitted by an associate during his or her working time or to another associate during that associate's working time.
> d. Solicitation or distribution on facility premises by non-associates is not permitted at any time.

Notwithstanding Policy No. 406's restrictions against solicitation in work areas, the policy makes an exception for charitable solicitation:

> [The Respondents] believe that it is our responsibility to be a good corporate citizen in our communities. For this reason, we permit solicitation for a few, recognized charities selected by the Company which have a particular significance and benefit to our communities and their citizens. In such event, a specific notice of the solicitation for the charitable cause is posted on the bulletin boards (electronic or otherwise, whichever is appropriate). These solicitations are approved, initiated and conducted by members of management only.

On February 25, 2016, the Charging Party filed the charge alleging that the no solicitation rule in the 2010 Associate Handbook was unlawful. On April 4, 2016, the Respondents revised the no solicitation provision contained in the 2010 Associate Handbook. Beginning on April 4, 2016, the Respondents provided the 2016 Associate Handbook, including the revised no solicitation provision, to and/or made it available to, all their employees. Since April 8, 2016, the 2016 Associate Handbook has been communicated to all employees and new hires at those locations through Respondents' intranet system. The pertinent provision states as follows:

> [The Respondents prohibit] solicitation during working time to prevent workplace distractions or misunderstandings that can result from solicitation. This means that we do not allow Associates to engage in solicitation for subscriptions, memberships, money to purchase gifts or flowers, or other outside activities during the working time, of an Associate or with another employee during that Associate's working time. Working time is that period during the workday when the associate is supposed to be on the job or otherwise attending to the duties of his or her job. It does not include such time as breaks, lunch, or rest periods, or before and after work. Non-employees are prohibited from any solicitation in our buildings or elsewhere on our property[15]

On April 5 and 6, 2016, Filoon distributed a notice to employees regarding solicitation and posted it on the associate information bulletin boards located in each of Respondents' locations in Florida, Georgia, Mississippi, Louisiana, Ohio, Texas, Missouri, Maryland, North Carolina, South Carolina and Vermont. The notice stated that the Respondents would no longer promulgate or maintain written work rules prohibiting them from soliciting on company property during work hours, engage in any conduct that will negatively impact the Respondents, and fail to participate in any company investigation. The notice also stated the permissible scope of rules prohibiting soliciting during working time, engaging in activities that compete with the company or exploit an employee's position for personal gain, and requiring employees to cooperate in misconduct investigations. Since April 6, 2016, the Respondents' human resources managers have either visually or verbally confirmed with each store manager that the notices have been posted to the associate information bulletin boards located in each store.[16]

E. Applicability of Disputed Policies to Respondents' Subsidiaries

In addition to the dissemination and maintenance of the Arbitration Agreement, 2010 Associate Handbook, 2016 Associate Handbook and Posted Notices to Respondents' employees, these documents were disseminated and maintained with respect to employees of several, but not all of, the Respondents' subsidiaries.[17]

[12] Jt. Exh. 14–15.
[13] Jt. Exh. 16.
[14] Jt. Exh. 17.
[15] Jt. Exh. 18.
[16] Jt. Exh. 19.

[17] The parties agree that any final determination regarding the legality of the Arbitration Agreement and the 2010 Associate Handbook will also be binding as to subsidiaries of the Respondents where the Arbitration Agreement and 2010 Associate Handbook were disseminated and maintained, and the Respondents agree that any final remedial order shall be

Legal Analysis

I. THE ARBITRATION AGREEMENT

The complaint alleges that the class and collective action waiver contained in the Arbitration Agreement, as well as its enforcement, violates Section 8(a)(1) of the Act. In support of the allegations, the General Counsel alleges that the administrative law judge is bound to follow extant agency precedent in *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), and *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004). In those cases, the Board held that Section 7 creates a substantive right for employees to pursue collective action and, thus, a required waiver of such right violates Section 8(a)(1) of the act.

The Respondents contends that the Arbitration Agreement does not violate the Act because: (1) the FAA requires that the Arbitration Agreement must be enforced as written; (2) a federal court has already entered an order enforcing the Arbitration Agreement; and (3) neither the General Counsel nor Charging Party ever argued to that court that the arbitrations were unlawful under the Act, any reconsideration of the district court's decision should be barred on equitable principles.

B. Board Precedent in D. R. Horton, Inc. Governs the Arbitration Agreement

It is undisputed that the Arbitration Agreement expressly prohibits employees, as a condition of their employment, from engaging in protective concerted activity pursuant to Section 7 of the Act. The Respondents maintain, however, that the General Counsel and Charging Party cannot rely on Board decisions in *D.R. Horton* and *Murphy Oil* that were erroneously decided and/or reversed by the federal courts upholding class action waivers. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 359–360 (5th Cir. 30 2013); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1016 (5th Cir. 2015). In *Murphy Oil*, the Board affirmed the holding in *D.R. Horton* and addressed the Fifth Circuit's rejection of the Board's decision by reiterating its position that the Board is not required to follow their decisions in other cases. *Murphy Oil*, 361 NLRB 774, 776, fn. 17, citing *Enloe Medical Center v. NLRB*, 433 F.3d 834, 838 (D.C. Cir. 2005).

Only the Board or the Supreme Court can reverse extant Board precedent in *D.R. Horton* and *Murphy Oil*. See *Waco, Inc*., 273 NLRB 746, 749, fn. 14 (1984); *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616–617 (1963), enf. granted in part, 331 F.2d 176 (1964). As such, unless and until the Supreme Court holds otherwise, an administrative law judge is bound to follow the Board's controlling precedent finding class action waivers unlawful. See, e.g., *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004) (finding that the administrative law judge has duty to apply established Board precedent which the Supreme Court has not reversed); *Chesapeake Energy Corp*., 362 NLRB No. 80 (2015) (rejecting the administrative law judge's deference of the Act to the FAA and finding that arbitration policies violated Section 8(a)(1)).

Moreover, the federal courts diverge in their opinions regarding the issue. The Seventh and Ninth Circuits recently agreed with the Board's decision in *D.R. Horton* and deferred to the Board's interpretation of Section 7 as prohibiting employers from restraining employees in the pursuit of class action remedies. *Lewis v. Epic Sys. Corp*., 823 F.3d 1147 (7th Cir. 2016); *Morris v. Ernst & Young*, __ F.3d __, Case No. 13-16599 (9th Cir. 8/22/16). Deference to the Board's interpretation of the Act is neither a novel nor new concept, even at the Supreme Court. See, e.g., *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992).

The Supreme Court has not overturned the Board precedent in *D. R. Horton* and *Murphy Oil* holding that class action waivers in arbitration agreements restricting the right of employees to engage in concerted activity are unlawful. Therefore, *D.R. Horton* remains controlling Board law. *Manor West, Inc*., 311 NLRB 655, 667 fn. 43 (1993).

B. The Arbitration Agreement Restrains Employees From Filing Unfair Labor Practices Charges with The Board.

The Respondents also assert that the Arbitration Agreement is lawful because employees can legally waive their rights to engage in collective litigation. The Respondents rely on *Circuit City Stores, Inc.* 532 U.S. 105 (2001) for the proposition that the waiver merely affects employees' procedural, not substantive, rights to pursue collective action.

It is true that federal courts and the Board have recognized the employee's right to waive statutorily protected rights. *BE & K Constr. Co. v. NLRB*, 23 F.3d 1459, 1462 (8th Cir. 1994) (holding that the right to refrain from joining or assisting a union is an equally protected right with that of joining or forming a union). However, the Board rejected that argument in *MasTec Services Co*., 363 NLRB No. 81 (2015), enf. denied No. 16-60011 (per curiam) (5th Cir. July 11, 2016) (rejected contention that opt-out provision afforded employees the freedom to enter into a class waiver, or refrain from doing so). Based on current Board decisional law, the Respondents' class action waiver unlawfully restricts the Section 7 rights of employees.

C. Respondents' Enforcement of the Arbitration Agreement Also Violates the Act.

The Respondent successfully enforced the Arbitration Agreement as against the Charging Party and at least two other employees, Desimoni and Reiter. As a result, the Charging Party, Desimoni and Reiter were prevented from pursuing their FLSA claims in Federal district court and relegated to arbitration.

The Respondents assert that the FAA takes precedence over the Act by requiring that arbitration agreements be enforced according to their terms unless they fall within a specific exception. *CompuCredit Corp. v. Greenwood,* 132 S.Ct. 665, 668–669 (2012). Board precedent, however, holds otherwise. In *Murphy Oil,* the Board reaffirmed the applicability of the FAA's savings clause exception and congressional intent that the Act's mandate to protect employees' substantive Section 7 rights overrides the FAA's interest in enforcing private agreements. 361 NLRB 774, 782–783.

The Respondents' additional reliance on the doctrines of res judicata, collateral estoppel, laches and/or waiver based on the

applicable to all of their subsidiaries in the United States and its territories where the Arbitration Agreement and 2010 Associate Handbook were disseminated and maintained.

federal court's determining granting the motion to compel arbitration, is unavailing. Under extant Board law, court judgments are not given collateral estoppel effect in Board proceedings. See *Field Bridge Associates*, 306 NLRB 322 (1992), enfd. 982 F.2d 845 (2d Cir. 1993). This rationale is premised on the general rule that if the Board was not a party to the prior private litigation, it is not barred from litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully." *Roadway Express, Inc.*, 355 NLRB 197 (2010). Given the Board's interests in preventing the erosion of employees' Section 7 rights, the Board's "Spielberg-Olin" standard for deferring to an arbitrator's decision is inapplicable here because it is "clearly repugnant" to the purposes of the Act. See *Olin Corp*., 268 NLRB 573, 574 (1984); *Spielberg Manufacturing Co*., 112 NLRB 1080, 1082 (1955).

Lastly, the Respondents refer to the General Counsel's failure to intervene, after unfair labor practice charges were filed, as an interested party in the FLSA Lawsuit pursuant to FRCP Rule 24. The Respondent's argument that the General Counsel is in privity with the charging party because he seeks relief on his behalf ignores the governmental interests involved. This argument also fails. The Board adheres to the general rule that if the federal agency was not a party to the prior private litigation, it is not barred from litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully. See *Allbritton Communications*, 271 NLRB 201, 202 fn. 4 (1984). In accordance with Section 3(d) of the Act, the General Counsel is accorded a prosecutorial function in seeking relief for the charging party in order "to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce." *Amalgamated Utility Workers v. Consolidated Edison Co. of New York*, 309 U.S. 261, 265 (1940).

Accordingly, the Respondents' successful motion to compel arbitration in the federal court cases unlawfully restricted Section 7 activity in violation of Section 8(a)(1) of the Act. See *Bristol Farms,* 364 NLRB No. 34 (2016). Moreover, consistent with the Board's decision in *Murphy Oil,* supra at 21, the Charging Party, Desimoni and Reiter are entitled to recover all reasonable litigation expenses and attorneys' fees incurred in opposing the Respondents' motion to compel arbitration in the FLSA Lawsuits. See also *Nijjar Realty, Inc., d/b/a Pama Management,* 363 NLRB No. 38 (2015).

II. THE NO SOLICITATION POLICY

The complaint alleges that the Respondents' no solicitation rule, in effect from November 1, 2010 to April 4, 2016, unlawfully restricted employees' Section 7 rights to engage in protected conduct. The Respondents deny that their no solicitation rule was unlawful and further aver that they lawfully repudiated it by their promulgation of a revised rule in 2016.

A. The 2010 No Solicitation Rule

The Respondents' 2010 Associate Handbook, which was in effect from November 1, 2010 until April 4, 2016, and publicized to all of their employees, included a rule prohibiting solicitation by employees anywhere on company property during "working hours" without the express permission of management. HR Policy 406, promulgated on January 18, 2012, describes a different no solicitation rule by "[limiting] Associates from engaging in solicitation or distribution during work time or in work areas, that may interfere with [the Respondents'] operations."[18]

A rule or policy violates Section 8(a)(1) of the Act if it explicitly restricts activities protected by Section 7 or if it can reasonably be read by employees to chill their Section 7 rights. *Lafayette Park Hotel,* 326 NLRB 824 (1998), enfd. 203 F.3d 52 (DC Cir. 1999). As such, a rule prohibiting solicitation during working hours, in contrast to working time, is overly broad and presumptively invalid, as it could reasonably be construed as prohibiting solicitation during break times or periods when employees are not working. *One Way, Inc.,* 268 NLRB 394 (1983).

The Respondents' 2010 no solicitation rule restricting employees' solicitations on company property was overly broad and presumptively invalid. *William Beaumont Hospital,* 363 NLRB No. 162, slip op. at 1–2 (2016), citing *Lutheran Heritage Village,* supra at 646–647. The rule required employees to request and receive permissions from Respondents' management before engaging in solicitation on company property or during work hours. The clear implication of the rule was that certain solicitation might be permitted, while permission for other types of solicitation might be declined. By requiring management approval, the rule causes anyone seeking to engage in Section 7 activities to disclose the nature of the activity. Thus, the disclosure requirement tended to chill employees' from engaging in protected activity. *UPMC,* 362 NLRB No. 191, slip op. at 30 (2015).

B. Respondents' Efforts to Repudiate the 2010 Rule

On April 4, 2016, the Respondents replaced the 2010 Associate Handbook's no solicitation provision with a new no solicitation rule. The parties agree that the April 2016 no solicitation rule is facially valid and that the applicable notice purportedly repudiating the 2010 no solicitation rule was distributed to employees at its facilities. The General Counsel contends, however, that the notice was an ineffective repudiation of its past policy and that there is no evidence that it was posted at the facilities of the Respondents' affiliates.

The Respondents' repudiation of the 2010 no solicitation rule, although only 37 days after the Charging Party filed the applicable charge, was still ineffective under the Board's standard set forth in *Passavant Memorial Hospital,* 237 NLRB 138 (1978) (repudiation must be timely, unambiguous, describe the unlawful conduct being remedied and be free from other unlawful conduct after its publication). The Posted Notices were timely and unambiguous, but did not adequately explain the reasons for replacing the 2010 rule with the 2016 no solicitation policy, including the unfair labor practices being remedied. *Lily Transportation Corp.,* 362 NLRB No. 64, slip op. at 1 (2015). Moreover, the Respondents continued engaging in unfair labor practices after the repudiation by maintaining the aforementioned unlawful arbitration and class action waiver. *Douglas Division, The Scott & Feltzer Company,* 228 NLRB 1016 (1977).

Under the circumstances, the Respondents' 2010 No

[18] As noted by the General Counsel, there is no evidence that HR Policy 406 was distributed to employees.

Solicitation Rule unlawfully coerced employees from engaging in Section 7 activities in violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondents TBC—Tire & Battery Corporation d/b/a TBC Corporation and TBC Retail Group, Inc., a wholly-owned subsidiary of TBC—Tire & Battery Corporation d/b/a TBC Corporation, constitute a single employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Since March 13, 2014, the Respondents have violated Section 8(a)(1) of the Act by maintaining and enforcing an Arbitration Agreement requiring employees to resolve employment-related disputes exclusively through individual arbitration and forego any right they have to resolve such disputes through class or collective action.

3. Since November 1, 2010, the Respondents have violated Section 8(a)(1) of the Act by maintaining a policy prohibiting employees from soliciting other employees during non-working time of the involved employees, prohibiting employees from soliciting in working areas during nonworking time, and requiring employees to get permission from management before engaging in solicitation during non-working time.

4. The aforementioned unfair labor practices affected commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has violated the Act by maintaining and enforcing the Arbitration Agreement, I shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

As I have concluded that the No Solicitation and Mutual Agreement to Arbitrate Claims and Waiver of Class/Collective Actions provisions are unlawful, the recommended order requires that Respondents revise or rescind them and advise their employees in writing that said rules have been so revised or rescinded. Because Respondents utilized these rules on a corporate wide basis, Respondents shall post a notice at all locations, including all affiliates and subsidiaries, where these rules, or any portion of them were in effect. See, e.g., *U-Haul Co. of California,* 347 NLRB 375, fn. 2 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007); *D.R. Horton,* supra, slip op. at 17.

I recommend Respondent be required to reimburse Charging Party Rodriguez and other FLSA Lawsuit plaintiffs for any litigation and related expenses, with interest, to date and in the future, directly related to Respondent's filing its motion to compel arbitration in *Corey Desimoni & James Reiter, individually & on behalf of all similar situated v. TBC Corporation,* Case No. 2:15-cv-366-UA-CM (M.D. Fla. 2015). Determining the applicable rate of interest on the reimbursement will be as outlined in *New Horizons*, 283 NLRB 1173 (1987). Interest on all amounts due to Rodriguez shall be computed on a daily bases as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

The Respondents shall also be required to move the United States District Court for the Middle District of Florida jointly with the Charging Party on request, to vacate their order compelling arbitration and permit employees to proceed with class action claims regarding wages, hours and/or working conditions in some forum, whether arbitral or judicial.

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

ORDER

The Respondents, TBC—Tire & Battery Corporation d/b/a TBC Corporation and TBC Retail Group, Inc., a wholly-owned subsidiary of TBC—Tire & Battery Corporation d/b/a TBC Corporation, and their affiliates and subsidiaries, officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing an arbitration agreement or waiver of class or collective actions which employees would believe compel them to individually arbitrate claims against the Respondents with respect to disputes about their wages, hours or other terms and conditions of employment.

(b) Maintaining and/or enforcing an arbitration agreement that requires employees to waive the right to maintain employment-related class or collective actions in all forums, whether arbitral or judicial.

(c) Maintaining a policy prohibiting employees from soliciting other employees during non-working time of the involved employees, prohibiting employees from soliciting in working areas during non-working time, or requiring employees to get permission from management before engaging in solicitation during non-working time.

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

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

(a) Notify all employees at locations where the aforementioned policies are in effect that they will no longer maintain or enforce the provisions contained in the No Solicitation provision and the Mutual Agreement to Arbitrate Claims and Waiver of Class/Collective Actions that waives employees' right to bring or participate in class or collective actions.

(b) Notify arbitral or judicial panels, if any, where the Respondents have attempted to enjoin or otherwise prohibit employees from bringing or participating in class or collective actions, that it is withdrawing those objections and that it no longer seeking to compel arbitration pursuant to the Arbitration Agreement.

(c) Reimburse the Charging Party, Luis Rodriguez and the other plaintiffs in *Corey Desimoni & James Reiter, individually & on behalf of all similarly situated vs. TBC Corporation,* Case No. 2:15-cv-366-UA-CM (M.D. Fla. 2015) for reasonable attorneys' fees and other litigation expenses incurred in their efforts opposing the Respondents' efforts to compel arbitration of their lawsuit against the Respondents.

(d) Within 14 days after service by the Region, post at all facilities where the Mutual Agreement to Arbitrate Claims and Waiver of Class/Collective Actions is or has been maintained or

enforced, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondents' authorized representative, shall be posted by the Respondents 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 Respondents customarily communicate with their employees and former employees by such means. Respondents also shall duplicate and mail, at their expense, a copy of the notice to all former employees who were required to sign the mandatory and binding arbitration policy during their employment with the Respondents. Reasonable steps shall be taken by the Respondents 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 Respondents have gone out of business or closed the facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since November 1, 2010.

(e) 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. October 14, 2016

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.

On or after March 13, 2014, we required you to sign the company's "Mutual Agreement to Arbitrate Claims and Waiver of Class/Collective Actions" as a condition of employment. In addition, on or after April 4, 2016, we distributed to you a new Associate Handbook. The new handbook revised the previous Associate Handbook by eliminating a rule that was alleged to violate Federal labor law. The National Labor Relations Board has now found that those rules were unlawful.

WE WILL NOT maintain a provision in the Associate Handbook entitled "No Solicitation" that contains the following language: "TBC provides a solicitation free work environment in order to prevent workplace distractions or misunderstandings that can result from solicitation. This means that we do not allow Associates or non-employees to solicit in our buildings, on our property or during work hours, unless that solicitation is approved in advance by the respective Senior Executive in conjunction with Human Resources."

WE WILL NOT maintain an arbitration agreement that employees reasonably would believe bars or restricts the right to file individual class, collective or representative action claims against us with respect to employment-related disputes, at all locations, with respect to all current and former employees, within the United States and its territories.

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 notify all current and former employees who were required to sign or otherwise become bound to the 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.

WE WILL notify the court in which Corey Desimoni, James Reiter and Luis Rodriguez filed their collective lawsuit that we have rescinded or revised the arbitration agreement upon which we based our motion to dismiss their collective lawsuit and compel individual arbitration, and WE WILL inform the court that we no longer oppose the collective lawsuit brought by Desimoni, Reiter and Rodriguez on the basis of that agreement.

WE WILL reimburse Desimoni, Reiter, Rodriguez and any other plaintiffs for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing our motion to dismiss the collective lawsuit and compel individual arbitration.

TBC—TIRE & BATTERY CORPORATION D/B/A TBC CORPORATION AND TBC RETAIL GROUP, INC., A WHOLLY-OWNED SUBSIDIARY OF TBC—TIRE & BATTERY CORPORATION D/B/A TBC CORPORATION

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12-CA-157478 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.

[19] 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."