UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

D. R. HORTON, INC.

and Case 12-CA-25764

MICHAEL CUDA,
an Individual

ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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I. STATEMENT OF THE CASE[1]

Administrative Law Judge William N. Cates issued his Decision in this case on January 3, 2011, reported at JD(ATL 32-10). D.R. Horton, Inc. (Respondent) filed exceptions related to the ALJ's findings and conclusions that Respondent violated Section 8(a)(1) and (4) of the Act by maintaining a mandatory arbitration provision that employees reasonably could believe bars or restricts their right to file charges with the Board, in violation of Section 8(a)(4) and (1) of the Act.[2] (ALJD p.5, L24 – p.6, L.37). Counsel for the Acting General Counsel submits this answering brief in response to Respondent's exceptions.[3]

This answering brief focuses on Respondent's exceptions 1 and 4 through 9.

II. STATEMENT OF FACTS

The essential facts are undisputed. Since January 2006, on a corporate-wide basis, Respondent has required its employees to execute a Mutual Arbitration Agreement (MAA) as a condition of employment. [GCX- 1(j),

[1] In this brief, references to the transcript will be T-page number; references to the Administrative Law Judge's Decision will be ALJD-page and line numbers; references to General Counsel's exhibits will be GCX-exhibit number; references to Respondent's exhibits will be RX-exhibit number; and references to joint exhibits will be JX-exhibit number.

[2] On March 14, 2011, Counsel for the Acting General Counsel filed exceptions and a brief in support of exceptions regarding the ALJ's failure to find that Respondent violated Section 8(a)(1) of the Act in other respects.

[3] An Order Consolidating Cases, Consolidated Complaint and Notice of Hearing was issued in Cases 12-CA-25764 and 12-CA-25766 on November 26, 2008. [GCX- 1(j)]. An Order Severing Cases, Approving Withdrawal of Certain Allegations of Complaint, and Approving Withdrawal of Charge in Case 12-CA-25766 was issued on April 20, 2009, withdrawing all allegations related to the latter case. [ALJD p.1, fn.1; GCX- 1(o)]. On April 22, the Regional Director issued an Amendment to Complaint alleging the filing and service of the second amended charge in Case 12-CA-25764. [GCX-1(q)]. On December 9, 2008, Respondent filed its Answer to Consolidated Complaint [GCX- 1(l)], and on May 5, 2009, Respondent filed its Answer to Amendment to Complaint [GCX- 1(s)].

paragraphs 4(a) through 4(c); GCX-1(l), paragraph 4; JX- 1, paragraph 2; GCX-2; JX-2; T 21-24, 28-29; ALJD p.2, L.23-38).

The relevant portions of the MAA are as follows:

Mutual Arbitration Agreement

As a condition of employment with D. R. Horton, Inc. or its subsidiaries or affiliates (collectively, the "Company"), and in order to avoid 'the burdens and delays associated with court actions, the undersigned employee ("Employee") and the Company voluntarily and knowingly enter into this Mutual Arbitration Agreement ("Agreement"):

1. Except as provided below, Employee and the Company, on behalf of their affiliates, successors, heirs, and assigns, agree that all disputes and claims between them, including those relating to Employee's employment with the Company and any separation therefrom, and including claims against the Company's affiliates, directors, employees, or agents, shall be determined exclusively by final and binding arbitration before a single, neutral arbitrator as described herein, and that judgment upon the arbitrator's award may be entered in any court of competent jurisdiction. Claims subject to arbitration under this Agreement include without limitation claims for discrimination or harassment; wages, benefits, or other compensation; breach of any express or implied contract; violation of public policy; personal injury; and tort claims including defamation, fraud, and emotional distress. Except as expressly provided herein, the Company and Employee voluntarily waive all rights to trial in court before a judge or jury on all claims between them.

2. Disputes and actions excluded from this Agreement are: (a) claims by Employee for workers' compensation or unemployment benefits; (b) claims for benefits under a Company plan or program that provides its own process for dispute resolution; (c) claims by either party for declaratory or injunctive relief relating to a confidentiality, non-competition, or similar obligation (any such proceedings will be without prejudice to the parties' rights under this Agreement to obtain additional relief in arbitration with respect to such matters); and (d) actions to compel arbitration or to enforce or vacate an arbitrator's award under this Agreement, such action to be governed by the Federal Arbitration Act and the provisions of Section 8 of this Agreement.

****

6. The parties intend that this Agreement will operate to allow them to resolve any disputes between them as quickly as possible. Thus, the

> arbitrator will not have the authority to consolidate the claims of other employees into a proceeding originally filed by either the Company or the Employee. The arbitrator may hear only Employee's individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding.
>
> ****
>
> By signing this agreement, Employee acknowledges that he or she is knowingly and voluntarily waiving the right to file a lawsuit or other civil proceeding relating to Employee's employment with the Company as well as the right to resolve employment-related disputes in a proceeding before a judge or jury. Employee further acknowledges and agrees that this Agreement, while mutually binding upon the parties, does not constitute a guarantee of continued employment for any fixed period or under any particular terms, and does not alter in any way the at-will nature of Employee's employment relationship.

(JX-2).[4]

In letters dated in February 2008, the Charging Party and other employees of Respondent, through their attorneys, advised Respondent of their intent to commence arbitration claims against Respondent of behalf of classes of employees, claiming that Respondent had misclassified employees as exempt under the Fair Labor Standards Act. (JX- 4, JX-5, JX-6; ALJD p.3, L.8-17).

By letters dated March 14 and 20, 2008, Respondent, through attorney Tricarico, advised Counsel for the Charging Party and other employees, that paragraph 6 of the Agreement prohibited the arbitration of collective claims and denied the validity of the efforts to initiate the arbitration procedure. (JX-8, JX-10; ALJD p.3, L.19-23).

[4] Paragraphs 3, 4, 5, 7 and 8 of the Agreement concern the arbitration procedure, and are omitted. The above-quoted final paragraph is unnumbered. (JX-2).

III. ARGUMENT

A. Contrary to Respondent's position, the ALJ correctly stated that one of the issues is whether Respondent's arbitration agreements lead employees reasonably to believe that they are barred or restricted from filing charges with the NLRB, in violation of Section 8(a)(4) and (1) of the Act. (Respondent's Exception 1)

In *U-Haul Co. of California*, in considering whether an employer's mandatory arbitration agreement violated Section 8(a)(4) of the Act, the Board invoked the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), for determining whether a rule unlawfully restricts Section 7 activities. Under that test, if the rule does not explicitly restrict activity protected by Section 7, the finding of a violation is dependent upon a showing of one of the following: (1) reasonable employees would construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. 343 NLRB 646, 647 (2004).[5]

Despite Respondent's argument that neither the second nor third prongs of the *Lutheran Heritage* test applies to the instant case, the *Lutheran Heritage* test is stated in the disjunctive. A rule is overly broad and violates the Act if any one of the three parts of the test is met. Accordingly, the ALJ correctly framed the Section 8(a)(4) issue in the instant case under the first part of the *Lutheran Heritage* test.

[5] Chairman (then-Member) Liebman concurred in the finding of a Section 8(a)(1) and (4) violation in *U-Haul Co. of California* under either the majority or dissenting views in *Lutheran Heritag*e. 347 NLRB at 377, fn. 2.

B. Respondent's claim that the ALJ erroneously relied upon *U-Haul Co. of California* and *Bill's Electric* in his analysis is without merit. (Respondent's Exception 4)

A mandatory arbitration agreement need not explicitly bar employees from filing charges with the Board in order to establish a violation of Section 8(a)(4) of the Act. In *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), where the Board found that the employer's mandatory arbitration agreement violated Section 8(a)(4), it recognized that the agreement did not explicitly restrict employees from resorting to the Board's remedial procedures, but found that the agreement's applicability to causes of action recognized by "federal law or regulations," would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board. Respondent's contention that the language contained in the arbitration agreement at issue in *U-Haul Co. of California* is notably different than the language contained in the instant agreement does not withstand scrutiny.

First, as the introductory sentence of Respondent's MAA makes clear, the execution of the MAA by employees is a condition of employment, and it is therefore mandatory. (JX-2). The plain language in Paragraph 1 of the MAA requires employees to submit all employment related claims to arbitration, except as noted in the limitations of Paragraph 2 of the Agreement. The specified exceptions make no mention of employees' Section 7 rights or the National Labor Relations Act, or employees' rights to file unfair labor practice charges with the Board. Rather, the agreement clearly requires employees to invoke the internal arbitration procedures set forth in the MAA if any claims of employment harassment or discrimination are lodged against the Respondent.

Thus, the referenced claims of employment discrimination are reasonably read to encompass unfair labor practice charges filed under the Act and access to the Board.

In addition, the final paragraph of the MAA requires employees to "voluntarily" waive the right to file a lawsuit or other civil proceeding relating to their employment as well as the right to resolve employment-related disputes in a proceeding before a judge or jury.[6] Respondent's waiver is not limited to proceedings initially filed in state or federal courts, and does not specify the type of judge involved in such lawsuits or other civil proceedings. In the absence of any specific exception in the MAA for NLRA cases, this waiver is reasonably read as encompassing not only proceedings before state court and federal court judges, but also as encompassing administrative proceedings before NLRB administrative law judges or before the Board itself (as Board members fulfill a judicial role), and judicial enforcement and review proceedings before judges of United States courts of appeals. The language in Respondent's MAA is very similar to the language found unlawful by the Board in *U-Haul Co. of California*, and the following rationale of the Board in that case applies here:

> In its exceptions, the Respondent argues, as does our dissenting colleague, that the above-arbitration policy is not unlawful because the memo announcing this policy included a phrase, in a section titled "What is Arbitration," stating that the "arbitration process is limited to disputes, claims or controversies that a court of law would be authorized to entertain or would have jurisdiction over to grant relief. . . ." The Respondent and our colleague contend that this statement makes clear that the policy does not extend to the filing of charges with the Board. We find this argument unavailing. The reference to a "court of law" in this part of the

[6] Although the introductory and final paragraphs of the MAA include the word "voluntary," it is undisputed that, as stated in the introductory paragraph of the MAA, the execution of the MAA is a condition of employment. [GCX- 1(j), paragraphs 4(a) through 4(c); GCX-1(l), paragraph 4; JX- 1, paragraph 2; GCX-2; JX-2; T 21-24, 28-29; ALJD p.2, L.23-38). In addition, there is no evidence or claim that since it implemented use of the MAA, Respondent has ever hired an employee who refused to sign the MAA, as is. Contrary to Respondent's assertion in its exceptions, the undisputed evidence establishes that the execution of the MAA by employees is mandatory rather than voluntary.

> memo does not by its terms specifically exclude an action governed by an administrative proceeding such as one conducted by the National Labor Relations Board. Indeed, there is nothing in this portion of the memo that reasonably suggests that its intent is to modify the policy language referencing the applicability of the policy to causes of action recognized by Federal laws or regulations. Further, inasmuch as decisions of the National Labor Relations Board can be appealed to a United States court of appeals, the reference to a "court of law" does nothing to clarify that the arbitration policy does not extend to the filing of unfair labor practice charges. While our dissenting colleague correctly states that it is the NLRB, and not the individual, who presents the case to the court, we believe that most nonlawyer employees would not be familiar with such intricacies of Federal court jurisdiction, and thus the language is insufficient to cure the defects in the policy.

347 NLRB at 377 (footnote omitted). Thus, the ALJ properly relied on *U-Haul Co. of California* in concluding that Respondent's maintenance of the MAA violates Section 8(a)(1) and (4) of the Act. [ALJD p.5, L.24 to p.6, L.3].

Respondent further argues that the ALJ improperly cited *Bill's Electric*, 350 NLRB 292, 296 (2007) as legal support for his decision. However, the ALJ correctly cited *Bill's Electric* to illustrate that an employer's mandatory arbitration requirement unlawfully restricts access to the Board's processes even where the requirement expressly states that it "shall not be a waiver of any requirement for the Employee to timely file any charge with the NLRB…," if other language in the agreement "would reasonably be read by affected applicants and employees as substantially restricting, if not totally prohibiting, their access to the Board's processes. Respondent correctly points out that in *Bill's Electric* the employer implemented its mandatory arbitration policy after the filing of unfair labor practice charges. However, the Board did not rely on that fact in concluding, "At the very least, the mandatory grievance and arbitration policy would reasonably be read by affected applicants and employees as substantially restricting, if not totally prohibiting, their access to the Board's processes." 350 NLRB at 296.

In the instant case, unlike the employer in *Bill's Electric*, Respondent never informed its employees that the MAA did not affect their rights to file unfair labor practice charges with the NLRB. Notwithstanding Respondent's contention that managers were instructed to tell employees who expressed uncertainty about the scope of the MAA that they would still be able to go to the "EEOC or similar agency" with a complaint, there is no evidence that Respondent's managers ever relayed that information to employees. Moreover, Respondent's claimed instructions to its managers did not expressly reference the NLRB or the NLRA. Thus, Respondent's overall conduct could be viewed as even more egregious than that of the employer in *Bill's Electric*. Accordingly, the ALJ correctly cited *Bill's Electric* in support of his finding that Respondent violated Section 8(a)(4) and (1) of the Act by maintaining the MAA.[7]

C. Respondent's assertion that the ALJ improperly found that employees would not understand that the MAA did not prevent them from filing charges with the Board and that the language of the agreement would lead employees to believe that they could not file charges with the Board, is without merit. (Respondent's Exceptions 5 and 6)

As demonstrated above in the analysis of the applicability of *U-Haul Co. of California* to the instant case, the ALJ correctly found that Respondent's MAA is reasonably read to prohibit employees from filing or pursuing unfair labor practice charges under the NLRA. Respondent's attempt to distinguish the filing and pursuit of unfair labor practice charges from the filing and pursuit of lawsuits and

[7] Respondent cites dicta from the decision of the United States Court of Appeals for the District of Columbia in *Guardsmark v. NLRB*, 475 F.3d 369, 375-376 (D.C. Cir. 2007) in support of its assertion that the ALJ improperly interpreted the MAA. Brief of Respondent in Support of Exceptions to Administrative Law Judge's Decision at p.11. However, the *Guardsmark* court held that the employer's rules were overly broad and violated the Act.

other civil proceedings falls flat. An unresolved unfair labor practice charge is resolved through litigation. A layperson likely would not draw the distinction between an administrative forum and a judicial forum. Moreover, as noted above, the reference in Respondent's MAA to "other civil proceedings" encompasses unfair labor practice charges filed with the Board, and in any case NLRB administrative cases may ultimately be heard in federal appellate courts.

The fact that Respondent did not seek to enforce the MAA in response to the Charging Party's unfair labor practice charge in the instant case does not detract from the ALJ's conclusion that a reasonable employee would likely construe the MAA to prohibit employees from filing charges with the Board. Respondent maintains the MAA requirement as a condition of employment for all of its employees nationwide and there is no evidence that Respondent did anything to publicize the fact that it did not to seek to enforce the MAA in response to the unfair labor practice charge in this case.

Respondent's argument that it did not violate Section 8(a)(1) and (4) of the Act because its employees have not clearly and unmistakably waived their Section 7 rights to file charges with the Board is without merit. *14 Penn Plaza, LLC v Pyett*, 556 U.S. ___, 129 S.Ct. 1456 (2009), cited by Respondent, is inapplicable to the Section 8(a)(1) and (4) issue in this case. *Pyett* involved a waiver issue raised by language in a collective-bargaining agreement that was voluntarily negotiated by an employer and a union, rather than an agreement written by an employer that employees have been required to sign as a condition of employment. As stated above, the Board's analysis in *U-Haul Co. of California* is applicable to the issue raised in Respondent's exceptions. The ALJ's findings and conclusions that Respondent violated Section 8(a)(1) and (4) of

the Act are supported by the record evidence and Board law. Accordingly, Respondent's Exceptions 5 and 6 are without merit.

D. Respondent's exceptions to that the ALJ's conclusions, remedy and recommended order are without merit. (Respondent's Exceptions 7 and 8)

As noted above, Respondent's exceptions to the ALJ's findings are meritless and the ALJ's findings of fact are supported by the record evidence. Accordingly, the ALJ's conclusions of law, recommended remedy and Order with respect to the 8(a)(4) and (1) violation are appropriate, and Respondent's exceptions 7 and 8 are without merit.

E. Respondent's assertion that the ALJ's decision is unenforceable because it contravenes the principles articulated in the Federal Arbitration Act is without merit. (Respondent's Exception 9)

Respondent misleadingly asserts that the Federal Arbitration Act and the Supreme Court decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) trump employees' statutory rights to access the Board's processes. Respondent derisively argues that the Federal Arbitration Act "calls for arbitration agreements to be analyzed as ordinary contracts and only as ordinary contracts, rather than parsed and nit-picked according to an administrative agency's own idiosyncratic requirements."[8] The *Gilmer* Court found that an employer can require an employee, as a condition of employment, to channel his or her non-NLRA employment claims to a private arbitral forum for resolution. Unlike the issue raised by Respondent's exceptions, *Gilmer* did not involve an NLRA claim

[8] Brief of Respondent in Support of Exceptions to Administrative Law Judge's Decision at p.14.

concerning employees' fundamental statutory rights and access to the Board's processes. Notwithstanding its attempts to distinguish *U-Haul Co. of California* and *Bill's Electric*, Respondent effectively argues that Board law is inapplicable to the Section 8(a)(4) and (1) issue raised in its exceptions, but Respondent cites no authority that supports that proposition. Rather, Board law squarely applies here. *U-Haul Co. of California,* 347 NLRB 375, 377 (2006). Counsel for the Acting General Counsel's brief in support of the Acting General Counsel's exceptions in this case at pages 7 to 12 fully addresses the question of the scope of the *Gilmer* decision in the context of the Section 7 considerations present in the instant case. For the reasons set forth therein, Respondent's Exception 9 is without merit and should be denied.

IV. CONCLUSION

The evidence and legal authority demonstrate that Respondent's exceptions lack merit to the extent so argued herein, and should be denied. Respondent's maintenance of its mandatory arbitration agreement violates Section 8(a)(1) and (4) of the Act because employees are required to execute it as a condition of employment, and because it can reasonably be read by employees to prohibit them from filing or pursuing

unfair labor practice charges under the Act. Counsel for the Acting General Counsel respectfully submits that Respondent's exceptions should be denied in their entirety.

Dated at Miami, Florida this 11th day of April, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions was duly served upon the following individuals by electronic transmittal on April 11, 2011:

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