Victory II, LLC d/b/a Victory Casino Cruises II *and* Donald Morgan. Case 12–CA–146110

April 22, 2016

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA AND MCFERRAN

The General Counsel seeks summary judgment in this case on the grounds that there are no genuine issues of material fact as to the allegations of the complaint, and that the Board should find, as a matter of law, that the Respondent violated Section 8(a)(1) of the Act by maintaining three different policies: a Confidentiality/Non-Disclosure rule in its employee handbook, a Confidentiality Agreement that employees signed as a condition of employment, and an Arbitration Agreement, signed as a condition of employment, that prohibits its employees from participating in collective or class litigation in all forums.

Pursuant to an original charge and an amended charge filed by Donald Morgan on, respectively, February 9, 2015, and March 30, 2015, the General Counsel issued the complaint on June 30, 2015. The complaint alleges that since on or before July 1, 2011, the Respondent has maintained a Confidentiality/Non-Disclosure rule in its employee handbook. The complaint further alleges that since on or before June 23, 2014, the Respondent has maintained both a Confidentiality Agreement and an Arbitration Agreement, and required its employees to execute both agreements as a condition of employment.

The confidentiality policy in the handbook states in full:

> "Confidentiality/Non-Disclosure." The protection of confidential business information and trade secrets is vital to the interest and success of Victory Casino Cruises. Such confidential information includes, but is not limited to, the following examples:
>
> Attorney/client information
> Compensation data
> Personnel Information
> Disciplinary Actions
> Compensation and bonus [sic]
> Computer programs and codes
> Customer lists
> Financial information
> Labor relations strategies
> Marketing strategies
> Medical information
> New materials research
> Pending projects and proposals
> Proprietary production processes
> Research and development strategies
> Scientific data
> Technological data
> Casino business strategies
> Trade secrets of Victory Casino Cruises
> Other confidential information regarding Victory Casino Cruises and/or its employees
>
> All employees are required to sign a non-disclosure agreement as a condition of employment. Employees who improperly use or disclose confidential business information will be subject to disciplinary action, up to and including termination and legal action, even if they do not actually benefit from the disclosed information.

The Confidentiality Agreement, as set forth in the Respondent's brief in opposition to the motion for summary judgment, states:

> Employees of the company are prohibited from revealing company business and employee information to anyone outside the company unless given specific permission to do so by senior management. This includes all information regarding company operations, budgets and expenses and individuals or groups of employees.
>
> The company considers all information about present or past employees to be confidential. No employee is allowed to divulge information about current or past employees without prior approval of senior management. Information regarding any employee's address, telephone number, or other personal information is to be considered highly confidential and not to be shared with anyone.
>
> Anyone divulging confidential information is subject to discipline up to and including termination.

The Arbitration Agreement, which is appended to the employee handbook, states in relevant part:

> It is the policy of The Company to require arbitration agreement [sic] to address claims arising out of or related to your employment that shall be settled by binding arbitration administered by the American Arbitration Association.
>
> Any controversy or claim arising out of your employment with Victory Casino shall be settled by binding

> arbitration . . . . There shall be no right or authority for claims to be arbitrated on a class action basis.

The complaint alleges that, by maintaining these policies, the Respondent has interfered with, restrained, and coerced employees in the exercise of their Section 7 rights.

On July 13, 2015, the Respondent filed an answer admitting all of the factual allegations in the complaint but denying the legal conclusions and asserting several affirmative defenses.

On August 7, 2015, the General Counsel filed a Motion for Summary Judgment. On September 17, 2015, the Respondent filed an opposition to the General Counsel's motion. On October 20, 2015, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The General Counsel and the Respondent each filed a response on November 2, 2015.

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

Ruling on Motion for Summary Judgment

As stated above, the Respondent's answer admits all of the factual allegations in the complaint. Specifically, the Respondent's answer admits that it has maintained the Confidentiality/Non-Disclosure rule since on or before July 1, 2011; the Confidentiality Agreement since on or before June 23, 2014; and the Arbitration Agreement since on or before June 23, 2014. We therefore find that there are no material issues of fact; nor has the Respondent raised any other issues warranting a hearing.[1]

A. The Arbitration Agreement

In *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), the Board reaffirmed the relevant holdings in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and found unlawful the maintenance and enforcement of a mandatory arbitration agreement requiring employees to waive the right to participate in class or collective actions in all forums, whether arbitral or judicial. The Respondent in its answer admits that it has maintained its Arbitration Agreement and required its employees to sign it as a condition of employment since at least June 23, 2014. By its terms, the agreement requires that all employment-based claims be resolved through individual, binding arbitration. The Respondent argues solely that *Murphy Oil* and *D. R. Horton* were wrongly decided by the Board, and raises no material issues of fact or other arguments in support of its Arbitration Agreement. Accordingly, we find that the Respondent's maintenance of the agreement requiring employees' class action waiver in all forums violates Section 8(a)(1) of the Act.[2] See, e.g., *Ross Stores, Inc.*, 363 NLRB No. 79 (2015); *Applebee's Restaurant*, 363 NLRB No. 75 (2015); *Toyota Sunnyvale*, 363 NLRB No. 52 (2015).[3]

We further find that the Respondent's maintenance of its Arbitration Agreement violates Section 8(a)(1) because employees would reasonably believe that it bars or restricts the right to file charges with the National Labor Relations Board and to access the Board's processes. The Agreement, which contains no exceptions or limiting language, expressly requires employees to pursue "[a]ny controversy or claim arising out of or related to your employment" solely through individual arbitration. We

[1] To the extent that the Respondent's answer argues that the unfair labor practices alleged in the complaint are barred by the 6-month statute of limitations set forth in Sec. 10(b) of the Act, we find no merit to this contention. The Respondent did not renew this argument in its response to the General Counsel's Motion for Summary Judgment. In any event, it is well settled that the Board will find a violation where an unlawful rule was maintained during the 6-month period prior to the filing of a charge, regardless of when it was first promulgated. See, e.g., *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. at 2 fn. 6 (2015); *PJ Cheese, Inc.*, 362 NLRB No. 177, slip op. at 1 (2015); *Cellular Sales of Missouri*, 362 NLRB No. 27, slip op. at 2 fn. 7 (2015). Here, the policies at issue were in effect at all relevant times, and therefore we reject the Respondent's 10(b) argument.

[2] Our dissenting colleague, relying on his dissenting position in *Murphy Oil*, supra, 361 NLRB No. 72, slip op. at 22–35, would find that the Respondent's Arbitration Agreement does not violate Sec. 8(a)(1). He observes that the Act does not "dictate" any particular procedures for the litigation of non-NLRA claims, and "creates no substantive right for employees to insist on class-type treatment" of such claims. This is all surely correct, as the Board has previously explained in *Murphy Oil*, above, slip op. at 2, 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 create a right to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint." *Murphy Oil*, supra, slip op. at 2 (emphasis in original). The Respondent's Arbitration Agreement is just such an unlawful restraint.

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, supra, there is no merit to our colleague's view that finding the Arbitration Agreement unlawful runs afoul of employees' Sec. 7 right to "refrain from" engaging in protected concerted activity. See *Murphy Oil*, above, slip op. at 18; *Bristol Farms*, above, 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. See *Murphy Oil*, above, slip op. at 17–18; *Bristol Farms*, above, slip op. at 2.

[3] The Respondent's answer further asserts that its Arbitration Agreement is voluntary and therefore does not fall under the proscriptions of *D. R. Horton* and *Murphy Oil*, supra. The Respondent did not renew this argument in its response to the General Counsel's Motion for Summary Judgment, and, in any event, the argument lacks merit. The Board has held that an arbitration agreement that precludes collective or class action in all forums is unlawful even if entered into voluntarily because it requires employees to prospectively waive their Sec. 7 right to engage in concerted activity. See *Bristol Farms*, 363 NLRB No. 45 (2015); *On Assignment Staffing Services*, supra, slip op. at 1, 5–8 (2015).

have consistently held that employees would reasonably read such policies to preclude the filing of unfair labor practice charges. See, e.g., *SolarCity Corp.*, 363 NLRB No. 83, slip op. at 4–6 (2015); *Chesapeake Energy Corp.*, 362 NLRB No. 80, slip op. at 2 (2015); *U-Haul Co. of California*, 347 NLRB 375, 377–378 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007).

The dissent's contention that this latter issue was not fully and fairly litigated is at odds with our case law. As noted above, the complaint alleges that the Respondent, by maintaining the Arbitration Agreement and the two confidentiality policies, is interfering, restraining, and coercing employees in the exercise of their Section 7 rights. Contrary to the dissent's assertion, in *Citi Trends, Inc.*, 363 NLRB No. 74, slip op. at 1 (2015), the Board did not find that identical complaint language, taken alone, was insufficient to put the respondent on notice that the right to file Board charges was at issue. Rather, the Board found this language insufficient because, in addition, the General Counsel's brief to the administrative law judge "made no argument regarding how employees would understand the [arbitration policy's] impact on their ability to file charges with the Board" and instead "focused exclusively" on the infringement of employees' rights to engage in collective action. Id.

Here, unlike in *Citi Trends*, the General Counsel provided the Respondent with written notice in response to the Notice to Show Cause, arguing that the Arbitration Agreement was overbroad "to the extent that [it] precludes filing of Board charges . . . ." The General Counsel further contended that an agreement reasonably interpreted as prohibiting the filing of unfair labor practice charges would unlawfully deny employees their rights under the NLRA, and immediately followed the latter statement by asserting that "[f]or these reasons, the Board should find the Respondent's Arbitration Agreement violates Section 8(a)(1) of the Act." In contrast, in the cases cited by our colleague, the General Counsel failed to treat access to the Board as a live issue.[4]

B. The Confidentiality/Non-Disclosure Rule and Confidentiality Agreement

We find that the Respondent's maintenance of its Confidentiality/Non-Disclosure handbook rule and Confidentiality Agreement also violate Section 8(a)(1) of the Act. It is settled that Section 7 of the Act grants employees the right to discuss information about other employees, such as wages and other terms and conditions of employment, and the Board has repeatedly found confidentiality rules unlawful if employees would reasonably construe the rules to prohibit those protected discussions. See, e.g., *Battle's Transportation, Inc.*, 362 NLRB No. 17, slip op. at 1–2 (2015); *Fresh & Easy Neighborhood Market*, 361 NLRB No. 8, slip op. at 2 (2014); *Cintas Corp.*, 344 NLRB 943, 943 (2005), enfd. 482 F.3d 463 (D.C. Cir. 2007). It is likewise settled that employees have a Section 7 right to discuss their conditions of employment with third parties, such as union representatives, Board agents, and the public in general, and the Board has invalidated rules prohibiting such third-party communication. See, e.g., *DirecTV U.S. DirecTV Holdings, LLC*, 359 NLRB No. 54, slip op. at 3 (2013), reaffirmed and incorporated by reference, 362 NLRB No. 48 (2015); *Hyundai America Shipping*, 357 NLRB 860, 872 (2011), enfd. in part 805 F.3d 309 (D.C. Cir. 2015); *Kinder-Care Learning Centers*, *Inc.,* 299 NLRB 1171, 1171–1172 (1990).[5]

The Respondent contends that we must look at the confidentiality rule in its entirety in order to determine whether it is unlawful. Indeed, an important part of our inquiry is to find a violation only where "the reach of the challenged rule is not adequately limited by context." *Fresh & Easy Neighborhood Market*, supra, slip op. at 2. See *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004) (in analyzing work rules, the Board "refrain[s] from reading particular phrases in isolation"). Here, however, a plain reading of the handbook rule language expressly prohibits the exercise of Section 7 rights. The rule's examples of confidential information that may not be disclosed include "compensation data," "compensation and bonus," and "disciplinary actions," which explicitly encompass the discussion of key terms and conditions of employment. See, e.g., *Advanced Ser-*

[4] *24 Hour Fitness USA, Inc.*, 363 NLRB No. 84, slip op. at 2 fn. 5 (2015) (General Counsel mentioned the alternative argument only in passing at the hearing and did not brief it); *RGIS, LLC*, 363 NLRB No. 132, slip op. at 2 fn. 3 (2016) (General Counsel included only a single, conclusory sentence on access to the Board in his brief, and did not controvert the respondent's argument that the policy did not unlawfully limit access to the Board*)*; *Citi Trends, Inc.,* supra (General Counsel made no argument); *GameStop Corp.*, 363 NLRB No. 89, slip op. at 1 fn. 1 (2015) (legality of confidentiality provision was untimely raised for first time in brief to the judge).

The dissent contends that, even if the General Counsel sufficiently articulated this argument, it did so in a response to the Board's Notice to Show Cause, and the Board's Rules did not put the Respondent on notice of a right to reply. That argument is meritless. Where, as here, the Rules neither specifically provide for nor specifically prohibit a party from responding to an opposing party's filing, Board practice has always permitted the party to request the opportunity. Having not sought that opportunity, the Respondent cannot argue that it was barred from being heard.

[5] In recognizing the longstanding principle that employees generally have a Sec. 7 right to discuss information about other employees, and to share information with third parties regarding their terms and conditions of employment, we do not, as our concurring colleague suggests, erase the requirement that such discussion must involve concerted activity to be protected by the Act.

vices, 363 NLRB No. 71, slip op. at 2 (2015) (employees have a Section 7 right to discuss discipline involving their fellow employees); *Scientific-Atlanta, Inc.*, 278 NLRB 622, 624–625 (1986) (discussion of wages is protected concerted activity because wages are a vital term and condition of employment). Moreover, the rule explicitly prohibits the disclosure of "personnel information," which the Board has held reasonably includes protected discussion of wages and other employment terms. See *Hyundai America Shipping*, supra at 871. Further, the rule does not exempt employees' protected communication with third parties. That the rule includes several examples of proprietary information prohibited from disclosure does nothing to save the rule from its express prohibition of employees' protected Section 7 rights to discuss employment terms such as wages and discipline. The reach of the challenged rule is thus not limited by the context of the overall language of the rule, and does not reasonably inform employees that the rule's scope is not as broad as explicitly stated.[6] Because the plain language of the confidentiality rule expressly prohibits discussion of wages, discipline, and personnel information, and absent meaningful contextual limitation to its broad scope, the maintenance of the rule violates Section 8(a)(1) of the Act. See *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004) (confidentiality rule unlawful where it specifically defines confidential information to include wages and disciplinary information), enfd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006); *Fresh & Easy Neighborhood Market*, supra, slip op. at 2–3.

We additionally find the Respondent's Confidentiality Agreement unlawful because employees would reasonably construe it to prohibit protected discussion of terms and conditions of employment. The proscription set forth in the Confidentiality Agreement is even broader than the Confidentiality/Non-Disclosure rule, extending to "all information about present or past employees" and "individuals or groups of employees." Confidentiality rules that by their terms forbid disclosure of "information concerning employees" are unlawful. *See Cintas Corp. v. NLRB*, supra, 482 F.3d at 468–469. Unlike the Confidentiality/Non-Disclosure handbook rule, the Confidentiality Agreement includes no examples that even purport to limit or clarify its expansive scope.[7] In addition, the agreement requires employees to gain permission from senior management before disclosing "information about current or past employees." As the Board explained in *Brunswick Corp*., "any rule that requires employees to secure permission from their employer as a precondition to engaging in protected concerted activity on an employee's free time and in nonwork areas is unlawful." Id., 282 NLRB 794, 795 (1987) (citing *Enterprise Products Co.*, 265 NLRB 544, 554 (1982)). Accord *DirecTV U.S. DirecTV Holdings, LLC*, supra, 359 NLRB No. 54, slip op. at 2. Finally, the rule prevents employees from revealing employee information to "anyone outside the company," expressly infringing upon the employees' Section 7 right to discuss conditions of employment with third parties. See *Double Eagle Hotel & Casino*, supra, 341 NLRB at 121 (invalidating a rule that stated, "You are not, under any circumstances, permitted to communicate any confidential or sensitive information concerning the Company or any of its employees to any non-employee without approval from the General Manager or the President"). We thus find that the Respondent's maintenance of its Confidentiality Agreement violates Section 8(a)(1) of the Act.

Accordingly, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

JURISDICTION

At all material times, the Respondent, a Delaware limited liability corporation with a place of business in Jacksonville, Florida, has been engaged in the business of operating casino cruises.

During the 12-month period ending June 30, 2015, the Respondent, in conducting its operations described above, derived gross revenues in excess of $500,000 and purchased and received goods valued in excess of $50,000 directly from points outside the State of Florida.

At all material times, Lester Bullock has held the position of chief executive officer of the Respondent, and Dezarae Fuste has held the position of director of human resources, and each of them has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

[6] The Respondent's additional assertion that its other handbook rules provide context limiting the plain language of the confidentiality rule is meritless. The policies at issue and the Respondent's employee handbook, in its entirety, are attached to the Respondent's opposition to the General Counsel's motion, and we have reviewed them. The Respondent does not identify any specific handbook provisions that provide limiting context; rather, it cites only general assertions in its handbook that the Respondent seeks to foster a positive environment for its employees and to comply with applicable employment laws.

[7] For the reasons stated above in our discussion of the Confidentiality/Non-Disclosure rule, we find meritless the Respondent's contention that its employee handbook as a whole, including the Confidentiality/Non-Disclosure rule, provides context establishing that the Confidentiality Agreement is lawful.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

ALLEGED UNFAIR LABOR PRACTICES

Since on or before June 23, 2014, the Respondent has maintained a binding arbitration agreement that requires employees to bring all disputes arising out of or related to their employment to individual binding arbitration. Since on or before July 1, 2011, the Respondent has maintained a confidentiality/non-disclosure rule in its employee handbook that prohibits employees from discussing with nonemployees or among themselves information relating to their wages, hours, and other terms and conditions of employment. Since on or before June 23, 2014, the Respondent has maintained, as a condition of employment, a confidentiality agreement which prohibits employees from discussing with nonemployees or among themselves, wages, hours, and other terms and conditions of employment.

CONCLUSIONS OF LAW

1. The Respondent, Victory II, LLC, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. By maintaining a mandatory arbitration agreement under which employees are required, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and has violated Section 8(a)(1) of the Act.

3. By maintaining a mandatory arbitration agreement that employees would reasonably believe bars or restricts the right to file charges with the National Labor Relations Board, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and has violated Section 8(a)(1) of the Act.

4. By maintaining a confidentiality/non-disclosure handbook rule that prohibits employees from discussing with nonemployees or among themselves information relating to their wages, hours, and other terms and conditions of employment, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and has violated Section 8(a)(1) of the Act.

5. By maintaining a mandatory confidentiality agreement that prohibits employees from discussing with nonemployees or among themselves wages, hours, and other terms and conditions of employment, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and has violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to rescind or revise its Arbitration Agreement, Confidentiality Agreement, and Confidentiality/Non-Disclosure employee handbook rule. With respect to the handbook rule, the Respondent may comply with our order of rescission by rescinding the unlawful provision and republishing its employee handbook without it. We recognize, however, that republishing the handbook could be costly. Accordingly, the Respondent may supply the employees either with handbook inserts stating that the unlawful rule has been rescinded, or with a new and lawfully worded rule on adhesive backing that will correct or cover the unlawfully broad rule, until it republishes the handbook without the unlawful provisions. Any copies of the handbook that include the unlawful rules must include the inserts before being distributed to employees. See *Guardsmark, LLC*, 344 NLRB 809, 812 fn. 8 (2005), enfd. in rel. part 475 F.3d 369 (D.C. Cir. 2007).

ORDER

The National Labor Relations Board orders that the Respondent, Victory II, LLC d/b/a Victory Casino Cruises II, Jacksonville, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

(b) Maintaining a mandatory 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.

(c) Maintaining a confidentiality/non-disclosure handbook rule that prohibits employees from discussing with nonemployees or among themselves, information relating to their wages, hours, and other terms and conditions of employment.

(d) Maintaining a mandatory confidentiality agreement that prohibits employees from discussing with nonemployees or among themselves, wages, hours, and other terms and conditions of employment.

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

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

(a) Rescind the Arbitration Agreement in all of its forms, or revise it in all of its forms to make clear to employees that the Arbitration Agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict employees' right to file charges with the National Labor Relations Board.

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

(c) Rescind the mandatory Confidentiality Agreement, or revise it to make clear to employees that it does not prohibit employees from discussing with nonemployees or among themselves, wages, hours, and other terms and conditions of employment.

(d) Notify all current and former employees who were required to sign or otherwise become bound to the mandatory Confidentiality Agreement that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(e) Within 14 days of the Board's Order, rescind the rule set forth in its employee handbook entitled "Confidentiality/Non-Disclosure."

(f) Furnish all current employees with inserts for the current employee handbook that (1) advise that the unlawful confidentiality/non-disclosure rule has been rescinded, or (2) provide the language of a lawful policy; or publish and distribute to all current employees a revised employee handbook that (1) does not contain the unlawful policy, or (2) provides the language of a lawful policy.

(g) Within 14 days after service by the Region, post at its facility in Jacksonville, Florida, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. 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 August 9, 2014.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 12 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. April 22, 2016

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

In this case, my colleagues find that the Respondent's Arbitration 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 further dissent from the majority's finding that the Agreement unlawfully restricts access to the Board because that issue was not fully and fairly litigated. Finally, I concur with my colleagues' finding that the Respondent's Confidentiality Rule and Confidentiality Agreement violate Section 8(a)(1) of the Act, but I reject their erroneous statements concerning the scope of Section 7 protection—statements that purport to erase the distinction between speech that constitutes concerted activity for the purpose of mutual aid or

[8] 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 denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

protection on the one hand, and on the other, mere griping.

1. Legality of the Class Action Waiver

I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than NLRA.[2] However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class-type treatment of non-NLRA claims. To the contrary, 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."[3] 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;[4] (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;[5] and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).[6] 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.

2. Interference with NLRB Charge Filing

My colleagues find that the Arbitration Agreement also violates the Act by unlawfully restricting employees from filing unfair labor practice charges with the Board. I believe that the Board is precluded from finding a violation of the Act on this basis because the issue was not fully and fairly litigated.

First, the complaint does not allege unlawful interference with Board charge filing. It simply alleges that by maintaining the Arbitration Agreement, "Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act." I believe it is unreasonable to read this allegation to allege not one, but two violations of the Act. Moreover, the Board has found identical complaint language insufficient to put an employer on notice that interference with the right to file Board charges was at issue. See *Citi Trends, Inc.*, 363 NLRB No. 74, slip op. at 1 (2015).

[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] *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).

[4] 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.").

[5] 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 1072 (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); but see *Totten v. Kellogg Brown & Root, LLC*, No. ED CV 14-1766 DMG (DTBx), 2016 WL 316019 (C.D. Cal. Jan. 22, 2016).

[6] 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).

Second, after issuing the complaint, the General Counsel proposed a settlement.[7] That settlement would have required the Respondent to cease requiring employees (i) to "agree to arbitrate all claims arising out of or related to [their] employment," (ii) to "relinquish [their] right to file class action claims," and (iii) to "repeal the policy and remove such policy letters on that subject from [their] personnel files." The proposed settlement did not include any remedy for interference with employees' right to file charges with the Board.[8] Like the complaint, the proposed settlement failed to put the Respondent on notice that such interference was at issue.

Third, the General Counsel's response to the Board's Notice to Show Cause further confirms the absence of any allegation regarding interference with Board charge filing. Summarizing the allegations as to which summary judgment is sought, counsel for the General Counsel states: "In sum, Respondent's policies unlawfully tend to chill employees' Section 7 protected activities undertaken for their mutual aid and protection *by expressly prohibiting employees from discussing their terms and conditions of employment, and expressly prohibiting their undertaking collective legal action against Respondent to vindicate their rights relative to their employment*" (emphasis added). In a section of the brief entitled "The Board is Not Required to Acquiesce to the Fifth Circuit's *Murphy Oil* Decision," counsel states, in passing, that "to the extent that Respondent's Arbitration Agreement precludes filing of Board charges, it is overbroad even in the eyes of the Fifth Circuit [decision in *Murphy Oil*]." I believe this is far too flimsy a basis on which to find that the General Counsel has alleged that the Arbitration Agreement violated the Act in this additional respect, much less to put the Respondent on notice of any such allegation as due process requires.

Moreover, Section 102.24(b) of the Board's Rules and Regulations, which addresses motions for summary judgment, does not provide for the filing of a reply to a response to a notice to show cause. Thus, even assuming counsel for the General Counsel's passing remark were otherwise sufficient to put interference with Board charge filing at issue, that remark was inserted in counsel for the General Counsel's response to the Notice to Show Cause, and nothing in the Board's Rules puts the Respondent on notice of a right to reply.[9] Counsel for the General Counsel's passing remark was literally too little, too late. By finding a violation in these circumstances, the majority has denied the Respondent due process of law. See *RGIS, LLC*, 363 NLRB No. 132, slip op. at 2 fn. 3 (2016) (finding that interference with employees' access to the Board was not at issue, where the General Counsel alluded to that theory in his statement of position but offered no supporting argument); *Citi Trends, Inc.*, above; *GameStop Corp.*, 363 NLRB No. 89, slip op. at 1 fn. 1 (2015) (reversing judge's finding that confidentiality provision in arbitration agreement violated the Act, where neither the complaint nor the stipulated record placed that provision at issue, and where the General Counsel raised and argued the issue for the first time in his brief to the judge, which meant "the [r]espondents had no opportunity to counter the General Counsel's argument"); *24 Hour Fitness USA, Inc.*, 363 NLRB No. 84, slip op. at 2 fn. 5 (2015) (rejecting General Counsel's exception to the judge's failure to find that nondisclosure provision in arbitration agreement violated the Act, where complaint contained no such allegation and the issue was only mentioned at the hearing in passing).

3. Respondent's Confidentiality Rule and Confidentiality Agreement

I concur with my colleagues' finding that the Respondent's Confidentiality Rule and Confidentiality Agreement violate Section 8(a)(1). The Rule prohibits employees from disclosing "compensation data," "compensation and bonus [sic]," and "disciplinary actions." The Confidentiality Agreement is even broader. It prohibits employees from revealing "all information regarding . . . individuals or groups of employees," states that "[t]he company considers all information about present or past employees to be confidential," and prohibits the disclosure of such information without prior approval from senior management. Although the Act does not protect every disclosure of information concerning employees' compensation, discipline, and other terms and conditions of employment, a blanket prohibition is unlawful because it encompasses situations when such disclosures would be protected. See *Waco, Inc.*, 273 NLRB 746, 747–748 (1984). Moreover, the right to engage in protected concerted activity involving the disclosure of such information is central to the Act, and the record reveals no reasonable limitations on or justifications for the Respondent's categorical prohibition of such disclo-

[7] The proposed settlement is disclosed in the Respondent's Memorandum in Opposition to Summary Judgment. The General Counsel does not dispute that a settlement was offered, nor does he dispute that the document attached to the Respondent's brief in support of this contention is an accurate copy of the proposed settlement.

[8] As the majority's order in this case illustrates, when the Board finds that an employer has unlawfully restricted access both to class or collective litigation *and* to the Board's processes, it provides separate remedies for those separate violations.

[9] My colleagues assert that nevertheless, the Board has a "practice" of permitting parties "to request the opportunity" to file a reply in these circumstances. Assuming this is so, I reject, as contrary to due process, the implication that the Respondent may properly be charged with notice of an unwritten Board practice.

sures. Cf. *Banner Estrella Medical Center,* 362 NLRB No. 137, slip op. at 13–19 (2015) (Member Miscimarra, dissenting in part) (describing requirement that the Board strike a proper balance between asserted business justifications and potential impact on NLRA rights).

However, I take exception with my colleagues' erroneous statements regarding the scope of the protection afforded by Section 7 of the Act. Section 7 protects, among other rights, the right to engage in concerted activity for the purpose of mutual aid or protection. Speech *may* constitute concerted activity, but only where it is "'engaged in with the object of initiating or inducing or preparing for group action or . . . [where it] ha[s] some relation to group action in the interest of the employees.'"[10] In other words, "[a]ctivity which consists of mere talk must, in order to be protected, be talk looking toward group action . . . . [I]f it looks forward to no action at all, it is more than likely to be mere 'griping.'"[11] Thus, precedent dating back more than 50 years draws a distinction between speech about terms and conditions of employment that constitutes *concerted activity* protected under Section 7, and speech about terms and conditions of employment that is nothing more than *mere griping* and is *not* protected by Section 7. Yet my colleagues mistakenly declare that "[i]t is settled that Section 7 of the Act grants employees the right to discuss information about other employees," and that "[i]t is likewise settled that employees have a Section 7 right to discuss their conditions of employment with third parties." These overbroad statements purport to sweep away a distinction that has stood for half a century. The distinction remains, but we should take care not to erode it.

Accordingly, I respectfully concur in part with and dissent in part from my colleagues' decision.

Dated, Washington, D.C. April 22, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

[10] *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988) (quoting *Mushroom Transportation Co. v. NLRB,* 330 F.2d 683, 685 (3d Cir. 1964)).

[11] *Mushroom Transportation Co. v. NLRB,* 330 F.2d 683, 685 (3d Cir. 1964).

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

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

WE WILL NOT maintain a confidentiality/nondisclosure handbook rule that prohibits employees from discussing with nonemployees or among themselves, information relating to their wages, hours, and other terms and conditions of employment.

WE WILL NOT maintain a mandatory confidentiality agreement that prohibits employees from discussing with nonemployees or among themselves, wages, hours, and other terms and conditions of employment.

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

WE WILL rescind the Arbitration Agreement in all of its forms or revise it in all of its forms to make clear that the Arbitration Agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict employees' right to file charges with the National Labor Relations Board.

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 rescind the mandatory Confidentiality Agreement, or revise it to make clear to employees that it

does not prohibit employees from discussing with nonemployees or among themselves wages, hours, and other terms and conditions of employment.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the mandatory Confidentiality Agreement that it has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

WE WILL within 14 days of the Board's Order, rescind the rule set forth in our employee handbook entitled "Confidentiality/Non-Disclosure."

WE WILL furnish all current employees with inserts for the current employee handbook that (1) advise that the unlawful confidentiality/non-disclosure rule has been rescinded, or (2) provide the language of a lawful policy; or WE WILL publish and distribute to all current employees a revised employee handbook that (1) does not contain the unlawful policy, or (2) provides the language of a lawful policy.

VICTORY II, LLC D/B/A VICTORY CASINO CRUISES II

The Board's decision can be found at www.nlrb.gov/case/12–CA–146110 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.