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On Assignment Staffing Services, Inc. and Arnella M. Freeman. Case 32–CA–095025

August 27, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON
AND MCFERRAN

In *Murphy Oil USA, Inc.*,¹ the Board reaffirmed its earlier decision in *D. R. Horton*, which held that an employer violates the National Labor Relations Act “when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against their employer in any forum, arbitral or judicial.”² Such agreements improperly interfere with the substantive right of employees, under Section 7 of the Act, to engage in collective action to improve working conditions.

The issue presented in this case is whether, consistent with *D. R. Horton* and *Murphy Oil*, the Respondent could lawfully require its employees, as a condition of employment, to be bound to an agreement that limits resolution of all employment-related claims to individual arbitration, unless employees follow a procedure to opt out of the agreement before it takes effect 10 days after receiving it.

As explained more fully below, we find such opt-out agreements unlawful on two separate grounds. First, the Respondent undisputedly requires its employees to sign an acknowledgement form certifying that they have received a copy of the Respondent’s Dispute Resolution Agreement (the Agreement), which takes effect 10 days after the date of receipt and thereafter waives employees’ Section 7 right to engage in collective legal action. That agreement does not cease to be a condition of employment simply because employees are given an opportunity to opt out of it. To the contrary, the Respondent’s opt-out procedure creates a second mandatory condition of employment, which requires employees to affirmatively act, by submitting an opt-out form that satisfies requirements imposed by the Respondent, to retain their Section 7 right to pursue collective or class litigation. This requirement interferes with this Section 7 right by significantly burdening its exercise.

¹ 361 NLRB No. 72 (2014).

² *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013).

Second, deciding an issue left open by *D. R. Horton*,³ we find that even assuming, as the Respondent argues, that the opt-out provision renders the arbitration agreement not a condition of employment, it is still unlawful because it requires employees to prospectively waive their Section 7 right to engage in concerted activity. Our conclusion follows directly from Supreme Court decisions holding that individual agreements between employees and employers cannot restrict employees’ Section 7 rights, from settled Board precedent to the same effect, and from the Norris-LaGuardia Act, which provides that “any ... undertaking or promise in conflict with the public policy declared in” that statute is unenforceable.⁴ For the reasons already articulated in *D. R. Horton* and *Murphy Oil*, the Federal Arbitration Act does not pose an obstacle to our broader holding today. There is no conflict between the NLRA and the FAA, and even if there were, the Norris-LaGuardia Act demonstrates that the FAA “would have to yield insofar as necessary to accommodate Section 7 rights.”⁵

I.

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 therefore the Board should find, as a matter of law, that the Respondent violated Section 8(a)(1) of the Act by promulgating, maintaining, and enforcing an agreement that prohibits its employees from participating in collective or class litigation in all forums.

Pursuant to a charge filed by Arnella M. Freeman on December 14, 2012, the General Counsel issued the complaint on March 25, 2013. The complaint alleges that, since about October 2012, the Respondent has promulgated, maintained, and enforced the Dispute Resolution Agreement. The complaint further alleges that the Agreement requires that employees bring all disputes arising out of or related to their employment or termination from employment to individual binding arbitration. Additionally, the complaint alleges that the Agreement precludes employees not currently participating in specified, ongoing wage and hour litigation (i.e., “The Freeman Case”) from later participating in that or other class actions unless they opt out of the Agreement.

³ The *D. R. Horton* Board noted that it did not reach the question of “whether, if arbitration is a mutually beneficial means of dispute resolution, an employer can enter into an agreement that is *not* a condition of employment with an individual employee to resolve either a particular dispute or all potential employment disputes through non-class arbitration rather than litigation in court.” 357 NLRB No. 184, slip op. at 13 fn. 28 (emphasis added).

⁴ 29 U.S.C. § 103 (emphasis added).

⁵ *Murphy Oil*, supra, 361 NLRB No. 72, slip op. at 6.

The complaint alleges that, by these actions, the Respondent interfered with employees' Section 7 rights to engage in collective legal activity by binding employees to an irrevocable waiver of their rights to participate in collective and class litigation.

On April 15, 2013, the Respondent filed an answer admitting all of the factual allegations in the complaint but denying the legal conclusions and asserting certain affirmative defenses.

On June 13, 2013, the General Counsel filed a Motion for Summary Judgment. On July 15, 2013, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On July 29, 2013, the Respondent filed a response to the General Counsel's Motion and a Cross-Motion for Summary Judgment. On August 16, 2013, the General Counsel filed a reply to the Respondent's response to his Motion for Summary Judgment and to the Respondent's Cross-Motion.

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

II.

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 promulgated, maintained, and enforced the Agreement requiring that employees bring all disputes arising out of or related to their employment or termination from employment to individual binding arbitration. The Respondent's answer further admits that the Agreement was promulgated, maintained, and enforced as "signed by its current and former employees employed at various locations throughout the United States, including at Eden Medical Center in Castro Valley, California." We therefore find that there are no material issues of fact; nor has the Respondent raised any other issues warranting a hearing.⁶

⁶ Inasmuch as the Respondent's Answer to the Complaint contends 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 and Cross-Motion for Summary Judgment. In any event, it is well settled that regardless of when an unlawful rule was first promulgated, the Board will find a violation where the rule was maintained and enforced during the 6-month period prior to the filing of a charge. See, e.g., *PJ Cheese, Inc.*, 362 NLRB No. 177, slip op. at 1 (2015); *The Neiman Marcus Group, Inc.*, 362 NLRB No. 157, slip op. at 2 fn. 6 (2015); *Cellular Sales of Missouri*, 362 NLRB No. 27, slip op. at 2 fn. 7 (2015). Here, the Agreement was in effect at all relevant times, and was initially promulgated just two months prior to the charge's filing. Accordingly, we reject the Respondent's Sec. 10(b) argument.

A.

The Respondent's employees are employed at various locations throughout the United States. Since October 2012, the Respondent has required, nationwide, that its employees sign an acknowledgement form certifying that they have received a copy of the Dispute Resolution Agreement, which takes effect 10 days after the date of receipt unless employees follow an opt-out procedure within those 10 days as specified in the Agreement. The Agreement provides in relevant part:

1. ARBITRATION OF CLAIMS...The Agreement applies to any dispute arising out of or related to Employee's employment with, or termination of employment from, Company. . . . This Agreement is intended to apply to resolving disputes that otherwise would be resolved in a court of law, and therefore, except as stated below, **this Agreement requires that all disputes must be resolved only by an arbitrator through final and binding arbitration and not by a court or jury trial.**

Employment Claims...The Agreement also applies, without limitation, to disputes regarding the employment relationship, any city, county, state or federal wage-hour law, compensation, breaks and rest periods, training, termination, or harassment, and claims... arising under. . . Fair Labor Standards Act.

. . . .

4. CLASS ACTION WAIVER. **There will be no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action ("Class Action Waiver").** Private attorneys general representative actions are not covered within the scope of this Agreement and may be maintained in a court of law, but an Employee may seek in arbitration individual remedies for him or herself under any applicable private attorney general representative action statute, and the arbitrator shall decide whether an Employee is an aggrieved person under any private attorney general statute. Although an Employee will not be retaliated against, disciplined or threatened with discipline as a result of his or her exercising his or her rights under Section 7 of the National Labor Relations Act by the filing of or participation in a class, collective or representative action in any forum, the Company may lawfully seek enforcement of this Agreement and the Class Action Waiver under the Federal Arbitration Act and seek dismissal of such class, collective or representative actions or claims. Any claim that all or part of the Class Action Waiver is unenforceable, unconscionable,

void or voidable may be determined only by a court of competent jurisdiction and not by an arbitrator.

....

7. APPLICATION TO EXISTING CLAIMS. This Agreement is intended broadly to apply to any existing controversy that has arisen from or that is related to Employee's employment with Company, as is permitted under Section 2 of the Federal Arbitration Act.

....

8. PARTICIPATION IN THE *Freeman* CASE. If Employee is a named plaintiff, or has joined as a plaintiff, in *Arnella Freeman v. On Assignment Staffing Services, Inc. d/b/a On Assignment Consultants*, filed October 16, 2012, Alameda County Superior Court Case No. RG12652237 ("*Freeman* case"), this Agreement will not apply to Employee with respect to that case...

If Employee is not a named plaintiff in the *Freeman* case, has not joined as a plaintiff or is not part of a certified class in the *Freeman* case, but would like to potentially participate in that case as a class member or plaintiff, Employee may opt out of this Agreement by following the procedure set forth in Paragraph 10, below. **By not opting out of this Agreement, however, Employee will be giving up the right to represent others in litigation and the right to participate in any class, collective or representative action in a court of law, including the *Freeman* case.** If Employee chooses not to opt out of this Agreement, Employee will be able to arbitrate whatever individual claims Employee has against Company, including the same types of claims as those being litigated in the *Freeman* case.

....

9. TEN-DAY OPT-OUT PERIOD. If Employee does not want to be subject to this Agreement, Employee may opt out of this Agreement by signing Attachment A to the Agreement ("Dispute Resolution Agreement Opt-Out Form") and either mailing it to Angela Kolarek, Human Resources 26745 Malibu Hills Road Calabasas, CA 91301, hand delivering it to the Human Resources department at the above address or sending it by pdf to arbitration@onassignmentcom. In order to be effective, the envelope containing the signed Attachment A must be post-marked by within 10 days of Employee's receipt of this communication or the e-mail transmitting the pdf of the signed Attachment A, must be dated within 10 days of Employee's receipt of this Agreement. Any Employee's decision to opt out will be kept by Human Resources in a file separate from the employee's personnel file. Should Em-

ployee not opt out of this Agreement within the 10-day period, Employee's continued employment with Company will constitute Employee's and Company's mutual acceptance of the terms of this Agreement.

....

11. NO RETALIATION. An employee who timely opts out of the Agreement... will not be subjected to any adverse employment action as a consequence of that decision and may pursue available legal remedies without regard to this Agreement.

....

ATTACHMENT A, DISPUTE RESOLUTION AGREEMENT OPT-OUT FORM

I hereby certify that I do not want to participate in or be bound by the Company's Dispute Resolution Agreement.

The Respondent presents the Agreement, along with a cover letter and Dispute Resolution Agreement Acknowledgement Form, to all employees. The cover letter explains that although the Agreement contains the 10-day opt-out procedure, the Respondent "believes that arbitration will enable employment-related disputes to be resolved more quickly, and at less cost, than in court." The cover letter later emphasizes the Respondent's belief that "the Agreement could make it easier for you to resolve any dispute you might have with the Company than if you went to court or were a part of a class action." The cover letter further explains the nature of arbitration, the class waiver, the 10-day opt-out procedure, how the Agreement affects employees' rights, and that employees are free to consult an attorney before deciding whether to opt out. The cover letter reiterates that, by failing to opt out, employees agree "to waive the right to file a court action as to disputes arising out of the employment relationship, and that any claim that is arbitrated can be done on behalf of the party only, and not as a class or representative action." The Acknowledgement Form is for employees to sign, thereby certifying the date on which they received a copy of the Agreement. Attached to the Agreement itself is the Dispute Resolution Agreement Opt-Out Form for completion by those employees wishing to opt out.

B.

We turn now to the two issues presented by the Respondent's arbitration agreement: (1) whether the Agreement is a mandatory condition of employment and thus falls squarely within the rule announced in *D. R. Horton* and reaffirmed in *Murphy Oil*; and (2) whether the Agreement would be unlawful, even if it were *not* mandatory.

1.

The Respondent effectively concedes that all employees must sign its Acknowledgement Form certifying that they received a copy of the Agreement, which takes effect 10 days thereafter unless employees follow the specified opt-out procedure. Thus, if an employee ultimately fails to opt out of the Agreement in perfect compliance with the Respondent's procedure, and within the 10-day timeframe allowed, the employee will become subject to the Agreement. The Agreement, in turn, provides that "all [employment] disputes must be resolved only by an arbitrator through final and binding arbitration and not by a court or jury trial," with "no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action." Because the Agreement explicitly bars employees from exercising their Section 7 right to pursue collective litigation of all employment-related claims in all forums, it is unlawful under *Murphy Oil* and *D. R. Horton*.⁷

The Respondent argues that its 10-day opt-out procedure ensures that employee participation in the Agreement is a voluntary decision and thus places the Agreement outside the scope of the *D. R. Horton* prohibition on mandatory individual arbitration agreements. We reject this contention for the reasons stated below.

The Agreement's prohibition against the pursuit of class or collective claims violates Section 8(a)(1). The existence of an opt-out procedure—itsself a condition of employment, as part of the Agreement—does not change this fact. While the Respondent's employees may retain their Section 7 rights by following the prescribed opt-out procedure, Section 8(a)(1)'s reach is not limited to employer conduct that completely prevents the exercise of Section 7 rights. Instead, the long-established test is whether the employer's conduct *reasonably tends to interfere* with the free exercise of employee rights under the Act. *American Freightways Co.*, 124 NLRB 146, 147 (1959). See, e.g., *Dover Energy, Inc.*, 361 NLRB No. 48, slip op. at 2 (2014).⁸ The Respondent's opt-out procedure reasonably tends to interfere with its employees' exercise of their Section 7 rights in at least two ways.

⁷ For the reasons fully stated in *Murphy Oil*, we reject the Respondent's contentions that *D. R. Horton* was not decided by a validly appointed Board, that it was wrongly decided and should be overruled, or that its holding is inconsistent with Supreme Court decisions regarding the Federal Arbitration Act issued both before and after *D. R. Horton* was decided.

⁸ See also *C. V. Uranga*, 173 NLRB 635, 635 fn. 2 (1968) (employer's remarks violated Sec. 8(a)(1) because they reasonably tended to interfere with employee rights under the Act "whether or not the employees actually felt intimidated by such remarks").

First, the opt-out procedure interferes with Section 7 rights by requiring employees to take affirmative steps, within 10 days after they receive a copy of the Agreement, to retain those rights. Employees must either hand-deliver or send—physically or electronically—a completed opt-out form to an address specified by the Respondent. The completed form must contain the employee's printed name, signature, and date, and, it must be sent within 10 days. Even employees who wish to retain their Section 7 rights will lose them unless they correctly follow the specified procedures.

Regardless of the procedures required, the fact that employees must take any steps to preserve their Section 7 rights burdens the exercise of those rights. A rule requiring employees to obtain their employer's permission to engage in protected concerted activity is unlawful, even if the rule does not absolutely prohibit such activity and regardless of whether the rule is actually enforced. *Chromalloy Gas Turbine Corp.*, 331 NLRB 858, 858–859 (2000), enfd. 262 F.3d 184 (2d Cir. 2001); *Brunswick Corp.*, 282 NLRB 794, 794–795 (1987). Even a rule requiring only advance notice that an employee will engage in protected concerted activity is an impediment to the exercise of Section 7 rights. See *Special Touch Home Care Services*, 357 NLRB No. 2, slip op. at 7 (2011) (employer unlawfully required individual employees to provide advance notice of whether they would engage in strike), enfd. in part 708 F.3d 447 (2d Cir. 2013). The Respondent's opt-out procedure is not materially different in the burden that it places on the exercise of Section 7 rights and is, therefore, similarly unlawful.

Second, the Respondent's opt-out procedure interferes with Section 7 rights because it requires employees who wish to retain their right to pursue class or collective claims to "make 'an observable choice that demonstrates their support for or rejection of'" concerted activity. *Allegheny Ludlum Corp.*, 333 NLRB 734, 740 (2001), enfd. 301 F.3d 167 (3d Cir. 2002). The Board has long held that an "employee is entitled to keep from his employer his views concerning unions, so that the employee may exercise a full and free choice on the point, uninfluenced by the employer's knowledge or suspicion about those views and the possible reaction toward the employee that his views may stimulate in the employer." *Quemetco, Inc.*, 223 NLRB 470, 470 (1976). Accordingly, "any attempt by an employer to ascertain employee views and sympathies regarding unionism generally tends to cause fear of reprisal in the mind of the employee if he replies in favor of unionism and, therefore, tends to impinge on his Section 7 rights." *Struksnes Construction Co.*, 165 NLRB 1062, 1062 (1967). This "right to remain silent . . . to protect the secrecy" of employees'

views concerning unions applies equally to the Section 7 right to engage in concerted activity. See *Stoner Lumber, Inc.*, 187 NLRB 923, 930 (1971), enf. mem. 1972 WL 3035 (6th Cir. 1972). See also *Special Touch Home Care Services*, 357 NLRB No. 2, slip op. at 7 (“permitting an employer to compel employees to provide individual notice of participation in collective action would impose a significant burden on [that] right ... [and] individual employees [would] be faced with the potentially intimidating prospect of telling their employer that they intend to take action that the employer might view unfavorably...”).⁹

The Respondent’s opt-out procedure places employees in a similar predicament because it forces them to reveal their sentiments concerning Section 7 activity. This procedure requires that employees choose one of two options. They can become bound by the unlawful Agreement—and forever waive their Section 7 rights—by doing nothing. Or employees can notify the Respondent that they have elected to opt out of the unlawful Agreement and thus, retain the ability to exercise rights fundamental to the Act. Under the circumstances here, an employee reasonably would believe that choosing this latter option would be construed as a rejection of the Respondent’s strong preference that employees forever waive their Section 7 right to engage in concerted litigation.¹⁰ The Respondent’s mandatory opt-out procedure interferes with employees’ Section 7 rights by “effectively put[ting] them in the position of having either to accept or reject”¹¹ the Respondent’s clearly preferred

course of action. The unlawful interference of the Respondent’s opt-out procedure is only amplified by the manner in which employees must make this observable choice. To effectively opt out, employees must explicitly request to be exempted from the requirement to arbitrate, in writing, by providing their name, signature, and the date. This puts the Respondent in the position of having a permanent record of which employees choose to opt out—a fact obvious to employees—and thereby further pressures them to become bound to the unlawful Agreement. See *Allegheny Ludlum*, 333 NLRB at 742 (employer’s request that employees appear in an antiunion campaign video particularly coercive because, for those employees who chose to participate, such participation would serve “as a permanent record of the participating employees’ opposition to the union”); see *Derby Refining Co.*, 235 NLRB 12, 15 (1978) (Board found that a supervisor’s questioning of employees about their union sympathies had a greater tendency to impinge on Section 7 rights where the employer “[wrote] down notes concurrent with the union related inquiries”), enf. mem. 1979 WL 4858 (10th Cir. 1979).¹²

In sum, then, the Respondent’s unlawful arbitration agreement is not saved from illegality by its mandatory opt-out procedure, which itself burdens and interferes with the exercise of rights protected by the Act.

2.

In *D. R. Horton*, the Board did not pass on whether an employer could lawfully “enter into an agreement that is not a condition of employment with an individual employee to resolve ... all potential employment disputes through non-class arbitration rather than litigation in

⁹ See also *Barton Nelson, Inc.*, 318 NLRB 712, 712 (1995) (when “supervisors approach individual employees and solicit them to wear antiunion or proemployer paraphernalia, the employees are forced to make an observable choice that demonstrates their support for or rejection of the union”); *Pillottex Corp.*, 234 NLRB 560, 560 (1978) (employer engaged in “a form of interrogation” by offering employees “vote no” buttons, which forced employees to accept the buttons and acknowledge opposition to the union or reject them and acknowledge union support); *Hatteras Yacht, AMF, Inc.*, 207 NLRB 1043, 1043 fn. 3, 1044 (1973) (employer’s maintenance of forms to revoke employees’ union designation cards, available in the employer’s personnel offices, “enabled [it] to identify which employees, if any, chose to withdraw their cards, thereby constituting an indirect means of unlawful interrogation”).

¹⁰ The Respondent’s strong preference for individual arbitration would be obvious to employees. The Respondent requires all employees to acknowledge receipt of the Agreement in writing. The cover letter accompanying the Agreement, in turn, explicitly states that the Respondent “believes that arbitration will enable employment-related disputes to be resolved more quickly, and at less cost, than in court.” The cover letter further states that the Agreement “could make it easier for you [the employee] to resolve any dispute you might have with the Company than if you went to court or were a part of a class action.”

¹¹ *A. O. Smith Automotive Products Co.*, 315 NLRB 994, 994 (1994) (employer violated Sec. 8(a)(1) when its supervisors distributed antiunion campaign paraphernalia to employees).

¹² The Respondent observes that its procedure contains safeguards to protect employees from retaliation, including language in the Agreement stating that employees who timely opt out “will not be subjected to any adverse employment action as a consequence of that decision and may pursue available legal remedies without regard to this Agreement.” The Respondent also points out that the Agreement provides that completed opt-out forms must be sent to a central location, i.e., Human Resources, which will maintain them in a file separate from employees’ personnel files. But in our view, a reasonable employee would recognize the obvious: that his or her decision to opt-out was not somehow secret or otherwise shielded from the Respondent and its managers, despite assurances against retaliation and segregation of opt-out forms from personnel files. It is true that the Board has held that an employer does not require employees to make an unlawful “observable choice” when it makes “antiunion paraphernalia available at a central location unaccompanied by any coercive conduct.” *Barton Nelson*, 318 NLRB at 712. But this principle has no application here, where the Agreement and the opt-out procedure are imposed on all employees. In turn, the consequences of failing to opt out—a permanent loss of Sec. 7 rights—are far greater than a reversible decision to put on antiunion paraphernalia.

court.”¹³ Consistent with the Board’s precedent (including the rationale of *D. R. Horton* itself), the decisions of the Supreme Court, and the Norris-LaGuardia Act, we hold that such non-mandatory agreements are contrary to the National Labor Relations Act and to fundamental principles of federal labor policy. Nothing in the Federal Arbitration Act, in turn, requires federal labor law to yield here.

The Board has consistently struck down agreements that require employees to prospectively waive their Section 7 rights. In *Mandel Security Bureau*, for example, an employer promised to reinstate a discharged employee in exchange for the employee agreeing to withdraw unfair labor practice charges he had filed with the Board and his “forbearance from future charges and concerted activities.” 202 NLRB 117, 119 (1973). The Board, despite noting that the employee “himself may have been partially responsible for instigating” the agreement, found that the agreement violated Section 8(a)(1) because the “future rights of employees as well as the rights of the public may not be traded away in this manner.” *Id.* The Board relied on *Mandel Security in Ishikawa Gasket America, Inc.*, 337 NLRB 175, 175 (2001). There, a departing employee received a monetary settlement in exchange for her one-year agreement not to “hire, influence or otherwise direct any employee of the Company to leave employment of the Company or to engage in any dispute or work disruption with the Company, or to engage in any conduct which is contrary to the Company’s interests in remaining union-free.” The Board found the settlement overly broad, and thus unlawful, because it conditioned the employee’s “receipt of separation payments on her refraining from protected concerted activities for a 1-year period.” *Id.* at 176.¹⁴

¹³ 357 NLRB No. 184, slip op. at 13 fn. 28 (emphasis added). The *D. R. Horton* Board also reserved any ruling on whether a voluntary agreement to resolve “a particular dispute” through non-class arbitration would be lawful. *Id.* Because there is no claim that the Respondent maintained such an agreement in this case, we too do not pass on that fact pattern today.

¹⁴ See also *Retlaw Broadcasting Co.*, 310 NLRB 984, 991 (1993) (Board found that an employer violated Sec. 8(a)(1) by offering to rehire an employee only if he agreed to waive his contractual right to file a grievance concerning his termination and his right to secure union representation in the future), enf. 53 F.3d 1002 (9th Cir. 1995); *McKesson Drug Co.*, 337 NLRB 935, 938 (2002) (employer violated Sec. 8(a)(1) by conditioning employee’s return to work on the employee agreeing to waive the right, “both present and future,” to file charges with the Board).

The Board’s policy of ensuring that employees remain free to engage in future Sec. 7 activity is further evident in its treatment of agreements that settle known and discrete employment disputes. See *Coca-Cola Bottling Company of Los Angeles*, 243 NLRB 501, 502 (1979) (Board found lawful a settlement agreement that reduced an employee’s discipline and returned him to work in exchange for the

Any binding agreement that precludes individual employees from pursuing protected concerted legal activity in the future amounts to a prospective waiver of Section 7 rights—rights that “may not be traded away,” in the words of the *Mandel Security* Board¹⁵—and thus is contrary the Act. It is well established, as the Board observed in *D. R. Horton*, that “employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA.”¹⁶ For purposes of the Act, there is no reason why a prospective waiver of the right to engage in concerted legal activity should be treated any differently from the waivers struck down by the Board in *Mandel Security* and *Ishikawa Gasket*.

Indeed, although the *D. R. Horton* Board left open the issue we decide now, it drew on Supreme Court decisions barring otherwise valid individual agreements that prevent employees from exercising Section 7 rights. Those decisions, *National Licorice Co. v. NLRB*¹⁷ and *J.I. Case Co. v. NLRB*,¹⁸ long ago made clear that “employers cannot enter into individual agreements with employees in which the employees cede their statutory rights to act collectively.”¹⁹

In *National Licorice*, the Supreme Court found unlawful individual employment contracts that included a clause discouraging, if not forbidding, discharged employees from exercising the Section 7 right to present a grievance to their employer “through a labor organization or his chosen representatives, or in any way except personally.” 309 U.S. at 360. The Court found that the contracts were “a continuing means of thwarting the policy of the Act.” *Id.* at 361. “Obviously,” the Court concluded, “employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which it [the Act] imposes” upon employers. *Id.* at 364.

employee’s “promise not to litigate his suspension further” because the agreement did not “prohibit [the employee] from filing unfair labor practice charges concerning future incidents or preclude him from engaging in protected concerted activity”); *Regal Cinemas*, 334 NLRB 304, 305–306 (2001) (Board found that an employer did not violate the Act by insisting, during bargaining, that discharged employees’ receipt of severance pay be conditioned on their waiving the right to file Board charges concerning their discharges; unlike a “proposed waiver of future right to Board access,” which is “contrary to the fundamental policy of the Act,” the severance plan was “clearly tailored to that transaction [the employees’ discharge], as opposed to any future-arising claims.”), enf. denied on other grounds 317 F.3d 300 (D.C. Cir. 2003).

¹⁵ 202 NLRB at 119.

¹⁶ 357 NLRB No. 184, slip op. at 3. See, e.g., *Brady v. National Football League*, 644 F.3d 661, 673 (8th Cir. 2011).

¹⁷ 309 U.S. 350 (1940).

¹⁸ 321 U.S. 332 (1944).

¹⁹ *D. R. Horton*, 357 NLRB No. 184, slip op. at 4.

In *J.I. Case*, the Court applied these principles to individual employment contracts that were, in all respects, voluntary in nature, i.e., “not a condition of employment,” “unfairly or unlawfully obtained,” “or [otherwise invalid] under the circumstances in which they were made.” 321 U.S. at 333. In holding that the contracts there, which pre-dated a union’s certification, did not limit the scope of an employer’s statutory duty to bargain with the union, the Court explained:

Individual contracts no matter what the circumstances that justify their execution or their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining . . . Wherever private contracts conflict with [the Board’s] functions [of preventing unfair labor practices], they obviously must yield or the Act would be reduced to a futility.

Id. at 337.

All of these cases are grounded in “the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining and by protecting the ‘exercise by workers of full freedom of association’”—the mechanisms chosen by Congress to counter the disruptive effects of the inequality of bargaining power between employers and employees. *National Licorice*, 309 U.S. at 362 (emphasis added). As the Supreme Court has recognized, achieving that public policy necessitates that the potential for collective action (whether for purposes of collective bargaining or other mutual aid or protection) cannot be curtailed by individual agreements. See, e.g., *J.I. Case*, 321 U.S. at 338 (1944) (“It is equally clear since the collective trade agreement is to serve the purpose contemplated by the Act, the individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement.”). In other words, to the extent that individual agreements limit the ability of workers to act collectively, such agreements detract from the “full freedom of association” Congress deemed so essential to accomplishing the Act’s stated objectives. In this context, it is the individual *agreement* itself not to engage in concerted activity that threatens the statutory scheme; whether the agreement was imposed or entered into voluntarily is beside the point.

Because they similarly frustrate the Act’s guarantees to all employees and achievement of the Act’s stated purposes, individual arbitration agreements that would prevent an employee from engaging in concerted legal activity “must yield” to the Act, whether or not they were a condition of employment and “no matter what the cir-

cumstances that justify their execution or what their terms,” in the words of the *J.I. Case* Court.²⁰

Essentially for the reasons explained in *D. R. Horton* and *Murphy Oil*, extending the rule of those decisions to arbitration agreements that are *not* conditions of employment creates no conflict with the Federal Arbitration Act.²¹ As we have seen, the fundamental flaw of all individual arbitration agreements that preclude employees from bringing joint, class, or collective workplace claims in any forum is that they vitiate a fundamental, substantive right under the National Labor Relations Act. Whether those agreements are imposed on employees by employers, or whether employees are free to reject them, makes no difference either to the legality of such agreements under the NLRA or to any required accommodation between the NLRA and the FAA.

In this respect, the Norris-LaGuardia Act has particular relevance here. The Board has previously explained why “even if there were a direct conflict between the NLRA and the FAA, the Norris-LaGuardia Act . . . indicates that the FAA would have to yield insofar as necessary to accommodate Section 7 rights.”²² An arbitration agreement between an individual employee and an employer that completely precludes the employee from engaging in concerted legal activity clearly conflicts with the express federal policy declared in the Norris-LaGuardia Act. That conflict in no way depends on whether the agreement is properly characterized as a condition of employment. By its plain terms, the Norris-LaGuardia Act sweepingly condemns “[a]ny undertaking or promise . . . in conflict with the public policy declared”²³ in the stat-

²⁰ See *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942), *enfg.* 33 NLRB 1014 (1941) (court held that a contract clause—which restricted employees’ Sec. 7 right to union representation by requiring them to first resolve disputes individually with their employer, and then through arbitration—was “a violation of the Act per se” because it “imposed a restraint upon collective action” even if “entered into without coercion”).

²¹ *Murphy Oil*, 361 NLRB No. 72, slip op. at 6; *D. R. Horton*, 357 NLRB No. 184, slip op. at 7-12.

²² *Murphy Oil*, 361 NLRB No. 72, slip op. at 6.

²³ Sec. 3, 29 U.S.C. § 103 (emphasis added). As one scholar has recently observed:

In this, the draftsmen sought to give the policy announced in section 2 the broadest possible sweep. They were well aware . . . that “[a]n almost endless array of legal games were played by employers that made almost all collective action by workers subject to legal prohibitions.”

Matthew W. Finkin, *The Meaning and Contemporary Vitality of the Norris-LaGuardia Act*, 93 Neb. L. Rev. 6, 14 (2014) (footnote omitted), quoting Daniel Jacoby, *Laboring for Freedom: A New Look at the History of Labor in America* 62 (1998).

This broad prohibition is recognized by the Board’s application of the Norris-LaGuardia Act. See *Barrow Utilities & Electric*, 308 NLRB

ute: insuring that the “individual unorganized worker” is “free from the interference, restraint, or coercion of employers . . . in . . . concerted activities for the purpose of . . . mutual aid or protection,”²⁴ including “[b]y all lawful means aiding any person participating or interested in any labor dispute who . . . is prosecuting, any action or suit in any court of the United States or any state.”²⁵

It is clear, moreover, *why* Congress chose not to distinguish between agreements imposed by employers as conditions of employment and agreements that might be characterized as voluntary undertakings. In enacting the Norris-LaGuardia Act, Congress declared that “under prevailing economic conditions . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment.”²⁶ In short, the inequality of bargaining power between the “individual unorganized worker” and his employer meant that any agreement between them, insofar as it restrained the worker’s ability to engage in protected concerted activity, could not rightly be treated as binding. The National Labor Relations Act, of course, is premised on a finding of the same “inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association.” NLRA Sec. 1, 29 U.S.C. § 1.

Federal labor law and policy thus prohibit agreements in which employees prospectively waive their right to engage in concerted activity for mutual aid or protection. This prohibition applies to all such agreements, whether or not imposed as a condition of employment, including an agreement to litigate workplace disputes solely through individual arbitration. The agreement here was effectively imposed by the Respondent as a condition of employment, and, as we have explained, it is therefore unlawful under the rule of *D. R. Horton*, as reaffirmed in *Murphy Oil*. But we would reach the same result even if the Respondent had permitted employees entirely to reject its Agreement in the first instance, with no consequences for their employment.

3.

Our dissenting colleague, Member Johnson, reiterates his disagreement with *D. R. Horton* and *Murphy Oil*, and that disagreement forms much of the foundation for his position in this case. The *Murphy Oil* majority carefully

refuted Member Johnson’s arguments there.²⁷ We do not reprise that debate here, but focus instead on his contentions that are specific to this case: (1) that because of its opt-out provision, the arbitration agreement here was not, in fact, a mandatory condition of employment; and (2) that an employer is free to enter into an agreement waiving an employee’s Section 7 rights, so long as the agreement is deemed voluntary. The practical effect of our colleague’s view is to entitle employers to use their economic power to determine whether and how workers may collectively pursue their rights under laws enacted to protect them. We do not see how that view can be squared with the last eight decades of federal labor law and policy, which rejects the notion that unrestrained “freedom of contract” should govern the relationship between employers and individual employees.

Our colleague asserts that “an employer does not impose a mandatory condition of employment by proffering an arbitration agreement that permits employees to opt out.” But this assertion reflects a basic misunderstanding of what a mandatory condition of employment is. Here, the employer does not merely proffer employees an agreement. Rather, it requires employees to very quickly take affirmative steps if they wish *not* to be bound by the agreement—and it does so at the beginning of their employment, almost certainly before any employment-related dispute has arisen. As we have explained, the mandatory condition of employment here is a requirement to act—and act fast—in order to preserve Section 7 rights.²⁸ It is simply incorrect to call this “at most a *de*

²⁷ 361 NLRB No. 72, slip op. at 11-16 (responding to Member Johnson’s dissent). As the *Murphy Oil* majority explained, Member Johnson errs in taking a restrictive view of when concerted legal activity is protected by Sec. 7 of the Act, in failing to grasp why the right to invoke existing class- or collective-action procedures is a *substantive* right under the Act, and in treating the Federal Arbitration Act as if it somehow trumped federal labor law and policy.

²⁸ As two legal scholars have recently observed:

The reality of . . . opt-out provisions is that they create a presumption in favor of the waiver because they require affirmative action on the part of the employee in order for the employee to retain existing statutory rights. Only a very small percentage of employees actually opt out, and those who do will be able to join collectively only with others who opt out, thus diminishing the potential size of any class or collective action.

Stephanie Greene & Christine Neylon O’Brien, *The NLRB v. the Courts: Showdown Over the Right to Collective Action in Workplace Disputes*, 52 American Business Law Journal 75, 119-120 (2015).

That the agreement here recites that opting-out will not subject an employee to “adverse employment action” is immaterial, contrary to our colleague’s view. What matters is that the Respondent has subjected *all* employees to a requirement to take action or forfeit a statutory right. Nor does Sec. 8(c) of the Act, invoked by our colleague, have any application in this context: the unfair labor practice in this case is predicated not on the employer’s expression of the view that arbitration

4, 11 fn. 5 (1992) (“all variations of the venerable ‘yellow dog contract’ are invalid as a matter of law”) (emphasis added).

²⁴ Sec. 2, 29 U.S.C. § 102.

²⁵ Sec. 4, 29 U.S.C. § 104.

²⁶ Sec. 2, 29 U.S.C. § 102.

minimis condition,” as our colleague does, at least if one accepts that the right to engage in concerted legal activity is fundamental to the National Labor Relations Act.²⁹ *Murphy Oil*, like *D. R. Horton* before it, carefully explained why employees’ Section 7 right to engage in concerted legal activity “as a means to secure whatever workplace rights the law provides them,” is not a procedural right, but a substantive one. 361 NLRB No. 72, slip op. at 8.³⁰

is preferable, but rather on the mandatory condition of employment it imposes.

Our colleague takes issue with our citation of Board decisions holding that employers may not coerce employees by imposing prerequisites to engaging in protected concerted activity or by requiring employees to make an observable choice to do so (or not). Certainly those decisions do not directly dictate the result here, but they demonstrate that our holding accords with a basic labor-law principle: that employers may not intrude on employees’ freedom to decide whether or not to engage in protected concerted activity—or, as here, to preserve their right to do so in the future.

²⁹ Our colleague cites judicial decisions holding that arbitration agreements with opt-out provisions are “not procedurally unconscionable,” but our position here is based not on contract-law doctrine, but on federal labor law. The issue is whether, consistent with the National Labor Relations Act, employers may subject employees to opt-out arrangements as a condition of employment. Such a condition may amount to an unfair labor practice whether or not it would be condemned by contract law or some other legal regime. Thus our colleague misses the point when he observes that the Board is not entitled to judicial deference for its analysis of a “contractual question.” The Board is, of course, entitled to deference in interpreting the federal statute it administers, because Congress entrusted the Board with the “difficult and delicate responsibility” of “balancing ... conflicting legitimate interests” in order “to effectuate national labor policy.” *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500–501 (1978). See generally Note, *Deference and the Federal Arbitration Act: The NLRB’s Determination of Substantive Statutory Rights*, 128 Harv. L. Rev. 907 (2015).

³⁰ As the *Murphy Oil* majority observed:

The rights uniquely guaranteed by Section 7 ... are, as the Supreme Court has observed, “collective rights,” and all of them are *substantive* rights. As the *D. R. Horton* Board indicated, Section 7 protects a wide range of concerted activity by employees who ... seek to compel their employer’s compliance with the Fair Labor Standards Act.

* * *

There is no basis in the Act or its jurisprudence to carve out concerted legal activity as somehow less entitled to protection than other concerted activity.

* * *

The collective rights created by Section 7, by definition, necessarily involve group action, and all are enforced one way: by the Board through its processes. This is in clear contrast with statutes like the Fair Labor Standards Act or the Age Discrimination in Employment Act, which establish purely individual rights, create private rights of action, and authorize group litigation only as a means to vindicate individual rights.

Member Johnson rejects the proposition that federal labor law and policy preclude employers from making agreements with individual employees to prospectively waive the substantive statutory right to engage in concerted legal activity. Our colleague insists that in this context, there is—“as an empirical matter”—no inequality of bargaining power between employers and individual employees. This claim strikes us as doubtful at best.³¹ But the empirical debate is beside the point because the inequality of bargaining power between individual employees and employers is the explicit premise of federal labor law and policy, as we have already explained. In light of what Congress has declared, we cannot accept our colleague’s claim that an “employee who is truly free to accept or reject arbitration ... is actually an equal bargaining partner with contractual power akin to that of a union.” The Board is not free to opt out of Section 1 of the National Labor Relations Act. And employees are no freer to accept or reject arbitration agreements than other agreements prospectively waiving Section 7 rights or that are otherwise invalid under the Norris-LaGuardia Act.

Member Johnson insists that today’s decision “is not good for the nation,” that assorted legal doctrines “have been thrown into the sacrificial bonfire,” and that the Board is “continu[ing] a war between the Act and arbitration” and “tilting at windmills” in a contest with the courts. We disagree on all counts of our colleague’s colorful indictment. It is certainly true that *D. R. Horton* and *Murphy Oil* have met a skeptical reception in the lower courts. But, as legal scholars have recently pointed out, “few [courts] have given serious consideration to the merits of the Board’s analysis and the fact that the case raises issues that have not been addressed by the Supreme Court.”³² The Board—as the agency with the “primary responsibility for developing and applying national labor policy” (in the Court’s words)—need not apologize for adopting a position so firmly grounded in Board precedent, in Supreme Court decisions, and in federal statutes.

361 NLRB No. 72, slip op. at 8 (emphasis in original), quoting *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 62 (1975).

³¹ No empirical evidence is cited for our colleague’s empirical claim. That an employer is able to impose a uniform arbitration agreement on all of its employees as a condition of employment certainly suggests that the employer has considerably greater bargaining power than any individual employee. See generally Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 Berkeley Journal of Employment & Labor Law 71, 78 (2014) (explaining that a “number of factors tend to result in employees having relatively less bargaining power than employers”).

³² Greene & O’Brien, *The NLRB v. the Courts*, supra, 52 American Business Law Journal at 121.

Accordingly, we grant the General Counsel's Motion for Summary Judgment.³³

III.

On the entire record, the Board makes the following

FINDINGS OF FACT

JURISDICTION

At all material times, the Respondent, a Delaware corporation with an office and place of business in Cincinnati, Ohio, has been engaged in the business of providing staffing services to various employers located throughout the United States.

During the 12-month period ending December 31, 2012, the Respondent, in conducting its operations described above, provided services valued in excess of \$50,000 in states other than the State of Ohio.

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 about October 2012, the Respondent has promulgated, maintained, and enforced the Dispute Resolution Agreement. The Agreement requires that employees bring all disputes arising out of or related to their employment or termination from employment to individual binding arbitration, and precludes employees not currently participating in specified wage and hour litigation (i.e., "The *Freeman* Case") from later participating in that or other class actions unless they opt out of the Agreement, thereby interfering with employees' Section 7 right to engage in collective legal activity.

CONCLUSIONS OF LAW

1. The Respondent, On Assignment Staffing Services, Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. By promulgating and maintaining a mandatory arbitration agreement under which employees are compelled, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, unless employees individually opt out of the waiver, 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.

³³ We deny the Respondent's Cross-Motion for Summary Judgment.

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 the Agreement. Because the Respondent utilized the Agreement on a nationwide basis, we shall order that the Respondent post a notice at all locations where the Agreement was in effect. See *D. R. Horton*, 357 NLRB No. 184, slip op. at 13.

ORDER

The Respondent, On Assignment Staffing Services, Inc., Castro Valley, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) 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, unless employees individually opt out of the waiver.

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

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

(a) Rescind or revise the Dispute Resolution Agreement to make clear to employees that the Dispute Resolution Agreement does not constitute a waiver of their right to maintain employment-related class or collective actions in all forums.

(b) Notify all current and former employees who were issued the Dispute Resolution Agreement that the Dispute Resolution Agreement has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Within 14 days after service by the Region, post at its facility in Castro Valley, California, and any other facility where the Dispute Resolution Agreement has been in effect, copies of the attached notice marked "Appendix."³⁴ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices

³⁴ 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."

shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since October 2012.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 32 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., August 27, 2015

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
MEMBER JOHNSON, dissenting.

Doubling down on the novel and untenable doctrines expounded in *Murphy Oil USA*¹ and *D. R. Horton*,² the Board today holds both (1) that an agreement to individually arbitrate employment-related disputes that permits employees to opt out nevertheless constitutes an unlawful mandatory condition of employment and (2) that, regardless, an employee may not voluntarily agree with an employer to resolve future disputes by individual arbitration. As discussed in detail in my dissent in *Murphy Oil*, above, slip op. at 35–58, I fundamentally disagree with the Board’s central holdings in that case and in *D. R. Horton*, above, which invalidate class action waivers in arbitration agreements. For these reasons alone, I would find that the Respondent here has not violated the Act by maintaining its arbitration agreement. Because, however, my colleagues continue to extend *D. R. Horton*’s flawed rationale where no Board has gone before—

this time, to micromanage mechanisms of contract formation—I again dissent.

The more my colleagues extend our law beyond the recognized principle that employees engage in activity protected by Section 7 when they *actively* join together to initiate or further a lawsuit, the more I have to disagree.³ Here is why. Contrary to my colleagues, Section 7 does not create a distinct protection for a substantive right conferred by a different statute, much less confer a substantive protection for a particular litigation procedure.⁴ By holding in *Murphy Oil* and *D. R. Horton* that Section 7 guarantees access to various class or representative procedures derived from statutes different from the Act, my colleagues thus extended the sweep of the Act’s protection over territory far removed from any real concerted activity. Today they overextend Section 7 yet a step further. Now, not only does Section 7 make these procedures unwaivable and make mandatory individual-specific arbitration contracts unlawful, but it goes so far as to render unlawful a contract-formation mechanism universally recognized as placing employees on the same footing as their employers when it comes to agreeing to an arbitration contract. This mechanism, the “opt-out” method, is popular in the world of arbitration agreements precisely because it does not condition the employee’s final acceptance of arbitration as a dispute resolution system on any other term or condition of employment. Thus, the employee is free to accept or reject the arbitration agreement, depending on whether he or she finds the agreement advantageous. The majority finds otherwise, departing from the wisdom of many court decisions that have held the opt-out process valid and voluntary. See *I*, *infra*.⁵

That the majority is now overturning principles of contract law and mechanisms of contract formation in the service of *D. R. Horton* and *Murphy Oil* shows that these

³ Such activity is protected because such a lawsuit is “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” *Meyers Industries*, 281 NLRB 882, 885 (1986), *affd.* sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988). See also *Murphy Oil*, above, slip op. at 40 (Member Johnson, dissenting). The Federal Arbitration Act, however, must be respected if an arbitration agreement between employees and their employer modifies or abrogates typical joinder principles as part of the arbitration procedure.

⁴ See *Emporium Capwell Co. v. Western Addition*, 420 U.S. 50, 72–73 (1975) (Sec. 8(a)(1) is not violated simply because Title VII has been violated).

⁵ The opt-out mechanism forms the contract if the employee remains silent (i.e., does not reject the contract) during the passage of the opt-out period. Under the American system of contract formation, silence can constitute acceptance of a contract if the parties have expressly agreed that it shall, by, for instance, expressly agreeing to an opt-out formation process during employment. See RESTATEMENT (SECOND) OF CONTRACTS §§ 4 cmt. a, 19 (1981).

¹ 361 NLRB No. 72 (2014).

² 357 NLRB No. 184 (2012), *enf. denied* in relevant part 737 F.3d 344 (5th Cir. 2013).

decisions really have no boundary. Under the majority's rationale, any contract between an employee and employer with some slight, tangential connection to potentially inconveniencing a Section 7 right could potentially constitute an unfair labor practice. Surely, it was not Congress's purpose in enacting the NLRA to undermine or preempt the common law rules of contract formation in this way. If the Act precludes the formation of a contract with such an extremely attenuated effect upon any possible concerted activity as the opt-out arbitration agreement at issue here, it is hard to imagine that it does not also preclude other common employment agreement procedural provisions, such as setting deadlines for employees filing claims, or *simply putting the onus on the employee to take any action*, in relation to a dispute.⁶

The absurdity of this consequence of the majority's analysis underscores the fundamental flaw in its premises: that Section 7 is an independent source of rights even though those rights were created by or embodied in statutes other than the Act. The logical corollary to the majority's position is that if no other statutory scheme had created a procedural mechanism for class, collective, or representative procedures, Section 7 would somehow do so, in and of itself. But we know, because the Supreme Court has instructed us, that the Act does not duplicate the protection of *substantive rights* provided by statutes other than the Act.⁷ Nor, and for the same reasons, can Section 7 provide for additional or duplicative *procedural rights* beyond those prescribed by the various rules governing class, collective, or representative procedures. Reasonable deadlines are part and parcel of administrative procedure under the NLRA as well as judicial procedure under the Federal Rules of Civil Procedure and their state equivalents. The requirement that parties act within established deadlines in order to preserve legal rights is an ordinary feature of our legal system and does not vitiate the right at issue, whether that right springs

⁶ Of course, the danger of finding a tangential effect to constitute an unfair labor practice extends beyond the realm of contract procedures for agreements with individual employees. This would also apply to more substantive provisions that might tangentially affect employees' Section 7 rights, such as those concerning confidentiality or intellectual-property protections. Indeed, there is no reason why grievance procedures in collective-bargaining agreements might not also come under attack, as the deadlines and requirements they present also tangentially hamper employees in asserting their Section 7 rights.

⁷ *Emporium Capwell*, above, at 71–72 (“assuming that [Title VII] s 704(a) protects employees’ picketing . . . of their employer, the same conduct is not necessarily entitled to affirmative protection from the NLRA”); see also *Meyers*, 281 NLRB at 887–888 (rejecting doctrine that “a single employee’s invocation of a statute enacted for the protection of employees generally” was concerted activity).

from the Constitution itself,⁸ the common law,⁹ or Federal statute.¹⁰ Thus, even assuming, arguendo, that Section 7 does encompass a substantive right to pursue class procedures, an affirmative requirement that an employee act to preserve such a right by sending an email or mailing a letter within a 10-day period—as my colleagues say “very quickly”—would not vitiate the right. My colleagues’ holding to the contrary rests upon the same NLRA exceptionalism that underpinned the majorities’ findings in *D. R. Horton* and *Murphy Oil* that the NLRA must trump the Federal Arbitration Act and decades of Supreme Court interpretations of that law. Accordingly, there is no conflict between the opt-out contract formation mechanism used by the employer here and employees’ rights under the Act.

I. AN ARBITRATION AGREEMENT THAT PERMITS
EMPLOYEES TO OPT OUT IS NOT A MANDATORY
CONDITION OF EMPLOYMENT.

Contrary to my colleagues, an employer does not impose a mandatory condition of employment by proffering an arbitration agreement that permits employees to opt out. To begin with, the Board has no special expertise in analyzing whether such an agreement is voluntary or mandatory. And Congress has delegated to the Board no special interpretive authority by virtue of which the Board’s analysis of such a contractual question would be due any deference from a reviewing court.¹¹ Thus, the starting point for our analysis of this question should be to look to the courts, which do have expertise in contract interpretation, for guidance. And the courts have uniformly held that a meaningful opportunity to opt out makes an arbitration agreement voluntary, and thus not procedurally unconscionable.¹² Simply put, a condition

⁸ For example, a defendant waives the Seventh Amendment right to a jury trial by failing timely to assert it. FED. R. CIV. P. 38(a), (d).

⁹ For example, a property owner may lose the common law right to exclude others from her property by failing to assert the right over a period of time. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 (2000).

¹⁰ For example, a labor organization loses the protection of the Act in certain circumstances by failing to provide timely notice prior to conducting an otherwise protected work stoppage. 29 U.S.C. § 158(g).

¹¹ See *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865–866 (1984).

¹² See, e.g., *Davis v. O’Melveny & Meyers*, 485 F.3d 1066, 1073 (9th Cir. 2007) (“if an employee has a meaningful opportunity to opt out of the arbitration provision when signing the agreement and still preserve his or her job, then it is not procedurally unconscionable”); *Legair v. Circuit City Stores Inc.*, 213 Fed. Appx. 436, 439 (6th Cir. 2007) (when plaintiff “failed to take the required action to opt out. . . . [he] by his conduct demonstrated his agreement to be bound.”); *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672, 675 & fn. 2 (5th Cir. 2006) (employee agreed to arbitrate dispute at issue where he had had notice and an opportunity to opt out of arbitration agreement but did not do so); *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1109 (9th Cir. 2002)

of employment that an employee can unilaterally avoid is not a mandatory condition.¹³ Unfortunately, my colleagues instead conclude—in an opinion that flies in the face of the considered judgment of those courts which have addressed the issue—that an arbitration agreement with an opt-out option is a mandatory condition of employment.¹⁴

My colleagues further assert that, despite the fact that the arbitration agreement's opt-out feature permits employees to pursue class or representative actions, it nevertheless coerces them in the exercise of their Section 7 rights. This assertion is equally unfounded. To the ex-

(where employee could “mull over whether to opt out of [the agreement, he] . . . assented . . . by failing to exercise his right to opt out”); *Circuit City v. Ahmed*, 283 F.3d 1198, 1199 (9th Cir. 2002) (arbitration agreement not procedurally unconscionable where employee had meaningful opportunity to opt out); *Michalski v. Circuit City Stores, Inc.*, 177 F.3d 634, 636 (7th Cir. 1999) (employee “was free not to arbitrate; she was given a choice and she chose—by not signing the opt-out provision—to be bound”).

¹³ Indeed, the Board has recently found a worker's *inability* to unilaterally change working conditions to be a significant indicator that the worker is not an independent contractor, but a true employee. *FedEx Home Delivery*, 361 NLRB No. 55 (2014).

¹⁴ That employees must necessarily accept, before opting out, that there will be an opt-out mechanism presents at most a *de minimis* condition. My colleagues vigorously disagree, persisting in labeling the opt-out process a mandatory condition of employment and, further, claiming an entitlement to deference from the courts in doing so. I respect their views, but whether arbitration is a mandatory or voluntary condition of employment is *not* a creature of the Act. It is instead part of contract law, and the courts have repeatedly found that the opt-out process results in a voluntary condition of employment. See, e.g., *Tillman v. Macy's, Inc.*, 735 F.3d 453, 461 (6th Cir. 2013) (“Because the information conveyed in the [arbitration agreement] and brochure was part of a valid offer, and because [the employee] accepted that offer by continuing her employment with Macy's without returning an opt-out form, it follows that [the employee] knowingly and voluntarily assented to all of its terms...” (internal footnote omitted)). Moreover, the evaluation of procedural unconscionability in an agreement often turns on whether the agreement is truly voluntary, and courts have repeatedly ruled that opt-out agreements are voluntary in this regard. E.g., *Grynko v. Sears Roebuck and Co.*, 2014 WL 66495, *6 (N.D. Ohio, January 6, 2014) (“Plaintiff argues that the [Arbitration] Agreement is procedurally unconscionable for two reasons. First, the Agreement does not allow employees to “negotiate the terms or conditions” of the Agreement. . . . The Court disagrees. As to the first reason, if an employee does not agree with the terms or conditions of the Agreement, she can opt out of the Agreement.”). Something that the courts have repeatedly recognized is voluntary and valid then logically cannot serve as the basis for an unfair labor practice. Notably, even the academic source my colleagues cite on “mandatory arbitration” acknowledges that, in mandatory arbitration, the employer makes the decision to adopt arbitration, not the employees. See Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 Berkeley Journal of Employment & Labor Law 71, 78 (2014) (“[T]he incidence of mandatory arbitration is *not the product of calculation of desirability by the individual employee*. . . . Rather, whether any given employee must bring individual rights claims through a mandatory arbitration procedure *depends on the decision of his or her employer* to adopt the procedure for its employees.”) (emphasis added).

tent that it is the employer's expressed or implied preference that employees do not opt out, Section 8(c) of the Act precludes any finding by the Board that the employer's mere advocacy of its agreement constitutes or evidences an unfair labor practice. Nor is there a shred of evidence that the Respondent has retaliated or threatened retaliation against employees who have chosen to opt out of the agreement. Indeed, the Respondent's Dispute Resolution Agreement expressly provides that “[a]n employee who timely opts out of the Agreement...will not be subjected to any adverse employment action as a consequence of that decision and may pursue available legal remedies without regard to this Agreement.”

My colleagues point to cases in which the Board has held that an employer unlawfully coerces its employees' choices by requiring employees to obtain permission to engage in protected activity, to give advance notice prior to engaging in protected activity, or to make an observable choice that demonstrates their support for or rejection of protected activity.

None of those cases control here. First, *Chromalloy Gas Turbine Corp.*,¹⁵ and *Brunswick Corp.*,¹⁶ involved work rules that were unlawful because they required employees to secure permission from their employer before engaging in protected activity. Here, employees can opt out of the arbitration agreement *without* seeking any employer permission. Next, in *Special Touch Home Care Services*,¹⁷ the Board found unlawful a requirement that individual employees give notice prior to engaging in protected activity. And, in *Allegheny Ludlum Corp.*,¹⁸ and multiple other cases cited by the majority, the Board has held that an employer may not lawfully require employees to make an observable choice that demonstrates their support for or rejection of concerted activity. Here, however, employees' choice to opt out is not directly observable by any representative of management whose actions directly affect their working conditions. And, there is no evidence that the employees' supervisors knew who was opting out. Indeed, the Respondent's Dispute Resolution Agreement provides that employees who choose to opt out are to send their completed opt-out forms to Human Resources, which will maintain the forms in a file separate from employees' personnel files.

Furthermore, even if an employee's choice to opt out were directly observable, it would not be the equivalent of the prior-notice requirement or observable choices

¹⁵ 331 NLRB 858, 858-859 (2000), *enfd.* 262 F.3d 184 (2d Cir. 2001).

¹⁶ 282 NLRB 794, 794-795 (1987).

¹⁷ 357 NLRB No. 2, slip op. at 7 (2011), *enfd.* in part 708 F.3d 447 (2d Cir. 2013).

¹⁸ 333 NLRB 734, 740 (2001), *enfd.* 301 F.3d 167 (3d Cir. 2002).

burdening employees' Section 7 rights that appear in the cases cited by the majority. Unlike in those cases, the choice faced by employees here is not a proxy for their attitudes toward Section 7 activity because employees choose not simply to opt out of the class action waiver, but rather to opt out of the arbitration agreement *as a whole*, and all of its terms. Employees might choose to opt out of the arbitration agreement because they like judges and juries better than arbitrators, or because of some other term or feature of the agreement equally unreflective of their inclination to file a class or representative action. Their choice to do so therefore does not indicate to their employer that they support, or intend to engage in, concerted activity.

To the extent that my colleagues suggest that there cannot be a true and non-coercive agreement between an employer and an employee simply because the employer advocates for the agreement, they turn both contract doctrine and the policy goals of the NLRA—discussed in detail below—on their heads. As discussed above, courts have repeatedly found that arbitration agreements are not procedurally unconscionable contracts of adhesion where employees have the ability voluntarily to opt out. Here, there is absolutely no evidence of any retaliation, or threat thereof, toward any employee who chose to opt out of the agreement. In sum, any conclusion that the agreement here is not voluntary is untenable.¹⁹

II. A VOLUNTARY AGREEMENT TO INDIVIDUALLY ARBITRATE EMPLOYMENT-RELATED DISPUTES DOES NOT VIOLATE THE ACT.

The Board exists, in part, to redress the inequality of bargaining power between employers and their employees, who did not, when the NLRA was enacted in 1935, generally “possess . . . actual liberty of contract.”²⁰ We continue to address such inequality where it persists, as we should, but it does not persist here as an empirical matter.²¹ To the contrary, the Respondent here—by vir-

tue of its own *binding contractual surrender* of its right not to employ someone who does not agree to its preferred terms of employment—ensures that its employees *are actually free not to contract* with it to arbitrate their employment disputes. Rather, they will and must continue to be employed if they exercise that freedom. The Act's legislative purpose does not speak to such a condition. We should not read the Act so as to punish employers who choose truly to surrender their contractual rights and all their bargaining power by nullifying their voluntarily-entered-into agreements.

Notably, the Supreme Court has held that employees *qua* employees are not generally a special class that is immune from the ordinary principles of contract interpretation, which are applicable to arbitration agreements under the Federal Arbitration Act (FAA).²² Employees may enter into and be bound by FAA-compliant agreements just like any other party. To hold, as my colleagues do today, that one party can never be held to its voluntary arbitration agreement simply because that party is an employee is blatant discrimination against arbitration agreements, a position that the Supreme Court has condemned throughout the history of the FAA. The majority's logic here must fail on this basis alone.

And, an employee who is truly free to accept or reject arbitration—as are the employees here—is actually an equal bargaining partner with contractual power akin to that of a union. The Supreme Court long ago made clear that the Board may not interfere with such balance under the guise of deciding cases.²³ By contorting the Act to offer additional protection to a party that is already on equal contract footing, my colleagues undermine, rather than encourage, “practices fundamental to the friendly

out of opt-out agreements without repercussion. My colleagues' suggestion that there is bargaining inequality where an employer can “impose a uniform arbitration agreement on all of its employees as a condition of employment” is inapposite: no agreement is imposed here, but merely offered. An employee who declines to participate stands to lose nothing but the potential benefits of arbitration over litigation. The premises of federal labor law and policy do not dictate that we ignore the facts before us in a particular case. To make our decisions in light of those facts is not, contrary to my colleagues' suggestion, to “opt out of Section 1 of the National Labor Relations Act,” but to fulfill our statutory duty to interpret the Act as it applies to the nation's continuously changing employment landscape.

²² 9 U.S.C. § 1 et seq. See *Circuit City v. Adams*, 532 U.S. 105, 109 (2001) (finding FAA covers every class of employees except transportation workers and seamen and that employee was bound to arbitration agreement); *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (state law precluding arbitration of employee claims struck down); see also *Equal Employment Opportunity Commission v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 749–750 (9th Cir. 2003).

²³ See *American Shipbuilding Co. v. NLRB*, 380 U.S. 300, 316–317 (1965); *NLRB v. Insurance Agents International Union*, 361 U.S. 477, 499–500 (1960).

¹⁹ My colleagues believe that my view “entitle[s] employers to use their economic power to determine whether and how workers may collectively pursue their rights...” I disagree. First, it is the employee's voluntary decision to opt out that determines “whether” that employee may collectively pursue his or her rights. That is obviously up to the employee and not the employer, as explained above. Second, in terms of “how” an employee may pursue such rights, regardless of the “economic power” of the parties, our legal system has traditionally recognized limitations imposed by both law and private agreement. The Act is not a license to wipe out those limitations.

²⁰ 29 U.S.C. § 151.

²¹ The Agreement on its face evidences the absence of bargaining inequality here. It states, without reservation, “[i]f Employee does not want to be subject to this Agreement, Employee may opt out,” and “an employee who timely opts out . . . will not be subjected to any adverse employment action as a consequence of that decision” Moreover, it is an observable fact that, across the nation, employees have opted

adjustment of industrial disputes,” in direct contravention of the Act’s foundational policies.²⁴ And, the majority’s rationale also falls afoul of Section 8(c), which should allow an employer to advocate for its arbitration agreement, without that advocacy being considered evidence contributing to an unfair labor practice finding.

Nor do my colleagues’ arguments provide any compelling support for their conclusion. The majority relies on cases in which the Board has held that employees may not prospectively waive substantive rights to conclude that the arbitration agreement here is unlawful even if it is voluntary. Again, this conclusion rests on a fundamental misconception underlying the decisions in *D. R. Horton* and *Murphy Oil* concerning the nature of the concerted activity protected by Section 7.

My colleagues cannot assert that the use of an arbitral forum in itself denies a party any substantive right.²⁵ And, the Supreme Court has held that the use of class action procedures is not a substantive right.²⁶ This question has been thoroughly litigated, and numerous decisions hold that various employment-related statutes—even those that explicitly contemplate class or collective procedures—do not guarantee class litigation. Thus, the Supreme Court has determined that there is no substantive right to collective procedures under the Age Discrimination in Employment Act (ADEA),²⁷ despite the statute expressly providing for collective procedures.²⁸ Similarly, numerous courts have held that there is no substantive right to proceed collectively under the Fair Labor Standards Act (FLSA),²⁹ despite the fact that the FLSA, like the ADEA, explicitly provides for class action suits.³⁰ Nor is there any such right under the Uniformed Services Employment and Reemployment Rights

Act (USERRA).³¹ Finally, even though precedent under Title VII of the Civil Rights Act of 1964 (Title VII)³² expressly provides for pattern and practice claims on behalf of a group of employees, there is no right for employees to proceed as a class in a Title VII action.³³ Because no employment statute provides for a substantive right to a class or collective procedure, the arbitration agreement here does not involve the prospective waiver of any substantive statutory right.³⁴

In any event, the Board has long recognized that “[a]rbitration as a means of resolving labor disputes has gained widespread acceptance . . . and now occupies a respected and firmly established place in Federal labor policy” with the strong endorsement of the Supreme Court.³⁵ For this reason, the Board generally refrains from adjudicating unfair labor practice issues that arise from a collective-bargaining agreement where the agreement provides, as most do, for arbitration as a method of resolving disputes over the meaning of its provisions.³⁶ Granted, a distinction can be made between an agreement to arbitrate disputes that is contained within a collective-bargaining agreement and one into which an employee voluntarily enters on an individual basis.³⁷ But, from the perspective of an employee whose entire period of employment occurs during the term of one or more collective-bargaining agreements that “waive” his or her Section 7 rights by permanently consigning their adjustment to arbitration, the distinction is one that makes no difference. The Act permits, and the Board

²⁴ 29 U.S.C. § 151.

²⁵ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626–627 (1985). Indeed the majority’s reconciliation of the NLRA and the FAA in *Murphy Oil*, above, presupposes that the flaw in a class-action waiver in an arbitration agreement lies only in its proscription of the ability to pursue claims as a class, and not in its proscription of the arbitral forum. See, e.g., *Murphy Oil*, above slip op. at 6 (“Finding a mandatory arbitration agreement unlawful [in this context] . . . does not conflict with the Federal Arbitration Act or undermine its policies, because . . . such a finding treats an arbitration agreement no less favorably than any other private contract that conflicts with federal law.”).

²⁶ See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612–613 (1997); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980); *Murphy Oil*, above, slip op. at 42–44 (Member Johnson, dissenting).

²⁷ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991).

²⁸ 29 U.S.C. § 621 et seq.

²⁹ *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004); see also *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 505–506 (4th Cir. 2002); *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319–320 (9th Cir. 1996).

³⁰ 29 U.S.C. § 201 et seq.

³¹ 38 U.S.C. § 4301 et seq. See *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672, 680–681 (5th Cir. 2006).

³² 42 U.S.C. § 2000 et seq.

³³ *Parisi v. Goldman, Sachs & Co.*, 710 F.3d 483, 487–488 (2d Cir. 2013).

³⁴ My colleagues posit that an employer cannot impose “a requirement to take action or forfeit a statutory right,” citing a law review article that argues that opt-out mechanisms “create a presumption in favor of the waiver because they require affirmative action on the part of the employee.” But, since arbitration agreements themselves can permissibly result in the total forfeiture of the constitutional right to a jury trial, a mere procedural requirement related to the potential formation of such an agreement cannot possibly constitute a burden unlawful under our statute, which important though it is, enjoys lesser footing than the Constitution. Moreover, as I explain above, a requirement of affirmative action to preserve rights is not alien to our system of law, including labor law.

³⁵ *United Technologies Corp.*, 268 NLRB 557, 558 (1984) (citing *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (commonly referred to collectively as the Steelworkers Trilogy); *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957)).

³⁶ *Collyer Insulated Wire*, 192 NLRB 837 (1971).

³⁷ This difference may underlie the majority’s somewhat puzzling claim to leave unresolved the question of whether a voluntary agreement to resolve a particular dispute through non-class arbitration would be lawful.

and the courts enthusiastically endorse, prospective agreements to resolve disputes by arbitration in the union context; the current context should be no different. As expressed in my *Murphy Oil* dissent (and the *Murphy Oil* partial dissenting opinion by Member Miscimarra), Section 9(a) of the Act protects an employee's right "at any time" to agree on the "individual" adjustment of disputes, which encompasses any individual agreement to engage in arbitration.³⁸

Even if there were a prospective waiver of a substantive statutory right, a proper accommodation of the NLRA and the FAA would require finding that such a waiver does not violate the Act. Apart from the concerns discussed above, the majority's theory that an employee cannot prospectively and bindingly agree to arbitrate employment-related disputes obliterates one of the three fundamental statutory attributes of arbitration under the FAA: the irrevocability of an agreement to settle disputes by arbitration.³⁹ The Act cannot be read in such an absolutist fashion.⁴⁰

Finally, the majority's remaining arguments, which are largely a reprise of those presented in *Murphy Oil*, remain unconvincing. Their reliance on *National Licorice Co. v. NLRB*⁴¹ and *J.I. Case Co. v. NLRB*,⁴² avails them no more here than it did in *Murphy Oil*. As described in my *Murphy Oil* dissent, slip op. 48-49, in *National Licorice*, the agreements themselves had been procured as part of an overall scheme to prevent unionization, and, in *J.I. Case*, the employer was attempting to refuse to bargain with a majority union on the basis of individual agreements previously obtained. Neither of those cases have anything to do with individual opt-out arbitration agreements formed as a matter of ordinary course, with no union present or waiting in the wings.

As in *Murphy Oil*, the majority concludes by again claiming that the Norris-LaGuardia Act makes individual-specific arbitration agreements the equivalent of "yellow dog" contracts and by again subordinating the FAA, the text of which obviously militates against the majority's position here. But they are no more correct now than they were then. Neither the text of these statutes nor

the precedent interpreting them supports the majority's interpretation. The Norris-LaGuardia Act does not sanction the breach of FAA-protected arbitration contracts, and the FAA has not been overridden by any "express congressional command," as the Supreme Court would require. See *Murphy Oil*, slip op. 49-51, 54-55 (Member Johnson, dissenting). The majority cannot point to a single court decision since *Murphy Oil* issued that supports their view of these statutes—statutes over which the courts and not the Board have expertise. See *Patterson v. Raymours Furniture Co.*, No. 14- CV5882-VEC, —F.Supp.3d —, —, 2015 WL 1433219, at *7 and fn. 7 (S.D.N.Y. Mar. 27, 2015) (declining to apply *Murphy Oil*, instead following binding Second Circuit precedent rejecting *D. R. Horton* to enforce a class action waiver, and observing that "the NLRB stands alone in holding that the NLRA overrides the FAA relative to class action waivers"); *Nanavati v. Adecco USA, Inc.*, No. 14-CV-04145-BLF, 2015 WL 4035072, at *2 (N.D. Cal. Jun. 30, 2015) (observing that "every court to have considered *Horton I* and *Murphy Oil* has rejected the reasoning in those opinions..."); *Hobson v. Murphy Oil USA, Inc.*, No. CV-10-S-1486-S, 2015 WL 4111661, at *2 (N.D. Ala. Jul. 8, 2015) (citing *D. R. Horton* and observing that "the NLRB's decisions are not entitled to deference when they concern the interpretation of the Federal Arbitration Act, or any statutory provision other than the NLRA").

CONCLUSION

Two overarching reasons compel this dissent. First, the continued undermining of arbitration principles in the service of the *Murphy Oil* theory, and its expansion, is not good for the nation. Now, with this opinion, ordinary contract formation doctrines, typical opt-out provisions, and even traditional concepts of voluntariness have also been thrown into the sacrificial bonfire. What we are sacrificing is not some second-class forum for the resolution of employment disputes, but arbitration. Arbitration is a time-honored system of dispute resolution which used to be thought synonymous with labor peace. I see no reason to continue a war between the Act and arbitration. Arbitration agreements, including the individual-specific ones, are indeed a valid and a preferred system of dispute resolution, not only according to the express decisions of the Supreme Court and the mandate of the Federal Arbitration Act, but also according to most participants in our nation's economy. This war should have never started, and it should have stopped right here in this opinion.

Second, although the *Murphy Oil* decision was made ostensibly on behalf of employee rights, its continuation is not cost-free to employees. The courts are independ-

³⁸ Sec. 9(a). See *Murphy Oil*, slip op. at 47-48 (Member Johnson, dissenting); id., slip op. at 30-34 (Member Miscimarra, dissenting in part).

³⁹ 9 U.S.C. § 2 (stating that "A written provision in . . . a contract . . . to settle by arbitration a controversy . . . shall be valid, *irrevocable*, and enforceable") (emphasis added).

⁴⁰ *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942) ("[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives.").

⁴¹ 309 U.S. 350 (1940).

⁴² 321 U.S. 332 (1944).

ent actors. As shown above, they have not adopted the Board's basic theory in *Murphy Oil*, and will be even less inclined to agree with this new permutation overriding yet more traditional contract doctrine. More importantly, it is the courts who determine the ultimate fate of the class action lawsuits before them. Employees who actually believe in the protection the Board is offering here, and who delay their lawsuits for Board resolution, may find that protection a mirage. As a striking example, Judge Charles Lynwood Smith Jr., the federal district court judge in the underlying *Murphy Oil* lawsuit, dismissed the employees' claim with prejudice because they chose to keep arguing that *D. R. Horton* and *Murphy Oil* were correct rather than proceeding in arbitration, as he had ordered:

More substantively, plaintiffs have not cited any authority to support their outlandish suggestion that a federal court order is without effect if there is a related proceeding pending before the NLRB. If plaintiffs truly were concerned about their rights under the NLRA being "irreparably harmed" by the requirement to arbitrate their individual claims, they could have requested either a stay of the arbitration order pending an outcome of the proceedings before the NLRB, or permission to seek an interlocutory appeal. They did neither. Instead, they simply disregarded this court's order because it required them to do something they did not want to do. That is not "reasonable behavior."

Hobson, 2015 WL 4111661, at *2. Judge Smith is quite correct in noting that we as a Board cannot inherently postpone or supersede court orders in these lawsuits. In a contest between the Board and the courts here, we are tilting at windmills. I do not think the majority intends to turn Section 7 into a siren song dooming other employee rights to a premature litigation graveyard. But, this is inevitable so long as the Board persists in forwarding a theory that lacks soundness, forfeits judicial deference, and then crawls at the typical slow pace of Board adjudication.⁴³ I respectfully wish that my colleagues had taken a different path.

Harry I. Johnson, III,

Member

⁴³ The Board chose not to take *D. R. Horton* directly to the Supreme Court via a petition for certiorari.

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 requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, unless they opt out of the waiver.

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

WE WILL rescind or revise the Dispute Resolution Agreement to make clear that the Dispute Resolution Agreement does not constitute a waiver of your right to maintain employment-related class or collective actions in all forums.

WE WILL notify all current and former employees who were issued the Dispute Resolution Agreement that the Dispute Resolution Agreement has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

ON ASSIGNMENT STAFFING SERVICES, INC.

The Board's decision can be found at www.nlrb.gov/case/32-CA-095025 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.

