United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 25, 2016

TO: Paula S. Sawyer, Regional Director
Region 27

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Haynes Mechanical Systems
Case 27-CA-171581

Bill Johnson's Chron
506-0170-0000-0000
506-6090-3300-0000
506-6095-8700-0000
506-4067-9500-0000
512-5009-0100-0000
512-5012-0125-0000

The Region submitted this case for advice as to whether: (1) non-solicitation provisions in the Employer's mandatory non-solicitation and confidentiality agreements are unlawful under Section 8(a)(1) of the Act, and (2) the Employer's state court lawsuit to enforce those provisions also violates Section 8(a)(1). We conclude that the non-solicitation provisions in the Employer's mandatory non-solicitation and confidentiality agreements unlawfully prohibit activity that is protected under the Act and, therefore violate Section 8(a)(1). We further conclude that the Employer's state court lawsuit has an illegal objective because it seeks to enforce those unlawful provisions and thus also violates Section 8(a)(1). Finally, because the Employer's lawsuit seeks to enforce contract provisions that are arguably prohibited by the Act, the lawsuit will also violate Section 8(a)(1) if the Employer does not take affirmative action to stay further prosecution of its lawsuit after receiving a *Loehmann*'s letter from the Region.[1]

FACTS

Haynes Mechanical Systems ("Employer") is a Colorado corporation that provides heating, ventilation, and air conditioning services ("HVAC") to commercial buildings and facilities. It has offices in the Denver, Colorado Springs, and Fort Collins areas

[1] *Loehmann's Plaza*, 305 NLRB 663, 671, 675-76 (1991) *supplemented by* 316 NLRB 109 (1995), *affirmed sub nom., UFCW Local 880 v. NLRB*, 74 F.3d 292 (D.C. Cir. 1996), *cert. denied sub nom., Teamsters Local 243 v. NLRB*, 519 U.S. 809 (1996).

in Colorado and an office in Phoenix, Arizona. It employs approximately 115 people who do not have any union representation. The Employer is also a franchise of Linc Service, which is owned by the ABM Franchising Group (referred to herein as "Linc/ABM"). As a mandatory condition of employment, the Employer requires employees to sign an agreement called the "Non-Disclosure and Non-Solicitation Agreement For the Protection of Trade Secrets" (referred to herein as "NDNSA") and a Linc/ABM "Employee Confidentiality Agreement" (referred to herein as "ECA"), of which the Employer is named as a beneficiary.

The NDNSA includes a provision that prohibits an employee from divulging any confidential or trade secret information obtained during employment, including customer lists, sales and marketing materials, customer contact and business information, order history, or pricing offers. The provision also prohibits an employee from directly or indirectly encouraging or seeking to influence any customer of the Employer to terminate its relationship with the Employer. These provisions apply during the "Restricted Period," which the NDNSA defines as including the employee's term of employment until 18 months after the date that the employee's employment is terminated.

The NDNSA also contains the following provision regarding "Non-Solicitation of employees": "You agree that during the Restricted Period you will not, without the prior written approval of the Company, seek to influence any employee of the Company to terminate or leave the employment of the Company."

The ECA from Linc/ABM that employees also must sign includes a provision "[f]or the purpose of protecting the Company's trade secrets and confidential business information" that prohibits employees from contacting or soliciting its customers. For the same purpose, it also has a non-solicitation provision that states, in relevant part:

> during my employment and for a period of one (1) year following his/her [sic] termination of employment of [sic] the company for any reason the employee will not either directly or indirectly, call on, solicit, or induce any other employee or officer of the Company's Linc Business or its affiliates whom I had contact with, knowledge of, or association with in the course of my employment with the Company's Linc Business to terminate his or her employment, and will not assist any other person or entity in such a solicitation, without the express written consent [of] the Company's Linc Business.

In February 2015,[2] the Employer hired the Charging Party to work as a service technician. The Employer required (b) (6), (b) (7 as a condition of employment to sign the

[2] All subsequent dates are in 2015 unless otherwise noted.

NDNSA and the ECA, and (b) (6) did so on February 25 and March 2, respectively. In May or June, the Charging Party had a conversation with a coworker ("Coworker"), who was another of the Employer's service technicians, about their pay rates. Coworker was being paid less than the Charging Party and was complaining about (b) (6) pay rate. The Charging Party told Coworker that (b) (6) used to be in a union job and that the pay was better. Coworker said that (b) (6) knew the benefits on a union job were better because (b) (6) brother was a union electrician. The Charging Party and Coworker then looked up the master agreement for Sheet Metal Workers Local 9 for the Denver metro area and saw that the wages in the agreement were higher than the wages paid by the Employer.

The Charging Party and Coworker continued to talk and at one point, Coworker asked the Charging Party to let (b) (6) know if there were any union jobs that (b) (6) knew of. Soon after, the Charging Party told Coworker that Colorado Sheet Metal ("CSM"), a unionized contractor, was looking for a service technician. Coworker said (b) (6) was interested, and the Charging Party gave (b) (6) the phone number for the General Manager at CSM. Coworker spoke with the General Manager at CSM, but CSM did not offer (b) (6) a position at that time.

In August, CSM's General Manager offered the Charging Party a project manager position, which was in the unit of CSM's employees represented by Sheet Metal Workers Local 9, and (b) (6) accepted. After the Charging Party accepted the position at CSM, (b) (6) informed a number of the Employer's employees of (b) (6) decision. The Charging Party told one of the Employer's employees that (b) (6) was a good worker and that if there was any opportunity to bring (b) (6) over to CSM, (b) (6) would like to do that. That employee said (b) (6) was happy with the Employer. On August 28, the Charging Party terminated (b) (6) employment with the Employer.

In September, after the Charging Party had started working for CSM, (b) (6) had three phone conversations with another of the Employer's employees. In the first conversation, the Charging Party passed along contact information but did not discuss job opportunities.[3] In the second conversation, the Charging Party told the employee that (b) (6) needed more experienced technicians at CSM and that (b) (6) would let (b) (6) know if any future opportunities came up. In the third conversation, the Employer's employee called the Charging Party. The Charging Party told the Employer's employee that (b) (6) was not aware of any job openings at the time but that if (b) (6) heard of anything (b) (6) would let (b) (6) know.

[3] It is not clear what "contact information" refers to, but the context suggests that it was for CSM.

Also in September, CSM's General Manager asked the Charging Party whether Coworker was still interested in the service technician job. The Charging Party called Coworker, who said that (b) (6), was still interested. The Charging Party set up a time for Coworker to meet with CSM's General Manager, and they did so around September 17. The Charging Party greeted Coworker before the meeting, but (b) (6), was not involved in the interview. CSM made Coworker a job offer, and Coworker gave two weeks' notice to the Employer on September 21.

On September 22, the Employer sent a letter to the Charging Party stating that (b) (6), had signed the Employer's NDNSA and ECA and that it wanted to ensure (b) (6), was aware of (b) (6), (b obligations. The Employer stated that the agreements contained provisions designed to protect the Company's confidential business information, trade secrets, and customer and employee relationships. The letter also stated that the Employer had become aware that since (b) (6), had ended (b) (6), (b employment relationship with it, the Charging Party had approached several of its employees, including Coworker, in an attempt to convince them to terminate their employment and join (b) (6), (b) (7 at CSM. The letter stated that such conduct was a direct breach of the agreements and that if the Employer learned that (b) (6), was continuing to breach those agreements, it would take whatever measures necessary to protect its rights and enforce the agreements, including seeking all available damages, injunctions, and attorneys' fees and costs.

On September 24, the Employer filed a complaint in Colorado state court against the Charging Party and CSM seeking an injunction and damages of over $100,000. In its complaint, the Employer alleged that the Charging Party had breached the non-solicitation provisions in the NDNSA and ECA agreements, that CSM had intentionally interfered with the Charging Party's performance under the agreements, and that the Charging Party and CSM had engaged in a civil conspiracy against it. The Employer further stated in its complaint that the HVAC services market in Colorado is highly competitive and that because of the intense nature of the competition in that service area, it devotes substantial effort to developing and maintaining relationships with its employees, including providing them with training and proprietary and confidential information.

The Charging Party filed an answer substantially denying the allegations and asserting a number of affirmative defenses. One of these defenses was that enforcement of the non-solicitation provisions violated the Act.

The Employer, in its initial disclosures as part of the lawsuit, stated that it was seeking damages related to the training and recruitment of Coworker (approximately $15,145), lost profits attributable to Coworker's departure (approximately $62,000 and ongoing and continuous), and the costs incurred for replacing (b) (6), (b) (7 (approximately $1,300 per month).

On March 11, 2016, the Charging Party filed a charge alleging that the Employer's state court lawsuit against (b) (6), (b) (7 violated Section 8(a)(1). The Charging Party amended the charge to also allege that the non-solicitation provision in the NDNSA is facially unlawful.

ACTION

We conclude that the non-solicitation provisions in the Employer's mandatory non-solicitation and confidentiality agreements unlawfully prohibit activity that is protected under the Act and, therefore violate Section 8(a)(1). We further conclude that the Employer's state court lawsuit has an illegal objective because it seeks to enforce those unlawful provisions and thus also violates Section 8(a)(1). Finally, because the Employer's lawsuit seeks to enforce contract provisions that are arguably prohibited by the Act, the lawsuit will also violate Section 8(a)(1) if the Employer does not take affirmative action to stay further prosecution of its lawsuit after receiving a *Loehmann*'s letter from the Region.

A. The Non-Solicitation Provisions in the Mandatory Agreements Violate Section 8(a)(1).

To determine whether an employer-mandated agreement is unlawful under the Act, the Board applies the *Lutheran Heritage Village* test.[4] Under *Lutheran Heritage Village*, a rule or policy is clearly unlawful if it explicitly restricts Section 7 activities.[5] If it does not, the policy will still violate Section 8(a)(1) upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.[6]

We conclude that the non-solicitation provisions in the Employer's mandatory agreements are unlawfully overbroad because employees would reasonably construe them to prohibit Section 7 activity. The Board has held that when employees

---

[4] *See, e.g., D.R. Horton, Inc.*, 357 NLRB 2277, 2280 (2012) (applying *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004), to determine whether employer violated Section 8(a)(1) by requiring employees to sign mandatory arbitration agreement as a condition of employment), *enforcement denied on other grounds*, 737 F.3d 344 (5th Cir. 2013); *U-Haul Co. of California*, 347 NLRB 375, 377-78 (2006) (same), *enforced*, 255 Fed. Appx. 527 (D.C. Cir. 2007).

[5] *Lutheran Heritage Village-Livonia*, 343 NLRB at 646.

[6] *Id*. at 647.

influence or solicit each other to change employers as part of a course of protected concerted activity, that conduct remains protected, as long as it is not disloyal under Board law.[7] For example, in *Boeing Airplane Co.,* the Board concluded that where employees organized a "Manpower Availability Conference" designed to bring together current employees and other employers as part of a contract bargaining campaign, the conduct was protected.[8] The Board rejected the employer's assertion that the employees' activity was disloyal, distinguishing it from cases that "involved a direct attack upon the employer and its business, unrelated to terms or conditions of employment or to any matter in issue between the union and the employer."[9] Instead, the Board found that "the employees collectively were seeking legitimate ends—to broaden their opportunities for employment, to obtain the best market for their services, and to lessen their dependence upon the [employer] for employment. . . ."[10] Thus, the employees' activity was protected and the employer's discharge of the employee who had taken the lead in organizing the conference violated Section 8(a)(1) and (3).[11]

---

[7] *See, e.g., Clock Electric, Inc.*, 338 NLRB 806, 806, 817 (2003) (affirming judge's conclusion that union's action of informing employees of the benefits of working for a union contractor and offering to place them with such contractors when work became available as part of a campaign to organize those employees was protected and that employees listening to the union's entreaties was similarly protected concerted activity). *Cf. Abell Engineering & Mfg.*, 338 NLRB 434, 434 & n.2 (2002) (inducing coworker to quit and work for union competitor was disloyal and not protected where union had stopped effort to organize employer and inducement was thus unrelated to improving employment terms and it would have been crippling and potentially fatal to the employer, which had only one other employee), *supplemented by* 340 NLRB 133, 133-34 (2003) (denying respondent's application for attorneys' fees and expenses). In *Clinton Corn Processing Co.*, 194 NLRB 184, 185-86 (1971), the Board also determined that a former employee lost the Act's protection by soliciting employees to work for an employer's competitor. In that case, neither the Board nor the judge provided case law support or other reasoning for its decision. *Id.* at 185-86, 190. There is also no indication in that case that the Board considered the former employee's activity as part of a course of protected activity.

[8] 110 NLRB 147, 148, 151 (1954), *enforcement denied*, 238 F.2d 188 (9th Cir. 1956).

[9] *Id.* at 150-51.

[10] *Id.* at 151.

[11] *Id.*

Likewise, in *Technicolor Services,* the Board adopted a judge's decision concluding that a union steward's efforts to have his coworkers fill out applications for other companies was protected because it was in the interest of continued employment of the employees, who could have lost their jobs with the current employer due to an upcoming government contract bidding process.[12] The judge found that the union's efforts were not indefensibly disloyal.[13]

Further, in *M.J. Mechanical Services*, the Board affirmed a judge's conclusion that union "salts" were protected in telling their coworkers about the benefits of belonging to a union and referring them to the union hall.[14] Such activity was protected even where it caused one employee to join the union, which then assigned him to work for a union contractor.[15]

Here, the non-solicitation provision in the NDNSA prohibits employees from "seek[ing] to influence any employee of the Company to terminate or leave the employment of the Company." The non-solicitation provision in the ECA prohibits employees from "directly or indirectly . . . call[ing] on, solicit[ing], or induc[ing] any other employee or officer . . . to terminate his or her employment." Employees would reasonably construe those provisions to prohibit the protected activity described above. For example, organizing a conference for employees to meet with other employers, or asking employees to fill out applications for other employers, as part of protective or protest activity would reasonably be considered influencing or indirectly inducing employees to terminate their employment. Even sharing information about union membership, union hiring halls, or union apprenticeship programs would reasonably be considered influencing or indirectly inducing employees to terminate

---

[12] 276 NLRB 383, 383, 388 (1985), *enforced*, 795 F.2d 916 (11th Cir. 1986).

[13] *Id.* at 388-89. *See also QIC Corp.*, 212 NLRB 63, 63, 68 (1974) (adopting a judge's decision concluding that a group of employees filing applications with a competitor employer was protected activity because employees were "free at any time they wished to exercise economic self-help and seek better paying jobs").

[14] 325 NLRB 1098, 1098, 1106 (1998).

[15] *Id.* at 1106. *See also T & W Pole Line Contracting, Inc.*, Case 17-CA-22364, Advice Memorandum dated April 12, 2004 (employee-organizer engaged in protected activity when he discussed with employer's employees potential job opportunities with a unionized employer and the union's apprenticeship program).

their employment. Thus, the non-solicitation provisions in the mandatory agreements are overly broad and are reasonably read to prohibit Section 7 activity.[16]

Additionally, we reject the Employer's defense that the non-solicitation provisions it requires employees to agree to are lawful because its business interest in maintaining those provisions outweighs the employees' Section 7 rights to engage in the protected activity described above. The Employer has stated that its agreements exist to protect the Company's confidential business information, trade secrets, and customer and employee relationships. It has argued that its interest in preventing employees from quitting the company and recruiting employees to join their competitors is substantial. The Employer also has stated that it is in a competitive market and devotes substantial effort to develop and maintain relationships with its employees, including providing them with training and proprietary and confidential information.

We acknowledge the Employer's interest in protecting itself in a competitive market, including protecting its business methods and retaining its employees. However, this interest must be balanced against its employees' right to engage in Section 7 activities.[17] Here, the employees' interests are significant. The right of employees to protect and improve their wages and benefits by engaging in discussion and solicitation are at the core of Section 7 protections.[18] The non-solicitation

---

[16] To the extent that *Quicken Loans, Inc.*, Case 28-CA-075857, Advice Memorandum dated August 30, 2012, and *Charles Schwab Corp.*, Case 28-CA-084931, Advice Memorandum dated September 14, 2012, suggest otherwise, we conclude that the analysis in those memoranda pertaining to the non-solicitation provision is no longer applicable.

[17] *See, e.g., Purple Communications, Inc.*, 361 NLRB No. 126, slip op. at 4-16 (Dec. 11, 2014) (balancing employer's asserted property interest in its email system, and its interests in maintaining production and discipline, protecting confidential information, preventing computer viruses, and ensuring that worktime is used for work, against employees' Section 7 rights to communicate about workplace matters); *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 4 (Aug. 22, 2014) (noting that an employer's legitimate interest in preventing the disparagement of its products, services, and in protecting its reputation from defamation are balanced against its employees' Section 7 rights if and when they are implicated), *enforced sub nom., Three D, LLC v. NLRB,* 629 Fed. Appx. 33 (2d Cir. 2015).

[18] *See, e.g.*, *Purple Communications, Inc.*, 361 NLRB No. 126, slip op. at 5 (explaining that collective action cannot come about without communication and that the

provisions at issue here significantly infringe on the ability of employees to discuss the potential advantages of union representation in order to gain higher wages and benefits either at their current employer or with another. They also prohibit employee collective action to change employers or threaten to change employers as a protective measure or a form of protest. The Board has recognized the importance of such conduct and how it may constitute a necessary predicate to employees improving their working conditions.[19] Indeed, the Board has held that employee activities aimed at maintaining or improving industry standards are protected, even where they involve targeting an employer other than their own,[20] or causing an employer economic harm.[21]

---

effectiveness of Section 7 rights depends in part on employees' ability to learn the advantages and disadvantages of organization from others).

[19] *See, e.g., Campbell Electric Co.*, 340 NLRB 825, 825, 840-41 (2003) (affirming judge's conclusion that employees were engaged in protected conduct despite the fact that they were being recruited by the union to work for union contractors; the union was not attempting to drive the employer out of business, it was attempting to restrict its supply of labor until such time that it became a union contractor); *M.J. Mechanical,* 325 NLRB at 1106 (affirming judge's finding that union "salts" were engaged in rights granted to them by Section 7 when they tried to convince coworkers to join the union and sign up at the union hall as part of an effort to restrict the labor supply available to the employer which was not paying the union scale); *Southern Pine Electric Cooperative*, 104 NLRB 834, 834 (1953) (employee statements that a group of employees would offer their two-week notice if something were not done about their pay was protected because it was designed to induce the employer to act favorably regarding employees' wage demand and thus constituted concerted activity for their mutual aid and protection), *enforced*, 218 F.2d 824 (5th Cir. 1955), *cert. denied*, 350 U.S. 830 (1955).

[20] *See, e.g., Kaiser Engineers*, 213 NLRB 752, 755 (1974) (employer's engineers who wrote to members of Congress opposing a competitor company's efforts to obtain visas for foreign engineers was protected activity), *enforced*, 538 F.2d 1379 (9th Cir. 1976).

[21] *See, e.g., Tradesmen International, Inc.*, 332 NLRB 1158, 1159-1160 (2000) (union organizer's testimony to municipal board that nonunion contractor was subject to bonding requirement was protected, because union sought to level the field between union and nonunion contractors), *enforcement denied*, 275 F.3d 1137 (D.C. Cir. 2002); *See also J. A. Croson Co.*, 359 NLRB No. 2, slip op at 4 (Sept. 28, 2012) (*Noel Canning* case) (citing various cases holding job targeting programs, which subsidize union

The Employer cannot demonstrate that its business interests outweigh its employees' significant Section 7 interests so as to justify its broad non-solicitation provisions.[22] The Employer has lawfully protected itself from the disclosure of proprietary information and the solicitation of its customers through other provisions in the NDNSA and ECA. Specifically, the Employer's NDNSA includes a provision that prohibits an employee from divulging any confidential or trade secret information obtained during employment, including customer lists, sales and marketing materials, customer contact and business information, order history, or pricing offers. The provision also prohibits an employee from directly or indirectly encouraging or seeking to influence any customer of the Employer to terminate its relationship with the Employer. Likewise, the ECA has a provision that prohibits employees from contacting or soliciting its customers.

---

employers to help them win job bids over nonunion employers, to be protected under the Act). Although *J. A. Croson Co.* was issued by a panel that under *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), was not properly constituted, it is the General Counsel's position that this case was soundly reasoned. The Region should therefore urge the ALJ and Board to apply the principles set forth in that case. *See DHL Express, Inc. v. NLRB*, 813 F.3d 365, 377 n.2 (D.C. Cir. 2016) (noting that the rationale in a voided, two-member Board decision was "instructive").

[22] *See Banner Estrella Medical Center*, 362 NLRB No. 137, slip op. at 2 (June 26, 2015) (rejecting judge's conclusion that employer's interest, because it was legitimate, necessarily outweighed any interference with Section 7 rights and concluding that a blanket rule restricting employee discussion regarding workplace investigations was unlawfully overbroad); *Brockton Hospital*, 333 NLRB 1367, 1369 (blanket prohibition on solicitation or distribution beyond immediate patient care areas was unlawfully overbroad), *enforced in relevant part*, 294 F.3d 100, 103-06 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003). Although the Employer has not raised it, the Region should be aware that one ALJ has concluded that while employees have a Section 7 right to solicit employees to quit a nonunion employer to go to work for a unionized competitor, an employer did not violate Section 8(a)(1) by maintaining a facially nondiscriminatory rule prohibiting such conduct because the employer's business justification of retaining employees and protecting its business methods and practices outweighed the employees' Section 7 rights. *See CBM Construction Services,* Case 04-CA-30627, JD-41-02, 2002 WL 533662 (NLRB Div. of Judges, April 4, 2002). However, because no Board decision issued in *CBM*, it does not constitute binding precedent. *See, e.g., Ogihara America Corp.*, 347 NLRB 110, 114 n.14 (2006).

The Employer also can lawfully further its interests in retaining employees and protecting against disclosure of proprietary information and knowledge by maintaining lawful non-compete agreements that do not infringe on collective activity. Additionally, it is important to note that the provisions do not implicate the Employer's property interests or its ability to maintain discipline in its operation.[23] Further, the fact that the Employer may incur economic harm by losing employees due to their protected activity is not sufficient to permit it to ban that activity.[24] In short, the Employer's business interests do not justify its blanket prohibition of the Section 7 activities described above. The non-solicitation provisions in the Employer's mandatory agreements are therefore overly broad and unlawful.[25]

Finally, as a procedural matter, we note that while the instant charge alleges that the non-solicitation provision in the NDNSA is unlawful, it does not allege that the non-solicitation provision in the ECA is unlawful. However, the Employer is also relying on the non-solicitation provision in that agreement in its state court lawsuit. Thus, the Region should solicit a charge against the Employer and its franchisor, Linc/ABM, alleging that the non-solicitation provision in the ECA violates Section 8(a)(1).[26]

---

[23] *Cf. Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615, 620-21 (1962) (employer's interest in cleanliness, order, and discipline at employees' work stations and its property rights with respect to its plant justified a rule prohibiting employees from distributing union literature in work areas).

[24] *See Jimmy John's*, 361 NLRB No. 27, slip op. at 4 & n.15 (Aug. 21, 2014) (concerted activity does not lose its protected status simply because it could have a detrimental impact on the employer; primary strikes and boycotts for example are protected notwithstanding the fact that their purpose is to cause economic harm to employers), *enforced sub nom.*, *MikLin Enterprises, Inc. v. NLRB*, 818 F.3d 397 (8th Cir. 2016).

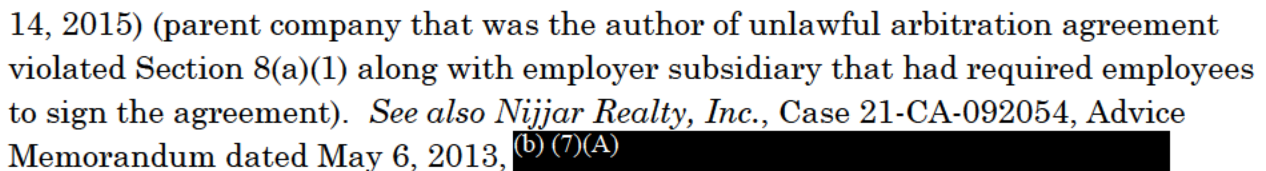
[25] We also reject the Employer's argument that employees waived their Section 7 rights when they signed the mandatory agreements. Employees cannot be required to sign away their Section 7 rights in individual contracts. *See Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 15 (Oct. 28, 2014), *enforcement denied*, 808 F.3d 1013 (5th Cir. 2015); *National Licorice Co. v. NLRB*, 309 U.S. 360, 360-61 (1940).

[26] While the Employer is a beneficiary of the Linc/ABM agreement, it is not clear that it could rescind the policy on behalf of Linc/ABM. The Region should therefore seek a charge against the Employer and Linc/ABM alleging that the ECA violates Section 8(a)(1). *See Countrywide Financial Corp.,* 362 NLRB No. 165, slip op. at 1 n.2 (Aug.

B. The Employer's State Court Lawsuit to Enforce the Unlawful Non-Solicitation Provisions in its Mandatory Agreements Has an Illegal Objective and Therefore Violates Section 8(a)(1).

Under the Supreme Court's decisions in *Bill Johnson's Restaurants v. NLRB*[27] and *BE & K Construction Co. v. NLRB*,[28] a party may violate Section 8(a)(1) by filing and maintaining a lawsuit having "an objective that is illegal under federal law."[29] Indeed, the Board may enjoin such lawsuits even if they are "otherwise meritorious" without infringing on the First Amendment right to petition the government for the redress of grievances.[30] A party's lawsuit has an illegal objective where it seeks to enforce a contract provision that is unlawful under the Act.[31] For example, in

14, 2015) (parent company that was the author of unlawful arbitration agreement violated Section 8(a)(1) along with employer subsidiary that had required employees to sign the agreement). *See also Nijjar Realty, Inc.*, Case 21-CA-092054, Advice Memorandum dated May 6, 2013, (b) (7)(A)



[27] 461 U.S. 731 (1983).

[28] 536 U.S. 516, 531-32 (2002).

[29] *Bill Johnnson's Restaurants*, 461 U.S. at 737, n.5; *Dilling Mechanical Contractors*, 357 NLRB 544, 546 (2011) (the Supreme Court's decision in *BE & K* "did not alter the Board's authority to find court proceedings that have an illegal objective under federal law to be an unfair labor practice"). *See also Can-Am Plumbing v. NLRB*, 321 F.3d 145, 151 (D.C. Cir. 2003); *Small v. Plasterers Local 200*, 611 F.3d 483, 492 (9th Cir. 2010).

[30] *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 20 (*citing Teamsters Local 776 v. NLRB*, 973 F.2d 230, 236 (3d Cir. 1992)).

[31] *See Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 19-20; *Elevator Constructors (Long Elevator)*, 289 NLRB 1095, 1095 (1988) (finding that union violated Section 8(b)(4)(ii)(A) by filing a grievance "predicated on a reading . . . of the collective-bargaining agreement that would convert it into a de facto hot cargo provision, in violation of Section 8(e)"), *enforced*, 902 F.2d 1297 (8th Cir. 1990). *See*

Murphy Oil, the Board found that the motion the employer filed in federal district court to compel arbitration and dismiss its employees' collective wage and hour lawsuit sought to enforce an unlawful mandatory arbitration agreement in violation of Section 8(a)(1).[32] The Board noted that the Supreme Court has long recognized its authority "to prevent an employer from benefitting from contracts which were procured through violation of the Act and which are themselves continuing means of violating it, and from carrying out any of the contract provisions, the effect of which would be to infringe the rights guaranteed by the National Labor Relations Act."[33] The Board also noted that reviewing courts have uniformly approved of its practice.[34]

Here, the Employer's lawsuit seeks to enforce the non-solicitation provisions in its NDNSA and the ECA. Specifically, the Employer is seeking damages under the non-solicitation provisions for the alleged loss that it suffered as a result of the Charging Party's actions that caused Coworker's departure. Because the non-solicitation provisions in the mandatory agreements are unlawful, the Employer's lawsuit to enforce them has an illegal objective and therefore violates Section 8(a)(1).[35] Further, because the Employer's lawsuit had an illegal objective

---

also Teamsters Local 705 v. NLRB (Emery Air Freight), 820 F.2d 448, 452 (D.C. Cir. 1987) (distinguishing between having an unlawful motive in bringing a lawsuit and seeking to enforce an unlawful contract provision).

[32] *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 2.

[33] *Id.* at 19, (*citing National Licorice Co.*, 309 U.S. at 365).

[34] *Id.* at 20 n.104 (*citing NLRB v. Auto Workers Local 1131*, 777 F.2d 1131, 1141 (6th Cir. 1985) ("[W]here, as here, the object of the grievance is to enforce an illegal contractual provision, the Board is fully empowered to enjoin the party from pursuing the grievance."); *Nelson v. Electrical Workers Local 46*, 899 F.2d 1557, 1562-63 (9th Cir. 1990) (finding that because there were "substantial grounds to believe the Agreement, as construed by the [u]nion, violates section 8(e), *Bill Johnson's* does not preclude the Board or the court from enjoining the Union's attempts to enforce the contract"); *Service Employees Local 32B-32J v. NLRB*, 68 F.3d 490, 495-96 (D.C. Cir. 1995) (finding that union's pursuit of arbitration had an illegal objective "from the start" because its sole purpose was to enforce the union's interpretation of a contract that would "necessarily result in an illegal hot cargo agreement")).

[35] We note that in the context of employer disciplinary action pursuant to unlawful rules in the workplace, the Board applies the test articulated in *Continental Group, Inc.,* 357 NLRB 409, 412 (2011). The Board has never applied *Continental Group* in

from its inception, the Region should seek reasonable expenses and legal fees with interest incurred by the Charging Party and CSM from the date that the Employer filed the suit.[36]

C. The Employer's Lawsuit is also Preempted Under *Garmon* and the Employer Will Violate Section 8(a)(1) by Continuing to Process It After Receiving a *Loehmann*'s Letter from the Region.

Under *Bill Johnson's*, the Board may also enjoin state court lawsuits that are preempted by the Board's jurisdiction.[37] Thus, "a preempted lawsuit can be condemned as an unfair labor practice, without regard to its objective merits or the motive with which it was filed, if it is unlawful under traditional 8(a)(1) principles."[38]

In *San Diego Bldg. Trades Council v. Garmon*, the Supreme Court held that "a

---

the context of a lawsuit, and we do not think it is applicable. However, even if the Board were to apply this test here, the Charging Party's conduct at a minimum implicates concerns underlying Section 7 because (b) (6), (b conduct involved protected conversations with Coworker about obtaining union wages and benefits.

[36] *See, e.g., Convergys Corporation*, 363 NLRB No. 51, slip op. at 2 & n.6 (Nov. 30, 2015) (ordering the respondent to reimburse the charging party-employee for reasonable attorneys' fees and litigation expenses, including interest, incurred in opposing its motion to strike, which sought to enforce an illegal agreement). We note that although the lawsuit names both the Charging Party and CSM as defendants, its claims against CSM are based on CSM's alleged interference with the Charging Party's performance under the illegal contract provisions at issue. Thus, the allegations against CSM constitute an unlawful interference with the Charging Party's Section 7 rights and also violate Section 8(a)(1). *See, e.g., J. A. Croson Co.*, 359 NLRB No. 2, slip op. at 8.

[37] 461 U.S. at 737, n.5.

[38] *Federal Security, Inc.*, 359 NLRB No. 1, slip op. at 13 (Sept. 28, 2012). Although *Federal Security* was issued by a panel that under *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), was not properly constituted, it is the General Counsel's position that this case was soundly reasoned. The Region should therefore urge the ALJ and Board to apply the principles set forth in that case. *See DHL Express, Inc. v. NLRB*, 813 F.3d at 377, n.2 (noting that the rationale in a voided, two-member Board decision was "instructive").

presumption of preemption applies even when the activity that the State seeks to regulate is only 'arguably' protected . . . or prohibited" by the Act.[39] In such circumstances, the Board must exercise its "primary jurisdiction" and determine in the first instance whether the challenged conduct is protected or prohibited by the Act, thereby potentially divesting the states of all jurisdiction.[40] The Court, however, recognized that not every state cause of action involving arguably protected or prohibited activity is preempted. The two exceptions the Court noted involve "activity that is 'a merely peripheral concern' of the Act and activity that touches interests 'deeply rooted in local feeling and responsibility.' "[41] Thus, *Garmon* preemption is designed to prevent state and local interference with the Board's interpretation and enforcement of the integrated scheme of regulation established by the Act.[42]

In *Loehmann's Plaza,* the Board, in interpreting *Garmon,* held that when the activity the state is attempting to regulate constitutes arguably protected or prohibited activity, preemption occurs upon Board involvement in the matter, and Board involvement occurs when the General Counsel issues a complaint regarding the same activity that is the subject of the state court lawsuit.[43] At that point, the pending state lawsuit is preempted and the "normal requirements of established law apply" rather than "the special requirements" of *Bill Johnson's*.[44] In other words, if the preempted lawsuit is unlawful under traditional Board principles, it can be condemned as an unfair labor practice. Under well-settled principles, a violation of

---

[39] 359 U.S. 236, 245 (1959), *cited in Federal Security, Inc.*, 359 NLRB No. 1, slip op. at 6.

[40] *Garmon*, 359 U.S. at 245. *See also Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 748-49 (1985); *Loehmann's Plaza*, 305 NLRB at 671.

[41] *Federal Security, Inc.*, 359 NLRB No. 1, slip op. at 6 (*citing Garmon*, 359 U.S. at 243-44, and *Webco Industries*, 337 NLRB 361, 362 (2001)).

[42] *See Building & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 224-25 (1993). *See also Federal Security, Inc.*, 359 NLRB No. 1, slip op. at 6 (*quoting Garmon*, 359 U.S. at 246 ("The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.")).

[43] 305 NLRB at 669-70.

[44] *Id.* at 671.

Section 8(a)(1) is established if it is shown that the employer's conduct has a tendency to interfere with a Section 7 right.[45]

Here, the Region's complaint will allege that the non-solicitation provisions in the NDNSA and ECA violate Section 8(a)(1) and the Board will have to consider the legality of the same provisions that form the basis of the Employer's state lawsuit. As described above, there is a strong argument that those provisions violate Section 8(a)(1) and, consequently, that the Employer's non-solicitation provisions are at a minimum arguably prohibited by Section 8 of the Act.[46] The Employer's state lawsuit for breach of contract and civil conspiracy seeks civil penalties and injunctive relief against the Charging Party and CSM under these same provisions. The state court must consider the legality of those provisions because one of the Charging Party's affirmative defenses in that proceeding is that the non-solicitation provisions violate the Act. Permitting the state lawsuit to proceed could result in the state court determining that the provisions are lawful before the Board can rule in the first instance on their legality. It is exactly this type of jurisdictional conflict that the Supreme Court made clear in *Garmon* must be resolved by permitting the Board to proceed in the first instance "if the danger of state interference with national [labor] policy is to be averted."[47] Indeed, it is "reasonable to infer that Congress preferred the costs inherent in a jurisdictional hiatus to the frustration of national labor policy which might accompany the exercise of state jurisdiction."[48]

Additionally, the Employer cannot avoid a preemption finding by asserting that the legality of its non-solicitation provisions are merely a peripheral concern of the Act. As described above, the Employer's non-solicitation provisions prohibit core

---

[45] *Id.* (*citing NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946)).

[46] *Cf. Webco Industries*, 337 NLRB at 362 (employer's selection of union supporters for layoff was arguably prohibited by Section 8 of the Act and thus its lawsuit seeking damages for breach of contract relating to that conduct as well as activity that was arguably protected was preempted).

[47] *Garmon*, 359 U.S. at 244-45. *See also Webco Industries*, 337 NLRB at 362 (finding Board had exclusive jurisdiction to determine legal effect of severance agreements discriminatees had signed because there was clear potential "for State interference with national labor policy" if employer's state claims for breach of contract were allowed to proceed).

[48] *Federal Security*, 359 NLRB No. 1, slip op. at 12 (*quoting Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 203 (1978)).

Section 7 activities, including discussions with other employees about their working conditions, how to improve those conditions, and their ability to become members of a union. Nor do the contract provisions touch on interests deeply rooted in local feeling and responsibility. The Supreme Court has held that the determination of whether State regulation should be permitted in such circumstances involves "a sensitive balancing" of factors, including, among other things, the harm to the Federal regulatory scheme, the importance of the asserted cause of action to the State in protecting the health and well-being of its citizens, and the risk that the State will sanction conduct that the Act protects.[49] The Supreme Court has ordinarily applied this exception in cases where the disputed conduct concerned activity historically recognized to be the subject of local regulation, such as trespass, intentional infliction of emotional distress, malicious libel, violence, threats of violence, and destruction of property.[50] The agreement at issue here does not implicate those kinds of deeply-rooted state concerns. Further, because Board precedent strongly supports finding that the non-solicitation provisions violate Section 8(a)(1), state involvement would interfere with Federal labor policy.

Because the exceptions to Federal preemption do not apply here, the Region should issue the Employer a *Loehmann's* letter directing it to take affirmative action to stay its state court proceeding within seven days of the issuance of the complaint.[51] The Employer is required to simply stay its state suit under the preemption theory, not seek its dismissal. If the Board decides in the administrative proceeding that the non-solicitation provisions are lawful, the Employer can resume prosecuting its

---

[49] *Operating Engineers Local 926 v. Jones*, 460 U.S. 669, 676 (1983) (determination involves "a sensitive balancing of any harm to the regulatory scheme established by Congress, either in terms of negating the Board's exclusive jurisdiction or in terms of conflicting substantive rules, and the importance of the asserted cause of action to the state as a protection to its citizens."); *Sears,* 436 U.S. at 188-89 (determination turns on "the nature of the particular interests being asserted and the effect upon the administration of national labor policies" of permitting state court jurisdiction).

[50] *See Federal Security, Inc.*, 359 NLRB No. 1, slip op. at 10 & n.88 (*citing Sears*, 436 U.S. 180 (trespass)); *Farmer v. Carpenters*, 430 U.S. 290 (1977) (intentional infliction of emotional distress); *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966) (malicious libel); *Automobile Workers v. Russell*, 356 U.S. 634 (1958) (mass picketing and threats of violence)).

[51] See *Loehmann's Plaza*, 305 NLRB at 671 & n.56, 675 (Appendix C).

claims.[52] However, if the Employer does not take the necessary steps to stay its state suit in the interim, the Region should issue an amended complaint alleging that the Employer further has violated Section 8(a)(1) by maintaining a preempted lawsuit post-complaint.[53]

Accordingly, the Region should issue complaint, absent settlement, alleging that the non-solicitation provision in the Employer's NDNSA, and the Employer's state lawsuit seeking to enforce unlawful non-solicitation provisions violates Section 8(a)(1). The Region should also solicit a Section 8(a)(1) charge against the Employer and its franchisor, Linc/ABM, alleging that the non-solicitation provision in the ECA is unlawful. Finally, the Region should send the Employer a *Loehmann's* letter directing it to take affirmative action to stay its state court proceeding within seven days.[54] If the Employer then fails to take the necessary steps to stay the state court proceeding, the Region should issue an amended complaint alleging that the Employer further violated Section 8(a)(1) by maintaining a preempted lawsuit.[55]

/s/
B.J.K.

ADV.27-CA-171581.Response.HaynesMechanicalSystems (b) (6), (b)

---

[52] *See Webco Industries*, 337 NLRB at 365 (concluding that employer's contract with employees did not unlawfully waive their Section 7 rights, that the activity of one of the employee targeted by the employer's lawsuit was not protected, and thus the employer's lawsuit was no longer preempted as to that employee).

[53] *See Federal Security*, 359 NLRB No. 1, slip op. at 13-14; *Webco Industries*, 337 NLRB at 363; *Loehmann's Plaza*, 305 NLRB at 671-72.

[54] Contrary to the procedure set forth in *Loehmann's Plaza*, 305 NLRB at 671-72, n.56, the Region should not send a similar letter to the state court. *See* OM Memorandum 97-50, "Makro, Inc. and Renaissance Properties d/b/a Loehmann's Plaza," dated July 30, 1997.

[55] In that event, the Region should also submit this case to the Injunction Litigation Branch with its recommendation as to whether Section 10(j) proceedings are warranted to protect the Board's jurisdiction. *See, e.g., Sharp v. Webco Industries, Inc.*, 265 F.3d 1085, 1089-90 (10th Cir. 2001) (affirming Section 10(j) order temporarily enjoining state court lawsuit on preemption grounds).