Anheuser-Busch, LLC *and* Matthew C. Brown *and* International Brotherhood of Teamsters Local 947 and International Brotherhood of Teamsters, Brewery and Soft Drink Workers Conference. Case 12–CA–094114

May 22, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND EMANUEL

On September 10, 2013, Administrative Law Judge William Nelson Cates issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and Charging Party each filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed cross-exceptions and a supporting brief, the Charging Party filed limited cross-exceptions, and the Respondent filed an answering brief.

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

The Board has considered the decision and the record[1] in light of the exceptions and briefs[2] and has decided to affirm the judge's rulings, findings,[3] and conclusions only to the extent consistent with this Decision and Order.

I. FACTS AND ADMINISTRATIVE LAW JUDGE'S FINDINGS

Since April 2004, the Respondent has maintained a Dispute Resolution Program (DRP). Employees subject to

[1] On September 25, 2015, General Counsel Richard F. Griffin, Jr. issued a Notice of Ratification in this case and served it on the parties and their representatives. On that same date, the General Counsel filed a copy of the Notice of Ratification with the Office of the Executive Secretary along with a letter requesting that the Notice of Ratification be placed in the case record. The Notice of Ratification states, in relevant part:

> I was confirmed as General Counsel on November 4, 2013. After appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act.
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> For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint.

On October 9, 2015, the Respondent filed an Opposition to Notice of Ratification challenging the General Counsel's request to have the Notice of Ratification added to the case record. The Respondent moves to strike the Notice of Ratification from the case record, arguing that there is no authority for adding the ratification to the record. In the alternative, the Respondent requests that its opposition be made part of the case record. The General Counsel filed a Response to Respondent's Opposition to Notice of Ratification.

Having duly considered the matter, pursuant to Sec. 102.48(b) of the Board's Rules and Regulations we grant the General Counsel's request that the September 25, 2015 Notice of Ratification be made part of the case record, and we grant the Respondent's alternative request that its Opposition be made part of the case record as well.

The Respondent also "moves for a Board Order requiring the General Counsel to independently investigate this case and make an independent decision to reissue or not issue a complaint alleging a violation of the Act." In light of Sec. 3(d) of the Act and the General Counsel's Notice of Ratification, the Respondent's motion is denied.

[2] The Respondent argues that the authority of the General Counsel and Regional Director to investigate and prosecute this case lapsed during the period when the Board lacked a valid quorum. We reject that argument. See *Burndy, LLC*, 364 NLRB No. 77, slip op. at 1 fn. 2 (2016) (citing *Bloomingdale's, Inc.*, 363 NLRB No. 172, slip op. at 2 (2016), which explains that General Counsel's authority derives from the Act, not from power delegated by the Board), and *Pallet Cos., a subsidiary of IFCO Systems, N.A., Inc.*, 361 NLRB 339, 339 (2014) (agency staff engaged in prosecution of unfair labor practices are directly accountable to General Counsel), enfd. 634 Fed. Appx. 800 (D.C. Cir. 2015).

The Respondent also argues that the investigation and prosecution of this case is invalid because former Acting General Counsel Lafe Solomon was not properly appointed under the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. §§ 3345 et seq. The Supreme Court held in *NLRB v. SW General, Inc. d/b/a Southwest Ambulance*, 580 U.S. ___, 137 S.Ct. 929 (March 21, 2017), that, under the FVRA, Solomon's authority to take action as Acting General Counsel ceased on January 5, 2011, after the President nominated him to be General Counsel. Nevertheless, the General Counsel's subsequent ratification renders moot the Respondent's argument that Solomon's lack of authority after his nomination precludes further litigation in this matter.

The Respondent challenges the merits of the General Counsel's ratification on the basis that: (1) the FVRA violation is a structural error that cannot be cured by de novo review; (2) the FVRA violation is a non-harmless error; (3) the General Counsel's ratification was perfunctory and the "invalidly-issued unfair labor practice complaint" prejudiced the Respondent; (4) there is nothing in the National Labor Relations Act that vests the General Counsel with the authority to cure an invalidly issued complaint; and (5) ratification so long after the issuance of the complaint and the hearing makes the ratification "fruit of the poisonous invalidly-issued complaint." We reject these arguments for the reasons set forth in *American Baptist Homes of the West d/b/a Piedmont Gardens*, 364 NLRB No. 13, slip op. at 7 fn. 19 (2016), reconsideration denied 364 NLRB No. 95 (2016), 2016 WL 4474794, appeal dismissed mem. on procedural grounds 2016 WL 8648496 (D.C. Cir. Oct. 18, 2016, rehearing en banc denied Jan. 9, 2017), petition for review in Ninth Circuit stayed for mediation. See also *1621 Route 22 West Operating Company, LLC v. NLRB*, 725 Fed. Appx. 129, 137 (3d Cir. 2018) (finding General Counsel's ratification valid under "'the presumption of regularity,' by which [courts] presume that public officials have properly discharged their duties absent 'clear evidence to the contrary'" (quoting *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14–15 (1926))).

The Respondent also argues that it has been prejudiced by the General Counsel's delay in addressing its FVRA argument, alleging that it may face increased backpay liability to the Charging Party as a result. But "the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969). In any event, this issue is moot in light of our dismissal of the complaint.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect.

the DRP must agree "to submit all covered claims" to the DRP, "to waive all rights to a trial before a jury on such claims, and to accept an arbitrator's decision as the final, binding and exclusive determination of all covered claims." The DRP defines "covered claims" to include employment discrimination claims. By its terms, the DRP applies "to all salaried and non-union hourly employees."

Since about April 1, 2004, the Respondent has required all job applicants, regardless of whether they are applying for unit or non-unit positions, to complete and sign an employment application expressing their agreement to be bound by the DRP in certain circumstances. In relevant part, the employment application signed by Charging Party Matthew Brown on June 16, 2004, states: "I AGREE THAT IF I BECOME EMPLOYED BY THE COMPANY, AND UNLESS A WRITTEN CONTRACT PROVIDES TO THE CONTRARY, ANY CLAIM I MAY HAVE AGAINST THE COMPANY WILL BE SUBJECT TO FINAL AND BINDING ARBITRATION IN ACCORDANCE WITH THE COMPANY'S DISPUTE RESOLUTION PROGRAM, AND THAT ARBITRATION WILL BE THE EXCLUSIVE METHOD I WILL HAVE FOR FINAL AND BINDING RESOLUTION OF ANY SUCH CLAIM." (Jt. Ex. 2.)[4]

Brown worked for the Respondent from September 2004 until March 2010, first as a weekend worker and then as an apprentice I, both bargaining-unit positions. The collective-bargaining agreement between the Respondent and the Union includes a grievance-arbitration procedure different from the DRP,[5] and the DRP does not apply to employee claims against the Respondent that are covered by the collective-bargaining agreement.

The Respondent terminated Brown's employment on March 11, 2010. On March 22, 2010, the Union filed a contractual grievance claiming that Brown's discharge was not issued in a fair and impartial manner for just and sufficient cause and constituted disparate treatment. On March 30, 2010, Brown filed a charge with the Florida Commission on Human Relations alleging that he was unlawfully discharged in retaliation for filing an earlier charge with the Commission asserting that a 2009 suspension was unlawfully based on race.

Brown's discharge grievance advanced through the collective-bargaining agreement's grievance process.[6] Ultimately, the Multi-Plant Grievance Committee (MPGC) upheld Brown's discharge on May 3, 2010. On December 29, 2011, the EEOC issued Brown two "Notice of Right to Sue" documents regarding the race discrimination and retaliation charges he had filed with the Florida Commission on Human Relations. On April 3, 2012, Brown filed a complaint against the Respondent in the U.S. District Court for the Middle District of Florida alleging race discrimination and retaliation in violation of Title VII.

On June 4, 2012, the Respondent filed with the district court a Motion to Dismiss or Stay and to Compel Arbitration ("Motion to Compel").[7] (Jt. Ex. 12.) In support of that motion, the Respondent's primary argument was that Brown was compelled to grieve and arbitrate his race discrimination and retaliation claims under the collective-bargaining agreement's grievance-arbitration procedure. In this regard, the Respondent cited two provisions of the collective-bargaining agreement: Article 26, which provides, among other things, that neither the Respondent nor the Union "shall discriminate against any individual because of race," and Article 8, which sets forth the grievance-arbitration procedure and defines a "grievance," in relevant part, as "any difference between the [Respondent] and the employee covered by this Agreement . . . as to . . . [a]ny . . . alleged violation of this Agreement by the [Respondent]." Id. at 2. The Respondent argued to the court that these two provisions, taken together, require Brown to assert his race discrimination and retaliation claims under the grievance-arbitration procedure contained in the collective-bargaining agreement. Id. at 5–6. "Alternatively," the Respondent argued, "in the event the Court determines that the CBA's arbitration requirement does not clearly and unmistakably apply to Brown's race discrimination and retaliation claims, Brown also personally agreed to arbitrate such claims upon signing his Employment Application with [the Respondent.]" Id. at 6–8.[8] This was the first time that the Respondent suggested that

Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] There is no allegation that the Respondent violated the Act by requiring applicants, including Brown, to agree to final and binding arbitration under the DRP (unless a written contract provides to the contrary) as a condition of employment.

[5] Contrary to the dissent's apparent implication, however, the collective-bargaining agreement's grievance-arbitration provision contains no language explicitly making it "permissible" for employees to resort to federal court proceedings after completing the contractually specified process.

[6] The parties' collective-bargaining agreement contains a three-step grievance procedure culminating in final and binding arbitration before a Multi-Plant Grievance Committee, which consists of two members each from the Respondent and the Union and a neutral member chosen by the MPGC from a list of neutrals provided by the American Arbitration Association.

[7] It appears that the court has not ruled on the Respondent's motion but has kept it "under advisement pending further developments in the ULP proceedings." *Brown v. Anheuser-Busch, LLC*, Case No. 3:12-cv-365-J-32JBT (M.D. Fla.), Order dated Oct. 9, 2013.

[8] We express no views regarding the merits of the arguments advanced by the Respondent in its Motion to Compel. Those issues are for the court to decide, not the Board.

the DRP might apply to a former bargaining-unit employee, and it is undisputed that the Respondent never gave the Union notice or an opportunity to bargain over the potential application of the DRP to Brown.

Brown then filed an unfair labor practice charge with the Board, and the Region issued a complaint, alleging that the Respondent unilaterally applied the DRP to unit-employee Brown, through its Motion to Compel, and thereby violated Section 8(a)(5). After a hearing, the judge found that the Respondent violated the Act as alleged, rejecting the Respondent's argument that its conduct did not violate the Act because, at the time the Respondent sought to apply the DRP to him, Brown was a former employee and therefore no longer a member of the bargaining unit. The judge's recommended Order included not only the standard cease-and-desist language for a Section 8(a)(5) and (1) unilateral-change violation, but also a recommendation that the Respondent be ordered to withdraw the portion of its defense in Brown's federal suit that seeks to have the matter decided pursuant to the DRP.

II. ANALYSIS

In its exceptions before the Board, the Respondent reiterates its argument that Brown was no longer an employee or member of the bargaining unit at the relevant time (and hence that it had no duty to bargain over his employment conditions), and it further argues that the judge's recommended Order violates its First Amendment right to petition a federal court for redress. The General Counsel and Charging Party contend that an order to withdraw the defense is proper and that the Board should also order the Respondent to reimburse Brown for his attorneys' fees and costs incurred in opposing the Respondent's Motion to Compel. As explained below, we conclude that the Respondent's Motion to Compel was an exercise of its First Amendment right to petition that cannot be found unlawful under Board and Supreme Court precedent. Accordingly, we reverse the judge's finding of the 8(a)(5) and (1) violation and dismiss the complaint.[9]

A. General Legal Principles

The Supreme Court has identified the "right to petition as one of 'the most precious of the liberties safeguarded by the Bill of Rights.'" *BE & K Construction Co. v. NLRB*, 536 U.S. 516, 524 (2002) (quoting *Mine Workers v. Illinois Bar Association*, 389 U.S. 217, 222 (1967)). To protect this essential right, the Supreme Court has placed limits on the Board's authority to find that a party's litigation efforts constitute an unfair labor practice. See *BE & K*, supra; *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983).[10] In general, the Board may make such a finding only if the litigation is both baseless and brought with the intent to retaliate against the exercise of Section 7 rights. *Bill Johnson's*, 461 U.S. at 744 (rejecting the Board's position that a retaliatory lawsuit may be found to violate the Act regardless of whether it had a reasonable basis). See also *BE & K Construction Co. v. NLRB*, supra (rejecting Board's finding that unsuccessful and retaliatory lawsuit violated Act after it was completed); *BE & K Construction Co.*, 351 NLRB 451 (2007) (holding, after Supreme Court remand, that filing and maintenance of reasonably based lawsuit does not violate Act, regardless of motive for bringing it).

Litigation that is *not* both baseless and retaliatory may violate the Act only if it falls within one of the two exceptions recognized in footnote 5 of *Bill Johnson's*. There, the Court stated:

> It should be kept in mind that what is involved here is an employer's lawsuit that the federal law would not bar except for its allegedly retaliatory motivation. *We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law. Petitioner concedes that the Board may enjoin these latter types of suits.* Nor could it be successfully argued otherwise, for we have upheld Board orders enjoining unions from prosecuting court suits for enforcement of fines that could not lawfully be imposed under the Act….

Bill Johnson's, 461 U.S. at 737 fn. 5 (emphasis added; citations omitted). Accordingly, only a legal filing that is preempted by federal law or that has an illegal objective may be found unlawful under the Act without a finding that it is "baseless and retaliatory."[11] In his decision, the judge did not

[9] In light of our conclusion that the Petition Clause resolves this case, a finding that does not turn on Brown's employment status or membership in the bargaining unit at the time the Motion to Compel was filed, we need not address those issues. Further, our dismissal of the complaint moots the General Counsel's and Charging Party's cross-exceptions seeking additional remedies.

[10] Although the Respondent's Petition Clause argument is directed at the appropriateness of the remedy, the analysis applies to the substantive question—i.e., whether the Board can find the litigation unlawful, not merely whether the Board can order the Respondent to cease pursuing it. That fact is apparent not only from the language of *Bill Johnson's* and *BE & K* but also from *BE & K*'s application of its analysis to completed lawsuits, in which the remedy of an injunction would be essentially moot.

[11] Despite some initial uncertainty about whether *BE & K* required even preempted and illegal-objective lawsuits to meet the "baseless and retaliatory" standard, the Board has held, with appellate court approval, that the exceptions set forth in *Bill Johnson's* footnote 5 were not altered by *BE & K*. See *Ashford TRS Nickel, LLC*, 366 NLRB No. 6, slip op. at 3–4 (2018) (citing *Can-Am Plumbing v. NLRB*, 321 F.3d 145 (D.C. Cir. 2003), and *Small v. Plasterers Local 200*, 611 F.3d 483, 492 (9th Cir. 2010), for proposition that "*BE & K* did not affect the footnote 5 exemption in *Bill Johnson's*").

cite *Bill Johnson's* or explain how his finding that the Respondent violated the Act by filing its Motion to Compel in federal district court is consistent with the First Amendment principles on which that case rests.[12]

B. Application to this Case

The General Counsel contends that the Respondent's Motion to Compel falls within the *Bill Johnson's* footnote 5 exception for lawsuits that have "an objective that is illegal under federal law." *Bill Johnson's*, 461 U.S. at 737 fn. 5. We disagree, for the reasons discussed below.[13] Although no party alleges that the Motion to Compel was baseless and retaliatory under *Bill Johnson's* and *BE & K*, supra, in the absence of an exception from that analytical framework, we must consider whether the Respondent's Motion to Compel may be found unlawful on the basis that it is baseless and retaliatory. We conclude that it may not.

1. Illegal objective

The General Counsel has not clearly articulated how the "illegal objective" exception applies here, and our review of Board precedent uncovered no examples analogous to this case. Rather, the Board has found an "illegal objective" where, for example, a court filing is contrary to a prior Board award, see, e.g., *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 (1991), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993), or where a court filing seeks to enforce an unlawful policy or contractual provision, see, e.g., *Truck Drivers Local 705 v. NLRB*, 820 F.2d 448, 452 (D.C. Cir. 1987) ("If the grievance had an unlawful objective, the contract provision sought to be enforced must *itself* have been illegal.") (emphasis in original).[14] Accord *Elevator Constructors (Long Elevator)*, 289 NLRB 1095, 1095–1096 (1988) (contractual provision would violate Section 8(e) if union's interpretation were upheld; therefore, grievance seeking that interpretation had an illegal objective), enfd. 902 F.2d 1297 (8th Cir. 1990); *Regional Construction Corp.*, 333 NLRB 313, 320 (2001) (in order to have illegal objective, respondent's motion "has to have involved a matter . . . which if granted would commit the court to countenance an[] underlying act by the Respondent which would be a violation of some federal law"). As the above cases indicate, the enforcement of a policy or contractual provision is not an illegal objective if the policy or provision is not itself illegal.

Here, the DRP is not alleged to be facially unlawful. The sole violation alleged is the manner in which the Respondent sought to apply it to Brown, i.e., by filing a motion in court without giving the Union notice and an opportunity to bargain. The General Counsel cites no case in which the Board has found that a court filing had an "illegal objective" solely because the filing itself amounted to a unilateral change. Compare *Regional Construction Corp.*, 333 NLRB at 320 (referring to "an[] *underlying act* by the Respondent which would be a violation of some federal law") (emphasis added). Here, there is no "underlying act," only the Motion to Compel itself.[15]

Our dissenting colleague contends that because the filing of the motion to compel arbitration "sought to implement . . . a unilateral change," "[i]ts motion . . . had an illegal objective." She rejects our rationale that there was no underlying act here, only the motion to compel itself, as "more akin to a semantic quibble than a legally significant distinction." And she says that even if an underlying act is required, that requirement was satisfied because the filing of the motion was preceded by a decision "to apply the DRP to a bargaining-unit employee." But the DRP was applied to Brown by the act of filing the motion to compel, so what our colleague is really saying is that the "underlying act" requirement was met because the filing of the motion was preceded by a decision to file the motion.

Our colleague is mistaken. The "underlying act" requirement is indeed legally significant. In fact, it is indispensable. Without it, the "illegal objective" exception would swallow the *Bill Johnson's* rule. Here's why.

Set aside the fact—an inconvenient one for the dissent—that the Respondent's primary objective in filing its motion was to compel arbitration of Brown's claims under the collective-bargaining agreement's grievance-arbitration procedure, not under the DRP. For present purposes,

[12] Plaintiffs are not the sole beneficiaries of the First Amendment right to petition the government for redress of grievances. The right extends to defendants as well. See *Freeman v. Lasky, Haas & Cohler* et al., 410 F.3d 1180, 1184 (9th Cir. 2005) (stating that "asking a court to deny one's opponent's petition is also a form of petition"); In re *Burlington Northern, Inc.*, 822 F.2d 518, 532 (5th Cir. 1987) ("We perceive no reason to apply any different [First Amendment protection] standard to defending lawsuits than to initiating them.").

[13] No one contends, or could demonstrate, that this case falls within the other exception identified in footnote 5 of *Bill Johnson's*, litigation that is preempted.

[14] The Board relied on the same principle in *Murphy Oil USA, Inc.*, 361 NLRB 774, 793 (2014) (holding that *Bill Johnson's* did not bar finding and remedying violation in employer's attempt, in court litigation, to enforce allegedly unlawful arbitration agreement), enf. denied in part 808 F.3d 1013 (5th Cir. 2015), affd. sub nom. *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S.Ct. 1612 (May 21, 2018) (holding that arbitration agreements between employers and employees are enforceable in court notwithstanding NLRA).

[15] We recognize that the fact that the legal filing is alleged to be a change in terms and conditions of employment in violation of Sec. 8(a)(5), rather than restraint, interference, or coercion under Sec. 8(a)(1), makes this case somewhat unusual. Nonetheless, the 8(a)(5) allegation that the Respondent's filing of the Motion to Compel is an unfair labor practice implicates the Respondent's First Amendment right to petition in the same way that an 8(a)(1) allegation would, so it is proper to apply the same *Bill Johnson's* analysis. And, in any event, our precedents offer no other relevant analytical framework.

we will treat the motion as a naked attempt to apply the DRP to Brown, without giving the Union prior notice and opportunity to bargain. The "preemption" exception does not apply here, and as we explain below, the motion to compel was not baseless and retaliatory. Thus, to constitute an unfair labor practice, the filing of the motion must fall within the scope of the "illegal objective" exception. Our position is that the filing of the motion did not have an illegal objective within the meaning of the Supreme Court's Petition Clause jurisprudence because the DRP is lawful, and therefore the Respondent, by filing its motion, did not ask the court "to countenance an[] underlying act by the Respondent which would be a violation of some federal law." *Regional Construction Corp.*, 333 NLRB at 320. Our colleague dismisses the "underlying act" requirement as a mere "semantic quibble." But it cannot be the case that the "illegal objective" exception applies without an underlying unlawful act. Otherwise, the "illegal objective" exception would apply whenever the litigation act itself—e.g., the filing of a lawsuit or, as here, of a defense motion—could be condemned as an unfair labor practice, absent the protection afforded by the Petition Clause. And if *that* were the case, it would not matter that the lawsuit or motion was reasonably based, and it would not matter that the lawsuit or motion was not impermissibly motivated. It could still be condemned as an unfair labor practice under the "illegal objective" exception, which, on this view, would swallow the rule of *Bill Johnson's* and turn the Petition Clause of the First Amendment into an empty promise. That is the position the dissent embraces.[16] Moreover, since a litigation act is *always* preceded by a decision to take the act, that decision—contrary to our colleague—cannot constitute the necessary underlying act.

2. Baseless and retaliatory

Absent an exception under footnote 5, this case must be considered under the Supreme Court's primary analysis in *Bill Johnson's*, which establishes that the Board can find the Motion to Compel unlawful only if it is both baseless and retaliatory. As noted, no party has argued that it is either, let alone both. In the interest of completeness and clarity, however, we continue the analysis by addressing these issues, and we find, for the reasons explained below, that the Motion to Compel is neither baseless nor retaliatory.

First, in assessing whether the Motion to Compel was baseless, we must respect the Supreme Court's reasons for establishing such a high standard. As the Court explained in *BE & K*, the importance of the rights set forth in the First Amendment calls for them to be protected by the creation of "breathing space" around them, i.e., the allowance of even some otherwise unprotected speech or conduct to ensure that the core rights are not trenched upon. *BE & K*, 536 U.S. at 530–532. On remand in *BE & K*, the Board stated that in determining whether a lawsuit is reasonably based, we look to whether a "reasonable litigant could realistically expect success on the merits." *BE & K Construction Co.*, 351 NLRB 29, 29 (2007) (quoting *Professional Real Estate Investors v. Columbia Pictures Industries,* 508 U.S. 49, 60 (1993)). As we later observed, however, "[t]aken out of context, that standard may be misunderstood to suggest that a lawsuit that entails some tacking into the wind of adverse precedent cannot be reasonably based." *Children's Hospital Oakland*, 351 NLRB 569, 571 (2007). To address any such misunderstanding, we explained:

> Such a view would be inconsistent with the constitutional underpinning of the Supreme Court's decision in *BE & K*, in which it recognized a First Amendment interest in lawsuits that "promote the evolution of the law by supporting the development of legal theories that may not gain acceptance the first time around." *BE & K*, supra at 532; see also *Bill Johnson's Restaurants*, supra at 747 (holding that the Board should "stay its hand" unless "the plaintiff's position is plainly foreclosed as a matter of law or is otherwise frivolous").

Id. In the instant case, as in *Children's Hospital*, we must be "[m]indful of these principles" in assessing whether the Respondent's lawsuit was reasonably based.

As in *BE & K*, we are dealing here with litigation that, even if it proves unsuccessful, was reasonably based. At the time the Respondent filed its Motion to Compel, Brown was a former employee whose discrimination lawsuit did not seek reinstatement, and he had, in his application for employment, agreed to be bound by the DRP if he was hired, "unless a written contract provide[d] to the contrary." We need not decide whether or not the Respondent's argument that the DRP applied in the circumstances here was legally correct, but we do not find it to be

[16] Our colleague takes refuge in *Elevator Constructors (Long Elevator)*, 289 NLRB at 1095, a case she cites repeatedly. Again, in that case, the "illegal objective" exception was found to have been met where the union advocated for an interpretation of a contract provision that would have made the provision unlawful under Sec. 8(e). Since the contract provision was not unlawful on its face, *Elevator Constructors* is on the outside edge of the Board's "illegal objective" precedent. Still, the contract provision was amenable to an interpretation that rendered it unlawful, and when the union adopted that interpretation, the contract became the underlying unlawful act, and the Board found the "illegal objective" exception met. Here, in contrast, nobody, including our colleague, contends that the DRP is amenable to an interpretation that would render it unlawful.

frivolous.[17] Further, many aspects of the law regarding the enforcement of arbitration agreements, especially in the employment context, were then, and still are, unresolved.[18] In sum, we conclude that the Respondent's contention that the DRP applied to Brown was neither "plainly foreclosed as a matter of law" nor "otherwise frivolous." *Bill Johnson's*, 461 U.S. at 747.

Finally, we easily dispense with the issue of whether the Respondent's Motion to Compel was retaliatory. As noted above, no party contends that the motion was motivated by a desire to retaliate against Brown's Section 7 activity of filing grievances, and there is nothing in the record to suggest that it was so motivated. The Respondent's motivation appears to be nothing more than a preference to arbitrate Brown's discrimination case rather than to litigate it in court. Plainly, such a motivation is in no way retaliatory, let alone directed against Brown's Section 7 activity.

Accordingly, we find that the Motion to Compel was neither baseless nor retaliatory under *Bill Johnson's*, supra, and *BE & K*, supra.

CONCLUSION

Because the Respondent's right to petition is protected by the First Amendment, demonstrating that its Motion to Compel is an unfair labor practice requires the General Counsel to surmount the high bar set by the Supreme Court in *Bill Johnson's Restaurant*, supra, and *BE & K Construction Co.*, supra. We conclude that the Motion to Compel did not have an illegal objective that would except it from *Bill Johnson's* primary analysis, and we find that it was not baseless and retaliatory within the *Bill Johnson's* analysis. Accordingly, we reverse the judge's finding that the Respondent's attempt to apply its DRP policy to Brown, by means of its Motion to Compel, constituted a unilateral change in violation of Section 8(a)(5) and (1) of the Act, and we dismiss the complaint.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. May 22, 2019

John F. Ring, Chairman

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

It is black-letter labor law that an employer may not impose a new term and condition of employment on a bargaining unit employee—particularly a term contrary to an existing collective-bargaining agreement—without first bargaining with the employee's union. Today we are asked to determine whether this otherwise clearly unlawful action can become lawful if the employer attempts to achieve its ends by petitioning a federal court to impose the new employment term. The answer—as a matter of both Board precedent and common sense—should be a clear and unequivocal "no." An attempt to achieve through litigation what one could not otherwise lawfully do constitutes petitioning the court with an illegal objective under *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), and under well-established law the involvement of the court in no way precludes the Board from finding and remedying the unfair labor practice.

Here, the Respondent sought to impose its Dispute Resolution Policy (DRP) on a discharged bargaining unit employee, Matthew Brown, after he filed a racial-discrimination lawsuit challenging his termination. However, the application of this policy was directly contrary to the applicable collective-bargaining agreement that governed Brown's employment, and it unilaterally changed his terms and conditions of employment in violation of the National Labor Relations Act. The collective-bargaining agreement provided for an entirely different grievance and arbitration process—which, unlike the DRP, did *not* waive employees' right to sue over employment discrimination.

In filing its motion to compel arbitration, the Respondent sought to implement—with the aid of the federal court's authority—a unilateral change that it could not lawfully implement otherwise. Its motion thus had an illegal objective, as understood by the Supreme Court and by the Board. That means, in turn, that the Board has the

[17] Similarly, we will not presume that the Respondent acted unreasonably in concluding that Brown, as a *former* employee whose discharge was upheld by the MPGC, was no longer a statutory employee in the bargaining unit when the Respondent filed its motion. And because there is no evidence that the Respondent intended to apply the DRP to an employee that it knew to be a current, active employee and unit member, we are not persuaded by the dissent's speculation that "the Respondent could take exactly the same approach with regard to an individual whose status as an employee and unit member was undisputed."

[18] See, e.g., *New Prime Inc. v. Oliveira*, 586 U.S. ___, 139 S.Ct. 532, 2019 WL 189342, Case No. 17-340 (Jan. 15, 2019) (holding that courts could not enforce arbitration agreement against interstate-transportation worker, even though he was not classified as employee); *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S.Ct. 1612 (May 21, 2018) (holding, contrary to Board decisions, that arbitration agreements between employers and employees are enforceable in court notwithstanding NLRA).

statutory authority—notwithstanding the Petition Clause—to redress the Respondent's violation of the Act. As I will explain, the majority's analysis of the "illegal objective" issue here is simply mistaken. Unlike the majority, I would adopt the judge's finding that the Respondent violated Section 8(a)(5) of the Act, and I would order appropriate remedies for that violation.[1]

I.

An employer's unilateral change to bargaining unit employees' terms and conditions of employment violates Section 8(a)(5) and (1) of the Act. *NLRB v. Katz*, 369 U.S. 736, 743–744 (1962). Under Section 8(d) of the Act, an employer must bargain in good faith with the union representing its employees with respect to wages, hours, and other terms and conditions of employment. *NLRB v. Borg-Warner Corp.,* 356 U.S. 342, 349 (1958). The implementation of a dispute-resolution process that requires employees to arbitrate all work-related claims and to waive their right to sue their employer is a mandatory subject of bargaining. See *Utility Vault Co.,* 345 NLRB 79, 79 fn. 2 (2005); see also *Litton Business Systems, Inc. v. NLRB*, 501 U.S. 190, 199 (1991).

In order for the Board to enjoin a party's lawsuit as an unfair labor practice, the litigation must be both baseless and retaliatory as described in *Bill Johnson's Restaurants*, supra, and *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002), or it must fall within one of the limited exceptions recognized in *Bill Johnson's*. The relevant exception here applies to litigation that has "an objective that is illegal under federal law." *Bill Johnson's*, 461 U.S. at 737 fn. 5. In articulating that exception, the Supreme Court explained that it had upheld Board orders enjoining unions from prosecuting lawsuits for enforcement of fines that could not be lawfully imposed under the Act.[2] That is, the Court permits the Board to enjoin lawsuits that seek to enforce an unlawful act. Similarly, the Board has found, with court approval, that it may enjoin litigation when a union seeks to enforce a contract provision that is itself unlawful under the Act or would be unlawful as enforced. See *Elevator Constructors (Long Elevator)*, 289 NLRB 1095, 1095 (1988), enfd. 902 F.2d 1297 (8th Cir. 1990).[3]

II.

It is clear that the Respondent unilaterally applied the DRP to Brown. The conclusion that it violated Section 8(a)(5) and (1) by doing so should be equally straightforward. The Respondent is an employer under the Act and subject to Section 8(d)'s bargaining obligations. The DRP is a mandatory subject of bargaining, which could not be applied unilaterally to a unit employee. By the DRP's express terms, moreover, it applied only to the Respondent's "salaried and non-union hourly employees." Throughout Brown's employment with the Respondent, Brown worked in nonsalaried, hourly positions that were covered by the collective-bargaining agreement—and excluded from the DRP's coverage. Plainly, nothing in the course of Brown's employment subjected him to the DRP. Certainly, the Respondent never bargained with the Union over applying the DRP to unit employees, nor did the Union somehow consent or waive its statutory right to bargain.

Nor (as the Supreme Court had made clear) would it have been permissible under the Act for an individual agreement between the Respondent and a unit employee like Brown to waive benefits or protections afforded by the collective-bargaining agreement, unless the Union and the Respondent had negotiated such a waiver. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944). Thus, Brown's employment application, cited by the Respondent, has no bearing here at all. Although the application form contained a small-print notice that the applicant would be subject to the DRP if he or she "bec[a]me employed by the company, and *unless a written contract provide[d] to the contrary*," it does not subject Brown to the DRP's restrictions any more that the DRP's own terms do. This is because, throughout his employment—including when he was discharged—Brown was covered by the collective-

[1] Pursuant to the requests of the General Counsel and the Charging Party, and consistent with Board practice, I would amend the judge's recommended Order to require the Respondent to: (1) notify the district court that it is rescinding its unlawful unilateral change of applying the DRP to bargaining unit members and that it no longer opposes Brown's lawsuit on the basis of the DRP; and (2) reimburse Brown for all reasonable expenses and legal fees, with interest, incurred in opposing the Respondent's unlawful motion in United States District Court to compel individual arbitration of his Title VII lawsuit. See *Bill Johnson's Restaurants*, 461 U.S. at 747 ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses" as well as "any other proper relief that would effectuate the policies of the Act."); *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 fn. 10 (1991) ("[I]n make-whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses."), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993).

[2] See *Granite State Joint Board, TWUA (International Paper Box Machine Co.)*, 187 NLRB 636 (1970), enf. denied, 446 F.2d 369 (1st Cir. 1971), revd. 409 U.S. 213 (1972); *Booster Lodge No. 405, IAM (The Boeing Co.)*, 185 NLRB 380 (1970), affd. in relevant part 459 F.2d 1143 (D.C. Cir. 1972), affd. 412 U.S. 84 (1973).

[3] In *Long Elevator*, the union filed a grievance on behalf of an employee, relying on a clause in the collective-bargaining agreement that the General Counsel did not contend was facially unlawful. The union sought a construction of that clause, however, that, if successful, would have resulted in a de facto hot-cargo clause. The Board concluded that, because the "contract clause as construed by the [r]espondent would violate Section 8(e)," the union sought an illegal objective in violation of Sec. 8(b)(4)(ii)(A) by attempting to enforce the unlawful construction of the clause through the grievance procedure. 289 NLRB at 1095.

bargaining agreement, which did "provide[] to the contrary." The collective-bargaining agreement provided a materially different, bargained-for dispute-resolution process, and one that, in sharp contrast to the DRP, did not clearly and unmistakably waive unit employees' rights to have a court hear discrimination claims. Thus, neither the DRP's own terms nor the employment application made the DRP applicable to Brown.

The Respondent does not deny that it failed to provide the Union with notice or an opportunity to bargain before seeking to apply the DRP to Brown and that it had never before attempted to apply the DRP to a bargaining unit employee.[4] Rather, the Respondent argues that, although it acted unilaterally, its conduct did not violate the Act because, at the time the Respondent sought to apply the DRP to him, Brown was a *former* employee and therefore no longer a member of the bargaining unit. Under well-established principles, the administrative law judge properly rejected that argument. Discharged or not, Brown is clearly a statutory employee,[5] and he remained a unit employee for purposes of determining the applicability of the DRP.[6]

In short, because the Union is the representative of bargaining unit employees—including Brown—the Respondent could not lawfully have applied the DRP to those employees without first bargaining in good faith with the Union. Unilaterally imposing the DRP on bargaining unit members, as the Respondent undisputedly did, is a clear violation of Section 8(a)(5) and (1) of the Act.[7]

It follows directly from this conclusion that the Respondent's motion to compel arbitration had an illegal objective under *Bill Johnson's*. The objective of the Respondent's motion was to apply the DRP to a bargaining unit member—which, under the circumstances, it could not do without violating the National Labor Relations Act. Just as the Supreme Court has observed that the Board may enjoin union lawsuits that are simply the mechanism to enforce and collect allegedly unlawful fines from employees, so the Board may enjoin an employer's legal action that seeks to impose an unlawful unilateral change in employment terms and conditions on union-represented employees. The Respondent's motion to compel arbitration was simply the mechanism to enforce its unlawful application of the DRP to unit employees. Similarly analogous is the Board's *Long Elevator* decision holding that a lawsuit or grievance seeking to enforce an unlawful contract provision has an illegal objective. Here, the Respondent's motion seeks to enforce the DRP in a way that unlawfully circumvents the collective-bargaining process. It is clear, therefore, that the Respondent violated Section 8(a)(5) and (1) of the Act and that the Petition Clause is not an obstacle to a Board remedy for the violation.[8]

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[4] The majority emphasizes that the Respondent's motion to compel arbitration nominally seeks application of the DRP only as the Respondent's "alternative" request (while primarily seeking application of the collective-bargaining agreement's arbitration provision). But the Respondent does not dispute that, by means of its motion, it applied the DRP to Brown. Its illegal objective—unilaterally subjecting bargaining unit employees to the DRP—need not be the Respondent's *sole* objective in order to find the filing unlawful. The Supreme Court's decision in *Bill Johnson's* refers to "a suit that has *an* objective that is illegal under federal law," id., 461 U.S. at 737 fn. 5 (emphasis added), not a suit whose *sole* objective is illegal. Cf. *Precrete, Inc. (Lathers Local 46)*, 140 NLRB 1, 7 (1962) (in case of picketing alleged to have illegal objective, where evidence arguably demonstrated multiple objectives, "the illegal objective would still have been proved because the violation alleged in the complaint requires only that 'an object' of the picketing, not the sole object, be that proscribed" by the Act) (citing *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 689 (1951).

And, of course, the Respondent knew (as the majority does) that the parties had already pursued the arbitration process set forth in the collective-bargaining agreement. As explained, that agreement does not actually preclude Brown from seeking recourse in the courts. The Respondent's request to apply the collective-bargaining agreement, therefore, would lead either to a dead end or back to the collective-bargaining agreement's implicit option of a subsequent lawsuit. Either way, the court would presumably address the Respondent's "alternative" argument that the DRP applies to Brown.

[5] The Board has long held that the term "employee" in Sec. 2(3) of the Act "shall not be limited to the employees of a particular employer" and includes "former employees of a particular employer." 29 U.S.C. § 152(3); *Waco, Inc.*, 273 NLRB 746, 747 fn. 8 (1984); *Little Rock Crate & Basket Co.*, 227 NLRB 1406, 1406 (1977); *Briggs Manufacturing Co.*, 75 NLRB 569, 570 (1947). The Respondent relies on *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), for the proposition that individuals who have been separated from employment are not a part of a bargaining unit, but that case involved the retirement benefits of current retirees, who have no expectation of returning to work, rather than the rights of discharged employees, like Brown, to challenge their discharges.

[6] As described, Brown was a bargaining unit member for the entire period that he actively worked for the Respondent. He challenged his termination through contractual grievance-arbitration proceedings, which were available to him because of his bargaining unit membership. Brown's federal lawsuit is an alternative avenue, permissible under relevant statutes and his collective-bargaining agreement, for him to challenge his termination. To hold that Brown is no longer a unit employee would effectively mean deciding that his termination was lawful and effective, but that is the very subject of his lawsuit.

Analogously, the Board treats individuals who, like Brown, have challenged the lawfulness of their discharges as potential eligible voters who are permitted to cast challenged ballots in representation case proceedings. See, e.g., *Advance Industrial Security, Inc.*, 217 NLRB 17, 17–18 (1975) (discharged employees awaiting U.S. Department of Labor disposition of Age Discrimination in Employment Act claim). Further, even the Respondent concedes that Brown is eligible for reinstatement under Title VII.

[7] Cf. *WGE Federal Credit Union*, 346 NLRB 982, 982 and fn. 2 (2006) (employer may not enforce rule unilaterally implemented in violation of Sec. 8(a)(5) duty to bargain).

[8] The Respondent contends that the illegal-objective exception "must be narrowly interpreted to only include litigation intended to circumvent Board orders." But the Respondent is simply incorrect. True, the Board has found an illegal objective where it "has previously ruled on a given

III.

My colleagues' arguments that the Petition Clause prevents the Board from redressing an obvious violation of Section 8(a)(5) simply because the violation takes the form of a judicial pleading are not persuasive.[9]

The majority cites *Regional Construction Corp.*, 333 NLRB 313 (2001), for the proposition that, in order to have an illegal objective, the Respondent's motion "has to have involved a matter . . . which if granted would commit the court to countenance an[] underlying act by the Respondent which would be a violation of some federal law." Id. at 320 (administrative law judge's decision). My colleagues assert that "[h]ere, there is no 'underlying act,' only the Motion to Compel itself." But they misconstrue the key point of the quoted text, and they wrongly conclude that it does not apply here.

First, the majority errs in placing so much weight on the word "underlying." The judge's statement summarized common fact patterns of prior cases, but nothing in *Regional Construction* suggests that a court filing that is *itself* the "act . . . in violation of some federal law" cannot be found to have an illegal objective. Board precedent refutes any such suggestion. Thus, a grievance seeking an unlawful interpretation of a contract provision was held to have an illegal objective, without any "underlying act" in violation of law. *Elevator Constructors (Long Elevator)*, 289 NLRB at 1095. The majority's position is more akin to a semantic quibble than a legally significant distinction.[10]

In any event, the Respondent's motion to compel arbitration obviously would not have been filed in the absence of the Respondent's underlying decision to apply the DRP to a bargaining unit employee—unlawfully.[11] The fact that the motion was not preceded by some other unlawful act—e.g., announcing to the Union and current employees that the DRP would be applied to bargaining unit employees—does not somehow change the nature of what the federal court was being asked to do. Thus, even under the majority's narrow reading of *Regional Construction*, the Board's finding of an illegal objective there supports finding the same here: by granting the motion to compel arbitration, the court would give effect to the Respondent's unilateral application of the DRP to a bargaining unit employee—and that would "commit the court to countenance" a violation of the Act.

The majority further asserts that the DRP was lawful and contends that "the enforcement of a policy or contractual provision is not an illegal objective if the policy or provision is not itself illegal." But even if the DRP was facially lawful, it was clearly *not* lawful as applied to Brown or other union-represented employees. Board law is clear that advocating for a *result* that would violate the law does, in fact, constitute an illegal objective. See *Elevator Constructors (Long Elevator)*, supra (finding illegal objective in grievance that sought unlawful contract interpretation).

The logical, but manifestly unreasonable, consequences of the majority's analysis highlight its flaws. If the Petition Clause precludes finding an unfair labor practice *irrespective of Brown's employment and bargaining unit status*, then the Respondent could take exactly the same approach with regard to an individual whose status as an employee and unit member was undisputed. In other words, any employer that has both represented and

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matter, and where the lawsuit is aimed at achieving a result that is incompatible with the Board's ruling." *Teamsters Local 776 (Rite Aid)*, 305 NLRB at 835; see also *Part-Time Faculty Assn. at Columbia College*, 367 NLRB No. 119, slip op. at 1 fn. 1 (April 24, 2019). But, as shown, that is not the only fact pattern to which the illegal-objective exception applies.

[9] Because I find that the Respondent's motion to compel arbitration fits within the illegal-objective exception of *Bill Johnson's*, I need not address whether the motion could also be enjoined as baseless and retaliatory (a view the majority rejects). Even so, I am dubious of the majority's finding that the Respondent's motion is neither "plainly foreclosed as a matter of law" nor "otherwise frivolous," and therefore is not baseless. The Respondent has argued that the DRP covers an individual—a bargaining unit member—whom the DRP's *express terms* exclude from coverage. That fact belies the Respondent's assertion that its legitimate purpose in filing the motion was "to enforce Respondent's [non-existent] contractual agreement with Charging Party [Brown]."

[10] Seeking to rationalize the supposed "underlying act" requirement, the majority insists that a *separate* underlying act is essential to ensure that the illegal-objective exception does not "swallow the rule of *Bill Johnson's* and turn the Petition Clause of the First Amendment into an empty promise," predicting that "[o]therwise, the 'illegal objective' exception would apply whenever the litigation act itself . . . could be condemned as an unfair labor practice." But the majority takes aim at a straw man. Here, the Respondent seeks to achieve an *unlawful outcome* (i.e., a unilateral change in employment terms) by means of its motion to compel. It is not alleged here that the motion itself is coercive, as in the more common 8(a)(1) case. This case, therefore, would not lead to the dire results the majority foresees any more than *Long Elevator* does.

The majority's attempt to distinguish *Long Elevator* is likewise unpersuasive. The majority argues that, there, when the union adopted an interpretation that rendered the contract unlawful, "the contract became the underlying unlawful act." Putting aside the oddity of this claim (the contract was not an "act" in any ordinary sense), the majority's argument disregards the obvious: the act at issue in *Long Elevator* was the union's adoption of a contract interpretation that would have produced an unlawful outcome. So, too, here, the Respondent adopted an interpretation of the DRP (i.e., that it applies to unit employees) that would have an unlawful outcome (i.e., a unilateral change in employees' terms of employment).

[11] The majority mischaracterizes my point here. I am not arguing that the Respondent's decision to file the motion to compel arbitration was the underlying act, even assuming that one is necessary, that it sought to enforce by filing the motion. Rather, it was the Respondent's decision to unilaterally, and therefore unlawfully, apply the DRP to bargaining unit employees that was the underlying act that the Respondent sought to enforce by filing the motion.

unrepresented employees, and that maintains an arbitration policy applicable only to the latter group, would be free to impose the arbitration policy even on a current, active
union-represented employee without providing notice to the union or an opportunity to bargain, and without any past practice of subjecting represented employees to the arbitration requirement, as long as the employer does so by means of a court filing.[12] It cannot be correct that the statutory duty to bargain and a collective-bargaining agreement could be circumvented so easily.

IV.

The Respondent's unilateral application of the DRP to represented employees violated Section 8(a)(5) and (1) of the Act, and because the motion to compel arbitration necessarily has an illegal objective, the Board can and should enjoin it, consistent with the Act's fundamental policy of creating stability in labor relations through collective bargaining. Contrary to the majority, the Petition Clause is no obstacle here.[13]

The majority's failure to reach the correct result here, however, does not prevent the court hearing Brown's discrimination lawsuit from doing so. In *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), the Supreme Court held that, despite the Board's primary jurisdiction to determine what is or is not an unfair labor practice, it is well established that:

> a federal court has a duty to determine whether a contract violates federal law before enforcing it. "The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in . . . federal statutes. . . . Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power."

Id. at 83–84 (quoting *Hurd v. Hodge*, 334 U.S. 24, 34–35 (1948)) (footnotes omitted in original).[14] The court thus owes no deference to the Board's misinterpretation of *Bill Johnson's* or its misunderstanding of the Petition Clause. Nothing the Board does today, therefore, prevents the court from concluding that the DRP cannot lawfully be applied to Brown.

Dated, Washington, D.C. May 22, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

Marinelly Maldonado, Esq., for the Government.[1]
Thomas Royall Smith, Esq., for the Company.[2]
Joseph Egan, Jr., Esq., for the Union.
Jeffery H. Klink, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM NELSON CATES, Administrative Law Judge. This case involves a single allegation that the Company, on or about June 4, 2012, unilaterally and without notice to the Union and without affording the Union an opportunity to bargain about a particular change, an alleged mandatory subject for bargaining, the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). I heard this case in trial in Jacksonville, Florida, on July 11, 2013. The case originates from a charge filed on December 3, 2012, by Matthew C. Brown, an individual. The prosecution of the case was formalized on March 29, 2013, when the Regional Director for Region 12 of the National Labor Relations Board (the Board), acting in the name of the Board's Acting General Counsel, issued a complaint and notice of hearing (the complaint), against Anheuser-Busch LLC. (the Company). The Company, in its answer to the complaint, and at trial, denies having violated the Act in any manner alleged in the complaint.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. I carefully observed the demeanor of the witnesses as they testified, and I rely on those observations here. I have studied the whole record, and based on the detailed findings and analysis below, I conclude and find the Company violated the Act essentially as alleged in the complaint.

FINDINGS OF FACT

I. JURISDICTION, SUPERVISORY/AGENCY STATUS, AND

[12] Active employees, like discharged employees, have the right to sue their employers for discrimination or harassment, absent a waiver of the right. Brown's lawsuit challenged both his suspension and his discharge as racially discriminatory; he filed EEOC charges after each action and obtained a right-to-sue notice regarding each charge. Even if Brown had not ultimately been discharged, he might still have filed a lawsuit regarding his suspension.

[13] The majority's high regard for the Petition Clause is paradoxical here, given that today's holding threatens to nullify a discharged employee's own right to petition the government for redress of his grievances against the employer.

[14] See also *Communications Workers of America v. Beck*, 487 U.S. 735, 743 (1988) (stating that "federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies"); *Connell Construction Co. v. Plumbers and Steamfitters Local 100*, 421 U.S. 616, 626 (1975) (same) (citing cases).

[1] I shall refer to counsel for the Acting General Counsel as counsel for the Government and the Acting General Counsel as the Government.

[2] I shall refer to counsel for the Respondent as counsel for the Company and shall refer to the Respondent as the Company.

LABOR ORGANIZATION

The Company is a Missouri limited liability corporation, with an office and place of business in Jacksonville, Florida, where it has been, and continues to be, engaged in the manufacture, sale, and distribution of beer and related products. During the past year, a representative period, the Company sold and shipped from its Jacksonville, Florida facility goods and materials valued in excess of $50,000 directly to customers located outside the State of Florida. The parties stipulated, and I find, the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties stipulated, and I find, that since January 1, 2010, Senior People Director Susan Brueggemann has been an agent of the Company within the meaning of Section 2(13) of the Act. It is admitted, that at all times material here, Jacksonville Brewery People Manager Timothy Saggau has been a supervisor and agent of the Company within the meaning of Section 2(11) and (13) of the Act.

The parties stipulated, and I find, International Brotherhood of Teamsters Local 947 and International Brotherhood of Teamsters, Brewery and Soft Drink Workers Conference (jointly the Union), both are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Brief Background

The issue here centers around the employment history of Brown at the Company, including his preemployment documents, his work and disciplinary history, and, his postemployment actions, including filings with the Equal Employment Opportunity Commission (EEOC) and in the United States District Court, Middle District of Florida, Jacksonville Division (District Court). It is necessary to set forth Brown's employment history even though the validity of his suspension and termination is not before me, nor, is the correctness of his posttermination actions. The issue before me only relates to the alleged unilateral action by the Company and whether it gave notice and an opportunity to bargain to the Union.

It is admitted the following employees of the Company (the unit), constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All maintenance and production and utilities employees of the Company, including hourly rated employees at its Jacksonville, Florida brewery, excluding clerical employees, professional employees, guards, watchmen and supervisors as defined in the National Labor Relations Act.

Since, on or before, March 28, 1998, the Company recognized the Union as the exclusive collective-bargaining representative of the unit. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which, is effective by its terms from November 7, 2008, to February 28, 2014. At all times since, on or before, March 28, 1998, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

B. Facts[3]

Since on or about April 1, 2004, until the present, the Company has maintained the Anheuser-Busch Dispute Resolution Program policy (DRP), at its Jacksonville, Florida facility, which states in relevant part:

> SPECIAL NOTICE TO EMPLOYEES
>
> THIS POLICY CONSTITUTES A BINDING AGREEMENT BETWEEN YOU AND THE COMPANY FOR THE RESOLUTION OF EMPLOYMENT DISPUTES
>
> By continuing your employment with Anheuser-Busch Companies, Inc. or any of its subsidiary companies ("Company"), you are agreeing as a condition of your employment to submit all covered claims to the Anheuser-Busch Dispute Resolution Program ("DRP"), to waive all rights to a trial before a jury on such claims, and to accept an arbitrator's decision as the final, binding, and exclusive determination of all covered claims.
>
> This program does not change the employment at-will relationship between you and the Company:
>
> GENERAL RULES
>
> COVERED EMPLOYEES
>
> The DRP applies to all salaried and non-union hourly employees of Anheuser-Busch Companies, Inc. or any of its U.S. subsidiaries. . . .

The practice, since April 1, 2004, has been that applicants for positions at the Company, both for nonbargaining and bargaining unit positions, agree to the same DRP application language set forth above.

Brown applied for employment with the Company as a weekend worker (Weekender), on June 16, 2004. The DRP language was in the employment forms completed by Brown and presented to the Company. Brown, however, did not receive a copy of the DRP at any time before or during his employment with the Company.

Brown was offered employment at the Company on September 20, 2004, as a Weekender, and, began working that position on September 25, 2004. Brown worked continuously as a Weekender from September 25, 2004, until May 20, 2005, when he became an apprentice I. Brown worked continuously, as an apprentice I, from May 20, 2005, until his termination on March 11, 2010. Brown's positions, as Weekender and apprentice I, are included in the bargaining unit described elsewhere here, and as such, Brown was in the bargaining unit during his entire employment at the Company.

The parties collective-bargaining agreement contains, at article 8, a three-step grievance procedure culminating in final and binding arbitration before a multiplant grievance committee (the MPGC) consisting of two members each from the Company and

[3] The facts set forth are, for the most part, admitted or stipulated. I do not indicate such at each series of facts. It will be apparent on the one occasion where it is necessary for me to make credibility resolutions, that the facts are contested, and, I resolve them.

the Union and a neutral member chosen by the MPGC from a list of neutrals provided by the American Arbitration Association.

On September 23, 2009, the Company suspended Brown for 4 weeks. On September 25, 2009, the Union filed a grievance claiming Brown's suspension was not for good cause. The grievance advanced through the various steps of the grievance process including the MPGC which, on December 9, 2009, denied Brown's suspension grievance. On December 7, 2009, Brown filed a charge with the Florida Commission of Human Relations alleging he was unlawfully suspended based on race.

As noted elsewhere here, the Company discharged Brown on March 11, 2010. On March 22, 2010, the Union filed a grievance claiming Brown's discharge was not for good cause. This grievance advanced to the MPGC level where, on May 3, 2010, the MPGC upheld Brown's discharge.

On March 30, 2010, Brown filed a charge with the Florida Commission of Human Relations alleging he was unlawfully discharged based on retaliation for filing the charge regarding his suspension with the Florida Commission of Human Relations on December 7, 2009.

On April 3, 2012, Brown filed a complaint against the Company in District Court alleging race discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964. On June 4, 2012, the Company, in response to Brown's complaint, filed a motion with the District Court to Dismiss or Stay and Compel Arbitration pursuant to the DRP in Brown's pre-employment application.

As of June 4, 2012, when the Company filed its motion with the District Court, Brown was a regular employee of Bacardi Rum.

Brown testified that after he received a Right to Sue letter from the EEOC he consulted an attorney who informed him of the Company's DRP program about which he became concerned. Brown testified he telephoned the Company's St Louis corporate headquarters, and after explaining to the receptionists he was a collective-bargaining employee and needed to speak with someone about the DRP program, his call was transferred to Senior People Director Brueggemann. Brown told Brueggemann he was a collective-bargaining employee who had just gone through the MPGC process, and lost, and wanted to know if the Company's DRP program applied to him. Brown testified Brueggemann replied: "[S]ince I had been through the grievance process, that the DRP did not apply to me because I was a collective bargaining employee."

Brown testified that a week after he filed his District Court lawsuit against the Company he again contacted Brueggemann. Brown again asked if the Company's DRP program applied to him and was again told it did not because he was a collective-bargaining unit employee.

Brueggemann testified she could not recall speaking with Brown and stated she believed if she had been called twice by Brown she would remember it. Brueggemann stated a collective-bargaining employee would not be covered by the DRP program but a former employee would be.[4]

Brown testified he was a member of the Union and served as a steward but did not know of the Company's DRP program[5] until he started exploring a lawsuit against the Company.

Brown stopped paying union dues around May 2010. The Union was not involved with, nor did anything for Brown, at the time he filed his District Court case, or when the Company filed its Motion to Compel on June 4, 2012. Brown was not aware of any labor dispute between the Company and the Union at the time the Company filed its Motion to Compel.

At no time did the Company give written notice of its intent to apply its DRP policy to bargaining unit employees. At no time did the Company offer to bargain, or bargain, with the Union regarding its DRP policy and/or the application of the DRP policy to bargaining unit employees.

C. The Allegations, Discussions, and Conclusions

It is alleged at paragraphs 8 and 9 of the complaint:

> (a) On June 4, 2012, Respondent filed a Motion to Dismiss or Stay and Compel Arbitration to the DRP, herein called Motion, in response to Matthew C. Brown's lawsuit described above. . ., notwithstanding that Brown was employed in the Unit and the DRP states that it applies to "salaried and non-union hourly employees," thereby changing the terms and conditions of employment of the Unit.
>
> (b) The subject described above in paragraph 8(a) relates to wages, hours, and other terms and conditions of employment of the Unit, and is a mandatory subject for the purposes of collective bargaining.
>
> (c) Respondent engaged in the conduct described above in paragraph 8(a) without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent.

It is alleged the Company's actions violate Section 8(a)(5) and (1) of the Act.

1. The Government's position

The Government notes the facts are mostly undisputed and asserts the case primarily presents the legal issue of whether the Company violated Section 8(a)(5) and (1) of the Act by changing terms and conditions of employment of its bargaining unit employees, specifically by attempting, in Brown's District Court case, to apply its DRP policy to a bargaining unit employee without providing the Union notice and an opportunity to bargain. The Government points out that, at all times material, the Union represented, and continues to represent, hourly paid production and maintenance employees, of which Brown was one. Government counsel asserts the Company's DRP policy, in effect since 2004, is applicable only to nonunion and salaried employees. The Government notes the parties collective-bargaining

[4] Brown impressed me he was testifying truthfully and without reservation. Brueggemann, on the other hand, impressed me as not being absolutely certain of her testimony. I credit Brown.

[5] Thirty-year employee and former union steward, trustee, and Vice President James Miller testified he was unaware of the Company's DRP program. International Brotherhood of Teamsters Secretary/Treasurer Larry Knouse testified he was unaware of the DRP program until July 2012 when he was contacted by Brown's attorney.

agreement contains a grievance and arbitration procedure applicable to unit employees, including Brown, and further notes Brown utilized that grievance procedure both with respect to his suspension and discharge. The Government states the lawfulness of Brown's suspension and discharge are irrelevant to the issues here, but rather, contends that when, on June 4, 2012, the Company filed its Motion to Dismiss or Stay Brown's Title VII lawsuit and compel arbitration pursuant to the Company's DRP policy, the Company changed the terms and conditions of employment for unit employees, including Brown, without notice to or bargaining with the Union and as such violated Section 8(a)(5) and(1) of the Act. As part of any relief provided the Government simply seeks to have the Company withdraw that portion of its defense to Brown's District Court lawsuit that requests the District Court direct the matter be decided pursuant to the Company's DRP policy.

2. The Company's position

The Company asserts that when Brown filed his District Court case in April 2012, he had not been an employee of the Company for approximately 2 years. The Company, more specifically argues, that when it filed its Motion to Dismiss or Compel arbitration in Brown's District Court lawsuit, its actions did not violate the Act because Brown was not, at that time, an employee of the Company. The Company does contend however, Brown is subject to its DRP policy because before Brown was an employee of the Company, he admittedly, signed an application for employment form agreeing to be subject to the Company's DRP policy for dispute resolutions between he and the Company.

The Company contends Brown does not, under the circumstance here, meet the definition of an employee within the meaning of Section 2(3) of the Act. The Company notes Brown's suspension and discharge were both processed through the parties collective-bargaining grievance procedure, where his suspension and discharge were upheld. The Company also notes there was no labor dispute between it and the Union and that Brown never claimed he was fired in violation of the Act. The Company contends its DRP policy was established for situations just like Brown's, where at the time of the its actions regarding Brown's lawsuit, he was not an employee of the Company, nor, a member of the bargaining unit. The Company contends where an employee is discharged for just cause and does not involve a labor dispute, or an unfair labor practice, as the Company asserts was the case with Brown, the individual is no longer an employee within the meaning of the Act. The Company notes this case is not about the merits of its DRP policy, nor, is it a case about Brown being denied access to the Federal courts, but, rather whether the Company's actions related to Brown's District Court lawsuit violates the Act. Summarized and stated differently, the Company articulates the "sole issue" here as whether it violated Section 8(a)(1) and (5) of the Act by moving in Federal court to compel Brown to arbitrate his Federal litigation 2 years after his termination was upheld and at a time when he has no right or prospect of returning to the bargaining unit. Again, further summarized, the Company asserts it did not violate Section 8(a)(5) of the Act because at the time Brown agreed to the Company's DRP policy and when the Company filed its motion to compel arbitration, Brown was not a member of the bargaining unit. The Company further argues that because Brown was not a bargaining unit member either before he was hired or after he was terminated, there was no obligation to bargain over the application of the DRP policy to him. The Company argues the issue of the DRP's application does not vitally affect terms and conditions of employment of unit employees and does not require it to bargain about it.

3. The *Noel Canning* issue

The Company asserted at trial and, reasserts in brief, the Board, and those who represent it, had no authority to prosecute this action pursuant to the reasoning in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted 133 S.Ct. 2861, (2013) (No. 12-1281), and circuit courts reaching similar conclusions. In *Noel Canning,* the circuit court found the recess appointments of two Board Members (Block and Griffin) were unconstitutional and invalid leaving the Board without a quorum to fulfill its responsibilities under the Act. The Board, in part, does not accept the *Noel Canning* decision. The Board explained its position on this point in *Belgrove Post Acute Care Center* 359 NLRB 633, 633 fn. 1 (2013), stating: "We recognize that the United States Court of Appeals for the District of Columbia Circuit has concluded that the President's recess appointments were not valid. . . . However, as the court itself acknowledged, its decision conflicts with rulings of at least three other courts of appeals…This question remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act."

Accordingly, I reject the Company's contention the Board lacks authority to proceed in this case.

4. The employee status of Brown

Inasmuch as the Company's defense to the unilateral action allegations rests on its contention Brown, at the time of the Company's actions here, was not an employee of the Company within the meaning of Section 2(3) of the Act; I address that issue first.

Section 2(3), in part, states:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, ...

The Board historically has interpreted Section 2(3) of the Act to include "members of the working class generally." *Briggs Mfg. Co*., 75 NLRB 569, 570 (1947). The Supreme Court has consistently upheld the Board's broad interpretation noting the breath of Section 2(3) is "striking" and applies to any employee, except those explicitly excluded. Applicants for employment are statutory employees under Section 2(3), entitled to the Act's protection. *NLRB v. Town & Country Electric, Inc.,* 516 U.S. 85 (1995); see also *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177 (1941). The Board in *Little Rock Crate & Basket Co*., 227 NLRB 1406 (1977), held that "Section 2(3) of the Act, as the Board has long held that term means, 'members of the working class generally,' including 'former employees of a particular employer.'"

Guided by the principles set forth above, I find Brown, at all times here, was an employee of the Company within the meaning of Section 2(3) of the Act. Brown, as an applicant for employment with the Company, became an employee within the meaning of the Act when he filled out his application for employment. The DRP policy agreement Brown signed was part of his application for employment with the Company. It is without question Brown was an employee during the approximately 6 years he worked for the Company as a Weekender and apprentice I. Likewise, as a former employee, in the circumstances here, Brown remained a statutory employee of the Company. Brown has since September 2009 challenged his suspension, and later discharge, from the Company. A grievance was filed over Brown's suspension on September 25, 2009, claiming his suspension was not for just cause. Although Brown's suspension grievance was denied, and he was thereafter discharged on March 11, 2010, he continued to pursue his employment status through the parties "collective-bargaining agreement grievance procedure," as well as, with State and Federal agencies, including his action in District Court. Brown's discharge was upheld through the grievance procedure, but, he has continued to pursue his employment status. Brown's status is still being pursued in the District Court.

In these circumstances, Brown remains an employee of the Company even if he is labeled a former employee of the Company. The fact Brown no longer works on a daily basis at the Company is not controlling here.

Having found Brown, at applicable times, an employee within the meaning of the Act, I now considered the issue of the alleged unilateral action by the Company and whether it gave notice and an opportunity to bargain to the Union.

5. The unilateral action

Section 8(a)(5) and (d) of the Act requires an employer to bargain in good faith with the collective-bargaining representative of unit employees with respect to wages, hours, and other terms and conditions of employment. *NLRB v. Borg-Warner Corp.,* 356 U.S. 342, 349 (1958). It is well established an employer violates Section 8(a)(5) of the Act if it makes material changes during the course of a collective-bargaining relationship on matters that are mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962). Simply stated the Government can establish a prima facie violation of Section 8(a)(5) of the Act if it shows an employer unilaterally made a material and substantial change in a term of employment without negotiating with the Union. The burden is on the employer to show, or demonstrate, the unilateral change was somehow permissible. The Board held in *Utility Vault Co.,* 345 NLRB 79 fn. 2 (2005), that the implementation of a dispute resolution process which requires employees arbitrate claims involving their terms and conditions of employment constitutes a mandatory subject of bargaining.

Guided again by the principles set forth above, I find the Company, unilaterally and without notice to, and without affording the Union an opportunity to bargain, applied its DRP policy against Brown, a unit employee, notwithstanding the fact, its DRP policy, by its terms, only applied to "salaried and non-union hourly employees." The Company's actions violate Section 8(a)(5) of the Act.

It is undisputed Brown worked in the unit during his entire active employment at the Company. It is undisputed Brown has pursued the status of his employment with the Company from his suspension on September 23, 2009, until the present. It is undisputed the Company applied its DRP policy to Brown on June 4, 2012, when it filed its Motion to Dismiss or Stay and Compel Arbitration in response to Brown's April 3, 2012 District Court lawsuit regarding his suspension and discharge. It is undisputed the Company applied its DRP policy to Brown without notice to or affording the Union an opportunity to bargain.

As outlined above, the Government here established a prima facie violation of Section 8(a)(5) of the Act. The Company changed the terms and conditions of unit employees without notice or bargaining. The establishment of a dispute resolution program, or, the unilateral application, or attempted application, of such a program for unit employees is a mandatory subject of bargaining because it requires employees to arbitrate terms and conditions of their employment, including suspension and discharge. The Company does not dispute it took the unilateral action.

The Company contends it did not have to bargain mainly because Brown was not an employee during his pre-employment application process and after he was terminated. I reject the Company's contention it had no obligation to bargain when it applied its DRP policy to Brown because Brown was not an "employee" within the meaning of the Act, at the time he agreed to be bound by the DRP policy or when the Company applied it to him. The Company's position Brown was not an employee at the application stage of his quest for employment with the Company is contrary to Board law. Brown was a unit employee his entire active employment and remains, under the circumstances here, an employee pursuant to Board precedent. Stated differently Brown was, and continues to be, an employee at all times applicable here, including when the Company filed its June 4, 2012 Motion with the District Court. Brown is still, at present, challenging his employment status in the District Court. The fact Brown has not worked at the Company, nor paid union dues, for the 2 years before he filed his District Court lawsuit does not compel a different result than I reach here. Nor does the fact Brown has, for some time, been fully employed at Bacardi Rum require a different result than I reach here. As an employee within the meaning of the Act, Brown is still a bargaining unit employee.

In summary, I find the Company violated Section 8(1)(1) and (5) of the Act when on June 4, 2012, it unilaterally applied its DRP policy (normally applicable to salaried and nonunion employees) to Brown, a bargaining unit employee, without notice to or affording the Union an opportunity to bargaining with respect thereto.

CONCLUSIONS OF LAW

1. The Company, Anheuser-Busch, LLC., a successor to Anheuser-Busch, Inc., is an employer engaged in commerce with the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Brotherhood of Teamsters Local 947 and International Brotherhood of Teamsters, Brewery and Soft Drink Workers Conference are, jointly and severably labor organizations within the meaning of Section 2(5) of the Act.

3. The Company, by filing a motion to dismiss or stay and

compel arbitration to its Dispute Resolution Program (DRP) in response to Matthew C. Brown's District Court lawsuit, changed the terms and conditions of its unit employees and violated Section 8(a)(5) and (1) of the Act.

REMEDY

Having found the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I recommend the Company be ordered to forthwith withdraw that portion of its defense in Brown's District Court lawsuit that seeks to have the District Court direct the matter be decided pursuant to the Company's DRP policy. I recommend the Company, upon request of the Union, bargain in good faith with the Union concerning the application of its DRP policy to unit employees. I also recommend the Company be ordered, within 14 days after service by the Region, to post an appropriate "Notice to Employees" in order that employees may be apprised of their rights under the Act, and the Company's obligation to remedy its unfair labor practices.

On these findings and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Company, Anheuser-Busch, LLC., a successor to Anheuser-Busch, Inc., Jacksonville, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Requesting the District Court in Brown's Title VII lawsuit to have the matter before the District Court referred to and decided through the Company's DRP policy.

(b) Unilaterally changing terms and conditions of employment of unit employees by applying its DRP policy to unit employees.

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

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

(a) Forthwith withdraw that portion of its defense in Brown's District Court lawsuit that requests the District Court have the matter before it decided pursuant to the Company's DRP policy.

(b) Upon request of the Union bargain in good faith with the Union concerning the application of its DRP policy to unit employees.

(c) Within 14 days after service by the Region, post at its Jacksonville, Florida facility, copies of the notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the posted notices are not altered, defaced, or covered by any other material. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as email, posting on an intranet or an internet site, or other electronic means, if the Company customarily communicates with its employees by such means. In the event that during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Company at any time since June 4, 2012.

Dated at Washington, D.C. September 10, 2013

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 do anything to prevent you from exercising the above rights.

WE WILL NOT unilaterally change terms and conditions of employment of unit employees by applying our Dispute Resolution Program policy to our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL forthwith withdraw that portion of our defense in Matthew C. Brown's District Court lawsuit that requests the District Court have the matter before it decided pursuant to our Dispute Resolution Program policy.

WE WILL upon request of the Union bargain in good faith with the Union concerning the application of our DRP policy to unit employees.

ALL OUR EMPLOYEES are free to become or remain, or refrain from becoming or remaining, members of any labor organization.

ANHEUSER-BUSCH, LLC

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] 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 the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12-CA-094114 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.