UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH

ROSS STORES, INC.

and

Cases 31–CA–109296
31–CA–114107

RACHEL GOSS, an Individual

*J. Carlos Gonzalez, Esq.*, for the General Counsel.
*Gregory D. Wolflick Esq. (Wolflick & Simpson),*
for the Respondent.
*Matthew Righetti, Esq. (Righetti & Glugoski),*
for the Charging Party.

# DECISION

## Statement of the Case

JAY R. POLLACK, Administrative Law Judge: This case came before me based on a stipulated record dated July 21, 2014, whereby the parties waived a hearing. On July 16, 2013, Rachel Goss (Goss) filed the charge in Case 31–CA–109296 against Ross Stores, Inc. (Respondent or the Employer). On February 27, 2014, Goss filed an amended charge against Respondent. On September 27, 2013, Goss filed the charge in Case 31–CA–114107. On February 28, 2014, the Regional Director for Region 31 of the National Labor Relations Board (the Board) issued a complaint against Respondent. The complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent filed a timely answer in which it denied that it had violated the Act.

The parties have been afforded full opportunity to appear, and to file briefs. Upon the entire record, and having considered the briefs submitted by the parties, I make the following:

## Findings of Fact

At all times material, Respondent, a corporation with a principal place of business in Thousand Oaks, California, has been engaged in the retail sale of clothing and related products. Respondent, in conducting its business operations described above, during 12 months prior to the issuance of the complaint, derived gross revenues in excess of $500,000. Respondent purchased and received goods at its facilities in California valued in excess of $5,000 directly from sources

outside the State of California. Accordingly, the parties stipulated and I find, Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

At all times material, Respondent, a corporation with a principal place of business in Thousand Oaks, California, has been engaged in the retail sale of clothing and related products. Respondent, in conducting its business operations described above, during 12 months prior to the issuance of the complaint, derived gross revenues in excess of $500,000. Respondent purchased and received goods at its facilities in California valued in excess of $5,000 directly from sources outside the State of California. Accordingly, the parties stipulated and I find, Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

Specifically, the complaint alleges that Respondent interfered with, restrained, and coerced employees in the exercise of their Section 7 activities by maintaining and enforcing several employment policies as set forth below. Since at least May 4, 2010, and at all material times, Respondent has maintained a provision titled "Arbitration Policy" in its Store Associate Handbook.

About May 4, 2010, Respondent had Goss sign a "Store Associates Handbook Acknowledgement and Agreement" which, when executed, required Goss to "agree to utilize, comply with, and be bound to" Respondent's Arbitration Policy described above.

Since at least August 18, 2011, Respondent has enforced its Arbitration Policy and Store Associates Handbook Acknowledgement and Agreement described above by asserting them in litigation brought against Respondent by Charging Party Rachel Goss in *Rachel Goss, individually and on behalf of all others similarly situated v. Ross Stores, Inc., Ross Dress For Less, Inc., and Does 1 through 50, inclusive,* Case RG11577328 (Class Action Complaint) tiled in Superior Court of the State of California, County of Alameda (Superior Court).

About August 18, 2011, Respondent filed in Superior Court a motion to compel individual arbitration of Goss' claims against Respondent alleged in the Class Action Complaint and filed the Declaration of Respondent's Manager, Corporate Paralegal, Jeff Cook in support of the motion to compel individual arbitration. About October 26, 2011, the Superior Court issued an order denying Respondent's motion to compel the Charging Party to individual arbitration. About December 14, 2011, Respondent appealed the Superior Court's denial of the motion to compel individual arbitration.

About October 31, 2013, the Court of Appeals of the State of California, First Appellate District, Division One, (Court of Appeals) reversed the Superior Court's order denying Respondent's motion to compel individual arbitration.

Since at least June 13, 2011, and at all material times, Respondent has maintained a provision titled "Dispute Resolution Agreement" requiring employees who agree to comply and be bound to it to individually arbitrate all employment-related claims, including claims arising under federal statutes.

Since June 13, 2011, Respondent has required all current and new store employees to review the Dispute Resolution Agreement by logging into Respondent's electronic program with an employee-specific password. Respondent's electronic program is used by employees to receive training and to acknowledge receipt of Respondent's new policies, procedures, and handbooks.

After presenting employees with the terms of the Dispute Resolution Agreement, the electronic program takes employees to an electronic signature page which prompts employees to either accept the terms of the Dispute Resolution Agreement by clicking an "I Agree" button or decline the terms of the Dispute Resolution Agreement by exiting the electronic program.

## Statement of the Issues

Based on the foregoing factual stipulations, the Parties agree that the legal issues to be resolved in this matter are the following:

(1) Whether Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing its Arbitration Policy which requires employees to resolve all employment-related disputes through individual arbitration.

(2) Whether Respondent violated Section 8(a)(1) of the Act by maintaining its Dispute Resolution Agreement which requires employees who accept to be bound by the Dispute Resolution Agreement to resolve all employment-related disputes through individual arbitration.

## Position of the Parties

The General Counsel and Charging Party argue that the Respondent's "Arbitration Policy" in its Store Associate Handbook is unlawful on its face and violates Section 8(a)(1) of the Act. In *D. R. Horton, Inc.,* 357 NLRB No. 184 (2012), the legal framework for considering the legality of employers' arbitration agreements that limit collective and class legal activity in judicial and arbitral forums was addressed by the Board. The Board held that a policy or agreement precluding employees from filing employment-related collective or class claims in both judicial and arbitral forums violates Section 8(a)(l) of the Act because this type of agreement restricts employees' Section 7 right to engage in concerted action for mutual aid or protection.

The Respondent argues Section 10(b) of the Act requires that a charge be filed within 6 months of the alleged incident giving rise to the violation of the Act. The Board does not have jurisdiction to issue a complaint based on conduct occurring more than 6 months before the filing and service of the charge. *Media General Operations, Inc.,* 346 NLRB 74 (2005).

Respondent further argues that even assuming that the 10(b) period somehow did not run until Respondent filed its Motion to Compel Arbitration on August 8, 2011, the Charging Party would have been required to file her charge on or before February 9, 2012. Even under this measure, the instant charge is more than 18 months beyond the 10(b) period. As a result, the Board has neither authority nor jurisdiction to issue the complaint in the instant matter.

Additionally, Respondent argues that the Board's continued reliance on *D. R. Horton, Inc.* is inappropriate.

## Conclusions

### 1. Section 10(b)

Section 10(b) of the Act requires that a charge be filed within 6 months of the alleged incident giving rise to a violation of the Act. A complaint may not issue based upon conduct occurring more than 6 months before the filing and service of the charge. *Media General Operations, Inc.,* 346 NLRB 74 (2005).

Here the charge was not filed until July 16, 2013. Thus, I can only consider matters after January 16, 2013. Thus, the allegation that Goss signed the agreement to arbitrate is time barred. The allegation that Respondent filed a court action to compel arbitration is time barred. The allegation that Respondent appealed the court's dismissal of its action to compel arbitration is time barred. The only allegations which are not timed barred are the maintenance of the Arbitration Agreement and the maintenance of the Dispute Resolution Agreement, since January 16, 2013.

### 2. The Arbitration Policy

The Arbitration Policy (Policy) "applies to any disputes arising out of or relating to the employment relationship, between an associate and Ross [. . . .] This policy requires that all such disputes be resolved only by an Arbitrator through final and binding arbitration."

Further, the Policy states "The parties will have the right to conduct civil discovery and bring motions, as provided by the Federal Rules of Civil Procedure and enforced by the Arbitrator. However, there will be no right or authority for any dispute to be brought, heard or arbitrated as a class action, private attorney general, or in a representative capacity on behalf of any person."

In *D. R. Horton, Inc.,*357 NLRB No. 184 (2012), the Board held that a policy or agreement precluding employees from filing employment-related collective or class claims in both judicial and arbitral forums violates Section 8(a)(1) of the Act because this type of agreement restricts employees' Section 7 right to engage in concerted action for mutual aid or protection. It is undisputed that the Arbitration Policy prohibits class actions in both judicial and arbitral forums. Respondent required employees to agree to the Arbitration Policy as a condition of employment. Accordingly, I find that Respondent's maintenance of the Arbitration Policy violates Section 8(a)(1) of the Act as set forth in *D. R. Horton, Inc.,* supra.

### 3. The Dispute Resolution Agreement

Respondent has required employees to review the Dispute Resolution Agreement by logging into Respondent's electronic program. The Dispute Resolution Agreement requires employees who agree to comply and be bound to individually arbitrate all employment-related claims. The Dispute Resolution Agreement "sets forth the procedures that you and Ross mutually agree must be used to resolve disputes arising out or relate to your employment with

Ross or its termination. Disputes subject to this Agreement will be resolved by mediation or final and binding arbitration and not by a court or jury. ”

The Agreement further states, “In arbitration, all parties will have the right to conduct discovery and bring motions as provided by the Federal Rules of Civil procedure. There will be, however, no right or authority for any dispute to be brought or arbitrated as a class action.”

In *D. R. Horton, Inc.,* 357 NLRB No. 184 (2012), the Board held that a policy or agreement precluding employees from filing employment-related collective or class claims in both judicial and arbitral forums violates Section 8(a)(1) of the Act because this type of agreement restricts employees’ Section 7 right to engage in concerted action for mutual aid or protection.

This Agreement, for employees who agree to sign it, prohibits employees from bringing forth claims against Respondent in a concerted manner. Accordingly, I find that Respondent’s maintenance of the Dispute Resolution Agreement violates Section 8(a)(1) of the Act as set forth in *D. R. Horton, Inc.,* supra.

Respondent argues that that the *D. R. Horton, Inc.* case became invalid as result of the United States Supreme Court holding in *Noel Canning v. NLRB,* 134 S.Ct. 2550 (2014). However, the *D. R. Horton, Inc.* decision was not affected by the *Noel Canning* decision. *D. R. Horton, Inc.* was issued by a Board consisting of Chairman Mark Pearce and Board Members Craig Becker and Brian Hayes. In *Noel Canning,* the Supreme Court held that the appointment of Members Terence Flynn, Sharon Block, and Richard Griffin were unconstitutional. The Supreme Court did not find that the appointments of Pearce, Becker, or Hayes were unconstitutional. Thus, *D. R. Horton, Inc.* continues to be binding Board precedent.

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by maintaining an Arbitration Agreement which waives the right to maintain class or collective actions in all forums, whether arbitral or judicial.

3. Respondent violated Section 8(a)(1) of the Act by maintaining a Dispute Resolution Agreement which waives the right to maintain class or collective actions in all forums, whether arbitral or judicial.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

## ORDER

The Respondent, Ross Stores, Inc. in Thousand Oaks, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Maintaining its Arbitration Agreement to the extent that Agreement prohibits employees from filing collective or class action lawsuits or arbitrations.

b. Maintaining its Dispute Resolution Agreement to the extent that Agreement prohibits employees from filing collective or class action lawsuits or arbitrations

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

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

a. Rescind or revise the prohibition of collective or class action lawsuits and arbitrations from its Arbitration Agreement and Dispute Resolution Agreement.

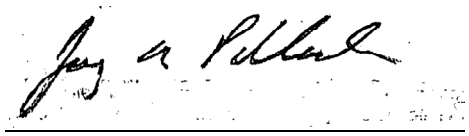
b. Within 14 days after service by the Region, post at its facility in Thousand Oaks, California, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 16, 2013.

[1] 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.

2 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

c. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., October 21, 2014



Jay R. Pollack
Administrative Law Judge

**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 prohibit you from filing collective or class action lawsuits or arbitrations in concert with your fellow employees.

WE WILL NOT maintain and enforce our Arbitration Agreement or Dispute Resolution Agreement to the extent that they prohibit employees from filing collective or class action lawsuits or arbitrations.

WE WILL rescind or revise the prohibition of filing collective or class action lawsuits and arbitrations from our Arbitration Agreement and Dispute Resolution Agreement

ROSS STORES, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

11500 West Olympic Boulevard, Suite 600
Los Angeles, California 90064-1824
Hours: 8:30 a.m. to 5 p.m.
310-235-7352

The Administrative Law Judge's decision can be found at http://www.nlrb.gov/case/31-CA-109296 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THISNOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 310-235-7123.