

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

T.T. MIYASAKA, INC.,)	Case No.	2016-CE-011-SAL
)		
)		
Respondent,)		
)		
and)		
)		
ALFONSO MAGAÑA,)	42 ALRB No. 5	
)		
Charging Party,)	(November 18, 2016)	
_____)		

DECISION AND ORDER

On August 8, 2016, Administrative Law Judge William L. Schmidt (the ALJ) issued the attached decision in the above-captioned case concluding that an arbitration agreement maintained by Respondent T.T. Miyasaka, Inc. (Respondent) violated Labor Code section 1153, subdivision (a) of the Agricultural Labor Relations Act (ALRA or Act) because the agreement reasonably could be understood by employees to be restrictive of their right to file unfair labor practice charges with the Agricultural Labor Relations Board (Board or ALRB), and to chill employees' rights under ALRA section 1152.¹ However, the ALJ concluded that there was no violation with respect to Respondent's maintenance and attempted

¹ On the same date, the ALJ issued his decision in the related companion case (*Premiere Raspberries, LLC dba Dutra Farms*, Case No. 2016-CE-010-SAL). The Board's decision with respect to that case is found at 42 ALRB No. 4.

enforcement of the class or collective action waiver contained in the arbitration agreement. The ALJ reasoned that the Board was bound by the California Supreme Court's opinion in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, where the court found a similar class action waiver was enforceable under the Federal Arbitration Act and did not violate Section 7 of the National Labor Relations Act (29 U.S.C. § 157).

The Board has considered the ALJ's decision and the record in light of the exceptions and briefs and has decided to affirm the ALJ's rulings, findings, and conclusions in full, and to issue the attached order.

ORDER

The Board adopts the recommended order of the administrative law judge as stated in the August 8, 2016 Decision of the ALJ and orders that the Respondent T.T. Miyasaka, Inc., its officers, agents, successors, and assigns, shall take the actions set forth in the order.

DATED: November 18, 2016

William B. Gould IV, Chairman

Genevieve A. Shiroma, Member

Cathryn Rivera-Hernandez, Member

CASE SUMMARY

T.T. MIYASAKA, INC.

Case No. 2016-CE-011-SAL

42 ALRB No. 5

Alfonso Magaña,
Charging Party

Administrative Law Judge (ALJ) Decision

In this case the General Counsel's complaint alleged that Respondent violated section 1153(a) of the Agricultural Labor Relations Act (ALRA) by maintaining a mandatory arbitration policy that required its employees to enter into an arbitration agreement that: 1) prohibited them from filing an unfair labor practice charge with the Agricultural Labor Relations Board (Board); and 2) required employees to waive any right they might have to pursue a class or collective action in any forum, arbitral or judicial, in order to resolve their employment disputes with the Respondent.

The Administrative Law Judge (ALJ) found, based on the analytical framework established in *Lutheran Heritage Village-Livonia* (2004) 343 NLRB 646, that Respondent violated section 1153(a) of the ALRA because its employees would reasonably construe the language of its arbitration policy and arbitration agreements as prohibiting their filing of unfair labor practice charges with the Board, an employee activity protected by section 1152. However, the ALJ concluded on the basis of the majority opinion of the California Supreme Court in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, that section 1152 does not protect the right of employees to pursue class or collective legal actions to resolve employment disputes with the Respondent. For that reason, Respondent did not violate section 1153(a) as alleged with respect to such waivers.

The ALJ ordered Respondent to amend its arbitration policy and agreement to provide specifically that employees have the right to file unfair labor practice charges with the Board and to utilize other services that agency provides.

Board Decision and Order

The Board affirmed the ALJ's rulings, findings, and conclusions in full, and adopted his recommended order.

This Case Summary is furnished for information only, and is not the official statement of the case, or of the ALRB.

STATE OF CALIFORNIA

BEFORE THE AGRICULTURAL LABOR RELATIONS BOARD

T. T. Miyasaka, Inc.)
 Respondent,)
 and) **Case No. 2016-CE-011-SAL¹**
 Alfonso Magaña)
 Charging Party.)
 _____)

Michael I. Marsh, and Jimmy Macias, Attys.,
for the General Counsel.

Ana Toledo, Atty., Noland, Hamerly, Etienne, Hoss,
for the Respondent.

Edgar Aguilasocho, Atty., Martinez, Aguilasocho, Lynch,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, ADMINISTRATIVE LAW JUDGE: I heard this case at Salinas, California, on May 4, 2016, pursuant to a notice of hearing issued by the Executive Secretary of the Agricultural Labor Relations Board (ALRB or Board) on March 22, 2016, later amended.

Alfonso Magaña (Magaña or Charging Party) initiated this case of first impression before the ALRB by filing an unfair labor practice charge on February 4, 2016. Magaña’s charge challenges the arbitration policy and the implementing arbitration agreement his employer, T. T. Miyasaka,

¹ The transcript of the hearing in this proceeding reflects an erroneous case number on the cover page. It is hereby corrected to reflect the proper case number shown above.

Inc. (Miyasaka, Respondent, or Employer), required him and his fellow employees to sign at the start of the 2015 season in order to work. He claims that Miyasaka's arbitration policy and the arbitration agreement violate the Agricultural Labor Relation Act (ALRA or Act) because it requires agricultural employees to waive their right file or participate in legal actions on a class or collective basis, and because employees would reasonably construe both the policy and the agreement as prohibiting them from filing charges with the Agricultural Labor Relations Board (ALRB). He also charges that Miyasaka violated the Act by acting to enforce its arbitration agreement against him and other unspecified employees in the Santa Cruz County Superior Court in January 2016.

On March 3, 2016, the Salinas Regional Director (Regional Director) issued the original complaint on behalf of the then Acting General Counsel alleging that Miyasaka violated, and continues to violate, ALRA § 1153(a) by maintaining and enforcing its arbitration policy and arbitration agreement as a condition of employment.² Respondent filed a timely answer on March 14, 2016, denying that it engaged in the unfair labor practices alleged and asserting that the complaint should be dismissed because it was not supported by a timely-filed unfair labor practice charge. Thereafter, on April 7, 2016, the Regional Director issued a First Amended Complaint on behalf of the General Counsel. This amended complaint (hereafter "complaint") became the operative pleading of the General Counsel's office. It also alleges that Miyasaka violated § 1153(a) by

² The ALRA is codified at Labor Code §§ 1140 through 1166.3. However, this decision retains the ALRA nomenclature from time to time when referring to statutory sections.

ALRA § 1153(a) makes it an unfair labor practice for an agricultural employer to interfere with, restrain or coerce an agricultural employee in the exercise of the rights guaranteed by ALRA § 1152. In pertinent part, ALRA § 1152 guarantees to California's agricultural employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."

maintaining and enforcing its arbitration policy. Miyasaka filed a timely answer to that complaint again denying that it had engaged in the unfair labor practices alleged and continuing to advance the defense that the complaint was not supported by a timely charge.

The record and the parties' post-hearing briefs present these three issues: 1) whether the General Counsel's complaint is supported by a timely-filed charge;³ 2) if so, whether Miyasaka's mandatory arbitration policy and its standard arbitration agreement violate § 1153(a) because a reasonable agricultural employee could construe its terms as precluding her/him from filing unfair labor practice charges with the ALRB as alleged in the complaint's first cause of action; and 3) whether Respondent Miyasaka's arbitration policy and standard arbitration agreement violate 1153(a) by requiring workers, as a condition of employment, to waive their protected statutory right under section 1152 to pursue a class or collective claim(s) in any forum, arbitral or judicial, as alleged in the second cause of action.

Having carefully considered the record, including the demeanor of the witnesses while testifying, and the briefs filed on behalf of the General Counsel, Charging Party, and Respondent, I find the complaint is supported by a timely-filed charge, and that Respondent violated section 1153(a) as alleged in the complaint's first cause of action but did not violate the Act as alleged in the second cause of action based on the findings and conclusions below.

³ ALRA § 1160.2 provides in relevant part: "No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board." Miyasaka claims the General Counsel's complaint here fails to comply with this statutory command and should be dismissed for that reason.

FINDINGS OF FACT

I. JURISDICTION

T. T. Miyasaka, Inc., a California corporation with an administrative office located in Watsonville, California, grows and harvests strawberries in Monterey County. Miyasaka employed Charging Party Magaña along with about 700 to 800 other agricultural employees during the 2015 season. (Tr. 31)⁴ Miyasaka sells and ships the strawberries it grows and harvests in Monterey County directly to Japan and to large American produce retailer locations throughout the United States. (Tr. 57-58)

Based on the foregoing, I find that Miyasaka engaged in agriculture as an agricultural employer within the meaning of section 1140.4(a) and (c) of the Act at all relevant times, employing Magaña and others, as agricultural employees within the meaning of section 1140.4(b) to perform portions of its agricultural operations. For these reasons, I further find that the ALRB has jurisdiction to hear and resolve the dispute presented here pursuant to § 1160, et seq., of the Act.

Furthermore, based on Miyasaka's direct involvement in international and interstate commerce on a scale unquestionably well beyond a *de minimis* amount, I find that the Federal Arbitration Act (FAA) would be applicable to the consideration of the arbitration agreements at issue here. 9 U.S.C. §§ 1-16.

⁴ Tr. refers the hearing transcript page number. Exh. preceded by ALJ, GC, R., CP, or Jt., refers to an exhibit identified and offered on behalf of the administrative law judge, General Counsel, Respondent, Charging Party or jointly by all parties, respectively, or that is a part of the record in this case by way of ALRB Rule 20280. Br. preceded by GC, R., or CP refers to a post-hearing brief filed by the General Counsel, Respondent, or Charging Party, respectively. Respondent and the Charging Party each received adverse subpoena rulings in this proceeding. Both elected to exclude the associated documents and rulings from the record in accord with Board Regulation 20250(h). Tr. 15-16.

II. THE ALLEGED UNFAIR LABOR PRACTICES

In this and a companion case, *Premiere Raspberries LLC dba Dutra Farms*, 2016-CE-010-SAL, also issued today, the ALRB's General Counsel alleges that two Northern California agricultural employers violated Section 1153(a) as described above. Few of the facts are disputed; most of controlling facts in this case are contained in Miyasaka's written employee policies, the terms of the written arbitration agreements its employees had to sign in order to work, and admissions by its agents concerning the process used to implement its recently-adopted arbitration policy.

A. Relevant Facts

Before the start of its strawberry season in February 2015, Miyasaka adopted and implemented a mandatory arbitration policy when it recalled former employees and hired new field workers.⁵ When the former workers and the new employees began arriving for the of the 2015 season, Miyasaka's ranch supervisors provided them an employment application packet containing six or so forms, including Miyasaka's new arbitration agreement developed under and designed to implement its new arbitration policy.⁶ Thereafter, the applicants and returning workers are sent to an orientation session conducted by the Human Resources (HR) specialists.⁷

⁵ No evidence shows that Miyasaka's arbitration policy was contained in its employee manual by the start of the 2015 season but it was set out in the 2016 employee manual. According to the 2016 employee manual's policy statement, "(a)ccceptance of employment or continuation of employment with the Company is deemed to be acceptance of this arbitration policy." Although no evidence shows any employee refused to sign an arbitration agreement when presented with it, this policy statement and the orientation process generally lend strong support for the inference I find inescapable that Miyasaka's arbitration policy is a mandatory condition of employment. The 2016 manual subsequently states the "terms" of the referenced arbitration policy in 13-numbered paragraphs. Those terms conform to the first 13-numbered paragraphs of the 2015 standard arbitration agreement presented to each employee for their signature before beginning work. Compare *Jt. Exhs. B and H*.

⁶ Other identified documents in the application packet included an I-9 form, W-4 form, a wage statement showing the employee's rate of pay, and a health

At the orientation sessions, the HR specialists explain a variety of company benefits and policies discussed in more detail below. They also assist and guide the employees in completing the forms provided in the application packet given to them by the ranch supervisors. Once the employee completes and signs the forms, they are reviewed by an HR specialist at the orientation session. (Tr. 22-24) When all of the forms Miyasaka requires are found to be in order, the employee may start working.

The standard arbitration agreement that came into use during the 2015 season (including the Spanish version signed by Magaña on February 27, 2015) contains the following three provisions central to the allegations made by the General Counsel in this case that follow immediately after a preamble:

1. The Company and I agree that all claims, disputes and controversies arising out of, relating to or in any way associated with my employment by the Company or the termination of that employment must be submitted to final and binding arbitration according to the terms of this Agreement.
2. The Company and I each voluntarily and with full knowledge, waive any and all of our rights to have any such arbitrable claims or disputes heard or adjudicated in any other type of forum, including without limitation, each party's right to a trial in a court. Examples of such disputes or claims which must be resolved through arbitration, rather than a court proceeding, include, but are not limited to, wage, hour and benefit claims; contract claims; personal injury claims; tort claims; claims for wrongful termination; defamation; discrimination and harassment, and any other similar state or federal statute

insurance election form. Additionally, the packet included a statement of the company's sexual harassment policy and worker compensation information which employees were allowed to retain.

⁷ The orientation sessions take place at Miyasaka's Abela Ranch in Salinas. (Tr. 20)

or any other employment-related claim of any kind. This agreement excludes workers' compensation and unemployment benefits claims.

3. To the extent permitted by law, the Company and I agree to waive any right to file any class or representative claims addressing wages or other terms or conditions of employment in any forum.

(Jt. Exh. B)

Other salient aspects of Miyasaka's arbitration agreement provide that a request for arbitration must be made within the limitations period "set by state or federal law for such claims" (§ 4); the arbitration process is to be conducted in accord with the current Employment Dispute Resolution Rules of the American Arbitration Association (§ 6); the arbitrator is obliged to issue a written decision applying the applicable state, federal, or common laws and that contains factual findings, legal conclusions, and reasons for the award which is deemed final and binding (§§ 7 and 10); authorizing the arbitrator to "resolve any dispute regarding the application or interpretation" of the agreement (§ 7); making each party responsible for the payment of its attorney and expert witness fees and other costs of arbitration but authorizing the arbitrator to award reasonable attorney fees if a party prevails on a statutory claim which contains authority for the reimbursement of the prevailing party's attorney fee (§§ 8 and 9); making Miyasaka responsible for the cost of the arbitrator and other costs "unique" to arbitration (§ 8); and a standard savings clause providing that other aspects of the agreement remain in effect if any term or provision is determined by a court or arbitrator to be unlawful (§ 14).⁸

⁸ There are slight variations between Miyasaka's 2015 and 2016 standard arbitration agreement form but none which are of any significance to the issues presented here. Further, no party makes any claim that the differences between the 2015 and 2016 versions of Miyasaka's arbitration agreement forms are of significance.

Miyasaka HR specialist Janet Flores facilitated an orientation session on February 27, 2015, for a group of about 20 employees including Magaña. Another HR specialist, Eugenia Robles, co-facilitated that meeting. (Tr. 21-22) Flores and Robles conduct all of the orientation sessions in Spanish. (Tr. 22) The standard topics for all such sessions include health insurance, worker protection standards, hygiene, heat stress, the arbitration agreement and other company policies such as sexual harassment and the worker compensation system.

For the presentation concerning the arbitration agreement, Flores presented a series of Power Point slides (four in all) that she used to explain the agreement. Flores explained that she reads the slides verbatim to the applicants so they all hear the same thing. The slides, according to Flores, attempt to summarize the company's arbitration policy outline provided to the HR specialists. In order, the slides state:

ARBITRATION AGREEMENT

Differences may arise between the Company and Its employees during employment with the Company or as a result of separation from employment with the Company. In an effort to resolve these disputes quickly and to keep the costs associated with the resolution of disputes to a minimum, the Company has adopted an arbitration policy and enters into arbitration agreements with its employees.

* * *

What is Arbitration?

- 1) A process for resolving the disputes outside of court.
- 2) The company pays for the process.
- 3) The employee and company select the arbitrator by mutual agreement. The arbitrator is usually a retired judge.

* * *

What disputes are resolved through Arbitration?

- 1) To the extent permitted by law, all claims, disputes and controversies relating to your employment before and

after signing this agreement. For example, wage and discrimination claims under state and federal law.

- 2) Not all claims are covered by this agreement:
For example, claims for unemployment insurance and workers compensation are not included.

* * *

Other terms of Arbitration Policy

- 1) To the extent permitted by law, employees waive any right to file any class or representative action in any forum.
- 2) Acceptance of employment or continuation of employment with the Company is deemed to be acceptance of this arbitration policy.
- 3) You should review the company Arbitration Agreement and Policy for more details. Please contact Human Resources with any questions.

[Jt. Exh. E]⁹

The content of Miyasaka's arbitration policy presentation outline merits the inference that it is distributed to employees but precisely how was never explained. The policy presentation outline provides as follows:

Arbitration Policy Presentation Outline

Differences may arise between the Company and its employees during employment with the Company or as a result of separation from employment with the Company. In an effort to resolve these disputes quickly and to keep the costs associated with the resolution of disputes to a minimum, the Company has adopted an arbitration policy and enters into arbitration agreements with its employees.

⁹ Arguably, portions of these Power Point slides contain misrepresentations of the actual content of the standard arbitration agreement the employees sign. The likelihood any of the employee witnesses in this case possess the skills to prosecute either a federal or state statutory wage and hour claim against Miyasaka is, I am confident, nonexistent. But the arbitration agreement provides that the employee is responsible for her/his own attorney's fees and can be liable for the company's attorney fees in the event of a loss.

A. What is Arbitration?

1. A process for resolving disputes outside of court.
2. The company pays for the process.
3. The employee and company select the arbitrator by mutual agreement. The arbitrator is usually a retired judge.

B. What disputes are resolved through Arbitration?

1. To the extent permitted by law, all claims, disputes and controversies relating to your employment before and after signing this agreement. For example, wage and discrimination claims under state and federal law.
2. Not all claims are covered by this agreement: For example, claims for unemployment insurance and workers compensation are not included.

C. Other terms of Arbitration Policy

1. To the extent permitted by law, employees waive any right to file any class or representative action in any forum.
2. Acceptance of employment or continuation of employment with the Company is deemed to be acceptance of this arbitration policy.
3. Procedure for initiating arbitration.
 - See agreement section 4.

You should review the company Arbitration Agreement and Policy for more details. Please contact Human Resources with any questions.

[Jt. Exh. C] Flores said this outline was used in the preparation of the Power Point slides but she did not otherwise utilize it for her orientation presentations.

Miyasaka again followed the employment process described above at the start of the 2016 season. Hence, both the new hires and all former employees were to sign the 2016 version of the arbitration agreement before starting work.

Magaña filed a “wage and hour class action” complaint on September 30, 2015, with the Santa Cruz County Superior Court against Miyasaka on behalf of himself and all others similarly situated. The complaint alleges several violations of California’s wage and hour laws. Jt. Exh. J. On January

26, 2016, Miyasaka filed a Petition to Compel Arbitration of that action with the Superior Court. Jt. Exh. K. In its petition, Miyasaka asserts that the Superior Court should compel arbitration of the wage and hour claims made in Magaña's court complaint because those claims are covered in paragraph 2 of the February 27 arbitration agreement signed by Magaña and Miyasaka's representative, Robles. Miyasaka's petition also relies on the class action waiver in the Magaña arbitration agreement to seek dismissal of the class action allegations in the complaint. At the time of this hearing, a hearing on Miyasaka's petition to compel arbitration was scheduled for June 29.

C. Analysis and Conclusions

1. Introduction

Collectively-bargained arbitration has been long utilized as a staple in the employment context to resolve contractual disputes between employees and their employer. This case does not involve a collectively-bargained arbitration agreement. Instead, it involves an arbitration agreement unilaterally devised by the employer and required of employees as a condition of employment, a totally different breed of arbitration agreement. The sweep of adhesive agreements, such as the ones involved here and in the companion case also decided today, are invariably far broader than that found in a collectively-bargained arbitration system. The latter are typically limited in their scope to the construction and application of the collective-bargaining agreement itself or, at most, the agreement and a limited number perhaps shop-floor or industry practices. I have yet to see one that included a class action waiver and it is rare to see statutory worker protections addressed unless the particular protection is somehow woven into the fabric of the collective-bargaining agreement itself.

By contrast, the adhesive agreements imposed by unorganized employers in recent years invariably include class action waivers and expand the scope of coverage to all manner of statutory protections

established at the federal, state, and local levels of government for the benefit employees over the last 80 or so years. Written employment contracts involving unrepresented employees are rare so it could be expected that the scope of arbitrable issues of a contractual nature arising in this context would be limited to often-futile attempts to prove an implied employment agreement of some sort or another. These emerging adhesive employment arbitration agreements thus serve to privatize employer-employee disputes not only about the direct employment relationship but also about a broad range of statutory protections available to employees under a variety of federal, state and local laws.

Adhesive arbitration practices became ubiquitous throughout the United States in the financial and consumer goods industries. Considerable precedent has emerged in the past four decades involving the enforceability of those perceived agreements that result largely from conditions imposed for consumers to merely have access common everyday goods and services. Once the proponents of this system experienced success in resurrecting the long-dormant FAA to insure their enforceability, the adhesive employment arbitration schemes soon followed suit.

Knowledgeable critics of this trend charge that these policies, especially as applied in the work place, seek mainly to privatize a broad range of statutory worker protections and to individualize the resolution of both contractual and statutory disputes, all for the employer's benefit.¹⁰ More strident critics charge that such arrangements amount to the resurrection of the "yellow dog" contract,¹¹ the specific abuse of worker First

¹⁰ See Julius G. Getman, *The Supreme Court on Unions, Why Labor Law is Failing American Workers*, Cornell University Press, 2016, Ch. 8 "The Supreme Court and Arbitration," pp 160-189.

¹¹ See e.g., Seligman and Clark, *Corporate America's oily trick: How big business uses "yellow-dog contracts" to crush basic rights*, Salon, Nov. 7, 2014. www.salon.com

Amendment associational rights thought to have been rendered judicially unenforceable by the Norris-LaGuardia Act (Norris-La Guardia) and made unlawful under the National Labor Relations Act (NLRA).¹²

2. The statute of limitations issue

a. Argument

Miyasaka argues that the allegations in the General Counsel’s complaint should be dismissed as untimely because the ALRA section 1160.2 limitations period bars the issuance of a complaint more than six months after an alleged unfair labor practice occurred. Miyasaka asserts that this time period began to run in February 2015 when Magaña signed the arbitration agreement and would have expired six months from the date of signing that February signing, well before Magaña filed his ALRB charge on February 4, 2016. Miyasaka contends that because the only “arbitration agreement that is the subject of the ULP and the Complaint was signed on February 27, 2015, more than six months before Charging Party filed the ULP, the complaint should be dismissed as untimely under the statutory limitation period. R. Br. pp. 3-4.

The General Counsel argues the complaint is supported by a timely charge as it alleges Miyasaka *maintained and sought to enforce* a mandatory arbitration policy in violation ALRA section 1153(a) during the limitation period and continues to do so to date. See First Amended Complaint ¶¶ 21 and 22, and 27 through 29.

b. Analysis

Magaña’s unfair labor practice charge alleges that since February 27, 2015, “and continuing to date, (Miyasaka) has unlawfully required, as a condition of employment, that employees waive their right to

¹² See the Norris-LaGuardia Act, 29 U.S.C. sections 101 et seq. From its earliest days, the NLRB has held yellow-dog contracts unlawful under the NLRA. See e.g. *Carlisle Lumber Company* (1936) 2 NLRB 248.

engage in protected concerted activity by signing waivers of the right to file and participate in class actions” in violation of the Act. The charge further alleges that Miyasaka had recently sought court enforcement of this mandatory condition of employment.

Although it is true that Magaña clearly signed the 2015 arbitration agreement outside the section 1160.2 six-month limitations period, neither the charge nor the complaint allege his signing of that agreement as the unfair labor practice to be remedied in this case. Instead, the complaint merely pleads the signing as an incidental fact, but the plain language of Magaña’s charge and the complaint specifies that the continuing nature of Miyasaka’s mandatory arbitration policy and its efforts to enforce it as the unfair labor practice. The arbitration agreement itself in the context of this case is merely an instrument used by Miyasaka to implement its arbitration policy set forth in its employee manual. Contrary to Miyasaka’s apparent outlook as to the scope of this dispute, I find this matter involves the lawfulness of the policy, which it perhaps adopted outside the limitations period, but which it nonetheless continues to maintain, give effect to during the limitations period, and defends in this case. By maintaining the vitality and enforceability of its arbitration policy during the limitations period, Miyasaka may be found to have violated the Act even though Magaña and others signed on to the implementing agreements outside the limitations period. *Ruline Nursery Co. v. ALRB* (1985) 169 Cal App. 3d 247, 266, quoting from *Julius Goldman's Egg City*, 6 ALRB No. 61, at p. 5, and citing *Machinists Local v. Labor Board* (1960) 362 U.S. 411, 416, the seminal case on this question. See also *PJ Cheese, Inc.* (2015) 362 NLRB No. 177 slip op. at 1 (defense that violation was time barred because arbitration policy was implemented and agreement signed outside limitations period rejected where it was found that the policy was maintained within the limitations period). As the evidence shows that

Miyasaka unquestionably maintained and gave effect to its arbitration policy within the six-month limitation period, I conclude that Miyasaka's statute of limitations defense lacks merit.¹³

In another component of its argument about the statute of limitations, Miyasaka asserts that it has a constitutional right to seek enforcement of its arbitration agreement in the Santa Cruz Superior Court.¹⁴ R Br. p. 4. Whenever a court becomes aware that an agreement is illegal, it has a duty to refrain from entertaining an action to enforce it. See e.g. *Bill Johnson's Restaurants v. NLRB* (1983) 461 U.S. 731, at 737 fn. 5 (federal courts); *Bovard v. American Horse Enterprises* (1988) 201 Cal App 3d 832 (California state courts).

Here, the General Counsel does not seek an immediate restraint on Miyasaka's constitutional right of access to the courts obviously protected by the First Amendment so clearly recognized in the context of labor disputes. See *Bill Johnson's Restaurants v. NLRB* (1983) 461 U.S. 731; *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966). Instead, in this administrative proceeding, she only places Miyasaka's right to do so in

¹³ Miyasaka raises no issue over the fact that the ALRB-access aspect of the General Counsel's complaint is not mentioned in Magaña's charge so I find it unnecessary to belabor or rule on that point. Suffice it to say the General Counsel is not bound to the four corners of a charge if her investigation produces evidence of other clearly related violations. See e.g. *Nish Noroian Farms*, supra., at 736 (the final complaint need not adhere to the specific matters alleged in the charge); *Ruline* at 267-268 (approving a complaint amendment at the hearing adding a closely related allegation not mentioned in the charge, citing with approval the conclusion in *NLRB v. Fant Milling* (1959) 360 U.S. 301 that "(o)nce the Board's jurisdiction has been invoked by the filing of a charge, its General Counsel is free to make full inquiry under its broad investigatory power in order to properly discharge its duty of protecting public rights.") In my judgement, the General Counsel's ALRB-access allegation is a closely related unlawful interference flowing from Miyasaka's arbitration policy.

¹⁴ The General Counsel's plainly seeks to do just that as the remedial action the complaint seeks includes a requirement that Miyasaka cease and desist from pursuing its petition to compel arbitration or move to vacate any order already entered that compels arbitration under the disputed agreements.

question which she is certainly entitled to do where, as here, she seeks to prove in an appropriate forum that the agreement is unlawful. In this context any restraint on Miyasaka’s constitutional right of court access would only occur to effect a remedial requirement after the entry of a final order in a judicially-reviewable administrative proceeding seeking to interdict the use the courts to enforce an unlawful agreement. The ALRB General Counsel clearly has the right to do exactly what she seeks to do here, or in other like situations. See *Bill Johnson’s* at 744 (holding that Congress empowered the NLRB in “proper” cases the remedy to enjoin a baseless lawsuit as an unfair labor practice brought against an employee in retaliation for exercising NLRA § 7 rights). As the General Counsel simply seeks a remedial order applicable only after a final adjudication that Miyasaka has petitioned the Superior Court to enforce an unlawful agreement, I find this ancillary argument also lacks merit.

3. First cause of action: The alleged prohibition against filing ALRB charges

a. Argument

Although the General Counsel implicitly concedes that Miyasaka’s arbitration policy and standard arbitration agreement do not explicitly preclude employees from filing unfair labor practice charges with the ALRB, she argues that “the present arbitration agreement implies that an employee waives his or her right to file charges with the Board.” GC Br. p. 9. In support of her conclusion, she relies on a similar finding by the NLRB in *D.R. Horton, Inc.* (2012) 357 NLRB 2277 enf. granted in relevant part (5th Cir. 2013) 737 F.3d 344, and *Murphy Oil USA, Inc.* (2014) 361 NLRB No. 72, enf. granted in relevant part (5th Cir. 2015) 808 F.3d 1013. In both cases, the NLRB concluded that the employer’s arbitration policies violated NLRA § 8(a)(1) because employees could reasonably read them as a prohibition against the filing of NLRB charges. The Fifth Circuit

enforced that portion of both NLRB remedial orders. *Horton*, 737 F.3d at 363-364; *Murphy Oil*, 808 F.3d at 1021.

Miyasaka argues that it never used its arbitration policy or agreements to prevent the filing of an ALRB charge by Magaña or any other employee. For this reason, it asserts that the General Counsel's theory that the arbitration agreement precludes agricultural workers from filing unfair labor practice charges with the ALRB "is pure speculation unsupported by facts or reasonable inference." Miyasaka also argues that the language of the agreement belies the General Counsel's allegation. It points to the portion of the agreement language specifying that the company and the employee agree to waive any right to file any class or representative claims addressing wages or other terms and conditions of employment in any forum only "to the extent permitted by law." (Jt. Exh. B, ¶ 3) Additionally, Miyasaka points to language in paragraph 2 of the arbitration agreement stating that "to the extent permitted by law, the Company and I ... waive any and all of our rights to have any arbitrable claims or disputes that we have be heard or adjudicated in any other type of forum" R. Br. pp 4-5.

b. Analysis

It is well established under NLRB case law that an employer violates § 8(a)(1) of the NLRA by maintaining workplace rules and policies, such as the Miyasaka arbitration policy, that would reasonably tend to chill employees in the exercise of their § 7 rights.¹⁵ *Lafayette Park Hotel*, 326 NLRB 825, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999). To determine whether particular rules or policies, including arbitration policies, violate § 8(a)(1), the NLRB employs the analytical framework originally set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *D.R.*

¹⁵ NLRA sections 7 and 8(a)(1) correspond to ALRA sections 1152 and 1153(a), respectively.

Horton, supra. Under *Lutheran Heritage*, a work rule or policy is unlawful if “the rule explicitly restricts activities protected by Section 7.” *Lutheran Heritage*, supra at 646. If the work rule does not explicitly restrict protected activities, it nonetheless violates Section 8(a)(1) if “(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” *Id.* at 647. As an objective test such as that found in *Lutheran Heritage* is also generally appropriate when applying ALRA § 1153(a) in similar situations, I find it appropriate to utilize that analytical framework here. See ALRA § 1148; see also *Karahadian Ranches, Inc. v ALRB* (1985) 38 Cal. 3d 1; *Carin v ALRB* (1984) 36 Cal. 3d 654.

Applying *Lutheran Heritage*, I find Miyasaka’s arbitration policy does not explicitly prohibit its agricultural employees from filing charges with the ALRB. Nor is there any evidentiary support for a conclusion that Miyasaka promulgated its arbitration policy or agreements in response to union activity. And as Miyasaka’s brief correctly argues, no evidence establishes that it took steps to interfere with the filing or processing of Magaña’s charge in this case. But this latter argument misses a critical point.

Miyasaka’s discerning employees could still reasonably construe the language of its arbitration policy and agreement as a prohibition against the filing of ALRB charges. It is of no moment that Miyasaka did not intend to prohibit the filing of ALRB charges by its employees or that it made no effort to interfere with what Magaña did here. Rather, the relevant focus of an inquiry under *Lutheran Heritage* centers on whether employees could reasonably conclude by reading the terms of the arbitration policy and standard arbitration agreement that they had to invoke the employer-mandated arbitration procedures instead of the statutorily established

processes, such as those found in the ALRA, to vindicate their work-place rights. If so, then the threshold for finding that Miyasaka's documents unlawfully chill employees in the exercise of their § 1152 rights has been met.

Miyasaka's reliance on the vague limiting phrase "to the extent permitted by law" is insufficient to overcome the more categorical and dominate language found in paragraph 2 of its policy and the implementing agreements which detail just some of the disputes encompassed by its mandatory policy. The arbitration policy explicitly requires its employees to individually arbitrate disputes related to wages, hours, benefits, discrimination and harassment, all of which are frequently at the core of disputes with employers that workers bring to the ALRB through the unfair labor practice charge medium. This specificity is followed immediately in the agreement with general language of an even greater sweep by including other claims cognizable under similar "state or federal statute(s)" apart from those concerning unemployment insurance or worker compensation claims. It is by no means a stretch to conclude that the use of this type of language in the arbitration policy or agreement could be reasonably construed by agricultural workers as a complete restraint on their right of access to public bodies such as the ALRB charged with enforcing their statutory rights. Such a conclusion is also reinforced by the language of paragraph 10 of the arbitration agreement that requires an arbitrator to apply the law from the court or public agency that ordinarily would have primary jurisdiction over the type of employment dispute at hand but for the arbitration agreement.

As I have concluded that Miyasaka's agricultural employees could reasonably construe the language of the used in the arbitration policy and agreement as precluding their access to the ALRB, I find that Miyasaka

violated, and is continuing to violate, § 1153(a), as alleged. See *D. R. Horton*, supra; *Bill's Electric, Inc.* (2007) 350 NLRB 292, 295-296.

4. Second cause of action: the class or collective action waiver

a. Argument

The General Counsel and the Charging Party argue that Miyasaka's maintenance and attempted enforcement of the class or collective action waiver contained in its arbitration policy and its arbitration agreements violate ALRA § 1153(a). They claim that the ALRA prohibits class action waivers and that this prohibition is not "preempted" by the FAA. The right to engage in concerted activity protected by ALRA §§ 1152 and 1153(a), they argue, includes the right to pursue legal actions on a class or collective basis. As the right to engage in concerted activity is a substantive rather than a procedural right, the FAA "savings" clause precludes the enforcement of arbitration agreements that unlawfully require employees to proscriptively waive their right to engage in protected concerted activities, such as pursuing legal actions on a class or collective basis in their employment disputes. In support, they rely on the NLRB's decisions in *Horton* and *Murphy Oil*, supra, as well as the recently issued opinion in *Lewis v. Epic Systems Corporation* (7th Cir. May 26, 2016 No. 15-2997) ___ F3d ___. Anticipating Miyasaka's arguments, the General Counsel also argues that Article III, Section 3.5(c) of the California Constitution precludes the ALRB from finding that the class or collective action protections based on ALRA § 1152 preempted by the FAA because no court of appeals has yet made such a determination.¹⁶

¹⁶ The relevant portion of Article III, Section 3.5 of the California Constitution provides that a California administrative agency "has no power . . . (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations."

Miyasaka argues that that the compulsory class action waivers contained in its arbitration policy and agreements do not violate the ALRA. It disputes the application of the NLRB's holdings in *Horton* and *Murphy Oil* to the facts of this case because: 1) the Fifth Circuit refused to enforce the class action holdings in both of those both cases; and 2) the California Supreme Court adopted the Fifth Circuit's *Horton* rationale in *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, to find a similar waiver lawful under the NLRA and the arbitration agreement containing it enforceable under the FAA. In Miyasaka's view, *Iskanian* requires the ALRB to conclude that class action waivers contained in its arbitration policy and agreements are lawful.

b. Analysis

The resolution of this important issue based on current developments is, to say the least, quite problematic. The NLRB's historic *Horton* decision begins with this paragraph that aptly sums up this the issue involved here:

In this case, we consider whether an employer violates Section 8(a)(1) of the National Labor Relations Act when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer *in any forum*, arbitral or judicial. For the reasons stated below, we find that such an agreement unlawfully restricts employees' Section 7 right to engage in concerted action for mutual aid or protection, notwithstanding the Federal Arbitration Act (FAA), which generally makes employment-related arbitration agreements judicially enforceable. In the circumstances presented here, there is no conflict between Federal labor law and policy, on the one hand, and the FAA and its policies, on the other.

Horton (2012) 357 NLRB 2277. [Emphasis added; Footnotes omitted.]

It has long been held that employer-imposed individual agreements requiring employees to prospectively waive rights protected by NLRA § 7 (which includes the right to engage in concerted activities for the purpose of “mutual aid and protection”) violate section 8(a)(1). See e.g. *National Licorice Co. v. NLRB*, (1940) 309 U.S. 350, 360-61. More recently, the Seventh Circuit, early on in its analysis of this issue in *Lewis*, supra, noted that “the Board has, ‘from its earliest days,’ held that ‘employer-imposed, individual agreements that purport to restrict § 7 rights’ are unenforceable.” *Lewis*, slip op. at p. 4, and the cases cited there. The Supreme Court acknowledged almost four decades ago that NLRA section 7 “protects employees from retaliation by their employer when they seek to improve their working conditions through resort to administrative and judicial forums.” *Eastex, Inc. v. NLRB* (1978) 437 U.S. 556, 565–566. In *Horton*, the NLRB expressly found that this principle extends to arbitration whether the arbitral system flows from collective-bargaining or is the employer’s unilateral creation. *Horton*, supra at 2278-79. Going further, *Horton* concluded that as an employer imposed class or collective action waiver was unlawful under § 8(a)(1), such arbitration agreements fell within the FAA’s savings clause thereby rendering them unenforceable under that statute. *Horton* also found this conclusion reinforced by Norris-LaGuardia’ prohibition against the enforcement of agreements that restrict employee concerted activities. *Id.* at 2276-77.

As noted, the Fifth Circuit has rejected the NLRB’s conclusion in *Horton* that class or collective action waivers in employment arbitration agreements violate the NLRA, finding therefore that the FAA savings clause inapplicable. That court found that the FAA case law pointed it in a “different direction.” *Horton v. NLRB*, 737 F.3d at 357. In *Lewis*, the Seventh Circuit succinctly summarized its sister circuit’s approach thusly:

Drawing from dicta that first appeared in (*AT&T Mobility LLC v. Concepcion*), 563 U.S. at 348, and was then repeated in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2310 (2013), the Fifth Circuit reasoned that because class arbitration sacrifices arbitration’s “principal advantage” of informality, “makes the process slower, more costly, and more likely to generate procedural morass than final judgment,” “greatly increases risks to defendants,” and “is poorly suited to the higher stakes of class litigation,” the “effect of requiring class arbitration procedures is to disfavor arbitration.” *D.R. Horton*, 737 F.3d at 359 (quoting *Concepcion*, 563 U.S. at 348–52); see also *Italian Colors*, 133 S. Ct. at 2312. The Fifth Circuit suggested that because the FAA “embod[ies] a national policy favoring arbitration and a liberal federal policy favoring arbitration agreements,” *Concepcion*, 563 U.S. at 346 (internal quotation marks and citations omitted), any law that even incidentally burdens arbitration—here, Section 7 of the NLRA—necessarily conflicts with the FAA. See *D.R. Horton*, 737 F.3d at 360 (“Requiring a class mechanism is an actual impediment to arbitration and violates the FAA. The (FAA’s) saving clause is not a basis for invalidating the waiver of class procedures in the arbitration agreement.”).

Lewis, supra at slip op. at 14.

Subsequently, the NLRB signaled its nonacquiesce with the Fifth Circuit’s rationale by reaffirming its position in *Murphy Oil*, supra. But before *Murphy Oil*, the California Supreme Court decided the *Iskanian* case. *Iskanian*, a driver for CLS Trucking who had executed an arbitration agreement with his employer that waived the right to initiate class proceedings in connection with employment disputes, filed a class action lawsuit in state court on behalf of himself and similarly situated employees claiming that the employer failed to properly compensate employees for overtime and meal and rest periods, reimburse business expenses, provide accurate and complete wage statements, or pay final wages in a timely manner. (As found above, Magaña filed a similar suit against Miyasaka in September 2015). In the lower courts, *Iskanian* argued that the California

courts should not enforce the arbitration agreement on the ground that it was contrary to California public policy, was unconscionable, and was unlawful under the NLRB's *Horton* decision.

The California Supreme Court concluded in a 6-1 opinion, Justice Werdegar dissenting specifically on the class action waiver issue, that *Concepcion* compelled the enforcement of the Iskanian arbitration agreement. The majority opinion, authored by Justice Liu, concluded that *Concepcion* had effectively overruled California's restrictions on class action waivers in both consumer arbitration agreements and employment arbitration agreements as reflected in the Court's prior opinions in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148, and *Gentry v. Superior Court* (2007) 42 Cal.4th 443, respectively. The majority also rejected Iskanian's claim that class action waivers are unlawful under the NLRA.

In dealing with the NLRA issue, the *Iskanian* majority specifically endorsed the Fifth Circuit's opinion concerning the class or collective action waiver issue in *Horton*, point-by-point. It first agreed with the Fifth Circuit's conclusion that the NLRB's class action waiver rule in *Horton* was not covered by the FAA's savings clause.¹⁷ "*Concepcion* makes clear" the Iskanian court said, "that even if a rule against class waivers applies equally to arbitration and nonarbitration agreements, it nonetheless interferes with fundamental attributes of arbitration and, for that reason, disfavors arbitration in practice." *Iskanian*, 59 Cal.4th at 372.

Next, the California Supreme Court agreed with the Fifth Circuit's conclusion that nothing in the NLRA's text or legislative history contained a congressional command prohibiting class action waivers so that it could

¹⁷ The FAA savings clause is found in section 2, which provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In *Horton* and *Murphy Oil*, the NLRB held that attempts to enforce arbitration agreements that violate the NLRA by barring protected, concerted litigation met the requirements under the FAA's savings clause. Federal courts have a "duty to determine whether a contract violates federal law before enforcing it. *Kaiser Steel Corp. v. Mullins* (1982) 455 U.S. 72, 83-84.

be said that the NLRA “conflicts with and takes precedence over the FAA.” *Id.* Both courts also rejected assertions that there was an inherent conflict between the NLRA and the FAA. The California Supreme Court twice noted with apparent approval the significance the Fifth Circuit placed in the fact that “the NLRA was enacted and reenacted prior to the advent in 1966 of modern class action practice” and, the Fifth Circuit’s observation that even any argument that there could be about an inherent conflict between the FAA and NLRA when the NLRA would have to be protecting a right of access to a procedure that did not exist when the NLRA was last reenacted (1947) had “limited force.”¹⁸ *Id.* at 371-72.

The Court also found significant that the U.S. Supreme Court has enforced class action waivers in the past even in the face of a federal statute (the Age Discrimination in Employment Act) that provides “permission” to bring class enforcement actions. *American Express Co. v. Italian Colors Restaurant* (2013) 570 U.S. _____. This holding, the Court observed, “reinforces our doubt that the NLRA’s general protection of concerted activity, which makes no reference to class actions, may be construed as an implied bar to a class action waiver.” *Iskanian* at 373.

Regardless, the Court said its conclusion did not mean that “the NLRA imposes no limits on the enforceability of arbitration agreements.” Thus, it found it notable that the Fifth Circuit had enforced the NLRB’s order in *Horton* based on its finding that it “contained language that would lead employees to reasonably believe they were prohibited from filing unfair labor practice charges with the Board.” *Id.* at 374. The Court then concluded this portion of its multifaceted decision with the following:

Moreover, the arbitration agreement in the present case, apart from the class waiver, still permits a broad range of collective activity to vindicate wage claims. CLS points out that the

¹⁸ In *Lewis v. Epic Systems*, *supra*, the Seventh Circuit sharply criticizes this argument noting that class action procedures have existed for centuries.

agreement here is less restrictive than the one considered in *Horton*: The arbitration agreement does not prohibit employees from filing joint claims in arbitration, does not preclude the arbitrator from consolidating the claims of multiple employees, and does not prohibit the arbitrator from awarding relief to a group of employees. The agreement does not restrict the capacity of employees to “discuss their claims with one another, pool their resources to hire a lawyer, seek advice and litigation support from a union, solicit support from other employees, and file similar or coordinated individual claims.” (*Horton I*, supra, 357 NLRB No. 184, p. 6; cf. *Italian Colors*, supra, 570 U.S. at p. ____, fn. 4 [making clear that its holding applies only to class action waivers and not to provisions barring “other forms of cost sharing”].) *We have no occasion to decide whether an arbitration agreement that more broadly restricts collective activity would run afoul of section 7.*

(Emphasis added) *Id.* at 374. Whatever the Court intended by this highly ambiguous language, I conclude that it does not license a trial judge to revisit *Iskanian*’s treatment of the NLRB’s *Horton* rule merely because Miyasaka’s arbitration policy standard arbitration agreement is arguably far more onerous than the one before the Court.

In an effort to explain away the impact of *Iskanian* on the outcome here, the General Counsel advances two arguments that merit discussion. First, she argues, in effect, that *Iskanian* is obsolete because there have been numerous important developments since the California Supreme Court’s 2014 *Iskanian* decision. Second, she claims that the Board cannot refuse to enforce the ALRA’s protection of concerted activities on the ground that the FAA “preempts” such enforcement because there has been no decision to that effect by an appellate court as required by Article III, Section 3.5(c) of the California constitution.

It is true that *Iskanian* issued early in the hubbub that has erupted over the NLRB’s *Horton* decision. Thus, *Iskanian* issued before the NLRB responded to the Fifth Circuit’s *Horton* rationale with a lengthy decision in

Murphy Oil, supra, that signaled that agency’s decision to stick with the conclusion it reached in *Horton* until eventually resolved by the U.S. Supreme Court.

And *Iskanian* issued nearly two years before the Seventh Circuit’s decision in *Lewis v Epic Systems*, supra. In that case, the Seventh Circuit, in a situation involving an arbitration agreement comparable to the one here, found the class action waiver in that agreement unlawful under the NLRA and unenforceable under the FAA because the concerted activity protection in NLRA § 7 meets the “criteria of the FAA’s saving clause for nonenforcement.” Concluding that the NLRA and FAA “work hand in glove,” Chief Judge Wood’s opinion in *Lewis* goes on to summarize the Fifth Circuit’s rationale in *Horton* which I have quoted above, and then bluntly rejects it in no uncertain terms as follows:

There are several problems with this logic. First, it makes no effort to harmonize the FAA and NLRA. *When addressing the interactions of federal statutes, courts are not supposed to go out looking for trouble: they may not “pick and choose among congressional enactments.” Morton*, 417 U.S. at 551. Rather, they must employ a strong presumption that the statutes may both be given effect. See *id.* The savings clause of the FAA ensures that, at least on these facts, there is no irreconcilable conflict between the NLRA and the FAA. (Emphasis added)

Lewis v Epic Systems, (7th Cir. 2016) ___ F3d ___, slip op. at p. 14-15.

The body of criticism of the Fifth Circuit’s *Horton* decision does not stop there. Review is presently pending in the Ninth Circuit of the NLRB’s decision in *Country Wide Financial, et al* (2015) 362 NLRB No. 165, which applied the *Horton/Murphy Oil* rationale to find a class action waiver in an arbitration agreement unlawful in that case. See *Countrywide Financial Corporation; Countrywide Home Loans, Inc.; and Bank of America Corporation v. National Labor Relations Board* (9th Cir.) Nos.

15-72700 and 15-73222. In that proceeding a group of labor law scholars who have written extensively in the past about the relationship of federal labor law under the Norris-LaGuardia Act and the NLRA with the FAA have filed an amicus brief (hereafter Amici Scholars) supporting the NLRB's *Horton/Murphy Oil* rationale. That brief is notable for the following contention it singles out and advances based exclusively on Norris-LaGuardia:

The plain language of Norris-LaGuardia prevents federal courts from enforcing “any . . . undertaking or promise in conflict with the public policy” that employees “shall be free from interference . . . of employers . . . in . . . concerted activities for the purpose of mutual aid or protection.” 29 U.S.C. §§ 102, 103. The Supreme Court has construed the term “concerted activities for the purpose of . . . mutual aid or protection” to include seeking redress in court. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66, 98 S. Ct. 2505, 2512 (1978).

Amici Scholars Br., p. 2. After reviewing the history of this 1932 statute, the Amici Scholars' brief argues that no appellate court rejecting the NLRB's reasoning in *Horton* has fully rationalized the import of Norris-LaGuardia or “explained why it is not controlling.” That brief is particularly critical of the Fifth Circuit in *Horton* for dismissing the relevance of Norris-LaGuardia in footnote 10 of its decision that tersely concludes that statute is “outside the Board's interpretative ambit” and then paying no further heed to Norris-LaGuardia at all.

No doubt I could research and locate numerous other criticisms of the Fifth Circuit's *Horton* decision but it would not alter the critical fact here that the California Supreme Court agreed with that federal appellate court's conclusion in *Iskanian* that class action waivers do not violate the NLRA. It has yet to reverse course by adopting something akin to the *Lewis v. Epic Systems* rationale, or the type of independent rationale

suggested by the Amici Scholars described above. I note that ALRA § 1148 commands the ALRB to apply NLRA precedent, as opposed to NLRB precedent as the General Counsel's brief states. Simply put, in *Iskanian* the California Supreme Court concluded that class action waivers do not violate the NLRA and are enforceable under the FAA. Whether I or the NLRB or the Seventh Circuit agrees or disagrees with that viewpoint is immaterial. California's highest court held just over two years ago that class action waivers do not violate the NLRA. That does not leave me in any position to declare that conclusion obsolete at this early stage of this developing case law.

I also find that the *Iskanian* decision fully answers the constitutional question raised by the General Counsel. *Iskanian* squarely addressed the precise precedent the General Counsel would have me apply here. While it is true that *Iskanian* is not couched in preemption terms, it concluded in unmistakable terms that the FAA commands the enforcement of adhesive arbitration agreements containing class action waivers because the defense against their enforcement based on the argument that such waivers are unlawful under the NLRA lacks merit. Even assuming that I have authority to address constitutional claims (which I highly doubt) *Iskanian*, in my judgment, fully satisfies the constitutional requirement for a decision by an appellate court under Article III, Section 3.5(c).

Having concluded that the California Supreme Court reached the conclusion in *Iskanian* that class action waivers in arbitration agreements are lawful under NLRA § 7, I find that conclusion to be the controlling precedent in California that state administrative agencies such as the ALRB are obliged to follow. Accordingly, I find Miyasaka's class action waiver provided for in its arbitration policy does not violate ALRA § 1153(a) as alleged in the complaint. Accordingly that allegation will be dismissed.

CONCLUSIONS OF LAW

1. The Respondent violated section 1153(a) of the Act by maintaining and enforcing an arbitration policy and arbitration agreement as a condition of employment that its employees could reasonably construe as limiting their right to file charges with the ALRB.

2. The requirement in Respondent's arbitration policy and arbitration agreements requiring its employees as a condition of employment to arbitrate their employment related disputes with the Respondent only on an individual basis does not violate the Act.

REMEDY

Having concluded that Miyasaka has violated the Act it will be required to cease and desist therefrom and take certain affirmative action specified below.

Miyasaka will be required to post and maintain the notice to employees attached hereto in the appropriate languages for a period of 60 days, provide access to Board agents for the purpose of reading and distributing the notice to employees, and to answer employee questions outside the presence any supervisor and managerial employee, all in the manner specified in the recommended Order below. Miyasaka will also be required to promptly amend its arbitration policy and every arbitration agreement executed by an employee since the inception of its that policy to provide explicitly that nothing in its arbitration policy or arbitration agreement may be construed to prohibit its employees from filing charges with the Agricultural Labor Relations Board. It will also be obliged to notify all employees and former employees of this amendment and provide

them a copy of it written in the same language as the original arbitration agreement signed by that employee.¹⁹

Based on these findings of fact, conclusions of law, and the entire record in this matter, I hereby issue the following

ORDER

Pursuant to Labor Code section 1160.3, Respondent, T. T. Miyasaka, Inc., its officers, agents, labor contractors, successors and assigns shall:

1. Cease and desist from:

(a) Maintaining or attempting to enforce an arbitration policy or an arbitration agreement that does not explicitly state that nothing in the policy is to be construed to prohibit or prevent any agriculture employee from filing an unfair labor practice charge with the Agricultural Labor Relations Board (ALRB) or otherwise having access to the services of the ALRB.

(b) In any like or related manner interfering with, restraining or coercing any agricultural employee in the exercise of the rights guaranteed by section 1152 of the Agricultural Labor Relations Act (Act).

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

(a) Immediately amend its arbitration policy and arbitration agreement form to explicitly provide that nothing in the arbitration policy or any arbitration agreement signed by an agricultural employee shall be construed as to prohibit or limit in any way access to the Agricultural Labor Relations Board (ALRB) for the purpose of filing an unfair labor practice charge or utilizing any other service provided by the ALRB.

(b) Promptly notify by mail all current and former agricultural employees who have signed an arbitration agreement of this amendment to the arbitration policy and provide each of them a copy of the amendment made to the arbitration agreement previously signed by them.

¹⁹ I find the requirement to notify former employees of this amendment is warranted by reason of the fact that the arbitration agreement purports to cover disputes that arise after the employee's period of employment.

(c) Upon request of the Regional Director, sign the Notice to Agricultural Employees attached hereto and, after its translation by a Board agent into all appropriate languages, reproduce sufficient copies in each language for the purposes set forth hereinafter.

(d) Post copies of the attached Notice, in all appropriate languages, in conspicuous places on its property, for 60 days, the period(s) and place(s) to be determined by the Regional Director, and exercise due care to replace any Notice which has been altered, defaced, covered or removed.

(e) Arrange for a representative of Respondent or a Board agent to distribute and read the attached Notice, in all appropriate languages, to all employees then employed, on company time and property, at time(s) and place(s) to be determined by the Regional Director. Following the reading, the Board agent shall be given the opportunity, outside the presence of supervisors and management, to answer any questions the employees may have concerning the Notice or their rights under the Act. The Regional Director shall determine a reasonable rate of compensation to be paid by Respondent to all non-hourly wage employees in order to compensate them for time lost during the reading of the Notice and the question-and-answer period.

(f) Mail copies of the attached Notice, in all appropriate languages, within 30 days after the issuance of this Order, to all current and former agricultural employees employed by Respondent who have signed an arbitration agreement at their last known addresses.

(g) Provide a copy of the Notice to each agricultural employee hired to work for Respondent during the twelve-month period following the issuance of a final order in this matter.

(h) Notify the Regional Director in writing, within thirty days after the date of issuance of this Order, of the steps Respondent has taken to comply with its terms.

(i) Upon request of the Regional Director, Respondent shall notify the Regional Director periodically in writing of further actions taken to comply with the terms of this Order until notified that full compliance has been achieved.

IT IS FURTHER ORDERED that the second cause of action in the General Counsel's complaint be and hereby is dismissed.

DATED: August 8, 2016.

William L. Schmidt
Administrative Law Judge

NOTICE TO AGRICULTURAL EMPLOYEES

After investigating charges that were filed in the Salinas Regional Office of the Agricultural Labor Relations Board (ALRB), the General Counsel of the ALRB issued a complaint alleging that we had violated the law. After a hearing at which all parties had an opportunity to present evidence, the ALRB found that we had violated the Agricultural Labor Relations Act (Act) by maintaining and attempting to enforce an unlawful arbitration policy and arbitration agreement you were required to sign that interfered with your rights under Section 1152 of the Act.

The ALRB has told us to post and publish this Notice.

The Agricultural Labor Relations Act is a law that gives you and all other farm workers in California the following rights:

1. To organize yourselves;
2. To form, join or help a labor organization or bargaining representative;
3. To vote in a secret ballot election to decide whether you want a union to represent you;
4. To bargain with your employer about your wages and working conditions through a union chosen by a majority of the employees and certified by the ALRB;
5. To act together with other workers to help and protect one another; and
6. To decide not to do any of these things.

Because you have these rights, we promise that:

WE WILL NOT maintain or attempt to enforce an arbitration policy or an arbitration agreement that does not explicitly state that nothing in the policy or agreement may be construed to prohibit or prevent you from filing an unfair labor practice charge with the Agricultural Labor Relations Board (ALRB) or otherwise having access to the services of the ALRB.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees from exercising their rights under the Act.

WE WILL immediately amend our arbitration policy and our arbitration agreement form to explicitly provide that nothing in the arbitration policy or any arbitration agreement signed by you may be construed as to prohibit or limit in any way your access to the Agricultural Labor Relations Board (ALRB) for the purpose of filing an unfair labor practice charge or utilizing any other service provided by the ALRB.

WE WILL promptly notify by mail all of our current and former agricultural employees who have signed an arbitration agreement of this amendment to our arbitration policy and all of our arbitration agreements with agricultural employees and **WE WILL** provide each of you with a copy of the amendment made to the arbitration agreement you have previously signed.

DATED:

T. T. MIYASAKA, INC.

By: _____
(Representative) (Title)