Dish Network, LLC *and* Brett Denney. Case 27–CA–158916

April 13, 2017

DECISION AND ORDER

BY ACTING CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

Upon a charge, a first amended charge, and a second amended charge, filed by Brett Denney on August 28, 2015, September 10, 2015, and November 12, 2015, respectively, the General Counsel issued a complaint and notice of hearing on December 14, 2015, and an amended complaint on March 25, 2016, alleging that the Respondent violated Section 8(a)(1) of the Act by prohibiting the Charging Party from discussing his suspension with coworkers and has been violating Section 8(a)(1) by, at all material times, maintaining and enforcing its "Arbitration Agreement."

On March 25, 2016, the Respondent, the Charging Party, and the General Counsel filed a joint motion to waive a hearing and a decision by an administrative law judge and to transfer this proceeding to the Board for a decision based on a stipulated record. On May 27, 2016, the Board granted the parties' joint motion. Thereafter, the Respondent and the General Counsel filed briefs.

On the entire record and briefs, the National Labor Relations Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Colorado corporation with its headquarters in Englewood, Colorado, and a sales center in Littleton, Colorado, provides satellite television and other media services. Annually, the Respondent purchases and receives at the Littleton Call Center goods valued in excess of $50,000 directly from points located outside Colorado, and the Respondent derives gross revenues in excess of $100,000. At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Facts

Since October 24, 2013, the Respondent has required all applicants for employment to sign and date its Arbitration Agreement. The agreement provides, in relevant part:

> This Mandatory Arbitration of Disputes—Waiver of Rights Agreement ("Agreement") acknowledged today between DISH Network L.L.C. and all of its affiliates (the term "affiliates" means companies controlling, controlled by or under common control with, DISH Network L.L.C.) (DISH Network L.L.C. and its affiliates are individually and collectively referred to herein as "DISH") and me ("Employee"). In consideration of the Employee's employment by DISH (and/or any of its affiliates) as good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Employee and DISH agree that any claim, controversy and/or dispute between them, arising out of and/or in any way related to Employee's application for employment, employment and/or termination of employment, whenever and wherever brought, shall be resolved by arbitration. The Employee agrees that this Agreement is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq., and is fully enforceable.
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> . . . . Regardless of what the above-mentioned Rules state, all arbitration proceedings, including but not limited to hearings, discovery, settlements, and awards shall be confidential and shall be held in the city in which the Employee performs services for DISH as of the date of the demand for arbitration, or in the event the Employee is no longer employed by DISH, in the city in which the Employee last performed services for DISH. The arbitrator's decision shall be final and binding, and judgment upon the arbitrator's decision and/or award may be entered in any court of competent jurisdiction.

The Arbitration Agreement does not have a procedure for the employee to opt-out of arbitration.

Since at least March 1, 2015, the Respondent has maintained the Arbitration Agreement (or a similar version of the Arbitration Agreement) at all of its nationwide locations.

The Charging Party, Brett Denney, was employed by the Respondent at its Littleton Call Center from about November 1, 2013, through March 11, 2015. On October 24, 2013, prior to being hired, Denney signed the Respondent's Arbitration Agreement.

From about November 12, 2013, to about March 11, 2015, the Respondent maintained a workplace policy titled, "Direct Sales Call Experience Expectations." The policy contained three categories (or tiers) of expectations of employees when dealing with the Respondent's customers. On November 12, 2013, after being hired, Denney signed a copy of this policy.

On about March 3, 2015,[1] the Respondent, by General Manager Emily Evans, suspended Denney because it suspected he had violated a Tier Three Expectations provision.[2] At the time of Denney's suspension he was under investigation for the suspected infraction, and Evans told Denney not to discuss his suspension with his coworkers.[3]

On about August 7, the Respondent filed, and has since maintained, a Demand for Arbitration with the American Arbitration Association pursuant to the Arbitration Agreement signed by Denney. The filing describes the Respondent's claim against Denney as one alleging "[c]onversion, unjust enrichment, and breach of contract."

B. Discussion

1. Arbitration Agreement

An employer violates Section 8(a)(1) if it maintains an arbitration policy that employees would reasonably believe interferes with their ability to file a Board charge or to access the Board's processes. *U-Haul Co. of California*, 347 NLRB 375, 377–378 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007). In *D. R. Horton*, 357 NLRB 2277, 2280 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and reaffirmed in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), cert. granted 137 S.Ct. 809 (2017), the Board endorsed the *Lutheran Heritage*[4] test for determining whether employer work rules interfere with employees' Section 7 rights. When, as here, the rule does not explicitly restrict activities protected by Section 7, the rule is nevertheless unlawful if (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to Section 7 activity; or (3) the rule has been applied to restrict the exercise of such activity. *Lutheran Heritage Village-Livonia*, 343 NLRB at 646–647; *D. R. Horton*, 357 NLRB at 2280. Additionally, in determining whether a challenged rule is unlawful, the rule must be given a reasonable reading, and particular phrases may not be read in isolation. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).

We find, as alleged, that the Respondent's maintenance of the Arbitration Agreement violates Section 8(a)(1) under prong (1) of the *Lutheran Heritage* test because employees would reasonably construe it to prohibit filing Board charges or otherwise accessing the Board's processes. The Agreement specifies in broad terms that it applies to "any claim, controversy and/or dispute between them, arising out of and/or in any way related to Employee's application for employment, employment and/or termination of employment, whenever and wherever brought." In *U-Haul Co. of California*, 347 NLRB at 377, the Board found that a policy requiring arbitration of "all disputes relating to or arising out of an employee's employment. . . [including] claims. . . recognized by . . . federal law or regulations" violated Section 8(a)(1) because employees reasonably would construe it to prohibit the filing of Board charges, notwithstanding that the policy did not explicitly prohibit employees from resorting to the Board's procedures. See also *D. R. Horton*, 357 NLRB 2278 at fn. 2. We reach the same conclusion here based on the breadth of the policy language encompassing "any claim . . . in any way related to . . . employment, whenever and wherever brought."

Additionally, the Agreement's confidentiality requirement independently violates Section 8(a)(1). A workplace rule that prohibits the discussion of terms and conditions of employment, as the Respondent's confidentiality provision does by prohibiting employees from discussing "all arbitration proceedings, including but not limited to hearings, discovery, settlements, and awards," is unlawfully overbroad. See, e.g., *Professional Janitorial Service of Houston*, 363 NLRB No. 35, slip op. at 1 & fn. 3 (2015) (finding unlawful confidentiality provision in arbitration policy that prohibited employees from discussing "any statements and information made or revealed during arbitration"). See also *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190, slip op. at 1–3 (2015) (finding unlawful rule that prohibited disclosure of "any information about the Company which has not been shared by the Company with the general public"); *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004) (finding unlawful handbook rule that prohibited disclosure of "confidential information," including "grievance/complaint information;"), enfd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006).

Contrary to another of the complaint's allegations, however, we do not find that the Agreement is unlawful under the rule of *D. R. Horton, Inc.*, supra, that an employer violates Section 8(a)(1) of the 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

[1] All dates are in 2015 unless otherwise indicated.

[2] The Respondent's policy states that the Tier Three provisions "are in place to represent DISH accurately and to avoid serious negative impacts on both the customer's experience and the company." The stipulated facts do not include specifics of Denney's purported infraction.

[3] Denney was not disciplined for any communications with coworkers regarding his suspension or the related investigation.

[4] *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).

against the employer in any forum, arbitral or judicial."[5] Here, the Agreement does not explicitly restrict class or collective claims, and the stipulated record is devoid of evidence that the Respondent sought to preclude employees from pursuing class or collective actions in any forum. Rather the Respondent's only action under the Arbitration Agreement involved its initiation of an arbitration claim against Denney.[6] In these circumstances, we cannot find on this record that employees reasonably would construe the language of the Agreement to restrict their class or collective rights. Accordingly, we dismiss this allegation.[7]

2. Respondent's instruction that Denney not discuss his suspension with others

The complaint additionally alleges that the Respondent violated Section 8(a)(1) by telling Denney not to discuss his suspension with his coworkers. We find merit to this allegation.

It is well established that employees have a Section 7 right to discuss discipline or disciplinary investigations with fellow employees. See *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 5–6 (2014); *Westside Community Mental Health Center*, 327 NLRB 661, 666 (1999). An employer's action to restrict those discussions is unlawful absent its demonstration of a legitimate and substantial business justification that outweighs the infringement on employee's Section 7 rights. *Banner Estrella Medical Center*, 362 NLRB No. 137, slip op. at 2–6 (2015); *Hyundai America Shipping Agency*, 357 NLRB 860, 874 (2011), enfd. in relevant part 805 F.3d 309 (D.C. Cir. 2015).[8]

Here, the stipulated facts show that the Respondent instructed Denney not to discuss his suspension with other employees, but they do not show that the Respondent offered any justification for its instruction.[9] Accordingly, the Respondent's instruction violated Section 8(a)(1). *Aliante Gaming,* 364 NLRB No. 80, slip op. at 1 (2016); *INOVA Health System*, 360 NLRB at 1228–1229.

CONCLUSIONS OF LAW

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

2. By maintaining, as a condition of employment, a mandatory arbitration agreement which employees reasonably would believe bars or restricts them from filing charges with the National Labor Relations Board or from accessing the Board's processes and by requiring employees to maintain the confidentiality of all arbitration proceedings, including but not limited to hearings, discovery, settlements, and awards, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act, and has violated Section 8(a)(1) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by prohibiting Brett Denney from discussing with other employees the discipline issued to him on March 3, 2015.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative actions designed to effectuate the policies of the Act. We shall also order the Respondent to rescind or revise its Agreement and to notify employees that it has done so. Because the Respondent utilized the arbitration policy on a nationwide basis, we shall order that the Respondent post a notice at

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[5] See also *Lewis v. Epic Systems*, 823 F.3d 1147 (7th Cir. 2016) (holding mandatory individual arbitration agreement that did not permit collective action in any forum violates the Act and is also unenforceable under the Federal Arbitration Act, 19 U.S.C §§1, et seq.), cert. granted 137 S. Ct. 809 (2017); *Morris v. Ernst & Young*, 834 F.3d 975 (9th Cir. 2016) (holding requirement that employees individually arbitrate all legal claims against employer constitutes concerted action waiver that violates the NLRA), cert. granted 137 S.Ct. 809 (2017).

[6] We further find that, as the stipulated facts do not show that the Respondent took any action to preclude group litigation in all forums, or gave any clear indication that it would do so, the Respondent's initiation of the arbitration proceeding against Denney did not amount to enforcement of the agreement in violation of Sec. 8(a)(1). See generally, *Citigroup Technology, Inc.*, 363 NLRB No. 55 (2015) (employer's opposition to class treatment of arbitration demand did not violate Sec. 8(a)(1) where its opposition was brought to the attention of the American Arbitration Association but was not the subject of a motion for dismissal in a court proceeding).

[7] Compare *Century Fast Foods, Inc.*, 363 NLRB No. 97, slip op. at 1 fn. 4 (2016) (finding Agreement unlawful where it did not explicitly restrict class or collective action but the employer had enforced the Agreement to restrict employees' Sec. 7 rights).

[8] We recognize that the Respondent's instruction to Denney not to discuss his suspension does not constitute a confidentiality "rule." Instructions directed solely at one employee that "were never repeated to any other employee as a general requirement" are not work rules. *Flamingo Las Vegas Operating Co.*, 360 NLRB 243, 243 & fn. 5 (2014). "Nonetheless, the same balancing of [an employer's] business justification against employee rights in evaluating the lawfulness of a confidentiality rule likewise applies to determine whether a confidentiality instruction issued to a single employee violates the Act." *INOVA Health System*, 360 NLRB 1223, 1229 fn. 16 (2014), enfd. 795 F.3d 68 (D.C. Cir. 2015).

[9] In its brief, the Respondent contends the instruction was justified to avoid speculation about what would happen to a new car Denney had been awarded as part of a Respondent-sponsored contest. However, the stipulation of facts is silent about the existence of any such concern. Moreover, even if the stipulated record had referenced such a concern, it would not justify the infringement of Denney's Sec. 7 right to discuss discipline. See generally *Hyundai America Shipping Agency*, supra at 874 (routine cautioning of employees not to discuss matters under investigation not justified by employer's assertion that doing so is necessary for protection of parties involved in the matter being investigated).

all locations where the Arbitration Agreement was in effect. See *D. R. Horton*, 357 NLRB at 2289.

ORDER

The National Labor Relations Board orders that the Respondent, Dish Network, LLC, Littleton, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining, as a condition of employment, a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board or to access the Board's processes.

(b) Maintaining a mandatory arbitration agreement that requires employees to maintain the confidentiality of all arbitration proceedings.

(c) Prohibiting employees from discussing with other employees any discipline issued to them or matters under investigation.

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

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

(a) Rescind its Arbitration Agreement in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration agreement does not restrict employees' right to file charges with the National Labor Relations Board or to access the Board's processes and that it does not require employees to maintain the confidentiality of arbitration proceedings.

(b) Notify all applicants and current and former employees who were required to sign the mandatory arbitration agreement in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Within 14 days after service by the Region, post at its Littleton, Colorado location copies of the attached notice marked "Appendix A" and at all other facilities where the unlawful arbitration agreement is or has been in effect, copies of the attached notice marked "Appendix B."[10] Copies of the notice, on forms provided by the Regional Director for Region 27, 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. If 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 marked "Appendix A" to all current and former employees employed by the Respondent at any time since October 24, 2013. If the Respondent has gone out of business or closed any facilities other than the one involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix B" to all current employees and former employees employed by the Respondent at those facilities at any time since October 24, 2013.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 27 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. April 13, 2017

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Mark Gaston Pearce, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

ACTING CHAIRMAN MISCIMARRA, concurring.

My colleagues find that the Respondent's Arbitration Agreement (Agreement) violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because employees would reasonably construe it to prohibit employees from filing Board charges or otherwise accessing the Board's processes. My colleagues also find that the Agreement's confidentiality requirement and the Respondent's instruction to employee Brett Denney not to discuss his suspension with other employees also violate Section 8(a)(1). I concur in these findings for the reasons stated below.[1]

[10] 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."

[1] I also concur in the majority's dismissal of the complaint allegation that the Agreement violated Sec. 8(a)(1) because it waived em-

1. Alleged interference with NLRB charge filing

In pertinent part, the Agreement requires employees to resolve by arbitration "any claim, controversy and/or dispute between [the employee and the Respondent], arising out of and/or in any way related to Employee's application for employment, employment and/or termination of employment, whenever and wherever brought . . . ." The Agreement further entitles the prevailing party in any arbitration to its reasonable attorneys' fees and costs, which specifically includes any fees and costs incurred in obtaining a stay or compelling arbitration in the event either party files "a judicial or administrative action asserting claims subject to this Agreement."

For the reasons stated in my separate opinion in *Applebee's Restaurant*, 363 NLRB No. 75, slip op. at 3–5 (2015) (Member Miscimarra, concurring in part and dissenting in part), I believe that an agreement may lawfully provide for the arbitration of NLRA claims, and such an agreement does not unlawfully interfere with Board charge filing, at least where the agreement expressly preserves the right to file claims or charges with the Board or, more generally, with administrative agencies. Here, however, the Agreement does not qualify in any way the requirement that all claims related to the employee's employment must be resolved exclusively in binding arbitration, and the broad scope of the Agreement appears to preclude any "administrative action," such as the filing of a Board charge. For this reason, I join my colleagues in finding that the Agreement violates the Act by unlawfully restricting the filing of charges with the Board. See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. mem. 255 Fed.Appx. 527 (D.C. Cir. 2007); *Murphy Oil*, above, slip op. at 23 fn. 4 (Member Miscimarra, dissenting in part) (finding that arbitration agreement unlawfully interfered with Board charge filing); *GameStop Corp.*, 363 NLRB No. 89, slip op. at 6–7 (Member Miscimarra, concurring in part and dissenting in part) (finding that Acknowledgment form—part of the employer's Rules of Dispute Resolution—unlawfully interfered with Board charge filing); *Applebee's Restaurant*, above (Member Miscimarra, dissenting in part) (finding that Agreement and Receipt for Dispute Resolution Program unlawfully interfered with Board charge filing).

ployees' right to participate in class or collective actions regarding non-NLRA employment claims. As my colleagues state, the Agreement does not restrict the ability of employees to pursue class or collective actions in all forums. Even if it did, I believe that the Agreement would be lawful for the reasons fully explained in my dissenting opinion in *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part), enf. denied in pert. part 808 F.3d 1013 (5th Cir. 2015), cert. granted 137 S.Ct. 809 (2017).

2. Confidentiality provision

The Agreement's confidentiality clause provides that "all arbitration proceedings, including but not limited to hearings, discovery, settlements, and awards shall be confidential." I believe this confidentiality provision violates Section 8(a)(1) because, as noted above, the Agreement encompasses unfair labor practice claims. Because many unfair labor practice claims involve concerted activity undertaken by two or more employees for the purpose of mutual aid or protection, the confidentiality clause at issue here—as applied to arbitration proceedings addressing alleged violations of the NLRA—would be plainly inconsistent with the Act. There may be circumstances where an arbitration agreement's confidentiality provision may be lawful based on justifications unrelated to the NLRA, particularly when the matter being arbitrated does not implicate NLRA-protected activity. However, this is not such a case, and the record reveals no countervailing interest that justifies the scope of the confidentiality clause at issue here. See *Professional Janitorial Service of Houston*, 363 NLRB No. 35, slip op. at 5 fn. 7 (2015) (Member Miscimarra, concurring in part and dissenting in part).[2]

[2] Unlike my colleagues, I do not rely on *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190 (2015), because I believe the confidentiality provision at issue there was lawful for the reasons expressed by former Member Johnson, id., slip op. at 3 fn. 6, and because I also disagree with the *Lutheran Heritage* "reasonably construe" test applied by the Board in *Rio All-Suites Hotel & Casino*. See *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 7–24 (2016) (Member Miscimarra, concurring in part and dissenting in part) (rejecting the "reasonably construe" standard articulated by the Board in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)).

The Respondent also contends that the Federal Arbitration Act (FAA) requires that the confidentiality provision in the Agreement be found lawful "when balanced against the lack of any substantive risk to employee's [sic] Section 7 rights." For the reasons stated in the text, I believe the Agreement's confidentiality provision unlawfully interferes with NLRA Sec. 7 rights, since the Agreement requires arbitration of claims arising under the NLRA. To the extent that the Respondent contends that the FAA requires enforcement of arbitration confidentiality provisions regardless of their impact on Sec. 7 rights, the Board has already rejected such a claim. See *California Commerce Club, Inc.*, 364 NLRB No. 31, slip op. at 1 fn. 2, 9–10 (2016); id., slip op. at 3 fn. 8 (Member Miscimarra, concurring in relevant part). The Supreme Court has also recognized that the FAA's requirement that arbitration agreements be enforced according to their terms may be overridden by a "contrary Congressional command." *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2309 (2013) (citing *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987)). I believe that the protection NLRA Sec. 7 affords to concerted activities undertaken for the purpose of mutual aid or protection constitutes a "contrary Congressional command" with respect to confidentiality provisions that are stated as broadly as the one at issue here, particularly absent a countervailing employer justification that outweighs the potential adverse impact on NLRA-protected activities. See *William Beaumont Hospital*, supra (Member Miscimarra, concurring in part and dissenting in part);

3. Instruction not to discuss suspension

The stipulated facts with respect to this allegation are as follows.

> 17. On about March 3, 2015, Respondent, by General Manager Emily Evans, told Charging Party not to discuss his suspension with his coworkers.
>
> 18. Respondent does not dispute that Charging Party may have been told by General Manager Emily Evans not to discuss the circumstances surrounding his suspension while the alleged Tier Three Expectations violation was pending investigation.
>
> 19. Charging Party was not disciplined for any communications he may have had with co-workers regarding his suspension or the related investigation.

For the reasons set forth in my partial dissent in *Banner Estrella Medical Center*, supra, slip op. at 8 (Member Miscimarra, dissenting in part), I believe an employee may lawfully be asked not to disclose matters that are discussed in a workplace investigation meeting, even if such a request is made routinely, particularly where the matter under investigation may have no relation to NLRA-protected activity, and where the potential adverse impact on NLRA-protected activity is outweighed by the importance of preserving the integrity of workplace investigations. In the instant case, however, the stipulated facts reveal that (i) Charging Party Denney was advised "not to discuss his suspension with his coworkers," which relates to the discipline imposed on Denney rather than matters discussed in an investigative meeting; and (ii) Denney also may have been advised not to discuss with other employees "the circumstances surrounding his suspension," which would further expand the scope of the required nondisclosure pertaining to his discipline. In these circumstances, I believe the directive(s) to Denney unlawfully interfered with a central aspect of many if not most NLRA-protected activities: communications with other workers regarding their treatment by their employer. Without the ability to engage in such communications, it would be virtually impossible for employees to engage in concerted activities with one another for the purpose of mutual aid or protection.[3] For these reasons, I believe the stipulated record establishes that the confidentiality directive(s) here were materially different from the nondisclosure request in *Banner Estrella*, where I believe the Board should have found that the employer's nondisclosure request was lawful based on the relation of the request to the employer's ongoing workplace investigation.[4] Accordingly, I concur in finding that the directives here violated Section 8(a)(1). See *INOVA Health System*, 360 NLRB 1223, 1228–1229 fn. 16 (2014), enfd. 795 F.3d 68 (D.C. Cir. 2015).[5]

Dated, Washington, D.C. April 13, 2017

Philip A. Miscimarra, Acting Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

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

cf. *Banner Estrella Medical Center*, 362 NLRB No. 137, slip op. at 13–19 (2015) (Member Miscimarra, dissenting in part) (describing requirement that Board strike a proper balance between asserted business justifications and potential impact on NLRA rights), appeal pending No. 15–1245 (D.C. Cir.).

[3] See NLRA Sec. 7 (protecting the right of employees to engage in "concerted" activities for the "purpose" of "mutual aid or protection").

[4] As stated in the text, the parties stipulated that "Respondent, by General Manager Emily Evans, told Charging Party not to discuss his suspension with his coworkers" and that "Respondent does not dispute that Charging Party may have been told by General Manager Emily Evans not to discuss the circumstances surrounding his suspension while the alleged Tier Three Expectations violation was pending investigation." For the reasons set forth in my partial dissent in *Banner Estrella Medical Center*, supra, slip op. at 8 (Member Miscimarra, dissenting in part), I agree that an employer has a legitimate interest in restricting disclosure of matters discussed during ongoing investigations. By its terms, however, the directive(s) here are materially different from the request at issue in *Banner Estrella*, and I do not believe it is controlling that the Charging Party was not disciplined "for any communications he may have had with coworkers regarding his suspension or the related investigation."

In its brief, the Respondent contends that the nondisclosure directive(s) in the instant case were justified to avoid speculation about what would happen to a new car that Denney had been awarded as part of a Respondent-sponsored contest. However, this justification is not evident from the stipulated record. Therefore, I do not reach or pass on whether such a justification might provide a sufficient justification for the nondisclosure directive(s) to Denney. Even if such a justification were supported by record evidence, however, I believe the nondisclosure directive(s) here would not implicate the types of considerations that supported my conclusion in *Banner Estrella* that the investigation-related nondisclosure request at issue in that case should have been declared lawful by the Board.

[5] I agree with my colleagues that the instruction to Denney was not a work rule. *INOVA Health System*, above.

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain, as a condition of employment, a mandatory arbitration agreement that employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board or to access the Board's processes.

WE WILL NOT maintain a mandatory arbitration agreement that requires employees to maintain the confidentiality of all arbitration proceedings.

WE WILL NOT prohibit you from discussing with other employees any discipline issued to you or matters under investigation.

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

WE WILL rescind the mandatory arbitration agreement in all of its form, or revise it in all of its forms to make clear that the arbitration program does not restrict your right to file charges with the National Labor Relations Board and that it does not require you to maintain the confidentiality of arbitration proceedings.

WE WILL notify all current and former employees who were required to sign the arbitration agreement in any form that it has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

DISH NETWORK, LLC

The Board's decision can be found at www.nlrb.gov/case/27–CA–158916 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, DC 20570, or by calling (202) 273-1940.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain, as a condition of employment, a mandatory arbitration agreement that employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board or to access the Board's processes.

WE WILL NOT maintain a mandatory arbitration agreement that requires employees to maintain the confidentiality of all arbitration proceedings.

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

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WE WILL notify all applicants and current and former employees who were required to sign the arbitration agreement in any form that it has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

DISH NETWORK, LLC

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