United States Government

National Labor Relations Board

OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: January 14, 2013

TO: Joseph F. Frankl, Regional Director
Region 20

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

SUBJECT: GameStop, Inc./GameStop Corp. — 512-5012-0125
Case 20-CA-080497 — 512-5012-9300
512-5072-0100

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) by maintaining and enforcing a mandatory arbitration policy that prohibits collective legal activity. We conclude that the Employer violated Section 8(a)(1) of the Act by maintaining its mandatory arbitration policy, as it unlawfully precludes collective legal activity and interferes with employees' access to the Board and its processes.

FACTS

Since 2007, the Employer has required the Charging Party and all other employees to sign, accept, and acknowledge receipt of the GameStop CARES Rules of Dispute Resolution Including Arbitration ("CARES rules"), which they did. Under the CARES rules, employees are required to arbitrate all "Covered Claims" on an individual basis; all class, collective, and representative actions are expressly prohibited. Page 2 of the CARES rules state that they "govern procedures for the resolution and arbitration of all workplace disputes or claims," and that all "Covered Claims" must be arbitrated. Also on page 2, the CARES rules state that they "do not preclude any employee from filing a charge with a state, local, or federal administrative agency such as the Equal Employment Opportunity Commission." On page 3, the CARES rules define a "covered claim" as "any claim asserting the violation or infringement of a legally protected right, whether based in statutory or common law . . . arising out of or in any way relating to the employees' employment . . ., unless specifically excluded as noted in 'What is Not a Covered Claim' below." Pages 3 and 4 of the CARES rules list examples of "Covered Claims," including "Discrimination or harassment on [an] unlawful basis," "Retaliation for complaining about discrimination or harassment," "Violations of any . . . federal . . . statute," "Retaliation for . . . exercising your protected rights under any statute," and "claims of wrongful termination or constructive discharge." Page 4 of the CARES rules lists "What is Not a Covered Claim," including "Matters within the jurisdiction of the National Labor Relations Board." In addition, for employees in California, the CARES rules provide for an "opt-out," whereby employees who send written notice to the Employer within 60 days of the start of their employment may exclude themselves from the coverage of the CARES rules.

The Charging Party left the Employer's employ in (b) (6), (b) (7)(C) and was re-hired in (b) (6), (b) (7)(C) At that time, the Charging Party signed a second CARES es acknowledgement.

Employer admits that its policy is to provide its handbook and CARES rules to all employees upon their hire. In 2011, the Employer and Charging Party entered into a confidential settlement agreement resolving unidentified claims made by the Charging Party against the Employer. This settlement agreement reiterated that the Charging Party was subject to the CARES rules.

Subsequently, a supervisor employed by the Employer filed a state class-action lawsuit against the Employer, on behalf of a putative class of employees that would have included the Charging Party. In January 2012, the Employer filed a Motion to Compel Arbitration and to Dismiss or Stay Proceedings, relying on the CARES rules and the "Acknowledgment and Receipt" form signed by the lead plaintiff in that lawsuit. In May 2012, prior to any ruling on the Employer's Motion to Compel, the action was voluntarily dismissed without prejudice.

In May 2012, the Charging Party filed the charge in the instant case, alleging that the CARES rules unlawfully prohibit all class and collective actions and violate Sections 7 and 8(a)(1) of the Act.

ACTION

We conclude that the Employer violated Section 8(a)(1) of the Act by maintaining the CARES rules, as they unlawfully preclude collective legal activity and interferes with employees' access to the Board and its processes.[1]

Initially, we agree with the Region that the Employer violated Section 8(a)(1) by maintaining the CARES rules because they unlawfully preclude collective legal activity.[2] In *D.R. Horton, Inc.*, the Board held that a policy or agreement which precludes employees from filing employment-related collective or class claims against their employer restricts employees' Section 7 right to engage in concerted action for mutual aid or protection, and therefore violates Section 8(a)(1) of the Act.[3]

---

[1] The Region should not allege in any complaint, absent settlement, that the Employer unlawfully moved to compel arbitration in the class-action lawsuit filed by a supervisor employed by the Employer. Given that the lawsuit does not appear to have itself been protected concerted activity, as it was filed solely by a Section 2(11) supervisor, the Employer's motion should not be included in any complaint, particularly as the Charging Party here has not (b) (6), (b) (7)(C) alleged any unlawful enforcement of the CARES rules, and, pragmatically, the n has been voluntarily dismissed.

[2] See, e.g., *Bloomingdales, Inc.*, Case 31-CA-071281, Advice memorandum dated September 28, 2012, at 3-11; *The Neiman Marcus Group, Inc.*, Case 31-CA-074295, Advice memorandum dated October 11, 2012, at 5-12. We note that the CARES rules are unlawful notwithstanding the limited 60-day opt-out period. See, e.g., *Bloomingdales, Inc.*, Case 31-CA-071281, Advice memorandum dated September 28, 2012, at 4-5; *24 Hour Fitness Worldwid*, Case 20-CA-035419, Advice memorandum dated Ma (b) (7)(A)

[3] 357 NLRB No. 184, slip op. at 1-7 (2012). We agree with the Region that the violation here is not affected by the Charging Party's having entered into a confidential

In addition, we conclude that the Employer violated Section 8(a)(1) by maintaining the CARES rules because they interfere with employees' access to the Board and its processes. The Board has made clear that mandatory arbitration policies that interfere with employees' right to file an unfair labor practice charge are unlawful.[4] Thus, for example, in *U-Haul Co. of California*, the Board held that an employer violated Section 8(a)(1) of the Act by maintaining a mandatory arbitration policy that employees would reasonably construe to prohibit the filing of unfair labor practice charges, and that did not clarify that the policy did not extend to the filing of unfair labor practice charges.[5]

In the instant case, the language of the CARES rules is similarly broad, confusing, and unclear, so that employees would reasonably conclude that they are precluded from filing unfair labor practice charges. Thus, page 2 of the CARES rules state that they "govern procedures for the resolution and arbitration of all workplace disputes or claims," and that all "Covered Claims" must be arbitrated. On page 3, the CARES rules define a "covered claim" as "any claim asserting the violation or infringement of a legally protected right, whether based in statutory or common law . . . arising out of or in any way relating to the employees' employment . . ., unless specifically excluded as noted in 'What is Not a Covered Claim' below." Pages 3 and 4 of the CARES rules list examples of "Covered Claims," including "Discrimination or harassment on [an] unlawful basis," "Retaliation for complaining about discrimination or harassment," "Violations of any . . . federal . . . statute," "Retaliation for . . . exercising your protected rights under any statute," and "claims of wrongful termination or constructive discharge." Each of these examples of "Covered Claims" would reasonably be read by employees to include claims that might be the subjects of unfair labor practice charges and Board proceedings. It is only later on page 4 that the policy first lists "Matters within the jurisdiction of the National Labor Relations Board" as part of "What is Not a Covered Claim." The meaning of even this statement is not clear, however, as it comes after the multiple earlier statements that indicate the requirement for arbitration of potential NLRA disputes. Similarly, while the CARES rules state on page 2 that they "do not preclude any employee from filing a charge with a state, local, or federal administrative agency such as the Equal Employment Opportunity Commission," any reading of this provision to apply to the NLRB is undercut by the contrary statements that come both before and after it.

Given the conflicting provisions of the CARES rules, the policy is, at best, ambiguous and confusing as to whether employees are permitted to file charges with the Board; at worst, it was intended to prohibit employees' exercise of these Section 7

---

settlement agreement reiterating that (b) (6), (b) (7 was subject to the CARES rules, as the Employer generally applies the CARES [redacted] les to all employees as a condition of employment. Under these circumstances, we need not address any issue regarding agreements that are not conditions of employment raised by the Board in the *D.R. Horton*, *id.*, slip op at 13 n.28.

[4] See, e.g., *Supply Technologies, LLC*, 359 NLRB No. 38, slip op. at 1-4 (2012); *Bill's Electric, Inc.*, 350 NLRB 292, 296 (2007); *Dish Network Corp.,* 358 NLRB No. 29, slip op. at 7-8 (2012); *U-Haul Co. of California*, 347 NLRB 375, 377-78 (2006), enfd. mem. 255 F. Appx. 527 (D.C. Cir. 2007).

[5] 347 NLRB at 377-78.

rights.[6] Therefore, as employees would reasonably read the policy to require arbitration of NLRA claims as "Covered Claims," and thus to prohibit employees from utilizing the Board's processes, we conclude that the Employer's maintenance of the CARES rules violates Section 8(a)(1) of the Act on this basis as well.[7]

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by maintaining the CARES rules, as they unlawfully preclude collective legal activity, and interfere with employees' access to the Board and its processes.

/s/
B.J.K.

ROF(s) -- 0 (NxGen)
ADV.20-CA-080497.Response.GameStop (b) (6), (b) (7)(

[6] See, e.g. (b) (7)(A)

[7] We note that the mere requirement and maintenance of the CARES rules here only violates Section 8(a)(1), and not Section 8(a)(4), in the absence of any efforts to enforce the policy. Thus, the Board has made clear that an unlawful rule or policy which employees would reasonably construe to prohibit the filing of unfair labor practice charges violates Section 8(a)(1) of the Act, while employer efforts to enforce such a rule or policy, or otherwise to coerce employees into refraining from exercising their Section7 right of access to the Board, also violates Section 8(a)(4). See, e.g., *Bill's Electric, Inc.*, 350 NLRB at 296, 307 (employer's maintenance of its unlawful policy violated Section 8(a)(1); its letters to employees seeking to enforce the policy and intimidate the employees violated Section 8(a)(4)).