D. R. Horton, Inc. *and* Michael Cuda. Case 12–CA–025764

January 3, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER AND HAYES

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.[1] 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.

I. BACKGROUND

Respondent D. R. Horton, Inc. is a home builder with operations in more than 20 states. In January 2006, the Respondent, on a corporate-wide basis, began to require each new and current employee to execute a "Mutual Arbitration Agreement" (MAA) as a condition of employment. The MAA provides in relevant part:

- that all disputes and claims relating to the employee's employment with Respondent (with exceptions not pertinent here) will be determined exclusively by final and binding arbitration;
- that the arbitrator "may hear only Employee's individual claims," "will not have the authority to consolidate the claims of other employees," and "does not have authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding"; and
- that the signatory employee waives "the right to file a lawsuit or other civil proceeding relating to Employee's employment with the Company" and "the right to resolve employment-related disputes in a proceeding before a judge or jury."

In sum, pursuant to the MAA, all employment-related disputes must be resolved through individual arbitration, and the right to a judicial forum is waived. Stated otherwise, employees are required to agree, as a condition of employment, that they will not pursue class or collective litigation of claims in any forum, arbitral or judicial.

Charging Party Michael Cuda was employed by the Respondent as a superintendent from July 2005 to April 2006. Cuda's continued employment was conditioned on his signing the MAA, which he did. In 2008, his attorney, Richard Celler, notified the Respondent that his firm had been retained to represent Cuda and a nationwide class of similarly situated superintendents. Celler asserted that Respondent was misclassifying its superintendents as exempt from the protections of the Fair Labor Standards Act (FLSA), and he gave notice of intent to initiate arbitration. The Respondent's counsel replied that Celler had failed to give an effective notice of intent to arbitrate, citing the language in the MAA that bars arbitration of collective claims.

Cuda filed an unfair labor practice charge, and the General Counsel issued a complaint alleging that the Respondent violated Section 8(a)(1) by maintaining the MAA provision stating that the arbitrator "may hear only Employee's individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding." The complaint further alleged that the Respondent violated Section 8(a)(4) and (1) by maintaining arbitration agreements requiring employees, as a condition of employment, "to submit all employment related disputes and claims to arbitration

[1] On January 3, 2011, Administrative Law Judge William N. Cates issued the attached decision. The Acting General Counsel and the Respondent each filed exceptions, a supporting brief, and an answering brief. The Acting General Counsel filed a reply brief. In addition, the Respondent filed a supplemental brief in support of its exceptions and in opposition to the Acting General Counsel's exceptions, and the Acting General Counsel filed a letter in response.

On June 16, 2011, the National Labor Relations Board issued an invitation to interested amici curiae to file briefs. Amicus briefs were filed by American Federation of Labor-Congress of Industrial Organizations (AFL–CIO); Change to Win; Coalition for a Democratic Workplace; Council on Labor Law Equality; Equal Employment Advisory Council, HR Policy Association, Society for Human Resource Management, California Employment Law Council, and Employers Group; National Retail Federation; Pacific Legal Foundation; Public Justice, P.C., National Employment Lawyers Association, et al.; Retail Industry Leaders Association; Service Employees International Union, Alton Sanders, and Taylor Bayer; Spiro Moss LLP; United States Chamber of Commerce; and United States Secretary of Labor and Equal Employment Opportunity Commission (EEOC). The Respondent filed three answering briefs in response to the briefs of various amici.

Member Hayes is recused and did not participate in deciding the merits of the case.

7." *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 836 (1984). And the same is true when the grievance is pursued under a unilaterally created grievance/arbitration procedure so long as its pursuit is concerted. Thus, the Board held in 1976,

> It is equally well settled that the advancement of a collective grievance is protected activity, even if the grievance in question is not formally stated or does not take place under the auspices of a contractual grievance procedure. *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9 (1962); *NLRB* v. *Walls Manufacturing Co.*, 321 F.2d 753 (C.A.D.C., 1963); *N.L.R.B.* v. *Hoover Design Corp.*, 402 F.2d 987 (C.A. 6, 1968).

Clara Barton Terrace Convalescent Center, 225 NLRB 1028, 1033 (1976). See also *Brad Snodgrass, Inc.*, 338 NLRB 917, 923 (2003) (nonemployee business agent was "engaging in protected activity on behalf of Respondent's employees when as Local 20's business agent he initiated grievances and complaints on their behalf while he was attempting to enforce what he believed to be . . . the applicable collective-bargaining agreements"); *UForma/Shelby Business Forms*, 320 NLRB 71, 77 (1995), enf. denied on other grounds 111 F.3d 1284 (6th Cir. 1997) (elimination of shift violated Sec. 8(a)(3) when done in retaliation for union members' pursuit of grievance to arbitration); *El Dorado Club*, 220 NLRB 886 (1975), enfd. 557 F.2d 692 (9th Cir. 1977) (employee was unlawfully discharged for participating in another employee's arbitration). Thus, employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA.

In enacting the NLRA, Congress expressly recognized and sought to redress "[t]he inequality of bargaining power between employees who do not possess full freedom of association . . . and employers who are organized in the corporate form or other forms of ownership association." 29 U.S.C. § 151. Congress vested employees with "full freedom of association . . . for the purpose of . . . mutual aid or protection," in order to redress that inequality. Id. Both the Board and the courts have recognized that collective enforcement of legal rights in court or arbitration serves that congressional purpose. For example, the Ninth Circuit explained in *Salt River Valley*, supra at 328, "By soliciting signatures to the petition, [the employee] was seeking to obtain such solidarity among the [workers] as would enable group pressure upon the [employer] in regard to possible negotiation and adjustment of the [workers'] claims. If suit were filed, such solidarity might enable more effective financing of the expenses involved. Thus, in a real sense, circulation of the petition was for 'mutual aid or protection.'" Employees are both more likely to assert their legal rights and also more likely to do so effectively if they can do so collectively. Cf. *Special Touch Home Care Services*, 357 NLRB 4, 10 (2011) ("The premises of the Act . . . and our experience with labor-management relations all suggest that permitting an employer to compel employees to provide individual notice of participation in collective action would impose a significant burden on the right to strike).[5]

Depending on the applicable class or collective action procedures, of course, a collective claim or class action may be filed in the name of multiple employee-plaintiffs or a single employee-plaintiff, with other class members sometimes being required to opt in or having the right to opt out of the class later. See, e.g., 29 U.S.C. § 216(b); Fed. R. Civ. P. 23(c)(2)(B)(v). To be protected by Section 7, activity must be concerted, or "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries*, 281 NLRB 882, 885 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). When multiple named-employee-plaintiffs initiate the action, their activity is clearly concerted. In addition, the Board has long held that concerted activity includes conduct by a single employee if he or she "seek[s] to initiate or to induce or to prepare for group action." *Meyers*, supra at 887. Clearly, an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7.

These forms of collective efforts to redress workplace wrongs or improve workplace conditions are at the core of what Congress intended to protect by adopting the broad language of Section 7. Such conduct is not peripheral but central to the Act's purposes. After all, if the Respondent's employees struck in order to induce the Respondent to comply with the FLSA, that form of concerted activity would clearly have been protected. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). Surely an Act expressly stating that "industrial strife" can be "avoided or substantially minimized if employers,

[5] Employees surely understand what several federal courts have recognized: that named plaintiffs run a greater risk of suffering unlawful retaliation than unnamed class members. See *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 85–86 (S.D.N.Y. 2001); *Ingram v. Coca-Cola Co.*, 200 F.R.D. 685, 701 (N.D. Ga. 2001); *Adams v. Mitsubishi Bank Ltd.*, 133 F.R.D. 82, 89 (E.D.N.Y. 1989); *Slanina v. William Penn Parking Corp.*, 106 F.R.D. 419, 423–424 (W.D. Pa. 1984). This risk of retaliation is virtually unique to employment litigation compared, for example, to securities or consumer fraud litigation. Thus, in a quite literal sense, named-employee-plaintiffs protect the unnamed class members.

> procedures prescribed by the National Labor Relations Act. . . .
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> . . . .
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> Wherever private contracts conflict with [the Board's] functions [of preventing unfair labor practices], they obviously must yield or the Act would be reduced to a futility.

Id. at 337.

During this same period of time, the Board held unlawful a clause in individual employment contracts that required employees to attempt to resolve employment disputes individually with the employer and then provided for arbitration. *J. H. Stone & Sons*, 33 NLRB 1014 (1941), enfd. in relevant part 125 F.2d 752 (7th Cir. 1942).[9] "The effect of this restriction," the Board explained, "is that, at the earliest and most crucial stages of adjustment of any dispute, the employee is denied the right to act through a representative and is compelled to pit his individual bargaining strength against the superior bargaining power of the employer." Id. at 1023 (footnote omitted). The Seventh Circuit affirmed the Board's holding, describing the contract clause as a per se violation of the Act, even if "entered into without coercion," because it "obligated [the employee] to bargain individually" and was a "restraint upon collective action." *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942).[10] These precedents compel the conclusion that the MAA violates the NLRA.

Just as the substantive right to engage in concerted activity aimed at improving wages, hours or working conditions through litigation or arbitration lies at the core of the rights protected by Section 7, the prohibition of individual agreements imposed on employees as a means of requiring that they waive their right to engage in protected, concerted activity lies at the core of the prohibitions contained in Section 8. Understanding why this is so requires consideration of the origins of Section 7 rights. In construing the NLRA, we must "reconstitute the gamut of values current at the time when the words [of the statute] were uttered." *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 620 fn. 5 (1967).

Modern Federal labor policy begins not with the NLRA, but with earlier legislation, the Norris-LaGuardia Act of 1932,[11] which aimed to limit the power of Federal courts both to issue injunctions in labor disputes and to enforce "yellow dog" contracts prohibiting employees from joining labor unions.[12] Thus, Congress has aimed to prevent employers from imposing contracts on individual employees requiring that they agree to forego engaging in concerted activity since before passage of the NLRA.

In fact, the provisions of the Norris-LaGuardia Act prohibit the enforcement of a broad array of "yellow dog"-like contracts, including agreements comparable to that at issue here. Section 2 of the Norris-LaGuardia Act, which declares the "public policy of the United States," observes that the "individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment." 29 U.S.C. § 102. Accordingly, Congress determined that workers should "have full freedom of association" and "shall be free from the interference, restraint, or coercion of employers" in "concerted activities for the purpose of collective bargaining *or other mutual aid or protection.*" Id. (emphasis added). In turn, Section 3 of the statute provides that "*any* . . . undertaking or promise in conflict with the public policy declared in" Section 2—not only the "yellow dog" contract—"is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court." 29 U.S.C. § 103 (emphasis added). In specifying what acts are *not* subject to restraining orders or injunctions, Section 4 of the statute identifies various types of activity, whether undertaken "singly or in concert," including "[b]y all lawful means aiding any person participating or interested in any labor dispute who . . . is *prosecuting, any action or suit* in any court of the United States or of any State." 29 U.S.C. §

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[9] Paragraph 8 of the contract read:

> 8. ADJUSTMENTS. The Company will endeavor to adjust with the Employee all complaints and disputes by negotiation, if possible. If it cannot be so adjusted, the Employee hereby selects _____ as his representative and arbitrator, and the Company selects its superintendent as its representative and they shall promptly hear and adjust all such complaints, or failing to do so shall select a third disinterested arbitrator, which three shall promptly hear, adjust and arbitrate every such complaint or dispute. The decision of a majority of such Board to be final on both Employee and Employer.

33 NLRB at 1023.

[10] For contemporary discussion of the case, see Recent Case, Labor Law—National Labor Relations Act–Arbitration Provision in Individual Contract Held to Be Unfair Labor Practice, 55 Harv. L. Rev. 1391, 1392 (1942). The Seventh Circuit's holding was anticipated by its earlier decision in a case involving the same clause in an individual employment contract. *NLRB v. Superior Tanning Co.*, 117 F.2d 881 (7th Cir. 1941), enfg. 14 NLRB 942 (1939).

[11] 29 U.S.C. § 101 et seq.

[12] See Edwin E. Witte, *The Federal Anti-Injunction Act*, 16 Minn. L. Rev. 638, 641–647 (1932). Since the enactment of the Norris-LaGuardia Act, all variations of a "yellow-dog" contract are deemed invalid and unenforceable, including "[a]ny promise by a statutory employee to refrain from union activity or to report the union activities of others." *Barrow Utilities & Electric*, 308 NLRB 4, 11 fn. 5 (1992).

individual act, waiving the right to do so is outside the scope of Section 7. At the same time, GC Memo 10–06 states that the wording of mandatory arbitration policies must make clear to employees that their right to act concertedly by pursuing class and collective claims is preserved. If a Section 7 right to litigate concertedly exists, then it defies logic to suggest, as GC Memo 10–06 does, that requiring employees to waive that right does not implicate Section 7. Moreover, the memo's rationale cannot be limited to waivers of the right to file and join class and collective actions. If choosing to initiate or participate in a class or collective action is a purely individual act, so is choosing to initiate or participate in *any* activity protected by Section 7. Based on the logic of GC Memo 10–06, an employer would be privileged to secure prospective individual waivers of *all* future Section 7 activity, including joining a union and engaging in collective bargaining. The memo's rationale is thus untenable.

Third, the memo's requirement that employers must expressly preserve employees' right to file a class or collective action challenging the validity of the required waiver has no substance. That is to say, GC Memo 10–06 does not state *on what ground* such a challenge might be brought. The memo could not have meant to suggest that the challenge could be based on interference with Section 7 rights, since the position of the memo is that individual class-action waivers do not implicate Section 7. But even assuming that a waiver-validity challenge would have a more than negligible chance of success, the addition of language assuring employees of their right to mount such a challenge, as GC Memo 10-06 requires, would not erase the tendency of the required waiver itself to interfere with the exercise of Section 7 rights. Employees still would reasonably believe that they were barred from filing or joining class or collective action,[17] as the arbitration agreement would still expressly state that they waive the right to do so. Employees reasonably would find an assurance that they may do so anyway either confusing or empty, or both: confusing, because employees would be told they have the right to do the very thing they waive the right to do; empty, because mandatory arbitration policies, such as Respondent's, are formal legal documents evidently prepared by, or with the aid of, counsel, and employees reasonably would assume that their employer would not go to the trouble and expense of drafting and requiring that they execute a legally invalid waiver.

[17] See *Bill's Electric*, 350 NLRB 292, 296 (2007) (finding mandatory arbitration policy unlawful under Sec. 8(a)(1) where it reasonably would be read "as substantially restricting" the filing of charges with the Board).

Finally, GC Memo 10–06 recognizes, as it must under *Eastex*, that Section 8(a)(1) would be violated if an employer threatens to retaliate against an employee for filing a class or collective action. It fails to recognize, however, that this basic principle is fundamentally at odds with the memo's ultimate conclusion. When, as here, employers require employees to execute a waiver as a condition of employment, there is an implicit threat that if they refuse to do so, they will be fired or not hired. Moreover, as stated above, the applicable test is that set forth in *Lutheran Heritage Village*, and under that test, a policy such as Respondent's violates Section 8(a)(1) because it expressly restricts Section 7 activity or, alternatively, because employees would reasonably read it as restricting such activity. That no employees are expressly threatened, disciplined, or discharged does not immunize the employer under existing precedent. We therefore reject the reasoning in GC Memo 10–06.

B. There Is No Conflict between the NLRA and the FAA Under the Circumstances Presented Here

Our analysis does not end, however, with the conclusion that the MAA restricts the exercise of rights protected by Federal labor law. The principal argument made by the Respondent and supporting amici is that finding the restriction on class or collective actions unlawful under the NLRA would conflict with the Federal Arbitration Act (FAA). The Respondent and amici contend that the Board has a duty to accommodate the FAA, and that dismissal of the 8(a)(1) allegation is therefore necessary.

This is an issue of first impression for the Board.[18] In dismissing the allegation that the class-action waiver was

[18] Various amici supporting the Respondent cite two decisions in which Federal district courts have been presented with the issue and have ruled that a class-action waiver does not violate the NLRA: *Slawienski v. Nephron Pharmaceutical Corp.*, No. 1:10-CV-0460-JEC, 2010 WL 5186622 (N.D. Ga. Dec. 9, 2010), and *Webster v. Perales*, No. 3:07-CV-00919-M, 2008 WL 282305 (N.D. Tex. Feb. 1, 2008). Although the results in those cases favor the Respondent, the courts' reasoning does not.

In *Slawienski*, the district court simply wrote protected concerted activity other than union activity out of Sec. 7 altogether: "There is no legal authority," the court said, "to support plaintiff's position [that the arbitration agreement violates Sec. 8(a)(1)]. The relevant provisions of the NLRA . . . deal solely with an employee's right to participate in union organizing activities." In support of that claim, the court quoted Sec. 7 but omitted the provision that protects "concerted activities for the purpose of . . . other mutual aid or protection." The court then missed the point of the plaintiff's argument, saying that Sec. 7 rights were not implicated because plaintiff and those who would "opt in" to the collective action were pursuing FLSA claims, not claims under the NLRA. *Slawienski*, supra slip op. at *2.

In *Webster*, the employer required plaintiffs to sign an arbitration agreement as a condition, not of employment, but of enrolling in an injury benefit plan. The district court found that the class-action waiver was not unlawful under Sec. 8(a)(1) because (a) plaintiffs "expressly acknowledged that their agreement to arbitrate was made voluntarily

Gilmer, supra. The Supreme Court has repeatedly emphasized, however, that the FAA protects the right of parties to agree to resolve statutory claims in an arbitral forum so long as "a party does not forgo the substantive rights afforded by the statute." *Gilmer*, supra at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985)). Thus, arbitration may substitute for a judicial forum only so long as the litigant can effectively vindicate his or her statutory rights through arbitration. *Gilmer*, supra at 28 (quoting *Mitsubishi*, supra at 637).

2. Holding that the MAA violates the NLRA does not conflict with the FAA or undermine the policy underlying the FAA

Holding that the MAA violates the NLRA does not conflict with the FAA or undermine the pro-arbitration policy underlying the FAA under the circumstances of this case for several reasons. First, the purpose of the FAA was to prevent courts from treating arbitration agreements less favorably than other private contracts. The Supreme Court, as explained, has made clear that "[w]herever private contracts conflict with [the] functions" of the National Labor Relations Act, "they obviously must yield or the Act would be reduced to a futility." *J. I. Case Co.*, supra 321 U.S. at 337. To find that an arbitration agreement must yield to the NLRA is to treat it no worse than any other private contract that conflicts with Federal labor law. The MAA would equally violate the NLRA if it said nothing about arbitration, but merely required employees, as a condition of employment, to agree to pursue any claims in court against the Respondent solely on an individual basis. It is thus clear that our holding, that the MAA conflicts with the NLRA, does not rest on "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740, 1746 (2011).

Second, the Supreme Court's jurisprudence under the FAA, permitting enforcement of agreements to arbitrate federal statutory claims, including employment claims, makes clear that the agreement may not require a party to "forgo the substantive rights afforded by the statute." *Gilmer*, supra at 26. The question presented in this case is *not* whether employees can effectively vindicate their statutory rights under the Fair Labor Standards Act in an arbitral forum. See *Gilmer*, supra.[21] Rather, the issue here is whether the MAA's categorical prohibition of joint, class, or collective federal state or employment law claims in any forum directly violates the substantive rights vested in employees by Section 7 of the NLRA.

Gilmer addresses neither Section 7 nor the validity of a class action waiver. The claim in *Gilmer* was an individual one, not a class or collective claim, and the arbitration agreement contained no language specifically waiving class or collective claims.[22] Here, although the underlying claim the Charging Party sought to arbitrate was based on the FLSA (specifically, the Charging Party contends that the Respondent misclassified him and other superintendents as exempt from FLSA requirements), the right allegedly violated *by the MAA* is not the right to be paid the minimum wage or overtime under the FLSA, but the right to engage in collective action under the NLRA. Thus, the question presented in this case is not whether employees can effectively vindicate their rights under the FLSA in arbitration despite a prohibition against class or

[21] In *Gilmer*, the Supreme Court held that a claim under the Age Discrimination in Employment Act (ADEA) could be subjected to compulsory arbitration pursuant to an agreement in a securities registration application. The plaintiff, employed as a financial services manager, had registered as a securities representative with several stock exchanges, and the registration application provided for arbitration in accordance with the rules of the various exchanges. After being discharged by his employer, the plaintiff brought an action in Federal court alleging that his termination violated the ADEA.

The Court noted that not all statutory claims will be appropriate for arbitration, but that, "having made the agreement to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." 500 U.S. at 26 (quoting *Mitsubishi Motors*, 473 U.S. at 628). The Court stated that such intent, if it exists, must be shown by the party seeking to avoid arbitration, and will be found "in the text of the ADEA, its legislative history, or "an 'inherent conflict' between arbitration and the ADEA's underlying purposes." Id. (quoting *Shearson/American Express v. McMahon*, 482 U.S. 220, 227 (1987)).

The plaintiff in *Gilmer* conceded there was no contrary intent in the ADEA or its legislative history. The Court therefore focused on whether there was an "inherent conflict" and found none. The Court acknowledged the public policies underlying the ADEA, but found that "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." Id. at 28 (quoting *Mitsubishi*, supra at 637). The Court then found that arbitration would not undermine the EEOC's role in enforcing the ADEA, because, inter alia, an individual ADEA claimant can still file a charge with the EEOC, and the EEOC has independent authority to investigate even absent a charge. Id. at 28–29. The Court also rejected various challenges to the adequacy of arbitration generally, finding those arguments "out of step" with current policy. Id. at 30.

[22] The plaintiff did argue that enforcing his arbitration agreement was inconsistent with the ADEA because "arbitration procedures . . . do not provide for . . . class actions." Gilmer, 500 U.S. at 32. But the Court pointed out that the arbitration rules actually at issue in *Gilmer* "provide for collective proceedings." Id. The Court, in dicta, then stated, "the fact that the [ADEA] provides for the possibility of collective action does not mean that individual attempts at conciliation were intended to be barred." The Court's evaluation of the intention behind the ADEA is not relevant to the question of compelled waiver of NLRA rights at issue here.

and the MAA's waiver of the right to proceed collectively in any forum.

Third, nothing in the text of the FAA suggests that an arbitration agreement that is inconsistent with the NLRA is nevertheless enforceable. To the contrary, Section 2 of the FAA, quoted above, provides that arbitration agreements may be invalidated in whole or in part upon any "grounds as exist at law or in equity for the revocation of any contract." This clause is fully consistent with the FAA's general intent to place arbitration agreements on the same footing as other contracts. Entirely apart from the Supreme Court's teachings in *National Licorice* and *J. I. Case,* supra—cases invalidating private agreements that restricted NLRA rights—it is a defense to contract enforcement that a term of the contract is against public policy. See, e.g., *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987). In fact, this principle has been specifically followed in relation to contract provisions violating the NLRA.

> It is . . . well established . . . that a federal court has a duty to determine whether a contract violates federal law before enforcing it. "The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in . . . federal statutes. . . . Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power." *Hurd v. Hodge*, 334 U.S. 24, 34–35 (1948) (footnotes omitted).

Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 83–84 (1982).

Courts presented with such a defense apply a balancing test: where the interest in favor of enforcing a contract term is outweighed by a public policy against enforcement, the term is unenforceable. Restatement (2d) of Contracts §178(1). In assessing the weight to be given to the respective interests, one must consider "the strength of the public policy as manifested by legislation" and "the likelihood that a refusal to enforce the term will further that policy." Id. § 178(3). As explained above, Section 7 of the NLRA manifests a strong federal policy protecting employees' right to engage in protected concerted action, including collective pursuit of litigation or arbitration. Moreover, Section 8(a)(1) and other provisions of the NLRA derived from the earlier Norris-LaGuardia Act manifest a strong federal policy against agreements in the nature of yellow-dog contracts, in which individual employees are required, as a condition of employment, to cede their right to engage in such collective action. A refusal to enforce the MAA's class-action waiver would directly further these core policies underlying the NLRA.

A policy associated with the FAA and arguably in tension with the policies of the NLRA was explained by the Supreme Court in *AT&T Mobility v. Concepcion*, supra at 1748: The "overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." The "switch from bilateral to class arbitration," the Court stated, "sacrifices the principal advantage of arbitration—its informality." Id. at 1750. But the weight of this countervailing consideration was considerably greater in the context of *AT&T Mobility* than it is here for several reasons. *AT&T Mobility* involved the claim that a class-action waiver in an arbitration clause of any contract of adhesion in the State of California was unconscionable. Here, in contrast, only agreements between employers and their own employees are at stake. As the Court pointed out in *AT&T Mobility*, such contracts of adhesion in the retail and services industries might cover "tens of thousands of potential claimants." Id. at 1752. The average number of employees employed by a single employer, in contrast, is 20,[25] and most class-wide employment litigation, like the case at issue here, involves only a specific subset of an employer's employees. A class-wide arbitration is thus far less cumbersome and more akin to an individual arbitration proceeding along each of the dimensions considered by the Court in *AT&T Mobility*—speed, cost, informality, and risk—when the class is so limited in size. 131 S.Ct. at 1751–1752. Moreover, the holding in this case covers only one type of contract, that between an employer and its covered employees, in contrast to the broad rule adopted by the California Supreme Court at issue in *AT&T Mobility*. Accordingly, any intrusion on the policies underlying the FAA is similarly limited.

Thus, whether we consider the policies underlying the two statutes as part of the balancing test required to determine if a term of a contract is against public policy and thus properly considered invalid under Section 2 of

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[25] The U.S. Census Bureau reports that in 2008 there were 5,930,132 employers (with employees), and those employers employed 120,903,551 employees. See http://www.census.gov/econ/smallbus.html. Accord: See U.S. Census Bureau, Sector 00: Survey of Business Owners (SBO): Company Statistics Series: Statistics for All U.S. Firms by Geographic Area, Industry, Gender, Ethnicity, and Race: 2007, available at http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=D&-ds_name=SB0700CSA01&-_lang=en. Employers covered by the Act may, on average, employ slightly more employees because only employers engaged in interstate commerce are covered, but that exclusion may be balanced by the exclusion of employers covered by the Railway Labor Act, which on average employ more employees than those covered by the NLRA.

action waiver unlawful will not result in any large-scale or sweeping invalidation of arbitration agreements.[28]

Nor does our holding rest on any form of hostility or suspicion of arbitration. Indeed, arbitration has become a central pillar of Federal labor relations policy and in many different contexts the Board defers to the arbitration process both before and after the arbitrator issues an award. See *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) ("The present federal policy is to promote industrial stabilization through the collective bargaining agreement. . . . A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement."); *Collyer Insulated Wire*, 291 NLRB 837, 839–843 (1971) (pre-award deferral); *Spielberg Mfg. Co.*, 112 NLRB 1080, 1081 (1955) (post-award deferral). Rather, our holding rests not on any conflict between an agreement to arbitrate and the NLRA, but rather solely on the conflict between the compelled waiver of the right to act collectively in any forum, judicial or arbitral, in an effort to vindicate workplace rights and the NLRA.

We thus hold, for the reasons explained above, that the Respondent violated Section 8(a)(1) by requiring employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge's Conclusion of Law 2.

"2. By maintaining a mandatory arbitration agreement provision that waives the right to maintain class or collective actions in all forums, whether arbitral or judicial, and that employees reasonably could believe bars or restricts their right to file charges with the National Labor Relations Board, 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."

AMENDED REMEDY

Because the Respondent utilized the MAA on a corporate-wide basis, we shall order, in addition to the relief ordered by the administrative law judge, that the Respondent post a notice at all locations where the MAA was in effect. See, e.g., *U-Haul Co. of California*, 347 NLRB 375 fn. 2 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007).

ORDER

The National Labor Relations Board orders that the Respondent, D. R. Horton, Inc., Deerfield Beach, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that employees reasonably could believe bars or restricts their right to file charges with the National Labor Relations Board.

(b) Maintaining a mandatory arbitration agreement that waives the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(c) 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 or revise the Mutual Arbitration Agreement to make it clear to employees that the agreement does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions and does not restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify the employees of the rescinded or revised agreement to include providing them a copy of the revised agreement or specific notification that the agreement has been rescinded.

(c) Within 14 days after service by the Region, post at its facility at Deerfield Beach, Florida, and any other facility where the Mandatory Arbitration Agreement has been in effect, copies of the attached notice marked "Appendix."[29] Copies of the notice, on forms provided by the Regional Director for Region 12 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, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, 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 notic-

[28] Moreover, we do not reach the more difficult questions of (1) whether an employer can require employees, as a condition of employment, to waive their right to pursue class or collective action in court so long as the employees retain the right to pursue class claims in arbitration and (2) whether, if arbitration is a mutually beneficial means of dispute resolution, an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute or all potential employment disputes through non-class arbitration rather than litigation in court.

[29] 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."

claims. In reference to employees' statutory rights, the only express exclusions are employee claims for workers' compensation or unemployment benefits.

Paragraph six of the agreement states:

> [T]he arbitrator will not have the authority to consolidate the claims of other employees into a proceeding originally filed by either the Company or the Employee. The arbitrator may hear only Employee's individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding.

At around the time of the distribution of the arbitration agreement to employees, the Respondent provided facility supervisors with a list of employees' frequently asked questions and the appropriate responses.[3] One of the instructions was to tell employees who expressed concern about the scope of the agreement that the agreement applied to relief sought through the courts and that they would still be able to go to the EEOC or similar agency with a complaint. However, the Respondent did not provide these questions and answers to employees at the time, and there is no evidence it ever communicated to them the above clarification of the scope of the agreement to its employees.

By letter dated February 13, 2008,[4] Cuda's attorney, Richard Celler, notified the Respondent that his law firm had been retained to represent Cuda and a class of similarly situated current and former "Superintendents" the Respondent employed on a national basis, to contest the Respondent's "misclassification" of them as exempt employees under the Fair Labor Standards Act.[5] The letter went on to state it constituted formal notice of a request to commence the arbitration process under paragraph 3 of the arbitration agreement. By letter of the same date, Celler advised Respondent his firm was also representing five other named employees.[6] By letter of February 21, Celler notified Respondent he was similarly representing employee Mario Cabrera and a class of similarly situated current and former "Superintendents" Respondent employed on a national basis.[7]

By letter of March 14, Michael Tricarloo, Respondent's counsel, replied to Celler's February 13 letter concerning the five-named employees.[8] Citing the language in paragraph 6 barring arbitration of collective claims, he denied the February 13 letter constituted effective notice of intent to initiate arbitration. For the same reason, Ticarloo, by letter of March 20, denied the validity of Cabrera's notice of intent.[9]

Analysis and Conclusions

Preliminarily, in reaching my conclusions about the legality of the provisions in question, I do not rely on the Region's initial determination or the contrary result of the General Counsel's Office of Appeals.[10] Further, I will not consider as dispositive Memorandum GC-10-06, cited in the Respondent's brief (at 5). The Board has repeatedly held that policies set out in the General Counsel's Casehandling Manual are not binding on the Board (or the General Counsel, for that matter). *Hempstead Lincoln Mercury Motors Corp.*, 349 NLRB 552, 553 fn. 4 (2007); see also *Children's National Medical Center*, 322 NLRB 205, 205 fn. 1 (1996). The same logic applies to other internal pronouncements the General Counsel issues.

I. DOES THE MANDATORY ARBITRATION AGREEMENT VIOLATE SECTION 8(A)(1) BY UNLAWFULLY PROHIBITING EMPLOYEES FROM ENGAGING IN PROTECTED CONCERTED ACTIVITIES?

Section 7 of the Act, as amended, 29 U.S.C. § 157, provides in relevant part that employees have the right to engage in concerted activities for their "mutual aid or protection." The Supreme Court has held that this "mutual aid or protection" clause encompasses employees acting together to better their working conditions through resort to administrative and judicial forums. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–567 (1978). In *Rockwell International Corp. v. NLRB*, 814 F.2d 1530, 1536 (11th Cir. 1987), the Circuit Court cited *Eastex* for the proposition that Section 7 is liberally construed to protect a broad range of employees concerns. Filing a class action lawsuit constitutes protected activity unless done with malice or in bad faith. *Harco Trucking, LLC*, 344 NLRB 478 (2005); *U Ocean Palace Pavilion, Inc.*, 345 NLRB 1162 (2005).

The crux of the matter here is the efficacy of a mandatory arbitration provision that restricts employees' from joining arbitration claims or collectively seeking recourse outside of arbitration. The General Counsel does not contend arbitration agreements are per se unlawful (GC br. at 12).

Indeed, decisions of the Supreme Court in recent years reflect a strong sentiment favoring arbitration as a means of dispute resolution. A leading case in the employment area is *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). Therein, the Court held an Age Discrimination in Employment Act (ADEA) claim can be subject to compulsory arbitration. The Court reviewed the Federal Arbitration Act (FAA), originally enacted in 1925, 43 Stat. 883, and then reenacted and codified in 1947 as Title 9 of the United States Code, concluding its provisions manifest a "'liberal federal policy favoring arbitration agreements.' *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)." Id. at 25 (fn. omitted).

The Court went on to state (Id. at 26) (citations omitted):

> Although all statutory claims may not be appropriate for arbitration, '[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." . . . [T]he burden is on Gilmer to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims. . . . "[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."

[3] E. Exh. 1.
[4] All dates hereafter occurred in 2008, unless otherwise stated.
[5] Jt. Exh. 4.
[6] Jt. Exh. 5.
[7] Jt. Exh. 6.
[8] Jt. Exh. 8.
[9] Jt. Exh. 10.
[10] See E. Exhs. 3 & 2, respectively.

REMEDY

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

[Recommended Order omitted from publication.]