No. 12-60031

In The
United States Court Of Appeals
For The Fifth Circuit

D.R. HORTON, INC.,
Petitioner and Cross-Respondent,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent and Cross-Petitioner.

On Petition For Review Of A Decision Of The National Labor Relations Board,
Board Case No. 12-CA-25764

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER EMPLOYER

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS OR ENTITIES PURSUANT TO FED. R. APP. P. 26.1 AND CIRCUIT RULES 28.2.1 AND 29.2

(1) *D.R. Horton, Inc. v. National Labor Relations Board*, Case No. 12-60031

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Amicus curiae the National Association of Manufacturers ("NAM") identifies and incorporates the representations contained in the merits briefs filed by Petitioner and Cross-Respondent D.R. Horton, Inc. and Respondent and Cross-Petitioner the National Labor Relations Board.

The NAM further identifies itself, a trade association representing more than 12,000 small and large manufacturing companies in every industrial sector and in all 50 states of the United States. Neither of the parties to this appeal is a member of the NAM. The NAM also identifies its counsel, Samuel Estreicher, Paul W. Cane, Jr., and Katherine C. Huibonhoa of Paul Hastings LLP.

Dated: June 6, 2012

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s/ Paul W. Cane, Jr.

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STATEMENT OF INTEREST

This brief *amicus curiae* is respectfully submitted by the National Association of Manufacturers ("NAM"). The NAM is the nation's largest industrial trade association, representing more than 12,000 small and large manufacturing companies in every industrial sector and in all 50 states of the United States. Its mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

A key concern of U.S. manufacturers, and a factor informing plant siting decisions, is the cost and delay of the U.S. employment dispute resolution system. The NAM believes that preserving the availability of a fair arbitration system for employment disputes helps address those concerns and promotes competitiveness.

This brief is submitted in response to what the NAM and its members fear is a new, unfounded regulatory innovation by the National Labor Relations Board ("NLRB" or the "Board") that, if left to stand, is likely to undermine the ability of employers and employees (not represented by labor unions) to negotiate binding predispute employment agreements providing for bilateral employer-employee arbitration of their disputes, without class or collective actions. The NAM does not

believe that such agreements abridge any rights guaranteed to employees under the National Labor Relations Act ("NLRA" or the "Act"), 29 U.S.C. §§ 151 *et seq*., contrary to what the Board below concluded. In this brief, the NAM focuses on the argument that the Board below exceeded its authority, both by regulating individual employment contracts without a basis in core NLRA concerns and by purporting to enforce the Norris-LaGuardia Act of 1932, 29 U.S.C. §§ 101 *et seq.*, as an all-purpose counter to the NLRB's responsibility to interpret the NLRA in a manner consistent with well-established federal arbitration law.[1]

SUMMARY OF ARGUMENT

The two-member Board in *D.R. Horton* ruled that a class action waiver in a predispute arbitration agreement required as a condition of employment violates Section 8(a)(1) of the Act, which makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7. 29 U.S.C. § 158(a)(1). In turn, Section 7 protects employees' rights "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. The theory of the agency's ruling is that because employees are protected from employer retaliation for engaging in

[1] No counsel for a party authored this *amicus curiae* brief in whole or in part, and no counsel, party, or other person other than *amicus curiae* contributed money intended to fund the preparation or submission of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a), the NAM states that all parties have consented to the filing of this brief *amicus curiae*.

group assertion of workplace claims by filing a group lawsuit, the right to file and maintain the lawsuit on a group basis become "protected activities" that may not be "restrict"[ed], *NLRB v. D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (2012), slip op. 4, even by otherwise lawful individual employment agreements. In essence, a minor aspect of the NLRA — the protection of the act of asserting a group claim over non-NLRA rights — becomes a basis for the NLRB's reaching out from its proper role of enforcing collective law into a new world of individual employment law. With this decision, the Board overstepped its bounds in two critical respects.

First, while the Board has the authority to ensure that contractual provisions entered into by employers and employees do not block access to core NLRA processes such as seeking union representation, filing a representation petition, or filing an unfair labor practice, it does not have the authority to regulate the rules of the forum, whether it be court or arbitration, where employees may assert their non-NLRA rights. In *D.R. Horton*, the agency claims it can now require either that arbitration of non-NLRA claims be conducted on a classwide basis or that the arbitration may be entirely elided by a class action in the courts. This is the regulatory equivalent of the agency tail wagging the dog — to require that the terms of arbitration agreements covering non-NLRA claims be vacated or to mandate that certain procedural devices be included in those arbitration agreements in order to avoid a violation of the NLRA.

The Board, it must be noted, has extremely limited authority over the interpretation and enforcement of collective bargaining agreements; and it has even less authority regarding the employment agreements of non-union employees. The panel below inserted itself into employment law matters which are governed by state contract law (to the extent not preempted by the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*. ("FAA")), as if it had general jurisdiction over contracts between employees and their employers. It does not.[2]

Second, the Board exceeded its authority by invoking the Norris-LaGuardia Act of 1932 as a basis for sidestepping its obligation to interpret the NLRA in a manner consistent with federal arbitration law as developed in a series of U.S. Supreme Court decisions spanning nearly 30 years. The Board does not have general authority to enforce the provisions of the Norris-LaGuardia Act, which pre-dated the NLRA and the Board's own existence. The Board's authority, instead, is limited to enforcement of the NLRA, and there is no provision of the NLRA that expressly incorporates the Norris-LaGuardia Act. Moreover, the agency's ruling in *D.R. Horton* vastly overstates the regulatory reach of the Norris-LaGuardia Act, which bans only certain contractual provisions restricting the right to seek

[2] D.R. Horton and other *amici* discuss in detail how the decision below disregards the FAA and long-standing Supreme Court jurisprudence regarding the arbitrability of employment disputes regardless of the availability of collective claim mechanism. The NAM fully shares in this view, but to avoid repetition does not reprise those arguments in this brief.

collective representation, and does not provide the bludgeon to rewrite U.S. employment law that the Board seemingly envisions.

The Board's overreaching into non-NLRA matters is also bad policy. The Board should not waste its limited resources delving into areas in which it has inadequate authority and expertise. The result — as in this case — is that the Board often will get the substantive law wrong, which in turn will require the expenditure of more resources on additional litigation and appeals. Moreover, by exceeding its authority, the Board sets itself against the thrust of U.S. Supreme Court jurisprudence and interferes with the work of other agencies whose core mission it is to focus on individual employment matters, such as the Department of Labor and the Equal Employment Opportunity Commission, and similar state agencies. The Board should not involve itself in non-NLRA employment law matters far removed from its core mission.

ARGUMENT

I. THE BOARD LACKS AUTHORITY TO REGULATE INDIVIDUAL CONTRACTS BETWEEN EMPLOYEES AND EMPLOYERS CONCERNING NON-NLRA RIGHTS

The Board's authority is limited to enforcing the processes of the NLRA. It does not as a general matter have jurisdiction to interpret the meaning of contracts, whether collective or individual, or to adjudicate breach of contract claims, whether collective or individual. *See Charles Dowd Box Co. v. Courtney*, 368 U.S.

502, 511 (1962) (once the parties have entered into a contract, "the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board") (citation omitted); *Pleasantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747, 754 (6th Cir. 2003) ("[P]recedent is clear that courts, not the NLRB, are the proper forum for enforcement of contracts, including CBAs."). This is because the NLRA's principal focus is safeguarding the process of holding representation elections and curbing unfair labor practices, not enforcing or declining to enforce agreements. *See NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 427 (1967) (stating that "the National Labor Relations Act[] does not undertake governmental regulation of wages, hours, or working conditions").

When dealing with employees who are not represented by labor unions or who have not sought collective representation, the Board's authority is even more limited. Admittedly, the Board properly polices contracts and policies in the non-union sector to ensure that employees are not giving up their right to invoke the Board's processes or agreeing to forestall collective bargaining. *See J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) ("Individual contracts . . . may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained collective bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement.") To

similar effect is *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), another case relied upon by the agency below: "By the contract, each employee agreed not 'to demand a closed shop or a signed agreement by his employer with any Union.' This provision foreclosed the employee from bargaining for a closed shop or a signed agreement with the employer, frequent subjects of negotiation between employers and employees . . . ." *Id.* at 360.

These are central concerns of the NLRA — not giving away by contract one's right to insist on collective representation or to be able to file a charge with the Board. The NLRA would be toothless without these core safeguards. The regulatory innovation of the two-person ruling below is to take other, relatively peripheral protections of the NLRA — the right of employees to assert group claims even over non-NLRA rights in non-NLRA fora free of employer retaliation — and convert those limited protections into an NLRA-based right to refashion the procedural rules of the fora for adjudication of those non-NLRA rights.

While established NLRB law makes clear that employees' rights to engage in concerted activities under Section 7 include the right to file a class action lawsuit, even if the underlying claim in that lawsuit has nothing to do with NLRA rights, employees have no right *under the NLRA* to any particular forum or set of rules for addressing their non-NLRA employment claims; and they have no NLRA right to succeed in that forum, whether on the merits or any procedural issue, in

disregard of the procedural and substantive law governing claims in that forum. Therefore, while the act of filing the lawsuit by two or more employees may be protected in some circumstances, any lawsuit that is filed is subject to the rules of the forum, including the enforcement of arbitration agreements under the FAA. For example, if the court or an arbitrator were to require sequestration of witnesses, there would be no Section 7 right for an employee to be allowed joint witness presentation. The same holds true for other rules of the forum, such as the enforceability of class action waivers.[3]

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[3] Prior to *D.R. Horton*, the Office of the General Counsel of the Board had advised that class action waivers do not violate Section 7 of the Act. *See* General Counsel Memorandum 10-06 (June 16, 2010) ("GCM"). The GCM first discussed the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), which held that an employer can require an employee, as a condition of employment, to arbitrate his or her individual non-NLRA employment claims. GCM, at 5 (citing *Gilmer*, 500 U.S. at 31); *see also Gilmer*, 500 U.S. at 32 (rejecting the argument that "arbitration procedures cannot adequately further the purposes of [federal age discrimination law] because they do not provide for broad equitable relief and class actions"). The Office of the General Counsel at that time properly delineated the Board's authority:

> While an employer may not condition employment on its employees' waiving collective bargaining rights protected by the NLRA, individual employees possessed of an individual right to sue to enforce non-NLRA employment rights can enter into binding individual agreements regarding the resolution of their individual rights in arbitration. So long as purely individual activity is all that is at issue in the individual class action waiver cases that have been upheld under *Gilmer*, the results of those cases are consistent with extant Board law.

The two-member Board in *D.R. Horton* holds for the first time that this peripheral Section 7 protection for group assertion of non-NLRA claims extends beyond protection against employer retaliation to include what appears to be a newly-minted NLRA right to a group process to pursue non-NLRA claims irrespective of the actual availability of that process under the law governing that non-NLRA forum. Thus, even where employees are not discharged or disciplined for filing a class action lawsuit dealing with non-NLRA claims, they now are deemed to have a Section 7 right to be free of otherwise lawful employer efforts to provide as a condition of employment that arbitration of employment disputes be direct employer-employee proceedings, without classwide claims.

The Board's conclusion flies in the face of the Supreme Court's FAA jurisprudence requiring that procedures governing private arbitration under individual agreements, including the availability of the class action joinder device, be determined by the contract between the employer and the employee in question. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991); *AT&T Mobility LLC v. Concepcion*, 563 U.S. __, 131 S. Ct. 1740, 1748 (2011). *See also* note 3 *supra*. But even if we put to one side the Court's FAA jurisprudence, *see Concepcion*, 131 S. Ct. at 1748 ("[r]equiring the availability of classwide

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GCM, at 5-6. The Board in *D.R. Horton* erroneously rejected the sound reasoning in the GCM. In response, the Office of the General Counsel was compelled to issue another memorandum, OM Memorandum 12-30 (January 23, 2012), stating that the analysis in the GCM was "no longer valid" and should not be relied upon.

arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA"), it is simply not within the purview of the Board to regulate or enforce employment contracts between individual employees and employers that do not threaten core NLRA functions. When the Board deals with group lawsuits or arbitrations over non-NLRA claims as a form of protected concerted activity under Section 7, its authority is subject to the rules of the forum governing the resolution of those claims. Section 7 does not itself change the rules of the forum, including but not limited to the availability of class action mechanisms.

In sum, there is no basis for the Board's ruling that somehow in the penumbras of Section 7, employees have an NLRA right to a particular joinder device in an arbitration proceeding addressing only non-NLRA federal or state employment laws. The NLRA right to engage in concerted activities should not be read as a warrant to regulate the perceived fairness of the procedures governing the resolution of non-NLRA employment claims.

II. THE BOARD'S RELIANCE ON THE NORRIS-LAGUARDIA ACT WAS MISPLACED

The Board overstepped its authority in another respect, by invoking the Norris-LaGuardia Act of 1932, 29 U.S.C. §§ 101 *et seq.*, as a basis for sidestepping its responsibility to interpret the NLRA in a manner consistent with well-established Supreme Court jurisprudence under the FAA. The Board stated below

that "even if there were a direct conflict between the NLRA and the FAA, there are strong indications that the FAA would have to yield under the terms of the Norris-LaGuardia." *D.R. Horton*, *supra*, slip op. 12. This was error for several reasons.

First, the Board lacks authority to enforce the Norris-LaGuardia Act, which is a statute entirely directed at the courts, not the NLRB. Nothing in the NLRA expressly incorporates any of the provisions of the Norris-LaGuardia Act.

Second, the Board misconstrues the scope of the Norris La-Guardia Act's refusal to enforce certain undertakings or promises colloquially referred to as "yellow dog contracts." Section 3 references the prohibited clauses as requiring:

> (a) Either party to such contract or agreement undertake[] or promise[] not to join, become, or remain a member of any labor organization or of any employer organization; or
>
> (b) Either party to such contract or agreement undertake[] or promise[] that he will withdraw from an employment relation in the event he joins, becomes, or remains a member of any labor organization or of any employer organization.

29 U.S.C. § 103. To the extent the Norris-LaGuardia Act's declaration of federal policy is relevant, the scope of the provision mirrors the core NLRA concerns of decisions like *National Licorice* and *J.I. Case.* It provides no support for the NLRB's rewriting the rules of the forum for the adjudication or arbitration of non-NLRA rights.

Finally, whatever the status of the Norris-LaGuardia, it does not provide grounds for sidestepping the NLRB's responsibility to engage in a "careful accommodation," *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942), of well-established federal law in the course of interpreting peripheral protections under Section 7. Even the right to strike over economic demands — a core Section 7 right that enjoys a separate reaffirmation in Section 13 of the Act, 29 U.S.C. § 163 — can be waived by a contract entered into by the labor union representative, *see NLRB v. Rockaway News Supply Co.*, 345 U.S. 71, 80-81 (1953); it must give way to federal laws requiring order on the merchant marine, *see Southern Steamship Co*., 316 U.S. at 47-48, and must be reconciled with the employee's common law of duty of loyalty to his employer, *see NLRB v. Local 1229, IBEW*, 346 U.S. 464, 473-76 (1953). Certainly the right to make a group claim in court or in arbitration over non-NLRA rights is no more sacrosanct than the right to engage in a strike over workplace demands, and has to be read in accordance with well-established non-NLRA federal laws, including the FAA.

III. THE BOARD SHOULD NOT INVOLVE ITSELF IN INDIVIDUAL EMPLOYMENT LAW MATTERS PLAINLY OUTSIDE ITS CORE MISSION

The Board's overreaching, whether by seeking to regulate individual employment contracts or to enforce the Norris-LaGuardia Act with respect to individual employment law, also makes for bad policy. Class action waivers of

non-NLRA claims in individual, non-union employment agreements, as well as any number of other non-NLRA matters, are not at the core of the NLRB's mission. The result is not only the unnecessary drain of Board resources, but also confusion and the intrusion of the Board into areas that are properly the domain of other agencies.

The NLRB asserts that its mission is "to safeguard employees' rights to organize and to determine whether to have unions as their bargaining representative. The agency also acts to prevent and remedy unfair labor practices committed by private sector employers and unions."[4] Class action waivers do not directly impact an employee's ability to organize. They do not restrain employees' ability to form a union, to work as a group to organize a union, to vote for or against a union, or to communicate with other employees regarding a union. Class action waivers do not impact the process whereby unions are certified. In an apparent attempt to accommodate the plaintiff-side employment bar, the Board is enmeshing itself in a mountain of employment litigation involving employers and non-union employees dealing with non-NLRA employment claims.

The Board should not waste its limited resources delving into areas in which it has inadequate authority and expertise. The result — as in this case — is that the

[4] *See* http://www.nlrb.gov/what-we-do.

Board often will get the substantive law wrong, which in turn will require the expenditure of more resources on additional litigation and appeals.

Moreover, from an NLRA-enforcement and compliance perspective, the result is confusion. In response to *D.R. Horton*, the Office of the General Counsel was compelled to issue a memorandum, OM Memorandum 12-30 (January 23, 2012), stating that the analysis in the GCM, *see* note 3 *supra*, was "no longer valid" and should not be relied upon. The OM Memorandum also directed Regional Offices to contact the Division of Advice in all cases involving arbitration agreements alleged to limit employees' collective legal actions with respect to non-NLRA rights, and to flag such cases for priority treatment. The need to implement these additional layers of process shows how the landscape has become more, not less, complicated as a result of the ruling in *D.R. Horton*, and further removed from core NLRA concerns.

Finally, by exceeding its authority, the Board pits itself against well-established U.S. Supreme Court jurisprudence and interferes with the work of other agencies whose core mission is to focus on individual employment matters, such as the Department of Labor and the Equal Employment Opportunity Commission, and similar state agencies. The Board should not involve itself in non-NLRA employment law matters far removed from its core mission.

CONCLUSION

This Court should decline to enforce the decision and order of the Board below finding that class action waivers violate Section 8(a)(1) of the Act, which makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7. 29 U.S.C. § 158(a)(1). The Board's insertion into non-NLRA matters over which it has no authority or proper regulatory interest is improper and ill-advised.

Respectfully submitted,

Dated: June 6, 2012

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CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 29(d) AND
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1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because:

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on June 6, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF.

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