Washington Legal Foundation

On the Merits:

D.R. HORTON, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 12-60031

U.S. Court of Appeals for the Fifth Circuit

July 13, 2012

Question Presented: Whether the National Labor Relations Act (NLRA) precludes a class action waiver in a mandatory arbitration agreement between an employer and an employee.

Summary of the Case: Michael Cuda, a former employer of D.R. Horton, filed an unfair labor practice charge with the National Labor Relations Board ("NLRB"), alleging that a class action waiver contained in his arbitration agreement with D.R. Horton violates the NLRA. Based on Cuda's charge, the NLRB's General Counsel issued a complaint alleging that D.R. Horton's arbitration agreement violated Section 8(a)(1) of the NLRA by infringing the right of D.R. Horton's employees to exercise their rights under Section 7 of the NLRA, which provides that employees may "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection."

In a two-member majority of the three-member Board, the NLRB held that because the arbitration agreement directly infringes on the substantive Section 7 rights of D.R. Horton's employees, it necessarily fails. The Board rejected the suggestion that Section 7 rights are procedural and not substantive. The Board drew a critical distinction between the process of certifying a class of employees (which it conceded is procedural in nature) and the "collective action inherent in seeking class certification," which it held is a substantive right under Section 7.

D.R. Horton appealed the ruling to the Fifth Circuit and asserts that the NLRB's holding conflicts with the principles embodied within the Federal Arbitration Act ("FAA") and that such a holding is not required by the NLRA.

On The Merits:
Judgment for Petitioner
Gerald L. Maatman, Jr.
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NLRB wrongly decided the issue at hand. Dating back for 50 years, the U.S. Supreme Court has liberally enforced private arbitration agreements according to their terms. In focusing on accommodating Section 7, the Board wholly ignored equally important rights and principles under the FAA. Congress enacted the FAA in 1925 to "reverse centuries of judicial hostility to arbitration agreements." *Scherck v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974). The FAA incorporates a strong federal policy favoring the enforcement of arbitration agreements. Indeed, the presumptive

arbitrability of statutory claims is so strong that it may only be denied if another statute reveals a contrary congressional command.

In recent years, the Supreme Court has repeatedly held that waivers of class or collective actions in arbitration agreements are enforceable under the FAA. As the Supreme Court recognized in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1773 (2010), and more recently in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) ("*Concepcion*"), waiver of class or collective actions in arbitration agreements are valid under the FAA and must be enforced "according to their terms." Such principles are fundamental and embodied within the FAA.

Here, the NLRB went to great lengths to draw a distinction between *Concepcion* and the facts at hand. The Supreme Court in *Concepcion* examined a conflict between the FAA and state law in determining whether to invalidate an agreement to arbitrate. It held that courts must rule on generally applicable state law contract defenses as they pertain to the arbitration agreement at issue, so long as the state laws do not stand as an obstacle to arbitration agreements in particular. Here, the Board attempted to distinguish *Concepcion* by noting that whereas *Concepcion* involved a state law that conflicted with federal authority (thus triggering issues of federal preemption), this case involves two federal statutes not necessarily in conflict. In light of these differences, the Board determined that neither *Concepcion* nor *Stolt-Nielsen* limited its findings.

But the distinction between state and federal law does not prevent employers from maintaining and enforcing mandatory arbitration agreements because, in both instances, the Supreme Court has liberally enforced private arbitration agreements. Recently, the U.S. District Court for the Northern District of California soundly applied *Concepcion*, stating that it "applies equally in the context of determining which federal statute controls." *Jasso v. Money Mart Express, Inc.*, 2012 U.S. Dist. LEXIS 52538, at *25 (N.D. Cal. Apr. 13, 2012).

As for the Board's position that the NLRA and the Norris-LaGuardia Act support its ability to prohibit class waivers in employment agreements, it is incorrect for two clear reasons. First, courts give no deference to the NLRB's interpretation of other federal statutes. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002) ("[W]e have . . . never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA."); *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942) ("[T]he Board has not been commissioned to effectuate the policies of the [NLRA] so single-mindedly that it may wholly ignore other equally important Congressional objectives.").

Second, regardless of the NLRB's invocation of the Norris-LaGuardia Act, that law does *not* apply to agreements to arbitrate. Rather, the Norris-LaGuardia Act specifically defines those contracts to which it applies. *See* 29 U.S.C. § 103(a), (b). Simply put, an agreement to arbitrate is not among the contracts to which the Act applies.

The Board's order also does not consider important public policy concerns. Prohibiting employers from including a class action waiver in a mandatory arbitration agreement minimizes an employer's ability to reduce the threat of class or collective actions, and the associated costs and damages inherent in such litigation. Additionally, the Board's decision affects employees of unionized and non-unionized employers, and may impact millions of employers who include no-class-action clauses in employment agreements.

It is necessary to find a balance between the federal preference for arbitration and the NLRA's protection of employees' Section 7 concerted activity. It is in the interest of both the NLRA and the FAA to recognize the limits of protected concerted activity within the meaning of Section 7 by preserving a meaningful judicial role in applying the FAA's "savings" clause when enforcing private arbitration agreements.

Such an approach would not proscribe class action waivers in arbitration agreements *per se*, but would protect the Section 7 right of employees to pursue class or collective actions to obtain a judicial determination of whether grounds "exist under law or equity" to render a class action waiver unenforceable. Employers could interpose—as a defense to employees' class or collective action—the parties' private arbitration agreement as their chosen device for resolving workplace disputes, while preserving employees' right to challenge collectively that agreement in court under applicable state or federal law.

Dissenting View:
Scott Nelson
Public Citizen

Section 7 of the National Labor Relations Act grants workers a substantive right to engage in a broad range of "concerted activities" for their "mutual aid and protection." The protection Section 7 affords to collective action is not limited to unionized workers, but extends to all employees covered by the Act. And Section 8(a)(1) of the NLRA provides unequivocally that it is illegal—an "unfair labor practice" in the parlance of the Act—for any employer "to interfere with, restrain, or coerce employees in the exercise of rights protected by section 7." An employer's attempt to enforce a contract that conditions employment on an individual worker's waiver of the right to engage in "concerted activities" under Section 7 has long been held to violate section 8(a)(1).

The National Labor Relations Board's decision below was a straightforward application of these longstanding principles. There is no question that the initiation of either collective litigation or arbitration is a protected concerted activity under Section 7. The Supreme Court has stated that "the 'mutual aid or protection' clause protects employees . . . when they seek to improve working conditions through resort to administrative and judicial forums," *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978), and that invoking arbitration of collective grievances is also a form of protected concerted activity. *NLRB v. City Disposal Systems Inc.*, 465 U.S. 822 (1984).

An agreement to engage only in individual arbitration of workplace grievances quite directly "interfere[s] with" and "restrain[s]" employees from engaging in the concerted activity of pursuing otherwise available collective remedies. Individual employment agreements that contain similar waivers of the right to engage in particular types of collective activity have long been condemned by the NLRB and the Supreme Court. *See, e.g.*, *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940); *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

Indeed, as long ago as 1942, the Board recognized that an employment agreement that purported to limit employees to individual negotiation and arbitration of their claims against their employer was an unfair labor practice, and the Seventh Circuit affirmed. The court characterized the provision as "a violation of the Act *per se*" because it "imposed a restraint upon collective action." *NLRB v. Stone*, 125 F.2d 752, 756 (1942). Nothing has changed in the intervening 70 years to alter the obvious conclusion that a provision that would prevent employees from seeking collective remedies for their grievances interferes with their right to engage in concerted activities under Section 7 of the NLRA.

The remaining question posed here is whether the Federal Arbitration Act somehow commands enforcement of a part of an arbitration agreement that violates the right to engage in concerted activities expressly protected by the NLRA. For a number of compelling reasons, the answer is no.

As the Supreme Court has consistently stated, the FAA does not permit arbitration agreements to divest anyone of substantive rights, *see, e.g., 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 265 (2009), and its authorization of the enforcement of arbitration agreements may be "overridden by a contrary congressional command." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). Here, the NLRA confers a substantive right to engage in concerted activities by invoking otherwise available and lawful collective remedies, and the imposition of *individual* arbitration would negate that substantive right. Moreover, the NLRA outlaws attempts by employers to interfere with concerted activities (including attempts made through provisions in individual employment agreements), thus overriding any authorization the FAA would otherwise provide for enforcement of a collective-action ban in an arbitration clause.

These conclusions are reinforced by the fact that the NLRA specifically protects the right to engage in collective activity, while the FAA does not specifically address collective actions at all. Rather, the FAA generally authorizes *arbitration* agreements—which are perfectly permissible under *D.R. Horton* as long as they do not foreclose pursuit of collective remedies—and says not a word about whether arbitration may or must be pursued individually or collectively. A preference for individual arbitration is, at best, merely implicit, in the FAA, whereas the protection of collective action is explicit in the NLRA. And the specific prevails over the general in the realm of statutory construction.

In addition, the FAA only makes arbitration agreements enforceable to the same extent as other contracts, and preserves defenses to contract enforcement that are generally applicable to all contracts. That enforcement of a contract would unlawfully deprive a party of protected rights under the NLRA in general, and the right to engage in concerted activities in particular, is a defense generally applicable to any contract with the prohibited effect, not just an arbitration agreement.

The Supreme Court's holding in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), that a state-law contract principle holding class-action waivers unconscionable does not qualify as a generally applicable defense to enforcement of a contract because it "interferes with fundamental attributes of arbitration," *id*. at 1748, has no application to the right to engage in concerted activities protected by the NLRA. *Concepcion*'s holding that the FAA does not permit the operation of state contract laws that "disfavor" arbitration is rooted in the doctrine that federal laws impliedly preempt state laws that interfere with their objectives, *id*. at 1747, a doctrine that is irrelevant when two federal laws are at issue.

In addition, *Concepcion's* premise that collective assertion of claims is incompatible with the advantages that arbitration supposedly offers for dispute resolution, however convincing it may be as applied to the kinds of consumer disputes at issue in *Concepcion*, cannot credibly be applied to disputes arising from employer-employee relations. In that field, arbitration of collective grievances has long been the norm, as the dominant form of employer-employee arbitration for generations has been arbitration under collective bargaining agreements. It is individual employer-employee arbitration that is a relatively recent innovation.

In short, there is no basis for concluding that Congress ever intended that the general enforcement of arbitration agreements under the FAA would trump the NLRA's specific prohibition on attempts by employers to stifle workers' rights to act collectively when pursuing workplace grievances. Indeed, the notion that the FAA was ever intended to apply to employment agreements at all is dubious. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 125-30 (2001) (Stevens, J., dissenting). Although the Court in *Circuit City* held that the FAA does reach employment agreements, it cannot be construed to displace specific protections Congress gave workers in the NLRA.

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