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Class Action Waiver Is Enforceable Despite NLRA Concerted Activity Provisions

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On December 3, 2013, in *D.R. Horton, Inc. v. National Labor Relations Board*, the U.S. Court of Appeals for the Fifth Circuit found that class action waiver provisions contained in mandatory, pre-dispute arbitration agreements governed by the Federal Arbitration Act (FAA) are enforceable, notwithstanding the right employees have to engage in concerted activities under the National Labor Relations Act (NLRA). On a separate but related issue, the Fifth Circuit found, however, that D.R. Horton violated the NLRA because its arbitration agreement could be reasonably interpreted to prohibit employees from filing unfair labor practice charges with the National Labor Relations Board (the "Board").

Facts and Procedural History

A former superintendent for D.R. Horton entered into a Mutual Agreement to Arbitrate Claims ("Arbitration Agreement") with the company. The Arbitration Agreement provided that he and D.R. Horton "voluntarily waive all rights to trial in court before a judge or jury on all claims between them" and that "all disputes and claims" would "be determined exclusively by final and binding arbitration." The Arbitration Agreement also contained a class action waiver provision providing: "the arbitrator [would] not have the authority to consolidate the claims of other employees" and would "not have the authority to fashion a proceeding as a class or collective action or to award relief to a group or a class of employees in one arbitration proceeding."

After his employment ended, the superintendent and a purported class of similarly situated employees attempted to initiate class-wide arbitration against D.R. Horton, alleging they had been misclassified as exempt from the statutory overtime provisions of the Fair Labor Standards Act (FLSA). D.R. Horton responded that the Arbitration Agreement barred pursuit of collective action claims and invited the employee and the other claimants to initiate individual arbitration proceedings. The superintendent, in turn, filed an unfair labor practice charge with the Board, claiming the Arbitration Agreement, and specifically the class waiver provision, violated the NLRA.

A complaint issued on the superintendent's charge and following a hearing, an administrative law judge (ALJ) found that the company's Arbitration Agreement violated the NLRA because its language would cause employees to reasonably believe they could not file an unfair labor practice charge. Upon review by the Board, a two-member panel—Chairman Mark Gaston Pearce and then-Member Craig Becker—issued a decision upholding the ALJ's determination. The Board also

found that the company's Arbitration Agreement violated Section 8(a)(1) of the NLRA because it prohibited the superintendent and other employees from engaging in their Section 7 rights under the NLRA to engage in protected concerted activities, including maintaining joint, class or collective actions.

D.R. Horton then filed a Petition for Review with the Fifth Circuit, arguing that the Board was not properly constituted when it issued its decision and that the Board's decision and analysis was inconsistent with the FAA and U.S. Supreme Court cases interpreting it.

The Fifth Circuit's Analysis

The court rejected D.R. Horton's arguments that the Board was not properly constituted at the time the Board issued its decision. It found the validity of Member Becker's appointment under the President's recess appointment powers was not a matter the court had to address. It also rejected the arguments that Member Becker's appointment had expired by the time the decision was issued and that the Board did not properly delegate authority to the two-member panel.

The court then turned its attention to analyzing the NLRA and the FAA. At the outset of its analysis, the court deferred to the Board's conclusion that the filing of class and collective actions is concerted activity protected by the NLRA. But, the court said, "To stop here, though, is to make the [NLRA] the only relevant authority." The court then undertook an analysis of the FAA and the U.S. Supreme Court cases interpreting it.

The Fifth Circuit found there is no substantive right to class procedures or to proceed collectively under the FLSA. It ultimately found that the Board's decision was inconsistent with the FAA and that the FAA does not yield to the NLRA.

In finding that the Arbitration Agreement ran afoul of the NLRA, the Board relied upon the FAA's "savings clause"—a provision that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Under the Board's reasoning, any contract provision that violated employees' rights under the NLRA would be unenforceable and therefore the Board had not treated the Arbitration Agreement differently than any other contract in violation of the FAA. The Fifth Circuit disagreed. It found that "the Board's rule does not fit within the FAA's savings clause," relying on the Supreme Court's decision in *AT&T Mobility v. Concepcion*, which in a different context held that the savings clause was inapplicable. The Fifth Circuit recognized that, just like the Supreme Court found in *Concepcion*, "the effect of [the Board's] interpretation is to disfavor arbitration" and "requiring a class mechanism is an actual impediment to arbitration and violates the FAA."

The Fifth Circuit recognized that the FAA's purpose is to ensure the enforcement of arbitration agreements according to their terms, and "that is the case even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" The Fifth Circuit found "[n]either the [NLRA's] statutory text nor its legislative history contains a congressional command against the application of the FAA," and such a congressional command could also not be inferred. Therefore, the court found the Arbitration Agreement, including the class waiver provision, should be enforced according to its terms.

The Fifth Circuit observed that, "[e]very one of our sister circuits to consider the issue has either suggested or expressly stated that they would not defer to the NLRB's rationale, and held arbitration agreements containing class waivers enforceable."

Although the court found that the class waiver provision did not violate the NLRA, the court did find a violation had occurred because the Arbitration Agreement included language that would lead employees to reasonably believe they were prohibited from filing unfair labor practice charges with the Board. The court based this finding on language in the agreement stating the employee "knowingly and voluntarily waives the right to file a lawsuit or other *civil proceeding* relating to Employee's employment..." (Emphasis in original). As a result, the court found that the employer should clarify in the agreement that employees retain access to the Board regardless of their agreement to arbitrate disputes.

Conclusion

The Fifth Circuit's ruling provides a significant victory to employers that have class waiver provisions in their arbitration agreements and solidifies the principle that, absent a clear pronouncement from Congress to the contrary, a valid arbitration agreement governed by the FAA must be enforced according to its terms. That said, the Fifth Circuit's pronouncement that an agreement to arbitrate cannot contain language

that would lead employees to reasonably believe they were prohibited from filing a complaint with the Board should not be overlooked or minimized. Employers should review their arbitration agreements immediately to evaluate whether they could be construed to lead employees to believe they were prohibited from filing unfair labor practice charges with the Board. If they find that an agreement could be construed that way, they should take action as soon as possible to make clear that such filings are not prohibited.

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