

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CONVERGYS CORPORATION

and

Cases 14-CA-075249  
and 14-CA-083936

HOPE GRANT, an Individual

**COUNSEL FOR THE GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS**

Counsel for the Acting General Counsel (General Counsel), pursuant to Section 102.46(d)(1) of the Board's Rules and Regulations, files the following answering brief opposing the exceptions filed by Respondents.

**I. Statement of the Case**

This case was submitted to Administrative Law Judge Arthur J. Amchan on a stipulated record pursuant to the parties' joint motion. Pursuant to charges filed by Hope Grant, an Individual (Charging Party) against Convergys Corporation (Respondent), a consolidated complaint issued on July 31, 2012, alleging that Respondent violated Section 8(a)(1) of the Act by requiring its employees to, as a condition of employment, execute waivers of class and collective action litigation of claims pertaining to their employment, and further violated Section 8(a)(1) by seeking to enforce the waivers by filing a motion to strike class and collective action allegation in a Fair Labor Standards Act (FLSA) filed by Hope Grant of behalf of herself and similarly situated employees.

On October 25, 2012, Administrative Law Judge Arthur J. Amchan (ALJ) issued his decision in which he found that Respondent violated Section 8(a)(1) in all respects alleged by the General Counsel. Respondent filed exceptions to the ALJ's decision and order. General Counsel is simultaneously filing cross-exceptions to the ALJ's recommended remedial order and notice posting insofar as they both omit specific cease and desist and affirmative provisions requiring Respondent to notify administrative and judicial forums, where the waiver is being used as a defense to seek dismissal of class and collective actions brought by employees on matters concerning their employment, that the waiver is rescinded.

## **II. Respondent's Exceptions**

As found by the ALJ in applying *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), the General Counsel submits that Respondent has violated Section 8(a)(1) of the Act by requiring employees, as a condition of employment, to sign a waiver of the right to bring lawsuits pertaining to their employment collectively and as class actions, and that Respondent further violated Section 8(a)(1) in filing and maintaining a court motion to enforce the waivers coercively obtained from employees.

### **A. The ALJ Properly Found that Enforcement of the Waiver by Court Motion Violated Section 8(a)(1)**

Respondent erroneously argues that it did not violate the Act by enforcing its unlawful waiver to interfere with employees' collective legal activity. (Respondent's brief,

at 17-18.)<sup>1</sup> To the contrary, in addition to the underlying waiver itself being unlawful, Respondent's Motion to Strike Class and Collective Allegations based on the waiver also violated Section 8(a)(1) of the Act.

Initially, we note that *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 737 n.5 (1983), supports proceeding against Respondent's Motion to Strike Class and Collective Allegations. In footnote 5 of *Bill Johnson's Restaurants*, the Court stated that it did not intend to preclude the enjoining of suits that have "an objective that is illegal under federal law." *Id.* In such circumstances, "the legality of the lawsuit enjoys no special protection under *Bill Johnson's*." *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 834 (1991), *enfd.* 973 F.2d 230 (3d Cir. 1992), *cert. denied* 507 U.S. 959 (1993).

Significantly here, the Board has made clear that it will apply footnote 5 to particular litigation tactics, as well as to entire lawsuits. Thus, for example, in *Wright Electric, Inc.*, the Board found that an employer's discovery request had an illegal objective and violated the Act, even though the lawsuit itself could not be enjoined. 327 NLRB 1194, 1195

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<sup>1</sup> Although Respondent argues that its waiver is not of any substantive rights but, rather, only of procedural rights (Respondent's brief, at 12-13), the waiver clearly requires employees to forego substantive rights under the NLRA -- namely, their rights to pursue employment-related claims in a collective or class action -- and the Board has so held. *D.R. Horton*, 357 NLRB slip op. at 10 ("Any contention that the Section 7 right to bring a class or collective action is merely "procedural" must fail. The right to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest." (Emphasis in original)). Thus, the waiver at issue here is unlawful not because it specifies particular lawful litigation procedures, but instead because it prohibits employees from exercising their Section 7 right to engage in collective legal activity.

Respondent also suggests that its waiver was lawful because "unions may waive Section 7 rights pursuant to collective bargaining agreements." (Respondent's brief, at 14.) In *D.R. Horton*, the Board expressly rejected this argument as well. 357 NLRB No. 184, slip op. at 10-11 (a waiver of Section 7 rights "freely and collectively bargained between a union and an employer does not stand on the same footing as an employment policy . . . imposed on individual employees by the employer as a condition of employment").

(1999), enfd. 200 F.3d 1162 (8th Cir. 2000).<sup>2</sup> Accordingly, a footnote 5 analysis is properly applied to Respondent's Motion to Strike Class and Collective Allegations, despite its arising as a defense in the course of a lawful employee lawsuit.<sup>3</sup>

A lawsuit (or litigation tactic) has a footnote 5 illegal objective "if it is aimed at achieving a result incompatible with the objectives of the Act." *Manno Electric*, 321 NLRB at 297. In particular, an illegal objective may be found for two reasons relevant to the instant cases. The first of these is where "the underlying acts constitute unfair labor practices and the lawsuit is simply an attempt to enforce the underlying act." *Regional Construction Corp.*, 333 NLRB 313, 319 (2001). This category includes the illegal union fine cases cited by the Court in footnote 5 itself.<sup>4</sup> In those cases, the unions violated Section 8(b)(1)(A) by fining employee/members, and the lawsuits were merely the mechanism to enforce and collect the unlawful fines.

The second reason is where a lawsuit is itself aimed at preventing employees' protected conduct. In such cases, the lawsuit is not merely retaliatory for employees' protected conduct, but instead also seeks to use the court itself to directly interfere with

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<sup>2</sup> See also, e.g., *Dilling Mechanical Contractors*, 357 NLRB No. 56, slip op. at 2-3 (2011) (finding that employer's discovery requests had an illegal objective, although the lawsuit itself did not).

<sup>3</sup> We note that legal actions that have an illegal objective may be found to be unlawful *ab initio*, in contrast to legal actions against "arguably protected" conduct, which are only unlawful to the extent they are continued after the General Counsel issues complaint, pursuant to *Loehmann's Plaza*, 305 NLRB 663 (1991), rev. denied 74 F.3d 292 (D.C. Cir. 1996). See, e.g., *Manno Electric*, 321 NLRB 278, 298 (1996), enfd. per curiam mem. 127 F.3d 34 (5th Cir. 1997).

<sup>4</sup> *Granite State Joint Board, Textile Workers Union*, 187 N.L.R.B. 636, 637 (1970), enf. denied 446 F.2d 369 (1<sup>st</sup> Cir. 1971), revd. 409 U.S. 213 (1972); *Booster Lodge No. 405, Machinists & Aerospace Workers*, 185 N.L.R.B. 380, 383 (1970), enfd. in relevant part 459 F.2d 1143 (1972), affd. 412 U.S. 84 (1973).

the Section 7 activity. Thus, for example, in *Manno Electric*, the Board found that an employer cause of action attacking employee statements made to the Board was not only preempted, but also had an illegal objective. 321 NLRB at 297.

Here, both of these reasons apply. Respondent's Motion to Strike Class and Collective Allegations sought to enforce a waiver that is itself unlawful, as correctly found by the ALJ. Thus, as in union fine cases, the underlying acts constitute unfair labor practices and the lawsuit is simply an attempt to enforce the underlying act. Moreover, Respondent's Motion to Strike Class and Collective Allegations also had an illegal objective because it was directly aimed at preventing employees' protected conduct. Indeed, the only objective of Respondent's Motion is to prohibit employees from engaging in Section 7 activity. Therefore, *Bill Johnson's Restaurants* footnote 5 supports proceeding against Respondent's Motion to Strike Class and Collective Allegations.

**1. The Board is not Collaterally Estopped or Precluded from Finding a Violation Based on Respondent's Attempt at Enforcement of the Waiver in the FLSA Action filed by Grant**

Even if the trial court were to issue a ruling on Respondent's Motion to Strike Class and Collective Allegations, the Board would not be collaterally estopped from finding a violation here. The doctrine of collateral estoppel, or "issue preclusion," provides that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153 (1979). Thus, collateral estoppel bars not only the decision-making court, but also any other court, from reconsidering the same issue. *United States v. Stauffer Chemical*, 464 U.S. 165 (1984). It is well established that three elements must be satisfied in order for collateral estoppel to apply: (1) the issue at stake must be identical to the one alleged in

the prior litigation; (2) the issue must have been actually litigated in the prior litigation by the party against whom preclusion is asserted; and (3) the determination of the issue must have been a critical and necessary part of the final judgment in the earlier action. *Town of North Bonneville v. Callaway*, 10 F.3d 1505, 1508 (9th Cir. 1993) (quoting *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320 (9th Cir. 1992)).

As a general rule, the Federal Government is not barred from subsequently litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully, unless the Federal Government was a party in the prior litigation. *United States v. Mendoza*, 464 U.S. 154, 162 (1984); *Field Bridge Associates*, 306 NLRB 322 (1992), *enfd.* sub nom. *Local 32B-32J Service Employees Intern. Union, AFL-CIO v. NLRB*, 982 F.2d 845 (2d Cir. 1993), *cert. denied* 509 U.S. 904 (1993). The Board has long held that “if the Government was not a party to the prior private litigation, it is not barred from litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully.” *Field Bridge Associates*, 306 NLRB at 322, citing *Allbritton Communications*, 271 NLRB 201, 202 fn. 4 (1984), *enfd.* 766 F.2d 812 (3d Cir. 1985), *cert denied* 474 U.S. 1081 (1986); see also, e.g., *Precision Industries*, 320 NLRB 661, 663 (1996), *enfd.* 118 F.3d 585 (8th Cir.1997), *cert. denied* 523 U.S. 1020 (1998). As the Board has stated, “Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief,” and the Board is “the public agency . . . chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce.” *Field Bridge Associates*, 306 NLRB at 322, quoting *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 265 (1940).

We recognize that two circuit court decisions *have* applied collateral estoppel principles to the Board and denied enforcement of Board orders in unfair labor practice cases that turned on the existence of a contract. *Donna-Lee Sportswear*, 836 F.2d 31 (1st Cir. 1987); *NLRB v. Heyman*, 541 F.2d 796 (9th Cir. 1976). In *Donna-Lee Sportswear*, the First Circuit held that the Board was precluded from finding an effective contract because a court had already ruled that no binding contract was in existence. 836 F.2d at 35. The court emphasized there that: (1) it was not unusual for a court to determine whether there was a valid contract; and (2) the private interests of the disputants predominated in that case, rather than any public rights at issue. *Id.* at 36-38. In *NLRB v. Heyman*, the Ninth Circuit denied enforcement of a Board order that the employer had unlawfully repudiated a collective-bargaining agreement and refused to bargain with the union. Instead, the court held that the Board was bound by a previous federal district court decision in a Section 301 lawsuit that rescinded the collective-bargaining agreement due to the union's lack of majority status. The Ninth Circuit wrote that "[a]n implicit collateral attack, launched through the filing of charges premised on the contract, may not be entertained by the Board under the guise of different policy considerations." 541 F.2d at 799. The Board has noted that, in both of those cases, the issue in the unfair labor practice case -- whether there was a contract or not -- was the same issue as the one that had been decided in the court proceeding. See, e.g., *Precision Industries*, 320 NLRB at 663 fn. 13.

In the instant case, of course, the Board was not a party to the private court action. Therefore, under established Board law, it is clear that the Board is not precluded from proceeding against the Respondent's unlawful Motion. Moreover, the issue at stake in the instant case is not identical to any decided in any prior litigation -- this case deals with

whether Respondent's enforcement of its waiver of collective legal activity unlawfully interferes with employees' Section 7 rights under the NLRA, while the courts would have considered whether to dismiss the Charging Party's collective and class action FLSA claims. Finally, the issue here does not concern a private dispute about the mere existence of a contract in which the particular interests of the disputants predominate, and as to which the courts may be at least as capable of determining as the Board. Rather, this case deals with whether Respondent's enforcement of its waiver violates employees' Section 7 rights – an issue regarding a public right that is within the exclusive authority and expertise of the Board. Thus, even under the rationale of *Donna-Lee Sportswear*, the Board is not precluded from finding that Respondent violated Section 8(a)(1) of the Act by litigating its Motion to Strike Class and Collective Allegations, even if a federal court were to rule on such a motion. Accordingly, as Respondent's Motion to Strike Class and Collective Allegations unlawfully interfered with employees' collective legal activity, Respondent's Motion also violated Section 8(a)(1) of the Act on that basis as well.

**B. Section 7 Protects the Right of Employees to Collectively Assert their Rights and the Right to Collectively Adjudicate their Rights Where Not Prohibited by Law**

Respondent erroneously argues that an employer does not violate the Act when it moves a court to dismiss a collective or class legal action based on an unlawful waiver of Section 7 rights because employees have had the opportunity to “assert” their claims. (Respondent's brief, at 7, 15, 17-18.) Contrary to Respondent's argument, the Board in *D.R. Horton* made clear that the Act guarantees “employees' opportunity to pursue without employer coercion, restraint or interference such claims of a class or collective nature as may be available to them under Federal, State or local law.” 357 NLRB No. 184, slip op. at 10 fn. 24. It is certainly true that Section 7 does not guarantee class certification if the

requirements for certification under Rule 23 are not met (i.e., the putative class lacks sufficient numerosity, commonality, etc.) -- as the Board stated in *D.R. Horton*, “[w]hether a class is certified depends on whether the requisites for certification under Rule 23 have been met.” *Id.*, slip op. at 10. It is equally true, however, that employees have the Section 7 right to be free from employer interference with their right to engage in collective legal activity. Such interference could not be more manifest than where, as here, an employer seeks to dismiss legal action precisely because it is collective.<sup>5</sup>

**C. Board was Lawfully Constituted When it Decided *D.R. Horton* and the Decision is Entitled to a Presumption of Validity**

Finally, Respondent mistakenly argues that *D.R. Horton* “was decided by a Board without a quorum and, therefore, has no legal effect.” (Respondent’s brief, at 6 n. 3.) This argument ignores that the Board applies the well-settled “presumption of regularity support[ing] the official acts of public officers in the absence of clear evidence to the contrary.” *Lutheran Home at Moorestown*, 334 NLRB 340, 341 (2001), citing *U.S. v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926). In *Entergy Mississippi, Inc.*, 358 NLRB No. 99 (2012), the Board found that Member Becker’s term ended by operation of law at noon on January 3, 2012, when the first session of the 112th Congress ended and the

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<sup>5</sup> Respondent wrongly suggests that, because the Board in *D.R. Horton* noted that employers may oppose class certification on legitimate grounds, employers must also be permitted to oppose class certification based solely on an employee waiver of Section 7 rights. (Respondent’s brief, at 17-18.) In *D.R. Horton*, the Board explicitly rejected a construction of the Act that would find that “employees are free to bring an employment-related class action lawsuit, but the employer may seek to have the suit dismissed on the ground that the employees executed a valid waiver.” *Id.*, slip op. at 6. The Board’s unequivocal rejection of that contention necessarily means that employers violate Section 8(a)(1) not only by requiring employees to execute waivers of their collective legal rights, but also by filing and maintaining court motions to enforce such waivers.

second session began. Thus, Member Becker lawfully participated in the resolution of *D.R. Horton*.

Furthermore, it is not an infirmity that in *D.R. Horton* the three-member Board issued the decision with two-members participating and one member recused. See, e.g., *Plaza Healthcare and Rehabilitation LLC*, 2011 WL 6950504, at \*1 n.1 (2011) ("In *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010), the Supreme Court left undisturbed the Board's practice of deciding cases with a two-member quorum of a panel when one of the panel members has recused himself. Under the Court's reading of the Act, 'the group quorum provision [of Sec. 3(b)] still operates to allow any panel to issue a decision by only two members if one member is disqualified.' . . . The same is true here, where one of the three Members of the full Board deciding the case is recused."). In other words, where the Board has only three members, it may follow the delegation to a panel practice noted with approval in *New Process*. See, e.g., *Route 22 West Operating Co.*, 357 NLRB No. 153, slip op. at 1 fn. 1 (Dec. 30, 2011), petition for review pending (3d Cir. Nos. 12-1031 & 12-1505); *G. Heileman Brewing Co.*, 290 NLRB 991, 991 & n.1 (1988), enf'd. 879 F.2d 1526 (7th Cir. 1989). But, as in the past, the full Board may also decide the case with two Board members where the third Board member is recused. See, e.g., *Wisconsin Bell, Inc.*, 346 NLRB 62, 62 n.2 (2005); *Iron Workers Local 1 (Advance Cast Stone Co.)*, 338 NLRB 43, 43 fn. 2 (2002); *Carpenters Local 20 (A. F. Underhill, Inc.)*, 323 NLRB 521, 521 fn. 1 (1997).

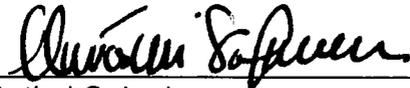
Accordingly, for the reasons found by the Administrative Law Judge, the Board should find that Respondent has violated Section 8(a)(1) of the Act by requiring employees, as a condition of employment, to sign a waiver of the right to bring lawsuits pertaining to their employment collectively and as a class action, and Respondent further

violated Section 8(a)(1) in filing and maintaining a court motion to enforce the waivers coercively obtained from employees.

### III. Conclusion

General Counsel respectfully requests the Board to affirm the Administrative Law Judge's findings, conclusions and recommended Order with respect to the matters raised in Respondent Convergys Corporation's exceptions. The General Counsel is simultaneously filing cross-exceptions to the recommended order and notice posting, seeking additional cease and desist and affirmative provisions.

Dated at St. Louis, Missouri, this 18<sup>th</sup> day of January, 2013.



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