

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**ON ASSIGNMENT STAFFING SERVICES, INC.**

and

**Case 32-CA-095025**

**ARNELLA M. FREEMAN, an Individual**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S REPLY TO  
RESPONDENT'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT AND  
CROSS-MOTION FOR SUMMARY JUDGMENT**

Comes now Counsel for the Acting General Counsel of the National Labor Relations Board, herein called the Board, pursuant to the Board's Rules and Regulations Section 102.24, and files this Reply to Respondent's Response to a Motion for Summary Judgment and Cross-Motion for Summary Judgment (Response) filed by Respondent on July 29, 2013.

On March 25, 2013, the Regional Director of the Thirty-Second Region of the Board issued a Complaint alleging that Respondent violated Section 8(a)(1) of the Act by promulgating and/or maintaining a dispute resolution agreement (DRA) prohibiting employees' participation in class actions. In its Response, Respondent failed to establish that there are any bona fide issues of fact which warrant a hearing before an administrative law judge on the allegations set forth in the Complaint. Accordingly, for the reasons set forth below, Counsel for the Acting General Counsel urges the Board to grant the June 13, 2013 Motion for Summary Judgment.

**I. Respondent's DRA Violates the National Labor Relations Act (the Act).**

The substantive right under the Act of freedom of association has compelled the Board to find that collective pursuit of workplace grievances through litigation or arbitration is conduct specifically protected by Section 7 of the Act. *D. R. Horton*, 357 NLRB No. 184 (2012). As such, a mandatory agreement that contains an explicit restriction on such protected conduct is unlawful. *Id.* Respondent's DRA, which includes language that binds employees to an irrevocable waiver of their rights to participate in collective and class action (both through litigation and arbitration), is precisely such an unlawful agreement.

**II. The DRA Is an Employer-Mandated Arbitration Agreement with Class/Collective Action Bans and Is, Therefore, Unlawful Under Board Precedent.**

In its Response, Respondent argues that the applicability of *D.R. Horton* is limited to contractual provisions upon which continued employment is conditioned. Respondent, however, holds a narrow view of what constitutes an employer mandate or, put another way, a wide view of what constitutes a voluntary employee action. In other words, continued employment may not be conditioned upon contractual provisions that are, nevertheless, mandatory by the employer or not the result of truly voluntary action by an employee. Thus, not conditioning continued employment upon the acceptance and signing of the DRA does not necessarily characterize the activity of an employee who so accepts and signs it as "voluntary." The uneven bargaining power inherent in the employee-employer relationship informs all contractual provisions entered into by these parties. Employment contracts that are presented by employers to employees in order to put in place the employer's wishes or preferences do not indicate the volition of the employee or the voluntariness of the employee's action in signing the agreement. For instance, an employee who accepts and signs a provision enforcing the employer's preferred method of payment of salaries via direct deposit, although payment for services rendered would be

forthcoming even if the employee opted out of the direct deposit provision (in other words, payment of salary would not be conditioned upon the acceptance of the direct deposit provision), does not necessarily make the employee's action voluntary. In that scenario, as in the present case, the employee's action is indicative of little more than the employee's subordinate position vis-à-vis his or her employer. Both resulting agreements merely reflect the wishes of the employer, while true freedom of contract presupposes the volition of both parties. An employment contract that merely puts forth the will of the employer, even if the employee's continued employment is not conditioned upon acceptance of the employer's will, cannot be an instrument to strip an employee of the important substantive rights afforded under the Act. In short, an employer cannot use its superior bargaining power to contract away its employees' substantive rights under the Act. *Cf.*, e.g., *National Licorice Co. v. NLRB*, 309 US 350 (1940) (in the context of individual employment contracts used by employers to force employees to only individually present grievances, "... employers cannot set at naught the [Act] by inducing their workmen to agree not to demand performance of the duties which [the Act] imposes"); *J.H. Stone & Sons*, 33 NLRB 1014 (1941) (referring to the "superior bargaining power of the employer" with respect to unlawful individual employment contracts requiring employees to attempt to resolve employment disputes individually). As the *D.R. Horton* Board pointed out:

That this restriction on the exercise of Section 7 rights is imposed in the form of an agreement between the employee and the employer makes no difference. From its earliest days, the Board, again with uniform judicial approval, has found unlawful employer-imposed, individual agreements that purport to restrict Section 7 rights – including, notably, agreements that employees will pursue claims against their employer only individually.

357 NLRB No. 184, slip op. at 4.

### **III. The DRA's Opt-Out Procedure Is Not Sufficient to Remedy Its Interference with Employees' Section 7 Rights.**

In its Response, Respondent argues that the opt-out opportunity it offers employees distinguishes this case from *D.R. Horton*, asserting that the limited opt-out opportunity makes the DRA voluntary and not a condition of employment. The Board should reject that argument. The DRA cannot be considered voluntary where it is imposed on employees as a condition of employment unless employees affirmatively act to opt-out of the DRA immediately upon commencing their employment. Thus, Respondent puts an unreasonable burden on employees to reserve their Section 7 rights by signing and delivering to the Respondent an opt-out form within a mere ten days of receiving it.

This opt-out provision does not render the DRA voluntary and it does not overcome Respondent's unlawful interference with employees' substantive rights under the Act. Providing employees a limited opportunity to opt out during the first ten days of receiving the DRA does not adequately protect employees' Section 7 rights. *Cf., e.g., Williams v. Securitas Sec. Servs.*, 2011 WL 2713741, at \*2 (E.D. Pa. 2011) (“[The employer] intends to bind its employees unless they opt out by calling a phone number deeply embedded in the ‘agreement’ even though the employee never signs the document. Quite simply, this Agreement stands the concept of fair dealing on its head”).

Nor does the DRA's statement that opt-out forms will be retained in a separate file from employees' personnel files reduce the coercive impact of the opt-out provision. By virtue of an on opt-out procedure's necessary requirement that employees self-identify as choosing to preserve their right to engage in Section 7 activity — and do so at the highly vulnerable time when they are new employees — an opt-out procedure itself is antithetical to the representative aspect of collective action, and the protection it affords employees from fear of reprisal. See,

e.g., *Special Touch Home Care Services*, 357 NLRB No.2, slip op. at 7 (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...”).

Moreover, insofar as the DRA is provided to employees at the commencement of employment, it imposes a waiver at a time when employees are unlikely to have any awareness of employment issues that may be resolved most effectively by collective legal action, or any awareness of any other employees’ efforts to act concertedly to redress issues of common concern. Furthermore, the DRA imposes a waiver in circumstances where employees have no notice of their Section 7 rights to engage in class and collective legal (including arbitral) activity or that a prohibition of such activity violates Section 8(a)(1) of the Act.

The DRA unlawfully interferes with the Section 7 right of those employees who do not act to opt out within ten days of receiving the DRA by establishing an irrevocable waiver of their *future* Section 7 rights. See *24 Hour Fitness USA, Inc.*, JD(SF)–51–12, 2012 WL 5495007 (November 6, 2012) (the ALJ found that the employer’s arbitration program, even with the opt-out provision, violated Section 8(a)(1) of the Act); *Mastec Services Co.*, JD(NY)-25-13, 2013 WL 2409181 (June 3, 2013) (same).

Thus, in analogous circumstances, the Board has found unlawful and unenforceable employer-employee agreements that condition employment on the employees’ waiver of prospective Section 7 rights, concluding that “future rights of employees as well as the rights of the public may not be traded away in this manner.” *Ishikawa Gasket American, Inc.*, 337 NLRB 175, 175 (2001) *enforced* 354 F.3d 534 (6th Cir. 2004) (finding unlawful a separation agreement prohibiting the departing employee from engaging in union and other protected activities for a 1-

year period); *Mandel Security Bureau, Inc.*, 202 NLRB 117, 119 (1973) (finding unlawful an employer conditioning reinstatement on the employee's refraining from future concerted activities and unfair labor charges, in addition to requesting withdrawal of pending charges).

In the instant case, Respondent's requirement that employees affirmatively preserve their Section 7 rights by opting *out* of the DRA places an unlawful burden on the employees' right to engage in collective action. Respondent cited no cases in its Response in which the Board or the courts have privileged such a requirement.<sup>1</sup> Just as it would be unlawful for an employer to require employees to act affirmatively to preserve their Section 7 rights to discuss terms and conditions of employment amongst themselves, to strike, or to engage in other union or concerted activities, an employer cannot be permitted to restrict the right to engage in collective and class legal (including arbitral) actions unless employees affirmatively preserve that right.<sup>2</sup> By placing the burden on employees to take immediate steps in order to retain their Section 7 rights, or lose them forever, Respondent necessarily interferes with its employees' exercise of those statutory rights.

Irrevocable waivers of employees' prospective Section 7 rights to collective legal (including arbitral) activity are unlawful, just as individual employment contracts that interfere with other prospective Section 7 rights are unlawful, because they are "a continuing means of thwarting the policy of the Act," *National Licorice Co. v. NLRB*, 309 U.S. 350, 361 (1940),

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<sup>1</sup> Counsel for the Acting General Counsel notes that cases addressing the separate issue of whether an arbitration agreement is procedurally or substantively unconscionable, such as *Circuit City v. Mantor*, 335 F.3d 101 (9th Cir. 2003) and *Davis v. O'Melvary & Meyers*, 485 F.3d 1066 (9th Cir. 2007), are not dispositive of the lawfulness of such agreements under the Act. Such cases do not address employees' Section 7 right to act concertedly, including their substantive statutory right to bring collective or class claims, or whether that right can be irrevocably waived with respect to all future claims.

<sup>2</sup> See, e.g., *D.R. Horton*, 357 NLRB No. 184, slip op. at 3: "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."

quoted in *D.R. Horton*, 357 NLRB No. 184, slip op. at 4, and present an unjustifiable obstacle to the free exercise of the right to engage in concerted activity for mutual aid and protection. Furthermore, Respondent's Response disregards the fact that concerted activity rights "are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others." *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972). The Act's protection of concerted activity for mutual aid and protection, as illustrated by the cases cited by the Board in *D.R. Horton*, 357 NLRB No. 184, slip op. at 4-5, recognizes that the decision whether to engage in concerted activity is not made abstractly by isolated individuals acting on their own, but instead is made as a result of concrete grievances and workplace discussions of the options available to employees. Respondent's DRA, even if assuming *arguendo* it were entered into by choice, unlawfully "sought to erect 'a dam at the source of supply' of potential, protected activity" and "thereby interfered with employees' exercise of their Section 7 rights." *Parexel International*, 356 NLRB No. 82, slip op. at 4 (2011), quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941).

Section 7 vests employees with the right to invoke — without employer coercion, restraint, or interference — procedures generally available under state or federal law for concertedly pursuing employment-related legal claims. *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), slip op. at 10. See also *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567-68 (1978). By imposing on employees a policy that precludes class-wide action (via both litigation and arbitration), Respondent has unlawfully denied employees their right to act collectively.

#### **IV. Voluntary Agreements Between an Employer and an Employee to Resolve All Disputes Through Individual Arbitration Violate the Act.**

Assuming, *arguendo*, that the DRA represents a truly voluntary agreement, it nonetheless violates the Act. Logically, and inherent to the nature of concerted activity, the statutory rights

of employees who opt out of the DRA are nonetheless adversely affected because such employees are prevented from acting in concert with employees who do not opt out of the DRA and, therefore, cannot pursue collective action through litigation and through arbitration. Freedom of association is severely maimed if there are none left with whom to associate.

Furthermore, regardless of the opt-out provision offered to employees with the DRA, once these irrevocable and binding agreements are signed and become effective, there can be no doubt that they also become conditions of employment. Thus, the Employer can now preclude employees' exercise of their Section 7 rights to engage in collective legal activity, and current employees can reasonably expect that they may face legal action if they breach the DRA. Once executed, the DRA completely extinguishes employees' Section 7 right to choose to act concertedly in any future employment dispute with the Employer.

Again, even if acceptance and agreement with the DRA is not characterized as a condition of employment and is viewed as truly voluntary, it would be unlawful. As the Board explained in *D.R. Horton*, employees' consent to an arbitration agreement does not render the agreement's restriction of Section 7 rights lawful. 357 NLRB No. 184, slip op. at 4-5. Indeed, the Board has long held, with court approval, that employers cannot avoid NLRA obligations, or obviate employees' rights under the Act, through agreements with individual employees. See, e.g., *J.I. Case Co. v. NLRB*, 321 NLRB 332, 337-39 (1944), *aff'g as modified* 134 F.2d 70 (7th Cir. 1943), *enforcing as modified* 42 NLRB 85 (1942). As cited above, the Supreme Court explained shortly after the statute's enactment that "employers cannot set at naught the [NLRA] by inducing their workmen to agree not to demand performance of the duties which [the statute] imposes." *National Licorice Co. v. NLRB*, 309 U.S. 350, 364 (1940). Consistent with this principle, individual agreements requiring employees to adjust their grievances with their

employer individually, rather than concertedly, “constitute[] a violation of the [NLRA] per se,” even when they are “entered into without coercion,” as they are a “restraint upon collective action.” *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942), *enforcing* 33 NLRB 1014 (1941), quoted in *D.R. Horton*, 357 NLRB No. 184, slip op. at 5.

Pursuant to the same principle, the Board has regularly set aside settlement agreements that require employees to prospectively waive their right to act in concert with coworkers in disputes with their employer. See, e.g., *Bon Harbor Nursing & Rehab. Ctr.*, 348 NLRB 1062, 1073, 1078 (2006) (employer unlawfully conditioned employees’ reinstatement, after discharges for non-union concerted protected protest, on agreement not to engage in further similar protests); *Bethany Med. Ctr.*, 328 NLRB 1094, 1005-006 (1999) (same); *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 175-76 (2001), *enforced* 354 F.3d 534 (6th Cir. 2004) (employer unlawfully conditioned discharged employee’s severance payments on agreement not to help other employees in disputes against employer or to act “contrary to the [employer’s] interests in remaining union-free,” as the Board held that “future rights of employees as well as the rights of the public may not be traded away in this manner”). See also *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 614-16 (2007) (the Board, while finding a settlement/waiver agreement valid, also made clear that it is reluctant to find that employees have effectively waived their right to relief over matters that were not yet investigated or even contemplated by the employee).

In this regard, it is noteworthy that in *D.R. Horton* the Board expressly found arbitration agreements prohibiting collective legal activity to be comparable to “yellow dog” contracts prohibiting employees from joining labor unions. *D.R. Horton*, 357 NLRB No. 184, slip op. at 5-6. In fact, it may be argued that the DRA interferes with employees’ Section 7 rights even more than traditional “yellow dog” contracts insofar as the restrictions on employees’ collective

action against the Respondent remain in effect even after their employment has ended and insofar as the DRA contemplates being fully enforceable in court thereby using governmental authority to enforce the prohibition on protected concerted activity. Significantly, the Board has long found that an employer violates Section 8(a)(1) by soliciting such agreements, as such conduct “has an inherent and direct tendency to interfere with, restrain, and coerce employees in the exercise of their rights under Section 7 of the Act...” *Hecks, Inc.*, 293 NLRB 1111, 1120-121 (1989) (request that employees promise to be bound by employer’s written policy stating the employer does not want and sees no need for a union-represented work force violates Section 8(a)(1)); *Western Cartridge Co.*, 44 NLRB 1, 6-8 (1942) (individual employment contract provision giving employer right to fire any employee who participates in a strike or concerted activity is unlawful); *Superior Tanning Co.*, 14 NLRB 942, 951 (1939), *enforced* 117 F.2d 881, 888-91 (7th Cir. 1941) (finding that individual contracts that were part of employer’s plan to discourage unionization, even if not signed under express coercion, are an unlawful restraint on Section 7 rights).

**V. The Board Should Rely on D.R. Horton as Precedent as D.R. Horton Presents no Procedural or Substantive Defects**

In its Response, Respondent challenges the validity of *D.R. Horton* based on procedural grounds. It is correct that, contrary to *Noel Canning v. NLRB*, \_\_\_ F.3d \_\_\_, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013) (petition for certiorari filed April 25, 2013), Presidential Recess Appointee Craig Becker, a Board Member who participated in *D.R. Horton*, was not appointed during an intersession recess of the Senate. *Noel Canning* held that Members Griffin and Block, current Board Members serving alongside Chairman Pearce, were not validly appointed because they were appointed during an intrasession recess. However, Respondent’s reliance on *Noel Canning* is misplaced. The Board has filed a petition for certiorari with the United States

Supreme Court seeking review of the D.C. Circuit's decision. Furthermore, in *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. 1, fn.1 (Mar. 13, 2013), the Board took note that in *Noel Canning*, the D.C. Circuit Court itself recognized that its conclusions concerning the Presidential appointments had been rejected by the other circuit courts that have addressed the issues. Compare *Noel Canning v. NLRB*, 2013 WL 276024, at \*14-15, 19 (D.C. Cir. Jan. 25, 2013) with *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). Thus, in *Belgrove*, the Board concluded that because the "question [of the validity of the recess appointments] remains in litigation," until such time as it is ultimately resolved, "the Board is charged to fulfill its responsibilities under the Act."<sup>3</sup> The Board's conclusion is equally applicable here.

Respondent also challenges the validity of *D.R. Horton* based on what it considers to be substantive grounds. Respondent argues that *D.R. Horton* erroneously attempts to regulate procedure insofar as the "ability to litigate on behalf of a class is merely a procedural, rather than a substantive[,] device provided by Rule 23 of the Federal Rules of Civil Procedure." However, Respondent mischaracterizes the Board's focus in *D.R. Horton* as being aimed on the distinction between litigation versus arbitration, when in fact the Board's focus in *D.R. Horton* is acutely aimed on the important distinction between individual action versus collective action, with the latter unequivocally being protected by the provisions of the Act which the Board had and has the duty to uphold. In short, the Board in *D.R. Horton* was not concerned with the procedure via which concerted activity could take place (litigation versus arbitration), but rather it correctly addressed an unlawful situation in which concerted activity was prohibited via *any* procedure,

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<sup>3</sup> The Third Circuit's decision in *NLRB v. New Vista Nursing and Rehabilitation*, \_\_ F.3d \_\_, 2013 WL 2099742 (3d Cir. May 16, 2013) should not change this result. As noted above, there still remains a split in the circuits regarding the validity of intrasession recess appointments.

both through the courts and through arbitration. In any event, the Board's decision in *D.R. Horton* binds the Board and an appeal of that decision would only be appropriate in another forum.

**VI. D.R. Horton is Consistent with the Policies Underlying the Federal Arbitration Act (“the FAA”) and with Supreme Court Precedent**

Contrary to the Respondent's position in its Response, the instant case, like *D.R. Horton*, does not present a conflict between the FAA and the Act. As the Board in *D.R. Horton* explained: “holding that an employer violates the NLRA by requiring employees, as a condition of employment, to waive their right to pursue collective legal redress in both judicial and arbitral forums accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible.” 357 NLRB No. 184, slip. op. at 12. This is because Section 2 of the FAA “provides that arbitration agreements may be invalidated in whole or in part” for the same reasons any contract may be invalid, including if it is unlawful or contrary to public policy. *Id.*, slip. op. at 11. Inasmuch as the DRA is inconsistent with the Act, it is not enforceable under the FAA.

The Board also emphasized that finding an arbitration policy, such as the one presented here, unlawful does not conflict with the FAA because “the intent of the FAA was to leave substantive rights undisturbed.” *Id.* Although Respondent argues that the DRA does not waive substantive rights, in fact it clearly requires employees to forego substantive rights under the NLRA — namely, an employee's right to pursue employment-related claims in a collective or class action. The Board has so held. *Id.*, slip. op. at 10-11. Thus, the DRA is unlawful not because it involves arbitration or specifies particular procedures, but instead because it prohibits employees from exercising their Section 7 right to engage in collective legal activity in *any* forum.

The interpretation and enforcement of the substantive rights protected by the Act is, in the first instance, accorded to the Board — not to the federal district courts — and it is the Board’s decision in *D.R. Horton* that should guide the determination here. See *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616-17 (1963).

*D.R. Horton* does not run afoul of the Supreme Court’s decisions in *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 130 S.Ct. 1758 (2010), and *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011).<sup>4</sup> We note that adherence to *D.R. Horton* does not compel class arbitration, as Respondent is free to limit its arbitration program to individual arbitration, so long as employees remain free to exercise their Section 7 right to engage in collective legal activity in court and are not compelled to only act individually. The Board held only that employers may not compel employees to waive their Section 7 right to collectively pursue legal action of employment claims in *all* forums, arbitral and judicial. *D.R. Horton*, 357 NLRB No.

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<sup>4</sup> The Supreme Court’s recent decision in *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (June 20, 2013) does not affect this issue. The Court’s decision in *American Express* was premised on its conclusion that “[n]o contrary congressional command” required the Court to reject the waiver of class arbitration at issue there, based on its finding that the “antitrust laws do not ‘evin[c]e an intention to preclude a waiver of class-action procedure.’” *Id.*, 133 S.Ct. at 2309, quoting *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 628 (1985). The Court further declined to invalidate the arbitration agreement at issue in *American Express* based on the respondent’s argument that it prevented the “effective vindication” of a federal statutory right. 133 S.Ct. at 2310-311, citing, *inter alia*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991). Based on these findings, the Board’s analysis of the NLRA is properly distinguished from the Court’s analysis of anti-trust law. As the Board stated in *D.R. Horton*, “[t]he 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*. 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.” 357 NLRB No. 184, slip op. at 9 (emphasis in original; footnote omitted).

Significantly, *American Express* did not address another basis for invalidating an arbitration agreement raised in *Gilmer*, i.e., where there is an “inherent conflict” between that arbitration and the underlying purposes of another Federal statute. 500 U.S. at 26 (if Congress intended to preclude a waiver of a judicial forum for ADEA claims, “it will be discoverable in the text of the ADEA, its legislative history, or an ‘inherent conflict’ between arbitration and the ADEA’s underlying purposes”). This is the aspect of *Gilmer* that is most relevant to *D.R. Horton*, 357 NLRB No. 184, slip op. at 11 (“under *Gilmer*, there is an inherent conflict between the NLRA and the MAA’s waiver of the right to proceed collectively in any forum”). Therefore, *American Express* did not in any way affect the Board’s holding in *D.R. Horton*.

184, slip op. at 12. Thus, so long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of classwide arbitration, and employers remain free to insist that *arbitral* proceedings be conducted on an individual basis. Any such policy would be entirely permissible under the FAA and would not run afoul of either *Stolt-Nielsen* or *AT&T*. Notably, while *Stolt-Nielsen* and *AT&T* make it clear that bilateral arbitration is *favored* under the FAA, neither of these decisions suggests that it is *compelled*. Indeed, *Stolt-Nielsen* makes explicit that an agreement to arbitrate on a class basis is enforceable under the FAA. *Stolt-Nielsen*, 130 S.Ct. at 1774-775. Thus, any claimed infringement on the FAA by protecting employees' Section 7 rights in these circumstances is entirely illusory.

In contrast, permitting an employer to require employees to limit their legal claims to individual arbitration vitiates the right to collective action that lies at the heart of the NLRA. It is axiomatic that an employer cannot force employees to forego that right. It therefore follows that prohibiting employers from doing so protects the values inherent in the NLRA, without offending those inherent in the FAA. Expressed another way, requiring an employer to adhere to the NLRA is entirely consistent with the FAA.

Even if, contrary to the foregoing, there was an irreconcilable conflict between the NLRA and the FAA, the *D.R. Horton* Board made clear that "the Supreme Court has held that when two federal statutes conflict, the later enacted statute, here the NLRA, must be understood to have impliedly repealed inconsistent provisions in the earlier enacted statute." 357 NLRB No. 184, slip. op. at 12, n. 26.<sup>5</sup> For the reasons stated here, and for those iterated by the Board in *D.R.*

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<sup>5</sup> While the FAA was reenacted and codified as Title 9 of the United States Code in 1947, the legislative history and the Supreme Court make clear that the relevant date of enactment is in 1925. See, e.g., H.R. Rep. No. 80-251 (1947), reprinted in 1947 U.S.C.C.A.N. 1511 (expressly stating that the 1947 bill made "no attempt" to amend the existing law); H.R. Rep. No. 80-255 (1947), reprinted in 1947 U.S.C.C.A.N. 1515 (same); *Compucredit*

*Horton*, finding the DRA unlawful under the Act will not pose a conflict with the FAA.

Furthermore, the Board also noted in *D.R. Horton* that even if there was a direct conflict between the NLRA and the FAA, the terms of the Norris-LaGuardia Act and the rules of statutory interpretation strongly indicate that the FAA would have to yield. *Id.*, slip op. at 12.

In *D.R. Horton*, the Board held that finding a mandatory arbitration agreement unlawful is “consistent with the well established interpretation of the NLRA and with core principles of Federal labor policy” and “does not conflict with the letter or interfere with the policies underlying the FAA and, even if it did, that the finding represents an appropriate accommodation of the policies underlying the two statutes.” *Id.*, slip op. at 8. Initially, the Board noted that: (1) under the FAA, “arbitration may substitute for a judicial forum only so long as the litigant can effectively vindicate his or her statutory rights through arbitration;” and (2) mandatory individual arbitration agreements prohibit employees from exercising their substantive statutory right to engage in collective legal action. *Id.*, slip op. at 9, 9-11. Thus, the Board emphasized that “nothing in the text of the FAA suggests that an arbitration agreement that is inconsistent with the NLRA is nevertheless enforceable.” *Id.*, slip op. at 11. Rather, a refusal to enforce a mandatory arbitration agreement’s class action waiver would directly further core policies underlying the NLRA, and is consistent with the FAA. *Id.*

## **VII. Conclusion**

For all the above reasons, Counsel for the Acting General Counsel urges the Board to find that its holding in *D.R. Horton* is controlling and that Respondent’s DRA, notwithstanding the opt-out provision, unduly interferes with employees’ freedom of association generally

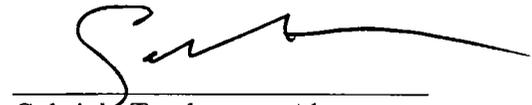
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*Corp. v. Greenwood*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 665, 668, 2012 WL 43514 (January 10, 2012) (“the Federal Arbitration Act (FAA), enacted in 1925”); *AT&T Mobility v. Concepcion*, 131 S.Ct. at 1745, 1751 (“[t]he FAA was enacted in 1925,” and “class arbitration was not even envisioned by Congress when it passed the FAA in 1925”); *Vaden v. Discover Bank*, 556 U.S. 49, 58, 129 S.Ct. 1262, 1271 (2009) (“[i]n 1925, Congress enacted the FAA”). The relevant date of enactment for the NLRA is 1935.

guaranteed under the Act and with employees' rights to file and participate in collective and class action, whether the forum for such action be judicial or arbitral, particularly guaranteed under Section 7 of the Act, in violation of Section 8(a)(1) of the Act, as alleged in the Complaint.

DATED at Oakland, California, this 16<sup>th</sup> day of August 2013.

Respectfully submitted,



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Gabriela Teodorescu Alvaro  
Counsel for the Acting General Counsel  
National Labor Relations Board, Region 32  
1301 Clay Street  
Oakland, California 94612-5211

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
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ON ASSIGNMENT STAFFING SERVICES, INC.

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ARNELLA M. FREEMAN, an Individual

Case(s) 32-CA-095025

Date: August 16, 2013

**AFFIDAVIT OF SERVICE OF ACTING GENERAL COUNSEL'S REPLY TO  
RESPONDENT'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT AND  
CROSS-MOTION FOR SUMMARY JUDGMENT**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

Joshua J. Cliffe, Esq.  
Littler Mendelson PC  
650 California St., 20th Floor  
San Francisco, CA 94108-2693  
VIA EMAIL: [jcliffe@littler.com](mailto:jcliffe@littler.com)

Michael G. Pedhirney, Esq.  
Littler Mendelson  
650 California Street, 20th Floor  
San Francisco, CA 94108-2693  
VIA EMAIL: [mpedhirney@littler.com](mailto:mpedhirney@littler.com)

Office of the Executive Secretary  
National Labor Relations Board  
1099 14<sup>th</sup> Street, N.W.  
Washington, DC 20005  
VIA EFILE

August 16, 2013

Date

Frances Hayden, Designated Agent of NLRB

Name

Signature

