

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 32**

**FAA CONCORD H, INC. d/b/a  
CONCORD HONDA**

**and**

**Cases 32-CA-066979  
32-CA-070343  
32-CA-072231**

**AUTOMOTIVE MACHINISTS LODGE  
NO. 1173, INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE WORKERS**

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF  
IN SUPPORT OF LIMITED EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

**1. Preliminary Statement**

On October 23, 2013, Administrative Law Judge Eleanor Laws (the Judge) issued her decision in the above-captioned case. In her decision, the Judge correctly concluded that Respondent violated Sections 8(a)(1) and (5) of the Act by the following conduct:

- (1) Unilaterally implementing a June 2011 Unit employee bonus;
- (2) Unilaterally changing the Unit employees' work week schedules;
- (3) Bypassing Automotive Machinists Lodge No. 1173, International Association of Machinists and Aerospace Workers (the Union) and dealing directly with its Unit employees regarding their terms and conditions of employment by meeting with them about alternative work week elections and actually holding two such elections; and

(4) Maintaining and enforcing a Mandatory Arbitration Agreement (MAA) which required Unit employees to resolve employment-related disputes exclusively through arbitration proceedings and by enforcing/interpreting this MAA to preclude resolution of such disputes through class action, thereby violating the Board's ruling in *D.R. Horton*, 357 NLRB No. 184 (2012).

The Judge then correctly ordered Respondent to remedy these violations of the Act by ceasing and desisting from unilaterally implementing an employee bonus or changing the work week schedule, by bypassing the Union and dealing directly with unit employees regarding their terms and conditions of employment, and by rescinding or revising its MAA to make it clear to employees that the agreement does not constitute a waiver in all forums of their right to maintain employment related class or collective actions. Nevertheless, although the Judge correctly found the above-detailed violations of Sections 8(a)(1) and (5) of the Act, and she correctly ordered Respondent to remedy these violations, she erred by rejecting the General Counsel's additional argument that under circumstances (like the instant case) where an employer maintains a Mandatory Arbitration Agreement that forbids employees from engaging in class judicial action, it then further violates the Act by opposing employee demands for class arbitration and fails to remedy this additional violation by agreeing to allow class arbitration.

In reaching this incorrect conclusion, the Judge started from the correct finding that in *D.R. Horton*, the Board held that "employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment related claims in *all* forums, arbitral and judicial. 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 class-wide arbitration. Employers remain free to insist that arbitral proceedings be conducted on an individual basis." *Id.* slip op at 11. However, from this

correct starting point, the Judge went on to incorrectly answer a question arguably left open by *D.R. Horton* – namely, where an employer maintains a MAA that expressly bars class judicial action and simultaneously opposes a demand for class arbitration – is the appropriate remedy for this violation an order limited only to requiring the employer to allow class judicial action? Or, alternatively, where class arbitration and not class judicial action has been initiated by the employees, should the Board order an employer to allow the class arbitration to proceed so long as that employer also simultaneously opposes class judicial action? The General Counsel submits that the Judge erred by failing to answer this question in the affirmative. Moreover, as a result of this error of law, the Judge further erred by limiting the remedial relief necessary to remedy the violations in this case by rejecting the General Counsel’s request that she order Respondent to “reimburse the unit employees and/or the Union for any litigation expenses directly related to its opposition to the Respondent’s unlawful motion to prohibit class arbitration.” In so holding, the Judge ignored well-established Board law supporting the retroactive application of new Board decisions, as well as the Board’s authority to award attorney’s fees in certain appropriate circumstances. Accordingly, pursuant to the Board’s Rules and Regulations, Series 8, as amended, Section 102.46(a), Counsel for the General Counsel has filed limited exceptions to the Judge’s decision and hereby files the following brief in support thereof.

## 2. The Judge's Findings of Fact<sup>1</sup>

Respondent, a corporation engaged in the business of selling and servicing automobiles at its dealership in Concord, California has had a collective-bargaining relationship with the Union covering a bargaining unit of service technicians since the time of the Union's certification as the designated certified bargaining representative of these employees on or around May 14, 2010. While the parties have engaged in bargaining for an initial collective-bargaining agreement since June 2010, to date, these ongoing negotiations have not resulted in an overall agreement.

In the meantime, the employees of Respondent have been working under an "alternative work week" schedule since least July 2008. (ALJD 4:3-5). This schedule mandated that employees work a four day per week, ten hour per day schedule ("4/10 schedule"). In her decision, the Judge took judicial notice of certain California state laws which mandate that employers who wish to implement alternative work week schedules must first obtain the employees' permission reflected through holding alternative work week elections in order to avoid paying their employees overtime for time worked beyond the traditional eight-hour day. (ALJD 4: 25-41).

As the record reflects and the Judge found, in early 2011, the Union discovered evidence which led it to suspect that Respondent had failed to properly implement its alternative work week schedule. (ALJD 4: 43-44; 5: 1-5). Specifically, the Union suspected that Respondent had never held an appropriate alternative work week election. Accordingly, on July 8, 2011, the Union's counsel issued a written demand for arbitration

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<sup>1</sup> References to the Administrative Law Judge's Decision are "ALJD \_\_\_\_;" references to the underlying transcript are "Tr. \_\_\_\_;" references to General Counsel's Exhibits and to Respondent's Exhibits are "GC Exh \_\_\_\_" and "R Exh \_\_\_\_" respectively; and references to the Joint Exhibit is "Jt. Exh \_\_\_\_"

under the terms of the MAA on behalf of some unit employees claiming they were owed overtime pay as a result of Respondent's failure to implement the alternative work week schedule properly. (ALJD 5: 21-25; Jt. Exh. 1, at Exh. Q) Specifically, some of the employees contended that Respondent had violated the California Labor Code and Business and Professions Code regarding a dispute over the alternative work week schedule and alleged unpaid overtime payments. (ALJD 7: 26-29).

By letter dated July 25, 2011, the Union advised Respondent of its intention to arbitrate the claims on a class wide basis, and identified three class representatives: Lucio Amaya, Brian Brock, and Paul Bryan.<sup>2</sup> (ALJD 7: 31-33). In response, Respondent objected to the arbitration moving forward on a class wide basis, and took the position that the arbitration agreements did not authorize class arbitration. Additional correspondence was exchanged by counsels for Respondent and the Unit employees/ Union in July, August and September. As of September 13, because of Respondent's opposition to class arbitration, Union counsel advised Respondent that the three class representatives would proceed with separate individual arbitrations. (ALJD 7: 36-38).

On October 31, Respondent stated its desire to consolidate the now nineteen individual actions. The parties next tackled the issue of whether an arbitrator could hear Respondent's motion for consolidation. In the meantime, on April 20, 2012, the three named representatives - Amaya, Brock and Bryan - filed a motion with the arbitrator seeking class arbitration on behalf of themselves and similarly situated current and former employees alleging violations of the California Labor Code. (ALJD 8: 15-17).

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<sup>2</sup> The remaining dates occurred in the year 2011 unless otherwise noted.

Most recently, on February 6, 2013, the arbitrator granted Respondent's motion to dismiss the class allegations, and the arbitration is proceeding on a consolidated basis.

### 3. Argument

#### A. **The Judge Erred By Concluding That Where An Employer Prohibits Class Judicial Action, the Board Lacks the Authority To Compel That Employer to Allow Class Arbitration under *D.R. Horton*.**

In *D.R. Horton*, the Board held that “an employer violated Section 8(a)(1) of the Act by maintaining a mandatory arbitration agreement that did not allow its employees to file joint, class or collective employment-related claims in any forum, arbitral or judicial.” *Id.*, slip op at 1. In her decision, the Judge noted that while the “law does not require the employer to permit class action arbitrations... *D.R. Horton* states that a form for class or collective claims must be available.” (emphasis added, ALJD 22: 14-16). Furthermore, the Judge further found that “employees must be permitted to proceed with class action claims regarding wages, hours and/or working conditions in *some forum*, whether arbitral or judicial.” Her decision, in other words, fails to squarely answer the precise question of whether an employer can block class arbitration when it has not allowed for class judicial options, which is the factual scenario here. In the instant matter, it is clear that Respondent has precluded the ability of employees to seek class arbitration while, at the same time, it has foreclosed the judicial forum option, leaving only the narrowest option of consolidated arbitrations. By the Judge's decision, she has decided that the only appropriate remedy for such a violation is to compel Respondent to modify its MAA to allow collective legal action by the employees. However, this remedy fails to take note of the fact that the MAA in this case expressly bars class judicial action, while not expressly barring class arbitration (at least on its face). Under

these circumstances, where the employees have reasonably reacted to this unclear language in the MAA by attempting to file for class arbitration, the Judge's finding that the Employer can lawfully oppose this class arbitration would force the employees to start over again by filing a brand new action in a judicial forum. It is submitted that it would be inequitable in a case like this to limit the employees to such a remedy, after they have expended the time, energy, and legal fees necessary to pursue their class arbitration demand for the past two and a half years.

Therefore, because the Judge's decision is unclear and inconsistent in some parts, and further incorrectly narrows the scope of the Board's decision in *D.R. Horton*, Counsel for the General Counsel hereby excepts to this portion of the Judge's decision.

**B. The Judge Erred by Failing to Order Respondent to Reimburse Unit Employees and/or the Union for Litigation Expenses.**

**1. The Judge Incorrectly Rejected a Retroactive Application of *D.R. Horton*.<sup>3</sup>**

Assuming arguendo that the Board agrees with the General Counsel that Respondent violated the Act by opposing the employees' demand for class wide arbitration, then it is respectfully submitted that the Judge further erred by rejecting Counsel for the General Counsel's related request that Respondent be ordered to reimburse the unit employees and/or the Union for any litigation expenses directly related to its opposition to Respondent's unlawful motion to the arbitrator to prohibit class arbitration. Counsel for the General Counsel respectfully submits that the Judge's ruling to the contrary is erroneous on several grounds. First the Judge incorrectly reasoned that no litigation expenses should be awarded for fees accrued prior to the January 3, 2012

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<sup>3</sup> 357 NLRB No. 184, slip op. at 1-7 (2012).

issuance of the *D.R. Horton* decision, because prior to that time, “the Board’s position on the issue was unclear.” (ALJD p. 22 l. 24). However, in reaching this incorrect conclusion, the Judge failed to apply the balancing test required in determining whether retroactive application of new case law is appropriate. The Judge’s decision in this regard completely ignores the Board’s usual practice to apply new policies and standards retroactively “to all pending cases in whatever stage.” *SNE Enterprises*, 344 NLRB 673 (2005). The propriety of retroactive application is determined by balancing any ill effect of retroactivity against the “mischief of producing a result [that] is contrary to statutory design or to legal and equitable principles.” *Id.* (citing *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947); See also *Aramark School Services*, 337 NLRB 1063 (2002).) In deciding whether retroactive application will cause manifest injustice, the Board balances three factors: (1) “the reliance of the parties on preexisting law”; (2) “the effect of retroactivity on accomplishment of the purposes of the Act”; and (3) “any particular injustice arising from retroactive application.” *SNE Enterprises*, *supra.* at 673.

It is clear that retroactive application of *D.R. Horton* to the instant matter will not cause manifest injustice. First, Respondent has not asserted that it relied on preexisting law, in the pre-*D.R. Horton* legal landscape, with regard to language in employee arbitration agreements prior to requiring employees to execute these documents. Nor will Respondent face an injustice if the Board orders retroactive application of the balancing of interest approach. If Respondent is forced to allow for class action arbitration or to modify its arbitration agreement to allow for judicial action, there is no evidence that Respondent’s legal position on the merits in the underlying arbitration will suffer. In

such circumstances, Respondent would still be afforded a full opportunity to present evidence at arbitration and/or to defend itself in a judicial forum if the Unit employees subsequently chose to go that route. Accordingly, to the extent that Respondent argues its legal position would suffer “manifest injustice,” there is no evidence to support this notion.

Further, in *D.R.Horton* itself, the Board carefully considered the varying arguments in this legal realm, and the decision appears to reconcile these various potentially inconsistent strands of law in the area of arbitration agreements, including the significance attached to the Act’s protection of concerted legal action, the potential conflict of the Federal Arbitration Act, as well as the previous handling of other cases involving arbitration agreements by the General Counsel. On the one hand, as Respondent points out in its brief, in the year 2010, the General Counsel operated under a narrower theory of violation. Thus, in a 2010 memorandum (“GC Memo 10-06”), the General Counsel found that “a class-action waiver is not *per se* unlawful, so long as the waiver makes clear to employees that they may act concertedly to challenge the waiver itself and will not be subject to retaliation by their employer for doing so.” However, the MAA in the case at bar contains no such clarification. Moreover, here, the unit employees have sought to arbitrate their state wage claims on a class-wide basis since the year 2011, and have been blocked by Respondent, in its enforcement of the underlying unlawful arbitration agreement, from doing so. By not affording these employees the opportunity to arbitrate on a class-wide basis, and to proceed instead as a consolidated matter, as counsel for the Unit employees argued before Arbitrator Richard Hodge at the hearing on December 28, 2012 regarding Respondent’s Motion to Dismiss Class Action

(GC Exh 15), employees suffer by being compelled to identify themselves and “opt in,” and are subjected to more limited discovery options. It is the position of the General Counsel, in agreement with the Board in *D.R. Horton*, that the statutory interest in protecting employees’ Section 7 rights such as these outweighs any injustice resulting from the retroactive application of the *D.R. Horton* decision. Thus, the Board’s decision in *D.R. Horton* should be applied retroactively in this case, and should not have been used as a basis by the Judge to deny the award of litigation expenses.

**2. The Judge Ignored Well-Established Board Precedent Awarding Reimbursement of Litigation Expenses and Fees To Employees and Unions As a Remedy for Unlawful Employer Lawsuits.**

Finally, it is respectfully submitted that the Judge erred in holding that there is no legal authority to support the General Counsel’s request for an award of attorney’s fees to the employees and the Union. In this regard, one needs look no further than the following wealth of case authority supporting such an award. See *Bill Johnsons’ Restaurants*, 461 U.S. at 747 (“If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney’s fees and other expenses” and “any other proper relief that would effectuate the policies of the Act”); *Phoenix Newspapers*, 294 NLRB 47, 51 (1989); *Summitville Tiles, Inc.*, 300 NLRB 64, 67 (1990).<sup>4</sup> Thus, in holding to the contrary, the Judge erred by ignoring

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<sup>4</sup> Indeed, in *J.A. Croson Company*, 359 NLRB No. 2 (2012), the Board recently reaffirmed that the reimbursement of legal fees and expenses to parties defending against unlawful legal actions is “a presumptively appropriate remedy.” *Id.* at 10. Though a presumptively appropriate remedy, the Board in *J.A. Croson* did not award litigation fees and expenses to the employees who opposed an unlawful lawsuit. However, this was because the lawsuit at issue there was not unlawful at its inception and the employees did not file their Board charge until long afterwards. Here, unlike *J.A. Croson*, Respondent’s clear opposition to employees’ attempts to proceed in a class wide arbitration was unlawful at its inception as Respondent was essentially prohibiting their collective legal action.

ample Board authority which fully supports the special remedy of reimbursement of litigation expenses and fees.

#### 4. Conclusion

For the reasons set forth above, it is respectfully requested that the Board find merit to the General Counsel's Limited Exceptions, and the Board is requested to make the appropriate findings and conclusions with respect to these matters and find that Respondent also violated Section 8(a)(1) by opposing employees' demands for class arbitration under circumstances where the Respondent also precludes class legal litigation as demonstrated by the record and order the appropriate remedies, including the retroactive application of *D.R. Horton* and a reimbursement of legal fees remedy.

**DATED AT** Oakland, California this 18<sup>th</sup> day of December 2013.

Respectfully submitted,



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UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 32

FAA CONCORD H, INC. d/b/a  
CONCORD HONDA

and

MACHINISTS AUTOMOTIVE TRADES  
DISTRICT LODGE NO. 190,  
AUTOMOTIVE MACHINISTS LODGE NO. 1173

Case(s) 32-CA-066979  
32-CA-070343  
32-CA-072231

Date: December 18, 2013

AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT  
OF LIMITED EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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.

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