UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE EXECUTIVE SECRETARY

FAA CONCORD H, INC. d/b/a CONCORD HONDA and AUTOMOTIVE MACHINISTS LODGE NO. 1173, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS.	Cases 32-CA-066979 32-CA-070343 32-CA-072231

EMPLOYER'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION FILED CONCURRENTLY WITH BRIEF IN SUPPORT OF THE EXCEPTIONS

December 18, 2013

LITTLER MENDELSON
A Professional Corporation
JOSHUA J. CLIFFE
jcliffe@littler.com
AURELIO PEREZ
aperez@littler.com
650 California Street, 20th Floor
San Francisco, California 94108-2693
Tel: (415) 433-1940
Fax: (415) 399-8490

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

Pursuant to the National Labor Relations Board's Rules and Regulations, including Section 102.46 thereof, FAA Concord H, Inc. d/b/a Concord Honda (hereinafter "the Employer") respectfully files the following Exceptions to the Administrative Law Judge's Decision issued by Administrative Law Judge Eleanor Laws (hereinafter "the ALJ") on October 23, 2013.

No.	Page(s)	Exception
1.	8:23-9:37; 21:29-32	The Employer excepts to the ALJ's conclusion that the Employer "violated Section 8(a)(1) and (5) of the Act by unilaterally implementing the [June] 2011 bonus."
2.	8:46-9:6	The Employer excepts to the ALJ's finding that the burden of showing a past practice "is by no means prima facie and…rests squarely with the employer."
3.	9:8-17	The Employer excepts to the ALJ's finding that the June 2011 bonus was "material, substantial and significant."
4.	9:9-10	The Employer excepts to the ALJ's finding that "[t]he Board has found similar and lesser bonus payments to be mandatory subjects of bargaining."
5.	9:8-17	The Employer excepts to the ALJ's presumption that the size of other bonuses found to be mandatory subjects of bargaining is dispositive of whether the June 2011 bonus, or any bonus, is material, substantial and significant.
6.	9:26-34	The Employer excepts to the ALJ's finding that that a past practice of awarding bonuses did not exist.
7.	9:27-31	The Employer excepts to the ALJ's conclusion that there was "an established practice of not offering bonuses."
8.	9:31-32	The Employer excepts to the ALJ's conclusion that "[n]o employee recalled having been incented to receive any other bonus," the nested implication that the Employer bore the burden of adducing such testimony, and incorrect suggestion that the testimony of more than one bargaining unit employee was offered at hearing.

No.	Page(s)	Exception
9.	9:32-33	The Employer excepts to the ALJ's conclusion that the record does not contain "evidence of specific bonuses the Respondent offered and paid," and, accordingly, that "references to various amounts paid [and titled 'bonus'] on employees' paychecks," do not suffice for such a showing.
10.	10:17-20; 10:25-27; 12:2-3	The Employer excepts to the ALJ's conclusion that there are only two exceptions to an employer's obligation to refrain from unilateral changes.
11.	11:1-5; 15:20-21	The Employer excepts to the ALJ's finding that the elections were presented to the Union as a "*fait accompli.*"
12.	11:2	The Employer excepts to the ALJ's failure to find that the Employer's "attempts to bargain about the election were genuine."
13.	11:8	The Employer excepts to the ALJ's factual finding that the Employer "did not offer to bargain over the effects of the election."
14.	11:2; 11:8	The Employer excepts to the ALJ's finding that the Employer "did not offer to bargain over the effects of the election," on the basis that the operative complaint contains no allegation regarding a failure to engage in effects bargaining.
15.	11:14-12:34	The Employer excepts to the ALJ's failure to find that the Union engaged in delay tactics to preclude an overall agreement or impasse that excused the Employer's purportedly unilateral actions.
16.	11:14-12:6	The Employer excepts to the ALJ's failure to consider the inability of the Union's representatives to provide any plausible explanation of the reason they insisted that the Employer maintain a status quo they alleged to be illegal as evidence of their intent to delay bargaining.
17.	13:1-18	The Employer excepts to the ALJ's failure to find that the alternative workweek elections conducted by the Employer were permissible because undertaken to comply with California wage and hour law.
18.	13:1-18, n10	The Employer excepts to the ALJ's finding that the cases cited by the Employer in its post-hearing brief establishing the permissibility of actions taken to comply with the law are distinguishable from this case.
19.	13:5, n10	The Employer excepts to the ALJ's finding that the Employer's reliance on *Pratt Industries,* 358 NLRB No. 52 (2012), is misplaced.

No.	Page(s)	Exception
20.	13:3-18	The Employer excepts to the ALJ's rejection of the Employer's defense of legal privilege because the Employer had argued in the alternative that the alternative workweek schedule was legally instituted.
21.	13:13-16	The Employer excepts to the ALJ's rejection of the Employer's argument that the Act should not be construed to discourage or prohibit an employer's attempt to comply with other laws," and the ALJ's reduction of that argument to the Employer's "ill-conceived attempt to foist responsibility for its own conduct on the Union, the Acting General Counsel, and in turn, the Board."
22.	13:16-18	The Employer excepts to the ALJ's dismissive reduction of the Employer's attempt to comply with legal obligations as "attempts to deflect the potential fallout from a lawsuit in another forum based on actions it maybe took or maybe didn't take in the past."
23.	13:18	The Employer excepts to the ALJ's conclusion that the Union "has no obligation" to assist in remedying allegedly unlawful conduct as well as the ALJ's failure to find that the Union is obliged not to oppose remedy of allegedly unlawful conduct.
24.	13:24	The Employer excepts to the ALJ's conclusion that the Employer must demonstrate a "dire financial emergency," in order to meet the second *RBE Electronics* exception.
25.	13:32-34	The Employer excepts to the ALJ's finding that the AWS election and related proceedings were not permitted as responses to the economic exigency inherent in the Employer's alleged non-compliance with California wage and hour laws.
26.	13:32-35	The Employer excepts to the ALJ's finding that "the circumstances placing them in the position to seek the new elections were in Concord's control and were reasonably foreseeable."
27.	12:24, 32-33	The Employer excepts to the ALJ's failure to consider, as evidence of the Union's delay tactics, the fact that the Union refused to bargain with the employer about the AWS elections for the month after it had received notice of the Employer's intent to host them.
28.	12:33-34	The Employer excepts to the ALJ's finding that the Employer failed to meet its burden to prove the Union engaged in delaying tactics under *RBE Electronics.*

No.	Page(s)	Exception
29.	12:24, 32-33	The Employer excepts to the ALJ's finding that the Union did not demonstrate a pattern of delaying tactics.
30.	13:34-35	The Employer excepts to the ALJ's finding that "it was [solely] the Employer's responsibility to comply with the legal requirements for establishing an alternative workweek schedule."
31.	13:34-35	The Employer excepts to the ALJ's finding that "[a]ny failure to [comply with the legal requirements for establishing an alternative workweek schedule] was not the result of an external event beyond its control."
32.	13:36-37	The Employer excepts to the ALJ's finding that any failure to comply with the legal requirements for establishing an alternative workweek schedule "could not conceivably be in anyone else's control," but the Employer's.
33.	13:37-38	The Employer excepts to the ALJ's finding that "[p]otential liabilities associated with a failure to hold elections properly and to file a legitimate record of the elections with the state are plainly reasonably foreseeable."
34.	13:38-14:2	The Employer excepts to the ALJ's finding that "Rodgers' discovery of the 2000 certificate of compliance and the ensuing arbitration likewise cannot be seen as an unforeseeable external event beyond the [Employer's] control."
35.	14:6-8	The Employer excepts to the ALJ's finding that "it cannot rationally be argued that anyone other than the Respondent created the situation giving rise to the claimed exigency."
36.	14:22-35	The Employer excepts to the ALJ's finding that the cases the Employer has cited in which the Board has found that compelling exigencies minimized the need to bargain to impasse are distinguishable or/inapplicable to this case.
37.	14:35-39	The Employer excepts to the ALJ's finding that the Employer was obliged under *RBE Electronics* to "present… evidence of a such a dire economic situation or an event beyond its control leading to its demise," or that the Employer did not present evidence of an "economic situation" and/or "an event beyond its control."
38.	14:41	The Employer excepts to the ALJ's finding that the Employer's economic exigency argument fails.

No.	Page(s)	Exception
39.	14:43-16:24; 21:29-32	The Employer excepts to the ALJ's conclusion that the Employer "violated Section 8(a)(1) and (5) of the Act by… meeting with employees about alternative workweek elections."
40.	15:1-16:25	The Employer excepts to the ALJ's failure to find that the Employer was privileged to directly communicate with union-represented employees for the purposes of establishing or changing the terms and conditions of employment, where the Union had been invited to participate, when the purpose of such communications was complying with and/or remedying and actual or alleged violation of law.
41.	15:11-13	The Employer excepts to the ALJ's conclusion that Employer communications with union-represented employees for the purposes of establishing or changing the terms and conditions of employment, where the Union had been invited to participate, when the purpose of such communications was complying with and/or remedying and actual or alleged violation of law, "clearly undermined the Union's role in collective bargaining."
42.	15:29-16:6	The Employer excepts to the ALJ's finding that the decisions in *Union Mfg. Co* 27 NLRB 1300 (1940) and *Darlington Veneer Co.*, 113 NLRB 1101 (1955) provide the legal framework for evaluating whether the communications at these meetings violated the Act.
43.	15 n. 17	The Employer excepts to the ALJ's conclusion that Employer meetings with union-represented employees for the purposes of establishing or changing the terms and conditions of employment "clearly had the effect… of undermining the Union."
44.	16:12-21	The Employer excepts to the ALJ's finding that the Employer's communications with union-represented employees for the purposes of establishing or changing the terms and conditions of employment were "made to the Union's exclusion," where the Union had repeatedly been invited (and had repeatedly refused) to participate.
45.	16:8-10	The Employer excepts to the ALJ's finding that "[t]he October 17 meetings were held to introduce the Respondent's plan to bypass the Union and demand proof from the employees that the Union was acting in accordance with their desires."
46.	16:10-11; 14-17	The Employer excepts to the ALJ's failure to discern what "meaningful role" the Union could have played through participation in such meetings.

No.	Page(s)	Exception
47.	16:19-20	The Employer excepts to the ALJ's conclusion that the "communications were effectively made to the Union's exclusion."
48.	16:23-24	The Employer excepts to the ALJ's finding that the Employer's "meetings with Unit members about the elections constituted direct dealing in violation of Section 8(a)(1) and (5).
49.	16:30-31	The Employer excepts to the ALJ's finding that the Employer "has enforced the [DRA]s to precluded class or collective litigation in violation of Section 8(a)(1).
50.	16:24-21:24	The Employer excepts to the ALJ's failure to address the argument, and find, that the Dispute Resolution Agreement ("DRA") is lawful under the Rules Enabling Act.
51.	17:38-46	The Employer excepts to the ALJ's expansion of cases in which the Board ruled that the NLRA prohibits an employer from taking an adverse employment action against an employee in retaliation for the employee bringing a good faith or non-malicious lawsuit or administrative complaint against the employer, whether individually or in concert with other employees, to support her erroneous conclusion that "[t]he Board has consistently held that collective legal action involving wages, hours, and/or working conditions is protected concerted activity under Section 7," as well as that conclusion itself.
52.	18:1-19:16	The Employer excepts to the ALJ's reliance on the Board's rejected decision in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012).
53.	18:14-30	The Employer excepts to the ALJ's finding that "employees would reasonably construe the [DRA's] language to prohibit Section 7 activity," as well as the ALJ's bases for said conclusion.
54.	18:22-25	The Employer excepts to the ALJ's finding that the "singular language [of the DRA], with no reference to the ability to pursue claims about working conditions jointly (other than through the Board's procedures) would lead an employee to read the [DRA] as applicable only to individual employment disputes."
55.	18:27-30	The Employer excepts to the ALJ's finding that, "[b]y stating that any communication made in connection with arbitrations proceeding is privileged, the [DRA] would reasonably be construed as prohibiting employees from discussing with each other information about employment disputes subject to arbitration."

No.	Page(s)	Exception
56.	18:32-19:14	The Employer excepts to the ALJ's finding that the Dispute Resolution Agreement is "silent" on employees' rights to engage in collective action even though it incorporates "the California Arbitration Act (Cal. Civ. Proc. Sec 1280 et. seq.)."
57.	19:12-16, 23-34; 20:7-8, 21-24	The Employer excepts to the ALJ's conclusion that the right to engage in a class or collective action is protected, concerted activity under Section 7 of the NLRA.
58.	20:36-37, n. 18	The Employer excepts to the ALJ's failure to find and conclude that the National Labor Relations Board lacked a quorum when it issued its decision in *D.R. Horton*, 357 NLRB No. 184 (2012).
59.	20:15-16	The Employer excepts to the ALJ's failure to find that the *D.R. Horton* has not been overturned by Supreme Court precedent.
60.	20:18-24	The Employer excepts to the ALJ's conclusion that the Federal Arbitration Act does not permit an employer to enter into an arbitration agreement with an employee in which the employee agrees not to bring or participate in a class or collective action.
61.	20:18-24	The Employer excepts to the ALJ's failure to find that the Dispute Resolution Agreement is lawful under the Federal Arbitration Act and, accordingly, any right to collective and/or class activity protected under the Act must yield to the FAA's command to enforce arbitration agreements according to their terms.
62.	20:7-8	The Employer excepts to the ALJ's finding that the Board's decision in *D.R. Horton* extends to arbitration agreements that prohibit class actions but permit collective actions.
63.	21:29-32; 10:9-14:41	The Employer excepts to the ALJ's conclusion that the Employer "violated Section 8(a)(1) and (5) of the Act by… holding alternative workweek elections."
64.	21:34-37; 18:14-16; 19:44-20:37	The Employer excepts to the ALJ's finding that the Employer "violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration agreement which required employee to resolve employment-related disputes exclusively through arbitration proceedings and by enforcing that agreement to preclude resolution of such disputes through class action."

No.	Page(s)	Exception
65.	22:41-23:3	The Employer excepts to the ALJ's order that it cease and desist from "unilaterally implementing an employee bonus or changes in the work week schedule in the absence of an overall agreement or a lawful impasse in collective-bargaining negotiations" to the extent that this prevents the Employer from making changes necessary to comply with California law.
66.	19:15-16	The Employer excepts to the ALJ's finding that "employees would reasonably construe the [DRA]…as permitting individual arbitration actions only," despite the fact that multiple employees are proceeding in a collective action.
67.	23:5-6.	The Employer excepts to the ALJ's order that it cease and desist from "bypassing the Union and dealing directly with its employees with regard to their terms and conditions of employment" to the extent that this would preclude the Employer from meeting with employees for the purpose of ascertaining their opinions and complying with California wage and hour law.
68.	23:8-9	The Employer excepts to the ALJ's order that it cease and desist from "maintaining Mandatory Arbitration Agreements that employees would construe as prohibiting class or collective actions" to the extent that it presumes that the Dispute Resolution Agreement is such an agreement.
69.	23:11	The Employer excepts to the ALJ's order that it cease and desist from "enforcing the Mandatory Arbitration Agreements to prohibit class actions."
70.	23:15-17	The Employer excepts to the ALJ's order that it "[r]escind or revise the MAAs 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."
71.	23:19-21	The Employer excepts to the ALJ's order that it "[n]otify the employees of the rescinded or revised agreements [including]… providing them copies of the revised agreements or specific notification that the agreements have been rescinded"
72.	23:23-37; Appendix	The Employer excepts to the ALJ's order that it post the notice marked "Appendix" at the Employer's facility in Concord.
73.		The Employer excepts to all rationales, findings, conclusions and recommendations of the ALJ that are inconsistent with the Exceptions set forth above.

Respectfully submitted,

Dated: December 18, 2013

By: */s/ Joshua J. Cliffe*
JOSHUA J. CLIFFE
LITTLER MENDELSON, P.C.
Attorneys for Respondent
FAA CONCORD H, INC. d/b/a CONCORD HONDA

Firmwide:124407246.2 026122.1138