

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

CHARLES DUNAWAY and
WALTER LINARES,

Charging Parties,

v.

SECURITAS SECURITY SERVICES
USA, INC.,

Respondent.

Case Nos. 31-CA-072179 and
31-CA-072180

Case Nos. 31-CA-088081 and
31-CA-088082

**RESPONDENT'S ANSWERING BRIEF TO
CHARGING PARTIES' EXCEPTIONS**

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I. INTRODUCTION

The Charging Parties' Exceptions, and Brief in Support of Exceptions, focus almost entirely on asserting that arbitration agreements with class action waivers are unenforceable because class action lawsuits are protected concerted activity under the National Labor Relations Act ("NLRA") and the Norris LaGuardia Act ("NLGA"). This single-minded focus completely ignores the legislative intent of the Federal Arbitration Act ("FAA"). This argument also ignores overriding U.S. Supreme Court precedent that requires arbitration agreements to be enforced as written, even when they contain class action waivers.

II. ARGUMENT

A. The Charging Parties' Exceptions Ignore Supreme Court Precedent Requiring Arbitration Agreements to be Enforced as Written, Even When the Agreements Contain Class Action Waivers.

In their brief, the Charging Parties assert that Securitas' arbitration agreements are unenforceable because the NLRA protects employees' right to engage in class actions. The Charging Parties completely ignore the current U.S. Supreme Court precedent, which clearly protects arbitration agreements as written, and allows class action waivers in those agreements.

In *AT&T Mobility v. Concepcion*, the Supreme Court upheld a class action waiver in an arbitration agreement and invalidated a state law that conditioned the enforceability of the agreement on the availability of classwide arbitration. *AT & T Mobility v.*

Concepcion, 131 S. Ct. 1740, 1753 (2011). Applying longstanding Supreme Court precedent, the Court concluded that the FAA establishes a strong federal policy in favor of enforcing arbitration agreements in accordance with their terms, including provisions that waive the right to pursue class or collective relief in arbitration. *Concepcion*, 113 S.Ct. at 1748.

The Supreme Court reaffirmed these principles shortly after the Board's *D.R. Horton* decision in *CompuCredit*. In that case, the Court reiterated that the FAA establishes a liberal federal policy favoring arbitration agreements. *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 669 (2012). That policy "requires courts to enforce agreements to arbitrate according to their terms." *Id.* The Court emphasized that this requirement applies "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command." *Id.* (Citations omitted).

The Court also relied on *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). *Gilmer* was an employment case under the federal Age Discrimination in Employment Act. *Id.* at 669-71. The Court declared that *Gilmer* was part of a "series of this Court's seminal decisions compelling arbitration, decisions which held that the FAA had established a federal policy favoring arbitrations." *Id.* at 672 n.4. Clearly, the Supreme Court intended the FAA to prevail in the context of labor and employment statutes. See also *Granite Rock Co. v. Intl. Brotherhood of Teamsters*, 130 S.Ct. 2847, 2858 (2010).

In addition, *CompuCredit* held that the burden rests on the party opposing arbitration to show that Congress intended to preclude a waiver of judicial remedies. *CompuCredit*, 132 S.Ct. at 669. To meet this burden, a “Congressional command” must be found in an unambiguous statement in the statute and cannot be gleaned from ambiguous statutory language. *Id.* at 670-73. The Court held that if a federal statute “is silent on whether claims under [it] can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms.” *Id.* at 673.

In the second case, *Italian Colors*, the Supreme Court held that a contractual waiver of class arbitration was enforceable under the FAA when the claims arose under the federal antitrust statutes. *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013). The Court reiterated that courts must “rigorously enforce” arbitration agreements according to their terms. Claims must be arbitrated under a federal statute “unless the FAA’s mandate has been overridden by a contrary congressional command,” and no such command existed in the antitrust statutes. *Id.* at 2309.

There is no “contrary Congressional command” in Section 7 of the NLRA, or anywhere else in the Act, requiring the Board to invalidate lawful arbitration agreements that contain class action waivers. Nothing in the NLRA’s plain language indicates that Section 7 creates a substantive right for employees to bring or participate in class actions. The statute is completely silent on whether it precludes arbitration agreements that include a class waiver. *D.R. Horton, Inc. v. NLRB*, slip op. at 21-24. Given the silence of the NLRA, under the Supreme Court’s reading of the FAA, the Board must enforce Securitas’ arbitration agreements as written, including the class action waiver.

B. The Charging Parties Rely on the Board's Decision in *D.R. Horton*, Which Has Been Rejected by at Least 40 Courts.

The Charging Parties urge the Board to follow its decision in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012). At last count, at least 40 courts, including four federal appellate courts, have rejected that decision as precedent.¹ The Fifth Circuit recently refused to enforce the Board's decision in that case. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). Prior to the Fifth Circuit's decision, the Second, Eighth, and Ninth Circuits refused to follow the Board's decision. *Richards v. Ernst & Young*, No. 11-17530, 2013 U.S. App. LEXIS 17488 (9th Cir. Aug. 21, 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Sutherland v. Ernst & Young*, 726 F.3d 290 (2d Cir. 2013). On the same day that the Administrative Law Judge issued his decision in this case, another ALJ reached the opposite conclusion, holding that the Board's position in *D.R. Horton* cannot be sustained in light of intervening Supreme Court precedent. *Chesapeake Energy Corp.*, NLRB Case No. 14-CA-100530 (November 8, 2013). Given this overwhelming contrary precedent, the Board should reconsider and overrule its decision in *D.R. Horton*.

C. The Board Should Follow the Fifth Circuit Court's Decision in *D.R. Horton*.

The Charging Parties contend that The NLRB has exclusive jurisdiction to determine whether conduct falls within the NLRA. The Fifth Circuit extensively discussed the role of the Board in interpreting the FAA and NLRA regarding an

¹ These decisions are summarized in Attachment A to this Respondent's Brief in Support of Exceptions.

employer's arbitration agreement in its decision in *D.R. Horton, Inc. v. NLRB*. The Court noted that "deference to the Board 'cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption . . . of major policy decisions properly made by Congress.'" *D.R. Horton, Inc. v. NLRB*, slip op. at 14 quoting *NLRB v. Fin. Inst. Emps. of Am., Local 1182*, 475 U.S. 192, 202 (1986). Particularly relevant to this case is the Court's finding that "the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *Id.* quoting *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942). This single-minded interpretation of arbitration contracts under the NLRA is precisely the approach advocated by the Charging Parties.

However, the Fifth Circuit found that the NLRA was not the only relevant authority in enforcing arbitration agreements. The FAA had equal importance to the question of whether class action waivers in arbitration agreements were enforceable. *Id.* at 15. The Court cited numerous court decisions finding no right to use class procedures under various employment-related statutory frameworks, including the Age Discrimination in Employment Act and the Fair Labor Standards Act. *Id.* at 17 citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 506 (4th Cir. 2002); *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319-20 (9th Cir. 1996). The Fifth Circuit concluded that, under the FAA, arbitration agreements must be enforced according to their terms. *CompuCredit*, 132 S. Ct. at 669.

The Court noted that two exceptions exist to this rule: (1) an arbitration agreement may be invalidated on any ground that would invalidate a contract under the FAA's "saving clause," *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011); and (2) application of the FAA may be precluded by another statute's contrary congressional command, *CompuCredit*, 132 S. Ct. at 669. *Id.* at 18. The relevant portions of the FAA's "savings clause" provide:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction. . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. §2.

In the underlying D.R. Horton case, the Board found that D.R. Horton's Mutual Arbitration Agreement violated the collective action provisions of the NLRA, making the saving clause applicable. Relying on the reasoning of *Concepcion*, the Fifth Circuit found that the effect of the Board's interpretation was to disfavor arbitration. "Requiring a class mechanism is an actual impediment to arbitration and violates the FAA. The saving clause is not a basis for invalidating the waiver of class procedures in the arbitration agreement." *Id.* at 21.

The Fifth Circuit next turned to the question of a clear Congressional intent to override the FAA. The Court noted that questions of arbitration must be addressed with a "healthy regard for the federal policy favoring arbitration." *Id.* citing *Gilmer*, 500 U.S. at 26. The party opposing arbitration bears the burden of showing whether a

congressional command exists. *Id.* Any doubts are resolved in favor of arbitration. *Id.* citing *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983).

The Court found there was no explicit language in the NLRA of a Congressional intent to override the FAA. In fact, nothing in the text mentions arbitration or explicitly mention procedures for such collective action. *Id.* at 22. The Court found that courts have consistently interpreted the NLRA to permit and require arbitration. *Id.* at 23 citing *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257-58 (2009); *Blessing v. Freestone*, 520 U.S. 329, 343 (1997); *Richmond Tank Car Co. v. NLRB*, 721 F.2d 499, 501 (5th Cir.1983).

The Fifth Circuit concluded that “the Board has not shown that the NLRA’s language, legislative history, or purpose support finding the necessary congressional command. Because the Board’s interpretation does not fall within the FAA’s ‘saving clause,’ and because the NLRA does not contain a congressional command exempting the statute from application of the FAA, the Mutual Arbitration Agreement must be enforced according to its terms.” *Id.* at 25. Since this case involves identical issues arising under the FAA, the Board does not have exclusive jurisdiction and should defer to the Supreme Court and Fifth Circuit’s interpretation of that Act. That interpretation requires the Board to enforce Securitas’ arbitration agreements as written.

D. Class Actions Are a Procedural Right Under the Federal Rules of Civil Procedure, Not a Substantive Right Under the NLRA .

The Charging Parties contend that class actions are a substantive right under the NLRA. The right to bring class claims is not a substantive right protected by

the NLRA, but a procedural right governed by Rule 23 of the Federal Rules of Civil Procedure. FED. R. CIV. P. 23; 29 U.S.C. §§ 201 *et seq.* Under the Rules Enabling Act, Congress authorized the courts to promulgate rules of procedure, but that those rules “shall not abridge, enlarge or modify any substantive rights.” 28 U.S.C. §2072(b); *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011); *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442 (2010); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999). As the Supreme Court stated, the “right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.” *Deposit Guaranty Nat’l Bank v. Roper*, 445 U.S. 326, 332 (1980) (emphasis added).

In *Italian Colors*, the Supreme Court expressly held that Congressional approval of class action law suits under the Federal Rule of Civil Procedure Rule 23 did not create an “entitlement to class proceedings for the vindication of statutory rights.” *Italian Colors*, 133 S.Ct. at 2309. And as the Fifth Circuit succinctly stated, “The use of class action procedures...is not a substantive right.” *D.R. Horton, Inc. v. NLRB*, slip op. at p. 16. Thus, Rule 23 cannot be interpreted as providing a substantive or statutory right to participate in class actions under the National Labor Relations Act. *Id.* Such an interpretation would constitute an enlargement of the rights enumerated in the NLRA to engage in protected, concerted activity.

In an attempt to bring class action waivers under the umbrella of the NLRA’s protected activity, the Charging Parties contend that class actions arising under state wage laws are no different than class actions under the Fair Labor Standards Act

(“FLSA”). As the Fifth Circuit pointed out in *D.R. Horton, Inc. v. NLRB*, numerous courts have held that there is no substantive right to proceed collectively under the FLSA. *D.R. Horton v. NLRB*, slip op. at 17 citing *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004); see also *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 506 (4th Cir. 2002); and *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319-20 (9th Cir. 1996). Accordingly, there would be no corollary substantive right to class actions under the NLRA.

In support of its assertion that class actions are a substantive right, the Charging Parties cite a U.S. Supreme Court case and two Seventh Circuit cases from the 1940's. The Charging Parties cite *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940) for the proposition that arbitration clauses violate the NLRA. A careful reading of the case shows that the Charging Parties misstate the ultimate holding of the Court. Contrary to the Charging Parties' assertion, the Court did not invalidate the contracts between the employer and employees, including an agreement to arbitrate over hours and rates of pay, because the contracts limited claims to the individual employee. Instead, the Court found that the employer's contracts with the individual employees were unenforceable because the contracts were procured through the mediation of an employer dominated employee committee and restricted employees' general rights to be represented by "any union" in violation of the Act. *Id.* at 360. In addition, the contracts required employees to give up their right to strike. Nothing in the record of this case suggests that the Respondent in any way restricted employees' access to any union. Therefore, the case cited by the Charging Parties is inapposite and fails to support their argument.

The individual contracts in *National Licorice* also prohibited arbitration of discharge claims. The Court concluded that this **prohibition** of arbitration violated the Act. *Id.* Despite the charging Parties contrived analysis, this case actually shows that the NLRA has been read for over 75 years to permit and encourage arbitration.

Similarly, the Charging Parties contend that the Seventh Circuit held that individual contracts requiring employees to arbitrate grievances individually were *per se* violations of the NLRA. See *NLRB v. Stone*, 125 F.2d 752, 755 (7th Cir. 1942). Again, the Charging Parties misstate the case. In *NLRB v. Stone*, the employer negotiated individual contracts in response to a union organizing campaign. The contracts required individual employees to negotiate directly with an employer regarding workplace grievances and submit any differences to binding arbitration. More importantly, the stated purpose of the contracts was to “prevent strikes and labor troubles.” The Court concluded that “by this provision the employee not only waived his right to collective bargaining but his right to strike or otherwise protest.” The individual arbitration provision was not unlawful standing alone. The contracts were unlawful because they required employees to waive fundamental Section 7 protected rights. As discussed below, unlike *NLRB v. Stone*, the record evidence in this case undisputedly establishes that Securitas made every effort to protect employees’ Section 7 rights and preserve employee access to the NLRB and Board procedures in its arbitration contracts.

The Charging Parties also cite *NLRB v. Superior Tanning Co.* for the proposition that an employer was ordered to cease and desist from giving effect to an arbitration clause because it had the obvious effect of restraining employees in the exercise of their

Section 7 rights. *NLRB v. Superior Tanning Co.*, 117 F.2d 881, 892 (7th Cir. 1940). *Superior Tanning* does not stand for the proposition that all arbitration agreements restrain employees in the exercise of their Section 7 rights. In fact, *Superior Tanning* recognizes that “the Act does not preclude the employer from ‘electing’ to make individual contracts with his employees.” *Id.* at 890 (citations omitted). However, in this case, the Court found that “the respondent engaged in a planned program to discourage unionization of his employees and to eliminate the Union from its plant. We have already tested the evidence which is substantial, and it is clear that the individual contracts were a part of the plan to keep the employees from joining the Union.” *Id.* The agreements were unlawful as part of a plan to interfere with the employees’ protected Section 7 right to join a union, not as arbitration agreements. There is absolutely no record evidence in this case to show that the arbitration agreements in this case were related in any way to union animus.

E. Nothing in the NLGA Prohibits Securitas’ Arbitration Agreements From Being Enforced as Written.

The Charging Parties contend that it is unlawful for employers to enter into contracts with their employees that would interfere with the rights of employees to engage in concerted activity related to wages and working conditions under the NLGA. However, in a two line footnote, the Fifth Circuit quickly rejected this argument and found that the Board’s reading of the NLGA was unpersuasive. The Court found that the NLGA clearly falls outside the Board’s interpretive area of expertise. *D.R. Horton v. NLRB*, slip op. at 24 n. 10. Similarly, the Ninth Circuit found that “Congress. . . did not

expressly provide that it was overriding any provision in the FAA when it enacted the NLRA or the Norris-LaGuardia Act.” *Richards v. Ernst & Young, LLP*, 734 F.3d 871, 2013 U.S. App. Lexis 17488, slip op. at 3 (9th Cir.2013), quoting *Morvant v. P.F. Chang’s China Bistro, Inc.*, 870 F. Supp. 2d 831, 845 (N.D. Cal. 2012).

Furthermore, the Board’s interpretation of the Norris LaGuardia Act in the *Horton* decision is incorrect. The Board contends that (a) an agreement prohibiting a person from aiding another person in a labor dispute who is prosecuting an action in federal or state court violates Section 4(d) of Norris LaGuardia; and (b) an arbitration agreement that prohibits a class action is a prohibited agreement. This contention, however, incorrectly conflates two separate provisions of the Norris LaGuardia Act, Sections 3 and 4, to arrive at an erroneous conclusion. The Board relies on Section 4(d), which does not concern agreements or contracts of any kind, much less FAA arbitration agreements. Accordingly, nothing in the NLGA prohibits class action waivers in arbitration agreements. Since the NLGA falls outside the Board’s area of expertise, the Board must defer to the Courts’ interpretation of that Act.

F. Contrary to the Charging Parties’ Exceptions, the Record Evidence Shows that Securitas’ Arbitration Agreements Do Not Bar Collective Activity.

The Charging Parties contend that Securitas’ arbitration agreements bar collective activity by its employees. The Charging Parties fail to cite any portion of the ALJ’s decision or any record evidence to support this argument. In fact, nothing in the record supports this broad declaration. The only facts in the record establish that Securitas went

out of its way to ensure that employees' knew that the agreement did not prohibit employees from exercising their Section 7 rights.

The language of the arbitration agreements is clear. Paragraph 1 of both agreements expressly states that "Claims may be brought before an administrative agency . . . notwithstanding the existence of an agreement to arbitrate." The very next sentence goes on to indicate that "Such administrative claims include without limitation claims or charges brought before . . . the National Labor Relations Board (www.nlr.gov)." The Agreement even provides the website of the NLRB to assist employees in filing claims. (Exhibit C & D). In addition, Paragraph 4 of the Agreement also specifically mentions the NLRB. That paragraph states that ". . .an employee will not be retaliated against, disciplined or threatened with discipline as a result of his or her exercising his or her rights under Section 7 of the National Labor Relations Act by the filing of or participation in a class, collective or representation action in any forum..." Therefore, all the record evidence establishes that Securitas' arbitration agreements form no bar to its employees' protected concerted activity under the NLRA.

III. CONCLUSION

For the foregoing reasons, and based on the stipulated record evidence, the Board should disregard the Charging Parties' Exceptions, and Brief in Support of Exceptions, and dismiss the charges in this case.

Dated: January 21, 2014

Respectfully Submitted,

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PROOF OF SERVICE BY MAIL AND E-MAIL

I am employed in Contra Costa County, Walnut Creek, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 1255 Treat Boulevard, Suite 600, Walnut Creek, CA 94597. On January 21, 2014, I served the within document(s):

**RESPONDENT'S ANSWERING BRIEF TO CHARGING PARTIES'
EXCEPTIONS**

- by placing a true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Walnut Creek, California addressed as set forth below.

- Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses on the attached service list on the dates and at the times stated thereon. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. The electronic notification address of the person making the service is mamartinez@littler.com.

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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on the same day with postage or fees thereon fully prepaid in the ordinary course of business.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on January 21, 2014, at Walnut Creek, California.



Monica A. Martinez

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