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

CONCORD HONDA'S ANSWERING BRIEF TO THE COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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Pursuant to 29 C.F.R. 102.46(f)(1), Respondent FAA Concord H, Inc. d/b/a Concord Honda ("Concord Honda," or "Respondent") hereby submits its answers to the Acting General Counsel's ("AGC") cross-exceptions to the Administrative Law Judge's Decision in this case. The AGC excepts to the ALJ's decision in two separate regards. Each set of exceptions is considered in turn.

I. THE AGC'S EXCEPTION TO THE ALJ'S DECISION NOT TO ORDER CLASS ARBITRATION LACKS ANY MERIT AND SHOULD BE DISMISSED.

First, the AGC asserts that "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*, [357 NLRB No. 184 (2012).]." (See AGC Exceptions ("AGCE"), § 3(A), pg. 6). In this respect, the AGC misconstrues the Board's ruling in *D.R. Horton*, and requests a remedy that is either moot or beyond the Board's power to grant.

In *D.R. Horton*, the Board held that an employer violates Section 8 when it "compels" an employee to waive his or her right to collectively pursue litigation of employment claims "in *all* forums, arbitral and judicial."[1] *D.R. Horton*, 357 NLRB No. 184, at 55 (emphasis in original); *see also id.* (". . . 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. . .") (emphasis added). The Board was clear that it was *not* mandating class arbitration:

> We need not and do not mandate class arbitration in order to protect employees' rights under the NLRA… Employers remain free to insist that *arbitral* proceedings be conducted on an individual basis… For example, an agreement requiring arbitration of any individual employment-related claims, but not precluding a

[1] By relying on *D.R. Horton* Respondent does not mean to suggest that it in any way accepts or endorses the decision. On the contrary, and as fully set forth in both its post-hearing brief and its exceptions, Respondent contends that the decision is procedurally void and substantively mistaken. Nonetheless, even assuming its propriety, the AGC's proposed interpretation of *D.R. Horton* is mistaken.

> judicial forum for class or collective claims, would not violate the NLRA, because it would not bar concerted activity.

D.R. Horton at 55-56.

Notwithstanding the Board's clear determination that "[e]mployers remain free to insist that *arbitral* proceedings be conducted on an individual basis," the AGC claims the ALJ erred in concluding that "[t]he law does not require the employer to permit class action arbitrations," and correspondingly erred in determining that it is beyond the AGC's "authority to require the Respondent to permit classwide arbitration." (*Id;* October 23, 2013 Decision of Administrative Law Judge, Eleanor Laws ("ALJD") at 22:14-17).

While the AGC asserts that the ALJ's determination improperly "narrows the scope of the Board's decision in *D.R. Horton*," by failing to order Respondent to allow class arbitration, the AGC provides no support for this assertion. Ultimately the only argument that the AGC offers in support of extending *D.R. Horton* to require class arbitration is that "it would be inequitable in a case like this to limit the employees to [bring their class claims in a public court] 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." (AGCE, § (3)(A), pg. 7.) The AGC does not cite any record evidence to support the asserted inequity because none exists.

Indeed, even the ALJ's presumption – that "the Employer… would force the employees to start over again by filing a brand new action in a judicial forum," is an unsubstantiated conclusion. The ALJ's proposed order would, *inter alia*, require Respondent to "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." (ALJD at 23:15-17.) There is no reason for the Board to remedy that which is, at best, a speculative harm.

Just as vague is the actual remedy requested by the AGC. The AGC asserts that Respondent has "violate[d] the Act by opposing employee demands for class arbitration and fail[ed] to remedy this additional violation by agreeing to allow class arbitration." (AGCE, §(1), pg. 2.) Apparently, the AGC wants the Board to order Respondent to submit to class arbitration. To the extent this undefined request seeks to reverse the ruling made by the arbitrator to strike class claims, it impermissibly seeks to usurp the authority of the arbitrator. To the extent the AGC requests anything less, it is unclear why such request would not be moot given the Arbitrator's decision on this issue.

In short, the AGC faults the ALJ for not contradicting the Board's express holding in *D.R. Horton* in order to remedy an unsubstantiated, speculative harm, in an undefined manner that would either intrude upon the authority of the arbitrator or be moot.

II. THE ALJ CORRECTLY DENIED THE AGC'S REQUEST THAT RESPONDENT REIMBURSE UNIT EMPLOYEES AND/OR THE UNION FOR LITIGATION EXPENSES.

In another attempt to expand the Board's holding in *D.R. Horton*, the AGC excepts to the ALJ's refusal to order Concord Honda to reimburse unit employees and/or the Union for litigation expenses directly related to its opposition to Concord Honda's motion to strike the class claims in the arbitration. (See AGCE, § 3(B), pg. 7; ALJD, 9:9-15.) This exception should be summarily denied.

A. There Is No Legal Basis For The Reimbursement of Litigation Expenses.

The AGC recognizes that its request for litigation expenses rests upon the Board's agreement that it was improper for the ALJ to adhere to the Board's express conclusion in *D.R. Horton* that "[e]mployers remain free to insist that arbitral proceedings be conducted on an individual basis." (*D.R. Horton* at 55-56; AGCE, § (B)(1), pg. 7.) However, the AGC fails to

recognize that the claimants, in pursuing class arbitration, did not seek to vindicate the Board's ruling in *D.R. Horton*, but rather to expand it.

Indeed, following the Board's issuance of the *D.R. Horton* decision, the union and employees could have filed suit in public court asserting that the implicit restriction against class actions in Respondent's arbitration agreement was unlawful. They did not. Instead, claimants filed their suit in arbitration three months after the Board unequivocally held that "[e]mployers remain free to insist that arbitral proceedings be conducted on an individual basis." (Joint Exh. X; *D.R. Horton* at 55-56.)

Thus, reimbursement of litigation expenses would be improper because the request is based on a legal principle that the Board has never supported and, indeed, rejected in *D.R. Horton.*

B. There Is No Evidentiary Basis For The Reimbursement of Litigation Expenses.

In the first instance, the AGC did not even brief the basis for this extraordinary remedy in its post-hearing brief. Such absence of briefing is unsurprising, as neither the AGC nor the Charging Party submitted any evidence of having incurred any legal fees in defending in the case. Thus, while the AGC included the issue in the operative pleading, the AGC (and the Charging Party) failed to substantiate any alleged damages they might have suffered. The ALJ noted that her decision to deny the AGC's request for litigation expenses was based in part on this failure. The AGC's exceptions have provided no evidentiary or legal grounds for disturbing the ALJ's conclusion that it is improper to deny remedy to an unsubstantiated harm.

C. A Retroactive Remedy In This Case Is Improper.

Even assuming the AGC had provided appropriate evidentiary support of litigation expenses incurred in vindicating a legal principle supported by Board authority, a retroactive

award of litigation expenses would still be inappropriate. In determining whether retroactive relief is appropriate, the Board must consider "the reliance of the parties on preexisting law, the effect of retroactivity on the purposes of the Act, and any particular injustice arising from retroactive application." *SNE Enterprises, Inc*., 344 NLRB 673, 673 (2005). None of those three factors justify a retroactive remedy in this case.

The first element, the parties' reliance on preexisting law, weighs against retroactive relief. As further demonstrated in Respondent's Post-Hearing and Exceptions Brief, *D.R. Horton* was a landmark, novel decision. Prior to the Board's issuance of the decision on January 3, 2012, the NLRB had never addressed the issue of whether class action waiver agreements violated Section 7 and 8(a)(1) of the NLRA. In fact, as the AGC concedes in its Exceptions Brief, a previous General Counsel opined in a memorandum that employers may require individual employees to sign a waiver of their right to file a class or collective claim as part of an agreement to arbitrate all claims without per se violating the Act. (General Counsel Memorandum GC 10-06); *D.R. Horton*, 357 NLRB No. 184, slip op. at p. 6. It strains credulity to suggest that the purported illegality of class action waivers was well established prior to 2012 when the Board's own General Counsel took a contrary position just two years prior.

The second element, 'the effect of retroactivity on the purposes of the Act,' also militates against a retroactive award. Specifically, the principle that the AGC would seek to apply retroactively – that employers may not insist that arbitral proceedings be conducted on an individual basis – has not yet been adopted by the Board and, as such, is logically incapable of retroactive application. However, even were the Board to expand the principle as requested by the AGC, this would implicate the third element – manifest injustice – of the test set forth in *SNE Enterprises, Inc.*

With respect to the third element, the AGC suggests there is "no evidence to support th[e] notion," that Respondent's legal position would suffer any "manifest injustice," and further asserts that "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." (AGCE, § (B)(1), pg. 9).

In reaching this conclusion, the AGC somehow overlooks the elephant in the room. Respondent's legal position is and has been that Claimants' suit cannot proceed on a class basis. More importantly, Respondent has already expended the necessary resources to contest and prevail on this dispute in the forum in which Claimants chose to litigate. To force Respondent to concede this position or even to have to oppose it again – in either public court or arbitration – would be manifestly unjust.

Thus, under the factors articulated by the Board in *SNE Enterprises, Inc*., a retroactive award of litigation expenses would still be inappropriate.

D. There Is No Precedent For The Requested Award Of Reimbursement Of Litigation Expenses.

The AGC asserts that the ALJ "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." (AGCE, § (B)(2), pg. 9.) The AGC has, at best, misread the ALJ's decision. The ALJ took no position as to whether such authority might exist, but rather noted that "[n]either the Acting General Counsel nor the Union ***submitted any argument or legal authority to support a request for reimbursement of litigation expenses***." (ALJD, 22:26-27, (emphasis supplied.))

Notably, the AGC neither denies the ALJ's actual conclusion nor remedies that absence in its exceptions. Instead, the AGC cites to a number of cases in which expenses and fees were awarded as a "remedy for unlawful employer lawsuits." (AGCE, § (B)(2), pg. 9.) Here there is no

dispute about the legality of the lawsuit, nor about which party instigated it. Respondent submits that the AGC's request that the Board expand the principle in the cited cases to this situation is unwarranted.

III. CONCLUSION

For the foregoing reasons and based on the record evidence, Concord Honda respectfully requests that the Board reject those portions of the ALJ's Decision excepted to by the AGC. As explained above, it must be found that Concord Honda's actions and the arbitration agreement do not violate Sections 7 and 8(a)(1) and (5) of the National Labor Relations Act and the charges must be dismissed.

Respectfully submitted,

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