

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE EXECUTIVE SECRETARY

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

Respondent,

and

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

Charging Party.

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

**CONCORD HONDA'S ANSWERING BRIEF TO THE
CHARGING PARTY'S CROSS-EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

January 29, 2014

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Pursuant to Section 102.46(e) of the Board’s Rules and Regulations, Respondent FAA Concord H, Inc. d/b/a Concord Honda (“Concord Honda” or “Respondent”) files this Answering Brief in response to the Cross-Exceptions to the Decision (“Decision”) of the Administrative Law Judge (“ALJ”) filed by Machinists Automotive Trades District Lodge No. 190, Automotive Machinists Lodge No. 1173 (the “Union” or “Charging Party”).

I. INTRODUCTION AND SUMMARY OF ANSWERS TO CROSS-EXCEPTIONS¹

The Decision issued by ALJ Eleanor Laws was erroneous with respect to virtually every conclusion of law set forth therein. Notwithstanding the fact that each of these errors were to the benefit of the Charging Party, the Charging Party filed cross-exceptions, none of which has a basis in either the record evidence or applicable law.

The Charging Party’s requests largely coalesce around four areas. First and foremost, the Charging Party uses its Cross-Exceptions Brief as a Trojan horse in an attempt to obtain findings on numerous issues of fact and conclusion of law that are simply not part of this proceeding, but that are part of the current consolidated arbitration in which multiple bargaining unit employees are currently litigating against Respondent. As a class, these cross-exceptions should fail for any of a number of the following reasons:

- the requested factual and legal conclusions were not fully and fairly litigated, nor included in the Complaint;
- the requested factual and legal conclusions issues encompass state law issues that are squarely outside the Board’s jurisdiction and area of expertise;

¹ Respondent hereby incorporates all arguments previously submitted in the adjudication of this dispute, as set forth fully in its Post-Hearing Brief, Exceptions Brief, and Answer to the AGC Exceptions Brief, including all procedural and jurisdictional arguments regarding the Board’s authority to act on the underlying charges, the ALJ and Board’s failure to dismiss the consolidated complaints, the ALJ’s acceptance of the Board’s quorum to issue its decision in *D.R. Horton*, 357 NLRB No. 184 (2012) (“*D.R. Horton*”), *enforcement denied in relevant part*, 737 F. 3d 344 (5th Cir. 2013), the Board’s decision to abide by the Rules Enabling Act and defer to the Federal Arbitration Act in issuing *D.R. Horton*, and the ALJ’s mistaken reliance on the Board’s decision in *D.R. Horton*.

- the requested factual and legal issues are currently being litigated in a single consolidated arbitration proceeding that includes all current and former employees who have made a claim and Respondent; and,
- the requested factual and legal conclusions are immaterial to the disputes properly before the Board, as set forth in the operative complaint, and irrelevant to the ALJ's proposed decision in this matter.

By way of one particularly salient example, the Charging Party's first cross-exception is to the ALJ's failure to determine that "no alternative workweek election was conducted in 2000." Here, the contested activity in the operative complaint – alleged direct dealing, unilateral changes, etc. – did not commence until 2010, at earliest. Accordingly, the Charging Party's request that Board affirmatively determine the status of an election held in 2000 is *prima facie* improper and fails for each of the four reasons outlined above.² This and other similar cross-exceptions must be denied out of hand.

The Charging Party also asserts that, irrespective of the ultimate resolution of the Board's ruling in *D.R. Horton*. Respondent's Dispute Resolution Agreement ("DRA") is unlawful for no no fewer than ten separate reasons. In the first instance, the Charging Party's Cross-Exceptions with respect to the majority of the ten arguments should fail because these arguments have not been raised at any point by either party prior to the current cross-exceptions. As these unnoticed issues have not been litigated, it would be improper for the Board to rule on them. However, even assuming these arguments and corresponding cross-exceptions were otherwise proper, they are factually and legally unsupported at best, as well as contradictory and illogical. Thus, both procedurally and on their merits, they must be dismissed.

² This request is also squarely contradicted by Charging Party's own admission that an election did occur in 2000. (*See* Charging Party Exceptions Brief ("CPE") at 2:7-10; GC Exh. 15, pg. 3; *see also* GC Exh. 11, pg. 2 ("On February 14, 2000, the above-named employer conducted a secret ballot election. [For sake of clarity we are referring to page 11 of the hearing transcript at lines 18-20 and, specifically, the statement by Caren Sencer, counsel for Charging Party in this proceeding and for a consolidated group of current and former employees in arbitration, that "[t]he only election for [an] alternative workweek was the 2000 election."].)

The Charging Party also cross-excepts to the ALJ's conclusions regarding the the Federal Arbitration Act ("FAA"), and specifically her rejection of the Charging Party's assertion that the FAA does not apply to the DRAs, because the "manner of resolution of a dispute" does not involve interstate commerce. However, the Charging Party fails to substantively engage (let alone refute) the legal reasoning of the ALJ's determination to the contrary and, more simply, to explain why the Board itself would maintain jurisdiction over the DRAs under the narrow reading of 'interstate commerce' advocated by the Charging Party.

Finally, the Charging Party requests that the Board mandate a variety of types of extraordinary relief that were not sought by the Complaint or the Assistant General Counsel ("AGC") and, in part, exceed the Board's jurisdiction to award.³

II. THE CHARGING PARTY'S CROSS-EXCEPTIONS TO THE ALJ'S DECISION SHOULD BE DENIED.⁴

A. The Majority Of The Union's Cross-Exceptions Should Be Dismissed Because They Are Unsupported, Immaterial, Outside the Scope of The Complaint, Or Outside The Scope Of The NLRB's Jurisdiction.

1. The Union's Cross-Exceptions Nos. 1, 3, 5-7, 10, 12, 17-24, 27-29, and 33 Are Unsupported By Fact or Law.

Section 102.46(c)(3) of the Board's Rules and Regulations requires that arguments in exceptions briefs present "clearly the points of fact and law relied on in support of the position taken on each question, with specific page reference to the record and the legal or

³ For example, the Charging Party requests that the "attorney for the company... be required to personally read the notice [requested by the Charging Party] to the employees." (CPE, 19:18-24.) Not surprisingly, the Charging Party cites no authority in support of this novel request.

⁴ The Charging Party's Cross-Exceptions purport to contain a "Summary of Events" that is filled with incorrect statements of fact and law. Some of these misrepresentations are offered without citation to any evidence or authority, other assertions cite to evidence or authority that provides insufficient support. As the "Summary of Events" has little bearing on the proper resolution of the Charging Party's cross exceptions, Respondent will not address them and would request that the Board also ignore the Charging Party's characterization. Nonetheless, the Respondent's disregard should not be considered an acquiescence to the asserted truth of any of the factual assertions contained in the papers submitted by the Charging Party in its Cross-Exceptions.

other material relied on.” Notwithstanding this requirement, the Union has failed to supply evidence to support many of its cross-exceptions. *See, e.g.*, Cross-exceptions nos. 1, 3, 5-7, 10, 12, 17-24, 27-29, and 33. Absent proper support, each cross-exception must be denied.

For example, cross-exception number three asserts the ALJ erred by failing to ascribe the appropriate interpretation to a statement by the Union’s bargaining agent and, specifically, failing to recognize “apparent...sarcasm.” (CPE at 5:14.) However, the Charging Party cites nothing other than the transcript of the ALJ’s decision to support its cross-exception and, ultimately, does not even attempt to meet its burden of demonstrating why the ALJ’s interpretation of the statement requires reversal.

The Charging Party similarly faults the ALJ for failing to find that union-represented employees voted in favor of an AWS because of the unlawful threats made by the employer to lay off employees. (CPE, 5:17-24.) Again, the Charging Party provides no further evidence or analysis to support its assertion that the ALJ misinterpreted the facts.⁵

Many of the Union’s “additional reasons” to strike down Respondent’s DRAs are similarly unsupported. For example, the Union’s assertions regarding the text of the DRAs (and the proper interpretation of same) are unsupported by any reference to the relevant portions of the DRAs in Sections IV (A), (C), (E), (F), and (J). (*See* CPE, 6:23-15:11.)

The absence of any reference to portions of the record stands in sharp contrast to the ALJ’s decision and the post-hearing briefing submitted by Concord Honda, which the ALJ considered in reaching her decision. It would therefore contradict the Board’s own rules, as well as basic principles of equity and due process, to alter the ALJ’s findings on the basis of these arguments and cross-exceptions.

⁵ Notably, the Union and Charging Party only produced one bargaining unit employee to testify about the election. The testimony of the witness was riddled with inconsistencies regarding many issues, including the disputed AWS elections. *See* Respondent’s Post-Hearing Brief, § 4(B)(2), pp. 26-28.

2. The Union’s Cross-Exceptions Nos. 1, 4, 6, 7, 11, 14, and 47 Are Immaterial And Irrelevant To The Issues Raised In The Complaint.

Cross-Exceptions Nos. 1, 4, 6, 7, 11, 14, and 47 are improper because they call for the Board to rule on theories and claims not raised in the Complaint, hearing, or post-hearing briefs. Instead of addressing alleged unfair labor practices, Cross-Exceptions Nos. 1, 4, 11, 14, and 47 call for the Board to rule on whether Concord Honda violated California wage and hour law. The significance and validity of Concord Honda’s actions under California law is far afield from the issues raised in the Complaint. For example, the ALJ’s consideration and determination as to whether Respondent engaged in unlawful direct dealing, committed unlawful unilateral changes, or otherwise violated the Act does not depend on the ALJ’s determination as to whether “it is unlawful [under] California Law for an employer to fail to pay overtime after 8 hours in a work day or 40 hours in a workweek regardless of work schedule.”⁶ (Cross-Exception No. 11.) Cross-exceptions Nos. 6 and 7 likewise concern the arbitration, and have no demonstrated bearing on any of the unfair labor practices charged. The Board’s determination of the propriety of the ALJ’s decision need not consider the propriety of the ALJ’s alleged failure to rule on questions of California law, or other matters unrelated to the charges – especially those not put before her in the Complaint.

3. The Union’s Cross-Exceptions Nos. 1, 4, 11, 14, And 47 Exceed The Board’s Jurisdiction.

The Union’s Cross-Exceptions 1, 4, 11, 14, and 47 are improper because they call for the Board to rule on various alleged violations of California law, without citing any basis for the Board’s exercise of jurisdiction over these claims. The Board’s jurisdiction is limited to disputes over alleged unfair labor practices. NLRA §10(a) (The Board is “empowered to prevent

⁶ It bears noting that the Charging Party’s statement of law is incorrect. Indeed, where there is an AWS, it is not unlawful for an employer to fail to pay overtime to an employee who works more than eight hours in one day. *See* California Labor Code Section 511.

any person from engaging in any unfair labor practice affecting commerce”). Interpreting this grant of authority, the Supreme Court has held that the NLRB may not interpret or apply statutes other than the NLRA, absent a successful argument for preemption. *United Bhd. of Carpenters & Joiners v. NLRB*, 357 U.S. 93, 108-111 (1958) (noting that the NLRB’s interpretation of federal law outside of NLRA is improper); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140, 149-150 (2002) (holding that the Board could not award back pay to an undocumented immigrant because such relief was foreclosed by federal immigration policy which the Board has no authority to enforce or administer).

As such, claims based on violations of state wage and hour law, absent unusual circumstances, are outside of the jurisdiction of the NLRB. The Union states no basis whatsoever for asserting that these wage and hour claims are so germane to this case as to require resolution by the Board.

The Union’s attempts are all the more improper given that the issues of state law on which they request Board determination are coterminous with the issues that bargaining unit employees are currently litigating in a single consolidated arbitration proceeding.

By way of specific example, the Charging Party excepts to the contested alternative workweek schedule (“AWS”) elections conducted by Respondent in 2011. The ALJ agreed with both the AGC and the Charging Party that Respondent’s meetings with employees regarding AWS elections and the elections themselves violated Sections 8(a)(1) and (5) of the Act. (Dec. 10:8-14:41; 15:1-16:25.) Nonetheless, the Union asserts that the AWS vote was unlawful and must be rescinded due to the taint of employee coercion. (CPE, 5:16-24.) While topically related to the issues set forth in the operative Complaint, the Charging Party is asking the Board to usurp the role of the Arbitrator who is tasked with determining the legality of

Respondent's AWS. The Board should refuse the Charging Party's invitation to end-run the pending arbitration and, accordingly, should deny the Charging Party's cross-exceptions.

Moreover, even were it appropriate for the Board to entertain and adjudicate issues that were not included in the Complaint, not fully and fairly litigated, and outside the Board's jurisdiction or expertise, any such determination would likely be moot. Because courts are under no obligation to defer to the NLRB's interpretation of statutes other than the NLRA (with the exception of cases involving preemption), the arbitrator (or a court reviewing the Board's decision) would not be obligated to effectuate any order issued by the NLRB on these state law claims. The Supreme Court has made clear that the NLRB's interpretation of statutes other than the NLRA is not entitled to effectuation by the court. In *NLRB v. Bildisco & Bildisco* 465 U.S. 513, 530 (1984), the U.S. Supreme Court precluded the Board from enforcing orders that were in conflict with the Bankruptcy Code. The Board had insisted, contrary to that statute, that the debtor-in-possession violated the NLRA by changing the terms of a collective bargaining agreement. *Id.* at 528-29. The Court explained:

While the Board's interpretation of the NLRA should be given some deference, the proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel. We see no need to defer to the Board's interpretation of Congress' intent in passing the Bankruptcy Code.

See also United Bhd. of Carpenters & Joiners v. NLRB, 357 U.S. 93, 108-111 (1958); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140, 149-150 (2002). Therefore, if the Board were to issue an order based on an interpretation of state law not in service of the resolution of a question ultimately arising under the NLRA, the order would be moot, as the state court and/or arbitrator would be free to re-adjudicate the state law question.

Thus, because Cross-Exceptions Nos. 4, 11, 14, and 47 call for the Board to make determinations outside the scope of its expertise and jurisdiction, they must be rejected.

B. The Board Must Disregard The Union’s “Additional Reasons” For Invalidating The DRAs Because, Given The Late Stage Of The Proceedings, Adjudication Of These New Theories Would Be Both Incomplete and Prejudicial.

The Union’s “additional reasons” for striking down the DRAs may not be considered because they are raised for the first time in the Union’s cross-exceptions. It is well-established under Board jurisprudence that it is improper to make a determination on an issue that has not been litigated. *See, inter alia, Golden State Foods Corp.*, 340 NLRB 382, 382-383 (2003) (Board reversed ALJ finding of unlawful interrogation as not fully litigated where, even assuming allegations of interrogation were closely related to allegation in complaint, violation not alleged in Complaint, finding based solely on Charging Party’s vague testimony with respect to alleged interrogatory, and no opportunity for employer’s witnesses to testify regarding same); *Smithfield Foods, Inc.*, 347 NLRB 1225, 1229 (2006) (Board reversed ALJ finding of unlawful threat where General Counsel neither raised this specific allegation in complaint nor attempted to amend the complaint, and no witnesses were called with respect to alleged threat); *see also J.C. Penny Co. v. NLRB*, 384 F.2d 479, 483 (10th Cir. 1967) (finding that trial examiner’s failure to amend the complaint to encompass allegations regarding matters first raised at the hearing mandated reversal of unfair labor practice with respect to those allegations because the “[f]ailure to clearly define the issues and advise an employer charged with a violation of the law of the specific complaint he must meet and provide a full hearing upon the issue presented is, of course, to deny procedural due process of law”); *Siracusa Moving & Storage Service Co.*, 290 NLRB 143, 143 (1988) (dismissing Section 8(a)(1) allegation on the basis that the conduct alleged was not identified in the complaint and the General Counsel failed to identify the conduct as a separate and distinct basis for a charge). This principle, ubiquitous throughout federal courts of appeal as well, especially applies if consideration of the issue for the first time on appeal would

prejudice the party that did not raise the argument. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (“It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.”); *Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996) (“The decision to consider an issue not raised below is discretionary, and such an issue should not be decided if it would prejudice the other party.”). Because the Union raises these arguments only after the factual record has been completed, it denies Concord Honda the opportunity to develop the record to respond to them. Furthermore, raising a substantial number of detailed legal arguments when Concord Honda has only 14 days in which to respond places it under considerable time pressure that deprives it of the opportunity it would have had to address them, had they been raised in the hearing or post-hearing brief. Under these circumstances, it is impossible to adjudicate these issues fully and without prejudice to Concord Honda. Therefore, they should be disregarded.

C. The Union’s “Additional Reasons” For Invalidating The DRAs Are Substantively Flawed.

In addition to the dispositive procedural grounds for rejecting the Charging Party’s motley crew of “additional reasons” to invalidate Respondent’s DRAs, each argument fails for substantive fails.

1. The Contested DRAs Do Not Prohibit Group Claims.

The Charging Party’s first novel argument against the DRAs is that they prohibit group claims. Basically, the Union asserts that 1) bargaining unit employees only desire the right to engage in concerted activity, and 2) Respondent has denied bargaining unit members this opportunity. In support of these arguments, the Union argues that beyond collective and class actions, “[t]here is a third type of action... that is fundamentally concerted activity.” The Union asserts that “[t]here is no formality to it[,] and that [the bargaining unit employees] do not seek to

create a class action... They simply have a group claim that they bring to the attention of the employer.” (CPE 7:3-9.)

The glaring problem with this argument is that the bargaining unit employees are currently litigating a variety of wage and hour claims against Respondent in a single consolidated arbitration – a proceeding in which each employee is represented by the Union’s lawyer. There is no shortage of “concerted activity” here. Just because the bargaining unit does not have access to one procedural mechanism does not mean that they have been denied the right to engage in concerted activity.⁷ (See Respondent’s Post-Hearing Brief, § IV(C)(2)(a), pp. 45-47. [Section 7 does not and cannot reach into the judicial system to regulate the *procedural* manner in which such an action shall be litigated.]) By the Union’s logic, every time a judge denies a motion for class certification, she violates the putative class members’ Section 7 rights. This argument, and the corresponding cross-exceptions must be dismissed.

2. The Extension Of The Litigation Privilege To The Contested DRAs Does Not Make Them Invalid.

The Charging Party asserts that DRA language holding that “all communications during or in connection with the arbitration proceedings are privileged in accordance with Cal. Civil Code Section 47(b),” is unlawful because it protects an employer who defames or maliciously prosecutes employees. In an attempt to tie this argument to the Act, the Charging Party asserts the agreement to extend litigation privilege to arbitration communications unlawfully allows an employer to commit “virtually any tort... [including] defamation, malicious prosecution[, etc.] ... about workers who exercise their [Section 7] rights.” (CPE, 9:4-9.)⁸

⁷ The Supreme Court has concluded that the ability to litigate on behalf of a class is merely a *procedural*, rather than *substantive* device provided by FRCP 23. *Deposit Guaranty Nat’l Bank v. Roper*, 445 U.S. 326, 332 (1980) (“[T]he right of a litigant to employ FRCP 23 is a procedural right only, ancillary to the litigation of substantive claims”).

⁸ The Charging Party’s argument that “applying a California privilege to an arbitration proceeding is

The Charging Party offers no evidence that this has happened with bargaining unit employees or could happen. Nor does the Charging Party offer any law demonstrating the viability of this “unconscionability” attack on the DRA, let alone the propriety of the Board’s determination of the dispute. Even were the DRA invalidated on this or any other basis, employees would then litigate their claims in state court which would subject their communications to the very same privilege standard the Charging Party asserts is unlawful here. Thus, appropriately viewed, the Charging Party’s attack is on the “litigation privilege” encapsulated in California Code of Civil Procedure, Section 47(b). The Charging Party has failed to provide sufficient argument to allow the Board to effectively invalidate either the state law or the broadly-accepted underlying principle.

3. The DRAs Are Not Invalid Because They Are Mutual.

The Charging Party asserts that the DRAs “are also unlawful because they are mutual.” The Charging Party cites no authority for this novel argument or any reason the Board could or should decide this attack on the DRA.

However, substantively the argument also fails. The California Supreme Court has repeatedly found arbitration agreements unlawful where they *lacked* mutuality. *See Armendariz v. Foundation Health Psychcare Services, Inc.*, (“*Armendariz*”) 24 Cal. 4th 83 (2000); *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 1536 (1997); *Kinney v. United HealthCare Servs., Inc.*, 70 Cal. App. 4th 1322, 1332 (1999).

Indeed, in October 2013, in *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1133-1134 (2013) (*Sonic II*), the California Supreme Court revisited the unconscionability doctrine as applied to pre-employment arbitration agreements in the wake of the United States

preempted by the [FAA] if the FAA applies,” demonstrates only a further misunderstanding of the FAA’s applicability and specifically fails to recognize that the privilege would apply to the arbitration, precisely because those were the terms of the parties’ agreement.

Supreme Court’s decisions in *AT & T Mobility LLC v. Concepcion* 563 U.S. ___, 131 S. Ct. 1740, 179 L.Ed.2d 742 (2011) (*Concepcion*) and *American Express Co. v. Italian Colors Restaurant* 570 U.S. ___, 133 S. Ct. 2304, 186 L.Ed.2d 417 (2013) (*Italian Colors*). Therein the California Supreme Court reaffirmed its holding in *Armendariz* that an arbitration agreement is “[s]ubstantively unconscionable... wherein the employee's claims against the employer, but not the employer's claims against the employee, are subject to arbitration.” Thus, contrary to the Charging Party’s position, it is the *lack* of mutuality, not its *presence*, that impinges upon the validity of an arbitration agreement.⁹

However, even overlooking the Charging Party’s inversion of equitable principles, their argument still lacks merit. The Charging Party posits that “[i]t is not difficult to imagine a circumstance where the employer may have claims against multiple employees such as overpayments for wages,” and that such employers might be deprived of the opportunity to “jointly defend themselves.” (CPE at 9:21:23.) Even accepting that an employer might sue an employee for an overpayment of wages – a rare proposition indeed – the Charging Party has failed to explain why the employees might not, where appropriate, consolidate to defend the action just as they have consolidated to prosecute their current action against Respondent. Indeed, it is difficult to imagine a situation in which an employer might wish to proceed on the same claim against numerous employees in separate proceedings, let alone an instance in which this has actually occurred.

4. The DRAs Are Not Invalid Because They Are Not Completely Mutual.

The Charging Party’s next argument is that the DRAs are also unlawful because they are insufficiently mutual. The Union specifically protests that while employees must

⁹ The Charging Party’s failure to acknowledge *Sonic II* for this proposition is all the more notable given their reliance on the case for other propositions. (see CPE 11:22-25.)

arbitrate claims against “owners, directors, officers, managers, employees, and agents,” of Respondent, that these classes are bound to arbitrate their disputes against any employee. As with its previous contrary argument, the Charging Party cites neither record evidence nor legal authority to support its position.

California courts have not required complete mutuality in arbitration. They have repeatedly set the bar at a “modicum of bilaterality,” where exceptions are made for “business realities.” *See Armendariz* at 118; *Sonic II* at 1133. A “business reality” underscores incomplete mutuality here. Specifically, while it is common for employees who sue their employer to also name a variety of agents, owners, and directors as defendants, it is hardly conceivable that such an employment suit might be brought by an owner, director, officer, or agent in his or her individual capacity against an employee. Indeed, it is difficult to determine what employment claim could exist. Certainly, to the extent that a manager might have a separate claim against an employee, that manager would also, as an employee of Respondent, be a signatory of the same DRA and thus, mutuality would be assured.

5. The DRAs Do Not Foreclose Concerted Expressive Activity.

The Charging Party’s assertion that the DRA is unlawful because it “forecloses... expressive activity [including] boycotting, and picketing,” is mistaken. First, the language of the DRA expressly excludes “any claim, dispute, and/or controversy... which would otherwise require or allow resort to any court or other governmental dispute resolution forum... with the sole exception of the National Labor Relations Act which are brought before the National Labor Relations Board.” (GC, Exh. 5.)

However, even if this express language is overlooked, the Charging Party cites no authority to demonstrate that an arbitration agreement has ever been interpreted so broadly as to prohibit employee expressive activity, let alone any evidentiary support that any party affected

by the current dispute did or reasonably could have construed the arbitration agreement to prohibit participation in such activity. Given this lack of evidence or authority, the Board should dismiss this argument.

6. The DRAs Do Not Foreclose Concerted Expressive Activity Or Prohibit Representative Actions That Are Authorized By State Law.

The Charging Party independently asserts that the DRAs are unlawful because they “deprive employees of the substantive rights... under state or federal law.” (CPE, 11:5-28.) The Charging Party has submitted no evidence that such deprivation has occurred, nor has the Charging Party attempted to explain what authority or expertise the Board might have to determine the ability of the arbitration agreements to provide appropriate redress of state law claims. And again, this allegation was not raised in the complaint. The corresponding cross-exceptions must be dismissed.

7. The DRAs Do Not Impose Additional Expenses On Workers.

In yet another claim that is not appropriate for disposition by the Board, the Charging Party asserts that the DRA is “invalid” because it “impose[s] additional and punitive expenses on workers.” (CPE, 12:1-27.) Again, the Charging Party offers no evidence that any Claimant has suffered any expenses, let alone *additional* expenses by having entered into an arbitration agreement.

The lack of evidence in this regard is not surprising as the DRA precludes the imposition of additional expenses on employees. In pertinent part, the DRA provides that “the allocation of costs and arbitrator fees shall be governed by... statutory provisions or controlling case law.” While California statutory law provides for the equal allocation of arbitration costs, for over a decade “controlling case law” has been clear that an employer must “pay all types of

costs that are unique to arbitration.” (*Armendariz* at 113; *accord Sonic II* at 1130). In short, the DRA places no additional expenses on employees.¹⁰

8. Respondent Has A Valid Business Justification For Precluding Class Claims.

The Charging Party asserts that “because the employer allows group claims to be brought, it has no valid business justification to preclude them in arbitration.” (CPE, 13:1-2.) The problem with this argument is that Respondent was never given the opportunity to provide evidence of its legitimate business reasons. But that kind of evidentiary showing will only be necessary if the Board some day requires a “valid business justification” for each element of a contract between an employer and her employee. The Union’s cross-exceptions should be denied.

9. The DRA Does Not Unlawfully Prohibit Employees From Refraining From Group Activities.

The Charging Party argues that the DRA is unlawful because it requires employees to engage in group activities. The Charging Party further asserts that “the employer insisted that the employees had to consolidate their actions and thus engage in group activity to which they objected.” (13:19:21.) However, it was not Respondent but rather the Arbitrator who *ordered* consolidation pursuant to California law. The Charging Party’s assertions to the contrary are false. Indeed, the Arbitrator – the Honorable Richard Hodge, a retired California state court judge – was clear in his Order about the grounds for the consolidation:

On his own motion pursuant to Code of Civil Procedure section 1281.3, the Arbitrator further determines that in order to minimize unnecessary costs and delay and to best effectuate the efficiencies desired by claimants and Defendant, that consolidation of the

¹⁰ In the same section, the Charging Party argues the DRA must be invalid because “[t]here is no practical way workers can bring minimum wage, overtime and similar claims as individuals.” (CPE, 12:26-27.) This assertion is incorrect. Indeed, bargaining unit members participating in the concurrent consolidated arbitration sought to proceed on an individual basis.

arbitration demands of the sixteen individuals who, subsequent to filing of this action, alleged the same claims against Defendant is appropriate. (GC Exh. 1(t), exh. 1, pg. 1.)

A state or federal judge would have made the same ruling. Thus, even assuming the Charging Party's argument were appropriately before the Board and within its jurisdiction and expertise to resolve, the Charging Party has failed to provide sufficient argument to allow the Board to effectively invalidate either the state law or the broadly accepted principles favoring consolidation from which it derives.

10. The DRA Does Not Foreclose Group Claims By Employees Or By The Union.

The Charging Party's final argument fares no better than the rest. Specifically, the Union asserts that the DRA "discourages union activity where the employees have selected a union as their representative but are precluded from engaging the union to pursue group claims on their behalf," and that "[w]orkers cannot bring claims as a group supported and sponsored by the Union." (CPE at 13:13:15; 14:5-6.) The Union makes this argument even though it is undisputed that the Union did sponsor a large group action in the form of the high-stakes wage and hour litigation underwritten by the Union's lawyer.

It is unclear just how the "Union can only represent one employee at a time." (CPE at 14:12-14.) To the extent the Union argues entitlement to *class* as opposed to consolidated proceedings, this argument founders for both the reasons previously discussed *supra* and in prior briefing (*e.g.*, the Act does not secure a procedural right to class adjudication). These arguments have been briefed more extensively in Respondent's Post-Hearing Brief, § IV(C)(2)(a), pp. 45-47 and, notably, have been rejected by the Fifth Circuit Court of Appeals in *D.R. Horton* as well as numerous other courts.

D. The Union's Cross-Exceptions Nos. 1, 3, 5-7, 10, And 12 To The ALJ's Findings Based On Credibility Considerations Are Improper Because They

Are Not Undermined By A Clear Preponderance Of The Evidence.

The “Board’s established policy is not to overrule an administrative law judge’s credibility resolutions unless the clear preponderance of all the relevant evidence” shows that these judgments were incorrect. *Hanson Material Service Corp.*, 353 NLRB 71, 71 n3 (2008); *see also Standard Dry Wall Products*, 91 NLRB 544, 545 (1950). In its cross-exceptions, the Union challenges many of the ALJ’s findings that are based on credibility determinations as well as conclusions derivative of the ALJ’s credibility determinations.

The ALJ personally heard testimony from the witnesses presented at hearing. Because the ALJ observed this testimony first-hand, she had the ability to take into account aspects of it that a transcript cannot reflect, and to draw assumptions as to the credibility from these aspects. The Union neither argues nor demonstrates that a clear preponderance of the evidence contradicts any of the ALJ’s findings. Given this absence, the Board should defer to the ALJ’s credibility determinations and, accordingly, dismiss cross-exceptions 1, 3, 5-7, 10, and 12.

E. The FAA Applies To The Contested DRAs And The Union’s Contrary Cross-Exceptions Must Be Dismissed.

The Union objects that the DRAs in this case cannot be governed by the FAA because they do not implicate interstate commerce. *See* CPE exceptions 15, 31. This conclusion is erroneous as it rests on misinterpretation of the Commerce Clause with respect to the FAA. The Union specifically argues that because “the manner of resolution of a dispute between Concord Honda and its employees—whether in court or in arbitration—does not have any impact on any issue of commerce,” it is equivalent to ‘commercial inaction’ that the Supreme Court found outside the scope of the Commerce Clause in *National Federation of Independent*

Businesses v. Sebelius, 567 U.S. 1, 132 S. Ct. 2566 (2012) (“*Sebelius*”).¹¹ Thus, per the Union’s argument, the arbitration agreement is not subject to Commerce Clause-enabled regulation by the FAA.

The Union’s assumptions are incorrect in several respects. First, as noted by the ALJ’s decision “the proper inquiry [...] is whether the technicians’ work activity affects commerce, not whether their choice of dispute resolution forum affects commerce.” (Dec., 21:14-16.) The ALJ’s conclusion accords with the FAA. Specifically, the FAA applies to any written arbitration provision in any “contract evidencing a transaction *involving commerce*.” 9 U.S.C. § 2 (emphasis supplied). In interpreting Section 2 of the FAA, the United States Supreme Court has construed the terms “involving commerce” broadly to cover all transactions within the reach of Congress’ power under the Commerce Clause. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 274-75 (1995). Even “[t]he slightest nexus of an agreement with interstate commerce will bring the agreement within the FAA.” *Cecala v. Moore*, 982 F. Supp. 609 (N.D. Ill. 1997). The Supreme Court has consistently held that Congress possesses authority pursuant to the Commerce Clause to enact legislation regulating employment relationships in businesses that operate solely intrastate so long as the business substantially affects interstate commerce. *See e.g. Katzenbach v. McClung*, 379 U.S. 294 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942). As the ALJ correctly noted, the Supreme Court in *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 200-201 (1956), found the question of whether the commerce clause would apply to an employment contract, bringing it under the FAA, was whether the employee “while performing his duties under the employment contract was working ‘in’ commerce, was

¹¹ The Union concedes that Concord Honda is engaged in interstate commerce. (CPE, pg. 16.) Furthermore, the ALJ’s ruling that the FAA applies to the DRAs implies a finding that the technicians affect interstate commerce through their work for Concord Honda. As no party has excepted to this finding, the ALJ’s determination is final for the purposes of this case.

producing goods for commerce, or was engaging in activity that affected commerce” (Dec. at 21:9-13).

Instead of addressing the ALJ’s conclusion or the authority on which she relies to support it, the Charging Party mischaracterizes the ALJ’s conclusion: “Applying the apparent rationale of the Administrative Law Judge, even if the Employer’s business did not affect interstate commerce (such as being two employees), if there was an arbitration agreement, it would be governed by the Federal Arbitration Act because the activity of dispute resolution is subject to Commerce Clause regulation.” (CPE, 17:2-6.) This reading simply makes no sense.

However, even if the Charging Party’s interpretation were proper, it would not apply. Unlike an abstract business of two employees, Concord Honda’s technicians play an integral part in the portions of its business that affect interstate commerce. Stated most simply, they work on automobiles that cross state boundaries (for sale or use in California) so that these automobiles might continue to cross state lines. Thus, the employees are not only contributing to the sale of goods (automobiles) between states, but the goods upon which they work are themselves another medium of interstate commerce. As such, the work of the employees directly implicates “interstate commerce” and, accordingly, falls within the ambit of the FAA.

The Union’s attempt to rely on *Sebelius* does not alter this conclusion. Indeed, even following *Sebelius*, at least one district court has affirmed that the relevant inquiry remains whether the employment relationship impacts commerce via the employer’s impact on commerce. *McElveen v. Reichenbach*, 2012 WL 3964973 (D.S.C. 2012) (“*McElveen*”). In *McElveen*, the court found the FAA to apply to an arbitration agreement between a car dealership and employee cashier who, by assisting out-of-state customers, contributed to the flow of interstate commerce. *McElveen* at **2-3.

Although the ALJ cited *McElveen* in support of her conclusion as the applicability of the FAA, the Charging Party has simply ignored the ALJ's argument. Ultimately, the Union has failed to demonstrate that *Sebelius* refines the scope of the FAA.

Still more harrowing, the Charging Party's argument that forum selection does not implicate commerce would effectively render the FAA dead letter and incapable of accomplishing its central goal – the enforcement of arbitration agreements according to their terms. *See* CPA, 15:24-26; 9 U.S.C. § 2. The Charging Party has not provided any argument to suggest that the FAA was void *ab initio*, and recent Supreme Court guidance repeatedly endorsing the FAA points unequivocally towards the robust scope and continuing vitality of the legislation. *See, e.g., AT&T Mobility LLC v. Concepcion*, 131 S. Ct., 1740, 1748-53 (2011); *Stolt-Nielsen* (the agreement must affirmatively permit class actions in order for an arbitrator to preside over the case as a class action); *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (June 20, 2013) (finding that the FAA's mandate to enforce arbitration agreements was not "overridden by a contrary congressional command" because the statutes at issue made no mention of class arbitration).

1. The Union's Interpretation Of The Commerce Clause Would Similarly Remove The DRAs From The Board's Jurisdiction.

The Union cannot simultaneously assert that the dispute at issue here falls outside of the grant of commerce clause power while asserting that the NLRB has authority to rule on it. Both the FAA and the NLRA, from which the NLRB's adjudicative authority derives, are based on the Congressional grant of authority through the Commerce Clause. *Cf.*: NLRA §10(a); 9 U.S.C. § 2. Accordingly, the Union's argument that "the manner of resolution of a dispute between Concord Honda and its employees—whether in court or in arbitration—does not have

any impact on any issue of commerce,” would, if accepted, only divest the Board of jurisdiction to rule on the validity of the agreements.

F. The Remedies Requested Are Disproportionate, Unsupported, And In Some Cases Beyond The Board’s Ability To Grant.

Foremost, the Union provides virtually no law or reasoning to justify its often extraordinary requests, which range from ruling on issues of state law to such oddities as having Concord Honda’s attorney read aloud to the employees. Furthermore, a variety of the remedies are irrelevant to the charged unfair labor practices, unresponsive to the ALJ’s findings, and insensitive to the difficulty of complying with an unsettled area of the law, in which novel issues arose in this case. For each of these reasons, the Union’s requests to alter the remedy should be denied.

1. The Union Provides No Legal Justification For Most of The Extreme Remedies It Requests.

The Union provides no evidence or law to support its request to impose remedies substantially more severe than those already requested by the AGC or ordered by the ALJ. Many of the requested remedies are out of proportion to the alleged wrongful conduct, which amounts to giving workers a bonus, attempting to comply with California wage and hour law, and enforcing a bilateral arbitration agreement in accordance with its terms in accordance with both the FAA, as expressly and repeatedly endorsed by the U.S. Supreme Court.

The impropriety of the Union’s requested changes to the remedies is well-illustrated by the fact that they far exceed those that the Region saw fit to request in its Second Consolidated Complaint (“Complaint”). The Complaint requested that the ALJ require Concord Honda to:

- reimburse the Unit members of any litigation expenses directly related to their opposition to the motion to prohibit class arbitration, as well as reimbursement of the additional tax burden this award created;

- move to vacate any order compelling arbitration pursuant to the parties' DRA;
- submit appropriate documentation to the Social Security Administration; and
- post at all locations where it normally posts notices to employees any Notice To Employees that may issue in this proceeding. Complaint ¶ 16.

The AGC also requested "all other relief as may be just and proper to remedy the unfair labor practices alleged." Complaint ¶ 16. In addition, the Union requests a number of further remedies outside of the scope of those the AGC expressly found appropriate:

- Declaring the AWS elections invalid (CPE, 18:21-22);
- Awarding overtime back-pay and interest as a consequence of finding that the AWS was not lawfully instituted (CPE, 19:7-10);
- Requiring Concord Honda to toll the statute of limitations from the date that the initial demand for arbitration was made (CPE, 19:12-14);
- Requiring Concord Honda to withdraw its granted request¹² for consolidation of the claims at issue in the arbitration (CPE, 19:15-17);
- Requiring Concord Honda's attorney to read the Notice to employees (CPE, 19:18-24); and
- Each of the requested alterations to the Notice, discussed in paragraphs 6-10 of Section VI of the Union's Cross-Exceptions Brief.

Because these remedies are out of proportion to the magnitude of the alleged violations, as requested by the AGC or provisionally ordered by the ALJ, and because the Union provides scant legal basis for imposing them, the Board should not grant any of the additional remedies the Charging Party seeks.

2. Remedies Dealing With Violations of California Law Are Irrelevant To Any Unfair Labor Practice Alleged.

As discussed previously, whether there was a violation of state wage and hour law is both irrelevant to the unfair labor practices alleged, outside the scope of the Complaint,

¹² As previously discussed, consolidation was granted by the Arbitrator "[o]n his own motion."

beyond the Board's grant of jurisdiction and outside the scope of its expertise, and coterminous with the legal issues currently before the Arbitrator in the single consolidated arbitration proceeding. Thus, the Charging Party's request for overtime back-pay must be denied for any and all of these reasons. (CPE, 19:7-10.) Similarly, the Charging Party's request that Concord Honda toll the statute of limitations implicates not only the same previous concerns, but also improperly invites the Board to weigh in on procedural issues related to multi-party civil litigation. (CPE, 19:12-14; Cross-Exceptions 47.) This request and the corresponding cross-exception should also be denied.

3. The Charging Party's Requests For Continuation of The "June 2011" Bonus Lacks Any Discernible Merit.

It is unclear exactly which "bonus system" the Union seeks to have reinstated in cross-exceptions 37 and 38. Assuming that the Charging Party is referring to the one-time eponymous "Technician Bonus for June 2011," it would only be supported by a conclusion overtly *opposite* to that reached by the ALJ, to which they do not except. (GC Exh. 3.) The Union has not excepted to the ALJ's finding that *the implementation* of the one-time bonus violated the NLRA. (ALJD at 21:29-32.) Moreover, the ALJ did not consider, let alone determine, that Respondent's provision of a one-time bonus constituted a failure to provide an ongoing bonus in violation of the Act, nor – until possibly now – has the Union argued such. If it was unlawful to award the one-time bonus in the first place, it is difficult to see how ordering Concord Honda to issue bonus after bonus will remedy the alleged wrong. Accordingly, the Charging Party's argument and the corresponding cross-exceptions must be dismissed.

4. The Request For Litigation Expenses And Retroactive Effect Of Remedies Should Be Denied Because Both Are Novel Issues.

The Union's requests in cross-exceptions 35 and 36 for attorneys' fees and litigation costs, and that this remedy be retroactive, should be also be summarily denied for the

same reasons fully set forth in Respondent's Exceptions Brief, § 4(E)(2), pp. 48-50, and Respondent's Answering Brief to the AGC's Exceptions, § 2, pp. 3-7.

III. CONCLUSION

Based on the record as a whole and the reasons cited herein, Respondent submits that the Union's Cross-Exceptions should be rejected.

Respectfully submitted,

Dated: January 29, 2014

By: /s/ Joshua J. Cliffe
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