

**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

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**CONCORD HONDA'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION AND IN RESPONSE TO THE ACTING  
GENERAL COUNSEL'S ANSWERING BRIEF**

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EMPLOYER'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE ALJ'S DECISION

## I. INTRODUCTION

Respondent FAA Concord H, Inc. d/b/a Concord Honda (“Concord Honda” or “Respondent”) submits this Reply to the Acting General Counsel’s (“AGC”) response to the Employer’s Exceptions to the Decision of the Administrative Law Judge (“ALJ”).

## II. THE ABSENCE OF QUORUM PRECLUDES INVESTIGATION AND LITIGATION OF THIS MATTER.<sup>1</sup>

Principally, the AGC and ALJ both lack authority to act in this case because they are both delegates of Board authority. As its agents, they necessarily lack the authority to pursue charges where, as here, the Board lacks such authority itself. The AGC relies on the Board’s decision in *Bloomingtondale’s Inc.*, 359 NLRB No. 113, slip op. at 1 (Apr. 30, 2013), as the basis for its authority to pursue the charges. Any reliance on this decision fails, in the first instance, as it was also issued by a Board that lacked quorum. Moreover, with all due respect, *Bloomingtondale’s* was wrongly decided. Section 3(d) of the NLRA states that the General Counsel (“GC”) is authorized to investigate charges, issue complaints, and prosecute charges “on behalf of the Board.” Therefore, the plain language of the NLRA conditions the GC’s authority on the Board’s.

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<sup>1</sup> The AGC’s assertion that this issue is not properly before the Board because it has not been explicitly referenced in an exception is without merit. Indeed, Respondent moved to stay proceedings in this case due to lack of quorum, argued the matter at the hearing, addressed this issue repeatedly in its briefing, and explicitly excepted to the AGC’s and ALJ’s authority on the basis of the lack of quorum argument set forth in *Noel Canning*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (U.S. June 24, 2013.) See Respondent’s Brief in Support of Exceptions (“Exceptions Br.”) at 1, 16-18, 30; Exception 58 (the ALJ failed to conclude that the “Board lacked a quorum...”). The Board is not required to disregard an issue that falls outside of the scope of the exceptions, and in fact ordinarily does not do so, especially where no prejudice will result. See *Planned Building Services Inc.*, 330 NLRB 791 n.1(2000) (rejecting procedural defects in exceptions where no prejudice resulted); *TNS INC.*, 309 NLRB 1348 n3 (1992) (finding failure to refer to specific exceptions does not warrant rejection of the Exceptions brief.”); *C.f. C & G Distributing Co.*, 359 NLRB No. 53 (2013); *DiMarco Paving & Construction Inc.*, 341 NLRB No. 42 (2004).

Accordingly, the ALJ's and AGC's grants of authority from the Board do not survive the Board's loss of quorum. In *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 475 (D.C. Cir. 2009), the D.C. Circuit Court of Appeals found that ***any power delegated by the Board ceases to exist once the Board loses its quorum***. *Id.* at 473.<sup>2</sup> Accordingly, because the Board lacked a quorum at the times the charge and complaints were issued through the hearing, neither the Board nor its agents, including the ALJ and AGC, were legally authorized to transact Board business. Accordingly, all actions taken prior to establishment of quorum are void.

### **III. THE EMPLOYER DID NOT VIOLATE THE ACT BY CONDUCTING AWS ELECTIONS AND IMPLEMENTING A 5X8 SCHEDULE.**

The AGC argues Respondent violated the Act by conducting AWS elections and implementing a 5x8 schedule and, specifically, that Respondent was not permitted to take steps necessary to ensure its compliance with California law.

Indeed, while the Complaint is focused on Respondent's conduct, the heart of the inquiry goes to the Union's bargaining tactics. Indeed, the dispute crystalizes into the following question: May the Union assert that Concord Honda is violating state wage and hour laws and harming employees *yet nonetheless* impede Concord Honda's attempts to ensure its compliance with those laws? In short, the philosophical dispute reduces to whether a union may demand an employer abide the very status quo whose illegality the union trumpets and, accordingly, frustrate an employer's attempts to comply with the law.<sup>3</sup>

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<sup>2</sup> In *New Process Steel*, the Supreme Court chose neither to adopt nor to overrule *Laurel Bay*. See *New Process Steel*, 130 S.Ct. 2635, 2643 n.4 (2010) ("Our conclusion that the delegee group ceases to exist once there are no longer three Board members to constitute the group does not cast doubt on prior delegations of authority to nongroup members, such as the regional directors or the general counsel. The latter implicates a separate question that our decision does not address.")

<sup>3</sup> As noted in Respondent's exceptions brief, the ALJ's logic would effectively create absurd results in day-to-day collective bargaining negotiations. Labor unions could assert that employers were violating the law in one forum yet, prevent those employers from remedying the alleged violation on the basis that such remedy would constitute a unilateral change. The ALJ'S decision would ultimately force the

While the ALJ and AGC mischaracterize Respondent's actions necessary to comply with law an attempt to shirk its own responsibility, Board precedent is clear that an employer does not have to bargain over whether to take actions necessary to comply with legal obligations. (ALJ Dec. 12:13-16.) *A fortiori*, an employer is privileged to take actions without violating the Act if the motivation for such action is to comply with the law.<sup>4</sup> Neither the ALJ nor the AGC's arguments change this calculus.

On the contrary, the AGC attempts to recast Respondent's obligation (and privilege) to comply with the laws as simply a financial issue that must meet the standard set by the Board in *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995). Board precedent does not collapse an employer's obligation to comply with the law as a 'financial issue.' To do so would risk disincentivizing or even prohibiting an employer's attempt to comply with obligations of other laws designed, like the Act itself, to protect employees.

However, even assuming Respondent were required to demonstrate financial exigency under *RBE Electronics*, Respondent still meets this standard. As Respondent detailed in its Exceptions Brief, Counsel for the claimants (and Union) has alleged that each of nineteen claimants had suffered, on average, \$19,000 in damages as of December 28, 2012. (Exceptions Br. At 26, n13, *citing* (AGC, Exh. 15, pg. 10 (internal pg. 34).)) Thus, even without claims for attorneys' fees and other penalties, Concord Honda faces over \$360,000 in alleged back pay liability and was – per the allegation of the Union and claimant bargaining members – continuing to violate the law and accrue financial liability. Ultimately, an allegedly invalid workweek equates to approximately an additional \$10,000 in wage liability each month. (AGC, Exh. 15,

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employer to commit or admit misconduct in one forum in order to legally remedy that potential misconduct in another forum.

<sup>4</sup> See *Rose v. Local 215, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 148 NLRB 236, 245 (1964); see also Respondent's Post-Hearing Brief, §(IV(C)(3).

pg. 7 (internal pg. 22); Tr. 49:10-14.) There can hardly be a dispute that the prospective loss of \$360,000 as well as a further \$10,000 per month does not constitute an economic exigency.

#### **IV. CONCORD HONDA'S DISPUTE RESOLUTION AGREEMENT DOES NOT VIOLATE THE ACT.**

The AGC argues that, because *D.R. Horton* has not yet been incontrovertibly rejected by the Supreme Court, the Board should persist in applying the misguided, much-pilloried, and void 2-0 decision. 357 NLRB No. 184 (2012) ("*D.R. Horton*"), *enforcement denied in relevant part*, 737 F. 3d 344 (5th Cir. 2013),

To the extent that the AGC's brief merely affirms the ALJ's decision, it is subject to critiques stated in Concord Honda's previous briefing as well the critiques of the numerous state and federal courts that have rejected the Board's rule. By way of quick reprise, the rule espoused in *D.R. Horton* is procedurally invalid because it issued from a Board without quorum and seeks to grant procedural rights that are outside the scope of the Act. The decision is also substantively flawed as Respondent's Dispute Resolution Agreement ("DRA") neither impinges Section 7 rights, nor could reasonably be construed to do so, and violates the FAA by precluding enforcement of arbitration agreements according to their terms. (Exceptions Br. at 31-42.)

Notwithstanding the above, the AGC asserts the DRA violates the Act because it:

- "expressly binds employees to resolve all employment related [sic] disputes through binding arbitration," and "fails to expressly incorporate California Code of Civil Procedure Section 1281.3," and<sup>5</sup>
- Notes that "communications made in conjunction with arbitration proceedings are privileged," which (it asserts) could chill employee speech.

Each of these arguments is mistaken. First, contrary to the ALJ's assertion, the DRA provides that "[t]he arbitrator shall be vested with authority to determine *any and all issues*

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<sup>5</sup> The AGC makes this assertion at least twice in its answering brief. The AGC fails to recognize that the DRA explicitly excepts certain disputes, including labor disputes before the Board from the arbitration provision.

[including claim consolidation] pertaining to the dispute/claims raised.” (emphasis supplied; bracket inserted). The ability to determine *any and all issues* necessarily includes joinder. Indeed, counsel for the parties discussed consolidation through joinder months before the filing of any arbitration complaint. More important, the Arbitrator ultimately chose to order consolidation *on his motion* pursuant to his powers under the DRA. (See ALJ Dec. 7:45-8:1; GC Exh. 1(t), exh. 1, pg. 1.) Most importantly, ***all claimants are proceeding in a single consolidated action against Concord Honda.***<sup>6</sup> Given the broad language of the DRA, the parties’ discussion of joinder, the Arbitrator’s consolidation order, and the continued consolidated hearing, the ALJ’s assertion that joinder is not permitted lacks any support. Indeed, even Advice recognized the “collective” nature of the proceeding. Given same, and given the further absence of *any* evidence that any bargaining unit member has or might construe the DRA to prohibit joinder, the ALJ’s conclusion simply cannot be maintained.<sup>7</sup>

Second, as addressed in Concord Honda’s Exceptions brief, there is no basis for finding that the DRA’s extension of “litigation privilege” to communications made in connect with any arbitration has been or could be construed to chill employee speech. The record is devoid of any

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<sup>6</sup> Even the Board’s Office of the General Counsel, Division of Advice (“Advice”) recommended a merit dismissal under these circumstances because in a “consolidated proceeding, all of the employees for whom the Union is making a claim would be able to act collectively.” This November 9, 2012 Advice Memorandum was rescinded on January 31, 2013. Respondent has not been notified of the grounds for such rescission and further sees no flaws in the logic of Advice’s conclusion.

<sup>7</sup> The AGC’s assertion that a consolidated action fails to sufficiently protect employee rights under the Act must also be rejected. While the AGC asserts that “consolidation lacks several important features of a class action,” the AGC fails to provide any example beyond the requirement that an employee would have to “self-identify” in order to participate in a consolidated action. (AGCAB, pg. 32, n. 8) The AGC does not acknowledge that a class proceeding would not only force uninterested employees to affirmatively opt-out of collective activity but that it would also secure a number of important *procedural* rights not encompassed by the Act, such as the extension of coverage to *former* employees as well as resolution of the dispute through representative proof. Even assuming the AGC had or could sufficiently allege the disadvantages of having to proceed in a consolidated proceeding, the AGC has failed to adduce evidence to support any such allegations.

evidence that any employee has construed the DRA to limit employee communications about the employment disputes.

The ALJ's determination is not only requires a disregard of all record evidence, but further disregard of the word's meaning. If anything, to "privilege" communications made in relation to an arbitration suggests receipt of *further* protection than other, unprivileged, speech. Finally, the ALJ's conclusion is also logically flawed as, absent arbitration, employees would litigate their claims in a court that would extend the very same "privilege" to communications that the ALJ concludes invalidates the DRA. In short, the ALJ's attack is on the "litigation privilege" encapsulated in California Code of Civil Procedure, Section 47(b). The ALJ's conclusions regarding both the absence of joinder and the effect of privilege are without merit and must be dismissed.

#### **V. RETROACTIVE APPLICATION OF *D.R. HORTON* IS UNWARRANTED.**

The AGC urges the Board to retroactively apply *D.R. Horton* because 1) Concord Honda allegedly did not assert reliance on preexisting law and 2) "there is no evidence that Respondent's legal position on the merits in the underlying arbitration will suffer." (AGCAB § 3(E)(1).) 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 justifies a retroactive remedy in this case.

The first element, the parties' reliance on preexisting law, weighs against retroactive relief. As discussed at length in other briefing,<sup>8</sup> *D.R. Horton* was a landmark, novel decision. *See Dana Corp.*, 351 NLRB 434, 443-44 (2007) (finding retroactive application of a ruling unwarranted when the Board issues a decision that "marks a significant departure from

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<sup>8</sup> See Respondent's Post-Hearing, Exceptions, and Answering Brief to the AGC's Exceptions.

preexisting law.”), overruled on other grounds by *Lamons Gasket Co.*, 357 NLRB No. 72 (2011). Prior to the January 3, 2012 issuance of the decision, the Board had never addressed the issue of whether class action waiver agreements violated the Act. 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* at 27. 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. On the contrary, the requested remedy contravenes the express holding of *D.R. Horton*:

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...

*D.R. Horton* at 55-56 (emphasis in original.) Given the Board has yet to mandate class arbitration and explicitly refused to do so in *D.R. Horton*, there is simply no remedy to retroactively apply.<sup>9</sup> However, even were the Board to transmogrify the principle espoused in

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<sup>9</sup> The AGC’s assertions that Concord Honda has failed to assert reliance on a legal position the Board has not addressed is of no moment. Concord Honda need not demonstrate that it relied on the affirmatively-defined state of the law in order to defeat retroactive application. The Supreme Court has noted that it is unfair for an agency to apply a decision retroactively when it has long been silent on the matter. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012).

*D.R. Horton* 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 asserts there is no evidence to suggest Respondent would suffer any “manifest injustice,” and further asserts that retroactive application of its request for mandated class arbitration would “afford[ Respondent] 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.” (AGCAB, pg. 34). 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 because Respondent and Claimants agreed that their dispute would be resolved in arbitration but did not agree to class arbitration. These points are vital as Respondent has already expended the necessary resources to contest and prevail on these points. Moreover, Respondent has prevailed in the arbitral forum in which its employees lodged their dispute.<sup>10</sup> To force Respondent to concede either (or each) position or even to force Respondent to contest either position 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 application of the AGC’s requested, novel remedy would be inappropriate.

**VI. THE AGC HAS FAILED TO DEMONSTRATE THAT THE JUNE 2011 BONUS CONSTITUTED A UNILATERAL CHANGE.**

The AGC asserts that the ALJ correctly determined that Respondent’s June 2011 Bonus constituted a material and substantial unilateral change in violation of the Act. The AGC reaches this conclusion by restating the same argument advanced by the ALJ in her decision and, as such, the analysis contains the same flaw.

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<sup>10</sup> Claimants could have filed suit in court and asserted that the arbitration agreement was unlawful. They did not.

The ALJ quotes (and the AGC parrots) the reasoning that “if the Acting General Counsel shows that the employer made material unilateral changes to mandatory subjects of bargaining, the burden shifts to the employer to prove the change was in some way privileged, such as being consistent with an established past practice.” *NLRB v. Katz*, 369 U.S. 573 (1962). (ALJ Dec. 8:40-9:6). Following the flawed logic to its conclusion, the ALJ further concludes that it is “the employer[’s burden] to prove the change was... consistent with an established past practice... Thus the past practice burden is by no means *prima facie* and it rests squarely with the employer.” (ALJ Dec. 9:1-6).

Absent from the ALJ’s decision or the AGC’s answering brief is any recognition of the distinction between proving a bonus was offered and demonstrating that offering a bonus constituted a ‘change’ that would operate to shift the burden to the employer. Stated simply, the only way to “prove that any change occurred is by establishing what the terms and conditions of employment were before the alleged change, also establishing what the terms and conditions of employment became after the change, and then comparing the two.” *Golden Stevedoring Co.*, 335 NLRB 410, 435 (2001) (emphasis supplied); *accord Monmouth Care Ctr.*, 354 NLRB No. 2 (2009) (two-member Board) (*aff’d* 356 NLRB No. 29 (2010)). Here, the AGC has not attempted to demonstrate what the conditions were before the June 2011 bonus. Moreover, where employee paystubs demonstrate that employees *did* receive other bonuses in 2011, the AGC simply has not met her burden to demonstrate that the provision of the June 2011 bonus constituted a change. (*See* AGC Exh. 2.) Having failed to meet this *prima facie* burden, the alleged unilateral change must fail.

## VII. CONCLUSION

For the foregoing reasons and based on the record evidence and the arguments set forth in Respondent’s Exceptions Brief, Concord Honda again respectfully requests that the Board reject

those portions of the ALJ's Decision excepted to by the Employer. It must be found that Concord Honda's actions taken to comply with legal obligations were permissible, that its DRA does not violate the Act, that no retroactive remedy is appropriate, that its provision of a bonus did not constitute a unilateral change and, accordingly, the underlying charge should be dismissed.

Respectfully submitted,

Dated: February 6, 2014

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