

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

VXI GLOBAL SOLUTIONS, LLC

and

Case 08-CA-133514

ANZEL MILINI

BRIEF OF CHARGING PARTY ANZEL MILINI

Charging Party Anzel Milini submits that this case is fully controlled by the Board’s decisions in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), and the numerous Board decisions following those authorities. These precedents stand for the proposition that an employer violates Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §§ 151-169 (the “Act”), when – as here – it requires employees as a condition of employment to sign an arbitration agreement that precludes them from collectively pursuing work-related claims, and similarly violates the Act when – as here – the employer litigates to enforce such a ban on class and collective actions.

Notwithstanding the dissenting views at the Board, and the reluctance of certain courts to acknowledge the force of the Board’s reasoning in *Murphy Oil*, Milini agrees that *D.R. Horton* was correctly decided, agrees that the Board should continue to adhere to it, and incorporates by reference in this Brief all of the majority’s points and authorities in *Murphy Oil* and *D.R. Horton*.

The Charging Party further submits that the following additional points warrant the Board’s attention and consideration.

1. **VXI's Arbitration Agreement Does Not Expressly Prohibit Class And Collective Actions**

Unlike the arbitration agreement at issue in *Murphy Oil*, Respondent VXI's "Mutual Agreement to Arbitrate" ("MAA") does not expressly forbid class or collective actions of any kind, or class and collective arbitrations in particular. Indeed, as Respondent – the drafter and master of the MAA – will gleefully concede, the terms "class action" and "collective action" do not appear anywhere in the MAA.¹ According to Respondent, the absence of these terms from the MAA reflects, as a matter of law, a mutual intent and understanding that the parties did not intend to permit class action or collective arbitration, and in fact, did not intend to permit any joinder of more than one employees' claim.²

To be clear, this is a legal fiction. Respondent's interpretation of the MAA, and the recent holding of the Ohio Court of Common Pleas³ to the effect that VXI's arbitration agreement constitutes a waiver of class and collective actions, are based solely on a willful misreading of *Stolt-Nielsen S.A. v. Animalfeeds International Corp.*, 559 U.S. 662, 130 S. Ct. 1758, 1776 n.10 (2010) where the parties **stipulated** that their arbitration agreement was "silent" as to the availability of class arbitration. In fact, the U.S. Supreme Court has never held that class

¹ Respondent's success in enforcing its MAA as a class action and collection waiver is most certainly a stroke of luck. The company had no reason to believe, prior to 2010, when the Supreme Court issued its decision in *Stolt-Nielsen S.A. v. Animalfeeds International Corp.*, 559 U.S. 662, 130 S.Ct. 1758 (2010), that its arbitration agreement would immunize it from class action and collective claims, and it had no reason after 2010 not to make the waiver explicit, since by that time it was clear that an explicit waiver would be enforceable. See Joint Motion and Stipulation of Facts at ¶¶ 10-15.

² Respondent expressly opposes not simply a class action, but also the joinder of the claims of Anzel Milini and Lashonna Shakoor in a single arbitration. Even the dissent of Member Johnson in *Murphy Oil* conceded "that a lawsuit initiated by multiple employees is concerted activity with the meaning of a Section 7 because such a lawsuit is 'engaged in with or on the authority of the employee himself.'" *Murphy Oil USA, Inc.*, 361 NLRB No. 72 at p.40.

³ See March 4, 2016 Judgment Entry, Mahoning County Court of Common Pleas, attached hereto as Exhibit 1 (not part of the parties' original Stipulation, but subject to administrative notice by the Board).

arbitration is available only when it is expressly spelled out in the agreement. See, e.g., *Stolt-Nielsen S.A. v. Animalfeeds International Corp.*, 559 U.S. 662, 130 S. Ct. 1758, 1776 n.10 (2010) (federal law is silent on “what contractual basis may support a finding that the parties agreed to authorize class-action arbitration”), *Oxford Health Plans LLC v. Sutter*, 569 U.S. ___, 133 S.Ct. 2064 (2013) (unanimously holding that arbitrator did not exceed scope of his authority by finding that an agreement permitted class action arbitration even where the agreement did not use the words “class action”). Nor has Milini ever conceded that it was her intent and understanding of the MAA that she was giving up the right to initiate or participate in a class action or collective arbitration.

The Board has previously found that an implied waiver in an arbitration agreement violates Section 8(a)(1) of the Act to the same extent as an express class action waiver. See, e.g., *Countrywide Fin. Corp., et al.*, 362 NLRB No. 165 (Aug. 14, 2015). The distinction is significant, however, because it rightly focuses attention on the conduct of Respondent in opposing the Charging Party’s effort to maintain a class action arbitration, and disposes of any arguments that Respondent or others may make based on “freedom of contract” or on traditional notions of “waiver” as consisting of a clear and unequivocal relinquishment of a known right. See, e.g., *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) (identifying “freedom of contract” as “one of the fundamental policies” of the NLRA) and 254 (recognizing that waiver by an employee of a right to a federal forum must be “clear and unmistakable”). In other words, the legal fiction that an employee who signs an arbitration agreement containing an express class-action waiver as a condition of employment is simply engaging in a “mutual agreement” with the employer and indulging in a fully-informed “waiver” of one right or another cannot legitimately be raised in the case of an implied class action waiver such as exists here.

Moreover, the proper waiver analysis in this case must look not only to the procedural device of class or collective actions but also to the employee's substantive Section 7 right to join with others to pursue claims in litigation concerning working conditions, including pay. "The Board and the courts have long held that conduct of employees to vindicate rights to payment for overtime work, and availing themselves of the safeguards of the Fair Labor Standards Act, is protected, **concerted** activity under Section 7 of the Act." *Novotel New York*, 321 NLRB 624, 633 (1996) (emphasis added). Clearly, VXI is claiming that its employees are **implicitly** waiving their Section 7 rights.

An effective waiver is "the intentional relinquishment or abandonment of a known right or privilege." *College Sav. Bank v. Fla. Prepaidsecondary Ed. Expense Bd.*, 527 U.S. 666, 682 (1999) (internal quotations and citations omitted). Where a party seeks to establish waiver of rights that are statutory or even constitutional in origin, such as Section 7 rights, a finding of waiver cannot be found lightly. See, e.g., *Novotel New York*, 321 NLRB 624, 630 (1996), citing *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983) (Section 7 invokes First Amendment values). Indeed, under authorities such as *College Sav. Bank*, such rights cannot – and certainly should not – be "implicitly" waived.

Regardless of the precise language or proper interpretation of the MAA, the Board may focus on the fact that Respondent has filed no fewer than 5 pleadings in the Ohio state courts attempting to prevent Charging Party, and her co-plaintiff, Lashonna Shakoor, from joining their claims with each other, or with any other of Respondents' employees or former employees in a joint proceeding or putative class action, when no agreement expressly precludes them from doing so. That conduct, whether or not it arises in connection with an arbitration agreement, violates the Act.

2. If An Employee’s Contractual Waiver of Class Or Collective Actions Relating To Her Wages Violates The Act, It Should Make No Difference Whether Such Waiver Is Part Of An Arbitration Agreement.

This case should be resolved by answering the simple question of whether a contractual waiver of the right of an employee to participate in a class or collective action over working conditions or pay violates the NLRA as an infringement on employees’ Section 7 rights. If so, it is immaterial whether that waiver is part of an otherwise enforceable arbitration agreement. Stated otherwise, if a class or collective action waiver, standing alone, would be unenforceable under the Act, why should it become lawful simply because it is contained in an agreement to arbitrate? The Respondent has no compelling answer to this question.

Nothing in the U.S. Constitution, in any act of Congress, or in any decision from the U.S. Supreme Court supports the radical notion that an employer’s preference for arbitration can trump workers’ statutory rights to band together for mutual aid or protection. The U.S. Constitution and acts of Congress must take precedence over judge-made law which transforms an arbitration agreement into an implicit waiver of the right to bring or participate in a class action and collective action, or – as is the case here – into an implicit waiver of Section 7 rights under the Act.

It is beyond dispute that Section 7 “protects concerted employee efforts ‘to improve working conditions through resort to administrative and judicial forums.’” *Murphy Oil*, Member Johnson dissent at p.40, quoting *Eastex v. NLRB*, 437 U.S. 556, 565-566 (1978). It is likewise beyond dispute that the Board “has authority to order an employer not to enforce contracts with its employees ... [that] contain provisions violating th[e] Act.” *National Licorice Co. v. NLRB*, 309 U.S. 350, 351 (1940). Finally, the Supreme Court has held “that **collective** activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection

of the First Amendment.” *Transportation Workers v. Michigan Bar*, 401 U.S. 576, 585 (1971) (emphasis added). See also, *Novotel New York*, 321 NLRB 624 (1996) (identifying “First Amendment values” inherent in the NLRA).

Under these authorities, an agreement between an employer and an employee banning the employee from collective activity in pursuit of wages violates the Act and the rights guaranteed by the Constitution. See, e.g., *Convergys Corp.*, 363 NLRB 51 (2015) (affirming ALJ finding that employer violated Section 8(a)(1) by maintaining a requirement – not in an arbitration agreement – that employees waive the right to litigate employment disputes on a class or collective basis). If there is no obstacle to the Board’s intervening to preclude an employer from enforcing such a contract, the offensive provision – unlawful standing on its own – cannot become permissible because it is part of an agreement to arbitrate disputes, unless the right to arbitrate is the highest law in the land, and it is not.

All that is guaranteed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (“FAA”) is that arbitration agreements be treated “on equal footing” with other contracts. H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924) (in the FAA, Congress sought only to place arbitration agreements “upon the same footing as other contracts, where [they] belong.”). Nothing in the FAA holds that arbitration agreements should be privileged over other contracts, and it should be unthinkable that even an “overriding federal policy favoring arbitration” could implicitly do away with substantive rights guaranteed by the Act and by the First Amendment.

As Justice Stevens has repeatedly noted, while the Supreme Court’s arbitration jurisprudence in the past 20 years has radically expanded to make arbitrable various rights provided by federal statute, such expansion is solely a result of a change in judicial philosophy, since neither the FAA nor the underlying federal statutes (such as the federal securities laws, the

FLSA, ADEA, Title VII, etc.) have changed. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 275-276 (2009) (Stevens, J. dissenting). Under the circumstances, it is fitting that the Board hold the line against employers using vague and adhesive arbitration agreements to “silently” deprive employees of basic statutory and constitutional rights as a result of increasingly anomalous conclusions drawn under the FAA. As the Court stated in *Bill Johnson’s Restaurants*, where – as here – it is the rights of “hourly-wage” workers at stake, who “lack the backing of a union, the need to allow the Board to intervene and provide a remedy is at its greatest.” *Bill Johnson’s Restaurants v. NLRB*, 461 U.S. 731, 741 (1983).

Conclusion

As the Board is aware, judicial hostility to *D.R. Horton* is by no means universal. See, e.g., *Totten v. Kellogg Brown & Root, LLC*, 2016 U.S. Dist. LEXIS 10424 (C.D. Cal. Jan. 16, 2016), *Herrington v. Waterstone Mortgage Corp.*, 993 F. Supp.2d 940 (W.D. Wis. 2014). Nor is the appellate fate of this issue as dire and “inevitable” as lamented by Member Johnson in his *Murphy Oil* dissent where he concluded:

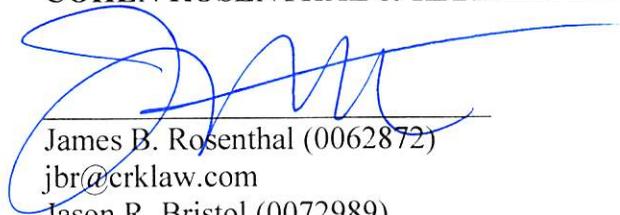
Finally, and most importantly, this unfortunate conflict will almost certainly end with the inevitable reaffirmation by the Supreme Court that the Act, too, must yield to the federal policy of enforcing arbitration agreements according to their terms.

Murphy Oil, 361 NLRB No. 72 at 57 (Johnson dissenting). With the death of Justice Scalia, the composition of the pro-arbitration Court that decided such cases as *14 Penn Plaza, supra*, (5-4, Scalia in majority), *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011) (5-4, Scalia writing for majority) and *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (5-3, Scalia writing for majority) has changed. The majority from that line of decisions could conceivably be lost, depending on his replacement.

The Board's view of this issue is legally correct, and defeatism such as Member Johnson expressed based on the prospects of this issue at the Supreme Court is no reason to rule otherwise. The Board should rule in favor of the Charging Party and find that Respondent's MAA, and its conduct in enforcing it as a class action waiver, constitute an unfair practice in violation of the Act.

Respectfully submitted,

COHEN ROSENTHAL & KRAMER LLP



James B. Rosenthal (0062872)

jbr@crklaw.com

Jason R. Bristol (0072989)

jbristol@crklaw.com

The Hoyt Block Building – Suite 400

700 West St. Clair Avenue

Cleveland, Ohio 44113

216-781-7956 [Telephone]

216-781-8061 [Facsimile]

Counsel for Charging Party

STATEMENT OF SERVICE

I certify that a copy the foregoing was served this 21st day of March, 2016, by e-mail, on the following:

Karen Neilsen
karen.neilsen@nlrb.gov

Mark S. Filipini
mark.filipini@klgates.com

Elliot Watson
Elliot.Watson@klgates.com



James B. Rosenthal

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

MA
MAR 04 2016
CLERK

Lashonna Shakoor, et al,) Case No. 13 CV 3183
)
Plaintiffs,) Judge Lou A. D'Apolito
)
vs.) Magistrate Daniel P. Dascenzo
)
VXI Global Solutions, Inc.,) Judgment Entry
)
Defendant.)

This matter is before the court on remand from the Seventh District Appellate Court.

This Court previously held that with respect to the issue of arbitrability of the claims presented by the Plaintiffs are within the parameters of the arbitration agreement. As such, the claims must be resolved through arbitration. However, on the question of whether or not the arbitration agreement permitted class arbitration or compelled individual arbitration, this Court held that such a question is left to the arbitrator, per the language of the agreement.

On remand, this Court reiterates its previous finding that the arbitration agreement does not explicitly permit class arbitration. Consequently, and in accordance with the reviewing court's reliance on the Ninth District Court of Appeals holding in Bachrach v Cornwell Quality Tool, Co. (unreported -WL2040865), this Court is compelled to find in favor of Defendant Corporation and against the employees. This matter is dismissed and referred to arbitration. Since the arbitration agreement does not explicitly "state that class arbitration is permitted, the claims are to be arbitrated individually. (Bachrach v. Cornwell)"

There is no just cause for delay.

Dated: 3/3/16



Judge Lou A. D'Apolito

SCANNED

CLERK: COPIES TO ALL COUNSEL OR UNREPRESENTED PARTIES

RECEIVED MAR 14 2016



2013 CV
03183
00044450373
JUDENT