

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: January 24, 2013

TO: William A. Baudler, Regional Director
Region 32

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Concord Honda
Case 32-CA-072231

512-5072-0100

512-5072-5700

This memorandum supersedes our previous memorandum, dated November 9, 2012.¹

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) of the Act by seeking to preclude employees from engaging in collective legal activity. We conclude that the Employer violated Section 8(a)(1) of the Act by seeking to preclude employees from engaging in collective legal activity.

FACTS

Since 2005, Concord Honda (the Employer) has required all unit employees to sign a mandatory arbitration agreement (MAA) which compels them to submit all disputes that arise out of their employment to binding arbitration, including claims that would otherwise go to court or an administrative agency other than the NLRB. The MAA is silent as to whether the mandatory arbitration may be conducted on a collective or class basis.

In 2010, Machinists Automotive Trades District Lodge No. 190, Automotive Machinists Lodge No. 1173 (the Union) was certified in a bargaining unit comprised of all full-time and part-time technicians and lube technicians employed by the Employer at its Concord, California facility. The bargaining unit represented by the Union currently contains 21 employees. Since the certification, the Employer and the Union have had a number of bargaining sessions but have not been able to reach a first collective-bargaining agreement.

¹ As we have received information from the Region that the Employer has made certain unlawful unilateral changes, a merit dismissal is no longer appropriate here.

In July 2011,² the Union's attorney filed a request under the MAA for class arbitration of a claim that the Employer had failed to pay required overtime wages. The Employer's attorney responded by rejecting the Union's request for class arbitration, asking the Union to instead identify the names of the employees it represents who were demanding arbitration, so the parties could initiate individual arbitration proceedings for each of the employees. The Union's attorney responded that the claims are being filed on a class basis and not as individuals, and gave the names of three employees who would be representatives of the class.

In August, the Employer's attorney took the position that the MAA does not provide for class arbitration, and that the Employer did not agree to proceed on a class basis. Based on the Employer's refusal to agree to class arbitration, the Union requested individual arbitrations for 19 named employees.³ The Employer then asked the Union to stipulate to consolidating the individual arbitrations; the Union agreed to consolidation if certain arbitrators were chosen, but not with other arbitrators. Thereafter, the Employer and the Union corresponded over several months as to which arbitrator or arbitrators would be chosen, and whether the arbitration proceedings would be on a class, consolidated, or individual basis.

The matter is currently pending before an arbitrator, with the Union still seeking class status in arbitration and the Employer still opposing class status based on the MAA. The arbitration is in the discovery process; the Employer has only provided discovery as to the three employees named as class representatives by the Union. The Employer has requested that the Union stipulate to consolidation of the nineteen individual arbitration claims into a single action under the California Arbitration Act, Section 1281.3 ("Consolidation of separate arbitration proceedings . . .").⁴ The Union continues to pursue class status, but the Employer has stated that, if class status is denied, it will move the arbitrator to consolidate the employee's claims. The Employer has also indicated that it would proceed with the arbitration on a class basis, if the arbitrator certifies the class.

In January 2012, the Union filed the charge in the instant case, alleging that the Employer violated Section 8(a)(1) of the Act by refusing to allow for class arbitration of

² All dates hereinafter are in 2011, unless otherwise noted.

³ It appears that the other two current employees were not interested in filing for arbitration as individuals.

⁴ It appears that such consolidation would lack some of the important features of a class action, such as the inclusion of all affected employees without individual employees having to step forward and self-identify themselves.

the employees' wage and hour claims while also maintaining the MAA prohibiting employees from taking their claims to court.

ACTION

We conclude that the Employer violated Section 8(a)(1) of the Act by seeking to preclude employees from engaging in class legal activity.

Initially, we agree with the Region that the Employer violated the Act by seeking to enforce the MAA to prohibit all collective and class legal activity since, in August 2011, it rejected the Union's class arbitration request on the basis that the MAA precludes class arbitration. In *D.R. Horton*, the Board set forth the appropriate legal framework for considering the legality of employers' policies and agreements that limit collective and class legal activity in non-union settings.⁵ The Board held that a policy or agreement precluding employees from filing employment-related collective or class claims against the employer restricts the employees' Section 7 right to engage in concerted action for mutual aid or protection, and therefore violates Section 8(a)(1) of the Act.

In particular, the Board held in *D.R. Horton* that "an employer violates Section 8(a)(1) of the National Labor Relations Act when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer."⁶ The Board stated that such an agreement unlawfully restricts employees' Section 7 right to engage in concerted action for mutual aid or protection.⁷ The Board reviewed its precedent that "has consistently held that concerted legal action addressing wages, hours or working conditions is protected by Section 7."⁸ In addition, the Board made clear that "the applicable test is that set forth in *Lutheran Heritage Village*, and under that test, a policy such as Respondent's violates Section 8(a)(1) because it expressly restricts Section 7 activity or, alternatively, because employees would reasonably read it as restricting such activity."⁹ In sum, the Board definitively held in *D.R. Horton* that an employer "violates Section 8(a)(1) by

⁵ *D.R. Horton, Inc.*, 357 NLRB No. 184, slip op. at 1-7 (2012).

⁶ *Id.*, slip op. at 1.

⁷ *Ibid.* (n. omitted).

⁸ *Id.*, slip op. at 2.

⁹ *Id.*, slip op. at 7, citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

requiring employees to waive their right to collectively pursue employment-related claims.”¹⁰

In the instant case, while the Employer’s MAA is silent on its face as to whether the mandatory arbitration may be conducted on a collective or class basis, the Employer has explicitly taken the position that the MAA prohibits the employees from proceeding as a class. Instead, the Employer’s position is that the MAA requires employees to each file their claims as individuals, albeit with the possibility of a consolidated proceeding (as the Employer is seeking in the current dispute). Thus, as the MAA precludes any forum other than arbitration from resolving employment disputes, the Employer has effectively foreclosed class employment-related litigation by employees.¹¹ Given the 8(a)(1) standard in *Lutheran Heritage Village-Livonia* that a violation will be found where a “rule has been applied to restrict the exercise of Section 7 rights,”¹² the standard specifically applied by the Board to mandatory arbitration agreements in *D.R. Horton*,¹³ it is clear that the MAA is unlawful as applied. Under *D.R. Horton*, such agreements unlawfully restrict and interfere with employees’ Section 7 right to engage in concerted action for mutual aid or protection, and violate Section 8(a)(1) of the Act.

We note that the limited collective activity the Employer has offered, i.e., consolidation of individual arbitration claims, does not make lawful its opposition to class proceedings based on the MAA. While the consolidation of individual claims would permit some limited collective legal activity, it appears that such consolidation would lack several important features of a class action that employees would otherwise have an opportunity to seek, such as the inclusion of all affected employees without individual employees having to step forward and self-identify themselves. Therefore, we agree with the Region that the availability of the alternative of consolidation does

¹⁰ 357 NLRB No. 184, slip op. at 13.

¹¹ We agree with the Region that the Union has not in any way waived employees’ rights to engage in collective legal activity without the Employer’s interference. Thus, not only did the Union initially file for class arbitration, but it has continued to request class arbitration throughout its dealings with the Employer, and has moved the arbitrator for class certification. The Union has indicated that it would proceed on an individual or consolidated basis if it must, but only if it is required to do so under the Employer’s unlawful MAA. Therefore, we conclude that there has been no Union waiver.

¹² 343 NLRB at 647.

¹³ *D.R. Horton*, 357 NLRB No. 184, slip op. at 4.

not make lawful the required waiver of employees' right to proceed on a collective or class basis.¹⁴

(b) (5)

¹⁵ In this regard, we note that the Employer may lawfully compel arbitration, as long as employees are fully able to exercise their legal rights to engage in collective legal activity in such a forum.¹⁶

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer's maintenance and enforcement of its MAA violates Section 8(a)(1) of the Act, as set forth above.

/s/
B.J.K.

ROF(s) -- 0 (NxGen)
ADV.32-CA-072231.Response.Concord Honda-3. (b) (6), (b) (7)

¹⁴ See *D.R. Horton*, 357 NLRB No. 184, slip op. at 6 (“if the Act makes it unlawful for employers to require employees to waive their right to engage in one form of activity, it is no defense that employees remain able to engage in *other* concerted activities”).

¹⁵ See, e.g., (b) (7)(A)

¹⁶ The General Counsel's long-standing position is that employers may lawfully require employees to bring their claims in arbitration, rather than in court, as long as all of their substantive rights are preserved (including their statutory right to engage in collective legal activity). See, e.g., *O'Charley's Inc.*, Case 26-CA-19974, Advice Memorandum dated April 16, 2001, at 5-7 (“Section 7 does not provide a right to select any particular forum to concertedly engage in activities for mutual aid or protection”).