NOTES ON *D.R. HORTON*: NLRB LIMITS ARBITRATION RIGHTS

By Roger B. Jacobs, Esq.

I. Introduction

In *D.R. Horton, Inc. and Michael Cuda*, 357 NLRB No. 184 (2012), a three-member panel of the National Labor Relations Board (NLRB)has issued a far-reaching decision that immediately affects arbitration provisions and the rights of unorganized individuals at the workplace.[1]

The ruling, essentially, holds that arbitration agreements in the workplace are valid as long as they affect individuals only and do not preclude class activity in any forum.

One of the fundamental problems with the decision is that it was decided based upon several premises not necessarily accurate. For example, commenting on the Supreme Court's decision in *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456 (2009), the Board concluded that the right to waive judicial class actions, clearly endorsed by the Supreme Court of the United States, does not impact Horton because the Horton waiver occurred through the collective bargaining process – where employees were represented by a labor organization.[2] In other words, the Board has tacitly endorsed collective bargaining through labor organizations as a means to achieve workplace resolution, but has suggested that any modification in individual workplace rights would be problematic without the imprimatur of a majority organization.

The two voting members of the panel, acting for the full Board, held that its decision would not preclude individuals not otherwise defined as employees under §2(3) of the Act from waiving their right to pursue class or collective claims and was narrowly tailored.[3]

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Thus, the Board suggested that executives or other exempt individuals were not covered. But, those individuals who might otherwise be – or perhaps should properly be – represented by organized labor can only have those workplace rights circumscribed through a collective bargaining process.

The Board discussed the interplay between the Federal Arbitration Act, 9 U.S.C. §1, and the National Labor Relations Act (NLRA,) 29 U.S.C. §150, and the historical context of each. However, the Board ruled that, in this instance, any interference with rights under the Federal Arbitration Act was justified, appropriate, and complementary.

The Board concluded that its decision did not adversely impact rights in the workplace. Rather, it enhanced them by requiring that individuals' rights to collective action in any forum be preserved. However, companies could still require individuals to pursue arbitration but could not preclude them from participating in class claims.

Thus, a question to ponder is the affect of precluding individuals from lawsuits who might later participate in a class claim. In other words, if Mary Sue lost at arbitration with the Widget Company, could she subsequently join a class claim by the Widget Workers of Wisconsin? I do not think the Board panel resolved such an issue. My reading of the decision suggests no finality by the Sue arbitration; rather, merely another effort for her and the WWW to re-litigate claims. At least on this point further clarity is needed.

The Horton decision must also call into question the implication of a panel limited to two voting members of an already politicized Board making a decision of first impression – by its own admission. It is true that Board decisions often wax and wane depending upon the party in control of the White House. However, such a significant review of the clash between arbitral rights and individual rights could have been deferred. Once member Hayes recused, his two colleagues should have waited for a new complement on the Board. Perhaps such a regulation should be considered, at least on cases of first impression.

II. Background Facts

The Horton company was a home builder with operations in more than twenty states. On a corporate-wide basis, beginning in 2006, it began to require each employee to execute a mutual arbitration agreement (MAA) as a condition of employment. The key provisions were as follows:

- that all disputes and claims relating to the employee's employment with Respondent (with exceptions not pertinent here) will be determined exclusively by final and binding arbitration;
- that the arbitrator "may hear only Employee's individual claims," "will not have the authority to consolidate the claims of other employees," and "does not have authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding"; and
- that the signatory employee waives "the right to file a lawsuit or other civil proceeding relating to Employee's employment with the Company" and "the right to resolve employment-related disputes in a proceeding before a judge or jury."

The MAA required all employment-related disputes to be resolved through individual arbitration. The right to a judicial forum was waived. Interestingly, the Administrative Law Judge who made the initial determination in Horton dismissed the allegation that the class action waiver violated Section 8(a)(1) of the NLRA.[4] However, two members of the Horton Board panel, acting on their own, reversed the Judge and found a violation of the Act.

The sum and substance of the Board's holding, as noted in footnote 6, is:

> [t]he MAA bars employees from pursuing their claims in any forum except arbitration and precludes collective actions in that arbitral forum. The result is that there is no forum in which employees may pursue a class or collective claim.

In its holding, the Board ruled that the MAA "clearly and expressly" barred employees from

exercising substantive rights protected by Section 7 of the NLRA.

The Board characterized the issue in *Horton* as "whether employees can be required, as a condition of employment, to enter into an agreement waiving their rights under the NLRA." However, the MAA did not require Cuda to waive any rights. Rather, it required him to contest those rights in arbitration.

The Board has converted that requirement into a denial of Section 7 rights for groups of employees who have not even come forward with claims.[5] The decision was far beyond the ALJ's initial holding as well as the issues he decided.

The Board went further – to contend that a waiver of rights under the NLRA took place because individuals were required to waive their rights to take collective action inherent in seeking class certification. The Board specifically said, "Rule 23 may be a procedural rule, but the Section 7 right to act concertedly by invoking Rule 23, Section 216(b), or other legal procedures is not."

I would suggest that the Board's logic is illogical and that Section 7 protects the rights of individuals to take concerted action – or not. Here, the Board confused concerted action with class action and, by implication, found that any constraints on individuals to pursue class or collective actions impaired the potential for concerted action even when it was not asserted.

Unfortunately, what occurred next set the stage for the Board's ruling. The Board called for amicus briefs on the very question that was to be decided in *D.R. Horton*. Obviously, there was disquietude over General Counsel Ronald Meisburg's Memorandum 10-06 dated June 16, 2010.

The memo stated as follows: "Employers, nonetheless, may require individual employees to sign a ... waiver of their right to file a class or collective claim without per se violating the Act."[6]

Perhaps the Board felt greater clarity was needed since Meisburg's Memo also stated that the individual filing of a class action claim related to employment was not necessarily "concerted activity." The Memo specifically stated that the pursuit of class action litigation for "personal reasons is not protected by Section 7 merely because of the incidental involvement of other employees as a result of normal class action procedures."[7]

III. Analysis

My point is demonstrated by the Board's comments in footnote 24 as follows:

> Nothing in our holding guarantees class certification; it guarantees only employees' opportunity to pursue without employer coercion, restraint or interference such claims of a class or collective nature as may be available to them under Federal, State or local law. Employees who seek class certification in Federal court will still be required to prove that the requirements for certification under Rule 23 are met, and their employer remains free to assert any and all arguments against certification (other than the MAA). Further, if an employee seeks class certification and fails – in other words, if the court determines that the claim fails to meet the requirements of Rule 23 and therefore must be pursued individually rather than as a class action – the resulting action would be subject to dismissal under the MAA in favor of arbitration.

Recognizing the flimsiness of its decision, the two voting members of the panel stated that the Board was not mandating "class arbitration in order to protect employees' rights under the NLRA." Rather, they stated that the Board held only that

> [e]mployers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial. So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of classwide arbitration. Employers remain free to insist that *arbitral* proceedings be conducted on an individual basis. (Emphasis supplied.)

The Board's decision strikes me as a conundrum, thus going too far and not going far enough at the same time. The Board's decision is contrary to the Supreme Court holding, in *Pyett*, as well as its further direction regarding arbitration. The courts have long favored arbitration as a forum for resolution of employment claims. The Board, however, signaled its discomfort with the ALJ decision when it sought amicus input regarding the MAA and the §8(a)(1) issue despite the ALJ decision that the Agreement was not unlawful.[8] The Board has not suggested that individuals would fare less well by having individual claims aggregated or that any of their rights would be abrogated.

My reading of the court's discussion of *Pyett*, *supra*, is that had Horton negotiated the provision with the union and reached the same contractual result, the Board would have had no choice but to bless that waiver thereby elevating union representation over individual employer-employee negotiation.[9]

The Board further eroded the soundness of its decision by saying:

> Finally, only those agreements that would be reasonably read to bar protected, concerted activity are vulnerable. For example, an agreement requiring arbitration of any individual employment-related claims, but not precluding a judicial forum for class or collective claims, would not violate the NLRA, because it would not bar concerted activity. Thus, contrary to the suggestion of the Respondent and supporting amici, finding the MAA's class-action waiver unlawful will not result in any large-scale or sweeping invalidation of arbitration agreements.

A clear reading of the Board's own statement is that agreements like the MAA would pass muster if they obligated employees to seek arbitration and did not affirmatively bar class claims.

Further, a reading of the underlying ALJ decision suggested that the slim Board panel went further than its own General Counsel had urged. The Judge noted that his decision dealt with the "efficacy of a mandatory arbitration provision that restricts employees from joining arbitration claims or collectively seeking recourse outside of arbitration." He specifically stated that the General Counsel did not contend arbitration agreements were *per se* unlawful. So why did the Board panel go further in crafting such a broad rejection previously not at issue in the same case?

The ALJ noted that he was "not aware of any Board decision holding that an arbitration clause cannot lawfully prevent class action lawsuits or joinder of claims."[10] Based upon that finding, and his reading of prior Supreme Court and other precedent, he declined to find a violation of Section 8(a)(1) of the Act. The two voting members of the panel of the Board should have gone no further.

The ALJ opined that "decisions of the Supreme Court in recent years reflect a strong sentiment favoring arbitration as a means of dispute resolution." The Board concluded to the contrary. On its own, and based upon the thinnest of legal reasoning, the panel broke new ground which will ripple through the courts for many years until the Supreme Court, again, clarifies and rejects this latest pronouncement. ■

ENDNOTES

1 The Board composition at the time was three members and Member Hayes was recused and did not participate in deciding the case. A question arises with regard to the political underpinnings of the decision itself.

2 For a discussion of the *Pyett* decision see Roger B. Jacobs "Supreme Court Tips Against Individual Rights — Again," 27 Hofstra Lab & Emp. L.J. 267 (2010).

3 "Sec. 2(2) of the Act, in turn, defines 'employer' to include, inter alia, employees of the federal government or any state or political subdivision. Thus, significant numbers of workers typically considered to be 'employees' in lay terms — supervisors, government employees, and independent contractors being perhaps the largest groups — are not covered by Sec. 7, and, therefore, any class or collective action waiver to which they are subject cannot be challenged on Sec. 7 grounds."

4 §8(a)(1) provides that it is an unfair labor practice for an employer to interfere in, restrain or coerce employees in the exercise of §7 rights. Section 7 provides a right to self-organization as follows: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

[5] It is significant to note that the incantation of §7 rights is not all-encompassing since it provides affirmative rights as well as the converse — "the right to refrain from any such activities." In other words, §7, as amended, was designed to protect individuals engaged in "other concerted activities" or "mutual aid or protection." It is unclear that requiring employees to arbitrate will abrogate these rights.

[6] Memo at 7.

[7] GM at 6.

[8] The ALJ William N. Cates conducted a trial on the facts in Miami, Florida in 2010. In his fact analysis ALJ Cates noted that in the instruction sheet for employees it stated they still would be able to go to the EEOC or a similar agency irrespective of the MAA. The issue arose when petitioner's counsel advised D.R. Horton of an intent to arbitrate a misclassification issue on behalf of several employees. Counsel for the company denied the request. Interestingly, the ALJ stated that he did not — nor was he required to — rely upon Memorandum 10-06, discussed above. The ALJ said, with particularity, that the "crux of the matter here is the efficacy of a mandatory arbitration provision that restrains employees from joining arbitration claims or collectively seeking recourse outside of arbitration. The General Counsel does not contend arbitration agreements are per se unlawful." Emphasis added.

The ALJ reviewed *Gilmer v. Interstate*, 500 U.S. 20 (1991) and , 500 U.S. 20 (1991) and *Pyett, supra*, regarding the favored status of arbitration to resolve workplace disputes. He concluded that he was "not aware of any Board decision holding that an arbitration clause cannot lawfully prevent class action lawsuits or joinder of arbitration claims." Based specifically upon U.S. Supreme Court holdings and the "absence ... of direct Board precedent" he declined to find a violation of §8(a)(1). Members Mark Gaston Pearce and Craig Becker disagreed.

[9] To the extent individuals would argue that the imposition of a waiver of any kind and the restriction to the arbitral forum is unlawful, such a conclusion is contrary to long-standing court precedent. Courts have routinely upheld contracts requiring individuals to arbitrate workplace claims. *Steelworkers Trilogy — United Steelworkers v. American Mfg. Co., 363 U.S. 564, 46 LRRM 2414 (1960); United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

[10] The ALJ did find the mandatory arbitration provision unlawful as a violation of §8(a)(4) because he found the language ambiguous. He ruled that employees might conclude they could not file charges with the Board even though the *Horton* instructions on the MAA provided otherwise. Thus, the Board could have sought greater clarity by *Horton* and followed Supreme Court precedent to permit arbitral expansion.