

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

D.R. HORTON, INC.,

Employer,

and

12-CA-25764

MICHAEL CUDA,

an Individual.

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations on behalf of its affiliated national and international labor organizations files this brief in response to the request of the National Labor Relations Board for amicus briefs.

INTRODUCTION

The charging party in this case, Michael Cuda, is an employee of respondent, D.R. Horton, Inc. Cuda holds the position of “superintendent,” which the respondent treats as exempt from the coverage of the Fair Labor Standards Act (FLSA). JD 3.

In February 2008, Cuda and four co-workers, who have also been classified as “superintendents” and treated as exempt from FLSA coverage, jointly attempted to initiate arbitration of their claims that respondent had violated the overtime provisions of the FLSA under their agreements with respondent to resolve all employment-related claims through arbitration. Cuda and the four other claimants later attempted to broaden their arbitration demand to allow other similarly situated employees of respondent to join the arbitration as claimants.

Respondent treated both the initial request to arbitrate and the subsequent request to allow other similarly situated claimants to join the arbitration as invalid. In this regard, respondent relied upon a provision in its arbitration agreement with employees providing that an “arbitrator will not have the authority to consolidate the claims of other employees into a proceeding originally filed by either the Company or [an] Employee” and “[t]he arbitrator may hear only [the] Employee’s individual claim and does not have the authority to fashion a proceeding as a class or collective action.” JD 2.

The Board has requested amicus briefs addressing whether the respondent “violate[d] Section 8(a)(1) of the Act by maintaining and enforcing its Mutual Arbitration Agreement, under which employees are required, as a condition of employment, to agree to submit all employment disputes to individual arbitration, waiving all rights to a judicial forum, where the arbitration agreement further provides that arbitrators will have no authority to consolidate claims or to fashion a proceeding as a class or collective action?”

For the reasons stated below, we urge the Board to find that the respondent’s actions interfered with the right of the charging party and his four co-claimants to engage in concerted activity for mutual aid or protection.¹

ARGUMENT

¹ The General Counsel’s opening brief demonstrates that the arbitration agreement here violates the NLRA in numerous ways that are not necessary to the core requirement that covered employees arbitrate their FLSA claims on an individual basis. We agree with the General Counsel’s opening brief so far as it goes and do not repeat those arguments here. Rather, this brief is directed to the question of whether an arbitration agreement that had none of the defects noted in the General Counsel’s opening brief would nevertheless violate the NLRA by requiring individual arbitration of claims.

Section 7 of the National Labor Relations Act grants employees the right “to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.” 29 U.S.C. § 157. Section 8(a)(1) makes “an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.” 29 U.S.C. § 158(a)(1). “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) (citing cases).

Enforcement of the arbitration agreement in this case according to its terms would prevent the charging party and his co-workers from “engag[ing] in . . . concerted activit[y] for mutual aid or protection,” 29 U.S.C. § 157, by joining together to arbitrate their claims that the respondent has not paid them the overtime wages required by the FLSA. The Supreme Court has held, as a general matter, that, a “party should be held to [an agreement to arbitrate statutory claims]” only so long as doing so “does not [cause the party] to forego the substantive rights afforded by the statute.” *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985). In other words, the arbitration agreement should be enforced so long as doing so does not undermine “the substantive protection afforded by a given statute.” *Ibid*.

“[T]he substantive protection afforded by [the] given statute” at issue here, *Mitsubishi Motors*, 473 U.S. at 628, is the right “to engage in . . . concerted activities for the purpose of . . . mutual aid or protection,” 29 U.S.C. § 157, free of employer

“interfere[nce]” or “restrain[t],” 29 U.S.C. § 158(a)(1). Enforcement of the arbitration agreements between the respondent and its employees according to their terms would cause the employees “to forego the substantive rights afforded by th[at] statute,” *Mitsubishi Motors*, 473 U.S. at 628. That is so, because the right of employees to “act[] in concert for their mutual aid and protection in prosecuting their wage claims under the wage and hour law . . . is guaranteed by Section 7 of the Act,” *Moss Planing Mill Co.*, 103 NLRB 414, 419 (1953), *enfd* 206 F.2d 557 (4th Cir. 1953), and the agreement here requires the covered employees to prosecute their wage claims on an “individual” basis and not “as a class or collective action,” JD 2.

“The action of an employee in seeking” to collectively arbitrate his FLSA claim with co-workers “clearly falls within the literal wording of § 7 that ‘[employees] shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.’” *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260 (1975) Thus, protection of the right to collectively arbitrate similar FLSA claims “plainly effectuates the most fundamental purposes of the Act . . . to protect ‘the exercise by workers of full freedom of association . . . for the purpose of . . . mutual aid or protection.’” *Id.* at 261-62, quoting 29 U.S.C. § 151.

“Requiring a lone employee” to arbitrate FLSA claims that could have been brought as part of a collective action “perpetuates the inequality the Act was designed to eliminate.” *Weingarten*, 420 U.S. at 262. It is obviously less expensive for a group of employees with similar claims to present those claims together in a single proceeding.

And, it may be impossible for a group of employees with relatively small individual claims to find an attorney willing to handle their claims on an individual basis. Beyond that, employees are less likely to feel coerced with respect to advancing their claims when they do so as part of a group. Given the obvious cost savings and elimination of the risk of inconsistent rulings, collective arbitration of similar FLSA claims would appear to be “most useful to both employee and employer.” *Ibid.* Indeed, the only apparent interest served by requiring employees to proceed individually would be the wholly illegitimate interest of discouraging employees with similar claims from seeking redress of FLSA violations.

All that being so, we submit that the Board should find that respondent violated NLRA § 8(a)(1) by enforcing the agreements to individually arbitrate their FLSA claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on July 20, 2011, I caused to be served a copy of the foregoing Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* by electronic mail or fax on the following:

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