

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

D. R. HORTON, INC.,

and

MICHAEL CUDA, an individual,

Case 12-CA-25764

Brief of *Amicus Curiae*
Coalition for a Democratic Workplace

William J. Emanuel
LITTLER MENDELSON, P.C.
2049 Century Park East, 5th Floor
Los Angeles, California 90067
Telephone: (310) 553-0308

Henry D. Lederman
Alexa L. Woerner
LITTLER MENDELSON, P.C.
Treat Towers
1255 Treat Boulevard, Suite 600
Walnut Creek, California 94597
Telephone: (925) 932-2468

TABLE OF CONTENTS

	PAGE
I. STATEMENT OF INTEREST	1
II. SUMMARY OF ARGUMENT	1
III. ARGUMENT	3
A. IN ENFORCING THE NLRA, THE BOARD MUST RESPECT OTHER IMPORTANT CONGRESSIONAL OBJECTIVES AND AVOID INFRINGING UPON OTHER FEDERAL STATUTES	3
1. Supreme Court Precedent Requires Deferral by the Board to Other Agencies and the Federal Courts for Interpretations of Other Federal Statutes	3
2. The Board’s Established Policy Requires That It Respect the Interpretations of Other Federal Statutes by Other Agencies and Courts	6
B. THE FAA REQUIRES THAT ARBITRATION AGREEMENTS BE ENFORCED ACCORDING TO THEIR TERMS— INCLUDING PROVISIONS THAT PRECLUDE CLASS OR COLLECTIVE ARBITRATION.....	9
C. AN ORDER TO ELIMINATE THE CLASS ACTION WAIVER FROM THE ARBITRATION AGREEMENT IN THIS CASE WOULD INTERFERE WITH THE OBJECTIVES OF CONGRESS IN ENACTING THE FAA	13
D. AN ORDER TO ELIMINATE THE CLASS ACTION WAIVER FROM THE ARBITRATION AGREEMENT WOULD ALSO VIOLATE THE EXPRESS REQUIREMENT OF SECTION 5 OF THE FAA.....	15
E. THE RIGHT TO FILE A CLASS ACTION IS MERELY A PROCEDURAL RIGHT THAT IS ANCILLARY TO THE LITIGATION OF SUBSTANTIVE CLAIMS, AND IT DOES NOT AFFECT SUBSTANTIVE RIGHTS UNDER THE NLRA	18
F. THE ACCOMMODATION ADVOCATED BY MEMORANDUM GC 10-06 AND BY THE ACTING GENERAL COUNSEL IN THIS CASE WOULD RESULT IN ENFORCEMENT OF THE NLRA WITHOUT INFRINGING ON THE POLICIES OF THE FAA	19
IV. CONCLUSION.....	23

TABLE OF AUTHORITIES

PAGE

CASES

AT&T Mobility LLC v. Concepcion,
131 S.Ct. 1740 (2011).....*passim*

AT&T Technologies, Inc. v. Communications Workers,
475 U.S. 643 (1986) 17

ATSA of California, Inc. v. Cont’l Ins. Co.,
754 F.2d 1394 (9th Cir. 1985)..... 16

Boys Markets, Inc. v. Retail Clerks Union Local 770,
398 U.S. 235 (1970) 5, 6

Can-Am Plumbing, Inc.,
350 N.L.R.B. 947 (2007)..... 6

Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos,
25 F.3d 223 (4th Cir. 1994)..... 16

Carter v. Countrywide Credit Indus.,
362 F.3d 294 (5th Cir. 2004)..... 12

Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100,
421 U.S. 616 (1975) 4, 13

Crawford Group, Inc. v. Holekamp,
543 F.3d 971 (8th Cir. 2008)..... 16

Deposit Guar. Nat’l Bank v. Roper,
445 U.S. 326 (1980) 18

Gilmer v. Interstate/Johnson Lane Corp.,
500 U.S. 20 (1991) 11, 14

Hoffman Plastic Compounds, Inc. v. NLRB,
535 U.S. 137 (2002) 5

Horenstein v. Mortgage Mkt., Inc.,
9 Fed. Appx. 618 (9th Cir. 2001) 12

Int’l Bhd. of Elec. Workers Local 48 (Kingston Constructors, Inc.),
332 N.L.R.B. 1492 (2000)..... 7, 8

TABLE OF AUTHORITIES
(CONTINUED)

	PAGE
<i>Johnson v. W. Suburban Bank</i> , 225 F.3d 366 (3d Cir. 2000).....	12, 13
<i>Kremer v. Chemical Constr. Corp.</i> , 456 U.S. 461 (1982).....	22
<i>Meyers Industries</i> , 268 N.L.R.B. 493 (1984)	19, 20
<i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.</i> , 473 U.S. 614 (1985).....	11, 17
<i>Morton v. Mancari</i> , 417 U.S. 535 (1974).....	22
<i>Moses H. Cone Mem’l Hosp. v. Mercury Constr. Co.</i> , 460 U.S. 1 (1983).....	9, 22
<i>NLRB v. Bildisco & Bildisco</i> , 465 U.S. 513 (1984).....	4
<i>NLRB v. Fansteel Metallurgical Corp.</i> , 306 U.S. 240 (1939).....	3
<i>Ortiz v. Fibreboard Corp.</i> , 527 U.S. 815 (1999).....	18
<i>OXY USA, Inc.</i> , 329 N.L.R.B. 208 (1999)	8
<i>Pac. Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.</i> , 814 F.2d 1324 (9th Cir. 1987)	16
<i>PCC Structural, Inc.</i> , 330 N.L.R.B. 868 (2000)	8
<i>Perry v. Thomas</i> , 482 U.S. 483 (1987).....	22
<i>R.J. O'Brien & Assoc. v. Pipkin</i> , 64 F.3d 257 (7th Cir. 1995)	16
<i>Rodriquez v. United States</i> , 480 U.S. 522 (1987).....	22

**TABLE OF AUTHORITIES
(CONTINUED)**

	PAGE
<i>Roseburg Forest Products</i> , 331 N.L.R.B. 999 (2000).....	8
<i>Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.</i> , 130 S.Ct. 1431 (2010).....	18
<i>Shell Oil Co. v. Co2 Comm., Inc.</i> , 589 F.3d 1105 (10th Cir. 2009).....	16
<i>Slawienski v. Nephron Pharm. Corp.</i> , 2010 U.S. Dist. LEXIS 130365 (N.D. Ga. 2010).....	13
<i>Southern S.S. Co. v. NLRB</i> , 316 U.S. 31 (1942)	3, 4, 14
<i>Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.</i> , 130 S.Ct. 1758 (2010).....	10, 11, 17, 18
<i>Sure-Tan, Inc. v. NLRB</i> , 467 U.S. 883 (1984)	5
<i>TVA v. Hill</i> , 437 U.S. 153 (1978)	22
<i>United Bhd. of Carpenters & Joiners v. NLRB</i> , 357 U.S. 93 (1958)	5
<i>United States v. Borden Co.</i> , 308 U.S. 188 (1939)	22
<i>Wal-Mart Stores, Inc. v. Dukes</i> , 564 U.S. ___, 2011 U.S. LEXIS 4567 (2011).....	18, 19
<i>Watt v. Alaska</i> , 451 U.S. 259 (1981)	22, 23
STATUTES	
9 U.S.C. § 5	2, 15, 16, 17
9 U.S.C. § 2	18, 22
29 U.S.C. § 185	5, 6

**TABLE OF AUTHORITIES
(CONTINUED)**

PAGE

29 U.S.C. § 186 8

29 U.S.C. § 158 (a)(5) 8

29 U.S.C. § 158 (e)..... 4

OTHER AUTHORITIES

Rule 23 of the Federal Rules of Civil Procedure.....2, 18

I.
STATEMENT OF INTEREST

Coalition for a Democratic Workplace (“CDW”) represents employers and associations and their workforces in traditional labor law issues. Consisting of over 600 member organizations, CDW was formed to give its members a voice on labor reform, specifically, the Employee Free Choice Act. More recently, CDW has advocated for its members on a number of labor issues including non-employee access, an employee’s right to have access to organizing information from multiple sources, and unit determinations. CDW’s members—the vast majority of whom are covered by the National Labor Relations Act (“NLRA”) or represent organizations covered by the NLRA—have a strong interest in the way the NLRA is interpreted and applied by the National Labor Relations Board (the “Board”).

II.
SUMMARY OF ARGUMENT

In the notice and invitations to file briefs in this case, the Board raises the question whether an employer violated the NLRA by maintaining a mandatory arbitration agreement that includes a waiver of the right to file class and collective claims. The simple answer to this question is that the Federal Arbitration Act (“FAA”) requires that the employer’s arbitration agreement be enforced according to its literal terms—including the waiver of class or collective claims. The Supreme Court has found that class actions are ill-suited to arbitration, emphasizing the FAA’s distinct underlying policies of efficient, inexpensive, and informal bilateral dispute resolution. These Congressional policies are entitled to stand on their own right, notwithstanding any perceived benefits from litigating in accordance with class procedures.

In this regard, the Supreme Court has repeatedly held that in enforcing the NLRA, the Board must respect and accommodate the interpretations of other federal statutes by other federal agencies and courts. Moreover, for at least the past decade, the Board has adhered to a policy of deferring to such interpretations. Such an accommodation is required in this case. Both the Acting General Counsel in this case, and the previous General Counsel in a guideline memorandum, have advocated a reasonable basis on which the Board can reach such an accommodation. As they suggest, employees can engage in all forms of concerted activity with respect to class or collective actions, without fear of retaliation, but the employer must be permitted to enforce the class or collective action waiver found in agreements covered by the FAA. Any other result would result in the Board trumping a statute it does not administer, the FAA, which it cannot lawfully do.

In addition, any attempt by the Board to invalidate the class action waiver in this case would violate section 5 of the FAA, which states that, if an arbitration agreement provides for the method of naming an arbitrator, “such method shall be followed.” Thus, the right of any individual party to an arbitration agreement to have a direct choice as to the individual who will hear the case is abrogated by a rule that would impose a single arbitrator in all cases. Finally, any attempt to force class proceedings on parties that have not agreed to such proceedings would result in exalting a purely procedural right to file a class action under Rule 23 of the Federal Rules of Civil Procedure over the substantive right to enforce an arbitration agreement according to its terms as guaranteed by the FAA.

///

III. ARGUMENT

A. **IN ENFORCING THE NLRA, THE BOARD MUST RESPECT OTHER IMPORTANT CONGRESSIONAL OBJECTIVES AND AVOID INFRINGING UPON OTHER FEDERAL STATUTES.**

1. **Supreme Court Precedent Requires Deferral by the Board to Other Agencies and the Federal Courts for Interpretations of Other Federal Statutes.**

Since the Board's inception, the Supreme Court has repeatedly ruled that the literal terms of the NLRA must be accommodated to the policies of other statutes, and it has consistently rejected decisions in which the Board did not respect the interpretations of other statutes by other federal agencies and courts.

Shortly after the NLRA became effective, in *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 252-59 (1939), the Supreme Court rejected a decision in which the Board awarded reinstatement with back pay to employees who engaged in a sitdown strike that led to a confrontation with law enforcement officials. Notwithstanding the literal language of the NLRA protecting strikers, the Court required that the Board take other laws into account, explaining that Congress could not have intended to compel employers to retain employees regardless of their unlawful conduct. *Id.* at 255.

In *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47-49 (1942), the Court set aside a reinstatement order by the Board in favor of employees who had engaged in a strike on shipboard, which amounted to a mutiny in violation of federal criminal statutes. Although the order appeared to be justified by the literal terms of the NLRA, the Court found that it was an abuse of discretion by the Board to reinstate the strikers. *Id.* at 38, 43. The Court announced the principle that still applies:

[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

Southern S.S. Co., 316 U.S. at 47.

Subsequently, in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 530 (1984), the Supreme Court precluded the Board from enforcing orders that were in conflict with the Bankruptcy Code. The Board had insisted, contrary to that statute, that the debtor-in-possession violated the NLRA by changing the terms of a collective bargaining agreement. *Id.* at 528-29. The Court explained:

While the Board's interpretation of the NLRA should be given some deference, the proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel. We see no need to defer to the Board's interpretation of Congress' intent in passing the Bankruptcy Code.

Bildisco & Bildisco, 465 U.S. at 529, n. 9.

A similar result was reached in *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 634-35 (1975), where the Supreme Court rejected a claim that federal antitrust policy should defer to the NLRA. The Court concluded that, although a subcontracting agreement negotiated by a union satisfied the literal language of section 8(e) of the NLRA, it resulted in a violation of the antitrust statutes because it was outside the context of a collective bargaining relationship. *Id.* at 626-35.

In another case, the Supreme Court held that, in interpreting the secondary boycott provisions of the NLRA in light of a "hot cargo" clause in a collective bargaining

agreement, the Board improperly adopted its own interpretation of the Interstate Commerce Act. *United Bhd. of Carpenters & Joiners v. NLRB*, 357 U.S. 93, 108-11 (1958).

In *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902-04 (1984), the Supreme Court held that the Board's remedial authority was limited by federal immigration policy, explaining that the Board was obliged to take into account the equally important Congressional objective adopted in the Immigration Reform and Control Act ("IRCA"). Thus, the Board was prohibited from reinstating workers who were not authorized to reenter the United States, and it was required to toll back pay during the period when they were not lawfully entitled to be present and employed in this country. *Id.* at 898-906.

In *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2002), the Supreme Court held that the Board had improperly awarded back pay to an illegal alien because such relief was foreclosed by federal immigration policy, as expressed by Congress in the IRCA, which the Board has no authority to enforce or administer. Summarizing the entire line of cases discussed above, the Court stated:

The *Southern S. S. Co.* line of cases established that where the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield.

Id. at 147.

The Supreme Court has also required that section 301 of the Labor Management Relations Act ("LMRA") be accommodated with conflicting provisions of the Norris LaGuardia Act. *Boys Markets, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235, 237-38 (1970). Although Norris LaGuardia imposes a ban on the issuance of labor injunctions by federal courts in labor disputes, the Court held that there must be an

exception under section 301 allowing an injunction when a union strikes over a grievance that is subject to arbitration in view of the policy considerations underlying that statute. *Boys Markets, Inc.*, 398 U.S. at 249-53.

In short, the Supreme Court has made it clear that the Board must respect the objectives of other federal statutes and avoid infringing upon them and their underlying policies. One of these statutes is the FAA, which is of equal importance to the NLRA, and under which the Board has no administrative responsibilities or expertise.

The FAA, as more fully addressed in Section III.B., *infra*, promotes Congressional policies favoring informal dispute resolution. Fundamentally, arbitration under the FAA is not supposed to duplicate court litigation. Indeed, that is the point of the statute. Therefore, the imposition of class proceedings on parties to an arbitration agreement that did not consent to such proceedings violates the FAA, and the Board may not, therefore, adopt any interpretation of the NLRA promoting that impermissible objective.

2. The Board's Established Policy Requires That It Respect the Interpretations of Other Federal Statutes by Other Agencies and Courts.

As a result of the Supreme Court decisions discussed above, the Board has adopted a policy of accommodating the NLRA to the policies of other federal statutes and thus deferring to the interpretations of other federal agencies and courts. As a unanimous Board panel stated in the most recent case involving this policy, "we acknowledge the Board's obligation to accommodate the NLRA to other Federal statutes such as the Davis-Bacon Act." *Can-Am Plumbing, Inc.*, 350 N.L.R.B. 947, 948 (2007).

In some cases, this accommodation of the Congressional policies reflected in other federal statutes necessarily results in a decision contrary to what the Board would have decided if the NLRA were construed in isolation. For example, in *Int'l Bhd. of Elec. Workers Local 48 (Kingston Constructors, Inc.)*, 332 N.L.R.B. 1492, 1501-02 (2000), the Board deferred to the Labor Department's interpretation of the Davis-Bacon Act in deciding whether a union could force an employee to pay extra dues under a "market recovery program," under which the union subsidized the wage rates paid by union contractors on certain construction projects. The Board held that the union violated the NLRA by forcing employees to pay such dues relating to work on projects that were covered by the Davis-Bacon Act, but that it was not a violation if the dues resulted from work on projects that were not covered by Davis-Bacon. *Id.* at 1492. Acknowledging that it had "no expertise and no authority on which to base a contrary finding," the Board relied on the fact that the Labor Department and the federal courts had construed the Davis-Bacon Act and its regulations as prohibiting the collection of market recovery program dues for work on Davis-Bacon projects. *Id.* at 1501.

The union contended in *Kingston Constructors* that decisions under the Davis-Bacon Act were preempted by the NLRA. *Id.* However, the Board unanimously rejected that contention, pointing out that the Supreme Court had instructed the Board in the *Southern Steamship* decision discussed above that it could not effectuate the policies of the NLRA single-mindedly or ignore other equally important Congressional objectives. *Id.* The Board stated:

Clearly, then, we cannot simply hold, as the Union and amici apparently would have us do, that because the collection of MRP dues on Davis-Bacon jobs would otherwise be unlawful under the NLRA, any ruling by other

agencies or courts that the same conduct violates Davis-Bacon must be preempted as inconsistent with the Act. Were we to do so, we would be announcing, in effect, that the NLRA trumps all other Federal statutes. And that is just what the Supreme Court in *Southern Steamship* said the Board cannot do.

Kingston Constructors, 332 N.L.R.B. at 1501.

In several additional cases, the Board has deferred to the expertise of other agencies in ruling on cases that required the interpretation of other federal statutes. For example, in *OXY USA, Inc.*, 329 N.L.R.B. 208, 208-10 (1999), the Board solicited the views of the Department of Labor and the Department of Justice on the legality, under section 302 of the Labor Management Relations Act, of an employer's proposal in collective bargaining negotiations that a union sponsor and administer an employee health plan. The Labor Department deferred to the Justice Department for a ruling on this question, and the Justice Department ruled that the employer's proposal did not violate section 302 as it would not have resulted in the union's receipt of a "thing of value." *OXY USA, Inc.*, 329 N.L.R.B. at 210-12. Accordingly, the Board found that the bargaining proposal was not unlawful under section 302, and therefore that the employer did not insist to impasse on an illegal bargaining proposal under section 8(a)(5) of the NLRA. *Id.* at 212.

In two other cases, the Board has deferred to the expertise of the Equal Employment Opportunity Commission in construing the Americans with Disabilities Act ("ADA") when a question under that statute overlapped with issues under the NLRA. In *Roseburg Forest Products*, 331 N.L.R.B. 999, 1001-03 (2000), the Board deferred to the EEOC's interpretation of confidentiality requirements under the ADA. And, in *PCC Structurals, Inc.*, 330 N.L.R.B. 868, 871-72 (2000), the Board deferred to the

interpretation by the EEOC and the federal courts of harassment as creating a hostile work environment under that statute.

In short, it is a well-established policy of the Board, as required by the Supreme Court, to respect and defer to the interpretations of other federal statutes by other agencies and the federal courts.

B. THE FAA REQUIRES THAT ARBITRATION AGREEMENTS BE ENFORCED ACCORDING TO THEIR TERMS—INCLUDING PROVISIONS THAT PRECLUDE CLASS OR COLLECTIVE ARBITRATION.

In its most recent arbitration decision, the Supreme Court upheld a class action waiver in an arbitration agreement and invalidated a law that prohibited such waivers. *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1745 (2011) (“*Concepcion*”). The Court explained, in summarizing several prior arbitration rulings, that the FAA establishes a liberal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract; that the courts must enforce arbitration agreements according to their terms; and that arbitration agreements can be invalidated only on grounds that would apply to the revocation of any contract. *Id.*

In one of the earlier arbitration decisions, *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24-25 (1983), the Supreme Court emphasized that questions of arbitrability under the FAA must be addressed with a healthy regard for the federal policy favoring arbitration, and that the FAA establishes as a matter of federal law that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.

In light of these fundamental principles, the Supreme Court held in *Concepcion* that the FAA preempts any state law that prohibits a class action waiver in an arbitration

agreement. 131 S.Ct. at 1753. The Court reasoned that “[t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings,” and that “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” *Id.* at 1748.

Specifically, the Court explained that the switch from bilateral arbitration to class arbitration would sacrifice the principal advantage of arbitration—its informality—and make the process slower, more costly, and more likely to generate procedural morass than final judgment. 131 S.Ct. at 1751. In addition, the Court emphasized that class arbitration would require formality in order to bind absent class members to the results of the arbitration, and that arbitration is poorly suited to the higher financial stakes of class litigation. *Id.* at 1751-52. Accordingly, the Court concluded that the state law in *Concepcion* would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in adopting the FAA. *Id.* at 1753.

In an earlier decision, *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S.Ct. 1758, 1768-71 (2010), the Supreme Court held that an arbitration panel had exceeded its powers by deciding as a policy matter that class arbitration could be ordered under an arbitration agreement when the agreement was silent on that subject. The Court emphasized that the “central or primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms,” and as with any other contract, the intention of the parties must control, including their intent as to the parties with whom they will arbitrate. *Id.* at 1773-75.

In addition, the Court explained in *Stolt-Nielsen* that class arbitration changes the nature of arbitration so much that the parties could not be presumed to have consented to it. 130 S.Ct. at 1775. For example, the Court stated that instead of resolving a dispute between two parties, the arbitrator would resolve many disputes between hundreds or thousands of parties; that the privacy and confidentiality of bilateral arbitration would be lost; that the arbitrator's award would adjudicate the rights of absent parties as well as the parties to the agreement; and that the commercial stakes of class arbitration are comparable to those of class action litigation, even though the scope of judicial review is much more limited. *Id.* at 1775-77.

Although the *Concepcion* decision involved a consumer contract, the same principles were followed in the employment context two decades earlier in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) ("*Gilmer*"). In that case, the Supreme Court enforced an agreement that required the arbitration of statutory claims under the Age Discrimination in Employment Act ("ADEA"), rejecting an argument that arbitration procedures could not adequately further the purposes of that statute because they did not provide for class actions. *Id.* The Court explained that "having made the bargain to arbitrate, the employee should be held to it unless Congress itself had evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." In addition, the Court emphasized that the burden was on the employee "to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims." *Id.* at 26.

In *Gilmer*, the Supreme Court relied on several earlier decisions in which statutory claims were held to be the subject of an arbitration agreement enforceable under the FAA. For example, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473

U.S. 614, 624-40 (1985), the Court held that an antitrust claim under the Sherman Act was appropriate for arbitration, notwithstanding the pervasive public interest in the enforcement of the antitrust laws and the plaintiff's role as a "private attorney general" in enforcing the statute.

The principle established in *Gilmer* has been extended by the federal appellate courts to several cases arising under the Fair Labor Standards Act ("FLSA") and other federal statutes. For example, in *Carter v. Countrywide Credit Indus.*, 362 F.3d 294, 298 (5th Cir. 2004), the Fifth Circuit rejected a claim that an arbitration agreement could not be enforced because the employees in question would not be able to proceed collectively as provided in the FLSA. The court relied on the Supreme Court's rejection of the same argument in *Gilmer*, despite the fact that the ADEA, like the FLSA, explicitly provided for collective action suits. *Id.*

In another appellate case, *Horenstein v. Mortgage Mkt., Inc.*, 9 Fed. Appx. 618, 619 (9th Cir. 2001), the Ninth Circuit rejected a contention by employees that an arbitration clause in their employment agreements could not be enforced because it eliminated their statutory right under the FLSA to a collective action. The court explained that the employees had knowingly signed an agreement to arbitrate their statutory claims, and therefore they had abandoned their right to enforce those claims as part of a collective action. *Id.*

The Third Circuit reached the same result in *Johnson v. W. Suburban Bank*, 225 F.3d 366, 370-71 (3d Cir. 2000), involving a short-term loan contract under two federal statutes, the Truth in Lending Act and the Electronic Fund Transfer Act. The court enforced the arbitration clause in the contract, thus rejecting the plaintiff's attempt to

maintain a class action against the bank. *W. Suburban Bank*, 225 F.3d at 370-79. Relying on *Gilmer*, the court concluded that nothing prevents contracting parties from inserting a provision in an agreement that refers statutory claims to arbitration, and that the burden of establishing that Congress meant to preclude arbitration for a statutory claim rests with the party who seeks to avoid arbitration. *Id.* at 370-71.

Furthermore, a federal district court has held, in ruling on a motion to compel arbitration in an FLSA action, that a class action waiver in an arbitration agreement did not violate the rights of employees to engage in concerted activity under the NLRA. *Slawienski v. Nephron Pharm. Corp.*, 2010 U.S. Dist. LEXIS 130365, *5-7 (N.D. Ga. 2010).¹

In short, the FAA establishes a strong federal policy in favor of enforcing arbitration agreements in accordance with their terms—including clauses that waive the right to pursue class or collective relief in arbitration. The Board’s well-established deferral policy and the Supreme Court’s precedent summarized above preclude the Board from infringing upon this policy of the FAA in deciding issues under the NLRA.

C. AN ORDER TO ELIMINATE THE CLASS ACTION WAIVER FROM THE ARBITRATION AGREEMENT IN THIS CASE WOULD INTERFERE WITH THE OBJECTIVES OF CONGRESS IN ENACTING THE FAA.

It is the Charging Party’s theory that his right to engage in concerted activity under the NLRA includes a right to require the elimination of a class action waiver from the terms of an arbitration agreement notwithstanding the contrary objectives of the FAA. Under this theory, there would be no accommodation between the two statutes as the

¹ The Board did not have exclusive jurisdiction over this issue, and thus the district court had jurisdiction to rule on it, because the Supreme Court has held that the federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal statutes. See *Connell Constr.*, 421 U.S. at 626.

objectives of the NLRA would dominate over the objectives of the FAA. This contention must fail for several reasons.

First, as explained in detail above, the Supreme Court has declared repeatedly that the Board cannot enforce the policies of the NLRA “so single-mindedly that it may wholly ignore other and equally important Congressional objectives.” *Southern S.S. Co.*, 316 U.S. at 47. Moreover, the Board has acknowledged in the cases discussed above that it cannot construe the NLRA in a manner that trumps other federal statutes. Thus, the contention that class arbitration could simply be dictated by the Board, or that the Board could require the elimination of a class waiver from an arbitration agreement notwithstanding the language of the agreement, is incorrect as it would ignore the equally important objectives of the FAA.

Second, the Charging Party has the burden of proving that Congress intended to preclude a waiver of the right to file class actions as concerted activity under the NLRA, and no such proof exists in this case. See *Gilmer*, 500 U.S. at 26. In *Gilmer*, the employee contended that a requirement to submit claims under the ADEA to arbitration would result in a waiver of the right to file class actions under that statute. *Id.* at 24. However, the Supreme Court held that the employee had the burden of proving that Congress evinced an intention to preclude such a waiver, and that he had failed to prove the existence of such an intention in the text of the ADEA, in the legislative history of that statute, or in an inherent conflict between arbitration and the statute’s underlying purposes. *Id.* at 26. Similarly, in this case the Charging Party has not shown that Congress intended to preclude a waiver of class actions in the agreement to arbitrate claims.

Finally, the Supreme Court emphasized repeatedly in the *Concepcion* decision that class arbitration is incompatible with the FAA, unless agreed to by the parties to the arbitration agreement. 131 S.Ct. at 1750-53. Specifically, the Court found that the law requiring class arbitration in that case would “stand as an obstacle to the accomplishment

of the FAA’s objectives.” *Concepcion*, 131 S.Ct. at 1753. In addition, the Court stated that “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” *Id.* at 1748. The Court also stated that “class arbitration, to the extent it is manufactured by [state law] rather than consensual, is inconsistent with the FAA. *Id.* at 1751. And, the Court concluded that the state law prohibiting class arbitration waivers “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.* at 1753.

In view of these rulings by the Supreme Court, there is no room in the federal statutory scheme for a decision by the NLRB that the NLRA precludes class waivers in an arbitration agreement. Such an interpretation of the FAA would interfere with the fundamental attributes of arbitration, create a scheme that is inconsistent with the statute, and stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Accordingly, instead of requiring that an employer accept class arbitration or court class actions as the price for maintaining a mandatory arbitration agreement, the Board must find some other way to accommodate the two statutes. To do otherwise would be a clear violation of federal law.

D. AN ORDER TO ELIMINATE THE CLASS ACTION WAIVER FROM THE ARBITRATION AGREEMENT WOULD ALSO VIOLATE THE EXPRESS REQUIREMENT OF SECTION 5 OF THE FAA.

A decision by the Board to interfere with the enforcement of arbitration agreements as they are written by requiring class arbitration in any mandatory arbitration agreement would also run afoul of section 5 of the FAA. That section states that, if an arbitration agreement provides for the method of naming or appointing the arbitrator, “such method shall be followed.” 9 U.S.C. § 5. But it would be impossible, in a class arbitration, to comply with the common arbitration agreement mandate that requires the

arbitrator to be chosen by mutual agreement of the parties, because none of the potentially hundreds or thousands of class members would have any say in the selection of the arbitrator to decide their claims, and nor would the employer, which has as much a right to be part of the arbitrator selection process as its employees. This factor alone would invalidate any attempt by the Board to impose class arbitration under an arbitration agreement.

Numerous decisions of the appellate courts have made it clear that section 5 of the FAA is a statutory mandate that must be followed without exception. See e.g. *Pac. Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp.*, 814 F.2d 1324, 1327 (9th Cir. 1987) (section 5 “contemplates that the parties must follow the contractual procedure for arbitrator selection if such exists”); *ATSA of California, Inc. v. Cont’l Ins. Co.*, 754 F.2d 1394, 1395 (9th Cir. 1985) (“Under 9 U.S.C. § 5, the parties’ method of appointing arbitrators must be followed”); *Shell Oil Co. v. Co2 Comm., Inc.*, 589 F.3d 1105, 1109-10 (10th Cir. 2009) (district court erred in failing to follow the panel selection clause in an arbitration agreement under section 5); *Crawford Group, Inc. v. Holekamp*, 543 F.3d 971, 976 (8th Cir. 2008) (arbitration award may be vacated if the method of the appointment of the arbitrator provided in the agreement has not been followed); *R.J. O’Brien & Assoc. v. Pipkin*, 64 F.3d 257, 263 (7th Cir. 1995) (“in order to enforce an arbitration award, the arbitrator must be chosen in conformance with the procedure specified in the parties’ agreement to arbitrate”); *Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos*, 25 F.3d 223, 225-26 (4th Cir. 1994) (clause that required that arbitrators be “chosen by mutual agreement” must be enforced in accordance with its terms).

The literal enforcement of section 5 of the FAA in choosing an arbitrator is required because mutual agreement is the hallmark of arbitration. “Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must give effect to the contractual rights and expectations of the parties.” *Stolt-Nielsen*, 130 S.Ct. at 1776 (internal citations omitted.) Indeed, the FAA exists to uphold such mutual agreements. As the Supreme Court held in *Concepcion*, “[t]he principal purpose of the FAA is to ensure that private arbitration agreements are enforced *according to their terms*.” 131 S.Ct. at 1748 (emphasis added.) As the Supreme Court also recognized, arbitrators derive their power to resolve disputes only because the parties have agreed to submit their grievances to them. *Stolt-Nielsen*, 130 S.Ct. at 1776; *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648-49 (1986).

In *Mitsubishi*, the Supreme Court emphasized that “if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, *that intention will be deducible from text or legislative history*.” 473 U.S. at 628 (emphasis added). Section 5 does not include an exception for class actions. See 9 U.S.C. § 5. Only Congress can amend that law. The NLRB cannot *de facto* amend section 5 of the FAA by requiring class arbitration or the abandonment of arbitration altogether to allow civil class actions. Interpreting the NLRA to make arbitration provisions unlawful, such as arbitrator selection provisions which are inconsistent with class actions, would amount to a repudiation of section 5 of the FAA. Accordingly, such an interpretation of the NLRA is prohibited.

///

///

E. THE RIGHT TO FILE A CLASS ACTION IS MERELY A PROCEDURAL RIGHT THAT IS ANCILLARY TO THE LITIGATION OF SUBSTANTIVE CLAIMS, AND IT DOES NOT AFFECT SUBSTANTIVE RIGHTS UNDER THE NLRA.

The Supreme Court has made it clear that the right of a party to enforce an arbitration agreement under section 2 of the FAA is a *substantive* right, and that a party to such an agreement cannot be compelled to submit claims to class arbitration unless it has agreed to do so. *Concepcion*, 131 S.Ct. at 1748; *Stolt-Nielsen*, 130 S.Ct. at 1776. In contrast, maintenance of a class action is *not* a substantive right. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ___, 2011 U.S. LEXIS 4567, *50 (2011). Instead, the ability to litigate on behalf of a class is merely a procedural device provided by Rule 23 of the Federal Rules of Civil Procedure.

The inherently procedural nature of the class action device is a recurring theme in the Supreme Court's decisions. See e.g. *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 130 S.Ct. 1431, 1442 (2010) ("In the Rules Enabling Act, Congress authorized this Court to promulgate rules of procedure...but with the limitation that those rules "shall not abridge, enlarge or modify any substantive rights"); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) ("The Rules Enabling Act underscores the need for caution...[N]o reading of the Rule can ignore the Act's mandate that 'rules of procedure shall not abridge, enlarge or modify any substantive right')(internal citation omitted); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims").

In *Dukes*, the Supreme Court reaffirmed a basic principle in *Concepcion*: The terms of Federal Rule of Civil Procedure 23, which authorizes class actions, cannot

“abridge, modify or enlarge any substantive right.” 564 U.S. ___, 2011 U.S. LEXIS 4567 at *50 (quoting 28 U.S.C. § 2072(b)). Thus, the *procedural* rights contemplated by the Federal Rules of Civil Procedure must yield to *substantive* statutory rights, such as those favoring the enforcement of arbitration agreements under the FAA. See *Id.*; *Concepcion*, 131 S.Ct. at 1748-49 (imposing class arbitration is inconsistent with the substantive provisions and policy of the FAA). Accordingly, the NLRA cannot be read so broadly as to hold that the ability to utilize the class action *procedural* device overrides the *substantive* right to enforce provisions in arbitration agreements which waive class arbitration or litigation, especially where, as here, the party bringing the claim can fully vindicate his personal rights in arbitration.

F. THE ACCOMMODATION ADVOCATED BY MEMORANDUM GC 10-06 AND BY THE ACTING GENERAL COUNSEL IN THIS CASE WOULD RESULT IN ENFORCEMENT OF THE NLRA WITHOUT INFRINGING ON THE POLICIES OF THE FAA.

In Memorandum GC 10-06, the former General Counsel established a framework for dealing with issues involving the validity of class action waivers under mandatory arbitration agreements. Although the memorandum was issued prior to the Supreme Court’s recent decision in *Concepcion*, it recognized that class or collective claims could be prohibited in arbitration agreements under *Gilmer* and its progeny as discussed above.

Memorandum GC 10-06 preserves the statutory right of individual employees under the NLRA to join with each other in filing a class or collective action.² However,

² Memorandum GC 10-06 correctly points out that not all class action lawsuits involve protected concerted activity under the NLRA, and that an employee’s activity will be considered “concerted” only if it is “engaged in *with* or *on the authority of* other employees, and not solely by and on behalf of the employee himself.” *Meyers Industries*, 268 N.L.R.B. 493, 497 (1984) (*Meyers I*), *remanded*, 755 F.2d 941 (D.C. Cir. 1985), *reaffirmed*, 281 N.L.R.B. 882 (1986) (*Meyers II*), *affd.* 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied* 487 U.S. 1205 (1988)(emphasis added). Thus, employees filing a class action must make a showing that their activity is actually

it also recognizes that employers have a right under the FAA to require individual employees to sign a waiver of their right to file an action without violating the NLRA. The key to this distinction, as explained in the memorandum, is that the agreement must make clear to employees that their right to act concertedly to challenge such an agreement by pursuing class and collective claims will not be subject to discipline or retaliation by the employer, and that those rights, consistent with the NLRA, are preserved.

Under this approach, a class action waiver would not deprive employees of the right to engage in concerted activity under the NLRA. For example, they could reach out to other employees, meet to discuss their claims, pool their resources to hire a lawyer with specialized expertise, seek support from a labor union, solicit support from other employees for the combined effort, maintain ongoing communications among the members of the group, benefit generally from the strength of numbers, and file similar or coordinated individual claims. They could even file a class action, including an effort to invalidate the class action waiver in court. In all of these concerted actions, the employees would be fully protected by the NLRA from any form of retaliation by the employer. The employer, however, would have a legal right under the FAA to defend its position under the arbitration agreement and seek to have the action dismissed.

“concerted” under *Meyers*, as concert will not be presumed merely because a lawsuit may result in a benefit to other employees. *Meyers II*, 281 N.L.R.B. at 887.

These principles have been followed by the Acting General Counsel in the briefs filed by his counsel in this case. In the initial brief, the Acting General Counsel asserted that:

[M]andatory arbitration agreements are not per se unlawful. As long as such an agreement is worded to make it clear to employees that their rights to act concertedly and to challenge the agreement by pursuing class and collective claims, either in arbitration or in court, will not be subject to discipline or retaliation by the employer, and that those rights are preserved, there is no violation of the Act.

Brief of Acting General Counsel at 7. In the same brief, the Acting General Counsel stated:

Even under the limitations of a *Gilmer* mandatory arbitration agreement, employees are entitled to engage in Section 7 activity by, for example, bringing a class action lawsuit against an employer challenging the very nature of the waiver agreement....In that event [the employer] would still be able to lawfully seek dismissal of any such class action based on a lawful *Gilmer* agreement.

Brief of Acting General Counsel at 12.

Moreover, a reply brief filed on behalf of the Acting General Counsel stated:

Thus, Counsel for the Acting General Counsel does not contend that the language in paragraph 6 of Respondent's Mutual Arbitration Agreement (MAA) is per se unlawful....[A]n employer has the right to limit arbitration to individual claims—as long as it is clear that there will be no retaliation for concertedly challenging the agreement.

Reply Brief of Acting General Counsel at 2.

The balance thus struck by the Acting General Counsel and his predecessor is a reasonable way in which to accommodate the policies of both the NLRA and the FAA. If the Board were to adopt a more restrictive policy by prohibiting employers from including a class action waiver in mandatory arbitration agreements, that would directly

conflict with the Supreme Court's *Gilmer* and *Concepcion* decisions, thus infringing upon the distinct policies of the FAA.

Because, as demonstrated by Memorandum GC 10-06, the NLRA and the FAA can be harmonized, the NLRA can not be read to supersede the FAA. The Supreme Court has directed that when two statutes arguably apply to an issue, the statutes "must" be read to give effect to each unless the statutes are "in irreconcilable conflict." *Rodriquez v. United States*, 480 U.S. 522, 524 (1987); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 468 (1982); *Watt v. Alaska*, 451 U.S. 259, 267 (1981). To do otherwise, would be to "repeal by implication" the earlier enacted statute, because in such a case the more recent of the two irreconcilably conflicting statutes governs. *Watt*, 451 U.S. at 266-67. The Supreme Court has repeatedly held that such "repeals by implication are not favored," *Rodriquez*, 480 U.S. at 524; *Watt*, 451 U.S. at 267; *TVA v. Hill*, 437 U.S. 153, 189 (1978); *Morton v. Mancari*, 417 U.S. 535, 549 (1974); and will not be found unless an intent to repeal is "clear and manifest." *United States v. Borden Co.*, 308 U.S. 188, 198 (1939); see also *Rodriquez*, 480 U.S. at 524; *Watt*, 451 U.S. at 267. Undoubtedly, Congress has evidenced no intent to repeal the FAA. To the contrary, the Supreme Court has repeatedly stated that the FAA represents "a congressional declaration of a liberal federal policy favoring arbitration agreements." See e.g. *Perry v. Thomas*, 482 U.S. 483, 489 (1987); *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24; *Concepcion*, 131 S.Ct. at 1745. Moreover, the FAA was actually codified and enacted into positive law in 1947, 12 years *after* the NLRA in 1935. See 9 U.S.C.A. § 2 (West), p.1. Therefore, although GC 10-06 demonstrates otherwise, in the event the Board determines that the NLRA and FAA are

“irreconcilable,” under the canons of statutory interpretation, it is the NLRA, and not the FAA, that must yield. See *Watt*, 451 U.S. at 266.

**IV.
CONCLUSION**

For the foregoing reasons, the charge in this case should be dismissed.

Respectfully submitted,

LITTLER MENDELSON P.C.

By: /s/ William Emanuel
WILLIAM J. EMANUEL
Attorneys for *Amicus Curiae*
COALITION FOR A DEMOCRATIC WORKPLACE

No counsel for a party to this case authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

