

United States of America
Before the National Labor Relations Board

D.R. HORTON, INC.

and

MICHAEL CUDA, an Individual

APPEAL TO THE BOARD FROM A DECISION BY
ADMINISTRATIVE LAW JUDGE WILLIAM N. CATES
CASE No. 12-CA-25764

**BRIEF FOR SPIRO MOSS LLP, AS AMICUS CURIAE,
SUBMITTING ON ITS OWN BEHALF AND ON BEHALF OF
CURRENT AND FUTURE EMPLOYEES REPRESENTED BY
SPIRO MOSS LLP**

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I. INTRODUCTION

On January 3, 2011, Administrative Law Judge William N. Cates issued a decision in the above-captioned case, which presents the following issue:

Did the Respondent violate 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?

In this matter, the judge declined to conclude that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (“NLRA”). After exceptions were filed by the General Counsel and D.R. Horton, the United States Supreme Court decided *AT&T*

Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) on April 27, 2011. D.R. Horton filed a supplemental brief arguing that *Concepcion* is equally applicable to the facts at issue in this matter.

On June 16, 2011, the Board invited the filing of amicus briefs on an issue of great public import (described above). Spiro Moss LLP, a firm dedicated exclusively to the representation of employees and consumers, submits this Brief to emphasize the critical role of the NLRA and other federal labor laws in preserving the right of employees to engage in concerted activity intended to improve their wages and working conditions. Because Spiro Moss LLP routinely represents employees that are parties to arbitration agreements that employers attempt to enforce in the manner advocated by D.R. Horton, Spiro Moss LLP comments publicly on behalf of its clients, and on behalf of all employees negatively impacted by the potential intrusion of a federal law of general application, the Federal Arbitration Act (“FAA”), into an area receiving special federal protections, the labor laws of the United States, including the NLRA.

As a result of *Concepcion*, it is contended that state courts may no longer decline to enforce a class action waiver in a consumer contract on the grounds of unconscionability under a state law rule such as that expressed in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005) (overruled by *Concepcion*). A class action waiver in an employment contract, however, which precludes employees from engaging in collective action to enforce statutory employment rights, is illegal and must remain unenforceable under state and federal law. The text of the NLRA and

companion labor laws of the United States compels no other result.

II. ARBITRATION AGREEMENTS THAT VIOLATE FEDERAL LAW BY INFRINGING UPON RIGHTS SECURED UNDER THE NLRA AND OTHER LABOR STATUTES ARE NOT ENFORCEABLE BY ANY COURT

A. The Statutory Law of the United States Secures, as a Fundamental Employee Protection, the Right to Engage in Concerted Activity

The United States has declared a clear intent to protect concerted activity by employees. 29 U.S.C. § 102 states:

Public policy in labor matters declared

In the interpretation of this Act [29 USCS §§ 101 et seq.] and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization *or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

Providing teeth to this declaration of policy, contracts interfering with this express declaration of public policy are unenforceable. 29 U.S.C. § 103 states, in part:

Nonenforceability of undertakings in conflict with public policy; "yellow dog" contracts

Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 2 of this Act [29 USCS § 102], is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court. . . .

Section 7 of the NLRA, which also specifies a number of rights held by employees, provides:

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 of 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 158(a)(3) of this title.

29 U.S.C.A. § 157, emphasis added. Under Section 7, it is an unfair labor practice “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157. . . .” 29 U.S.C.A. § 158(a)(1).

The rights secured under Section 7 have a long history, originating roughly 80 years ago in the Norris-LaGuardia Act:

There followed, in 1932, the Norris-LaGuardia Act, which declared that “the individual ... worker shall be free from the interference, restraint, or coercion, of employers ... in self-organization or in *other concerted activities for the purpose of collective bargaining or other mutual aid or protection.*” 29 U.S.C. § 102 (emphasis added). This was the source of the language enacted in § 7. It was adopted first in § 7(a) of the National

Industrial Recovery Act and then, in 1935, in § 7 of the NLRA. See generally Gorman & Finkin, *The Individual and the Requirement of “Concert” Under the National Labor Relations Act*, 130 U.Pa.L.Rev. 286, 331-346 (1981).

Against this background, it is evident that, in enacting § 7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment. *There is no indication that Congress intended to limit this protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way. Nor, more specifically, does it appear that Congress intended to have this general protection withdrawn in situations in which a single employee, acting alone, participates in an integral aspect of a collective process.*

N.L.R.B. v. City Disposal Sys. Inc., 465 U.S. 822, 834-35, 104 S. Ct. 1505, 1513 (1984) (emphasis added).

It is beyond reasonable dispute that concerted activity by employees for mutual aid and protection receives the strongest possible protection available under the laws of the United States. Thus, by recognizing that class actions and collective actions under the FLSA constitute forms of concerted activity for mutual aid and protection, it requires no great logic to understand that arbitration provisions that expressly or implicitly infringe upon those rights are unenforceable by mandate of federal law.

B. A Prohibition on Class Actions Addressing Wages and Working Conditions Violates the National Labor Relations Act

The NLRB has determined, and courts have agreed, that class actions constitute a form of concerted action by employees when those suits seek to improve wages or

working conditions. *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975),
enfd. mem. 567 F.2d 391 (7th Cir. 1977), cert. denied 438 U.S. 914 (1978); *see also*,
United Parcel Service, 252 NLRB 1015 (1980), enfd. 677 F.2d 421 (6th Cir. 1982),
Saigon Gourmet, 353 NLRB 1063 (2009), *Le Madri Restaurant*, 331 NLRB 269
(2000), and others. Thus, an arbitration agreement or clause that, by its express or
implied terms, precludes class actions by employees to enforce wage and hour laws is
unlawful pursuant to Section 7 of the NLRA. Such a ban would unlawfully prevent
employees from engaging in concerted activity to improve their wages and/or working
conditions. Because the object of such an arbitration agreement or clause is unlawful,
it is void and unenforceable by any court.

**1. Class Actions Constitute a Form of Concerted Activity for
Mutual Aid and Protection Protected by the NLRA**

The NLRA protects all forms of concerted activity by employees to improve
wages or working conditions:

Section 7 of the Act extends to employee efforts “to improve terms and
conditions of employment or otherwise improve their lot as employees
through channels outside the immediate employee-employer
relationship.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Section 7
thus specifically affords protection to employees “when they seek to
improve working conditions through resort to administrative and judicial
forums.” *Id.* at 566. The Court in *Eastex, supra*, underscored that the
express language of Section 7 protects concerted activities for the broad
purpose of “mutual aid or protection,” in addition to concerted activity
for “self-organization” and “collective bargaining.” *Id.* at 565.

52nd St. Hotel Associates, 321 NLRB 624, 633 (1996).

The broad rights conferred by Section 7 encompass pursuit of civil lawsuits. “It

is well settled that the filing of a civil action by employees is protected activity unless done with malice or in bad faith.” *In Re 127 Rest. Corp.*, 331 NLRB 269, 275 (2000), citing *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975) and *Host International*, 290 NLRB 442, 443 (1988). As stated by the NLRB in *Trinity*:

In regard to the Section 7 rights of employees filing civil actions against their employer, the Board in *Leviton Manufacturing Company, Inc.*, reiterated the applicable principle that the filing of the civil action by a group of employees is protected activity unless done with malice or in bad faith.

Trinity, 221 NLRB 364, 365 (1975), enfd. mem. 567 F.2d 391 (7th Cir. 1977), cert. denied 438 U.S. 914 (1978).

Suits under the Fair Labor Standards Act, which allows “collective” actions by employees, are one type of concerted activity recognized as protected by the NLRA:

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. See, e.g., *Moss Planing Mill Co.*, 103 NLRB 414, 418-419 (1953), enfd. 206 F.2d 557 (4th Cir. 1953); *Poultrymen's Service Corp.*, 41 NLRB 444, 462-463 (1942), enfd. 138 F.2d 204, 210 (3d Cir. 1943); *Lion Brand Mfg. Co.*, 55 NLRB 798, 799 (1944), enfd. 146 F.2d 773 (5th Cir. 1945); *Cristy Janitorial Service*, 271 NLRB 857 (1984); *Triangle Tool & Engineering*, 226 NLRB 1354, 1357 fn. 5 (1976); *Joseph De Rario, DMD, P.A.*, 283 NLRB 592, 594 (1987); and *Nu Dawn Homes*, 289 NLRB 554, 558 (1988).

52nd St. Hotel Associates, 321 NLRB at 633.

For the purposes of Section 7, class actions are no different than collective actions under the FLSA. *Harco Trucking, LLC and Scott Wood*, 344 NLRB 478 (2005) illustrates how pursuing a class action lawsuit on behalf of other employees, just like a FLSA action, constitutes protected activity under the NLRA.

Scott Wood was employed by Harco as a low-bed truck driver. He was laid off on December 24, 2002. In March 2003 he filed a lawsuit against Harco in California Superior Court over a violation of California wage laws. In 2003 the complaint was amended as a class action on behalf of the named Plaintiff and similarly situated drivers employed by Harco. When Harco was rehiring, Wood applied for a job. He was told that he could expect to be re-employed until the lawsuit was resolved. The ALJ found that the respondent violated Section 8(a)(1) of the NLRA by refusing to hire Wood because he engaged in the protected concerted activity of filing and maintaining the class action lawsuit against Harco. The Board agreed:

[W]e agree with the Judge's finding that the Respondent violated Section 8(a) (1) by refusing to hire Scott Wood because he engaged in protected concerted activities.

Harco Trucking, 344 NLRB at 479; *see also*, *Trinity Trucking*, 221 NLRB at 365 and *Host International*, 290 NLRB at 443.

The CONCLUSIONS OF LAW Section of the ALJ decision in *Harco Trucking*, adopted in full by the Board, makes clear that the filing of a class action lawsuit, even by one single employee, constitutes protective activity under the NLRA:

2. Scott Wood was engaged in protected concerted activities within the meaning of Section 7 of the Act in filing and maintaining a class action lawsuit, on behalf of himself and his co-workers against his former employer.

Harco Trucking, 344 NLRB at 483.

Harco Trucking is but one in a long line of decisions, over many decades, finding that class and collective actions constitute concerted activity protected by the

NLRA. In *Le Madri Restaurant*, 331 NLRB 269, 275-276 (2000), the NLRB found that an employer unlawfully discharged employees for engaging in Section 7 activity, including filing a lawsuit in federal court on behalf of other employees, alleging violations of federal *and* state labor laws. In *Mohave Electric Cooperative*, 327 NLRB 13 (1998), *enfd.* 206 F.3d 1183 (D.C. Cir. 2000), the NLRB determined that two employees were engaged in protected concerted activity when, pursuant to a common concern for workplace safety, they both petitioned for injunctive relief against harassment. In *Novotel New York*, 321 NLRB 624, 633-636 (1996), the NLRB found that an opt-in class action lawsuit alleging employer violations of the Fair Labor Standards Act was protected concerted activity. In *Host International*, 290 NLRB 442, 442-443, 445 (1988), the NLRB found that an employee's filing of a civil federal court lawsuit concertedly with other employees, claiming that their employer had physically assaulted, searched, detained and interrogated them in violation of their constitutional and statutory rights, constituted Section 7 activity. In *United Parcel Service*, 252 NLRB 1015, 1018, 1022, *fn.*26 (1980), *enfd.* 677 F.2d 421 (6th Cir. 1982), the NLRB found that the employer violated the Act by discharging an employee for filing a class action lawsuit regarding rest breaks. In *Saigon Gourmet*, 353 NLRB 1063, 1064 (2009), the Board found that concertedly asserting wage and hour claims is protected concerted activity. The overwhelming body of NLRB decisions leaves no doubt that class actions constitute a form of concerted action by employees to improve wages or working conditions.

The foundational purpose of the NLRA is to guarantee that employees are

empowered to band together to advance their work-related interests on a collective basis. A mandatory arbitration agreement that prohibits all class, collective and/or joint employee efforts to obtain redress for violation of employment law necessarily inhibits protected concerted activity in violation of Section 7 of the NLRA.

2. A Contract That Interferes with Concerted Activity in Violation of the NLRA Is Void

Despite the lack of a statutory code of federal contract law, unlawful contracts that violate federal law cannot be enforced as a matter of federal common law:

There is no statutory code of federal contract law, but our cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law. In *McMullen v. Hoffman*, 174 U.S. 639, 19 S.Ct. 839, 43 L.Ed. 1117 (1899), two bidders for public work submitted separate bids without revealing that they had agreed to share the work equally if one of them were awarded the contract. One of the parties secured the work and the other sued to enforce the agreement to share. The Court found the undertaking illegal and refused to enforce it, saying:

“The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it....” *Id.*, at 654, 19 S.Ct., at 845.

“[T]o permit a recovery in this case is in substance to enforce an illegal contract, and one which is illegal because it is against public policy to permit it to stand. The court refuses to enforce such a contract and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest.” *Id.*, at 669, 19 S.Ct., at 851.

The rule was confirmed in *Continental Wall Paper Co. v. Louis*

Voight & Sons Co., 212 U.S. 227, 29 S.Ct. 280, 53 L.Ed. 486 (1909), where the Court refused to enforce a buyer's promise to pay for purchased goods on the ground that the promise to pay was itself part of a bargain that was illegal under the antitrust laws. "In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties." *Id.*, at 262, 29 S.Ct., at 292.

Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 77-78, 102 S. Ct. 851, 856 (1982). *See also, California v. United States*, 271 F.3d 1377, 1383 (Fed. Cir. 2001) ("Without a doubt, contractual provisions made in contravention of a statute are void and unenforceable").

Indeed, even the most blatant violation of a contract does not allow enforcement of an unlawful contract contrary to the law:

The Court cannot enforce the parties' subcontract, even though CLS through Barbara Moore, its principal officer, has blatantly violated the terms and conditions of the subcontract with MGC, for it is plainly contrary to law. *See Paul Arpin Van Lines, Inc. v. Universal Transp. Servs., Inc.*, 988 F.2d 288, 290 (1st Cir.1993); *Smithy Braedon Co. v. Hadid*, 825 F.2d 787, 790 (4th Cir.1987). The Court further finds that MGC is barred from injunctive relief by the doctrine of unclean hands. *See Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 387, 64 S.Ct. 622, 88 L.Ed. 814 (1944) ("[A] federal court should not, in an ordinary case, lend its judicial power to a plaintiff who seeks to invoke that power for the purpose of consummating a transaction in clear violation of law."); *United States v. Felici*, 208 F.3d 667, 670-71 (8th Cir.2000) ("The doctrine of unclean hands is an equitable doctrine that allows a court to withhold equitable relief if such relief would encourage or reward illegal activity.").

Morris-Griffin Corp. v. C & L Serv. Corp., 731 F. Supp. 2d 488, 489-90 (E.D. Va. 2010). Because justice cannot countenance violation of the law, an illegality defense to enforcing a contract cannot be waived.

The foregoing principles of federal common law apply to arbitration

agreements. For example, in *U-Haul Company of California, Inc.*, 347 NLRB 375, 377-78 (2006), enfd. 2007 WL 4165670 (D.C. Cir. 2007), the employer violated the NLRA by maintaining a mandatory arbitration policy that would reasonably be construed as prohibiting an employee from filing an unfair labor practice charge with the Board. The NLRB explained why even an implied suggestion that the arbitration provision supplanted rights under the NLRA was unlawful:

[T]he breadth of the policy language, referencing the policy's applicability to causes of action recognized by "federal law or regulations," would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board. Plainly, the employees would reasonably construe the remedies for violations of the National Labor Relations Act as included among the legal claims recognized by Federal law that are covered by the policy.

U-Haul Co. of California, 347 NLRB at 377.

The rule that contractual provisions are void when they are illegal is so fundamental that a court may invalidate a contract on the grounds of illegality even when the court would otherwise lack jurisdiction over the activity giving rise to the dispute. With respect to activity subject to Sections 7 or 8 of the NLRA, courts normally defer to the exclusive competence of the NLRB. However, when enforcement of a contract would countenance a violation of federal law, that rule of deference to the NLRB does not apply:

As a general rule, federal courts do not have jurisdiction over activity which "is arguably subject to § 7 or § 8 of the [NLRA]," and they "must defer to the exclusive competence of the National Labor Relations Board." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245, 79 S.Ct. 773, 780, 3 L.Ed.2d 775 (1959). *See also Garner v. Teamsters*, 346 U.S. 485, 490-491, 74 S.Ct. 161, 165-166, 98 L.Ed. 228 (1953). It is also well established, however, that a federal court has a

duty to determine whether a contract violates federal law before enforcing it. “The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in ... federal statutes.... Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.” *Hurd v. Hodge*, 334 U.S. 24, 34-35, 68 S.Ct. 847, 853, 92 L.Ed. 1187 (1948) (footnotes omitted).

Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 83-84, 102 S. Ct. 851, 859-60 (1982).

In other words, because the courts cannot be used as tools to enforce illegal contracts, they must be able to refuse to enforce private agreements that have an unlawful object. In *Kaiser*, the Supreme Court succinctly explained why the primary jurisdiction of the NLRB yields to the judicial obligation to abstain from enforcement of illegal agreements:

While only the Board may provide affirmative remedies for unfair labor practices, a court may not enforce a contract provision which violates § 8(e). Were the rule otherwise, parties could be compelled to comply with contract clauses, the lawfulness of which would be insulated from review by any court.

Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 86, 102 S. Ct. 851, 861 (1982).

States, too, may determine whether enforcement of a contractual provision would violate the NLRA:

Under federal labor law, the court must interpret the contract provision to determine if the provision violates the NLRA, before enforcing a fine under the contractual provision. *Kaiser Steel*, 455 U.S. at 83-84, 102 S.Ct. at 859-60, 70 L.Ed.2d at 843-44; *Scofield v. NLRB* (1969), 394 U.S. 423, 429, 89 S.Ct. 1154, 1158, 22 L.Ed.2d 385, 393. The courts cannot enforce a contract that violates the NLRA. *Scofield*, 395 U.S. at 429, 89 S.Ct. at 1158, 22 L.Ed.2d at 393.

Comm'n Workers of Am., Local 5900 v. Bridgett, 512 N.E.2d 195, 199 (Ind. Ct. App.

1987). To find otherwise would effectuate an intolerable abuse of state courts. Parties to contracts could assert unlawful contractual positions in state courts and bar those courts from recognizing illegality under the NLRA. Such a result would be abhorrent to preservation of the robust, employee-protective goals of the NLRA.

“The law has long been clear that all variations of the venerable ‘yellow dog contract’ are invalid as a matter of law.”¹ *Barrow Utilities & Elec. Co-Op.*, 308 NLRB 4, n. 5 (1992). Like “yellow dog contracts,” arbitration agreements that would expressly or implicitly ban class or collective actions directed at the improvement of wages or working conditions are also invalid as a matter of law, illegal as violative of the NLRA.

3. The Primary Jurisdiction of the NLRB Is Not Jeopardized When a Court Declines to Enforce a Contract that Violates the NLRA

The NLRB is vested with primary jurisdiction to rule upon affirmative claims of unfair labor practices under the NLRA and where a plaintiff asserts, in the first, instance, that the employer committed an unfair labor practice claim, the NLRB’s primary jurisdiction over that claim is well established. But the primary jurisdiction of

¹ “Yellow dog contracts” are contracts requiring an employee or prospective employee to agree not to join or become a member of a labor organization as a condition of getting or keeping a job. Arbitration agreements that bar an employee from engaging in the concerted activity of participating in a class action as a condition of getting or keeping a job deserve no less a rule of absolute invalidity.

the NLRB has recognized limits. One such limit, discussed above, exists where a court is asked to enforce an illegal contract provision.

It is, of course, the Board, not the courts, which has primary jurisdiction to determine what is and is not an unfair labor practice, and to provide affirmative remedies. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245, 79 S.Ct. 773, 779, 3 L.Ed.2d 775 (1959). Nonetheless, as the federal courts may not enforce a contractual provision that violates section 8 of the Act, they may be obliged at times, in the course of resolving a contract dispute, to decide whether or not such a violation exists. *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 86, 102 S.Ct. 851, 860, 70 L.Ed.2d 833 (1982).

Courier-Citizen Co. v. Boston Electrotypers Union No. 11, Int'l Printing & Graphic Communications Union of N. Am., 702 F.2d 273, 276 n. 6 (1st Cir. 1983).

As explained by one court of appeal, a more general limit exists where there is little likelihood of creating conflicting rules of substantive law:

The general rule of primary jurisdiction, however, has not been given a broad mechanical application to bar all suits or defenses that arise in labor relations cases from being decided by the courts. *Sears, Roebuck and Co. v. San Diego County District Council of Carpenters* (1978), 436 U.S. 180, 188-89, 98 S.Ct. 1745, 1753, 56 L.Ed.2d 209, 220. The doctrine is limited to its primary justification which is “the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose.” *Vaca v. Sipes* (1967), 386 U.S. 171, 180-81, 87 S.Ct. 903, 912, 17 L.Ed.2d 842, 852; *see also, Kaiser Steel Corp. v. Mullins* (1982), 455 U.S. 72, 83-84, 102 S.Ct. 851, 859-60, 70 L.Ed.2d 833, 843-44; *Sears, Roebuck and Co.*, 436 U.S. at 188-89, 98 S.Ct. at 1752-53, 56 L.Ed.2d at 219-20; *William E. Arnold Co. v. Carpenters District Council* (1974), 417 U.S. 12, 16, 94 S.Ct. 1069, 1072, 40 L.Ed.2d 620, 625. Therefore, unless the Congressional intent of keeping the area of labor relations uniform is placed in jeopardy, the doctrine is inapplicable.

Comm'n Workers of Am., Local 5900 v. Bridgett, 512 N.E.2d 195, 198 (Ind. Ct. App. 1987). *Comm'n Workers of Am., Local 5900* describes the approach for determining

whether the doctrine of primary jurisdiction applies:

The critical inquiry in applying the doctrine of primary jurisdiction is whether the controversy presented to the state court is identical with that which could be presented to the NLRB. *Belknap Inc. v. Hale* (1983), 463 U.S. 491, 510, 103 S.Ct. 3172, 3183, 77 L.Ed.2d 798, 814. Also, the rule in *Garmon* is relaxed “when the state court can ascertain the actual legal significance under federal labor law by reference to compelling precedent applied to essentially undisputed facts.” *Garmon*, 359 U.S. at 245, 79 S.Ct. at 780, 3 L.Ed.2d at 783. Thus, when the uniformity of federal labor law is not jeopardized, the courts may resolve a dispute even though it arguably is covered by sections 7 and 8 of the NLRA. *Sears, Roebuck and Co.*, 436 U.S. at 188-89, 98 S.Ct. at 1753, 56 L.Ed.2d at 220.

Comm'n Workers of Am., Local 5900, 512 N.E.2d at 199.

Uniformity of federal labor law is not jeopardized if an arbitration agreement is not enforced by the trial court due to its unlawful impact on concerted activity by employees. Rather, at any time, a plaintiff could assert an illegality defense against the attempt to enforce an arbitration agreement with an illegal object. A trial court is fully empowered to render that determination without impinging upon the NLRB’s primary jurisdiction. *Kaiser Steel*, 455 U.S. at 83-84. Indeed, the trial court is obligated to make that determination:

Under federal labor law, the court must interpret the contract provision to determine if the provision violates the NLRA, before enforcing a fine under the contractual provision. *Kaiser Steel*, 455 U.S. at 83-84, 102 S.Ct. at 859-60, 70 L.Ed.2d at 843-44; *Scofield v. NLRB* (1969), 394 U.S. 423, 429, 89 S.Ct. 1154, 1158, 22 L.Ed.2d 385, 393. The courts cannot enforce a contract that violates the NLRA. *Scofield*, 395 U.S. at 429, 89 S.Ct. at 1158, 22 L.Ed.2d at 393.

Comm'n Workers of Am., Local 5900 v. Bridgett, 512 N.E.2d at 199.

III. CONCLUSION

Under federal common law, an arbitration agreement such as the one in this case is not enforceable because it violates the declared public policy of the United States, and *Concepcion* compels no other outcome for the issue presented by the Board for public comment. The Board would act consistently with its mandate by explicitly declaring that any express or implied arbitration provision infringing upon rights secured by the labor laws of the United States are void. The Board should not countenance, encourage or acquiesce to the enforcement of illegal contracts and should not undermine the fundamental protections for employees that seek to adequately vindicate their statutory rights.

Dated: July 27, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

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