THE NLRB
AND A SERIES OF UNFORTUNATE EVENTS

by JAMES L. MORRIS and YUSUF ZAKIR

The National Labor Relations Board (NLRB) faced a series of potentially unfortunate events in late 2013 and early 2014. Employers celebrate these small victories, but the fight will certainly continue. There are three noteworthy events to review: (1) the *Horton* decision, (2) the *Noel Canning* Supreme Court argument, and (3) the "Poster Rule."

The *Horton* Decision: The Fifth Circuit Rejects the NLRB on Class Action Waivers

On December 3, 2013, the U.S. Court of Appeals for the Fifth Circuit issued its long-awaited decision in *D.R. Horton, Inc. v. Nat'l Labor Relations Bd.*, 737 F.3d 344 (5th Cir. 2013). The Fifth Circuit rejected the controversial 2012 decision in which the NLRB held that an employer violated the National Labor Relations Act (NLRA) by requiring its employees to sign an arbitration agreement that prohibited an employee from pursuing claims in a collective or class action.

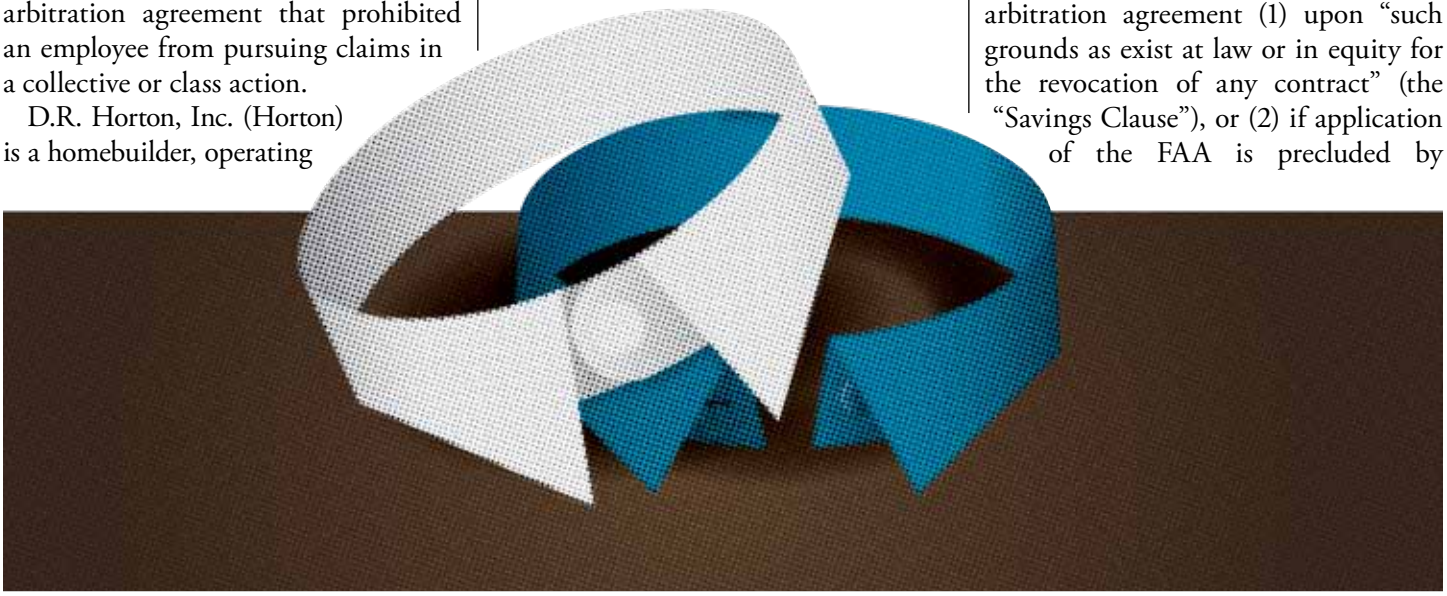
D.R. Horton, Inc. (Horton) is a homebuilder, operating in over twenty states. It began requiring its employees to sign a mutual arbitration agreement, which provided that employees could not pursue class or collective claims in an arbitral or judicial forum. In other words, the arbitration agreement required employment-related disputes to be resolved through individual arbitration.

In the underlying decision, the NLRB found the arbitration agreement violated the NLRA because by precluding employees "from filing joint, class, or collective claims" addressing employment-related disputes in any forum, the employer impaired the NLRA-protected right to engage in protected concerted activity. The NLRB further held that the relevant NLRA provisions did not conflict with the Federal Arbitration Act (FAA).

The NLRB's position already had been rejected in other cases by a number of federal district courts and federal appellate courts, including the Second and Eighth Circuits. The NLRB's decision as to *Horton* itself, however, remained subject to review by the Fifth Circuit.

The Fifth Circuit began by avoiding or rejecting procedural and constitutional issues, such as the validity and expiration of a recess appointment of an NLRB member and the authority of the NLRB panel to issue its decision. It then discussed the substance of the NLRB's decision. While the Fifth Circuit recognized that Section 7 of the NLRA may protect the rights of employees to pursue class or collective actions, the court noted that this does not conclude the inquiry, but rather, the FAA has "equal importance" in the court's review. *Id.* at 357.

The court observed that under the FAA, an arbitration agreement must be enforced according to its terms. However, two exceptions to this rule exist: the court may invalidate an arbitration agreement (1) upon "such grounds as exist at law or in equity for the revocation of any contract" (the "Savings Clause"), or (2) if application of the FAA is precluded by



another statute's contrary congressional command. *Id.* at 359.

The Fifth Circuit rejected the NLRB's view that, under the Savings Clause exception, the arbitration agreement violated the "protected concerted activity" provisions of the NLRA. Relying on the U.S. Supreme Court's 2011 decision in *AT&T Mobility, LLC v. Concepcion*, 563 U.S. _, 131 S. Ct. 1740 (2011), the court found that the NLRB's interpretation—requiring employee access to collective procedures in an arbitral or judicial forum—presents "an actual impediment to arbitration and violates the FAA." *Horton*, 737 F.3d at 360. Therefore, the NLRB's interpretation was at odds with the Supreme Court's mandate in *Concepcion* that otherwise valid arbitration agreements be enforced according to their terms.

Moreover, the Fifth Circuit found that the second exception to application of the FAA likewise did not apply, because "there is no basis on which to find that the text of the NLRA supports a congressional command to override the FAA." *Id.* Furthermore, the court found that a contrary congressional command could not be inferred from any assertion of an inherent conflict between the FAA and the purpose of the NLRA. Although the Fifth Circuit rejected the NLRB's decision invalidating the waiver of class procedures in the arbitration agreement, it upheld the NLRB's decision that *Horton* violated Section 8(a)(1) of the NLRA because an employee would reasonably interpret the arbitration agreement as prohibiting the filing of an unfair labor practice charge *with the NLRB*. Since the arbitration agreement was ambiguous about whether an employee still had the right to file a charge with the NLRB, the agreement *could* be read as prohibiting an employee from doing so. The Fifth Circuit agreed with the NLRB that this violated the NLRA.

The Fifth Circuit's decision hammers another nail into the coffin of the NLRB's *Horton* decision. Employers will certainly rely on the decision in federal and state court challenges to the enforcement of arbitration agreements containing class waiver provisions. The recently reconstituted NLRB, however, likely will not readily accept this judicial repudiation of its position. The Board may seek a rehearing, or may appeal this decision to the U.S. Supreme Court. The NLRB may also continue asserting its *Horton* arguments in other cases involving arbitration agreements with class waiver provisions, especially in parts of the country where a federal court of appeals has not already rejected its arguments. In fact, on March 13, the NLRB filed a petition asking the Fifth Circuit to rehear and reverse its decision in *Horton*.

While employers currently may feel they have some cause for celebration, employers should remain wary and vigilant.

In the meantime, and at a minimum, employers who use arbitration agreements with their employees may wish to review their agreements to make sure they do not state or imply that employees are prohibited from filing administrative claims with agencies such as the NLRB and the EEOC.

President Obama's NLRB Appointments and the *Noel Canning* Argument

Two years ago, President Obama made three appointments to the NLRB by executive order, claiming he had such authority because Congress was in recess. These appointments were disputed on the basis that the Senate was in "pro forma" session conducting congressional business and, therefore, not actually in recess.

On January 25, 2013, the U.S. Court of Appeals for the D.C. Circuit ruled that the President can make recess appointments only during *inter*session recesses, not during *intra*session recesses. *Noel Canning v. Nat'l Labor Relations Bd.*, 705 F.3d 490 (D.C. Cir. 2013). The court further found that the President had violated the Appointments Clause of the United States Constitution, stating that these appointments "would demolish the checks and balances inherent in the advice-and-consent requirement, giving the President free rein to appoint his desired nominees at any time he pleases, whether that time be a weekend, lunch, or even when the Senate is in session and he is merely displeased with its inaction. This cannot be the law." *Id.* at 504.

The matter is now before the U.S. Supreme Court, in *Nat'l Labor Relations Bd. v. Noel Canning, cert. granted*, 133 S. Ct. 2861 (2013). During oral argument last January, the Justices strongly questioned the administration's authority to make the appointments. Justice Anthony Kennedy questioned whether a lunch break or a one-day break would possibly serve as a recess. Justice Elena Kagan noted that "it real[ly] is the Senate's job to determine whether they're in recess or whether they're not." Justice Kagan stated that recess appointments have been used by Presidents of both parties "as a way to deal, not with congressional absence, but with congressional intransigence, with a Congress that simply does not want to approve appointments that the President thinks ought to be approved," and further noted that "there's no such thing truly as congressional absence anymore."

Solicitor General Donald B. Verrilli, on behalf of the Obama administration, argued there are "many dozens of board decisions and, perhaps, many hundreds of board decisions that are under a cloud" as a result of the contest to President Obama's appointments. He further noted that "the Board will have a considerable amount of work to do" if the Supreme Court were to find that the appointments were invalid.

The Supreme Court's decision is not expected until June 2014, and it may have an enormous impact on employers. If the Supreme Court were to rule that the appointments were invalid—and questioning during oral argument suggests this is a very real possibility—the result could invalidate all NLRB decisions made by the invalidly appointed Board members. Since many of these decisions were unfavorable to employers, a Supreme Court ruling against the Obama administration could prove fruitful to employers, at least in the short term.

IN BRIEF

Employers' arbitration agreements should not imply that employees are prohibited from filing administrative claims with agencies such as the NLRB and the EEOC

This is not the end of the story, however. Any sense of relief for employers may be short-lived. Going forward, the NLRB could simply "re-do" any decisions undone by the Supreme Court. This wouldn't be the first time.

In *New Process Steel v. Nat'l Labor Relations Bd.*, 560 U.S. 674 (2010), the Supreme Court invalidated approximately 600 NLRB rulings because the Board had operated without a quorum. About a month after the Supreme Court ruling, the NLRB announced that it was "seeking to have each of these cases remanded to the Board for further consideration." Later it ratified all personnel, administrative, and procurement actions taken during the twenty-seven-month period. Finally, the Board reconsidered some of the improperly released decisions—this time with a proper three-member panel (two of whom, however, had made the original decisions)—and adopted those prior decisions.

Saying "Uncle" on the Poster Rule

The NLRB recently abandoned its two-year fight to require most private-sector employers, including those who do *not* have unionized workforces, to post an 11x17 poster containing information about the "right of employees to organize and bargain collectively with their employers" (the "Poster Rule").

The NLRB proposed the Poster Rule in August 2011, to take effect April 2012. Litigation quickly followed. The U.S. Court of Appeals for the D.C. Circuit struck down the rule in May 2013 and the U.S. Court of Appeals for the Fourth Circuit did the same in June 2013. Both appellate courts found that the NLRB had no authority to require the posting. The NLRB was required to file any appeal with the Supreme Court by January 3, 2014. It did not do so, announcing instead that it had "decided not to seek Supreme Court review." The NLRB noted, however, that the workplace poster is still available on the NLRB website, and employers can voluntarily display it at their discretion.

This represents a legal victory for employers. Most employers objected to the Poster Rule, arguing that it required biased and pro-union language to be publicly posted, and violated an employer's free speech rights. Some believed the Poster Rule overstepped the NLRB's authority in an effort to spur union organizing.

The battle, however, will certainly rage on. The NLRB has stated that it "remains committed to ensuring that workers, businesses, and labor organizations are informed of their rights and obligations under the National Labor Relations Act," and that it "will continue its national outreach program to educate the American public about the statute." Employers should anticipate further efforts by the NLRB to advance a pro-organizing agenda throughout the American workplace.

Conclusion

While employers currently may feel they have some cause for celebration, they should remain wary and vigilant. Although the NLRB has experienced a few setbacks, it appears poised to bounce back—and with a vengeance. (In fact, the NLRB announced on February 5, 2014 its intention to resurrect its previously shelved proposal to alter longstanding rules for union representation elections. The proposal would dramatically shorten the time period between the filing of an election petition and the actual election date. These so-called "ambush" or "quickie" elections would likely significantly tilt the landscape in favor of union organizing.) Of course, employers should continue to ensure compliance with the National Labor Relations Act and all other federal and California labor and employment laws.

This article is current as of the date of submission (March 19, 2014). This article should not be construed as legal advice or legal opinion on any specific facts or circumstance. The contents are intended for general informational purposes only.

James L. Morris *is the senior partner in Rutan & Tucker's Labor and Employment Department in its Orange County office. He has extensive experience both in employment and labor law litigation, and in counseling employers on a broad range of labor and employment matters. Mr. Morris can be reached at jmorris@rutan.com.* ***Yusuf Zakir*** *is an associate in Rutan & Tucker's Labor and Employment Department in Orange County. He handles a wide variety of employment-related litigation and also provides counseling to businesses regarding all aspects of the employer-employee relationship. He can be reached at yzakir@rutan.com.*

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