# United States Court of Appeals
for the
# Third Circuit

Nos. 15-4092, 16-1212

THE ROSE GROUP, d/b/a Applebee's Restaurant,

*Petitioner*,

– v. –

NATIONAL LABOR RELATIONS BOARD,

*Respondent*,

*JEFF ARMSTRONG,

*Intervenor*.

*(Pursuant to Clerk's Order dated 02/01/2016)

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

## BRIEF FOR *AMICUS CURIAE* NATIONAL RETAIL FEDERATION IN SUPPORT OF PETITIONER

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## RULE 26.1 DISCLOSURE STATEMENT

The National Retail Federation is not a publicly traded corporation. It has no parent corporation, and there is no public corporation that owns 10% or more of its stock.

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## INTEREST OF AMICUS CURIAE

The National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. Its global membership includes retailers of all sizes, formats, and channels of distribution as well as chain restaurants and industry partners from the United States and more than 45 countries abroad. In the U.S., the NRF represents an industry that includes more than 3.5 million establishments and which directly and indirectly accounts for 42 million jobs – one in four U.S. jobs. The total U.S. GDP impact of retail is $2.5 trillion annually, and retail is a daily barometer of the health of the nation's economy.

The NRF has an interest in this action because it concerns issues of great significance to its membership and the retail industry as a whole, namely whether the National Labor Relations Board ("NLRB" or "Board") and the courts will honor an agreement between an employer and an employee in which the parties agree to submit all disputes to individual arbitration and waive any right to pursue claims on a class basis.

The NRF is particularly well positioned to address these questions because many retailers have implemented arbitration programs in recent years as a means of resolving employment disputes in a quicker, less expensive way than in protracted litigation in court. These arbitration programs provide alternative

dispute resolution mechanisms which are fair, balanced and protective of employee rights. Arbitration is well-suited to resolving individual employment disputes and the process benefits both the employee and the employer. The NRF submits this brief pursuant to the consent of Petitioner but with objection from the NLRB. The Rose Group, the Defendant-Petitioner herein, is not a member of the NRF and did not contribute to the authoring or preparation of this Amicus Brief.

## STATEMENT OF THE CASE

This case arises from a decision of the NLRB affirming an Administrative Law Judge's determination that an otherwise lawful agreement of employees to submit certain workplace claims to individual rather than to class or collective arbitration constituted "the elimination of employees' statutory rights to pursue collective action regarding the terms and conditions of their employment" and was therefore unlawful. *Rose Group*, 363 N.L.R.B. No. 75, at *1 n.1 (2015). The NLRB mistakenly insists its determination is entitled to a deferential review (Br. NLRB 6). Because, however, the NLRB drew legal conclusions about the potential applicability of a statute outside of its purview, the Federal Arbitration Act 9 U.S.C. § 1 *et seq*., the "appellate review of legal questions raised in an NLRB decision and order is plenary." *Sheet Metal Workers Int'l Ass'n Local Union No. 27 v. E.P. Donnelly, Inc.,* 737 F.3d 879, 888 (3d Cir. 2013).

The majority of circuit courts to consider the basic arbitrability issue here have rejected the NLRB position and upheld class-action waivers in arbitration agreements. See *D.R. Horton, Inc.*, 737 F.3d 344 (5th Cir. 2013), *petition for reh'g en banc denied*, 5th Cir. No. 12-60031 (April 16, 2014); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 296-97 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013); *but see, Lewis v. Epic Sys. Corp.*, No. 15-2997, 2016 WL 3029464, at *2 (7th Cir. May 26, 2016).

## SUMMARY OF THE ARGUMENT[1]

The NLRB seeks to void an otherwise valid arbitration agreement on the grounds that it abridges an employee's substantive rights under Section 7 of the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* ("NLRA"). In the agreement, each employee consented not only to submit his or her disputes to arbitration, but also that the arbitration deal solely with each individual employee and not with class or collective claims. Such an arbitration agreement may be voided under only one of two scenarios: (1) it fails on ordinary contract grounds under state law; or (2) the Federal Arbitration Act's ("FAA") mandate favoring arbitration has been expressly overridden by congressional command. *See*

[1] No Party's counsel authored this brief in whole or in part. No person, aside from Amicus Curiae, its members, and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for Petitioner have stated that they do not oppose the filing of this brief. Counsel of record for the NLRB stated they object to the filing.

*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). The NLRB appears to be challenging the arbitration agreements at issue solely under the second prong.

The NLRB acknowledges that the FAA's savings clause, 9 U.S.C. § 2, provides that arbitration agreements are generally enforceable unless they would deprive individuals of a substantive statutory right. *See* Br. NLRB 28. Here, no substantive right is at issue because a class action is merely a procedural device. Alternatively, if this Court deems a class action to be a substantive right, *i.e.*, under Section 7 of the NLRA, then the Court must also read the whole of Section 7, which provides expressly that the right at issue is waivable. In either scenario, the outcome is the same. Accordingly, the NRF Amicus requests that the decision of the NLRB be overturned.

## I. Bringing A Class Action Is Not A Substantive Right

### A. Courts Have Long Held That There Is No Substantive Right To Proceed Collectively

The NLRB contends that bringing a class action is a substantive right. This contention, however, conflicts with court precedent. The Supreme Court has long held that litigants do not have a substantive right to class action procedures under Rule 23. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997); *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."); *see also D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 357 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right."). The NLRB attempts to circumvent this well-established rule by arguing that Section 7 of the NLRA creates a substantive right to a certain procedure, namely class actions. *See* Br. NLRB 11-12. Yet, nothing in the text of the NLRA permits such a view.

Several parts of the NLRA grant an employee a substantive right to a certain procedure. For example, there is a right to petition the NLRB for an election, Section 159(e)(1), and a right to file an Unfair Labor Practice ("ULP") Charge, Section 158(a)(4). Nowhere in the NLRA, however, did Congress guaranty or even mention a right to file a class action. Had Congress intended to grant a substantive right to employees to file a class action, it most certainly could have, but instead chose not to.

For many years, the courts have examined and upheld the validity of arbitration agreements. This Court in *Vilches v. TheTravelers Companies, Inc.*, determined that class-action waivers under the Fair Labor Standards Act 29 U.S.C. § 201, *et seq*. ("FLSA") were enforceable. 413 Fed. Appx. 487, 493-94 (3d Cir. 2011); *see also*, *Quilloin v. Tenet HealthSystem Phila., Inc.*, 673 F.3d 221 (3d Cir. 2012). In these and the following decisions, courts have consistently ruled that employees have no substantive right to proceed collectively. *See Sutherland v.*

*Ernst & Young LLP*, 726 F.3d 290, 296-97 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002). In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991), the Supreme Court addressed the specific issue of whether a claim under the Age Discrimination in Employment Act 29 U.S.C. § 621, *et seq.* ("ADEA") may be subjected to mandatory arbitration pursuant to an arbitration agreement found in an individual's securities registration application. Even though the ADEA, like the FLSA, allows for class relief, the Supreme Court found the individual arbitration agreement enforceable, rejecting the plaintiff's argument that the arbitration agreement abridged his right to bring a class action. *Gilmer*, 500 U.S. at 29.

### B. Congress Could Have Expressly Provided That The NLRA Overrides The FAA, But It Did Not Do So

The Wagner Act (the original NLRA) was enacted in 1935. It granted Section 7 rights to employees for the first time. Those rights included the right relied upon by the NLRB in this matter: that is, to engage in protected concerted activities. The FAA was initially passed in 1925 and then codified and reenacted in 1947. That same year (1947), Congress passed the Taft-Hartley Act amending the Wagner Act. Among other changes, the Taft-Hartley Act amended Section 7 by granting to employees for the first time the right to refrain from engaging in

protected concerted activities or from otherwise exercising the rights afforded to them under Section 7.

If Congress had intended to exempt Section 7 rights from the coverage of the FAA, or to give Section 7 rights priority over the application of the FAA, or to confer a non-waivable right to file or participate in class actions in the context of Section 7 rights, it easily could have done so in 1947. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 673 (2012) (where the statute is "silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms."). The fact that Congress did not so act raises the presumption that it did not intend to grant Section 7 rights any greater status than other statutory rights. *See Gilmer*, 500 U.S. at 29 ("Congress, however, did not explicitly preclude arbitration or other nonjudicial resolution of claims, even in its recent amendments to the ADEA.").

### C. Congress Knows How To Pass A Law Foreclosing The Use Of Arbitration, But Did Not Do So In The Taft-Hartley Amendments To The NLRA

The Supreme Court has stated that an arbitration clause is unenforceable if the "FAA's mandate has been overridden by a contrary congressional command." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (requiring claims under the Sherman and Clayton Acts to be arbitrated because Congress did not preclude arbitration under those statutes). Congress has passed laws that

expressly preclude the use of arbitration agreements. *See*, *e.g.,* Commodity Exchange Act, 7 U.S.C. § 26(n)(2) (2010); Motor Vehicle Franchise Contract Dispute Resolution Process, 15 U.S.C. § 1226(a)(2) (2002); and Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. § 5518(b). Unlike those statutes, the NLRA contains no such express congressional prohibitory command. Because Congress has shown its willingness and ability to override expressly the FAA in other statutes, this Court should find that it did not intend to override the FAA with respect to the NLRA.

If the Court determines that a class action is not a substantive right, then there would be no conflict between the FAA and the NLRA, and the NLRB's decision to read the NLRA over the FAA's savings clause should be overturned.

## II. If The Court Finds That There Is A Substantive Right Under Section 7 Of The NLRA To Bring A Class Action, The Court Must Also Find That Such A Right May Be Waived

The NLRB ignores important aspects of the NLRA's history. As set forth above, in 1947 the Taft-Hartley Act amended the NLRA to curtail union power in the workplace, and protect the rights of employees to not participate in union or other concerted activities. For example, employees for the first time could file ULPs against unions. Further, Section 7, the portion of the Act relied on by the NLRB here, was altered significantly. Interestingly, the NLRB does not reference the 1947 Taft-Hartley Act amendment to Section 7. This historical context,

coupled with the Supreme Court's ruling in *14 Penn Plaza LLC, v. Pyett*, 556 U.S. 247 (2009) (holding a union could waive an employee's statutory rights to bring claims under the ADEA), demonstrate that employees may exercise their NLRA statutory rights by waiving or refraining from activity that might otherwise arguably allow for class actions in arbitration.

### A. Taft-Hartley Amended NLRA Section 7 To Allow Employees To Waive Section 7 Rights

After the 1947 amendments, Section 7 of the NLRA now 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 8(a)(3) [29 USCS§ 158(a)(3].*

29 U.S.C. § 157 (emphasis added to show text inserted by the 1947 Taft-Harley Amendments).

The new words added to the second half of Section 7 (and that apply to the entire first half of the Section), expressly state that employees "shall" have "the right to refrain" from engaging in concerted activities for the purpose of mutual aid or protection. *Id.* The amended statutory text makes clear that employees have a choice not to participate in protected concerted activity, such as filing or participating in class litigation or class arbitration proceedings. This is precisely

the right that employees of Petitioner exercised when they agreed to be bound by the Company's single employee arbitration mechanism.

When the text of an act is clear and unambiguous, the court need not go deeper in its analysis. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). The NLRB cannot insist that Section 7 guarantees a substantive right to engage in protected concerted activities, while denying the existence of a substantive right to refrain from such activities.

If there were any doubt as to the applicability of the second part of Section 7 to this case, the legislative history addresses that precise point. "As has already been pointed out in the discussion of Section 7, the conference agreement guarantees in express terms the right of employees to refrain from collective bargaining or concerted activities if they choose to do so." H. R. Rep. No. 3020, at 47 (June 3, 1947) (House Conf. Rep. No. 510). If employees have a substantive right to participate in Section 7 protected concerted activities, then they have an equal substantive right to refrain from participating in Section 7 protected concerted activities. The "refrain" language within Section 7 of the NLRA grants to employees the right to waive participation in protected concerted activity. The memorialization of that right in the form of a pre-dispute arbitration agreement does not alter the analysis.

In short, unless otherwise constricted by Congress, employees may enter into pre-dispute contracts with their employers providing that their substantive statutory rights are to be decided in arbitration and not in the courts. They may also agree that such arbitrations shall be single employee only, and not class arbitration.

Notably, the Supreme Court has held that employees may delegate, pre-dispute, to their unions the right to decide their substantive statutory claims in individual arbitration. *See Pyett*, 556 U.S. 247. An employee who has the right to delegate such a right to a union, clearly may choose to exercise that right personally. Further, in the exercise of that personal right, that employee may agree, pre-dispute, via contract with an employer to decide a substantive statutory right in single employee arbitration.

While the NLRB attempts to differentiate *Pyett* on the ground that the employees had already exercised their Section 7 rights by certifying a union that could then bargain away those rights, this is a distinction without difference. *See* Br. NLRB 21 n.9. An employee's ability to waive rights under Section 7 either exists or it does not. The NLRB cannot insert factual conditions precedent in order to make a legal rule conveniently applicable only when it aligns with the NLRB's objectives.

### B. Taft-Hartley's Legislative History Demonstrates That Congress Intended To Limit Section 7 Protected Concerted Activity

Taft-Hartley was enacted in response to unions and employees using the power of the NLRA to coerce individual employees and employers. Congress believed that the NLRB had gone too far in endorsing behavior that was beyond the scope of what should be considered protected concerted activity under Section 7. The legislative history of the 1947 Amendments speak to these circumstances. The revisions to Section 7 show that:

> [t]aken in conjunction with the provisions of section 8 (b) (1) of the conference agreement (which will be hereafter discussed), wherein it is made an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of rights guaranteed in section 7, it is apparent that many forms and [varieties] of concerted activities which the Board, particularly in its early days, regarded as protected by the act will no longer be treated as having that protection, since obviously persons who engage in or support unfair labor practices will not enjoy immunity under the act.

H.R. Rep. No. 3020, at 40.

One of Congress's goals in enacting Taft-Hartley was to allow employees to choose whether to engage in protected concerted activities. The amendments expressly gave employees the right to refrain from engaging in protected concerted activities, whether those activities involved refusing to march on a picket line or agreeing to resolve their employment related disputes in single rather than in class arbitration.

A thorough examination of the history of Congressional amendments to the NLRA, including the 1947 Taft-Hartley amendments, shows Congress's intent to balance employee rights under Section 7; that is, to provide to employees not only the right to engage in concerted activities for their mutual aid and protection, but also the right to refrain from engaging in such activities. It is with reference to this history (as well as to the clear unambiguous language in the amended Section 7) that this Court should examine whether employees of Petitioner lawfully exercised their Section 7 right by agreeing to an arbitration mechanism that would resolve only their claims, and not any allegedly similar class claims.

### C. Other Rights Under Section 7 Have Been Routinely Curtailed By The NLRB, Congress And The Courts

Protected concerted activity and other rights under Section 7 are not unlimited under the NLRA. The NLRA limits the expression of protected concerted activity in several respects. For example, picketing is limited under various circumstances prescribed under Section 158(b)(4) (secondary boycotts) and under Section 158(b)(7) (organizational and recognitional picketing). 29 U.S.C. § 158. Under Section 158(g), picketing or striking employees of any health care institution must give advance notice of their intent to picket or strike. 29 U.S.C. § 158(g). Even the process of collective bargaining has rules. Unions cannot refuse to bargain in good faith with an employer under Section 158(b)(3). Thus, the idea that the NLRA provides employees with an unlimited right, in this

case a right to class arbitration, under the guise of a substantive Section 7 right, is mistaken.

Section 7 guarantees an employee the right to join (or not to join) a union. Assuming this is a substantive right, the significance of an employee's signing a union authorization card is significantly tempered by rules accompanying that action. *See NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). An employee who may have a substantive right under Section 7 to sign a union authorization or membership card, has a right to refrain from doing so.

Further, although there is an express prohibition within the NLRA against an employee's signing an agreement with an employer waiving the right to join a union, (*see* 29 U.S.C. § 103, prohibition on "yellow-dog" contracts), there is no such prohibition anywhere in the Act limiting an employee's right to enter into an agreement with the employer to accept individual arbitration of employment related disputes and to forgo class arbitration.

## CONCLUSION

To be clear, the NRF does not suggest that employees may be retaliated against for engaging in concerted activity. Nor does the NRF suggest that arbitration agreements may prohibit employees from filing charges at the NLRB. Rather, the NRF urges that, as required by the Supreme Court's decisions in *Gilmer* and its progeny, employees who have entered into a pre-dispute arbitration

agreement that includes a class action waiver should be bound by their bargain. The NLRB should not be allowed to ignore the clear direction of the Supreme Court and overwhelming weight of authority of Circuit Courts in a misguided attempt to protect some, but not other, Section 7 rights. Those rights the NLRB seems to ignore include an employee's right to refrain from engaging in concerted activities. The right to agree not to participate in class arbitration is clearly encompassed within Section 7 rights. Class waivers limit only how and before whom claims may be brought, an agreement the Supreme Court has said must be honored in the absence of Congressional intent otherwise. Here, Congressional intent not only discredits the position taken by the NLRB but, in fact, legitimizes the very practice at issue. There is simply no basis, under the NLRA, for the NLRB to reject class action waivers out of hand.

Dated: New York, New York
July 28, 2016

*/s/Evan J. Spelfogel*

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 3,541 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point font.

Dated: July 28, 2016

Respectfully submitted,

/s/ Evan J. Spelfogel
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## CERTIFICATE OF BAR MEMBERSHIP

I certify that I am a member in good standing of the bar of this Court.

Dated: July 28, 2016

Respectfully submitted,
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## CERTIFICATE OF IDENTICAL COMPLIANCE AND VIRUS CHECK

I certify that the text of the electronic version of this brief filed on the CM/ECF system is identical to the text of the paper copies that will be sent by Federal Express overnight delivery to the Clerk of the Court.

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Dated: July 28, 2016

Respectfully submitted,
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## CERTIFICATE OF SERVICE

I certify that on the 28th day of July 2016, I filed the foregoing brief using this Court's Appellate CM/ECF system, which effected service on all parties.

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