15-2820-cv

United States Court of Appeals
for the
Second Circuit

CONNIE PATTERSON, on behalf of herself and all others similarly situated,
DAVID AMBROSE,

Plaintiffs-Appellants,

– v. –

RAYMOURS FURNITURE COMPANY, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF NATIONAL RETAIL FEDERATION AS *AMICUS CURIAE*

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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., 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 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 all parties. Raymours Furniture Company, Inc., the Defendant-Appellee herein, is a member of the NRF and did not contribute to the authoring or preparation of this Amicus Brief.

SUMMARY OF THE ARGUMENT[1]

The Appellants seek to void an otherwise valid arbitration agreement they entered into on the grounds that it abridges their substantive rights under Section 7 of the National Labor Relations Act ("NLRA"). In their agreements, Appellants consented not only to submit disputes with their employer to arbitration, but also that the arbitration be individual employee only, not class or collective claims. An arbitration agreement may be voided under 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 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). The Appellants challenge the arbitration agreement at issue solely under the second prong.

[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 all parties have stated that they do not oppose the filing of this brief.

The Appellants acknowledge 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. Br. Pls.-Appellants 11. No substantive right is at issue here, however, 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. Thus, the NRF Amicus requests that the decision of the district court be affirmed.

I. Bringing A Class Action Is Not A Substantive Right

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

Appellants contend that bringing a class action is a substantive right. This, 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."). Appellants attempt 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. Pls.-Appellants 13. Yet, nothing in the text of the NLRA permits such a view.

There are several parts of the NLRA that do grant an employee a substantive right to a certain procedure. For example, there is a right to petition the Board for an election, Section 159(e)(1), and a right to file an Unfair Labor Practice ("ULP") Charge. However, nowhere in the NLRA 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. In their decisions, courts have consistently ruled that employees have no substantive right to proceed collectively. This Court in *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 296-97 (2d Cir. 2013), expressly stated as much. 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 ("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 Fair Labor Standards Act ("FLSA"), allows for class relief, the Court found the individual arbitration agreement enforceable. 29 U.S.C. § 201, *et seq*. The Court enforced

the individual arbitration agreement even though the plaintiff specifically argued the arbitration agreement abridged a right to bring a class action.

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 Appellants 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, in 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 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.*, 7 U.S.C. § 26(n)(2) (Commodity Exchange Act)(2010); 15 U.S.C. § 1226(a)(2) (Motor Vehicle Franchise Contract Dispute Resolution Process)(2002); and 12 U.S.C. § 5518(b) (Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010). To the contrary, here, under the NLRA, there is no such express congressional prohibitory command. Because Congress has shown its willingness and ability to override expressly the FAA in other statutes, the 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, there would be no conflict between the FAA and the NLRA, and the district court decision should be affirmed.

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

Appellants and their Amici provide, at best, an incomplete history of the NLRA and ignore important aspects of its actual history. *See* Br. for Labor Law Scholars Amici 1. The NLRA was amended in 1947 by the Taft-Hartley Act. The Taft-Hartley Amendments were aimed at curtailing union power over the workplace, and protecting the rights of employees to participate or not participate in union or other concerted activities. The Act was amended, for example, to allow employees to file ULPs against unions. Further, Section 7, the portion of the Act relied on by Appellants and their Amici here, was altered significantly. Interestingly, neither Appellants nor their Amici even 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), demonstrate that employees may waive their NLRA statutory rights that might otherwise arguably allow for class actions.

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

Section 7 of the NLRA was amended in 1947 to, among other changes, add the second half of the Section. As amended, it reads:

> 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 Appellants 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 Appellants and their Amici cannot insist on the one hand 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 right to refrain from participating in 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 an arbitration agreement does not alter the analysis.

In short, unless otherwise constricted by Congress, employees may enter into 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 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 via contract with an employer to decide a substantive statutory right in single employee arbitration.

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 for coercive means. Congress believed that the Board 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.

On of Congress's goal's in enacting Taft-Hartley was to allow employees to choose whether to engage in protected concerted activities, or not. The

amendments expressly gave them the right to refrain from engaging in protected concerted activities, whether that activity involves marching on a picket line or agreeing to resolve all employment related disputes in single rather than in class arbitration.

Appellants opine that the circumstances surrounding the 1935 passage of Norris-LaGuardia somehow compel the Court to rule against class waivers. However, a more thorough examination of the history of subsequent 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 Appellants 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 Concerted Rights Under Section 7 Have Been Routinely Curtailed By The Board, 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 an 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 Circuits Courts in a misguided attempt to protect Section 7 rights. Those rights, the NLRB seems to forget, expressly 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 Appellants and 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
March 25, 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 3,164 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: March 25, 2016

Respectfully submitted,

/s/ Evan J. Spelfogel
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CERTIFICATE OF SERVICE

I certify that on the 20th day of June 2016, I filed the foregoing brief using this Court's Appellate CM/ECF system, which effected service on all parties.

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