

WASHINGTON SUPREME COURT NO. 87877-3

Court of Appeals No. 66137-0-I

LAWRENCE HILL, ADAM WISE, and ROBERT MILLER, on behalf
of themselves and all persons similarly situated

Respondents/Cross-Appellants,

v.

GARDA CL NORTHWEST, INC., f/k/a AT SYSTEMS, INC. a
Washington Corporation

Appellant/Cross-Respondent.

PETITION FOR REVIEW

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I. INTRODUCTION

Petitioners are Larry Hill, Adam Wise, Robert Miller, and approximately 300 other similarly-situated employees and former employees of the Defendant armored car company, Garda CL Northwest. Petitioners brought suit against Garda for denying them regular meal and rest breaks in violation of the Washington Industrial Welfare and Minimum Wage Acts. Petitioners seek review of the decision of the Court of Appeals issued July 30, 2012, which reversed the trial court's decision to compel class arbitration and ordered the plaintiffs and class members to each arbitrate their claims individually.

The Court of Appeals permitted Garda to enforce an unconscionable arbitration clause even after litigating through class certification and almost all the way to trial, and ordered the class members to individually arbitrate their claims in what is, practically speaking, a non-existent forum. This Court should take review because the decision below would deprive workers of the right and ability to enforce minimum workplace health and safety standards in their workplace and would totally insulate an employer who violates those standards.

II. ISSUES PRESENTED FOR REVIEW

1. Does a litigant waive the right to demand arbitration by litigating for 19 months, engaging in discovery and motion practice, and waiting

until a class has been certified and notified before attempting to compel individual arbitration?

2. Did the courts below ignore well-settled rules of contract law by ordering individual employees to arbitrate under an arbitration provision in a union contract that did not purport to deprive individual employees of the ability to enforce statutory rights in court, and where there was no practical way for the claims to be brought in arbitration?

3. Did the courts below have an obligation to review the terms of arbitration which the Plaintiffs challenged as unconscionable before compelling arbitration?

4. Did the Court of Appeals misapply U.S. Supreme Court precedent by ordering the class of employees to arbitrate their claims individually because there was no explicit “class arbitration” provision in the CBA?

III. STATEMENT OF THE CASE

Petitioners/Plaintiffs are a class of over 300 messengers and drivers (“Plaintiffs”) who were employed by Garda CL Northwest (“Garda” or “Defendant”) in the State of Washington to pick up, transport, and deliver currency in armored trucks for Garda clients. Clerk’s Papers at (“CP”) 4. Plaintiffs allege that while working for Garda, they were not allowed meal and rest breaks as required under Washington Industrial Welfare Act, RCW 49.12, and Minimum Wage Act, RCW 49.46. CP 7.

At each Garda facility in Washington, Garda requires employees to sign a “labor agreement.” CP 560 at p. 37. Although the labor agreements are ostensibly between Garda and the “employee associations” at each of Garda’s branches, Garda’s employee associations are not “unions” in the normal sense. Employees do not pay dues to the associations, and the associations have no resources. CP 606-607. The associations do not in fact “negotiate” with the company and generally must accept whatever is offered. CP 555 at p. 16; CP 561 at p. 39. Although Garda has separate agreements with each branch association, the language of the agreements at each branch is materially identical. *See* Appellant’s Opening Brief in the Court of Appeals at 3-4.

All Garda’s labor agreements contain a clause entitled “Grievance and Arbitration” that sets forth an informal mechanism for resolving employee grievances. *See* CP 142. It does not say employees must arbitrate statutory wage claims, or forbid such claims in court.

The procedure is as follows: First, a grievance “shall be presented in writing to the company” by the employee and/or the union “within (14) calendar days of the occurrence giving rise to [the] grievance.” *Id.* The company then has 14 days to respond. If the *union* finds this response inadequate, *it* has 14 days to request arbitration. *Id.* However, even then no arbitration can occur unless, after a “management-union meeting” there

still exists “a legitimate as well as significant issue of contract application.” *Id.*

The contract calls for selection of an arbitrator from the Federal Mediation and Conciliation Service (FMCS), and requires the union to split the costs of arbitration with Garda. *Id.* It limits awards by the arbitrator to between two and four months of backpay. CP 142, 165.

This contractual arbitration process has *never* been used by any Garda employee in Washington. CP 571. According to the “senior shop steward” in Seattle, the “union” does not even file grievances for employees because it has no money to pay for arbitration. CP 607.

Plaintiffs Hill, Wise, and Miller filed this suit against Garda in King County Superior Court on February 16, 2009. CP 3. Defendant answered on April 23, 2009. CP 9. The parties litigated the case for 19 months. Throughout 2009, the parties each requested and obtained from the other extensive documentary discovery. CP 841. By March 3, 2010, Garda had produced nearly 7,000 thousand pages of documents and never once objected based on arbitration. CP 567-572, CP 828. In February 2010, Plaintiffs took the deposition of Garda’s District Manager for Washington. CP 841. In March, 2010, the parties filed a joint motion for a continuance of the trial date, from August 2010 to December 2010, to provide “additional time to prepare for trial,” which the court granted. CP

799, 802. Although Defendant indicated in the motion that it believed matter was “properly subject to arbitration,” Plaintiffs expressly disagreed, and Garda took no action to seek an arbitral forum. CP 799.

On March 26, 2010, Plaintiffs moved for class certification. CP 806, 841. Again, Garda took no action to compel arbitration. Instead, it filed a motion to seal under the extant protective order. CP 810. Before Garda responded to Plaintiffs’ motion, the parties agreed to mediate. CP 548. At Defendant’s request, Plaintiffs re-noted their motion for class certification to May 28, 2010, to provide Defendant with sufficient time to respond should the mediation be unsuccessful. CP 548, 815, 851.¹

Mediation took place on May 6, 2010, and was unsuccessful. CP 841. Defendant’s counsel then asked that Plaintiffs re-note their class certification motion again, to June 4, due to a planned vacation. There was no mention of any intent to seek arbitration. CP 849. Defendant then asked for yet *another* continuance of the class certification motion so they could conduct further discovery—specifically, depositions of each of the named Plaintiffs—before responding to the motion for class certification. CP 851. There was still no mention of arbitration. Plaintiffs re-noted the class certification motion for a final time to July 16, 2010. CP 817.

¹ While discussing mediation, Garda had asked Plaintiffs to agree to arbitration. Plaintiffs indicated they would consider “a comprehensive proposal” for class arbitration. CP 626. Garda never made any proposal or mention of arbitration.

Garda then retained new counsel. CP 842, 851-852. Its new counsel stated his intention to seek another continuance of Plaintiffs' class certification motion, in order to take additional discovery and file dispositive motions. CP 842-43. Plaintiffs' counsel opposed this, and on June 4, 2010, Garda filed a motion asking the court to continue the motion for class certification, in order to take more discovery and move for summary judgment. CP 823-824. Again, Defendant did not mention any intent to arbitrate and instead expressly confirmed its intent to continue to litigate *in court*. See CP 828 ("Counsel requires reasonable time to prepare for depositions that are absolutely critical in this representative action."). Counsel conceded that the case was already "a relatively mature class action lawsuit." CP 860. The court denied Defendant's motion to continue and confirmed the motion for class certification would be heard July 16 and the trial date would remain December 6, 2010. CP 921-22.

Defendant then propounded a second set of written discovery on Plaintiffs and conducted full-day depositions of each of the three named Plaintiffs on all issues in the case. CP 548-549. On July 1, 2010, Defendant filed its opposition to class certification. On this same date, Defendant filed a Motion to Compel Arbitration or for Summary Judgment and it noted this motion for hearing on August 27, 2010, six weeks after the hearing on class certification. CP 517-518.

On July 23, 2010, the trial court granted class certification. CP 519-521. On August 6, 2010, the parties submitted briefing to the trial court regarding class notice. CP 862-873, 874-895. Defendant did not mention arbitration or request a stay pending their motion to compel arbitration. CP 862-866. The Court entered an order approving class notice on August 9, 2010. CP 896. Notice was sent on August 16, 2010 to all 306 class members. CP 549. The same day, the parties exchanged their second and final disclosures of potential trial witnesses. *See* CP 903.

On August 27, 2010—a mere 14 weeks before trial was to begin—the court held a hearing on Defendant’s Motion to Compel Arbitration or for Summary Judgment. CP 517-518. The court denied summary judgment but ordered further briefing on arbitration. CP 767. On September 24, 2010, the court ordered class arbitration. *Id.* Defendant appealed the decision to compel arbitration on a class-wide basis, and Plaintiffs cross-appealed the decision to compel arbitration. The Court of Appeals affirmed the order compelling arbitration but reversed on the issue of class arbitration and concluded that all class members must arbitrate individually.

IV. ARGUMENT

The Court of Appeals’ decision conflicts in many ways with decisions of this Court and with other decisions of the Court of Appeals.

RAP 13.4 (b)(1) & (2). The decision also implicates issues of substantial public interest: *First*, whether employees in this state can be forced to waive the right to seek judicial enforcement of state wage and hour laws, even after their claims have been litigated for a substantial period of time and a class has been judicially certified and notified of the litigation. *Second*, whether a court or arbitrator can deprive those employees of the right to join together as a class for their common benefit, even where the alleged agreement to arbitrate does not forbid class actions and expressly contemplates group remedies. These are issues of substantial public interest and should be determined by the Supreme Court. RAP 13.4(b)(4).

A. The Court of Appeals' Decision Sets Forth Unprecedented Standards for Waiver of Arbitration by Litigation.

It is well-established that a contractual right to arbitration is waived if it is not timely invoked. *Otis Housing Ass'n Inc. v. Ha*, 165 Wn.2d 582, 587, 201 P.3d 309 (2009). “[A] party to a lawsuit who claims the right to arbitration must take some action to enforce that right within a reasonable time.” *Id.* at 588 (quoting *Lake Wash. Sch. Dist. No. 414 v. Mobile Modules NW, Inc.*, 28 Wn. App. 59, 64, 621 P.2d 791 (1980)). “Simply put . . . a party waives a right to arbitrate if it elects to litigate instead of arbitrate.” *Id.* Garda failed to take action within a reasonable time and elected to litigate instead of arbitrate. The Court of Appeals’ decision to the contrary is reviewed de novo. *Id.* at 586.

Determining whether a litigant has waived a right to arbitration depends on its *actions*, not its words. *See Otis*, 165 Wn.2d at 587 (party “must take some *action* ... within a reasonable time” (emphasis added)). The Court of Appeals did not look to Garda’s actions in the litigation, but instead relied on its words. Slip Op. at 6-7, 8. That its decision conflicts with precedent is exemplified by recent decision from Division 2, *River House Dev., Inc. v. Integrus Architecture, P.S.*, 167 Wn. App. 221, 272 P.3d 289 (2012). That case involved a very similar record of litigation, discovery and motion practice evincing an intent to litigate, while one party—River House—continued to say it intended to seek arbitration. *Id.* at 225-29. The trial court found waiver and the Court of Appeals affirmed, finding that regardless of its words, River House’s *actions* were inconsistent with an intent to arbitrate:

The party arguing for waiver is not required to show that its adversary has never mentioned arbitration or equivocated about the process to be followed. It need show only that as events unfolded, the party's conduct reached a point where it was inconsistent with any other intention but to forgo the right to arbitrate.

Id. at 238. If a party could litigate for an extended time and take no action to seek arbitration but still preserve the right to do so simply by continuing to “reserve” that right, all of the supposed benefits of arbitration would be lost, at great cost to the other party and the courts. *See Nino v. The Jewelry Exchange, Inc.*, 609 F.3d 191, 209 (3d Cir. 2010).

Here, Garda took no action to move this case to arbitration, while taking numerous actions that were inconsistent with arbitration and advanced the litigation. Garda “answered the complaint, engaged in extensive discovery, deposed witnesses, submitted and answered interrogatories, and prepared fully for trial.”² *Ives v. Ramsden*, 142 Wn. App. 369, 383-84, 174 P.3d 1231 (2008). It participated in extensive discovery which would not have been allowed in arbitration. CP 549 ¶ 13 (applicable arbitration rules do not provide for discovery). *See Steele v. Lundgren*, 85 Wn. App. 845, 858, 935 P.2d 671 (1997). Then, after mediation failed and it turned to the class certification motion, Garda proceeded to take three depositions and repeatedly requested extensions of time, never mentioning arbitration. CP 855, 828.

Meanwhile, Garda “pass[ed] up several obvious opportunities to move for arbitration.” *Steele*, 85 Wn. App. at 856. It did not pursue arbitration during extensive document exchange or when Plaintiffs demanded a corporate representative for deposition; or after mediation failed; or when it engaged new counsel; or when it sought an extension of time to respond to the motion for class certification. Instead, at each juncture, it continued to litigate.

² Trial was set for December 2010, and the court had already denied a request to move that date. CP 578, 922. And the parties had identified trial witnesses and obtained sworn declarations from dozens of them. *See* CP 903-12; CP 994-1095.

Garda's tactics gave it distinct advantages and severely prejudiced the Plaintiffs. Even when it finally filed a motion to compel arbitration, it deliberately set it for hearing almost two months out, long past the hearing on class certification, allowing it to "continue to weigh [its] options, even then." *Steele*, 85 Wn. App. at 856. Class certification is a watershed event affecting the status and rights of hundreds of class members. Garda's tactics allowed it to see whether a class was certified before changing forums.³ Garda then allowed the court to issue notice to all 300 class members advising them that their claims would be decided in this lawsuit by the court, and never even mentioned arbitration. CP 864, 899-902.

The Court of Appeals' decision contradicts the law on litigation waiver and would permit parties to switch forums at will. This Court should take review under RAP 13.4(b)(1), (2), and (4).

B. The Court of Appeals Erroneously Construed the Contract Against the Employees and in Favor of Arbitration to Find the Employees Waived All Access to the Courts.

In interpreting the language of Garda's arbitration clause, the Court of Appeals made a fundamental legal error, plainly contradicting prior decisions of state and federal courts.

³ See *Steele*, 85 Wn. App. at 858-59 (prejudice results when a party loses a motion and then attempts to relitigate the issue by invoking arbitration) (quoting *Kramer v. Hammond*, 943 F.2d 176, 179 (2d Cir. 1991)).

The arbitration clause at issue in this case is found in a “collective bargaining agreement” (CBA) between Garda and its employee “associations.” Such arbitration provisions are interpreted differently than other contracts because CBAs are contracts with a union rather than the individual. *See Brundridge v. Fluor Fed. Servs., Inc.*, 109 Wn. App. 347, 356, 35 P.3d 389 (2001). As a result, “an arbitration clause in a CBA will not waive an employee’s right to a judicial forum [for statutory claims] unless such a waiver is clear and unmistakable.” *Id.* (citing *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 79-80 (1998)). Thus, the usual “presumption” favoring broad interpretation of arbitration clauses applies in the labor context only to contract disputes, not statutory claims, because “arbitrators are in a better position than courts *to interpret the terms of a CBA.*” *Wright*, 525 U.S. at 78 (emphasis in original). Where the dispute involves the meaning and application of statutory provisions, the opposite presumption applies: the right to a judicial forum for such claims is *preserved* unless it is clearly and unmistakably waived. *Id.* at 79-80 (“not only is petitioner’s statutory claim not subject to a presumption of arbitrability; we think any CBA requirement to arbitrate it must be particularly clear.”); *accord, Brundridge*, 109 Wn. App. at 355.

The Court of Appeals superficially acknowledged this legal rule,⁴ but nonetheless ignored it, and instead interpreted “ambiguity” in the contract language “in favor of arbitration.” Slip op. at 12. “A collective bargaining agreement’s grievance and arbitration procedure is presumed to be the exclusive remedy unless otherwise stated in the contract.” *Id.*⁵ This contradicts the rule of law expressed in *Brundridge* and *Wright*.

Garda’s grievance and arbitration clause does not meet the clear and unmistakable standard to waive the right to a judicial forum with respect to statutory claims. As the Supreme Court held in *Wright*, such a waiver must be “explicit.” 525 U.S. at 80. In other words, the agreement must actually say that the arbitration procedure is the *exclusive* means of resolving disputes over alleged wage violations.⁶ Garda’s arbitration clause contains no exclusivity clause.

Furthermore, it contains many ambiguities as to whether statutory claims even *can* be arbitrated, and in any event places insurmountable practical obstacles in the way of any employee who would try. First,

⁴ In fact, the Court of Appeals incorrectly associated the heightened standard to “the requirement to arbitrate” rather than the waiver of a judicial forum. Slip Op. at 9; see *Wright*, 525 U.S. at 80; *Brundridge*, 109 Wn. App. at 355.

⁵ The court cited *Minter v. Pierce Transit*, 68 Wn. App. 528, 530, 843 P.2d 1128 (1993), in which the plaintiff claimed a breach of the CBA, not statutory violations.

⁶ For example, in *14 Penn Plaza v. Pyett*, 556 U.S. 247, 252 (2009), the CBA contained a provision that unequivocally provided that arbitration was the “sole and exclusive” means of remedying all contractual and statutory claims.

while the clause defines “grievance” in a way that includes statutory wage and hour claims, it does not make all grievances subject to arbitration. CP 165. Arbitration is only available after all of the following occur: (1) the union requests arbitration, (2) a management-union meeting is held to attempt resolution, and (3) after such meeting, “a legitimate as well as significant issue of contract application remains open.” CP 165 ¶ (c). The Court in *Wright* found similarly ambiguous provisions to mean, under the “clear and unmistakable standard,” the CBA did not preclude employees from bringing statutory claims in court. *Wright*, 525 U.S. at 81.⁷

In addition, regardless what the CBA says, employees cannot be forced to waive a judicial forum for vindicating statutory claims if the arbitral forum is not actually available. *See Brown v. Services for the Underserved*, 2012 U.S. Dist. Lexis 106207, *5 (E.D.N.Y. July 31, 2012).⁸ Garda’s arbitration clause requires action by the union in order for

⁷ Like the CBA at issue in *Wright*, Garda’s labor agreements do not explicitly incorporate the requirements of Washington wage laws. *See Wright*, 525 U.S. at 80 (noting that CBA “contains no explicit incorporation of statutory nondiscrimination requirements”); *see also Curtis v. United States*, 59 Fed. Cl. 543, 549 (Fed. Cl. 2004). Accordingly, Plaintiffs’ claims cannot be resolved by reference to the terms of the agreements, but depend on analysis and application of Washington statutes, regulations, and case law.

⁸ *Brown* relied on *14 Penn Plaza*, 556 U.S. at 273-74, in which the Court confirmed that if an arbitration clause in a CBA permitted the union to prevent employee members from vindicating their federal statutory rights it would not be upheld (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 & n. 19 (1985)). *Brown* cited several other district court decisions after *Penn Plaza* that invalidated arbitration clauses when unions have prevented

an employee to use it. CP 165. Yet, it is undisputed that the “union” is essentially a creation of the company, with no independent resources or bargaining power. CP 606-07. As the shop steward in Seattle testified, the union has not pursued and does not pursue grievances on behalf of employees, much less arbitration. CP 607, 571-72. Accordingly, arbitration is not actually an available avenue for employees to vindicate their statutory rights, and the CBA cannot prevent a suit in court.

The Court of Appeals applied the wrong legal standard for interpreting an arbitration clause in a union contract, and in effect sent the employees to a non-existent forum to pursue their statutory rights. This Court should take review under RAP 13.4(b)(2) and (4).

C. The Court of Appeals Erroneously Refused to Consider the Threshold or “Gateway” Issue of Whether the Arbitration Provision Was Void as Unconscionable.

In opposing Garda’s belated motion to compel arbitration, the Plaintiffs also pointed out that the terms of arbitration in the CBAs were unconscionable. CP 534. The trial court did not address this issue. CP 916-17. The Court of Appeals also declined to address it. Slip Op. at 4. This was legal error. Any challenge to the validity of an agreement to arbitrate is a “gateway” issue that the courts must decide before ordering

their members from arbitrating statutory discrimination claims.” 2012 U.S. Dist. Lexis 106207 at *5.

arbitration. *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2778, 177 L. Ed. 2d 403 (2010).

As noted above, the first problem with enforcement of Garda's arbitration agreement is that it effectively denies employees their fundamental and non-waiveable statutory rights. A contract that effectively exculpates a party from a whole class of wrongful conduct is unconscionable under Washington law. *Scott v. Cingular*, 160 Wn.2d 843, 847, 161 P.3d 1000 (2007).

In addition, Garda's grievance/arbitration clause gives employees just 14 days to assert a claim, as opposed to the three-year limitation period applicable under state law. CP 165; *see SPEEA v. Boeing Co.*, 139 Wn.2d 824, 835-36, 991 P.2d 1126 (2000). Such a radical shortening the limitation period is plainly unconscionable. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 356-57, 103 P.3d 773 (2004).

Similarly, Garda's arbitration provision requires fee-splitting; the "union" must pay half of the arbitrator's fees. CP 165. This Court has been clear that if an employee demonstrates that an arbitration agreement's fee-splitting provision is prohibitive, it is unconscionable. *Adler*, 153 Wn.2d at 308-09. While Plaintiffs' individual claims may be worth a few thousand dollars, the cost of arbitration is likely to be \$50,000 to \$100,000. CP 599 (noting that a case which took only four hours of

arbitrator time cost \$5,000). This ratio would “effectively den[y]” plaintiffs the ability to bring their claims at all. *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 465, 45 P.3d 594 (2002); CP 600-07.

Garda’s arbitration clause also forbids any award of back pay of more than four months. CP 165.⁹ Such a limitation on statutory remedies is unconscionable. *Zuver v. Airtouch Comm’ns Inc.*, 153 Wn. 2d 293, 315, 318, 103 P.3d 753 (2004).

The Court of Appeals erred in ignoring its duty to determine the legal validity of the arbitration agreement before enforcing it, and this Court should take review under RAP 13.4(b)(4).

D. The Court of Appeals’ Decision to Force Each Employee Class Member to Individually Arbitrate His Wage Claims Against His Employer Conflicts with Precedent and Deprives Plaintiffs of Their Statutory Rights.

After rejecting all of the Plaintiffs’ reasons to deny arbitration altogether, the Court of Appeals granted Garda’s appeal and reversed the trial court’s decision that Plaintiffs could arbitrate as a class as previously certified. Garda had taken the position that the arbitrator should decide whether the CBA permitted class arbitration. The Court of Appeals went

⁹ The qualifying phrase, “unless specifically mandated by federal or state statute or law” does not save the provision. It is not clear how an arbitrator would construe the language, and in this context, the provision must be strictly construed against the Defendant. *See Zuver*, 153 Wn.2d at 355 (rejecting employer’s post-hoc offer of more moderate interpretation and construing provision against employer).

even further: it held as a matter of law that the CBA did not permit class arbitration, and each class member must individually arbitrate his claim for missed meal and rest breaks.

The court relied entirely on *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010). There, the Court held that a party could not be compelled to submit to class arbitration “unless there is a contractual basis for concluding that the party agreed to do so.” *Id.* at 1775. The Court of Appeals misread *Stolt-Nielsen* to mean that whenever an arbitration clause does not *explicitly* permit class arbitration, it must be interpreted to forbid it. Slip Op. at 15. That is not the law; *Stolt-Nielsen* expressly recognized that an arbitration agreement may *implicitly* permit class arbitration. *Stolt-Nielsen*, 130 S. Ct. at 1775.¹⁰

In *Stolt-Nielsen*, there was no need to consider the parties’ intentions because the parties had stipulated that they had not come to any agreement concerning class arbitration. *Id.* at 1770, 1776 n. 10. However, the Court reiterated the general rule that a court or arbitrator “must give effect to the contractual rights and expectations of the parties.” *Id.* at 1773-74. It acknowledged that “custom and usage” may be relevant to

¹⁰ See also *Fantastic Sams Franchise Corp. v. FSRO Assoc. Ltd.*, 683 F.3d 18, 22 (1st Cir. 2012); *Sutter v. Oxford Health Plans, Inc.*, 675 F.3d 215, 222 n. 5 (3d Cir. 2012); *Jock v. Sterling Jewelers*, 646 F.3d 113, 121 (2d Cir. 2011).

determining the parties' intent, as well as other rules based on applicable state or federal law. *Id.* at 1769 n. 6, 1770.¹¹

Having misread the law, the Court of Appeals conducted no contractual analysis and simply concluded that class arbitration was prohibited under Garda's CBAs. Slip. Op. at 12. This is clearly erroneous. First, there is a long tradition of class arbitrations arising from collective bargaining agreements. As the leading commentator on labor arbitration law states, "It is widely accepted that a union has standing to file a group grievance that affects a significant portion of the bargaining unit." Elkouri & Elkouri, *HOW ARBITRATION WORKS* 212 (Alan Miles Rubin, 6th ed. 2003). Indeed, the very nature of "collective" bargaining is to establish rights and responsibilities for *all* employees as a group, not for individual employees. *See Brundridge*, 109 Wn. App. at 355. Any ruling in arbitration concerning Garda's wage practices would presumably apply to all employees, just as any determination in a class action applies to all class members.¹²

¹¹ *See also id.* at 1175 (referencing tradition and custom in applicable industry as indicative of intent regarding class arbitration); *see also AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 79 L. Ed. 2d 742, 756 (2011) (*Stolt-Nielsen* held ordering class arbitration must be based on "the arbitration agreement itself or some background principle of contract law that would affect its interpretation.").

¹² *See* Imre S. Szalai, *Aggregate Dispute Resolution: Class and Labor Arbitration*, 13 HARV. NEGOTIATION L. REV. 399, 407 (2008) ("Class arbitration shares a general similarity with labor arbitration in that both involve aggregate dispute resolution.").

The labor agreements at issue here reflect this; they expressly allow the “union” to bring grievances on behalf of its members and expressly state that “[t]he decision of the arbitrator shall be binding upon the grievant *and all parties to this Agreement.*” CP 143.¹³ The trial court already concluded that the wage and hour practices at issue here are “common” to all employees. CP 520. Garda cannot reasonably contend that it intended any challenges to its company-wide wage practices would be resolved through individual arbitrations, one employee at a time. Based on the language, nature, and context of the parties’ agreements, it is clear that Garda’s labor agreements must permit “class” arbitrations.¹⁴

¹³ Garda requires all of its driver/messengers to personally sign its labor agreements. *See* CP 156.

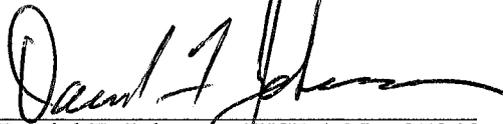
¹⁴ The Court of Appeals’ decision to order individual arbitration is wrong for another reason: it would have the effect of depriving Plaintiffs of their substantive rights under the National Labor Relations Act (NLRA) to engage in “concerted activity” for their “mutual aid and protection.” 29 U.S.C. § 157. This includes the right to take action “through resort to administrative and judicial forums.” *Eastex Inc. v. NLRB*, 437 U.S. 556, 566 (1978); *Brady v. National Football League*, 644 F.3d 661, 673 (8th Cir. 2011) (“[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is ‘concerted activity’ under § 7 of the National Labor Relations Act.”). Thus, the NLRA provides a substantive legal right to bring class actions to redress conditions of employment, and waivers of such rights will not be upheld, even when found in an arbitration clause. *See 14 Penn Plaza*, 129 S. Ct. at 1474; *D.R. Horton, Inc. v. Michael Cuda*, Case no. 12-CA-25764 (N.L.R.B. January 3, 2012); *Owen v. Bristol Care, Inc.*, 2012 U.S. Dist. Lexis 33671, *10-13 (W.D. Mo. Feb. 28, 2012); *Cf. Delock v. Securitas Security Servs. USA, Inc.*, 2012 U.S. Dist. Lexis 107117, *8 (E.D. Ark. Aug. 1, 2012) (disagreeing and citing cases going both ways).

V. CONCLUSION

For the foregoing reasons, the Court should accept review of the decision of the Court of Appeals.

Dated this 29th day of August, 2012.

BRESKIN JOHNSON TOWNSEND, PLLC

By: 
Daniel F. Johnson, WSBA No. 27848
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Attorneys for Respondents/Cross-Appellants

CERTIFICATE OF SERVICE

I, Sylvia Rollins, certify and declare:

I am over the age of 18 years, make this Declaration based upon personal knowledge, and am competent to testify regarding the facts contained herein. On this 29th day of August 2012, I served true and correct copies of the document to which this Certificate is attached on the following in the manner listed below.

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- VIA FACSIMILE
- Via First Class Mail
- Via Electronic Filing
- Via Email**
- Via Messenger

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.


Sylvia Rollins, Legal Assistant

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 AUG 29 PM 4:45

February 2009, Lawrence Hill, Adam Wise, and Robert Miller (the employees) filed a class action lawsuit on behalf of themselves and others who worked for Garda as armored truck drivers in the state of Washington.² The complaint alleged that Garda altered employee time records in order to reduce wages, denied employees meal and rest breaks, and failed to pay employees for “off-clock” work.

The applicable collective bargaining agreements required Garda employees to grieve and arbitrate “any claim under any federal, state, or local law . . . related to the employment relationship.” In its April 2009 answer, Garda asserted that the employees’ claims “must be resolved by arbitration” under the dispute resolution provisions of these agreements. Garda, however, did not move to compel arbitration for more than a year. In the meantime, the parties engaged in discovery. Then, toward the end of 2009, Garda and the employees “delayed significant investment in prosecuting and defending the case” during the adjudication of Pellino v. Brink’s, Inc.,³ which presented similar claims regarding meal and rest breaks.

After a trial court issued a decision for the Pellino class in January 2010,

² The putative class consisted of “[a]ll people who have been employed by Garda CL Northwest or its predecessor to work on armored trucks in the State of Washington and who, at any time between February 11, 2006 and the present, performed work that was not paid, and/or were denied meal and/or rest breaks.”

³ 164 Wn. App. 668, 676, 267 P.3d 383 (2011).

Garda and the employees discussed settlement but did not reach an agreement. The employees moved for class certification in March 2010. Garda agreed to engage in mediation, but those efforts also failed. At Garda's request, the hearing on class certification was renoted three times. Then, on July 1, Garda moved to compel arbitration. The trial court heard the class certification motion on July 16 and certified the plaintiff class on July 23. At the hearing on Garda's motion to compel, the trial court ordered supplemental briefing on its authority to order class arbitration.

In its supplemental briefing, Garda asserted that the arbitrator, not the court, should decide whether the parties agreed to class arbitration and requested that the trial court order arbitration on an individual basis. The employees contended that the arbitration agreements were unenforceable because Garda waived the right to seek arbitration by engaging in litigation for 19 months before filing its motion to compel, the employees did not clearly and unmistakably waive the right to a judicial forum, and certain provisions in the arbitration agreement were unconscionable. The trial court ordered class arbitration, stating, "[T]he court, in light of its prior decision to certify a class, believes that it has the authority to compel arbitration as a class."

The parties filed cross motions for discretionary review in this court. A commissioner of this court granted discretionary review.

STANDARD OF REVIEW

We review a trial court's decision to grant a motion to compel arbitration de novo.⁴ The party opposing arbitration bears the burden of demonstrating that the agreement is unenforceable.⁵ We also review the issue of waiver de novo, applying the legal test for waiver to the facts established in the trial court.⁶

ANALYSIS

We begin with the employees' cross appeal. If, as the employees claim, the arbitration agreements are unenforceable, we need not reach the issue raised by Garda's appeal. The employees claim the arbitration agreements are unenforceable for three reasons: (1) Garda waived its contractual right to arbitration, (2) the employees did not "clearly and unmistakably" waive their rights to a judicial forum, and (3) the arbitration agreements are unconscionable. We conclude the third ground does not merit discretionary review under RAP 2.3(b)(4) and do not consider it.⁷ Because we find the remaining grounds meritless, the arbitration agreements are enforceable.

The employees first claim that Garda waived its right to arbitration by

⁴ Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 797, 225 P.3d 213 (2009).

⁵ Satomi, 167 Wn.2d at 797.

⁶ Steele v. Lundgren, 85 Wn. App. 845, 850, 935 P.2d 671 (1997).

⁷ In granting discretionary review, the commissioner permitted the parties to brief the unconscionability issue, even though it did not merit discretionary review, stating, "The panel of judges that considers the appeal on the merits will be in the best position to determine which issues it will address."

engaging in 19 months of litigation before filing the motion to compel. A party may waive its contractual right to arbitrate.⁸ In this context, “[w]aiver is the ‘voluntary and intentional relinquishment of a known right.’”⁹ A party waives the right to arbitrate by “conduct inconsistent with any other intention but to forego that right.”¹⁰ “[A] party to a lawsuit who claims the right to arbitration must take some action to enforce that right within a reasonable time.”¹¹ However, “waiver of a contractual right to arbitration is disfavored, and a party seeking to prove waiver has ‘a heavy burden of proof.’”¹² Whether waiver has occurred depends on the facts of the case; our determination is not susceptible to bright line rules.¹³

The employees allege that Garda acted inconsistently with arbitration by participating in discovery and in motions practice, taking depositions of the named plaintiffs, and moving for summary judgment. We disagree. The record demonstrates that during the relevant period, the parties were largely attempting

⁸ Ives v. Ramsden, 142 Wn. App. 369, 382-83, 174 P.3d 1231 (2008).

⁹ Ives, 142 Wn. App. at 383 (quoting Lake Wash. Sch. Dist. No. 414 v. Mobile Modules Nw., Inc., 28 Wn. App. 59, 61, 621 P.2d 791 (1980)).

¹⁰ Ives, 142 Wn. App. at 383 (quoting Shoreline Sch. Dist. No. 412 v. Shoreline Ass’n of Educ. Office Emps., 29 Wn. App. 956, 958, 631 P.2d 996 (1981)).

¹¹ Otis Hous. Ass’n v. Ha, 165 Wn.2d 582, 588, 201 P.3d 309 (2009) (quoting Lake Wash. Sch. Dist. No. 414, 28 Wn. App. at 64).

¹² Steele, 85 Wn. App. at 852 (internal quotation marks omitted) (quoting Fisher v. A.G. Becker Paribas, Inc., 791 F.2d 691, 694 (9th Cir. 1986)).

¹³ Steele, 85 Wn. App. at 853.

to resolve their dispute through means alternative to litigation. In late 2009 and early 2010, the parties put the case on hold while awaiting a decision in Pellino. From January to March, Garda and the employees explored settlement options. During that time, they filed a joint stipulation and motion to continue the trial date to December 2, stating, "Plaintiffs and Garda agree that this stipulation and motion is made without prejudice to Garda's position . . . that this matter is properly subject to arbitration under the applicable Labor Agreements." Shortly after the employees moved for class certification, Garda agreed to mediation, and the class certification hearing was postponed.¹⁴ In an e-mail discussing the preparations for mediation, the employees' lawyer indicated, "We . . . remain willing to give serious and good faith consideration to a comprehensive proposal for arbitration, should mediation fail. However, we are not prepared to make a decision on arbitration vs. litigation prior to mediation." In June, Garda substituted counsel and deposed the named plaintiffs. Finally, Garda moved to compel arbitration on July 10, arguing in the alternative that the trial court should grant it partial summary judgment. Because the delay in filing the motion to compel resulted in part from an effort to resolve this case without resorting to litigation and Garda asserted its arbitration rights in its answer, we do not find

¹⁴ The hearing was renoted two additional times—once so that counsel could go on a planned vacation and the second time so that Garda could depose the named plaintiffs.

Garda's acts to be inconsistent with arbitration.¹⁵

The cases the employees cite do not persuade us otherwise. In Steele v. Lundgren,¹⁶ we held that an employer waived his right to arbitrate a former employee's discrimination claim after the employer engaged in litigation for 10 months. The employer did not assert his right to arbitration during any of the "obvious opportunities," including in the answer, at the time the employee amended her complaint, at the time of substitution of counsel, at the time the case was assigned to an individual calendar, or at the time of filing a confirmation of joinder.¹⁷ Additionally, the employer engaged in "overly aggressive" discovery.¹⁸ On the whole, the employer's conduct demonstrated that he was "weigh[ing] his options."¹⁹ We held that under the totality of the circumstances, the employer's actions were inconsistent with arbitration and affirmed the trial court's finding that the employer waived its right to arbitrate the dispute.²⁰

In Ives v. Ramsden,²¹ Ramsden "answered the complaint, engaged in

¹⁵ See Steele, 85 Wn. App. at 854 ("Settlement is favored in public policy. Parties should be able to pursue settlement at any time without being viewed as acting inconsistently with arbitration.").

¹⁶ 85 Wn. App. 845, 847, 935 P.2d 671 (1997).

¹⁷ Steele, 85 Wn. App. at 853-55.

¹⁸ Steele, 85 Wn. App. at 854.

¹⁹ Steele, 85 Wn. App. at 855-56.

²⁰ Steele, 85 Wn. App. at 856.

²¹ 142 Wn. App 369, 384, 174 P.3d 1231 (2008).

extensive discovery, deposed witnesses, submitted and answered interrogatories, and prepared fully for trial.” More than three years later, “on the eve of trial, Ramsden argued for the first time that the arbitration agreement foreclosed trial.”²² Division Two of this court held that Ramsden’s behavior was inconsistent with arbitration.²³ In Naches Valley School District No. JT3 v. Cruzen,²⁴ Division Three of this court held that a party to a collective bargaining agreement waived arbitration by filing for summary judgment. Finally, in Otis Housing Ass’n v. Ha,²⁵ the housing association waived its right to arbitrate the issue of whether an option to purchase had been properly exercised by filing an action to compel arbitration after litigating the same issue.

These cases demonstrate that the right to arbitration must be timely invoked. In the cases above, the parties seeking arbitration first asserted that right well into the litigation. Here, Garda timely invoked its right to arbitration at the beginning of the litigation and throughout the proceedings leading up to its motion to compel. The record establishes the employees’ awareness that Garda wished to arbitrate the claims. And the delay in filing the motion to compel was due, at least in part, to the parties’ desire to engage in mediation, which is not an act inconsistent with arbitration.

²² Ives, 142 Wn. App. at 384.

²³ Ives, 142 Wn. App. at 384.

²⁴ 54 Wn. App. 388, 395-96, 775 P.2d 960 (1989).

²⁵ 165 Wn.2d 582, 588, 201 P.3d 309 (2009).

Additionally, Garda's other actions do not demonstrate waiver. While Garda engaged in discovery, took depositions, and engaged in limited motions practice, it did not demonstrate the extensive or aggressive litigation behavior found to be indicative of waiver in Steele. Garda moved for summary judgment. But unlike the teachers in Naches, Garda joined this motion with its motion to compel. Finally, the employees have not demonstrated that Garda had prepared fully for trial as the defendant in Ives had. Because Garda's conduct does not demonstrate an intent to litigate rather than arbitrate, Garda did not waive its arbitration right.

Second, the employees argue that they did not "clearly and unmistakably" waive their rights to pursue their claims in a judicial forum. In other words, they claim that arbitration is not mandatory. We disagree. A party waives its right to a judicial forum only when the requirement to arbitrate is clear and unmistakable.²⁶ This rule exists to protect the interests of the individual, which are at times in tension with the collective interests represented by a union.²⁷ Broad, general language is insufficient to effect a clear and unmistakable waiver.²⁸

²⁶ Wright v. Universal Mar. Servs. Corp., 525 U.S. 70, 79-80, 119 S. Ct. 391, 142 L. Ed. 2d 361 (1998); see also Brundridge v. Fluor Fed. Servs., Inc., 109 Wn. App. 347, 355, 35 P.3d 389 (2001).

²⁷ Brundridge, 109 Wn. App. at 355; see also Wright, 525 U.S. at 80-81.

²⁸ Wright, 525 U.S. at 80.

In this case, the grievance procedures in the collective bargaining agreements require arbitration of all grievances, which are defined as

a legitimate controversy, claim or dispute by an employee, shop steward or the Union concerning rates of pay, entitlement to compensation, benefits, hours, or working conditions set forth herein, including without limitation, claims of harassment or discrimination or hostile work environment in any form, . . . or any claim of retaliation for making any such or similar claim, or the interpretation or application of this Agreement or any agreement made supplementary thereto, or any claim under any federal, state or local law, statute or regulation or under any common law theory whether residing in contract, tort or equity or any other claim related to the employment relationship.

These arbitration agreements require employees to submit any claim under any federal, state, or local law to the grievance procedure outlined in the arbitration agreement. Clearly, this provision encompasses the employees' wage claims under chapter 49.52 RCW and chapter 49.12 RCW. The requirement to arbitrate is clear and unmistakable. The employees waived their rights to pursue their claims through litigation.

The employees disagree, arguing that this case is like Brundridge v. Fluor Federal Services, Inc.²⁹ It is not. There, the arbitration clause required the parties to arbitrate any dispute "aris[ing] out of the interpretation or application of this AGREEMENT."³⁰ Because the employees' claim for wrongful discharge

²⁹ 109 Wn. App. 347, 35 P.3d 389 (2001).

³⁰ Brundridge, 109 Wn. App. at 356 (alteration in original).

in violation of public policy did not require the application or interpretation of the collective bargaining agreement and because the arbitration clause did not explicitly incorporate the employees' statutory claims, Division Three of this court held that the arbitration clause was not sufficiently specific to waive the employees' rights to pursue their claims in court.³¹ In contrast to the arbitration clause in Brundridge, the arbitration agreements here include claims arising under state law. Because the arbitration agreements explicitly incorporate the employees' claims, Brundridge does not control.

The employees also assert that the arbitration agreements limit the types of grievances they must arbitrate. They rely on a clause requiring a meeting between the employer and the union before submitting the case to arbitration, which states, "If after such management-union meeting arbitration is still necessary because a legitimate as well as significant issue of contract application remains open, then both the Company and the Union shall prepare a written position statement for submission to the arbitrator." (Emphasis added.) According to the employees, because their claims do not involve an issue of contract interpretation, they are not subject to arbitration under the agreement. We, however, must read each contract as a whole.³² Each arbitration agreement describes a grievance and arbitration process and identifies the categories of

³¹ Brundridge, 109 Wn. App. at 356.

³² Berg v. Hudesman, 115 Wn.2d 657, 666, 801 P.2d 222 (1990).

claims subject to that process. The covered claims include those arising under state law. The underlined language from the agreements simply describes the next step in the grievance and arbitration process. To read the contracts as suggested would eliminate a remedy for certain conflicts. And even if the contracts are ambiguous as to which claims may proceed to arbitration, we must interpret any ambiguity resulting from the phrasing in favor of arbitration.³³

The employees claim that the arbitration agreement must contain an explicit statement that arbitration is the parties' exclusive remedy. We disagree. A collective bargaining agreement's grievance and arbitration procedure is presumed to be the exclusive remedy unless otherwise stated in the contract.³⁴ Because there is no statement to the contrary, we presume that arbitration is the employees' exclusive remedy.

Having determined that Garda did not waive arbitration and that the parties unequivocally agreed to arbitrate the current disputes, we turn to Garda's appeal. Garda claims that the trial court erred by compelling class arbitration, arguing that only an arbitrator may decide whether an agreement permits arbitration on a class-wide basis. We agree that the trial court erred by ordering

³³ Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).

³⁴ Minter v. Pierce Transit, 68 Wn. App. 528, 531-32, 843 P.2d 1128 (1993) (citing Republic Steel Corp. v. Maddox, 379 U.S. 650, 652-53, 657-58, 85 S. Ct. 614, 13 L. Ed. 2d 580 (1965)).

class arbitration but reach this conclusion without deciding whether the arbitrator or the court should decide the availability of class arbitration.

Stolt-Nielsen S.A. v. AnimalFeeds International Corp.³⁵ controls the outcome of this case. Stolt-Nielsen, a shipping company, entered into a contract for maritime shipping services, known as a charter party, with AnimalFeeds, a supplier of raw ingredients for animal feed.³⁶ The charter party contained an arbitration clause.³⁷ After a criminal investigation revealed that Stolt-Nielsen and other shipping companies were engaged in an illegal price-fixing conspiracy, AnimalFeeds and other charterers brought similar suits against Stolt-Nielsen.³⁸ Their claims were determined to be subject to mandatory arbitration, and AnimalFeeds served Stolt-Nielsen with a demand for class arbitration.³⁹ The parties stipulated that the arbitration clause was silent on the issue of class arbitration.⁴⁰ The arbitrators, however, concluded that the arbitration clause allowed for class arbitration because the clause did not “show ‘an inten[t] to preclude class arbitration.’”⁴¹ The district court vacated the award, and the Court of Appeals reversed, finding “the arbitrators’ decision was not in manifest

³⁵ ___ U.S. ___, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010).

³⁶ Stolt-Nielsen, 130 S. Ct. at 1764. A charter party is a standard contract in the maritime trade. 130 S. Ct. at 1764.

³⁷ Stolt-Nielsen, 130 S. Ct. at 1765.

³⁸ Stolt-Nielsen, 130 S. Ct. at 1765.

³⁹ Stolt-Nielsen, 130 S. Ct. at 1765.

⁴⁰ Stolt-Nielsen, 130 S. Ct. at 1766.

⁴¹ Stolt-Nielsen, 130 S. Ct. at 1766 (alteration in original).

disregard of federal maritime law."⁴²

The United States Supreme Court granted certiorari "to decide whether imposing class arbitration on parties whose arbitration clauses are 'silent' on that issue is consistent with the Federal Arbitration Act (FAA)."⁴³ In answering this question, the Court noted that the arbitration panel had failed to determine what the parties' agreement permitted and instead "impose[d] its own view of sound policy regarding class arbitration."⁴⁴ It decided that the parties' stipulation about their agreement's silence on class arbitration "left no room for an inquiry regarding the parties' intent."⁴⁵

After observing that arbitration "is a matter of consent, not coercion,"⁴⁶ the Court stated,

[C]ourts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties.

From these principles, it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.⁴⁷

⁴² Stolt-Nielsen, 130 S. Ct. at 1766.

⁴³ Stolt-Nielsen, 130 S. Ct. at 1764.

⁴⁴ Stolt-Nielsen, 130 S. Ct. at 1767-68.

⁴⁵ Stolt-Nielsen, 130 S. Ct. at 1770.

⁴⁶ Stolt-Nielsen, 130 S. Ct. at 1773 (quoting Volt Info. Scis., Inc. v. Bd. of Trs. Of Leland Stanford Junior Univ., 489 U.S. 468, 479, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)).

⁴⁷ Stolt-Nielsen, 130 S. Ct. at 1774-75 (citation omitted).

Because the parties had not agreed to arbitrate on a class-wide basis, they could not be compelled to submit their dispute to class arbitration.⁴⁸

The Court noted that § 10(b) of the FAA required it either to “direct a rehearing by the arbitrators” or decide the question originally referred to the panel.⁴⁹ Because the Court concluded that the facts before it permitted only one outcome, it decided the outcome.⁵⁰

Turning to the arbitration agreements in this case, the contracts here, as in Stolt-Nielsen, are silent on the issue of class arbitration. When it compelled the parties to arbitrate on a class-wide basis, the trial court did not ascertain the parties’ intent from the language of the agreement. Because no contractual basis existed allowing the court to order class arbitration, the trial court erred by doing so.

As in Stolt-Nielsen, only one possible outcome exists under the facts of this case; therefore, we do not remand to either the court or the arbitrator for determination of whether the arbitration agreement allows class arbitration. As a matter of law, the trial court could not compel class arbitration. We remand for individual arbitration.

CONCLUSION

⁴⁸ Stolt-Nielsen, 130 S. Ct. at 1775.

⁴⁹ Stolt-Nielsen, 130 S. Ct. at 1770.

⁵⁰ Stolt-Nielsen, 130 S. Ct. at 1770

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We reverse the trial court's order compelling class arbitration and remand for individual arbitration.

WE CONCUR:

Dwyer, J.

Leach, C. J.

Becker, J.