



United States Government

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, DC 20570

September 13, 2016

Mark Langer, Clerk
U.S. Court of Appeals
for the District of Columbia Circuit
333 Constitution Ave. NW
Washington, DC 20001

Re: *Price-Simms, Inc. v. NLRB*,
Case Nos. 15-1457, 16-1010

Dear Mr. Langer:

Pursuant to Rule 28(j), we submit this letter regarding *Morris v. Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), *petition for cert. pending*, No. 16-300 (filed Sept. 8, 2016), and *Patterson v. Raymours Furniture Co.*, No. 15-2820-CV, 2016 WL 4598542 (2d Cir. Sep. 7, 2016). Both addressed the validity of agreements requiring individual arbitration of work-related claims.

The court in *Morris* held, like the Board here, that such agreements are unenforceable. “[E]mployees have the right to pursue work-related legal claims together...” and such concerted activity “is the essential, substantive right established by the NLRA.” 2016 WL 4433080, at *2. Because an individual-arbitration agreement interferes with that right, *id.* at *5, it violates Section 8(a)(1) of the NLRA. (NLRB Br.15-23.) Further, the NLRA’s invalidation of the agreement can, and must, be harmonized with the FAA. *Morris*, 2016 WL 4433080, at *7-10. The FAA’s saving clause allows general contract defenses, and illegality under the NLRA “has nothing to do with arbitration as a forum,” *id.* at *6, and does not “specially ‘disfavor’ arbitration,” *id.* at *10. (NLRB Br.35-37.)

Morris rejected the employer’s analogy of illegality under the NLRA to the rule rejected in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). 2016 WL 4433080, at *6-7, 9-10. (NLRB Br.34-35.) Finding no conflict between the NLRA and FAA, the court dismissed the dissent’s argument that a “contrary congressional command” is required to find an arbitration agreement unenforceable. *Id.* at *8. (NLRB Br.28-29 & n.9.)

The court in *Patterson* held it was bound by *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013), which rejected the Board’s rationale. *Patterson*, 2016 WL 4598542, at *2-3. But it observed that “if [it] were writing on a clean slate, [it] might well be persuaded, for the reasons forcefully stated in ... *Lewis[v. Epic Sys. Corp.]*, 823 F.3d 1147 (7th Cir. 2016), *petition for cert. pending*, No. 16-285 (filed Sep. 2, 2016)], and *Morris*[, *supra*], to join the Seventh and Ninth Circuits and hold that the [] waiver of collective action is unenforceable.” *Id.* at *3.

Very truly yours,

Linda Dreeben
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cc: all counsel (via CM/ECF)