

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

April 20, 2017

Lyle W. Cayce
Clerk

No. 16-60367

ACUITY SPECIALTY PRODUCTS, INCORPORATED, doing business as
Zep, Incorporated,

Petitioner Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent Cross-Petitioner

Petition for Review and Cross-Application
for Enforcement of an Order of the
National Labor Relations Board
NLRB No. 32-CA-75221
NLRB No. 32-CA-102838

Before JONES, CLEMENT, and HIGGINSON, Circuit Judges.

PER CURIAM:*

A panel of the National Labor Relations Board (Board) declared Acuity Specialty Products, Inc., d/b/a Zep, Inc.'s (Zep) alternative dispute resolution policy unlawful because it "requires employees to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial," and could be reasonably construed by employees

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

No. 16-60367

as barring or restricting their right to file unfair labor practice charges with the Board. Zep petitioned this court for review of the Board's order. The Board filed a cross-application for enforcement of its order.

The Board admits that its order directly contravenes our decisions in *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015).¹ Those decisions hold that “an employer does not engage in unfair labor practices by maintaining and enforcing an arbitration agreement prohibiting employee class or collective actions and requiring employment-related claims to be resolved through individual arbitration.” *Murphy Oil*, 808 F.3d at 1016 (citing *D.R. Horton*, 737 F.3d at 362). Notwithstanding the Board's request that we reevaluate those decisions, this court is bound by its prior published opinions. *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) (“It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel's decision, absent an intervening change in law, such as by a statutory amendment, or the Supreme Court, or our *en banc* court.”).

Zep also challenges the Board's conclusion that the policy violates the National Labor Relations Act because “employees reasonably would believe that it bars or restricts their right to file unfair labor practice charges with the Board.” The agreement states that certain “covered claims” are subject to the class-waiver provision, and provides a comprehensive list of what qualifies as a “covered claim.” It explicitly excludes “matters within the jurisdiction of the National Labor Relations Board” from coverage under the agreement. Further bolstering the clarity of the exclusion is its location below a section heading

¹ This issue is currently before the Supreme Court, which recently consolidated and granted certiorari in *Murphy Oil* and two other cases. See *N.L.R.B. v. Murphy Oil USA, Inc.*, 137 S. Ct. 809 (2017); *Ernst & Young, LLP v. Morris*, 137 S. Ct. 809 (2017); *Epic Sys. Corp. v. Lewis*, 137 S. Ct. 809 (2017).

No. 16-60367

titled, "WHAT IS NOT A COVERED CLAIM?" If there be any doubt, Zep asserts, and we agree, that this provision does not bar the bringing of unfair labor practice claims.

Accordingly, Zep's petition for review of the Board's order is **GRANTED** and the Board's cross-application for enforcement of its order is **DENIED**.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

April 20, 2017

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 16-60367 Acuity Specialty Products, Inc v. NLRB
USDC No. 32-CA-75221
USDC No. 32-CA-102838

Enclosed is a copy of the court's decision. The court has entered judgment under FED R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED R. APP. P. 39 through 41, and 5TH Cir. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH Cir. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

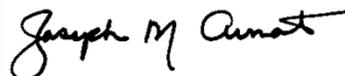
Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that the NLRB pay to Acuity Specialty Products the costs on appeal.

Sincerely,

LYLE W. CAYCE, Clerk

A handwritten signature in black ink that reads "Joseph M. Armato". The signature is written in a cursive style with a prominent initial "J".

By: _____
Joseph M. Armato, Deputy Clerk

Enclosure(s)

Ms. Linda Dreeben
Mr. Thomas S. Giotto
Mr. Kelly Haze Kolb
Mr. Gregoire Sauter
Mr. David J. Strauss
Mr. George P. Velastegui
Ms. Kira Dellinger Vol