

[CASE NO. 16-1385]

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IN THE

**United States Court of Appeals  
for the Sixth Circuit**

**NATIONAL LABOR RELATIONS BOARD,**  
*Petitioner,*

v.

**ALTERNATIVE ENTERTAINMENT, INC.,**  
*Respondent.*

On Appeal from the National Labor Relations Board

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**APPELLANTS' MOTION TO STAY THE MANDATE  
PENDING THE FILING AND DISPOSITION OF A PETITION  
FOR A WRIT OF CERTIORARI**

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## **MOTION**

Respondent-Appellant Alternative Entertainment, Inc. (“AEI”) respectfully requests that this Court stay its mandate pending the filing and disposition of a petition for a writ of certiorari to the Supreme Court of the United States. Such stays are warranted when the petition “would present a substantial question” and “there is good cause for a stay.” Fed. R. App. P. 41(d)(2)(A). Those criteria are satisfied here.<sup>1</sup>

### **I. FACTS**

This Court issued its published opinion in this matter on May 26, 2017. Taking a side in a split among the circuits, the panel held, in a split decision of its own, that “Mandatory arbitration provisions that permit only individual arbitration of employment-related claims are illegal pursuant to the NLRA and unenforceable pursuant to the FAA’s saving clause.” Slip at 13. The majority of the panel concluded:

Therefore, we join the Seventh and Ninth Circuits in holding that an arbitration provision requiring employees covered by the NLRA individually to arbitrate all employment-related claims is not enforceable. Such a provision violates the NLRA’s guarantee of the right to collective action and, because it violates the NLRA, falls within the FAA’s saving clause. Slip at 17-19.

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<sup>1</sup> This Court’s opinion encompasses two issues. First, whether AEI violated the NLRA by barring employees from pursuing class-action litigation or collective arbitration of work-related claims. Second, whether AEI violated the NLRA when it discharged James DeCommer. AEI is only requested a stay in the Court’s mandate regarding the first issue.

Judge Sutton provided a very substantial dissent.

AEI intends to timely file a petition for writ of certiorari. AEI will assert in its petition that certiorari is appropriate as to the following issue: Whether an employment agreement may permissibly include a provision barring class action actions, as several circuits have squarely held, or whether such a provision violates Section 7 of the NLRB, 29 U.S.C. § 157, and is unenforceable under the FAA's savings clause, as the Sixth Circuit held here.

Counsel for AEI requested the NLRB's position on this motion, but has not received a response.

## **II. ARGUMENT**

### **A. Standard of Review**

When a party asks this Court to stay its mandate pending the filing of a petition of a writ of certiorari, that party must show that the petition will present a substantial question and that there is good cause for a stay. Fed. R. App. P. 41(d)(2)(A). These criteria are established here.

#### **1. AEI Presents a Substantial Question**

The issue decided by this Court—that a class action waiver contained in a mandatory employment agreement violates the NLRA and is unenforceable—is of immense importance to employers and employees alike, across the nation. This point is amply demonstrated by the widespread litigation on this issue throughout

the country, as well as its obvious practical consequences. AEI's petition would, at the very least, present a "substantial question" for certiorari. As this Court's opinion recognized, its ruling created a conflict amongst the circuits in both result and rationale. *See* Slip at pp. 13-17 (Doc. 47-2).

The circuit split on this question, moreover, is of the type that calls for prompt resolution by the Supreme Court. Until it is resolved, the identical contractual provision would be lawful and enforceable within some circuits, but not others. The resulting uncertainty would be intolerable, particularly for multi-state employers who utilize substantially uniform employment agreements in each of their business locations in different geographic locations throughout the country.

There is, at the very least, a reasonable possibility that the Supreme Court would reverse this Court's decision. To date, including the decision in this case, six circuits have ruled on this issue. The Sixth Circuit's ruling in AEI conflicts with three other circuits that have squarely ruled on this issue. With this decision, the Sixth Circuit joins the Seventh and Ninth circuits in holding that such agreements violate the NLRA. *See Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7<sup>th</sup> Cir. 2016); *Morris v. Ernst & Young, LLP* 834 F.3d 975 (9<sup>th</sup> Cir. 2016). The three Circuit Courts that have held just the opposite are the Second, Fifth and Eighth. *See Murphy Oil, U.S.A., Inc. v. NLRB*, 808 F.3d 1013 (5<sup>th</sup> Cir. 2015) *cert. granted by NLRB v. Murphy Oil, U.S.A.*, 137 S. Ct. 809; 196 L.Ed. 2d 595 (2017).;

*Patterson v. Raymours Furniture Co.*, 659 Fed. Appx. 40 (2<sup>nd</sup> Cir. 2016); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8<sup>th</sup> Cir. 2013). Thus, a deep divide exists amongst the Circuit Courts. The fact that reasonable minds can differ on this very issue is further evidenced by the dissent in this case. *See* Slip at 24-34 (Doc. 47-2).

And, of course, the most compelling evidence the certiorari would likely be granted is that the Supreme Court has already done so and this very issue is pending before the court. *See NLRB v. Murphy Oil, U.S.A.*, 137 S. Ct. 809; 196 L.Ed. 2d 595 (2017).

## **2. There is Good Cause for the Stay**

The order which the NLRB seeks to enforce requires AEI to rescind its arbitration program. Within a few months the Supreme Court might very well rule that class action waivers are lawful. During the interim, a class action could be brought and, if that mandate were not stayed, AEI would be prevented from asserting the class action waivers. Even if there is no litigation commenced in the interim, AEI would be required to go through a significant administrative task of rescinding its current agreement and then re-establishing them if the Supreme Court rules that class action waivers are lawful.

## **III. CONCLUSION**

For the reasons expressed above, this Court should stay issuance of its mandate to the extent that it would require AEI to rescind its arbitration

agreements to enable AEI to file a petition for writ of certiorari, and, upon the filing of a petition, automatically continue the stay pending its final disposition by the United States Supreme Court.

JACKSON LEWIS P.C.

Dated: June 15, 2017

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