



United States Government

**NATIONAL LABOR RELATIONS BOARD**

**OFFICE OF THE GENERAL COUNSEL**

Washington, D.C. 20570

June 13, 2018

David J. Smith, Clerk of Court  
U.S. Court of Appeals  
for the Eleventh Circuit  
56 Forsyth St. N.W.  
Atlanta, GA 30303

Re: *Cowabunga, Inc. v. NLRB*,  
Nos. 16-10932(L), 16-11391 XAP

Dear Mr. Smith:

The National Labor Relations Board submits this brief pursuant to the Court's May 23 Order directing the parties to file letter briefs regarding the effect on this case of the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, No. 16-285, 2018 WL 2292444 (U.S. May 21, 2018). The Board also addresses the effect on this case of the Board's recent decision in *The Boeing Company*, 365 NLRB No. 154, 2017 WL 6403495 at \*2 (Dec. 14, 2017).<sup>1</sup>

In its Decision and Order under review, the Board found that Cowabunga, Inc. violated the National Labor Relations Act by maintaining an agreement barring employees from concertedly pursuing work-related claims in any forum, arbitral or judicial. 363 NLRB No. 133, 2016 WL 787106, at \*5 (Feb. 26, 2016). In doing so, the Board applied the rule set forth in *Murphy Oil, USA, Inc.*, 361 NLRB 774 (2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *affirmed*, No. 16-307, 2018 WL 2292444 (U.S. May 21, 2018). The Board separately found, under its analytical framework for evaluating the lawfulness of facially neutral work rules, laid out in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), that the Company violated the NLRA by maintaining an agreement that employees would "reasonably

---

<sup>1</sup> On June 1, 2018, the Board filed an unopposed motion asking the Court, in light of *Epic* to grant the Company's petition for review in part, deny the Board's cross-application for enforcement in part, remand the remainder of the case and to vacate the Court's May 23 briefing schedule.

construe” as restricting their right to file unfair-labor-practice charges with the Board. *Cowabunga*, 2016 WL 787106, at \*5.

The Company filed a petition for this Court to review the Board’s Order, and the Board filed a cross-application for enforcement of that Order. The parties briefed the case and, on January 24, 2017, presented oral argument.

As described below, the Board asks the Court, in light of *Epic Systems*, to summarily grant the Company’s petition for review, and deny the Board’s cross-application for enforcement, of that portion of the Board’s Order finding that the Company unlawfully maintained an agreement requiring that employees individually arbitrate work-related disputes. Moreover, in light of *Boeing*, the Board asks the Court to sever and remand the remainder of the Board’s Order, which found that the Company unlawfully maintained an agreement restricting employees’ access to the Board’s processes.

#### Maintenance of an Individual-Arbitration Agreement

On May 21, 2018, the Supreme Court issued its decision in *Epic Systems*, together with *Murphy Oil* and *Ernst & Young LLP v. Morris*, No. 16-300. 2018 WL 2292444. The Court held that employers may lawfully maintain arbitration agreements that bar employees from concertedly pursuing work-related legal claims. The Board agrees with the Company’s conclusion (Letter Br. 1) that under *Epic Systems* the Board’s finding that the Company unlawfully maintained an individual-arbitration agreement cannot be sustained. Accordingly, the Board requests that the Court summarily grant the Company’s petition for review and deny the Board’s cross-application for enforcement, of the relevant portion of its Order.

#### Maintenance of an Agreement Restricting Employees’ Access to the Board

The Supreme Court’s decision in *Epic Systems* does not address whether an arbitration agreement requiring that employees individually arbitrate employment-related disputes interferes with employees’ right to file Board charges in violation of the NLRA. However, in *Boeing*, the Board “overrule[d] the *Lutheran Heritage* ‘reasonably construe’ standard,” under which this violation was analyzed, and announced a new test to replace it. 2017 WL 6403495 at \*2. *Boeing*’s rejection of the “reasonably construe” standard eliminates the Board’s rationale for its finding that the Company’s agreement restricts employees’ right to file unfair-labor-practice charges with the Board. The Company agrees (Letter Br. 2) that this part of the Board’s Order needs to be remanded so that the Board may determine in the first instance whether the

agreement violates the NLRA under *Boeing's* framework. Accordingly, the Board respectfully asks this Court to remand that issue to the Board.<sup>2</sup>

Very truly yours,

s/ Linda Dreeben

Linda Dreeben

National Labor Relations Board

(202) 273-2989

---

<sup>2</sup> The Board is seeking remand of other violations predicated upon *Lutheran Heritage*, including in *Everglades College, Inc. v. NLRB*, 11th Cir. No. 16-10341 (letter brief filed June 6, 2018), which involved the same question of whether an employer unlawfully maintained an agreement that employees would reasonably construe as restricting access to Board processes.

### **CERTIFICATE OF COMPLIANCE**

Pursuant to the Court's May 23, 2018 Order, the Board certifies that its letter brief does not exceed 15 pages.

/s/ Linda Dreeben

Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1015 Half Street, SE  
Washington, DC 20570

### **CERTIFICATE OF INTERESTED PERSONS**

Pursuant to Federal Rule of Appellate Procedure 26 and Local Rule 26.1-2(b), the National Labor Relations Board, by its Deputy Associate General Counsel, hereby certifies that the following persons and entities have an interest in the outcome of this case:

1. Cowabunga, Inc., Petitioner
2. Dreeben, Linda J., Deputy Associate General Counsel for NLRB
3. Fischer & Phillips, LLP, Counsel for Petitioner
4. Harrell, Jr., Claude, Regional Director, Region 10, for the NLRB
5. Heaney, Elizabeth, Attorney for NLRB
6. Hines, Chadwick, Charging Party
7. Kyle, John, Deputy General Counsel for NLRB
8. Meyers, Kerstin I., Attorney for NLRB

9. National Labor Relations Board, Respondent
10. Pearce, Mark Gaston, Member of the NLRB
11. Potashnick, Mark A., Attorney for Charging Party
12. Robb, Peter, General Counsel for the NLRB
13. Sheehy, Barbara, Attorney for NLRB
14. Walters, James, Attorney for Petitioner
15. Weinhaus & Potashnick, Counsel for Charging Party

/s/ Linda Dreeben

Linda Dreeben  
Deputy Associate General Counsel  
National Labor Relations Board  
1015 Half Street, SE  
Washington, D.C. 20570  
(202) 273-2960

**CERTIFICATE OF SERVICE**

I certify that on June 13, 2018, the foregoing letter brief was filed with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system, and that all counsel are registered CM/ECF users.

s/ Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

National Labor Relations Board

1015 Half Street, SE

Washington, DC 20570