

CASE NO. 16-70637  
[CONSOLIDATED WITH CASE NOS. 16-70694 AND 71955]

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

AUTOMOTIVE MACHINISTS LODGE NO. 1173, INTERNATIONAL  
ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,  
Respondent/Cross-Petitioner.

FAA CONCORD H., INC., d/b/a CONCORD HONDA,  
Petitioner/Cross-Respondent.

v.

NATIONAL LABOR RELATIONS BOARD,  
Respondent/Cross-Petitioner.

ON APPEAL FROM NATIONAL LABOR RELATIONS BOARD CASE NOS.  
32-CA-066979, 32-CA-070343 AND 32-CA-072231  
363 NLRB NO. 136

**PETITIONER/CROSS-RESPONDENT AUTOMOTIVE MACHINISTS  
LODGE NO. 1173, INTERNATIONAL ASSOCIATION OF MACHINISTS  
AND AEROSPACE WORKERS' RESPONSE TO MOTION OF THE  
NATIONAL LABOR RELATIONS BOARD TO REMOVE CASE FROM  
ABEYANCE**

David A. Rosenfeld, Bar No. 058163  
Caren P. Sencer, No. 233488  
WEINBERG, ROGER & ROSENFELD  
A Professional Corporation  
1001 Marina Village Parkway, Suite 200  
Alameda, California 94501  
Telephone: 510) 337-1001

Counsel for Petitioner/Cross-Respondent, AUTOMOTIVE MACHINISTS  
LODGE NO. 1173, INTERNATIONAL ASSOCIATION OF MACHINISTS AND  
AEROSPACE WORKERS

The Petitioner opposes the Motion of the National Labor Relations Board only in part.

1. The Petitioner submits that the portion of this case dealing with the mandatory arbitration procedure should be remanded to the Board for reconsideration in light of the decision of the Supreme Court in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), and the companion cases. The portion of the case dealing with other issues should be severed and remain with this Court.

2. *Epic Systems* is limited to the question of whether an arbitration agreement may prohibit statutory collective actions or class actions under the Federal Rules of Civil Procedure or the Fair Labor Standards Act, 29 U.S.C. § 216(b); it addresses no other issues. In each of the three cases before the Court, there were Fair Labor Standards Act cases, brought as collective actions within the meaning of the Fair Labor Standards Act, which affected commerce. It addresses the issue of mandatory arbitration in that context.

No other issues were addressed.

The Court should not grant the Motion to grant the company's Petition for Review. Nor should it deny the Union's Petition for Review. Rather, this Court should simply remand this portion of the case to the Board for reconsideration in light of *Epic Systems* and to consider the Union's alternative arguments why the maintenance of the arbitration procedure is unlawful. Those additional arguments were detailed in the Union's opening brief. As stated, the issues are:

### III. THE STATEMENT OF THE ISSUES

1. In the absence of proof that the employment transactions affect commerce, can the Federal Arbitration Act be constitutionally or statutorily applied?
2. In the absence of proof that there is a "contract evidencing a transaction involving commerce," can the FAA be applied?
3. In the absence of proof that there is an employment controversy that affects commerce, can the

Federal Arbitration Act be constitutionally or statutorily applied?

4. Does the MAA interfere with the right of employees to enforce provisions of federal law concerning the workplace so that the FAA cannot be applied to preclude invoking those procedures, remedies and statutes?
5. Where federal law holds that certain California representative actions are not preempted by the FAA, can the MAA prohibit employees from invoking those procedures on a representative basis?
6. Where the arbitration procedure prohibits employees from utilizing striking, boycotting and other concerted activities to resolve employment disputes, does the FAA preempt the application of the National Labor Relations Act, which otherwise protects such activity?
7. Where the employees are required by extant law to invoke the arbitration procedure and the employer insists on prohibiting any class action in those arbitration proceedings, has the employer enforced the class action waiver even though the individuals did not seek an order of court to compel arbitration on a class basis?
8. Where, over the objection of the employees, the case proceeds on a consolidated basis, does this consolidation interfere with their Section 7 right to “refrain” from protected, concerted activity?
9. Where the Board’s Order addresses only “class or collective actions” under the terms of the existing arbitration agreement and fails to address other forms of group actions, such as representative actions, qui tam actions and other forms of group action, is the remedy inadequate?
10. Where the Board’s Order prospectively addresses only “joint, class or collective actions” and fails to address other forms of group actions, such as representative actions, qui tam actions and other forms of group action, is the remedy inadequate?
11. Is the Board’s remedy adequate in that it does not toll the statute of limitations on any group claims?

*See* DktEntry 11 at 2-3 .

If the Court were to vacate the Board's Decision, the Board will likely take that as an order that that portion of the case is over. The Court must clearly remand with direction to reconsider. The Court should furthermore direct that the Board do so promptly.

3. This position suggesting remand does not include the portion of the Board's Order regarding the bonus plan and other issues that are before the Court that are unaffected by *Epic Systems*. As to those issues, the Petitioner agrees with the Board's suggestion of severance and the establishment of a briefing schedule. Petitioner takes no position on the merits of those remaining issues but agrees they should be severed.

Dated: July 5, 2018

WEINBERG, ROGER & ROSENFELD  
A Professional Corporation

By: /s/ DAVID A. ROSENFELD  
David A. Rosenfeld  
Caren P. Sencer  
Attorneys for Petitioner and Cross-  
Respondent, AUTOMOTIVE  
MACHINISTS LODGE NO. 1173,  
INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE  
WORKERS

140536\975534

**CERTIFICATE OF SERVICE**

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

I hereby certify that on July 5, 2018, I electronically filed the foregoing PETITIONER/CROSS-RESPONDENT AUTOMOTIVE MACHINISTS LODGE NO. 1173, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS' RESPONSE TO MOTION OF THE NATIONAL LABOR RELATIONS BOARD TO REMOVE CASE FROM ABEYANCE with the United States Court of Appeal for the Ninth Circuit, by using the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Notice of Electronic Filing by CM/ECF system.

I certify under penalty of perjury that the above is true and correct.  
Executed at Alameda, California, on July 5, 2018.

/s/ Katrina Shaw  
\_\_\_\_\_  
Katrina Shaw