

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 16**

MASTEC, INC.

and

JOSE LUIS SANCHEZ CORDERO, an Individual

Case No. 12-CA-153478

MASTEC SERVICES CO.

and

MOISHE BEN LEVISON, an Individual

Case No. 12-CA-154795

**EXCEPTIONS OF RESPONDENTS, MASTEC, INC.
AND MASTEC SERVICES COMPANY, INC.**

Pursuant to 29 C.F.R. § 102.46, and the July 11, 2018 Order Setting Time to File Exceptions and Brief in Support, Respondents, MasTec, Inc. and MasTec Services Company, Inc. (collectively, “Respondents”), files these exceptions to the August 31, 2016, Decision by Administrative Law Judge Michael A. Rosas (the “Decision”).

I. INTRODUCTION

The Decision found that Respondents violated Section 8(a)(1) of the National Labor Relations Act (the “NLRA”), 28 USC 158(a)(1), by maintaining and enforcing an arbitration agreement that required employees, as a condition of employment, to waive their rights to pursue work-related claims on class basis. In doing so, the Administrative Law Judge applied the rule set forth in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) *enf. denied in relevant part* 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), *enf. denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *affirmed*, No. 16-307 (May 21, 2018). The Administrative

Law Judge did not rely on any other legal theory in recommending finding that Respondents committed maintenance and enforcement violations.

On May 21, 2018, the U.S. Supreme Court issued its decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018)¹, and held that employers may lawfully maintain and enforce arbitration agreements that require claims to be brought on an individual, as opposed to class or collective, basis. Under *Epic Systems Corp.*, the Decision’s finding that Respondents unlawfully maintained and enforced an arbitration agreement is not enforceable and contrary to controlling law. *See Franks v. N.L.R.B.*, No. 16-10644, slip op. at 10-11 (11th Cir. Jul. 31, 2018) (Eleventh Circuit summarily reversed the Board’s decision that Samsung’s arbitration agreement violated the NLRA in light of the recent *Epic Systems Corp.* decision, which the Board conceded meant Samsung’s arbitration agreements with class action waivers are lawful and the Board’s finding that the employer unlawfully maintained an individual arbitration agreement could not be sustained.); *see also Northrop Grumman Systems Corp.*, 366 NLRB No. 147, *1 (2018) (finding that “[i]n light of the Supreme Court’s ruling in *Epic Systems*, which overrules the Board’s holding in *Murphy Oil*, we conclude that the complaint [which alleged that Respondent violated the NLRA by maintaining a dispute resolution program requiring employees to waive their right to resolve employment disputes by collective or class action] must be dismissed.”). This recent U.S. Supreme Court decision should be applied retroactively to this case, and the Board should therefore overrule the Administrative Law Judge’s Decision and issue an order dismissing the Consolidated Complaints. *Raytheon Network Centric Systems and United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers Int’l Union*,

¹ Decided together with No. 16-300, *Ernst & Young LLP et al. v. Morris et al.*, on certiorari from the United States Court of Appeals for the Ninth Circuit, and No. 16-307, *National Labor Relations Board v. Murphy Oil USA, Inc., et al.*, on certiorari from the United States Court of Appeals for the Fifth Circuit.

AFL-CIO, 365 NLRB No. 161 (“The Board’s usual practice is to apply new policies and standards retroactively ‘to all pending cases in whatever stage.’” (citations omitted)).

II. EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE’S FINDINGS OF FACT, CONCLUSIONS OF LAW, REMEDY AND ORDER.

The entirety of the Decision exclusively rests on then-existing Board precedent that has since been overturned by the U.S. Supreme Court. There being no other legal theory to support the Decision, the overturning of the *D.R. Horton/Murphy Oil* rationale requires that the Decision be overruled and the Complaints dismissed. To the extent a more detailed reasoning is required, Respondents’ exceptions are as follows:

1. Findings of Fact, Section II Alleged Unfair Labor Practices, Subsection (A) Dispute Resolution Policy (page 2, lines 34-40) – The Administrative Law Judge erred in finding that “[t]he DRP provision at issue here expressly prohibits an employee’s right to join a class or collective action.” The stipulated record evidence shows that Respondents’ DRP is voluntary, contains an opt-out procedure, and is not a mandatory condition of employment. *See* JX 2 & 3. The stipulated record evidence further shows that by signing the DRP, newly hired employees acknowledged that they have reviewed and will abide by the DRP if they do not voluntarily opt-out of the DRP within 30 days of receiving the DRP. *See* Joint Motion and Stipulated Record, paragraph 7.

2. Legal Analysis, Section I. The Board Precedent in *D.R. Horton, Inc.* Governs the DRP (page 5, lines 37-40) – The Administrative Law Judge erred in finding that “[t]he Supreme Court has not overturned Board precedent in *D.R. Horton* and *Murphy Oil* holding that class action waivers in arbitration agreements restricting the right of employees to engage in concerted activity are unlawful. Therefore, *D.R. Horton* remains controlling Board law.” In overruling the NLRB’s decision in *Murphy Oil USA, Inc.*, the Supreme Court in *Epic Systems Corp.*, 138 S. Ct.

at 1619, now says otherwise—the FAA requires courts to enforce arbitration agreements, including terms providing for individualized proceedings and waiving the right to bring a class action lawsuit, and the NLRA has no competing or conflicting command making such a contract provision illegal. *Epic Systems Corp.* is now the “law of the land,” and its holdings bind the Board. *Waco, Inc.*, 273 NLRB 746, 749, fn. 14 (1984); *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616-17 (1963).

The Board has already acknowledged the Supreme Court’s reversal of extant Board precedent in *D.R. Horton* and *Murphy Oil*. On the same day as the decision in *Epic Systems Corp.*, the Board released a press statement acknowledging its respect for the Supreme Court’s *Epic Systems Corp.* decision, which the Board conceded “clearly establishes that arbitration agreements providing for individualized proceedings, and waiving the right to participate in class or collective actions, are lawful and enforceable.” SUPREME COURT ISSUES DECISION IN NLRB V. MURPHY OIL USA, <https://www.nlr.gov/news-outreach/news-story/supreme-court-issues-decision-nlr-v-murphy-oil-usa> (last visited July 31, 2018). The Board’s press release goes on to state that “[t]he Board is committed to expeditiously resolving [the 55 cases pending before the Board with allegations that employers violated the NLRA by maintaining or enforcing individual arbitration agreements with class action waivers] in accordance with the Supreme Court’s decision.”² The Supreme Court’s decision in *Epic Systems Corp.*, which binds the Board, now governs the DRP and Respondents’ actions in maintaining and enforcing the DRP and expressly held that class action waivers are lawful, enforceable, and do not violate the NLRA.

3. Legal Analysis, Section II. *D.R. Horton, Inc.* Was Not Wrongly Decided (page 5, lines 42-45 and page 6, lines 1-7) – The Administrative Law Judge erred in finding that *D.R.*

² Recently, and as mentioned above, the Board adhered to this commitment and the Supreme Court’s holding in *Epic Systems Corp.* by reversing the Administrative Law Judge’s order and dismissing the complaint in *Northrop Grumman Systems Corp.*, 366 NLRB No. 147 (2018).

Horton, Inc. was not wrongly decided and “its holding did not conflict with the [Federal Arbitration Act (the “FAA”)] because the intent of the FAA was to leave substantive rights undisturbed and that the right to join or pursue collective relief was a substantive Section 7 right.” Again, nowhere in the Supreme Court’s decision in *Epic Systems Corp.*, which is acknowledged and has already been applied by the Board, does the Court find rights under Section 7 of the NLRA substantive. *See, generally, Epic Systems Corp.*, 138 S. Ct. at 1624-26. Rather, the Court points out that “[t]he notion that Section 7 confers a right to class or collective actions seems pretty unlikely when you recall that procedures like that were hardly known when the NLRA was adopted in 1935.” *Id.* at 1624. Section 7 of the NLRA “does not mention class . . . procedures,” it “does not express approval or disapproval of arbitration,” and it “does not even hint at a wish to displace the [FAA] – let alone accomplish that much clearly and manifestly, as [Supreme Court] precedents demand” *Id.* Thus, arbitration agreements waiving the right to participate in class actions, like the DRP, lawfully waive procedural, not substantive rights, and Section 7 of the NLRA does not otherwise protect an employee’s procedural right to bring, join, or participate in class actions or collective relief. *See id.*

4. Legal Analysis, Section III. Respondents’ Voluntary DRP Restricts Section 7 Rights and Violates the Act (pages 6, lines 16-30 and 45-47, and page 7, lines 1-7) and Section IV. Employees’ Signing the DRP is not the Same as Refraining from Concerted Activity (page 8, lines 7-8) – The Administrative Law Judge erred in relying upon *On Assignment Staffing Services*, 362 NLRB No. 189 (2015), *Chromalloy Gas Turbine Corp.*, 331 NLRB 858 (2000), *enf.* 262 F.3d 184 (2nd Cir. 2001), and *Brunswick Corp.*, 282 NLRB 794 (1987) for the propositions that “the opt-out procedure interferes with Section 7 rights by requiring employees to take affirmative steps and burdens the exercise of Section 7 rights. A policy requiring

employees to obtain their employer’s permission to engage in protected concerted activity is unlawful, even if the rule does not absolutely prohibit such activity and regardless of whether the rule is actually enforced,” and “the Respondent’s opt-out procedure interferes with Section 7 rights because it requires employees who wish to retain their right to pursue class or collective claims to ‘make ‘an observable choice that demonstrates their support for or rejection of’ concerted activity.” Again, the Supreme Court addresses this point explaining that nothing in the catchall phrase in Section 7 of the NLRA: “other concerted activities for the purposes of . . . other mutual aid and protection”, can be read to include protection for the right to pursue class actions. *Epic Systems Corp.*, 138 S. Ct. at 1625 (“None of the preceding and more specific terms speaks to the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum, and there is no textually sound reason to support the final catchall term should bear such a radically different object than all its predecessors.”). In fact, Section 7 of the NLRA does not speak to class action procedures at all. *Id.* at 1624-26 (2018).

5. Legal Analysis, Section III. Respondents’ Voluntary DRP Restricts Section 7 Rights and Violates the Act (page 7, lines 12 and 23-26) – The Administrative Law Judge erred in finding that “Respondent’s DRP violates the [NLRA],” and that “[i]t is reasonable to expect that employees would not be inclined to affirmatively opt out of the DRP over concern of standing out as an employee who rejected the employer’s request that they waive their Section 7 rights.” This assumption is not based on any record evidence. *See* Joint Motion and Stipulated Record; *see also* Order Granting Joint Motion for a Hearing Based on a Stipulated Record in lieu of Oral Testimony and Establishing Briefing Date (finding that “[t]he parties stipulate and agree that the facts recited in the stipulation are not in dispute and represent a full and complete record

of the evidence necessary for the finder of fact to issue a decision.”). Regardless, nothing indicates that the NLRA guarantees class action procedures, especially when considered in light of “the express (and entirely unmentioned) teachings of the [FAA],” which “requires courts ‘rigorously’ to ‘enforce arbitration agreements according to their terms, including terms that specify . . . *the rules* under which that arbitration will be conducted.” *Id.* at 1621, 1628. Like the instant case, the parties in *Epic Systems Corp.* contracted for arbitration using “individualized rather than class or collective action procedures.” *Id.* at 1621. The FAA “seems to protect [that agreement] pretty absolutely.” *Id.*

6. Legal Analysis, Section III. Respondents’ Voluntary DRP Restricts Section 7 Rights and Violates the Act (page 7, lines 28-30) and Section IV. Employees’ Signing the DRP is not the Same as Refraining from Concerted Activity (page 7, lines 31-44) – To the extent the Administrative Law Judge relied upon *MasTec Services Co.*, 363 NLRB No. 81 (2015) *enf. denied* No. 16-60011 (per curium) (5th Cir. Jul. 11, 2016), for the propositions that (i) the DRP includes the same language that has been found to violate Section 8(a)(1) of the NLRA, and (ii) the opt-out provision of the DRP is not the same as an employee “refraining from concerted activity,” the Administrative Law Judge’s reliance is misplaced because the underlying proposition that class action procedures are “concerted activity” at all has been overruled by *Epic Systems Corp.*, 138 S. Ct. 1612, 1616 and 1624-29.

7. Legal Analysis, Section V. Respondents’ Motions to Compel Arbitration Violate the Act (page 8, lines 21-23 and 31-32) – The Administrative Law Judge erred in relying upon *Murphy Oil*, 361 NLRB No. 72 for the proposition that “[t]he Board has held that filing a motion to dismiss the class action and compel arbitration further violated Section 8(a)(1) as enforcement of an unlawful mandatory arbitration agreement,” and other “Board precedent” for the finding

that “the Respondent’s motions to compel arbitration in the district court violated Section 8(a)(1) of the [NLRA].” Again, the Supreme Court’s holding in *Epic Systems Corp.* makes clear that arbitration agreements providing for individualized proceedings, like the DRP, *must be enforced* and are not unlawful or contrary to the language and prohibitions of the NLRA. *Epic Systems Corp.*, 138 S. Ct. at 1616, 1623-29.

8. Conclusions of Law No. 2 and 3 (page 8, lines 39-45) – The Administrative Law Judge erred in concluding that “[s]ince February 1, 2013, the Respondents have violated Section 8(a)(1) of the [NLRA] by maintaining and enforcing a Dispute Resolution Policy requiring employees to resolve employment-related disputes exclusively through individual arbitration, and forego any right they have to resolve such disputes through class or collective action,” and “[t]he aforementioned unfair labor practices affected commerce within the meaning of Section 2(6) and (7) of the [NLRA].” The DRP is a voluntary, enforceable and lawful arbitration policy that does not violate the NLRA or constitute any concerted activity under Section 7 of the NLRA. *Id.* at 1616-29. Therefore, the DRP cannot, and the stipulated record is completely devoid of any evidence showing that, Respondents “interfere[d], restrain[ed] [or] coerc[ed] its employees in the exercise of their rights under Section 7 of the NLRA. *American Freightways Co.*, 124 NLRB 146, 147 (1959).

9. All remedies and recommendations (pages 9-10) – The Administrative Law Judge erred in ordering Respondents to cease and desist maintaining, using, and enforcing the DRP, and in ordering Respondents to take the affirmative actions set forth in his recommendation to “effectuate the policies of the [NLRA].” The decision of the United States Supreme Court, clearly permits Respondents’ efforts to maintain, use, and enforce the DRP, and establishes that such class action waivers are both consistent with the instruction of the FAA, and not in conflict

with or violation of the NLRA. *Epic Systems Corp.*, 138 S. Ct. at 1619. Consequently, each and every remedy recommended by the Administrative Law Judge runs afoul of binding precedent insofar as there has been no violation of the Act.

III. CONCLUSION

The Board cannot adopt the findings, conclusions, and recommended order because the United States Supreme Court reversed the Board precedent upon which the Administrative Law Judge relied. Accordingly, Respondents respectfully request that the Board decline to adopt the Decision and issue an order dismissing the Consolidated Complaints.

Date: August 8, 2018

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2018, a copy of Exceptions of Respondents MasTec, Inc. and MasTec Services Company, Inc. was served on the following:

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