

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ADVANCED SERVICES, INC.)	
)	
Petitioner)	No. 15-3988
)	
v.)	Board Case Nos.
)	26-CA-063184
NATIONAL LABOR RELATIONS BOARD)	26-CA-071805
)	
Respondent)	
)	

JOINT MOTION
TO SUMMARILY GRANT ASI'S PETITION FOR REVIEW IN PART,
REMAND THIS CASE TO THE BOARD IN PART,
AND DISMISS ASI'S PETITION IN PART

To the Honorable, the Judges of the United States
Court of Appeals for the Eighth Circuit:

The National Labor Relations Board (“the Board”) and Advanced Services, Inc. (“ASI”) (together, “the Parties”), by their respective counsel, jointly move this Court to summarily grant ASI’s petition for review with regard to the portion of the Board’s Order governed by the Supreme Court’s decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), and remand to the Board the portion of the Order governed by *The Boeing Company*, 365 NLRB No. 154, 2017 WL 6403495 (Dec. 14, 2017). Pursuant to Federal Rule of Appellate Procedure 42(b), the Parties also request that the Court dismiss with prejudice ASI’s petition for review

as to the remaining portions of the Order. In support of their joint motion, the Parties show as follows:

1. On December 22, 2015, the Board issued a Decision and Order (“the Order”) against ASI in Board Case Nos. 26-CA-063184 and 26-CA-071805. *See Advanced Services, Inc.*, 363 NLRB No. 71, 2015 WL 9315530 (Dec. 22, 2015). The Board found that ASI violated Section 8(a)(1) of the National Labor Relations Act (“the Act”), 29 U.S.C. § 158(a)(1), by committing the following unfair labor practices (“ULPs”):

- (a) Maintaining an alternative-dispute-resolution policy (“ADR policy”) that barred employees from concertedly pursuing work-related claims in any forum, arbitral or judicial, *Advanced Servs.*, 2015 WL 9315530, at *1-3 (applying *Murphy Oil, USA, Inc.*, 361 NLRB 774 (2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), affirmed, No. 16-307 (May 21, 2018));
- (b) Requiring that all proceedings under the ADR policy be kept confidential, including any arbitration hearing and record, all documents exchanged, and all communications in connection to the resolution or arbitration of employee claims, *id.* at *3 n.5, *7 (applying *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004));

- (c) Instructing employees not to discuss performance improvement plans amongst themselves, *id.* at *1 n.4, *7; and
- (d) Prohibiting employees from discussing disciplinary investigations, *id.* at *3-4.

2. ASI filed a petition for this Court to review the Order challenging the four violations found by the Board, which was docketed as Case No. 15-3988.

3. The Court placed this case in abeyance pending disposition of petitions for certiorari in *Epic Systems Corp. v. Lewis*, No. 16-285, *Murphy Oil, USA, Inc. v. NLRB*, No. 16-307, *Ernst & Young, LLP v. Morris*, No. 16-300, and *Patterson v. Raymours Furniture Co.*, No. 16-388.

4. On May 21, 2018, the Supreme Court issued its decision in *Epic Systems, supra*, holding that employers may lawfully maintain arbitration agreements that bar employees from concertedly pursuing work-related legal claims.¹

5. On June 21, 2018, this Court removed the above-captioned case from abeyance and ordered ASI to file its opening brief by July 23, 2018. The Court subsequently extended that deadline until September 21, 2018.

6. The Board acknowledges that, in light of the Supreme Court's *Epic Systems* decision, the Board's finding that ASI's ADR policy unlawfully barred employees from concertedly pursuing work-related claims is not enforceable. Accordingly,

¹ The Court issued *Epic Systems* together with *Murphy Oil*, No. 16-307, and *Ernst & Young LLP*, No. 16-300.

the Parties respectfully request this Court to grant summary review of the portion of the Order finding that ASI unlawfully maintained an ADR policy barring employees from concertedly pursuing work-related claims.

7. On December 14, 2017, the Board issued its decision in *The Boeing Company, supra*, which overruled the *Lutheran Heritage* standard for evaluating facially neutral work rules. The issue of whether the confidentiality provision in ASI's ADR policy violates the Act under the *Boeing* framework is a question for the Board to answer in the first instance. Accordingly, the Parties respectfully request this Court to sever and remand that issue to the Board.

8. The Parties have entered into an agreement to settle the two remaining issues raised by Board's Decision and Order. The Parties agree that their settlement fully resolves those issues and dispenses with the necessity for further litigation. The Parties therefore respectfully request that, pursuant to Federal Rule of Appellate Procedure 42(b), the Court enter an order dismissing those issues.

9. In light of the Supreme Court's *Epic Systems* decision, the Board's decision in *The Boeing Company*, and the Parties' settlement, the Parties jointly request that the Court:

- (a) Summarily grant ASI's petition for review with regard to the portion of the Order finding that ASI unlawfully maintained an ADR policy barring employees from concertedly pursuing work-related claims;

- (b) Remand to the Board the portion of the Order finding that ASI unlawfully maintained a rule requiring that all proceedings under the ADR policy be kept confidential; and
- (c) Dismiss with prejudice ASI's petition for review with regard to the portion of the Order finding that ASI violated the Act by prohibiting the discussion of performance improvement plans and disciplinary investigations.

10. Each party is to bear its own costs.

11. ASI, by its counsel, has authorized the Board to execute this motion on its behalf.

WHEREFORE, the Parties respectfully request that the Court grant the relief set forth in this motion.

Respectfully submitted,

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Dated at Washington, DC
this 20th day of August 2018

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 27(d)(2)(A) and 32(g)(1), the Board certifies that this motion contains 813 words of proportionally spaced, 14-point type, and the word-processing software used was Microsoft Word 2010. The Board further certifies that the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

s/ Linda Dreeben
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Dated at Washington, DC
this 20th day of August 2018

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CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2018, I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I further certify that this document was served on all parties or their counsel of record through the appellate CM/ECF system.

s/ Linda Dreeben
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Dated at Washington, DC
this 20th day of August 2018