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Cincinnati, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE SCHERZINGER CORPORATION

and

Case 09-CA-165460

ROBERT COLLEY

DECISION, ORDER, AND NOTICE TO SHOW CAUSE

On June 17, 2016, Administrative Law Judge Paul Bogas issued the attached decision.

The General Counsel and the Respondent both filed exceptions and supporting briefs, answering briefs, and reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

1. The judge found, applying the Board's decisions in *D. R. Horton, Inc.*, 357 NLRB 2277 (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), that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by maintaining and enforcing an agreement titled Scherzinger Complaint Procedures (Complaint Procedures) that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial.

Recently, the Supreme Court issued a decision in *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612 (2018), a consolidated proceeding including review of court decisions below in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). *Epic Systems* concerned the issue, common to all three cases, whether employer-employee agreements that contain class- and collective-action waivers and stipulate that employment disputes are to be resolved by individualized arbitration violate the National Labor Relations Act. *Id.* at ___, 138 S. Ct. at 1619–1621, 1632. The Supreme Court held that such employment agreements do not violate this Act and that the agreements must be enforced as written pursuant to the Federal Arbitration Act. *Id.* at ___, 138 S. Ct. at 1619, 1632.

The Board has considered the decision and the record in light of the exceptions and briefs. In light of the Supreme Court’s decision in *Epic Systems*, which overrules the Board’s holding in *Murphy Oil USA, Inc.*, we conclude that the complaint allegation that the maintenance and enforcement of the Complaint Procedure is unlawful based on *Murphy Oil* must be dismissed.¹

2. There remains the separate issue whether the Respondent’s Complaint Procedures independently violated Section 8(a)(1) of the Act because it interferes with employees’ ability to raise work-related complaints with their co-workers and other entities. The General Counsel excepts to the judge’s failure to find that employees would reasonably construe the Complaint Procedures to require employees to voice workplace complaints only to the Respondent.

¹ We therefore find no need to address other issues raised by the Respondent’s exceptions to the judge’s decision regarding this allegation.

At the time of the judge's decision and the General Counsel's exceptions, the issue whether maintenance of a work rule or policy that did not expressly restrict Section 7 activity violated Section 8(a)(1) would be resolved based on the prong of the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), that held an employer's maintenance of a facially neutral work rule would be unlawful "if employees would reasonably construe the language to prohibit Section 7 activity." *Id.* at 647. Recently, the Board overruled the *Lutheran Heritage* "reasonably construe" test and announced a new standard that applies retroactively to all pending cases. *The Boeing Co.*, 365 NLRB No. 154, slip op. at 14-17 (2017).

Accordingly, we sever and retain this complaint allegation, and we issue below a notice to show cause why the allegation that the Complaint Procedures unlawfully restricts employees' ability to raise work-related complaints with their co-workers and other entities should not be remanded to the judge for further proceedings in light of *Boeing*, including, if necessary, the filing of statements, reopening the record, and issuance of a supplemental decision.

ORDER

The complaint allegation that the maintenance and enforcement of the Complaint Procedures unlawfully restricts employees' statutory rights to pursue class or collective actions is dismissed.

Further,

NOTICE IS GIVEN that any party seeking to show cause why the issue whether the Respondent's Complaint Procedures unlawfully restrict employees' ability to raise work-related complaints with their co-workers and other entities should not be remanded to the administrative law judge must do so in writing, filed with the Board in Washington, D.C., on or before October

26, 2018 (with affidavit of service on the parties to this proceeding). Any briefs or statements in support of the motion shall be filed on the same date.

Dated, Washington, D.C. October 12, 2018.

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD