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Fry's Electronics, Inc. and Alexander Warner. Case 32-CA-156938

October 18, 2018

DECISION AND ORDER REMANDING¹

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

Pursuant to a charge filed by Alexander Warner, the General Counsel issued a complaint on November 24, 2015, an amended complaint on December 7, 2015, and a second amended complaint on January 25, 2016. The second amended complaint alleges that the Respondent has maintained and/or enforced a mandatory arbitration agreement² that unlawfully restricts employees' statutory rights to pursue class or collective actions in violation of Section 8(a)(1) of the National Labor Relations Act. The second amended complaint also alleges that the mandatory arbitration agreement includes language that employees would reasonably conclude prohibits or restricts their right to file unfair labor practice charges with the Board. On January 29, 2016, the General Counsel filed a motion for summary judgment. On February 25, 2016, the National Labor Relations Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On March 9, 2016, the Respondent filed a response to the General Counsel's motion and a cross-motion for summary judgment. On March 23, 2016, the General Counsel filed a reply.

1. Recently, the Supreme Court issued its 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 Sys-*

¹ The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

² The second amended complaint identifies two versions of the Agreement, one that the Respondent required its employees to sign from approximately September 2012 to February 2014 and one that the Respondent required its employees to sign from approximately February 2014 to the date of the second amended complaint. In his motion for summary judgment, the General Counsel notes that the Respondent changed the language of the agreement in February 2014 in ways that are not determinative to this proceeding. In its response to General Counsel's motion for summary judgment, the Respondent refers to a single arbitration agreement. Therefore, we too refer to the 2012 and 2014 agreements in the singular.

tems 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. 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 mandatory arbitration agreement is unlawful based on *Murphy Oil* must be dismissed.

2. There remains the separate issue whether the Respondent's arbitration agreement independently violates Section 8(a)(1) of the Act because it interferes with employees' ability to access the Board. When the parties filed their pending motions, the issue whether maintenance of a facially neutral work rule or policy violated Section 8(a)(1) would be resolved based on the "reasonably construe" prong of the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). On December 14, 2017, the Board issued its decision in *The Boeing Co.*, 365 NLRB No. 154, in which it overruled the *Lutheran Heritage* "reasonably construe" test and announced a new standard that applies retroactively to all pending cases. Under the standard announced in *Boeing*, the parties' motions do not establish that there are no genuine issues of material fact and that either party is entitled to judgment as a matter of law as to this complaint allegation.

Accordingly, we deny without prejudice the motions for summary judgment with respect to this complaint allegation, and we will remand this proceeding to the Regional Director for Region 32 for further action as she deems appropriate.

ORDER

The complaint allegations that the maintenance and enforcement of the mandatory arbitration agreement unlawfully restricts employees' statutory rights to pursue class or collective actions are dismissed.

IT IS FURTHER ORDERED that the parties' motions for summary judgment are denied without prejudice in all other respects, and these proceedings are remanded to the Regional Director for Region 32 for further appropriate action.

Dated, Washington, D.C. October 18, 2018

John F. Ring,

Chairman

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD