

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PRIVATE NATIONAL MORTGAGE
ACCEPTANCE COMPANY LLC,
“PENNYMAC”

and

Case 20-CA-170020

RICHARD SMIGELSKI

DECISION, ORDER, and
NOTICE TO SHOW CAUSE

On November 29, 2016, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed cross exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

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 decision in *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 a Mutual Arbitration Policy (the “MAP”) 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).¹ *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 allegations that the MAP is unlawful based on *Murphy Oil* must be dismissed.²

2. There remains the separate issue whether the Respondent’s MAP independently violated Section 8(a)(1) of the Act because it interferes with employees’ ability to access the Board. The Respondent excepts arguing that, under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the judge erred in finding that employees would reasonably interpret MAP as prohibiting them from filing changes with the Board. Although the General Counsel agrees with the judge’s finding based on *U-Haul Co. of California*, 347 NLRB 375, 377-378 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007), and similar cases, he cross excepts to the judge’s failure to conform his Conclusions of Law, Remedy, Order, and Notice to this finding.

¹ On January 26, 2017, the Respondent filed an unopposed Motion to Stay and Hold Case in Abeyance until such time as the Supreme Court issued its decision in *Epic*, *Morris*, and *Murphy Oil*. Because the Court has issued its decision, we deny the Respondent’s motion as moot.

² 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 parties' exceptions, the issue whether maintenance of a work rule or policy that did not expressly restrict employee access to the Board violated Section 8(a)(1) on the basis that employees would reasonably believe it did would be resolved based on the prong of the analytical framework set forth in *Lutheran Heritage Village-Livonia*, supra., 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." 343 NLRB 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 MAP unlawfully restricts employee access to the Board should not be remanded to a 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 allegations that the maintenance and enforcement of the Mutual Arbitration Policy unlawfully restricts employees' statutory rights to pursue class or collective actions are dismissed.

Further,

NOTICE IS GIVEN that any party seeking to show cause why the issue whether the Respondent's Mutual Arbitration Agreement unlawfully restricts employee access to the Board should not be remanded to an administrative law judge must do so in writing, filed with the Board in Washington, D.C., on or before November 30, 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., November 16, 2018.

JOHN F. RING, CHAIRMAN

LAUREN MCFERRAN, MEMBER

MARVIN E. KAPLAN, MEMBER

(SEAL)

NATIONAL LABOR RELATIONS BOARD