

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE**

TARLTON AND SON, INC.

and

ROBERT MUNOZ, an Individual

**Cases 32-CA-119054
32-CA-126896**

**COUNSEL FOR THE GENERAL COUNSEL’S POSITION STATEMENT
IN LIGHT OF THE COURT’S REMAND TO THE BOARD**

This matter is currently before the Board on remand from the Ninth Circuit Court of Appeals. Based on the Supreme Court’s decision in *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612 (2018) (*Epic Systems*), the only remaining litigable issue now is whether Tarlton and Son, Inc., herein called Respondent, violated Section 8(a)(1) of the Act by promulgating a Mutual Arbitration Policy (Arbitration Policy) to its employees in specific response to their concerted protected activities.¹

In 363 NLRB No. 175, the Board majority found that Respondent violated the Act because it promulgating the Arbitration Policy in response to its employees engaging in protected activities, namely the filing of a class action complaint by Charging Party and two other employees against Respondent in California Superior Court for alleged violations of the State labor code. The Board affirmed the ALJ’s discrediting of Respondent’s testimony that the decision to implement the Arbitration Policy was unrelated to the filing of the class action

¹ The allegation that the mere maintenance of the Arbitration Policy has been vacated by the Court in light of the Supreme Court’s decision in *Epic Systems Corp. v. Lewis*, No. 16-285, 2018 WL 2292444 (U.S. May 21, 2018).

complaint. It affirmed the ALJ's finding that Respondent failed to articulate a business justification for implementing the Arbitration Policy that was unrelated to the filing of the class-action complaint. The Board also independently found that the Respondent unlawfully promulgated Arbitration Policy in response to the class-action lawsuit, *Id.* slip op. at 2, and that the employees were engaged in protected concerted activity when they jointly filed the California class action lawsuit. *Id.*, slip op. at 3.

The General Counsel is now of the view that no violation of the Act occurred when Respondent implemented the Arbitration Policy in response to its employees' concerted activities because a joint filing of a non-NLRA legal claim is not protected by the Act under the Supreme Court's implicit holding in *Epic Systems*. The General Counsel seeks to dismiss this Complaint and urges the Board to overturn legal precedent that establishes that filing of a joint class action lawsuit is protected activity within the meaning of Section 7 of the Act.²

DATED AT Oakland, California, this 13th day of December, 2018.

Respectfully Submitted,

/s/ Christy Kwon
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Region 32
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² See e.g., *Spandsco Oil & Royalty Co.*, 42 NLRB at 948-49 (1942); *Trinity Trucking & Materials Corp.*, 221 NLRB at 365 (1975); *United Parcel Service*, 252 NLRB at 1018, 1022 & fn. 26 (1980); *Mojave Electric Coop.*, 327 NLRB at 13 (1998); *200 East 81st Restaurant Corp. d/b/a Beyoglu*, 362 NLRB No. 152 (2015).

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REGION 32**

TARLTON AND SON, INC.

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**Case(s) 32-CA-119054
32-CA-126896**

Date: December 13, 2018

**AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S
POSTION STATEMENT IN LIGHT OF THE COURT'S REMAND TO THE BOARD**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

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December 13, 2018

Date

Ida Lam, Designated Agent of NLRB

Name

/s/ Ida Lam

Signature