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Hobby Lobby Stores, Inc. *and* The Committee to Preserve the Religious Right to Organize. Case 20–CA–139745

January 2, 2019

SUPPLEMENTAL DECISION, ORDER, AND NOTICE TO SHOW CAUSE

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On May 18, 2016, the National Labor Relations Board issued a Decision and Order, 363 NLRB No. 195,[1] finding that the Respondent violated Section 8(a)(1) of the Act by both (1) maintaining and enforcing a mandatory individual arbitration policy and (2) interfering, through the arbitration policy, with employees' ability to access the Board. On June 28, 2018, the United States Court of Appeals for the Seventh Circuit, in light of *Epic Systems Corp. v. Lewis*, 584 U.S. __, 138 S.Ct. 1612 (2018), vacated the Board's Order and remanded the case to the Board for further proceedings.[2]

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

1. At the time of the Board's decision, and Administrative Law Judge Eleanor Laws' September 8, 2015 decision which the Board affirmed, the issue of whether the maintenance and enforcement of a policy 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, would have been resolved based on the analytical framework set forth in 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).

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 (NLRA). 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 (FAA). 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 mandatory individual arbitration policy is unlawful based on *Murphy Oil* must be dismissed.[3]

2. There remains the separate issue whether the Respondent's mandatory individual arbitration policy independently violated Section 8(a)(1) of the Act in accord with the rationale of *U-Haul Co. of California*, supra, because it interferes with employees' ability to access the Board. At the time of the Board's decision, and the judge's decision which the Board affirmed, the issue of whether the maintenance of a 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 have been resolved based on the prong of the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which held that 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*

[1] In the Board's initial decision, it denied both the Charging Party's "motion to allow oral argument and suggestion for public notice" and the Respondent's request for oral argument. It also rejected the Charging Party's argument that the judge improperly approved the joint motion of the General Counsel and the Respondent for her to resolve the case on a stipulated record. We reaffirm those actions.

[2] We deny the Charging Party's request to file additional position statements in light of *Epic Systems*.

[3] We reaffirm the finding in the prior Board decision that there is no merit in the Charging Party's cross-exceptions, which raise numerous arguments that are wholly outside the scope of the General Counsel's complaint. 363 NLRB No. 195, slip op. at 1 fn. 2. At no point in this litigation has the General Counsel argued that a violation must be found on any basis other than the rationale underlying the holding in *Murphy Oil*, and, as discussed below, in *U-Haul Co. of California*, 347 NLRB 375, 377–378 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007). It is well settled that a charging party cannot enlarge upon or change the General Counsel's theory of a case. See *SJK, Inc. d/b/a Fremont Ford*, 364 NLRB No. 29, slip op. at 2 fn. 1 (2016) (rejecting similar arguments made by charging party in addition to *Murphy Oil* theory of violation); see also *Kimtruss Corp.,* 305 NLRB 710 (1991). This procedural rationale extends to the Charging Party's contentions that a violation can be found here because the FAA does not apply. We find no need to address individually the other issues raised by the Charging Party.

Co., 365 NLRB No. 154 at slip op. 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 mandatory individual arbitration policy unlawfully restricts employee access to the Board 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 allegations that the maintenance and enforcement of the mandatory individual 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 mandatory individual arbitration policy unlawfully restricts employee access to the Board 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 January 16, 2019 (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. January 2, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD