**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | | |
|---|---|---|
| AUTOMOTIVE MACHINISTS LODGE NO. 1173, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS | ) | |
| Petitioner | ) | |
| v. | ) | No. 16-70637 |
| NATIONAL LABOR RELATIONS BOARD | ) | |
| Respondent/Cross-Petitioner | ) | |
| v. | ) | Nos. 16-70674, 16-71955 |
| FAA CONCORD H. INC. d/b/a CONCORD HONDA | ) | |
| Petitioner/Cross-Respondent | ) | |

**MOTION OF THE NATIONAL LABOR RELATIONS BOARD TO REMOVE CASE FROM ABEYANCE, SUMMARILY GRANT THE COMPANY'S PETITION FOR REVIEW IN PART, DENY THE BOARD'S CROSS-APPLICATION FOR ENFORCEMENT IN PART, DENY THE UNION'S PETITION FOR REVIEW, REMAND THE ISSUES FOR FURTHER CONSIDERATION, AND SEVER AND SET A BRIEFING SCHEDULE FOR THE REMAINING ISSUES**

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

This Court placed this case in abeyance pending the Supreme Court's decision in *NLRB v. Murphy Oil USA, Inc.*, No. 16-307, *Ernst & Young, LLP v. Morris*, No. 16-300, and *Epic Systems Corp. v. Lewis*, No. 16-285. The Supreme

Court decided those cases on May 21, 2018. *Epic Systems Corp. v. Lewis*, No. 16-285, 2018 WL 2292444 (U.S. May 21, 2018).[1] In light of that decision, the National Labor Relations Board respectfully moves this Court to remove this case from abeyance, and, for the reasons set forth below: summarily grant in part the petition for review of the Board's Order filed by FAA Concord H. (the Company) and deny the Board's cross-application for enforcement of its Order in part; remand the case to the Board in part; deny the petition for review filed by the Automotive Machinists Lodge No. 1173, International Association of Machinists and Aerospace Workers (the Union); and sever and retain for briefing the portion of the case that is unaffected by *Epic Systems*.

1. In the Decision and Order under review, the Board found that the Company violated the National Labor Relations Act (the Act) by maintaining an agreement barring employees from concertedly pursuing work-related claims in any forum, arbitral or judicial. *FAA Concord H, Inc. d/b/a Concord Honda*, 363 NLRB No. 136, slip op. at 1 (Feb. 24, 2016). In doing so, the Board applied the rule set forth in *Murphy Oil, USA, Inc.*, 361 NLRB 774 (2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *affirmed*, No. 16-307 (May 21, 2018). In finding that the Company unlawfully maintained the agreement, the Board relied solely on the *Murphy Oil* rationale and did not address any of the

[1] The Court issued *Epic Systems* together with *Murphy Oil* and *Morris*.

Union's proffered alternative legal theories for why the arbitration agreement violated the Act.[2] The Board also dismissed an allegation that the Company unlawfully enforced its arbitration agreement. *Concord Honda*, 363 NLRB No. 136, slip op. at 1-2.

Separately, the Board found that the Company violated Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) by unilaterally implementing a bonus plan, changing employees' work schedules, and bypassing the Union to deal directly with employees. *Id*. at 1 n.1. The Board also denied the Union's request for additional remedies. *Id*. at 1 n.2.

2. The Company and the Union each petitioned for review of the Board's decision. The Company's petition challenged the Board's finding of the violations described above. The Union's petition challenged the Board's failure to find that the Company unlawfully enforced the agreement, as well as its refusal to grant certain remedies regarding the unlawful maintenance of the agreement. The Board cross-applied for enforcement of its decision, and this Court consolidated the three cases.

[2] The Union's alternative theories were that the agreement restricted employees' right to strike or engage in other concerted activities, prohibited state-law actions to which the Federal Arbitration Act (FAA) does not apply, interfered with other federal statutes allowing for group claims, and was not subject to the FAA because it did not affect commerce within the meaning of the Commerce Clause.

3. The Union filed its opening brief arguing that the Board erred by dismissing the enforcement allegation, and that the Board's ordered remedies were not sufficient to remedy the maintenance violation. The Union also argued that the arbitration agreement was unlawful under the several alternative legal theories that the Board had not addressed. Thereafter, this Court granted the Company's motion to place this case in abeyance pending the Supreme Court's decision in *NLRB v. Murphy Oil, USA, Inc.*, No. 16-307, with a status report from the Company due July 2, 2018.

4. On May 21, 2018, the Supreme Court issued its decision in *Epic Systems*, overturning the Board's *Murphy Oil* rationale and holding that the Act does not bar employers from maintaining arbitration agreements that bar employees from concertedly pursuing work-related legal claims. The Board acknowledges that under that decision, the Board's finding that the Company unlawfully maintained the Agreement cannot be upheld on the grounds on which the Board relied, and the Board is willing to submit to partial summary grant of review and denial of enforcement of the relevant portion of its Order.

However, *Epic Systems* does not resolve the maintenance issue in this case. Instead, remand of that issue is necessary for the Board to consider the Union's alternative legal theories for finding the arbitration agreement unlawful. The Board neither considered nor rejected these theories when issuing the Decision and

Order under review. Likewise, *Epic Systems*, which overturned the Board's *Murphy Oil* rationale, did not address the Union's proffered alternative arguments. Remand of the maintenance issue is therefore necessary for the Board to consider these arguments in the first instance. The Court should also remand the allegation that the Company unlawfully enforced the agreement, which rests on the claim that maintenance of the agreement was unlawful. *See NLRB v. Food Store Employees*, 417 U.S. 1, 8-10 (1974) (remand appropriate for Board to consider merits of argument in the first instance); *accord Commc'n Workers of Am., Local 5008 v. NLRB*, 784 F.2d 847, 851-52 (7th Cir. 1986) (where the Board relies on single incorrect ground for a decision, the removal of that ground requires a remand for further consideration).

5. The Court should deny the Union's petition for review. Its challenge to the Board's failure to find that the Company unlawfully enforced the agreement relied on the Board's now overturned *Murphy Oil* rationale, and its challenge to the Board's failure to order additional remedies was limited to the maintenance violation. These challenges are without basis now that the maintenance and enforcement issues warrant remand to the Board for further consideration.

6. The remaining violations found by the Board— that the Company unilaterally implemented a bonus plan, changed employees' work schedules, and bypassed the Union to deal directly with employees— are unaffected by *Epic*

*Systems*. Therefore, the Board continues to seek enforcement of its Order regarding these remaining unfair labor practices. To that end, the Board requests that the Court sever those issues and establish a briefing schedule so that they can be resolved.

WHEREFORE, the Board respectfully requests that the Court remove this case from abeyance, and to the extent the case is governed by the Supreme Court's decision in *Epic Systems*, summarily grant review of the Board's Order in part, deny enforcement of the Board's Order in part, remand the maintenance and enforcement issues, and sever and set a briefing schedule for all other issues.

Respectfully submitted,

/s/Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, S.E.
Washington, D.C. 20570

Dated at Washington, D.C.
this 25th day of June 2018

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | | |
|---|---|---|
| AUTOMOTIVE MACHINISTS LODGE NO. 1173, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS | ) | |
| Petitioner | ) | |
| v. | ) | No. 16-70637 |
| NATIONAL LABOR RELATIONS BOARD | ) | |
| Respondent/Cross-Petitioner | ) | |
| v. | ) | Nos. 16-70674, 16-71955 |
| FAA CONCORD H. INC. d/b/a CONCORD HONDA | ) | |
| Petitioner/Cross-Respondent | ) | |

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its motion contains 1186 words of proportionally spaced, 14-point type, and that the word processing system used was Microsoft Word 2010.

s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570

Dated at Washington, D.C.
this 25th day of June 2018

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | | |
|---|---|---|
| AUTOMOTIVE MACHINISTS LODGE NO. 1173, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS | ) | |
| Petitioner | ) | |
| v. | ) | No. 16-70637 |
| NATIONAL LABOR RELATIONS BOARD | ) | |
| Respondent/Cross-Petitioner | ) | |
| v. | ) | Nos. 16-70674, 16-71955 |
| FAA CONCORD H. INC. d/b/a CONCORD HONDA | ) | |
| Petitioner/Cross-Respondent | ) | |

**CERTIFICATE OF SERVICE**

I certify that on June 25, 2018, the foregoing motion was filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, and that all counsel are registered CM/ECF users.

s/ Linda Dreeben

Linda Dreeben
Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570