

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

20/20 COMMUNICATIONS, INC.

and

Case 12-CA-165320

CHARLIE SMITH, an Individual

**COUNSEL FOR THE GENERAL COUNSEL’S RESPONSE TO THE
BOARD’S NOTICE TO SHOW CAUSE AND OPPOSING REMAND**

I. Procedural Background

On April 29, 2016, the Regional Director of Region 12 (“the Regional Director”) issued a Complaint and Notice of Hearing (“the Complaint”) against 20/20 Communications, Inc. (“Respondent”). The Complaint, based upon a charge filed by Charlie Smith, an individual (“Smith”), on December 12, 2015, and amended on February 17, 2016, alleges that Respondent promulgated, maintained, and enforced a mandatory Mutual Arbitration Agreement (“MAA”), including a class and collective action waiver applicable to:

all disputes and claims between them, including those relating to [an] Employee’s employment with [Respondent], and any separation therefrom... include[ing] without limitation claims for discrimination, harassment, or retaliation; wages, overtime, benefits, or other compensation; breach of any express or implied contract; violation of public policy; personal injury; and tort claims including defamation, fraud, and emotional distress.”

On September 6, 2016, Administrative Law Judge Michael A. Rosas (“ALJ Rosas”) issued his decision in this matter (“ALJD”). Relying on *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), ALJ Rosas concluded that Respondent had violated Section 8(a)(1) of the National Labor Relations Act (“the Act” or “the NLRA”) by maintaining and enforcing an MAA “requiring employees to resolve employment-related disputes exclusively through individual

arbitration, and forego any right they have to resolve such disputes through class or collective action.” ALJD at 8:29-30.

On October 4, 2016, Respondent and the General Counsel each filed Exceptions to the ALJD. The General Counsel excepted to ALJ Rosas’ omission of analysis and a conclusion of law regarding the MAA’s interference with employees’ ability to access the Board, citing *U-Haul Co. of California*, 347 NLRB 375, 376-377 (2006). Respondent excepted to ALJ Rosas’ conclusions that the MAA’s class and collective action waiver was unlawful, and that the MAA’s “opt-out” provision was insufficient to offset the coercive nature of the contract.

Both *Murphy Oil* and *U-Haul* analyzed the lawfulness of these kinds of arbitration provisions under the framework set forth by the Board in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). While the case was pending before the Board, the Board overruled the “reasonably construe” prong of *Lutheran Heritage* in *Boeing Co.*, 365 NLRB No. 154, slip op. at 14-17 (2017), and in *Epic Systems v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612, WL 2292444 (May 21, 2018) the United States Supreme Court overruled the Board’s class action waiver rationale set forth in *Murphy Oil* in.

Thereafter, on November 29, 2018, the Board dismissed and severed the allegation relating to the class and collective action waiver, and issued a Notice to Show Cause as to why the remaining allegation of this case should not be remanded to ALJ Rosas for reconsideration in light of the new *Boeing* standard.

II. The Board Should Not Remand the Remaining Allegation

The General Counsel opposes a remand of the remaining allegations to ALJ Rosas in order to conserve Board resources. The allegation that the MAA unlawfully interferes with employees’ ability to access Board processes is similar to the issue currently pending before the

Board in *Prime Healthcare*, Case 21-CA-133781, where the General Counsel’s position on the unlawfulness of such a provision under a *Boeing* framework has already been set forth in detail.

As argued fully in the General Counsel’s brief in *Prime Healthcare*, attached hereto, because the mandatory arbitration agreement requires that employment-related disputes must be determined exclusively by final and binding arbitration, it is incumbent on Respondent to make it clear that employees have the right to file charges with the Board and otherwise seek the Board’s assistance. Respondent’s language providing that “Employee does not waive his or her right to file an administrative complaint with the appropriate administrative agency (e.g., the EEOC or state agencies of a similar nature)” – which only appears several paragraphs later in the MAA – does not make it sufficiently clear that employees can go to the Board. Therefore, Respondent’s MAA violates the Act.

Accordingly, the General Counsel respectfully urges the Board to decide *Prime Healthcare* and conclude that the rule at issue in *Prime Healthcare* violates the Act for the reasons set forth in the General Counsel’s brief in that case. That same rationale should be applied in the instant case to find that Respondent violated Section 8(a)(1) of the Act by maintaining the MAA inasmuch as it interferes with employee access to the Board.

Dated: January 4, 2019.

/s/ Caroline Leonard
Caroline Leonard, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 12
201 E. Kennedy Blvd., Suite 530
Tampa, Florida 33602
Tel. (813) 228-2662
caroline.leonard@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, Counsel for the General Counsel's Response to the Board's Notice to Show Cause and Opposing Remand, was served on January 4, 2019, as follows:

By electronic filing:

National Labor Relations Board
Hon. Roxanne Rothschild
Executive Secretary
1015 Half Street SE
Washington, D.C. 20570-0001

By electronic mail to:

Kevin D. Zwetsch, Esq.
Ina Crawford, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
100 N. Tampa St., Ste. 3600
Tampa, FL 33602
kevin.zwetsch@ogletreedeakins.com
ina.crawford@ogletreedeakins.com

Christopher C. Murray, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
111 Monument Cir., Ste. 4600
Indianapolis, IN 46204
christopher.murray@ogletreedeakins.com

Andrew Frisch, Esq.
Morgan & Morgan, P.A.
600 N. Pine Island Rd., Ste. 400
Plantation, FL 33324-1311
afrisch@forthepeople.com

/s/ Caroline Leonard
Caroline Leonard, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 12
201 E. Kennedy Blvd., Suite 530
Tampa, Florida 33602
Tel. (813) 228-2662
caroline.leonard@nlrb.gov