

1 UNITED STATES OF AMERICA
2 BEFORE THE NATIONAL LABOR RELATIONS BOARD
3 Washington, D.C.

4 TARLTON AND SON, INC.
5 and
6 ROBERT MUNOZ, an Individual

Cases 32-CA-119054
32-CA-126896

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11 **RESPONDENT TARLTON AND SON, INC.’S REPLY TO AMICUS BRIEF OF**
12 **AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL**
13 **ORGANIZATION**

14 Respondent Tarlton and Son, Inc. (“Respondent” or “Tarlton”) files this reply
15 to the amicus brief of American Federation of Labor and Congress of Industrial
16 Organization.

17 **I. INTRODUCTION**

18 The Ninth Circuit remanded the decision in Tarlton and Son, Inc., 363 NLRB
19 No. 175 (2016) to the Board after issuance of the Supreme Court’s decision in Epic
20 Systems Corporation v. Lewis, 138 S.Ct. 1612 (2018), because Epic Systems
21 precludes the Board’s findings that Tarlton violated Section 8(a)(1) in connection
22 with its mandatory arbitration policy.

23 Dismissal of the Section 8(a)(1) violations is compelled by the Supreme
24 Court’s Epic Systems decision. Amicus brief’s arguments ignore the holding of
25 Epic Systems which requires dismissal of the Board’s finding that Tarlton
26 independently violated Section 8(a)(1) by implementing the MAP after several ex-
27 employees’ filed a state court wage and hour class action. The General Counsel
28 agrees with Tarlton that this Section 8(a)(1) violation should be dismissed. Amicus

1 disagrees based on arguments and citations to cases rejected by the majority in Epic
2 Systems.

3 **II. ARGUMENT**

4 **A. Epic Systems rejected the proposition that the filing of a class**
5 **action is protected Section 7 conduct.**

6 While Amicus vainly argues otherwise, the Supreme Court in Epic Systems
7 expressly rejected the proposition that protected concerted activity under Section 7
8 encompassed the filing of a class action by employees. Epic Systems, supra, 138
9 S.Ct. at 1630 (“... today’s decision merely declines to read into the NLRA a novel
10 right to class action procedures that the Board’s own general counsel disclaimed as
11 recently as 2010.”). In fact, Justice Ginsburg’s dissent makes the majority’s
12 holding perfectly clear in stating that, “In the face of the NLRA’s text, history,
13 purposes, and longstanding construction, the Court nevertheless concluded that
14 collective proceedings do not fall within the scope of § 7.” 138 S.Ct. at 1638.

15 Because the Supreme Court held in Epic Systems that the pursuit of a
16 collective or wage and hour class action is not Section 7 protected concerted
17 activity, Tarlton did not violate Section 8(a)(1) by implementing the MAP after the
18 filing of the employees’ state court class action. Accordingly, this Section 8(a)(1)
19 violation should be dismissed, and Amicus’ arguments to the contrary should be
20 rejected.

21 **B. Amicus’ reliance on *Eastex, Inc. v. NLRB*¹ is misplaced.**

22 Amicus’ brief relies heavily on the Supreme Court’s decision in Eastex, Inc.
23 v. NLRB. This reliance is misplaced.

24 Amicus contends that the Supreme Court in Eastex “held that Section 7
25 protects ‘concerted activity’ aimed at obtaining relief from substandard working
26 conditions via appeals to government, including the executive, legislative and
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28 ¹ 437 U.S. 556 (1978).

1 judicial branches.” Amicus Brief at p. 4 (emphasis added). In this regard, Amicus
2 incorrectly cites Eastex for the proposition that the Supreme Court squarely held
3 that “employees’ concerted appeals to all branches of government . . . is protected
4 by § 7.” Id. at 5. The Court in Eastex, instead, expressly refused to hold what
5 constituted “concerted activity” in the context of employees’ resorting to
6 administrative and judicial forums. Eastex, 437 U.S. at 566 n. 15 (“We do not
7 address here the question of what may constitute ‘concerted’ activities in this
8 context.”)

9 In fact, the Court’s holding in Eastex is more limited than suggested by
10 Amicus’ brief. Thus, the Court in Epic Systems stated:

11 “In Eastex, Inc. v. NLRB ... we simply addressed the question whether a
12 union’s distribution of a newsletter in the workplace qualified as a protected
13 concerted activity. We held it did, noting that it was “undisputed that the
14 union undertook the distribution in order to boost its support and improve its
15 bargaining position in upcoming contract negotiations,” all part of the
16 union’s “continuing organizational efforts.” . . . In NLRB v. City Disposal
17 Systems, Inc., 465 U.S. 822, 831–832, 104 S.Ct. 1505, 79 L.Ed.2d 839
18 (1984), we held only that an employee’s assertion of a right under a
collective bargaining agreement was protected, reasoning that the collective
bargaining “process—beginning with the organization of the union,
continuing into the negotiation of a collective-bargaining agreement, and
extending through the enforcement of the agreement—is a single, collective
activity.” Nothing in our cases indicates that the NLRA guarantees class and
collective action procedures . . . “

19 Epic Systems, supra at 1628 (emphasis added). Based on the foregoing, Amicus is
20 clearly wrong in contending that “[n]othing in Epic suggests that Section 7 does not
21 protect a concerted effort by employees to invoke a court or agency’s process and
22 protection.” See Amicus Brief at p. 11.

23 **C. Amicus’ argument that Epic Systems did not involve “retaliation”**
24 **is irrelevant.**

25 In its brief, Amicus makes much of the fact that Epic Systems (and its
26 companion cases) did not involve any allegation of employer retaliation. See
27 Amicus Brief at pp. 9-10. Why this is relevant to the instant case is unclear because
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1 the remaining Section 8(a)(1) allegation here also does not involve any alleged
2 retaliation by Tarlton.

3 Amicus in its brief engages in hyperbole and exaggeration in misconstruing
4 the General Counsel's position in this case. Only by doing so, can Amicus claim
5 that the General Counsel is contending that an employer does not violate Section
6 8(a)(1) by retaliating against employees for engaging in Section 7 protected
7 concerted activities. Nowhere in its brief, does the General Counsel make this
8 contention. See, e.g., General Counsel's Brief at p. 2 ("The General Counsel is
9 now of the view that no violation of the Act occurred when Respondent
10 implemented the Arbitration Policy in response to its employees' concerted
11 activities because a joint filing of a non-NLRA legal claim is not protected by the
12 Act under the Supreme Court's implicit holding in Epic Systems.") Rather, the
13 General Counsel is merely repeating what the Supreme Court stated in Epic
14 Systems - that Section 7 does not encompass the filing of a class action by
15 employees.

16 **III. CONCLUSION**

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18 For the reasons noted above, Respondent Tarlton and Son, Inc. requests that the
19 Board reject the arguments made in Amicus' brief, dismiss the Section 8(a)(1) violations
20 and dismiss the complaint in its entirety.

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22 DATED: February 26, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard S. Zuniga, declare as follows:

1. I hereby certify that on February 26, 2019, I filed **RESPONDENT TARLTON AND SON, INC.'S REPLY TO AMICUS BRIEF OF AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATION** in Cases 32-CA-119054 and 32-CA-126896, via E-Filing.

2. I hereby certify that on February 26, 2019, I caused to be served true and correct copies of **RESPONDENT TARLTON AND SON, INC.'S REPLY TO AMICUS BRIEF OF AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATION** in Cases 32-CA-119054 and 32-CA-126896, by first-class U.S. Mail and by E-Mail on the following parties:

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I hereby certify that the foregoing is true and correct. Executed this 26th day of February, 2019, at Los Angeles, California.


Richard S. Zuniga