FAA Concord H, Inc. d/b/a Concord Honda *and* Automotive Machinists Lodge No. 1173, International Association of Machinists and Aerospace Workers. Cases 32–CA–066979, 32–CA–070343, and 32–CA–072231

March 7, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

This case is on remand from the United States Court of Appeals for the Ninth Circuit. On February 24, 2016, the National Labor Relations Board issued a Decision and Order in the above-titled proceeding,[1] finding that the Respondent violated Section 8(a)(1) of the Act by unlawfully maintaining a mandatory arbitration agreement and violated Section 8(a)(5) and (1) by unilaterally implementing a bonus plan, changing the employees' work schedules, and bypassing the Union and directly dealing with employees with regard to the holding of alternative workweek elections.

The Respondent and Charging Party filed petitions for review with the United States Court of Appeals for the Ninth Circuit. The Board filed a cross-application for enforcement of its Order. The court held the proceedings in abeyance pending the Supreme Court decisions in *Murphy Oil USA, Inc. v. NLRB* and related cases.

The Supreme Court recently 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. 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. Id. at __, 138 S. Ct. at 1619, 1632.

Following the Supreme Court's decision in *Epic Systems*, the Board filed a motion with the court to remove the instant case from abeyance. The Charging Party filed a response. On July 19, 2018, the court vacated the Board's decision in its entirety and remanded it to the Board "with instructions to consider the Union's alternative legal theories as to the arbitration agreement, and to give the NLRB's decision such reconsideration as the NLRB deems necessary in light of *Epic Systems.*"

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[2]

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 allegation that the mandatory arbitration agreement is unlawful based on *Murphy Oil* must be dismissed. We have considered the Petitioner's alternative legal theories as to the arbitration agreement and find them to be without merit.[3]

[1] 363 NLRB No. 136 (2016).

[2] Member Emanuel is recused and took no part in the consideration of this case.

[3] The court of appeals directed the Board, on remand, "to consider the Union's alternative legal theories as to the arbitration agreement, and to give the NLRB's decision such reconsideration as the NLRB deems necessary in light of *Epic Systems*." Those theories include contentions that the arbitration agreement (i) restricts employees' right to strike or engage in other concerted activities, (ii) is unlawful to the extent that it restricts actions arising under state law because the Federal Arbitration Act (FAA) is not applicable to those cases, (iii) is contrary to federal statutes other than the National Labor Relations Act, and (iv) is not subject to the FAA because it does not affect commerce within the meaning of the Commerce Clause.

Having duly considered these alternative legal theories, we find that they are without merit because they are wholly outside the scope of the General Counsel's complaint. At no point in the Board 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*. It is well settled that a charging party cannot enlarge upon or change the General Counsel's theory of a case. See, e.g., *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), and *Hobby Lobby Stores, Inc.*, 363 NLRB No. 195, slip op. at 1 fn. 2 (2016) (same); see also *Kimtruss Corp.,* 305 NLRB 710 (1991).

We also find these alternative legal theories to be without merit on additional grounds. To begin with, these theories must be rejected to the extent they contradict the Supreme Court's holding in *Epic Systems* that nothing in the National Labor Relations Act precludes the maintenance or enforcement of individual arbitration agreements. Moreover, we reject the contention that the arbitration agreement at issue here, which by its terms covers only claims, disputes, and/or controversies that "would otherwise require or allow resort to any court or other governmental dispute resolution forum," restricts the right to strike or engage in other concerted activities protected by Section 7 of the Act. Finally, we lack jurisdiction to decide the Union's claims that the arbitration agreement at issue in this case is not enforceable under the FAA or is contrary to other federal statutes. Such arguments should be presented to the court or agency that has jurisdiction to consider them.

Member McFerran would not pass on the merits of the Union's alternative legal theories at this time. She believes that the better course for the Board would be to either solicit statements of position from the parties or remand the case to an administrative judge to allow the parties to more fully present their arguments.

In addition, we affirm and incorporate by reference the findings in the now-vacated Decision and Order reported at 363 NLRB No. 136 that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing a bonus plan, changing the employees' work schedules, and bypassing the Union and directly dealing with employees, as these findings are unaffected by the decision in *Epic Systems*. The court has not otherwise instructed us to review these findings de novo. The Order, as modified herein, is set forth in full below.[4]

ORDER

The National Labor Relations Board orders that the Respondent, FAA Concord H, Inc. d/b/a Concord Honda, Concord, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally implementing a bonus program for unit employees without first notifying the Union and giving it an opportunity to bargain.

(b) Unilaterally changing the unit employees' work schedules without first notifying the Union and giving it an opportunity to bargain.

(c) Bypassing the Union and dealing directly with unit employees with regard to the holding of alternative workweek elections.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request by the Union, rescind the unilaterally implemented bonus program and the unilaterally implemented workweek schedule.

(b) Make affected unit employees whole for any loss of earnings and other benefits suffered as a result of the failure to bargain over the changes to unit employees' work schedules, in the manner set forth in the amended remedy section of the decision reported at 363 NLRB No. 136 and incorporated by reference herein.

(c) Compensate unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 32, within 21 days of the date the amount of backpay is fixed, either by agreement or Board Order, a report allocating the backpay award to the appropriate calendar years for each employee.

(d) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, including the holding of alternative workweek elections, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All full-time and regular part-time technicians and lube technicians employed by Respondent and performing work at its Concord, California facility; excluding all confidential employees, guards, and supervisors as defined in the National Labor Relations Act.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Concord, California facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix" to all current employees and former employees employed by the Respondent at any time since April 18, 2011.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[4] We shall modify the Social Security reporting requirement in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). We shall substitute a new notice to conform to the Order as modified.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. March 7, 2019

John F. Ring, Chairman

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unilaterally implement a bonus program for unit employees without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT unilaterally change the unit employees' work schedules without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT bypass the Union and deal directly with unit employees with regard to the holding of alternative workweek elections.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request by the Union, rescind the unilaterally implemented bonus program and the unilaterally implemented workweek schedule.

WE WILL make affected unit employees whole for any loss of earnings and other benefits suffered as a result of our failure to bargain over the changes to employees' work schedules.

WE WILL compensate unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 32, within 21 days of the date the amount of backpay is fixed, either by agreement or Board Order, a report allocating the backpay award to the appropriate calendar years for each employee.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, including the holding of alternative workweek elections, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All full-time and regular part-time technicians and lube technicians employed by Respondent and performing work at its Concord, California facility; excluding all confidential employees, guards, and supervisors as defined in the National Labor Relations Act.

FAA CONCORD H, INC. D/B/A CONCORD HONDA

The Board's decision can be found at www.nlrb.gov/case/32-CA-066979 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.