Quality Dining, Inc. *and* Ryan Rutherford. Case 04−CA−175450

May 29, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

On December 15, 2016, Administrative Law Judge Raymond P. Green issued a decision in this case. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[1]

The judge found, applying the Board's decision in *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by maintaining and enforcing an arbitration agreement 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.

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. 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.

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 allegation that the arbitration agreement is unlawful based on *Murphy Oil* must be dismissed.

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

ORDER

The complaint is dismissed.

Dated, Washington, D.C. May 29, 2019

John F. Ring, Chairman

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

David G. Rodriguez, Esq., for the General Counsel.
Matthew Hank, Esq., counsel for the Respondent.
R. Andrew Santillo, Esq., counsel for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. The charge and amended charges were filed on May 3, June 9, and July 20 and 26, 2016. The initial complaint was issued on July 29, 2016, and an amended complaint was issued on October 17, 2016. In substance the complaint alleged that (a) the Respondent has maintained an arbitration agreement and dispute resolution program that requires employees to waive their right to seek collective legal action regarding employment issues and claims and (b) has threatened to discharge employees who did not sign the revised arbitration agreement.

On, October 20, the parties filed a joint motion to submit the case on a stipulation of facts.

Upon consideration of the stipulated record and the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

Based on the stipulated facts, the Respondent admitted and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent is an Indiana corporation which, through wholly-owned subsidiaries, is engaged in the operation of over 100 franchise restaurants in New Jersey, Indiana, Ohio, Delaware, Michigan, and Pennsylvania.

Between November 4, 2015, and April 25, 2016, the Respondent required the employees of the restaurants, including the Charging Party, to sign an arbitration agreement as a condition of employment. The arbitration agreement reads in pertinent part:

> Employee and the Company mutually agree that any and all claims or disputes described in paragraph 2 that Employee may have now or in the future with or against the Company may be heard by a neutral mediator and that if voluntary mediation is unsuccessful, or if the Employee or the Company do not wish to use the voluntary mediation procedure, the claim or dispute shall be submitted to arbitration.
>
> The disputes and claims covered by this Agreement include all claims or controversies, whether or not arising out of employment or termination of employment and claims for violation of any federal, state, local, or other governmental law, statute, regulation, or ordinance including without limitation any law related to discrimination, terms and conditions of employment, or termination of employment whether now existing or subsequently enacted.
>
> Only one employee may be a party to any particular arbitration unless otherwise agreed by the parties. Each arbitration is limited to the claims of the Employee who is a party to that arbitration and shall not include claims pertaining to any other Employee unless otherwise agreed by the parties.

Since on or before November 4, 2015, the Respondent has maintained and enforced as a dispute resolution program. This program contains the following provisions:

> I understand if I am employed by Quality Dining, I will be required to sign an Arbitration Agreement which provides that I cannot file a lawsuit against the Company for anything connected with my employment, and that any such claims will be heard by an arbitrator and not by a judge in court.
>
> Only one Employee may be a party to any particular arbitration unless otherwise agreed by the parties. Each arbitration is limited to the claims of the Employee who is a party to that arbitration and shall not include claims pertaining to any other Employee unless otherwise agreed by the parties.

Since about April 25, 2016, the Respondent began requiring employees of the restaurants as a condition of employment, to sign a revised arbitration agreement. This contains the following provisions:

> CLASS AND COLLECTIVE ACTION WAIVERS
>
> a. EMPLOYER AND I WAIVE ANY RIGHT FOR ANY DISPUTE TO BE BROUGHT, HEARD, DECIDED OR ARBITRATED AS A CLASS ACTION and the Arbitrator will have no authority to hear or preside over any such claim ("Class Action Waiver"). Notwithstanding any other clause in this Agreement, the Class Action Waiver is not severable from this Agreement in any instance in which the dispute is brought as a class action.
>
> b. EMPLOYER AND I WAIVE ANY RIGHT FOR ANY DISPUTE TO BE BROUGHT, HEARD, DECIDED OR ARBITRATED AS A COLLECTIVE ACTION and the Arbitrator will have no authority to hear or preside over any such claim ("Collective Action Waiver"). Notwithstanding any other clause in this Agreement, the Collective Action Waiver is not severable from this Agreement in any instance in which the dispute is brought as a collective action.

On April 28, 2016, the Respondent sent a memorandum to the employees of the Restaurants. This memorandum contained the following statements:

> Please take the time to read this Arbitration Agreement. Entering this version of the Arbitration Agreement is a condition of employment. IT APPLIES TO YOU. Going forward, the Arbitration Agreement will govern all covered legal disputes between you and the Company.
>
> Please sign and return the Arbitration Agreement to your Store manager by May 1, 2016. If you have any questions regarding the Arbitration Agreement, please contact your Human Resources Manager, Trish Norvell at 574-243-6216.

On April 28, 2016, Grayling Corporation's Whitehall, Pennsylvania restaurant sent a broadcast text message to its employees. This message stated:

> Corporate will not allow you to work past Thursday 5/5/16 if you do not hand in your arbitration agreement. Please get the back to management ASAP.

I should note here that the arbitration agreements do contain a proviso that permits employees to file charges with administrative agencies including the National Labor Relations Board.

On March 22, 2016, the Charging Party and employee Stephanie Joseph filed a class-action lawsuit on behalf of themselves and similarly situated employees in the Pennsylvania Court of Common Pleas, alleging, inter alia, that the Respondent violated the Pennsylvania Minimum Sage Act.

On April 22, 2016, the aforesaid lawsuit was removed to the United States District Court for the Eastern District of Pennsylvania.

On April 26, 2016, the Plaintiffs amended the lawsuit to add an allegation that the Respondent violated the Fair Labor Standards Act of 1938.

On May 4, 2016, the Respondent filed a motion to dismiss the aforesaid lawsuit and requested the Court to enforce the Arbitration Agreement against the Plaintiffs.

ANALYSIS

This is yet another case involving an employer's implementation of a policy requiring employees to enter into agreements that waive their right to utilize any legal process, other than arbitration, to enforce their collective interests in relation to wages, hours, and terms and conditions of employment.[1]

Notwithstanding a variety of decisions by some circuit courts, until the Supreme Court makes a definitive ruling on

[1] In view of the large number of NLRB cases that have dealt with this issue over the past few years, it seems that these types of policies and agreements have become common, even ubiquitous among companies of sufficient size to have a human resource manager or department. In this regard, I think that it would fair to assume that the number of cases reaching the Board by way of unfair labor practice charges represents only the tip of the iceberg. Accordingly, it may be increasingly difficult for a prospective employee to turn down a job where this type of agreement is required as a condition of employment inasmuch as the next employer to whom he or she applies will likely have the same requirement.

this issue, I am bound to follow the Board's current precedent.

This case is controlled by the Board's decision in *Murphy Oil USA, Inc.,* 361 NLRB No. 72 (2014), enf. denied*,* 808 F.3d 1013 (5th Cir., Oct. 26, 2015). In *Murphy Oil* and subsequent cases, the Board has consistently held that requiring employees to execute arbitration agreements containing class action waivers is a violation of Section 8(a)(1) of the Act.

The Respondent's dispute resolution policy has been maintained and enforced within the 6-month period prior to the filing of the charge in this case. By the same token, the Respondent has required employees to execute the arbitration agreements during that same period of time. Accordingly, despite the fact that the policy and the arbitration agreements were created outside the statute of limitations period, this matter is not precluded by Section 10(b) of the Act. In this respect, the Board has consistently held that an agreement entered into outside the 10(b) period may be found to be unlawful if the provisions are unlawful and are being enforced within the 10(b) period. *Control Services*, 305 NLRB 435 fn. 2 (1991), enfd. 961 F.2d 1569 (3d Cir. 1992); *Teamsters Local 293 (R.L. Lipton Distributing*), 311 NLRB 538, 539 (1993); and *Whiting Milk Corp*., 145 NLRB 1035, 1037–1038 (1964).

The assertion by the Respondent that its policy and mandatory arbitration agreements are not prohibited because of a savings clause is also without merit. In *SolarCity Corp*., 363 NLRB No. 83, slip op. at page 6 (2015), the Board stated:

> It would be unclear to the reader (especially to a reader without specialized legal knowledge) whether and to what extent the subsequent language creating an exception for filing charges with Federal agencies modifies the previous broad prohibition on pursuing any form of collective or representative activity… This ambiguity would lead a reasonable employee to wonder whether he may file an unfair labor practice charge, particularly when the charge is filed with or on behalf of other employees, and thus serves as another reason to affirm the judge's finding that the Agreements unlawfully prohibit filing charges with the Board.[2]

Finally, in its communication to employees dated April 28, 2016, the Respondent essentially threatened to discharge any of its employees who refused to sign and hand in the arbitration agreements. I therefore conclude that by doing so the Respondent threatened employees with discharge in violation of Section 8(a)(1) of the Act

REMEDY

As I have concluded that the Respondent has unlawfully maintained a policy that precludes class or collective actions by employees, I shall recommend that it be ordered to rescind or revise that policy, to make it clear to employees that its policy and agreements made pursuant to that policy do not constitute a waiver in all forums of their rights to maintain class or collective actions relating to their wages, hours or other terms and conditions of employment. I shall also recommend that the Respondent be required to notify its employees of the rescinded or revised policy.

Because the Respondent's dispute resolution program and arbitration agreements have been and continues to be maintained on a multistate basis, it is recommended that the Respondent be ordered to post the attached Notice at all locations where the program has been or is still in effect.

Although the United States District Court for the Eastern District of Pennsylvania had not, at the time of this stipulation made a decision, it is recommended that the Respondent be required to file a motion with the court requesting the withdrawal of its motion to dismiss the Charging Party's lawsuit and to enforce the arbitration agreements.

To the extent that the Charging Party has incurred litigation expenses relating to the Respondent's petition to compel arbitration in conformance with an arbitration agreement, it is recommended that the Respondent reimburse Ryan Rutherford, Stephanie Joseph, and any other employees who participated in the class action lawsuit, for such expenses with interest as determined in *Kentucky River Medical Center*, 356 NLRB8 (2010), enf. denied on other grounds, sub. nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (DC Cir. 2011).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Quality Dining Inc., its officers, agents, and representatives, shall

1. Cease and desist from

(a) Maintaining and/or enforcing a policy that compels employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial

(b) Requiring employees to sign binding arbitration agreements that prohibit collective and class litigation.

(c) Threatening employees with discharge unless they signed binding arbitration agreements that prohibit collective and class actions.

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

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

(a) Rescind or revise the mandatory arbitration policy, or revise it to make clear to employees that the policy does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums or that requires employees to waive their right to maintain employment related class and collective claims in all forums, whether arbitral or judicial.

(b) Notify all current and former employees who were required to sign or otherwise become bound by the mandatory arbitration policy in any form that it has been rescinded or revised and, if revised, provide them with a copy of the revised

[2] See also *Lincoln Eastern Management Corp*., 364 NLRB No. 16, slip op. at 3 fn. 2 (2016).

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

policy

(c) Withdraw any pending motions in the United States District Court for the Eastern District of Pennsylvania in which the Respondent seeks enforcement of the arbitration policy's unlawful restriction on class or collective claims; or if such motions have already been granted, move the appropriate court to vacate any orders for individual arbitration and reimburse employees for any litigation expenses including attorney's fees, directly related to opposing Respondent's motions to compel individual arbitration.

(d) In the manner set forth in this decision, reimburse Ryan Rutherford and Stephanie Joseph, and any other class participants, for any reasonable attorneys' fees and litigation expenses that he may have incurred in opposing the Respondent's motion to compel individual arbitration.

(e) Within 14 days after service by the Region, post at its locations nationwide where the arbitration policy has been promulgated, maintained or enforced copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 4 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 the physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or 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. In addition, a copy of this notice will be made available to employees on the same basis and to the same group or class of employees as the arbitration policy was made available to them. In the event that, during the pendency of these proceedings, 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 to all current employees and former employees employed by the Respondent at any time since December 3, 2015.

(f) Within 21 days after service by the Region, file with the Regional Director 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.

Dated, Washington, D.C. December 15, 2016

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.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT maintain or enforce an arbitration policy or any agreements made with employees pursuant to that policy that waives the right of employees to maintain class or collective action in any forum.

WE WILL NOT pursuant to the terms of such agreements seek to enforce them by filing motions in court to dismiss collective action lawsuits and to compel individual arbitrations.

WE WILL NOT require employees to sign binding arbitration agreements that prohibit collective and class litigation.

WE WILL NOT threaten employees with discharge if they refuse to sign binding arbitration agreements.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL withdraw any pending motions in which we have sought to enforce the arbitration policy's unlawful restriction on class or collective claims; or if such motions have already been granted, move the appropriate court to vacate any orders for individual arbitration.

WE WILL reimburse Ryan Rutherford and Stephanie Joseph, and any other class action participants, for any reasonable litigation expenses including attorney's fees, directly related to opposing our motion to dismiss a Fair Labor Standards Act lawsuit and to compel individual arbitration.

QUALITY DINING, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/04-CA-175450 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.