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Prime Healthcare Paradise Valley, LLC and Richard Cardona and Stephene Ortega Cases 21–CA–133781 and 21–CA–133783

June 18, 2019

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On April 22, 2016, the National Labor Relations Board issued a Decision and Order finding that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by maintaining and enforcing its Mediation and Arbitration Agreement (M & AA) and Mutual Agreement to Arbitrate (MAA). *Prime Healthcare Paradise Valley, LLC*, 363 NLRB No. 169 (2016). Applying *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), the Board found that the M & AA and MAA unlawfully required employees, as a condition of their employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. *Prime Healthcare Paradise Valley, LLC*, above, slip op. at 1. The Board also found that the M & AA violated the Act on the basis that employees reasonably would construe it to restrict their access to the Board’s processes. *Id.*, slip op. at 1 fn. 3.

The Respondent filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit. The Board filed a cross-application for enforcement and, subsequently, a motion to hold the appeal in abeyance pending the Supreme Court’s resolution of the issue presented 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)—namely, whether employer-employee agreements that contain class- and collective-action waivers and require individualized arbitration violate Section 8(a)(1) of the Act. On May 21, 2018, the Supreme Court held that such agreements do not violate the Act and should be enforced as written pursuant to the Federal Arbitration Act (FAA). *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612, 1632 (2018).

¹ On February 4, 2019, the Board granted the AFL–CIO’s motion to file an amicus brief and accepted its brief filed on January 17, 2019. The AFL–CIO’s suggestion that the Board solicit amicus briefs from the

On July 3, 2018, the D.C. Circuit granted the Board’s motion to remove this case from abeyance, granted the Respondent’s petition for review and denied the cross-application for enforcement with respect to the portion of the Board’s Order governed by *Epic Systems*, and remanded the remainder of the case for further proceedings before the Board. *Prime Healthcare Paradise Valley, LLC v. NLRB*, No. 16–1132, –1173 (D.C. Cir. July 3, 2018) (unpublished per curiam order). On July 13, 2018, the Board notified the parties that it had accepted the remand and invited them to file statements of position with respect to the issues raised by the remand. Thereafter, the General Counsel and the Respondent filed statements of position. The AFL–CIO filed an amicus brief.¹

The D.C. Circuit’s July 3, 2018 order having disposed of all allegations controlled by the Supreme Court’s decision in *Epic Systems*, the sole remaining issue is whether the M & AA unlawfully restricts access to the Board and its processes. In its prior decision, the Board resolved this issue under the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *Prime Healthcare Paradise Valley, LLC*, 363 NLRB No. 169, slip op. at 1 fn. 3, 9. In *Lutheran Heritage*, the Board held, among other things, that an employer violates Section 8(a)(1) of the Act if it maintains a facially neutral work rule that employees “would reasonably construe . . . to prohibit Section 7 activity.” 343 NLRB at 647.

In *Boeing Co.*, 365 NLRB No. 154 (2017), the Board overruled the “reasonably construe” prong of the *Lutheran Heritage* standard and held that when it considers “a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.” *Id.*, slip op. at 3 (emphasis omitted). In conducting this evaluation, the Board will strike a proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policies, viewing the rule or policy from the employees’ perspective. *Id.* “As a result of this balancing . . . the Board will delineate three categories” of work rules:

Category 1 will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential

public was denied, although Member McFerran would have invited public briefing. The Respondent filed a response to the AFL–CIO’s amicus brief.

adverse impact on protected rights is outweighed by justifications associated with the rule. . . .

Category 2 will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.

Category 3 will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.

Id., slip op. at 3–4 (emphasis in original). However, these categories “will represent a classification of *results* from the Board’s application of the new test. The categories are not part of the test itself.” *Id.*, slip op. at 4 (emphasis in original). The Board also decided to apply its new standard retroactively to all pending cases in whatever stage. *Id.*, slip op. at 16–17.

The Board has considered its previous decision and the record in light of the statements of position filed by the parties, the AFL–CIO’s amicus brief, and the Respondent’s response to that brief. For the reasons that follow, we find that the M & AA restricts access to the Board and its processes, that the potential impact on NLRA rights is profound, and that no legitimate employer interests justify it.² Accordingly, under the standard set forth in *Boeing*, we find that the Respondent has violated Section 8(a)(1) of the Act by maintaining the M & AA.³

I. FACTS

The Respondent maintained the M & AA from at least July 25, 2012, until approximately May 13, 2014. The M & AA states, in pertinent part, as follows:

Except as otherwise provided in this Agreement, the Company and the Employee hereby consent to the resolution by binding arbitration of all claims or controversies for which a federal or state court would be authorized to grant relief, whether or not arising out of, relating to or associated with the Employee’s employment with the Company.

Claims covered by this Agreement include, but are not limited to, claims for wages or other compensation due; claims for breach of any contract or

covenant, express or implied; tort claims; claims for discrimination or harassment on bases which include but are not limited to race, sex, sexual orientation, religion, national origin, age, marital status, disability or medical condition; claims for benefits, . . . and claims for violation of any federal, state or other governmental constitution, statute, ordinance, regulation, or public policy including but not limited to Title VII of the Civil Rights Act, Age Discrimination in Employment Act, The Americans with Disabilities Act, Family and Medical Leave Act, Equal Pay Act and their state equivalents. The purpose and effect of this Agreement is to substitute arbitration as the forum for resolution of the Claims; all responsibilities of the parties under the statutes applicable to the Claims shall be enforced.

. . . .

Claims Not Covered by This Agreement— This Agreement does not apply to or cover claims for workers compensation or unemployment compensation benefits; claims resulting from the default of any obligation of the Company or the Employee under a loan agreement; claims for injunctive and/or other equitable relief for intellectual property violations. If either the Company or the Employee has more than one claim against the other, one or more of which is not covered by this Agreement, such claims shall be determined separately in the appropriate forum for resolution of those claims. Nothing in this Agreement shall preclude the parties from agreeing to resolve claims other than Claims covered by this Agreement pursuant to the provisions of this Agreement.

. . . .

Term, Modification, and Revocation—This Agreement shall survive the employer-employee relationship between the Company and the Employee and shall apply to any covered Claim whether it arises or is asserted during or after termination of the Employee’s employment with the Company or the expiration of any benefit plan. This Agreement can be modified or revoked only by a writing signed by the Employee and an executive officer of the Company that references this Agreement and specifically states an intent to modify or revoke this Agreement.

² The General Counsel did not allege that employees would reasonably construe the MAA to restrict their access to the Board. Thus, the lawfulness of the MAA is not before us.

³ Member Emanuel notes that, although this sentence might suggest that the M&AA is still in effect at the Respondent’s facility, the statement

of facts below clarifies that the Respondent maintained the M&AA until approximately May 13, 2014; since that date the Respondent has required all employees to sign the MAA; and the MAA revised the M&AA by adding language providing that employees were not prevented from filing charges with the Board.

All new employees from 2010 until May 2014 were required to sign the M & AA as a condition of employment.

Since at least May 13, 2014, the Respondent has required all employees at its National City facility to sign the MAA as a condition of employment. The MAA revised the M & AA by adding, in relevant part, the following: “[T]his Agreement does not prevent you from filing and pursuing administrative proceedings before the . . . National Labor Relations Board,” and “nothing herein is intended to limit your rights under Section 7 of the National Labor Relations Act and you will not experience any retaliation for exercising such rights.”

II. THE PARTIES’ POSITIONS

A. The General Counsel

In his statement of position on remand, the General Counsel argues as follows. The Supreme Court’s analysis in *Epic Systems* suggests that the Court “will not lightly infer illegality of an FAA-enforceable arbitration contract,” and therefore “the Board should carefully review the language of arbitration agreements for actual, as opposed to theoretical, violations of the NLRA.” In conducting this careful review, the Board must draw a distinction between agreements that merely require arbitration and those that also limit access to the Board. Arbitration agreements that unlawfully limit access to the Board include those that “explicitly prohibit the filing of claims with administrative agencies, that state that employees must use arbitration ‘exclusively’ for all of their work-related claims, that state that employees cannot use any other forum, that indicate that statutory claims must be brought exclusively in arbitration[,] or [that] otherwise use language that employees would reasonably understand as prohibiting the filing of claims with the Board.” Analyzed under *Boeing*, contends the General Counsel, the M & AA is unlawful because it “explicitly states that all other forums are displaced by arbitration for all claims, including federal statutory claims.” This interferes with the exercise of employees’ fundamental right to file unfair labor practice charges with the Board, and “the adverse impact is not outweighed by any justification associated with the rule.” The General Counsel would place the M & AA in *Boeing* category 3.

The General Counsel also posits six principles for analyzing arbitration agreements in light of *Boeing*, the first of which is quoted above. For completeness, we repeat it here, together with the other five.⁴

1. Arbitration agreements that explicitly prohibit the filing of claims with administrative agencies, that

state employees must use arbitration “exclusively” or cannot use any other forum for all of their work-related or statutory claims, or that otherwise use language that employees would reasonably understand as prohibiting the filing of claims with the Board should be found unlawful and placed in *Boeing* Category 3.

2. Arbitration agreements that state all employment disputes “shall” or “must” be resolved through arbitration should not be presumed to violate the Act. Such agreements require employees to utilize arbitration for employment-related disputes, but exclusivity should not be read into them absent other language indicating exclusivity. Such agreements should be placed in *Boeing* Category 2 and, read as a whole, analyzed to determine whether they would reasonably be read to interfere with the exercise of NLRA rights.

3. Arbitration agreements with a “savings clause” that explicitly allows employees to utilize administrative proceedings in tandem with arbitral proceedings should be found lawful and placed in *Boeing* Category 1, since employees would understand that they retain the right to access the Board and its processes, at least where the “savings clause” is reasonably proximate to the mandatory arbitration language so that the entire agreement would be read by employees to permit access to the Board.

4. Vague savings clauses that would require employees to “meticulously determine the state of the law” themselves are likely to interfere with the exercise of NLRA rights. Such clauses include, for example, those stating that “nothing in this agreement shall be construed to require any claim to be arbitrated if an agreement to arbitrate such claim is prohibited by law,” or that exclusively require arbitration but limit that requirement to circumstances where a claim “may lawfully be resolved by arbitration.”

5. In deciding whether a savings clause is adequate, the Board should be mindful of *Boeing*’s admonition that “perfection [should not be] the enemy of the good.” *Boeing*, above, slip op. at 2. The General Counsel points to *Securitas Security Services USA, Inc.*, 363 NLRB No. 182 (2016), and *SolarCity Corp.*, 363 NLRB No. 83 (2015), as cases where, in the General Counsel’s view, “the Board . . . required a degree of comprehensiveness and precision that should not be required” in finding arbitration agreements unlawfully interfered with access to the Board.

⁴ For the sake of brevity, we have paraphrased the General Counsel’s six principles. We list them here for expository purposes without passing

on their merits. So also with respect to the principles advocated by the AFL–CIO, summarized below.

The General Counsel contends that the Board should find the arbitration clauses lawful and place those cases in *Boeing* Category 2.

6. Finally, the General Counsel asserts that arbitration agreements allowing Board charge filing but precluding or limiting Board remedies should be found unlawful, as the impact of such a limitation on employees' right to an effective Board remedy outweighs any legitimate business justification for imposing such a limitation.

A. *The Respondent*

Turning to the Respondent's statement of position, the Respondent advances the following argument. By its terms, the M & AA applies to "claims or controversies for which a federal or state court would be authorized to grant relief." Thus, under *Boeing* the M & AA does not have a reasonable tendency to interfere with the exercise of Section 7 rights because it applies only to claims that may be asserted in court in the first instance, not to charges filed with an administrative agency, such as the Board.⁵ Because the M & AA does not implicate employees' Section 7 rights at all, no balancing of the extent of the M & AA's impact on those rights with the Respondent's business justification is required. The Respondent concludes that the M & AA is a *Boeing* Category 1 rule and requests that the Board dismiss the complaint.⁶

B. *The AFL-CIO*

In its amicus brief, the AFL-CIO argues as follows. First, the Board should find a mandatory arbitration agreement unlawful if the agreement broadly requires arbitration of claims and includes only vague, legalistic carve-outs for charge filing that are unlikely to be understood by most employees—for example, agreements requiring the arbitration of all claims except for claims "a court of law would have jurisdiction to entertain" or where arbitration is "specifically prohibited by law." Employees would reasonably believe that such an agreement would prohibit the filing of charges with the Board. No legitimate employer justification outweighs the adverse impact on employee

rights of such an agreement, particularly since "the right to file charges [with the Board] is the lynchpin of the entire NLRA structure."⁷

Second, the AFL-CIO asserts that the Board should provide clear guidance as to language that will render arbitration agreements lawful, and this guidance should require such agreements to include language that (i) employees can reasonably understand; (ii) makes clear at the outset that there are limitations to the claims that are covered by the mandatory arbitration requirement, using wording such as "with the exceptions set forth below" before listing claims that must be arbitrated; and (iii) specifically states that Board charge filing is not covered by the mandatory arbitration agreement. Thus, according to the AFL-CIO, arbitration agreements stating that all employment disputes "shall" or "must" be resolved through arbitration reasonably tend to interfere with Section 7 rights, unless such agreements contain an explicit carve-out for Board charge filing.⁸

Finally, in its prior decision applying *Lutheran Heritage*, the Board found that "employees reasonably would construe the [M & AA] to restrict their access to the Board's processes," *Prime Healthcare*, above, slip op. at 1 fn. 3, and *Lutheran Heritage's* "reasonably construe" standard is indistinguishable from *Boeing's* requirement that facially neutral rules be "reasonably interpreted" to determine potential interference with Section 7 rights. Thus, the AFL-CIO argues that the potential interference with Section 7 rights has been established; the balancing test required by *Boeing* must be reached; and applying that test, the balance tips decisively in favor of finding the M & AA unlawful because the agreement impedes charge filing, a "core, foundational" right under the Act.

III. DISCUSSION

C. *Legal Background*

Section 7 of the Act protects the right of employees to utilize the Board's processes, including the right to file unfair labor practice charges. See, e.g., *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740 (1983). The Board has no power to issue complaints sua sponte;

⁵ In support of this interpretation, the Respondent states that several employees who signed the M & AA also filed charges against the Respondent with administrative agencies, including the Equal Employment Opportunity Commission; no employee ever complained that he or she felt the M & AA precluded the filing of administrative charges; and there is no evidence that the Respondent ever intended to limit anyone's right to file an unfair labor practice charge.

⁶ The Respondent makes two additional arguments. First, it argues that Charging Party Cardona lacked standing to continue his claim that the M & AA unlawfully restricted his Sec. 7 rights because he reached an informal settlement agreement with the Respondent in November 2015. Second, the Respondent argues that the judge ordered inappropriate remedies.

⁷ Thus, the AFL-CIO disagrees with the General Counsel's fourth principle to the extent that the General Counsel recommends finding arbitration agreements with vague, legalistic carve-outs to be "likely" unlawful. The AFL-CIO recommends finding them categorically unlawful because "there is no legitimate justification for drafting such agreements in a manner that does not expressly state that employees may file charges with the Board." In addition, although the AFL-CIO generally agrees with the General Counsel's first principle that an arbitration agreement is unlawful if the prohibition on filing claims with administrative agencies is explicit and employees cannot use any other forum, the AFL-CIO would rely on pre-*Boeing* caselaw rather than *Boeing* itself.

⁸ Thus, the AFL-CIO disagrees with the General Counsel's second principle. -

Section 10(b) of the Act empowers the Board to do so “[w]henever it is charged that any person has engaged in or is engaging in any . . . unfair labor practice . . .” (emphasis added). Accordingly, the Supreme Court has recognized that “[i]mplementation of the Act is dependent upon the initiative of individual persons who must . . . invoke its sanctions through filing an unfair labor practice charge.” *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967). Congress intended employees to be completely free to file charges with the Board, to participate in Board investigations, and to testify at Board hearings. *NLRB v. Scrivener*, 405 U.S. 117, 121–122 (1972). This is shown by Congress’s adoption of Section 8(a)(4) of the Act, which makes it an unfair labor practice to discharge or otherwise discriminate against employees for filing charges or giving testimony under the Act. *Id.* at 121–122; see also *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 424 (1968) (“The policy of keeping people ‘completely free from coercion’ [] against making complaints to the Board is . . . important in the functioning of the Act as an organic whole.”) (quoting *Nash v. Florida Industrial Commission*, 389 U.S. at 238). Consistent with these principles, the Board has held that an employer violates Section 8(a)(1) if it restricts an employee’s right to file charges with the Board, including through restrictions contained in arbitration agreements. See, e.g., *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), *enfd.* 255 Fed.Appx. 527 (D.C. Cir. 2007).⁹

Nothing in the Supreme Court’s decision in *Epic Systems* disturbed this longstanding precedent. As noted above, the Court there held that employer-employee agreements that contain class- and collective-action waivers and stipulate that employment disputes are to be resolved by individualized arbitration do not violate the Act and must be enforced as written pursuant to the FAA. 138 S.Ct. at 1619, 1632. As the Court has recognized, however, the FAA’s requirement that arbitration agreements be enforced according to their terms may be “overridden by a contrary congressional command.” *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987); see also *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 103–104 (2012) (citing examples of statutes where Congress has restricted the use of arbitration). Although the Court in *Epic Systems* rejected the Board’s holding that

the Act prohibits individual arbitration agreements containing class- and collective-action waivers, it did not address whether the Act prohibits agreements that restrict employees’ access to the Board or its processes. We hold that the Act does prohibit such agreements. Under Section 10(b) of the Act, the Board has no power to issue complaint unless an unfair labor practice charge is filed, and Section 10(a) of the Act relevantly provides that the Board’s power to prevent unfair labor practices “shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.” Consistent with this clear congressional command, we hold that the FAA does not authorize the maintenance or enforcement of agreements that interfere with an employee’s right to file charges with the Board. See *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1019 (5th Cir. 2015); cf. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (rejecting argument that arbitration would undermine the role of the EEOC on the basis that petitioner remained free to file an employment-discrimination charge with that agency).

Consistent with these principles, an arbitration agreement that explicitly prohibits the filing of claims with the Board or, more generally, with administrative agencies must be found unlawful. Such an agreement constitutes an explicit prohibition on the exercise of employee rights under the Act. See, e.g., *PAE Applied Technologies, LLC*, 367 NLRB No. 105, slip op. at 2 fn. 6 (2019) (finding rule that prohibited union officers from communicating with customers about matters involving the parties’ collective-bargaining agreement “violated Sec. 8(a)(1) because it explicitly prohibited Section 7 activity”); see also *Lutheran Heritage Village-Livonia*, 343 NLRB at 646 (rules that explicitly restrict Section 7 rights will be found unlawful).¹⁰

Where an agreement does not contain such an explicit prohibition, however, it is facially neutral, and the standard set forth in *Boeing*, above, applies. Under that standard, the Board must first determine whether that agreement, “when reasonably interpreted, would potentially interfere with the exercise of NLRA rights.” *Boeing*, above, slip op. at 3. If it does, the Board will proceed to analyze the rule under *Boeing*’s balancing test, weighing the agreement’s potential interference with Section 7 rights against the employer’s legitimate business justifications. *Id.*¹¹

⁹ The arbitration agreement at issue in *U-Haul Co. of California* generally provided for arbitration of all employment-related disputes. Unlike the agreement at issue in this case, it did not make arbitration the exclusive forum for the resolution of all federal statutory claims. While we adhere to the general principle for which *U-Haul* stands—i.e., that an employer violates Sec. 8(a)(1) if it restricts an employee’s right to file charges with the Board—we do not here pass on the Board’s conclusion that the agreement at issue in *U-Haul* was unlawful.

¹⁰ *Boeing* did not affect the holding of *Lutheran Heritage* that a rule is unlawful if it explicitly restricts Sec. 7 activity. *PAE Applied Technologies*, above.

¹¹ Member McFerran acknowledges that *Boeing Co.*, 365 NLRB No. 154 (2017), is currently governing law, and joins the majority for institutional reasons, but adheres to and reiterates her dissent in that case. That said, she agrees with her colleagues that *Boeing* did not disturb prior precedent holding that arbitration agreements that explicitly prohibit filing claims with the Board or with administrative agencies are unlawful.

D. The M & AA is unlawful

Applying these principles, we find that the M & AA violates Section 8(a)(1) of the Act. Although the M & AA does not explicitly prohibit charge filing (or the exercise of other Sec. 7 rights), it does, when reasonably interpreted, interfere with the exercise of the right to file charges with the Board. To begin with, it requires that “all claims or controversies for which a federal or state court would be authorized to grant relief” be resolved by binding arbitration. Contrary to the Respondent’s argument, this language does not limit the scope of the M & AA to claims and controversies for which a court would be authorized to grant relief “in the first instance.” A federal court of appeals is authorized to grant relief for claims arising under the Act on a petition for enforcement or review of a Board order pursuant to Section 10(e) and (f), respectively. Moreover, a federal district court is authorized to grant interim injunctive relief for claims arising under the Act *in the first instance* pursuant to Section 10(j) and (l).¹² The M & AA then states that covered claims “include, but are not limited to” claims under a long list of employment-related statutes as well as “claims for violation of any federal, state, or other governmental constitution, statute, ordinance, regulation, or public policy,” and it further states that “[t]he purpose and effect of this Agreement is to substitute arbitration as the forum for resolution of the Claims.” The M & AA specifically excludes certain claims, but none of those exclusions covers charges filed with the NLRB, with any other administrative agency, or with administrative agencies generally.¹³ Reasonably interpreted, these provisions, taken as a whole, make arbitration the *exclusive* forum for the resolution of all claims, including federal statutory claims under the National Labor Relations Act. Accordingly, we

Further, Member McFerran observes that the M & AA arguably *is* an arbitration agreement that “explicitly prohibits the filing of claims with the Board or, more generally, with administrative agencies,” and is unlawful for that reason alone. Although the Board is not specifically named, the M & AA’s prohibition on filing charges with the Board is explicit because, without qualification, the M & AA “substitute[s] arbitration as the forum for the resolution of the Claims” (previously identified as a comprehensive list of employment-related claims). She nonetheless agrees with her colleagues’ conclusions, below, that the only reasonable interpretation of the M & AA from the employees’ perspective is that it does prohibit the filing of charges and that no legitimate employer justification could outweigh this core statutory right.

¹² Significantly, *Boeing* requires the Board to interpret disputed provisions from “the perspective of the employees,” *Boeing*, above, slip op. at 3, and it is unlikely that employees would be sufficiently familiar with the “intricacies of Federal court jurisdiction” to appreciate the distinction the Respondent has advanced. *U-Haul Co. of California*, 347 NLRB at 377-378; see also *Ingram Book Co.*, 315 NLRB 515, 516 fn. 2 (1994) (“Rank-and-file employees do not generally carry lawbooks to work or apply legal analysis to company rules as do lawyers, and cannot be

find that the M & AA, when reasonably interpreted, restricts the filing of charges with the Board.¹⁴

Having determined that the M & AA interferes with employees’ right to file charges with the Board, we now balance the “nature and extent of the potential impact” of the M & AA on those rights with any legitimate justification associated with this aspect of the M & AA. *Boeing*, above, slip op. at 3. Initially, we note that the Respondent does not advance any justification for a restriction on charge filing; instead, it argues only that the M & AA, when reasonably interpreted, does not interfere with Section 7 rights. In any event, we find that, as a matter of law, there is not and cannot be any legitimate justification for provisions, in an arbitration agreement or otherwise, that restrict employees’ access to the Board or its processes. Again, the Supreme Court has recognized that Congress “wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board.” *NLRB v. Scrivener*, 405 U.S. at 121 (citing *Nash v. Florida Industrial Commission*, 389 U.S. at 238). This complete freedom is indispensable to the effectuation of national labor policy under the Act. See NLRA Section 10(b) (providing, in relevant part, that the Board “shall have power” to issue a complaint “[w]hensoever it is charged that any person has engaged in or is engaging in any . . . unfair labor practice”); *Nash v. Florida Industrial Commission*, 389 U.S. at 238 (“Implementation of the Act is dependent upon the initiative of individual persons who must . . . invoke its sanctions through filing an unfair labor practice charge.”). Any contention that a restriction on filing unfair labor practice charges with the Board is supported by legitimate justifications must be rejected as contrary to the judgment and intent of Congress.¹⁵

expected to have the expertise to examine company rules from a legal standpoint.”)

¹³ The General Counsel asserts that disclaimer or “savings clause” language that notifies employees that they retain the right to utilize administrative proceedings may render an otherwise unlawful arbitration agreement lawful. As those facts are not presented here, we shall defer consideration of the import of such clauses to a future appropriate case.

¹⁴ The “when reasonably interpreted” standard is objective and looks solely to the wording of the rule, policy, or other provision at issue—here, the M & AA, interpreted from the employees’ perspective. Thus, contrary to the Respondent, it is irrelevant that some employees may have filed charges with administrative agencies despite the M & AA or that the Respondent has not invoked the M & AA to restrict administrative charge filing.

¹⁵ We recognize that arbitration may offer “quicker, more informal, and often cheaper resolutions” of claims than litigation in court. *Epic Systems*, 138 S.Ct. at 1621. Even assuming that arbitration offered similar benefits as compared to NLRB proceedings (a position neither argued nor established on this record), any claim that such considerations justify a restriction on charge filing would be contrary to Sec. 10(a) of the Act, as explained above.

Balancing the “nature and extent of the potential impact” on Section 7 rights with any legitimate justification associated with the rule, as *Boeing* requires, we now place provisions that make arbitration the exclusive forum for the resolution of all claims in *Boeing* Category 3. As explained above, such provisions significantly impair employee rights, the free exercise of which is vital to the implementation of the statutory scheme established by Congress in the National Labor Relations Act. No legitimate justification outweighs, or could outweigh, the adverse impact of such provisions on employee rights and the administration of the Act.¹⁶

REMEDY

The Respondent contends that even assuming the M & AA is found to unlawfully interfere with Board charge filing, an order requiring the Respondent to rescind the M & AA and notify those employees who signed it of its rescission is “grossly overbroad,” particularly because it has since replaced the M & AA with the MAA, an arbitration agreement with an explicit reservation of charge-filing rights under the Act. The Respondent also argues that if the Board finds the M & AA unlawful, the basis for that finding would be that the M & AA omits an explicit carve-out for NLRB charges, and this is not a valid basis for requiring the rescission of an otherwise-lawful arbitration agreement.

We find the Respondent’s arguments unpersuasive. First, although the Respondent adopted the MAA in 2014, there is no evidence that it has ever revoked the M & AA. By its terms, the M & AA states that it can only be revoked “by a writing signed by the Employee and an executive officer of the Company that references this Agreement and specifically states an intent to modify or revoke this Agreement.” Nothing in the MAA indicates that it modifies or revokes the M & AA, nor has the Respondent presented any other evidence sufficient to show that it has

ever revoked the M & AA in the manner specified therein as to any employee, much less that it has done so for all the employees who signed it. Second, the mere discontinuance of an unfair labor practice does not dissipate its effect or obviate the need for a remedial order. *Iron Workers Local 444 (Gust K. Newberg Construction Co.)*, 174 NLRB 1108, 1110 fn. 13 (1969) (citing cases), *enfd.* 426 F.2d 229 (7th Cir. 1970). The Respondent’s adoption of the MAA “did not eliminate the adverse effect upon employees’ protected activities of its prior conduct in maintaining and giving effect to the” M & AA. *Swift Service Stores*, 169 NLRB 359, 360 (1968). “Moreover, [the] Respondent continues to insist on the legality of the” M & AA. *Id.*¹⁷

Nor is there any merit to the Respondent’s contention that rescission of an arbitration agreement is unwarranted on these facts. The Board has ordered rescission of rules the unlawfulness of which turns on the *omission* of certain language. See, e.g., *Long Beach Memorial Medical Center, Inc. d/b/a Long Beach Memorial Medical Center & Miller Children’s and Women’s Hospital Long Beach*, 366 NLRB No. 66, slip op. at 3 (2018), *enfd. per curiam* ___ Fed.Appx. ___ (D.C. Cir. 2019) (ordering employer to rescind or revise policies that would have been lawful had they included language clarifying that the restrictions those policies imposed on displaying union insignia only applied in patient-care areas).¹⁸ The Respondent’s claim that rescission is inappropriate because the unlawful provision is contained in an arbitration agreement is equally unfounded. Rescission of the M & AA is necessary to meaningfully remedy the unfair labor practice found. Nothing in *Epic Systems* suggests that because some terms of an arbitration agreement are lawful, such as class- and collective-action waivers, rescission cannot be required when, as here, an arbitration agreement also contains an unlawful provision.¹⁹ Accordingly, we shall order

¹⁶ The Respondent additionally argues that the complaint should be dismissed because Charging Party Cardona’s charge is moot. According to the Respondent, Cardona resolved his claims by executing a non-Board settlement agreement in November 2015, and this settlement required

Cardona to notify the Board that he no longer wished to participate in Board proceedings. The record does not indicate, however, that Cardona attempted to withdraw his charge or otherwise contacted the Board regarding his settlement.

The Board will not be bound by any settlement that is at odds with the Act or the Board’s policies. *Wooster Division of Borg-Warner Corp.*, 121 NLRB 1492, 1495 (1958). The Board determines whether to give effect to a non-Board settlement under the standard set forth in *Independent Stave Co.*, 287 NLRB 740, 743 (1987), which includes consideration of “whether the settlement is reasonable in light of the nature of the violations alleged.” The Respondent makes no argument for the validity of Cardona’s non-Board settlement under *Independent Stave* or any other Board precedent. Rather, it simply asserts that dismissal is warranted

based on the settlement’s existence. Given the centrality of the right to file charges with the Board, a settlement that did not remedy the Respondent’s maintenance of an arbitration agreement interfering with that right would be unlikely to find favor with the Board. In this matter, however, the Board lacks the necessary information to analyze whether Cardona’s settlement satisfies *Independent Stave*. Accordingly, we reject the Respondent’s argument that Charging Party Cardona does not have standing in this matter because of his non-Board settlement.

¹⁷ Member McFerran agrees that a rescission remedy is warranted because, for all the reasons stated above, the requirements of an effective repudiation have not been met. See *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

¹⁸ Member Emanuel dissented in *Long Beach Memorial Medical Center* and would have found the policy in issue there lawful, thereby obviating the need for a rescission remedy.

¹⁹ Citing 9 U.S.C. § 2, the Respondent contends that “rescission of an arbitration agreement is only valid upon such grounds that exist in law or in equity for the revocation of any contract.” Even assuming, for the

the Respondent to rescind the M & AA to the extent it has not already done so, or to revise it to make clear to employees that it does not bar or restrict their right to file charges with the Board. Nothing in our order precludes the Respondent from promulgating a lawful arbitration agreement as a condition of employment.

ORDER

The Respondent, Prime Healthcare Paradise Valley, LLC, National City, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a Mediation and Arbitration Agreement that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

(b) 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) To the extent it has not already done so, rescind the Mediation and Arbitration Agreement in all its forms, or revise it in all its forms to make clear to employees that the Mediation and Arbitration Agreement does not bar or restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all current and former employees who were required to sign or otherwise became bound to the Mediation and Arbitration Agreement in any form that the Mediation and Arbitration Agreement has been rescinded or revised, and, if revised, provide them a copy of the revised agreement.

(c) Within 14 days after service by the Region, post at its National City, California facility copies of the attached notice marked "Appendix."²⁰ Copies of the notice, on forms provided by the Regional Director for Region 21, 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

sake of argument, that the Respondent's interpretation of the FAA is correct, the requirement is satisfied here: for all the reasons stated above, a restriction on filing charges with the Board would be equally unlawful regardless of whether it is contained in an arbitration agreement or some other contract.

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 January 29, 2014.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 18, 2019

John F. Ring, Chairman

Lauren McFerran, Member

Marvin E. Kaplan, Member

William J. Emanuel, 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

²⁰ 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."

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a Mediation and Arbitration Agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

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, to the extent we have not already done so, rescind the Mediation and Arbitration Agreement in all its forms, or revise it in all its forms to make clear that the Mediation and Arbitration Agreement does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise became bound to the Mediation and Arbitration Agreement in any form that the Mediation and Arbitration Agreement has been rescinded

or revised and, if revised, WE WILL provide them a copy of the revised agreement.

PRIME HEALTHCARE PARADISE VALLEY, LLC

The Board's decision can be found at www.nlr.gov/case/21-CA-133781 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.

