UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PFIZER, INC.,

Respondent,

Cases 10-CA-175850
07-CA-176035

and

REBECCA LYNN OLVEY MARTIN,

Charging Party,

and

JEFFREY J. REBENSTORF,

Charging Party.

CHARGING PARTY MARTIN'S ANSWERING BRIEF IN OPPOSITION TO EXCEPTIONS

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The confidentiality clause at issue is included in an arbitration agreement that required all employees to submit disputes with their employer, including those related to the violation of their statutory employment rights, to binding arbitration. The clause provides:

> The parties shall *maintain the confidential nature of the arbitration proceeding and the award, including all disclosures in discovery, submissions to the arbitrator, the hearing, and the contents of the arbitrator's award*, except as may be necessary in connection with a court application for a temporary or preliminary injunction in aid of arbitration or for the maintenance of the status quo pending arbitration, a judicial action to review the award on the grounds set forth in the FAA, or unless otherwise required or protected by law or allowed by prior written consent of both parties. This provision shall not prevent either party from communicating with witnesses or seeking evidence to assist in arbitrating the proceeding. [*Nothing in this Confidentiality provision shall prohibit employees from engaging in protected discussion or activity relating to the workplace, such as discussions of wages, hours, or other terms and conditions of employment*.] In all proceedings to confirm or vacate an award, the parties will cooperate in

> preserving the confidentiality of the arbitration proceeding and the award to the greatest extent allowed by applicable law.

ALJD at 3 (Mar. 21, 2019) (emphasis added). All parties agree that employees were required to consent to the arbitration provisions, including the confidentiality requirement, as a condition of employment. *See* Pfizer Brief at 7 (employees are "bound to the Agreement as a condition of employment").[1]

The Administrative Law Judge correctly held that requiring employees to agree to the confidentiality clause was an unfair labor practice for the following reasons.

I. The Legality of the Confidentiality Clause Must Be Examined under *Boeing*

Pfizer argues that the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018), created a special category of employer policies exempt from the Board's recent decision in *Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017), and subject to extraordinary deference.[2] But that is not the case and, in fact, the Board has only recently so held.

In *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10 (June 18, 2019), the Board applied its *Boeing* analysis to an arbitration agreement and found the agreement unlawful because it would reasonably be understood to preclude the filing of charges with the Board. After describing the steps of the *Boeing* analysis, *id*., slip op. at 5, the Board held in the very next paragraph of its opinion, "Applying these principles, we find the M & AA [the Mediation and

[1] ALJD at 1-2. The General Counsel's wholly unsupported assertion that "the parties' agreed-to language is entitled to greater deference than unilaterally-issued policies," General Counsel's Brief at 6, is wholly without foundations as his lack of supporting citation demonstrates. The Board has applied the same analysis to unilaterally imposed work rules and rules contained in "agreements" that are a condition of employment. If it did not do so, employers would simply impose all work rules through required "agreements."

[2] The General Counsel does not agree with this assertion and his brief applies the *Boeing* analysis to this case: "the analysis in *Boeing* . . . is an appropriate framework for determining whether an arbitration provision interferes with Section 7 rights." General Counsel Brief at 4 n. 1. *See also id*. at 7 ("the Board should apply the *Boeing* test").

Arbitration Agreement] violates Section 8(a)(1) of the Act." *Id*. at 6. Even more explicitly, the Board stated, "Accordingly, under the standard set forth in *Boeing*, we find the Respondent has violated Section 8(a)(1) of the Act by maintaining the M & AA." *Id*. at 2.

The *Boeing* analysis applies here.

II. The Confidentiality Clause Is Unlawful under *Boeing*

The confidentiality clause is unlawful under *Boeing* for two reasons.

First, as the Board made clear in *Prime Healthcare*, "*Boeing* did not affect the holding of *Lutheran Heritage*[-*Livonia*, 343 NLRB 646 (2004)] that a rule is unlawful if it explicitly restricts Sec. 7 activity." 368 NLRB No. 10, slip op. at 5 n. 10. The confidentiality clause at issue here does exactly that.

The confidentiality clause bars communications that are protected activity and nothing else. It is not "facially neutral" and thus is unlawful under that portion of *Lutheran Heritage* left standing by *Boeing*. The arbitration agreement at issue requires arbitration of all statutory employment disputes, for example, a dispute about whether employees were paid the minimum wage. If an employee brings such a dispute to arbitration and, in the course of the arbitration, learns that other employees were also paid less than the minimum wage, the confidentiality clause bars the arbitrating employee from discussing that information with the other employees. It thus "explicitly restricts Sec. 7 activity," *i.e*., employees discussing their wages with one another. And the arbitration agreement at issue requires arbitration of nothing but disputes over wages and other terms and condition of employment. That is, the only possible subject of covered disputes is terms and conditions of employment and the only communications barred by the confidentiality clause concern terms and conditions of employment.

Not only does the confidentiality clause restrict employees from sharing information with co-workers regarding the terms and conditions of employment that the employee learned during the arbitration process, but it also precludes employees from sharing the contents of an arbitration award rendered after the parties have completed the arbitration hearing. Thus, if an employee challenges a pay practice (e.g. not counting employees' travel time or mandatory training as "hours worked" etc.) and an arbitrator rules in the employee's favor, under the confidentiality provision the prevailing employee may not share the contents of the award with co-workers; co-workers who the employer will likely continue to pay under the challenged practice. Moreover, because the confidentiality provision restricts sharing the contents of the award (as opposed to simply precluding distribution of an award which it also does), the employee is not allowed to discuss the remedy of the award. If the remedy requires the employer to change its pay practice with respect to that employee, the confidentiality clause on its face precludes the prevailing employee from discussing the change with co-workers.

The rule restricting the use of camera-enabled devices upheld in *Boeing* differs from the confidentiality clause in exactly this critical respect. In *Boeing*, the Board observed that "[t]he vast majority of images or videos blocked by the policy do not implicate any NLRA rights." 365 NLRB No. 154, slip op. at 19. Here, in contrast, *every* disclosure concerning an arbitration conducted under the agreement will relate to terms and conditions of employment, a dispute about terms and conditions of employment, the mandated process for resolving such disputes, or the outcome of that process – all of which "implicate . . . NLRA rights."

The Board has repeatedly held that employee discussion of wages and other terms and condition of employment is core Section 7, protected activity. *Parexel Int'l, LLC*, 356 NLRB 516 (2011); *Valley Slurry Seal Co*., 343 NLRB 233, 245 (2004) ("[T]he Board has held that

Section 7 of the Act, which grants to employees the 'unfettered' right to engage in concerted activities for their mutual aid and protection, encompasses discussions, amongst employees about their salaries and other compensation for work—an inherently concerted activity. It follows that restrictions upon employees from communicating with each other concerning their wages, compensation, or other terms and conditions of employment are 'plain and obvious' violations of Section 8(a)(1) of the Act." (internal citations omitted)); *Automatic Screw Products Co*., 306 NLRB 1072 (1992) (holding that prohibiting employees from discussing wages "has a natural tendency to restrain them in the exercise of their Section 7 right to learn about and assess such a vital term and condition of employment as the salaries paid by their employer"), *enfd. mem.* 977 F.2d 582 (6th Cir. 1992); *Brockton Hosp. v. NLRB,* 294 F.3d 100, 106-07 (D.C. Cir. 2002). Those holdings extend to discussion of grievances concerning terms and conditions of employment. *See, e.g*., *Phoenix Transit System*, 337 NLRB 510, 510 (2002) (the employer "violated Section 8(a)(1) of the Act by maintaining a confidentiality rule prohibiting employees from discussing their sexual harassment complaints among themselves"); *Radisson Plaza Minneapolis and Hotel Employees and Restaurant Employees Union*, 307 NLRB 94, 94 (1992) (finding that "absen[t] . . . an overriding business justification," the employer's confidentiality provisions in handbook violated Section 8(a)(1) because they prohibited employees from discussing their wages); *All American Gourmet*, 292 NLRB 1111, 1130 (1989) (holding employer could not restrict employee's right to discuss her sexual harassment claim because "it precluded [her] from discussing sexual harassment with other employees"). The Board has never limited the right based on the source of the information discussed.[3]

[3] The General Counsel is thus simply wrong when he argues that the confidentiality clause "is no different from prohibiting the disclosure of confidential business . . . information." General Counsel's Brief at 11. Business information is entirely different than information about terms

Pfizer repeatedly asserts that "the Confidentiality Provision does *not* prohibit employees from discussing the terms and conditions of employment that are at issue in the proceeding." Pfizer Brief at 10. But that is simply wrong. The provision does prohibit that protected discussion to the extent it discloses information about such terms and conditions discovered in the arbitration proceeding or resulting from the proceeding, *e.g.*, that the terms are unlawful in the view of the arbitrator.

The confidentiality clause thus expressly restricts Section 7 activity and is unlawful.

Second, even if the Board reads the confidentiality clause as not expressly restricting the exercise of Section 7 rights, the Board must find it unlawful under *Boeing* for the same reason it found the agreement unlawful in *Prime Healthcare:* the clause "when reasonably interpreted, would potentially interfere with the exercise of NLRA rights." 368 NLRB No. 10, slip op. at 5. In fact, *Boeing* says exactly that:

> 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. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another.

365 NLRB No. 154, slip op. at 4 (emphasis omitted). The confidentiality provision is "a rule that prohibits employees from discussing wages or benefits with one another" when the

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and conditions of employment. And employers cannot label all information about terms and conditions of employment confidential in order to prevent employees from engaging in protected discussion of such information. The confidentiality clause at issue here is not limited to information an employee may have acquired improperly or in the ordinary course of his or her employment under conditions that may justify a restriction on distribution of the information. Nor is the clause limited to specific types of particularly sensitive information that might be disclosed in the course of an arbitration proceeding such as personal medical information or social security numbers.

information being discussed is derived from an arbitration proceeding. *Boeing* thus expressly controls this case.

Even if *Boeing* did not expressly speak to this case, the analysis it requires of facially neutral rules leads to the same result. In *Boeing*, the Board held:

> when evaluating 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. at 3 (emphasis omitted).

Under existing Board law, it is clear that the "nature and extent of the potential impact on NLRA rights" of the confidentiality clause is large. In *Boeing*, the Board observed that it "may differentiate among different types of NLRA-protected activities (some of which might be deemed central to the Act and others more peripheral)." *Id*. at 15. Here, the Board has repeatedly held that the types of communications barred by the confidentiality clause are "central to the Act" as they are the necessary first steps of self-organization. *See, e.g., Double Eagle Hotel & Casino*, 341 NLRB 112, 115 n. 14 (2004) (finding that "the ability to discuss terms and conditions of employment with fellow employees" is the ability to discuss "the most basic of Sec. 7 subjects"). The Board made clear in *Boeing*, "the impact of a particular rule on NLRA rights may be self-evident." *Id*. at 15. That is certainly the case here.[4]

[4] Under this prong of the *Boeing* analysis, the Board must reject the General Counsel's reliance on *S. Freedman & Sons, Inc*., 364 NLRB No. 82 (Aug. 25, 2016). The adverse impact on Section 7 rights of a confidentiality clause in an individual settlement agreement is far more limited than the across-the-board policy applying to all employees at issue here and covering not only settlement agreements but all aspects of any arbitration proceeding. Moreover, the Board observed in *S. Freedman* that the impact on Section 7 rights was minimal because "the Union itself retained the ability to share the terms with employees, as it was not bound by the confidentiality clause." *Id*., slip op. at 2. Here there is no union and therefore no such hedge on the restriction of Section 7 rights. Finally, the Board made clear in *S. Freedman*, that the waiver of rights implicit in a confidentiality provision in a settlement agreement has to be "narrowly

Pfizer argues that "the Confidentiality Provision is a procedural provision like [the] class action waiver at issue in *Epic Systems*." Pfizer Brief at 11. But that is simply wrong. A class action is a procedural device that operates within the arbitration itself. The confidentiality clause, in contrast, operates only outside the arbitration proceeding, controlling employees' communications with their coworkers even long after the arbitration process has ended. Such an on-going restriction is a clear violation of Section 7.

On the other side of the balance, Pfizer has advanced no "legitimate justifications" for the confidentiality clause. In contrast to *Boeing*, where the employer offered extensive evidence documenting the legitimate business purposes served by the rule, including maintaining security and complying with federal procurement requirements, 365 NLRB No. 154, slip op. at 17-19, here Pfizer offered no such evidence whatsoever. At most, Pfizer asserts that confidentiality is an essential attribute of arbitration. But that mere assertion is insufficient under *Boeing* and, as we demonstrate below, it is also false. The only possible justification for the confidentiality clause is to prevent employees from sharing information that might either prompt collective action to remedy common grievances or additional claims in arbitration. Neither is a "legitimate justification[]" under *Boeing*.

For both of these reasons, the confidentiality clause is unlawful under *Boeing*.[5]

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tailored to the facts giving rise to the settlement and the employee [must] receive[] something in exchange for [the] waiver." *Id*. Neither is true here.

[5] We note that no party relies on the language in the confidentiality clause barring disclosure "unless otherwise . . . protected by law." Nor could they. As former Member Miscimarra explained, it is "[a] sound principle that an otherwise illegal rule will not be rendered lawful based on language that would predictably be understood only by someone with specialized legal knowledge." *Securitas Security Services USA, Inc.*, 363 NLRB No. 182, slip op. at 8 (2016) (Member Miscimarra, dissenting in part). Indeed, the Board had applied this common sense insight—that is, that "[r]ank-and-file employees do not generally carry lawbooks to work or apply legal analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint," *Ingram Book Co.*, 315 NLRB 515,

III. The Confidentiality Clause Is Unlawful under the General Counsel's Own Theory

The General Counsel argues, "On the other hand, the Board should find that confidentiality provisions in arbitration agreements that are strictly limited to matters inherent to the arbitration process generally do not significantly impact Section 7 rights because they *do not prevent employees from discussing* terms and conditions of employment, *the fact of the arbitration, and/or their claims*. Rather, such provisions only address the confidentiality of matters that arise in the arbitration proceedings themselves." General Counsel's Brief at 8 (emphasis added). But the clause actually at issue in this case falls on the unlawful side of the line drawn by the General Counsel because it does require "the fact of the arbitration" and the employees' "claims" to be kept confidential.

The clause requires employees to maintain "the confidential nature of the arbitration proceeding." A reasonable employee would read that encompassing language to bar disclosure of "the fact of the arbitration" and his or her "claims." That reading is reinforced by the proviso which reads, "Nothing in this Confidentiality provision shall prohibit employees from engaging in protected discussions or activity relating to the workplace, such as discussions of wages, hours, or other terms and conditions of employment." The proviso does not expressly

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516 n.2 (1994)—for decades and in diverse contexts. *See, e.g.*, *id.* at 516 (overbroad no-distribution rule not saved by handbook proviso that employer would "abide by the applicable state or federal law" in the event of a conflict); *Ford Motor Co.*, 315 NLRB 609, 610 (1994) (exception for solicitation and distribution that are "legally protected" found insufficient to save employer's rule); *Westinghouse Electric Corp.*, 240 NLRB 905, 916-17 (1979) (rule prohibiting solicitation and distribution found unlawful, notwithstanding the clause "except where permitted by law"), *enfd. in relevant part* 612 F.2d 1072 (8th Cir. 1979). This rule of construction is established Board law. Indeed, *Boeing*'s instruction that the new test should be applied, "focusing on the perspective of employees," *i.e.*, not on the perspective of lawyers, incorporates the rule of construction. 365 NLRB No. 154, slip op. at 3. *See also Prime Healthcare*, 368 NLRB No. 10, slip op. at 6 n. 12.

encompass the fact of the arbitration or the claims being arbitrated and none of the terms in the proviso are reasonably read to encompass either.

The confidentiality clause is thus unlawful under the General Counsel's own theory.

IV. The Supreme Court's Decision in *Epic Systems* Strongly Suggests that the Confidentiality Clause Is Unlawful

Pfizer argues that *Epic Systems* supports its position only by taking selected phrases from the opinion out of context. Most importantly, Pfizer asserts that the Court's statement that "'arbitration agreements . . . must be enforced as written,'" is an absolute and categorical command. Pfizer Brief at 8 (quoting *Epic Systems*, 138 S.Ct. at 1632.) But that cannot be the case.[6] If it were, an arbitration agreement could provide, "Employees agree that all disputes concerning wage, hours and working conditions must be submitted to binding arbitration and that no employee will strike, picket, protest, or attempt to engage in collective bargaining concerning any such dispute." The Court in *Epic Systems* made clear that that provision would violate a core substantive NLRA right and would not have to be "enforced as written," and the Court's logic applies squarely here.[7]

The Court in *Epic Systems* recognized that arbitration agreements could impermissibly curtail Section 7 rights, but held that they did not do so by barring class and collective actions in court or arbitration. The Court thus established a dichotomy, observing, "The NLRA secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes." 138 S.Ct. at 1619. The Court emphasized,

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[6] The General Counsel does not follow this extreme construction of *Epic Systems* as he concedes that an agreement that required confidentiality concerning the fact of arbitration or the claims in arbitration would be unlawful, as discussed *supra*. *See* General Counsel's Brief at 8.

[7] Pfizer's remaining arguments are all based on dicta in *Epic Systems* and, even if accepted, would in no way suggest that an arbitration agreement must be enforced if it results in the waiver of a substantive right protected by the NLRA or another federal statute.

"Section 7 focuses on the right to organize unions and bargain collectively." *Id*. at 1624. "Union organization and collective bargaining in the workplace are the bread and butter of the NLRA." *Id*. at 1627. And the Court expressly recognized that the central, substantive rights protected by the NLRA are not limited to "'self-organization, form[ing], join[ing], or assist[ing] labor organizations,' and 'bargain[ing] collectively.'" *Id*. at 1625 (quoting 29 U.S.C. § 157). Rather, those words are followed by "a more general term" that "is usually understood to 'embrace . . . objects similar in nature to those objects enumerated by the preceding specific words.'" *Id*. (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2018)). "All of [this] suggests," the Court reasoned, that the "other concerted activities" employees have a protected substantive right to engage in that cannot be waived in an arbitration agreement must be "similar in nature" to "self-organization" and "serve to protect things employees 'just do' for themselves in the course of exercising their right to free association in the workplace, rather than 'the highly regulated, courtroom-bound activities of class and joint litigation.'" *Id*. (quoting *NLRB v. Alternative Entertainment, Inc.*, 858 F.3d 393, 414-15 (6th Cir. 2017) (Sutton, J., concurring in part and dissenting in part)).

The Court's logic makes clear that the protected substantive rights that cannot be waived in an arbitration agreement are not limited to the actual acts of organizing and joining a union. In fact, the Court made that explicit: "this Court's Section 7 cases have usually involved just what you would expect from the statute's plain language: efforts by employees *related* to organizing and collective bargaining in the workplace." *Id*. at 1628 (emphasis added). And the Court explained how activity can be "related" to the specifically protected forms of activity in describing its holding in *NLRB v. City Disposal Systems, Inc*., 465 U.S. 822 (1984), that a single employee's enforcement of a collective bargaining agreement is protected concerted activity:

"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.'" *Epic Systems*, 138 S.Ct. at 1628 (quoting *City Disposal*, 465 U.S. at 831-32). The same is true of "self-organization," as the Board has recognized. It is a "process" that often begins with a discussion of wages and other terms and conditions of employment. Thus, nothing could be more centrally in the category of protected concerted activity described in *Epic Systems* than talking about wages and other terms and conditions of employment, including discussing information about terms and conditions of employment acquired in an arbitration proceeding and the results of that proceeding.

In other words, *Epic Systems* makes clear that a clause in an arbitration agreement barring class and collective actions must be enforced as written and a clause barring organizing and collective bargaining and related, similar "concerted activity" need not be enforced as written. The question left open in *Epic Systems* is where to draw the line between those two types of clauses. Both the logic of *Epic Systems* and the Board's prior case law make clear that a clause barring discussion of wages or other terms of employment, even if it is limited to discussion of information about terms and conditions of employment learned in an arbitration proceeding, falls on the non-enforcement side of the line.

The Board has made clear that discussions of wages and other terms and conditions of employment are protected precisely because they are closely "related" to "self-organization" as required under *Epic Systems*. Such discussions are "the grist on which concerted activity feeds." *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995) (citation omitted), *enfd. in part*, 81 F.3d 209 (D.C. Cir. 1996). *See also Whittaker Corp.*, 289 NLRB 933, 933-34 (1988) ("[I]t is obvious that higher wages are a frequent objective of organizational

activity, and discussions about wages are necessary to further that goal." (quoting *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976))). Discussions about wages and other working conditions and employees' dissatisfaction with them are often the precursor to organizing and seeking union assistance. *See Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1206 n. 10 (2014) ("[D]iscussions of wages are often preliminary to organizing or other action for mutual aid or protection."); *Parexel International, LLC*, 356 NLRB 516, 518 (2011) ("Discussions about wages are often the precursor to organizing and seeking union assistance . . . [and prohibiting such discussions has] the effect of keeping other employees in the dark about these matters, thus preventing them from discussing, and possibly inquiring further or acting in response to, substandard wages or perceived wage discrimination"); *Valley Slurry Seal Co*., 343 NLRB 233, 245 (2004) ("[S]uch discussions may well be a 'precursor' to seeking representation by a labor organization" (internal citations omitted)); *Automatic Screw Products Co*., 306 NLRB 1072 (1992) ("[S]uch discussion may be necessary as a precursor to seeking union assistance and is clearly concerted activity."), *enfd. mem.* 977 F.2d 582 (6th Cir. 1992); *Triana Industries*, 245 NLRB 1258, 1258 (1979) (preventing wage discussions "has a natural tendency to restrain employees in the exercise of rights guaranteed them under Section 7 of the Act")

Thus, the Board has already made clear not only that restrictions on employees' discussions of wages and other terms and conditions of employment are unlawful, but also that such activity is "related to organizing" as required by *Epic Systems.* Such restrictions do not have to be "enforced as written" even if they are embodied in an arbitration agreement.

Addressing the dissent in *Epic Systems*, the Court majority stated, "the legislative policy embodied in the NLRA is aimed at 'safeguard[ing], first and foremost, workers' rights to join unions and to engage in collective bargaining.'" 138 S.Ct. at 1630 (quoting dissent). "Those

rights stand every bit as strong today as they did yesterday," the Court concluded. *Id*. But that would clearly not be the case if the Board sanctions the confidentiality clause. The central right to organize will be undermined as the Board has repeatedly recognized.

Thus, the express logic of *Epic Systems* makes clear that the confidentiality clause does not have to be enforced as written.

Our position is supported by the questions posed during oral argument in *Epic Systems*. Specifically, Justice Kennedy, a member of the 5-4 majority, made clear that he assumed employees would remain free to exchange precisely the forms of information barred by the instant agreement when he cast his vote. Justice Kennedy had the following dialogue with the Board's General Counsel:

> JUSTICE KENNEDY: . . . . You said this rule means that three people -- employees – can't go to the same attorney and say please represent us, and we will share our information with you, we have three individual arbitrations, but you represent all three of us, they can do that.
>
> MR. GRIFFIN: They could do that, Your Honor, but it doesn't –
>
> JUSTICE KENNEDY: Well, that is collective action.
>
> MR. GRIFFIN: But it's not the – it's not the collective action that is protected here. The act protects the employees' rights to proceed concertedly in the –
>
> JUSTICE KENNEDY: Well, they are proceeding concertedly. They have a single attorney. They are presenting their case. It is going to be decided maybe in three different hearings.
>
> . . . .
>
> JUSTICE KENNEDY: . . . [M]any of the advantages of concerted action can be obtained by going to the same attorney.

Transcript of oral argument at 37–39, *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018) (No. 16-285).

Justice Kennedy's questions clearly demonstrate that he believed employees remained free under the arbitration agreement before the Court to discuss their arbitration claims with one another, take them to the same lawyer, and share information from the proceedings with one another directly or through the lawyer, thus obtaining "many of the advantages of concerted

action." But if the confidentiality clause at issue here can be enforced, that would not be the case. Employees would not be able to share information obtained in their individual arbitrations and neither would their lawyer. Indeed, it is not clear that they could retain a single lawyer given that the lawyer, as an agent of the employees, would be bound by the confidentiality clause to keep anything learned in one arbitration confidential in respect to his or her other clients and perhaps, even from him or herself as an agent of those other employees – an obviously impossible duty that might preclude common representation. The employees would not be able to achieve "many of the advantages of concerted action." Clearly, Justice Kennedy, who cast the deciding vote in *Epic Systems*, did not believe the holding there suggested that such a confidentiality clause must be enforced as written.

Finally, the core holding in *Epic Systems* was that the NLRB's holding that Section 7 barred class or collective action waivers "interfere[ed] with 'fundamental attributes of arbitration.'" 138 S.Ct. at 1622 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). But confidentiality is not a "fundamental attribute[] of arbitration." In *Epic Systems* the Court described those essential attributes of arbitration several times. *See* 138 S.Ct. at 1621 ("quicker, more informal, and often cheaper"); *id*. at 1623 ("individualized and informal"); *id*. ("informality"). According to the Court, collective or class action procedures were inconsistent with these attributes. In no instance, however, did the Court include confidentiality as among those fundamental attributes. In addition, the rules of the major U.S. arbitration providers do not require the parties to maintain confidentiality and "generally no such obligation is imposed on the parties." *See* General Counsel's Brief at 8 n. 4 (quoting Ronald Ravikoff, *Your Arbitration Is Private, but Is It Confidential*, Daily Business Review, May 26, 2015)).

The Court's holding in *Epic Systems* strongly suggests that the confidentiality clause is unlawful.

V. Conclusion

For the above-stated reasons, the Board should affirm the ALJD.

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2019, the foregoing Brief in Opposition to Exceptions was electronically filed via the NLRB E-Filing System with the National Labor Relations Board and served on the following in the manner specified below:

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