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Haynes Building Services, LLC *and* J. Tadeo Gomez-Flores. Case 31–CA–093920

December 23, 2019

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On February 23, 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 threatening to enforce its Arbitration Agreement ("Agreement"). Applying the analysis set forth in *D. R. Horton*, 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 the Agreement unlawful on the basis that it required employees, as a condition of employment, to waive their right to pursue class or collective actions in any forum, whether arbitral or judicial. *Haynes Building Services, LLC*, 363 NLRB No. 125, slip op. at 1, 4–5 (2016). The Board also found that the Respondent unlawfully required its job applicants to sign a Notice to Applicant that included an arbitration provision employees would reasonably construe to restrict their access to the Board and its processes. Id., slip op. at 3–4.

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. On May 21, 2018, the Supreme Court held that employer-employee agreements that contain class- and collective-action waivers and require individualized arbitration do not violate Section 8(a)(1) of 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).

On July 3, 2018, the D.C. Circuit granted the Respondent's petition for review, denied enforcement of the portion of the Board's order governed by *Epic Systems*, and remanded the remainder of the case for further proceedings before the Board. On October 30, 2018, the Board issued a Notice to Show Cause why this case should not be remanded to the administrative law judge to decide the remaining issue under the standard set forth in *Boeing Co.*, 365 NLRB No. 154 (2017), discussed below. The General Counsel filed a statement of position, opposing remand. The Respondent did not file a response. Because no party favors a remand and the remaining allegation may be decided based on the existing record, we find that a remand is unnecessary.

The Board has considered its previous decision and the record in light of the General Counsel's statement of position. For the reasons set forth below, we find that under *Boeing* and its progeny, the arbitration provision in the Notice to Applicant unlawfully restricts employee access to the Board and its processes. Accordingly, we conclude that the Respondent violated Section 8(a)(1) of the Act by maintaining this provision in the Notice to Applicant.

Facts

The parties stipulated that during the relevant time period, the Respondent required all applicants for employment to sign a Notice to Applicant. The arbitration provision in the Notice to Applicant, translated from its original Spanish, read as follows:

> I agree to submit to an obligatory arbitration for all disputes and complaints that arise from the submission of this application. Furthermore, if I am hired by this Company, I am in agreement that all disputes or complaints that cannot be resolved within the Company and informally shall be submitted to obligatory arbitration conducted under the Association of Arbitration's rules.

Discussion

The court's July 3, 2018 order having disposed of all allegations controlled by the Supreme Court's decision in *Epic Systems*, above, the remaining issue for decision is whether the arbitration provision included in the Notice to Applicant 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 *Haynes Building Services*, 363 NLRB No. 125, slip op. at 2. 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 2017, the Board issued a decision in *Boeing Co.*, overruling the "reasonably construe" prong of *Lutheran Heritage*. 365 NLRB No. 154, slip op. at 2. Under *Boeing*, a facially neutral rule or policy must be evaluated in such a way as to strike a proper balance between the business justifications for the rule and the invasion of employee rights in light of the Act and its policies, viewing the rule or policy from the employees' perspective. Id., slip op. at 3. Under *Boeing*, the Board first determines whether a challenged rule or policy, when reason-

ably interpreted, would potentially interfere with the exercise of rights under Section 7 of the Act. If not, the rule or policy is lawful. If so, the Board evaluates two things: "(i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule." Id.[1] The Board decided to apply its new standard retroactively to all pending cases in whatever stage. Id., slip op. at 16–17.

Subsequently, in *Prime Healthcare Paradise Valley, LLC,* the Board held that the maintenance and enforcement of arbitration agreements that interfere with employees' right to file charges with the Board remain unlawful notwithstanding the Supreme Court's decision in *Epic Systems*. 368 NLRB No. 10, slip op. at 5 (2019). This is so because the FAA's requirement that arbitration agreements be enforced as written "may be 'overridden by a contrary congressional command,'" which the Board found to be established in Section 10 of the Act. Id. (quoting *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987)). Indeed, "[u]nder 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.'" Id.

Accordingly, and consistent with *Lutheran Heritage,* 343 NLRB at 646, the Board in *Prime Healthcare* explained that an arbitration agreement that "explicitly prohibits the filing of claims with the Board or, more generally, with administrative agencies must be found unlawful." 368 NLRB No. 10, slip op. at 5. The Board further held that where an arbitration agreement does not contain such an express prohibition—i.e., where the arbitration agreement in question is facially neutral—the *Boeing* standard applies. Id. Under that standard, the Board will first determine whether the agreement, when reasonably interpreted, would potentially interfere with the exercise of Section 7 rights. Id. If it does, *Boeing*'s balancing test comes into play, which would typically require the Board to weigh the agreement's potential interference with Section 7 rights against the employer's legitimate justifications. However, the Board concluded 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." Id., slip op. at 6. Finally, the Board placed arbitration agreements that restrict employees' access to the Board by making arbitration the exclusive forum for the resolution of all claims in *Boeing* Category 3, which designates rules and policies that are unlawful to maintain. Id., slip op. at 7.

Applying these principles, the Board in *Prime Healthcare* found that the arbitration agreement at issue there violated the Act because, although it did not explicitly prohibit charge filing or other access to the Board and its processes, it did, when reasonably interpreted, interfere with employees' right to file charges with the Board. Id., slip op. at 6. The arbitration provision at issue in that case required "all claims or controversies for which a federal or state court would be authorized to grant relief"—"includ[ing], but . . . not limited to" claims under a long list of employment-related statutes and "claims for violation of any federal, state, or other governmental constitution, statute, ordinance, regulation, or public policy"—to be resolved by binding arbitration. Id. The *Prime Healthcare* agreement contained no clause excluding from its scope claims arising under the Act, and neither did it contain a savings clause preserving employees' right to file charges with the Board or with administrative agencies generally. Rather, the agreement stated that "[t]he purpose and effect of this [a]greement is to substitute arbitration as the forum for the resolution of" all covered claims. Id. The Board found that, when reasonably interpreted, the foregoing language made arbitration the exclusive forum for the resolution of all claims, including claims arising under the Act, thereby restricting charge filing with the Board, and that "there is not and cannot be any legitimate justification" for such a restriction. Id.

Applying the same rationale in *Beena Beauty Holding, Inc. d/b/a Planet Beauty*, 368 NLRB No. 91 (2019), the Board again found a facially neutral arbitration clause unlawful. In *Beena Beauty*, the arbitration agreement

[1] After conducting the analysis *Boeing* requires, the Board will designate the rule into one of the following three categories:

- 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 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; and
- 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 would be a rule that prohibits employees from discussing wages or benefits with each other.

Boeing, supra, slip op. at 3–4. 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.

broadly required the parties "TO SUBMIT ANY CLAIMS THAT EITHER HAS AGAINST THE OTHER TO FINAL AND BINDING ARBITRATION" (emphasis in original). Id., slip op. at 2. As in *Prime Healthcare,* the agreement did not exclude claims arising under the Act from its scope—it excluded only claims for workers' compensation and unemployment benefits—and it did not contain a savings clause preserving employees' right to file charges with the Board or with administrative agencies generally. Accordingly, the Board found that the agreement in *Beena Beauty* unlawfully "[made] arbitration the exclusive forum for the resolution of all claims except for workers compensation and unemployment benefits, including claims arising under the Act." Id., slip op. at 3.

The arbitration provision in this case includes language similar in breadth to the language found unlawful in *Prime Healthcare* and *Beena Beauty*. Applicants are required to agree to "obligatory arbitration for all disputes and complaints" arising from the submission of their application, and, if the applicant is hired, he or she must further agree that "all disputes or complaints that cannot be resolved within the Company and informally shall be submitted to obligatory arbitration." Moreover, like the arbitration agreements at issue in both *Prime Healthcare* and *Beena Beauty*, the arbitration provision in the Respondent's Notice to Applicant neither excludes from its scope claims arising under the Act nor contains a savings clause preserving the right to file charges with the Board or with administrative agencies generally.[2] As in those cases, the provision at issue here significantly impairs employee rights, the free exercise of which is vital to the implementation of the statutory framework established by Congress in the National Labor Relations Act, and cannot be legitimately justified. *Prime Healthcare*, 368 NLRB No. 10, slip op. at 6, 7. The arbitration provision in the Notice to Applicant therefore belongs in *Boeing* Category 3. Accordingly, we find that the Respondent violated Section 8(a)(1) of the Act by maintaining the arbitration provision in the Notice to Applicant.

Amended Remedy

Having found that the Respondent has engaged in an unfair labor practice, we shall order it to cease and desist and to take certain affirmative action necessary to effectuate the policies of the Act. Specifically, having found that the Respondent unlawfully maintained a mandatory arbitration provision in its Notice to Applicant that employees reasonably would believe bars or restricts their right to file charges with the Board, we shall order the Respondent, to the extent it has not already done so, to rescind the unlawful provision and to advise its employees in writing that it has done so.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Haynes Building Services, LLC, Monrovia, California, its officers agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration provision in its Notice to Applicant that employees reasonably would believe bars or restricts the right of employees 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) Rescind the mandatory arbitration provision in the Notice to Applicant in all its forms, or revise it in all its forms to make clear to employees that the arbitration provision in the Notice to Applicant does not bar or restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all applicants and current and former employees who were required to sign or otherwise became bound to the Notice to Applicant in any form that the arbitration provision in the Notice to Applicant has been rescinded or revised and, if revised, provide them with a copy of the revised Notice to Applicant.

(c) Within 14 days after service by the Region, post at its Monrovia, California facility copies of the attached

[2] The Respondent's Arbitration Agreement, presented to employees after their hire, contains the following sentence: "In conformity to the pertinent law, this agreement for arbitrating disputes will not prevent you from filing a charge or complaint with an administrative government agency." *Haynes Building Services*, 363 NLRB No. 125, slip op. at 2. The General Counsel does not allege that the Arbitration Agreement violates the Act by interfering with employees' access to the Board, and that issue is not before us. But even if the Arbitration Agreement lawfully preserves employees' right to file charges with the Board, this does not cure the unlawfulness of the Notice to Applicant. Applicants do not see the Arbitration Agreement until after they are hired, and the Notice to Applicant does not reference or incorporate the Arbitration Agreement. Accordingly, the Respondent's Arbitration Agreement does not cure the illegality of the Notice to Applicant.

[3] In its previous decision, the Board ordered the Respondent to rescind the Notice to Applicant in its entirety. However, the Notice to Applicant contains provisions unrelated to the arbitration provision found unlawful here, such as one allowing the Respondent to contact applicants' references and another by virtue of which the applicant agrees to employment-at-will. We therefore require that the Respondent rescind only the arbitration provision.

notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 28, 2012.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 31 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 23, 2019

John F. Ring, Chairman

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

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 mandatory arbitration provision in our Notice to Applicant that 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 rescind the mandatory arbitration provision in the Notice to Applicant in all its forms or revise it in all its forms to make clear that the arbitration provision does not bar or restrict employees' right to file charges with the National Labor Relations Board.

WE WILL notify all applicants and current and former employees who were required to sign or otherwise became bound to the Notice to Applicant in any of its forms that the arbitration provision in the Notice to Applicant has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised Notice to Applicant.

HAYNES BUILDING SERVICES, LLC

The Board's decision can be found at www.nlrb.gov/case/31-CA-093920 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.

[4] 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."