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California Commerce Club, Inc. and William J. Sauk.
Case 21–CA–149699

June 19, 2020

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

The question presented in this case is whether an agreement providing for arbitration of employment-related disputes violates the National Labor Relations Act (the Act or NLRA) on the basis that it includes the following provision: “The arbitration shall be conducted on a confidential basis and there shall be no disclosure of evidence or award/decision beyond the arbitration proceeding.” This provision affects employees’ exercise of their rights under Section 7 of the Act to the extent that it restricts their freedom to discuss terms and conditions of employment. See *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 205 (2007) (“It is axiomatic that discussing terms and conditions of employment with coworkers lies at the heart of protected Section 7 activity.”), *enfd.* 519 F.3d 373 (7th Cir. 2008). However, this provision is contained in an arbitration agreement, the enforceability of which is governed by the Federal Arbitration Act (FAA). In *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612 (2018), the Supreme Court held that agreements containing class- and collective-action waivers and stipulating that employment disputes are to be resolved by individualized arbitration do not violate the NLRA and must be enforced as written pursuant to the FAA. The question presented here is whether the disputed confidentiality provision in the Respondent’s arbitration agreement likewise does not violate the NLRA. For the reasons that follow, we hold that the confidentiality provision at issue here does not violate the NLRA, and we overrule prior Board decisions to the extent they are inconsistent.

Our determination that the confidentiality provision at issue in this case is lawful under the Act does not mean, however, that any confidentiality provision is lawful merely because it is included in an arbitration agreement. As the Supreme Court explained in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, “[a]rbitration under the [FAA] is a matter of consent, not coercion, and the parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate . . . so too may they specify by contract *the rules under which the arbitration will be conducted.*” 489 U. S.

468, 479 (1989) (internal citation omitted; emphasis added). Provisions that impose confidentiality requirements beyond the scope of the arbitration proceeding and “the rules under which the arbitration will be conducted” receive no protection from the FAA. Such provisions must be assessed under the same standards that apply to confidentiality rules generally. Moreover, any provision that purports to impose confidentiality requirements on unfair labor practice proceedings before the Board would violate the Act. If such a provision were to be included in an arbitration agreement, the FAA would not render it enforceable.

Background

Since February 2015, the Respondent and employees, including Charging Party William J. Sauk, have been parties to an Arbitration Agreement and Mandatory Dispute Resolution Process (the Agreement) that (1) provides that employees will resolve employment-related claims through individual arbitration, waiving the right to pursue such claims through class or collective actions, and (2) includes a provision stating that “[t]he arbitration shall be conducted on a confidential basis and there shall be no disclosure of evidence or award/decision beyond the arbitration proceeding.”

On July 29, 2015, the General Counsel issued a complaint alleging that the Respondent was violating Section 8(a)(1) of the Act by maintaining the Agreement on the basis that it requires employees to waive their right to pursue class or collective actions. The complaint further alleges that the confidentiality provision separately violates Section 8(a)(1) on the basis that “employees would reasonably conclude that [it] interfere[s] with employees’ ability to discuss topics protected by Section 7 of the Act and therefore preclude[s] employees from engaging in conduct protected by Section 7 of the Act.”

On January 6, 2016, Administrative Law Judge Amita Baman Tracy found both violations. Applying the Board’s decisions in *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), she found that the Respondent was violating Section 8(a)(1) by maintaining the Agreement because the Agreement requires employees to waive their right to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. *California Commerce Club, Inc.*, 364 NLRB No. 31, slip op. at 6–9 (2016).

The judge also found that the confidentiality provision unlawfully restricts employees in the exercise of their Section 7 right to discuss terms and conditions of employment. *Id.*, slip op. at 9–10. The judge stated that although

the confidentiality provision “only prohibits discussion of evidence obtained during the course of the arbitration proceeding, it still explicitly limits employees’ right to discuss terms and conditions of employment such as wages.” *Id.*, slip op. at 9. The judge likened the confidentiality provision at issue here to workplace confidentiality rules that the Board has found unlawful to maintain on the basis that they expressly prohibit discussion of wages and working conditions, citing *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004) (finding unlawful a confidentiality rule prohibiting discussion of “disciplinary information, grievance/complaint information, performance evaluations, [and] salary information”), enfd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006). *Id.* The judge also noted that the Board had found a similar confidentiality provision contained within an arbitration agreement unlawfully overbroad, citing *Professional Janitorial Service of Houston*, 363 NLRB No. 35 (2015) (finding unlawful a confidentiality provision stating that “[a]ll statements and information made or revealed during arbitration are confidential, and neither you nor the [c]ompany may reveal any such statements or information, except on a ‘need to know’ basis or as permitted or required by law”). *Id.*

The judge rejected the Respondent’s argument that the confidentiality provision is not overly broad because it does not prevent employees from discussing the events or circumstances that give rise to arbitration proceedings. The judge found that a reasonable employee would construe the provision’s reference to “evidence” as encompassing all aspects of the dispute. In support, she cited cases where the Board, applying the “reasonably construe” prong of the standard set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), found facially neutral confidentiality rules unlawfully overbroad. See, e.g., *Rio All-Suites Hotel & Casino*, 362 NLRB 1690, 1691–1692 (2015) (finding unlawful a confidentiality rule prohibiting employees from disclosing “any information about the Company which has not been shared by the Company with the general public”). *Id.*, slip op. at 9–10.

¹ Under *Boeing*, the Board first determines whether a challenged rule or policy, reasonably interpreted, would potentially interfere with the exercise of rights under Sec. 7 of the Act. If not, the rule or policy is lawful and placed in Category 1(a). If so, the Board determines whether an employer violates Sec. 8(a)(1) of the Act by maintaining the rule or policy by balancing “the nature and extent of the potential impact on NLRA rights” against “legitimate justifications associated with the rule,” viewing the rule or policy from the employees’ perspective. *Id.*, slip op. at 3. As a result of this balancing, the Board places a challenged rule into one of three categories. Category 1(b) consists of rules that are lawful to maintain because, although the rule, reasonably interpreted, potentially interferes with the exercise of Sec. 7 rights, the interference is

Finally, the judge noted the Respondent’s argument that the FAA requires the enforcement of arbitration agreements and their terms, including, in the Respondent’s view, confidentiality provisions like the one at issue here. The judge disagreed with this FAA-based argument, but without any pertinent discussion or analysis. *Id.*, slip op. at 9.

On June 16, 2016, the Board issued a Decision and Order adopting both of the judge’s findings. See 364 NLRB No. 31 (2016). Concerning the confidentiality provision, the Board simply concluded that a “workplace rule that prohibits the discussion of terms and conditions of employment, as the Respondent’s confidentiality provision does by prohibiting employees from ‘disclosure of evidence or award/decision beyond the arbitration proceeding,’ is unlawfully overbroad.” *Id.*, slip op. at 1 fn. 2.

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 of its Order. The court held the proceedings in abeyance pending the Supreme Court’s review of *Murphy Oil* and related cases.

While the appellate court was holding this case in abeyance, the Board overruled the “reasonably construe” prong of the *Lutheran Heritage* standard and set out a new standard for determining whether a facially neutral work rule, when reasonably interpreted, would unlawfully interfere with, restrain, or coerce employees in the exercise of their Section 7 rights; and the Board applied the new standard retroactively to all pending cases. *Boeing Co.*, 365 NLRB No. 154 (2017).¹

The Supreme Court subsequently issued its decision in *Epic Systems*, supra, which overruled *Murphy Oil USA*, supra. On July 5, 2018, the United States Court of Appeals for the District of Columbia Circuit granted the Board’s motion to (1) summarily grant, in light of *Epic Systems*, the Respondent’s petition for review of, and deny the Board’s cross-application to enforce, the portion of the Board’s Decision and Order finding unlawful the Agreement’s provisions mandating individual arbitration, and

outweighed by legitimate employer interests. Category 3, in contrast, consists of rules that are unlawful to maintain because their potential to interfere with the exercise of Sec. 7 rights outweighs the legitimate interests they serve. Categories 1(a), 1(b) and 3 designate *types* of rules; once a rule is placed in one of these categories, rules of the same type are categorized accordingly without further case-by-case balancing (for Category 1(b) and 3 rules; balancing is never required for rules in Category 1(a)). Some rules, however, resist designation as either always lawful or always unlawful and instead require case-by-case analysis under *Boeing*’s balancing framework. These rules are placed in Category 2. See *id.*, slip op. at 3–4; *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2–3 (2019).

(2) remand the remainder of the case to the Board for further proceedings.

On July 13, 2018, the Board accepted the court's remand and advised the parties that they could file statements of position with respect to the issues raised by the remand. The General Counsel and Respondent each filed a statement of position.

Contentions of the Parties

Applying *Boeing*, the Respondent argues that, when reasonably interpreted, the confidentiality provision does not forbid employee discussion of terms and conditions of employment. The Respondent asserts that the provision "states nothing about preventing employees from discussing the terms and conditions of their employment (e.g., their wages, performance evaluations, discipline, complaints, etc.) with co-workers (or other third parties)." Rather, the Respondent argues, the provision merely prohibits disclosure of "evidence or awards obtained in the arbitration proceeding itself," which the Respondent asserts would include confidential business records or other information protected by the right of privacy. In the Respondent's view, the provision is lawful because it does not prevent employees "from discussing anything else related to their employment, including the very events or circumstances that give rise to arbitration proceedings."

As it did in the underlying proceedings, the Respondent also presents arguments rooted in the FAA. Citing Supreme Court precedent, the Respondent contends that arbitration is a matter of contract and that courts must "rigorously enforce arbitration agreements according to their terms," including "for claims that allege a violation of a federal statute, unless the FAA's mandate has been overridden by a contrary congressional command." *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 233 (2013) (internal citations and quotation marks omitted). The Respondent adds that the Court has further explained that the purpose of the FAA is to enforce arbitration agreements according to their terms "to allow for efficient, streamlined procedures." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). The Respondent asserts that protecting parties' agreement to arbitrate disputes on a confidential basis saves resources, protects parties from reputational injury, and facilitates the cooperative exchange of discovery. If confidentiality provisions in arbitration agreements are deemed unlawful, the Respondent contends, the arbitral process will be hampered: parties will be unwilling to submit relevant but sensitive materials to an arbitrator if they believe those materials will be discoverable in future, unrelated proceedings. The Respondent also observes that two federal appellate courts have characterized confidentiality as a fundamental aspect of arbitration. See *Guyden v. Aetna, Inc.*, 544 F.3d 376,

385 (2d Cir. 2008) (confidentiality is a "paradigmatic aspect of arbitration"); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004) (stating that an "attack on the confidentiality provision is, in part, an attack on the character of arbitration itself").

The General Counsel now sides with the Respondent. He asserts that under *Boeing* and *Epic Systems*, the Board should find that the Respondent's confidentiality provision does not violate the Act. The General Counsel reads *Epic Systems* for the proposition that the Supreme Court will not "lightly infer illegality of an FAA-enforceable arbitration contract, and will not apply the concept of protected concerted activity broadly to invalidate" arbitration agreements, including the procedures for conducting arbitration under such agreements. Accordingly, the General Counsel argues that the Board should review provisions in an arbitration agreement for "actual, as opposed to theoretical, violations of the NLRA and should identify with precision language alleged to irreconcilably conflict with the FAA." The General Counsel asks us to adopt the following framework for determining the lawfulness of a confidentiality provision in an arbitration agreement:

[A]s long as an arbitral confidentiality provision confines itself to arbitration-related matters and does not touch the type of Section 7 activities that employees "just do" for themselves, it should not be interpreted to interfere with Section 7 rights. Under this analysis, if the parties agree to keep the content and results of the arbitration itself confidential, as long as an employee is not prohibited from discussing the fact of the arbitration, the employee's claims against the employer, the legal issues involved, and information related to terms and conditions of employment obtained outside of the arbitration, such an agreement would not interfere with Section 7 rights and should be lawful.

The General Counsel contends that the Respondent's confidentiality provision, evaluated within this framework, does not violate the Act.

Discussion

A. *The Confidentiality Provision's Impact on NLRA Rights*

No provision of the Act expressly prohibits confidentiality provisions like the one at issue here—or indeed, any confidentiality provision. Section 7 of the Act guarantees employees the right, among others, to form, join or assist labor organizations and "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Applying this statutory provision, the Board has held that discussing terms and conditions of employment with coworkers "lies at the heart of

protected Section 7 activity.” *St. Margaret Mercy Healthcare Centers*, 350 NLRB at 205; see also *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171 (1990) (“Under Section 7 of the Act, employees have the right to engage in activity for their ‘mutual aid or protection,’ including communicating regarding their terms and conditions of employment.”) (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978)). But the Board has never interpreted the Act to prohibit all confidentiality requirements. To the contrary, the Board’s decisions in this area carefully analyze the terms of disputed confidentiality provisions, taking into account their scope, the interests implicated, and the policies of the Act. Compare, e.g., *Macy’s, Inc.*, 365 NLRB No. 116 (2017) (finding lawful a rule restricting disclosure of confidential information from employer’s own files) and cases cited therein, with *Boeing*, 365 NLRB No. 154, slip op. at 15 (rule that prohibits employees from discussing wages or benefits with one another violates the Act).

The confidentiality provision at issue in this case prohibits any party from disclosing an arbitrator’s award or decision. It also prohibits any party from disclosing evidence introduced in the arbitral proceeding. It does *not* prohibit disclosing information a party possesses independent of the arbitral proceeding. Thus, under a reasonable interpretation of the confidentiality provision, information regarding events, facts, and circumstances that a party is privy to separate and apart from an arbitral proceeding does not become nondisclosable simply because this evidence is also introduced in an arbitral proceeding. This interpretation is reinforced by language in the confidentiality provision stating that “there shall be no disclosure of evidence or award/decision *beyond the arbitration proceeding*,” which underscores that the provision at issue here is concerned with maintaining the confidentiality of matters disclosed in the arbitral proceeding but otherwise closely held. The confidentiality provision also does not restrict employees from discussing their terms and conditions of employment or workplace issues generally. Indeed, the provision does not apply at all in the absence of an arbitral proceeding; it states that “[t]he arbitration shall be conducted on a confidential basis.” In sum, we agree with the General Counsel that, when reasonably read, the provision does not prohibit employees from disclosing the existence of the arbitration, their claims against the employer, the legal issues involved, or the events, facts, and circumstances that gave rise to the arbitration proceeding.

While the confidentiality provision’s restrictions are limited in scope, we nevertheless recognize that the

provision would restrict employees’ ability to discuss terms and conditions of employment insofar as an arbitrator’s award or evidence introduced in the arbitral proceeding (and known by an employee-party through that sole means) concerns terms and conditions of employment. In particular, the provision would prevent an employee from disclosing to coworkers that the employee prevailed in his or her claim, even if the claim involved a workplace issue common to other employees.

Of course, the fact that a work rule may restrict some activity that Section 7 protects does not end the analysis of whether it violates the Act. The Board must balance the impact of the challenged rule on Section 7 rights against any legitimate employer interests served by the rule. *Boeing*, supra, slip op. at 3. As the Respondent notes, protecting parties’ agreement to arbitrate disputes on a confidential basis saves resources, protects all parties from reputational injury, and facilitates the cooperative exchange of discovery. While these interests are weighty, we will assume, without deciding, that they do not outweigh the impact of the Respondent’s confidentiality provision on the exercise of Section 7 rights and that this provision would therefore violate the Act if maintained as an employer-promulgated work rule.² Such a finding does not end the analysis here, however, because this provision is not an employer-promulgated work rule but rather is maintained as part of an arbitration agreement to which the FAA applies. Accordingly, to decide whether it violates the Act, we must first determine whether it is shielded by the FAA.

B. *The Enforceability of the Confidentiality Provision Under the FAA*

In *American Express v. Italian Colors Restaurant*, the Supreme Court concisely summarized the principles that must guide our analysis here:

[C]ourts must “rigorously enforce” arbitration agreements according to their terms, *Dean Witter Reynolds Inc. v. Byrd*, 470 U. S. 213, 221 (1985), including terms that “specify *with whom* [the parties] choose to arbitrate their disputes,” *Stolt-Nielsen*, *S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 683 (2010)], and “the rules under which that arbitration will be conducted,” *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 479 (1989). That holds true for claims that allege a violation of a federal statute, unless the FAA’s mandate has been “overridden by a contrary congressional command.” *CompuCredit Corp. v. Greenwood*, 565 U. S.

² In *Boeing*, the Board stated that it would place particular rules into one of three categories after balancing the “nature and extent of the potential impact” on Sec. 7 rights with any legitimate justification

associated with the rule. We decline to do that here with respect to the disputed confidentiality rule because the disposition of this case turns on the FAA, not on a balancing of Sec. 7 rights and employer interests.

[95, 98] (2012) (quoting *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987)).

570 U.S. at 233.

The confidentiality provision at issue here is part of an arbitration agreement and specifies “rules under which . . . arbitration will be conducted,” *Volt*, 489 U.S. at 479—i.e., “on a confidential basis,” with “no disclosure of evidence or award/decision beyond the arbitration proceeding.” As the Court explained in *Volt*, “[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.” *Id.* at 476; see also *AT&T Mobility v. Concepcion*, 563 U.S. at 344–345 (“The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. It can be specified, for example, that the decisionmaker be a specialist in the relevant field, *or that proceedings be kept confidential* to protect trade secrets. And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.”) (emphasis added).³

The FAA therefore requires that the confidentiality provision be enforced according to its terms absent a contrary congressional command. A party claiming that a contrary congressional command displaces the FAA “bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow. The intention must be clear and manifest.” *Epic Systems*, 138 S. Ct. at 1624 (internal quotations and citation omitted). In *Epic Systems*, the Supreme Court held that Section 7’s guarantee of the right “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” does not qualify as a contrary congressional command that displaces the FAA with respect to provisions in an arbitration agreement requiring that

employment-related disputes be resolved by individual arbitration, precluding class or collective litigation. As the Court explained, Section 7 of the NLRA “does not express approval or disapproval of arbitration. It does not mention class or collective action procedures. It does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as our precedents demand.” *Id.*

This exacting standard has not been satisfied here, either. No provision of the Act mentions confidentiality rules or agreements, much less prohibits them. If a confidentiality rule violates the NLRA, it does so because the employer’s interests in maintaining the rule are outweighed by its tendency to interfere with the exercise of Section 7 rights. See generally *Boeing*, *supra*. But the Supreme Court has already rejected the notion that Section 7 “speaks to the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum.” *Epic Systems*, *supra* at 1625. And as explained above, the confidentiality provision at issue here is part and parcel of the rules under which the parties have agreed to conduct arbitration. It would be contrary to *Epic Systems* and to decades of Supreme Court precedent interpreting the FAA to find a contrary congressional command on these facts.⁴ To the contrary, the FAA gives parties the discretion to design their own dispute-resolution procedures, tailored to the type of dispute, including that arbitral proceedings be kept confidential if the parties so choose. *AT&T Mobility v. Concepcion*, 563 U.S. at 344–345. This principle has been recognized by the Second and Fifth Circuits as well, which rejected challenges to confidentiality provisions in arbitration agreements as an attack on the character of arbitration itself. *Guyden v. Aetna*, 544 F.3d at 385 (no conflict between arbitral confidentiality requirement and purposes of Sarbanes-Oxley Act’s whistleblower protections); *Iberia Credit Bureau v. Cingular Wireless*, 379 F.3d at 175.⁵

³ Accord *Lamps Plus, Inc. v. Varela*, ___ U.S. ___, 139 S. Ct. 1407, 1416 (2019) (“Whatever [rules parties] settle on, the task for courts and arbitrators at bottom remains the same: ‘to give effect to the intent of the parties.’”) (quoting *Stolt-Nielsen*, 559 U.S. at 684); *Webster v. A.T. Kearney, Inc.*, 507 F.3d 568, 573 (7th Cir. 2007) (citing *Volt* for the proposition that “under the FAA the parties are free to agree to any governing rules, and the courts will enforce whatever system they choose”).

⁴ We recently held otherwise regarding language in arbitration agreements that interferes with employees’ right to file unfair labor practice charges with the Board. Under Sec. 10(b) of the Act, the Board has no power to issue unfair labor practice complaints unless an unfair labor practice charge is filed, and Sec. 10(a) of the Act 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.” In *Prime Healthcare Paradise Valley, LLC*, we held that these statutory provisions do establish a contrary congressional command with respect to provisions in an arbitration agreement that restrict employees’ access to the Board and its

processes. 368 NLRB No. 10, slip op. at 6 (2019); see also *VW Credit, Inc.*, 369 NLRB No. 42, slip op. at 5 (2020) (“Section 10(a) is a clear congressional command that arbitration agreements that interfere with an employee’s right to file charges with the Board cannot be lawfully maintained or enforced, notwithstanding the Federal Arbitration Act.”). These same considerations would preclude the maintenance or enforcement, whether in an arbitration agreement or otherwise, of any provision that purported to require employees to keep confidential their involvement in any proceeding before the Board or any information they may learn in connection with their participation in that proceeding. See *NLRB v. Scrivener*, 405 U.S. 117, 121–122 (1972) (Congress intended employees to be completely free to file charges with the Board, to participate in Board investigations, and to testify at Board hearings). No such provisions are at issue here.

⁵ *Iberia* involved an arbitration agreement between a cellular provider and its customers, and the court there found unavailing the contention that requiring that the award be kept confidential accorded an informational advantage to the cellular provider, who would know how prior

In *Epic Systems*, the Court distinguished the activities listed in Section 7 (forming, joining, and assisting labor organizations; engaging in other concerted activities for mutual aid or protection), which are “things employees just do for themselves in the course of exercising their right to free association in the workplace,” from “the highly regulated, courtroom-bound ‘activities’ of class and joint litigation.” *Epic Systems*, supra at 1625 (internal quotation omitted). This distinction further supports our holding today. Communicating with each other about events, facts, and circumstances they either know about firsthand or have heard about from their colleagues is something employees “just do.” As we have explained, the confidentiality provision at issue in this case does not restrict such communications. A confidentiality provision that did sweep that broadly would exceed the scope of an arbitral dispute-resolution procedure and would, to that extent, violate the Act; and nothing in our decision today or in *Epic Systems* is to the contrary. In contrast, disclosing an arbitral award, or disseminating evidence or information obtained solely through participating as a party in an arbitral proceeding, are not things that employees “just do.” *Id.*⁶

For all of the foregoing reasons, we hold that provisions in an arbitration agreement requiring that arbitration be conducted on a confidential basis, including provisions precluding the disclosure of evidence, award, and/or decision beyond the arbitration proceeding, do not violate the Act and must be enforced according to their terms pursuant to the FAA.⁷ Notwithstanding the existence of such an agreement, however, it remains the case that an employer violates Section 8(a)(1) if it discharges or otherwise disciplines an employee for discussing terms and conditions of employment where such discussions are protected

arbitrations turned out while customers would not. Noting that customers too might prefer confidentiality in some cases, the court held that in any event, the attack on confidentiality was, in part, an attack on the character of arbitration itself: if every arbitration proceeding required a publicly available decision, “one would expect that parties contemplating arbitration would demand discovery similar to that permitted under [Federal] Rule [of Civil Procedure] 26, adherence to formal rules of evidence, more extensive appellate review, and so forth—in short, all of the procedural accoutrements that accompany a judicial proceeding. But part of the point of arbitration is that one ‘trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.’” *Id.* at 175–176 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

⁶ Under the FAA, arbitration agreements are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. The Supreme Court has declined to decide whether “the saving clause was designed to save not only state law defenses but also defenses allegedly arising from federal statutes.” *Epic Systems*, 138 S. Ct. at 1622. The Court has held, however, that “the saving clause does not save defenses that target arbitration

by Section 7. As the Board explained in *Cordúa Restaurants, Inc.*, 368 NLRB No. 43, slip op. at 3 (2019),

while *Epic Systems* entitled the [r]espondent to promulgate and maintain individual arbitration agreements, including promulgating such agreements in response to opt-in activity, and to enforce those agreements in court by seeking individual arbitration of the employees’ wage-and-hour claims pursuant to those agreements, it did not similarly entitle the [r]espondent to discharge [an employee] for joining with his coworkers in filing a collective action to pursue those claims.

The same principle applies here. Consistent with *Epic Systems*, the Respondent is entitled to maintain a mandatory arbitration agreement that includes the disputed confidentiality provision. But it would not be entitled to discharge or discipline an employee for a Section 7–protected disclosure of information even if the disclosure violated that provision. Instead, the arbitration agreement, including the confidentiality provision, is enforceable by its terms by an arbitrator or a court.

CONCLUSION

Discussing terms and conditions of employment is an essential element of the activities safeguarded by Section 7 of the Act, and the protection of those activities plays a key role in effectuating the national labor policy established by Congress and articulated in Section 1 of the Act. Where arbitration agreements are involved, however, the Supreme Court has made clear that the goals and purposes of the FAA must also be taken into account. As the Court stressed in *Epic Systems*, 138 S. Ct. at 1624, it is our duty to strive “to give effect to both” (internal quotation and citation omitted). Our decision today endeavors to do just that by drawing a line between confidentiality provisions

either by name or by more subtle methods, such as by interfer[ing] with fundamental attributes of arbitration.” *Id.* (internal quotation omitted). As shown, a prohibition on arbitral confidentiality provisions would interfere with a fundamental attribute of arbitration. See *Iberia Credit Bureau v. Cingular Wireless*, supra; *Guyden v. Aetna*, supra. The FAA’s savings clause accordingly provides no basis for refusing to enforce such provisions.

⁷ Accordingly, we overrule prior decisions to the extent they are inconsistent with our decision today, including *Professional Janitorial Service of Houston*, supra, 363 NLRB No. 35, slip op. at 8 (finding unlawful a provision stating that “[a]ll statements and information made or revealed during arbitration are confidential, and neither you nor the [c]ompany may reveal any such statements or information, except on a ‘need to know’ base or as permitted or required by law”); and *Jack in the Box, Inc.*, 364 NLRB No. 12, slip op. at 9 (2016) (finding unlawful a provision stating that “[t]he [a]rbitrator’s decision is confidential. Neither [e]mployee nor the [c]ompany may publicly disclose the terms of the award unless” agreed to in writing by the other party, required by a court, or as otherwise required by law.).

that set forth “rules under which . . . arbitration will be conducted,”⁸ and confidentiality provisions that interfere with what employees “just do for themselves in the course of exercising their right to free association in the workplace”⁹—i.e., discuss workplace matters of mutual concern, whether or not they are also the subject of an arbitral proceeding. On one side of the line, the FAA prevails; on the other, the NLRA. We find that the confidentiality provision at issue here falls on the side of the line governed by the FAA. Accordingly, for all the reasons stated herein, we find that the Respondent has not violated the Act by maintaining the arbitration agreement at issue in this case.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 19, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

⁸ *Volt Information Sciences*, 489 U. S. at 479.

⁹ *Epic Systems*, 135 S. Ct. at 1625.