

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE ROSE GROUP D/B/A  
APPLEBEE'S RESTAURANT

and

Case 05-CA-135360

JEFF ARMSTRONG

NOTICE TO SHOW CAUSE

On December 22, 2015, the National Labor Relations Board issued a Decision and Order finding that the Respondent violated Section 8(a)(1) of the Act by both (1) maintaining a mandatory arbitration program that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums; and (2) interfering, through the arbitration program, with employees' ability to access the Board. 363 NLRB No. 75. On June 12, 2018, the United States Court of Appeals for the Third Circuit denied enforcement, in light of *Epic Systems Corp. v. Lewis*, 584 U.S. \_\_\_, 138 S.Ct. 1612 (2018), of the Board's Order on the first finding and remanded the second finding back to the Board.

At the time of the Board's decision, and Administrative Law Judge Susan A. Flynn's April 22, 2015 decision that the Board affirmed in relevant part, the issue whether maintenance of a policy that did not expressly restrict employee access to the Board violated Section 8(a)(1) on the basis that employees would reasonably believe it did would be resolved based on the prong of the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), that held an employer's

maintenance of a facially neutral work rule would be unlawful if “employees would reasonably construe the language to prohibit Section 7 activity.” *Id.* at 647. While this case was pending before the court, the Board overruled the *Lutheran Heritage* “reasonably construe” test and announced a new standard that applies retroactively to all pending cases. *The Boeing Co.*, 365 NLRB No. 154, slip op. at 14–17 (2017).

Accordingly, the Board hereby issues the following notice to show cause why this issue should not be remanded to a judge for further proceedings in light of *Boeing*, including, if necessary, the filing of statements, reopening the record, and issuance of a supplemental decision.

**NOTICE IS GIVEN** that any party seeking to show cause why this case should not be remanded to the administrative law judge must do so in writing, filed with the Board in Washington, D.C., on or before December 21, 2020 (with affidavit of service on the parties to this proceeding). Any briefs or statements in support of the motion shall be filed on the same date.

Dated, Washington, D.C., December 7, 2020.

By direction of the Board:

/s/ Roxanne L. Rothschild

Executive Secretary