

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
(PETITION FOR REVIEW FROM THE NLRB)**

MOTOR CITY PAWN BROKERS INC.,

Petitioner/Cross-Respondent

Case No. 20-1730/20-1854

v.

NLRB Case 07-CA-179458

NLRB Case 07-CA-179461

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**TERRENCE WALKER,
PATRICIA TILMON**

Intervening Parties

**MOTOR CITY PAWN BROKER, INC.'S BRIEF IN REPLY TO NLRB
AND INTERVENING PARTIES**

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ARGUMENT

1. The NLRB and ALJ Erroneously Concluded that Requiring Employees To Arbitrate Claims Against MCPB Was Unlawful

As a background note, the Court should keep in mind that the entire discussion that follows is hypothetical. Unlike some cases, there is no suggestion in this case that MCPB sought to enforce any of its employment agreements to prevent anyone from filing a charge with the Board. This Court's focus is therefore on each side's view of the relevant language in the abstract, guided by the relevant principles guiding contract interpretation.

The first issue is whether the FAA, as recently interpreted by the Supreme Court and this Court, allows MCPB to mandate arbitration.

The Board notes that MCPB did not raise this issue earlier. There is a simple explanation: the law in the area has evolved considerably since this case began. This evolution constitutes an "extraordinary circumstance" under 29 U.S.C. § 160(e). *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896 n. 7; 104 S.Ct. 2803, 2811 (1984) (deeming "substantial change in controlling [case] law" an "extraordinary circumstance," and thus allowing employer to raise a new argument not raised before the Board).¹

¹ Intervenors repeat many of the Board's arguments, including this one. This Brief will only address new or different issues raised by Intervenors.

The Board then argues that the FAA’s direction can be “overridden by a contrary congressional command.” True. So the relevant inquiry is: does such a contrary congressional command exist? The answer is no, in light of the guidance offered by the Supreme Court in *Epic Sys. Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612, 1627 (2018) and this Court in *Gaffers v. Kelly Servs., Inc.*, 900 F.3d 293 (6th Cir. 2018).

The Board relies on its own decision in *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10 (2019), which in turn relies on Section 10(a). Of course, no Court since *Epic Systems* has discussed this issue, much less agreed with the Board about it. The Board also cites two pre-*Epic Systems* cases, *Cellular Sales* and *Murphy Oil*; Intervenor also cite three other Board decisions.

This Court should not follow the Board’s reasoning in *Prime Healthcare* for the reasons set forth in MCPB’s opening brief and this one. Based on current law, the Court must view the documents at issue in this case through the eyes of a reasonable, objective employee. Nothing about these documents would signal to such an employee that MCPB was intending to infringe on such an employee’s Section 7 rights.

The Court should examine the actual language in the Employment Agreement, which requires arbitration of “claims” and not “charges.” Employment law distinguishes these two words. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500

U.S. 20, 28 (1991) and *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), cited in MCPB’s Brief, footnote 1. The Board distinguishes them as well, explaining the “charging” process at pages 15-16. When “reasonably interpreted” through an objective lens under *Boeing*, “claim” must mean “claim,” not “charge.” A “claim” could confer some benefit on the claimant; a “charge” triggers some process by a third party such as the EEOC or the Board (or, to use another example, a prosecutor’s office).²

The Board, however, is not so careful. As the Board would have it, “Motor City’s arbitration policy expressly prohibits employees from filing Board charges...”. Board Brief, at 19. No. *If* that were true, and *if* recent cases from the Supreme Court and this Court prohibited MCPB from mandating arbitration, perhaps the case could be made that MCPB’s Employment Agreement interfered with the exercise of Section 7 rights. But that is not this case.

The Board accuses MCPB of “fine parsing of the language.” But no parsing is necessary. The Employment expressly addresses “claims,” not “charges.” It mandates arbitration of any “claims” under various statutes, including the NLRA. The Employment Agreement’s clear intent is to move all “claims” into arbitration,

² Intervenors note that MCPB improperly relies on contract interpretation principles, even though the parties never executed a contract. This misses the point. Under NLRA analysis, MCPB’s documents should be reviewed through the eyes of a reasonable, objective employee.

including any claims that a creative employee or attorney might suggest arise out of language in the NLRA.

Notably, the Board cannot refute the fact that the Contract and Receipt document does not mention the NLRA at all. It is therefore entirely possible that a reasonable employee would read the Contract and Receipt first, maybe never even getting to the Employment Agreement. Or an employee might read them together and conclude that the Contract and Receipt is the primary guide. Or an employee might wonder about the interplay between the two and move forward with a “charge.” The only scenario that supports the Board is where an employee would read both, conclude that Employment Agreement is primary, and therefore be “chilled” from exerting his or her rights to file a “charge.” MCPB suggests that this scenario is facially unlikely, is not a reasonable interpretation, and should not become the basis for a finding that MCPB violated the NLRA.

As a final thought experiment about the hypothetical linguistic analysis at the heart of this issue, it is worth considering that MCPB cannot, on this record, possibly be accused of *actually* trying to deter employees from filing charges with the Board. If that was MCPB’s intention, the Employment Agreement and the Contract and Receipt would have said “claims and/or charges.” Both would have referred to the NLRA. Instead, MCPB used “claims” to describe that set of triggering actions that may result in a piece of litigation that actually could be resolved in arbitration. A

“charge” filed with the Board may result in procedural remedies that have nothing to do with the employee and may not even be the subject of an arbitration between the employee and MCPB in the first place.

2. The NLRB and ALJ Erroneously Concluded that the Requirement for Employees to Indemnify MCPB Was Unlawful

The Board, without any analysis of its own, repeats its own holding and analysis that triggered this appeal in the first place. But the only logical reading of the indemnification provision in the contract documents is to allow MCPB to seek reimbursement from an employee who causes some damage to the company. And there is nothing about this language suggesting that it is a Category 3 rule, if a rule at all.

Neither Judge Tafe nor the Board took issue with this logical indemnification clause. Rather, they expressed concern about an unreasonable interpretation that could chill Section 7 rights “by placing a heavy financial burden on the pursuit of claims.” The language, interpreted correctly, does not support this concern.

3. The NLRB and ALJ Erroneously Concluded that the Prohibition on Employee Disclosure of the Employee Handbook Was Unlawful

The Board cannot explain away the inconsistency noted in MCPB’s Brief. The Board was right when it concluded that “employees would reasonably understand, from the numerous examples of confidential information specified in the Employment Agreement and the Employee Handbooks, that they are limited to

prohibiting disclosure of legitimately confidential and proprietary information rather than information pertaining to employees' terms and conditions of employment.”

This conclusion naturally applies to the entire handbook.

4. The NLRB and ALJ Erroneously Concluded that MCPB's Prohibitions and Limitations Affecting Solicitation and Association with other Employees Were Unlawful

Again, the Court must stand in the shoes of a hypothetical, reasonable employee. Reading the Contract and Receipt, such an employee would naturally conclude that s/he should not solicit other employees for the purpose of employment or association, or to terminate such relationship with MCPB. It would be quite a stretch, and certainly not a reasonable one, for that employee to conclude that s/he was prohibited from discussing with other employees or former employees the terms or conditions of their employment, or otherwise organizing for their *mutual aid or protection*.

5. The NLRB and ALJ Erroneously Concluded that MCPB Unlawfully Terminated Four Employees

The Board's position, as enunciated by the General Counsel at the hearing, is absolute and extremely harsh: an employer offering an employment contract drafted by competent counsel with any flaw at all is liable for backpay if the employee, claiming the s/he does not like “the print,” refuses to sign it and is then justifiably discharged for insubordination, and even if the flaw is minor, never actually

enforced, and discovered for the first time by the General Counsel during its investigation.

In light of General Counsel's position, this Court is charged with a specific task: locating the relevant language in the statute and then analyzing it to determine whether an employer can really be required to pay backpay under this set of facts, and in the absence of statutory discrimination – the General Counsel's position ignores the concept of causation altogether. To be clear, on this point, MCPB does not argue that it would be immune from other remedies, such as modification of the agreement and/or notice-posting. The sole issue is backpay.

MCPB laid out the relevant statutory language and case law. It does not support the General Counsel.

In response, the General Counsel first notes that “it is unlawful to discipline an employee for refusing to agree to an unlawful rule or policy.” Board Brief, at 31. First, this principle does not support the General Counsel's absolute position that it is unlawful to discharge an employee for making an illegitimate decision (“I'm not signing this because I don't like the print”), when it later appears that the agreement may contain an unlawful policy. Seen on the day of the discharge, that employee was not disciplined “for refusing to agree to an unlawful rule or policy.” What the employee refused to do, without good reason, was sign a contract with a font s/he did not like.

Second, even if General Counsel is right that such an action would be unlawful, the General Counsel must still connect one more dot: in addition to non-monetary remedies, can such an employer be liable to the recalcitrant, insubordinate employee for backpay? In statutory terms, General Counsel must satisfy the Court that Congress declared that a violation of Section 8(a)(1) (the only statute implicated here) would impose an obligation for an employer to pay a former employee possibly years' worth of income.

NLRB v. Long Island Ass'n for AIDS Care, Inc., 870 F.3d 82, 88 (2d Cir. 2017), does not support the Board. In that case, the employee was undisputedly discharged for refusing to sign a confidentiality agreement because of the substance of the agreement, not because of “the print” or for any unrelated reason. There was also evidence, unlike in this case, that the employee “engaged in concerted activity with respect to wages at LIAAC by discussing wages and COLA increases with other employees, and by bringing these concerns to” his employer. *Id.*, at 86 (though this was not part of the holding). Finally, and most significantly, it does not appear that the parties raised, or that the Court considered, the issue of whether backpay was an appropriate remedy.³

³ It appears from the briefing that there were to be post-decision factual inquiries regarding reinstatement and backpay in light of the fact that the grant funding Mr. Acosta's work had expired. See <https://www.nlr.gov/case/29-CA-149012>, Reply Brief, at 24.

The Board also cites *NLRB v. Air Contact Transp. Inc.*, 403 F.3d 206, 214-15 (4th Cir. 2005). Again, that case involved an employee engaged in protected concerted activities, and a clear and unlawful reaction by the employer by sending a letter to the employee condemning the action, and by demanding that he acknowledge receipt of the letter. Again, there was no discussion in that case of the propriety of awarding backpay. Finally, given the facts of *Air Contact*, the Board goes too far when it seeks immunity from a causation requirement; the facts of the case, like those of *Long Island Association for AIDS Care*, demonstrated a straight-line connection between the employee's protected activity and his discharge. Board Brief, at 34-35. This Circuit has never adopted such a relaxed view of the causation requirement.

The Board argues that “discrimination against protected activity is not the only way to violate the Act.” Board Brief, at 37. MCPB does not disagree. As noted above, MCPB appreciates that if the Court finds a violation of Section 8(a)(1) (which MCPB disputes), certain non-monetary remedies may be appropriate. But the point is that a violation of Section 8(a)(1), which does not involve “discrimination,” cannot form the basis for a backpay award.

In the end, the Board asks for relief outside of the express language of statute, relying instead on “the statutory regime and the Board's wide discretion in crafting remedies.” Board Brief, at 38. Therein lies the rub. The Board does not have the

power to cobble together inapplicable sections of the NLRA to create a helpful “regime” when Congress explicitly used the word “discrimination” otherwise. And it would be surprise to Congress if the Courts allowed the Board to use its “wide discretion” to re-write Sections 8(a)(1) and 10(c).

As it makes this argument, the Board relies on an unfortunate and misleading edit of Section 10(c). Board Brief, at 38. In relevant part, the statute provides that the Board may issue an order “including reinstatement of employees *with or without back pay*, as will effectuate the policies of this subchapter: ***Provided, That*** where an order directs reinstatement of an employee back pay may be required of the employer or labor organization as the case may be, responsible for the discrimination suffered by him...” (emphasis added). Contrary to the Board’s use of ellipses and its incomplete truncation of this section, the structure of the statute explains that Congress expressly permitted the Board to award reinstatement without any showing of discrimination. The Board would have an option to also award backpay in such a situation if the employer was “responsible for the discrimination...”. Backpay is inextricably connected to discrimination. And discrimination, though part of Sections 8(a)(3) and (4), is not part of Section 8(a)(1).

6. The NLRB and ALJ Erroneously Concluded that Bartolucci and Salzer Were Entitled to Backpay as Alleged Discriminatees, Without Having Timely Filed a Charge

The Board argues that the belated claims of Mr. Bartolucci and Mr. Salzer were nothing more than “amended charges.”

Once again, the Board seeks to impermissibly expand the language of the statute, this time Section 10(b). Again, MCPB does not argue here about non-monetary remedies – the Board could in theory impose those remedies (if there was a statutory predicate) on MCPB regardless of how many employees are involved or when their identities were revealed.

MCPB’s concern relates to backpay. Allowing Mr. Bartolucci and Mr. Salzer to collect backpay even though they never filed a charge would violate the express terms of the statute and this Court’s direction in *Don Lee Distrib. Inc. v. NLRB*, 145 F.3d 834, 844-45 (6th Cir. 1998), assuring MCPB that “its liability under the Act is extinguished for any activities occurring more than six months before.”

To be clear, the Board is asking this Court to be the first one to permit an award of backpay to a former employee who, if s/he had filed a charge more than six months after the alleged violation, would not have been able to obtain that relief. *Redd-I* and its progeny do not support this re-write of Section 10(b).

A final note: Intervenors repeat the *Redd-1* argument discussed above, but they do not, and cannot, explain why Mr. Bartolucci never filed a charge, and certainly did not come forward within six months.

CONCLUSION AND RELIEF REQUESTED

MCPB requests that the NLRB Decision be reversed and vacated, or for such other relief as the Court deems proper.

Respectfully submitted,
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Dated: February 25, 2021

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing document was served upon the attorneys of record of all parties in the above cause electronically, in accordance with Fed.R.Civ.P. 5(d) on the 25th day of February, 2021.

/s/
Amy Zielinski

CERTIFICATE OF COMPLIANCE

Pursuant to 6th Cir. R. 32(a)(7)(c), the undersigned certifies this brief complies with the type-volume limitations of 6th Cir. R. 32(a)(7)(B).

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/s/ Jonathan B. Frank
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