Tarlton and Son, Inc. *and* Robert Munoz. Cases 32–CA–119054 and 32–CA–126896

October 30, 2019

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On April 29, 2016, the Board issued a Decision and Order in this proceeding, which is reported at 363 NLRB No. 175.[1] The Board found that the Respondent unlawfully maintained a mutual arbitration policy (MAP) requiring employees to waive their right to maintain class or collective actions in all forums. The Board also found that the Respondent independently violated Section 8(a)(1) of the National Labor Relations Act (the Act) by promulgating the map in response to the protected concerted activity of Charging Party Robert Munoz and two other employees in jointly filing a state-court wage-and-hour claim. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit. Following a series of events detailed in the margin below, the case ended up in the United States Court of Appeals for the 9th Circuit.[2] On March 30, 2017, the Board filed a motion requesting the 9th Circuit to hold the case in abeyance pending the Supreme Court's resolution of the issue presented in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015)—namely, whether employer-employee agreements that contain class- and collective-action waivers and require individualized arbitration violate Section 8(a)(1) of the Act. On May 21, 2018, the Supreme Court held that such agreements do not violate 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 June 4, 2018, the Board asked the 9th Circuit to remove the case from abeyance.

On July 19, 2018, the 9th Circuit (i) removed this case from abeyance, (ii) denied the Charging Party's petition for review, (iii) granted the Respondent's petition for review and denied the Board's cross-application for enforcement with respect to the portion of the Board's Order governed by *Epic Systems*, and (iv) remanded the remainder of the case for further proceedings before the Board. See *NLRB v. Tarlton and Son, Inc.*, No. 16-71915, et al. (9th Cir., 2018) (unpublished order). On November 21, 2018, the Board granted the Charging Party's request for additional position statements and permitted the parties to file statements of position with respect to the issues raised by the remand. Thereafter, all parties filed statements of position.[3] The AFL–CIO filed an amicus brief.[4] The Respondent, General Counsel, and Charging Party filed answering briefs to the AFL–CIO's amicus brief.

The Board has delegated its authority in this proceeding to a three-member panel.

Following the 9th Circuit's remand, the sole remaining issue is whether the Respondent unlawfully promulgated the MAP in response to the employees' joint filing of a wage-and-hour claim in a California state court. The Board has considered its previous decision and the record in light of the statements of position filed by the parties, the AFL–CIO's amicus brief, and the responses to that brief. For the reasons that follow, we find that the Respondent lawfully promulgated the MAP. Accordingly, we dismiss the complaint.

[1] On January 27, 2015, Administrative Law Judge Amita Baman Tracy issued the initial decision in this proceeding. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed an answering brief, and the Respondent filed reply briefs responding to each answering brief. The Charging Party also filed exceptions and a supporting brief, and the Respondent filed an answering brief. In addition, prior to the issuance of the Board's decision reported at 363 NLRB No. 175, the Charging Party filed four postbrief letters calling the Board's attention to recent case authority pursuant to *Reliant Energy*, 339 NLRB 66 (2003).

[2] The Respondent initially filed its petition for review in the D.C. Circuit on May 5, 2016. On May 27, 2016, the Respondent filed a motion for reconsideration with the Board. On June 8, 2016, the Charging Party filed a motion to dismiss the Respondent's petition for review, arguing that the motion for reconsideration filed by the Respondent made the petition for review premature. The Board denied the Respondent's motion for reconsideration in an unpublished decision on August 26, 2016. The D.C. Circuit subsequently granted the Charging Party's motion to dismiss the Respondent's petition for review as incurably premature. See *Tarlton and Son, Inc. v. NLRB*, No. 16-1141 (D.C. Cir. 2016). Meanwhile, after the Board denied its motion for reconsideration, the Respondent had filed a second petition for review with the D.C. Circuit on August 31, 2016. However, another petition for review, filed by the Charging Party, was pending in the 9th Circuit. On December 16, 2016, the Board filed a motion in the D.C. Circuit to transfer the Respondent's second petition for review to the 9th Circuit. The D.C. Circuit granted the Board's motion, *Tarlton and Son, Inc. v. NLRB*, No. 16-1307 (D.C. Cir. 2017), and on March 28, 2017, the 9th Circuit consolidated the Respondent's and Charging Party's petitions for review and the Board's cross-application for enforcement.

[3] Following the court's remand, the Charging Party also filed four additional letters, pursuant to *Reliant Energy*, above, calling the Board's attention to recent case authority.

[4] On February 12, 2019, the Board granted the AFL–CIO's motion to file an amicus brief and accepted its brief filed on January 9, 2019.

The Respondent's Promulgation of its Mutual Arbitration Policy

On November 7, 2013, Charging Party Munoz and two other employees filed a class-action complaint against the Respondent in California Superior Court, alleging violations of the California Labor Code related to the calculation and payment of their wages. After the Respondent received a copy of the class-action complaint, it contacted its attorneys and provided them with the complaint. The Respondent's attorneys then drafted the MAP. Employees were first presented with the MAP in late November or early December 2013, and since that time the Respondent has required employees, as a condition of their employment, to sign the MAP. The MAP requires employees to submit most legal claims arising out of their employment to binding arbitration.[5] It states, in relevant part, that signatories "forego and waive any right to join or consolidate claims in arbitration with others or to make collective or class claims in arbitration, either as a representative or a member of a class, unless such procedures are agreed to by" both the Respondent and the employee. Employees also sign an accompanying form entitled "Employee Agreement to Arbitrate," which similarly states that "final and binding arbitration will be the sole and exclusive remedy" for any claims against the Respondent, and the employee agrees to "forego any right to bring claims on a class or collective basis."

In its prior decision, the Board adopted the judge's finding under *Lutheran Heritage* that the "MAP independently violated Section 8(a)(1) because it was promulgated in response to employees' protected concerted activity, namely the filing of a class-action complaint by Robert Munoz and two other employees against the Respondent in California Superior Court." See *Tarlton & Son, Inc.*, 363 NLRB No. 175, slip op. at 2 (2016) (citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004)). However, that decision predated the Supreme Court's determination that arbitration agreements that contain class- and collective-action waivers and require individualized arbitration do not violate the Act and should be enforced as written pursuant to the FAA. *Epic Systems Corp. v. Lewis*, 584 U.S. at __, 138 S.Ct. at 1632.

In its recent decision in *Cordúa Restaurants, Inc.,* 368 NLRB No. 43 (2019), the Board reaffirmed long-standing precedent establishing that Section 7 of the Act protects employees when they pursue legal claims concertedly. Id., slip op. at 4.[6] We therefore agree with the finding in the prior Board decision that Munoz and the other two employees were engaged in protected concerted activity when they filed their lawsuit. Nevertheless, the Board also held in *Cordúa* that the promulgation of an individual arbitration agreement in response to Section 7 activity does not violate the Act. Id., slip op. at 2. As the Board there explained, the Supreme Court's decision in *Epic Systems* establishes that requiring employees to resolve their employment-related claims through individual arbitration rather than through collective action does not restrict the exercise of Section 7 rights. Id. Moreover, here, as in *Cordúa Restaurants*, the MAP "is enforceable in court or before an arbitrator; nothing in its terms suggests that employees would be disciplined for failing to abide by its provisions." Id., slip op. at 3. Accordingly, for the reasons stated in *Cordúa Restaurants*, to find that the promulgation of the MAP violated the Act because it was in response to Section 7 activity would be inconsistent with the Supreme Court's holding in *Epic Systems* that individual arbitration agreements do not violate the Act and must be enforced according to their terms. We therefore find that the Respondent's promulgation of the MAP was lawful, and we dismiss the complaint.[7]

ORDER

The finding in 363 NLRB No. 175 that the Respondent independently violated Section 8(a)(1) by promulgating the MAP in response to employees' protected concerted filing of a class-action wage-and-hour complaint is reversed, and the complaint is dismissed.

Dated, Washington, D.C. October 30, 2019

John F. Ring, Chairman

[5] The MAP "does *not* cover . . . any claims that could be made to the National Labor Relations Board" (emphasis in the original).

[6] We therefore reject the General Counsel's argument that the Board should overrule precedent holding that such concerted action is protected within the meaning of Sec. 7 of the Act. See *Cordúa Restaurants,* above, slip op. at 4 fn. 15 (collecting cases stating that employees' concerted pursuit of legal claims is protected activity under the Act).

[7] We also overrule *Amerisave Mortgage Corp.*, 363 NLRB No. 174 (2016), to the extent it is inconsistent with this decision and *Cordúa Restaurants,* above. In *Amerisave Mortgage*, 1 week after employees filed an FLSA collective action, the respondent issued a revised mandatory arbitration agreement that precluded employees from initiating or maintaining a court action concerning employment-related matters and from pursuing class or collective claims in arbitration. The Board found that the respondent violated Sec. 8(a)(1) by promulgating the revised agreement in response the employees' protected activity of filing the FLSA lawsuit. 363 NLRB No. 174, slip op. at 3–4, fn. 16. Under *Cordúa Restaurants* and our decision today, however, the promulgation of an arbitration agreement that requires employees to waive their right to pursue employment disputes through class or collective actions, even in response to the concerted filing of such an action, does not violate the Act.

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD