

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BLOOMINGDALE’S, INC.)
)
Petitioner/Cross-Respondent)
)
v.)
) Nos. 16-71338, 16-71904
NATIONAL LABOR RELATIONS BOARD)
)
Respondent/Cross-Petitioner)

**MOTION OF THE NATIONAL LABOR RELATIONS BOARD TO
REMOVE THIS CASE FROM ABEYANCE, SUMMARILY GRANT THE
COMPANY’S PETITION FOR REVIEW IN PART AND DENY THE
BOARD’S CROSS-APPLICATION FOR ENFORCEMENT IN PART, AND
REMAND TO THE BOARD THE REMAINDER OF THE CASE**

To the Honorable, the Judges of the United States Court
of Appeals for the Ninth Circuit:

The National Labor Relations Board respectfully moves this Court to
remove this case from abeyance, summarily grant review and deny enforcement of
that portion of the Board’s Order governed by the Supreme Court’s decision in
Epic Systems Corp. v. Lewis, No. 16-285, 2018 WL 2292444 (U.S. May 21, 2018),
and remand to the Board the remainder of the case.

1. In the Decision and Order under review, the Board found that
Bloomingdale’s, Inc. (the Company) violated the National Labor Relations Act by
maintaining and enforcing an agreement barring employees from concertedly
pursuing work-related claims in any forum, arbitral or judicial. *Bloomingdale’s*,

Inc., 363 NLRB No. 172, slip op. at 3-4 (2016). In doing so, the Board applied the rule set forth in *Murphy Oil, USA, Inc.*, 361 NLRB 774 (2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, No. 16-307 (Jan. 13, 2017).

The Board separately found, under its analytical framework laid out in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), that the Company violated the Act by maintaining an arbitration agreement that employees would reasonably construe as restricting their right to file unfair-labor-practice charges with the Board. *Bloomington's, Inc.*, 363 NLRB No. 172, slip op. at 4-6 (2016).

2. On January 12, 2017, this Court denied the Company's motion for summary reversal and placed this case in abeyance pending the Supreme Court's decision in *NLRB v. Murphy Oil, USA, Inc.*, No. 16-307. Prior to that time, the Board had filed the record and the Company had submitted its opening brief.

3. On May 21, 2018, the Supreme Court issued its decision in *Epic Systems*, holding that employers may lawfully maintain arbitration agreements that bar employees from concertedly pursuing work-related legal claims.¹ The Board acknowledges that under that decision, the Board's finding that the Company unlawfully maintained and enforced the Agreement is not enforceable, and the

¹ The Court issued *Epic Systems* together with *Murphy Oil*, No. 16-307, and *Ernst & Young LLP v. Morris*, No. 16-300.

Board is willing to submit to partial summary grant of review and denial of enforcement of the relevant portion of its Order.

4. On December 14, 2017, the Board issued *The Boeing Company*, which “overrule[d] the *Lutheran Heritage* ‘reasonably construe’ standard” and announced a new test to replace it. 365 NLRB No. 154, 2017 WL 6403495 at *2 (Dec. 14, 2017). *Boeing*’s rejection of the “reasonably construe” standard eliminates the Board’s rationale for its finding at issue here that the Company’s agreement restricts employees’ right to file unfair-labor-practice charges with the Board. The issue of whether the agreement restricts that right under *Boeing*’s framework is a question for the Board to answer in the first instance. Accordingly, the Board respectfully moves this Court to sever and remand that issue to the Board.

WHEREFORE, the Board respectfully requests that the Court remove this case from abeyance, summarily grant review and deny enforcement of that portion of the Board’s Order governed by the Supreme Court’s decision in *Epic Systems*, and sever and remand to the Board the remainder of the case.

Respectfully submitted,

/s/Linda Dreeben

Linda Dreeben

Deputy Associate General Counsel

NATIONAL LABOR RELATIONS BOARD

1015 Half Street, S.E.

Washington, D.C. 20570

Dated at Washington, D.C.
this 22nd day of May 2018

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its motion contains 598 words of proportionally spaced, 14-point type, and that the word processing system used was Microsoft Word 2010.

s/ Linda Dreeben
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CERTIFICATE OF SERVICE

I certify that on May 22, 2018, the foregoing motion was filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, and that all counsel are registered CM/ECF users.

s/ Linda Dreeben
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