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Bloomingdale’s, Inc. and Fatemeh Johnmohammadi.
Case 31–CA–071281

January 21, 2020

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

On April 29, 2016, the National Labor Relations Board issued a Decision and Order finding that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA or the Act) by maintaining and enforcing the mandatory individual arbitration procedure set forth in its Solutions InSTORE (SIS) dispute-resolution policy. *Bloomingdale’s, Inc.*, 363 NLRB No. 172 (2016). Applying *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), the Board found that the SIS policy unlawfully required employees, as a condition of their employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. *Bloomingdale’s*, 363 NLRB No. 172, slip op. at 3–4. The Board also found that the SIS policy violated the Act on the basis that employees reasonably would construe it to restrict their access to the Board’s processes. *Id.*, slip op. at 4–6.

The Respondent filed a petition for review with the United States Court of Appeals for the Ninth Circuit. The Board filed a cross-application for enforcement. On May 21, 2018, the Supreme Court held that employer-employee agreements that contain class- and collective-action waivers and require individualized arbitration do not violate Section 8(a)(1) of 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 28, 2018, the Ninth Circuit granted the Board’s motion to vacate the portion of the Board’s Order governed by *Epic Systems* and to remand the remainder of the case for further proceedings before the Board. On October 24, 2018, the Board issued a Notice to Show Cause why this case should not be remanded to the administrative law judge for application of the *Boeing*¹ standard, discussed below. The General Counsel and the Respondent each filed a statement of position opposing remand, although

the Respondent’s opposition was contingent on having an opportunity to file an additional brief.

The Board has considered its previous decision and the record in light of the statements of position filed by the parties regarding the necessity of remanding the case to the administrative law judge. For the reasons that follow, we conclude that no remand is necessary, and, applying the standard set forth in *Boeing* and its progeny, we find that a reasonable employee would not interpret the SIS policy as restricting access to the Board and its processes. Accordingly, we find that the Respondent has not violated Section 8(a)(1) of the Act by maintaining the policy.

I. FACTS

The Respondent operates a chain of upscale department stores. Since January 2004, the Respondent has maintained a four-step Solutions InSTORE (SIS) dispute-resolution policy for its employees, in which mandatory arbitration is the fourth and final step. At all times relevant here, the Respondent has provided the SIS policy to newly hired employees via a packet containing a summary brochure, a plan document, a form for employees to acknowledge receipt of the materials, and a form employees may use to opt out of step 4 arbitration during a 30-day window. The opt-out form is not at issue.

Article 2 of the plan document, entitled “Claims Subject to or Excluded from Arbitration,” states: “Except as otherwise limited, all employment-related legal disputes, controversies or claims arising out of, or relating to, employment or cessation of employment, whether arising under federal, state or local decisional or statutory law (‘Employment-Related Claims’), shall be settled exclusively by final and binding arbitration.” Three paragraphs later, in the same article but on the next page, the plan document expressly states, “Claims by Associates . . . under the National Labor Relations Act are . . . not subject to Arbitration.”

The summary brochure, in discussing what happens if an employee does not opt out of step 4 arbitration during the 30-day window, provides, “When covered by Step 4 final and binding arbitration, you and the Company agree to use arbitration as the sole and exclusive means to resolving [sic] any dispute regarding your employment.” Although the summary brochure does not expressly repeat the plan document’s exclusion for NLRA claims, it does state at the bottom of the same page as the language cited above, in red text, that “[m]ore specific details are in the program’s Plan Document, which is included here. You should read it,” and, highlighted in a bright red box on the next page, the summary brochure further states, “This booklet is a summary of some of the provisions, benefits,

¹ *Boeing Co.*, 365 NLRB No. 154 (2017).

and limitations of the Solutions InSTORE program. You are directed to read the Plan Document for the actual details.”

The acknowledgement form employees had to sign states, in relevant part:

I have received a copy of the Solutions InSTORE brochure and Plan Document and acknowledge that I have been instructed to review this material carefully.

...

I understand that I am covered by and have agreed to use all 4 steps of Solutions InSTORE automatically by my taking or continuing a job in any part of Macy’s, Inc.

This means that if at any time I have a dispute or claim relating to my employment, it will be resolved using the Solutions InSTORE process described in the brochure and Plan Document. . . . I can read all about Solutions InSTORE, including the benefits and tradeoffs of Step 4, in the brochure and Plan Document. Questions or comments about the program can be directed to my Human Resources Representative or the Office of Solutions InSTORE.

II. DISCUSSION

Because the Ninth Circuit’s June 28, 2018 order disposed of all allegations controlled by the Supreme Court’s decision in *Epic Systems*, above, the only remaining issue is whether the SIS policy unlawfully restricts access to the Board and its processes. In its prior decision, the Board resolved this issue under the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *Bloomington’s*, 363 NLRB No. 172, slip op. at 5. In *Lutheran Heritage*, the Board held, among other things, that an employer violates Section 8(a)(1) of the Act if it maintains a facially neutral work rule that employees “would reasonably construe . . . to prohibit Section 7 activity.” 343 NLRB at 647.

As noted above, in 2017 the Board issued a decision in *Boeing*, in which it overruled the “reasonably construe” prong of *Lutheran Heritage*. 365 NLRB No. 154, slip op. at 2.² Under *Boeing*, a facially neutral rule or policy must be evaluated by weighing the asserted business justifications for the rule against the rule’s potential interference with employee rights under the Act, viewing the rule or policy from the employees’ perspective. *Id.*, slip op. at 3. The Board decided to apply its new standard retroactively

to all pending cases in whatever stage. *Id.*, slip op. at 16–17.

Subsequently, in *Prime Healthcare Paradise Valley, LLC*, the Board held that the maintenance and enforcement of arbitration agreements that interfere with employees’ right to file charges with the Board remain unlawful following the Supreme Court’s decision in *Epic Systems*. 368 NLRB No. 10, slip op. at 5 (2019). Consistent with *Lutheran Heritage*, 343 NLRB at 646, the Board explained that an arbitration agreement that “explicitly prohibits the filing of claims with the Board or, more generally, with administrative agencies must be found unlawful.” 368 NLRB No. 10, slip op. at 5. The Board further held that where an arbitration agreement does not contain such an express prohibition—i.e., where the arbitration agreement in question is facially neutral—the Board will first determine whether the agreement, when reasonably interpreted, would potentially interfere with the exercise of Section 7 rights. *Id.* (quoting *Boeing*, 365 NLRB No. 154, slip op. at 3). “The ‘when reasonably interpreted’ standard is objective and looks solely to the wording of the rule, policy, or other provision at issue[,] . . . interpreted from the employees’ perspective.” *Id.*, slip op. at 6 fn. 14.

In *Briad Wenco, LLC d/b/a Wendy’s Restaurant*, the Board concluded that an arbitration agreement that contained a savings clause expressly allowing the filing of Board charges could not be reasonably understood to potentially interfere with employees’ right to file charges and was therefore lawful. 368 NLRB No. 72, slip op. at 2–3 (2019). In that arbitration agreement, the first paragraph stated broadly that any claim had to be settled by arbitration, the second paragraph notified employees that the eleventh paragraph excludes certain claims, and the eleventh paragraph contained the savings clause allowing the filing of Board charges. *Id.*, slip op. at 1. The Board reasoned the savings clause was effective because it was “unconditional,” “explicit,” and “sufficiently prominent.” *Id.*, slip op. at 2–3.

Here, the SIS plan document contains an unconditional and explicit exclusion for NLRA claims that, in our view, is even more prominent than the savings clause in *Briad Wenco*.³ The title of the relevant article, “Claims Subject to or Excluded from Arbitration,” warns of exclusions, as does the “[e]xcept as otherwise limited” preface to the sentence stating that employment-related claims are subject

² Other aspects of *Lutheran Heritage* remain intact, including whether a challenged rule or policy explicitly restricts activities protected by Sec. 7. 343 NLRB at 646.

³ An exclusion clause carves out certain claims from the scope of an arbitration agreement, whereas a savings clause provides that employees retain the right to file charges with the Board even if the arbitration

agreement includes NLRA claims within its scope. Similar to a savings clause, an exclusion clause informs employees that their access to the Board and its processes is unimpeded. An exclusion clause does so by making clear that NLRA claims are not at all within the scope of the duty to arbitrate.

to arbitration. The express exclusion then appears just three paragraphs later. Consistent with *Briad Wenco*, the SIS plan document, standing alone, is lawful. See also *Private National Mortgage Acceptance Company LLC*, 368 NLRB No. 126, slip op. at 3 (2019) (holding that arbitration agreement excluding from its scope “any claims that could be made to the National Labor Relations Board” did not interfere with right to file charges with the Board).

We reach the same result with respect to the summary brochure and acknowledgement form. These documents do not themselves repeat the exclusion of NLRA claims, but they appear together in the packet with the plan document and its prominent, unmistakable exclusion. The summary brochure, in red text, exhorts employees to read the plan document for “[m]ore specific details” and, in a red box, warns employees that it is “a summary of some of the provisions, benefits, and limitations” of the SIS policy and tells them, again, to “read the Plan Document for the actual details.” The acknowledgement form requires employees to affirm that they have been “instructed to review [the plan document and summary brochure] carefully,” and it informs them that they “can read all about Solutions InSTORE, including the benefits and tradeoffs of Step 4, in the brochure and Plan Document.” Thus, the summary brochure and acknowledgement form make clear the terms of the plan document control and that

employees must read the plan document. In our view, a reasonable employee will read these documents in compliance with the documents’ own directions.

Accordingly, we conclude that employees would not reasonably interpret the SIS policy to bar or restrict their access to the Board.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. January 21, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD