JD-30-19
Birmingham, AL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PFIZER, INC.

and **Cases 10–CA–175850**
07–CA–176035

REBECCA LYNN OLVEY MARTIN, an Individual

and

JEFFREY J. REBENSTORF, an Individual

Joseph Webb, Esq. **and** ***Katherine Chahrouri, Esq.,***
for the General Counsel.
Jonathan Fritts, Esq., of Washington, D.C.,
for the Respondent.
Steven Stastny, Esq., of Birmingham, Alabama,
for Charging Party Martin.

SUPPLEMENTAL DECISION

KELTNER W. LOCKE, Administrative Law Judge. The Respondent lawfully required employees, as a condition of continued employment, to waive their *procedural* right to sue it in court and instead agree to submit such claims to arbitration. However, an employer cannot lawfully require workers to waive *substantive* rights, which include their Section 7 rights to discuss and publicly disclose their terms and conditions of employment. Therefore, the Respondent violated Section 8(a)(1) of the Act when it imposed a clause requiring employees to keep information about arbitration confidential.

Background

On about May 5, 2016, the Respondent announced to employees that if they continued to work for Respondent, they would thereby have agreed to a "Mutual Arbitration and Class Waiver Agreement" (the "Agreement") which, with certain exceptions, waived their rights to sue the Respondent in court and also waived their right to file a class or collective action against the Respondent in any forum. To be bound, an employee did not have to acknowledge or sign

the Agreement but just continue to work rather than quit.[1] In other words, the Respondent imposed this Agreement as a condition of continued employment.

Two employees filed unfair labor practice charges which resulted in the issuance of a complaint on August 15, 2016, and a hearing which opened before me on November 4, 2016. On January 10, 2017, I issued a Bench Decision and Certification which found that the Respondent's imposition of the Agreement violated Section 8(a)(1) of the Act. This conclusion rested on the precedent established by the Board in *Murphy Oil USA, Inc.,* 361 NLRB 774 (2014). See also *D. R. Horton, Inc.,* 357 NLRB 2277 (2012).

After my decision issued, and while it remained pending before the Board on appeal, the Supreme Court reviewed the Board's *Murphy Oil* precedent which I had followed in reaching the conclusion that Respondent's imposition of the Agreement violated the Act.[2] On May 21, 2018, the Supreme Court issued a decision which rejected the Board's *Murphy Oil* rationale. *Epic Systems Corp. v. Lewis*, 584 U.S. ____, 138 S.Ct. 1612 (2018).

Because the Supreme Court rejected the framework which guided my decision, it likewise made untenable the conclusion which I had reached. Accordingly, on October 18, 2018, the Board issued a decision dismissing the allegations that Respondent had violated the Act by imposing the Agreement on its employees. *Pfizer, Inc.,* 367 NLRB No. 23 (2018).

However, the complaint in this case had raised one other allegation and my conclusion, finding merit to the allegation, did not rest on the now-rejected *Murphy Oil* rationale. This issue survived the dismissal of the remainder of the case and is the focus of this supplemental decision on remand. It concerns a portion of the Agreement called the "confidentiality clause." That clause states, in part, as follows:

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[1] The Agreement includes a clause stating: "You understand that your acknowledgement of this Agreement is not required for the Agreement to be enforced. If you begin or continue working for the Company sixty (60) days after receipt of this Agreement, even without acknowledging this Agreement, this Agreement will be effective, and you will be deemed to have consented to, ratified and accepted this Agreement through your acceptance of and/or continued employment with the Company."

The Agreement also specifies that, for current employees, "consideration for this Agreement includes continuation of your employment. . ." For new hires, the Agreement states that "consideration for this Agreement includes Pfizer's consideration of your application for employment and your offer of employment. . ."

Additionally, the Respondent distributed to employees a sheet with answers to frequently asked question. One of the questions was "Do I have to agree to this?" The answer stated: "The Arbitration Agreement is a condition of continued employment with the Company. If you begin or continue working for the Company sixty (60) days after receipt of this Agreement, it will be a contractual agreement that binds both you and the Company."

Also, a May 6, 2016 letter to employees from Respondent's human resources department stated "All covered colleagues will be bound by the agreement as part of their continued employment at Pfizer."

[2] More specifically, the Supreme Court considered the Fifth Circuit's decision which rejected the Board's rationale. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). The Court consolidated this case with two other appellate decisions presenting similar issues: *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016) and *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016).

The parties shall maintain the confidential nature of the arbitration proceeding and the award, including all disclosures in discovery, submissions to the arbitrator, the hearing, and the contents of the arbitrator's award, except as may be necessary in connection with a court application for a temporary or preliminary injunction in aid of arbitration or for the maintenance of the status quo pending arbitration, a judicial action to review the award on the grounds set forth in the FAA, or unless otherwise required or protected by law or allowed by prior written consent of both parties. This provision shall not prevent either party from communicating with witnesses or seeking evidence to assist in arbitrating the proceeding. [Nothing in this Confidentiality provision shall prohibit employees from engaging in protected discussion or activity relating to the workplace, such as discussions of wages, hours, or other terms and conditions of employment.] In all proceedings to confirm or vacate an award, the parties will cooperate in preserving the confidentiality of the arbitration proceeding and the award to the greatest extent allowed by applicable law.

My initial decision, finding that this provision violated Section 8(a)(1) of the Act, rested on existing Board precedent concerning when a work rule unlawfully interfered with employees' exercise of their Section 7 rights. However, after my decision issued, the Board overruled this precedent and established a new standard for determining whether a particular work rule violated the Act. See *The Boeing Co.,* 365 NLRB No. 154 (2017), overruling the "reasonably construe" test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

In its *Boeing* decision, the Board decided to apply the new standard retroactively to all cases then pending, which include the present case. Therefore, it has become necessary to perform a fresh analysis based on the new precedent. In its October 18, 2018 decision which dismissed the other allegations, the Board ordered this remaining allegation remanded to me "for further proceedings in light of *Boeing*, including, if necessary, the filing of statements, reopening the record, and issuance of a supplemental decision." *Pfizer, Inc.,* 367 NLRB No. 23 (2018).

After receiving the Board's remand order, I spoke with counsel by telephone conference call on two occasions. The parties advised me that they did not wish to present further evidence but they did wish to file briefs. Accordingly, on November 27, 2018, I issued an order setting a deadline of December 21, 2018, for filing briefs. Because of uncertainty regarding the position which the General Counsel ultimately would take concerning the lawfulness of the confidentiality clause, the parties wished an opportunity to request permission to file reply briefs. The November 27, 2018 order set a deadline of January 4, 2018, for filing a request to file a reply brief.

The parties submitted timely briefs, which have been considered. However, no party requested permission to file a reply brief, and no party has filed such a brief.

The Respondent's brief, as might be expected, argues that the confidentiality clause is lawful. Somewhat less expectedly, the General Counsel now agrees with the Respondent that

under the *Boeing* standard the confidentiality clause is lawful, at least on its face.[3] However, contrary to both the General Counsel and the Respondent, I conclude that the clause chills the exercise of Section 7 rights and violates Section 8(a)(1) of the Act.

Preliminary Matters

At the outset, some preliminary issues warrant discussion. First, does the Federal Arbitration Act (FAA) preclude the Board from considering whether the confidentiality clause is violative and, if so, ordering a remedy? The Respondent contends that the Supreme Court's recent decision in *Epic Systems*, interpreting the FAA, precludes the Board from considering the lawfulness of the confidentiality clause. This argument warrants careful and early consideration because if the FAA, as interpreted in the *Epic Systems* decision, does in fact preclude the Board from considering whether the language in the confidentiality clause violates the Act, further examination of the clause itself becomes unnecessary.

The Respondent also bases another argument on the *Epic Systems* decision. The Respondent contends that *Epic Systems* does not allow the lawfulness of the confidentiality clause to be judged under any standard except the principles used to determine whether any contract is valid and enforceable. If the Respondent is correct, then the issue of whether or not the confidentiality clause violates Section 8(a)(1) of the Act cannot be decided by applying the Board's precedents.

If the *Epic Systems* decision does not forbid the Board from applying labor law precedents and principles, then a question arises as to how comfortably the Respondent's confidentiality clause fits within the *Boeing* analytical framework. The Board established the *Boeing* test to evaluate the lawfulness of work rules, employment policies and employee handbook provisions. The confidentiality clause does not bear any of these labels, so it is appropriate to consider whether the confidentiality clause constitutes a work rule, employment policy or employee handbook provision subject to *Boeing* analysis.[4]

(a) Does the Federal Arbitration Act preclude the Board from evaluating the lawfulness of the confidentiality clause?

The Respondent's brief characterizes the confidentiality clause as "part and parcel of the arbitration process" and argues that the Federal Arbitration Act, as interpreted by the Supreme Court in *Epic Systems*, requires that the Agreement must be enforced by its terms, confidentiality clause and all.[5] The Respondent's brief argues for an expansive interpretation of the *Epic Systems* decision:

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[3] The government's brief did disagree with the Respondent concerning the Board's authority to judge the lawfulness of the confidentiality clause and the standards to be used in doing so.

[4] For reasons discussed below, I conclude that the confidentiality clause has a "dual identity," also serving as a work rule and employment policy which appropriately may be assessed using the *Boeing* framework.

[5] Although Respondent's brief did not elaborate on this point, the Respondent's argument implies that any challenge to the confidentiality clause would have to be made in the proceeding before the arbitrator and the issue would be decided, in the first instance, by the arbitrator. Thus, the brief quotes

> The Supreme Court's [*Epic Systems*] decision was *not* limited to class action waivers. Rather, the Court analyzed the connection between arbitration agreements and the NLRA more broadly and concluded that because the rules and procedures applied to workplace disputes in arbitration typically do not implicate Section 7 rights, the Board may not supersede the FAA by applying the NLRA to strike down the terms and procedures set forth in arbitration agreements. [Citation to *Epic Systems* omitted; italics in original.]

Restating the Respondent's argument in slightly different order reveals some problems with it. The Respondent's contention that "the Board may not supersede the FAA by applying the NLRA to strike down the terms and procedures set forth in arbitration agreements" rests on the premise that the "*rules* and procedures applied to workplace disputes in arbitration *typically* do not implicate Section 7 rights." (Italics added.) However, this premise is wobbly.

Respondent's use of the word "rules" adds confusion because it fails to distinguish between a rule concerning procedure and a rule affecting substance. The *Epic Systems* decision concerned an assertion that Section 7 of the National Labor Relations Act prohibited an employer from compelling employees to waive the right to class action *procedures*. However, for reasons discussed below, a rule which specifies *procedure* differs significantly and materially from a rule creating or affecting a *substantive* right.

Moreover, the Respondent generalizes that arbitration rules and procedures *typically* do not implicate Section 7 rights but here we must consider not the typical but the specific. Respondent's generalization - about what such rules "typically do not" do - fails to engage the issues to be decided here, namely, whether the specific rule under consideration - the prohibition expressed by the confidentiality clause - *does* interfere with Section 7 rights and, if so, whether such interference rises to the level of a violation of Section 8(a)(1) of the Act.

Additionally, the Respondent's argument focuses on *Epic Systems* while ignoring other relevant precedent. *Epic Systems* is just one of the stars in a constellation of Supreme Court decisions interpreting the Federal Arbitration Act. These other decisions are important because they express a principle which the Court did not need to mention, and therefore did not mention, in *Epic Systems*, but which is of great relevance in the present case.

This principle involves a fundamental distinction between procedural rights and substantive rights. The *Epic Systems* decision did not concern a substantive right. Rather, the Court considered, and rejected, a claim that Section 7 of the NLRA entitled employees to use class action *procedures*. Unlike *Epic Systems*, the present case concerns a substantive right.

Kilgore v. KeyBank National Association, 718 F.3d 1052, 1059 fn. 9 (9th Cir. 2013) as follows: "In any event, the enforceability of the confidentiality clause is a matter distinct from the enforceability of the arbitration clause in general. Plaintiffs are free to argue *during arbitration* that the confidentiality clause is not enforceable." (Italics added.) The Respondent's argument, if accepted, would preclude any consideration of how the prohibition in the confidentiality clause may restrict employees in the exercise of rights granted by Section 7 of the NLRA. Prohibiting the use of labor law standards to judge whether the clause infringes upon rights granted by Section 7 of the NLRA would effectively negate those rights.

The substantive right/procedural right distinction

A brief review of the Federal Arbitration Act's changing role will help explain why the Court has found it necessary to draw a distinction between substantive and procedural rights. By the early 20th Century, some businesses had developed the practice of negotiating contracts which required disputes about the meaning of the agreement to be referred to and decided by an arbitrator rather than litigated in court. Arbitration often was quicker. Additionally, it gave the contracting parties greater control over who would be interpreting the terms that they had negotiated. By specifying in the contract that arbitrators would be obtained from a particular source or selected through an agreed-upon procedure, the parties could assure that the person interpreting their contract met their standards of competence and impartiality.

However, even though businesses were entering into contracts providing for such alternative dispute resolution, courts often were hostile to the process and found ways to thwart it. Therefore, in 1925, Congress passed the Federal Arbitration Act. This law required courts to enforce arbitration provisions, but it also included a "saving clause" which allowed a court to refuse enforcement under some limited circumstances.

For the first 60 years under the FAA, an arbitrator's duty simply involved interpreting the terms in contracts. Although arbitrators routinely examined such private agreements to decide what obligations the contractual language imposed, they generally didn't determine what rights a party had been granted by a state or federal law. Stated another way, judges understood the FAA to require the court to grant a motion to compel arbitration when the issue to be decided by the arbitrator concerned contractual rights rather than a right created by federal or state law, such as the right to be paid at least a specified minimum wage and the right not to be sexually harassed.

However, starting in the mid-1980s, the Supreme Court began expanding the scope of the FAA. In a number of cases, the court held that if two parties had entered into an agreement with an arbitration clause, and the clause did not *specifically exclude* the arbitration of statutory rights, the district courts should grant motions to compel arbitration, even if doing so resulted in the arbitrator interpreting the text of a public law rather than merely the terms of a private agreement.

Interpreting the FAA in this manner, to allow private arbitrators to enforce rights granted by public law, would not be too controversial if both parties to an arbitration agreement had *voluntarily* agreed that the arbitrator could decide an issue which otherwise would be decided by a judge. Presumably, if the choice really were voluntary, a party would only agree to use an arbitrator if he believed that the arbitrator would be as fair as a court. However, a problem arises because many arbitration agreements are not fully, truly voluntary.

When competition is limited, a company may be able to require customers to sign a contract which includes a clause waiving the right to go to court. If the company's competitors also include similar clauses in their contracts, a customer has little choice but to go along.

For example, in some places cellphone customers may face the choice of signing a standard-form contract with an arbitration clause or else doing without a smartphone. An employee faces an even more drastic choice if his employer tells him that he must agree to waive his right to go to court and agree to arbitration or else will lose his job and have to find work elsewhere.

However, Supreme Court decisions interpreting the FAA were giving employers precisely this power and some employers, upon learning that they had the power, used it. Concerns arose about where and how to draw the line. If a company can require employees to waive the right to judge and jury, what other rights could employees be forced to waive? Could an employer lawfully require employees to give up the right to be paid at least a minimum wage? The right not to be discriminated against on the basis of sex?

For example, suppose an employer told a job applicant, "if you want to work here, you have to agree to accept $3 an hour as full payment and waive your right, under federal law, to be paid at least the minimum wage." Or suppose that an employer said the following to an existing female employee: "If you continue to work here, you thereby agree that men who don't have your qualifications or experience may, nonetheless, be selected for a promotion even though you also applied." Or suppose an employer told the employee that "by continuing to work here, you thereby agree that your supervisor may sexually harass you and create a hostile work environment."

If employers could impose such conditions lawfully, if they were allowed to insist that employees give up their statutory rights or else quit and seek work elsewhere, then companies would possess the power to nullify any legal requirement they didn't like. Indeed, employers would be able to pull the teeth out of all sorts of laws protecting workers by forcing them to waive their rights under such laws. Should a private company have the power to slough off the legal duties that Congress has imposed as easily as a snake sheds its skin?

A Supreme Court decision allowing someone to waive the right to a judge and jury could establish a precedent easily misused, a precedent allowing the powerful to force the less powerful to give up many other rights, such as the right to receive the minimum wage, the right to a workplace which complies with federal safety regulations, and the right to be free of invidious discrimination. How could a precedent allowing the compelled waiver of one right be kept from opening a gate allowing the compelled waiver of other rights?

The Court established such a limiting principle by making a distinction between "procedural rights" and "substantive rights." An individual could waive a "procedural right," such as having the case decided by a court, but could not be forced to waive a "substantive right," such as being paid at least the minimum wage. Although an employee could be compelled to appear before an arbitrator rather than a judge, the arbitrator would apply the same statutory standard which would have been used in court. By following the identical standard that a judge would use, the arbitrator presumably would reach the same result a court would reach. Therefore, when someone was required to agree that an arbitrator, not a judge, would decide his claim, that person was not giving up the *substantive* protection of the law, such as the right to be paid at least the minimum wage, but only was waiving the procedural right to present his case in court.

This substantive/procedural distinction could be applied not only in cases involving rights created by employment laws, but also in fields where arbitrators decided other statutory issues. In fact, the Supreme Court set forth the principle in a case involving rights under antitrust law. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985), the Court stressed that by agreeing "to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute, it only submits to their resolution in an arbitral, rather than a judicial, forum."[6] The Supreme Court addressed a statute's lack of language about arbitration by treating Congress' silence, in effect, as an absence of objection. Essentially, the Court presumed that Congress had chosen to allow arbitration unless it found sufficient evidence, either in a statute's text or in the legislative history, that Congress had intended that only courts interpret and apply the law. See Note, "The Substantive Waiver Doctrine in Employment Arbitration Law," *130 Harv.L.Rev. 2205* (2017).

The Court later referred to this same distinction in a number of cases involving employment-related laws. See *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20. 26 (1991); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001); and *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 273 (2009) ("substantive waiver of federally protected civil rights will not be upheld"). This principle - that the Court allows only the waiver of procedural rights and will not permit the compelled waiver of a substantive civil right - certainly applies in the present case.

It should be stressed that nothing in the Court's recent *Epic Systems* decision overruled or modified the procedural right/substantive right distinction the Court had made in these previous cases. In *Epic Systems*, the Court did not discuss this distinction because the need did not arise; the case did not involve the assertion of any substantive right.

In *Epic Systems*, when the Court rejected the argument that Section 7 of the NLRA prohibited employers from requiring employees to waive the right to bring class actions, it consistently characterized the claimed right as *procedural*. Thus, the Court stated that "today's decision merely declines to read into the NLRA a novel right to class action *procedures*. . ." *Epic Systems Corp. v. Lewis*, 584 U.S. ___, slip op. at 22 (italics added).

In *Epic Systems*, the Court also stated: "Nothing in our cases indicates that the NLRA guarantees class action *procedures*." Id., slip op. at 18 (italics added). The Court further stated that "Section 7 doesn't speak to class and collective action *procedures* in the first place." Id., slip op. at 13 (italics added).

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[6] To establish through its precedents that arbitrators could take the place of judges and decide statutory issues, the Court also had to deal with the fact that laws creating new rights often did not say anything about arbitration. (A law's silence about arbitration, of course, is easy to understand. For the Federal Arbitration Act's first 60 years, arbitrators just interpreted contracts. During that period, lawmakers likely felt no need to include language either allowing or prohibiting the arbitration of statutory claims.)

The Court likewise distinguished its decision in *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), stating that "not a single one of the lower court or Board decisions *Eastex* discussed went so far as to hold that Section 7 guarantees a right to class or collective action *procedures*." Id., slip op. at 19 (italics added).

Indeed, the Court rejected the argument that Section 7 accorded employees the right to seek legal redress in class actions because such a right would be *procedural* in nature but Section 7 instead protected employee *activity*. As the Court put it, Section 7 protects things employees "just do" but no language in Section 7 "speaks to the *procedures* judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum. . ." Id., slip op. at 12 (italics added).

Unlike the claimed Section 7 right which the Court considered and rejected in *Epic Systems*, the Section 7 right at issue here does not concern supposed entitlement to use a procedure but rather the right to engage in *activity*. Specifically, employees have the right to discuss with each other *all* their terms and conditions of employment, including arbitrations, to disclose these terms and conditions to the public and to ask for the public's support in changing them for the better.

This right clearly is substantive. It protects activity that, in the Court's words, employees "just do." We know that because many times in the past, employees just did it. And when they did it, they enjoyed the Act's protection. See, e. g., *Ellison Media Company*, 344 NLRB No. 136 (2005) (employee discussion of sexual harassment by supervisor is protected activity), citing *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964), and *Vought Corp.,* 273 NLRB 1290, 1294 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986); *Phoenix Transit System*, 337 NLRB 510, 510 (2002) (Section 7 protects employees' right to discuss their sexual harassment complaints among themselves), enfd. mem. 63 Fed. Appx. 524 (D. C. Cir. 2003); *Waco, Inc.,* 273 NLRB 746, 748 (1984)(rule prohibiting discussion of wages was a clear restraint on employees' Section 7 right to engage in concerted activity for their mutual aid or protection); *All American Gourmet*, 292 NLRB 1111, 1130 (1989); *Leather Center, Inc.,* 312 NLRB 521, 528 (1993)(Section 7 rights include right to convey complaints to representatives of the media); *Hacienda de Salud-Espanola*, 317 NLRB 962 (1995); *Compuware Corp.,* 320 NLRB 101 (1995); *St. Luke's Episcopal-Presbyterian Hospitals, Inc.,* 331 NLRB 761, 762 (2000); *Case Farms of North Carolina*, 353 NLRB 257, 260 fn. 12 (2008)(Section 7 protected two employees who, speaking on behalf of other employees, complained about working conditions to local newspaper reporters).

Because the Section 7 right affected by the Respondent's confidentiality clause is a substantive right rather than a procedural right, the *Epic Systems* decision, which found that a claimed procedural right did not exist, but which did not concern a well-established substantive right, can be and should be distinguished.

Authority of the Board

The Respondent contends that, because the confidentiality clause is part of an arbitration agreement, the Federal Arbitration Act governs its lawfulness and, therefore, the Board lacks the authority to determine whether the confidentiality clause violates the NLRA. However, that

argument fails to take into account the Board's function in the statutory scheme which Congress enacted.

Congress granted employees the right to engage in concerted activity for their mutual aid or protection, and other related rights, in Section 7 of a comprehensive statute addressing problems resulting from an inequality of bargaining power. 29 U.S.C. § 157. In the same statute, Congress made it an unfair labor practice to interfere with these rights, 29 U.S.C. § 158, and established the Board to administer it. 29 U.S.C. § 153.

In Section 10 of the Act, 29 U.S.C. § 160, Congress gave the Board authority to prevent and remedy violations. The Supreme Court has held that "Section 10(a) and (c) of the [National Labor Relations] Act commits to the Board the exclusive power to decide whether unfair labor practices have been committed and to determine the action the employer must take to remove or avoid the consequences of his unfair labor practice." *National Licorice Co. v. NLRB*, 309 U.S. 350, 365 (1940).

May the confidentiality clause hide from the NLRA, and the Board's scrutiny, because it is part of an arbitration agreement? In *National Licorice Co.,* the Supreme Court also stated:

> The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices. The public right and the duty extend not only to the prevention of unfair labor practices by the employer in the future, but to the prevention of his enjoyment of any advantage which he has gained by violation of the Act, whether it be a company union *or an unlawful contract* with employees, as the means of defeating the statutory policy and purpose.

Id., 309 U.S. at 364 (italics added). Considering that Congress gave the Board exclusive authority to determine whether an action constituted an unfair labor practice, it seems highly unlikely that it contemplated another body exercising that authority simply because the language which potentially interfered with Section 7 rights appeared in a contract rather than elsewhere. If Congress had intended such a result, it would have said so explicitly. Therefore, I conclude that the Board possesses the authority to decide whether the confidentiality clause violates the NLRA.

Epic Systems **Further Distinguished**

Because of the substantive right/procedural right distinction discussed above, I reject the Respondent's arguments that the *Epic Systems* decision controls here, and that it compels the conclusion that the Federal Arbitration Act deprives the Board of authority to consider whether the confidentiality clause conveys a message which violates Section 8(a)(1) of the National Labor Relations Act. Additionally, another relevant factor may be discerned behind the scenes in *Epic Systems* which is not present here.

In *Epic Systems*, the Court raised the possibility that the Board was straining to extend its authority beyond what Congress intended by inventing a new right which the Board itself had not recognized for its first 7 decades. Thus the Court stated that "In 2012, the Board - for the first time in the 77 years after the NLRA's adoption - asserted that the NLRA effectively

nullifies the Arbitration Act in cases like ours." *Epic Systems Corp. v. Lewis*, 584 U.S. ___, slip op. at 4.

The Court was referring to the Board's conclusion, in *D. R. Horton, Inc.,* above, that an employer could not lawfully require employees to waive the right to take legal action against it by filing a class action in any forum, whether in court or before an arbitrator. In that case, as in *Murphy Oil*, above, the Board had held that filing a class action constituted "concerted activities for the purpose of collective bargaining or other mutual aid or protection" within the meaning of Section 7 of the NLRA.

Rejecting this theory, the Court even hinted that the Board's "discovery" of a new right illustrated a government agency's tendency to expand its "turf" through creative and overly-generous interpretations of the statute it administers.[7]*Epic Systems Corp. v. Lewis*, 584 U.S. ____, slip op. at 20. Such a tendency certainly isn't present here. It should be stressed that the present case does not involve an expansive interpretation of Section 7 to create a new right but, as the cases cited above illustrate, concerns a long-recognized and firmly-established old right. From the earliest days of the Act, Section 7 has protected employees' right to discuss and publicize working conditions they consider unsatisfactory.

The right to discuss conditions of employment has such a venerable history because it is the essential predicate to all other rights granted by Section 7. *Any* concerted activity protected by Section 7 necessarily begins with employee discussion about a work-related problem. Prohibiting employees from talking about a working condition effectively prevents them from deciding to protest it in concert.

In one sense, the present case is the exact reverse of *Epic Systems*. There, the Supreme Court held that the Board's interpretation of the NLRA unduly encroached upon the province of the Federal Arbitration Act. Here, the Respondent advocates an interpretation of the Federal Arbitration Act which would encroach upon the NLRA by reducing the rights granted by Section 7 of the NLRA and restricting the Board's authority to enforce those rights. *Epic Systems* concerned whether the NLRA should be interpreted in a way that impinged upon the FAA, but the issue here concerns whether the FAA should be interpreted in a way that impinges on the NLRA.

Interpreting the FAA in a way which curtails the NLRA is as undesirable as interpreting the NLRA in a way which interferes with the FAA. The interpretation advocated by the Respondent creates an unnecessary conflict between statutes of the very sort condemned by the Court in *Epic Systems*. In that case, the Supreme Court decried construing a statute in a manner

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[7] Although the Court, in *Epic Systems*, did not use the word "turf" or the phrase "mission creep," it did imply that such a tendency might have affected the Board's *D. R. Horton* decision:

> An agency eager to advance its statutory mission, but without any particular interest in or expertise with a second statute, might (as here) seek to diminish the second statute's scope in favor of a more expansive interpretation of its own–effectively "bootstrap[ping] itself into an area in which it has no jurisdiction." Adams Fruit Co. v. Barrett, 494 U.S. 638, 650 (1990).

which placed it in conflict with another law. Instead, the Court taught that, whenever possible, statutes should be interpreted as a "harmonious whole." *Epic Systems Corp. v. Lewis*, 584 U.S. ____, slip op. at 2. Here, the Respondent would wield the FAA to clobber rights granted by the NLRA. Such an interpretation is needless and must be avoided.

The issue in this case concerns whether the confidentiality clause interferes with the exercise of rights granted by Section 7 of the National Labor Relations Act. It should be stressed that when an employer unlawfully interferes with these statutory rights, this unfair labor practice harms more than employer's own workers. The employer breaches a federal statute which sets labor policy for the entire country, a policy which seeks to benefit all by reducing the "strikes and other forms of industrial strife or unrest" which burden and obstruct commerce. 29 U.S.C. § 151. The Board, when it considers the facts relevant to an allegation and determines whether the law has been broken, is not merely vindicating the right of the particular employer's workers but is enforcing a statute which protects the public as a whole. Congress stated, in Section 10(a) of the Act:

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. *This power shall not be affected by any other means of adjustment or prevention* that has been or may be established by agreement, *law*, or otherwise. . .

29 U.S.C. § 160(a) (Italics added). The Respondent here attempts to use the Federal Arbitration Act as a shield to prevent the Board from performing the law enforcement duties which Congress entrusted to it. Respondent asserts that, because of the FAA, only contract law standards can be applied, but such standards, which largely evolved at common law, are blind to the national labor policy which Congress established and likewise blind to the federal statute which embodies that policy and which makes unlawful certain conduct which the common law tolerated.

Congress certainly did not intend that one of the laws it enacted be used to thwart another. Instead, it protected the Board's power to enforce the NLRA by including in Section 10(a) the language quoted above. It is entirely appropriate for the Board to use that authority here.

To summarize, for all the reasons discussed above, I reject the Respondent's argument that *Epic Systems* precludes the Board from considering the lawfulness of the confidentiality clause and from ordering a remedy should the clause violate the Act.

The General Counsel's Argument

Only in unusual circumstances does the General Counsel agree with a respondent that, although the complaint alleges that certain conduct violates the Act, the conduct in question actually is lawful. The Supreme Court's *Epic Systems* decision created such an unusual circumstance. The General Counsel believes that the Court's holding requires a conclusion that the confidentiality clause does not violate Section 8(a)(1) and argues that this allegation should be dismissed.

However, the General Counsel's reasoning rests on an incorrect assumption, namely, that neither what happens during an arbitration nor the arbitrator's award is a condition of employment. For example, the General Counsel's brief states:

> Confidentiality provisions that confine themselves to information concerning matters disclosed in the arbitration hearing and relating to the arbitration *do not significantly implicate Section 7 rights*, and therefore, in conformity with *Epic*, such agreements should be enforced as written. [Italics added.]

The General Counsel thus assumes that no harm comes to Section 7 rights from a rule which only prohibits employees from talking about arbitration, but which allows them to talk about anything else. However, the cases cited above and other precedents clearly establish that Section 7 *does* protect employee discussions about terms and conditions of employment. Therefore, the General Counsel's assumption can be correct only if what happens during an arbitration, and the arbitrator's award, do not pertain to terms and conditions of employment. Another portion of the General Counsel's brief reveals this same implicit assumption, that arbitration somehow is not a term or condition of employment. It states:

> [A]s long as an arbitral confidentiality provision confines itself to arbitration-related matters and does not touch the type of Section 7 activities that "employees just do" for themselves it should not be interpreted to interfere with Section 7 rights.

The Supreme Court, in *Epic Systems*, had used the phrase "things that employees 'just do' for themselves" to distinguish the activities protected by long-recognized Section 7 rights - substantive rights - from the claimed right to use class action procedures, a right the Court ultimately concluded did not exist. Clearly, as the cases cited above[8] establish, employee discussions about conditions of employment fall within the category of things that employees "just do" and within the protection of Section 7.

Just as there is a difference between playing baseball and talking about a baseball game, arbitration and an employee discussion *about* arbitration are two different things. Court decisions allowing an employer to force employees to use arbitration do not serve as precedents for the separate proposition that an employer can prohibit employees from talking about it.

If something is a condition of employment, Section 7 allows employees to talk about it and does not place any working condition off limits. If it's a working condition, employees have the legal right to discuss it.

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[8] For example, *Ellison Media Company*, 344 NLRB No. 136 (2005) (employee discussion of sexual harassment by supervisor is protected activity), citing *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964), and *Vought Corp.*, 273 NLRB 1290, 1294 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986); *Phoenix Transit System*, 337 NLRB 510, 510 (2002) (Section 7 protects employees' right to discuss their sexual harassment complaints among themselves), enfd. mem. 63 Fed. Appx. 524 (D.C. Cir. 2003).

The arbitration system which the Respondent imposed most certainly *is* a condition of employment. See footnote 1, above. The Respondent even admitted that fact in the "FAQ sheet" it distributed to employees, which stated that the "Arbitration Agreement is a condition of continued employment with the Company."

After imposing this system on employees as a condition of employment, and after informing employees in writing that it was a condition of employment, the Respondent would be hard pressed to deny it now. The Respondent has not. The Respondent's brief does not raise any defense based on an argument that its arbitration system is not a condition of employment.

Moreover, an arbitration of a work-related dispute not only is *itself* a condition of employment, imposed by the Respondent, but any such arbitration *affects* working conditions and for this reason, too, employees have a Section 7 right to discuss it. For example, an arbitrator's decision concerning whether an employee should receive overtime pay typically would set a standard applicable to others who worked similar hours. Thus, if the arbitrator reached a decision which appeared to be contrary to wage and hour law, an employee discussion about the award clearly would concern a term or condition of employment and therefore would fall within Section 7's protection. Of course, the discussion would still be protected even if the employees believed the arbitrator had decided the issue correctly.

Similarly, employee discussion about an arbitrator's decision concerning claims of sexual harassment, or concerning any other employment condition, would be protected. Because the Respondent established the arbitration system to decide legal claims arising out of employment, every such case would relate to terms and conditions of employment.

Both because arbitration *is* a condition of employment and because the arbitration *affects* conditions of employment, employees have the same right to discuss arbitrations and disclose information about them as they do to discuss their wages. The employees' Section 7 right to discuss and disclose their conditions of employment is the long-established rule. No party has cited any case which makes employee discussions and disclosures about arbitration an exception to the rule and I have found none.

Therefore, I reject the General Counsel's implicit assumption that arbitration is not a condition of employment and likewise reject the conclusion, based on that assumption. Because the arbitration system which the Respondent imposed, as a condition of employment, is precisely that, any rule that prohibits employees from discussing or disclosing information about an arbitration necessarily infringes on their exercise of rights granted by Section 7 of the NLRA.

Whether the prohibition's negative impact on Section 7 rights is great enough to violate Section 8(a)(1) of the Act is another question. The Act gave the Board exclusive authority to take evidence and decide this issue and the Supreme Court's *Epic Systems* decision does not preclude the Board from doing its job. But what standards should the Board apply in making that determination? That issue will be discussed next.

(b) Is the Board precluded from using its own precedents to judge the lawfulness of the confidentiality clause?

The Board's remand order directs me to judge the lawfulness of the confidentiality clause by applying its *Boeing* standards. However, the Respondent contends that only general contract law standards may be used. On this point, the General Counsel disagrees with the Respondent and instead takes the position that the *Boeing* framework should be used.

The Respondent bases its argument, that only general contract law standards may be used to judge the lawfulness of the confidentiality clause, on Section 2 of the Federal Arbitration Act, which states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*.

9 U.S.C. § 2 (italics added). The Respondent's argument, that this section of the FAA applies to the confidentiality clause and controls the outcome here, necessarily rests on the assumption that the clause's location within the arbitration agreement shields it from being scrutinized separately. Thus, the Respondent's brief, characterizing the confidentiality clause as "part and parcel" of the Arbitration Agreement, asserts:

> The confidentiality provision in Pfizer's Arbitration Agreement is lawful and enforceable based on this [*Epic Systems*] precedent. Similarly, a challenge to the provision may *not* be based on a defense that would apply only to arbitration, would derive its meaning from the fact that an agreement to arbitrate is at issue, or would interfere with a fundamental attribute of arbitration. Interpreting the NLRA to dictate whether arbitration proceedings may be confidential would do all three. [Italics in original.]

Although the Respondent's brief bases this argument on the Supreme Court's *Epic Systems* decision, for the reasons discussed above, I have concluded that this decision is distinguishable on its facts and not controlling here. By prohibiting employee discussion and disclosure of information about an arbitration or about an arbitrator's award, the confidentiality clause prevents employees from exercising substantive rights granted by Section 7 of the NLRA. In contrast, the prohibition at issue in *Epic Systems* - denying employees the right to use class action procedures - did not have any impact on a Section 7 right because the Court held that no such right to use class action procedures existed.

The Supreme Court has not yet addressed the situation considered here, where a prohibition in an arbitration agreement does interfere with the exercise of indisputably real, long-established Section 7 rights. The present facts would present to the Court a case of first impression requiring an analysis beyond the scope of the *Epic Systems* decision.

In addition to *Epic Systems*, the Respondent's brief also quotes the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011), for the proposition that the "saving clause" of the Federal Arbitration Act "offers no refuge for defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."

However, there is a crucial difference between the facts in *AT&T Mobility LLC v. Concepcion* and the facts here. Just as *Epic Systems* did not involve a conflict between language in an arbitration agreement and a *substantive statutory right*, neither does *AT&T Mobility LLC v. Concepcion*. The people affected by the arbitration agreement in this latter case were not employees but rather customers, who were contesting a provision in a cellphone contract which required the arbitration of claims on an individual basis, excluding class actions. In *Epic Systems*, the employees had claimed that Section 7 gave them a right to class action procedures - a claim that the Court rejected - but in *AT&T Mobility LLC v. Concepcion*, the customers did not even claim that such a law, protecting them as customers, granted a similar right.

Rather *AT&T Mobility LLC v. Concepcion* concerned the effects of a state court precedent which voided, as unconscionable, agreements which prohibited class actions. The Supreme Court held that the Federal Arbitration Act did not allow the state court precedent to have the effect of insert into a provision allowing class actions into an arbitration contract when the parties had not themselves agreed to it. In reaching this conclusion, the Supreme Court noted that introducing class procedures into arbitration would create problems.

The Supreme Court has expressed a continuing concern about how requiring class action procedures in arbitration would change arbitration's character, making it more unwieldy and less desirable. However, the present case, unlike *AT&T Mobility LLC v. Concepcion* and *Epic Systems*, does not involve any attempt to require class action procedures in arbitrations.

Another distinction is equally important and perhaps moreso. The present case, unlike either *AT&T Mobility LLC v. Concepcion* or *Epic Systems* concerns a substantive civil right granted by a federal statute, the right of workers to act in concert for their mutual aid or protection. Additionally, as will be discussed at greater length below, this right furthers a strong federal policy which, among other things, protects workers from exploitation by reducing the inequality of bargaining power between employers and employees.

It is well established that an employer cannot lawfully require an employee, as a condition of hire or continued employment, to waive this civil right, granted by Section 7 of the NLRA. Indeed, an employer's mere *attempt* to condition employment on willingness to waive a Section 7 right constitutes unlawful interference with the exercise of those rights. See, e.g., *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218 (1995), enfd. 81 F.3d 209 (D. C. Cir. 1996)(unlawful to condition reinstatement on discharged employees' waiver of right to discuss working conditions); *Bethany Medical Center*, 328 NLRB 1094 (1999)(unlawful to condition employment on employees waiving right to engage in a further lawful walkout); *Bon Harbor Nursing & Rehabilitation Center*, 348 NLRB 1062 (2006)(unlawful to require, as condition of further employment, that employees promise not to engage in concerted protests of working conditions); *Beverly Health & Rehabilitation Services*, 346 NLRB 1319 (2006)(unlawful to condition hire on employee's willingness to cross picket line); *Retlaw*

Broadcasting Co., 310 NLRB 984 (1993), enfd. 53 F.3d 1002 (9th Cir. 1995) (unlawful to condition employment on employee's waiver of right to invoke the protections of collective-bargaining agreement); *Senior Citizens Coordinating Council*, 330 NLRB 1100 (2000) (unlawful to condition further employment on employees' willingness to sign a retraction of their prior protected, concerted activity).

For the reasons discussed above, I conclude that the Supreme Court's decisions in *AT&T Mobility LLC v. Concepcion* and in *Epic Systems* can and must be distinguished.[9] Because the Court, in *AT&T Mobility LLC v. Concepcion*, did not have to consider, and did not consider, the effect of a statutory right to discuss and publicly protest either working conditions or any other matter, the Court's passing reference to confidentiality in the context of "streamlined procedures" cannot be considered a holding that confidentiality should, under all circumstances, be considered a procedural issue. Neither involves a substantive federal civil right which Congress granted employees as part of a comprehensive federal policy.

Another reason also compels the rejection of the Respondent's argument that the confidentiality clause's lawfulness cannot be judged by applying labor law standards. That argument does not take into account that the confidentiality clause has a *dual status*. In addition to its identity as a clause in the Arbitration Agreement, the clause also is an expression of the Respondent's employment policy and a work rule.

(c) The confidentiality clause's dual identity

The text of the confidentiality clause does more than function as a term in a contract. It also communicates a message to employees concerning what conduct the Respondent has prohibited. In fact, the clause's language began performing this function well before the clause became part of a purportedly binding contract. This important chronology will be discussed further below, but first, another matter should be addressed: Does the text of the confidentiality clause constitute an "employment policy" or "work rule" as those terms are used in the Board's *Boeing* decision?

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[9] The Court's opinion in *AT&T Mobility LLC v. Concepcion* includes another statement which, at first glance, may appear to support the Respondent's argument. The Court noted that the FAA's principal purpose was to ensure that private arbitration agreements are enforced according to their terms. Doing so gave contracting parties the opportunity to customize the arbitration procedure to fit their needs. The Court stated:

> The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. It can be specified, for example, that the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets.

563 US 333, slip op. at 10. The fact that the Court referred to confidentiality as an example of "streamlined procedures" suggests that, in that instance at least, it classified confidentiality as a procedural matter. However, *AT&T Mobility LLC v. Concepcion* concerned an arbitration clause in a contract for cellphone service and not an arbitration agreement imposed as a condition of employment. Section 7 of the NLRA grants rights to *employees*, but the cellphone customer was not the employee of AT&T Mobility LLC, so the Section 7 right to discuss and disclose working conditions did not apply. Moreover, the case did not involve a claim that any other law granted cellphone customers a substantive right analogous to those granted to employees by Section 7 of the NLRA.

As used in *Boeing*, the terms "work rule," "employment policy" and "employee handbook provision" all appear to describe messages communicated by an employer which typically meet these criteria: (1) The message informs employees about what conduct is required or prohibited or sets work standards[10] and (2) a failure to comply with the message can subject an employee to discharge or other disciplinary action. The latter requirement does not have to be spelled out in the particular message if, under all the circumstances, employees reasonably would believe that a failure to obey the instruction could result in such consequences. The factors would militate against a conclusion that employees reasonably would believe that they could be disciplined for failure to obey the instruction.

The confidentiality clause plainly satisfies the first criterion because it communicates to employees what conduct is required ("The parties shall maintain the confidential nature of the arbitration proceeding and the award. . ."). The second question requires more detailed analysis: Would employees reasonably believe, under the totality of circumstances, that discharge or other discipline could result from a failure to "maintain the confidential nature of the arbitration. . ."

The confidentiality clause itself does not state that an employee would be subject to discharge or discipline if he or she revealed something about the arbitration. The record in this case also includes an explanatory sheet which the Respondent provided to employees to answer their "frequently asked questions." The explanatory material likewise does not raise the possibility of disciplinary action for failure to abide by the confidentiality clause. These

However, other factors reasonably would lead employees to reach the opposite conclusion, that they could be disciplined for disobeying the confidentiality clause. The rather formal legal style of the clause and of the entire Agreement conveys the sense that it is of consequence and should not be disregarded. Similarly, the fact that the Respondent imposed the Agreement on almost all its unrepresented employees, nationwide, underscores the importance of the policy to high-level corporate officials.

Respondent also made it clear to employees that they could not change the Agreement in any respect. An employee's only option was to stay employed and thereby waive certain legal rights or else quit. An employee reasonably would conclude that if continued employment is conditioned on agreeing to the terms of the Agreement, then disclaiming the Agreement - informing management that the employee decided not to be bound by it - would lead to the employee's discharge. If an employee's unwillingness to agree necessitated termination of employment, the employee reasonably would conclude that disobeying the policy carried at least some adverse consequences.

One additional factor should be considered: Would the fact that the confidentiality clause appears in the Arbitration Agreement rather than, for example, in an employee manual, lead employees reasonably to believe that it did not constitute a rule binding on them?

[10] The Board observed in *Boeing* that "Most work rules, employment policies, and employee handbook provisions exist for the purpose of permitting employees to understand what their employer expects and requires." *The Boeing Co.*, 365 NLRB No. 154, slip op. at 14.

When evaluating the lawfulness of a statement made by an employer to its employees, the Board considers what effect the message reasonably would have on employees' willingness to exercise the rights guaranteed in Section 7 of the NLRA? How the employer characterizes the message isn't determinative. Even a supposed "joke" will violate the Act if it reasonable would chill employees' exercise of their Section 7 rights. *Meisner Electric, Inc.,* 316 NLRB 597, 599 (1995); *Ethyl Corporation*, 231 NLRB 431, 434 (1977) ("It is well established that the coercive and unlawful effect of a statement is not blunted merely because. . . accompanied by laughter or made in an offhand humorous way.") Likewise, considering the totality of circumstances, I conclude that the coercive effect of the confidentiality clause would not be blunted by the fact that it appears as part of a document titled "Mutual Arbitration and Class Waiver Agreement" and under the subtitle "Confidentiality."

Considering all the factors discussed above from the employees' point of view, and applying an objective standard, I conclude that employees reasonably would view the confidentiality clause, and its instruction to "maintain the confidential nature of the arbitration," as binding upon them. Further, I conclude that employees reasonably would believe that they could be subject to disciplinary action for disclosing to the public how an arbitrator treated grievants. Likewise, they reasonably would believe that they might be disciplined if they disclosed to the public the contents of the arbitrator's award, even though the award clearly would affect terms and conditions of employment.

In these circumstances, employees reasonably would understand the confidentiality clause to state a "work rule," as that term is used in the *Boeing* decision. See *Professional Janitorial Service of Boston, Inc.,* 363 NLRB No. 35, slip op. at 2 (2015).[11]

Likewise, the confidentiality clause aptly could be characterized as an "employment policy." The record indicates that the Respondent alone made the decision to prohibit employees from revealing to the public information about an arbitration. The fact that the Respondent conveyed this policy to its employees as part of the Arbitration Agreement, rather than posting it on a bulletin board or printing it in a handbook, does not change the message communicated.

For these reasons, I conclude that the confidentiality clause constitutes a work rule and employment policy as those terms are used in *Boeing*. Thus, the clause does not exist solely as a part of the Arbitration Agreement but also serves a separate function, communicating to employees that they are prohibited from disclosing information about arbitration to the public. The clause has a dual identity.

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[11] In *Professional Janitorial Service* the Board held that "the Respondent's mandatory Arbitration Policy is a work rule properly analyzed under the test set forth in *Lutheran Heritage Village–Livonia*, 343 NLRB 646 (2004)." Although the Board later, in *Boeing*, replaced the *Lutheran Heritage Village–Livonia* analytical framework with a fresh one, the *Boeing* decision doesn't affect the Board's conclusion in *Professional Janitorial Service* that the arbitration policy was, in fact, a work rule subject to evaluation under the standards established for work rules.

Moreover, the clause existed as a statement of employment policy and work rule *well before* it existed as a contract clause. Paragraph 7(h) of the Respondent's Arbitration Agreement states, in part:

> If you begin or continue working for the Company sixty (60) days after receipt of this Agreement, even without acknowledging this Agreement, this Agreement will be effective, and you will be deemed to have consented to, ratified and accepted this Agreement through your acceptance of and/or continued employment with the Company.

Thus, no binding contract exists for the first 60 days after an employee receives the Agreement. But even though the text of the confidentiality clause is not binding *as a contract* during this time, it does exist as a statement of the Respondent's employment policy and as a work rule. Employees clearly know about this work rule because each has received a copy of it, and, for the reasons discussed above, they reasonably would believe that disobeying the rule could result in discipline. Therefore, if the message reasonably communicated by the clause's text violates Section 8(a)(1), the violation begins *before* the formation of any contract. It starts when the employee receives the rule and learns that he may not discuss or disclose information about an arbitration or an arbitrator's award.

The Respondent contends that the clause's status as "part and parcel" of the Arbitration Agreement prevents the Board from judging its lawfulness under labor law standards, but during the 2-month period after an employee receives and is aware of the clause's language, no contract exists. Even assuming, for the sake of analysis, the correctness of the Respondent's argument that the clause's status as part of an arbitration agreement insulates it from Board scrutiny, that reasoning could not apply to the 60-day period during which no contract was in effect.

Thus, nothing precludes the Board from exercising its authority during this 2-month period.[12] Likewise, during this period before the Arbitration Agreement, by its own terms, becomes effective, no impediment exists which even arguably would preclude the Board from applying labor law standards to judge the lawfulness of the prohibition expressed by the clause.

Should the Board determine that the message reasonably communicated by the language of the confidentiality clause violates Section 8(a)(1), the Board certainly can order the Respondent to undo the harm caused when the clause was promulgated by rescinding the clause as a statement of employment policy and work rule. Similarly, nothing prevents the Board from including in its remedial order the customary requirement that a respondent not commit "like or related" violations in the future. Thus barred from re-promulgating the message, the Respondent could not incorporate it into an arbitration agreement and require an employee to be bound by it.

[12] The Respondent promulgated the confidentiality clause on or about May 5, 2016. The Charging Parties filed their respective unfair labor practice charges on May 9, 2016, and May 11, 2016, well within the 6–month limitation period set forth in Section 10(b) of the Act.

In sum, when acting upon a suitably timely charge, which is the case here, the Board possesses and exercises authority to remedy an unfair labor practice from its inception and to order a respondent to restore the conditions which would have existed had the unfair labor practice not occurred. Therefore, even assuming for the sake of analysis the correctness of the Respondent's argument - that the Board may not apply labor law standards to judge a clause clothed in an arbitration agreement - that premise does not prevent the Board from examining the clause when it stands naked, before the formation of such an agreement.

(d) No Waiver

The Respondent may argue that when the Arbitration Agreement takes effect as a binding contract, it renders irrelevant the fact that for the previous 60 days, the confidentiality clause had served as a statement of employment policy which communicated to employees the message that the Respondent did not permit them to discuss or disclose information about an arbitration of a work-related dispute. This argument rests on an assumption that the Arbitration Agreement effects a waiver of employees' Section 7 right to engage in such activity. Absent a waiver, the Section 7 right continues to protect the employee's right to discuss and disclose information about an arbitration and/or arbitral award. However, for the following reasons, the Arbitration Agreement did not effect a waiver.

The principle articulated by the Supreme Court in *Mitsubishi Motors Corp v. Syler Chrysler-Plymouth, Inc.,* above, that, by agreeing to arbitrate a statutory claim, a person does not forgo the substantive rights afforded by a statute, does not rule out the possibility that a waiver might truly be voluntary. However, as noted above, it is well established that an employer cannot force an employee to give up a Section 7 right and even an attempt to compel such a waiver constitutes unlawful interference or whether the employer has placed some other form of unlawful pressure on the employee to achieve that end, there is more at stake than just the harm to that one employee. The Board is enforcing a public right granted by Congress in a statute which sets federal labor policy for the entire country.

Indeed, to be voluntary, the decision to give up a Section 7 right must be made not only in an environment free of coercion and duress. However, the Respondent placed its employees under considerable coercion and duress by telling them, in effect, that they could not continue to work without thereby agreeing to the terms of the Arbitration Agreement. This implied threat of job loss created an environment in which an employee could not make a truly voluntary choice.

Additionally, the record does not establish that employees ever knowingly chose to waive this right. To make such a deliberate choice, employees first would have to know that they possessed the right to discuss and disclose working conditions, including those pertaining to arbitration, and then decide to give it up. Although a labor lawyer would understand that Section 7 necessarily included the right to discuss and disclose information about working conditions, because without such discussion employees could not concertedly engage in other protected activities, such an understanding cannot be imputed to employees who do not have this legal training.

The record does not establish that employees even were aware they possessed the Section 7 right to discuss and disclose their conditions of employment, including information about work-related arbitrations. Neither the Arbitration Agreement itself nor the explanatory material which Respondent provided informed employees about this Section 7 right. Likewise, neither the Arbitration Agreement nor the explanatory material informed employees that they were free to discuss and disclose information about an arbitration and arbitral award and that they would not be disciplined for doing so. The record does not indicate that the Respondent otherwise communicated to employees that they would not be subjected to discharge or discipline for discussing or disclosing information about work-related arbitrations and I conclude that the Respondent did not do so.

In sum, the record does not establish either that employees knew about their Section 7 right to discuss and disclose information about this condition of employment or knowingly made a choice to give up that right. Therefore, I conclude that they did not.

Congress entrusted to the Board the responsibility of administering the NLRA and, over many years, the Board has created a body of precedent concerning when a purported waiver of a Section 7 right is effective. It is appropriate to follow the Board's precedent here and I do so.[13] However, the Executive is not speaking with two voices here. Moreover, when the Board decides whether a right granted by the NLRA has been waived, it acts exclusively within its own area of expertise.

The Arbitration Agreement did not specifically inform employees that they would be waiving a right and it did not require employees to sign the document or take any other affirmative action to indicate that they agreed with it. They only had to continue doing what

[13] It might be argued that the Supreme Court's decision in *Epic Systems* called into question the principle that the Board's experience enforcing the NLRA gives its interpretation of that Act more weight or makes Board precedents more authoritative. More specifically, in *Epic Systems*, the Court considered and rejected the argument that the Board's conclusion – that Section 7 granted employees certain procedural rights – warranted deference under *Chevron U. S. A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

In *Chevron*, the Court had held that when Congress, in writing a particular statute, did not directly address a particular issue, and the administrative agency administering this statute had made a decision about how the law applied to this issue, then the Court will defer to this interpretation if it is "permissible." However, in *Epic Systems*, the Court cited a number of reasons for declining to apply *Chevron*.

Although a government agency develops expertise interpreting the statute it administers, there is less reason to respect an agency's interpretation of some other statute outside its sphere of experience. In *Epic Systems*, the Court concluded that the Board was trying to interpret not only the NLRA but also the Federal Arbitration Act, a statute it did not administer, and about which it had no special expertise. The Court also observed that the Board and the Solicitor General were advancing two conflicting interpretations of the law and, therefore, "the Executive seems of two minds." An argument for deferral "on grounds of political accountability," the Court stated, surely "becomes a garble when the Executive speaks from both sides of its mouth, articulating no single position on which it might be held accountable." *Epic Systems Corp. v. Lewis*, 584 U.S. ___, slip op. at 20.

they had done before, namely, come to work rather than quit. However, to be effective, the waiver of a Section 7 right must be clear and unequivocal.

This principle applies generally to *all* purported waivers of rights created by the Act, and is not limited to situations involving arbitration. For example, it applies to a purported waiver by an employee of a grievance claim for lost earnings. *International Total Services*, 280 NLRB 576, 580 (1987). It applies to an employee's statutory right to refrain from financially supporting a union. *Automotive and Allied Industries Local 618 (Sears, Roebuck & Co.)*, 324 NLRB 865, 867 (1997). It applies to the purported waiver of an employee's statutory right to wear union emblems. *Albertsons, Inc.,* 300 NLRB 1013, 1017 (1990). It also applies to a purported waiver by a union of the right to bargain over terms and conditions of employment. *Rockwell International Corporation*, 260 NLRB 1346 (1982); *TCI of New York*, 301 NLRB 822, 824 (1991). Likewise, it applies to a claim that a union waived its right to received information relevant to and necessary for it to perform its duties as exclusive bargaining representative. *Quality Building Contractors*, 342 NLRB 429, 432 (2004). Similarly, it applies to a purported waiver of the right to honor a picket line or engage in a sympathy strike. *Keller-Crescent Company*, 217 NLRB 685, 687 (1975).

In the present case, the record does not even suggest, let alone establish, that any employee said to the Respondent "I am waiving this right" or communicated that message to the Respondent in any manner. Merely continuing to work is such an ordinary, everyday experience that it does not signal any intent to waive such a right. There is no assurance that an employee who received the Respondent's Arbitration Agreement even read its paragraph 7(h), which provided that continuing to work for 60 days resulted in the Agreement taking effect.

In these circumstances, merely continuing to work does not evince any intention to waive the Section 7 right. It certainly does not constitute the clear and unequivocal manifestation of intent which is necessary, under the Board's precedents, to effect a waiver.

The record does not include any other evidence suggesting that any employee waived a Section 7 right. Therefore, I find that no employee did so.

Because no employee waived the right to engage in activity protected by Section 7 of the Act, all employees retained the right to discuss and disclose information about arbitrations and arbitral awards. Yet employees reasonably would understand the language in the confidentiality clause to mean that they did not possess this right. Thus, the confidentiality clause would lead employees to believe something that was untrue. The extent to which this incorrect belief interferes with the exercise of Section 7 rights and whether such interference violates Section 8(a)(1), will be addressed later in this decision.

(e) Contractual Form Does Not Shield Language

The argument that otherwise violative language becomes immune when imposed on employees in a contract rests on the improbable assumption that Congress intended to allow its laws to be circumvented so conveniently. The Supreme Court rejected that notion in 1940 in *National Licorice Co v. NLRB*, above, in which the Court stated:

> Obviously employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which it imposes. . .

National Licorice Co v. NLRB, 309 U.S. at 364. In *J. I. Case Co v. NLRB*, 321 U.S. 332, 337 (1944) the Court similarly observed: "Wherever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility." Moreover, in *Kaiser Steel Corp v. Mullins*, 455 U.S. 72, 77 (1982) the Supreme Court stated: "There is no statutory code of federal contract law, but our cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law."

Additionally, in *Kaiser Steel Corp v. Mullins*, the Court noted that it was well established "that a federal court has a duty to determine whether a contract violates federal law before enforcing it" and then, quoting *Hurd v. Hodge*, 334 U.S. 24, 34–35 (1948), stated:

> The power of the federal courts to enforce the terms of private agreements is at all times exercised *subject to the restrictions and limitations of the public policy of the United States as manifested in . . . federal statutes*. . . . Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.

Kaiser Steel Corp v. Mullins, 455 U.S. at 83–84 (italics added; internal quotation marks omitted).

A public policy of the United States, manifested in a federal statute, clearly condemns an employer's use of its superior power to force employees, as a condition of employment, to sign away their right to engage in concerted activities for their mutual aid or protection. Congress expressed this public policy in the Norris-LaGuardia Act, which it enacted 3 years before the NLRA. Section 103 of the Norris-LaGuardia Act states, in part:

> Any undertaking or promise, such as is described in this section, or any other undertaking or promise *in conflict with the public policy declared in section 102 of this title*, is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court. . .

29 U.S.C. § 103 (italics added). Section 102 of that Act states, in part:

> Whereas. . .the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. . . it is necessary that he. . . shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization *or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection*; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are enacted.

29 U.S.C. § 103 (italics added). In other words, Congress declared it to be the public policy of the United States that employees have the right, among others, to engage in concerted activities for their mutual aid or protection. Moreover, in an employer required employees to agree to give up such rights, Section 102 of the Norris-LaGuardia Act made such a contract unenforceable.

Three years later, Congress went even further when it enacted the NLRA. In the law's preamble, Congress again referred to the inequality of bargaining power, in Section 7 it granted employees rights which included engaging in concerted activity for their mutual aid or protection, and in Section 8(1)[14] it made interference with those rights unlawful. The public policy which animates the NLRA thus is quite similar to, and consistent with, that manifested by the Norris-LaGuardia Act.

When the Court, in *Epic Systems*, held that Section 7 of the NLRA did not grant employees an entitlement to use class action procedures, it stated that the Norris-LaGuardia Act did not mandate a different result:

> [T]he Norris-LaGuardia Act adds nothing here. It declares "[un]enforceable" contracts that conflict with its policy of protecting workers' "concerted activities for the purpose of collective bargaining or other mutual aid or protection. " 29 U.S.C. §§102, 103. That is the same policy the NLRA advances and, as we've seen, it does not conflict with Congress's statutory directions favoring arbitration. See also *Boys Markets, Inc* v. *Retail Clerks*, 398 U.S. 235 (1970) (holding that the Norris-LaGuardia Act's anti-injunction provisions do not bar enforcement of arbitration agreements).

Epic Systems v. Lewis, 584 U.S. ____, slip op. at 15-16. However, in *Epic Systems*, the Court held that Section 7 of the NLRA did not grant employees a right to use class action procedures. In other words, filing a class action was not a "concerted activity for mutual aid or protection" within the meaning of Section 7 of the Act.

Requiring an employee to agree to waive the right to file a class action did not interfere with the employee's statutory right to engage in protected concerted activities for the simple reason that filing a class action was no more a protected concerted activity than would be, for example, eating broccoli. If an employer made an employee agree, as a condition of employment, not to eat broccoli, it would not transgress the Norris-LaGuardia Act. For the same reason, it would not implicate that statute to require an employee to waive another "right" not found in Section 7, a claimed-but-illusory right to use class action procedures.

As the Court observed, the Norris-LaGuardia Act "adds nothing" to its analysis in *Epic Systems*. Certainly, a statute which makes unenforceable a contract which interferes with protected, concerted activity has no relevance in a case where there is no protected, concerted activity. However, the present case, unlike *Epic Systems*, *does* involve protected, concerted activity and, indeed, long-recognized protected, concerted activity of fundamental importance.

[14] The Taft–Hartley Act in 1947 changed the name of Section 8(1) to Section 8(a)(1).

Forbidding employees from talking about working conditions prevents them from deciding to act in concert.[15]

Accordingly, in the present case, unlike *Epic Systems*, the Norris-LaGuardia Act adds a great deal. It makes unenforceable a contract term which directly interferes with the employees' ability to engage in well-established protected concerted activity which resides at the core of the rights protected by Section 7 of the NLRA.

Enforcement of the confidentiality clause's prohibition on discussing and disclosing information about a working condition would demean and diminish a strong public policy which Congress manifested in both the Norris-LaGuardia Act and the National Labor Relations Act. In both statutes, Congress addressed the great difference in bargaining power between employer and employee. Vastly disproportionate power allowed an employer to compel employees to sign away their rights or else lose their jobs.

Thus, in the Norris-LaGuardia Act, Congress observed that "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor. . ." 29 U.S.C. § 103. Likewise, in the preamble to the National Labor Relations Act, Congress refers to the "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association. . ." 29 U.S.C. § 151.

When the Supreme Court upheld the constitutionality of the National Labor Relations Act, it also noted the inequality of power:

> Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that, if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer.

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937). Thus, a strong public policy to remedy the individual employee's inability "to leave the employ and resist arbitrary and unfair treatment" has been manifested in two statutes and recognized by the Supreme Court. Yet such an inequality of power can be discerned, alive and well, in the present facts. This

[15] In *Epic Systems*, the Court found no manifestation of Congressional intent to grant employees the right to class action procedures. Such an intent would have been highly unlikely when Congress enacted the NLRA in 1935, when class action procedures did not even exist. Indeed, the Court noted that Federal Rule of Civil Procedure 23 did not create the modern class action until 1966. *Epic Systems Corp. v. Lewis*, 584 U.S. ____, slip op. at 11. In contrast, 3 years *before* the NLRA, Congress had manifested its intent to protect the employees' right to engage in concerted activities for their mutual aid or protection in the Norris–LaGuardia Act. The employees' right to engage in such concerted activities has a long pedigree which the claimed right to class action procedures does not.

disproportionate power is being wielded to destroy some of the very rights which Congress created to corral it.

The Respondent doesn't try to disguise that it is exercising its power to grab employee rights. It does not even require workers to sign any document memorializing that they are giving up the right to engage in well-established protected activity. The Respondent just communicates to employees, in rather formal and legalistic language, a message which boils down to "if you keep working here those rights are gone."

Certainly, the Respondent did not force employees to make a choice as extreme as "your money or your life." But telling them "your rights or your job" is sufficiently coercive to offend public policy and to negate any argument that the waiver was voluntary.

It is not necessary here to decide whether the offense to public policy is so great that it would invalidate the entire agreement under contract law principles. Rather, the issue before me at this juncture concerns whether the employees have voluntarily waived any Section 7 right. For the reasons discussed above, I conclude that they have not.

This conclusion leads to the further conclusion that, notwithstanding the message that the Respondent communicated to employees, they still possess those rights as well as all other rights granted by Section 7 of the NLRA. Whether the message which the Respondent communicated to employees interfered with the exercise of those rights enough to violate Section 8(a)(1) of the Act will be discussed later in this decision.

(f) Respondent's "Fundamental Attribute" Theory

The Respondent's brief also advances another theory, which it bases on the Supreme Court's holding that the FAA's "saving clause" will not invalidate an agreement to arbitrate for reasons "that target arbitration either by name or by more subtle methods, such as by 'interfere[ing] with fundamental attributes of arbitration. '" *Epic Systems*, 584 U.S. ___, slip op. at 7. To make this argument, the Respondent first asserts that confidentiality is one of these "fundamental attributes of arbitration." The Respondent then further contends that a Board order requiring it to retract or rescind its confidentiality clause "would interfere with a fundamental attribute of arbitration" and therefore run afoul of the Supreme Court's prohibition against interfering with such attributes.

The Respondent's argument necessarily assumes that only contract law standards may be used to judge whether the confidentiality clause violates Section 8(a)(1) of the NLRA. However, for a number of reasons discussed in this decision, I reject that premise and conclude, to the contrary, that the Board's *Boeing* framework should be followed. Additionally, the Respondent's argument assumes a fact not in evidence, namely, that confidentiality is indeed, a "fundamental attribute" of arbitration. The record simply lacks evidence to support such a conclusion.

Of course, some facts are so generally and universally recognized that taking judicial or administrative notice of them is appropriate. To qualify, such a fact either (1) must be generally known within the trial court's territorial jurisdiction or (2) can be accurately and readily

determined from sources whose accuracy cannot reasonably be questioned. See Rule 201(b), Federal Rules of Evidence. The asserted fact in question does not meet either standard.

The rule allowing judicial notice to be taken of certain facts applies to noncontroversial matters. However, the extent to which confidentiality is a fundamental attribute of arbitration is not settled. See, e. g., Drahozal, "Confidentiality in Consumer Arbitration," *7 Y. B. Arb & Mediation 28* (2015), addressing this controversy and discussing empirical data concerning the frequency of confidentiality provisions in arbitration agreements.[16]

Additionally, since its establishment in 1935, the Board has acquired extensive experience pertaining to grievance-arbitration clauses in collective-bargaining agreements, but this experience teaches that not all collective-bargaining agreements include arbitration provisions and that in those contracts which do, the specific language varies from agreement to agreement. Therefore, making any generalization about confidentiality requirements would be difficult and any such generalization, to be credible, must be based on evidence.

To support its argument that confidentiality is a "fundamental attribute" of arbitration, the Respondent quotes a remark in *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004) that "the plaintiffs' attack on the confidentiality provision is, in part, an attack on the character of arbitration itself." The 5th Circuit made this comment in the course of discussing whether a confidentiality provision made the arbitration agreement so unconscionable as to be unenforceable, and the appellate court particularly was focusing on the lower court's concern that the confidentiality provision prevented the development of precedent. The 5th Circuit dismissed that concern, reasoning that if every arbitration were required to produce a publicly available "precedential" decision on par with a judicial decision, then parties contemplating arbitration would come to expect greater discovery, formal rules of evidence, more extensive appellate review and other procedural features found in a judicial proceeding.

This context indicates that the appellate court, when it commented that an attack on confidentiality amounts to "an attack on the character of arbitration itself," likely regarded confidentiality as being an attribute of arbitration similar to informality and limited discovery, common characteristics of arbitration which distinguish the process from litigation in court. However, the question of whether confidentiality really is a *fundamental* attribute of arbitration did not have to be decided to resolve the issues before the court, and the court's opinion does not indicate either that it had received and considered evidence on this particular question or

[16] The information in the cited article has not been relied upon to support any finding or conclusion about confidentiality in arbitration other than that taking judicial or administrative notice is unwarranted and, therefore, sufficient proof must be offered. Similarly, this decision relies on the Board's institutional experience, discussed below, for no purpose except to note that the arbitration provisions in collective bargaining agreements vary and, accordingly, any such generalization should be supported by credible evidence.

that it was deciding such an issue as a point of law. Therefore, the comment should be treated as dicta rather than precedent.[17]

In arguing that confidentiality is a fundamental attribute of arbitration, the Respondent's brief also analogizes confidentiality to Rule 408 of the Federal Rules of Evidence, which, the Respondent contends, "protects from disclosure '[e]vidence of conduct or statements made in compromise negotiations. '" However, it is not quite accurate to say that Rule 408 protects statements made during settlement negotiations from *disclosure*. Rather, the rule makes such evidence *inadmissible*. See, e.g., *St. George Warehouse, Inc.,* 349 NLRB 870, 872–874 (2007). The relevant Section 7 right here is not a supposed right to introduce an arbitration award into evidence or to elicit testimony about what happened during an arbitration hearing but rather the employees' right to discuss these matters and their right to make such information public as part of a concerted attempt to gather support for changing such working conditions. Rule 408 applies only to testimony.

To buttress its argument that confidentiality is a fundamental attribute of *arbitration*, the Respondent also points to restrictions on the disclosure of information about what transpires during a *mediation*. The Respondent even cites language from the online description of the Board's alternative dispute resolution program. The Respondent's brief quotes this description as stating that an experienced mediator would be provided "to facilitate confidential settlement discussions. . ." However, by conflating arbitration with mediation, the Respondent's argument misses the mark. Although both can be categorized as means of alternative dispute resolution, arbitration differs materially from mediation both in goals and methods.

A *mediator* tries to get conflicting parties to agree to a compromise resolving the conflict. To achieve that goal, the mediator seeks frank information about what each party must obtain to reach agreement and what each party is willing to give up. However, negotiators, like poker players, shy away from revealing too much. To encourage candor, a mediator tries to create an environment in which each side can speak to the mediator privately, trusting that the mediator will keep what is said secret. Thus, confidentiality is conducive to confiding and in some cases is essential to the mediator's efforts to settle a dispute.

However, if the parties fail to reach a settlement, a mediator cannot decide disputed facts or fashion and impose an outcome. An arbitrator has such authority but a mediator does not.

Unlike a mediator, an arbitrator typically does not meet alone with one party or the other to elicit confidential information. An arbitrator performs essentially a judicial function, hearing testimony when both sides are present to examine the witness. The same ethical strictures which discourage a judge from having an ex parte conversation with one side apply with equal force to an arbitrator.

[17] Additionally, *Iberia Credit Bureau, Inc v. Cingular Wireless LLC* concerned a commercial arbitration. As discussed below, there is a greater need for confidentiality in commercial arbitration than in employment arbitration.

Because an arbitrator functions as a substitute for a judge and acts in the judge's place, the amount of confidentiality necessary to perform this function is the same whether the case is being presented to an arbitrator or a judge. However, court proceedings almost always are open to the public and the sealing of records is an uncommon exception to the rule.[18]

Additionally, a claim that confidentiality is a "fundamental attribute of arbitration" ignores the important distinction between employment arbitration and commercial arbitration. Both employment and commercial arbitration are in the same genus but they are distinct and different species which should not be conflated. The reasons why the parties to commercial arbitration may need confidentiality do not exist in employment arbitration.

The parties in a commercial arbitration typically are businesses disputing the meaning of some provision in a contract they had entered. Such contracts may reveal trade secrets or contain other sensitive proprietary information of interest to competitors.

By comparison, issues in an employment arbitration typically involve questions such as whether an employee violated an attendance or other work rule, whether the employee's job performance met production standards, whether the employee received agreed-upon compensation for working overtime, whether an employee was laid off in accordance with the negotiated seniority system, or whether an employee was discharged for good cause. The arbitration of such issues rarely requires the disclosure of trade secrets or proprietary business information.

In the present case, the types of information which might be revealed in an arbitration can be inferred, to a considerable extent, from the Respondent's Arbitration Agreement itself. This Agreement requires that claims arising under the following statutes, among others, be arbitrated rather than tried in court: The Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Worker Adjustment and Relocation Notification Act, the Equal Pay Act, the Americans With Disabilities Act, and the Family and Medical Leave Act.

It would appear unlikely that arbitration of disputes arising under any of these statutes would often require the disclosure of a trade secret or other proprietary information useful to competitors. Similarly, with the exception of claims arising under the Americans With Disabilities Act, such arbitrations ordinarily would not be expected to involve particularly sensitive information.

Evidence relevant to a dispute arising under the Americans With Disabilities Act typically *would* include sensitive medical records. However, both judges and arbitrators possess authority to seal records and to order that documents be redacted before introduction

[18] The Sixth Amendment to the United States Constitution provides that in all criminal proceedings, "the accused shall enjoy the right to a speedy and public trial." Although the Seventh Amendment does not afford civil litigants an analogous specific right to a public trial, the public's traditional access to courtrooms is so longstanding, and so important to democratic processes, that *openness*, not secrecy, might fairly be called a "fundamental attribute" of civil litigation.

into the record. Likewise, both judges and arbitrators can narrowly tailor such orders to meet the specific needs of the parties.

Significantly, disputes arising under all of the listed statutes would, in the absence of an arbitration agreement, be tried in court, which is open to the public except under uncommon circumstances. As noted above, proceedings in open court are the rule and exhibits introduced into evidence typically are public.

The fact that courts ordinarily resolve employment-related cases in open trials, using protective orders sparingly but when necessary, strongly suggests that a broad confidentiality provision blanketing the entire arbitration process is not essential to the arbitration of employment-related disputes. Accordingly, the accuracy of the assertion that blanket confidentiality is a "fundamental attribute" of employment arbitration is hardly self-evident. Rather, it requires proof, which the present record lacks.

Because the Respondent's argument depends on a premise which is both unproven here and open to serious question, the argument must be rejected.

(g) Other Considerations

The prohibition of discussion and disclosure which the confidentiality clause communicates to employees directly affects their willingness to exercise the rights granted by Section 7. It would appear quite reasonable to conclude that an analytical framework designed specifically to assess such impact would identify and rely upon the most relevant and accurate information for determining whether the detrimental effect rises to the level of a Section 8(a)(1) violation. Nonetheless, the Respondent argues that the Board may not use such a standard but instead, must base any decision about the prohibition's lawfulness on general principles of contract law.

Both logic and common sense balk. Contending that only contract law standards may be applied in determining whether a statement violates labor law seems too much like saying that the safety of a watch with a radioactive radium dial must be judged by determining whether the watch keeps good time.

A common law standard used to determine whether or not an enforceable contract exists fits poorly, if at all, the task of determining whether certain conduct impinges unlawfully on the exercise of statutory rights. The issue here does concern conduct, not contract. The conduct involves wielding words rather than a physical object but nonetheless it is an action: Promulgating and continuing to communicate a message to employees which reasonably would chill the exercise of the substantive rights granted by Section 7 of the NLRA.[19]

[19] The complaint in this case alleges that the Respondent both promulgated and maintained the confidentiality rule. *Maintaining* an unlawful rule constitutes continuing conduct, regardless of whether the communication continues because a copy of the rule remains posted on a bulletin board, or because the text remains printed in the employee handbook, or because the rule appears as a clause in a document labeled "contract" or "agreement" which remains in force.

The Respondent contends, in effect, that the words communicating the prohibition enjoy a special, privileged status because they appear in a document called an "arbitration agreement" rather than in some other place. However, this document is merely the means of communicating the message. Just as radium remains radioactive, and harmful, regardless of how it comes into contact with a person, a message which unlawfully interferes with the exercise of Section 7 rights causes the same harm no matter how communicated. If such a message causes harm when posted on a bulletin board or printed in a handbook, it will have the same deleterious effect when conveyed to employees in a document labeled "agreement."

It is true that radium would be less dangerous if wrapped in lead which prevented the radioactivity from coming into contact with anyone. However, the Respondent has not established that placing the prohibition in an "arbitration agreement" somehow shields employees from the harmful effect on Section 7 rights which the prohibition causes. If anything, placing the prohibition in a formal legal document arguably dignifies it and increases its potence rather than the opposite.

The amount of danger posed by a particular radium sample must be assessed with an instrument designed for that purpose, such as a geiger counter. A tape measure won't do. Likewise, only precedents under the National Labor Relations Act provide a proper framework for assessing the extent of harm caused to the substantive rights which that law grants.

Test must consider the total circumstances

The impact of the prohibition on employees' willingness to exercise their Section 7 rights depends on all the circumstances, and the Board's analytical framework considers them all. The contract law analysis urged by the Respondent does not.

At the time courts developed the common law standards for judging contract validity, Congress had not yet enacted the NLRA. Those common law standards hardly could address an issue that did not then exist. Moreover, even after Section 7 rights came into existence, courts did not possess original jurisdiction to enforce the rights it granted, and therefore had little reason to broaden the contract validity standards to include an analysis of the contract's impact on those rights.

Therefore, it should surprise no one that the common law standards for contract enforceability, which deal with the legal *status* of a document, do not take into account the fact that the very act of informing an employee that he must waive Section 7 rights or else lose his job, causes injury to those rights. Common law courts have no reason to consider this effect. Their decisions about the validity of private agreements do not address the enforcement of a public law or the purposes which Congress intended the law to serve.

Moreover, the harm does not begin at some later date when the agreement goes into effect or when the validity of the agreement, as a contract, becomes an issue. The harm, and therefore the violation, starts at the moment an employer informs the employee that he must waive the Section 7 right to remain employed. This harm does not depend on whether or not

the arbitration agreement is ever enforced or even on whether it ever becomes enforceable as a contract.

The Supreme Court's decision in *Epic Systems* illustrates the stark truth that common law contract standards, which crystallized well before Congress articulated policies protecting workers, are indifferent to the values which Congress infused into the NLRA. In *Epic Systems*, the Court assumed that the arbitration agreements were valid as contracts even though they were "contracts of adhesion," forced on employees as a condition of continued employment. For contract law purposes, it did not matter that one party to the "agreement" wielded overwhelmingly disproportionate power. But when Congress saw such a power inequality between employer and employee it did matter. It troubled the lawmakers so much that, very deliberately, they rejected the common law model and replaced it with the system embodied in the NLRA. See 29 U.S.C. § 151.

Congress sought to remedy the effects of this imbalance by granting employees a new right. This right, to act collectively for the purpose of collective bargaining or other mutual aid or protection, did not exist at common law.

Here, the Respondent argues that common law standards intended for another purpose provide the only appropriate way to determine whether there is a violation of a statute which Congress enacted to address a problem *ignored* by the common law. Such an argument lacks neither irony nor disrespect for Congressional intent.

To support its argument, the Respondent cites the Supreme Court's decision in *Epic Systems*, contending that the Court rejected the policies implicit in the NLRA in favor of the cold calculus of the common law. In *Epic Systems*, the Court did not have to make such a choice and did not. The Court did not hold that the contract law principles, applied to judge the enforceability of an arbitration agreement, won out over a substantive right granted by Section 7 of the NLRA. Rather, the Court held that Section 7 did not create the supposed right in question. The claimed right did not exist.

Were *Epic Systems* a boxing match, the bout would not end with a victorious FAA standing over a fallen Section 7 right. No bonafide Section 7 right ever showed up in the ring.

Here, the Respondent's argument mistakenly assumes that, in *Epic Systems*, the FAA did kayo Section 7. However, the *Epic Systems* decision set no such precedent. In fact, considering how strongly the decision stressed that federal statutes should be construed to work *harmoniously*, the Court clearly would have considered unsatisfactory an outcome in which one law emerged victorious over the other. The *Epic Systems* decision teaches that, whenever possible, two federal laws should be construed so that they never have to face each other in the ring.

Accordingly, the *Epic Systems* decision does *not* signal that the Court was rejecting the Congressional intent which resulted in enactment of the NLRA. To the contrary, in *Epic Systems* the Court stressed that instead "of overriding Congress' policy judgments, today's decision seeks to honor them." *Epic Systems Corp v. Lewis*, 584 U.S. ____, slip op. at 22.

Here, the Congressional policy embodied in the NLRA should be honored rather than ignored. This policy recognizes, and seeks to ameliorate, the imbalance of power between employer and employee. This Congressional intent makes it altogether proper to take into account what the common law ignored, namely, that the Respondent used its greater power to impose on employees a prohibition which affected their exercise of Section 7 rights. Even if an exploitation of superior power weighs little in a common law analysis of whether the arbitration agreement is an enforceable contract, it matters when applying the statute which Congress enacted to address this inequality.

The issue to be decided here does not depend on whether the words in the Arbitration Agreement constitute an enforceable contract any more than it depends on whether those words rhyme. The alleged unfair labor practice does not arise from the formation of a contract but from an earlier event, the Respondent's communication of a message to employees which affected their willingness to exercise the rights granted them by Section 7 of the NLRA. The Respondent communicated this message by delivering it to each employee as a clause in the Arbitration Agreement, but conveying the message in this manner does not make it any less potent than it would have been had the employees received it in some other form, such as in an employee handbook.

As already noted, Section 7 grants substantive rights which an employee cannot be compelled to waive. Such rights would be hollow and ineffectual, nothing but words on paper, if employers could abrogate them by fiat, by telling employees, in effect, that if they didn't agree to the abrogation they had to quit. See *National Licorice Co v. NLRB*, above. Labeling a policy a "clause" in a contract neither changes nor escapes the reality that the clause's text communicates to employees a message discouraging them from exercising their Section 7 rights. Reality matters.

In reality, the Respondent both composed and imposed the language in the confidentiality clause unilaterally, and the Respondent retains authority to rescind or modify that language, and the policy it reflects, at any time. It alone bears responsibility for whatever effects the language produces on the exercise of Section 7 rights. If the Respondent's employment policy interferes with the exercise of rights granted by Section 7, it makes no difference whether the Respondent expresses this policy as a clause in an arbitration agreement or publishes it to employees some other way.

The allegedly unlawful action consisted of interfering with employees' Section 7 rights and the "arbitration agreement" was merely the tool wielded to accomplish the interference. Asserting this document as a defense is a bit like a burglar saying, "Don't blame me, it was the crowbar."

Mandate to harmonize statutes

Accepting the Respondent's argument would require me to disregard a principle already noted above, a tenet which the Supreme Court stressed more than once in its *Epic Systems* decision: Laws should be interpreted in a way which harmonizes them rather than in a way which pits one against another.

In the second paragraph of its *Epic Systems* decision, the Court stated that it "is this Court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another." *Epic Systems Corp v. Lewis*, 584 U.S. ____, slip op. at 2. Likewise, in the concluding paragraph of the majority opinion, the Court observed: "Because we can easily read Congress's statutes to work in harmony, that is where our duty lies." Id., slip op. at 25.

The Court's articulation of this tenet at both the start and conclusion of its analysis underscores the principle's alpha-to-omega importance when interpreting how two different federal laws should interact. Contrary to this principle, the Respondent's argument puts both the Federal Arbitration Act and the National Labor Relations Act in the ring and orders them to come out fighting.

The Respondent argues for an interpretation allowing arbitration agreements to be used as safe havens for the expression of employment policies and work rules which, if communicated in some other manner, would be subject to labor law. If the Respondent can poke such a hole in the coverage of Section 7, it likely will get larger over time as lawyers become increasingly creative in drafting arbitration agreements. However, just as the NLRA should not be interpreted in a manner which interferes with the FAA, that law should not be interpreted in a way that reduces the existing scope of the NLRA and its protection.

Summary of Conclusions Regarding Preliminary Matters

In sum, for the reasons discussed above, I conclude that rights arising under Section 7 are substantive rather than procedural, thereby distinguishing the present case from *Epic Systems*. Because Section 7 rights are substantive, the Respondent cannot require employees to waive them as a condition of keeping their jobs.

Additionally, for the reasons discussed above, I reject the Respondent's arguments that the FAA deprives the Board of authority to assess the lawfulness of the confidentiality clause under the NLRA and also Respondent's related argument that the lawfulness of the confidentiality clause may only be judged by applying the principles used at common law to determine the enforceability of a contract. To the contrary, I conclude that the Board may, consistent with *Epic Systems* and other Supreme Court precedent, judge whether the confidentiality clause interferes with, restrains or coerces employees in the exercise of their Section 7 rights. Further, I conclude that in doing so, it is appropriate to apply the standards promulgated by the Board in *The Boeing Company*, above, and now turn to that task.

Lawfulness of the Confidentiality Clause

For the reasons discussed above, I have concluded that employees reasonably would consider the confidentiality clause in the Respondent's Agreement to be a statement of Respondent's employment policy and a work rule. Reading this text, employees also reasonably would believe that they could be disciplined if they disclosed information about an arbitration or the contents of the arbitrator's award. Because the confidentiality clause constitutes an expression of employment policy and work rule, the Board's *Boeing* decision will guide this analysis.

It would appear likely that, under the standards in effect before the Board established the new analytical framework in *Boeing*, the confidentiality clause in the Agreement would have been found to violate Section 8(a)(1) of the Act. See, e. g., *Professional Janitorial Service*, above,[20] citing *Rio All-Suites Hotel & Casino*, 362 NLRB 1690 (2015) and *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004), enfd. 414 F. 3d 1249 (10th Cir. 2005), cert, denied 546 U.S. 1170 (2006).

However, because the Board decided the cited cases before *Boeing*, a new analysis, using the *Boeing* framework, is needed. That analysis appears below.

The *Boeing* Framework

Under the Board's previous, pre-*Boeing* standard, even when an employer's facially-neutral employment policy did not expressly restrict Section 7 activity, and even when such a policy had not been adopted in response to protected activity or applied to restrict protected activity, it still might violate the Act if employees "would reasonably construe the language to prohibit Section 7 activity." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). In *The Boeing Company*, above, the Board determined that this "reasonably construe" standard failed to give sufficient consideration to an employer's legitimate business reasons for promulgating the allegedly violative rule or policy.

In the *Boeing* decision, the Board listed a number of other shortcomings of the precedent then in effect, including that *Lutheran Heritage Village-Livonia* did not provide a framework clear enough to predict whether a rule or policy would be found lawful or violative. After extensive discussion of the problems inherent in the analytical process prescribed by *Lutheran Heritage Village-Livonia*, the Board overruled that case's "reasonably construe" test and promulgated a new standard for use in determining whether a facially-neutral rule or employment policy violated the Act. The Board stated that, in making such a determination, it would evaluate (i) the nature and extent of the potential impact the rule or policy had on NLRA rights and (ii) the employer's legitimate justifications for the rule or policy.

The Board noted that it had a duty to strike the proper balance between asserted business justifications and the infringement on employee rights. In formulating the new standard, the Board placed particular emphasis on the need for clarity, so that employers and others applying the test could reliably predict whether a rule or policy was lawful or unlawful.

To promote such clarity, the Board explained that application of the *Boeing* standard, when analyzing the lawfulness of a particular rule or policy, will result in a determination that

[20] A difference between *Professional Janitorial Service* and the facts in the present case should be noted. In *Professional Janitorial Service*, the Board found the confidentiality policy to be unlawful because it prohibited employee discussion of any "statements or information revealed during arbitration." The confidentiality clause in the present case includes a sentence which states: "Nothing in this Confidentiality provision shall prohibit employees from engaging in protected discussion or activity relating to the workplace, such as discussions of wages, hours, or other terms and conditions of employment." This sentence and its effect will be discussed below.

the rule or policy falls into one of three categories. However, the Board stressed that these categories are *not themselves part of the test* itself but exist to classify the *results* of the test.

Category 1 includes rules that the Board designates as lawful to maintain, either because the rule,[21] when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights or because the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Clearly, a rule can wind up in this second "subcategory" only as the result of balancing how severely the rule impinges on Section 7 rights with the importance of the rule in furthering the employer's legitimate business interests.

Category 2 includes rules and policies that warrant individualized scrutiny in each case to determine whether the rule or policy, when reasonably interpreted, would prohibit or interfere with the exercise of NLRA rights and, if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.

Category 3 includes "rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example would by a rule that prohibits employees from discussing wages or benefits with one another." *The Boeing Company*, 365 NLRB No. 154, slip op. at 15.

As already noted, the categories are not part of the test itself but provide a kind of sorting bin to classify the results. Therefore, it would be inappropriate to begin the analytical process by looking at a rule or policy and making a snap judgment that it belongs in a particular category. In some instances, such an improper shortcut would allow the judge to skip the important step of considering a respondent's justifications for the rule and weighing those justifications against the rule's impact on the employees' exercise of Section 7 rights.

Instead, I will take care to weigh both the nature and extent of the rule's potential impact on NLRA rights and the legitimate justifications for such a rule. Moreover, during the analysis I will keep in mind not only the need for clarity but the other considerations which the Board deems especially important. The *Boeing* decision specifically recognizes that various activities protected by Section 7 differ in importance. Some protected activities are central to the Act but others are more peripheral. The *Boeing* framework also contemplates consideration of special factors relating to the particular industry and work setting. Additionally, events which shed light on the rule's impact on Section 7 rights, or on the employer's legitimate need for the rule, may be taken into account.

In accordance with *Boeing*, I will evaluate the rule's impact on employee rights from the employees' perspective. Additionally, I will be mindful of the guidance, in *Boeing*, concerning

[21] For brevity, I use only the word "rule" but intend it also to refer to employment policies.

when a rule having some impact on the exercise of Section 7 rights nonetheless lawfully may be maintained.[22]

Lawfulness of Confidentiality Clause

(a) Consideration of the clause without the "limiting sentence"

The text of the confidentiality clause appears in full earlier in this decision. The clause includes a "limiting sentence" which purports to make an exception allowing employees to engage in certain protected activities. Here, I will begin by examining the clause's text *except for the sentence about protected activities*. If the clause is lawful *without* inclusion of the limiting sentence, it is appropriate to end the analysis at that point. However, if the clause is unlawful without the limiting language, then it will be necessary to consider whether this additional sentence has a saving effect.

The clause begins with the prohibition on disclosure which is central to its purpose, but it does not use words such as "prohibit" or "forbid." Rather, it states: "The parties shall maintain the confidential nature of the arbitration proceeding and the award, including all disclosures in discovery, submissions to the arbitrator, the hearing, and the contents of the arbitrator's award. . ."[23]

Notwithstanding that the clause appears to impose a duty to keep secret rather than a prohibition on disclosing, I conclude that employees reasonably would understand the message to be that they are not allowed to discuss or disclose the arbitral award or other information about the arbitration, such as what happened during the hearing. For reasons discussed above, I further conclude that employees reasonably would believe that they could be disciplined for disobeying this prohibition.

The arbitration process itself clearly is a condition of employment. Without repeating the detailed discussion earlier in this decision, it may be noted that the Respondent specifically made arbitration a condition of employment by informing employees that *if they continued to work*, they would thereby have agreed to arbitrate (with a few exceptions) "all disputes, claims, complaints, or controversies ('Claims') that you have now or at any time in the future may have against Pfizer. . ."

It is well established and long recognized that employees have a Section 7 right to discuss their terms and conditions of employment. See, e. g., *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004)(rule prohibiting employees from discussing grievance/complaint information, disciplinary information and other work-related matters unlawful); *Aroostook*

[22] In *Boeing*, the Board also cautions that a rule which is lawful to maintain may still may be invoked unlawfully in response to employees' protected activity. However, the present case does not include any allegation concerning the unlawful application of an otherwise lawful rule.

[23] The confidentiality clause continues by listing exceptions allowing disclosure when necessary during litigation related to an arbitration. These exceptions do not relate to the employees' right to discuss the details of the arbitration with each other or to disclose them to the public as part of a concerted protest relating to working conditions. A sentence later in the clause, purporting to allow employees to engage in protected activity, will be discussed below.

County Regional Ophthalmology Center, above (restriction on discussion of grievances unlawful); *Hyundai American Shipping Agency*, 357 NLRB 860 (2011)(finding unlawful a blanket oral rule forbidding employee discussion of "any matter under investigation" by the human resources department). See also *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992), citing *Heck's, Inc.,* 293 NLRB 1111, 1119 (1989); *Waco, Inc.,* 273 NLRB 746 (1984); *Phoenix Transit System*, 337 NLRB 510 (2002). Because the Respondent has made arbitration a condition of employment, and because the confidentiality clause prohibits employees from discussing what happened during an arbitration, the clause clearly interferes with employees' Section 7 rights. Unless the "limiting sentence" somehow saves it, the clause's prohibition on discussion would violate Section 8(a)(1).

Section 7 not only grants employees the right to discuss working conditions among themselves, but also the right to disclose those working conditions to the public as part of concerted activity protesting those conditions. See *Valley Hospital Medical Center, Inc.,* 351 NLRB 1250, 1252 (2007) (Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute, including communications about labor disputes to newspaper reporters), citing *Allied Aviation Service Co. of New Jersey, Inc.,* 248 NLRB 229, 231 (1980), enfd. mem. 636 F.2d 1210 (3d Cir. 1980); *Allstate Insurance Co.,* 332 NLRB 759, 765 (2000); *Leather Center, Inc.,* above; *Hacienda de Salud-Espanola*, above; *Compuware Corp.,* above; *St. Luke's Episcopal-Presbyterian Hospitals, Inc.,* above, and *Case Farms of North Carolina*, above. Taking away this right reduces the effectiveness of other concerted activity protected by Section 7. For example, if picketing employees could only put the words "unfair wages" on their signs, but not inform the public of the actual wage rates, the bare claim of unfairness would lose credibility. Moreover, the unsatisfactory nature of a working condition often can be communicated to the public only by describing that condition and its effects. Prohibiting employees from speaking publicly about working conditions cuts to the quick of Section 7 and therefore, absent a legitimate and sufficient business justification, violates Section 8(a)(1) of the Act.

Accordingly, I conclude that, at least in the absence of the "limiting sentence," the confidentiality clause restricts activity clearly protected by Section 7 and interferes with the exercise of the substantive rights granted by that provision. The likelihood is great that such a prohibition would violate Section 8(a)(1) of the Act, which makes it necessary to determine whether the "limiting sentence" sufficiently removes the sting.

(b) Effect of "limiting sentence" on the clause's legality

Because I have concluded that the confidentiality clause would violate Section 8(a)(1) in the absence of modifying language, I now must weigh the possibly redemptive effect of the "limiting sentence." The Respondent's brief states, in part:

> The confidentiality clause only restricts the dissemination of "the arbitration proceeding and the award, including all disclosures in discovery, submissions to the arbitrator, the hearing, and the contents of the arbitrator's award. . . ." [Stipulation of Facts 7.] Thus, the confidentiality provision is limited to the arbitral proceeding and the information and documents disclosed during the proceeding. The confidentiality provision also

specifically disclaims any interpretation that would prohibit employees from exercising their Section 7 right [to] discuss their terms and conditions of employment:

[Nothing in this Confidentiality provision shall prohibit employees from engaging in protected discussions or activity relating to the workplace, such as discussions of wages, hours, or other terms and conditions of employment.]

However, the Respondent's argument falls short in two respects. First, employees reasonably would not understand the "limiting sentence" quoted above to allow them to discuss an arbitration proceeding or an arbitral award but, to the contrary, reasonably would conclude, after reading the confidentiality clause including the "limiting sentence," that the Respondent did not allow them to discuss these subjects. Second, employees reasonably would not understand the "limiting sentence" to allow them to present information about an arbitration to the public as part of a concerted protest of that condition of employment.

(1) Employees would not reasonably understand the "limiting sentence" to allow discussions about an arbitration proceeding or award

To determine what effect an employer's communication to employees has on the exercise of Section 7 rights, the Board does not examine the text in the abstract but rather considers what message employees reasonably would receive when they read or heard it. In reaching a conclusion regarding the message which a text reasonably conveys, the Board applies an objective standard, examines the text from the employees' viewpoint, and takes into account the totality of circumstances. *Children's Center for Behavioral Development*, 347 NLRB 35 (2006); *Consolidated Biscuit Co.,* 346 NLRB 1175 (2006).

The "limiting sentence" states that nothing in the confidentiality clause "shall prohibit employees from engaging in protected discussions or activity relating to the workplace. . ." In considering the message which employees reasonably would receive, I do not assume that they would have a labor lawyer's knowledge of the Act. Therefore, I do not assume that they necessarily would know what constitutes a "protected discussion or activity." Reasonably, they would depend on the remainder of the "limiting sentence" to explain what is meant by a "protected discussion or activity."

This remaining part of the "limiting sentence" gives examples of protected activity: "such as discussions of wages, hours, or other terms and conditions of employment." Significantly, these examples do not include matters related to the arbitration.

The confidentiality clause begins by stating the general rule, that the "parties shall maintain the confidential nature of the arbitration proceeding *and the award*. . ." (Italics added.) The "limiting sentence" then gives examples of exceptions to the general rule, that is, examples of permitted activities. However, as noted, these examples - identifying what subjects could be discussed without violating the confidentiality clause - do not include arbitration or the arbitral award.

Since the confidentiality clause has *explicit* language requiring that the arbitration and award be kept confidential, someone reading it would look for similarly explicit language in

the "limiting sentence." That is, an employee reasonably would conclude that vague, general language would not be enough to create an exception to an explicit prohibition. Considering that the Respondent had forbidden a range of activities, if the Respondent had intended to allow any activity within that category, it would have said so specifically.

For example, the clause specifically lists the "contents of the arbitrator's award" among the matters which must be kept confidential. On its face, this language even would forbid one employee telling another whether the arbitrator had ruled for or against the grievant. The "limiting language" does not include any specific exception allowing an employee to reveal how the arbitrator ruled, so the employee reasonably would conclude that doing so was prohibited.

In fact, the limiting language makes no exception for *any* part of the arbitration process, not even to allow employees to discuss the outcome. Therefore, I conclude that an employee who read the confidentiality clause, including the "limiting sentence," reasonably would believe that he was not permitted to discuss any aspect of the arbitration.

(2) The "limiting sentence" fails to inform employees that they can disclose information about the arbitration, and the arbitrator's award, to the public

Board caselaw has long established that Section 7 protects employees when they publicize their dissatisfaction with working conditions and seek public support for their efforts to change those conditions. See, e. g., *Greyhound Lines*, 251 NLRB 1638 (1980); *Country Club of Little Rock*, 260 NLRB 1112 (1982); *Bon Harbor Nursing and Rehabilitation Center*, 348 NLRB 1062 (2006); *Valley Hospital Medical Center, Inc.,* above. This right necessarily extends to informing the public about the details of the working conditions the employees seek to change. Indeed, if the Act merely allowed employees to announce that they had a dispute with their employer about working conditions, but did not permit them to explain why they believed a working condition was unsatisfactory, the right would be illusory. Without doubt, employees may explain to the public why they consider their working conditions to be unsatisfactory and therefore have the right to provide information about those working conditions.

However, the Respondent's confidentiality clause clearly communicates the message that employees may *not* disclose information either about how the arbitrator conducted the hearing or about the arbitrator's award. The "limiting sentence" does not make an exception which would allow employees to publicize their dissatisfaction with this condition of employment.

(3) The Respondent's arguments concerning the effects of the "limiting sentence" and another potentially limiting provision

The "Limiting Sentence" in Confidentiality Clause

In its brief, the Respondent contends that the "limiting sentence" (which it refers to as a "disclaimer") assures that the confidentiality clause does not impose an unlawful restriction on

the exercise of Section rights. After quoting this limiting language, the Respondent's brief states:

> Given this explicit disclaimer, the confidentiality provision cannot be reasonably interpreted to interfere with employees' Section 7 rights. It does *not* prohibit employees from discussing the facts and circumstances that led to the arbitration proceeding or from marshalling evidence in support of their claims. Indeed, the confidentiality provision makes clear that it does *not* prohibit employees from seeking out witnesses and evidence in support of their claims. SOF 7[24] ("This provision shall not prevent either party from communicating with witnesses or seeking evidence to assist in arbitrating the proceeding.") [Italics in original.]

The Respondent's argument is telling for what it does not assert. The brief stresses that the confidentiality provision "does *not* prohibit employees from discussing the facts and circumstances that led to the arbitration proceeding" (underlining added) but the Respondent stops short of claiming that the confidentiality clause allows discussion or disclosure of information about the arbitration proceeding itself. The brief's omission of any claim that employees were permitted to discuss and disclose what happened during an arbitration leads to the same conclusion that an employee reasonably would reach after reading the clause itself: Employees are not permitted to talk about the arbitration itself or its outcome. Certainly, if the confidentiality clause did, in fact, allow discussion and disclosure of information about the arbitration and award, the Respondent's brief would have said so.

Moreover, apart from the confidentiality clause, another portion of the Arbitration Agreement assures employees that nothing "in this Agreement shall prohibit you from making truthful disclosures to appropriate governmental agencies including but not limited to your right to contact, communicate with, or report matters (whether as a whistleblower or otherwise) to any government entity or agency. . ." The fact that the Agreement makes an explicit exception allowing employees to make "truthful disclosures" to a government agency, but nowhere mentions an exception allowing employees to disclose information about the arbitration to the public, further communicates that the clause did not permit employees to disclose information about an arbitration to the public.[25]

Another Potentially Limiting Provision

The Respondent's brief also asserts that the "Arbitration Agreement explicitly recognizes employees' right to challenge the Agreement and dispels any fear that employees may be disciplined if they choose to do so." The brief does not cite any language in the confidentiality clause to support this argument, but instead points to language elsewhere in the Agreement which states:

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[24] "SOF 7" refers to the seventh paragraph of the Stipulations of Fact.

[25] The Respondent's use of the modifier "truthful" before the word "disclosures" may further contribute to the impression that Respondent expected employees to follow the prohibition punctiliously. Of course, persons complaining to government agencies are expected to tell the truth and may face criminal penalties if they do not. See, e.g., 18 U.S.C. § 1001.

You have the right to challenge the validity of the terms and conditions of this Agreement on any grounds that may exist in law and equity, and the Company shall not discipline, discharge, or engage in any retaliatory actions against you in the event you choose to do so. The Company, however, reserves the right to enforce the terms and conditions of this Agreement.

The fact that the Agreement assures employees that they have the right to make a legal challenge, and also to make "truthful disclosures" to a government agency, but says nothing about speaking to the public, creates the strong impression that public disclosure of information about the arbitration or the arbitrator's award is forbidden. Accordingly, an employee reading this language reasonably would believe that it referred to making a *legal* challenge in court or before an arbitrator, but would not interpret the language to permit other disclosures, such as to the public.

It may also be noted that language promising not to take any action against an employee for challenging the confidentiality clause does not constitute an assurance that no retaliatory action would be taken for *disobeying* the prohibition communicated by the clause. An employee reading the quoted language reasonably would not believe that it allowed the confidentiality clause to be disregarded.

Indeed, it is not surprising that nothing in the Arbitration Agreement reasonably would be understood to allow employees to discuss or disclose what happened during an arbitration or the award. The whole point of the confidentiality clause appears to be to *prohibit* such employee discussion and disclosure.

Not only does the Respondent's brief stop short of making any claim that employees are free to speak about these matters, a sentence in the brief makes clear that the confidentiality clause *does* prohibit discussion and disclosure of information about an arbitration and award. This sentence states: "Thus, the confidentiality provision is limited to the arbitral proceeding and the information and documents disclosed during the proceeding."

In sum, under the totality of circumstances, employees reasonably would understand the confidentiality clause to prohibit them from discussing arbitrations and arbitrators' awards among themselves, and they also reasonably would understand the clause to forbid disclosing such information to the public. However, Section 7 grants employees the right both to discuss these terms and conditions of employment and to disclose them to the public. Therefore, I conclude that the confidentiality clause, and the employment policy it communicates, interferes with the exercise of rights guaranteed by Section 7 of the Act. Determining whether such interference violates Section 8(a)(1) requires consideration of the Respondent's asserted reasons and justifications for the rule as well as an assessment of the rule's impact on the exercise of Section 7 rights

(4) Balancing the Section 7 right against the Respondent's interests in maintaining the prohibition

As noted above, a conclusion that the Respondent's rule adversely affects the exercise of Section 7 rights does not end the *Boeing* analysis but rather moves it along to the next step, which involves weighing the importance of the affected Section 7 right - its centrality - against

the importance of the work rule to the Respondent's legitimate business interests. In the *Boeing* case itself, the work rule in question prohibited taking photographs in the plant without first obtaining special permission. Arguably, there might be occasions where taking photographs might be a protected activity, but it was far from obvious that such occasions would arise very frequently. Even assuming that employees typically would have a Section 7 right to take pictures in a plant, such a right hardly would be central to the Act's purposes, and restricting this activity would leave a wide range of other protected activity unaffected.

Although the affected Section 7 right in *Boeing* weighed relatively little, the employer, a defense contractor, had strong business reasons for the restriction. Photographs in the plant could reveal proprietary secrets about how the high-tech aircraft were built. Even more important, the design and construction of these military aircraft involved classified information. Failure to keep it secure could result in the employer losing the security clearances necessary to perform the contract. Besides those reasons, the employer had an even more compelling interest, protecting the country's safety. In such circumstances, the employer's legitimate business interests far outweighed the marginal Section 7 right, so the Board concluded that the rule was lawful.

In the present case, unlike *Boeing*, the affected right is not on the margins of Section 7 but close to the center, because it prohibits employees from discussing a condition of employment. Essentially *all* concerted activity begins with employees talking about working conditions. Unless employees are aware of a work-related problem, they cannot decide to take concerted activity to address it, and they certainly cannot even be aware of the problem unless employees can discuss it. An order forbidding employees from talking thus nips protected activity not just in the bud but even before the bud. Protected activity cannot be conceived, let alone germinated, if employees are prohibited from talking about working conditions.

Likewise, the employees' Section 7 right to ask the public to support their efforts to obtain better conditions of employment plays a vital role in correcting the "inequality of bargaining power" which Congress intended the NLRA to address. 29 U.S.C. § 151. Picket signs provide the most iconic example of such protected activity, but Section 7 protects the right of employees to take their cause to the public in many different ways. The right clearly includes informing the public not only that a dispute exists but also explaining to the public the reasons why employees consider their conditions of employment to be unsatisfactory. When that condition of employment involves Respondent's arbitration procedure, any explanation of employee dissatisfaction would entail informing the public about what happened during an arbitration or why an arbitral award was unfair.

Respondent's Reasons

The centrality of the Section 7 right must be weighed against the Respondent's reasons for the rule that restricts it. The Respondent's brief states that "the confidentiality provision is lawful based on the legitimate interest in fostering trust and confidence in the arbitration process as an alternative dispute resolution procedure."

It is far from obvious how the work rule would lead to the claimed result and the Respondent doesn't explain it. In the sentence quoted above, the Respondent *appears* to be

stating that keeping details of the arbitration secret will cause employees to trust the process more than they would trust it if they knew what was happening. However, I hesitate to conclude that the Respondent would argue that its arbitration procedure, like sausage making, might be disillusioning to watch.

Because such an interpretation of the Respondent's argument does not appear to help its case, fairness requires a second look to ascertain whether the Respondent might intend another meaning. Yet, no other interpretation is readily apparent. It is difficult to understand how prohibiting employees from discussing or disclosing information about an arbitration could foster "trust and confidence" in the process unless knowing what actually happened would have the opposite effect.

Rather than attempting an explanation of how enforced ignorance could foster trust, the Respondent's brief offers another argument, that confidentiality is a "fundamental attribute" of arbitration. As discussed above, controversy about such a claim makes it inappropriate to take judicial or administrative notice and the record does provide evidentiary support.

However, the greatest problem with the Respondent's arguments is that they don't answer the key question: Why does the Respondent need to prohibit employees from discussing or disclosing information about what happens during an arbitration? Stated another way, what benefit does the Respondent derive from prohibiting discussion and disclosure, and why is the benefit to the Respondent important enough to justify the harm caused to employees' statutory rights?

The *Boeing* decision illustrates the importance of this inquiry. In *Boeing*, there was a compelling business justification for the rule: If the employer permitted photography in the plant, it could result in the disclosure of military secrets, which in turn would lead to the revocation of security clearances. Without security clearances, the employer would lose valuable government contracts. The no-photography rule reduced a very serious risk of monetary loss.

Thus, in assessing the weight to be accorded an asserted business justification for a rule which impinges upon Section 7 rights, it is highly relevant to ask "What does the employer stand to gain by having the rule and what would the employer stand to lose without the rule?" Boeing's risk of financial loss would increase if the no-photography rule were not in effect.

In the present case, the Respondent seeks to justify the confidentiality rule by claiming that it fosters trust in the arbitration process. For the sake of analysis, at this juncture I will set aside skepticism and instead, for the moment, will assume that a rule prohibiting discussion and disclosure of information about an arbitration or an arbitrator's award somehow *would*, in fact, increase employee trust in the arbitration process. Taking that as a given, what does the Respondent stand to gain if employees trust that arbitration is a good way to resolve disputes? What does the Respondent stand to lose if employees don't trust arbitration?

It is not obvious that the Respondent would gain or lose any material benefit. Regardless of whether employees trust arbitration or do not, they remain legally bound to use it. Moreover, the Respondent has not explained how the extent to which employees trust or distrust arbitration

as a process affects the company's risk, efficiency or profit. The Respondent's brief does not identity any concrete way, or any way at all, whereby the amount of trust its employees place in arbitration has an effect on its "bottom line." Therefore, Respondent's argument that the confidentiality rule increases employee trust in arbitration, whether correct or not, falls short of demonstrating that any serious business interest will be furthered by that rule.

The Respondent's asserted justifications for the work rule must be weighed against the importance of the right in effectuating the purposes of the Act. As discussed above, the right to discuss working conditions resides at the core of Section 7 rights because the decision to engage in other concerted activities protected by Section 7 results from discussion, and absent such discussion, those other concerted activities will not take place.

The importance of the employees' Section 7 right to disclose their conditions of employment to the public, as part of a concerted appeal to the public, also has been noted above, but it merits further discussion here. The role of this right in the statutory scheme will determine how much it will weigh when balanced against the Respondent's justifications for the confidentiality rule. At first glance, the significance of this right may be underestimated, but a closer examination reveals the essential role it plays in the system established by Congress.

As the Supreme Court has observed, the object of the NLRA "was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement." *H. K. Porter Co v. NLRB*, 397 U.S. 99, 103 (1970).

Thus, Congress created a system in which an employer and the representative of its employees would negotiate an agreement. If an employer did not agree to the union's proposals, the union could exert economic pressure by urging the public not to patronize the employer and by going on strike. Obviously, a union's strength would depend on how effectively it could persuade the public to support the employees' cause. Success depended to a considerable extent on enlisting the public's support.

Employees legitimately seek to improve their working conditions in ways other than striking, and these concerted activities also fall within the system established by Congress. For example, employees may send representatives to a shareholder's meeting, either to picket or otherwise persuade corporate-level officials that their working conditions need to be improved. Section 7 protects such concerted activity. See, e. g. *Engelhard Corp.,* 342 NLRB 46 (2004). Such activity also calls public attention to the employees' complaint.

The success or failure of any concerted activity, whether a strike or appeals to shareholders, depends to a considerable extent on the employees' ability to muster public support, which in turn depends on the ability of the employees to explain why their conditions of employment should be improved. As noted above, a picket sign stating only that an employer's wage rates are "unfair" does not make the case. To convince the public, employees must also reveal what wages they are actually receiving.

Employees' have an even greater need to inform the public when the working condition is not so clearcut or familiar as wage rates. When the working condition concerns arbitration, many members of the public will have little familiarity with the subject. Employees must disclose information about the particular arbitration procedure and its effects to explain to these members of the public why they want changes in this working condition.

The importance of the employees' rights - both their right to discuss their working conditions with each other and their right to inform the public about their conditions of employment, and thereby awaken public opinion to their cause - can be illustrated by the following hypothetical. Suppose a supervisor is sexually harassing women employees, creating a hostile work environment.[26]

Further suppose that the arbitrator hearing an employee's sexual harassment case treats the employee in a manner which the employee reasonably believes to be patronizing, hostile or dismissive. Or suppose this arbitrator, who happens to be of the same age and gender as the harassing supervisor, systematically credits the supervisor's testimony and discredits the grievant's, without providing any adequate explanation for this choice. If other employees knew how the employee had been treated, they, too, would be concerned, because they, too, might have to appear before the arbitrator if they wished to file a sexual harassment complaint.

However, by prohibiting the affected employee from discussing the arbitration or its unsatisfactory outcome, the Respondent prevents her from mustering the support of other workers, including those who also might have suffered sexual harassment. The prohibition precludes employees from discussing the extent and seriousness of the problem and deciding what steps to take for their mutual aid or protection. As noted above, Section 7 protects *concerted* activities, and acting in concert requires employees to communicate with each other. By forbidding discussion about the treatment an employee received during an arbitration, by prohibiting them from talking about whether the arbitrator was sympathetic or hostile, fair or unbiased, and by denying the affected employee even the right to tell fellow workers about the outcome announced in the arbitrator's award, the Respondent effectively has squelched any concerted activity about this condition of employment.

Even in the absence of any irregularity in the way the arbitration hearing was conducted, the Arbitration Agreement which the Respondent imposed on employees may itself raise such concerns about fairness that employees will wish to exercise their right to discuss each arbitration as it occurs. The Respondent alone designed the arbitration procedure it imposed on employees, and this sole authorship, by one of the parties appearing before the arbitrator, reasonably could generate suspicions that the Respondent had tilted the system in its favor.

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[26] It should be stressed that no one has alleged, and nothing in the record indicates, that any of the Respondent's managers or supervisors has engaged in sexual harassment. This hypothetical fact pattern was chosen because of the prevalence of the problem in general. The Equal Employment Opportunity Commission reported that during Fiscal Year 2018, it received 13,055 charges alleging sexual harassment. See "Charges Alleging Sex–Based Harassment," EEOC Enforcement and Litigation Statistics, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm.

Under the Respondent's arbitration scheme, employees have considerably less power to assure the fairness of the proceeding than they would enjoy either in court or in an arbitration pursuant to a negotiated procedure in a collective-bargaining agreement. In a jury trial, jurors' names would be drawn from a large pool and, during voir dire, the employee's lawyer would exercise the right to challenge individuals believed to be biased. That procedure certainly provides some assurance that the decision-maker will be fair. So does an arbitration procedure which an employer negotiates with a union representing the employees.

A negotiated arbitration procedure in a collective-bargaining agreement typically specifies an organization or government agency which will provide, on request, a list of potential arbitrators, and the parties then select an arbitrator from this list, or from a subsequent list furnished by the same source.

In negotiations to establish an arbitration system, the employees' representative participates in selecting this source and a source must be acceptable to the union or there will be no agreement. The competence and impartiality of arbitrators from a particular source are important considerations in choosing a source and, before agreeing to use a particular organization, the union can check out the source's published standards, its reputation, and other users' past experiences. Thus, the employees, through their union, have some assurance that the arbitrator will be chosen from a list meeting acceptable standards of competence, fairness and diversity.

In contrast, in the arbitration procedure which the Respondent imposed on employees, the Respondent alone chose the source of arbitrators. The employees had no say in selecting the source of arbitrators and therefore have no power to assure that the arbitrators on a list will meet their expectations of competence and fairness. Likewise have no control over whether the list will reflect the diversity of the work force.

When one side has complete control over what organization will provide the arbitrators, there well may be a temptation either to select a source whose arbitrators lean in one direction. Even in the absence of a palpable temptation, the lopsided nature of the selection process creates a reasonable concern.

The Respondent's Arbitration Agreement also provides that, except for a filing fee, the Respondent pays the entire cost of the arbitration. There is no 50/50 cost sharing of the kind specified in many collective-bargaining agreements. The fact that the Respondent will be writing the check to the arbitrator would raise in employees' minds a he-who-pays-the-piper concern. Such a concern is particularly reasonable because the Respondent is the one repeat customer who will be writing similar checks to arbitrators in the future, and who has the sole power to choose another source of arbitrators at any time.

The fact that the Respondent writes the checks and also chooses the source of arbitrators also raises another concern. Because the Respondent will be paying the bill, there may well be a temptation to choose the source which provides the least expensive arbitrators, regardless of their quality. For this reason, too, employees very reasonably will want to discuss with each other what actually happens at the arbitration and how the arbitrator ruled.

Moreover, regardless of the quality of the arbitrators provided by the source, the employees' lack of a voice, their inability to insist that potential arbitrators be provided by a source they trust, may prompt them to want to discuss this condition of employment and decide what to do about it. Only by discussing their experiences can the employees decide whether the system is fair and, if not, whether or not to push for changes by engaging in further concerted activities, including explaining to the public why they believe the system is unfair and awakening public opinion to their cause.

It hardly can escape notice how much the employees' powerlessness vis-à-vis their employer resembles the "inequality of bargaining power" which Congress described in the preamble of the National Labor Relations Act, 29 U.S.C. § 151, and then addressed in Section 7 by granting employees new rights not found in the common law. 29 U.S.C. § 157. The Respondent might find it difficult to deny the importance of these rights to employees in their present situation, even though it seeks to deny the opportunity to exercise them.

The Respondent's desire to prevent employees from talking publicly about what happens during arbitrations is understandable. As the "#MeToo" movement recently has demonstrated, public opinion can be a potent force bringing about change in the workplace. However, the fact that the employees' concerted appeal to the public can be effective does not justify an employer's attempt to forbid it.

Although the power of public opinion seems particularly strong today, when the employees' concerted appeal to the public can be made through both the mass media and social media, their right to communicate with the public about working conditions goes back to the enactment of the NLRA in 1935. It is no new innovation but firmly established.

The discussion above has focused on employees' Section 7 right to engage in concerted activity for their mutual aid or protection, but it should be noted that the Respondent's confidentiality requirement also interferes with employees' exercise of the Section 7 right to join or assist labor organizations. Should some of the Respondent's employees contact a union to discuss whether such representation could improve working conditions, they likely would wish to compare the Respondent's arbitration scheme with the arbitration provisions in collective bargaining agreements which the union had negotiated. However, the Respondent's confidentiality clause forbids them from disclosing to the union officials what really has happened during arbitrations.

Unlike the prohibition of photography in *Boeing*, which potentially interfered with a right on the periphery of Section 7, the Respondent's prohibition on discussion and disclosure interferes with Section 7 rights essential to the purposes of the Act. The ban on photography in *Boeing* did little, if anything, to prevent employees from exercising their Section 7 rights to discuss working conditions and, if they believed the conditions unfair, to make a concerted appeal to the public. In contrast, the prohibition in the present case directly interferes with those rights at the core of Section 7.

This harm must be weighed against the reasons and justifications which the Respondent has asserted for the rule. As discussed above, the Respondent has not demonstrated that the rule is necessary for any legitimate business purpose. Therefore, I conclude that the

Respondent's reasons for the prohibition do not outweigh the harm inflicted upon the employees' Section 7 rights. Further, I conclude that the prohibition violates Section 8(a)(1) of the Act.

Having concluded that the prohibition violates Section 8(a)(1), I will now consider how it should be classified. Because the rule is unlawful, it would not fit into Category 1.

The Board stated that "Category 2 will include rules that warrant individual scrutiny" to determine "whether the rule would prohibit or interfere with NLRA rights." The Board described Category 3 as follows:

> Category 3 will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another.
>
> *The Boeing Company*, 365 NLRB No. 154, slip op. at 4 (italics in original). The rule in the present case exactly fits Category 3 because it prohibits employees from discussing a condition of employment and its adverse impact on NLRA rights is not outweighed by the Respondent's claimed justifications for it. Accordingly, I conclude that the Respondent's prohibition on discussion or disclosure of matters related to arbitration, including the arbitral award, constitutes a Category 3 violation.

Remedy

Because the Respondent violated Section 8(a)(1) of the Act, it must take all action necessary to remedy the harm caused by the unfair labor practice. Such action includes the posting of a notice at all facilities where employees affected by the Arbitration Agreement work. Additionally, if the Respondent customarily communicates with its employees by electronic means, notices must be distributed by these means as well.

From the record, it appears that some employees work out of their homes, and therefore might not see a notice posted in the Respondent's offices. The record also indicates that the Respondent provided each employee individually with a copy of the Arbitration Agreement. The Agreement provided that it would become effective 60 days after receipt, so it appears likely that the Respondent delivered the Agreement to each employee in a manner which assured that the employee received and read it.

To assure that each employee who received the Agreement receives notice that it is permissible to discuss and disclose information about an arbitration and an arbitral award, and that the Respondent will not take any disciplinary or other adverse action against an employee who does so, the Respondent should be required to deliver the notice to each employee in the same manner that it delivered the Agreement to that employee, or in a substantially equivalent

manner providing similar assurance of receipt.[27] In the present case, there is also a possibility of confusion which requires particular care in drafting the notice. Although the recommended order, below, invalidates the confidentiality clause in the Arbitration Agreement, the order makes clear that it does not invalidate the rest of the Agreement. Additionally, the recommended order specifically states that it does not deprive an arbitrator of authority to order that certain testimony or evidence be kept confidential where essential to protect proprietary or trade secrets or personal privacy. The notice to employees similarly includes these qualifications.

Further, if the Respondent has taken disciplinary or other adverse action against any employee because that employee discussed or disclosed information about an arbitration or the award, the Respondent must take all steps necessary to undo that disciplinary action and purge any reference to it from the employee's personnel file and other records.

CONCLUSIONS OF LAW

1. The Respondent, Pfizer, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by prohibiting its employees from discussing or disclosing information about an arbitration conducted pursuant to the Arbitration Agreement which the Respondent imposed and by prohibiting them from discussing or disclosing information about the arbitrator's award.

3. The Respondent did not engage in any unfair labor practices alleged in the complaint not specifically found herein.

On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended[28]

ORDER

The Respondent, Pfizer, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from:

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[27] In *National Licorice Co. v. NLRB*, above, the Supreme Court modified the Board's order that the employer post a notice so that the notice might "more accurately represent the affirmative action of the Board and that misinterpretation of its action may be avoided." 309 U.S. at 367. To thwart a union's attempts to represent the employees, the employer in that case had picked a committee of employees and then negotiated a contract with that committee. A large number of employees signed copies of this agreement, which supposedly was an individual contract even though each copy was the same. Although these contracts violated the Act, they did grant employees some improvements in wages and benefits, and the Court revised the notice language to make clear that the employees did not have to give up those improvements.

[28] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

(a) Promulgating and/or maintaining a work rule and employment policy prohibiting employees from discussing or disclosing information pertaining to an arbitration conducted pursuant to the Arbitration Agreement which Respondent imposed on its employees, including any award resulting from such arbitration.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the work rule and employment policy prohibiting employees from discussing or disclosing information about an arbitration or arbitral award and modify any document which expresses such a prohibition, including the Arbitration Agreement which the Respondent required its employees to accept, to state that employees are free to discuss and disclose information relating to an arbitration or arbitral award and will not be discharged, disciplined, or subjected to any other adverse employment action for doing so. This requirement does not invalidate any other portion of the Arbitration Agreement and does not limit an arbitrator's authority to order that specific testimony or evidence be kept confidential when essential to protect proprietary or trade secrets or personal privacy.

(b) In addition to the remedial actions described above in paragraph 2(a), deliver to each employee who received a copy of the Arbitration Agreement which included this prohibition, a modified copy with the prohibition removed, together with a copy of the notice described below in paragraph (d). Delivery of these documents shall be effected by the same means used to deliver the Arbitration Agreement to each employee, or in a substantially equivalent manner.

(c) If the Respondent has disciplined, discharged or subjected any employee to an adverse employment action because that employee failed to comply with the prohibition on discussing or disclosing information about an arbitration or arbitral award, rescind such discipline or adverse action, make the employee whole, with interest, for all losses suffered because of it, and remove from the employee's personnel file and other records all references to such disciplinary or adverse action.

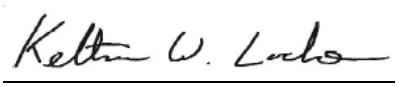
(d) Post at all of its facilities in the United States where any employee affected by the prohibition described above in paragraph 1(a) works, and within each such facility at all places where notices customarily are posted, and at all locations where job applicants seek or are interviewed for employment, copies of the attached notice marked "Appendix A."[29] Copies of the notice, on forms provided by the Regional Director for Region

[29] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read, "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB 11 (2010). In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at such closed facility or facilities at any time since May 5, 2016. *Excel Container, Inc.,* 325 NLRB 17 (1997).

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated Washington, D. C. March 21, 2019



Keltner W. Locke
Administrative Law Judge

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act.

WE WILL NOT prohibit employees from discussing or from disclosing information about any arbitration, or about the award resulting from any arbitration, which was, is now or will be conducted pursuant to the Arbitration Agreement which we required employees to accept as a condition of employment.

WE WILL NOT discharge, discipline or take any adverse employment action against any employee for failing to comply with this unlawful prohibition.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind our work rule and employment policy which prohibits employees from discussing arbitration and arbitral awards and modify any document expressing that policy to make clear that this prohibition has been rescinded, that all employees are free to discuss and disclose information about arbitrations and arbitral awards, and that no employee will be discharged, disciplined, or subjected to any adverse employment action for doing so, and WE WILL provide a copy of such modified document, together with a copy of this notice, to each employee who received the Arbitration Agreement. Apart from the prohibitions on discussion and disclosure of information concerning arbitration or an arbitrator's award, the Arbitration Agreement remains in effect and binding according to its terms. The order of the National Labor Relations Board does not preclude an arbitrator from ordering that specific testimony or evidence be kept confidential when deemed essential to protect proprietary or trade secrets or personal privacy.

WE WILL, if any employee has been discharged, disciplined or subjected to adverse action for failing to comply with the unlawful prohibition on discussion and disclosure of information

about arbitration or an arbitral award, rescind the discharge, discipline or other adverse action, restore the employee to the same status as before the discharge, discipline or adverse employment action, make the employee whole, with interest, for any losses suffered thereby, and remove any reference to the discharge, discipline or adverse employment action from the employee's personnel file and other files.

PFIZER INC.
(Employer)

Dated _____ By _____

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

Harris Tower, 233 Peachtree Street, N.E., Suite 1000, Atlanta, GA 30303-1531
(404) 331-2896, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/10-CA-175850 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (470) 343-7498.