UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DISH NETWORK, L.L.C.	)	
	)	
Petitioner/Cross-Respondent	)	
	)	No. 17-60368
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	

THE NATIONAL LABOR RELATION BOARD'S MOTION TO SEVER AND REMAND IN LIGHT OF RECENT BOARD DECISION

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

The National Labor Relations Board ("the Board"), by its Deputy Associate General Counsel, respectfully submits this motion to sever and remand to the Board certain issues in this case for further consideration in light of the Board's recent decision in *The Boeing Company*, 365 NLRB No. 154, 2017 WL 6403495 (Dec. 14, 2017). Specifically, the Board seeks remand of two unfair labor practice findings for the Board to reconsider in light of *Boeing*. The Board, however, requests that the unfair-labor-practice finding unaffected by *Boeing* remain in Court for enforcement. In support thereof, the Board shows as follows:

1. On April 13, 2017, the Board issued its Decision and Order in *Dish Network, LLC*, 365 NLRB No. 47 (2017), finding that DISH, a satellite television company, committed several unfair labor practices. Specifically, the Board found

that DISH maintained an arbitration agreement ("the Agreement") that violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), in two independent ways—by restricting employee access to the Board's processes and by requiring confidentiality in all arbitration proceedings. 365 NLRB No. 47, slip op. at 1-2, 2017 WL 1406206 *2-3. The Board also found that DISH violated Section 8(a)(1) by orally instructing an employee not to discuss his discipline pending investigation. *Id.* slip op. at 3, 2017 WL 1406206 *3-4.

2. DISH filed a petition for review arguing that the Board erroneously found that it had violated the Act. The Board filed a cross-application for enforcement. This case has been fully briefed since December 15, 2017. Oral argument has not yet been scheduled.

3. In assessing the legality of workplace rules, the Board has principally relied on the analytical framework laid out in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Under *Lutheran Heritage*, the Board first considers whether "[a] rule explicitly restricts activities protected by Section 7" of the Act. *Id.* at 646. If it does, then the Board will find the rule unlawful. *Id.* But even a rule that does not explicitly restrict Section 7 rights—a "facially neutral" rule—may be unlawful. In *Lutheran Heritage*, the Board articulated a three-prong test for assessing whether a facially neutral rule violates Section 8(a)(1). 343 NLRB at 647. As relevant here, the Board determined that it would find a violation under

the first prong of this test if employees would "reasonably construe" a rule's language as prohibiting activities protected by Section 7. *Id.*[1]

On December 14, 2017, the Board issued *Boeing*, which "overrule[d] the *Lutheran Heritage* 'reasonably construe' standard" and announced a new test to replace it. 2017 WL 6403495, at *2. Specifically, the Board overruled that prong of the *Lutheran Heritage* test under which a "facially neutral" workplace rule (one that does not expressly restrict Section 7 activity) was unlawful if employees would "reasonably construe" it as prohibiting Section 7 activity. Under the new *Boeing* test, in examining a facially neutral policy, rule, or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of Section 7 rights, the Board will evaluate: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule. *Boeing*, 2017 WL 6403495, at *16. The Board's new test is applied retroactively, including "to all other pending cases." *Id.* at *17-18.

4. Here, applying *Lutheran Heritage*'s "reasonably construe" prong, the Board determined the Agreement's provision requiring arbitration of "any claim," "in any way related to" employment "whenever and wherever brought" was unlawful because employees would reasonably construe the language as restricting

[1] Under the second and third prongs, which are not at issue in this case, a facially neutral rule is unlawful if it "was promulgated in response to union activity," or if it "has been applied to restrict the exercise of Section 7 rights." *Id.*

their rights under the Act to file charges with the Board. 365 NLRB No. 47, slip op. 1-2, 2017 WL 1406206 *2-3. *Boeing*'s rejection of the "reasonably construe" standard eliminates the Board's rationale for that finding. *Boeing* also calls into question the finding that the Agreement's confidentiality provision, which applied to "all arbitration proceedings," was unlawfully overbroad.

Whether the Agreement's provisions are lawful under *Boeing*'s framework is a question for the Board in the first instance. Therefore, the Board respectfully moves to sever and remand those two unfair labor practice findings to the Board for reconsideration of those findings.

5. However, the Board's recent decision in *Boeing* does not affect the Board's determination that DISH violated Section 8(a)(1) by prohibiting an employee from discussing his discipline and the related investigation with his coworkers. This finding does not depend on any part of *Lutheran Heritage* that was overruled by *Boeing* or otherwise implicated by *Boeing*. Rather, that violation turns on a distinct and separate area of extant Board law establishing that an employer cannot restrict employees from discussing discipline or disciplinary investigations with fellow employees absent demonstrating legitimate and substantial business justification that outweighs the infringement on employees' Section 7 rights. The Board found that DISH did not offer any such justification for its instruction. 365 NLRB No. 47, slip op. at 3, 2017 WL 1406206 *3-4. Thus,

the Board's finding that DISH unlawfully prohibited the discussion of discipline and any related investigation remains valid and enforceable.

In sum, the Board requests that the Court sever and remand the two unfair labor practice findings relating to DISH's Agreement and to continue its proceedings regarding the unfair labor practice finding that DISH unlawfully told an employee not to discuss his discipline or matters under investigation.

6. Board counsel has contacted counsel for DISH who opposes the motion to the extent it seeks enforcement of the oral instruction violation.

WHEREFORE, the Board respectfully requests the Court grant the Board's motion to sever and remand the issues as outlined herein.

/s/ Linda Dreeben
Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, D.C. 20570

Dated at Washington, D.C.
this 12th day of February 2018

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its motion contains 1,026 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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Dated at Washington, DC
this 12th day of February, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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1015 Half Street, SE
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Dated at Washington, DC
this 12th day of February, 2018