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Alpharetta, GA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

COWABUNGA, INC.

and

Case 10-CA-151454

CHADWICK HINES

ORDER DENYING MOTION AND REMANDING

On February 26, 2016, the National Labor Relations Board granted the General Counsel's motion for summary judgment in a Decision and Order, 363 NLRB No. 133, finding that the Respondent violated Section 8(a)(1) of the Act by (1) maintaining and enforcing a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, and (2) maintaining an arbitration agreement that employees reasonably would believe interferes with their ability to access the Board. On June 26, 2018, the United States Court of Appeals for the Eleventh Circuit denied enforcement of the Board's Order on the first of these findings in light of *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612 (2018). As to the second finding, the court vacated the Board's grant of summary judgment and remanded the allegation to the Board.

At the time of the Board's decision, the issue whether maintenance of an arbitration agreement that does not expressly restrict employee access to the Board violates Section 8(a)(1) on the basis that employees would reasonably believe it did would have been resolved based on the prong of the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), that held an employer's

maintenance of a facially neutral work rule would be unlawful “if employees would reasonably construe the language to prohibit Section 7 activity.” *Id.* at 647. Recently, the Board overruled the *Lutheran Heritage* “reasonably construe” test and announced a new standard that applies retroactively to all pending cases. *The Boeing Co.*, 365 NLRB No. 154, slip op. at 14-17 (2017).

Under the standard announced in *Boeing*, the General Counsel has not established in his motion for summary judgment that there are no genuine issues of material fact or that he is entitled to judgment as a matter of law. Accordingly, we deny without prejudice the General Counsel’s motion, and we will remand this issue to the Regional Director for Region 10 for further action as he deems appropriate.

ORDER

IT IS ORDERED that the General Counsel’s motion for summary judgment is denied, and this proceeding is remanded to the Regional Director for Region 10 for further appropriate action.

Dated, Washington, D.C. October 31, 2018.

John F. Ring, Chairman

Marvin E Kaplan, Member

William E. Emanuel, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD