

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

VELOX EXPRESS, INC.

and

JEANNIE EDGE, An Individual

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Case 15-CA-184006

**COUNSEL FOR THE GENERAL COUNSEL’S RESPONSE
TO THE BOARD’S NOTICE TO SHOW CAUSE**

Counsel for the General Counsel (General Counsel) respectfully submits this Response to the Notice to Show Cause issued by the National Labor Relations Board (Board) on August 29, 2019. For the reasons explained below, the General Counsel does not oppose the severing and remand of the complaint allegation concerning Respondent’s maintenance of the “Non-Disparagement” provision of the Independent Contractor Agreement (GCX 1[k] ¶ 6)¹ to the Administrative Law Judge (ALJ) for further proceedings consistent with the Board’s decision in *Boeing Co.*, 365 NLRB No. 154 (2017).

I. Procedural Background

Jeannie Edge alleged in a charge that Velox Express, Inc. (the Respondent) violated Section 8(a)(1) of the Act by discharging her, misclassifying its drivers as independent contractors and not

¹ “GCX” and “RX” references are to the numbered exhibits of the General Counsel, or Respondent, respectively.

as employees, and maintaining certain unlawful rules.² An Amended Complaint issued on April 13, 2017. A hearing was held on July 24 and 25, 2017 in Little Rock, Arkansas, before Administrative Law Judge Arthur J. Amchan. ALJ Amchan rendered his decision on September 25, 2017, in JD-76-17, finding, *inter alia*, that Respondent’s maintenance of the non-disparagement provisions in the independent contractor agreement was unlawful. Thereafter, Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief to Respondent’s exceptions, and Respondent filed a reply brief.³

While this case was pending before the Board on exceptions, the Board issued its decision in *The Boeing Company*, overruling the “reasonably construe” test in *Lutheran Heritage Village – Livonia*, 343 NLRB 646 (2004).

On August 29, 2019, the Board issued a Decision and Order in *Velox Express* in which it severed the complaint allegation relating to the maintenance of the non-disparagement provision in the independent contractor agreement and retained that issue for future resolution. *Velox Express, Inc.*, 368 NLRB No. 61 (August 29, 2019). The instant Notice to Show Cause was included in the Board’s Decision and Order that issued on August 29, 2019.

II. The Board Should Remand the Complaint Allegation Concerning Respondent’s Maintenance of a “Non-Disparagement” Provision in its Independent Contractor Agreement to the ALJ for Further Consideration in Light of *Boeing*

Respondent excepted to the ALJ’s determination that the maintenance of the following provision in Respondent’s independent contractor agreement violated Section 8(a)(1):

During the Term and following the termination of this Agreement, regardless of the reason for such termination, Independent Contractor shall not do or say anything that a reasonable person would construe as detrimental or disparaging to the goodwill and

² The charge was filed on September 12, 2016.

³ On February 15, 2018, the Board issued a Notice and Invitation to File Briefs in this case, requesting the parties and interested amici to address the misclassification of statutory employees as independent contractors as a violation of Section 8(a)(1) of the Act.

good reputation of the Company, including making negative statements about the Company's method of doing business, the effectiveness of its business policies and practices or the quality of any of the Company's services or personnel. (GCX 1[k] ¶ 6; GCXs 2, 22, 24).

The General Counsel does not oppose the remand to the ALJ of this contract term for further consideration in light of the Board's decision in *Boeing*. Under *Boeing*, work rules affirming common standards of civility among employees are category 1 rules and are lawful. This provision, however, prohibits disparagement or criticism of Respondent, which falls into category 2 and thus requires individualized scrutiny. Therefore, the General Counsel does not oppose the remand of this complaint allegation (GCX 1[k] ¶ 6) to the ALJ for further processing consistent with the Board's decision in *Boeing*.

The General Counsel further submits that there is no need to reopen the record in this matter as this complaint allegation was fully litigated by the parties during the unfair labor practice hearing.

III. Conclusion

For the reasons stated above, the General Counsel does not oppose the remand of the "Non-Disparagement" provision of the Independent Contractor Agreement, as alleged in the Amended Complaint at paragraph 6, to the ALJ for further consideration.

Dated at Memphis, Tennessee this 12th day of September 2019.

/s/ Linda Mohns

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CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2019, a copy of Counsel for the General Counsel's Response to Notice to Show Cause was filed via E-Filing with the NLRB Office of Executive Secretary.

I further certify that on September 12, 2019, a copy of Counsel for the General Counsel's Response to Notice to Show Cause was served by e-mail on the following:

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I further certify that on September 12, 2019, a copy of Counsel for the General Counsel's Response to Notice to Show Cause was served by regular mail upon the following:

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/s/
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