

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

FOUR SEASONS HEALTHCARE & WELLNESS
CENTER, LP, A California Limited Partnership

and

Case No. 31-CA-169143

ANA CRUZ, an Individual

COUNSEL FOR GENERAL COUNSEL'S RESPONSE

TO THE BOARD'S NOTICE TO SHOW CAUSE

On November 21, 2019, the Board issued a Decision, Order and Notice to Show Cause why this case should not be remanded to the Administrative Law Judge. Counsel for the General Counsel respectfully opposes remanding the captioned case to a judge for further proceedings, including if necessary the filing of statements, reopening of the record, and issuance of a supplemental decision, in light of *The Boeing Co.*, 365 NLRB No. 154, slip op. at 14-17 (2017).

A. Remand is Unnecessary

The sole issue remaining in the instant case is whether Respondent maintained a policy that interferes with employees' access to the Board and its processes. As the Board has recently recognized, where the only issue in a case is the facial lawfulness of an arbitration agreement, which is already a part of the record, a remand is

unnecessary. See, e.g., *Briad Wenco, LLC d/b/a Wendy's Restaurant*, 368 NLRB No. 72 (2019), slip op. at 2 n.2 (remand unnecessary where only issue was facial lawfulness of arbitration agreement and whether a reasonable employee would understand the agreement to restrict access to the Board) and *Everglades College d/b/a Keiser University and Everglades University*, 368 NLRB No. 123 (2019), slip op. at 1 (same).

B. The Rule is Facially Lawful

Moreover, for the reasons set forth below, the Board to find that, under *Boeing*, employees would not reasonably interpret the mandatory arbitration agreement to bar or restrict their access to the Board. As such, it is unnecessary to take evidence concerning the Employer's business justification for the rule.

Briefly, the Employer requires, as a condition of employment, that employees sign a two-page "AGREEMENT TO BE BOUND BY ALTERNATIVE DISPUTE RESOLUTION POLICY," (Agreement) with an attached three-page "ALTERNATIVE DISPUTE RESOLUTION POLICY" (Policy). The Agreement states that the Policy applies "to all disputes relating to my employment, the terms and conditions of my employment, including but not limited to my compensations, wages, ... benefits, discipline, performance evaluations, promotions, transfers, and the termination of my employment" The Agreement further states that such employment disputes include, among a long list of other claims, "alleged violations of federal ... statutes or regulations." The Agreement also provides that arbitration is the "exclusive means" for

resolving covered disputes, and prohibits employees from joining or participating in a class action or representative action, acting as a representative of others, or otherwise consolidated a covered claim with the claims of others.

The final paragraph of the Agreement states that certain types of disputes are “expressly excluded and not covered by this policy,” including workers’ compensation and unemployment insurance disputes, disputes “expressly excluded by federal or state statute,” and those required to be arbitrated under a different procedure pursuant to an employee benefit plan. The final paragraph, on page two of the Agreement just above the signature lines, goes on to state:

[N]othing in this ADR Policy shall be construed as precluding any employee from filing a charge with a state or federal administrative agency, such as ... the National Labor Relations Board. A state or federal administrative agency would also be free to pursue any appropriate action. However, any claim that is not resolved administratively through such an agency shall be subject to this agreement to arbitrate and the ADR Policy.

Similarly, the attached ADR policy also defines “Covered Disputes” in broad terms, as “any dispute arising out of or related to my employment, the terms and conditions of my employment and/or the termination of [my] employment[.]” Disputes expressly excluded mirror those expressly excluded in the Agreement itself. And the final paragraph of the three-page policy includes a similar “savings clause,” situated under a heading entitled “SEVERABILITY”:

Nothing in this Alternative Dispute Policy is intended to preclude any employee from filing a charge with ... the National Labor Relations Board or any similar federal or state agency seeking administrative resolution. However, any claim that cannot be resolved through administrative proceedings shall be subject to the procedures of this ADR policy.

The Board has recently considered whether an arbitration provision that contained a savings clause similar to the one in this case interfered with access to the Board or its processes. See *Briad Wenco, LLC d/b/a Wendy's Restaurant*, 368 NLRB No. 72, *supra*. In that case, the arbitration agreement included claims arising under the Act within the scope of the agreement (*id.* slip op. at 2), but contained a savings clause providing that nothing in the agreement was to be construed to prohibit employees from filing charges with, or participating in any investigation or proceeding conducted by, an administrative agency, including the National Labor Relations Board. *Id.* Based on this savings clause, and its sufficiently prominent placement (“separated by only about a page of text” from the broadly-worded description of covered claims, and part of the same document), the Board found that the agreements could not “be reasonably interpreted to prohibit employees from filing Board charges or participating in Board proceedings in any manner, whether acting individually or in concert with coworkers.” In this regard, the Board noted that the class- or collective-waiver provision of the agreement applied to “all claims subject to arbitration” under the agreement, and thus

would not require employees with claims that are not being arbitrated, such as a Board charge, to pursue it only in an individual capacity. *Id.* at n. 4. Thus, in light of the effective savings-clause, the Board found the agreements to be lawful under *Boeing* Category 1(a). *Id.*

As in *Briad Wenco*, employees would not reasonably interpret the arbitration policy (including the agreement to be bound by it) to bar or restrict their access to the Board. The Policy unequivocally and prominently states that employees have a right to file Board charges, as did the policy in *Briand Wenco*. Indeed, this savings-clause language is found not only in the Agreement to be bound, just above the signature line on page 2 and only about a page after the description of covered claims, but also again in the Policy itself, at the bottom of the third and final page. Although the savings clause in *Briad Wenco* explicitly allowed not only the filing of charges with the Board but also participation in any investigation or proceeding before the Board, employees here would reasonably understand the right to file an administrative charge with the Board as including the right to participate in any resulting Board processes. *Compare, e.g., Everglades College*, 368 NLRB No. 123 at slip op. p. 3, (finding a violation where the arbitration provision at issue contained “no specific exemption for filing charges with the Board.”). Nor is *Briad Wenco* distinguishable because the collective/class action waiver language in that case applied only to “claims subject to arbitration” under the agreement and thus explicitly would not require employees to pursue Board charges in

only an individual capacity. *Id.* at n. 4. Employees would not reasonably interpret the collective/class action waiver language in this case as requiring them to pursue Board charges in only an individual capacity.

Accordingly, the Board should conclude the savings clause language in this case is sufficient and that the Agreement and Policy are lawful under *Boeing* Category 1(a).

For the foregoing reasons, the Counsel for the General Counsel respectfully opposes remanding the instant matter to a judge for further proceedings.

Dated: December 18, 2019

/s/ Steven Wyllie _____
Steven Wyllie
Counsel for the General Counsel