

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

UBER TECHNOLOGIES, INC.

and

LENZA H. MCELRATH III

Case 20-CA-181146

RESPONDENT UBER TECHNOLOGIES, INC.'S
BRIEF IN RESPONSE TO NOTICE TO SHOW CAUSE

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Respondent Uber Technologies, Inc. (“Uber”) files this brief in response to the National Labor Relations Board’s, December 12, 2019, Notice to Show Cause and states as follows.

I. STATEMENT OF THE CASE

As discussed in full below, the Complaint must be dismissed. The only remaining allegation in the Complaint is whether the Dispute Resolution Agreement (“Agreement”) entered into between Uber and Charging Party Lenza H. McElrath III (“McElrath”) is lawful under the rule announced by the National Labor Relations Board (“Board” or “NLRB”) in *The Boeing Co.*, 365 NLRB No. 154 (2017). Specifically, the question presented to the Board is whether the Agreement’s mandatory arbitration language, when reasonably interpreted, would potentially interfere with the exercise of rights under the National Labor Relations Act (“NLRA”).

Consistent with the Board’s recent decision in *Briad Wenco*, 368 NLRB No. 72 (Sept. 11, 2019), the Uber Agreement is clearly lawful. Much like the *Briad Wenco* agreement, the Uber Agreement directs employment related-matters to mandatory arbitration, but expressly, and prominently, includes a “savings clause” that permits employees to bring, and participate in, proceedings before the NLRB. Accordingly, the Uber Agreement, like the *Briad Wenco* agreement, is lawful, and the Complaint must be dismissed.

II. RELEVANT FACTS

Given the limited scope of the issue presented, and the familiarity of the parties with the record, Respondent below briefly describes the relevant facts.

On September 3, 2014, McElrath executed a copy of the Uber Agreement, a two-page document, as a condition of his employment with Uber. *See* Uber Agreement (Ex. 1). The Agreement, provides that all disputes arising out of, or related to, McElrath’s employment with Uber are to be submitted to arbitration. The Agreement, however, expressly protects McElrath’s

right to bring charges before the NLRB. Indeed, *Section 1* of the Agreement, entitled “How This Agreement Applies”, expressly states:

Regardless of any other terms of this Agreement, *claims may be brought before and remedies awarded by an administrative agency* if applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. *Such administrative claims include* without limitation claims or *charges brought before* the Equal Employment Opportunity Commission (www.eeoc.gov), the U.S. Department of Labor (www.dol.gov), *the National Labor Relations Board* (www.nlr.gov), or the Office of Federal Contract Compliance Programs (www.dol.gov/esa/ofccp).

See id. (Emphases added).

Moreover, to further encourage and protect McElrath if he so chooses to file an unfair labor practice charge with the Board, the Agreement provides express assurances against retaliation should McElrath invoke his Section 7 rights. In this regard, Section 3, entitled “Class Action Waiver”, states:

Although *an Employee will not be retaliated against*, disciplined or threatened with discipline *as a result of his or her exercising his or her rights under Section 7 of the National Labor Relations Act* by the filing of or participation in a class, collective or representative action in any forum, the Company may lawfully seek enforcement of this Agreement and the Class Action Waiver, Collective Action Waiver and Private Attorney General Waiver under the Federal Arbitration Act and seek dismissal of such class, collective or representative actions or claims.

See id. (Emphases added).

III. LEGAL ARGUMENT

To the extent the General Counsel continues to prosecute Uber for maintenance of its Agreement, such action is clearly baseless. By its express terms, the Uber Agreement preserves employees’ rights to file charges with the Board, directs employees to the Board’s website, and ensures employees that they will not be retaliated against for filing charges with the Board.

Under any of the Board’s work rule tests, let alone the *Boeing* test, the Uber Agreement is lawful. Accordingly, the Complaint must be dismissed.

A. The *Boeing* Standard.

Under the current work rule test, when the Board “considers ‘a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.’” *See Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10, at *2 (June 18, 2019) (quoting *Boeing*, 365 NLRB No. at *4). In conducting this evaluation, the Board has delineated three categories of work rules:

Category 1 [includes] rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. . . .

Category 2 [includes] rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with 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.

Id.

As highlighted by the *Prime Healthcare* Board, the General Counsel has already weighed in on the type of agreement found here – namely, an arbitration agreement with a savings clause.

The General Counsel’s position regarding arbitration agreements with savings clauses is that:

Arbitration agreements with a “savings clause” that explicitly allows employees to utilize administrative proceedings in tandem with arbitral proceedings should be found lawful and placed in

Boeing Category 1, since employees would understand that they retain the right to access the Board and its processes, at least where the “savings clause” is reasonably proximate to the mandatory arbitration language so that the entire agreement would be read by employees to permit access to the Board.

Prime Healthcare, 368 NLRB No. 10, at *5.

For the reasons discussed immediately below, the Complaint must be dismissed.

B. The Uber Agreement Cannot be Reasonably Interpreted to Interfere with Rights Protected Under the NLRA.

The Uber Agreement is a lawful Category 1 work rule because it expressly and prominently includes a “savings clause.” The very first section of the Agreement states in laymen’s terms, that:

Regardless of any other terms of this Agreement, *claims may be brought before and remedies awarded by an administrative agency* if applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. *Such administrative claims include* without limitation claims or *charges brought before* the Equal Employment Opportunity Commission (www.eeoc.gov), the U.S. Department of Labor (www.dol.gov), *the National Labor Relations Board* (www.nlr.gov), or the Office of Federal Contract Compliance Programs (www.dol.gov/esa/ofccp).

See id. (Emphases added). The just-quoted “savings clause” appears in the same section of the Agreement that restricts employment claims to arbitration. Indeed, it is found in the paragraph directly below the restrictive language. Accordingly, Section 1 of the Agreement cannot be found to somehow limit an employee’s ability to access the NLRB, even with the most tortured reading.

Moreover, Section 3 of the Agreement provides further support that employees are free to bring claims under the NLRA. Section 3 clearly states that “an Employee will not be retaliated against, disciplined or threatened with discipline as a result of his or her exercising his or her rights under Section 7 of the National Labor Relations Act...” It is axiomatic that if Uber and its

employees have agreed that employees will not be adversely treated for exercising rights under the NLRA, then employees must be permitted to exercise their rights under the NLRA which, of course, includes filing charges with the NLRB.

This case is a mirror image of the *Briad Wenco* decision. In *Briad Wenco* the Board found the following “savings clause” insulated the employer’s mandatory arbitration agreement from attack:

11. Nothing in this Agreement shall be construed to prohibit any current or former employee from filing any charge or complaint or participating in any investigation or proceeding conducted by an administrative agency, including but not limited to . . . the National Labor Relations Board...

Briad Wenco, 368 NLRB No. at, *1. The Board reasoned that the agreement was lawful because:

The language in paragraph 11 is unconditional and sufficiently prominent. With the inclusion and placement of this language, the agreements cannot 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. Paragraph 11 is sufficiently prominent within the agreements to ensure that employees who read them know that the agreements preserve employees’ rights to access the Board and its processes. In particular, paragraph 2 refers to paragraph 11, which contains the relevant language. In addition, paragraph 11 is reasonably proximate to paragraphs 1 and 2; they are separated by only about a page of text and are part of the same document. Because the agreements are explicit in informing employees that there is “nothing” in them that should be read as preventing employees from accessing the Board, and this language is sufficiently prominent within the agreements, they cannot be reasonably understood to potentially interfere with employees’ exercise of their NLRA rights.

Id. at *3.

Here, the Uber Agreement, is even more explicit than the *Briad Wenco* agreement. As an initial matter, the Uber Agreement unequivocally states that employees are permitted to bring

DISPUTE RESOLUTION AGREEMENT

1. How This Agreement Applies: This Agreement is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. This Agreement applies to any dispute arising out of or related to Employee's employment with Uber Technologies, Inc. or one of its affiliates, successor, subsidiaries or parent companies ("Company") or termination of employment and survives after the employment relationship terminates. Except as it otherwise provides, this Agreement is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law or before a forum other than arbitration. This Agreement requires all such disputes to be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial. Such disputes include without limitation disputes arising out of or relating to interpretation or application of this Agreement, but not as to the enforceability, revocability or validity of the Agreement or any portion of the Agreement, including the Class Action Waiver described below.

Except where this Agreement otherwise provides, this Agreement also applies, without limitation, to disputes regarding the employment relationship, trade secrets, unfair competition, compensation, breaks and rest periods, termination, or harassment and claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans With Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act (except for claims for employee benefits under any benefit plan sponsored by the Company and covered by the Employee Retirement Income Security Act of 1974 or funded by insurance), and state statutes, if any, addressing the same or similar subject matters, and all other federal and state statutory and common law claims to the extent permitted by law.

Regardless of any other terms of this Agreement, claims may be brought before and remedies awarded by an administrative agency if applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims include without limitation claims or charges brought before the Equal Employment Opportunity Commission (www.eeoc.gov), the U.S. Department of Labor (www.dol.gov), the National Labor Relations Board (www.nlr.gov), or the Office of Federal Contract Compliance Programs (www.dol.gov/esa/ofccp).

2. How Arbitration Proceedings Are Conducted: Except as provided in this Agreement, any controversy or claim covered by this Agreement shall be settled by arbitration in accordance with the Employment Arbitration Rules of the American Arbitration Association ("AAA") then in effect. These rules are available at www.adr.org, or you can ask Human Resources for a copy. The party bringing the claim must demand arbitration in writing and deliver the written demand by hand or first class mail to the other party within the applicable statute of limitations period. In arbitration, the parties will have the right to conduct adequate civil discovery, bring dispositive motions, and present witnesses and evidence as needed to present their cases and defenses, and any disputes in this regard shall be resolved by the Arbitrator. Each party will pay the fees for his, her or its own attorneys, subject to any remedies to which that party may later be entitled under applicable law. However, in all cases where required by law, the Company will pay the Arbitrator's and arbitration fees. The Arbitrator may award any party any remedy to which that party is entitled under applicable law, but such remedies shall be limited to those that would be available to a party in his or her individual capacity in a court of law for the claims presented to and decided by the Arbitrator, and no remedies that otherwise would be available to an individual in a court of law will be forfeited by virtue of this Agreement. The Arbitrator will issue a decision or award in writing, stating the essential findings of fact and conclusions of law. A court of competent jurisdiction shall have the authority to enter a judgment upon the award made pursuant to the arbitration. A party may apply to a court of competent jurisdiction for temporary or preliminary injunctive relief in connection with an arbitrable controversy, but only upon the ground that the award to which that party may be entitled may be rendered ineffectual without such provisional relief.

CERTIFICATE OF SERVICE

The undersigned counsel for Respondent certifies that a copy of the foregoing Respondent's Brief in Response to Notice to Show Cause was served by Electronic Filing through the Board's website:

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Dated: December 26, 2019

/s/
Alan I. Model