Countrywide Financial Corporation, Countrywide Home Loans, Inc., and Bank of America Corporation *and* Joshua D. Buck and Mark Thierman, Thierman Law Firm *and* Paul Cullen, The Cullen Law Firm. Cases 31–CA–072916 and 31–CA–072918

January 24, 2020

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On August 14, 2015, the National Labor Relations Board issued its Decision and Order in this proceeding, finding that the Respondents violated Section 8(a)(1) of the National Labor Relations Act by (1) maintaining or enforcing/applying a mandatory arbitration agreement in a manner that requires employees to waive the right to maintain class or collective actions in all forums; and (2) maintaining a mandatory arbitration agreement that employees would reasonably believe bars or restricts employees' right to file charges with the Board or to access the Board's processes. *Countrywide Financial Corp.*, 362 NLRB 1331 (2015). The Respondents filed a petition to review, and the Board filed a cross-application to enforce, the Board's Decision and Order.

On June 29, 2018, the United States Court of Appeals for the Ninth Circuit granted the Board's motion for the Court to (1) summarily grant Respondents' petition to review and deny the Board's cross-application to enforce the portion of the Board's Decision and Order dealing with the first finding in light of *Epic Systems Corp. v. Lewis*, 584 U.S. __, 138 S.Ct. 1612 (2018) (holding that employers may lawfully maintain arbitration agreements that bar employees from concertedly pursuing work-related claims); and (2) remand the second finding back to the Board for further proceedings in light of *The Boeing Company*, 365 NLRB No. 154 (2017) (*Boeing*).[1] See *Countrywide Financial Corporation et al v. NLRB*, Nos. 15-72700, 15-73222 (9th Cir. June 29, 2018).

On October 15, 2018, the Board issued a Notice to Show Cause why the second and sole remaining issue should not be remanded to a judge for further proceedings in light of *Boeing*, including, if necessary, the filing of statements, reopening the record, and issuance of a supplemental decision. No party filed a response.[2]

The Board has reviewed the entire record and has concluded, for the reasons set forth below, that no remand to an administrative law judge is necessary, and that the arbitration agreement unlawfully restricts access to the Board and its processes in violation of Section 8(a)(1) of the Act.

I. FACTS

From about 2007 through approximately March 2009, applicants for employment with Respondent Countrywide Home Loans, Inc. (CHL) were presented with arbitration agreements substantially similar to the "Mutual Agreement to Arbitrate Claims" (Arbitration Agreement or Agreement) presented to Dominique Whitaker and John White in August 2007 and September 2008, respectively. 362 NLRB at 1331–1332. Respondent CHL was a subsidiary of Respondent Countrywide Financial Corporation (CFC), the author of the Arbitration Agreement and one of the companies that maintains the Agreement. Id. at 1331 & fn. 2. The Agreement states that an applicant "will not be able to move forward in the application process at

[1] In *Boeing*, the Board overruled the "reasonably construe" prong of the *Lutheran Heritage* standard that governed whether maintenance of a policy that does not expressly prohibit Sec. 7 activity nevertheless violates Section 8(a)(1) of the Act. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). Under *Boeing*, 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." *Boeing*, slip op. at 3 (emphasis omitted). In conducting this evaluation, the Board will strike a proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policies, viewing the rule or policy from the employees' perspective. Id. "As a result of this balancing . . . the Board will delineate three categories" of work rules:

> *Category 1* will include 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* will include 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* will include 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., slip op. at 3–4 (emphasis in original). However, these categories "will represent a classification of *results* from the Board's application of the new test. The categories are not part of the test itself." Id., slip op. at 4 (emphasis in original). The Board also decided to apply its new standard retroactively to all pending cases in whatever stage. Id., slip op. at 16–17.

[2] On December 20, 2018, the Board denied Counsel for the General Counsel's Motion to Accept a Late-Filed Response to the Notice to Show Cause.

this time" if the applicant does not agree to be bound by the Arbitration Agreement. Id. at 1332.[3]

Section 1 of the Agreement, titled "Designated Claims," states as follows:

> Except as otherwise provided in this Agreement, the Company and the Employee hereby consent to the resolution by arbitration of all claims or controversies arising out of, relating to or associated with the Employee's employment with the Company that the Employee may have against the Company or that the Company may have against the Employee, including any claims or controversies relating to the Employee's application for employment with the Company, the Company's actual or potential hiring of the Employee, the employment relationship itself, or its termination (hereinafter the "Covered Claims"). The Covered Claims subject to this Agreement include, but are not limited to, claims for wages or other compensation due; claims for breach of any contract or covenant, express or implied; tort claims; claims for discrimination or harassment on bases which include but are not limited to race, sex, sexual orientation, religion, national origin, age, marital status, disability or medical condition; claims for benefits and claims for violation of any federal, state or other governmental constitution, statute, ordinance, regulation, or public policy. The purpose and effect of this Agreement is to substitute arbitration, instead of a federal or state court, as the exclusive forum for the resolution of Covered Claims. The parties' responsibilities and legal remedies available under any substantive law applicable to a Covered Claim shall be enforced in any arbitration conducted pursuant to this Agreement.

Id. at 1331–1332 fn. 3.

Section 3, entitled, "Claims Not Covered by This Agreement," states that "[n]othing in this Agreement shall be construed to require arbitration of any claim if an agreement to arbitrate such claim is prohibited by law." Id. at 1331–1332.

Section 10, entitled "Exclusive Remedy," states, "Arbitration is the parties' exclusive remedy for Covered Claims." Id. at 1332.

II. DISCUSSION

A. Legal Principles

This case is controlled by the Board's recent decisions in *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10 (2019) (*Prime Healthcare*), and *Everglades College, Inc. d/b/a Keiser University*, 368 NLRB No. 123 (2019) *(Everglades)*, which issued after the Notice to Show Cause. Consistent with the clear congressional command in Section 10(a) of the Act that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise," we held in *Prime Healthcare* that the Federal Arbitration Act does not authorize the maintenance or enforcement of arbitration agreements that interfere with an employee's right to file charges with the Board. 368 NLRB No. 10, slip op. at 5. We also held that an arbitration agreement that explicitly prohibits the filing of claims with the Board or, more generally, with administrative agencies must be found unlawful because such an agreement constitutes an explicit prohibition on the exercise of employee rights under the Act. Id.[4]

Where an arbitration agreement does not contain such an express prohibition but rather is facially neutral, the standard set forth in *Boeing*, above, applies. Id. Under that standard, the Board must first determine whether that agreement, "when reasonably interpreted, would potentially interfere with the exercise of NLRA rights." *Boeing*, above, slip op. at 3. If it does, the Board will proceed to analyze the rule under *Boeing*'s balancing test, weighing the agreement's potential interference with Section 7 rights against the employer's legitimate business justifications. Id.

In *Prime Healthcare*, we concluded that where provisions in an arbitration agreement or elsewhere make arbitration the exclusive forum for the resolution of employment-related claims, including claims for violations of federal statutes, then such provisions are unlawful and fall within *Boeing* Category 3. 368 NLRB No. 10, slip op. at 6–7. As we explained, such provisions, reasonably interpreted, interfere with the exercise of the right to file charges with the Board; such provisions significantly impair employee rights, the free exercise of which is vital to the implementation of the statutory scheme established by Congress in the National Labor Relations Act; and no legitimate justification outweighs, or could outweigh, the

[3] The Agreement states that it is between "the Company and the Employee" and defines the Company as "Countrywide Financial Corporation and all of its subsidiary and affiliated entities . . . and all successors and assigns and any of them." Id. at 1331. In June 2008, Respondent Bank of America (BAC) purchased CFC and became the parent of CFC and CHL. Id. at 1331& fn. 2. Respondents CHL, CFC, and BAC joined together and were active participants in seeking to enforce the Agreement in federal court litigation. Id. at 1331 fn. 2.

[4] As we noted in *Prime Healthcare,* the Supreme Court in *Epic Systems* did not address whether the Act prohibits agreements that restrict employees' access to the Board or its processes. Id.

adverse impact of such provisions on employee rights and the administration of the Act. Id., slip op. at 6–7.

B. The Arbitration Agreement is Unlawful

Applying *Prime Healthcare*, we conclude that the Arbitration Agreement interferes with employee rights under the Act and falls within *Boeing* Category 3. Although the Arbitration Agreement does not explicitly prohibit charge filing, it does interfere, when reasonably interpreted, with the right to file charges with the Board. The Agreement states that "[a]rbitration is the parties' exclusive remedy for covered claims," which are defined as claims arising out of, relating to, or associated with the employee's employment relationship and claims for violation of federal statutes. Employees would reasonably interpret this language to restrict the filing of charges with the Board. See id., slip op. at 6 (reasonably interpreted, provisions that make arbitration the exclusive forum for the resolution of all employment-related claims restrict the filing of charges with the Board).[5] And, as we explained in *Prime Healthcare*, no legitimate justification outweighs, or could outweigh, the adverse impact of such a provision on employee rights and the administration of the Act. Id., slip op. at 6–7.

Applying our recent decision in *Everglades*, we also conclude that the exclusion clause in Section 3 is too vague to salvage the Arbitration Agreement. Section 3 states that "[n]othing in this Agreement shall be construed to require arbitration of any claim if an agreement to arbitrate such claim is prohibited by law." We recently held in *Everglades* that a reasonable employee interpreting vague, generalized exclusion-clause language like that here—purporting to except claims for which arbitration is "specifically prohibited by law"—"cannot be expected to divine any intent to exclude from [the] coverage" of an arbitration agreement claims arising under the NLRA, given that rank-and-file employees do not generally carry law books and "'cannot be expected to have the expertise to examine company rules from a legal standpoint.'" *Everglades*, 368 NLRB No. 123, slip op. at 3–4 (quoting *Ingram Book Co.*, 315 NLRB 515, 516 fn. 2 (1994)). In other words, as we explained in *Everglades*, slip op. at 4, while an objectively reasonable employee would understand that the arbitration agreement does not apply where "prohibited by law," that language leaves the reasonable employee in the dark as to *what* is "prohibited by law" because "the language remains impermissibly vague and ambiguous as to whether it applies to claims that the NLRA has been violated."

In sum, the language of the Arbitration Agreement, when reasonably interpreted under *Boeing*, makes arbitration the exclusive forum for resolution of claims arising under the Act, and the exclusion clause language is legally insufficient. The Agreement restricts employee access to the Board, and such restriction of Section 7 rights cannot be supported by any legitimate business justification. Therefore, the Agreement is a *Boeing* Category 3 policy, and we find that the Respondents violated Section 8(a)(1) of the Act by maintaining it.[6]

ORDER

A. The National Labor Relations Board orders that the Respondent, Countrywide Home Loans, Calabasas, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that employees would reasonably believe bars or restricts the right of employees to file charges with the National Labor Relations Board.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the mandatory arbitration agreement, or revise it to make clear to employees that it does not bar or restrict employees' right to file charges with the National Labor Relations Board.

[5] We find no merit in the Respondents' contention, advanced in the initial litigation, that employees would understand that the Arbitration Agreement applies only to claims brought in Federal or State court—and therefore does not prohibit employees from filing charges with the Board—in light of the explanatory sentence in Section 1 that the "purpose and effect of this Agreement is to substitute arbitration, *instead of a federal or state court,* as the exclusive forum for the resolution of Covered Claims." 362 NLRB at 1332–1333 (emphasis added). In *Prime Healthcare*, we rejected a similar argument, noting that a federal court of appeals *is* authorized to grant relief for claims arising under the Act on a petition for enforcement or review of a Board order pursuant to Sections 10(e) and (f), respectively, and that a federal district court *is* authorized to grant interim injunctive relief for claims arising under the Act in the first instance pursuant to Sections 10(j) and 10(l). *Prime Healthcare*, 368 NLRB No. 10, slip op. at 6. Significantly, *Boeing* requires the Board to interpret disputed provisions from "the perspective of employees," *Boeing*, above, slip op. at 3, and it is unlikely that employees would be sufficiently familiar with the "intricacies of Federal court jurisdiction" to appreciate the distinction the Respondent has advanced. *Prime Healthcare*, 368 NLRB No. 10, slip op. at 6 (citing *U-Haul Co. of California*, 347 NLRB 375, 377–378 (2006), enfd. 255 Fed. Appx 527 (D.C. Cir. 2007)). Nowhere does the Arbitration Agreement state that it excludes claims arising under the NLRA from its scope, or that employees retain the right to file charges with the NLRB or with administrative agencies generally. Reasonably interpreted, these provisions, taken as a whole, make arbitration the exclusive forum for resolution of federal statutory claims under the National Labor Relations Act.

[6] Contrary to his colleagues, Member Emanuel would find the exclusion clause in Sec. 3 renders the Arbitration Agreement lawful for the reasons set forth in his dissenting opinion in *Everglades,* slip op. at 6–7. He would therefore dismiss the allegation that the Respondent violated Sec. 8(a)(1) by maintaining the Agreement.

(b) Notify all applicants and current and former employees who were required to sign the arbitration agreement that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Within 14 days after service by the Region, post at its Calabasas, California facility copies of the attached notice marked "Appendix A."[7] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix A" to all current employees and former employees employed by the Respondent at any time since July 19, 2011, and any employees against whom the Respondent has enforced its mandatory arbitration agreement since August 22, 2011.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. The National Labor Relations Board orders that the Respondent, Countrywide Financial Corporation, Calabasas, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right of employees to file charges with the National Labor Relations Board.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the mandatory arbitration agreement, or revise it to make clear to employees that it does not bar or restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all applicants and current and former employees who were required to sign the arbitration agreement that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Within 14 days after service by the Region, post at its Calabasas, California facility copies of the attached notice marked "Appendix B."[8] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix B" to all current employees and former employees employed by the Respondent at any time since July 19, 2011, and any employees against whom the Respondent has enforced its mandatory arbitration agreement since August 22, 2011.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

C. The National Labor Relations Board orders that the Respondent, Bank of America Corporation, Lancaster, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right of employees to file charges with the National Labor Relations Board.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the mandatory and binding arbitration agreement, or revise it to make clear to employees that it does not bar or restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all applicants and current and former employees who were required to sign the arbitration agreement that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Within 14 days after service by the Region, post at its Lancaster, California facility copies of the attached notice marked "Appendix C."[9] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix C" to all current employees and former employees employed by the Respondent at any time since July 19, 2011, and any employees against whom the Respondent has enforced its mandatory arbitration agreement since August 22, 2011.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 24, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the mandatory arbitration agreement or revise it to make clear that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all applicants and current and former employees who were required to sign the mandatory arbitration agreement that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

COUNTRYWIDE HOME LOANS

The Board's decision can be found at www.nlrb.gov/case/31-CA-072916 or by using the QR code below. Alternatively, you can obtain a copy of the

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the mandatory arbitration agreement or revise it to make clear that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all applicants and current and former employees who were required to sign the mandatory arbitration agreement that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

COUNTRYWIDE FINANCIAL CORPORATION

The Board's decision can be found at www.nlrb.gov/case/31-CA-072916 or by using the QR code below. Alternatively, you can obtain a copy of the

decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX C

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the mandatory and binding arbitration agreement or revise it to make clear that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all applicants and current and former employees who were required to sign the mandatory arbitration agreement that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

BANK OF AMERICA CORPORATION

The Board's decision can be found at www.nlrb.gov/case/31-CA-072916 or by using the QR

code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.