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Hobby Lobby Stores, Inc. *and* the Committee to Preserve the Religious Right to Organize. Case 20–CA–139745

July 24, 2020

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On May 18, 2016, the National Labor Relations Board issued a Decision and Order finding that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining and enforcing its Mandatory Arbitration Agreement (MAA). *Hobby Lobby Stores, Inc.*, 363 NLRB No. 195 (2016) (*Hobby Lobby I*). Applying *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), the Board found that the MAA unlawfully required employees, as a condition of their employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. *Hobby Lobby I*, above, slip op. at 1. The Board also found that the MAA violated the Act because employees reasonably would construe it to restrict their access to the Board's processes. Id., slip op. at 1 & 14–15.

The Respondent filed a petition for review with the United States Court of Appeals for the Seventh Circuit. The Board filed a cross-application for enforcement. On May 21, 2018, the Supreme Court held that employer-employee agreements that contain class- and collective-action waivers and require individualized arbitration do not violate Section 8(a)(1) of the Act and must be enforced as written pursuant to the Federal Arbitration Act (FAA). *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612, 1632 (2018).

On June 28, 2018, the Seventh Circuit vacated the Board's Decision and remanded the case to the Board for further proceedings. On January 2, 2019,[1] the Board issued a Supplemental Decision, Order, and Notice to Show Cause. *Hobby Lobby Stores, Inc.*, 367 NLRB No. 78 (2019) (*Hobby Lobby II*). The Board dismissed the allegations that the Respondent violated the Act by maintaining and enforcing its MAA.[2] It also issued a Notice to Show Cause why the remaining allegation—that the MAA unlawfully interfered with employees' ability to access the Board—should not be remanded to the administrative law judge for further proceedings in light of the Board's decision in *Boeing Co.*, 365 NLRB No. 154 (2017). The Charging Party filed a statement of position supporting remand.[3] Neither the General Counsel nor the Respondent filed a response.

The Board has considered its previous decision and the record in light of the statement filed by the Charging Party. Because the remaining allegation may be decided based on the existing record, we conclude that remand is not necessary. For the reasons explained below, we find that the MAA does not unlawfully restrict employee access to the Board and its processes. Accordingly, we dismiss the allegation that the Respondent violated Section 8(a)(1) of the Act by maintaining the MAA.

I. FACTS

The Respondent is an Oklahoma corporation with several stores throughout the State of California, including one in Sacramento, California. The Respondent is engaged in the retail sale of arts, crafts, hobbies, home décor, and holiday and seasonal products. Since at least April 28, 2014, the Respondent has maintained the MAA.[4] In relevant part, the MAA states:

> **This Agreement between Employee and Company to arbitrate all employment-related Disputes includes, but is not limited to**, all Disputes under or involving Title VII of the Civil Rights Act of 1964, the Civil Rights Acts of 1866 and 1991, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Fair Credit Act, the Employee Retirement Income Security Act, and **all other federal, state, and municipal statutes, regulations, codes, ordinances, common laws, or public policies** that regulate, govern, cover, or relate to equal employment, wrongful termination, wages, compensation, work hours, invasion of privacy, false imprisonment, assault, battery, malicious prosecution, defamation, negligence, personal injury, pain and suffering, emotional distress, loss of consortium, breach of

[1] All subsequent dates are in 2019 unless otherwise noted.

[2] On January 16, the Charging Party filed a motion for reconsideration of the dismissal of these allegations. On March 4, the Board denied that motion. On October 3, the United States Court of Appeals for the District of Columbia Circuit dismissed the Charging Party's appeal of the Board's denial for lack of jurisdiction, finding that the Committee to Preserve the Religious Right to Organize failed to show that it met the requirements for Art. III standing. *The Committee to Preserve the Religious Right to Organize v. NLRB*, No. 19–1102 (D.C. Cir. Oct. 3, 2019) (unpublished per curiam order).

[3] The Charging Party also submitted a letter pursuant to Sec. 102.6 of the Board's Rules and Regulations.

[4] The Respondent maintains one MAA for employees in California and another for employees outside of California. The MAAs are not materially different with respect to the provision below.

> fiduciary duty, sexual harassment, harassment and/or discrimination based on any class protected by federal, state or municipal law, or interference and/or retaliation involving workers' compensation, family or medical leave, health and safety, harassment, discrimination, or the opposition of harassment or discrimination, and any other employment-related Dispute in tort or contract. **This Agreement shall not apply to claims for benefits under unemployment compensation laws or workers' compensation laws.**
>
> **By agreeing to arbitrate all Disputes, Employee and Company understand that they are not giving up any substantive rights under federal, state, or municipal law (including the right to file claims with federal, state, or municipal government agencies).** Rather, Employee and Company are mutually agreeing to submit all Disputes contemplated in this Agreement to arbitration, rather than to a court.

Jt. Exh. 2I (emphasis added).

II. DISCUSSION

The only issue left unresolved by *Hobby Lobby II* is whether the MAA unlawfully restricts employee access to the Board and its processes. In *Hobby Lobby I*, the Board resolved this issue under the analytical framework set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *Hobby Lobby I*, above, slip op. at 1 & 14–15. In *Lutheran Heritage*, the Board held, among other things, that an employer violates Section 8(a)(1) of the Act if it maintains a facially neutral work rule that employees "would reasonably construe . . . to prohibit Section 7 activity." 343 NLRB at 647. While *Hobby Lobby I* was pending on appeal, however, the Board overruled the "reasonably construe" prong of *Lutheran Heritage. Boeing*, 365 NLRB No. 154, slip op. at 2.[5] The Board decided to apply the new standard retroactively to all pending cases in whatever stage. Id., slip op. at 16–17.

Subsequently, in *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10 (2019), the Board held that, notwithstanding the Supreme Court's decision in *Epic Systems*, above, the FAA "does not authorize the maintenance or enforcement of agreements that interfere with an employee's right to file charges with the Board." Id., slip op. at 5. This is so because the FAA's requirement that arbitration agreements be enforced as written "may be 'overridden by a contrary congressional command,'" which the Board found to be established in Section 10 of the Act. Id. (quoting *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987)); see *IIG Wireless, Inc.,* 369 NLRB No. 66, slip op. at 2 (2020).

Accordingly, the Board held in *Prime Healthcare* 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 "[s]uch an agreement constitutes an explicit prohibition on the exercise of employee rights under the Act." 368 NLRB No. 10, slip op. at 5. The Board further held that where an arbitration agreement does not contain such an explicit prohibition but rather is facially neutral, the Board must apply the standard set forth in *Boeing* and initially "determine whether that agreement, 'when reasonably interpreted, would potentially interfere with the exercise of NLRA rights.'" Id. (quoting *Boeing*, 365 NLRB No. 154, slip op. at 3.) The Board found that, under *Boeing*, arbitration agreements violate the Act when, "taken as a whole, [they] make arbitration the *exclusive* forum for the resolution of all claims, including federal statutory claims under the National Labor Relations Act." Id., slip op. at 6. Further, the Board found that, "as a matter of law, there is not and cannot be any legitimate justification for provisions, in an arbitration agreement or otherwise, that restrict employees' access to the Board or its processes." Id.

[5] In *Boeing*, the Board overruled the "reasonably construe" prong of *Lutheran Heritage*, above, and announced a new standard, applied retroactively, for evaluating the lawfulness of a facially neutral policy. 365 NLRB No. 154, slip op. at 2–3, 17. Under *Boeing*, the Board first determines whether a challenged rule or policy, reasonably interpreted, would potentially interfere with the exercise of rights under Sec. 7 of the Act. If not, the rule or policy is lawful and placed in Category 1(a). If so, the Board determines whether an employer violates Sec. 8(a)(1) of the Act by maintaining the rule or policy by balancing "the nature and extent of the potential impact on NLRA rights" against "legitimate justifications associated with the rule," viewing the rule or policy from the employees' perspective. Id., slip op. at 3. As a result of this balancing, the Board places a challenged rule into one of three categories. Category 1(b) consists of rules that are lawful to maintain because, although the rule, reasonably interpreted, potentially interferes with the exercise of Sec. 7 rights, the interference is outweighed by legitimate employer interests. Category 3, in contrast, consists of rules that are unlawful to maintain because their potential to interfere with the exercise of Sec. 7 rights outweighs the legitimate interests they serve. Categories 1(a), 1(b) and 3 designate *types* of rules; once a rule is placed in one of these categories, rules of the same type are categorized accordingly without further case-by-case balancing (for Category 1(b) and 3 rules; balancing is never required for rules in Category 1(a)). Some rules, however, resist designation as either always lawful or always unlawful and instead require case-by-case analysis under *Boeing*'s balancing framework. These rules are placed in Category 2. See id., slip op. at 3–4; *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2–3 (2019).

The "reasonably interpreted" standard in *Boeing* considers how the wording of the rule, policy, or other provision at issue would be viewed from the perspective of an objectively reasonable employee who is "aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job. The reasonable employee does not view every employer policy through the prism of the NLRA." *LA Specialty Produce*, 368 NLRB No. 93, slip op. at 2.

Here, the MAA requires that "any dispute, demand, claim, controversy, cause of action, or suit" "shall be submitted to and settled by final and binding arbitration." None of the listed exclusions from the MAA's coverage includes claims arising under the National Labor Relations Act.[6] Without more, the MAA thus makes arbitration the exclusive forum for the resolution of federal statutory claims under the Act.

In decisions subsequent to *Prime Healthcare*, however, we made clear that the analysis does not end there if the challenged arbitration agreement includes a savings clause, i.e., a clause providing that employees "retain the right to file charges with the Board, even if the agreement otherwise includes claims arising under the Act within its scope." *Everglades College, Inc. d/b/a Keiser University*, 368 NLRB No. 123, slip op. at 3 fn. 3 (2019). Thus, in *Anderson Enterprises, Inc. d/b/a Royal Motor Sales*, 369 NLRB No. 70 (2020), and *Briad Wenco, LLC d/b/a Wendy's Restaurant*, 368 NLRB No. 72 (2019), the Board found that the agreements at issue, which also required arbitration of claims arising under the Act, were nevertheless lawful because they contained savings clauses that explicitly informed employees that they retained the right to file charges with the Board and access its processes.[7] The Board has also indicated that a savings clause may be legally sufficient, even if it does not expressly refer to "the National Labor Relations Board," "the NLRB" or "the Board," if it informs employees of their right to file claims or charges with administrative agencies generally.[8] The Board examines savings-clause language in the context of the arbitration agreement as a whole to ensure that the right of employees to access the Board and its processes is adequately safeguarded. See *Anderson Enterprises*, above, slip op. at 3 (finding arbitration agreement lawful based on both the wording of the savings clause and its sufficiently prominent placement within the agreement); *Briad Wenco*, above, slip op. at 2 (same).

The MAA here includes a savings clause providing, without limitation, that individuals who sign the MAA "are not giving up any substantive rights under federal, state, or municipal law (including the right to file claims with federal, state, or municipal government agencies)." The scope of this savings-clause language permitting the filing of claims is coextensive with the general coverage language of the MAA. Accordingly, an objectively reasonable employee, as defined under the *Boeing* standard, who understands that the general coverage language encompasses claims under the Act, would also understand that the general savings-clause language permits the filing of a claim with any federal administrative agency, including the Board.[9] Further, as in *Anderson Enterprises* and *Briad Wenco*, the savings clause in the MAA is prominently placed on the same page as, and only two paragraphs after, the first mention of the exclusive arbitration requirement. Accordingly, we conclude that the MAA is lawful under *Boeing* Category 1(a).

ORDER

The complaint is dismissed.

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

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[6] Claims excluded from coverage by the MAA are "claims for benefits under unemployment compensation laws or workers' compensation laws."

[7] The arbitration agreement in *Anderson Enterprises* contained a savings clause providing that "[c]laims may be brought before an administrative agency . . . . Such administrative claims include without limitation claims or charges brought before . . . the National Labor Relations Board." 369 NLRB No. 70, slip op. at 1. The arbitration agreement in *Briad Wenco* contained a savings clause providing that "[n]othing 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 . . . the National Labor Relations Board." 368 NLRB No. 72, slip op. at 1.

[8] See *Haynes Building Services, LLC*, 369 NLRB No. 2, slip op. at 3 (2019) (agreement at issue "did not contain a savings clause preserving employees' right to file charges with the Board or with administrative agencies generally"); *E. A. Renfroe & Co.*, 368 NLRB No. 147, slip op. at 3 (2019) (agreement at issue "[did] not contain a savings clause preserving employees' right to file charges with the Board or, more generally, with administrative agencies"); *Beena Beauty Holding, Inc. d/b/a Planet Beauty*, 368 NLRB No. 91, slip op. at 2 (2019) (arbitration agreement at issue "contained no exception for filing charges with the Board or other administrative agencies") .

[9] We have found, however, that where coverage language in an arbitration agreement specifically and expressly subjects claims arising under the National Labor Relations Act to final and binding arbitration, a generally worded savings clause does not sufficiently safeguard employees' right of access to the Board. See *GC Services, Inc.*, 369 NLRB No. 133 (2020).