

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-1238

September Term, 2017

FILED ON: JANUARY 29, 2018

GRILL CONCEPTS SERVICES, INC., D/B/A THE DAILY GRILL,
PETITIONER/CROSS-RESPONDENT

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT/CROSS-PETITIONER,

AND

UNITE HERE LOCAL 11,
INTERVENOR

On Petition for Review and Cross-Application for Enforcement
of an Order of the National Labor Relations Board

Before: HENDERSON and WILKINS, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

J U D G M E N T

The petition for review and the cross-petition for enforcement were considered on the record and the briefs (including the supplemental briefs) filed by the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The Court has accorded the issues full consideration and determined that they do not warrant a published opinion. For the reasons stated below, it is

ORDERED and **ADJUDGED** that the cross-petition for enforcement is granted in part and the petition for review is remanded.

In the order on review, the National Labor Relations Board (Board) found that Petitioner Grill Concepts Services, Inc. (Company) committed multiple unfair labor practices prohibited by the National Labor Relations Act (Act). *Grill Concepts Servs., Inc.*, 364 NLRB No. 36 (2016). Among them: some of the Company's employee handbook rules violated section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), under the then-Board test pursuant to which employee handbook rules are considered unfair labor practices if employees can "reasonably construe" the rules as prohibiting the exercise of protected labor activity, *see Martin Luther Mem'l Home, Inc.*, 343

NLRB 646, 647 (2004). On December 14, 2017, the Board overruled the “reasonably construe” test and announced a new standard to take its place. *Boeing Co.*, 365 NLRB No. 154 (2017). We now grant summary enforcement of those decisions both unchallenged by the Company and of which the Board continues to seek enforcement. We remand the remainder of the case to the Board.

We grant summary enforcement of five Board decisions. The Board found the Company violated section 8(a)(1) by: (1) impliedly threatening an employee with job loss unless he ceased supporting the union; (2) interrogating employees about their union activities; (3) creating the impression that employees’ union activity was under surveillance; (4) soliciting grievances; and (5) maintaining a handbook rule prohibiting employees from “solicit[ing] or distribut[ing] literature concerning outside activities or merchandise while in their work area or while on-duty.” Joint Appendix (JA) 529, 554–55. The Company did not challenge any of these Board decisions in its petition for review and, because none of them are affected by the new *Boeing* standard, the Board continues to seek enforcement thereof. *See* NLRB Supp. Br. 7. “Because [the Company] does not contest the Board’s determinations . . . we summarily enforce the Board’s findings and order on these charges.” *Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 765 (D.C. Cir. 2012).

Seven Board decisions—five challenged in the Company’s petition, two unchallenged—rest on the Board’s now-overruled “reasonably construe” test. Six concluded that rules included in the Company’s employee handbook violated the Act: (1) the “Team Member Relations/Positive Culture” rule; (2) the “Timekeeping” rule; (3) the “Team Member Conduct While Representing the Restaurant” rule; (4) the “Online Communications” rule; (5) the “Progressive Discipline: Gross Misconduct (confidentiality)” rule; and (6) the “Progressive Discipline: Gross Misconduct (investigations)” rule. JA 529, 548–55. One concluded that a rule contained in the Company’s Dispute Resolution Arbitration Agreement that subjects “employment-related disputes” to arbitration violated the Act.¹ JA 529, 559 (rule violated section 8(a)(1) “because employees would reasonably believe it encompasses Board charges”). Because the Board’s decisions regarding these seven matters rest on the now-replaced “reasonably construe” test, the Board no longer seeks enforcement thereof and instead seeks remand to reconsider them in light of the new *Boeing* test. *See* NLRB Supp. Br. 5. We accordingly remand. *See NLRB v. Food Store Emps. Union, Local 347*, 417 U.S. 1, 10 n.10 (1974) (“[A] court reviewing an agency decision following an intervening change of policy by the agency should remand”); *Williston Basin Interstate Pipeline Co. v. FERC*, 165 F.3d 54, 62 (D.C. Cir. 1999) (“[W]hen an agency changes a policy or rule underlying a decision pending review, the agency should” move to remand or explain how decision can be independently sustained (internal quotation omitted)).

We also remand the remaining Board decisions the Company challenged in its petition for review. Specifically, we remand the Board’s determinations that the Company violated the Act by (1) prohibiting union buttons; (2) promising employees several benefits to discourage union support; and (3) maintaining the Code of Ethics: Relationships with Outside Parties employee handbook rule. JA 529–31. Although these determinations are unaffected by the new *Boeing* test, we believe it would waste judicial resources to hear and decide them now while, at the same time,

¹ Another challenge regarding the Dispute Resolution Arbitration Agreement—the enforceability of its class-action waiver—was severed from this case on March 30, 2017 and held in abeyance pending Supreme Court review of the issue. *See Grill Concepts Services v. NLRB*, Case Nos. 17-1100, 17-1121. This order does not affect that case.

a substantial part of the case is remanded. *See Williams v. First Gov't Mortg. & Inv'rs Corp.*, 176 F.3d 497, 500 (D.C. Cir. 1999) (noting general “desire to avoid deciding [the] case piecemeal”); *Linder v. Dep't of Def.*, 133 F.3d 17, 23 (D.C. Cir. 1998) (stating, in different context, policy against “piecemeal litigation” because it may lead to “mischief of economic waste and of delayed justice” (internal quotation omitted)).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See Fed. R. App. P. 41(b); D.C. Cir. R. 41.*

PER CURIAM

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk