

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

ANDERSON ENTERPRISES, INC. d/b/a ROYAL MOTOR
SALES

and

Case 20-CA-187567

ISIDRO MIRANDA, an Individual

COUNSEL FOR THE GENERAL COUNSEL'S
BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

This case was presented to Administrative Law Judge Lisa D. Thompson by Joint Motion to Submit a Stipulated Record on June 2, 2017. The Joint Motion was granted on June 16, 2017. The primary issue in this case is a limited one: whether the language of Respondent's Binding Arbitration Agreement (BAA or Agreement) (Joint Exhibit N) and the language of its Alternative Dispute Resolution Policy (ADR Policy) (Joint Exhibit O), which preceded the BAA, would reasonably be read by an employee to limit or prohibit the filing of unfair labor practice charges with the National Labor Relations Board (Board) in violation of Section 8(a)(1) of the National Labor Relations Act (Act).¹ Despite the BAA's and ADR Policy's language purporting to exclude Board charge processes from the scope of their reach, Board law demonstrates that the BAA and ADR Policy would indeed reasonably be read by an employee to limit or prohibit pursuit of Board charges. The BAA and ADR Policy therefore interfere with important Section 7 rights and violate the Act as alleged.

II. FACTS

Respondent is a corporation with a principal place of business in San Francisco, California, where it is engaged in the retail sale and service of automobiles. (Joint Motion, ¶ 2(a)).

¹ As certain Exhibits in the record indicate (i.e., Joint Exhibits A & C), the General Counsel at one time alleged that the ADR Policy (Joint Exhibit O) violates the Act for the additional reason that it precludes employees from pursuing employment-related claims on a collective or class basis in any forum. *See, e.g., Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014). That claim, however, was withdrawn and placed in administrative abeyance pending an anticipated ruling on the viability of the theory by the Supreme Court. *E.g., NLRB v. Murphy Oil USA, Inc.*, 137 S. Ct. 809 (Mem.) (Jan. 13, 2017) (granting certiorari in relation to the Fifth Circuit's decision at 808 F.3d 1013 (2015)). Because the pending Supreme Court cases, however, will have no impact on the theory that the Agreement is reasonably read as interfering with employee access to Board processes, the Counsel for the General Counsel has for now advanced this matter on that lone theory.

A. RESPONDENT'S BINDING ARBITRATION AGREEMENT

Since at least May 3, 2016, and continuing to date, Respondent has required its employees to sign and agree to its BAA as a condition of employment and continued employment. (Joint Motion, ¶ 4(b)). The BAA would be reasonably read by an employee to limit or prohibit the right to file claims with the Board because it is ambiguous, suggests that an employee cannot file a Board charge with or on behalf of other employees, and suggests that filing a Board charge is futile. The relevant portions of the BAA are set forth below:

"I also acknowledge that the Company utilizes a system of alternative dispute resolution which involves binding arbitration to resolves all disputes which may arise out of the employment context. Because of the mutual benefits (such as reduced expense and increased efficiency) which private binding arbitration can provide both the Company and myself, I and the Company both agree that any claim, dispute, and/or controversy that either party may have against one another (including, but not limited to, any claims of discrimination and harassment, whether they be based on the California Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as amended, as well as all other applicable state or federal laws or regulations) which would otherwise require or allow resort to any court or other governmental dispute resolution forum between myself and the Company (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory, or equitable law, or otherwise, (with the sole exception of claims arising under the National Labor Relations Act, which are brought before the National Labor Relations Board. .)

* * *

In order to provide for the efficient and timely adjudication of claims, the arbitrator is prohibited from consolidating the claims of others into one proceeding. This means that the an arbitrator will hear only my individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group of employees in one proceeding. **Thus, the Company has the right to defeat any attempt by me to file or join other employees in class, collective, representative, or joint action lawsuit or arbitration (collectively "class claims").** I further understand that I will not be disciplined, discharged, or otherwise

retaliated against for exercising my rights under Section 7 of the National Labor Relations Act, including but not limited challenging the limitation on a class, collective, representative, or joint action. **I understand and agree that nothing in this agreement shall be construed so as to preclude me from filing any administrative charge with, or participating in any investigation of a charge conducted by, any government agency. however, after I exhaust such administrative process/ investigation, I understand and agree that [I] must pursue any such claims through this binding arbitration procedure.** ” (Joint Exhibit N) (emphasis added).

The BAA’s opening statement asserts, without limitation, that binding arbitration will be used “to resolve all disputes which may arise out of the employment context.” The BAA then proceeds to provide an exhaustive list of covered claims, including “all other applicable state or federal laws or regulations.” It is not until deeper in the document, and separate from the initial broad pronouncement, that the BAA qualifies its application to all employment-related disputes by stating, parenthetically, the “exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board.” However, the BAA bars employees from bringing any claims by “class, collective, representative, or joint action lawsuit.” Although this prohibition is followed by a statement that employees will not be retaliated against for exercising their “rights under Section 7 of the National Labor Relations Act,” there is no mention of what those rights are. Finally, the BAA informs employees that they are not precluded from filing “any administrative charge with, or participating in any investigation of a charge conducted by, any government agency,” but even if they do so, after they “exhaust such administrative process/investigation,” employees must still pursue any claims against Respondent through individual binding arbitration according to the terms of the BAA.

B. RESPONDENT’S ALTERNATIVE DISPUTE RESOLUTION POLICY

Prior to the BAA, Respondent required its employees to sign and agree to its ADR Policy as a condition of employment and continued employment. (Joint Motion, ¶ 5(a)). Although the

ADR Policy has been replaced, Respondent can enforce the ADR Policy against any employee who signed it, at any time. (Joint Motion, ¶ 5(a)). In fact, Respondent enforced the ADR Policy against the Charging Party on October 26, 2016 by asserting the ADR Policy as an affirmative defense that should bar the Charging Party's lawsuit filed against Respondent in San Francisco Superior Court. (Joint Motion, ¶ 5(b)). As such, Respondent continues to maintain the ADR Policy.

Like BAA, the ADR Policy would be reasonably read by an employee to limit or prohibit the right to file claims with the Board because it is ambiguous, requires specialized legal knowledge to understand, and suggests that an employee cannot file a Board charge with or on behalf of other employees. The relevant portions of the ADR Policy are set forth below:

The Dealership utilizes a system of alternative dispute resolution which involves binding arbitration to resolve all disputes which may arise out of the employment context. Because of the mutual benefits (Such as reduced expense and increased efficiency) which private binding arbitration can provide both you and the Dealership, you and the Dealership (collectively referred to as the "parties") both agree that **any claim, dispute, and/or controversy that either party may have against one another** (including, without limitation, 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, and state statutes, if any, addressing the same or similar subject matters, and all other state statutory and common law claims) which would otherwise require or allow resort to any court or other governmental dispute resolution forum between you and the Dealership (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) **arising from, related to, or having any relationship or connection whatsoever with you seeking employment with, employment by, or other association with the Dealership, whether based on tort, contract, statutory, or equitable law, or otherwise, (with the exception of workers compensation and unemployment insurance claims, or any other claims that by law are not resolvable through final and binding arbitration) shall be**

submitted to and determined exclusively by binding arbitration. Claims may be brought before an administrative agency but only to the extent 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 National Labor Relations Board.

* * *

[T]here will be no right or authority for any dispute to be brought, heard, or arbitrated as a class or collective action. Notwithstanding this Class Action Waiver, you and the Dealership agree that you do not waive your right under Section 7 of the National Labor Relations Act to file a class or collective action in court and that you will not be disciplined or threatened with discipline if you do so. **The Dealership, however, may lawfully seek enforcement of the Class Action Waiver contained in this Policy under the Federal Arbitration Act and seek dismissal of any such claims.** (Joint Exhibit O) (emphasis added).

Like the BAA, the ADR Policy's opening statement asserts, without limitation, that binding arbitration will be used "to resolve all disputes which may arise out of the employment context." The ADR Policy then proceeds to provide an exhaustive list of covered claims, including claims "which would otherwise require or allow resort to any court or other governmental dispute resolution forum." Eventually, the ADR Policy states generally that "claims may be brought before an administrative agency," including the National Labor Relations Board, but only if the law allows it "notwithstanding the existence of an agreement to arbitrate." The ADR Policy further instructs employees that they have "no right for any dispute to be brought, heard, or arbitrated as a class or collective action." Although the ADR Policy informs employees that they are not waiving their "right under Section 7 of the National Labor Relations Act to file a class or collective action in court," it warns employees that should they do so Respondent will seek to enforce the ADR Policy and have their class claims dismissed.

III. ARGUMENT

An arbitration policy violates Section 8(a)(1) of the Act if the policy would be reasonably

construed by an employee to limit or prohibit the right to file claims with the Board. *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enf'd. 255 Fed.Appx. 527 (D.C. Cir. 2007). When an arbitration policy, such as Respondent's BAA and ADR Policy, is alleged to interfere with access to the Board, the Board's task is to determine how an employee would reasonably interpret the policy. *See id.* The Board recognizes that the average employee does not have legal expertise and "cannot be expected to examine company rules from a legal standpoint." *SolarCity Corp.*, 363 NLRB No. 83, slip op. at 6 (Dec. 22, 2015). Further, any ambiguities in an arbitration policy must be construed against the drafter of the policy. *See Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 224 (1995).

A policy's explicit exclusion of Board claims from its arbitration requirement does not render the policy lawful. *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enf'd. 255 Fed.Appx. 527 (D.C. Cir. 2007). To be effective, such "saving clauses" must clearly inform employees about the precise nature of their rights and not deter them from exercising Section 7 rights for fear of violating an ambiguous policy. *See SolarCity Corp.*, above, at 6 (2015). Indeed, the Board has routinely held arbitration agreements with explicit exclusions of Board claims to be unlawful after considering how such agreements would reasonably be understood by employees. *Id.* (holding that despite an explicit exception of "claims brought before the National Labor Relations Board," arbitration policy was unlawful); *Bloomington's, Inc.*, 363 NLRB No. 172, slip op. at 4-5 (Apr. 29, 2016) (holding arbitration agreement expressing that "claims under the National Labor Relations Act are not subject to arbitration" still unlawful); *Ralph's Grocery Co.*, 363 NLRB No. 128, slip op. at 2-3 (Feb. 23, 2016) (same); *Lincoln Eastern Management*, 364 NLRB No. 16, slip op. at 2 (May 31, 2016) (same).

In addition to making clear that employees may file charges with the Board individually,

mandatory arbitration policies that prohibit class claims must also make clear that employees may file charges with the Board “with or on behalf of other employees.” *See Solar City*, above, at 7-8; *Labor Ready Southwest, Inc.*, 363 NLRB No. 138, slip op. at fn 2 (Feb. 26, 2016). Furthermore, arbitration policies that would be reasonably construed by an employee to suggest that even a charge filed with the Board may ultimately have to be resolved by arbitration are also unlawful. *See, e.g. Professional Janitorial Services of Houston*, 363 NLRB No. 35, slip op. at 1-2 (Nov. 24, 2015) (holding policy providing that employees could file claims with the Board was unlawful where it also stated “if such an agency [i.e., the Board] completes its processing of your action against the Company, you must use arbitration if you wish to pursue further your legal rights, rather than filing a lawsuit on the action.”). As explained in *Ralph’s Grocery Co.*, such provisions interfere with employees’ rights by “creating the impression that [filing charges with the Board] would be futile.” *Ralph’s Grocery Co.*, above, at 3.

A. RESPONDENT’S BINDING ARBITRATION AGREEMENT WOULD BE REASONABLY INTERPRETED BY EMPLOYEES TO LIMIT OR PROHIBIT THEM FROM FILING CLAIMS WITH THE BOARD.

The BAA does not make clear that employees retain the unlimited right to file unfair labor practice charges with the Board in spite of the policy’s general arbitration requirement. The BAA initially provides that binding arbitration must be used to resolve “all disputes which may arise out of the employment context,” without limitation. An employee would reasonably read this broad language to prohibit filing unfair labor practice charges with the Board, since Board charges typically arise in the employment context, and the BAA requires all such disputes to be resolved exclusively by arbitration. Although a later provision makes an exception for Board claims, an employee would reasonably be confused as to which of the apparently-contradictory provisions is controlling. The conflicting provisions create an ambiguity that could reasonably

lead employees to believe that their right to file unfair labor practice charges with the Board is limited or prohibited. This ambiguity must be construed against Respondent.

Moreover, the BAA provides that the “Company has the right to defeat any attempt by [an employee] to file or join other employees in a class, collective, representative, or joint action lawsuit.” As there is no language excepting Board charges from Respondent’s unqualified “right to defeat any” collective legal action, an employee would reasonably conclude that the bar on collective action includes a bar on filing Board charges with or on behalf of other employees. Thus, even assuming the BAA is interpreted to permit an employee to access the Board individually, the policy is unlawful because it suggests that the employee cannot do so in concert with other employees.

Additionally, although the BAA informs employees that they are not precluded from filing administrative charges with government agencies, it indicates that there is no point in doing so because even after they “exhaust” the administrative procedure, they must still use binding arbitration to resolve any claims against Respondent. Employees, who are likely to be unfamiliar with Board law, would reasonably read this language to mean that even if they initially receive assistance from the Board, their claim must ultimately be resolved through arbitration under the BAA.

In all, Respondent’s BAA is ambiguous and confusing as to whether employees are permitted to file charges with the Board, whether Board claims can be filed with or on behalf of other employees, and whether Board charges will ultimately be arbitrated like any other employment-related claim. Due to the ambiguity, Respondent’s employees would reasonably read the BAA to limit or prohibit their ability to file claims with Board. Thus, Respondent’s promulgation and maintenance of the BAA violates Section 8(a)(1) of the Act.

B. RESPONDENT'S ALTERNATIVE DISPUTE RESOLUTION POLICY WOULD BE REASONABLY INTERPRETED BY EMPLOYEES TO LIMIT OR PROHIBIT THEM FILING CLAIMS WITH THE BOARD.

Like the BAA, the ADR Policy also does not make clear that employees retain the unlimited right to file unfair labor practice charges with the Board in spite of the policy's general arbitration requirement. The ADR Policy provides that binding arbitration must be used for "all disputes which may arise out of the employment context," without limitation. Again, an employee would reasonably read this broad language to limit or prohibit the filing of unfair labor practice charges with the Board. Although a later provision states that claims may be brought before an administrative agency if the law permits it, and specifically names the National Labor Relations Board, an employee would reasonably be confused as to which provision was controlling. The conflicting provisions create an ambiguity that would reasonably lead employees to believe that their right to file unfair labor practice charges with the Board is limited or prohibited. This ambiguity must be construed against Respondent.

Additionally, the ADR Policy's exceptions require specialized legal knowledge to understand. The ADR Policy provides exceptions for claims that may be brought before administrative agencies, including the Board, "but only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate." The average employee is not likely to have the familiarity with Board law necessary to know that she has an unlimited right to file claims with the Board "notwithstanding an agreement to arbitrate." Unsurprisingly, the Board has held that policies with exceptions similar to those stated in Respondent's ADR Policy would likely restrain employees from filing charges with the Board out of fear that doing so would violate the policy. *E.g. SolarCity Corp.*, 363 NLRB No. 83, slip op. at 6 (holding a policy's exclusion of claims "expressly excluded from arbitration by statute" required specialized legal knowledge to understand). Indeed, the Board has specifically held a

policy's exclusion of administrative claims "if, and only if, applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate" could reasonably be understood by employees to limit or prohibit their right to file Board charges. *ISS Facility Services, Inc.*, 363 NLRB No. 160, slip op. at 3 (Apr. 7, 2016). This language is virtually identical to that in Respondent's policy.

Moreover, even if the ADR Policy makes clear that an employee has the right to access the Board individually, the policy is unlawful because it suggests that the employee cannot do so in concert with other employees. Respondent's ADR Policy states "there will be no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action." An employee would reasonably conclude that the bar on "collective action" includes a bar on filing Board charges with or on behalf of other employees. Although the policy goes on to say that employees will not be disciplined for attempting to file class or collective actions, its statement that the Respondent "may lawfully seek enforcement of the Class Action Waiver and seek dismissal of any such claims" strongly suggests that any attempts at collective action would be futile.

In all, Respondent's ADR Policy is ambiguous and confusing as to whether employees are permitted to file charges with the Board and whether Board charges may be filed with or on behalf of other employees. Due to the ambiguity, Respondent's employees would reasonably read the ADR Policy as requiring them to submit their Board claims to arbitration. Thus, Respondent's maintenance of the ADR Policy violates Section 8(a)(1) of the Act.

C. RESPONDENT'S AFFIRMATIVE DEFENSE THAT REVIEWING COURTS HAVE REJECTED THE BOARD'S RATIONALE FOR THE ALLEGED VIOLATION IS INCORRECT.

In Respondent's Answer to the Second Amended Complaint, it argued that the BAA and

ADR Policy should not be found unlawful because “[t]here is no legal basis for either this proceeding or the substantive allegations of the Complaint, inasmuch as courts which have reviewed cases relying on the rationale advanced by Counsel for General Counsel in this case have denied enforcement of the NLRB’s position that individual mandatory arbitration agreements containing class action waivers constitute an unfair labor practice.” (Joint Exhibit M). The assertion that reviewing courts have held there is no legal basis for finding arbitration agreements unlawful under the Act is an incorrect characterization of the law. Reviewing courts have not rejected the Board’s rationale that arbitration policies violate Section 8(a)(1) of the Act if an employee would reasonably read the policy to limit or prohibit filing claims with the Board. In fact, in *D.R. Horton*, the Fifth Circuit affirmed the Board’s holding that the Employer’s policy violated Section 8(a)(1) because “an employee would reasonably read the agreement as also precluding unfair labor practice charges.” *D.R. Horton, Inc. v NLRB*, 737 F.3d 344, 363-64 (5th Cir. 2013) citing *U-Haul Co. of California*, 347 NLRB 375 (2006).

Furthermore, even if circuit courts of appeal had rejected the Board’s rationale, an Administrative Law Judge must apply established Board precedent that the Supreme Court has not reversed. *Iowa Beef Packers*, 144 NLRB 615, 616 (1963); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984), *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enf’d. 640 F.2d 1017 (9th Cir. 1981); *Herbert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993); *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004). As discussed above, there is ample Board precedent demonstrating that Respondent’s BAA and ADR Policy are unlawful because employees would reasonably read the policies to limit or prohibit them from filing charges with the Board and to require them to individually arbitrate their Board claims instead.

IV. CONCLUSION

For the reasons discussed above, Counsel for the General Counsel urges the Administrative Law Judge to find that Respondent is violating Section 8(a)(1) of the Act by maintaining the BAA and ADR Policy because employees would reasonably read the policies as barring them from pursuing Board charges individually and from pursuing Board charges with or on behalf of a group of co-workers. Accordingly, Counsel for the General Counsel seeks an order requiring Respondent to cease and desist from maintaining and enforcing those portions of the BAA and ADR Policy that may be reasonably read to prohibit or restrict employees' right to file Board charges, rescind the unlawful portions of the BAA and ADR Policy, notify all current and former employees subject to the BAA and/or ADR Policy that it has rescinded the unlawful provisions, and post a remedial "Notice to Employees" at all locations where the BAA and/or ADR Policy have been in effect.

DATED AT San Francisco, California this 31st day of July, 2017.

Respectfully Submitted,



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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
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ANDERSON ENTERPRISES, INC. DBA ROYAL
MOTORS SALES

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Case 20-CA-187567

ISIDRO MIRANDA, an Individual

**AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO
THE ADMINISTRATIVE LAW JUDGE**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on July 31, 2017, I served the above-entitled document(s) by **certified mail** upon the following persons, addressed to them at the following addresses:

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