

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 32

ANDERSON ENTERPRISES, INC. DBA ROYAL  
MOTOR SALES

Respondent

and

Case: 20-CA-187567

ISIDRO MIRANDA, an Individual

Charging Party

**BRIEF OF RESPONDENT ANDERSON ENTERPRISES, INC DBA ROYAL MOTOR  
SALES**

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ENTERPRISES, INC DBA ROYAL MOTOR SALES*

## I. INTRODUCTION

This is a baseless case that requires the Administrative Law Judge to assume that the Respondent's employees are not merely unsophisticated, but illiterate. This is unfair to both Respondent and to its Employees. Fundamentally, the underlying claim by the General Counsel is that an arbitration agreement that expressly states that "claims may be brought before an administrative agency" and specifically states NLRB charges may be brought—even including a URL to help employees obtain access to the Board—in fact "restrains and coerces" employees from exercising their NLRA rights. No reasonable person can interpret an arbitration agreement that tells employees they are free to file Board charges notwithstanding the agreement as forbidding or discouraging the same.

The General Counsel of the National Labor Relations Board ("General Counsel") alleges that Anderson Enterprises, Inc. *dba* Royal Motor Sales's ("Royal Motors" or "Respondent's") Arbitration Agreement ("AA") entered into voluntarily by Charging Party Isidro Miranda ("Miranda") on June 1, 2011, as well as the arbitration agreements currently in place at Royal Motors violate the National Labor Relations Act ("NLRA" or the "Act") under the theory articulated in *D.R. Horton*, 357 NLRB No. 184 (2012), *enf. denied D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), *reh 'g denied* (5th Cir. Apr. 17, 2014); and *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. (Oct. 28, 2014). This issue has been stayed pending Supreme Court review of *Murphy Oil*, which the parties expect to be dispositive on this issue. However, the General Counsel further alleges that the Company's AAs similarly violated the Act because the AAs allegedly interfere with employees' access to the Board and its processes because employees could reasonably conclude that these provisions prohibit or restrict their right to file unfair labor practices with the Board. However, this is flat out false—they do the opposite. They

are not merely silent—they actively tell employees they are free to file NLRB charges. The Administrative Law Judge ("ALJ") must recognize that the arbitration agreements do not seek to regulate or affect core Section 7 rights.

Even if the Board's position in *D.R. Horton* and *Murphy Oil* is adhered to despite the many other federal and state court decisions rejecting the Board's position, the AAs at issue in this case are different from the mandatory arbitration agreements at issue in *D. R. Horton* and *Murphy Oil* because these AAs explicitly allow employees to file charges with the Board as well as other administrative agencies. This is an important distinction that removes the AAs from the "small percentage" of arbitration agreements encompassed by *D.R. Horton*, 357 NLRB No. 184, slip op. at 12.

With respect to Counsel for the General Counsel's theory that the AAs interfere with employees' rights to file charges with the Board, the theory must fail because the AAs *expressly* permit employees to file claims and charges with the Board and, as a result, employees could not reasonably construe the language of the AAs to prohibit the employees from filing or cooperating in the processing of unfair labor practices with the Board. In fact, the opposite is true. The AA Miranda signed specifically excludes "without limitation" administrative "claims or charges brought before the ... [Board]." The latter AA similarly excludes "claims arising under the [NLRA] which are brought before the [BOARD]." Any confusion created by the existence of the AAs as to whether employees may file charges or claims with the Board is alleviated by the explicit provisions of the AAs.

Further, a core allegation of the Complaint, that the AA violates the Act because it contains a class/collective action waiver, is time-barred under Section 10(b) of the Act. As the

parties stipulated, Mr. Miranda signed an arbitration agreement in 2011. The charge was filed in 2016, long after the Section 10(b) period expired. To the extent that the Complaint in this case and any potential remedies rest on evidence that the AA is unlawful because it was entered into by Mr. Miranda as a condition of his employment, that allegation is time-barred.

For all of these reasons, Respondent respectfully submits that the Complaint should be dismissed in its entirety.

## II. Statement of Facts

Respondent is engaged in the retail sale and service of vehicles in San Francisco. The AAs are two dispute resolution procedures providing for arbitration of, *inter alia*, employment-related claims arising out of or related to Employee's employment, including termination of employment. The AAs provides that all covered disputes will be resolved only by an arbitrator through final and binding arbitration. One of the AAs was applicable when Isidro Miranda, the charging party, signed it in 2011 (see Ex. A to Complaint) and one was adopted at a later point (see Ex. B to Complaint.) While they differ slightly in wording, the relevant text in the earlier AA reads:

I. 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 Equal Employment Opportunity Commission ([www.eeoc.gov](http://www.eeoc.gov)), the U.S. Department of Labor ([www.dol.gov](http://www.dol.gov)), or the National Labor Relations Board ([www.nlr.gov](http://www.nlr.gov)). Nothing in this Policy shall be deemed to preclude or excuse a party from bringing an administrative claim before any agency in order to fulfill the party's obligation to exhaust administrative remedies before making a claim in arbitration.

The earlier AA then goes on to read:

4. In arbitration, the parties will have the right to conduct civil discovery, bring motions, and present witnesses and evidence as provided by California's procedural rules. However, there will be no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action ("Class Action Waiver"). Regardless of anything else in this Policy and/or any rules or procedures that might otherwise be applicable by virtue of this Policy or by virtue of any arbitration organization rules or procedures that now apply or any amendments and/or modifications to those rules, the interpretation, applicability, enforceability or formation of this Class Action Waiver, including, but not limited to any claim that all or part of this Class Action Waiver is void or voidable, may be determined only by a court and not by an arbitrator. Notwithstanding any other clause contained in this Policy, this Class Action Waiver shall not be severable from this Policy in any case in which the dispute to be arbitrated is brought 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 the 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.

The latter AA, which Charging Party did not sign, reads, in relevant part:

I also acknowledge that the Company 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 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, claims for medical and disability benefits under the California Workers' Compensation Act, and Employment Development Department claims) shall be submitted to and determined exclusively by binding arbitration. 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 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 a 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 to 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 from participating in any investigation of a charge conducted by, any government agency such as the Department of Fair Employment and Housing and/or the Equal Employment Opportunity Commission; however, after I exhaust such administrative process/investigation, I understand and agree that I must pursue any such claims through this binding arbitration procedure. I acknowledge that the Company's business and the nature of my employment in that business affect interstate commerce. I

### III. ARGUMENT

*D.R. Horton* and *Murphy Oil* are wrongly decided. The Board has far exceeded its authority and administrative expertise under the NLRA and has been rejected by virtually every court that has considered it and Respondent expects that the Supreme Court (and/or a majority created by incoming Board members) will reject it likewise. However, given the parties' stipulation, the analysis here is limited to the "U-Haul issue" of whether the AAs "would be reasonably read by employees to prohibit filing unfair labor practice charges with the Board and thus violates Section 8(a)(1) of the Act.

#### **A. The AAs Explicitly Allow Employees to File Charges with the Board and Participate in Board Processes.**

The General Counsel's allegations that the AAs interfere with employees' right to file charges with the Board should be dismissed because, contrary to the General Counsel's contention, an employee would not reasonably conclude that the language in the AAs prohibits or restricts his or her right to file unfair labor practice charges with the Board.

If a work rule does not explicitly restrict activities protected by Section 7 of the Act, the Board will only find the rule or policy unlawful if (1) employees would reasonably construe the language to prohibit protected Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 activity. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). The General Counsel, as far as Respondent understands the Amended Complaint at this point, does not contend that the AAs explicitly restrict employees from filing charges with the Board, that Respondent promulgated the AAs in response to union activity, or that Respondent applied the AAs to restrict employees' ability to file charges with the Board or to participate in Board processes. As a result, in

evaluating whether the maintenance of the AAs was lawful, the relevant inquiry is whether an employee would reasonably construe the AAs to prohibit him or her from filing charges with the Board or participating in Board processes.

Contrary to the General Counsel's assertions, the AAs do not interfere with employees' rights to file charges with the Board and participate in Board processes. Instead, both of the AAs explicitly *authorize* employees to file charges with the Board as both agreements specifically exempt charges with the Board from the coverage of the AAs. *Lutheran Heritage*, 343 NLRB at 646 (work rules cannot be read in isolation and must be given a reasonable reading).

Even if the Board concluded that the Revised AA (and/or the AA) were ambiguous as to whether employees could file claims with the Board or access the Board's processes, any such ambiguity was subsequently cured by the AAs' identical explicit statements *permitting* employees to file such claims and charges with the Board. In lieu of revising the AAs every time another court decision issued addressing the enforceability of arbitration agreements, both of the AAs generally exempt from their coverage claims and charges filed with administrative agencies that permit such claims to be filed notwithstanding the AAs. Both of the AAs made it crystal clear that the Board is one of those administrative agencies and that employees are permitted to file such charges notwithstanding the AAs, stating that "claims may be brought before an administrative agency... includ[ing] without limitation claims or charges brought before ... the [Board]." Far from interfering with employees' Section 7 rights, the AAs explicitly reference the employees' right to file charges with the Board served to foster and protect the employees' Section 7 rights by reminding them of their right to file such charges and, in the case of one of the AAs, providing the NLRB's web address to assist them in doing so. *See, e.g., Tiffany & Co.,*

Case No. 01-CA-111287, at 3-4 (Aug. 5,2014) (finding a confidentiality clause lawful when it expressly excluded protected concerted activity from its coverage); *see also Cox Communications, Inc.*, Case No. 17-CA-087612, at 5 (Div. of Adv.) (Oct. 19,2012) (finding a social media policy lawful because it contained a clause expressly stating that it was not intended to interfere with employees' Section 7 activity).

Because both of the AAs expressly permit employees to file charges with the Board, a reasonable employee reading the AAs could not conclude -or even suspect -that he or she would be prohibited from filing charges with the Board or participating in the Board's processes.

**B. The Complaint Is Barred by Section 10(b).**

Section 10(b) states that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. § 160(b). Mr. Miranda entered into the AA in 2011, as Exhibit A to the Complaint states. He did not file her charge until October 2016, *years* after entering into the AA. Thus, the allegation that requiring Mr. Miranda to execute the AA was an unfair labor practice is barred by Section 10(b) of the Act.

Counsel for the General Counsel cannot avoid this Section 10(b) problem by arguing that the mere maintenance of the AAs constitutes a violation of the Act. Unlike an employer policy or work rule that is alleged to be facially unlawful so that its mere maintenance constitutes a violation of the Act, the theory of a violation with respect to the AAs depends on the circumstances in which the agreement was entered into. The General Counsel's theory of a violation cannot possibly be that all arbitration agreements that contain a class or collective action waiver are facially unlawful or necessarily restrain or coerce employees from filing Board charges.

In this sense, the timeliness of the charge with respect to Respondent's maintenance of the AAs is analogous to a collective bargaining agreement that is alleged to be unlawful based on the circumstances existing at the time the agreement was entered into. In *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411 (1960), the Supreme Court held that "a finding of violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of the § 10(b) proviso." *Id.* at 422. The allegation in that case was that a collective bargaining agreement containing a union security clause was unlawful because the union did not represent a majority of the employees in the bargaining unit at the time the agreement was entered into. There was no dispute as to that fact before the Supreme Court -the union did not challenge that it lacked majority status at that time. *Id.* at 412 n.1. The charge was filed more than six months after the agreement was entered into, and the complaint alleged that the continued enforcement of the agreement violated the Act. The Supreme Court held that this complaint was barred by Section 10(b), reasoning that:

Where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice . . . the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

*Id.* at 416-17.

In this case, the complaint alleges that Respondent violated the Act by maintaining the AAs. These allegations depend on the facts and circumstances at the time the AAs were entered into. Because Mr. Miranda entered into the AA outside the Section 10(b) period, the Complaint

allegation with respect to Respondent's maintenance of the AA is, as in *Local Lodge No. 1424*, an effort to revive a now "legally defunct unfair labor practice." *Id.* at 417. The Complaint should be dismissed on this basis.

#### IV. CONCLUSION

For the foregoing reasons, Respondent respectfully urges the Administrative Law Judge to dismiss the Complaint in its entirety.

Respectfully Submitted,  
FINE, BOGGS & PERKINS, LLP

  
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Roman Zhuk  
Counsel for Respondent Anderson Enterprises, Inc.

Dated: July 31, 2017

Respondent's Brief  
Case 20-CA-187567

**CERTIFICATE OF SERVICE**

I hereby certify that on this day, I served the forgoing BRIEF OF RESPONDENT ANDERSON ENTERPRISES, INC DBA ROYAL MOTOR SALES by mail on the following parties:

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This 31st day of July 2017.



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