

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

SOLARCITY CORP.

and

Case 32-CA-180523

RAVI WHITWORTH, an Individual

**COUNSEL FOR ACTING GENERAL COUNSEL'S
ANSWERING BRIEF IN SUPPORT OF THE ADMINISTRATIVE
LAW JUDGE'S DECISION AND IN RESPONSE TO
RESPONDENT'S EXCEPTIONS**

On September 8, 2017, Administrative Law Judge Eleanor Laws (the Judge) issued her decision in this case, in which she found that Respondent SolarCity Corp. maintained a series of mandatory arbitration agreements that unlawfully interfered with employees' access to the Board.¹ The Judge's findings and conclusions with respect to these matters are fully supported by and consistent with existing Board law and should be affirmed.

I. ISSUES PRESENTED

On October 27, 2017, Respondent filed its exceptions to the Judge's decision and a brief in support of its exceptions. The sole issue on review is whether the "carve-out" language in Respondent's various arbitration agreements clearly advises employees that they have the unconditional right to file charges with the Board, including charges that raise group or collective concerns. This issue has already been decided by the Board because the carve-out

¹ As set forth in the Judge's decision, the underlying issues of whether Respondent's arbitration agreements interfered with employees' Section 7 rights to engage in collective legal action and whether Respondent unlawfully enforced one of those agreements, were placed in abeyance pending the outcome of *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015); *Lewis v. Epic System Corp.*, 823 F.3d 1147 (7th Cir. 2016) and *Morris v. Ernst & Young*, 834 F.3d 975 (9th Cir. 2016), all now pending before the Supreme Court.

provision in this case is essentially the same as the one the Board found to be deficient in *Solar City Corporation*, 363 NLRB No. 83 (December 22, 2015). In such circumstances, the Judge's findings and conclusions that the carve-out provision in this case is similarly inadequate is correct and should be upheld, and Respondent's various arguments attacking the Judge's *Lutheran Heritage Village*² analysis of this issue should be rejected on that basis as well.³

Respondent's remaining argument, namely, that the Board should revisit the *Lutheran Heritage Village* "reasonably construe" test and either clarify or overturn it, is similarly without any basis.

I. ARGUMENT

A. The Judge Correctly Found That Respondent's Arbitration Agreements Violate Section 8(a)(1) of the Act

The Judge correctly found that the first sentence of Respondent's "Scope of Arbitration Agreement" requiring employees to arbitrate any disputes "without limitation" is so "all-encompassing" that notwithstanding the various "carve out" language that follows, employees would reasonably interpret the agreement to mean that all disputes, including those that fall within the Board's purview, must be arbitrated "without limitation."⁴ (Jt. Ex. 8, p. 5 of 12; Jt.

² *Martin Luther Memorial Home, Inc. d/b/a Lutheran Heritage Village - Livonia*, 343 NLRB 646 (2004).

³ Respondent's related argument that it is not appropriate to hold ambiguities in a rule or policy against the drafter of the rule or policy is similarly meritless. Initially, the Board has long held that it is proper to construe ambiguities in a rule against the promulgator of the rule. *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998); *Norris-O'Bannon*, 307 NLRB 1246, 1245 (1992). Moreover, and as a general matter, it is unclear how Respondent can argue that an ambiguity in a rule is not relevant to analyzing how a reasonable employee would understand the rule and/or whether a rule "clearly informs" employees of, say, their right to file charges with the Board.

⁴ *Solarcity Corp.*, 363 NLRB No. 83, slip op. at 7 (2016); *Hobby Lobby Stores, Inc.*, 363 NLRB No. 195 (May 18, 2016); *2 Sisters Food Group, Inc.* 357 NLRB No. 168 (2011); *Bill's Electric*,

Ex. 9, p. 6 of 10; Jt. Ex. 10, p. 6 of 10; Joint Ex. 11, p. 6-7 of 13) (ALJD 5:1-30).⁵ Such an interpretation is more than reasonable given this section is preceded by a section that repeatedly states that employees agree to arbitrate “all disputes,” “any disputes,” and “all such disputes”:

Arbitration. In consideration of my employment with the Company, its promise to arbitrate **all disputes** with me; and my receipt of compensation and benefits provided to me by the Company, at present and in the future, the Company and I agree to arbitrate **any disputes** between us that might otherwise be resolved in a court of law under the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (the “Federal Arbitration Act”), and agree that **all such disputes** only be resolved by an arbitrator through final and binding arbitration, and not by way of court or jury trial, except as otherwise provided herein or to the extent prohibited by applicable law and in accordance with the Federal Arbitration Act. I acknowledge that this Agreement is governed by the Federal Arbitration Act and evidences a transaction involving commerce.

(Jt. Ex. 8, p. 4 of 12; Jt. Ex. 9, p. 5 of 10; Jt. Ex. 10, p. 5 of 10; Joint Ex. 11, p. 6 of 13) (emphasis added).

The Judge also correctly rejected Respondent’s argument that the arbitration agreements are somehow saved from unlawfulness based on various confusing “carve out” language. However, each attempt to “carve out” disputes covered by the National Labor Relations Act fails to clearly advise employees that they have an unrestricted right to pursue claims with the Board. (ALJD 5:34 – 6:45)

The first insufficient attempt appears at the second sentence of the first paragraph of the Scope of the Arbitration Agreement section, which states that “nothing in this Agreement shall be deemed to preclude or excuse a party from bringing an administrative claim before any

350 NLRB 292, 296 (2007); *U-Haul*, 347 NLRB 375 (2006), *enfd.* 255 *Fed Appx.* 527 (D.C. Cir. 2007).

⁵ Joint Exhibits from the Joint Motion will be referenced as “Jt. Ex. _” and the Administrative Law Judge’s Decision will be referenced as “ALJD” with page and line number).

agency in order to fulfill that Party's obligation to exhaust administrative remedies before making a claim in arbitration." (Jt. Ex. 8, p. 5 of 12; Jt. Ex. 9, p. 6 of 10; Jt. Ex. 10, p. 6 of 10; Joint Ex. 11, p. 6-7 of 13) (ALJD 5:34-42). This implies that even if charges are filed with the Board, their claims will ultimately be resolved through final and binding arbitration. (ALJD 5:34-42). Such language fails to provide adequate clarity.

The next insufficient attempt appears in the second paragraph of the same Scope of Arbitration section. The exception is very general -- "except to the extent such waiver is expressly prohibited by law" -- and it appears only after a clearly worded express waiver to pursue class or collection actions: "I expressly agree to waive any right to pursue or participate in any dispute on behalf of, or as part of, any class or collective action." (Jt. Ex. 8, p. 5 of 12; Jt. Ex. 9, p. 6 of 10; Jt. Ex. 10, p. 6 of 10; Joint Ex. 11, p. 6-7 of 13). There is nothing in this paragraph that advises employees they can file Board charges. *See e.g. Chesapeake Energy Corp.*, 362 NLRB No. 80, slip op. at 3 (2015) (although arbitration agreement did not expressly prohibit employees from filing unfair labor charges with the Board, requiring employees to pursue any claim or dispute they had against the company in individual arbitration would reasonably be read to prohibit filing Board charges).

The third failed attempt appears in the sixth paragraph of the Scope of Arbitration Section. (Jt. Ex. 8, p. 5 of 12; Jt. Ex. 9, p. 6 of 10; Jt. Ex. 10, p. 6 of 10; Joint Ex. 11, p. 6-7 of 13). It is confusing by design. The "carve out" language for the National Labor Relations Board is located as far from the first all-encompassing "without limitation" sentence as possible, and buried within the sixth paragraph that begins with "nothing contained in this Agreement shall be construed to prevent or excuse me from utilizing the Company's existing internal procedures for resolution of complaints." In this context, it is difficult to understand what the following

carve-out sentences actually mean even if the Board is mentioned by name. There is some language that states that employees can pursue claims “but only if, and to the extent the Federal Arbitration Act permits” but as the Judge correctly noted, without specific legal knowledge of this highly complex area of law, it is difficult to imagine how this is not reasonably read to mean employees cannot file a group or collective charge with the Board. (ALJD 6:8-16) When the Board is finally mentioned as an example of a “permitted agency,” it is along with the Equal Employment Opportunity Commission, whose claims, in the first paragraph of the same section are expressly required to be arbitrated “without limitation.” Thus, this carve-out language is confusing and ambiguous on its face, and does not clearly inform employees they have an unrestricted right to pursue charges with the Board.

In sum, any interpretation that ignores the context in which “carve-out” language appears is inconsistent with well-established interpretation principles found in *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). Just as particular phrases should not be read in isolation to presume interference, a savings clause should not be read in isolation to presume that it safeguards rights that were already expressly waived. Simply mentioning the Board by name at the end of a single-spaced six-paragraph section within a 13-page Agreement, after explicit language that disputes are to be arbitrated “without limitation,” does not clearly inform employees they can pursue charges with the Board. At best, the proximate location of the carve-out language, couched in multiple ways (all in legalese) would reasonably lead to confusion about whether an employee can or cannot pursue claims with the Board, especially ones that are group or collective in nature. Accordingly, the Judge’s findings of fact and conclusion that Respondent’s arbitration agreements violate Section 8(a)(1) of the Act should be adopted in whole.

B. The Judge Applied the Correct Legal Standard and There is No Basis to Overrule *Lutheran Heritage Village*

The Board has consistently applied *Lutheran Heritage Village's* second-prong “reasonably construe” test in assessing the lawfulness of employee rules and policies and Respondent has cited no authority, including any Courts of Appeals decisions, that calls into question the appropriateness of that test.⁶ Similarly, Respondent’s assertion that administrative law judges have distorted that “reasonably construe” test from an objective one to a subjective one is unsupported by any example of such a distortion or any cases where such a distortion or even the possibility of it is discussed. Finally, Respondent’s alternate request that the Board expand the range of considerations for the “reasonably construe” test ignores the fact that the Board already considers a number of these proffered additional considerations, such as the business justification for the rule and consideration of the industry or workplace context of the rule. Thus, in *Flagstaff Medical Center, Inc.*, 357 NLRB 659, 663 (2011), the Board clearly considered both the business justification for the no-photographing rule, as well as its hospital context, in concluding that the rule was lawful. In this regard, Respondent’s request that the Board consider the “sophistication level” of employees in assessing the lawfulness of a rule raises a host of unworkable issues, such as (1) how does one measure or determine the “sophistication level” of an employee, and what does that term mean anyway; and (2) what do you do if you have a workforce whose “sophistication level” varies – do you determine the lawfulness of a rule based on how an Einstein would understand it, or by how a non-Einstein would (or would not) understand it? Asking these questions is alone enough to demonstrate the infeasibility of that proffered additional consideration.

⁶ Respondent’s only apparent support for this position appears to be dissents by Board Member and Chairman Miscimarra.

II. CONCLUSION

In summary, Respondent's exceptions and supporting arguments offer no basis to overturn the Judge's findings and conclusions that Respondent's various arbitration agreements unlawfully interfere with employees' right to file charges with the Board, including charges that raise group or collective concerns. Accordingly, it is requested that the Board reject Respondent's exceptions, affirm the Judge's decision, and issue an appropriate order to remedy Respondent's unfair labor practices.

DATED AT Oakland, California this 13th day of November 2017.

Respectfully submitted,

 (by C.K.)

Judith J. Chang
Counsel for the Acting General Counsel
National Labor Relations Board, Region 32
1301 Clay Street, Room 300N
Oakland, CA 94612-5224

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Date: November 13, 2017

**AFFIDAVIT OF SERVICE OF COUNSEL FOR ACTING GENERAL COUNSEL'S
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I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) upon the persons at the addresses and in the manner indicated below. Persons listed below under "E-Service" have voluntarily consented to receive service electronically, and such service has been effected on the same date indicated above.

Richard H. Rahm, Esq.
Littler Mendelson, P.C.
333 Bush Street, 34th Floor
San Francisco, CA 94104
VIA EMAIL: rrahm@littler.com

Lisa Lin Garcia, Esq.
Littler Mendelson, P.C.
333 Bush Street, 34th Floor
San Francisco, CA 94104
VIA EMAIL: llgarcia@littler.com

Jahan C. Sagafi, Esq.
Outten & Golden LLP
1 Embarcadero Center, 38th Floor
San Francisco, CA 94111
VIA EMAIL: jsagafi@outtengolden.com

Robert N. Fisher, Esq.
Outten & Golden LLP
3 Park Avenue, 29th Floor
New York, NY 10016
VIA EMAIL: rfisher@outtengolden.com

Office of the Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
VIA E-FILE

November 13, 2017

Date

Ida Lam, Designated Agent of NLRB

Name


Signature