

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

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

and

Case 20–CA–187567

ISIDRO MIRANDA, an Individual

Tracy Clark, Esq.,

for the General Counsel.

Roman Zhuk, Esq. (Fine, Boggs & Perkins, LLP),

for the Respondent Company.

Marco Palau, Esq. (Mallison & Martinez),

for the Charging Party.

DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. This is another case involving employer mandatory arbitration provisions. There is no dispute that the Respondent Company, a California auto dealership, maintains such provisions in a Binding Arbitration Agreement (BAA) and an Alternative Dispute Resolution Policy (ADRP), which employees have been required to sign as a condition of employment.¹ The issue is whether those provisions are unlawfully overbroad because they would reasonably be read by employees to prohibit them from filing unfair labor practice charges with the Board.²

I. The Binding Arbitration Agreement

The Company has maintained and required employees to sign the BAA since at least May 3, 2016. In relevant part, the agreement states as follows:

I . . . 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

¹ There is also no dispute, and the record establishes, that the Board has jurisdiction.

² On June 2, 2017, the parties filed a joint motion requesting that this issue be decided based on an attached stipulated record. The motion was granted on June 16, and the General Counsel and the Company subsequently filed briefs on July 31. Although the case was originally assigned to another administrative law judge, it was reassigned on November 21, after the stipulated record was approved and the briefs were filed.

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. . . .

The General Counsel contends that employees would reasonably conclude that the foregoing provision precludes them from filing Board charges because the first sentence indicates that "all disputes which may arise out of the employment context" are subject to binding arbitration, and the second sentence indicates that this includes claims "based on . . . federal laws or regulations[]" which would otherwise require or allow resort to any court or other governmental dispute resolution forum." Although the second sentence goes on to parenthetically exclude "claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board," the General Counsel argues that this explicit exclusion is insufficient, citing *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), *enfd.* 255 Fed. Appx. 527 (D.C. Cir. 2007); *SolarCity Corp.*, 363 NLRB No. 83, slip op. at 5 (2015); *Ralph's Grocery Co.*, 363 NLRB No. 128, slip op. at 1–2 (2016); *Bloomingtondale's, Inc.*, 363 NLRB No. 172, slip op. at 4–5 (2016); and *Lincoln Eastern Management Corp.*, 364 NLRB No. 16, slip op. at 2–3 (2016).

All of these cited cases are readily distinguishable, however. In *U-Haul* there was no explicit exclusion of Board claims from the employer’s mandatory arbitration policy. In *SolarCity*, the exclusion contained caveats indicating that Board charges were permitted only if they were “expressly excluded from arbitration by statute,” or “applicable law permits [an] agency to adjudicate. . .” In *Ralph’s Grocery*, the policy began with a bolded underlined instruction that all claims before any court or agency were subject to mandatory arbitration; the provision permitting employees to file Board charges did not appear until halfway through 6 pages of legalese; and the provision was preceded by sentences suggesting that such charges would be permissible only when necessary to satisfy “any applicable statutory conditions precedent or jurisdictional prerequisites.”³ In *Bloomingtondale’s*, the 17-page plan document repeatedly stated that any and all employment claims arising under federal law were subject to a four-step arbitration program, followed only by a statement that “claims . . . under the National Labor Relations Act are . . . not subject to Arbitration under Step 4.”⁴ Finally, in *Lincoln Eastern*, the first two paragraphs of the 3 ½ page policy broadly required arbitration of all employment claims, and the sentence permitting employees to file Board charges did not appear until the following page.⁵ Here, in contrast, the explicit exclusion of Board charges is clear, unqualified, and appears in the second sentence immediately after the language otherwise requiring mandatory arbitration of federal claims.

The General Counsel’s brief argues that the provision is also unlawfully overbroad because of the fifth sentence (“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”). The General Counsel argues that an employee would reasonably interpret this sentence to prohibit filing a Board charge on behalf of, or in concert with, other employees, citing *Solar City*, above, slip op. at 6; and *Labor Ready Southwest, Inc.*, 363 NLRB No. 138, slip op. at 1 n. 2 (2016).⁶ However, again, both of these cited cases are distinguishable. In both cases, the employer’s policies contained broad language that waived the right to bring, pursue, or participate in “any dispute” on behalf or as part of a class, collective or representative action, and was not otherwise clearly limited, either on its face or in context, to non-NLRB disputes. Here, in contrast, it is clear from the placement of the restriction on class, collective, representative, or

³ The Board in *Ralph’s Grocery* additionally found a violation because there was no reference to the right to file Board charges in the summary of the policy contained in the employment application.

⁴ As in *Ralph’s Grocery*, the Board in *Bloomingtondale’s* additionally found a violation because the exclusion of Board charges was not mentioned in the summary brochure or the employee acknowledgement form that accompanied the 17-page plan document.

⁵ The exclusion here is arguably more similar to the parenthetical exception for “actions arising under the NLRA” found insufficiently clear in *Labor Ready Southwest, Inc.*, 363 NLRB No. 138, slip op. at 1 n. 2 (2016). However, the General Counsel does not argue that the *Labor Ready* decision is controlling on this issue, and the language here is considerably clearer.

⁶ This precise issue or theory was not expressly set forth in the parties’ joint motion to approve the stipulated record (which did not include the usual short statements of position), and the Company’s brief does not address it. However, the stipulated issue—whether the BAA “would be reasonably read by employees to prohibit filing unfair labor practice charges with the Board”—is broad enough to include charges filed collectively as well as individually.

joint claims (immediately after the third and fourth sentences discussing related limitations on the arbitrator’s authority), and the restriction’s explicit reference to that discussion (“Thus, . . .), that the restriction is limited to those claims that are subject to binding arbitration, i.e., claims other than those “arising under the National Labor Relations Act which are brought before the
 5 National Labor Relations Board, claims for medical and disability benefits under the California Workers’ Compensation Act, and Employment Development Department claims.”⁷

Finally, the General Counsel’s brief argues that the provision is also unlawfully overbroad because of the seventh sentence (“I understand and agree that nothing in this
 10 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”). The
 15 General Counsel argues that employees would reasonably conclude from this language that filing a charge with the Board would be futile because the charge would ultimately have to be arbitrated, citing *Ralph’s Grocery*, above, slip op. at 2–3; and *Professional Janitorial Service of Houston, Inc.*, 363 NLRB No. 35, slip op. at 3 (2015).⁸

Again, however, both of these cited cases are distinguishable. In *Ralph’s Grocery*, the
 20 policy stated that employees were not prevented from filing administrative charges with a federal agency such as the Board; “[h]owever, final and binding arbitration as described in this Arbitration Policy is the sole and exclusive remedy or formal method of resolving the Covered
 25 Disputes.” As for *Professional Janitorial Service*, the policy there confusingly stated that an employee could file “non-waivable” statutory claims with an administrative agency, which “may” include charges before the Board, “regardless of whether you use arbitration to resolve them”; “[h]owever, if such an agency completes its processing of your action against the
 30 Company, you must use arbitration if you wish to pursue further your legal rights, rather than filing a lawsuit on the action.”

Here, as discussed above, the second sentence of the provision clearly and unconditionally excludes “claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board” from the binding arbitration procedure. Thus, notwithstanding the subsequent use of the phrase “any government agency” in the seventh
 35 sentence, read in context that sentence appears to address charges filed with any other

⁷ As discussed above and in fn. 5 supra, *Solar City* and *Labor Ready* are also distinguishable because the exclusion of Board charges was conditional or less clear, which created confusion whether all Board charges were exempt from the restriction on class or collective claims. See also *Adecco USA, Inc.*, 364 NLRB No. 9, slip op. at 4 (2016).

⁸ Again, this precise issue or theory was not set forth in the parties’ joint motion to approve the stipulated record, and the Company’s brief does not address it. However, as the General Counsel’s argument is without merit, there is no need to decide whether it goes beyond the stipulated issue or denies the Company procedural due process. Compare *Securitas Security Services USA, Inc.*, 363 NLRB No. 182, slip op. at 3 n. 6 (2016); and *Valley Health System LLC*, 363 NLRB No. 178, slip op. at 3 n. 6 (2016), and cases cited there.

administrative agencies “such as the Department of Fair Employment and Housing⁹ and/or the Equal Employment Opportunity Commission.” In any event, even if the seventh sentence would reasonably be construed to include charges filed with the Board, it states that an employee would only have to pursue the administrative claim through binding arbitration after the employee had
 5 “exhaust[ed] the administrative process/ investigation.” Thus, the provision more clearly indicates that an employee would only have to submit an administrative claim to arbitration if the claim was ultimately rejected or dismissed by the agency.

As indicated by the General Counsel, ambiguities in workplace rules or policies are
 10 generally construed against the employer. See, e.g., *Valley Health System*, above, slip op. at 1; and *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enf. 203 F.3d 52 (D.C. Cir. 1999). However, a rule or policy is not unlawfully overbroad merely because employees *could* interpret it to restrict protected activity; as indicated above, the test is whether employees *reasonably would* interpret it to restrict such activity. *Lutheran Heritage Village-Livonia*, 343 NLRB 646,
 15 647–648 (2004). Further, in applying that test, particular phrases must be evaluated in the context of the rule or policy as a whole, rather than in isolation. *Id.* at 646. See also *Mediaone of Greater Florida, Inc.*, 340 NLRB 277, 279 (2003). Here, evaluating the BAA as a whole, employees would not reasonably interpret it to mean that they may not file charges with the Board, either individually or collectively, or that doing so would be futile. Accordingly, contrary
 20 to the General Counsel’s allegation, the Company has not violated the Act by maintaining the agreement.

II. The Alternative Dispute Resolution Policy

25 Prior to the BAA, the Company required employees to sign the ADRP. Although the Company apparently no longer does so, the policy remains binding and enforceable against those employees, including Charging Party Isidro Miranda, who signed it in the past. In relevant part, the policy states as follows:

30 The Alternative Dispute Resolution Policy, which is also set forth in the Employee Handbook, applies to any employment-related dispute between you and Royal Motor Sales, whether initiated by you or by the Dealership.

35 1. 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
 40 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

⁹ The California Department of Fair Employment and Housing is separate from the California Employment Development Department and has a different parent agency.

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), the U.S. Department of Labor (www.dol.gov), or the National Labor Relations Board (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.

* * * *

4. . . . [T]here will be no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action (“Class Action Waiver”). . . . 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. . . .

As indicated by the General Counsel, the above policy statement is clearly unlawful under the Board precedent discussed above. First, as in *Lincoln Eastern*, the exclusion of Board claims does not appear until well into the policy after repeated statements that the binding arbitration policy applies to all employment disputes. Second, as in *SolarCity*, *Ralph’s Grocery*, and *Professional Janitorial Service*, the exclusion of Board claims is qualified; it specifically states that such claims may be brought before the agency “only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate.” See also *Securitas Security Services USA, Inc.*, 363 NLRB No. 182, slip op. at 4 (2016) (finding an identically qualified exclusion confusing and therefore unlawfully overbroad). Third, as in *SolarCity* and *Labor Ready*, the policy broadly waives the right to bring “any dispute” as a class

or collective action, and is not otherwise clearly limited, either on its face or in context, to non-NLRB disputes.¹⁰

Further, contrary to the Company’s contention, the allegation is not barred by the 6-month limitation period set forth in Section 10(b) of the Act. The Board has consistently held that maintenance of an unlawful workplace rule or policy is a continuing violation. See *Bloomingtondale’s*, above, slip op. at 1 n. 1, and cases cited there.

Accordingly, the Company has violated Section 8(a)(1) of the Act by maintaining the ADRP, as alleged.

ORDER¹¹

The Respondent, Anderson Enterprises, Inc. d/b/a Royal Motor Sales, San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration policy that employees reasonably would believe bars or restricts them from filing charges with the National Labor Relations Board.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its Alternative Dispute Resolution Policy (ADRP) or revise it to make clear to employees that it does not bar or restrict them from filing charges with the National Labor Relations Board.

(b) Notify all current and former employees who were required to sign or otherwise become bound to the ADRP that it has been rescinded or revised, and provide them with a copy of the revised policy, if any.

(c) Within 14 days after service by the Region, post the attached notice marked “Appendix” at its facility in San Francisco, California and all other facilities where the ADRP is

¹⁰ Again, this precise issue or theory was not expressly set forth in the parties’ joint motion to approve the stipulated record, and the Company’s brief does not address it. However, as with the BAA, the stipulated issue—whether the ADRP “would be reasonably read by employees to prohibit filing unfair labor practice charges with the Board”—is broad enough to include charges filed collectively as well as individually.

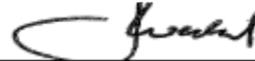
¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

or has been maintained in effect.¹² Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of this proceeding, Respondent has gone out of business or closed the facilities where the ADRP has been unlawfully maintained, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at any time since May 3, 2016.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

The second amended complaint is dismissed insofar as it alleges that the Respondent has also violated the Act by maintaining the Binding Arbitration Agreement (BAA).

Dated, Washington, D.C., December 4, 2017



Jeffrey D. Wedekind
Administrative Law Judge

¹² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration policy that our employees reasonably would believe bars or restricts them from filing charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind our Alternative Dispute Resolution Policy (ADRP) or revise it to make clear that it does not bar or restrict you from filing charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the ADRP that it has been rescinded or revised, and provide them with a copy of the revised policy, if any.

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

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

901 Market Street, Suite 400, San Francisco, CA 94103-1735
(415) 356-5130, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/20-CA-187567 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE
DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY
OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE
WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S
COMPLIANCE OFFICER, (415) 356-5183.