BEFORE THE NATIONAL LABOR RELATIONS

BOARD

ANDERSON ENTERPRISES, INC. DBA ROYAL MOTOR SALES Respondent and ISIDRO MIRANDA, an Individual Charging Party	Case: 20-CA-187567

<u>EXCEPTION FILED BY RESPONDENT ANDERSON ENTERPRISES, INC DBA ROYAL MOTOR SALES TO DECISION OF ADMINISTRATIVE LAW JUDVE</u>

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EXCEPTIONS OF EMPLOYER TO DECISION OF ADMINISTRATIVE-LAW JUDGE

Pursuant to Section 101.11(b) of the Statements of Procedure, and Section 102.46 of the Rules and Regulations, Series 8 (29 C.F.R. §§ 101.11(b), 102.46), as amended, of the National Labor Relations Board, the undersigned, attorney for Employer in this case, files these exceptions to the decision of the administrative-law judge, dated December 4, 2017, service of which was made with the order transferring the case to the Board on December 4, 2017.

Respondent's exceptions are directed both generally to the entire report of the administrative-law judge and specifically to the judge's findings, conclusions, and recommendations, set forth below, relating to the alleged violation by respondent of Section 8(a)(1) of the National Labor Relations Act, as amended.

Respondent does not take exception to the ALJ's conclusions regarding the Binding Arbitration Agreement ("BAA"), found in part I of his decision on pages 1- 4:21. Respondent's exceptions are as follows:

1. The administrative-law judge erred in finding in the decision, set forth on page 6:35-7:10 that Employer violated the Act by maintaining what he refers to as the ADRP at the time that Charging Party was employed for the Employer. With respect to the General Counsel's theory that the ADRP the charging party signed interfered with employees' rights to file charges with the Board, endorsed by the ALJ in his decision, the theory must fail because the ADRP expressly permitted employees to file claims and charges with the Board and, as a result, employees could not reasonably construe the language of the ADRPs 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 ADRP states "without limitation" that administrative "claims or charges brought before the ... [Board]." (Joint Exhibit O to Joint Motion to Submit a Stipulated Record). When a rule or policy does not specifically refer to protected activity, as is the case here, the Board should "not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule could be interpreted that way." *Lutheran Heritage Village Livonia*, 343 NLRB 646, 647 (2004) (emphasis in original). Moreover, when determining how a rule might be reasonably construed, "the Board must refrain from reading particular phrases in isolation and must not presume improper interference with employee rights." S.T.A.R., Inc., 347 NLRB 82, 83 n.3 (2006). But that is precisely what the General Counsel and the ALJ are doing, selecting one isolated phrase regarding confidentiality as the sole basis to argue that the ADRP interferes with employees' rights under the NLRA. In Plasterers Local 627, the Board found both parties' interpretation of a contract were reasonable and that the General Counsel failed to prove his interpretation was the only reasonable one or that the respondent's interpretation was unreasonable; therefore, no violation was found. 274 NLRB 1286, 1288 (1985). In light of the alleged ambiguity as to how different provisions of the ADRP could be reasonably construed to permit or preclude class arbitration, there is no evidentiary basis for the General Counsel's contention that the Arbitration Agreement can be reasonably construed to prohibit Section 7 activities. Even if the Board concluded that the ADRP was 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 ADRP's identical explicit statements permitting employees to file such claims and charges with the Board. In lieu of revising the ADRPs 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 ADRPs. Both of the ADRPs 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 ADRPs 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 by providing the NLRB' s web address even 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 the ADRP expressly permits 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.

2. The administrative-law judge erred in implicitly relying on the *Lutheran Heritage* standard in part II of his decision. This standard has since been overturned by the NLRB in The Boeing Company decision for case no. 19-CA-090932. Under the standard set out in this case, the ADRP falls into Category 1, which is a rule, which reasonably interpreted, does not prohibit or interfere with exercise of NLRA rights, for the reasons stated above.

3. The administrative-law judge erred in his recommendation because the underlying decision was wrong, as discussed above/

4. The administrative-law judge erred in failing to recommend on the entire record that the complaint against the Employer be dismissed in its entirety.

WHEREFORE, respondent respectfully requests the National Labor Relations Board to set aside the administrative-law judge's decision, and that the Board make findings and conclusions in accordance with the facts in the record and in conformity with the provisions of the Act. It is further requested that the Board find and conclude that respondent has not violated Section 8(a)(1) of the Act, as alleged in the complaint in this case, and that the Board issue an order dismissing the complaint in its entirety.

Dated at San Francisco this January 2, 2018

Respectfully submitted,

FINE, BOGGS & PERKINS LLP

/s/ R. Zhuk
Roman Zhuk
Attorneys for Anderson Enterprises

I, Roman Zhuk, a member of the State Bar of California representing Anderson Enterprises in this matter, hereby certify that on this day, I e-filed the above with the NLRB and then served the forgoing BRIEF OF RESPONDENT ANDERSON ENTERPRISES, INC DBA ROYAL MOTOR SALES on the following parties:

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Dated at San Francisco this January 2, 2018

Respectfully submitted,
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