

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

and

Case 20-CA-187567

ISIDRO MIRANDA, an Individual

COUNSEL FOR THE GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

Submitted By  
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Pursuant to the National Labor Relations Board's Rules and Regulations Section 102.46(d), Counsel for the General Counsel hereby submits its Answer to Respondent's Exceptions to the Administrative Law Judge's Decision.<sup>1</sup>

## I. INTRODUCTION

On December 4, 2017, Administrative Law Judge (ALJ) Jeffrey D. Wedekind found that Respondent's Alternative Dispute Resolution Policy (ADRP) violated Section 8(a)(1) of the National Labor Relations Act (the Act) because employees would reasonably interpret the policy to limit their ability to file charges with the National Labor Relations Board (Board). (ALJD, 6:36-7:10). Although the ALJ correctly decided that the ADRP was unlawful under *Lutheran Heritage Village Livonia*, 343 NLRB 646 (2004), the Board's subsequent decision in *The Boeing Company*, overturned the *Lutheran Heritage Village Livonia* standard. 365 NLRB No. 154 (Dec. 14, 2017). The *Boeing* standard applies retroactively to all pending Board cases and thus applies here. *Id.*, slip op. at 17. The new *Boeing* standard requires the Board to balance an employer's justifications for maintaining a policy that, when reasonably interpreted, would potentially interfere with Section 7 rights against the nature and extent of its potential impact on those rights. *Id.*, slip op. at 14. Here, the ADRP's adverse impact on the Act's central policy of preserving unrestricted access to the Board outweighs Respondent's peripheral interest in maintaining an arbitration policy that would reasonably be interpreted to limit Board access. Accordingly, the ADRP is unlawful under *Boeing*.

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<sup>1</sup> Herein, references to the Administrative Law Judge's Decision issued on December 4, 2017, will state "ALJD" followed by the page and line numbers. References to Respondent's Exceptions to the Administrative Law Judge's Decision will state "R Excep." followed by page numbers.

## II. RESPONDENT'S EXCEPTIONS

Respondent's first exception incorrectly asserts that a mandatory arbitration policy is lawful if it expressly excludes Board claims even if the policy would reasonably be interpreted to limit Board access. (R. Excep., 2-3). Respondent's first exception also incorrectly asserts that the ALJ failed to consider the ADRP as a whole to reach his decision. (R. Excep., 2). Respondent's second exception correctly points out that the ADRP should now be analyzed under the *Boeing* standard. (R. Excep., 3). However, Respondent incorrectly asserts that the ADRP is lawful under *Boeing*. Respondent's third and fourth exceptions are cumulative of its first and second exceptions and thus will not be addressed separately in this Answering Brief. (R. Excep., 3).

### A. The ALJ Correctly Found that the ADRP Would Reasonably Be Interpreted to Limit Board Access Despite Its Exclusions.

A fundamental policy of the Act is unrestricted access to the Board and its processes. *In re Denver Newspaper and Graphic Communications, Local No. 22*, 338 NLRB 130, 130 (2002). Thus, employer policies that would be reasonably interpreted to limit Board access have been found unlawful. *See e.g., Solar City*, above at 4-5; *ISS Facility Services, Inc.*, 363 NLRB No. 160, slip op. at 2-3 (April 7, 2016).

Respondent argues that its ADRP is not unlawful and that the Board should overturn the ALJ's decision because the ADRP permits employees to file charges with the Board. However, a mandatory arbitration policy's explicit exclusion of Board claims from its arbitration requirement does not render the policy lawful if the policy would still be reasonably interpreted to interfere with an employee's access to the Board. *See, e.g. SolarCity Corp.*, 363 NLRB No. 83, slip op. at 5-6 (Dec. 22, 2015).<sup>2</sup> Furthermore, even if the Board were to now hold that a

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<sup>2</sup> To support its assertion that arbitration policies that expressly exclude Section 7 activities are lawful, Respondent cites *Tiffany & Co.*, JD(NY)-31-14, (Aug. 5, 2014) and *Cox Communications, Inc.*, 40 NLRB AMR 25, Advice Memorandum dated October 19, 2012, neither of which has any precedential value. Further, *Tiffany & Co.* and *Cox*

mandatory arbitration policy that contains an unqualified, explicit exclusion of Board claims is per se lawful, the policy here is nonetheless unlawful because its exclusion is qualified.

Respondent's ADRP qualification that "claims may be brought before an administrative agency *but only to the extent applicable law permits* access to such agency notwithstanding the existence of an agreement to arbitrate" would be reasonably interpreted to limit an employee's access to the Board. (ALJD, 6:14-16)(emphasis added). Indeed, the language "only to the extent" signals a limitation. Although the next sentence clarifies that Board claims are a type of claim that may be brought before an administrative agency, it does not clarify to what "extent applicable law permits" Board claims if there is an agreement to arbitrate. A rank-and-file employee with no legal expertise would not know whether "applicable law" precludes only certain types of Board claims, precludes access to the Board entirely, or does not preclude Board access at all. Employees "cannot be expected to examine company rules from a legal standpoint." *SolarCity Corp.*, above at 5. Further, to the extent the exclusion of Board claims is ambiguous, the ambiguity must be construed against the Respondent. *Aroostook County Region*, 317 NLRB 218, 224 (1995).<sup>3</sup> Finally, even if the Board were to hold that the ADRP's exclusion unambiguously informs an employee that she has the right to access the Board individually, the policy is still unlawful because, as the ALJ correctly found, it suggests that the employee cannot do so in concert with other employees. (ALJD, 6:44-7:2). Here, the ALJ correctly found that the

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*Communications* both acknowledge that the Board must analyze whether a policy would reasonably be interpreted to limit employee's Section 7 rights, even if it has a savings clause.

<sup>3</sup> Respondent argues that the ambiguities in the ADRP must be construed against the Charging Party. This is wrong. The law regarding ambiguities in work rules promulgated by an employer is clear—any ambiguity must be resolved against the drafter of the rule rather than the employees who are required to obey it. *Aroostook County Region*, 317 NLRB 218, 224 (1995). *Plasterers Local 627*, which Respondent cites to argue that ambiguities should not be construed against the promulgator of a work rule, does not stand for that proposition. 274 NLRB 1286 (1985). In *Plasterers*, the Board declined to decide whether an ambiguous provision in a collective-bargaining agreement obligated the union to bargain on a certain date. The *Plasterers* Board was not asked to decide whether the text of a provision was lawful, but whether a party violated its terms. Whether the text of a work rule violates the Act is an entirely different question and must be analyzed under the standard articulated in *Aroostook County Region*, 317 NLRB 218 (1995), which construes ambiguity against the drafter of a work rule.

ADRP would be reasonably interpreted to interfere with an employee's access to the Board, despite its exclusions for Board claims, because the exclusion is qualified, ambiguous, and impinges upon collective action. (ALJD, 6:36-7:10).

**B. The ALJ Correctly Found the ADRP to be Unlawful after Considering the Policy as a Whole.**

Respondent claims that the ALJ failed to consider the ADRP policy as a whole. To support this claim, the Respondent asserts the ALJ “select[ed] one isolated phrase regarding confidentiality as the sole basis to argue that the ADRP interferes with employees’ rights under the NLRA.” (R. Excep., 2) This is a misreading of the ALJ’s decision. The ALJ relied on three different factors to conclude that the ADRP was unlawful, none of which concerned confidentiality. First, the ALJ noted that the ADRP’s exclusion of Board claims did not appear “until well into the policy after repeated statements that the binding arbitration policy applies to all employment disputes.” (ALJD, 6:35-40) Second, the ALJ found that the ADRP’s exclusion of Board claims contained a confusing qualification, as it excludes Board claims “only to the extent applicable law permits.” (ALJD, 6:40-45). Third, the ALJ found that the policy’s class and collective action waiver did not clearly exclude collective NLRB disputes. (ALJD, 7:1-2). Thus, the ALJ properly concluded the ADRP was unlawful after considering the policy as a whole.

**C. The ADRP is Unlawful under the New Boeing Standard**

As discussed above, the standard for evaluating facially neutral work-rules has changed since the ALJ issued his decision. The lawfulness of the ADRP is now properly evaluated under the standard articulated in *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017). Unlike the *Lutheran Heritage Village Livonia* standard, which found a policy unlawful if it would be reasonably interpreted by an employee to interfere with rights protected by the Act, *Boeing* requires the Board to perform a balancing test if it determines that a policy would be interpreted

to interfere with Section 7 rights. *Id.*, slip op., at 14. Specifically, under *Boeing*, where a facially neutral rule, when reasonably interpreted, potentially interferes with employees' rights under the Act, the Board balances: (i) the nature and extent of the potential impact on employees' rights; and, (ii) the legitimate justifications associated with the policy. *Id.* Rules are unlawful if they limit rights protected by the Act and the adverse impact on the rights outweighs the justification for the rule. *Id.*, slip op. at 15. In conducting this balancing test, the Board may consider whether the affected right is central or peripheral to the Act. *Id.* Likewise, the Board may consider whether the employer's justification for the policy has a direct, immediate relevance to employees or business operations, or is peripheral in nature. *Id.* Here, as the ALJ found, Respondent's ADRP would be reasonably interpreted to limit employee's access to the Board. (ALJD, 6:36-7:10). Hence, the Board must consider the nature and the extent of the potential impact on employee rights and whether there is a legitimate justification for the policy.

Because unrestricted access to the Board and its processes is a central policy of the Act, *In re Denver Newspaper and Graphic Communications*, 338 NLRB 130, 130 (2002), any potential interference with an employee's access to the Board should be given significant weight under the *Boeing* test. Respondent has failed to articulate any justification for the ADRP. Given Respondent's failure to articulate any justification for the ADRP, the rule's potential adverse impact on an employee's access to the Board very clearly outweighs Respondent's interest in maintaining the rule.

Even if Respondent had articulated a justification for the ADRP, its justification would not have outweighed the ADRP's adverse impact on employees' access to the Board. To be sure, an employer may have legitimate business justifications for maintaining a mandatory arbitration policy. However, these justifications are of peripheral importance to an employer. Unlike

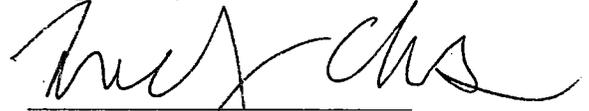
employer rules that maintain order, discipline, or security; mandatory arbitration policies do not have direct or immediate relevance to employees or to an employer's business operations. Indeed, mandatory arbitration policies do not set any rules that employees must follow during the ordinary course of their work. Instead, mandatory arbitration policies merely select the forum where an employee and employer must settle employment disputes, should they arise. The Act's central policy of protecting an employee's unrestricted access to the Board outweighs the peripheral importance of mandatory arbitration to employers. Additionally, there is no legitimate interest in enacting a policy that can be reasonably interpreted to limit access to the Board where a policy that cannot be so interpreted can be enacted with ease. The Respondent's revised arbitration policy—which the ALJ found could not be reasonably interpreted to limit Board access—demonstrates that Respondent was able to easily enact such a policy. (ALJD, 5:18-21).

### III. CONCLUSION

Based on the entire record, the ALJ appropriately found Respondent maintained a policy that employees would reasonably interpret to limit their right to file charges with the Board. The Board should find that the ADRP remains unlawful under *Boeing* because the ADRP's adverse impact on the Act's central policy of preserving unrestricted access to the Board outweighs Respondent's peripheral interest in maintaining a policy that would reasonably be interpreted to limit Board access. Accordingly, the General Counsel respectfully requests that the Board overrule Respondent's exceptions in full.

DATED AT San Francisco, California, this 16<sup>th</sup> day of January, 2018.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Tracy Clark", written over a horizontal line.

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**ISIDRO MIRANDA, an Individual**

**AFFIDAVIT OF SERVICE OF: Counsel for the General Counsel's Answering Brief to  
Respondent's Exceptions**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on January 16, 2018, I served the above-entitled document(s) by **electronic mail**, as noted below, upon the following persons, addressed to them at the following addresses:

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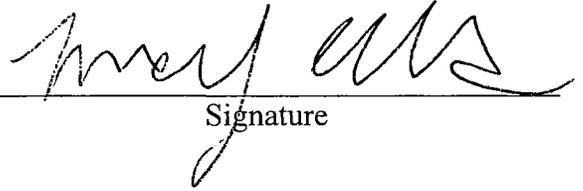
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