

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

SAN RAFAEL HEALTHCARE AND WELLNESS,
LLC

and

Case 20-CA-204948

NATIONAL UNION OF HEALTHCARE WORKERS

COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION

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I. INTRODUCTION

This case presents a straightforward question: whether Respondent’s Alternative Dispute Resolution policy (the Policy) is reasonably interpreted by employees as restricting or prohibiting them from accessing the Board’s processes for resolving employment-related disputes. Judge Wedekind properly found that it unlawfully restricts or interferes with employees’ right to file Board charges and to have those charges decided through the Board’s processes. Although Judge Wedekind failed to address Respondent’s request to reopen the record following the Board’s decision in *The Boeing Company*,¹ this is at most harmless error, as Respondent’s Policy unlawfully interferes with employees’ access to the Board under both the *Boeing* and *U-Haul of California*² analytic frameworks. The Board should therefore reject Respondent’s exceptions and affirm Judge Wedekind’s decision and recommended order.

II. THE ALJ PROPERLY FOUND RESPONDENT’S ARBITRATION POLICY OBJECTIVELY INTERFERES WITH EMPLOYEES’ ACCESS TO THE BOARD’S PROCESSES.

Judge Wedekind properly found that Respondent’s Policy, a mandatory arbitration policy, is reasonably interpreted by employees to prohibit or restrict their right to file and seek resolution of unfair labor practice charges with the Board. (ALJD at 7) This factual finding should stand, whether the Board continues to apply the *Lutheran Heritage* analysis in evaluating mandatory arbitration clauses, as it did in *U-Haul* and subsequent cases, or it extends the *Boeing* decision to apply to this case. This extension of *Boeing* to mandatory arbitration policies is not a foregone conclusion, contrary to Respondent’s exaggerated claim that Boeing “expressly” or “absolutely” overruled *U-Haul* and its progeny. (Resp. Br. at 2, 10) Signaling a more cautious

¹ 365 NLRB No. 154 (Dec. 14, 2017).

² 347 NLRB 375 (2006).

approach, the Board’s *Boeing* decision expressly disclaimed such an intent.³ And indeed, given the Board’s interest in providing “certainty and clarity” in this area,⁴ the *Boeing* decision did not purport to overrule settled law as articulated in *U-Haul*. But even if the Board adopts the *Boeing* analysis for mandatory arbitration clauses, it should leave undisturbed Judge Wedekind’s appropriate factual finding that the Policy is reasonably interpreted as prohibiting or restricting employees from filing charges with the Board.

A. Judge Wedekind’s Finding That the Mandatory Arbitration Policy Reasonably Restricts or Prohibits the Filing Of Board Charges is Consistent With the Board’s Previous Decisions Addressing This Issue.

Under current law, the Board’s decision in *Lincoln Eastern*⁵ controls here, providing a clear path for finding that the Policy is reasonably interpreted as prohibiting or restricting employees’ right to file Board charges. As in *Lincoln Eastern*, the Policy opens with an expansive definition of the types of claims covered—literally “ALL DISPUTES” between the employer and employees. (JM025–27 (capitalization in original)) The first two pages of the Policy then list examples of covered claims, including “alleged violations of federal . . . statutes,” and claims of “harassment, discrimination, retaliation or wrongful termination” that cannot be resolved “during an investigation by an administrative agency,” as well as “breach of contract” claims or “any other change in the terms and conditions of employment.” As the Board has repeatedly found in previous cases, a reasonable rank-and-file employee would read this absolute and unequivocal statement of coverage and the accompanying examples as encompassing most if not all theories under which an employer might violate the National Labor Relations Act. Thus, absent any language of exclusion, the Policy’s broad definition of covered claims is reasonably

³ *The Boeing Co.*, 365 NLRB No. 154, slip op. at 12 n. 51 (Dec. 14, 2017) (“Other than the cases addressed specifically in this opinion, **we do not pass** on the legality of the rules at issue in past Board decisions that have applied the *Lutheran Heritage* ‘reasonably construe’ standard.”) (emphasis added).

⁴ *Id.*, slip op. at 14.

⁵ 364 NLRB No. 16 (May 31, 2016).

read as precluding access to the Board's processes.

The Policy also broadly prohibits employees from “joining or participating in a class action or representative action, acting as a private attorney general or representative of others, or otherwise consolidating a covered claim with the claim of others.” (JM026) The Board has found comparable prohibitions on class or collective action unlawful because, as they “clearly encomp[ass] filing an unfair labor practice charge with the Board when that charge purports to speak to a group or collective concern . . . such restrictions lead a reasonable employee to wonder whether he may file an unfair labor practice charge . . . filed with or on behalf of other employees.”⁶

The Board has repeatedly found that an obscurely placed clause excluding the filing of Board charges from the otherwise expansive coverage of the arbitration policy is insufficient to ensure that employees would understand they retained the right to access the Board's processes despite the all-encompassing language indicating otherwise.⁷ Here, the out-of-the-way placement of the exemption clause contrasts starkly with the expansive, indeed absolute statement of coverage conspicuously placed on the first page of the Policy. Moreover, the purported exemption appears under the legalistic and misleading heading “Severability” and, other than appearing at the end of the document, is not distinguished from the surrounding text. (ALJD at 5) Indeed, Respondent's characterization of the paragraph in which this exemption appears as “standalone” (Resp. Br. at 12) implies a prominence that is simply not supported by

⁶ *SolarCity*, slip op. at 6.

⁷ *Lincoln Eastern*, 364 NLRB No. 16, slip op. at 2 (May 31, 2016) (“Considering the policy as a whole, we find that it is not written in a manner reasonably calculated to assure employees that their statutory right of access to the Board's processes remains unaffected.”); *see also Ralphs Grocery Co.*, 363 NLRB No. 128, slip op. at 2 (Feb. 23, 2016) (finding that inconsistent coverage and exclusion statements in an ADR policy were “not written in a manner reasonably calculated to assure employees that their statutory right of access to the Board's processes remains unaffected.”); *Bloomingtondale's, Inc.*, 363 NLRB No. 172, slip op. at 4-5 (Apr. 29, 2016) (finding unlawful arbitration agreement containing statement that “claims...under the National Labor Relations Act are...not subject to arbitration”).

the text. As Judge Wedekind properly observed, the placement of the rights-preservation clause was not sufficiently “conspicuous” to nullify the broad statements of coverage found at other places in the policy. (ALJD at 6)

Similarly, the Policy’s carve-out for Board *charges*, as opposed to the broader term *claims* used at other points throughout policy, creates an ambiguity as to whether an employee is entitled to obtain relief through an NLRB proceeding or merely entitled to file a charge. The sentence immediately following the exemption underscores this uncertainty by extending the Policy’s coverage to “any *claim* that cannot be resolved through administrative proceedings.” (JM 027 (emphasis added)) This last sentence is reasonably read to cover enforcement of a Board Order before a Circuit Court of Appeals, which is the “traditional” Federal court that decides a Board charge that “cannot be resolved through administrative proceedings” before the Board and precisely the “traditional” Federal court that Respondent acknowledges its Policy is calculated to avoid.⁸ Respondent argues that this clause does not reasonably imply a restriction on access to the Board’s processes because it is the Board, not the employee, who is a party to such an enforcement action. (Resp. Br. at 14) But the Board rejected just such an argument in its leading arbitration-policy case, observing that “most nonlawyer employees would not be familiar with such intricacies of Federal court jurisdiction.”⁹ Reading these two sentences together, a reasonable employee would be left uncertain as to whether they are entitled to have the Board resolve charges they might file.¹⁰ Judge Wedekind properly relied on this ambiguity to support of his finding that the Policy is reasonably interpreted as restricting or prohibiting

⁸ See 29 C.F.R. § 102.14.

⁹ *U-Haul*, 347 NLRB 375, 378 (2006).

¹⁰ *Cf. Professional Janitorial Services of Houston*, 363 NLRB No. 35, slip op. at 1–2 (Nov. 24, 2015) (holding policy providing that employees could file claims with the Board was unlawful where it also stated “if such an agency [i.e., the Board] completes its processing of your action against the Company, you must use arbitration if you wish to pursue further your legal rights, rather than filing a lawsuit on the action.”).

employees' right to file Board charges.

Judge Wedekind also noted then-Member Kaplan's concurring articulation in *Boeing* of the appropriate objective standard for evaluating employer rules and policies, which in turn was based on the Court of Appeals for the Fifth Circuit's analysis in *T-Mobile USA Inc. v. NLRB*¹¹ and which requires "reference to the perspective of an objectively reasonable employee who is "aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job" and who "does not view every employer policy through the prism of the NLRA." (ALJD at 6:29–33) This point is well taken, but it arguably applies with greater force to such rules as those prescribing "harmonious interactions and relationships" in the workplace, where the connection to the National Labor Relations Act requires a nuanced understanding of the more peripheral expressions of protected-concerted activity. For example, in the *T-Mobile* case itself, the Court found that a "reasonable employee" would not construe policies requiring employees to maintain a commitment to integrity or a positive work environment as restricting Section 7 activity, but that the reasonable employee would construe a broad no-recording policy as restricting Section 7 rights.¹² Here, however, the conduct at issue—the right to initiate and pursue Board proceedings—lies at the very core of the NLRA. Thus, under then-Member Kaplan's concurring articulation of the *Boeing* analysis, a reasonable employee would interpret the Policy as restricting or prohibiting employees' access to the Board.

B. In Challenging Judge Wedekind's Proper Factual Finding, Respondent Employs a Results-Driven Interpretive Scheme Based on a Selective Reading of the Policy.

In its Exceptions Brief, Respondent argues that the Policy "clearly" applies only to civil litigation filed in state or federal court because such words and phrases as "civil court action," "lawsuit," "judge," and "jury" appear in the preamble and sections defining who and what is

¹¹ 865 F.3d 265, 271 (5th Cir. 2017).

¹² 865 F.3d at 274–75.

covered by the Policy. (Resp. Br. at 5–6, 17–18) But the Board has roundly rejected the proposition that non-operative phrases in a document can nullify an otherwise clear statement of effect. For example, in *U-Haul*, the Board specifically rejected the idea that a policy containing a description of the rights waived and referring to a “court of law” reasonably conveys that administrative proceedings are exempt.¹³ There, the Board determined that a memorandum describing arbitration as limited to claims or controversies a “court of law would be authorized to entertain” was insufficient to reasonably exclude agency proceedings where, as here, the policy included a broad definition of covered disputes, including “causes of action recognized by Federal laws or regulation.”¹⁴ Because the Policy here includes a substantially equivalent, all-encompassing definition of covered disputes—“alleged violations of federal, state and/or local constitutions, statutes or regulations”—the mere presence of references to courts and court procedures in the Policy does not reasonably convey that administrative proceedings are excluded.

Moreover, a careful reading of the language Respondent relies on reveals that none of the phrases it marshals have the effect of excluding claims other than those filed in court from the Policy’s coverage. For example, Respondent asserts that the reference to the “court system” in the preamble of the Policy, which sets forth the justification for the waiver but does not create any rights or obligations, “would certainly color an employee’s reasonable reading” of the rest of the Policy. Similarly, the language Respondent relies on in the “Who is Covered” section specifies that the agreement waives the right to civil court action, but does not state that this is the sole or exclusive waiver in the agreement. (Resp. Br. at 17; ALJD at 2:30–35) In fact, as Judge Wedekind properly observed, the sentence preceding this reference to civil court action

¹³ *U-Haul*, 347 NLRB at 377.

¹⁴ *Id.*

states that the agreement makes arbitration the exclusive means for resolving all covered disputes, “in court or in any other forum.” (ALJD at 2:33, 5:35–37) Finally, Respondent relies on the Policy’s description of how hybrid claims will be handled if employees file a “lawsuit in court,” but again without expressly limiting the broad statements of coverage contained elsewhere in the Policy. Thus, for Respondent’s interpretation to be correct, the reasonable employee would have to read an operative effect into these phrases in the Policy that is not supported by the plain language of the document.

Respondent also argues that Judge Wedekind improperly focused on what it characterizes as “three isolated aspects of the policy” in determining that it reasonably restricted or prohibited access to the Board’s policy. (Resp. Br. at 13 (citing ALJD 5:1–18)) In fact, Judge Wedekind’s analysis in this section of his decision addresses *four* aspects of the policy, since he also addresses the placement of the purported exemption clause. The Policy broadly prohibits employees from “joining or participating in a class action or representative action, acting as a private attorney general or representative of others, or otherwise consolidating a covered claim with the claim of others.” (JM026) The Board has found comparable prohibitions on class or collective action unlawful because, as they “clearly encomp[ass] filing an unfair labor practice charge with the Board when that charge purports to speak to a group or collective concern such restrictions lead a reasonable employee to wonder whether he may file an unfair labor practice charge . . . filed with or on behalf of other employees.”¹⁵ Far from being “isolated aspects,” these parts of the Policy encompass all sections of the document except the preamble and a legalistic paragraph appearing under the heading “Severability.” Indeed, it is only by reading the purported exemption “in isolation” that Respondent is able to suggest an interpretation of the Policy that does not reasonably convey a restriction or prohibition on

¹⁵ *SolarCity*, slip op. at 6.

employees' right to file NLRB charges. Contrary to Respondent's revisionist characterization of the document, Judge Wedekind properly analyzed the Policy by reading the purported exemption for Board charges in its proper context; an obscure clause contradicting otherwise broad statements of inclusion.

Respondent goes one step further, arguing that any arbitration agreement containing an express exemption for the filing of Board charges "cannot be reasonably interpreted" to restrict or prohibit the right to file such charges, citing then-Member Miscimarra's dissent in *Lincoln Eastern*.¹⁶ (Resp. Br. 19) But under this rule of interpretation, the Board would be required to read such an express exemption without regard for the context in which it appears, disregarding any contradictory statements of coverage found elsewhere in the document. Thus, such a rule of interpretation would require the Board to abandon its well-settled policy of reading rules in context, considering the whole document, and not in isolation.¹⁷

C. Respondent's Selective Use of Canons of Construction Lacks Supporting Authority and Glosses Over Contradictory Principles.

Seeking to bolster its argument that Judge Wedekind improperly interpreted the policy as a whole to reasonably restrict or prohibit the right to file Board charges, Respondent imports concepts of statutory construction such as avoiding superfluity and inconsistency,¹⁸ arguing that a reasonable interpretation requires the reader to "harmonize" the broad statements of coverage found in the "Who is Covered" and "Covered Disputes" sections of the Policy with the exempting language buried within or beneath the "Severability" section. (Resp. Br. at 13–14) While these canons of construction provide a comforting and familiar shorthand for attorneys,

¹⁶ 364 NLRB No. 16, slip op. at 6.

¹⁷ Cf. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) ("Arguable ambiguity arises only through parsing the language of the rule, viewing the phrase "goals and objectives" in isolation.").

¹⁸ See, e.g., *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant...").

Respondent has cited no authority whatsoever applying them in determining what a reasonable *employee* would understand a rule or policy to mean. Indeed, Respondent acknowledges that employees might be unable to determine whether the Policy covers violations of the National Labor Relations Act without the assistance of an attorney. (Resp. Br. at 22 n.6) Moreover, to the extent that canons of construction apply where discerning the objective employee’s reasonable interpretation, Respondent has failed to address the rule of construction that a savings clause is not given effect where it creates a conflict with the rule it purports to modify.¹⁹ Rather than falling back on comfortable but inapposite canons of construction, the Board should undertake to evaluate the Policy from the perspective of a reasonable employee, who “cannot be expected to have the . . . expertise to examine company rules from a legal standpoint.”²⁰ Judge Wedekind properly considered the broad statements of coverage that appear at several points in the Policy, contrasted them with the single statement of exemption tucked into a legalistic section at the end of the document, and found that a reasonable employee would understand that their right to file charges was restricted by the Policy.

In short, Respondent has not shown a compelling justification for overturning Judge Wedekind’s factual determination that the Policy is reasonably interpreted as restricting or prohibiting employees’ right to file Board charges. Respondent’s savings clause is insufficient both because it is ambiguous on its face and, considering its obscure placement in a legalistic clause separated from the broadly inclusive definition of covered claims, it does not reasonably assure employees that their statutory right of access to the Board’s processes remains unrestricted.

¹⁹ See, e.g., *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) (despite a statute’s savings clause providing that “compliance with” a safety standard “does not exempt any person from any liability under common law,” a state common law tort action against auto manufacturer found to be preempted by a federal motor vehicle safety standard giving manufacturers a choice among types of passive restraints to install for front seats).

²⁰ *Ralph’s Grocery Co.*, slip op. at 1 (quoting *SolarCity*, slip op. at 5); *Lincoln Eastern*, slip op. at 2.

III. THE ALJ CORRECTLY DETERMINED THAT RESPONDENT’S POLICY IS UNLAWFUL UNDER THE *BOEING* BALANCING TEST.

Judge Wedekind also appropriately analyzed the Policy under *Boeing*, balancing Respondent’s articulated business justification against employees’ fundamental right to access the Board’s process. Under the *Boeing* framework, the Board will weigh the “nature and extent of the potential impact on NLRA rights” against any “legitimate justifications associated with” the policy.²¹ In announcing this new test, the Board recognized that “some types of Section 7 activity may lie at the periphery of our statute” and therefore may not warrant unconditional protection.²² Although then-Member Kaplan articulated the specific contours of the test differently, he agreed that the Board must strike the balance between employees’ NLRA rights and employers’ business justifications. Member Kaplan also joined the other two members of the majority in laying out three categories that would obtain under this analysis.²³ Category 1 includes: (i) rules that are generally lawful because, when reasonably interpreted, they do not prohibit or interfere with the exercise of NLRA rights, without any need for a balancing of rights and interests or justifications; and (ii) rules that are generally lawful even though they potentially interfere with the exercise of NLRA rights, but where this risk is outweighed by legitimate justifications. Category 2 includes rules that warrant individualized scrutiny in each case. Category 3 includes rules that are generally unlawful because their potential interference with the exercise of protected rights outweighs any possible justifications.²⁴ Examples of Category 3 rules include those prohibiting employees from discussing wages and benefits with each other. In the absence of cases applying the recently adopted *Boeing* framework, it is uncertain whether the Board would place arbitration policies reasonably read as restricting or prohibiting the filing

²¹ *Id.*, slip op. at 3.

²² *Id.*, slip op. at 2.

²³ *Id.*, slip op. at 15 n.77.

²⁴ *Id.*, slip op. at 3–4.

of Board charges within Category 2 or Category 3. But the arbitration policy at issue here should be found unlawful in either case.

A. The Policy Infringes on a Foundational Right under the NLRA.

First, in assessing the nature and extent of the Policy’s potential impact on NLRA rights, the Board should be mindful of the fundamental role of charge-filing in its regulatory scheme. As Judge Wedekind correctly observed, employees’ right to file Board charges is “central to the federal nationwide labor policy and enforcement contemplated by the NLRA.” (ALJD at 7:6–7) The right to access and seek relief through the Board’s processes at issue here is a “fundamental goal of the Act, as reflected in Section 8(a)(4), which makes it unlawful to discharge or discriminate against employees for coming to the Board.”²⁵ In the Supreme Court’s words, Congress sought “complete freedom” for employees to file charges with the Board, to participate in a Board investigation, or to testify at a Board proceeding.²⁶

Respondent tacitly acknowledges that the right to file charges is a fundamental one, arguing instead that the degree of infringement is slight because the Policy expressly exempts the filing of Board charges. (Resp. Br. 24) This argument presupposes, however, that Judge Wedekind incorrectly found that the Policy is reasonably interpreted as restricting or prohibiting employees from filing Board charges. In light of Judge Wedekind’s well-supported factual finding, the Board should reject Respondent’s attempt to minimize the Policy’s infringement on the fundamental NLRA right to access the Board’s processes.

B. Respondent’s Interest in Arbitrating “Traditional Lawsuits” Bears Only Tangentially on the Policy’s Infringement of the Right to File Board Charges.

On the other side of the scale, Respondent argues in essence that Judge Wedekind gave

²⁵ *SolarCity*, 363 NLRB No. 83, slip op. at 5 (Dec. 22, 2015).

²⁶ *Id.* (citing *NLRB v. Scrivener*, 405 U.S. 117, 121 (1972)); *see also id.*, slip op. at 6 (“[T]he Board and the courts have long recognized that ‘filing charges with the Board is a vital employee right designed to safeguard the procedure for protecting all other employee rights guaranteed by Section 7.’”) (quoting *Mesker Door, Inc.*, 357 NLRB No. 59, slip op. at 6 (2011)).

insufficient weight to its business interest in maintaining its arbitration policy, which it characterizes as the need to avoid “crushingly expensive” litigation of employment disputes “in traditional lawsuits” or “traditional court litigation.” (Resp. Br. at 21–22) But while Respondent’s argument may justify the waiver of litigation through “traditional lawsuits,” it has offered no justification for requiring employees to waive access to the Board’s processes.²⁷ Indeed, if Respondent’s concern is, as it asserts, the costs associated with “traditional court litigation,” not proceedings before the Board, all Respondent need do is revise its policy to more clearly exclude Board proceedings from the claims required to be arbitrated. If, as it appears from Respondent’s Exceptions Brief, Respondent does not intend for the Policy to preclude employees from filing Board charges, then the harm to its interests of such a revision is de minimis. But Respondent can’t have it both ways; either it has an interest in creating an inference that employees must arbitrate claims that they would otherwise file with the Board, in which case it has to justify its infringement on a central right protected by the Act, or it has no such interest, in which case it cannot then argue that its infringement on that right is justified.

Respondent also misleadingly asserts that Judge Wedekind failed to consider the specific business justifications for its Policy. (Resp. Br. 23–24) But the Judge directly quoted from Respondent’s brief in articulating those justifications, demonstrating that he did in fact consider the business justifications Respondent raised. (ALJD at 7:10) Judge Wedekind therefore properly found that Respondent’s interest in arbitrating workplace disputes did not justify “such potentially pervasive interference with employees’ fundamental rights and protections under the Act.” (ALJD at 7:13)

²⁷ *Cf. T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 275 (5th Cir. 2017) (finding rule unlawful in part because the “operative language of the rule on its face prohibits . . . Section 7 activity wholly unrelated to [T-Mobile’s] stated interests.”)

In short, Judge Wedekind properly weighed Respondent’s professed business interest in arbitrating workplace disputes against the Policy’s potential infringement on employees’ foundational right to file Board charges. Under the *Boeing* framework, a policy that restricts the right to file a charge should fall within Category 3 because the interference with what the Supreme Court has identified as a fundamental right under the Act outweighs any possible justification. In the alternative, the Policy here should be found unlawful under Category 2 because, as argued by Respondent, its proffered justification applies to traditional lawsuits, not to administrative proceedings, and therefore does not outweigh the strong public policy interest in protecting access to the Board’s processes.

IV. RESPONDENT HAS NOT MET ITS BURDEN TO SHOW CAUSE FOR REOPENING THE RECORD.

Respondent’s request to reopen the record should be denied because Respondent has not shown with sufficient particularity what evidence it would offer or how such evidence, if offered, would require a different outcome. A motion to reopen the record must state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result.²⁸ Here, Respondent only stated that it intended to offer evidence of “potential impact and business justifications,” without specifying what those impacts or justifications might be. (Resp. Br. 25) Respondent’s failure to state what new or different evidence it would offer precludes a determination that such evidence would change the outcome of this case—a threshold determination for granting such a request. Moreover, Respondent offered a substantial articulation of its business justification in its Exceptions Brief, belying its claim that it was unable to do so. (Resp. Br. 21–23) Indeed, the Policy itself includes statements of the justifications supporting

²⁸ Section 102.48(c)(1) of the Board’s Rules and Regulations. The Board has construed Section 102.48 of its Rules and Regulations as applying to requests to open the record after issuance of an administrative law judge’s decision but before the issuance of a Board decision. *Walden Security Inc.*, 366 NLRB No. 44, slip op. at 1 n.2 (March 23, 2018); *USF Red Star, Inc.*, 339 NLRB 389, 389 fn. 3 (2003).

it. (ALJD 1–2) Finally, the Policy at issue in this case implicates only the general business interests associated with arbitration, such as the anticipated cost savings, unlike the no-camera rule at issue in *Boeing*, which implicated security and confidentiality concerns specific to the company’s status as an aerospace manufacturer, and Respondent has not asserted any circumstances specific to its business operations that make its arbitration policy unique. Where the record is sufficient to support the Judge’s decision, as here, the Board finds a failure to rule on such a motion harmless error.²⁹ The Board should therefore reject Respondent’s exceptions in this regard.

V. CONCLUSION

The Policy’s initial statement regarding the scope of covered claims is absolute, explicit, and unlawful: “ALL DISPUTES” between Respondent and its employees are subject to mandatory arbitration. This broad language encompasses disputes involving violations of the National Labor Relations Act. In challenging the Judge’s appropriate determination that the Policy reasonably prohibits or restricts the right to file Board charges, Respondent attempts to misdirect the Board’s attention from repeated, broad statements of coverage to focus exclusively on an obscure savings clause, while cherry-picking canons of construction to create an interpretive framework that supports its desired outcome. Under Respondent’s construction, the “reasonable employee” would ignore the informational, rather than restrictive, effect of various clauses discussing the interplay between courts and arbitration, but would take the opposite approach with respect to an isolated phrase purporting to exempt charge-filing from the Policy’s coverage. In attacking the Judge’s balancing of its asserted interest in arbitration against the fundamental right to file Board charges, Respondent fails to assert any business interest that would not be equally served by a policy that exempts claims under the National Labor Relations Act. Thus, to the extent that the Board adopts *Boeing* as the appropriate analytic framework for

²⁹ *Pennsylvania Power Co.*, 301 NLRB 1104 (1991).

considering whether a mandatory arbitration policy unlawfully interferes with rights guaranteed by the NLRA when it is reasonably interpreted to restrict or prohibit employees from filing Board charges, the Board should find the Policy unlawful, either as a general rule under Category 3, or in this specific instance under Category 2.

DATED AT San Francisco, California this 28th day of March, 2018.

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