

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALEXANDRIA CARE CENTER, LLC,

and

Case 31-CA-140383

ROSALINDA ZUNIGA, an Individual.

**RESPONDENT ALEXANDRIA CARE CENTER, LLC'S RESPONSE
TO THE BOARD'S NOTICE TO SHOW CAUSE**

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I. ALEXANDRIA CARE CENTER OPPOSES REMAND TO THE ALJ BECAUSE IT AND THE GENERAL COUNSEL HAVE ALREADY FILED BRIEFS TO THE BOARD ARGUING THEIR POSITIONS UNDER THE NEW *BOEING COMPANY* TEST, AND OBJECTIVES OF JUDICIAL ECONOMY PROVIDE CAUSE TO RETAIN THIS CASE AT THE BOARD

A. Introduction

Respondent Alexandria Care Center, LLC (“Respondent” or “Alexandria”) files this Response to the Board’s Notice to Show Cause, issued on November 21, 2018, opposing remand of this proceeding to the Administrative Law Judge (“ALJ”). The grounds for Respondent’s opposition arise from the fact that in Respondent’s Exceptions filed with the Board, as well as in its Brief in Support of Exceptions, counsel for the General Counsel’s Answering Brief to Respondent’s Exceptions, and Alexandria’s Reply Brief to the Answering Brief, the parties have already submitted their respective positions to the Board under the new test announced in *The Boeing Company*, 365 NLRB No. 154 (2017).¹ In fact, as noted in the Notice to Show Cause, the decision of the ALJ issued on December 14, 2017, the same day that the Board decided *Boeing Company*.² As a result, judicial economy and efficient and economical use of time and resources of both the National Labor Relations Board and Alexandria provide cause for this case to remain before the Board.

B. The Legal Issues Raised In Alexandria’s Exceptions Have Placed The Analysis Under The New *Boeing Company* Test Before The Board

Respondent’s Brief in Support of Exceptions to Administrative Law Judge’s Decision, filed on January 31, 2018, indicates the following three questions are presented to the Board:

1. Whether the ALJ erred in finding that Respondent’s Employment Dispute Resolution (EDR) Program violates Section 8(a)(1) of the Act by prohibiting or restricting employees from filing unfair labor practice charges with the Board? [Exceptions 3-16]
2. Whether, under the new balancing standard adopted

¹ This fact distinguishes the instant case from many of the similar cases addressing the same sole alleged violation of the Act - *i.e.*, that language in an arbitration agreement interferes with employees’ access to the Board and its processes in violation of Section 8(a)(1) – in which exceptions and all briefing had been filed with the Board long before its decision in *Boeing Company* issued.

² The instant case was transferred to the Board by Order issued on that same date.

by the Board in *Boeing Company*, Alexandria's business justifications for maintaining the language in the EDR Program outweigh the potential adverse impact on the protected right under the Act to file unfair labor practice charges with the Board? [Exceptions 4-5 and 12-14]

3. Whether the ALJ erred in finding, in effect, that while the EDR program permits filing a charge with the Board, its provisions that Respondent may seek to enforce the EDR Program and to dismiss any lawsuit filed under the NLRA render futile the provisions for filing such a charge? [Exceptions 6-10]

As the proceeding in this case was conducted on a stipulated record,³ it only remains for the Board to apply the new test adopted in *Boeing Company* to these questions. A remand of the case to the ALJ is entirely unnecessary to accomplish this task.

C. Applying The *Boeing Company* Test In The Manner Sought By The General Counsel In Response To The Board's Notice To Show Cause, The Provisions In Respondent's EDR Program Are Lawful

Counsel for the General Counsel's Response to the Board's Notice to Show Cause, received by the undersigned on Monday, December 3, 2018, indicates that counsel for the General Counsel also opposes remand to the ALJ. Such opposition, however, is based upon the General Counsel already having presented its position on the issue in the instant case to the Board in Counsel for the General Counsel's Brief on Remand to the Board in *Prime Healthcare Paradise Valley, LLC*, Case 21-CA-133781, which was filed with the Board on August 31, 2018 and a copy of which is attached to Counsel for the General Counsel's Response to the Board's Notice to Show Cause.

In the brief in *Prime Healthcare*, the General Counsel applies the *Boeing Company* test to arbitration agreements essentially as follows:

³ A Joint Motion to Transfer Proceedings to Division of Judges, Stipulation of Facts, Statement of Issue Presented, and Parties' Brief Statement of Position, including supporting Joint Exhibits, was entered into by all parties, and an Order Granting Joint Motion, Approving Stipulation of Facts and Setting Briefing Schedule was issued by Associate Chief Administrative Law Judge Gerald M. Etchingham on September 8, 2017. Joint Exhibits in that Joint Motion are indicated herein as "Jt. Ex. _."

- Arbitration provisions should be within **Category 1 of Boeing Company**⁴ and lawful where a savings clause explicitly provides that employees may use administrative proceedings in tandem with arbitration proceedings. As long as employees understand they retain the right to access the Board and its processes, there should be nothing unlawful about requiring the use of arbitration as well. Even arbitration agreements that provide for “exclusive” arbitration of all claims should be lawful if they contain express language that preserves employees’ rights to access the Board and its processes so that the entire agreement would be read by employees as permitting Board access.

- Arbitration provisions should come under **Category 2 of Boeing Company**⁵ and be analyzed to determine whether they would reasonably be read to interfere with the exercise of NLRA rights where an arbitration agreement: (a) merely states all employment disputes shall or must be “resolved” through arbitration, and should not have exclusivity read into the agreement unless other language in the provision indicates exclusivity; (b) merely requires employees to utilize the arbitration system for employment-related disputes, but, in the absence of other language, does not prohibit employees from utilizing Board processes such as ULP proceedings; (c) read as a whole, but not by a particular provision, actually prohibits filing of charges with the Board or bringing claims to administrative agencies; and/or (d) lacks an explicit prohibition on pursuing proceedings in other forums, and should not have a prohibition on pursuing other proceedings read into it as it is silent on the issue.

⁴ Category 1 includes policies that the Board designates as lawful to maintain, either because (i) the policy, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the policy.

⁵ Category 2 includes policies that warrant individualized scrutiny in each case as to whether the policy would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.

- Arbitration provisions should fall under **Category 3 of Boeing Company**⁶ as unlawful where an arbitration agreement: (a) explicitly prohibits filing claims with administrative agencies; (b) states employees must use arbitration “exclusively” for all work-related claims; (c) says employees cannot use any other forum; (d) states statutory claims must be brought exclusively in arbitration; and/or (e) otherwise uses language that employees would reasonably understand as prohibiting the filing of claims with the Board.

Further, the General Counsel indicates that in deciding whether a savings clause is adequate, the Board should not require excessive comprehensiveness and precision.

As Respondent has previously stated in its Brief in Support of Exceptions, Alexandria’s EDR Program provides that the agreement of Alexandria and the employee to the EDR Program binds them to use it as “the only means of resolving **employment-related disputes on issues covered by the EDR Program**. [Emphasis added.]” (Jt. Ex. 13, 1st page). Such covered disputes are described as those “arising out of or relating to your employment with the [sic] us (including your application for employment), **except as expressly set forth below**. [Emphasis added.]” (Jt. Ex. 13, 3rd page).

Among those disputes excluded from coverage under the EDR Program are:

. . . any other claims that, under applicable state or federal statutory law (including regulations promulgated there under) and/or case law, expressly cannot be subject to arbitration or similar alternative dispute resolution procedures (however, you and we may nonetheless voluntarily choose to resolve those claims under the EDR Program). **The EDR program does not constitute a waiver of your rights under the National Labor Relations Act**, but the [sic] we may seek to enforce the EDR Program (including its class and collective action provisions) and seek dismissal of any lawsuit filed under **the National Labor Relations Act**. [Emphasis added.]
[¶] You retain the right to pursue employment disputes before

⁶ Category 3 includes policies that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected personal conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the policy.

federal or state administrative agencies. **Nothing in the EDR Program prevents you from filing a claim with a federal or state administrative agency** or cooperating in a federal or state agency investigation. [Emphasis added.]

(Jt. Ex. 13, 3rd page).

Considering the EDR Program under the General Counsel's application of the *Boeing Company* test, the language expressly excludes certain claims from resolution under the Program procedures. Specifically, the EDR Program indicates it does not waive employees' rights under the NLRA. While the provision does not expressly state that among such NLRA protections is the right to file an unfair labor practice charge, the immediately following two sentences provide for the right to pursue an employment dispute before a federal administrative agency, to file a claim with such agency, and to cooperate in such agency's investigation of the claim. Thus, read as a whole, these provisions protect the right of employees to file a charge under the NLRA with the NLRB. As a result, from the General Counsel's perspective, Alexandria's saving clause is a lawful Category 1 provision.

To the extent the saving clause also preserves Alexandria's opportunity to seek to enforce the EDR Program and seek dismissal of any claim under the NLRA, the language merely describes Alexandria's right in every case to either defend against the NLRA claim on the merits, or to assert the EDR Program as a procedural defense. Even if this language is interpreted as affording Alexandria the opportunity to compel arbitration of a claim filed under the NLRA, the saving clause would fall under Category 2. As Alexandria has previously argued and now reiterates, the legitimate justifications for the EDR Program – namely, lower costs, greater efficiency and speed, the ability to choose expert adjudicators to resolve specialized disputes, and avoiding the risk of devastating “in terrorem” settlements –prevails over and outweighs the saving clause's potential adverse impact upon the right to file a Board charge. Thus, even if it is

viewed as a Category 2 provision, the savings clause in Respondent's EDR Program is lawful.

D. The Objectives Of Judicial Economy, Including Efficient Use Of Both NLRB Agency and Alexandria Resources And Time, Compel Retaining This Case At The Board And Not Remanding It To The ALJ

The foregoing demonstrates that objectives of judicial economy will be accomplished by retaining the instant case before the Board to address the alleged violation with respect to Alexandria's EDR Program under the new *Boeing Company* test. By keeping this case at the Board, not only the Board's limited agency time and financial resources, but those of Alexandria as well, will be conserved. If, however, this case is instead remanded to the ALJ, it will increase the expense and amount of time to be expended by Respondent, which has already briefed the case to the ALJ and filed exceptions, a supporting brief, and a reply brief to the Board.

II. CONCLUSION

For all the foregoing reasons, Respondent Alexandria submits this case should not be remanded to the ALJ. Rather, the case should remain at the Board in order that the issue of whether Respondent's EDR Program interferes with employees' access to file a charge with the Board will be economically and efficiently resolved.

Dated: December 5, 2018

Respectfully submitted,

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LITTLER MENDELSON, PC

By 
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CERTIFICATE OF SERVICE

I hereby certify that, on this 5th day of December 2018, I e-filed the Respondent Alexandria Care Center, LLC's Response to the Board's Notice to Show Cause with the Office of the Executive Secretary of the National Labor Relations Board on the NLRB's E-Filing system, and served a copy of this Response to the Board's Notice to Show Cause by electronic mail upon the following:

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