

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

WINDSOR SACRAMENTO ESTATES, LLC
dba WINDSOR CARE CENTER OF
SACRAMENTO,

Employer,

and

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 2015,

Union.

NLRB Case No. 20-CA-196183

**EMPLOYER WINDSOR SACRAMENTO ESTATES, LLC'S
RESPONSE TO ORDER TO SHOW CAUSE RE SUMMARY JUDGMENT**

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Pursuant to Section 102.24(b) of the National Labor Relations Board's ("NLRB" or "Board") Rules and Regulations, Respondent Windsor Sacramento Estates, LLC dba Windsor Care Center of Sacramento ("Respondent"), by and through its attorneys Epstein Becker Green, hereby submits this brief in response to the Board's Order Transferring Proceeding to the Board and Notice to Show Cause ("Notice to Show Cause") as to why the Charging Party Service Employees International Union, Local 2015's ("Union" or "Charging Party") motion for summary judgment should not be granted. As well as why Respondent's and Counsel for the General Counsel's ("General Counsel") Motions for Summary Judgment should be granted and the Complaint should be dismissed.

I. INTRODUCTION.

As detailed in Respondent's Motion,¹ Respondent's Alternative Dispute Resolution Policy ("ADR Policy") cannot be reasonably interpreted as interfering with employees' rights to file Board charges because it expressly states that employees *can* file Board charges. Moreover, even if the ADR Policy could be reasonably interpreted in such a manner, its cost- and time-saving business justifications outweigh any potential impact the ADR Policy might have on protected rights, which is minimal at best.

Although the Charging Party's Motion² contends the ADR Policy unlawfully restricts employees' rights to file Board charges, it provides virtually no support for its contention. That is, the Charging Party does not contend employees would not understand the unambiguous exclusion for Board charges, and it does not explain how interpreting the ADR Policy as a restriction on Board charge filings could possibly be reasonable in light of such unambiguous exclusionary language.

Moreover, the Charging Party completely ignores the indispensable second half of the legal test – whether the business justifications outweigh the potential impact on protected rights. Under the balancing test, a policy that could be reasonably interpreted as a restricting Section 7 rights

¹ As used herein, "Respondent's Motion" shall refer to the Motion for Summary Judgment filed in NLRB Case 20-CA-196183 on February 25, 2019.

² As used herein, "Charging Party's Motion" shall refer to the Motion for Summary Judgment filed in NLRB Case 20-CA-196183 and dated January 22, 2019.

might nevertheless be lawful if the business justifications outweigh the potential impact. Thus, not only did the Charging Party fail to show the ADR Policy could be reasonably interpreted in an unlawful manner, but by ignoring the balancing test, the Charging Party has failed to prove that such an interpretation would render the ADR Policy unlawful.

Accordingly, Respondent respectfully requests that the Board grant Respondent's Motion and deny the Charging Party's Motion, with an order that the General Counsel dismiss the complaint.

II. ANALYSIS.

As detailed in Respondent's Motion, the ADR Policy expressly states that employees can file Board charges, and thus, it cannot be reasonably interpreted as interfering with employees' access to the Board. Moreover, even assuming *arguendo* such an interpretation was reasonable, the business justifications for the ADR Policy outweigh the potential theoretical impact on Section 7 rights. Although the Charging Party contends otherwise in its motion for summary judgment, the Charging Party does not explain how any interpretation of the ADR Policy as a restriction on Board Charge filings is reasonable given the Policy's unambiguous exclusion, nor does it explain why the business justifications do not outweigh the potential impact on Section 7 rights. On the other hand Respondent's Motion, as well as the General Counsel's Motion,³ explicitly establish that the ADR Policy does not violate the Act. Accordingly, Respondent respectfully requests that the Board grant Respondent's Motion and deny Charging Party's Motion.

A. The ADR Policy Expressly States That Employees Retain the Right to File Board Charges Under the Policy.

As explained in Section IV(A)(1)(a) of Respondent's Motion, employees could not reasonably interpret the ADR Policy as a prohibition on filing Board charges because the ADR Policy expressly states employees can file Board charges. Specifically, the ADR Policy states, in plain English, **"Nothing in this Alternative Dispute Policy is intended to preclude any**

³ As used herein "General Counsel's Motion" shall refer to the Motion for Summary Judgement filed in NLRB Case 20-CA-196183 on February 13, 2019.

employee from filing a charge with...the National Labor Relations Board...” Any employee who reads basic English would understand that nothing in the ADR Policy restricts the right to file Board charges. In light of this unequivocal exclusionary language, it would be patently unreasonable for an employee to interpret the Policy as interfering with employees’ access to the Board when the Policy says the exact opposite. *See Murphy Oil USA, Inc. v. NLRB*, 8008 F.3d 1013, 1020 (2015). For this reason alone, the Board should grant Respondent’s Motion and deny the Charging Party’s Motion.

Importantly, the Charging Party does not contend employees would not understand the plain English exclusion. Nor could it credibly do so given the indisputably simple language used in the statement. Yet, to get around this unambiguous exclusion for Board charges, the Charging Party argues the breadth of the general coverage clause and the placement of the exclusion for Board charges renders the exclusion ineffectual. Neither contention withstands scrutiny.

First, the ADR Policy’s general coverage clause cannot be read in isolation; it must be read as a cohesive whole with the Policy’s other provisions, including the exclusions subsequently set forth in the Policy. *See Lutheran Heritage*, 343 NLRB 646, 647 (2004) (phrases cannot be isolated and interpreted in a vacuum and must be interpreted in the context of the policy’s other provisions)⁴. Thus, the issue is not whether the general coverage clause can be interpreted to prohibit the filing of Board charges; the issue is whether employees would understand the subsequent exclusion for Board charges limits the general coverage clause’s reach. As noted above, any employee who understands basic English would understand what the exclusion means, and the Charging Party has not claimed otherwise.

Second, the placement of the exclusion does not render it ineffectual or unnoticeable. The exclusion appears in a standalone paragraph at the end of the ADR Policy separated by the capitalized, bold font heading, “Severability,” a word that commonly signals that what follows is capable of being separated from the Policy. *See Webster’s Seventh New Collegiate Dictionary*, p.

⁴ Although *Boeing* overruled *Lutheran Heritage*’s “reasonably construe” test, the principles of interpretation articulated by the Board in *Lutheran Heritage* and its progeny are ordinary, well-established rules of construction relied upon by the Board long before the advent of the “reasonably construe” standard and remain salient to the reasonable interpretation prong of the *Boeing* test.

795, col. 1 (7th ed.) (“the quality or state of severable,” i.e., “capable of being severed.”). Notably, when the Board has found the placement of an exclusion rendered it ineffectual, the exclusion was embedded in a lengthy paragraph or among the voluminous pages of a complicated legal document in a manner that suggests access to the Board is illusory or futile. *See Ralph’s Grocery Co.*, 363 NLRB No. 128, slip op. at 1-3 (2016); *see also Bloomingdale’s, Inc.*, 363 NLRB No. 172, slip op. at 5 (2016); *Lincoln Eastern Management Corp.*, 364 NLRB No. 16, slip op. at 3 (2016). That is not the case here. Quite the opposite, the exclusion is unmistakably conspicuous and noticeable.

Accordingly, for the reasons stated in Section IV(1)(A)(1)(a) of Respondent’s Motion, the Board should grant Respondent’s Motion and deny the Charging Party’s motion.

B. The Charging Party Ignores the Important Contextual Clarifications Which Would Inform Employees That The Policy Targets Traditional Court Litigation, Not Administrative Actions.

The Charging Party’s Motion completely ignores important contextual elucidations that would signal to employees that the Policy’s the aim is to avoid traditional court litigation, not to interfere with access to the Board. As detailed in Section IV(A)(1)(b) of Respondent’s Motion, the Policy repeatedly emphasizes that its overall goal is to avoid the problems intrinsic to traditional court litigation. *See* Respondent’s Motion at Section VI(1)(A)(1)(b). In fact, the Policy begins by outlining this goal before it even sets forth the arbitration mandate:

In any organization, employment disputes will arise, sometimes requiring resolution through a formal proceeding. *Traditionally, this proceeding has been conducted through our court system. However, our court system too often has proven to be an exceedingly costly and time consuming process, thus failing to provide the parties involved with an acceptable resolution of the dispute.*

Similar references appear throughout the Policy. *See* Respondent’s Motion at Section IV(A)(1)(b). These repeated references, which are staggered throughout the Policy, would certainly impact the reader’s understanding of the Policy’s reach, conveying to him or her, from the outset, that the goal of the Policy is to provide a viable alternative to costly and protracted court litigation. Coupled with the unambiguous exclusion for Board charge filings, these key passages

would surely impress upon employees that the ADR Policy only precludes employees from filing a lawsuit in state or federal court and not with an agency like the National Labor Relations Board.

The Charging Party's Motion does not even address the impact these contextual clarifications would have on an employee's understanding of the Policy, much less proffers an explanation why such contextual explications do not eliminate any purported ambiguity in the Policy's scope. Accordingly, for these reasons, which are explained more fully in Respondent's Motion, the Board should grant Respondent's Motion and deny Charging Party's Motion.

C. **The Business Justifications for the ADR Policy Outweigh the Potential Impact on Protected Rights.**

As detailed in Section VI(A)(2) of Respondent's Motion, the business justifications for the ADR Policy far outweigh the potential impact on protected employee rights. Specifically, the impact on protected Section 7 rights is slight, at best, given that the ADR Policy expressly exempts Board charges from its purview and repeatedly emphasizes throughout the Policy that the goal is avoid traditional court litigation. By contrast, the ADR Policy furthers important business interests that benefit employers and employees alike. Traditional court lawsuits are time-consuming, costly, and often unnecessarily protracted. Arbitration offer an expedient, cost-effective alternative that enables disputes to be resolved much quicker and much more cost effectively.

The Charging Party's Motion ignores the balancing test required under *Boeing*, 365 NLRB No. 154 (2016) ("*Boeing*"), focusing entirely on the "reasonably interpret" part of the test. However, *Boeing* sought to strike a better balance between industrial realities and theoretical infringement on employee rights and, therefore, instituted a balancing test that would render facially neutral policies lawful even if the policy could be reasonably interpreted to interfere with protected Section 7 rights, when the business justifications outweighed the potential impact on rights. By failing to address this equally important aspect of the *Boeing* test, the Charging Party has failed to prove the ADR Policy is unlawful as a matter of law under *Boeing*. For this reason alone, because the Charging Party has failed to address all elements of the applicable test, the Charging Party's Motion must be denied.

Moreover, as stated above and more fully in Section VI(A)(2) of Respondent's Motion, Respondent's Motion should be granted as the weighty business justifications underlying the ADR Policy far outweigh the minimal, if any, impact the ADR Policy would have on protected Section 7 rights.

III. CONCLUSION

For these reasons, respondent respectfully submits the Board should deny the Charging Party's Motion and grant Respondent's Motion together with an order that the General Counsel dismiss the Complaint in its entirety.

Dated: July 23, 2019

EPSTEIN, BECKER and GREEN, P.C.

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

1. At the time of service I was at least 18 years of age and **not a party to this legal action**.
2. My business address is 1925 Century Park East, Suite 500, Los Angeles, CA 90067.
3. I served copies of the following documents (*specify the exact title of each document served*):

**EMPLOYER WINDSOR SACRAMENTO ESTATES, LLC'S
RESPONSE TO ORDER TO SHOW CAUSE RE SUMMARY JUDGMENT**

4. I served the documents listed above in item 3 on the following persons at the addresses listed:

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5. a. **By personal service.** I personally delivered the documents on the date shown below to the persons at the addresses listed above in item 4.
2. **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 4 and placed the envelope for collection and mailing on the date shown below, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Los Angeles, California.

3. **By e-mail or electronic transmission.** I caused the documents to be sent on the date shown below to the e-mail addresses of the persons listed in item 4. I did not receive within a reasonable time after the transmission any electronic message or other indication that the transmission was unsuccessful.
6. I served the documents by the means described in item 5 on (*date*): **July 23, 2019**.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

7/23/19

Stephanie Alvarez

DATE

(TYPE OR PRINT NAME)

(SIGNATURE OF DECLARANT)

