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**Anderson Enterprises, Inc. d/b/a Royal Motor Sales
and Isidro Miranda.** Case 20–CA–187567

May 8, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN
AND EMANUEL

On December 4, 2017, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision. The Respondent filed exceptions, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions¹ and brief and has decided to affirm the judge’s rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

I. BACKGROUND

Prior to May 3, 2016, the Respondent required its employees to sign a mandatory arbitration agreement, entitled Alternative Dispute Resolution Policy (ADRP), which remains binding and enforceable against employees who signed it, including the Charging Party, Isidro Miranda. On October 26, 2016, the Respondent enforced the ADRP by asserting it as an affirmative defense in litigation brought by the Charging Party against the Respondent in the Superior Court of California of the County of San Francisco.

The ADRP broadly subjects any employment-related dispute between an employee and the Respondent to binding arbitration, but it also specifically provides that employees may bring claims before the National Labor Relations Board. In relevant part, the ADRP provides as follows:

The Alternative Dispute Resolution Policy, which is also set forth in the Employee Handbook, **applies to any employment-related dispute between you and Royal Motor Sales**, whether initiated by you or by the Dealership.

1. The Dealership utilizes a system of alternative dispute resolution which involves binding arbitration to resolve all disputes which may arise out of the employment context. Because of the mutual benefits (such as reduced expense and increased efficiency) which private binding

arbitration can provide both you and the Dealership, you and the Dealership (collectively referred to as the “parties”) both agree that **any claim, dispute, and/or controversy that either party may have against one another** (including, without limitation, disputes regarding the employment relationship, trade secrets, unfair competition, compensation, breaks and rest periods, termination, or harassment and claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans With Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act, and state statutes, if any, addressing the same or similar subject matters, and all other state statutory and common law claims) which would otherwise require or allow resort to any court or other governmental dispute resolution forum between you and the Dealership (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) **arising from, related to, or having any relationship or connection whatsoever with you seeking employment with, employment by, or other association with the Dealership**, whether based on tort, contract, statutory, or equitable law, or otherwise, (with the exception of workers compensation and unemployment insurance claims, or any other claims that by law are not resolvable through final and binding arbitration) **shall be submitted to and determined exclusively by binding arbitration. Claims may be brought before an administrative agency but only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims include without limitation claims or charges brought before the Equal Employment Opportunity Commission (www.eeoc.gov), the U.S. Department of Labor (www.dol.gov), or the National Labor Relations Board (www.nlr.gov).** Nothing in this Policy shall be deemed to preclude or excuse a party from bringing an administrative claim before any agency in order to fulfill the party’s obligation to exhaust administrative remedies before making a claim in arbitration.

...

4. In arbitration, the parties will have the right to conduct civil discovery, bring motions, and present witnesses and evidence as provided by California’s procedural rules. However, there will be no right or authority for any dispute to be brought, heard or arbitrated as a class

¹ There are no exceptions to the judge’s dismissal of the complaint’s allegation that the Respondent violated Sec. 8(a)(1) by maintaining the Binding Arbitration Agreement.

or collective action. (“Class Action Waiver”). . . . Notwithstanding this Class Action Waiver, you and the Dealership agree that you do not waive your right under Section 7 of the National Labor Relations Act to file a class or collective action in court and that you will not be disciplined or threatened with discipline if you do so. The Dealership, however, may lawfully seek enforcement of the Class Action Waiver contained in this Policy under the Federal Arbitration Act and seek dismissal of any such claims.

Jt. Exh. O (emphasis added).

The judge found that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA or Act) by maintaining the ADRP because, in his view, employees would reasonably read it to prohibit them from filing unfair labor practice charges with the Board. In so concluding, the judge relied on the “reasonably construe” prong of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) (*Lutheran Heritage*), which was extant law at the time the judge issued his decision.² Shortly after the judge issued his decision, the Board overruled the “reasonably construe” prong of *Lutheran Heritage*, announced a new standard for evaluating the lawfulness of facially neutral rules and policies, and decided to apply the new standard retroactively to all pending cases. *Boeing Co.*, 365 NLRB No. 154, slip op. at 2–3, 16–17 (2017).³

On exceptions, the Respondent contends that the judge erred in finding that the ADRP unlawfully interferes with employees’ access to the Board. The Respondent observes that the Board in *Boeing* overruled the analytic

framework applied by the judge to find an unfair labor practice here. The Respondent contends that the ADRP is lawful under *Boeing* because, when reasonably interpreted, it does not prohibit or interfere in any way with employees’ exercise of NLRA rights. The Respondent asserts that to the contrary, the ADRP expressly permits employees to file claims and charges with the Board, making it clear to employees that they can seek redress from the Board.

The General Counsel argues that the ADRP remains unlawful under *Boeing*. In the General Counsel’s view, the ADRP interferes with employees’ access to the Board by broadly subjecting employment-related disputes to mandatory arbitration. The General Counsel further argues that the judge correctly found that the ADRP is not saved by its language recognizing the right of employees to bring claims before administrative agencies, explicitly including the Board.

II. DISCUSSION

For the reasons discussed below, we reverse the judge’s decision and find that the Respondent did not violate Section 8(a)(1) of the Act by maintaining its ADRP. The ADRP, when reasonably interpreted, does not potentially interfere with employees’ right to file Board charges and participate in Board proceedings.

In *Prime Healthcare Paradise Valley, LLC*, we held that “an arbitration agreement that explicitly prohibits the filing of claims with the Board or, more generally, with administrative agencies must be found unlawful” because “[s]uch an agreement constitutes an explicit prohibition on

² In *Lutheran Heritage*, the Board held that an employer violates Sec. 8(a)(1) of the Act “when it maintains a work rule that reasonably tends to chill employees in the exercise of their Sec.[.] 7 rights.” *Id.* at 646. The maintenance of a rule is unlawful if the rule explicitly restricts activities protected by Sec. 7. *Id.* If a rule does not constitute such an explicit restriction, its maintenance remained unlawful under *Lutheran Heritage* if “(1) employees would reasonably construe the language [of the rule] to prohibit Sec.[.] 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Sec.[.] 7 rights.” *Id.* at 647.

³ Under *Boeing*, the Board first determines whether a challenged rule or policy, reasonably interpreted, would potentially interfere with the exercise of rights under Sec. 7 of the Act. If not, the rule or policy is lawful. If so, the Board determines whether an employer violates Sec. 8(a)(1) of the Act by maintaining the rule or policy by evaluating two things: “(i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.” *Id.*, slip op. at 3 (emphasis omitted). In conducting this evaluation, the Board will strike a proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policies, viewing the rule or policy from the employees’ perspective. *Id.* “[T]he Board will delineate three categories” of work rules:

Category 1 will include rules that the Board designates as lawful to maintain, either because (i) the rule, 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 rule. . . .

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

Category 3 will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.

Id., slip op. at 3–4 (emphasis in original). The subdivisions of Category 1 were subsequently redesignated 1(a) and 1(b). See *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2 fn. 2 (2019). Placement of a rule or policy in Category 1(a) does not result from balancing NLRA rights and legitimate justifications. See *id.*, slip op. at 2 (for a Category 1(a) rule, “there is no need for the Board to take the next step in *Boeing* of addressing any general or specific legitimate interests justifying the rule”). The *Boeing* standard replaced only the “reasonably construe” prong of *Lutheran Heritage*. Other aspects of *Lutheran Heritage* remain intact, including whether a challenged rule or policy explicitly restricts activities protected by Sec. 7. See above, fn. 2.

the exercise of employee rights under the Act.” 368 NLRB No. 10, slip op. at 5 (2019). We further stated that where an arbitration agreement does not contain such an explicit prohibition but rather is facially neutral, the standard set forth in *Boeing* applies. *Id.* Under that standard, the Board determines whether the arbitration agreement at issue, “when reasonably interpreted, would potentially interfere with the exercise of NLRA rights.” *Boeing*, 365 NLRB No. 154, slip op. at 3.⁴ The “when reasonably interpreted” standard is an objective one and looks solely to the wording of the rule, policy, or other provision at issue interpreted from the perspective of an objectively reasonable employee, who does not view every employer policy through the prism of the NLRA. See *LA Specialty Produce*, 368 NLRB No. 93, slip op. at 2.

In *Briad Wenco, LLC d/b/a Wendy’s Restaurant*, 368 NLRB No. 72 (2019), we addressed the lawfulness of arbitration agreements that require employees to arbitrate federal statutory claims but also include “savings” language that clearly and prominently informs employees that they are free to file charges with the Board. The first paragraph of the arbitration agreements at issue in *Briad Wenco*, when reasonably interpreted, included claims arising under the Act within the scope of their arbitration mandate. *Id.*, slip op. at 1. But the agreements also contained a savings clause providing that “[n]othing in this Agreement shall be construed to prohibit any current or former employee from filing any charge or complaint or participating in any investigation or proceeding conducted by an administrative agency, including . . . the National Labor Relations Board.” *Id.* We found that the savings clause was sufficiently prominent within the agreements, inasmuch as it was referenced in the agreements’ second paragraph and contained in the eleventh paragraph, which was separated from the first and second paragraphs by only about a page of text. *Id.*, slip op. at 2. Because the savings clause explicitly informed employees that they retained the right to file charges with the Board and access its processes, we concluded that employees could not reasonably interpret the agreements to prohibit them from filing Board charges or participating in Board proceedings. *Id.*

⁴ As *Boeing* itself makes clear, a challenged rule may not be found unlawful merely because it could be interpreted, under some hypothetical scenario, as potentially limiting some type of Sec. 7 activity or because the employer failed to eliminate all ambiguities from the rule. See *id.*, slip op. at 9.

⁵ The specific reference to the “National Labor Relations Board” in the savings clause here distinguishes this case from *Cedars-Sinai Medical Center*, 368 NLRB No. 83 (2019), where we found that the respondent violated Sec. 8(a)(1) by maintaining an arbitration agreement that encompassed federal statutory claims while excluding claims that were “preempted by federal labor laws.” *Id.* We found it unlikely that an

Here, similar to the arbitration agreements in *Briad Wenco*, the ADRP requires arbitration of employment-related disputes, including “statutory” claims, which would include claims arising under the Act. However, this coverage language is immediately followed by a savings clause that explicitly permits employees to bring claims to the Board:

Claims may be brought before an administrative agency but only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims include without limitation claims or charges brought before . . . the National Labor Relations Board.

As in *Briad Wenco*, we conclude that this savings clause renders the ADRP lawful under *Boeing*. First, the savings clause is sufficiently prominent. It follows immediately the sentence providing for arbitration of “any” claims, necessarily including claims arising under the Act, and therefore is even more prominent than the savings clause that rendered the arbitration agreements lawful in *Briad Wenco*. See 368 NLRB No. 72, slip op. at 2. Second, the savings clause here, like the one in *Briad Wenco*, specifically and affirmatively states that employees may bring claims and charges before the National Labor Relations Board.

We are unpersuaded by the General Counsel’s argument that employees would not understand that they retain the right to file unfair labor practice charges with the Board because the ADRP also provides that “[c]laims may be brought before an administrative agency . . . *only to the extent applicable law permits* access to [an administrative] agency” (emphasis added). Certainly, it is unlikely that rank-and-file employees would know whether the Board is an administrative agency to which they are guaranteed access by “applicable law . . . notwithstanding the existence of an agreement to arbitrate.” However, the very next sentence of the ADRP identifies claims brought to the National Labor Relations Board as administrative claims that employees are entitled to bring. Thus, any ambiguity created by the italicized language above is immediately resolved.⁵

objectively reasonable employee would be familiar with the legal doctrine of preemption, let alone what actions and claims were preempted by federal labor laws, and hence we concluded that the clause was legally insufficient. *Id.*, slip op. at 3. We accordingly found that the arbitration agreement restricted employee access to the Board and that such a restriction could not be supported by any legitimate business justification as a matter of law. *Id.* Here, unlike in *Cedars-Sinai*, the ADRP makes clear that employees may bring claims before the National Labor Relations Board specifically.

Member Emanuel did not participate in *Cedars-Sinai* and expresses no opinion on whether the arbitration agreement in that case was lawful.

For these reasons, the ADRP cannot be reasonably understood to potentially interfere with employees' access to the Board and its processes. Accordingly, we find that the ADRP is lawful under *Boeing* Category 1(a). *Boeing*, 365 NLRB No. 154, slip op. at 4 (holding that Category 1(a) consists of "rules that are lawful because, when reasonably interpreted, they would have no tendency to interfere with Section 7 rights") (internal footnote omitted).⁶

We recognize that in several pre-*Boeing* cases, beginning with *SolarCity Corp.*, 363 NLRB No. 83 (2015), the Board found savings clauses nearly identical to that here to be inadequate. See, e.g., *Adecco USA, Inc.*, 364 NLRB No. 9 (2016); *Securitas Security Services USA, Inc.*, 363 NLRB No. 182 (2016); *ISS Facility Services, Inc.*, 363 NLRB No. 160 (2016). Those findings were based on the "reasonably construe" prong of *Lutheran Heritage*, which the Board in *Boeing* has since overruled.⁷ An important element of the Board's rationale in each of those cases was that the disputed arbitration agreement could have been written more clearly to eliminate any potential ambiguities as to the employees' right to file Board charges.⁸ The Board in *Boeing* repudiated both the "reasonably construe" prong of the *Lutheran Heritage* standard and the fruitless quest for "linguistic precision" that prevailed under that standard, which, as it came to be applied, demanded a "perfection that literally [was] the enemy of the good." *Boeing*, 365 NLRB No. 154, slip op. at 2. *Boeing* itself thus severely eroded the rationale on which *SolarCity* and its progeny are based. To the extent that the

holdings of those cases still retain any vitality, we overrule them for the reasons stated above.

We also recognize that our finding that the savings clause renders the ADRP lawful is in tension with the holding in *Ralph's Grocery Co.*, 363 NLRB No. 128 (2016), on which the judge relied. There, the Board held that an agreement that requires employees to resolve through arbitration all statutory employment-related claims—including by implication claims arising under the NLRA, although this is not expressly stated⁹—necessarily interferes with employees' right of access to the Board even if the agreement contains a savings clause expressly preserving such access. *Id.*, slip op. at 3. That holding, however, depends upon the "reasonably construe" prong of *Lutheran Heritage* and therefore suffers from the same infirmities as the holdings in *SolarCity* and its progeny.

Ralph's Grocery also rests on the false premise that such savings-clause language provides an illusory right because an agreement requiring employees to arbitrate all employment-related claims creates the impression that filing charges with the Board would be futile. That is not so. To begin with, filing Board charges is not objectively futile. To the contrary, Section 10(a) of the Act makes clear that the Board's authority to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." 29 U.S.C. § 160(a) (emphasis added). Moreover, we disagree that employees would believe that filing Board charges would be futile. To be sure, an arbitration agreement that makes arbitration the

Nevertheless, he agrees with his colleagues that the present case is distinguishable from *Cedars-Sinai*.

⁶ The ADRP also provides that "[n]othing in this Policy shall be deemed to preclude or excuse a party from bringing an administrative claim before an agency in order to fulfill the party's obligation to exhaust administrative remedies before making a claim in arbitration." The judge did not rely on this language in finding the ADRP unlawful, and the General Counsel does not rely on it to establish a violation. Accordingly, it is not necessary for us to address it. In any event, even if it were to be considered, we find that it does not detract from the clear import of the savings clause that employees are free to seek redress from the Board.

⁷ Viewed abstractly, the "reasonably construe" prong of *Lutheran Heritage* looks like the first step in the *Boeing* analysis. That is, asking whether a rule or policy, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights (*Boeing*) seems like just another way of asking whether employees would reasonably construe the language of a rule or policy to prohibit Sec. 7 activity (*Lutheran Heritage*). Thus, since we are finding the ADRP lawful at step one of the *Boeing* analysis, it would seem as though it should not matter that *SolarCity* and its progeny were decided under the "reasonably construe" prong of *Lutheran Heritage*. But as the Board has explained, the "reasonably construe" prong as applied in cases subsequent to *Lutheran Heritage* became something very different from what step one of *Boeing* is meant to be. Under that now-overruled standard, the Board invalidated facially neutral rules "based on its judgment that such rules could have been written more narrowly to eliminate potential interpretations that might

conflict with the exercise of Section 7 rights—interpretations that might occur to an experienced labor lawyer but that would not cross a reasonable employee's mind." *LA Specialty Produce*, 368 NLRB No. 93, slip op. at 1–2. Rules and policies were found unlawful to maintain "solely because they were ambiguous in some respect." *Boeing*, 365 NLRB No. 154, slip op. at 2 (emphasis in original). In *Boeing*, the Board "repudiated the quest for 'linguistic precision.'" *LA Specialty Produce*, 368 NLRB No. 93, slip op. at 2 (quoting *Boeing*, 365 NLRB No. 154, slip op. at 2). Subsequently, we clarified that at step one of the *Boeing* analysis, "the outcome of th[e] inquiry 'should be determined by 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. The reasonable employee does not view every employer policy through the prism of the NLRA.'" *Id.* (quoting *Boeing*, 365 NLRB No. 154, slip op. at 3 fn. 14 (quoting *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 271 (5th Cir. 2017))). Thus, despite superficial appearances, the fact that *SolarCity* and its offspring were decided under the "reasonably construe" prong of *Lutheran Heritage* makes a great deal of difference.

⁸ See, e.g., *SolarCity*, 363 NLRB No. 83, slip op. at 5 (criticizing the respondent for not "drafting a provision that clearly informs employees that they have the unconditional right to file charges with the Board").

⁹ We need not address here whether savings-clause language preserving the right to file claims or charges with administrative agencies is sufficient to render an agreement lawful where the agreement expressly mandates arbitration of NLRA claims.

exclusive forum for resolving all statutory employment-related claims and does not contain sufficiently prominent language informing employees that they retain the right to file charges with the Board does unlawfully interfere with charge filing, as the Board held in *Prime Healthcare*, above. But it does not follow that employees would consider filing charges with the Board to be either prohibited or futile when the agreement *does* contain language explicitly stating that permitted agency claims include claims or charges brought before the National Labor Relations Board, as is the case here. The position advanced by the *Ralph's Grocery* majority unreasonably attributes to employees the inclination to simply disregard the savings clause as though it were meaningless surplusage. We believe that objectively reasonable employees would understand that the inclusion of such language in a legal document is intended to, and does, describe their legal rights in precisely the manner that the text explicitly states: employees have the right to file charges with the Board. And of course, once an employee exercises that right, the Board's power to act is unaffected by any agreement, including arbitration agreements.

Further, nothing in the agreement at issue here or in *Ralph's Grocery* requires employees to file an arbitral claim either before or at the same time as they file an unfair labor practice charge with the Board.¹⁰ Both agreements announce a temporally unconditioned right to bring claims for violation of the NLRA directly to the Board. Thus, employees may choose to file Board charges first—and the Board's power to litigate and adjudicate their claims is unaffected, as a matter of law, by any arbitration agreement. We have also made clear that employees may not be required to surrender the right to obtain Board-ordered remedies. *Kelly Services Inc.*, 368 NLRB No. 130 (2019). For these reasons and those discussed below, employees would suffer no adverse consequences if they relied solely on the Board and its processes to vindicate their rights under the Act, foregoing arbitration entirely.

We also disagree with the rationale advanced by the *Ralph's Grocery* majority, that an employer's requiring individual employees to arbitrate their employment-related disputes “necessarily interferes with employees' statutory right of access to the Board.” 363 NLRB No.

128, slip op. at 3. This holding was explicitly premised on the Board's prior decision invalidating individual arbitration agreements in *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015). But *Murphy Oil* was overruled by the Supreme Court in *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S.Ct. 1612 (2018). The Court there held that employer-employee agreements containing class- and collective-action waivers and providing that employment disputes are to be resolved through individualized arbitration do not violate the NLRA and must be enforced as written pursuant to the Federal Arbitration Act (FAA). The notion that employers violate the Act by requiring individual employees to arbitrate employment-related claims, while also expressly informing them that they retain the right to file charges with the Board, cannot be reconciled with this principle. For these reasons, we also overrule *Ralph's Grocery Co.* and its progeny. See, e.g., *Lincoln Eastern Management Corp.*, 364 NLRB No. 16 (2016).¹¹

The judge also found that the ADRP is unlawful to the extent that its paragraph 4 (i.e., the Class Action Waiver) provides that “there will be no right or authority for any dispute to be brought, heard, or arbitrated as a class or collective action.” The judge reasoned that the Class Action Waiver “is not . . . limited, either on its face or in context, to non-NLRB disputes” without further explaining how the Class Action Waiver, in the context of the entire agreement, would interfere with access to the Board or rights under the Act. We disagree with the judge's finding of a violation on this basis. To begin with, a restriction on class or collective actions in the arbitral setting is perfectly lawful under the Act. See *Epic Systems Corp. v. Lewis*, above. Further, by its terms, the Class Action Waiver only applies to disputes resolved in arbitration. Jt. Exh. O, para. 4 (“In arbitration, . . . [T]here will be no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action.”). Nothing in the Class Action Waiver provision requires an employee with a claim under the NLRA to pursue it before the Board only in an individual capacity or otherwise interferes with employees' Section 7 right to engage in concerted activity for mutual aid or protection. See *Briad Wenco*, 368 NLRB No. 72, slip op. at 2 fn. 4 (class- and collective-action waiver in

¹⁰ Of course, the imposition of any condition on filing a charge with the Board, including any purported requirement that an employee pursue arbitration *before* filing a charge, would interfere with the employee's right to file charges and violate the Act. See *NLRB v. Scrivener*, 405 U.S. 117, 121–122 (1972) (recognizing that Congress intended employees to be completely free to file charges with the Board, to participate in Board investigations, and to testify at Board hearings). Such facts are not present in this case.

¹¹ The clause at issue here is a savings clause (a clause in an arbitration agreement that provides that employees retain the right to file

charges with the Board even if the agreement otherwise includes claims arising under the Act within its scope), not an exclusion clause (which carves out or excludes certain claims from the scope of the arbitration agreement). Consequently, we find it unnecessary to address *Professional Janitorial Service of Houston, Inc.*, 363 NLRB No. 35 (2015), and *Labor Ready Southwest, Inc.*, 363 NLRB No. 138 (2016), cases the judge cited, as in each of those cases, the Board addressed the adequacy of exclusion clauses under *Lutheran Heritage's* “reasonably construe” standard.

arbitration agreement was lawful where it did not require employees to pursue claims that were not being arbitrated, such as a Board charge, in an individual capacity).

ORDER

The complaint is dismissed.

Dated, Washington, D.C. May 8, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Tracy Clark, Esq., for the General Counsel.

Roman Zhuk, Esq. (Fine, Boggs & Perkins, LLP), for the Respondent Company.

Marco Palau, Esq. (Mallison & Martinez), for the Charging Party.

DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. This is another case involving employer mandatory arbitration provisions. There is no dispute that the Respondent Company, a California auto dealership, maintains such provisions in a Binding Arbitration Agreement (BAA) and an Alternative Dispute Resolution Policy (ADRP), which employees have been required to sign as a condition of employment.¹ The issue is whether those provisions are unlawfully overbroad because they would reasonably be read by employees to prohibit them from filing unfair labor practice charges with the Board.²

I. THE BINDING ARBITRATION AGREEMENT

The Company has maintained and required employees to sign the BAA since at least May 3, 2016. In relevant part, the agreement states as follows:

I . . . acknowledge that the Company utilizes a system of alternative dispute resolution which involves binding arbitration to resolve all disputes which may arise out of the employment context. Because of the mutual benefits (such as reduced expense and increased efficiency) which private binding arbitration can provide both the Company and myself, I and the

Company both agree that any claim, dispute, and/or controversy that either party may have against one another (including, but not limited to, any claims of discrimination and harassment, whether they be based on the California Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as amended, as well as all other applicable state or federal laws or regulations) which would otherwise require or allow resort to any court or other governmental dispute resolution forum between myself and the Company (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory, or equitable law, or otherwise, (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, and Employment Development Department claims) shall be submitted to and determined exclusively by binding arbitration. In order to provide for the efficient and timely adjudication of claims, the arbitrator is prohibited from consolidating the claims of others into one proceeding. This means that an arbitrator will hear only my individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group of employees in one proceeding. Thus, the Company has the right to defeat any attempt by me to file or join other employees in a class, collective, representative, or joint action lawsuit or arbitration (collectively "class claims"). I further understand that I will not be disciplined, discharged, or otherwise retaliated against for exercising my rights under Section 7 of the National Labor Relations Act, including but not limited to challenging the limitation on a class, collective, representative, or joint action. I understand and agree that nothing in this agreement shall be construed so as to preclude me from filing any administrative charge with, or from participating in any investigation of a charge conducted by, any government agency such as the Department of Fair Employment and Housing and/or the Equal Employment Opportunity Commission; however, after I exhaust such administrative process/investigation, I understand and agree that [I] must pursue any such claims through this binding arbitration procedure. . . .

The General Counsel contends that employees would reasonably conclude that the foregoing provision precludes them from filing Board charges because the first sentence indicates that "all disputes which may arise out of the employment context" are subject to binding arbitration, and the second sentence indicates that this includes claims "based on . . . federal laws or regulations[] which would otherwise require or allow resort to any court or other governmental dispute resolution forum." Although the second sentence goes on to parenthetically exclude "claims arising under the National Labor Relations Act which

¹ There is also no dispute, and the record establishes, that the Board has jurisdiction.

² On June 2, 2017, the parties filed a joint motion requesting that this issue be decided based on an attached stipulated record. The motion was

granted on June 16, and the General Counsel and the Company subsequently filed briefs on July 31. Although the case was originally assigned to another administrative law judge, it was reassigned on November 21, after the stipulated record was approved and the briefs were filed.

are brought before the National Labor Relations Board,” the General Counsel argues that this explicit exclusion is insufficient, citing *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007); *SolarCity Corp.*, 363 NLRB No. 83, slip op. at 5 (2015); *Ralph’s Grocery Co.*, 363 NLRB No. 128, slip op. at 1–2 (2016); *Bloomington’s, Inc.*, 363 NLRB No. 172, slip op. at 4–5 (2016); and *Lincoln Eastern Management Corp.*, 364 NLRB No. 16, slip op. at 2–3 (2016).

All of these cited cases are readily distinguishable, however. In *U-Haul* there was no explicit exclusion of Board claims from the employer’s mandatory arbitration policy. In *SolarCity*, the exclusion contained caveats indicating that Board charges were permitted only if they were “expressly excluded from arbitration by statute,” or “applicable law permits [an] agency to adjudicate . . .” In *Ralph’s Grocery*, the policy began with a bolded underlined instruction that all claims before any court or agency were subject to mandatory arbitration; the provision permitting employees to file Board charges did not appear until halfway through 6 pages of legalese; and the provision was preceded by sentences suggesting that such charges would be permissible only when necessary to satisfy “any applicable statutory conditions precedent or jurisdictional prerequisites.”³ In *Bloomington’s*, the 17-page plan document repeatedly stated that any and all employment claims arising under federal law were subject to a four-step arbitration program, followed only by a statement that “claims . . . under the National Labor Relations Act are . . . not subject to Arbitration under Step 4.”⁴ Finally, in *Lincoln Eastern*, the first two paragraphs of the 3-½ page policy broadly required arbitration of all employment claims, and the sentence permitting employees to file Board charges did not appear until the following page.⁵ Here, in contrast, the explicit exclusion of Board charges is clear, unqualified, and appears in the second sentence immediately after the language otherwise requiring mandatory arbitration of federal claims.

The General Counsel’s brief argues that the provision is also unlawfully overbroad because of the fifth sentence (“Thus, the Company has the right to defeat any attempt by me to file or join other employees in a class, collective, representative, or joint action lawsuit or arbitration”). The General Counsel argues that an employee would reasonably interpret this sentence to prohibit filing a Board charge on behalf of, or in concert with, other

employees, citing *Solar City*, above, slip op. at 6; and *Labor Ready Southwest, Inc.*, 363 NLRB No. 138, slip op. at 1 fn. 2 (2016).⁶ However, again, both of these cited cases are distinguishable. In both cases, the employer’s policies contained broad language that waived the right to bring, pursue, or participate in “any dispute” on behalf or as part of a class, collective or representative action, and was not otherwise clearly limited, either on its face or in context, to non-NLRB disputes. Here, in contrast, it is clear from the placement of the restriction on class, collective, representative, or joint claims (immediately after the third and fourth sentences discussing related limitations on the arbitrator’s authority), and the restriction’s explicit reference to that discussion (“Thus, . . .”), that the restriction is limited to those claims that are subject to binding arbitration, i.e., claims other than those “arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers’ Compensation Act, and Employment Development Department claims.”⁷

Finally, the General Counsel’s brief argues that the provision is also unlawfully overbroad because of the seventh sentence (“I understand and agree that nothing in this agreement shall be construed so as to preclude me from filing any administrative charge with, or from participating in any investigation of a charge conducted by, any government agency such as the Department of Fair Employment and Housing and/or the Equal Employment Opportunity Commission; however, after I exhaust such administrative process/investigation, I understand and agree that [I] must pursue any such claims through this binding arbitration procedure”). The General Counsel argues that employees would reasonably conclude from this language that filing a charge with the Board would be futile because the charge would ultimately have to be arbitrated, citing *Ralph’s Grocery*, above, slip op. at 2–3; and *Professional Janitorial Service of Houston, Inc.*, 363 NLRB No. 35, slip op. at 3 (2015).⁸

Again, however, both of these cited cases are distinguishable. In *Ralph’s Grocery*, the policy stated that employees were not prevented from filing administrative charges with a federal agency such as the Board; “[h]owever, final and binding arbitration as described in this Arbitration Policy is the sole and exclusive remedy or formal method of resolving the Covered Disputes.” As for *Professional Janitorial Service*, the policy there

³ The Board in *Ralph’s Grocery* additionally found a violation because there was no reference to the right to file Board charges in the summary of the policy contained in the employment application.

⁴ As in *Ralph’s Grocery*, the Board in *Bloomington’s* additionally found a violation because the exclusion of Board charges was not mentioned in the summary brochure or the employee acknowledgement form that accompanied the 17-page plan document.

⁵ The exclusion here is arguably more similar to the parenthetical exception for “actions arising under the NLRA” found insufficiently clear in *Labor Ready Southwest, Inc.*, 363 NLRB No. 138, slip op. at 1 fn. 2 (2016). However, the General Counsel does not argue that the *Labor Ready* decision is controlling on this issue, and the language here is considerably clearer.

⁶ This precise issue or theory was not expressly set forth in the parties’ joint motion to approve the stipulated record (which did not include the usual short statements of position), and the Company’s brief does not address it. However, the stipulated issue—whether the BAA “would be

reasonably read by employees to prohibit filing unfair labor practice charges with the Board”—is broad enough to include charges filed collectively as well as individually.

⁷ As discussed above and in fn. 5 supra, *Solar City* and *Labor Ready* are also distinguishable because the exclusion of Board charges was conditional or less clear, which created confusion whether all Board charges were exempt from the restriction on class or collective claims. See also *Adecco USA, Inc.*, 364 NLRB No. 9, slip op. at 4 (2016).

⁸ Again, this precise issue or theory was not set forth in the parties’ joint motion to approve the stipulated record, and the Company’s brief does not address it. However, as the General Counsel’s argument is without merit, there is no need to decide whether it goes beyond the stipulated issue or denies the Company procedural due process. Compare *Securitas Security Services USA, Inc.*, 363 NLRB No. 182, slip op. at 3 fn. 6 (2016); and *Valley Health System LLC*, 363 NLRB No. 178, slip op. at 3 fn. 6 (2016), and cases cited there.

confusingly stated that an employee could file “non-waivable” statutory claims with an administrative agency, which “may” include charges before the Board, “regardless of whether you use arbitration to resolve them”; “[h]owever, if such an agency 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.”

Here, as discussed above, the second sentence of the provision clearly and unconditionally excludes “claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board” from the binding arbitration procedure. Thus, notwithstanding the subsequent use of the phrase “any government agency” in the seventh sentence, read in context that sentence appears to address charges filed with any other administrative agencies “such as the Department of Fair Employment and Housing⁹ and/or the Equal Employment Opportunity Commission.” In any event, even if the seventh sentence would reasonably be construed to include charges filed with the Board, it states that an employee would only have to pursue the administrative claim through binding arbitration after the employee had “exhaust[ed] the administrative process/ investigation.” Thus, the provision more clearly indicates that an employee would only have to submit an administrative claim to arbitration if the claim was ultimately rejected or dismissed by the agency.

As indicated by the General Counsel, ambiguities in workplace rules or policies are generally construed against the employer. See, e.g., *Valley Health System*, above, slip op. at 1; and *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enf. 203 F.3d 52 (D.C. Cir. 1999). However, a rule or policy is not unlawfully overbroad merely because employees could interpret it to restrict protected activity; as indicated above, the test is whether employees reasonably would interpret it to restrict such activity. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647–648 (2004). Further, in applying that test, particular phrases must be evaluated in the context of the rule or policy as a whole, rather than in isolation. *Id.* at 646. See also *Mediaone of Greater Florida, Inc.*, 340 NLRB 277, 279 (2003). Here, evaluating the BAA as a whole, employees would not reasonably interpret it to mean that they may not file charges with the Board, either individually or collectively, or that doing so would be futile. Accordingly, contrary to the General Counsel’s allegation, the Company has not violated the Act by maintaining the agreement.

II. THE ALTERNATIVE DISPUTE RESOLUTION POLICY

Prior to the BAA, the Company required employees to sign the ADRP. Although the Company apparently no longer does so, the policy remains binding and enforceable against those employees, including Charging Party Isidro Miranda, who signed it in the past. In relevant part, the policy states as follows:

The Alternative Dispute Resolution Policy, which is also set forth in the Employee Handbook, applies to any employment-related dispute between you and Royal Motor Sales, whether initiated by you or by the Dealership.

⁹ The California Department of Fair Employment and Housing is separate from the California Employment Development Department and has a different parent agency.

1. The Dealership utilizes a system of alternative dispute resolution which involves binding arbitration to resolve all disputes which may arise out of the employment context. Because of the mutual benefits (such as reduced expense and increased efficiency) which private binding arbitration can provide both you and the Dealership, you and the Dealership (collectively referred to as the “parties”) both agree that any claim, dispute, and/or controversy that either party may have against one another (including, without limitation, disputes regarding the employment relationship, trade secrets, unfair competition, compensation, breaks and rest periods, termination, or harassment and claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans With Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act, and state statutes, if any, addressing the same or similar subject matters, and all other state statutory and common law claims) which would otherwise require or allow resort to any court or other governmental dispute resolution forum between you and the Dealership (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with you seeking employment with, employment by, or other association with the Dealership, whether based on tort, contract, statutory, or equitable law or otherwise, (with the exception of workers compensation and unemployment insurance claims, or any other claims that by law are not resolvable through final and binding arbitration) shall be submitted to and determined exclusively by binding arbitration. Claims may be brought before an administrative agency but only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims include without limitation claims or charges brought before the Equal Employment Opportunity Commission (www.eeoc.gov), the U.S. Department of Labor (www.dol.gov), or the National Labor Relations Board (www.nlr.gov). Nothing in this Policy shall be deemed to preclude or excuse a party from bringing an administrative claim before any agency in order to fulfill the party’s obligation to exhaust administrative remedies before making a claim in arbitration.

4. . . . [T]here will be no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action (“Class Action Waiver”) Notwithstanding this Class Action Waiver, you and the Dealership agree that you do not waive your right under Section 7 of the National Labor Relations Act to file a class or collective action in court and that you will not be disciplined or threatened with discipline if [] you do so. The Dealership, however, may lawfully seek enforcement of the Class Action Waiver contained in this Policy under the

Federal Arbitration Act and seek dismissal of any such claims.

...

As indicated by the General Counsel, the above policy statement is clearly unlawful under the Board precedent discussed above. First, as in *Lincoln Eastern*, the exclusion of Board claims does not appear until well into the policy after repeated statements that the binding arbitration policy applies to all employment disputes. Second, as in *SolarCity, Ralph's Grocery*, and *Professional Janitorial Service*, the exclusion of Board claims is qualified; it specifically states that such claims may be brought before the agency "only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate." See also *Securitas Security Services USA, Inc.*, 363 NLRB No. 182, slip op. at 4 (2016) (finding an identically qualified exclusion confusing and therefore unlawfully overbroad). Third, as in *SolarCity* and *Labor Ready*, the policy broadly waives the right to bring "any dispute" as a class or collective action, and is not otherwise clearly limited, either on its face or in context, to non-NLRB disputes.¹⁰

Further, contrary to the Company's contention, the allegation is not barred by the 6-month limitation period set forth in Section 10(b) of the Act. The Board has consistently held that maintenance of an unlawful workplace rule or policy is a continuing violation. See *Bloomington's*, above, slip op. at 1 fn. 1, and cases cited there.

Accordingly, the Company has violated Section 8(a)(1) of the Act by maintaining the ADRP, as alleged.

ORDER¹¹

The Respondent, Anderson Enterprises, Inc. d/b/a Royal Motor Sales, San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration policy that employees reasonably would believe bars or restricts them from filing charges with the National Labor Relations Board.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its Alternative Dispute Resolution Policy (ADRP) or revise it to make clear to employees that it does not bar or restrict them from filing charges with the National Labor Relations Board.

(b) Notify all current and former employees who were required to sign or otherwise become bound to the ADRP that it has been rescinded or revised and provide them with a copy of the revised policy, if any.

(c) Within 14 days after service by the Region, post the

¹⁰ Again, this precise issue or theory was not expressly set forth in the parties' joint motion to approve the stipulated record, and the Company's brief does not address it. However, as with the BAA, the stipulated issue—whether the ADRP "would be reasonably read by employees to prohibit filing unfair labor practice charges with the Board"—is broad enough to include charges filed collectively as well as individually.

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended

attached notice marked "Appendix" at its facility in San Francisco, California and all other facilities where the ADRP is or has been maintained in effect.¹² Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of this proceeding, Respondent has gone out of business or closed the facilities where the ADRP has been unlawfully maintained, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at any time since May 3, 2016.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

The second amended complaint is dismissed insofar as it alleges that the Respondent has also violated the Act by maintaining the Binding Arbitration Agreement (BAA).

Dated, Washington, D.C., December 4, 2017

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration policy that our employees reasonably would believe bars or restricts them from filing charges with the National Labor Relations Board.

Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind our Alternative Dispute Resolution Policy (ADRP) or revise it to make clear that it does not bar or restrict you from filing charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the ADRP that it has been rescinded or revised and provide them with a copy of the revised policy, if any.

ANDERSON ENTERPRISES, INC. D/B/A ROYAL MOTOR
SALES

The Administrative Law Judge's decision can be found at www.nlr.gov/case/20-CA-187567 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

