NATIONAL LABOR RELATIONS BOARD

SUPPLY TECHNOLOGIES, LLC	)	Case No.: 18-CA-19587
	)	
Respondent,	)	
	)	
vs.	)	
	)	
TEAMSTERS LOCAL 120	)	
	)	
	)	
Charging Party.	)	
	)	

RESPONDENT, SUPPLY TECHNOLOGIES, LLC'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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I. STATEMENT OF THE CASE

Respondent, Supply Technologies, LLC (the "Company"), submits this brief in support of its exceptions ("Exceptions") to the decision of Administrative Law Judge George Alemán (the "ALJ") in the above-captioned case issued on May 31, 2011 (the "ALJD"). The ALJD failed to apply the relevant law to the evidence on the record. As a result, the conclusion that the Company's Total Solutions Management arbitration program ("TSM") violated Section 8(a)(1) and Sections 8(a)(1) and (4) of the National Labor Relations Act, 29 U.S.C. §§151-169 (the "Act") is unsupported by the record and contrary to law.

During the hearing and in the ALJD, the ALJ evinced a complete failure to understand the essential legal concepts supporting a contract to arbitrate employment disputes. As stated in the TSM Agreement to Use ("Agreement"), TSM is a mandatory arbitration program arising under and enforced through the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"). The Agreement is a contract concerning a matter of commerce and, subject to FAA Section 2, must be enforced subject to the laws governing the enforcement of any contract. The ALJ failed to interpret the clear terms of TSM as written, repeatedly read individual sentences, and even words, out of context, and based his legal conclusions on speculation unsupported by the evidence.

Despite the Company's extensive briefing on the legal underpinnings of TSM, the ALJD wholly ignored FAA mandates concerning the interpretation and application of arbitration agreements. Without citation to any legal authority and contrary to the FAA and numerous federal court decisions interpreting the FAA, the ALJ unlawfully imposed substantive requirements on TSM and, contrary to governing law, determined that TSM violated the Act.

In addition to his failure to adhere to the FAA's mandates, the ALJ's analysis of the TSM language also disregarded the National Labor Relations Board's ("NLRB") decisions in *Lafayette Park Hotel*, 326 NLRB 824 (1998), *Martin Luther Memorial Home, Inc.*, 343 NLRB 646 (2004), *Utility Vault Company*, 345 NLRB 79, 82 (2005), *Palms Hotel and Casino*, 344 NLRB 1363 (2005), and *Extendicare Health Services, Inc.*, 350 NLRB 184 (2007), and federal court decisions regarding the interpretation of employer policies under the Act. In short, by refusing to read and interpret the TSM documents "as a whole" as required, the ALJ manufactured non-existent inconsistencies upon which he relied to find TSM unlawful.

Finally, the ALJ failed to reference undisputed evidence concerning the alleged discriminatees' actual understanding and/or ability to understand TSM. Specifically, witness testimony demonstrated that the Company' employees clearly understood that TSM was a contract for the arbitration of employment disputes which required the waiver of the right to file actions in court but <u>expressly</u> preserved the right to file administrative charges with any "government agency." Contrary to the ALJ's factual findings, the record demonstrates that the Company provided employees with extensive documentation explaining TSM and invited them to contact Human Resources ("HR") with any and all questions concerning the program in accordance with its past practice. Despite this invitation, not one of the discriminatees sought to clarify any alleged "confusion" over TSM. Nevertheless, the ALJ wrongly concluded that it was reasonable for the alleged discriminatees to refuse to obtain clarification of any questions they had about TSM and in so doing, abandoned the NLRB's objective standard for interpretation of employer policies.

On these and other grounds, as discussed in more detail herein, the Company contends that the ALJD is contrary to law, unenforceable and must be reversed in its entirety.

II. RELEVANT FACTS

A. The Company.

The Company, a subsidiary of Park Ohio Industries, Inc., provides logistics services. The Minneapolis, Minnesota facility (the "Facility") administers 89 on-site and remotely-located employees. (JX 4; Transcript[1] at 64). Employees perform warehouse, quality assurance, engineering, information technology, sales and office functions. (JX 4; Tr. at 61).

B. The Total Solutions Management Program.

TSM is an alternative dispute resolution program created under and construed through the FAA. (JX 2(c)). The Agreement is the contract through which the parties (the Company and an employee) agree to waive their respective rights to file lawsuits over workplace disputes and instead resolve them through binding arbitration pursuant to the FAA. The terms and operation of TSM are set forth in materials distributed to all Facility employees. (JX 1). TSM materials included: (1) the Agreement; (2) "Questions and Answers" ("Q&A"); (3) "Official Rules" for filing a claim under the TSM ("Rules"); and (4) a memorandum ("Memo") from Human Resources ("HR"). (JX 1 and 2). The Agreement sets forth the TSM steps and employee rights; the Rules describe the process for employees who chose to file claims under TSM; the Q&A answers likely employee questions; and the Memo asked employees to "review all the documents carefully" and contact HR with "any" questions. (JX 2(a)-(d)).

The Agreement is the arbitration contract, states that it is made and construed under the FAA, and is otherwise governed by Ohio law. (JX 2(c)). The Agreement specifically advises that an employee who accepts TSM waives the right to file a lawsuit in court, to seek and obtain legal or equitable relief through court, and to have a jury decide his or her claims. (JX 2(c)). This waiver covers court actions over claims arising under federal, state or local statutes. Claims

[1] For purposes of citation, "transcript" will be abbreviated as "Tr."

arising under criminal, workers' compensation and unemployment compensation laws are the only court claims that may not be resolved under TSM. (JX 2(a) and (c)).

The Agreement expressly states that an employee retains the right to file a charge or complaint with a government agency and to participate in an agency investigation:

> **Both Supply Technologies and I can still file a charge or complaint with a government agency**, but even if we do that, all time limitations in the TSM program will continue to run, and will not be tolled or stopped while the agency proceeding is pending. Neither Supply Technologies nor I need to file a charge or complaint with any agency to initiate the TSM process, and filing such a charge or complaint is not sufficient to start the TSM process. **Supply Technologies and I are also free to cooperate with a government agency that might be investigating a charge or complaint**, but we both waive any right we might have otherwise had to any remedy that the agency might try to obtain on our behalf (to the extent that this is permissible under law).

(JX2(c))(emphasis added). When read as a whole, the Agreement waives the parties' individual rights to file lawsuits based on employment disputes while retaining their respective rights to file administrative charges and participate in administrative investigations or proceedings related to such charges. The Agreement further waives the parties' rights to administrative remedies to the extent permitted by law.

The explanatory Q&A provides additional specific guidance as to the Agreement's provisions and repeatedly confirms that the parties retain their rights to file administrative charges. (JX 2(b)). The Q&A also confirms that filing a TSM claim is not a condition for filing an administrative charge and that the processing of an administrative charge and a claim under TSM proceed independently of each other. The Rules provide more detailed guidance as to the TSM procedure for employees who chose to file a claim under the program. (JX 2(a)). The Agreement, Rules and Q&A serve distinct purposes and, as a result, are not identical in all respects. The contractual terms of the TSM program are set forth in full in the Agreement and there is nothing in the Rules or Q&A that contradicts those provisions.

C. Implementation of TSM.

Facility management distributed TSM materials to all employees on October 22, 2010.[2] (JX 4; Tr. at 42). The Company required all 89 employees administered through the Facility to sign the Agreement as a condition of continued employment – including all supervisors and managers. (JX 1; Tr. at 61-62). All employees who signed the Agreement continued their employment, while all employees who chose not to sign the Agreement resigned their employment. (JX 1).

Alleged discriminatee (and the General Counsel's ("GC") only witness) Neng Moua ("Moua") received and reviewed the all the TSM materials – Agreement, Q&A, Rules and Memo. (Tr. at 39-40, 55). Moua read all the documents and discussed them with other employees over the weekend. (Tr. at 43). He also discussed the documents with his sister – an attorney. (Tr. at 57-58). Moua's sister discussed TSM with other attorneys and relayed their comments to Moua before October 25. (Tr. at 58).

Based upon Moua's reading of the TSM materials and his consultation with legal counsel, Moua testified that:

- he recognized that the Agreement was a "contract" (Tr. at 39-40);
- he understood that it was his decision to sign or not sign the Agreement (Tr. at 62);
- **he understood that TSM preserved his right to file a charge with a government agency** (Tr. at 56);
- **he never told NLRB investigators that he believed TSM prevented him from filing charges with the NLRB** (Tr. at 63);
- he understood that TSM required him to waive the right to remedies through the filing of a charge with a government agency (Tr. at 48); and

[2] All subsequent dates are in 2010 unless otherwise noted.

- he refused to sign the Agreement because he did not want to waive his rights to file a court action. (Tr. at 47).

Despite Moua's extensive testimony concerning the terms of the Agreement, he contradicted that testimony when he claimed that he did not "really understand it." (Tr. at 47). Moua "explained" that he found the Agreement "confusing" and "inconsistent." (Tr. at 48). Despite this alleged lack of understanding, Moua admitted that he disregarded the Company's invitation to resolve employee questions and did not contact HR because he was "uncomfortable" doing so. (Tr. at 48, 55, 73). The only reason Moua gave for his supposed discomfort was HR personnel's single presentation on wages during the 2010 union election campaign. (Tr. at 66-67). Moua admitted he understood that the Company specifically offered to answer any employee questions about TSM and had a longstanding policy allowing employees to seek direct clarification of policy issues from HR. (Tr. at 55-56).

D. The Unfair Labor Practice Charges.

Not a single Company employee filed an unfair labor practice charge ("ULP") challenging any aspect of TSM. Instead, Charging Party, Teamsters Local 120 ("Charging Party"), whom the Company's employees twice rejected as their bargaining representative, filed a number of ULPs against the Company. However, none of the ULPs drafted by Charging Party ever alleged that the TSM denied employee access to the NLRB.

Charging Party filed ULP against the Company on October 25 (Case No. 18-CA-19581). (RX 3) ("ULP 581"). ULP 581 alleged that the Company violated Sections 8(a)(1) and (3) of the Act by: 1) threatening discharge in retaliation for suspected union organizing activity. [and] 2) compelling employees to waive their rights under "the NLRA, the EEOC" and various other laws in retaliation for suspected union organizing activity. (RX 3). ULP 581 never alleged that TSM interfered with access to the NLRB or that the waivers it contained were unlawful.

Memorializing and reiterating its stated objections to TSM, Charging Party created a flyer and distributed it at the Facility on October 26. (RX 1; Tr. at 95). Although, the October 26 flyer quoted TSM materials and stated that TSM "attempts to replace an impartial judicial system with a worthless company policy," it never alleged that it interfered with access to the NLRB. (RX 1). Indeed, Charging Party distributed a revised flyer after October 26. This revised flyer also never alleged that TSM interfered with employees' access to the NLRB. (RX 2; Tr. 98).

Charging Party filed a second ULP (Case No. 18-CA-19587) on November 3. (RX 4)("ULP 587"). ULP 587 alleged that the Company violated Sections 8(a)(1) and (3) by "[using] employees' refusal to sign the 'Total Solutions Management' agreement as a pretext to discharge them in retaliation for union organizing activity." (RX 4). Again, ULP 587 never alleged that TSM interfered with access to the Board or violated Sections 8(a)(1) and (4).

On November 29, at the request of Region 18, the Company submitted a statement of position responding to the specific Section 8(a)(1) and (3) allegations in ULP 581 and ULP 587 – the only allegations in existence at the time. On December 3, Region 18 requested additional information concerning the specific charges, and the Company promptly responded. On December 6, Region 18 again contacted Company counsel via telephone with additional questions about the pending charges. Company counsel responded that same day and offered to provide additional information on request. After December 6, Region 18 provided the Company with no further opportunity to respond to any charges or subsequent amendments. Region 18 did not provide the Company with any indication that further allegations were forthcoming.

Neither Charging Party nor any Company employee ever alleged, in a charge or otherwise, that TSM interfered with access to the Board or violated Sections 8(1) and (4).

Rather, on December 14, Region 18 sent a facsimile to Charging Party. (RX 7). In that facsimile, Region 18 took it upon itself to draft an amended charge in ULP 587 that Region 18 advocated "reflect[ed] the allegation we believe is meritorious." (RX 7). (the "Region 18 Amended Charge"). Region 18 also recommended withdrawal of ULP 581 because a "meritorious" allegation was not "contained in that charge." (Id.) Region 18, therefore, concluded that the Company never retaliated against any employees for suspected union organizing activity. Region 18 never revealed who had made this "allegation [Region 18] believe(d) is meritorious" or whether it had switched sides from a neutral administrative agency to an advocate on behalf of Charging Party and made the allegation on its own.

The Region 18 Amended Charge alleged, for the first time, that TSM "interferes with and restricts employee access to the National Labor Relations Board and its procedures and remedies" in violation of Section 8(a)(1). Charging Party executed the Region 18 Amended Charge on December 14. (GCX 1(c); RX 7). Region 18 never notified the Company that it had unilaterally amended ULP 587 and never provided the Company an opportunity to respond to the new allegations. One day after Region 18 redrafted the Charge on behalf of Charging Party, on December 15, the Regional Director determined that TSM violated Section 8(a)(1).[3]

On December 21, Charging Party filed a second amended charge for ULP 587 which alleged that the Company violated Section 8(a)(4). (GCX 1(e)). Region 18 never disclosed whether Charging Party submitted this amended charge of its own volition or whether Region 18, as is had done before, drafted the amendment or advocated on behalf of Charging Party on what to file. Once again, Region 18 never provided the Company with any opportunity to

[3] The Company asks the NLRB to take administrative notice of Regional Director's December 15, 2010 probable cause determination in NLRB Case No. 18-CA-19587. *See Metro Demolition Co.*, 348 NLRB 272, 272 fn.3 (2006) (the Board may take judicial notice of its own proceedings).

respond to the new allegation.

E. The Complaint.

After refusing to provide the Company any opportunity to respond to the completely new charges Region 18 drafted for the Charging Party, the Regional Director issued the Complaint on December 27. Paragraphs 4 and 5 allege that "TSM interferes with employee access to the Board's processes," that the Company "threatened employees with discharge if they refused to agree to the TSM" and, as a result, the Company, "interfered with, restrained, and coerced employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act."[4] Paragraph 6 alleges that "by engaging in the conduct described above in paragraph 5, Respondent has discharged or otherwise discriminated against its employees because they refused to enter into an alternative dispute resolution procedure that interferes with employee access to the Board's processes in violation of Sections 8(a)(1) and (4) of the Act." (GCX 1(g)).

F. The Existing Arbitration Agreement.

In 2002, 2003 and 2004, the Company required employees to sign an arbitration agreement (the "Existing Arbitration Agreement") when hired.[5] (RX 8). Like TSM, the Existing Arbitration Agreement binds the Company and an employee and encompasses statutory employment claims. Paragraph 4 of the Existing Arbitration Agreement states: "The provisions herein shall not prevent the Employee from filing a charge or complaint with any administrative agency or to cooperate with such agency in an investigation or prosecution of such charges or complaints." (RX 8).

[4] The Complaint is mis-numbered such that there are two paragraphs numbered "5." As a result, the Complaint's allegations that the Company violated Section 8(a)(1) are set forth in paragraphs 4, 5, and 5.

[5] RX 8 was admitted through a Declaration under Federal Rule of Evidence 902(11) executed by the Company Human Resources Coordinator Wendy Butch. The declaration states that the attached arbitration agreement and executed signature pages were drafted by the Company. Additionally, K. Lee testified that he knew that Integrated Logistics Solutions – the employer identified on the arbitration agreement he signed in 2002 – is the same entity as the Company. (Tr. at 144).

Alleged discriminatees Hlee Yang ("H. Yang"), Kham Seng Lee ("K. Lee") and Charlie Lee ("C. Lee") each signed the Existing Arbitration Agreement when hired. (RX 8; Tr. at 128, 143, 154). Despite the existence of the Existing Arbitration Agreement with language virtually identical to the TSM, each of them actually filed administrative charges with the EEOC, alleging that the Company violated Title VII (claims subject to resolution under the Existing Arbitration Agreement). (RX 10, RX 13, RX 16; TX 130, 144, 155). K. Lee and C. Lee testified that the Company did nothing to interfere with their access to the administrative agency (the EEOC) in 2010. (Tr. at 145, 155).

A hearing occurred before the ALJ on February 10, 2011 in Minneapolis, Minnesota. The GC presented a single witness, Moua, and the Company presented four witnesses, Charging Party Representative T. Rhys Ledger, H. Yang, K. Lee and C. Lee.

III. LAW AND ARGUMENT

A. The TSM Agreement is a Lawful and Enforceable Contract to Arbitrate Under the FAA, and the Board Must Construe it that Way.

The FAA, as confirmed in several recent decisions of the U.S. Supreme Court, evinces the intent of the U.S. Congress to overcome hostility toward arbitration agreements. *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 270 (1995). As the Supreme Court instructed, "the preeminent concern of Congress in passing the FAA was to enforce private agreements into which parties had entered, a concern which requires that we rigorously enforce agreements to arbitrate." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-626 (1985)(quoting *Dean Witter Reynolds, Inc. v. Byrd*, 407 U.S. 213, 221 (1985)(internal quotes omitted)). FAA Section 2 provides, in relevant part:

> [A] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . or an agreement in writing to submit to arbitration an existing

> controversy arising out of such a contract, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added). In interpreting Section 2, the Supreme Court has repeatedly held that the FAA requires arbitration agreements be placed on equal footing with other contracts. *Volt Information Sciences v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 478 (1989). Thus, arbitration agreements may only be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

The Supreme Court has further explained that "this saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility v. Concepcion*, 131 S.Ct 1740, 1746 (2011) quoting *Doctor's Associates, Inc.* v. *Casarotto*, 517 U.S. 681, 687, (1996)(emphasis added). Specifically, an arbitration agreement must be interpreted in accordance with its choice of law provisions. *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 86 (2002)(Thomas. J. concurring). Federal courts have held that an arbitration agreement does not require a "simple integrated writing" but, pursuant to Section 2, need only be "in writing." *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1369 (11th Cir. 2005).

In construing arbitration agreements, federal courts have also instructed that an agreement using "general, inclusive language, rather than listing every possible specific claim" is not ambiguous. *Brown v. ITT Consumer Finance Corp.*, 211 F.3d 1217, 1221 (11th Cir. 2000). The Eleventh Circuit specifically concluded that, "[a]n arbitration agreement is not vague solely because it includes the universe of the parties' potential claims against the other." *Id.*

1. The U.S. Supreme Court Has Upheld the Arbitration of Statutory Employment Claims Under the FAA.

For twenty years, courts have applied the FAA to enforce contracts requiring the arbitration of statutory employment disputes. *See*, *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20 (1991)("*Gilmer*"). In *Gilmer*, the Supreme Court explained that agreements to arbitrate claims arising under federal employment statutes are enforceable, "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Gilmer*, 500 U.S. at 26.[6] The Court specifically explained that there was no inherent inconsistency between the important social policies embodied in employment statutes and enforcing agreements to arbitrate claims arising under them. *Id.* at 27. The Court instructed that, "[S]o long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 28. The Court summarized its holdings concerning the legitimacy of agreements to arbitrate statutory claims in *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000), stating:

> [w]e have recognized that federal statutory claims can be appropriately resolved through arbitration, and we have enforced agreements to arbitrate that involved such claims. We have likewise rejected generalized attacks on arbitration that rest on "suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants." These cases demonstrate that even claims arising under a statute designed to further important social policies may be arbitrated because "so long as the prospective litigant may effectively vindicate [his or her] statutory cause of action in the arbitral forum," the statute serves its function.

Id. at 89-90 (internal quotations and citations omitted). Again, in 2001, the Supreme Court stressed that:

[6] Indeed, in *Gilmer*, the Supreme Court noted that it had found arbitrators competent to decide claims arising under a variety of federal statutes. *Id* at 26.

> The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law; as we noted in *Gilmer*, 'by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.'

Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001)(quoting *Gilmer, supra* at 26.)

The Supreme Court further instructed that an arbitration agreement does not infringe upon a federal agency's authority to enforce employment statutes as long as employees are free to file charges with a government agency. In *Gilmer*, the Court noted that because the Equal Employment Opportunity Commission ("EEOC") may receive information concerning alleged statutory violations "from any source," arbitration does not interfere with its investigative and enforcement authority. *Gilmer*, 500 U.S. at 28. On this ground, the Court concluded that, "the mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration." *Id*. at 28-29. *See also, EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295-96 (2002) (an employee's agreement to arbitrate statutory claims does not interfere with an agency's ability to vindicate the public interest and enforce the statute).

More recently, in *14 Penn Plaza v. Pyett*, 556 U.S. 247, 129 S.Ct. 1456 (2009), the Supreme Court enforced an agreement to arbitrate statutory claims contained in a collective bargaining agreement negotiated under the Act. The specific contractual arbitration provision at issue required the arbitration of all claims of discrimination – including those based on "union membership," Title VII of the Civil Rights Act, the ADEA or "any other similar laws, rules, or regulations". 129 S.Ct at 1461(emphasis added). The contractual provision expressly provided that arbitration was the "sole and exclusive remedy for violations" of these statutory claims. After reaffirming its decisions in *Circuit City* and *Gilmer, supra*, the Court concluded that "[n]othing in the law suggests a distinction between the status of arbitration agreements signed

by an individual employee and those agreed to by a union representative." *Id*. at 1465. Concerning the arbitration of statutory discrimination claims, the Court instructed:

> Absent a constitutional barrier, "it is not for us to substitute our view of . . . policy for the legislation which has been passed by Congress." Congress is fully equipped "to identify any category of claims as to which agreements to arbitrate will be held unenforceable."

Id. at 1472 (citing *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33 (2008) and *Mitsubishi, supra*.).

2. Arbitration Agreements May Not Lawfully Require Employees to Waive the Right to File Administrative Charges.

In *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984), the Supreme Court explained that "a charge of employment discrimination is not the equivalent of a complaint initiating a lawsuit." *Id*. at 68. The Sixth Circuit Court of Appeals cited *Shell Oil*, in *EEOC v. Sundance Rehabilitation Corp.*, 466 F.3d 490 (6th Cir. 2006) for the proposition that, "[A] charge filed with the EEOC is not a complaint seeking relief. Rather, it informs the EEOC of possible employment discrimination." *Id.* at 499(citing *Shell Oil*, 466 U.S. at 68). The Sixth Circuit also explained that a waiver of the right to file a charge with an administrative agency is void as against public policy because, as in the case of the EEOC's enforcement of Title VII and the ADEA, some agencies can only investigate discrimination upon a charge being filed. *Sundance Rehabilitation Corp.*, 466 F.3 at 499. *See also, U-Haul of California*, 347 NLRB 375 (2006) at fn 11 (citing U.S. Supreme Court and federal decisions and regulations holding that the right to file administrative charges is non-waivable).

3. Employers May Lawfully Require Employees to Waive Administrative Remedies.

While federal courts have made clear that employees may not be required to waive the right to file administrative charges alleging violations of employment statutes, courts have long

held that employees may waive the right to remedy through administrative processes. The lead federal case is *EEOC v. Cosmair, Inc.*, 821 F.2d 1085 (5th Cir. 1987). The Fifth Circuit first explained that, "Actions, causes of action, claims, and demands all entail the seeking of 'one's own' from another. The purpose of a charge, however, is not to seek recovery from the employer but rather to inform the EEOC of possible discrimination." *Id*. at 1089(citing *Shell Oil, supra*). Exemplifying its conclusion that obtaining a remedy was not the *sine qua non* of an administrative charge, the Court observed: "Indeed, charges can be filed by persons other than the employee who allegedly suffered from the discrimination." *Id.*

Upon this legal foundation, the Fifth Circuit held that "although an employee cannot waive the right to file a charge with the EEOC, the employee can waive not only the right to recover in his or her own lawsuit but also the right to recover in a suit brought by the EEOC on the employee's behalf." *Id.* at 1091. *See also, Sundance, supra* at 498-99; *Wastak v. Lehigh Valley Health Network*, 342 F.3d 281, 290-91 (3rd Cir. 2003); *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316, 321 (5th Cir. 2003)(an employee can waive rights to money damages under the Family Medical and Leave Act); *Clifford v. Home Box Office, Inc.*, 2009 U.S. Dist. LEXIS 43352 at *28 (E.D. N.Y., May 18, 2009).

Cosmair's holding concerning the waiver of administrative remedies was expressly adopted in a U.S. Senate Report on the 1990 amendments to the Older Workers Benefits Protection Act. The report stated that "an employee may validly waive the right to recover in his own lawsuit as well as the right to recover in a suit brought by the [EEOC] on his own behalf." S. Rep. 101-263 at 35 (1990), reprinted in 1990 U.S.C.C.A.N. 1509, 1541.[7]

[7] As the Third Circuit explained in *Wastak, supra*, the Senate Report citation to *Cosmair* addressed the intent underlying 29 U.S.C. §626(f)(4) which provides, in its entirety:

> No waiver agreement may affect the [EEOC's] rights and responsibilities to enforce this chapter.

4. Congressional Intent Favoring Arbitration Embodied in the FAA and Federal Law Governing the Waiver of Administrative Remedies Applies to the Act.

As established by the decisions cited above, the U.S. Supreme Court repeatedly has held that disputes arising under federal employment statutes may be resolved in an arbitral forum pursuant to an agreement under the FAA absent any statutory provision evincing congressional intent to prohibit arbitration of such claims. Moreover, pursuant to established federal decisions (expressly adopted by the U.S. Senate), as long as an agreement preserves the right to file administrative charges it may require the waiver of the right to an administrative remedy.

The policy behind these decisions comports with the FAA's establishment of arbitration as a favored mechanism for dispute resolution. Like the federal employment statutes at issue in the decisions cited above, the Act contains no provision evincing congressional intent to exclude claims brought under its provision from arbitration. As Section 10(a) of the Act provides:

> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8 [section 158 of this title]) affecting commerce. This power 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). Interpreting Section 10(a), the Supreme Court explained that, "Congress has made it clear that it wishes all persons with information about [unfair labor practices] to be completely free from coercion against reporting them to the Board." *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967). The Court further explained that "this complete freedom is necessary . . . to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses." *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972). Like the EEOC when it acts to enforce Title VII and the ADEA, the NLRB depends upon the filing of charges to enforce the Act. In *Nash, supra*, the Court noted that:

> No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the [EEOC].

> Although § 10(a) of the Act empowers the Board to prevent unfair labor practices, and thus to protect employees' § 7 rights, § 10(b) conditions the exercise of that power on the filing of charges; the Board cannot initiate its own processes.

Nash, 389 U.S. at fn 3.

Notably, the Act "does not give private rights to victims of unfair labor practices." *Containair Systems Corp. v. NLRB*, 521 F.2d 1166, 1170 (2nd Cir. 1975)(citing *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261 (1940)). As the Supreme Court explained in *Amalgamated Utility Workers*, "The Board seeks enforcement [of its orders regarding unfair labor practices] as a public agent, not to give effect to a 'private administrative remedy.'" *Amalgamated Utility Workers*, 309 U.S. at 269. The NLRB has itself recognized in numerous decisions that it acts for the public, not individuals. *See, Retail Clerks International Association*, 163 NLRB 817 (1967) and decisions cited therein. This conclusion confirms the long-established principle that any individual – whether personally affected by an alleged unfair labor practice or not – may file a charge with the NLRB levying such an allegation.[8] *Electrical Contractors, Inc. v. NLRB*, 245 F.3d 109, 121 (2nd Cir. 2001)(quoting *NLRB v. Ind. & Mich. Elec. Co.*, 318 U.S. 9, 17 (1943)).

However, as the Supreme Court instructed in *Gilmer*, "so long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Gilmer*, 500 U.S. at 28. Accordingly, where an arbitration agreement preserves an individual's right to the protections against unlawful discrimination or retaliation set forth in the Act, claims asserting those rights are properly subject to arbitration. Furthermore, where an arbitration agreement preserves the right to report alleged violations of the Act and participate in NLRB processes, the NLRB's

[8] Indeed, the charges at issue in this matter were not brought by the alleged discriminatees, but by a labor organization that is not their certified representative. Moreover, the actual charges currently at issue were not even drafted by that labor organization but were "created" and advocated by Region 18.

authority to enforce the Act – as specifically set forth in Section 10(a) – is undiminished, and such an agreement does not violated the Act.

B. The ALJ Failed to Interpret TSM in Accordance With the FAA and Federal Law.

As set forth in the U.S. Supreme Court decisions cited above, an FAA arbitration agreement must be interpreted on equal footing with other contracts. Additionally, such an agreement may require arbitration of statutory employment claims absent contrary congressional intent. Because TSM enables Company employees effectively to vindicate their statutory causes of action in the arbitral forum and does not interfere with access to NLRB processes, it does not undermine the remedial and deterrent function of the Act or any other federal employment statue.

Despite the Company' extensive briefing on these legal issues, the ALJ failed to address them in the ALJD or provide authority to support the conclusion that they are inapplicable to TSM or the allegations raised in the Complaint. Based upon this failure, the Company has taken the following exceptions:

1. The ALJ failed to read and interpret the Agreement as a contract between the Company and its employees under the FAA. (Exception 1)

The ALJD wholly fails to acknowledge that the Agreement is made under and should be construed according to the FAA. As a result, the ALJ's legal analysis wholly ignores federal decisions governing FAA arbitration agreements. As Moua testified, the Agreement is a contract to arbitrate. Therefore, the NLRB must construe the respective rights of the parties under the TSM program under the FAA. The ALJ's failure to address or distinguish this clear and undisputed fact, and his imposition of substantive requirements on TSM beyond those applicable to contracts in general, renders his conclusion that TSM violated Section 8(a)(1) and 8(a)(1) and (4) contrary to Section 2 of the FAA and federal decisions interpreting the FAA.

2. The ALJ concluded, without citation to any authority, that, as a matter of law, charges arising under the Act must be expressly excluded or exempted from and may not be arbitrated under an arbitration agreement enforceable through the FAA. (Exception 2)

The ALJD states that by not including an exemption or exclusion for claims that might arise under the Act, TSM would reasonably lead employees to conclude that they could not file a charge with the NLRB alleging violations of the Act. (ALJD at 10, lines 7-17). The Agreement's clear and expansive statement that the parties retain the right to file charges with any administrative agency and the right to participate in any agency investigation completely refutes this conclusion. (JX 2(c)). The ALJD concludes, **without citation to any authority**, that claims arising under the Act are not subject to arbitration.

As discussed above, an agreement requiring arbitration of statutory claims may be found unenforceable only where a statute clearly demonstrates congressional intent to preclude the arbitration of such a claim. As numerous federal courts have repeatedly held, resolution of employment disputes through arbitration upholds the remedial and deterrent function of employment statutes – specifically those statutes prohibiting employment discrimination. As long as an arbitration agreement preserves the right to file administrative charges, it does not interfere with an agency's authority to enforce a statute and is presumptively lawful.

Absent any authority from the ALJ that the Act evinces congressional intent to prohibit arbitration of claims asserting violation of its provisions (of which he cited none), his decision is contrary to the FAA and federal decisions applying it to employment statutes.

3. The ALJ's legal determination that requiring a waiver of an employee's right to administrative remedies violates Section 8(a)(1) of the Act is contrary to federal law. (Exception 3)

As set forth above, federal courts and the U.S. Congress have affirmed that, while an agreement cannot require an employee to waive his or her right to file charges with an

administrative agency alleging statutory violations, it can require an employee to waive the right to agency remedies. This governing determination affirms the legitimate, statutory function of a government agency charged with enforcing an employment statute by preserving the flow of information concerning possible violations. It also upholds the principle that government agencies do not enforce statutes to obtain remedies for individuals, but to preserve the social policies they embody for the public at large in accordance with the intent of Congress.

Indeed, in this case, TSM provides greater rights to an employee than the Act does. For example, an employee has one year from the date of the event giving rise to a claim to file - twice the amount of time allowed under 29 U.S.C. 160(b) for filing a ULP. Additionally, while a charging party has no recourse in the event the General Counsel dismisses a charge, an employee may pursue any claim under TSM to resolution on the merits before a neutral arbitrator. *See*, *Vaca v. Sipes*, 386 U.S. 171, 182 (the General Counsel has unreviewable discretion to refuse to institute and unfair labor practice complaint).

The Act is no different than Title VII, the ADEA, the Fair Labor Standards Act or the Family and Medical Leave Act in this regard. In light of the clear legal standard, the ALJ's determination that requiring employees to waive administrative remedies rendered their rights under Act "meaningless" and would have a "chilling effect" upon them is contrary to law. By basing the determination that TSM violates the Act on grounds that waiver of administrative remedies violates the Act, the ALJD contradicts congressional intent as expressed in the FAA.

4. The ALJ's interpretation of the TSM Agreement and the Existing Arbitration Agreement evinced a complete failure to understand basic contract law and statutory principles governing arbitration agreements. (Exception 4)

As discussed above, the ALJD is bereft of any recognition of the legal status of the Agreement and the TSM program under the FAA. When presented with evidence of the Existing

Arbitration Agreements signed by three of the alleged discriminatees, which were in effect at all times relevant to this matter, the ALJ stated that he was "somewhat troubled" by the documents. (Tr. at 122). Specifically, H. Yang testified that he had signed the Existing Arbitration Agreement when hired in 2002. (RX 8 and Tr. at 128). The Existing Arbitration Agreement requires him to arbitrate all employment claims. (RX 8). While bound to the Existing Arbitration Agreement with nearly identical language as that set forth in the Agreement, **H. Yang filed a charge with the EEOC and the Company in no way interfered with that process.** (RX 10 and Tr. at 130).

The ALJ expressed utter disbelief that a contract to arbitrate signed in 2002 – and which had no stated termination date – could bind H. Yang after his separation from employment with the Company. Specifically, the ALJ stated:

> "The fact that – you know, I get fired by the NLRB. What difference does it make? I should be able to do whatever I want if I'm no longer employed by the company. . . . . Why would your arbitration agreement bind him to anything -- . . . . -- eight years after he signed it and two months after he was either voluntarily quit or was fired? . . . . I'm not persuaded at all."

(Tr. at 132-33).

This colloquy reveals that the ALJ lacked a basic understanding of the purpose and operation of agreements to arbitrate employment disputes -- whether their disputes arise pre- or post-termination -- or the law governing the interpretation and enforceability of such agreements.[9] Given this, his apparent failure to consider and address in the ALJD the full legal context for TSM under the FAA and controlling federal law is not surprising, but it does support the conclusion that his analysis of the relevant legal and factual issues was deficient and,

[9] Despite the ALJ's apparent disbelief, the principle that an agreement to arbitrate employment disputes remains in effect after a signatory employee's termination is not novel. For example, in the U.S. Supreme Court's 1991 landmark decision in *Gilmer, supra*, the Court enforced an employee's obligation to arbitrate an employment discrimination claim brought after he was terminated. *See, Gilmer,* 500 U.S. at 24-35.

ultimately erroneous.[10]

5. The ALJ's legal and factual determination that the TSM program violated Section 8(a)(1) because the Agreement, Rules and Q & A are not identical is contrary to the FAA's requirements concerning the form of arbitration agreements. (Exception 5)

The ALJ based his determination that TSM violated Section 8(a)(1), in part, on the conclusion that the terms of the Agreement were not identical to information provided in the Rules and the Q&A. (ALJD at 3, 9-10). In effect, the ALJ determined that -- despite the fact that the Agreement clearly preserved an employee's statutory right to file administrative charges -- because every document referring to or explaining the workings of the TSM program did not contain this provision, it could lead an employee to conclude that he or she had no such right.

The ALJD created an unlawful implicit requirement that every document the Company produced concerning TSM contain an express disclaimer concerning the retention of the right to file administrative remedies. As explained above, the only requirement for an FAA arbitration agreement is that it exists "in writing." *Caley v. Gulfstream Aerospace Corp.,* 428 F.3d 1359, 1369 (11th Cir. 2005). Federal courts regularly hold that additional substantive requirements, other than those applicable to contracts generally, cannot be imposed on agreements to arbitrate. *See*, Doctor's *Associates, Inc.* v. *Casarotto*, 517 U.S. 681, 686-87 (1996), and cases cited therein. Additionally, by taking issue with what he characterized as TSM's "all-encompassing and rather sweeping in nature" description of covered claims, the ALJ ran afoul of federal courts' determinations that "an arbitration agreement is not vague solely because it includes the universe of the parties' potential claims against each other." See, e.g., *Brown,* 211 F.3d at 1221.

[10] Further evidence of the ALJ's unfamiliarity with the law governing arbitration agreements is found in his conclusion that the Company "purports to *give* employees the right to file a charge with a government agency, such as the Board." (ALJD at 9, lines 40-41)(emphasis added). The Agreement provision in question states, in relevant part, that, "[B]oth Supply Technologies and I can *still file* a charge or complaint with a government agency . . ." (JX 2(c))(emphasis added). The language does not and, indeed, cannot "give" statutory rights to employees. It simply and directly states that the parties "still" have the unwaivable right to file administrative charges they had prior to signing the Agreement.

In summary, the ALJ disregarded the FAA's express provisions concerning the grounds upon which an agreement to arbitrate may be deemed unlawful or unenforceable. In so doing, by concluding that TSM violated Section 8(a)(1) he impermissibly required that all documents referring to TSM include identical information and expressly list every possible claim subject to arbitration under its terms. Based upon the foregoing law, for these additional reasons, the ALJ's determination is contrary to law.

6. The ALJ's legal determination that the TSM Agreement violates the Act without concluding that it is unenforceable as a matter of Ohio contract law conflicts with Section 2 of the FAA and numerous federal court decisions. (Exception 6)

The ALJD states that the Agreement and the TSM program are in violation of the Act and that requiring the alleged discriminatees to accept it as a term of continued employment was unlawful. Additionally, the ALJD decrees that the Agreement is unlawful and, arguably, unenforceable as to the majority of the Company employees at four facilities who accepted its terms. (ALJD at 11). Pursuant to Section 2 of the FAA, an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The Agreement expressly states that, in addition to the FAA, Ohio law governs its terms in all respects. (JX 2(c)). Contrary to the express provisions of the FAA Section 2, the ALJ engaged in no analysis under Ohio law (statute or decision) to support the conclusion that the Agreement is unlawful or otherwise unenforceable. As a result, the ALJD is contrary to the express provisions of the FAA.

7. The ALJ's factual conclusion that the TSM is "ambiguous and confusing, and thus unlawful" is factually incorrect. (Exception 7)

The ALJ bases his conclusion that TSM is "ambiguous and confusing, and thus unlawful" on grounds that Company documents describing the program "do not entirely coincide with each

other." (ALJD at 3, lines 34-36). However, there is neither ambiguity nor inconsistency in the Agreement or between the Agreement, the Rules and the Q&A. In short, the alleged specific "inconsistencies" or "conflicts" to which the ALJ points do not exist.

For example, the ALJ states that while the Agreement identifies "claims unrelated to my employment with Supply Technologies" as claims subject to TSM, the Rules do not. (ALJD at 3, lines 35-39). However, the Rules clearly state that "Supply Technologies and its employees must bring all claims that they might want to bring against each other through the TSM program." (JX 2(a)). Indeed, the list of specific claims set forth in the Rules, although not exclusive, includes specific claims unrelated to employment (breach of promise or contract, battery, theft, invasion of privacy, etc.).

The ALJ further concludes that the Rules list claims for "embezzlement, restitution, [and] misappropriation of trade secrets" as among those covered by TSM but the Agreement does not. (ALJD at 3, lines 39-42). As a review of the first page of the Agreement clearly demonstrates, this conclusion is simply wrong.[11] (JX 2(c)).

Indeed, there is no provision set forth in the Agreement which is rescinded or contradicted in either the Rules or the Q&A. Thus, the ALJ's conclusion that the Agreement contradicts or is rendered ambiguous by Rules and the Q&A is indisputably incorrect. Because he based his determination that TSM violated the Act on this false conclusion, the ALJ's legal determination is without merit.

Additionally, the ALJ concludes erroneously that TSM is unlawful because the Agreement, the Rules and the Q&A fail to contain identical language which would lead an employee to reasonably believe he or she did not have the right to file NLRB charges. As

[11] The Agreement clearly states that "Supply Technologies agrees to use the TSM program itself, should Supply Technologies want to bring a claim of any kind against me (such as a claim for theft, embezzlement, restitution, trade secret misappropriation, willful misconduct, etc.)." (JX 2).

discussed above, the Agreement is the written contract memorializing the parties' agreement to arbitrate. As such, it contains all the substantive terms of that agreement – including the maintenance of the right to file administrative charges and the waiver of administrative remedies. As set forth in the Company' post-hearing brief, the Rules provide a detailed explanation of the workings of the program for employees who already have filed claims under it, and the Q&A provides explanatory information to assist employees in understanding their rights and responsibilities under the Agreement. (Company Brief at 5). While not word-for-word identical, the three documents are not contradictory. Importantly, the right to file administrative charges and the waiver of administrative remedies are expressly set forth in the Agreement, and nothing in either the Rules or the Q&A rescinds or contradicts the express terms of the Agreement as to those or any other provisions.

In effect, the ALJ's demonstrated failure to understand the basic contract principles governing contracts in general, and arbitration agreements in particular, led him to misread and misunderstand TSM. *See, Cole v. Burns International Security Services*, 105 F.3d 1465, 1485-86 (D.C. Cir. 1997)("where a contract is unclear on a point, an interpretation that makes the contract lawful is preferred to one that renders it unlawful."). His conclusion that TSM violated the Act was based entirely on misreading of the TSM documents and is, therefore, factually and legally incorrect.

C. The ALJD's Conclusion that TSM Violates Section 8(a)(1) and 8(a)(1) and (4) of the Act is Contrary to the Facts in the Record and Law.

As set forth above, the ALJD is factually and legally deficient in that it ignores the clear and established body of law governing contracts to arbitrate employment disputes under the FAA. It commits further error by concluding, contrary to law, that a waiver of administrative remedies is unlawful. Insofar as the ALJ's determination that TSM violates the Act is based on

these erroneous legal and factual foundations, it is incorrect and must be reversed.

In addition to the dispositive errors discussed above, the ALJD misapplied the decisions of the NLRB and federal courts regarding the interpretation of employer policies and ignored or failed to properly address record evidence rebutting the conclusion that TSM violates the Act.

1. The ALJ's legal conclusion that TSM violates Section 8(a)(1) of Act because employees could reasonably conclude that it prohibited them from filing charges with the NLRB is in error. (Exception 8)

The ALJ purported to apply the analytical standards set forth in *Martin Luther Memorial Home, Inc.*, 343 NLRB 646 (2004) and *Lafayette Park Hotel*, 326 NLRB 824 (1998) to conclude that the Agreement is "ambiguous and confusing, and thus unlawful." (ALJD at 8, lines 14-15). As discussed above, the ALJ based his conclusions on an impermissible interpretation of the TSM documents which took individual phrases out of context and strained to manufacture conflict and ambiguity among them (where none existed). Additionally, the ALJ based his determination in part on the unsupported conclusion that a lawful waiver of administrative remedies provision violated the Act. (ALJD at 8, lines 17-34; 9, lines 1-14).

In accordance with the interpretive guidance set forth in *Martin Luther Memorial Home, Inc.* and *Lafayette Park Hotel*, *supra*, the ALJ had to review the plain terms of the Agreement without presumption that they improperly interfered with employee rights. *Martin Luther Memorial Home, Inc.*, 343 NLRB at 646. *See also*, *Crowne Plaza Hotel*, 352 NLRB 382 (2008)(an employer policy that neither prevents employees from using NLRB processes nor requires them to go to management prior to using NLRB processes does not violate Section 8(a)(1)). Additionally, the ALJ had to refrain from reading the Agreement as prohibiting Section 7 activity simply because it "could" be interpreted that way. *Id*. at 647. Yet this is precisely what the ALJ did when he concluded that the Agreement's language "could reasonably and

understandably confuse employees as to the extent and true nature of their Section 7 right to file any such charge."

Put simply, the Agreement expressly preserves employees' right to file administrative charges and nothing in any of the TSM materials contradicts or rescinds this provision. *See, Utility Vault Company*, 345 NLRB 79, 82 (2005) (an affirmative statement in an arbitration agreement that employees retained the right to file administrative charges would render it lawful under the Act) and *Extendicare Health Services, Inc.*, 350 NLRB 184, 187 (2007)(an employer rule that assures employees that they retain Section 7 rights does not violate Section 8(a)(1)). The actual language in the TSM is as follows:

> Both Supply Technologies and I can still file a charge or complaint with a government agency….Supply Technologies and I are also free to cooperate with a government agency that might be investigating a charge or complaint….

The language above could not have been more clear and comports fully with *Utility Vault Company*, 345 NLRB 79, 82 (2005). Insofar as the preservation of the right to file expressly retains the authority of the NLRB to receive, investigate and process any future charges from signatory employees, it in no way interferes with the NLRB's power to administer or enforce the Act or prohibit the Company from committing unfair labor practices. *See, Certain-Tweed Products*, 147 NLRB 1517, 1519-20 (1964)("the Board's ability to secure the vindication of rights protected by the Act depends in large measure upon the ability of its agents to investigate charges fully to obtain relevant information and supporting statements from individuals.").

As discussed above, the Act does not create private rights for recovery by individual charging parties or alleged discriminatees. What it does create is the right to notify the NLRB of alleged unfair labor practices (among the other rights set forth in Section 7 (*e.g.*, collective bargaining and concerted activity) which neither Charging Party nor the GC have alleged TSM

violates). That right is expressly preserved in the Agreement. It is therefore unreasonable that an employee would construe TSM to interfere with the right to file a charge with the NLRB. *See, Extendicare Health Services, Inc.*, 350 NLRB 184 (2007)(employer communication must be given a reasonable reading *as a whole*).

In short, the ALJ did not interpret the TSM materials as a whole and wrongly concluded that because they were not identical they were contradictory. In effect, the ALJD interprets the Agreement, the Rules and the Q&A as three separate, stand-alone agreements and unreasonably assumes that employees would read them in that fashion. Indeed, under the ALJ's flawed analysis, the Company would have been better served to have provided only the Agreement, without explanatory materials and deny the ALJ the opportunity to take each document out of context to manufacture ambiguity and conflict. Of course, had that been the case, the ALJ undoubtedly would have concluded that the Company had failed to sufficiently explain the Agreement's terms.

In the end, contrary to the ALJD and in accordance with the NLRB's decisions, TSM does not violate Section 8(a)(1) of the Act.

2. The ALJ wrongly determined that, with only limited exceptions, "all other claims employees might have, or wish to raise, against Respondents would have to be processed, heard and resolved exclusively through the TSM program." (Exception 9)

The ALJ's determination that TSM requires all possible employee claims to be "processed, heard and resolved exclusively through the TSM program" is contrary to the express provisions of the Agreement. The Agreement, as required by law, expressly preserves employee rights to file administrative charges and cooperate with an administrative agency's investigation and processing of such charges. Because TSM creates no limitation or restriction on the actions taken by administrative agencies – and indeed, cannot do so, *See, EEOC v. Waffle House, Inc.*,

534 U.S. 279, 295-96 (2002) – it does not prohibit the filing of charges with administrative agencies independent of and simultaneous with TSM claims.

3. The ALJ's conclusion that the Company did not explain why the contents of the Agreement, the TSM Official Rules (the "Rules") and the Questions & Answers were not identical is factually incorrect. (Exception 10)

The ALJD states that "[N]o explanation was proffered by the Respondent as to why the language in the "Agreement to Use" purporting to allow employees to file a charge or complaint with government agencies was not included in the TSM "Official Rules." (ALJD at 9, lines 43-50). The ALJ relies on this alleged "unexplained and glaring omission" to conclude that employees would be confused about their rights under TSM. (ALJD at 9, line 52; 10, lines 1-3). First, as discussed above, there is no legal requirement that all documents referring to the operation of an arbitration agreement repeat every substantive provision in the contract governing that agreement. Indeed, this new requirement imposed by the ALJ violates the FAA. *See*, *AT&T Mobility v. Concepcion*, 131 S. Ct 1740 (2011).

Second, in its post-hearing brief ("Company Brief"), the Company expressly described the contents and function of all the TSM documents. (Company Brief at 5-8). The Company specifically stated that "[T]he Agreement sets forth the TSM steps and employee rights, the Rules describe the TSM process in greater detail for employees who file claims and are already involved in the process and the Q&A answers specific employee questions about TSM." (Company Brief at 5). Also, as is plainly apparent, the Rules take effect after the parties have resolved the question of whether a claim can or should be brought under TSM. Therefore, there is no need for the Rules to repeat the substantive provisions of the Agreement regarding the continuing right to file charges with a government agency. Thus, the Company identified the separate purposes for which each package of TSM documents were designed.

It is elementary that, having clearly stated the preservation of the right to file administrative charges in the contract obligating the parties to arbitrate in the Agreement, it was not necessary to restate them in the document setting forth the rules governing the processing of a claim already within the TSM program. Additionally, nothing in the Rules or in the Q&A reasonably could lead one to conclude that those documents contradict or undermine the rights set forth in the Agreement. A reasonable reading of the TSM documents "as a whole" confirms this conclusion and refutes the ALJ's determination that TSM violates Section 8(a)(1).

4. The ALJ's factual and legal determination that the Agreement's express statement -- that employees retain the right to file administrative charges with and cooperate with the subsequent investigation of any government agency -- could be interpreted as ambiguous or confusing or is contradicted by any provision in any TSM documents is not supported by the record. (Exception11)

As discussed above, but noted as a separate Exception to the ALJD, the ALJ's conclusion that because the Rules and Q&A failed to repeat all substantive terms set forth in the Agreement, the TSM program was confusing is not a reasonable reading of the documents in context. *See, Adtranz ABB Daimler-Benz v. NLRB*, 253 F.3d 19, 28 (D.C. Cir. 2001) ("the NLRB could not declare such a policy to be facially unlawful based on 'fanciful' speculation, but rather had to consider the context in which the rule was applied and its actual impact on employees"). In this case, by apparently ignoring the separate purpose of the different TSM documents, the ALJ has specifically rejected their context and based his findings of violation on that legal and factual error.

5. The ALJ's determination that the Company did not meet its burden to explain the remedy waiver provision of TSM is without foundation, as nothing in the Complaint alleges that the provision is unlawful, nor did the GC specifically argue that the provision violated the Act during the hearing or in her post-hearing brief. (Exception 12)

The ALJD alleges that the Agreement's requirement that the Company and a signatory

employee waive any right to administrative remedy was contrary to the Agreement's express preservation of the right to file administrative charges. (ALJD at 8, lines 29-34; 9, lines 1-4). As noted above, the remedies waiver provision is lawful and the ALJ presented no authority undermining that conclusion. However, and specific to this objection, neither the ALJ nor the GC specifically alleged that the provision itself was ambiguous or contrary to law during the hearing. Moreover, the GC did not argue that the provision violated the Act in her post-hearing brief.

Put simply, the GC bears the burden of proof as to the allegations in the Complaint. *Lance Investigation Service, Inc.*, 338 NLRB 1109, 1111 (2003). Without notice of this alleged issue, the Company could not present specific evidence concerning it. The NLRB has long held that "a respondent cannot fully and fairly litigate a matter unless it knows what the accusation is." *Champion International Corp.*, 339 NLRB 672, 673 (2003). In *Artesia Ready Mix*, 339 NLRB 1224 (2003) the NLRB explained that a valid complaint must include a "plain statement of the things claimed to constitute an unfair labor practice that respondent may be put upon his defense." *Id*. at 1226 (citing *NLRB v. Piqua Munising Wood Products Co.*, 109 F.2d 552 (6th Cir. 1940)). The NLRB further noted that NLRB complaints are not subject to the strict pleading requirements of civil litigation, because, "by the time a respondent is served with the complaint, it has long been given the opportunity to present its position to the General Counsel." *Id*. at 1227 (citing *Patrician Assisted Living Facility*, 339 NLRB 1153, 1154 (2003)).

In this case, at no time did Charging Party, Region 18, the GC or the ALJ contend that the administrative remedy waiver provision of the Agreement violated the Act. Indeed, the first time this provision came into question was in the ALJD. As a result, the Company had neither notice of such an allegation nor opportunity to present its position prior to filing this Brief in

support of its exceptions. The ALJ's conclusion that the Company failed to explain the legality of a provision, which had never been subject of a charge or a complaint, is indefensible.

6. The ALJ failed to address facts demonstrating that neither Moua nor Charging Party alleged that the TSM program prohibited employees from filing charges with the NLRB in their initial statements to the NLRB investigators or in the original charges filed in this matter. (Exception 13)

The record evidence shows that neither Moua nor Charging Party alleged that TSM prohibited employees from filing charges with the NLRB or accessing NLRB processes. (RX 1, 2, 3, 4; Tr. at 63). The initial allegations concerning TSM were that it was promulgated in retaliation for employees' involvement in "union organizing activity" and not that it interfered otherwise with Section 7 rights or access to NLRB processes. (RX 3 and 4). Additionally, beginning on October 26 – the day after it filed the first charge against the Company – Charging Party distributed flyers at the facility which objected to TSM. (RX 1, 2; Tr. at 95, 98). The flyers do not contend that TSM interferes with Section 7 rights or would reasonably lead an employee to conclude he or she could not file a charge with the NLRB.

Thus, the record evidence demonstrates that, having reviewed the TSM terms and rejected them, Moua never alleged to the NLRB that TSM prohibited him from accessing NLRB processes. Additionally, Charging Party did not allege that TSM prohibited access to the NLRB in either of its first two ULP charges or in flyers it drafted (and revised) and distributed to oppose TSM. The ALJ's failure to address this undisputed evidence undermines his conclusion that a reasonable employee would interpret TSM to interfere with Section 7 rights. Indeed, the only "person" who reached that conclusion was Region 18, which hijacked the Charge process by advocating on behalf of Charging Party on how it interpreted TSM and redrafting the charge for Charging Party in a manner "reflect[ed] the allegation [Region 18] believe(s) is meritorious." (RX 7).

7. The ALJ failed to sustain the Company's objection to the admission of its Statement of Position, which responded to allegations that it implemented TSM in retaliation for employee participation in protected activity (charges later withdrawn or amended out of the charge) during the hearing. (Exception 14).

Over the Company's objection, the ALJ admitted into evidence the November 19, 2010 position statement it submitted to Region 18 as part of its investigation of the initial unfair labor practices filed against the Company. (GCX 6; RX 3, 4). As noted by the Company counsel during the hearing, the statement of position presented the Company's position concerning the specific allegations set forth in ULP 581 and ULP 587 on November 29, 2010. (Tr. at 76-77). Both of the original ULP charges alleged that the Company violated Sections 8(a)(1) and (3) by implementing the TSM program in retaliation for union organizing activities. Charging Party later withdrew ULP 581 and amended ULP 587 so as to remove the Section 8(a)(3) allegation entirely.

Insofar as the statement of position responded to charges that were not part of the Complaint, the ALJ's decision to admit it into evidence was in error.

8. The ALJ's failed to address facts demonstrating that representatives of Region 18 redrafted the charge in Case No. 18-CA-19587 and sent it to Charging Party for filing. (Exception 15)

The record demonstrates that Charging Party's initial allegations as expressed in ULP 581 and ULP 587 was that the Company violated the Act by implementing TSM in retaliation for union organizing activity. Neither of the initial charges alleged that TSM itself separately violated the Act by interfering with employee Section 7 rights or access to NLRB processes. The allegations that ultimately appeared in the Complaint were generated entirely by representatives of Region 18 who directed Charging Party to withdraw ULP 581 and amend ULP 587. (RX 7). At base, the undisputed fact that it did not occur to Charging Party (or any of the

alleged discriminatees) to allege that TSM prohibited or would lead a reasonable employee to conclude that it prohibited access to the NLRB unequivocally demonstrates that Charging Party failed to interpret TSM as interfering with NLRB processes. The ALJ's failure to address and account for these facts is glaring and in error.

9. The ALJ's factual determination that H. Yang, K. Lee and C. Lee did not understand the TSM terms because they did not understand English is contrary to the record evidence. (Exception 16)

At several places in the ALJD, the ALJ concludes that H. Yang, K. Lee and C. Lee were unable to fully understand the TSM program because they possessed "limited or no ability to speak and/or understand English." (ALJD at 5-10). The record shows that each employee had read and/or signed employment documents written in English during their employment – including the Existing Arbitration Agreement. (RX 8, 9, 11, 12, 14 and 15; Tr. at 128-30, 140, 143-44, 152-54). Additionally, employment documents admitted into the record show that C. Lee received a GED at Central Evening High School in St. Paul, Minnesota for which the course material and testing was entirely in English, and K. Lee learned "English language skills" in 1988 and earned a high school degree in the United States in English. (RX 11, 14; Tr. at 152-53). The record further shows that the Company, on request, regularly provided assistance in understanding company policies for employees with less proficiency in English. (Tr. at 56-57, 72) There is no evidence indicating that, despite the Company's specific solicitation of questions concerning TSM, H. Yang, K. Lee or C. Lee sought the assistance they knew was available. Based on this undisputed evidence, there is no support for the conclusion that these three alleged discriminatees failed to understand the TSM program.

The ALJD cites no authority for the proposition that failing to provide translations of employment policies to employees with less proficiency in English is a violation of the Act or

provides grounds for concluding that an employer has violated the Act. Indeed, the ALJ's analysis of this issue relies on a baseless presumption and no prior NLRB authority that, unless an employer translates all employment policies into the first language of any group of its employees, employees may reasonably conclude that a policy violates their Section 7 rights. Such a conclusion would require all employers to translate all documents into the first language of all employees or face ULP charges.

10. The ALJ's factual determination that "only about 5-6" of the approximately 17-18 Hmong-speaking employees "are fluent in the English language" is contrary to the record. (Exception 17)

The ALJD erroneously states that "only about 5-6" of the Hmong-speaking employees "are fluent in the English language." (ALJD at 2, fn 3). During the hearing, in response to a question of the ALJ, Moua testified that of the 17 or 18 Hmong-speaking employees at the Facility, "five or six of us could speak English very fluently." (Tr. at 38)(emphasis added). Clearly, Moua's testimony was not that only "5-6" of the Hmong-speaking employees were "fluent," but that only five or six of them were "very fluent." The ALJ failed to identify the distinction between "fluent" and "very fluent," nor did the ALJD cite to specific evidence indicating that any employee lacked sufficient English fluency so as to be unable either to understand TSM or seek clarification of its terms from HR.

11. The ALJ's factual and legal determination that an employee could conclude that the TSM program would prevent them from filing charges with an administrative agency failed to address record evidence that H. Yang, K. Lee and C. Lee filed administrative charges while bound to a mandatory arbitration agreement with the Company and the Company took no action to prevent them from doing so. (Exception 18)

The Company presented undisputed evidence that H. Yang, K. Lee and C. Lee signed the Existing Arbitration Agreement to arbitrate employment disputes when hired. (RX 8; Tr. at 128, 143, 154). The Existing Arbitration Agreement binds the Company and an employee and

requires the arbitration of statutory employment claims – with terms virtually identical to those in the Agreement. (RX 8). While bound to the Existing Arbitration Agreement, H. Yang, K. Lee and C. Lee filed charges with an administrative agency (the EEOC) alleging employment discrimination. (RX 10, RX 13, RX 16; Tr. 130, 144, 155). K. Lee and C. Lee both testified that the Company did nothing to interfere with their filing administrative charges while they were obligated to arbitrate such claims. (Tr. at 145, 155).

Contrary to the ALJ's speculation as to the effect TSM would have on employees' exercise of their right to file NLRB charges, this clear evidence demonstrates that the subject employees previously had accepted a mandatory arbitration agreement and had filed administrative charges without interference from the Company while bound to that agreement. *See, Adtranz ABB Daimler-Benz v. NLRB*, 253 F.3d 19, 28 (D.C. Cir. 2001) ("the NLRB could not declare such a policy to be facially unlawful based on 'fanciful' speculation, but rather had to consider the context in which the rule was applied and its actual impact on employees").

The actual and undisputed evidence refutes the ALJ's conclusions that TSM would lead an employee to conclude he or she could not file administrative charges since employees contractually bound to the Existing Agreement (with virtually identical language) actually filed administrative charges. Nothing could demonstrate more clearly what these employees reasonably concluded. Nevertheless, these facts exist nowhere in the ALJD or in the ALJ's analysis.

12. The ALJ's legal determination that TSM violated Sections 8(a)(1) and (4) of the Act is contrary to decisions of the NLRB and the express provisions of the Act. (Exception 19)

The ALJ concluded that the Company violated Sections 8(a)(1) and (4) of the Act by "discharging" the alleged discriminatees for refusing to accept "its unlawful policy." (ALJD at

11). As discussed above, this determination is without merit because TSM does not violate the Act. Because TSM was not unlawful, requiring employees to accept it as a mandatory condition of continued employment does not violate Sections 8(a)(1) and (4).

However, assuming *arguendo* that TSM violates Section 8(a)(1), implementation of the program as a mandatory condition of employment cannot, without more, create grounds for a Section 8(a)(4) violation. Section 8(a)(4) of the Act makes it unlawful for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." 29 U.S.C § 158(a)(4) (emphasis added). Thus, under the express statutory terms, an 8(a)(4) violation is conditioned on the determination that an employer discriminated or took adverse action toward employee "because" he or she accessed or attempted to access or took part in NLRB processes. *See, NLRB v. Scrivener,* 405 U.S. 117 (1972).

The NLRB has found Section 8(a)(1) and (4) violations when an employer implements or attempts to implement an employment term that interferes with an employee's ability to file future NLRB charges. *Metro Networks, Inc.*, 336 NLRB 63, 66 (2001)(citing *Mandel Security Bureau, Inc.*, 202 NLRB 117 (1973)). Typically, the NLRB's analysis includes application of the familiar *Wright Line* standards and/or a showing that protected conduct was a "motivating factor" in the employer's decision.[12] *See e.g. American Gardens Management Co.*, 338 NLRB 644, 645 (2002). Notably, Section 8(a)(4) allegations based on the promulgation of a policy have been analyzed in the same manner as Section 8(a)(1) charges. *See Bill's Electric*, 350 NLRB 292, 296 (2007) (enforcement of a mandatory arbitration agreement which could reasonably be read by employees as substantially restricting or prohibiting access to Board

[12] *See Wright Line*, 251 NLRB 1083, 1089 (1980), analyzing violations of the Act turning on employer motivation and requiring a showing by a preponderance of the evidence that employee protected activity was the motivating factor in the employer's decision.

processes violates Section 8(a)(4)). As set forth in *Martin Luther Memorial Home, Inc.* and *Lafayette Park Hotel, supra*, the analysis of whether an employer policy violates Section 8(a)(1) does not include establishing an employer's discriminatory intent to make a prima facie showing.

The express language of Section 8(a)(4) states that it is a violation of the Act for an employer to discriminate against an individual "because" that individual accessed NLRB processes. Thus, as a statutory prerequisite for a Section 8(a)(4) violation, the GC bears the burden of demonstrating that an employer acted in response to protected activity and did so with discriminatory intent under *Wright Line.*

In this case, the ALJ expressly found that the Company did not implement TSM in response to union activity. (ALJD at fn 11). The GC presented no evidence that the Company implemented TSM in retaliation for any employee exercising his or her Section 7 rights. Indeed, any charge that the Company implemented TSM in retaliation against unionizing activity was deemed without merit and removed from the initial charges by Region 18. As a result, the ALJ's conclusion that the Company violated Sections 8(a)(1) and (4) of the Act are contrary to the express provisions of the Act and beyond the Board's authority. *See Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984)("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). By basing a Section 8(a)(1) and (4) violation on the same grounds as a Section 8(a)(1) violation, the ALJ has read the conditional "because" out of Section 8(a)(4), contrary to the unambiguously expressed intent of Congress. Indeed, the GC presented no evidence that any of the 20 alleged discriminatees notified the Company at the time they refused to accept TSM that their refusal was based on their conclusion that it interfered with their access to NLRB processes or prohibited them from exercising Section 7 rights.

13. The ALJ's legal determination that the Company threatened the alleged discriminatees with termination for failing to sign the TSM Agreement in violation of Sections 8(a)(1) and (4) of the Act is meritless. (Exception 20)

As stipulated by the Company and the GC, the Company required all employees at the Facility to accept the TSM program as a condition of continued employment. (JX 1 at 1(c)). Employees who accepted TSM continued their employment, employees who rejected TSM ended their employment with the Company by virtue of that choice. (JX 1 at 1(g)-(h)). Moua testified that he understood that it was his choice to either agree to or reject TSM in exchange for continued employment. (Tr. at 62).

As discussed above, because the terms of the Agreement did not violate the Act, the Company appropriately implemented TSM and required its employees to accept its terms as a condition of continued employment. As a result, presenting these terms to the alleged discriminatees was not a threat of termination but the establishment of a lawful condition of continued employment that each employee was free to accept or reject. *See*, *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1105 (D.C. Cir. 2001)("It is well recognized that an employer is free to lawfully run its business as it pleases.").

14. The ALJ's factual determination that "the Respondent, in the past, has apparently used a mandatory arbitration program at its other facilities" misleadingly distorts the record. (Exception 21)

The record includes undisputed evidence that in 2002, 2003 and 2004, the Company required employees to accept the Existing Arbitration Agreement as a condition of employment. (RX 8; Tr. at 128, 143, 154). The Existing Arbitration Agreement was not "apparently" used at "other facilities." (ALJD at 2, fn 4). It was required as a condition of employment at the Facility and, per its express terms, currently binds alleged discriminatees H. Yang, K. Lee and C. Lee. The ALJ's misleading recitation of the record evidence further exemplifies his failure to

understand the contractual and legal significance of employment arbitration agreements and undermines the reliability of his factual and legal analysis of the issues presented in this matter.

15. The ALJ's factual determination that Neng Moua did not understand the TSM program is contrary to and/or ignores the record evidence. (Exception 22)

The record clearly demonstrates that Moua received and had an opportunity to read all the TSM documents. (Tr. at 47-48). Moua testified that he reviewed the TSM documents with his sister – an attorney – and that his sister solicited other attorneys' opinions on TSM and discussed them with him. (Tr. at 55-58). Moua understood that the Agreement was a contract, required him to waive his right to file lawsuits against the Company, preserved his right to file charges with an administrative agency, and required him to waive any right to a remedy through an administrative agency. (Tr. at 40, 48, 56).

Thus, according to his own testimony, Moua understood the terms of TSM. To the extent Moua claimed he found the TSM documents "inconsistent," he did not testify that any of those alleged inconsistencies led him to conclude that TSM prohibited him from filing NLRB charges or otherwise exercising Section 7 rights. To the contrary, Moua testified that he never alleged that TSM interfered with his access to the NLRB when interviewed by a Region 18 investigator. Moreover, as discussed more fully below, Moua admitted that he unreasonably refused to seek clarification of TSM's alleged inconsistencies from HR – as the Company invited him to do.

In the end, Moua testified that he was not comfortable accepting TSM. (Tr. at 48). The Company agrees that it was his right to do so. However, Moua's testimony shows that he had a very good understanding of TSM's terms, did not conclude that they prevented him from exercising his Section 7 rights, never sought clarification of the terms he allegedly did not understand, and chose not to accept TSM. Moreover, Moua admitted that he never told the Company that he felt TSM restricted his Section 7 rights or was unlawful.

Based on the testimony of the GC's sole witness, the ALJ's factual conclusion that employees did not or could not understand TSM is contrary to the evidence and without merit. The ALJ's legal determination based on this conclusion is meritless.

16. The ALJ's legal and factual determination that Neng Moua was justified in failing to seek clarification of his questions about TSM from Human Resources is without foundation in the record. (Exception 23)

Moua testified that he read over the TSM documents, discussed them with his sister – an attorney who obtained comment on TSM from fellow attorneys and related that information to Moua. (Tr. 43, 57-58). In addition to this review and legal consultation, Moua testified that he understood that the Company had solicited questions about TSM and invited employees to contact HR directly. (Tr. at 55). Moua also testified that it was the Company's policy to allow employees to contact HR to clarify policy issues whenever they wanted to. (Tr. at 55-56). Despite the Company's specific invitation concerning TSM and longstanding policy of allowing employees to seek direct guidance from HR, Moua did not attempt to resolve his concerns about TSM with HR. (Tr. at 55). Moua's stated reason for failing to contact HR was the involvement of HR personnel in a single presentation during the 2010 union election campaign. (Tr. at 66-67). As a result of this single presentation in 2010, Moua testified that he did not "feel comfortable" seeking guidance from HR.[13] (Tr. at 67). There is no evidence in the record that any of the alleged discriminatees who claimed they did not understand TSM ever attempted to contact HR to clarify their concerns.

The ALJD accepts, without analysis, that Moua – and all of the other alleged discriminatees – had no obligation to contact HR to seek clarification concerning the alleged

[13] Notably, Moua did not allege that any HR representative engaged in unlawful or threatening conduct during the campaign and agreed that to his knowledge no ULP charges were filed against the Company related to the 2010 election. (Tr. at 62).

"ambiguities and contradictions" in the TSM documents. Thus, the ALJ concluded that, despite the absence of any evidence that the Company unlawfully discriminated or retaliated against employees for asking questions about Company policies, Moua (and the other alleged discriminatees) reasonably rejected the Company's offer to answer their questions about TSM. The ALJ's conclusion is contrary to the decisions of the NLRB regarding an employee's failure to obtain clarification of allegedly ambiguous employer directives. *See, Lance Investigation Service, Inc.*, 338 NLRB 1109, 1110-11 (2003) (no violation where an employee had an opportunity to clarify an ambiguity and failed to do so). The ALJ's failure to justify (legally and factually) the alleged discriminatees' arbitrary refusal to take advantage of the Company's offer to further explain TSM further undermines his conclusion that TSM's ambiguities and contradictions would lead an employee to conclude that it interfered with Section 7 rights.[14]

In short, by not even attempting to clarify concerns about TSM, Moua and the other discriminatees failed to act reasonably. As a result, any conclusion that TSM violated the Act based upon their willfully uninformed understanding of TSM is without merit.

17. The ALJ's reliance on *U-Haul of California*, 347 NLRB 375 (2006) and *Bill's Electric*, 350 NLRB 292 (2007) is misplaced. (Exception 24)

In *U-Haul Company of California*, 347 NLRB 375 (2006) ("*U-Haul*"), the NLRB held that the maintenance of a mandatory arbitration program as a condition of employment violated Section 8(a)(1). The program at issue covered "any . . . legal or equitable claims and causes of action recognized by local, state or federal law or regulations." *Id*. at 377. However, unlike the Agreement, the arbitration program at issue in *U-Haul* did not expressly affirm that employees retained the right to file charges with government agencies. The NLRB affirmed the ALJ

[14]Moua's refusal to seek assistance in understanding TSM that he knew was available is simply not reasonable based upon a single HR presentation during an election campaign. During that campaign, no allegations of illegal Company activity or related post-election objections exist. (Tr. at 62, 66).

holding that because the program's terms covered "causes of action recognized by federal law or regulations" employees would reasonably read it to prohibit the filing of unfair labor practices and violated Section 8(a)(1).[15] In support of its conclusion, the NLRB cited *Gilmer, supra,* for the proposition that prohibitions on the filing of administrative charges are void as a matter of public policy. *Id*. at fn 11. The NLRB also cited *Cosmair, supra,* for the same proposition.[16] As discussed above, in *Cosmair,* the Fifth Circuit Court of Appeals further held that the contractual waiver of remedies obtained through an administrative agency was lawful and enforceable. *See, Cosmair,* 821 F.2d at 1091.

TSM is easily distinguishable from the arbitration program at issue in *U-Haul* because, in accordance with *Gilmer, Cosmair* and other federal decisions, TSM expressly provides that employees retain the right to file administrative charges. Thus, the ALJ's reliance on *U-Haul* to find that TSM violated Section 8(a)(1) is misplaced. Additionally, the ALJ relies on *U-Haul* to support his finding that by requiring the alleged discriminatees to accept TSM as a term of continued employment, the Company violated Sections 8(a)(1) and (4). However, in *U-Haul*, while the ALJ found that the agreement violated Section 8(a)(1) and (4), the Board affirmed only the Section 8(a)(1) violation. *U-Haul*, 347 at 378. As a result, *U-Haul* provides no support for the ALJ's determination that TSM violated Sections 8(a)(1) and (4).

Similarly, in *Bill's Electric*, 350 NLRB 292 (2007) the NLRB held that a mandatory arbitration procedure violated Section 8(a)(1) of the Act and that the attempt to enforce it

[15] The Board also specifically noted that its decision was limited to the specific arbitration agreement at issue in *U-Haul*. *Id*. at fn 11.

[16] The NLRB also based its holding on the policies embodied in 29 U.S.C. § 626(f)(4), concerning the waiver of the right to file administrative charges under the OWPBA. *Id.* at fn 11. As discussed in footnote 7 above, when construing 29 U.S.C. §626(f)(4), the U.S. Senate adopted the holding of *Cosmair, supra* as to the legality of a waiver of remedies obtain through an administrative agency.

violated Section 8(a)(4).[17] Specifically, the employer sent a letter to three employees who had filed charges with the NLRB telling them that they had "to follow these grievance procedures as the exclusive step for resolution of any claimed violation of your rights." *Id.* at 296. The program at issue also specifically stated that employees retained the right to file charges with the Board, but also provided that employees who sought NLRB relief bore additional costs. *Id.* On those specific grounds, the Board determined that the program violated Section 8(a)(1) of the Act. By contrast, TSM preserves the right to file administrative charges and imposes no additional cost on employees who choose to do so. Additionally, as discussed above, the evidence clearly demonstrates that, with regard to the Existing Arbitration Agreement, the Company took no action suggesting that employees bound by its terms could not file administrative charges.

Based on the foregoing, the ALJ's reliance on *U-Haul* and *Bill's Electric* is misplaced. Additionally, the ALJ failed to address the NLRB's decisions in *Utility Vault*, 345 NLRB 79, 82 (2005)(express affirmation of the right to file administrative charges renders a mandatory arbitration agreement lawful) and *Extendicare Health Services, Inc.*, 350 NLRB 184, 187 (2007)(an employer rule that assures employees that they retain Section 7 rights does not violate Section 8(a)(1)) which support the conclusion that TSM does not violate the Act. In short, in accordance with prior NLRB decisions and federal law, TSM expressly preserved employees' right to file administrative charges – including notifying the NLRB of alleged violations of the Act.

[17] The Section 8(a)(4) violation was based on facts showing that the employer attempted to enforce the arbitration program against three individuals *after* they filed ULP charges. *Bill's Electric*, 350 NLRB at 296. The Company notes that, for purposes of the Section 8(a)(4) analysis, there were no ULP charges or other Board processes pending, or that employees contemplated filing such charges, when the Company implemented TSM.

18. The ALJ's Conclusions of Law, Remedy and Order in their entirety as they are contrary to law. (Exception 25)

Because TSM's terms were lawful under the FAA and do not interfere with an employee's right to access NLRB processes or exercise of Section 7 rights, the ALJ's Conclusions of Law, Remedy and Order are contrary to law.

19. The ALJ's Remedy and Order are in violation of the FAA. (Exception 26)

The ALJ's Remedy and Order are in violation of the FAA.

IV. CONCLUSION

For the reasons set forth in the Company's Exceptions, the ALJ's factual conclusions are without support in the record and his legal conclusions are contrary to governing law.

V. REQUEST FOR ORAL ARGUMENT

Per NLRB Rule 102.46(i), the Company requests permission to argue the foregoing exceptions orally before the NLRB.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2011 the foregoing was filed electronically via the E-Filing system on the NLRB website. The foregoing was also served via certified U.S. Mail and email on Catherine Homolka, Counsel for the Acting General Counsel, National Labor Relations Board, Suite 790, 330 South Second Avenue, Minneapolis, Minnesota 55401, (catherine.homolka@nlrb.gov) and T. Rhys Ledger, Director of Organizing and Government Affairs, Teamsters Local 120, 9422 Ulysses Street N.E., Blaine, Minnesota 55434 (rledger@teamsterslocal120.org).

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