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**Supply Technologies, LLC and Teamsters Local 120.**  
Case 18–CA–019587

December 14, 2012

DECISION AND ORDER

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On May 31, 2011, Administrative Law Judge George Alemán issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a statement in support of the administrative law judge's decision.<sup>1</sup>

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief<sup>2</sup> and has decided to affirm the judge's rulings,<sup>3</sup> findings,<sup>4</sup> and conclusions,<sup>5</sup> and to adopt his recommended Order as modified.<sup>6</sup>

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<sup>1</sup> On July 11, 2012, the Respondent filed a Motion to Reopen the Record. The Acting General Counsel filed an opposition to the motion and the Respondent filed a reply. We deny the motion. The Respondent has failed to establish that extraordinary circumstances warrant granting the motion pursuant to Sec. 102.48 of the Board's Rules and Regulations. Specifically, it has failed to show that the evidence it seeks to introduce, if credited, would require a different result. At issue is evidence purportedly showing that, some 5 months after the judge's decision issued and nearly 10 months after the close of the hearing in this case, three of the discriminatees in this case sought mediation of certain administrative claims under a dispute resolution program that preceded the program at issue here. The Respondent asserts that this evidence supports its contention that the judge erred in finding that reasonable employees would construe its mandatory arbitration policy to interfere with their rights to access to the Board, because these individuals participated in administrative claims despite the existence of a policy that resembles the one at issue in this case. We disagree. Evidence of those employees' subjective views regarding the prior policy would not be dispositive of the issue here: whether the Respondent's current policy reasonably tends to interfere with employee access to the Board.

<sup>2</sup> The Respondent has requested oral argument. The request is denied as the record, exceptions, brief, and statement in support of the judge's decision adequately present the issues and the positions of the parties.

<sup>3</sup> For the reasons stated by the judge, we affirm the judge's ruling to admit the Respondent's position statement into the record.

<sup>4</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

The judge found, and we agree, that the Respondent violated Section 8(a)(1) of the Act by instituting and maintaining a mandatory grievance-arbitration program, called Total Solutions Management (TSM), that prohibits or restricts employees' Section 7 right to file unfair labor practice charges or otherwise access the Board's processes. We also agree with the judge that the Respondent violated Section 8(a)(1) by threatening employees with discharge if they did not sign and accept the unlawful policy,<sup>7</sup> and, thereafter, by discharging 20 employees because they refused to sign the policy.

The Board's test for determining if an employer's rules unlawfully interfere with employees' Section 7 rights is set out in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). When, as here, a rule does not explicitly restrict Section 7 rights, finding a violation depends on a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to Section 7 activity; or (3) the rule has been applied to restrict Section 7 activity.<sup>8</sup> *Id.* We agree with the judge that TSM violates Section 8(a)(1) under prong (1) because employees would reasonably construe its language to prohibit filing Board charges or otherwise accessing the Board's processes, activities protected by Section 7. See *Bill's Electric, Inc.*, 350 NLRB 292, 296 (2007); *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007). We are not persuaded by the Respondent's assertions that employees would reasonably interpret TSM to protect their right of access to the Board.<sup>9</sup> That right, of course, is integral to

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<sup>5</sup> We find it unnecessary to reach the judge's conclusion that the discharges also violated Sec. 8(a)(4), as alleged, as doing so will not materially affect the remedy. In light of this finding, we conclude that the Respondent's exceptions to procedural and evidentiary rulings related to the Sec. 8(a)(4) allegation are moot.

<sup>6</sup> We shall modify the recommended Order to conform to the Board's standard language. We shall substitute a new notice to conform to the Order as modified.

<sup>7</sup> No exceptions were filed to the judge's conclusion, supported by the testimony of 4 employees and the documentary evidence, that all 20 discriminatees were threatened with discharge if they did not sign the TSM.

<sup>8</sup> No exceptions were filed to the judge's finding that TSM was not shown to have been promulgated in response to union activity, and there is no claim that TSM has been applied to restrict Sec. 7 rights. Therefore, the only element of the *Lutheran Heritage* test at issue is whether employees would reasonably construe TSM to restrict Sec. 7 rights.

<sup>9</sup> In its exceptions, the Respondent raises an additional contention: that the judge erred by failing to address the Federal Arbitration Act (the FAA) in his decision. We disagree. The Respondent does not contend that a waiver of the right to file charges with the Board or access its processes would be permissible under the FAA; to the contrary, the Respondent admits in its brief that an arbitration agreement cannot lawfully interfere with rights protected by the Act. Rather, the

the Act. As the Supreme Court has explained, Congress aimed to ensure that employees were “completely free from coercion” with respect to Board access. *NLRB v. Scrivener*, 405 U.S. 117, 123. (1972).

The Respondent provided employees with three documents setting forth the TSM program: the Agreement to Use Supply Technologies’ Alternative Dispute Resolution Program (the Agreement), the “Official Rules,” and an explanatory document entitled “Questions and Answers.” We find, in accord with the judge, that the ambiguity of the Agreement, standing alone, is such that reasonable employees would construe it as interfering with their right to file unfair labor practice charges or access other Board processes. The other two documents not only fail to clarify the Agreement, but exacerbate its ambiguity.

The Agreement is a two-and-a-half-page document densely packed with legalese. By its own terms, it is plainly designed to be broad in scope. The opening paragraph requires employees to agree as follows:

I agree to use **Supply Technologies’ Alternative Dispute Resolution Program** (“TSM”) to bring **any claim of any kind** against Supply Technologies or any of its past, present, or future predecessors, successors, assigns, affiliates, parents, subsidiaries, divisions, directors, officers, shareholders, representatives, employees, insurers, members and attorneys (collectively called “**Supply Technologies**”), regardless of whether the claim arose before, during, or after my employment with Supply Technologies. I also agree that my heirs, my spouse, my agents and my representatives must also use TSM . . . [emphasis in original].

The next paragraph further specifies that

[t]he claims I **must** bring in TSM include, but are not limited to, all the following:

claims relating to my application for employment, my employment, or the termination of my employment;

claims under any federal state, or local statute (including, but not limited to, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act, Sec-

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Respondent’s arguments to the judge and to the Board are based on its position that the TSM would not be read to contain such a waiver. The present dispute concerns whether the Respondent’s imposition of certain language in the TSM violates substantive rights protected by the Act. It does not involve the invocation or enforcement of an arbitration agreement itself. Under these circumstances, the judge appropriately applied Board law to determine TSM’s reasonable construction without reference to the FAA.

tions 1981 through 1988 of Title 42 of the United States Code, ERISA (the Employee Retirement Income Security Act), Worker Adjustment Relocation and Notification Act, the Americans with Disabilities Act, the Fair Labor Standard[s] Act, the Family and Medical Leave Act, the Sarbanes-Oxley Act, the Equal Pay Act and the Uniformed Services Employment and Reemployment Rights Act . . . [emphasis in original].

The Agreement then states the three types of claims excluded from TSM—criminal matters, claims for workers’ compensation, and claims for unemployment compensation benefits—and emphasizes that these are “the **only** claims [employees] can bring against Supply Technologies outside of the TSM program . . .” (emphasis in original).

Given the Agreement’s broad scope, its three limited exceptions, and its specific requirement that federal statutory claims must be brought under TSM, reasonable employees reading the Agreement would understand it to restrict their right to file unfair labor practice charges or otherwise access the Board’s processes. Although the National Labor Relations Act is not one of the specifically named statutory claims subject to the TSM, the Agreement expressly states that the list of statutes that are subject to the TSM is nonexhaustive. Moreover, each of the statutes that is named is, like the NLRA, concerned with workplace rights. In contrast, the short description of excluded claims states that they are the only claims excluded. We conclude that reasonable employees would understand the Agreement to mean that TSM applies to claims under the Act, and to inhibit their right to file Board charges or otherwise access Board processes, just as it explicitly limits employee rights to seek redress in similar forums.

The Respondent and our dissenting colleague rely heavily on other language in the Agreement to assert that TSM actually protects employees’ rights to file Board charges. We disagree. This language—which begins at the bottom of page 2 and continues on page 3—states that “[b]oth Supply Technologies and [the employee] can still file a charge or complaint with a government agency” and “are free to cooperate with a government agency that might be investigating a charge or complaint.” In contrast to the language on page 1 naming the statutes preempted by TSM, no statute or government agency is named here. Nor does this language explain that filing an administrative charge is intended to be an exception to the broad and nonexhaustive list of claims that, according to page 1 of the Agreement, “must” be brought in TSM.<sup>10</sup>

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<sup>10</sup> Immediately after stating that employees may file a charge with a government agency, the Agreement expressly states that, “even if [em-

In accord with the judge, we find that the language leaves the scope of TSM ambiguous, at best. First, it does not adequately countermand the plain meaning of the Agreement's opening paragraphs: that all claims under a federal statute relating to the employee's employment—which would, of course, encompass claims under the Act—must be brought under the TSM. The Respondent, of course, not the employees, designed TSM and drafted the documents that define its scope. The ambiguity in those documents is properly resolved against the drafter. See, e.g., *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998).<sup>11</sup>

Our decision is fully supported by Board precedent. For example, in *U-Haul Co.*, supra, the Board found that the employer violated Section 8(a)(1) by maintaining a policy requiring arbitration of “all disputes relating to or arising out of an employee's employment,” including various common law and statutory causes of action and “any other legal or equitable claims and causes of action recognized by local, state, or federal law or regulations.” Although the policy did not explicitly restrict employees' right to file unfair labor practice charges—and, in fact, a memo announcing the policy stated that the “arbitration

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ployees] do that, **all time limitations in the TSM program will continue to run**” (emphasis in original). The document goes on to say that no filing with a government agency is required to invoke TSM, nor is the filing of one sufficient to start the TSM process. It further states that employees must “waive any right [they] might have otherwise had to any remedy that the agency might obtain on [their] behalf (to the extent permissible by law).” The emphasis on TSM's time limitations would reasonably have the effect, if not the intent, of discouraging employees from initiating or becoming involved in an administrative proceeding.

We find it unnecessary to address the judge's presumption that the requirement that employees waive all rights to administrative remedies was itself unlawful. For the reasons discussed here and by the judge, TSM violates the Act even without this remedy-waiver provision.

<sup>11</sup> TSM's “Questions and Answers” and “Official Rules” documents reinforce, rather than clarify, the confusion. Although “Questions and Answers” reiterates that employees “have the right to file a charge or complaint with a government agency,” it emphasizes, like the Agreement, that all TSM time limitations will continue to run. Calculated or not, the text and its layout emphasize the primacy of TSM and the consequences of not invoking it in a timely manner. The “Official Rules,” in turn, do not mention the right to file a charge; instead, they broadly state that “[t]he types of claims that must be brought under the TSM program include, but are not limited to, . . . [c]laims for discrimination, harassment, or retaliation,” “[c]laims for violation of a federal, state, or local statute, ordinance, regulation, or public policy,” and “[c]laims for wrongful failure to hire, wrongful termination, or constructive discharge,” among others. The “Official Rules” repeat the statement that the only claims *not* subject to TSM are criminal claims and claims for workers' compensation or unemployment. No other exceptions—including the right to file a charge with a government agency—are mentioned. The references in the “Official Rules” to wrongful termination and constructive discharge, in particular, would reasonably lead an employee to think that NLRB claims are among those preempted.

process is limited to disputes, claims or controversies that a *court of law* would be authorized to entertain”—the Board found that employees would reasonably read the policy as encompassing Board charges. 347 NLRB at 377–378 (emphasis supplied). See also *2 Sisters Food Group*, 357 NLRB No. 168, slip op. at 2 (2011) (policy requiring employees to submit “all [employment] disputes and claims” to binding arbitration was unlawful; the fact that the policy was explicitly limited to claims “that may be lawfully [] resolve[d] by arbitration” would not clarify, for a reasonable employee, that the agreement did not preclude the filing of charges with the Board); *Bill's Electric*, 350 NLRB at 296 (employer violated Sec. 8(a)(1) by maintaining a policy stating that its grievance and arbitration procedure “shall be the exclusive method of resolution of all disputes, . . . but this shall not be a waiver of any requirement for the Employee to timely file any charge with the NLRB”; notwithstanding the express reference to Board charges, the Board found that the policy would reasonably be read “as substantially restricting, if not totally prohibiting,” access to the Board's processes).<sup>12</sup>

The Agreement makes abundantly clear that employees had no choice but to sign it and submit to the TSM program: if they did not comply, their employment would be terminated. The final provision before the employee's signature line states in bold type, “I understand that I would not be or remain employed by Supply Technologies absent signing this agreement.” It is apparent that when the Respondent intended to make a provision clear and unambiguous, it did so. With respect to em-

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<sup>12</sup> Our colleague contends that we have “distorted” the *Lutheran Heritage* test. He asserts that our decision amounts to a finding that an arbitration agreement will be deemed unlawful unless it *expressly* guarantees the right to file charges with the Board and to access the Board's processes. That is not our holding. Rather, we have examined the agreement in its entirety, as *Lutheran Heritage* directs. It is our colleague who, contrary to *Lutheran Heritage*, appears to read the “government agency” language in isolation, deeming it sufficient to preserve access to the Board.

Our colleague also argues that the majority exhibits “antipathy” toward mandatory dispute resolution programs for unrepresented employees. First, he contends that the Board's position is inconsistent with the longstanding practice of deferring to collectively bargained arbitration procedures. Of course, a collectively bargained procedure stands on a different footing from one unilaterally imposed by the employer on pain of termination, and we disagree with our colleague's suggestion that it is “unacceptably paternalistic” to attach legal significance to this distinction. Second, our colleague reads our decision as conflicting with the “liberal federal policy favoring arbitration agreements.” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). As noted, TSM is *not* the product of an agreement. And, in any event, our colleague appears to concede that the asserted conflict exists only if the arbitration procedure found unlawful assures the right to file charges with the Board and access to its processes. As we have determined, TSM, as interpreted by a reasonable employee, does not.

ployees' rights under the Act, however, the TSM documents are markedly different. In sum, we agree with the judge that reasonable employees would understand TSM as interfering with the right to file unfair labor practice charges or otherwise access the Board's processes. Accordingly, the maintenance of TSM violates Section 8(a)(1).<sup>13</sup>

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Supply Technologies, LLC, Minneapolis, Minnesota, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(b) Rescind and revoke its unlawful TSM grievance-arbitration policy and notify employees in writing that it has done so."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. December 14, 2012

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD  
MEMBER HAYES, dissenting.

The Respondent required its employees, as a condition of continued employment, to sign an alternative dispute resolution agreement committing them to use its Total Solution Management (TSM) procedures for the private adjudication of employment issues. Neither the formal agreement nor the accompanying explanatory materials expressly state that the TSM program applies to claims arising under the Act. I assume, *arguendo*, that it does,<sup>1</sup>

<sup>13</sup> In *D. R. Horton, Inc.*, 357 NLRB No. 184, slip op. at 2 fn. 2 (2002), the Board adopted the judge's finding that the respondent's mandatory arbitration agreement would lead employees to believe that they were prohibited from filing charges with the Board. Our decision here is consistent with *D. R. Horton*, but we would reach the same result even in the absence of that decision.

<sup>1</sup> This point is certainly not free from doubt. All of the specifically enumerated actions under federal statutes that an employee is obligated to submit to TSM resolution involve actions that individuals may directly take in court. This is distinguishable from proceedings under our Act where any person can file a charge but only the General Counsel issues complaints and thereafter assumes full responsibility for litiga-

tion on behalf of the public interest. There is no way an individual can proceed directly to litigate an unfair labor practice charge in court.

but that does not resolve the critical complaint allegation that the program is unlawful because it has a reasonable tendency to interfere with employees' rights to file charges with the Board or otherwise access its processes. The judge and my colleagues find a fatal ambiguity in the TSM documents on this point. I do not.

The TSM program documents do not expressly restrict employees' rights to file charges with the Board. On the contrary, both the *Agreement to Use* and the accompanying *Question and Answer* document expressly state that an employee can still file a charge or complaint with a government agency and is free to cooperate with an agency in the investigation of a charge or complaint. This necessarily encompasses the Board's processes.<sup>2</sup> Further, the TSM program purports to waive an employee's remedial rights obtainable through agency action only to the extent permissible under law. As in other areas of accommodation between the Act and private dispute resolution systems, the Board retains exclusive authority under Section 10(a) of the Act, subject to judicial review, to determine the permissible extent of this waiver. In these circumstances, I find that employees would not reasonably be confused about whether the TSM program interferes with their Section 7 right of access to the Board, even in the absence of express reference to Section 7 or the Board in the TSM documents.<sup>3</sup>

The result reached by the judge and my colleagues is particularly disturbing for two reasons. First, it reflects a distortion of the first prong of *Lutheran Heritage* second-stage test<sup>4</sup> for determining whether a work rule that does not explicitly restrict Section 7 rights is nevertheless unlawful. Second, it signals the Board's continued reluctance to endorse any form of mandatory alternative dispute resolution encompassing statutory claims for individual workers in a nonunion setting.

<sup>2</sup> The provision also encompasses the filing of EEOC charges and is therefore consistent with the holding of *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), that a mandatory arbitration agreement could not preclude an employee from filing a charge of discrimination with that agency.

<sup>3</sup> Inasmuch as I would find the TSM program lawful, I would accordingly dismiss the allegation that the Respondent violated Sec. 8(a)(1) by threatening to dismiss and dismissing those employees who refused to sign the agreement to be bound by that program.

<sup>4</sup> *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). If the rule explicitly restricts Sec. 7 rights, it is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647.

As to the first concern, the analysis essayed by the judge and my colleagues boils down to one principle: in the nonunion setting, an individual mandatory arbitration agreement for the resolution of employment disputes will be deemed ambiguous and unlawful unless (a) it expressly exempts claims arising under the Act from its coverage, or, possibly, (b) it covers such claims but expressly states without qualification that employees may still pursue such claims and gain relief through the Board's processes. In other words, the test is not whether ambiguous language would reasonably tend to interfere with employees' Section 7 rights. The test is simply whether the language is ambiguous. If it is—that is, if it fails expressly to guarantee the right to file unfair labor practice charges *with the Board* and to access *the Board's* processes—nothing can save the language from being found unlawful.

This analysis goes far beyond even the most strained out-of-context majority readings in recent cases of work rules found unlawful under the first prong of the *Lutheran Heritage* second-step test. Indeed, it calls into question the utility of that prong as a neutral decision-making tool to assure protection of Section 7 rights against real, rather than imaginatively perceived, interference. It also further complicates the ability of employers to draft work rules in furtherance of legitimate operational interests. As one commenter recently noted:

When introducing the bill that eventually became the NLRA, the bill's sponsor, Senator Robert F. Wagner, stated: "When employees are denied the freedom to act in concert even when they desire to do so, they cannot exercise a restraining influence upon the wayward members of their own groups, and they cannot participate in our national endeavor to coordinate production and purchasing power." While emphasizing the importance of providing employees with an enforceable right to engage in concerted activity, Senator Wagner nevertheless acknowledged: "[E]mployers are tremendously handicapped when it is impossible to determine exactly what their rights are. Everybody needs a law that is precise and certain."<sup>5</sup>

Unfortunately, the latter observation by Senator Wagner is all but forgotten. The only precision and certainty provided by this case and recent precedent construing

<sup>5</sup> Lauren K. Neal, "The Virtual Water Cooler and the NLRB: Concerted Activity in the Age of Facebook," 69 Wash. & Lee L. Rev. 1715, at 1758 (2012) (footnote citations omitted).

work rules is that any rule that does not explicitly assure protection of Section 7 rights—perhaps even with specific examples—is at risk of being found ambiguous and unlawful. My colleagues' decision here is only the most extreme example of such reasoning. This is hardly the maintenance of labor relations stability which the Act tasks us to assure as a primary policy.

Perhaps an even more disturbing aspect of this case is the apparent continuing antipathy of the Acting General Counsel and a Board majority towards private mandatory dispute resolution programs in the nonunion setting.<sup>6</sup> Although the Board has never so held, it is difficult to avoid the implication from this case that any private dispute resolution system for individual employees in a nonunion work force is unlawful unless it is a nonmandatory. This is not, of course, the principle applicable to collectively-bargained mandatory dispute resolution systems, where the Board has for decades deferred individual employees' statutory claims to prearbitral proceedings and limited its review of arbitral resolution of those claims, whether or not they are consonant with the interests of the union bargaining representative. The failure to countenance a comparable accommodation of mandatory grievance arbitration in the nonunion setting reflects an unacceptably paternalistic view of unrepresented employees. As one commenter put it, [t]here is no sound reason to prohibit adults, who otherwise have the capacity to enter into binding contracts, from agreeing to submit employment claims to arbitration simply because they are not unionized."<sup>7</sup>

Further, in my view, the reluctance to sanction any form of mandatory dispute resolution in nonunion work forces cannot be reconciled with the well-recognized "liberal federal policy favoring arbitration agreements."<sup>8</sup> As long as a mandatory dispute resolution system assures the right to file charges with the Board and access to its processes—as I find the TSM does—and contains requisite due process safeguards—an issue not presented here—I would find it to be a presumptively lawful mechanism for the initial litigation of substantive rights under

<sup>6</sup> See *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012); see also *2 Sisters Food Group*, 357 NLRB No. 168 (2011), cited by the majority. In that case, I similarly dissented from the majority's determination that employees would reasonably construe language in a mandatory arbitration agreement to interfere with their Sec. 7 rights.

<sup>7</sup> Liquita Lewis Thompson, "Arbitrators—Unlike Too Many Cooks—Do Not Spoil the Soup! Making the Case for Allowing Pre-Dispute Mandatory Arbitration of Unfair Labor Practice Charges in Nonunion Workforces," 23 Lab. Law 301, 302 (2008).

<sup>8</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

our Act, just as it would be under numerous other federal employment statutes.

Dated, Washington, D.C. December 14, 2012

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Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a grievance-arbitration procedure as a condition of employment that interferes with your right to access the Board's processes or to file charges with the Board.

WE WILL NOT discharge, or threaten to discharge, any of you for refusing to sign our TSM grievance-arbitration agreement which requires you to give up your right to file a charge with, or to have access to, the Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind and revoke our TSM grievance-arbitration policy and notify employees in writing that we have done so.

WE WILL, within 14 days from the date of this Order, offer Neng Moua, Chao Tao Moua, Kham Seng Lee, Chou Yang, Hlee Yang, Kao Moua, Charlie Lee, Blong Moua, Vue Pao Lee, Chia Vue, Tommy W. Moua, Youa Vang Moua, Por Lee, Gerardo Garcia, Chao Hang, Her Vue, Hoe Yang, Mike Moua, Rafael Peil, and Nhia Long Moua full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Neng Moua, Chao Tao Moua, Kham Seng Lee, Chou Yang, Hlee Yang, Kao Moua, Charlie Lee, Blong Moua, Vue Pao Lee, Chia Vue, Tommy W. Moua, Youa Vang Moua, Por Lee, Gerardo Garcia, Chao Hang, Her Vue, Hoe Yang, Mike Moua, Rafael Peil, and Nhia Long Moua whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Neng Moua, Chao Tao Moua, Kham Seng Lee, Chou Yang, Hlee Yang, Kao Moua, Charlie Lee, Blong Moua, Vue Pao Lee, Chia Vue, Tommy W. Moua, Youa Vang Moua, Por Lee, Gerardo Garcia, Chao Hang, Her Vue, Hoe Yang, Mike Moua, Rafael Peil, and Nhia Long Moua, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

SUPPLY TECHNOLOGIES, LLC

*Catherine M. Homolka and Pamela W. Scott, Esqs.*, for the General Counsel.

*Stephen S. Zashin and Patrick J. Hoban, Esqs.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

GEORGE ALEMÁN, Administrative Law Judge. This case was tried in Minneapolis, Minnesota, on February 10, 2011. The charge was filed by Teamsters Local 120 (the Charging Party) on November 3, 2010, and amended on December 14 and 21, 2010.<sup>1</sup> On December 27, 2010, the Regional Director for Region 18 of the National Labor Relations Board (the Board) issued a complaint alleging that Supply Technologies, LLC (the Respondent) had engaged in unlawful conduct in violation of Section 8(a)(1) and (4) of the National Labor Relations Act (the Act).

Specifically, the complaint alleges that the Respondent violated Section 8(a)(1) by instituting an alternative dispute resolution program, known as Total Solution Management or (TSM) which unlawfully interferes with its employees' right of access to the Board's processes under Section 7 of the Act, and by threatening to discharge employees who refuse to agree to the TSM. It further alleges that the Respondent violated Section 8(a)(4) and (1) of the Act by discharging the following 20 employees for refusing to sign the TSM agreement: Neng Moua, Chao Tao Moua, Kham Seng Lee, Chou Yang, Hlee Yang, Kao Moua, Charlie Lee, Blong Moua, Vue Pao Lee, Chia Vue, Tommy W. Moua, Youa Vang Moua, Por Lee, Gerardo Garcia, Chao Hang, Her Vue, Hoe Yang, Mike Moua, Rafael Peil, and Nhia Long Moua. By answer dated January 7, 2011, the Respondent denied having committed any unfair labor practices.

<sup>1</sup> All dates are in 2010, unless otherwise indicated.

At trial, all parties were afforded a full and fair opportunity to be heard, to present oral and written evidence, to examine and cross-examine witnesses, and to argue orally on the record. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

#### FINDINGS OF FACT

##### I. JURISDICTION

The Respondent, an Ohio corporation, with an office and place of business in Minneapolis, Minnesota, is engaged in the business of supplying parts and materials to manufacturers and distributors. During the past calendar year, the Respondent, in the course and conduct of its business operations, purchased and received at its Minneapolis, Minnesota facility goods and materials valued in excess of \$50,000 directly from points located outside the State of Minnesota. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

###### A. Factual Background

The Respondent is a division of Park Ohio Industries and, as noted, operates a facility in Minneapolis, Minnesota, as well as three other facilities in the Midwest.<sup>2</sup> Its employee complement consists of 89 employees, 74 of whom work at the Minneapolis facility performing warehouse, quality assurance, administrative, and sales functions,<sup>3</sup> and 15 other employees assigned at its various Midwestern facilities.

On June 21, 2010, the Union filed a petition with the Board seeking to represent “All full time and regular part-time warehouse and drivers” employed by the Respondent at the Minneapolis facility. (GC Exh. 3.) An election among the employees was thereafter held on August 4. The Union, however, did not prevail in its efforts for, of the 44 valid votes cast, 22 were cast for, and 22 against, union representation. The results were thereafter certified by the Board on October 18. (GC Exh. 5.)

Three days later, on October 21, Park Ohio Industries instituted the TSM program at its Minneapolis and other facilities.<sup>4</sup> It was to be effective at the Minneapolis facility on October 22, and on October 25 at its other facilities. (GC Exh. 6, p. 4.)

<sup>2</sup> The Respondent’s other facilities are located in Des Plaines, Illinois, Memphis, Tennessee, and Lenexa, Kansas. (See GC Exh. 6, p. 4—Respondent’s position statement to the Board.)

GC Exh. 6 was received into evidence at the hearing over the Respondent’s objection. (Tr. 76.) The Respondent, on brief (see R. Br. p. 9, fn. 9), renews its objection to the receipt of GC Exh. 6 into evidence. I adhere to my ruling, for the Board has long found position statements to be properly admissible into evidence. See, e.g., *Roman, Inc.*, 338 NLRB 234 (2002); also *Salon/Spa At Boro, Inc.*, 356 NLRB No. 69, slip op. at 40 fn. 13 (2010); *McKenzie Engineering Co.*, 326 NLRB 473, 492 fn. 6 (1998); *Optica Lee Borinquen, Inc.*, 307 NLRB 705 fn. 4 (1987).

<sup>3</sup> The employee complement at the Minneapolis facility includes some 17–18 employees who speak Hmong, a dialect from Southeast Asia. Of these, only about 5–6 are fluent in the English language. (Tr. 37–38.)

<sup>4</sup> The Respondent, in the past, has apparently used a mandatory arbitration program at its other facilities. (See GC Exh. 6, p. 2.)

With some exceptions more fully discussed below, the TSM program requires employees to utilize a 3-step procedure as the sole means for resolving any and all claims against the Company.

##### 1. The TSM program

Step 1 of the TSM calls for employee claims to be investigated by a TSM administrator who is required to, within 30 days, make a determination and issue a written “Step One Determination” letter to the parties.<sup>5</sup> Step 2 allows a dissatisfied party (employee or the Company) to appeal the TSM administrator’s decision to a neutral mediator by filing a “Step 2 Mediation Demand” form with the TSM administrator within 30 days of the latter’s initial step 1 determination. If mediation is unsuccessful, the TSM administrator will provide the employee with a “Step Two Determination” letter, after which the employee can, if he/she chooses, request arbitration of the claim by submitting a “Step 3 Arbitration Demand” form to the TSM administrator.

Employees at the Minneapolis facility were first notified of the TSM program in mid-afternoon on October 22, as the morning shift was ending. That afternoon, employees were given copies of a memo from Respondent’s human resources vice president, Betty Boris informing them of the Company’s new procedure for dispute resolution, along with three other sets of documents outlining the TSM program. The documents included: (1) The “Official Rules” of the TSM program; (2) the TSM agreement, entitled “Agreement to Use,” which employees were to sign and return to their supervisor by 9 a.m. on October 26; (3) a document containing “Questions and Answers” designed to explain the TSM program. (See Jt. Exh. 2(a–c).) The Boris memo instructed employees to contact human resources if they had any questions regarding the TSM program.

As spelled out in the TSM’s “Official Rules,” and again in the “Agreement to Use, the above-described 3-step grievance arbitration procedure was, with some limited exceptions, to be the sole method used by employees and the Company to resolve all of their disputes, controversies, and claims with each other.” The “Official Rules” and “Agreement to Use” documents both make patently clear that the only claims expressly exempted from the TSM procedure are those involving workers’ compensation claims, unemployment claims, and criminal claims. Other than these three categories of claims, all other claims employees might have, or wish to raise against the Respondent would have to be processed, heard, and resolved exclusively through the TSM program.

Both the “Official Rules” and “Agreement to Use” documents list some, but not all, of the types of claims that must be heard exclusively through the TSM program. The list of claims identified in both documents, however, do not entirely coincide with each other. The “Agreement to Use” document, for example, lists, inter alia, all “claims unrelated to my employment with Supply Technologies” as being subject to the TSM procedure, language not found among the types of claims listed in

<sup>5</sup> The record does not make clear if the TSM administrator is a management official or some other individual.

the “Official Rules” document. On the other hand, the “Official Rules” document lists “claims for embezzlement, restitution, misappropriation of trade secrets” as subject to the TSM procedure; no such or similar language is found in the “Agreement to Use” document.

The “Official Rules” document also specifically lists “claims for discrimination, harassment, or retaliation” as being subject to the TSM process. The document, however, does not specify what types of “discrimination, harassment, or retaliation” claims would fall within this subject category and appears to be all-encompassing and rather sweeping in nature. Thus, it is unclear if an employee who, for example, claims to have been discriminated, harassed, or retaliated against for engaging in Section 7 protected or union activity at Respondent’s facility would be required to have his/her claim heard under the TSM program. Notably, no similar language is found in the “Agreement to Use.”

The “Agreement to Use,” however, does expressly provide that an employee and the Company “can still file a charge or complaint with a government agency,”<sup>6</sup> and is “free to cooperate with a government agency that might be investigating a charge or complaint.” Oddly enough, this stated right to file a charge is not included in the “Official Rules” document. Nor is this purported right to file a charge with a government agency without restriction, for the “Agreement to Use” also makes clear in language following recitation of the above-stated right that an employee who opts to file such a charge “waives any right [he/she] might have otherwise had to any remedy that the agency might try to obtain on our behalf (to the extent this is permissible under law.)” No explanation was provided either at the hearing, or in its posttrial brief, by the Respondent as to the meaning, purpose, or intent of this “waiver” language, or how it related to the preceding language regarding the right of employees to file a charge in the first place. A plain reading of this language, however, strongly suggests that while employees might arguably have the right to file a charge with a government agency under the TSM, they nevertheless would not be entitled to any remedial relief that could be available to them from the agency with which the charge was filed.

## 2. The distribution of the TSM documents to employees

Neng Moua was one of the employees who received the TSM package on October 22. He testified that at around 2:45 p.m. on October 22, his supervisor, Warehouse Manager Ted Hambrook, approached him and directed him to a nearby conveyor belt where copies of the TSM program were stacked in four different piles. The first pile consisted of copies of claim forms employees were to use when submitting a claim under the TSM program; the other three piles contained copies of the above-described sets of TSM documents, e.g., the “Official Rules,” the “Agreement to Use,” and the “Questions and Answers.”

Hambrook instructed Moua and others who were working nearby to take copies of the TSM packets. He told Moua and the others that the packet had been sent from human resources,

and that they were to take the packet home, “read it, sign it, and bring it back by the due date on it,” namely, October 26. Moua recalls hearing another employee, Hue Yang, ask Hambrook what the documents were, and Hambrook responding, “I don’t know. Read it.” Moua claims he and other employees then took copies of the TSM packet and began glancing at the information. Hambrook, who had a checklist with employee names on it, began checking off the names as employees picked up their packets, and instructed employees to sign the checklist acknowledging they had received the TSM packet. He told employees as they did so that they had to read and sign the TSM agreement and return it to the Company. (Tr. 52–53.) The 20 employees named in the complaint as discriminatees all received copies of the Boris memo along with the TSM documents packet. (See Jt. Exh. 1.)

Moua, who is fluent in both Hmong and English, testified that he took the TSM documents home and read them. He testified, however, that while he was able to read the documents given his fluency in English, he did not fully understand their contents. Moua recalled that during the weekend he spent reading the TSM packet, several coworkers called him to ask what the packet meant, apparently unable, like Moua, to fully understand what they were being asked to sign. Moua told these coworkers that he was “not really sure exactly what it’s all about,” but that they should continue to read it and they could discuss it on Monday when they reported for work.

On reporting for work on Monday, October 26, Moua observed that employees were discussing the TSM program among themselves, and that they seemed somewhat edgy and concerned about the program. The following day, Tuesday, when the signed TSM agreements were to be turned in by employees, Michael Beyer, Respondent’s branch manager, approached Moua shortly after 9 a.m. and asked to speak with him. Moua agreed and followed Beyer to a conference room where they had a discussion about the TSM program. Beyer then handed Moua a copy of the TSM program and told him that the 9 a.m. deadline for the signed TSM agreements to be turned in had passed, and that he was giving Moua “one last chance to sign this document and turn it in to me.” He cautioned that if Moua did not sign it, he “would no longer work for this company.” Moua told Beyer that he could not sign the TSM agreement, to which Beyer replied, “Well, if you’re not going to sign it, then you can no longer work here and I’m going to have to walk you out.” Beyer then escorted Moua out of the facility.

Moua gave two reasons for not signing the TSM agreement. Thus, he testified that, while able to read the TSM documents given to him, he simply did not fully understand how the program worked, and was unwilling to sign something he could not understand. He further was of the view that the TSM program would effectively prevent him from exercising other rights he had. Moua found the information in the TSM packet to be confusing and inherently self-contradictory. By way of example, he explained that while the TSM policy does state that employees can file a charge with a government agency, he nevertheless concluded from the “waiver” language in the same provision, that employees who file such a charge “cannot get relief” from the agency, and that the agency “cannot do any-

<sup>6</sup> The “Questions and Answers” document contains a similar reference to the right of employees to file a claim with government agencies. (Jt. Exh. 2[b].)



thing for you” even if the charge were deemed to be meritorious by the agency. Thus, Moua’s testimony suggests that he viewed the right mentioned in the TSM policy, about employees being able to file a charge with a government agency, as meaningless since their entitlement to any remedial relief they might obtain from the filing of any such charge would, under the TSM program, be forfeited or waived. Moua explained that “its things like that that made me really confused about this document,” referring to the TSM policy. (Tr. 48.)

Beyer, Moua contends, never asked him why he did not want to sign the TSM agreement, nor did he explain the TSM documents or program to him. Moua, for his part, likewise did not ask Beyer to explain or clarify any questions or doubts he may have had regarding the TSM program. (Tr. 46–48.) He admits not having contacted human resources regarding the TSM program as was suggested in the Boris memo. Moua added that while, in the past, e.g., some 5–6 years earlier, he had not had any difficulty going to human resources with questions, more recently he felt uncomfortable doing so. (Tr. 67.) As Beyer did not testify, Moua’s testimony stands unrefuted. For this reason, and as Moua came across as a wholly plausible and believable witness, I credit his testimony and find that Beyer did threaten to discharge Moua if he did not sign the TSM, and thereafter fired Moua when the latter declined to do so.

Hlee Yang, who also declined to sign the TSM agreement, testified, via interpreter, that, at around 9:35 a.m. on October 26, as he was working his shift, Beyer and Hambrook approached and asked him to sign the TSM agreement. When he explained to them, with his limited English skill, that he did not understand the TSM documents, they advised that if he did not sign the TSM agreement, he would be fired. Beyer and Hambrook then led him into an office at which point Beyer repeated that if Yang refused to sign, he would be terminated. After Yang apparently declined to sign the agreement, Beyer and Hambrook instructed him to “get out,” that he could not stay in the facility, and escorted him off the premises. Yang recalled seeing other employees waiting outside the office as he was being escorted out (Tr. 137–138). Hambrook did not testify, nor as noted, did Beyer. Accordingly, I credit Yang’s version of this October 26 meeting with Beyer and Hambrook and find that he too, like Moua, was threatened with discharge if he did not sign the TSM agreement, and that he was thereafter likewise terminated for declining to do so.

Another employee, Kham Seng Lee, testified, also via interpreter, to being approached by Hambrook and Beyer around 9:30 a.m. on October 26, as he was working his shift, and taken to a meeting room where Beyer asked him if he had signed the TSM agreement. Lee replied he had not because he did not understand it, and needed 1 or 2 weeks to fully read and understand it. Beyer said he could not do that, but that if Lee signed the agreement, he could continue working; if he did not, he would have to go home. Lee responded that since he did not understand the agreement, he was not going to sign it, to which Beyer replied, “If you don’t sign, then you need to go home.” Beyer told Lee that he could not stay in the facility a minute more and had to leave. He and Hambrook then escorted Lee out of the facility. Lee was not certain if he had been fired, but assumed this to be the case since he was told he had to leave

immediately and could not stay in the facility a minute longer. Lee’s testimony as to what transpired between him and Beyer (as well as Hambrook) is unrefuted. (Tr. 147–148.) Accordingly, I find that Kham Seng Lee was implicitly threatened with termination when told he would have to leave the facility unless he signed the TSM agreement, and was, in fact, terminated when instructed to leave the facility immediately and to go home following his refusal to sign the agreement.

Charlie Lee also worked for the Respondent until October 26. Like the above-discussed employees, Charlie Lee, who understood and spoke some English but testified with the aid of an interpreter, was approached on the morning of October 26, by Beyer and asked if he had signed the TSM agreement. Charlie Lee replied he had not, and Beyer told him, if he had not signed the agreement, he no longer worked for the Company. He told Charlie Lee that if he signed the agreement, he could stay on. Like the other employees’ testimony, Charlie Lee’s account of his October 26 meeting with Beyer was not disputed as the latter did not testify. As with Kham Seng Lee, I find that Charlie Lee was similarly threatened with discharge unless he signed the TSM agreement, was thereafter terminated for refusing to do so.

It is undisputed, and the parties so stipulated, that, in addition to Moua, Hlee Yang, Kham Seng Lee, and Charlie Lee, some 16 other named alleged discriminatees who declined to sign the TSM agreement ceased working for the Respondent on or around October 26. It is also patently clear from the witnesses who testified, and the Respondent does not dispute, that the provisions of TSM program were never discussed with, or explained to, employees.

As to the 16 other named discriminatees, none was called to testify. There is, therefore, no evidence as to what, if anything, may have been said to them by Beyer, Hambrook, or any other management official on their refusal to sign the agreement. The Respondent, however, does not contend, nor was any evidence produced to show, that they were treated or told anything different from what was said or done to Moua, Hlee Yang, Kham Seng Lee, and Charlie Lee when they refused to do so. I am convinced, and so find, that like Moua and the other three named discriminatees who did testify, the other 16 named discriminatees had the same or very similar experience, to wit, they were instructed to sign the agreement or they would not be able to continue working, and, on their refusal to do so, were told to leave and immediately escorted out of the facility. Thus, I find that these 16 individuals were likewise also threatened with discharge if they did not sign the TSM agreement, and then terminated for refusing to do so.

The complaint, as noted, alleges, and counsel for the General Counsel contends, that Respondent’s TSM arbitration policy, which employees were required to accept as a condition of their continued employment, is unlawful in that it effectively interferes with the employees’ Section 7 right to file charges with, or to otherwise seek redress from, the Board for any work-related grievances they may have against the Respondent arising under the Act. She further alleges that Moua, Hlee Yang, Kham Seng Lee, Charlie Lee, and the 16 other employees who declined to sign the TSM agreement were unlawfully terminated for doing so. The Respondent disagrees, insisting that its

TSM policy expressly recognizes its employees right to of access to the Board, and that the employees who left rather than accept the TSM policy were not terminated but voluntarily resigned. I find merit in counsel for the General Counsel's contentions.

#### B. Discussion

It is well settled that Section 7 of the Act protects the right of employees to utilize the Board's processes, including the right to file unfair labor practice charges. *Braun Electric Co.*, 324 NLRB 1, 3 (1997). An employer rule or policy that unduly interferes with or restricts that right will be found to be unlawful. *Bill's Electric, Inc.*, 350 NLRB 292, 296 (2007); *U-Haul Co. of California*, 347 NLRB 375, 377 (2006); *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

In determining if a company rule or policy, like the mandatory TSM arbitration policy at issue here, unlawfully interferes with an employee's Section 7 right of access to its processes, the Board looks first at whether the rule or policy explicitly prohibits or restricts such protected activity. If so, the rule or policy will be found to be unlawful. If, however, the rule or policy does not explicitly restrict Section 7 activity, it may nonetheless still be found unlawful if (1) employees would reasonably construe the language of the rule or policy to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *U-Haul*, supra at 376; *Lutheran Heritage Village-Livonia*, supra; also *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). When making this determination, the Board will give the rule or policy in question a reasonable reading, and will refrain from reading particular phrases in isolation or presuming improper interference with employee rights. *Lutheran Heritage Village-Livonia*, supra, and *Lafayette Park Hotel*, supra, also *Turtle Bay Resorts*, 353 NLRB 1242, 1270 (2009); *Albertson's, Inc.*, 351 NLRB 254, 258 (2007).

Here, a fair reading of the Respondent's TSM grievance-arbitration policy does not disclose any express prohibition on its employees' right of access to the Board. Counsel for the General Counsel admits as much (see GC Br. 10), but contends that there are other provisions in the TSM which could equally be read as precluding the filing of charges with the Board, or are so ambiguous, confusing, and contradictory that employees would be unable to determine whether or not they retained the right under the TSM to file a charge with the Board or to utilize its processes.

The Respondent counters that not only is there no express provision in the TSM policy prohibiting or denying employees access to the Board, the policy, in fact, expressly affirms the right of employees to utilize the Board's processes, referring in this regard to the language in the "Agreement to Use" stating that employees are free to "file a charge or complaint with a government agency," and to similar references to this right found in the "Questions and Answers" document. It contends on brief, as it did at the hearing, that there is no ambiguity in the TSM policy regarding employee rights, that the employees' right of access to the Board is expressly stated in clear and unambiguous terms which employees could readily understand. It claims instead that counsel for the General Counsel has inten-

tionally "parsed, twisted, and selectively edited the TSM to conjure ambiguity from clarity," and that, if allowed to speak for itself, the TSM language "demonstrates that the program does not restrict, interfere with, or limit an employee's access to the Board." (Tr. 31-32.)

The Respondent's assertion, that the TSM language should be allowed to speak for itself, makes very good sense as it accords with the Board's directive in *Lutheran Heritage Village-Livonia*, supra, and *Lafayette Park Hotel*, supra, that individual or particular phrases of a disputed rule or policy not be read in isolation but rather be considered with the policy as a whole in determining its validity. Its assertion, however, while valid, nevertheless brings to mind the cautionary phrase, "Be careful what you wish for," for a review of the various provisions of the TSM policy, including the language cited and relied on by Respondent, leads me to conclude, in agreement with counsel for the General Counsel, that the policy is, at best, ambiguous and confusing, and thus unlawful.<sup>7</sup>

The Respondent, as noted, relying solely and exclusively on the TSM language in the "Agreement to Use" document granting employees the right to file a charge or complaint with a government agency, claims that this language gives employees the unfettered and unrestricted right to file charges with the Board or to utilize its processes. Its claim, however, does not withstand scrutiny, for, as previously discussed, the TSM provision containing the language relied on by the Respondent also contains language requiring employees who choose to file such a charge to waive their right to any remedial relief they might otherwise be able to obtain from the government agency like the Board.<sup>8</sup> This waiver requirement, in my view, renders meaningless whatever right employees purportedly have under the TSM to file a charge with the Board, and would, I find, have a chilling effect on an employee's willingness to exercise their Section 7 right to do so.

Clearly, an employee interested in filing a charge with the Board, possibly over some adverse employment action that might have been taken against him at the workplace, could reasonably conclude, after reading the provision in its entirety, that it would be pointless to do so given the provision's "rem-

<sup>7</sup> In arguing for the validity of its policy, the Respondent appears to pay only lip service to the *Lutheran Heritage Village-Livonia* and *Lafayette Park Hotel* requirement that a rule or policy be considered as a whole when its validity is being assessed. Thus, it is the Respondent, not counsel for the General Counsel, who, as discussed infra, selectively identifies the one provision in the TSM policy that it deems most supportive of its position, and ignores other equally relevant provisions which appear to contradict or be inconsistent with the cited provision it relies on. By contrast, counsel for the General Counsel, in her posttrial brief, has fully discussed and addressed all of the pertinent provisions in the TSM policy, including the language relied on by the Respondent (see GC Br. 20), in making her argument that the policy is unduly restrictive of, or prohibits outright, the Sec. 7 right of employee to have access to the Board.

<sup>8</sup> The Respondent makes much of the fact that the "Question and Answer" document also notifies employees of their right to file a charge with a government agency. What the "Question and Answer" document, however, fails to mention to employees is that this right to file a charge also carries with a requirement that employees waive their right to any remedy that might flow from the filed charge.

edy” waiver requirement. Indeed, the requirement in the provision that employees relinquish any right to a remedy on filing a charge with the Board would, if anything, serve to deter and discourage employees from exercising their Section 7 right to bring a charge before the Board or to utilize its processes. If this was not what the Respondent intended to convey through this provision, it never made its intention known to employees before requiring them to accept the TSM program, nor did it offer or provide any clarification or explanation at the hearing or in its brief to this rather ambiguous provision in its policy.

At best, however, the inherent contradiction in the provision, between the averred right of employees to file a charge with a government agency, and the requirement therein that they waive their right to any remedy that might accrue from such a charge, could reasonably and understandably confuse employees as to the extent and true nature of their Section 7 right to file any such charge. Moua’s assertion, which I credit, that he found the language in the TSP policy, stating that he was free to file a charge but denying him any remedial relief, “really confusing,” attests to the provision’s ambiguity. Kham Seng Lee’s credible claim that he did not understand the policy, and needed more time to review it, a request which was denied him, further attests to the confusing nature of the TSM policy.

Nor is the above-discussed provision in the “Agreement to Use” document the only ambiguous and confusing language in the TSM policy regarding an employee’s right of access to the Board for, as previously indicated, there is yet other language in the TSM which, on its face, appears to prohibit or deny employees their Section 7 right to file a charge with the Board. For example, the “Official Rules” and the “Agreement to Use” documents in the TSM policy both contain provisions stating, in clear and unambiguous terms, that “the only claims” employees can bring against Respondent outside the TSM policy are “criminal claims, and claims for workers’ compensation or unemployment compensation benefits.” Conspicuously missing from this list of exclusions to the TSM program are claims that employees might wish to file with a government agency, such as the Board. Notably, the word “only” in the above-referenced language of the “Agreement to Use” is highlighted in boldface type, intended, I am convinced, to emphasize and convey to employees in no uncertain terms that these, and *only* these, three types of claims were exempt or excluded from coverage under the TSP arbitration program.

These same provisions also make clear that all other claims employees might want to pursue against Respondent through other avenues, which presumably would include the filing of an unfair labor practice charge with the Board, “must be brought under the TSM program.” The word “must” in the above provision is also highlighted in boldface type too, I am further convinced, convey and make clear to employees that the TSM program is the only and exclusive forum they have in which to address claims that do not fall within any of the three named exclusions (e.g., criminal claims, workers’ compensation claims, unemployment claims). Clearly, the wording is intended to let employees know that use of the TSM program for resolution of claims other than the three types listed therein is mandatory and not optional. This particular provision, therefore, appears to be at odds, and in conflict, with the language in

the previously discussed provision relied on by the Respondent which purports to give employees the right to file a charge with a government agency, such as the Board.

No 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.” The latter document, as noted, sets forth the procedural rules to be followed in the grievance arbitration process, and lists, in some detail, the types of claims that have to be taken through the TSM, as well as the only three types of claims (criminal, workers’ compensation, and unemployment claims) not subject to the TSM policy. There is nothing in the record or the TSM policy itself to suggest, nor has the Respondent contended, that this was some inadvertent omission on its part. Presumably, employees signing on to the TSM program were agreeing to bound to the terms and provisions contained in both the “Agreement to Use” and the “Official Rules.” However, the unexplained and glaring omission in the “Official Rules,” of the right of employees to file a charge or complaint with a government agency set forth in the “Agreement to Use,” would undoubtedly cause confusion in an employee’s mind as to which of the two TSM documents was accurate. Clearly, both cannot be accurate, for one, the “Official Rules,” could reasonably be read as denying employees that right, while the “Agreement to Use” appears to confer the right on employees.

Further adding to the ambiguity and confusion in the TSM policy are yet other provisions expressly prohibiting, inter alia, employees from filing claims outside the TSM program “relating to my application for employment, my employment, or the termination of my employment,” claims “for discrimination, harassment, or retaliation,” or claims “arising under any federal statute.”<sup>9</sup> These broadly-worded provisions contain no exemptions or exclusions for claims that might arise under the NLRA. These provisions, therefore, either standing alone or in conjunction with the other previously-discussed ambiguous provisions, would reasonably lead employees to conclude that they could not file a charge with the Board to protest, say a discharge, suspension, retaliation, etc., resulting from their involvement in protected or union activity, since such a claim would obviously relate to their employment and raise a statutory claim under the NLRA, a federal statute. See *U-Haul Co. of California*, 347 NLRB 375 (2006).<sup>10</sup>

<sup>9</sup> See bullet point items 1 and 2 in the policy’s “Agreement to Use,” and bullet point items 1, 2, and 4 in the policy’s “Official Rules.” (Jt. Exhs. 2[a], [c].)

<sup>10</sup> In *U-Haul*, an arbitration policy that mandated coverage of all causes of action recognized by “federal law or regulations” was found by the Board to be unlawful. While acknowledging that the *U-Haul* policy did not explicitly restrict employees from resorting to the Board’s remedial procedures, the Board nevertheless found that employees would reasonably construe the remedies for violations of the Act as included among the legal claims recognized by Federal law that are covered by the policy. Here, the Respondent’s employees, as noted, would just as readily construe the requirement, that all “claims for violation of a federal . . . statute” be brought through the TSM program, as including NLRB related claims.

In sum, a plain reading of the TSM policy as a whole, including the various provisions therein which arguably relate to or address the right of employees under Section 7 of the Act to file a charge with the Board or to utilize its processes, reveals a rather ambiguous policy rife with contradictions and inconsistencies regarding the right. Employees perusing the TSM policy for guidance on whether they were free to file a charge with the Board or to use its processes would, I am convinced, come away either believing that the policy prohibits or severely limits their right to do so, or understandably confused and unsure as to whether they had such a right. This confusion clearly would have been magnified among the Hmong employees who possessed limited or no ability to speak and/or understand English. The Respondent, as noted, never took the time to explain or clarify the contradictions and ambiguities in its policy to any of its employees.

It is well settled that any ambiguity in a rule or policy will be construed against its promulgator. *Salon/Spa at Boro, Inc.*, 356 NLRB No. 69, slip op. at 27 (2010); *Bryant Health Center*, 353 NLRB 739, 745 (2009). Here, the ambiguities in the TSM policy, on the question of whether employees retain their Section 7 right of access to the Board, are substantial enough to render the policy invalid. When an employer rule or policy, like the TSM policy here, is so ambiguous that it can reasonably be interpreted by employees in such a way as to cause them to refrain from exercising their statutory rights, the rule or policy will be deemed to be invalid. *Superior Emerald Park Landfill, LLC*, 340 NLRB 449, 456 (2003); also *U-Haul*, supra.

Accordingly, I find the Respondent's TSM policy to be unlawful, and its implementation and maintenance to be a violation of Section 8(a)(1) of the Act. I further find that the Respondent also violated Section 8(a)(1) when it threatened the 20 named discriminatees with discharge if they did not sign and accept its unlawful policy, and violated Section 8(a)(4) and (1) of the Act when it thereafter discharged the employees on their refusal to do so. *U-Haul*, supra at 377; *Bill's Electric, Inc.*, 350 NLRB 292, 296 (2007).<sup>11</sup>

#### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By instituting its TSM grievance-arbitration policy which prohibits or restricts its employees' Section 7 right to file a charge with the Board or to access its processes, threatening to discharge employees for refusing to sign and accept its terms, and conditioning continued employment on employee acceptance of its policy, the Respondent has violated Section 8(a)(1) of the Act.

<sup>11</sup> At the hearing, counsel for the General Counsel raised the argument that the Respondent initiated and implemented its TSM policy in response to its employees' union activity. While the timing of the program's implementation on October 21, 3 days after the Board certified the election results reflecting that the Union did not prevail, does raise a suspicion of a possible connection between the program's implementation and the union activity of its employees, there is simply no evidence for making that connection, and suspicion alone, in my view, does not suffice.

3. By discharging employees Neng Moua, Chao Tao Moua, Kham Seng Lee, Chou Yang, Hlee Yang, Kao Moua, Charlie Lee, Blong Moua, Vue Pao Lee, Chia Vue, Tommy W. Moua, Youa Vang Moua, Por Lee, Gerardo Garcia, Chao Hang, Her Vue, Hoe Yang, Mike Moua, Rafael Peil, and Nhia Long Moua for their refusal to sign and accept and be bound to the TSM policy, the Respondent violated Section 8(a)(4) and (1) of the Act.

4. The Respondent's above described unlawful conduct affects commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Regarding the Respondent's unlawful institution and maintenance of its TSM grievance-arbitration policy, I agree with counsel for the General Counsel that revocation of the TSM policy in its entirety at all four of Respondent's facilities is the appropriate remedy here.<sup>12</sup>

The Respondent, having unlawfully discharged employees Neng Moua, Chao Tao Moua, Kham Seng Lee, Chou Yang, Hlee Yang, Kao Moua, Charlie Lee, Blong Moua, Vue Pao Lee, Chia Vue, Tommy W. Moua, Youa Vang Moua, Por Lee, Gerardo Garcia, Chao Hang, Her Vue, Hoe Yang, Mike Moua, Rafael Peil, and Nhia Long Moua for refusing to agree to its unlawful TSM grievance-arbitration policy, must offer them reinstatement to their former or substantially equivalent positions, and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

The Respondent shall also be order to remove from its files any reference to the unlawful discharges of the above employees, and to notify the employees in writing that it has done so,

<sup>12</sup> In *Bill's Electric*, supra, the Board, found a similar arbitration procedure that interfered with employee access to the Board to be unlawful, but did not call for rescission or revocation of the entire policy. Rather, in agreement with the judge, the Board found it proper to require the employer therein to "modify" the policy to ensure that it included language stating "that the procedure does not apply to any matter an employee may choose to bring before the Board," and ordering it to cease enforcing the procedure as to any matter brought before the Board. In *Bill's Electric*, however, the arbitration procedure's offending language was contained in a single provision, readily discernible, and thus easily subject to redaction and/or modification. Unlike in *Bill's Electric*, however, the TSM arbitration policy here is comprised of three separate documents consisting of 12 pp. in all, with the various ambiguous and contradictory offending provisions spread throughout the documents. In these circumstances, I find it proper to require the Respondent to revoke the policy in its entirety as I am not convinced that piecemeal modification would effectively resolve or ameliorate the policy's overall ambiguities regarding its employees' right of access to the Board.

and that the discharges will not be used against them in any way.

Finally, the Respondent shall be required to post a notice to employees at the four facilities that were subject to its unlawful TSM policy. Inasmuch as some of the discriminatees, and presumably other employees at Minneapolis facility, speak Hmong and have no, or very limited, English speaking skills, the notices shall be posted in both English and Hmong<sup>13</sup>

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>14</sup>

#### ORDER

The Respondent, Supply Technologies, LLC, Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and giving effect to its unlawful TSM grievance-arbitration procedure.

(b) Threatening to discharge employees who refuse to sign and accept the TSM grievance-arbitration program.

(c) Discharging employees who refused to sign its TSM grievance-arbitration agreement.

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

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

(a) Rescind and revoke its unlawful TSM grievance-arbitration policy.

(b) Within 14 days from the date of the Board's Order, offer Neng Moua, Chao Tao Moua, Kham Seng Lee, Chou Yang, Hlee Yang, Kao Moua, Charlie Lee, Blong Moua, Vue Pao Lee, Chia Vue, Tommy W. Moua, Youa Vang Moua, Por Lee, Gerardo Garcia, Chao Hang, Her Vue, Hoe Yang, Mike Moua, Rafael Peil, and Nhia Long Moua full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Neng Moua, Chao Tao Moua, Kham Seng Lee, Chou Yang, Hlee Yang, Kao Moua, Charlie Lee, Blong Moua, Vue Pao Lee, Chia Vue, Tommy W. Moua, Youa Vang Moua, Por Lee, Gerardo Garcia, Chao Hang, Her Vue, Hoe Yang, Mike Moua, Rafael Peil, and Nhia Long Moua whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges,

<sup>13</sup> It is unclear if the Respondent's Minneapolis facility is the only one with Hmong employees among its workforce complement, or whether there are Hmong speaking employees at its other three facilities. I resolve any doubts in this regard in favor of requiring the posting of the notice in both the English and Hmong language at the other three facilities.

<sup>14</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facilities in Minneapolis, Minnesota, Des Plaines, Illinois, Memphis, Tennessee, and Lenexa, Kansas, copies of the attached notice marked "Appendix"<sup>15</sup> in both English and Hmong languages. Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 26, 2010.

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

Dated, Washington, D.C. May 31, 2011

#### APPENDIX

##### NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

<sup>15</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a grievance-arbitration procedure as a condition of employment that interferes with your right to access the Board's processes or to file charges with the Board.

WE WILL NOT discharge, or threaten to discharge, any of you for refusing to sign our TSM grievance-arbitration agreement which requires you to give up your right to file a charge with, or to have access to, the Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind and revoke our TSM grievance-arbitration policy.

WE WILL, within 14 days from the date of this Order, offer Make Neng Moua, Chao Tao Moua, Kham Seng Lee, Chou Yang, Hlee Yang, Kao Moua, Charlie Lee, Blong Moua, Vue Pao Lee, Chia Vue, Tommy W. Moua, Youa Vang Moua, Por Lee, Gerardo Garcia, Chao Hang, Her Vue, Hoe Yang, Mike Moua, Rafael Peil, and Nhia Long Moua full reinstatement to their former jobs or, if those jobs no longer exist, to substan-

tially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Neng Moua, Chao Tao Moua, Kham Seng Lee, Chou Yang, Hlee Yang, Kao Moua, Charlie Lee, Blong Moua, Vue Pao Lee, Chia Vue, Tommy W. Moua, Youa Vang Moua, Por Lee, Gerardo Garcia, Chao Hang, Her Vue, Hoe Yang, Mike Moua, Rafael Peil, and Nhia Long Moua whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Neng Moua, Chao Tao Moua, Kham Seng Lee, Chou Yang, Hlee Yang, Kao Moua, Charlie Lee, Blong Moua, Vue Pao Lee, Chia Vue, Tommy W. Moua, Youa Vang Moua, Por Lee, Gerardo Garcia, Chao Hang, Her Vue, Hoe Yang, Mike Moua, Rafael Peil, and Nhia Long Moua, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

SUPPLY TECHNOLOGIES, LLC