

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

GC SERVICES LIMITED PARTNERSHIP,)	
a limited partnership, and)	
GC FINANCIAL CORP., a general partner,)	Case 28-CA-166389
)	
and)	
)	
BRADLEY NELSON, an Individual)	

**REPLY BRIEF IN SUPPORT OF RESPONDENT’S EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE’S DECISION**

Dated: May 13, 2019

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To facilitate the prompt resolution of employment disputes, GC Services utilizes a Mutual Agreement for Dispute Resolution (“MADR”). In its Response to GC Services’ Exceptions, the CGC urges the Board to adopt the ALJ’s flawed reasoning and unsustainable conclusions regarding the MADR. However, the CGC, like the ALJ, cannot identify any supporting evidence or legal authority for the ALJ’s conclusion that the MADR explicitly restricts Section 7 activity because it applies to NLRA claims. The CGC’s attempt to salvage the ALJ’s failure to enforce the MADR as written, disregard for binding precedent and undisputed evidence, flawed reasoning, and unsustainable conclusions regarding the MADR does not change the fact that GC Services’ Exceptions establish that the ALJ’s Decision and Recommended Order must be overturned for multiple, yet independently sufficient, reasons. Indeed, the CGC offers no viable basis to sustain the ALJ’s erroneous conclusion that the MADR – which expressly *preserves* the right to file ULP charges with the Board – interferes with Section 7 rights. As a result, the Board should reverse the ALJ’s Decision and dismiss the Amended Complaint in its entirety for the reasons set forth in GC Services’ Exceptions and herein.

I. THE CGC PROVIDES NO BASIS TO UPHOLD THE ALJ’S ERRONEOUS ANALYSIS AND UNSUSTAINABLE CONCLUSIONS.

The ALJ’s Decision is based on the results-driven and erroneous conclusion that the “plain language” of the MADR explicitly restricts Section 7 activity because it expressly requires GC Services’ employees to arbitrate “any claim under the National Labor Relations Act.” [ALJD p. 5, lines 24-30.] Notably absent from the ALJ’s Decision and the CGC’s justification thereof, however, is any citation to evidentiary or legal support that can sustain this conclusion in light of GC Services’ Exceptions.

A. There Is No Legitimate Dispute the ALJ Disregarded the FAA and Binding Supreme Court and Board Precedent.

The CGC cannot justify the ALJ’s complete disregard for the applicable standards and framework for interpreting and potentially invalidating arbitration agreements, which must be enforced as written. *See* 9 U.S.C. § 2 (arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract”); *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612, 1632 (2018) (“Congress has instructed that arbitration agreements . . . must be enforced as written”). As written, there is no doubt that the MADR expressly and broadly preserves the right of GC Services’ employees to “file a complaint with any federal, state, or other governmental administrative agency, regarding any perceived infringement of any legally protected rights” – which they have done many times since it was implemented. [Joint Motion ¶¶ 1(t) and (y); Joint Ex. 2.]

There is also no dispute that the Supreme Court has made clear that arbitration agreements that require arbitration of statutory claims are enforceable “unless the FAA’s mandate has been overridden by a contrary congressional command,” which is a “heavy burden” because the congressional, not judicial, intention must be “clear and manifest.” *Epic Systems*, 138 S. Ct. at 1624; *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012) (internal quotations omitted). Nonetheless, the CGC and ALJ ignored this clear and binding directive even though the requisite congressional pronouncement does not exist.

Likewise, the CGC fails to provide any justification for the ALJ’s disregard for the Supreme Court’s recognition that it is perfectly consistent for an arbitration agreement to preserve employees’ right to file charges with administrative agencies while requiring them to ultimately adjudicate their claims in arbitration. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (“An individual ADEA claimant subject to an arbitration agreement will still be free

to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action.”). Neither the ALJ nor the CGC cited to any authority suggesting that this Supreme Court precedent would not extend to ULP charges or that would support the rejection of former Member Miscimarra’s well-reasoned dissents in several factually similar cases that indicate it does. *See Hobby Lobby Stores*, 363 NLRB No. 195 (2016) (Member Miscimarra, dissenting); *Ralph’s Grocery*, 363 NLRB No. 128 (2016) (Member Miscimarra, dissenting in part); *GameStop Corp.*, 363 NLRB No. 89 (2015) (Member Miscimarra, dissenting in part); *Applebee’s Rest.*, 363 NLRB No. 75 (2015) (Member Miscimarra, dissenting in part).

Additionally, the CGC, like the ALJ, still cannot sufficiently explain why the Board would approve of arbitration of NLRA claims in a unionized environment, but not in a non-unionized environment. Instead, they improperly fixated on the purported unequal bargaining power between individual employees and employers notwithstanding the Supreme Court’s directive that this is insufficient to void arbitration agreements. *See Gilmer*, 500 U.S. at 33. In any event, this meaningless and artificial distinction cannot change the fact that the Board has long viewed arbitration as an appropriate forum for resolving NLRA disputes – even when one of the parties files a ULP charge and the other party requests deferral to arbitration. *See Babcock & Wilcox Constr. Co., Inc.*, 361 NLRB 1124 (2014); *Olin Corp.*, 268 NLRB 573 (1984); *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). Because the CGC cannot dispute that the ALJ disregarded this bedrock and binding law, the ALJ’s Decision must be vacated for the reasons set forth in GC Services’ Exceptions 1-9.

B. The CGC Provides No Basis to Countenance the ALJ’s Multiple Reversible Errors.

In the face of an insurmountable number of reversible errors, the CGC declares that the ALJ’s flawed and results-driven analysis was “well-reasoned” and “correct.” CGC’s Brief, p. 8.

Conclusory declarations do not, however, make it so. It is clear that the ALJ improperly relied on her opinion of what the law should be, not what it actually is, and the CGC's attempt to obfuscate the fatal flaws in the ALJ's Decision fails for several reasons. *See, e.g., Fred Jones Mfg. Co.*, 239 NLRB 54, 54 (1978) (explaining that an ALJ commits error by “substitut[ing] his own view of what the law should be for applicable Board precedent” and that an ALJ's duty is to “follow and apply established Board precedent, regardless of [her] personal views”).

Preliminarily, the CGC cannot dispute that the ALJ disregarded that the Supreme Court has found that arbitration agreements requiring individualized arbitration of employment-related disputes are enforceable and do not violate the NLRA. *See Epic Systems*, 138 S. Ct. at 1612. Significantly, the Supreme Court found that Section 7 “does not express approval or disapproval of arbitration” and “does not even hint at a wish to displace the Arbitration Act – let alone accomplish that much clearly and manifestly, as our precedents demand.” *Id.* at 1625. Relatedly, the CGC is unable to justify the ALJ's failure to follow the Board's directive that any attacks on arbitration agreements based on theories that conflict with the Supreme Court's decision in *Epic Systems* must be rejected. *See FAA Concord H*, 367 NLRB No. 104, slip op. at 4 n. 3 (2019) (“To begin with, these theories must be rejected to the extent they contradict the Supreme Court's holding in *Epic Systems* that nothing in the National Labor Relations Act precludes the maintenance or enforcement of individual arbitration agreements.”).

The CGC mistakenly claims that GC Services relies on the MADR's plain language informing its employees they can file administrative charges “erases the explicit requirement that any claim under the National Labor Relations [Act] must be resolved by final and binding arbitration.” CGC's Brief, p. 6; [Joint Motion ¶ 1(t); Joint Ex. 2.] The CGC's mischaracterization of GC Services' position does not, however, change the fact that the ALJ ignored that the MADR

expressly preserves the right to file administrative charges. Nor does it excuse the ALJ's complete disregard for the undisputed evidence that GC Services' employees have continued to file administrative charges with notable frequency since the MADR became effective. [Joint Motion ¶ 1(y).]

The CGC attempts to justify the ALJ's disregard for the undisputed fact that GC Services' employees have continued to file administrative charges by dismissing this important evidence. The cases relied on by the CGC do not change the fact that both the Board and the General Counsel have expressly noted the importance of actual practice in determining whether a facially neutral rule, policy, or handbook provision violates the Act. *See Boeing*, 365 NLRB No. 154, slip op. at 15 ("Parties may introduce evidence regarding a particular rule's impact on protected rights[.]"); GC Memorandum 18-04 ("the Board in *Boeing* noted that evidence that a rule has actually caused employees to refrain from Section 7 activity is a useful interpretive tool"). Thus, the fact that GC Services' employees continue to file administrative charges notwithstanding the MADR is a key factor that should have been considered when evaluating whether the MADR is lawful. Accordingly, the CGC's and ALJ's continued contortion of the MADR's plain language and conflation of the mutually compatible issues of the arbitrability of NLRA claims and the ability to file administrative charges with the Board is not viable.

Additionally, the CGC's defense of the ALJ's disregard of former Member Miscimarra's logical pronouncements regarding the compatibility of the NLRA and arbitration is unpersuasive. The CGC insists that the pertinent cases are distinguishable because, although the Board interpreted the arbitration agreements in those cases as covering NLRA claims, "it reached that conclusion by interpreting ambiguous language rather than the restriction being explicitly stated." CGC's Brief, p. 6. This reliance on a meaningless distinction does not save the ALJ's clearly

erroneous analysis. As the CGC has acknowledged, in each of those cases except *GameStop*, the arbitration agreements at issue, like the MADR, required employees to arbitrate NLRA claims but preserved their right to file charges with administrative agencies.¹ See CGC’s Brief, p. 6 (“a reading of those cases reveals that . . . the Board interpreted the agreements and found that they required arbitration of claims under the Act”). Moreover, there is no doubt that former Member Miscimarra’s poignant observations regarding the compatibility of the NLRA and arbitrability is directly relevant to this case. In fact, the logical end point of the CGC’s position is that an arbitration agreement that requires arbitration of NLRA claims is lawful as long as it does not expressly mention the NLRA. In other words, the CGC appears to encouraging employers to hide the proverbial ball by using ambiguous language in their arbitration agreements and leaving employees to guess whether the agreement covers NLRA claims. This approach is antithetical to the Board’s mission and particularly ironic here given its advancement in defense of the ALJ’s professed reliance on contract interpretation principles. Indeed, the fundamental purpose of a contract is to clearly establish each party’s rights and obligations.

Furthermore, the CGC’s attempt to justify the ALJ’s results-driven approach by citing to inapposite cases dealing with express limitations on Section 7 rights is equally unavailing. See CGC’s Brief, p. 10-13. Unlike these cases, the MADR preserves, not restricts or waives, Section 7 rights. Moreover, those cases did not involve arbitration agreements that were required to be analyzed in light of the FAA’s “emphatic federal policy in favor of arbitral dispute resolution.” *KPMG LLP v. Cocchi*, 564 U.S. 18, 21 (2011).

¹ The CGC’s attempt to distinguish *GameStop* is unavailing because GC Services only cited *GameStop* for former Member Miscimarra’s correct conclusion that “the question of whether an arbitration agreement covers NLRA claims is different from whether or not the Agreement interferes with NLRB-charge filing.” *GameStop*, 363 NLRB No. 89, slip op. at 5.

In sum, the CGC's attempt to salvage the ALJ's significantly flawed Decision is not persuasive and it must be overturned for the reasons set forth in Exceptions 1-9.

II. THE CGC CANNOT JUSTIFY THE ALJ'S REFUSAL TO ANALYZE THE MADR UNDER THE BOARD'S DECISION IN *BOEING*.

The ALJ should have analyzed the MADR under the Board's decision in *Boeing*, which applies retroactively to all cases involving work rules, policies, and handbook provisions. Despite previously acknowledging that *Boeing* is a "useful and appropriate framework" for analyzing the MADR, the CGC now backpedals in an attempt to preserve the ALJ's clearly erroneous Decision. These intellectual gymnastics do not, however, change the fact that the Board has stated that *Boeing* applies to facially neutral arbitration agreements and the CGC has acknowledged as much. See CGC Brief to ALJ, p. 10, n. 4 (acknowledging that *Boeing* is a "useful and appropriate framework" for considering the legality of the MADR); Notice to Show Cause in Case 21-CA-182368 (2018) (remanding case in which ALJ held that arbitration agreement unlawfully interfered with Board charge-filing "for further proceedings *in light of Boeing*") (emphasis added); CGC Brief on Remand to the Board, p. 4, in *Prime Healthcare Paradise Valley*, Case No. 21-CA-133781 (2016) ("an arbitration provision that requires that employment related claims be resolved by arbitration, but does not prohibit the filing of an unfair labor practice charge, would be a lawful Category 1 rule under *Boeing* because no interference with any NLRA rights is implicated").

Under the framework set forth in *Boeing*, the MADR is a lawful Category 1 rule both because it does not prohibit or interfere with Section 7 rights and any potential adverse impact on protected rights is outweighed by legitimate justifications associated with the rule.² See *Boeing*, 365 NLRB No. 154, slip op. at 15 (2017). There is no question employers have legitimate and

² The MADR need only meet one of these criteria to be a Category 1 rule. See *Boeing*, 365 NLRB No. 154, slip op. at 3-4.

important business reasons for maintaining arbitration programs. *See* 9 U.S.C. § 1 *et seq.*; *see also*, *e.g.*, *Epic Systems*, 138 S. Ct. at 1620; *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013). Although the CGC contends for the first time in its response that there is no evidence in the record establishing GC Services’ legitimate justifications for the MADR, this has never been in dispute and the CGC cannot belatedly put it at issue.³ Regardless, the only provision of the MADR addressing the pertinent Section 7 right (i.e., the filing of charges) expressly preserves it. It is also irrefutable that GC Services’ employees fully understand that although they must arbitrate any employment-related disputes, they can still file charges with administrative agencies. [Joint Motion ¶ 1(y).] This reality further establishes the MADR does not interfere with, or have an adverse impact on, Section 7 rights. At a minimum, it establishes the ALJ has created a solution in search of a problem and that individual scrutiny of the MADR mandates the conclusion that it is, at worst, a Category 2 rule.

The CGC also cannot justify the ALJ’s blatant disregard for the Board’s unequivocal directive in *Boeing* that ambiguities in facially neutral workplace rules, policies, and handbook provisions are no longer construed against employers. *See Boeing*, 365 NLRB No. 154, slip op. at 10 n. 43. This is particularly the case where, as here, there is no evidence or precedent to support the ALJ’s conclusion that the MADR must be construed against GC Services as the drafter of the agreement because its language is “uncertain.” The plain language of the MADR and the record mandate precisely the opposite conclusion. Indeed, there is no dispute that GC Services’

³ *See, e.g., Wal-Mart Stores*, 349 NLRB 1095, 1107 n. 7 (2007) (refusing to consider argument CGC made to the Board that it had not previously made before the ALJ); *Yorkaire*, 297 NLRB 401, 401 (1989) (“A contention raised for the first time in exceptions to the Board is ordinarily untimely raised and, thus, deemed waived.”).

employees – including the Charging Party – fully understand they can file administrative charges notwithstanding the MADR and have done so. [Joint Motion ¶ 1(y).]

Also, glaringly absent from the CGC’s justification of the ALJ’s analysis is any recognition that “[a] primary principle of contract construction is that the contract be read as a whole, and that every part therein be interpreted in relation to the entire instrument.” *Supreme Sunrise Food Exchange*, 105 NLRB 918, 920 (1953). While the CGC correctly notes that specific terms are afforded greater weight than more general terms, it fails to account for the ALJ’s failure to recognize that the only language in the MADR that specifically addresses the filing of administrative charges expressly promotes it.

In sum, the ALJ’s Decision should also be vacated for the reasons set forth in Exceptions 10-15.

III. THE ALJ IMPROPERLY REFUSED TO TAKE JUDICIAL NOTICE OF EVIDENCE.

The parties’ Joint Motion expressly states that it “does not prevent the parties from requesting the Administrative Law Judge, Board or Appellate Court to take judicial notice of matters of public record or public court, administrative, or Board proceedings.” [Joint Motion ¶ 2.] Pursuant to this provision, GC Services noted that Region 28 issued the Amended Complaint based on the Board’s decision in *U-Haul Company of California*, 347 NLRB 375 (2006), which applied the now-defunct *Lutheran Heritage* “reasonably construe” standard. Apparently concerned about this information, the CGC has proffered several unavailing arguments, including that consideration of the email violates Federal Rule of Evidence 408.⁴ GC Services has not, however, relied on the

⁴ See Section § 16-408 of NLRB Division of Judges Bench Book (“FRE 408 prohibits use of settlement offers or other statements during settlement discussions *as admissions*, but does not prohibit their use for other purposes.”) (emphasis added).

email as an admission and the ALJ's failure to take judicial notice of it notwithstanding Joint Motion ¶ 2 establishes the validity of Exception 16. *See* Fed. R. Evid. 201(b)(2); *Cty. of Santa Clara v. Trump*, 267 F. Supp. 3d 1201, 1217 (N.D. Cal. 2017).

IV. CONCLUSION

For the reasons set forth in GC Services Exceptions and above, the Board should reverse the ALJ's Decision and Recommended Order and dismiss the Amended Complaint in its entirety.

Dated: May 13, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on May 13, 2019 a copy of the foregoing REPLY IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION has been filed via electronic filing with:

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