

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
SAN FRANCISCO BRANCH OFFICE**

**CBRE, INC.**

**and**

**Case 21-CA-182368**

**STEVE THOMA, an Individual**

James Racine, Esq., for the General Counsel.

Michael Curtis, Esq. (Baker & Schwartz, PC)  
for the Charging Party.

Gordon A. Letter, Esq., (Littler Mendelson, PC)  
for the Respondent.

**DECISION**

**STATEMENT OF THE CASE**

JOHN T. GIANNOPOULOS, Administrative Law Judge. Based upon a charge filed by Steve Thoma (Charging Party or Thoma), on March 31, 2017 a Complaint and Notice of Hearing (Complaint) issued alleging that CBRE, Inc. (CBRE or Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) by maintaining an arbitration agreement containing language which employees would reasonably believe infringed upon their rights to file unfair labor practice charges with the National Labor Relations Board (the Board). On April 13, 2017, Respondent filed an answer denying the Complaint's unfair labor practice allegations, and proffering various affirmative defenses.

This case is before me based upon a Joint Motion and Stipulation of Facts (Joint Motion) submitted by the parties on September 29, 2017. Pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations the parties agree to waive a hearing and ask that this matter be decided based upon the Joint Motion, the associated exhibits, along with the briefs filed by the parties on November 17, 2017. Furthermore, in the Joint Motion the parties stipulate the following issues to be resolved with respect to the Complaint:

- (1). Whether Respondent violated Section 8(a)(1) of the Act by maintaining an arbitration agreement which employees would reasonably conclude prohibits or restricts their right to file unfair labor practice charges with the Board;
- 5 (2). Whether the language in Thoma’s initial unfair labor practice charge constitutes an admission that the arbitration agreement excludes claims seeking to enforce rights under the Act, and whether such an admission should be binding notwithstanding the amended charge;
- 10 (3). Whether the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16, controls enforcement of the arbitration agreement; and
- (4). Whether the Complaint is barred by Section 10(b) of the Act.
- 15 Having considered the Joint Motion, the stipulated facts and exhibits, along with the arguments of the parties set forth in their respective briefs, I make the following findings of fact and conclusions of law.

#### I. JURISDICTION AND LABOR ORGANIZATION

CBRE, a Delaware corporation with an office and place of business in Los Angeles, California, is engaged in the businesses of commercial real estate and investment services. In  
 20 conducting these enterprises, Respondent annually furnishes services valued in excess of \$50,000 directly to employers located outside the State of California. Respondent stipulates, and I find, that it is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.<sup>1</sup>

#### 25 II. FACTS

On August 17, 2016, Thoma filed the initial charge in this matter containing the following language:

30 CBRE has been violating Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration agreement that prohibits employees from engaging in protected, concerted activities. That agreement, which employees are required [to] enter as a condition of employment, applies to ‘any dispute or claim between  
 35 you and CBRE.’ The agreement also contradictorily then states: ‘All claims or disputes subject to arbitration, other than claims seeking to enforce rights under Section 7 of the National Labor Relations Act, must be brought in the party’s individual capacity, and not as a plaintiff or class member in any class, collective, or representative action.’ It is contradictory because NLRB precedent establishes that employees’ rights to engage in concerted activity for mutual aid and  
 40 protection, protected Section 7 [sic], includes concerted legal activity. Most

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<sup>1</sup> The facts set forth herein are based upon the Joint Motion and related exhibits. Citations to the joint exhibits are denoted by “JX.” See also *McDonough v. CBRE, Inc.*, No. CV 14-13674-FDS, 2016 WL 2349102, at \*1 (D. Mass. 2016) (Court notes that CBRE, Inc. is a Delaware corporation with its principal place of business in California).

recently, CBRE violated Section 8(a)(1), on July 14, 2016, when it obtained a hearing date from the LA Superior Court in Case No. BC612940 for a motion to compel arbitration of Mr. Thoma's class claims. (JX. 3)

5 The charge was amended on December 7, 2016, to state:

10 The Employer, CBRE, Inc./CBRE Group, Inc. by maintaining and enforcing the policies set forth in the Employer's Arbitration Agreement, unlawfully prevented its employees from engaging in protected, concerted activities, namely the activity of filing joint, class, or collective employment-related claims in any forum, arbitral or judicial. The policies maintained and enforced by the Employer are facially unlawful in that they also impermissibly restrict their employees' access to the Board and its processes. (JX. 5)

15 The parties stipulated that, since at least March 17, 2016, Respondent has maintained an arbitration agreement that applies to all of its statutory employees within the meaning of Section 2(3) of the Act. The pertinent language in the arbitration agreement reads as follows:

20 In the event of any dispute or claim between you and CBRE (including all of its employees, agents, subsidiary and affiliated entities, benefit plans, benefit plans' sponsors, fiduciaries, administrators, affiliates, and all successors and assigns of any of them), we jointly agree to submit all such disputes or claims to confidential binding arbitration and waive the right to a jury trial.

25 The claims and disputes subject to arbitration include all claims arising from or related to your employment or the termination of your employment including, but not limited to, claims for wages or other compensation due; claims for breach of any contract or covenant (express or implied); tort claims; claims for discrimination (including but not limited to, race, sex, religion, national origin, age, marital status, or medical condition or disability); claims for benefits (except where an employee benefit or pension plan specifies that its claims procedure shall culminate in an arbitration procedure different from this one); and claims for violations of any federal, state, or governmental law, statute, regulation, or ordinance. All claims or disputes subject to arbitration, other than claims seeking to enforce rights under Section 7 of the National Labor Relations Act, must be brought in the party's individual capacity, and not as a plaintiff or class member in any class, collective, or representative action. The arbitration (i) shall be conducted pursuant to the provisions of the arbitration rules of the Federal Arbitration Act (ii) shall be heard before a retired State or Federal judge in the county containing the Company's office in which you were last employed. The Company shall pay for all fees and costs of the Arbitrator; however, each party shall pay for its own costs and attorney's fees, if any, except as otherwise required by law.

45 In consideration of my employment, I agree to conform to the rules and standards of CBRE, Inc. as amended from time to time at the company's sole discretion.

...

I represent and warrant that I have read and fully understand the foregoing and seek employment under these conditions.

### III. ANALYSIS

#### A. The arbitration agreement violates Section 8(a)(1) of the Act

The language in Respondent’s arbitration agreement violates Section 8(a)(1) as employees would reasonably read the agreement to require arbitration of all employment related claims, including alleged violations of the Act. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). In *U-Haul Co. of California*, 347 NLRB 375, 377–378 (2006) the Board found an arbitration clause with similar language constituted violation. Citing *Lutheran Heritage*, the Board held that, while the language in the arbitration agreement did not explicitly restrict employees from resorting to the Board’s remedial procedure, the breadth of the language used, referencing the arbitration provision’s applicability to causes of actions recognized by “federal law or regulations,” would reasonably be read by employees to prohibit the filing of charges with the Board. *Id.* at 377.

The same is true here. Respondent’s arbitration agreement requires mandatory arbitration of “any dispute or claim . . . arising from or related to your employment or the termination of your employment including . . . claims for violations of any federal, state, or governmental law, statute, regulation, or ordinance.” (JX. 1) As with the language in *U-Haul Co. of California*, Respondent’s broad language requiring mandatory arbitration of all claims for violations of any “federal or governmental law, statute, regulation, or ordinance,” would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board. Because the “language of the policy is reasonably read to require employees to resort to the Respondent’s arbitration procedures instead of filing charges with the Board,” it violates Section 8(a)(1) of the Act. *Id.* at 377. See also *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772, 774, 778 (8th Cir. 2016) (sustaining the Board’s finding of a violation where the employer maintained an arbitration agreement requiring the individual arbitration of all “claims, disputes, or controversies arising out of, or in relation to this document or Employee’s employment with [the] Company,” as employees would reasonably interpret the quoted language to limit or preclude their rights to file charges with the Board).

The arbitration agreement’s reference to the NLRA does not save Respondent from liability. The agreement states that “[a]ll claims or disputes subject to arbitration, other than claims seeking to enforce rights under Section 7 of the National Labor Relations Act, must be brought in the party’s individual capacity, and not as a plaintiff or class member in any class, collective, or representative action.” The plain reading of this sentence, in the context of the entire agreement, only exempts NLRA related claims from the agreement’s prohibition against class, or collective, arbitration. Thus, when reading the clause in full, NLRA related claims are still subject to mandatory arbitration, but can be pursued through collective or class-action arbitration, while non-NLRA related claims must be pursued through individual arbitration.

Accordingly, the mandatory nature of Respondent’s arbitration policy would reasonably be ready by “employees as substantially restricting, if not totally prohibiting, their access to the Board’s processes.” *Bill’s Electric, Inc.*, 350 NLRB 292, 296 (2007).<sup>2</sup>

5 B. Neither the language of the initial charge nor the FAA saves Respondent from a violation

Respondent argues that there is no violation, and that the language in the original charge is an admission by Thoma “that the [a]rbitration [a]greement excludes claims seeking to enforce rights under Section 7 . . . and that Thoma would not believe on face value that the language . . .  
 10 precluded him from filing a charge with the Board.” (Resp. Br., at 7) This argument fails. The test to determine whether a rule violates the Act is an objective one, and is not dependent upon an employee’s subjective interpretation. *Miami Systems Corp.*, 320 NLRB 71, fn. 4 (1995),  
 15 enfd. in part 111 F.3d 1284 (6th Cir. 1997). Thus Thoma’s subjective belief as to whether the arbitration agreement precluded him from filing a charge not relevant. *Id.* Moreover, even if Thoma’s subjective belief – as evidenced by the language used in the initial charge – is relevant,  
 20 which it is not, it only highlights why the language is a violation as it is unlawfully vague and “likely to leave employees unwilling to risk violating the rule by exercising Section 7 rights.” *ISS Facility Services, Inc.*, 363 NLRB No. 160, slip op. at 2 (2016). Finally, because the language in the arbitration agreement violates the Act, it “falls within the FAA’s savings clause.”  
*NLRB v. Alternative Entertainment, Inc.*, 858 F.3d 393, 408 (6th Cir. 2017).<sup>3</sup> Thus, the Federal Arbitration Act does not preclude the finding of a violation. *Id.*

C. The Complaint is not barred by Section 10(b) of the Act

25 If an employer or a union maintains an unlawful rule during the 6-month period prior to the filing of a charge, Section 10(b) does not preclude the Board from finding a violation, even if the rule was adopted more than 6 months prior to the filing of the charge. *Carney Hospital*, 350  
 NLRB 627, 627–28, 640 (2007); *Ivy Steel & Wire, Inc.*, 346 NLRB 404, 422 (2006). Such is the case here. The parties stipulated that Respondent’s arbitration agreement has been in effect since  
 30 at least March 17, 2016, and that it was in effect at the material time periods set forth in the Complaint. This includes the period of time when Thoma filed the charge and amended charge. Accordingly, the Complaint is not time-barred by Section 10(b) of the Act. *Cellular Sales of Missouri*, 824 F.3d at 779 (charge is not time-barred when it is filed during the period in which  
 35 respondent has maintained the unlawful arbitration agreement).

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<sup>2</sup> Even if this clause could plausibly be read to exclude NLRA related claims from the agreement’s requirement that all disputes be subject to mandatory arbitration, the Board “routinely has found insufficient language in workplace rules purporting to except, or ‘save,’ employees’ legal rights from restrictions on their conduct . . . even where such exceptions referred to the ‘NLRA’ or ‘National Labor Relations Act.’” *ISS Facility Services, Inc.*, 363 NLRB No. 160, slip op. at 2 (2016). A violation still exists because “absent language more clearly informing employees about the precise nature of the rights supposedly preserved, the rule remains vague and likely to leave employees unwilling to risk violating the rule by exercising Section 7 rights.” *Id.*

<sup>3</sup> Pursuant to the FAA’s savings clause, “an arbitration provision that runs afoul of ay ‘grounds as exist at law or in equity for the revocation of any contract’ is unenforceable.” *Alternative Entertainment, Inc.*, 858 F.3d at 406 (quoting 9 U.S.C. § 2).

## 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 maintaining an arbitration agreement that employees reasonably would believe bars them from filing charges with the National Labor Relations Board the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act, and has violated Section 8(a)(1) 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. Specifically, Respondent is ordered to rescind or revise its arbitration agreement, and to notify employees that it has done so. If the arbitration agreement has been revised, Respondent shall provide employees a copy of the revised agreement as set forth in the Order.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended<sup>4</sup>

## ORDER

Respondent CBRE, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining an arbitration agreement that employees would reasonably believe bars or restricts rights to file charges with the National Labor Relations Board.

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

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

(a) Rescind the arbitration agreement in all of its forms, or revise it in all its forms to make clear to employees that the arbitration agreement does not restrict employees' rights to file charges with the National Labor Relations Board.

(b) Notify all applicants, current employees, and former employees, who were required to sign or electronically acknowledge the arbitration agreement in any form that the arbitration agreement has been rescinded or revised and, if revised, provide them with a copy of the revised agreement.

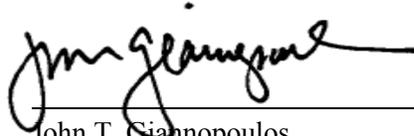
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<sup>4</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

5 (c) Within 14 days after service by the Region, post at its Los Angeles, California  
facility copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on  
forms provided by the Regional Director for Region 31, 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  
10 where notices to employees are customarily posted. In addition to physical posting  
of paper notices, 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  
15 altered, defaced, or covered by any other material. If the Respondent has gone out  
of business or closed any of the facilities 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 the  
closed facilities any time since March 17, 2016.

20 (d) Within 21 days after service by the Region, file with the Regional Director for  
Region 31 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 with this  
order.

Dated, Washington, D.C. November 24, 2017

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John T. Giannopoulos  
Administrative Law Judge

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<sup>5</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."



The Administrative Law Judge's decision can be found at [www.nlr.gov/case/21-CA-182368](http://www.nlr.gov/case/21-CA-182368) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (213) 634-6502.