

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.**

**CALIFORNIA COMMERCE CLUB, INC.,
DOING BUSINESS AS COMMERCE HOTEL
AND CASINO**

And

Case 21-CA-149699

WILLIAM J. SAUK, an Individual

**COUNSEL FOR THE GENERAL COUNSEL'S STATEMENT OF POSITION
ON REMAND TO THE BOARD**

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I. INTRODUCTION AND STATEMENT OF THE ISSUE

This action is before the Board on remand from the United States Court of Appeals for the District of Columbia Circuit to determine whether the Board’s decision in *The Boeing Company*, 365 N.L.R.B. No. 154 (December 14, 2017), and the United States Supreme Court decision in *Epic Systems Corp. v. Lewis*, --- U.S. ---, 138 S. Ct. 1612, WL 229244, 211 L.R.R.M. (BNA) 3061 (May 21, 2018), affects the Board’s finding that California Commerce Club, Inc., doing business as Commerce Hotel and Casino (“California Commerce Club”) violated Section (8)(a)(1) of the National Labor Relations Act (the “Act”) by maintaining a confidentiality clause in an arbitration agreement that prohibits employees from disclosing information about an arbitration proceeding.

In *Epic*, the United States Supreme Court enforced an employment arbitration agreement requiring individualized, rather than collective, arbitration of employment disputes. In so doing, the *Epic* majority applied the provisions of the Federal Arbitration Act to find that covered

employment arbitration agreements should generally be enforced as written, and that a provision precluding collective arbitration did not violate any express employee right or interest under the Act.

For the reasons that follow, it is the position of the General Counsel that under *Boeing*, when viewed in light of *Epic*, the arbitration confidentiality provision should be deemed to be a Category 2 rule, which “warrant[s] individualized scrutiny in each case as to whether the rule, when reasonably interpreted, would prohibit or interfere with the exercise of NLRA rights.” *Boeing*, slip op. at 4. For the reasons discussed below, the Board should find that California Commerce Club’s arbitration confidentiality provision is lawful.

The Provision at Issue:

The arbitration shall be conducted on a confidential basis and there shall be no disclosure of evidence or award/decision beyond the arbitration proceeding.

II. ARGUMENT

a. The Supreme Court’s decision in *Epic* and its Relevance Here

Analysis of *Epic* and its potential application is necessary because the provisions at issue here, unlike those in *Boeing*, concern provisions of an arbitration agreement. In *Epic*, the Court addressed the question: “Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?” *Epic*, slip op. at 1. Although the Court did not address the type of arbitration

provisions presented in the instant case, the sweeping language of *Epic* included intensive analysis of its application to arbitration provisions that may affect NLRA-protected rights.

In *Epic*, a majority of the Supreme Court held that an arbitration agreement requiring individualized arbitration proceedings, and barring class or collective proceedings before judges or arbitrators, did not violate the NLRA. In so holding, the Court disagreed with *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), in which the Board had invalidated a similar individualized arbitration requirement because it infringed employees' NLRA Section 7 rights to engage in the "concerted activity" of pursuing claims as a class or collective action. The Supreme Court found no such infringement in the language of the NLRA, stating that Section 7 protects unionization and collective bargaining and "other concerted activities" that "employees 'just do' for themselves in the course of exercising their right to free association in the workplace," rather than the procedural formalisms of the courtroom and joint or class litigation. *Id.*, slip op. at 12.

The Court also refused to endorse the *D.R. Horton* decision because permitting any party to demand classwide proceedings undermines "a fundamental attribute of arbitration" -- "the traditionally individualized and informal nature of arbitration." *Id.*, slip op. at 7-9, citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 347, 348 (2011). As the Court noted in *Epic*, arbitration is an individualized proceeding and classwide arbitration procedures may not be imposed without the individual parties' affirmative consent. *Id.*, slip op. at 8-9, citing *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684-687 (2010).

The Court further cautioned that federal statutes must be read to give effect to both laws and it, as well as lower courts, were not at "liberty to pick and choose among congressional enactments." The NLRA and the Federal Arbitration Act (FAA) should thus be read in harmony and without hostility to arbitration and the arbitration agreements entered into by the parties. If

the statutes cannot be harmonized, one statute can displace the other only if there is “a clearly expressed congressional intention” to do so. Given no congressional indication that the NLRA supplants the FAA, the Court directed that FAA-covered arbitration agreements are to be enforced as they are written, unless clearly unlawful. As to interpretation of the NLRA’s Section 7 provisions, “... a statute’s meaning does not always ‘turn solely’ on the broadest imaginable ‘definitions of its component words,’” Id, p. 23 (citation omitted). The NLRA should therefore not be read in its broadest possible interpretation if it would conflict with and essentially negate the parties’ agreements under the FAA.

The *Epic* majority analysis suggests that the Supreme Court will not lightly infer illegality of an FAA-enforceable arbitration contract, and will not apply the concept of protected concerted activity broadly to invalidate an agreed to arbitration agreement. Accordingly, in pursuing future cases, the General Counsel and the Board should carefully review the language of arbitration agreements for actual, as opposed to theoretical, violations of the NLRA and should identify with precision language alleged to irreconcilably conflict with the FAA, and the policy bases on which the Board would rely in contending that the FAA is, in fact, in conflict with the NLRA. Thus, to the extent specific clauses in arbitration provisions are confined to the arbitral process and do not reach beyond their confines to interfere with Section 7 rights of employees to engage in the type of concerted activities that employees “just do” for themselves, the wording should generally be considered lawful under the Act.

This analysis is consistent with the Board’s reasoning in *Boeing* in which the Board retreated from reading into employee handbook provisions the broadest possible application of the “reasonably construe” standard in *Lutheran Heritage*, 343 NLRB 646 (2004) that resulted in the invalidation of facially neutral policies “solely because they were ambiguous in some

respect.” Thus, if an arbitration provision is facially neutral, and does not, on its face, “prohibit or interfere with the exercise of NLRA rights,” it should be deemed lawful. An adjudicative body should not search beyond the language of the provision for theoretical or hypothetical conflicts with NLRA protected rights.

Were the Board to apply the *Boeing* analysis to the arbitration provision in *Epic*, it should find that arbitration provisions prohibiting class actions fall into the Category 1 rule since the provision, according to the Supreme Court, does not prohibit or significantly interfere with the exercise of NLRA rights. *See Epic*, slip op. at 2 (“The NLRA secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum. This Court has never read a right to class actions into the NLRA—and for three quarters of a century neither did the National Labor Relations Board.”). Similarly, an arbitration provision that requires that employment-related claims be brought to arbitration, but which would not reasonably be read to 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 are implicated. Any other reading of such a provision would violate the interpretive directives of *Epic*.

However, where arbitration provisions clearly implicate Section 7 rights, they should be categorized as, and analyzed under, the *Boeing* Category 2 rules. Thus, arbitration provisions that require confidentiality touch on core Section 7 rights of employees to discuss terms and conditions of employment.

b. Confidentiality Clauses in Arbitration Agreements that Limit Section 7 Rights Are Unlawful

The General Counsel has found confidentiality policies in employee handbooks to be Category 2 rules under *Boeing* because they may interfere with the Section 7 rights of employees to discuss their terms and conditions of employment. Where such policies interfere with Section 7 rights and the NLRA-protected conduct is not outweighed by legitimate justifications, such policies should be found to be unlawful. It is well established that employees have a Section 7 right to discuss and share information regarding their terms and conditions of employment. *See, e.g., Boeing*, 365 NLRB No. 154, slip op. at 16. Thus, a rule that “prohibits employees from discussing wages or benefits with one another” is an example of a “Category 3” unlawful rule.

Similarly, in the arbitration context, confidentiality clauses that reach beyond the arbitral proceedings into the traditional sphere of Section 7 activities remain unlawful under *Epic* and *Boeing*. However, the Board should find that arbitral confidentiality agreements that confine themselves to the matters disclosed in the course of arbitration proceedings generally do not adversely impact Section 7 rights because they do not prevent employees from discussing matters protected under Section 7, such as their terms and conditions of employment, the fact of their arbitration, and their claims.

The text of the FAA itself is silent on the issue of confidentiality in arbitration. And, the Supreme Court has stated only that confidentiality in arbitral proceedings may be necessary to protect parties’ interests with respect to certain sensitive information, including “trade secrets.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. at 345. As courts have recognized, there is a substantial difference between an employer’s interest in prohibiting disclosure of business-

related information and documents and an interest in prohibiting disclosure of information related to employees' wages and other terms and conditions of employment. *See, e.g., Flex Frac Logistics v. NLRB*, 746 F.3d 205, 209-10 (5th Cir. 2014). In addition, while American Arbitration Association (AAA) rules governing arbitration generally require that *the arbitrator* maintain the confidentiality of proceedings, they impose no similar duty on the parties to arbitral proceedings -- the parties remain free, absent agreement otherwise, to disclose information pertaining to arbitration hearings, discovery, settlements, and awards.¹ Thus, confidentiality has long been recognized as an issue in arbitration proceedings and specifically part of the arbitration procedure determined by the parties.

As noted, *Epic* holds that the procedures to which the parties agree in arbitration should be enforced unless clearly violative of the Act. Confidentiality provisions that confine themselves to information concerning matters disclosed in the arbitration hearing and relating to the arbitration do not significantly implicate Section 7 rights, and therefore, in conformity with *Epic*, such agreements should be enforced as written. This would include agreements requiring confidentiality of documents and information produced in connection with an arbitral hearing (other than documents and information that have become known outside of the arbitration) as well as any settlements and awards, but which do not prohibit discussion of the fact of the

¹ *See, e.g.,* Christopher R. Drahozal, *Confidentiality In Consumer and Employment Arbitration*, 7 *Yearbook On Arbitration And Mediation*, 28, 30-31 (2016); Ronald Ravikoff, *Your Arbitration is Private, but is it Confidential*, Daily Business Review, May 26, 2015 (“[w]hile the obligation of the arbitrator [and administrator] to maintain confidentiality is usually clear, generally no such obligation is imposed on the parties”); AAA *Statement of Ethical Principles* (“the AAA takes no position on whether parties should or should not agree to keep the proceeding and award confidential between themselves. The parties always have a right to disclose details of the proceeding, unless they have a separate confidentiality agreement. Where public agencies are involved in disputes, these public agencies routinely make the award public”).

arbitration or the claims made in the arbitration or matters outside of the arbitration. Thus, under *Boeing*, such confidentiality clauses, which do not prevent employees from sharing information outside of the arbitral proceeding, should be considered as lawful Category 2 provisions.

c. New Principles of Interpretation Applicable to Arbitration Agreements under *Epic* and *Boeing*.

The pre-*Boeing* rationale underlying the allegations in the instant case was that the employer maintained an agreement that employees would “reasonably construe” as restricting their ability to discuss their terms and conditions of employment. Those allegations were originally based on the analytical framework for assessing whether workplace rules interfere with employees’ rights under the Act as set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) -- the extant precedent at the time of the Complaint here. Because the Board in *Boeing* overturned its prior “reasonably construe” standard, the question now is whether the employer’s policy or, in this case, the parties’ arbitration agreement, unduly interferes with employee rights under *Boeing*.² In this regard, as directed by *Epic* that the parties’ agreed-to language should be enforced, the Board should review the language of the arbitration agreement to determine whether there is an actual, as opposed to a hypothetical, interference with Section 7 rights. If the agreement’s provisions, when reasonably interpreted, do not interfere with Section 7 rights, or interfere only marginally with Section 7 rights, the provisions should be deemed

² Although the Court in *Epic* addressed voluntary agreements between an employer and employee, and *Boeing* (and previously *Lutheran Heritage*) expressly applies to employer-implemented handbook rules and not voluntary agreements, the analysis in *Boeing* regarding how employees would interpret ambiguous language and how to balance the impact on Section 7 rights with legitimate employer business interests is a useful and appropriate framework for considering the legality of these provisions as well.

lawful and all inquiry should end there. If, as reasonably interpreted, the provisions interfere with or prohibit employees' sharing information regarding their working conditions (apart from information specific to the arbitral proceeding), the provisions should be found unlawful because the Section 7 rights at issue are not "peripheral," but "deemed central to the Act" and outweigh any legitimate employer business justification. *Boeing*. slip op. at 16.

In interpreting arbitration agreements, the Supreme Court's decision in *Epic* must be considered in addition to *Boeing*, which addressed employer-issued employee handbook provisions. Arbitration provisions are agreed to by the individual parties and, under *Epic*, are entitled to greater deference than unilaterally issued policies. *Epic* dictates that an arbitration agreement should be enforced, unless it is clearly in conflict with the NLRA or has been applied in a manner that violates the Act. Thus, if an agreement does not clearly interfere with or prohibit NLRA-protected activities, "the rule is lawful . . . , and the Board's inquiry into maintenance of the rule comes to an end." *Boeing*. If an agreement is ambiguous concerning its impact on NLRA-protected rights, the Board should use the *Boeing* analytical framework of Category 2 rules to determine whether the agreement would reasonably be read to prohibit or interfere with the exercise of NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.

Of course, even if provisions of arbitration agreements are facially lawful, the *Boeing* Board made clear that application of an otherwise lawful rule may still be unlawful. The Board explained that "even when a rule's *maintenance* is deemed lawful, the Board will examine the circumstances where the rule is *applied*." *Boeing*, slip op. at 4-5. If such application negatively affects NLRA-protected activity, such application may violate the Act. Thus, to the extent a

lawful Category 1 or Category 2 arbitration agreement is applied so as to interfere with core Section 7 rights, such application of the agreement should be found unlawful.

d. Applying these general principles to confidentiality of arbitration provisions.

According to *Epic*, the NLRA did not encompass within Section 7 rights specific procedural aspects of arbitration. *Epic*, slip op. at 11-13. Accordingly, as long as an arbitral confidentiality provision confines itself to arbitration-related matters and does not touch the type of Section 7 activities that “employees ‘just do’ for themselves,” it should not be interpreted to interfere with Section 7 rights. Under this analysis, if the parties agree to keep the content and results of the arbitration itself confidential, as long as an employee is not prohibited from discussing the fact of the arbitration, the employee’s claims against the employer, the legal issues involved, and information related to terms and conditions of employment obtained outside of the arbitration, such an agreement would not interfere with Section 7 rights and should be lawful.

- 1) The Board has held that parties may lawfully enter into a confidential settlement agreement. *S. Freedman & Sons, Inc.*, 364 NLRB No. 82, slip op. at 2 (August 25, 2016). If the parties can lawfully agree to settle an arbitration confidentially, there is no reason why the parties cannot agree to a confidential resolution of an arbitration through a confidential arbitration award. After all, arbitration itself is a voluntary procedure for resolving disputes. Thus, an arbitration agreement requiring confidentiality of

settlements and awards does not impact or unduly interfere with any Section 7 rights.³

Under the Category 2 analysis, such arbitration agreements should be considered lawful since “the risk of intruding on NLRA rights is ‘comparatively slight.’” *Boeing*, slip op. at 16. A blanket confidentiality provision, requiring all aspects of the arbitration to be held confidential, including the fact of the arbitration, the employee’s claims against the employer, the legal issues involved, or other information related to terms and conditions of employment, should be unlawful.

- 2) Confidentiality provisions that provide that the arbitration shall be conducted on a confidential basis or that the arbitration proceedings shall be confidential do not, on their face, “when reasonably interpreted,” interfere with Section 7 rights.⁴ Such provisions merely require that the content of the arbitration proceedings and their results not be publicized. They do not interfere with employees’ rights to share information concerning wages and terms and conditions of employment.
- 3) An arbitration agreement that unlawfully requires blanket confidentiality but that contains a sufficient disclaimer or other savings clause that is proximate to the confidentiality clause should be considered lawful. For example, an arbitration agreement with an unlawful confidentiality requirement could, depending on the language of that requirement, be made lawful by including language such as “nothing in this confidentiality provision shall prohibit employees from engaging in protected discussions

³ It should be noted that employees may benefit as much as employers in keeping an arbitration awards confidential, particularly in cases in which the arbitrator upholds an employee’s discharge.

⁴ Examples of such provisions are: “The arbitration shall be conducted on a confidential basis and there shall be no disclosure of evidence or award/decision beyond the arbitration proceeding”; and “All arbitration proceedings, including but not limited to hearings, discovery, settlements, and awards shall be confidential.”

or activity relating to the workplace, such as discussions of wages, hours, or other terms and conditions of employment.”

While the above analysis of these issues is certainly not exhaustive, we hope it may help the Board in evaluating a large percentage of the individual variations in arbitration agreement language that is subject to the Board’s review.

e. Applying these Principles to the Arbitration Agreement Here

California Commerce Club’s confidentiality provision provides that “the arbitration shall be conducted on a confidential basis and there shall be no disclosure of evidence or award/decision beyond the arbitration proceeding.”

The confidentiality provision does not limit an employee’s ability to discuss terms and conditions of employment. Rather, it requires both parties to keep confidential the content of the arbitral proceedings, including the information and documents that are disclosed pursuant to the arbitral process. It does not limit an employee’s ability to discuss his or her terms and conditions of employment, the circumstances and reasons for discipline and any facts or materials of which the employee became aware outside of the arbitral process. Because the confidentiality requirements do not reach to matters outside of the arbitral proceeding, the provision contains no unlawful limitation on employees’ Section 7 rights.

Although we urge the Board to find the confidentiality clause lawful as written under *Boeing*, injudicious use of the provision could render its *application* unlawful. For instance, were this confidentiality provision to be applied to matters outside of the confines of arbitral process to gag employees’ discussion of information obtained outside of the proceedings, or if

the provision were applied inequitably, then under *Boeing* and consistent with *Epic*, such *application* of the confidentiality clause would be unlawful under the Act. Under Section 7 of the Act, employees have a right to discuss and share information regarding their terms and conditions of employment. *See, e.g., Boeing*, 365 NLRB No. 154, slip op. at 16. Thus, if, under this rule, an employer disciplined an employee for discussing terms and conditions of employment matters revealed during the arbitration of which the employee otherwise had knowledge outside of the arbitration, such application of the provision would be unlawful.

Similarly, a confidentiality provision must be applied evenhandedly to be lawful. An employer may not require an employee's strict adherence to a confidentiality provision and not itself comply with its strictures. Therefore if, for example, California Commerce Club, which seeks to hold arbitration awards confidential in its arbitration agreement, were to use, disclose or refer to a confidential arbitration award in a later litigation or hearing, while holding employees to the silence of confidentiality, such application of the confidentiality agreement would be unlawful. In other words, to be lawful in application, a confidentiality requirement imposed on an employee must be equally borne by the employer.

III. CONCLUSION

In light of the arguments detailed above, we urge the Board to dismiss the Complaint allegation that the arbitration agreement's confidentiality provision unlawfully interferes with employees' Section 7 right to discuss their terms and conditions of employment (as set forth in paragraph 4(c) of the Complaint).

DATED at Los Angeles, California, this 24th day of August, 2018.

Respectfully submitted,

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STATEMENT OF SERVICE

I hereby certify that a copy of COUNSEL FOR THE GENERAL COUNSEL'S STATEMENT OF POSITION ON REMAND TO THE BOARD was submitted by E-filing to the Executive Secretary of the National Labor Relations Board on August 24, 2018.

Respondent Counsel was served with a copy of that document by electronic mail, and the Charging Party was served with a copy of that document by regular mail, on August 24, 2018.

/s/ Lindsay R. Parker

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