

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CBRE, INC.,

and

Case 21-CA-182368

STEVE THOMA, an Individual.

**RESPONDENT CBRE, INC.'S RESPONSE
TO THE BOARD'S NOTICE TO SHOW CAUSE**

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I. CBRE, INC. OPPOSES REMAND TO THE ALJ BECAUSE IT AND THE GENERAL COUNSEL HAVE ALREADY FILED BRIEFS TO THE BOARD ARGUING THEIR POSITIONS UNDER THE NEW *BOEING COMPANY* TEST, AND OBJECTIVES OF JUDICIAL ECONOMY PROVIDE CAUSE TO RETAIN THIS CASE AT THE BOARD

A. Introduction

Respondent CBRE, Inc. (“Respondent” or “CBRE”) files this Response to the Board’s Notice to Show Cause, issued on December 17, 2018, opposing remand of this proceeding to the Administrative Law Judge (“ALJ”). The grounds for Respondent’s opposition arise from the fact that the parties have already submitted their respective positions to the Board under the new test announced in *The Boeing Company*, 365 NLRB No. 154 (2017), in Respondent’s Exceptions filed with the Board, as well as in its Brief in Support of Exceptions, counsel for the General Counsel’s Answering Brief to Respondent’s Exceptions, and CBRE’s Reply Brief to the Answering Brief.¹ In fact, the decision of the ALJ issued on November 24, 2017, as noted in the Notice to Show Cause; the Board decided *Boeing Company* on December 14, 2017; and, Respondent’s Exceptions and Brief in Support of Exceptions were filed on January 10, 2018. As a result, judicial economy and efficient and economical use of time and resources of both the National Labor Relations Board and CBRE provide cause for this case to remain before the Board.

B. The Legal Issues Raised In CBRE’s Exceptions Have Placed The Analysis Under The New *Boeing Company* Test Before The Board

Respondent’s Brief in Support of Exceptions to Administrative Law Judge’s Decision, filed on January 31, 2018, indicates the following four questions are presented to the Board:

1. Whether the ALJ erred in finding that Respondent’s Arbitration Agreement violates Section 8(a)(1) of the Act by prohibiting or restricting employees’ access to the Board and its processes? [Exceptions 1-35]
2. Whether, under the new balancing standard adopted by the Board in *Boeing Company*, CBRE’s business justifications

¹ This fact distinguishes the instant case from many of the similar cases addressing the same sole alleged violation of the Act - *i.e.*, that language in an arbitration agreement interferes with employees’ access to the Board and its processes in violation of Section 8(a)(1) – in which exceptions and all briefing had been filed with the Board long before its decision in *Boeing Company* issued.

for maintaining the language in the Arbitration Agreement outweigh the potential adverse impact on the protected right under the Act to file unfair labor practice charges with the Board? [Exceptions 7 - 23]

3. Whether the ALJ erred in finding that while the language in the original charge – that the Arbitration Agreement excludes claims seeking to enforce Section 7 rights – which Thoma attempted to change by filing an amended charge, is not a relevant admission regarding whether CBRE’s Arbitration Agreement permits employees to file a charge with the Board? [Exceptions 24 - 28]

4. Whether the ALJ erred in finding that the language in the Arbitration Agreement is within the “savings clause” of the Federal Arbitration Act (FAA), and that as a result, the FAA does not control and does not require that the Arbitration Agreement be enforced according to its terms, regardless of the asserted violation of the Act? [Exceptions 29 – 32]

As the proceeding in this case was conducted on a stipulated record,² it only remains for the Board to apply the new test adopted in *Boeing Company* to these questions. A remand of the case to the ALJ is entirely unnecessary to accomplish this task.

C. Applying The *Boeing Company* Test In The Manner Sought By The General Counsel In Response To The Board’s Notice To Show Cause, The Provisions In Respondent’s Arbitration Agreement Are Lawful

Counsel for the General Counsel’s Response to the Board’s Notice to Show Cause, received by the undersigned on Friday, December 21, 2018, indicates that counsel for the General Counsel also opposes remand to the ALJ. Such opposition, however, is based upon the General Counsel already having presented its position on the issue in the instant case to the Board in Counsel for the General Counsel’s Brief on Remand to the Board in *Prime Healthcare Paradise Valley, LLC*, Case 21-CA-133781, which was filed with the Board on August 31, 2018 and a copy of which is attached to Counsel for the General Counsel’s Response to the Board’s

² A Joint Motion to Transfer Proceedings to the Division of Judges and Joint Stipulation of Facts, including supporting Joint Exhibits, was entered into by all parties, and an Order Granting Joint Motion, Approving Stipulation of Facts, and Setting Briefing Schedule was issued by Administrative Law Judge John T. Giannopoulos on October 4, 2017. Joint Exhibits in that Joint Motion are indicated herein as “Jt. Ex. _.”

Notice to Show Cause.

In the brief in *Prime Healthcare*, the General Counsel applies the *Boeing Company* test to arbitration agreements essentially as follows:

- Arbitration provisions should be within **Category 1 of *Boeing Company***³ and lawful where a savings clause explicitly provides that employees may use administrative proceedings in tandem with arbitration proceedings. As long as employees understand they retain the right to access the Board and its processes, there should be nothing unlawful about requiring the use of arbitration as well. Even arbitration agreements that provide for “exclusive” arbitration of all claims should be lawful if they contain express language that preserves employees’ rights to access the Board and its processes so that the entire agreement would be read by employees as permitting Board access.

- Arbitration provisions should come under **Category 2 of *Boeing Company***⁴ and be analyzed to determine whether they would reasonably be read to interfere with the exercise of NLRA rights where an arbitration agreement: (a) merely states all employment disputes shall or must be “resolved” through arbitration, and should not have exclusivity read into the agreement unless other language in the provision indicates exclusivity; (b) merely requires employees to utilize the arbitration system for employment-related disputes, but, in the absence of other language, does not prohibit employees from utilizing Board processes such as ULP proceedings; (c) read as a whole, but not by a particular provision, actually prohibits filing of charges with the Board or bringing claims to administrative agencies; and/or (d) lacks an explicit prohibition on

³ Category 1 includes policies that the Board designates as lawful to maintain, either because (i) the policy, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the policy.

⁴ Category 2 includes policies that warrant individualized scrutiny in each case as to whether the policy would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on

pursuing proceedings in other forums, and should not have a prohibition on pursuing other proceedings read into it as it is silent on the issue.

- Arbitration provisions should fall under **Category 3 of *Boeing Company***⁵ as unlawful where an arbitration agreement: (a) explicitly prohibits filing claims with administrative agencies; (b) states employees must use arbitration “exclusively” for all work-related claims; (c) says employees cannot use any other forum; (d) states statutory claims must be brought exclusively in arbitration; and/or (e) otherwise uses language that employees would reasonably understand as prohibiting the filing of claims with the Board.

Further, the General Counsel indicates that in deciding whether a savings clause is adequate, the Board should not require excessive comprehensiveness and precision.

As Respondent has previously stated in its Brief in Support of Exceptions, CBRE’s Arbitration Agreement, contained in a single paragraph, provides in relevant part that:

In the event of any dispute or claim between you and CBRE . . . , we jointly agree to submit all such disputes or claims to confidential binding arbitration and waive any right to a jury trial. 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 violation 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. (Emphasis added.)

(Jt. Ex. 1, Appendix A). Considering the Arbitration Agreement under the General Counsel’s application of the *Boeing Company* test, the above-quoted language carves out an express

NLRA-protected conduct is outweighed by legitimate justifications.

⁵ Category 3 includes policies that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected personal conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the policy.

exception for claims to enforce Section 7 rights under the National Labor Relations Act. The specific delineation of the exception in the above-quoted form is consistent with the short-form nature of the Arbitration Agreement. Under reasonable interpretation, the language of the Arbitration Agreement conveys an exception for Section 7 claims, and does not contain any language preventing an employee from filing an unfair labor practice charge with the Board. As stated on page 5 of Counsel for the General Counsel’s Brief on Remand to the Board in *Prime Healthcare*, “. . . an arbitration provision that requires that employment related claims be resolved by arbitration, but which 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 are implicated. Any other reading of such a provision would violate the interpretive directives of [*Epic Systems Corp. v. Lewis*, ___ U.S. ___, 138 S.Ct. 1612, WL 2292444, (May 21, 2018)].” As a result, from the General Counsel’s perspective, CBRE’s saving clause is a lawful Category 1 provision.

Further, even if the language of the Arbitration Agreement is interpreted as requiring arbitration of a claim filed under the NLRA, under the General Counsel’s analysis, the saving clause would fall under Category 2. As CBRE has previously argued and now reiterates, the legitimate justifications for the Arbitration Agreement – namely, lower costs, greater efficiency and speed, the ability to choose expert adjudicators to resolve specialized disputes, and avoiding the risk of devastating “in terrorem” settlements – prevail over and outweigh the saving clause’s potential adverse impact upon the right to file a Board charge. Thus, even if it is viewed as a Category 2 provision, the savings clause in Respondent’s Arbitration Agreement is lawful.

D. The Objectives Of Judicial Economy, Including Efficient Use Of Both NLRB Agency and CBRE Resources And Time, Compel Retaining This Case At The Board And Not Remanding It To The ALJ

The foregoing demonstrates that objectives of judicial economy will be accomplished by

retaining the instant case before the Board to address the alleged violation with respect to CBRE's Arbitration Agreement under the new *Boeing Company* test. By keeping this case at the Board, not only the Board's limited agency time and financial resources, but those of CBRE as well, will be conserved. If, however, this case is instead remanded to the ALJ, it will increase the expense and amount of time to be expended by Respondent, which has already briefed the case to the ALJ and filed exceptions, a supporting brief, and a reply brief to the Board.

II. CONCLUSION

For all the foregoing reasons, Respondent CBRE submits this case should not be remanded to the ALJ. Rather, the case should remain at the Board in order that the issue of whether Respondent's Arbitration Agreement interferes with employees' access to file a charge with the Board will be economically and efficiently resolved.

Dated: December 26, 2018

Respectfully submitted,

GORDON A. LETTER
LITTLER MENDELSON, PC

By 
GORDON A LETTER

Attorneys for Respondent
CBRE, INC.

CERTIFICATE OF SERVICE

I hereby certify that, on this 26th day of December 2018, I e-filed the Respondent CBRE, Inc.'s Response to the Board's Notice to Show Cause with the Office of the Executive Secretary of the National Labor Relations Board on the NLRB's E-Filing system, and served a copy of this Response to the Board's Notice to Show Cause by electronic mail upon the following:

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