UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

IGT d/b/a INTERNATIONAL GAME TECHNOLOGY

and **Cases 28-CA-166915**
28-CA-173256
28-CA-174003
28-CA-174526

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL UNION 501, AFL-CIO

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

Respectfully submitted,

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I. INTRODUCTION

By its Brief in Support of its Exceptions (Brief), IGT d/b/a International Game Technology (Respondent) urges the Board to overturn the well-reasoned ruling of Administrative Law Judge Jeffrey D. Wedekind (ALJ). While the Brief offers a veneer of convincing reasons for the Board to reverse the decision of the ALJ (the Decision), a careful reading of the Respondent's argument and the authority cited strips away that veneer to show that Respondent either misunderstood or misstated Board authority. The record and Decision are likewise presented in a manner that does not reflect their true content. The Board should reject Respondent's exceptions *in toto* and affirm the Decision.

II. RESPONDENT'S EXCEPTIONS

A. The ALJ's Determinations Regarding the Information Request Should Not Be Overturned

1. Respondent's Information Request Exceptions

Exception 1: IGT excepts to the ALJ's conclusion/finding that IGT violated the Act by failing or refusing to provide the Union with a list of all of IGT locations in the United States, because it is contrary to established Board law and is unsupported by the evidence in the record. (D. 6, 16; Tr. n/a)

Exception 2: IGT excepts to the ALJ's conclusion/finding that the relevance of the Union's request for all of IGT's locations should have been apparent to IGT, because it is contrary to established Board law and is unsupported by the evidence in the record. (D. 5; Tr. 228, 232, 241-243).

Exception 3: IGT excepts to the ALJ's conclusion/finding that the Union obviously needed to know where the IGT's locations were in order to verify that the wages there were what

the IGT said they were, because it is contrary to the record evidence and the Union's undisputed testimony. (D. 5; Tr. 228, 232, 241-243).

Exception 4: IGT excepts to the ALJ's conclusion/finding that the Union testified it requested the list of all of IGT's locations "because the Union wanted the Las Vegas contract to mirror the wages and benefits at other locations, particularly other locations in southern Nevada and southern California within the Union's jurisdiction, rather than in New York", because it is contrary to the record evidence and to the Union's undisputed testimony. (D. 2; Tr. 228, 232, 241-243).

Exception 5: IGT excepts to the ALJ's conclusion/finding that it should have been clear to IGT that the Union was only requesting IGT to provide it with IGT's locations in the United States, because it is unsupported by the record evidence and the Union's undisputed testimony. (D. 5-6; Tr. 228, 232, 240-243).

Exception 6: IGT excepts to the ALJ's conclusion/finding that the Union's request that IGT provide it with a list of all of IGT's locations and/or a list of all jurisdictions where IGT conducts business was not an overbroad, ambiguous request to which Respondent could lawfully request clarification before responding, because it is contrary to established Board law and is unsupported by the record evidence. (D. 6; Tr. 228, 232, 240-243).

Exception 7: IGT excepts to the ALJ's conclusion/finding that the Union did not have the burden to demonstrate the relevance of its request for non-unit information, which was not presumptively relevant, even though IGT requested the Union to provide the reasons why IGT was required to provide the broad request for non-unit information, because it is contrary to established Board law. (D. 6; Tr. n/a).

Exception 8: IGT excepts to the ALJ's conclusion/finding that IGT was required to provide the Union with the non-unit information it requested (the list of all of IGT's locations) despite the undisputed fact that the Union never demonstrated the relevance of the requested non-unit information, because it is contrary to established Board law. (D. 5-6; Tr. n/a)

Exception 15: IGT excepts to the ALJ's conclusion/finding that IGT did not respond to the Union's March 28, 2016 email, because, it is contrary to the evidence in the record. (D. 8; Tr. 265-66).

2. Facts

On October 28, 2015, during a bargaining session between the Union and Respondent, Respondent stated that it was in negotiation with another union.[1] Tr. 226. According to Respondent, negotiations were taking place in New York. *Id*. Respondent stated that it wanted the Union's contract to mirror the other one being negotiated. *Id*. On March 28, 2016, the Union sent an information request via e-mail, requesting, among other things a "list of all company locations." GCX 17. On April 6, Respondent replied, "Responsive information applicable to the bargaining unit members has already been provided to the Union." GCX 20(b). The Union then sent a modified request on April 7, requesting:

> For the purpose of bargaining please provide the following information can you provide a list of all jurisdictions where IGT and GTECH conducts business for example Prescott AZ, Scottsdale AZ, Coachella CA, Needles CA, Pauma Valley CA, Cabazon CA, Pala CA and Temecula CA etc. Including premium pay and health benefits.

GCX 21(b). The Union's jurisdiction encompasses southern, including California locations such as Temecula and Coachella. Tr. 229. The Union provided the specified locations because they

[1] References to the Transcript are Tr. __, showing page or pages. GCX __ refers to General Counsel's Exhibits. RX __ refers to Respondent's Exhibits.

fall in the Union's jurisdiction.[2] Tr. 228, 230. At the time of its first request, the Union had not yet discovered these locations. Tr. 355. On April 13, Respondent replied, "Please provide the justification for providing all Company locations." GCX 22(c).

Thereafter, Respondent sent a list of locations where the local bargaining unit (the Unit) had performed work in the Las Vegas, Nevada area. Tr. 104, 453 see RX 15. This list was limited to the Unit. Tr. 453. The Union did not respond to the request for justification for listing Respondent's locations. Tr. 243. It is undisputed that Respondent did not provide the information requested.

3. Authority

The Board's standard for determining which information requests must be honored is a liberal discovery-type standard. *United Parcel Service of America*, 362 NLRB No. 22, slip op. at 3 (2015). Potential or probable relevance is sufficient to give rise to an employer's obligation to provide information. *Richmond Health Care*, 332 NLRB 1304, 1305 fn. 1 (2000). To demonstrate relevance, the General Counsel must present evidence either (1) that the union demonstrated relevance of the non-unit information, or (2) that the relevance of the information should have been apparent to the Respondent under the circumstances. *Disneyland Park*, 350 NLRB 1256, 1258 (2007).

4. Argument

In its Exceptions, Respondent argues that because the ALJ found the information the Union requested to be not presumptively relevant, and, because the Union did not demonstrate to Respondent the relevance of the information it requested, Respondent was excused from

[2] Respondent provided information in 2015 including several slot machine manuals. Tr. 230. In reviewing those manuals, the Union learned of other specific locations where Respondent operates. Tr. 232. The Union included some of those other locations in its April 7 information request in GCX 21.

providing the information. Ultimately, Respondent argues that the ALJ based his ruling on a standard he created. Respondent's claim is not accurate.

The standard elaborated by the ALJ is set forth explicitly in *Disneyland Park*, 350 NLRB at 1258 (2007), which Respondent cited in support of its argument. That is, when information is not presumptively relevant, a union must *either* demonstrate the relevance *or* the relevance must be apparent before an employer is obligated to furnish it. Board law states that if a union requests information that is not presumptively relevant, the union simply does not benefit from the presumption, and the union then has a burden to show that it is relevant. Respondent would have the Board narrow its standard and exclude the rule that an employer must provide information whose relevance should be apparent.

The ALJ found that the Union was not required to explain the relevance of its information request – adding, however, that such an explanation might have avoided litigation – because the relevance should have been apparent. Here, the record demonstrates why the relevance of the Union's information request should have been apparent to Respondent. As the ALJ found, witnesses testified, and Respondent did not refute; Respondent stated at the bargaining table that it intended to model its collective-bargaining agreement with the Union after another agreement it was negotiating with a different union. Other locations[3] thereby became relevant to the Union. Discovering these locations was arguably the first step in obtaining more information about the negotiations on which the Union's collective-bargaining

[3] As Respondent points out, the Union's request for Respondent's locations was not limited to any geographical area. However, the Union's communications after its initial request focused solely on locations in the United States. The ALJ found, therefore, that it should have been clear that the Union's concern was with locations within the United States. The ALJ addressed this issue in his order, limiting the Respondent's obligation to provide a list of its locations within the United States. Decision at 18. CGC did not file exceptions to the order or to the Decision in general.

agreement was purportedly to be based. It is reasonable to conclude, as the ALJ did, that one of the Union's key concerns would be wages.

All other claims made in the Exceptions above are amply supported by the Decision, including the authority and portions of the record cited thereto. Without additional argument, there is nothing to which Counsel for the General Counsel (CGC) may respond.

CGC respectfully requests that the Board dismiss Exceptions 1-8 and 15.

B. The ALJ's Determinations Regarding Respondent's Failure to Bargain Should Not Be Overturned

1. Respondent's Failure to Bargain Exceptions

Exception 9: IGT excepts to the ALJ's conclusion/finding that IGT violated the Act by failing and/or refusing to provide the Union with a meaningful opportunity to bargain over the Company's decision to use AppleOne temporary employees on the Stations Project and the effects of that decision, because it is contrary to established Board law and is unsupported by the record evidence. (D. 10, 13, 14, 16-17; Tr. 45, 49, 81-82, 142-43, 154, 161, 166, 179-82, 184, 211, 219-21, 222, 256, 265, 298, 329, 333-34, 390, 398-99, 401-06, 425, 456-57, 467-69, 474, 484-85).

Exception 10: IGT excepts to the ALJ's conclusion/finding that the evidence failed to show that Respondent had a past practice of subcontracting work to AppleOne, because it is contrary to established Board law and is unsupported by the record evidence. (D. 10; Tr. 49, 142, 154, 166, 456, 467-69, 484).

Exception 11: IGT excepts to the ALJ's conclusion/finding that Shane West was turned away when he arrived to work overtime on the Stations Project in mid-May, 2016, because it is not supported by the record evidence. (D. 12; Tr. 381, 420, 427).

Exception 12: IGT excepts to the ALJ's conclusion/finding that IGT's decision to use AppleOne for temporary workers on the Stations Project was based on IGT's consideration of labor costs, because it is contrary to established Board law and is unsupported by the record evidence and is contrary to IGT's undisputed testimony. (D. 11-12; Tr. 137, 139-40, 143-44, 155, 457, 484-85).

Exception 13: IGT excepts to the ALJ's conclusion/finding that on pages 458 to 461 of the transcript IGT admitted that it contracted with AppleOne because it did not want to go through the hiring, employment, and licensing/regulatory compliance process, because there is no such admission in the record. (D. 11; Tr. 458-61).

Exception 14: IGT excepts to the ALJ's conclusion/finding that IGT did not make any changes to the unit's scheduling as requested by the Union, because, it is contrary to the evidence in the record. (D. 8; Tr. 457).

2. Facts

a. Discussion of the UGA Project

Respondent is a corporation involved in the business of assembling, installing, and servicing gaming machines. The Union was certified on May 26, 2015. Tr. 37. Currently, there are at least forty two employees in the Unit. Tr. 37. The Unit is comprised of technicians who perform highly technical work. See GCX 2 (a seven-page job description. Tr. 37-39).

Cynthia Hartman (Hartman) has worked for Respondent for five and a half years. Tr. 35. Shondra DeLoach-Perea (DeLoach) has worked for Respondent for eight years. Tr. 134.

The parties met for bargaining on March 16 and 17, 2016.[4] Tr. 42. During the March 17 meeting, Respondent discussed the "UGA project." Tr. 43, 135-136. This was the first instance in which Respondent mentioned the project to the Union. Tr. 136. According to DeLoach, UGA

[4] All further dates are in 2016, unless otherwise noted.

was "brought up in a very general state." *Id*. When asked what was said about UGA, she responded, "Just in general that there was a project, that there was a customer." *Id*.

Respondent informed the Union that the project was for a customer called Station Casinos (Station). Tr. 136; see Tr. 44. DeLoach recalled that a discussion of Respondent's capacity took place at that meeting; that although Respondent had no clear direction from Station, Respondent knew that UGA was above its capacity to execute. Tr. 137. DeLoach explained that "above capacity" meant that Unit technicians could not perform all of the work within the time allotted. Tr. 139-140.

At the time of the March 17 meeting, Respondent was not aware of where the UGA project was scheduled to begin. Tr. 136-137. At that time, the contract for the UGA project was still being negotiated. Tr. 136. DeLoach recalled informing the Union that Respondent was having meetings at Red Rock, the location of Station's corporate office. Tr. 463. By that date, Station had informed Respondent that the project would require three to six months to complete. Tr. 140. Respondent did not tell the Union when the UGA project was scheduled to begin. Tr. 43. This, too, was because the contract between Respondent and Station had not been finalized. Tr. 44. Respondent told the Union that it would let the Union know when the contract was finalized. Tr. 50.

During the March 17 meeting, Respondent stated that it would use a third party vendor to perform work on UGA. Tr. 44. That third party vendor was AppleOne. *Id*. Hartman stated that DeLoach discussed the scope of work that AppleOne would be performing. Tr. 48. The UGA project involves the installation of equipment into gaming machines. Tr. 43. DeLoach did not recall stating anything beyond "material handling work" when describing what work would be

performed by AppleOne.[5] Tr. 169-170; see also Tr. 68-69. According to DeLoach, material handling can include installation of equipment in gaming machines. Tr. 138. She admitted that "material handling" may mean different things within Respondent's operations. Tr. 139. It would not always include installation. *Id*. She could not otherwise recall how she described the work. Tr. 138. But she stated that she did not describe details of what work AppleOne would perform because not all of the details were available to her at that time. Tr. 140. DeLoach could not recall any other discussion of the use of AppleOne during that meeting. Tr. 144. She later recalled, however, under questioning from Respondent's counsel, that Respondent also stated during the meeting that it was normal practice for Respondent to use temporary workers. Tr. 161.

DeLoach stated that someone from the Union mentioned using the Union's hiring hall to satisfy Respondent's labor needs for the UGA project.[6] Tr. 140, 142. Hartman verified that the Union offered to allow the company to use Union members to perform work on the UGA project.[7] Tr. 45. Respondent replied by stating that it did not wish to hire temporary employees. Tr. 45, 141, 142.

Hartman recalled that Respondent's attorney and lead negotiator Theo Gould (Gould) stated that Respondent would offer Unit members overtime. Tr. 44. She later recalled that she had made the offer. Tr. 455. She described this offer, explaining that she stated, "something to the effect of, if you'd like us to - tell us how you would like - how the bargaining unit would like

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5 DeLoach described her understanding of the work to be performed by temporary workers, based on discussions with Station, as "movement of parts." Tr. 151.

6 Although later, DeLoach denied that there was any discussion of the hiring hall in connection with the UGA project. Tr. 168-169. She then testified that the first discussion of the hiring hall was during the March 16 meeting. Tr. 179. The second discussion was on March 17. *Id*. Her recollection of the discussion was limited to the Union's explanation of a hotline to be used to obtain candidates for open positions with Respondent. Tr. 181.

7 Although later, Hartman claimed that no discussion of the hiring hall was with regard to the UGA project. Tr. 124.

to be scheduled, what their preference would be..." *Id*. Hartman stated that there were no proposals or counter-proposals made on any item during this meeting. Tr. 48, 49. The Union's negotiator Jose Soto (Soto) stated that, before they reached an agreement, he needed to know what work would be performed and how involved the temporary workers would be. Tr. 379. DeLoach, however, claimed that the parties reached an agreement. Tr. 143. She characterized this agreement as the Union's understanding that Respondent could not complete the UGA project with the Unit. Tr. 143-144. The parties then set May 3 and 4 as the dates for the next bargaining session. Tr. 52.

At the time of hearing, the UGA project was in operation at 16 locations, and it involved over 10,000 machines. Tr. 167. Work on the project began on April 18. Tr. 478; see also Tr. 59, 149, 162. The project requires workers to place a device into a machine, then to wire and secure it. Tr. 470. From the beginning of the project, Respondent knew that temporary workers would be installing equipment in machines. Tr. 151. Temporary workers were used from the first day of the project. Tr. 149. Somewhere between 10 and 30 temporary workers per day were used on UGA. Tr. 461. Some technicians worked on the UGA project as part of their normal shift. Tr. 172.

Hartman had a practice of summarizing meeting discussions and sending them in e-mail format to the Union. Tr. 53. On March 23, Hartman sent a summary of the March 17 meeting to the Union. Tr. 53-54; see GCX 5. Respondent summarized what was agreed to during the March 17 session in an e-mail. Tr. 49. GCX 5 makes no mention of the scope of work to be performed by AppleOne. Tr. 119. Hartman admitted that GCX 5 does not include everything that was discussed at the meeting. Tr. 119-120.

Soto took issue with the summary in GCX 5. Tr. 56. He responded on March 28. See GCX 6; Tr. 56. In his response, Soto classified the use of temporary workers as a "change" and requested an opportunity to bargain with Respondent. GCX 6(b). Hartman claims she was surprised by the request. Tr. 57. She explained that Respondent had informed Union of the UGA project and that the Unit would be utilized "to their fullest capacity," and the Union had agreed to work with Unit members regarding the adjustment of Unit members' schedules.[8] Tr. 57. She explained that Respondent was "fully utilizing" the Unit by offering overtime. Tr. 78; see GCX 8.

On April 20, two days after work on UGA began, Soto sent Hartman an additional message in which he quoted concerns from a Unit member regarding AppleOne employees. See RX 7, pages 2-3 (substituting GCX 7). Hartman responded via e-mail the following day. See GCX 8. In her message, she claims that the parties already "met about and discussed" the matter. GCX 8. Hartman explained that this meeting and discussion referred to the March 17 meeting and that no other meeting or discussion occurred between March 17 and April 21. Tr. 66. Nevertheless, in that same message, Hartman stated that the parties had "repeatedly discussed and exchanged correspondence" regarding the use of temporary workers.[9] GCX 8. Hartman believed that, by April 21, all necessary bargaining had occurred. Tr. 72-73. In his response sent via e-mail the same day, Soto denied that the parties had discussed or bargained over the work that temporary workers would be performing. See GCX 8. Soto again requested an opportunity to bargain. See GCX 8. Hartman responded the same day by stating that Respondent had used temporary workers to perform this work in the past and that Respondent would continue to do so. See GCX 8. She stated that Respondent agreed to ensure that the Unit

[8] Hartman is not aware of any workers' schedules being adjusted in connection with the UGA project. Tr. 78.

[9] Hartman explained that her use of the term "outside contractors" in GCX 8 referred to employees of temporary agencies. Tr. 75.

would be "fully utilized" and offered overtime. See GCX 8. She then stated that Respondent had already told the Union during a bargaining session that it would not hire additional employees for work on single projects. See GCX 8. Finally, she stated that Respondent would reply to any new matters or have further discussion at the next bargaining session, scheduled for May 3 and 4. Tr. 79; see GCX 8. The next day, Soto sent an e-mail explaining an employer's duty to bargain with an exclusive bargaining representative and that the failure to do so was a violation of the Act. See GCX 9. Soto again requested an opportunity to bargain. See GCX 9. Hartman responded the same day, stating that Respondent would not hire more employees and that Soto should send any proposal the Union wished for Respondent to consider. See GCX 9.

Between April 21 and May 3, AppleOne employees continued performing the same work they had been. Tr. 79-80. No in-person discussions occurred regarding use of temporary workers occurred between those dates. Tr. 81.

DeLoach was part of the decision to use temporary workers. Tr. 479. These discussions occurred in March. Tr. 480. As of March 17, Respondent had communicated with the AppleOne regarding the UGA project. Tr. 48-49. The final decision to use temporary workers was made in early April. Tr. 480. DeLoach explained that her department, field services, does not generate revenue.[10] Tr. 155. DeLoach first claimed that labor costs were not part of the

[10] In general, Respondent does not deny that it is a for-profit entity. Tr. 113.

decision to use temporary workers. Tr. 467. She later admitted that she was not part of the department or deliberations that might have considered cost.[11] Tr. 481.

b. Respondent's Past Practice

According to Hartman, the last time temporary workers performed work on gaming machines in Las Vegas was in 2015. Tr. 76-77. She could not say whether that work was performed before or after May 2015. Tr. 77. The temporary workers were assigned to Respondent's depot department where they tested equipment. Tr. 77, 469. The temporary workers' task consisted of plugging equipment in to see if it was functioning. Tr. 469. Employees in the depot department are not part of the Unit. Tr. 478.

Respondent characterized the work being done by temporary workers on the UGA project as retrofitting a device into slot machines, then wiring and securing it. Tr. 470. Respondent claims that this work is the same as was done in the depot department in 2015. *Id*. However, when DeLoach was asked to identify a "similar type project as the UGA Project" in which temporary workers were used, she first described a 2014 project.[12] Tr. 166; see also Tr. 77. DeLoach stated that that project, performed at Sunset Station, was the last such project performed at a casino. Tr. 166, 479. It involved delivering, installing, removing, and transporting slot machines. Tr. 166, 468. DeLoach allowed that temporary workers might have disconnected wires and might have connected some, but they were as "simple as possible." Tr. 468, 469. No Unit employees were used on that project. Tr. 166, 174, 479. DeLoach admitted that she had no responsibility over the project. Tr. 177. She was involved "from a business

[11] DeLoach testified as to several factors that might have been considered in the deliberations in which she was involved. Temporary workers were considered ideal because the project was short-term. Tr. 458. The burden of "on-boarding" the employees, obtaining a gaming license, or addressing performance issues was left to AppleOne. Tr. 459. Respondent did not have the responsibility of laying off workers at the end of the project. Tr. 174.

[12] Respondent could not state how many temporary workers were used. Tr. 173. It was an amount between ten and fifty. *Id*.

aspect," not from a "day-to-day doing the function" aspect. Tr. 178. Her familiarity with the project, such as how many workers were used and how long the project lasted, was based on Respondent's records. *Id*.

Besides these two discrete projects, Respondent testified that temporary workers assist with an annual gaming show. Tr. 469. They install and remove machines. Tr. 470. The last such show was in September of 2015. Tr. 478. These machines were not "live." Tr. 479. Respondent stated that it tries to use Unit members during the two weeks prior to the gaming show. Tr. 485. Respondent could not testify whether Unit members worked in coordination with temporary workers. Tr. 486.

3. Authority

Section 8(d) of the Act defines mandatory bargaining subjects as "wages, hours, and other terms and conditions of employment," which includes issues that "settle an aspect of the relationship between the employer and employees" in the bargaining unit. *Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971). When a union and employer are engaged in negotiations for a collective-bargaining agreement, the employer's obligation to refrain making changes to mandatory subjects of bargaining requires more than merely providing notice and an opportunity to bargain; rather the employer must refrain from any implementation, absent overall impasse on bargaining for the agreement as a whole. *Register-Guard*, 339 NLRB 353, 354 (2003).

Subcontracting bargaining unit work is a mandatory subject of bargaining. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 215 (1964). This is true even when no member of the bargaining unit suffers a loss of hours or is laid off as a result of the decision to subcontract. *Acme Die Castings*, 315 NLRB 202, 209 (1994). Even slight departures from an employer's past

practice will prevent the employer from relying on past practice as a defense. See *id*. In order for an employer to present a defense of past practice, it must be shown that the work subcontracted was similar in kind or degree to that which was customary in the past. See *Westinghouse Electric Corp.*, 150 NLRB 1574, 1576 (1965).

In reliance on *Westinghouse*, the Board has found that an employer's decision to subcontract may not constitute an unfair labor practice under certain conditions: (1) was motivated solely by economic considerations; (2) comported with its customary business operations; (3) did not vary significantly in kind or degree from an established past practice; (4) had no demonstrable adverse impact on the bargaining unit employees; and (5) was preceded by the union's having an opportunity to bargain over the decision. *Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R.*, 342 NLRB 458, 469 (2004), enfd. 414 F.3d 158 (1st Cir. 2005). However, Board decisions subsequent to *Westinghouse* have emphasized that the subcontracting at issue there involved work not performed by unit employees and therefore had no direct adverse impact on them. *E.I. Du Pont de Nemours*, 364 NLRB No. 113, slip op. at 11 fn. 30 (2016).

The Board recognizes two general exceptions to the rule that subcontracting is a mandatory subject of bargaining: "when economic exigencies compel prompt action, and when a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining." *Register-Guard* at 354. (quoting *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. 15 F.3d 1087 (9th Cir. 1994)). However, the Board has narrow view of the economic exigencies exception, limiting it to "extraordinary events which are an unforeseen occurrence, having a major economic effect requiring the company to take immediate action." *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995); see *Seaport Printing*

& Ad Specialties, Inc., 351 NLRB 1269, 1270 (2007) (finding that the employer was obligated to bargain with the union over staffing decisions even in the wake of a hurricane).

Finally, a unilateral change to an otherwise mandatory subject may not be unlawful if it is not "material, substantial, and significant." *Crittendon Hospital*, 342 NLRB 686, 686 (2004). For example, in *Berkshire Nursing Home, LLC*, the employer did not violate the Act by changing its parking policy, resulting in a four-minute increase to employees' walk from their cars to the facility entrance. 345 NLRB 220 (2005). However, the Board has held that a change affecting just one employee can result in a violation of Section 8(a)(5). See, e.g., *Kentucky Fried Chicken*, 341 NLRB 69, 84 (2004). This is because a unilateral change "minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent." *Berkshire Nursing Home, LLC*, 345 NLRB at 225 (citing *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1162 (D.C. Cir. 1992)). Indeed, a unilateral change relegates a union "to the status of a supplicant" at the bargaining table, "a position incompatible with the purposes and policies of the Act." *Kajima Engineering & Construction*, 331 NLRB 1604, 1620 (2000).

4. Argument

Respondent presents a number of arguments against the ALJ's finding that failed its duty to bargain with the Union, discussing the five *Westinghouse* criteria,[13] but ignoring Board treatment of *Westinghouse*, which is essential to proper analysis here.

a. All of Respondent's Significant "Bargaining" Actions Took Place After it Began Using Temporary Workers

[13] Respondent's Brief does not cite *Westinghouse*, but that case is cited in *General Electric Co.*, 240 NLRB 703 (1979), on which Respondent relied, and Respondent's analysis demonstrates that it used those factors as guidance.

Apparently addressing the fifth *Westinghouse* factor, Respondent argues that, through various actions, it fulfilled its duty to bargain with the Union over the use of temporary workers on the UGA project. Among those actions, Respondent argues that by telling the Union it would not hire more employees for the project and by offering overtime to the Unit members, it fulfilled its duty. Respondent points out that it is not required to reach an agreement on the issue, but may stand firm on its position.

Respondent's assertion that the parties discussed use of the hiring hall on March 16 is supported by the record. Respondent's further assertion that it informed the Union on March 17 that there was an upcoming project on which it planned to use temporary workers and even offered[14] overtime or schedule adjustments in connection with the project has some support in the record. There is also evidence that Respondent rejected the Union's offer to utilize its hiring hall to satisfy its need for workers on the UGA project. What Respondent's Brief fails to mention is that the single discussion in which these matters were treated involved minimal details regarding the project, including details about what work temporary workers would be performing, and that the Union stated that it would need those details before it could engage in substantive bargaining. The summary immediately above is the only "bargaining" that occurred prior to Respondent's use of temporary workers to perform Unit work on the UGA project.[15]

The other matters Respondent mentions such as its response to the Union's information request, its invitation to the Union to make a proposal regarding the use temporary workers, and its later discussions of the Union's concerns all occurred after temporary workers had begun

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[14] Respondent points to GCX 5 as evidence that bargaining took place. That exhibit is an e-mail created by Respondent purporting to summarize what was discussed at the bargaining table. It contains no reference to any agreements reached. See GCX 5(b). Nevertheless, Respondent argues in its Brief that the parties entered into agreements over scheduling and overtime arrangements. At hearing, the Union denied these claims. Tr. 211, 212, 259. Hartman denied that any proposals or counter-proposals were made. Tr. 48, 49.

[15] Respondent admits that temporary workers performed Unit work.

working on the project on a massive scale. These minimal overtures were performed after the unilateral changes were in effect.

Essentially, Respondent claims that it is excused from failing to bargain beforehand by offering to address concerns and proposals afterward. This, of course, does not fulfill Respondent's duty to bargain before making changes affecting the Unit. Likewise, Respondent's single, general discussion before it began the project fell short of the requirement to bargain. Respondent's actions fail to meet the Board's standard.

b. Respondent Did Not Establish Sufficient Past Practice to Excuse its Failure to Bargain

Respondent argues that the Decision does not comport with Board law with respect to what is required of an employer to establish that its choice to subcontract work is excused by past practice. On the contrary, it is Respondent who fails to present a full and accurate explication of Board law. Relying on the administrative law judge's decision in *General Electric Co*., 240 NLRB 703 (1979), Respondent argues that it has satisfied the Board's criteria. Respondent failed to mention that, in that case, the administrative law judge also found that the subcontracted work at issue "constituted work not normally or regularly performed by bargaining unit employees." *Id* at 708. The Board has made in clear in multiple decision, including *E.I. Du Pont*, which was cited by the ALJ, that this factor is crucial. Also of significance to the administrative law judge was the fact that "the question of subcontracting was a subject considered in sessions leading to the last and current collective-bargaining agreement." *General Electric* at 709. Here the work at issue is undisputedly Unit work, and there is no significant bargaining history because the parties are currently negotiating their first contract.

As the ALJ found, the incidents on which Respondent relied in arguing that there existed a past practice of subcontracting work do not match the project at issue here. Evidence at

hearing revealed three other projects in which temporary workers were used: the depot testing project, the annual gaming show, and a 2014 project.

The depot project did not involve the Unit. Temporary workers were employed to test equipment to see if it functioned, requiring simple plug-and-test procedures in a shop. The project at issue here involves the installation of specialized hardware inside live game machines at casino locations. The ALJ discredited Respondent's testimony that the work was the same.

Regarding the gaming show, live games were not involved, so the machines would not require the function of key components whose service, installation, and maintenance is a major part of Unit work and of the project at issue here. The work performed by temporary workers during this annual event consisted of transporting machines and setting them up for display purposes. As the ALJ noted, there is no evidence that Unit members have worked with temporary workers during these events. The other project mentioned by Respondent occurred in 2014 and was similarly limited in scope, involving only the installation and removal of machines.

In fact, Respondent's argument that this is a unique, temporary project supports the ALJ's finding that there is no past practice. The depot project and the 2014 project are too sporadic to constitute past practice, and the gaming show is too dissimilar. Respondent did not establish a past practice under Board law.

c. The Decision to Subcontract Unit Work was Material, Substantial, and Significant

Respondent points out that Board law does not require an employer to bargain over subcontracting if it does not constitute a material, substantial, and significant change. Respondent's argument reveals that it considers a change to be material, substantial, and significant based solely on its effect on the bargaining unit. Respondent argues that the project

here was too big for the Unit to complete, Unit employees were offered overtime and utilized to their "full capacity," and no Unit employees lost hours or their job because temporary workers did not substitute the Unit employees. Respondent argues that one employee's alleged denial of overtime, which Respondent disputes, was *de minimis* and therefore insufficient to constitute a violation under *General Electric Company*, 264 NLRB 306 (1982).

Respondent's argument that a unilateral change is immaterial and insignificant because bargaining unit members do not lose benefits is based on an improper narrowing of Board law. Central to the Board's criteria regarding unilateral subcontracting is the question of whether the subcontracted work is bargaining unit work. Here, it is. Furthermore, as the ALJ pointed out, the Board has found that subcontracting bargaining unit work may be significant for reasons other than wages or benefits. Respondent takes issue with the ALJ's inclusion of cases noting that an adverse effect might exist in a union's missed opportunity to increase the size of the bargaining unit because Respondent has been adamant that it will not hire more employees for the project at issue. But the possibility of increasing the bargaining unit is only an example. There are several other considerations that might be significant to the Union and the Unit.

For example, the Union might have requested some say in how overtime was offered in a manner suiting the Unit. The Union might have bargained to adjust Unit members' schedules to allow them to spend their regular work hours on the UGA project, which is of special interest to the Unit. The Union might wish to have some say on the particulars of what work the temporary workers were performing, allaying Unit members' concern that they were training their own replacements.

Finally, Respondent's fulfillment of its obligation to bargain may have as much symbolic importance as practical application. By excluding the Union from any involvement the change,

Respondent rendered the Union a mere bystander to a matter of major concern to the Unit and a mere supplicant at the bargaining table afterward, giving Unit members the impression that their Union is powerless to influence matters affecting their jobs. This is especially important in light of the fact that the parties are negotiating their first contract, a time at which member support is crucial. For all of these reasons, the unilateral change was significant.

d. The Record Supports the ALJ's Finding that Respondent Considered Labor Costs

Respondent points to the size of the project concerned and argues that its motive for employing temporary workers was solely economic. Respondent takes issue with the ALJ's finding that DeLoach admitted the Respondent did not want to engage in the hiring process, which Respondent argues is not a labor cost. Respondent points to DeLoach's testimony that Respondent did not consider labor costs.

Respondent's argument ignores the ALJ's finding regarding the testimony of Hartman that temporary workers are paid less than Unit members. DeLoach's testimony that labor costs were not a factor in Respondent's decision is undermined by her admission that she did not participate in the discussion that considered costs. Respondent's argument that DeLoach merely described the differences between using temporary work and hiring employees ignores the import of this testimony. These differences demonstrate the advantages of subcontracting for Respondent, including avoiding the costs and inconvenience of hiring. Respondent argues that the ALJ improperly classified these costs as labor costs but ignores the ALJ's ruling that even non-labor cost reasons for subcontracting "must relate to a change in the scope and direction of the business." Decision at 12, citing *Overnite Transportation Co.*, 330 NLRB 1275, 1276 (2000), affd. in part and reversed in part mem. 248 F.3d 1131 (3d Cir. 2000). The ALJ pointed out that Respondent did not contend in its post-hearing brief that the decision to use temporary

workers related to a change in the scope and direction of its business. Respondent similarly makes no such argument in its Brief.

Respondent's assertion in Exception 14 has no supporting argument. The corresponding Decision is supported by Hartman's testimony that she is unaware of any schedule adjustments.

Aside from the crucial fact that the subcontracted work was Unit work, Respondent has failed to demonstrate that any of the criteria for lawful unilateral subcontracting was satisfied. CGC respectfully requests that the Board dismiss Exceptions 9 through 14.

C. The ALJ's Determinations Regarding Respondent's Threat Should Not Be Overturned

1. Exceptions Regarding Threat

Exception 16: IGT excepts to the ALJ's conclusion/finding that IGT violated the Act by threatening the unit technicians with loss of overtime because the Union sought to bargain on their behalf over IGT's use of AppleOne temporary workers on the Stations Project, because it is contrary to established Board law and is unsupported by the evidence in the record. (D. 17; Tr. 81, 219, 221-22, 291, 329, 333-34, 388, 390, 401-06, 425).

Exception 17: IGT excepts to the ALJ's conclusion/finding that IGT's statement would have been reasonably interpreted as a threat to take away the employees' overtime if the Union did not withdraw its rightful demand for bargaining. (D. 17; Tr. 81, 219, 221-22, 291, 329, 333-34, 388, 390, 401-06, 425).

Exception 18: IGT excepts to the ALJ's conclusion/finding that IGT asked two unit members, "Are you going to let this guy take overtime away from you, are you going to let this guy take money out of your pockets?" because it is contrary to established Board law and is contradicted by the General Counsel's witnesses. (D. 14; Tr. 388, 390, 401, 403, 425).

2. Facts[16]

The Union and Respondent met on May 4, 2015. Tr. 220. Soto was the lead Union representative at this session. Tr. 401. Employees Juan Robles (Robles) and Shane West (West) were also present. Tr. 388, 424. Both are members of the Unit. Tr. 204.

The parties discussed issues such as the use of temporary workers and overtime. Tr. 221, 328, 337, 388, 389, 390, 402. The Union requested the opportunity to bargain over the subject of overtime and accused Respondent of making a unilateral change. Tr. 390, 403. The Union also stated that the subject of temporary workers performing Unit work was not bargained over. Tr. 221, 327.

Ultimately, Soto pressed the issue of why Respondent was using temporary workers without having bargained with the Union. Tr. 424. The discussion became heated. Tr. 222, 332. Respondent's negotiator Gould became upset that Soto insisted on bargaining. Tr. 390. Gould became red-faced and raised his voice. Tr. 404-405. Soto was frustrated over Respondent's refusal to bargain, which he repeatedly requested. Tr. 405. Soto stated he could not make proposals or a decision unless Respondent provided him information and allowed him to bargain. Tr. 221-222. He stated that he had a right to information under the Act. Tr. 222. Gould responded that he did not care what Soto said or what he felt the Act said. Tr. 222, 318. Soto responded by stating that if Gould was not concerned with what he had to say, the meeting was over. Tr. 222, 403-404. Soto also warned that if Respondent was unwilling to bargain over the issue at that time, the matter would be litigated. Tr. 404. Gould responded that he would win any such litigation. *Id*. Soto stood up and threatened to leave. Tr. 332-333. According to Soto and West, Gould looked at Robles and West and asked whether they were willing to allow Soto

[16] All facts regarding this allegation are drawn from CGC witness testimony. Respondent presented no refuting witness testimony or evidence.

to take "money out of [their] pockets." Tr. 221, 329, 425. According to Robles, after Soto told Gould that he wished to bargain, Gould repeatedly told Soto that he was going to deprive employees of their overtime and wages. Tr. 390, 403. Soto did not end the meeting; he instead requested a caucus. Tr. 333.

3. Authority

The Board's established policy is to not overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence demonstrates that the ALJ is incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

In evaluating whether a would-be threat violates Section 8(a)(1) of the Act, the Board must determine whether the statement is a threat of retaliation in response to protected activity under the totality of circumstances. *Mediplex of Danbury*, 314 NLRB 470, 471 (1994). As the Board explained in *Double D Construction Group*, 339 NLRB 303, 303-304 (2003), "[t]he test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction." The employer's motive for making the statement is irrelevant. *American Freightways Co., Inc.*, 124 NLRB 146, 147, (1959). Therefore, it does not matter whether employees were the intended recipients of the threatening statement. *Corporate Interiors, Inc.*, 340 NLRB 732, 732-733 (2003).

A threat need not be one of job loss in order to be unlawful. It is unlawful for an employer to threaten to withhold a benefit if employees engage in protected action. *Longview Fibre Paper & Packaging*, 356 NLRB 796, 801 (2011). The Board has found the threat to take away employees' overtime to be unlawful. *Hedstrom Co.*, 223 NLRB 1409, 1424 (1976).

4. Argument

In its Exceptions, Respondent argues that its statement was not a threat under two theories.

a. The ALJ's Credibility Determinations Were Proper

Respondent argues, citing *N.L.V. Casino Corp.*, 174 NLRB 42 (1969), that the ALJ improperly credited the testimony of Soto and West because their testimonies did not match the testimony of Robles regarding Respondent's statement. Respondent claims that the Robles testified that Respondent did not make a threat because the statement was directed at the Union in response to the Union's standing up and threatening to end the bargaining session. Respondent characterizes its statement as a plea it made on behalf of its employees.

Respondent misstated the Board's ruling in *N.L.V. Casino Corp.* In that case, the trial examiner compared the conflicting testimonies of two CGC witnesses to the testimonies of two of the employer's witnesses. *Id* at 44. The trial examiner discredited the conflicting testimonies of a CGC witness and determined that the employer had not made an unlawful threat. *Id*. The Board's decision contains no discussion of the issue except to state generally that it found no basis for overruling the trial examiner's credibility findings. *Id* at 42. Neither this case nor other Board law requires a finder of fact to discredit two corroborating witnesses because an additional witness's testimony does not exactly match theirs.

Although Respondent correctly states that the ALJ did not explicitly discredit Robles, the ALJ did state with regard to the threat allegation, "I give greater weight to the testimony of Soto and West, as their testimony was mutually corroborative and uncontradicted by the Company's witnesses." Decision at 14 fn. 18. Other than Robles' testimony, Respondent gives no reason why the Board should overturn the ALJ's credibility finding.

Respondent asserted further that Robles "credibly testified that Gould did not make any unlawful threats." Brief at 43. That is entirely inaccurate. Robles' testimony differed from that of Soto and West, but he testified that Gould told Soto that Soto would deprive employees of wages and overtime. Robles testified that Gould said so in response to Soto's insistence that Respondent bargain with the Union. Respondent also argues that Robles' testimony that Gould's comments were directed at Soto as opposed to the employees present[17] demonstrates that the statement was not a threat. Even if the ALJ had credited Robles in this regard, Gould still made the statement in the immediate presence of employees. The statement need not be directed at employees in order to constitute a threat. It is sufficient that it be said in their presence.

Respondent's attempt to characterize Gould's statement as a plea on behalf of employees is unconvincing. Even if Gould's words could be said to constitute such a plea, the question is how employees might reasonably interpret those statements. In general, the idea that outside counsel who was retained to negotiate on behalf of the employer would plead at the bargaining table on behalf of employees is unreasonable.

b. Circumstances Surrounding the Statement Support the ALJ's Finding

In the alternative, Respondent argues that the circumstances surrounding the statement show that it was not a threat. Respondent points out the parties had been discussing overtime when Gould made the statement and that Gould merely questioned whether Robles and West approved of Soto's leaving the meeting. Respondent argues that because the parties were discussing overtime, because Respondent provided overtime before and after the meeting, because the Union threatened to end the meeting, and because the Union did not make an issue of the threat until trial; the statement was not a threat.

[17] A point of fact that is contradicted by the testimonies of West and Soto, that Gould directed his statement at employees, Soto and Robles. The ALJ credited their testimony regarding the threat.

Respondent correctly states that Board law requires a consideration of the totality of the circumstances. However, Respondent has excluded multiple salient circumstances from its analysis. While true that the parties had discussed overtime, they had also discussed Respondent's failure to bargain over the subject of overtime and the use of temporary workers. There is no dispute that Respondent offered employees overtime before the meeting in question. This demonstrates why employees might reasonably fear to lose a benefit they enjoyed.

Further, the Union was frustrated that this benefit was conferred without bargaining. The question of whether Respondent continued to offer overtime to employees after the meeting has no impact on whether Respondent's statement was a threat. An employer does not obviate a threat by failing to act on the threat. Had Respondent taken overtime or wages from employees, this would arguably constitute a separate violation.

It is undisputed that Soto threatened to end the meeting. He even stood up. However, the meeting was not ended, and Soto did not leave at that time. In any case, CGC is at a loss to understand how Soto's statement or action would give Respondent license to state that employees might lose benefits. Respondent's claim that Gould's statement merely pointed out that an untimely end to the meeting would cause the employees to lose overtime[18] is illogical. Respondent was already offering overtime as a benefit, and witness testimony – apparently acknowledged by Respondent in its Brief – was that Respondent was unwilling to bargain over the issue. Respondent's Brief asserts that the overtime would have continued. Brief at 47. It is possible that the purpose of Respondent's argument on this point is to discredit the witnesses' testimony. If so, CGC refers to its argument above regarding credibility.

[18] Furthermore, Gould's comment did not mention overtime only; he made a general reference to "money," which could be interpreted as wages.

Finally, Respondent argues that the Union did not "call out Gould" or file charges over the threat. While it is certainly in any union agent's best interest to be familiar with the Act, the Union is not responsible for enforcing it. The Union is likewise not responsible for attempting to address violations of the Act with Respondent, especially – as is the case here – in the absence of a collective-bargaining agreement that might provide a grievance-arbitration mechanism to achieve such a resolution. The Union's responsibility was the same as any other charging party's: to report the violation to Board agent.[19] Furthermore, it is not the effect on the Union with which the Board is concerned. If Soto did not react strongly to Respondent's threat, it may be because he is not an employee of Respondent. It is the effect on the employees, in this case Robles and West, that matters. The ALJ rightly found that Gould's statement that employees might lose money because Soto insisted on bargaining might have the effect of discouraging them from engaging in union activity or supporting their Union.

In light of the ALJ's credibility determinations, his sound reasoning, and reliance on Board law; CGC urges the Board to dismiss Exceptions 15 through 17.

D. The ALJ's Determinations Regarding Respondent's Rule Should Not Be Overturned

1. Exceptions

Exception 19: IGT excepts to the ALJ's conclusion/finding that IGT violated the Act by maintaining an overbroad non-disparagement provision in its Separation Agreement and General Release, because it is contrary to established Board law and is unsupported by the evidence in the record. (D. 16-17; Tr. 189-90, 192).

[19] Where, as here, the information does not come to light until the eve of trial, it may be impractical to file a new charge. However, the ALJ found no error in the late addition of the allegation, and Respondent filed no exception in that regard.

Exception 20: IGT excepts to the ALJ's conclusion/finding that IGT cannot maintain a broad non-disparagement provision in a contract executed between IGT and a non-employee or a person who does not have Section 7 rights with respect to IGT. (D. 16; Tr. 189-90, 192).

2. Facts

Respondent occasionally offers separation agreements to its employees. Tr. 189, 191-192, 196. This is typically done when the employee's position is eliminated. Tr. 190, 191, 193, 195. Until January 25, 2016, virtually all such agreements included the following non-disparagement clause:

> You will not disparage or discredit IGT or any of its affiliates, officers, directors and employees. You will forfeit any right to receive the payments or benefits described in Section 3 of you engage in deliberate conduct or make any public statements detrimental to the business or reputation of IGT.

Tr. 196, 489; GCX 27(c). This the rule CGC alleged to be unlawful in its complaint. The same agreement contains another section titled "Employee's Waiver," stating:

> Nothing in this Agreement shall be construed to prohibit you from filing a charge with or participating in an investigation or proceeding conducted by the EEOC or any similar state or federal agency. Notwithstanding the foregoing, you waive any right to any personal recovery in any action or proceeding that may be commenced on your behalf with any federal or state agency in any way arising out of or relating to the matters released in this Agreement.
>
> Furthermore, nothing in this Agreement is intended to prevent you from cooperating voluntarily with any inquiry by the U.S. Securities and Exchange Commission, the U.S. Department of Justice, or any other regulatory or governmental authority, without prior notice to the Company.

GCX 27(c). Respondent presented evidence at hearing that on January 25, it changed the wording in its non-disparagement clause to the following:

> You will not disparage or discredit IGT or any of its affiliates, officers, directors and employees. You will forfeit any right to receive the payments or benefits described in Section 3 if you engage in deliberate conduct or make any public statements detrimental to the business or reputation of IGT. Nothing in this clause is intended to prevent you from testifying in a legal proceeding or complying with a subpoena, and nothing is

> intended to interfere with any of your rights to consult with anyone on employment matters, whether or not those matters lead to court or legal proceedings.

Tr. 489; RX 20.

3. Authority

A rule or policy violates Section 8(a)(1) if it can reasonably be read by employees to chill their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999); *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

In *Quicken Loans, Inc.*, the Board found a company's non-disparagement clause to be unlawful. 359 NLRB 1201, 1201 n. 3 (2013), affirmed in relevant part 361 NLRB No. 94 (2014). In that case, the clause at issue stated:

> The Company has internal procedures for complaints and disputes to be addressed and resolved. You agree that you will not (nor will you cause or cooperate with others to) publicly criticize, ridicule, disparage or defame the Company or its products, services, policies, directors, officers, shareholders, or employees, with or through any written or oral statement or image (including, but not limited to, any statements made via websites, blogs, postings to the internet, or emails and whether or not they are made anonymously or through the use of a pseudonym). You agree to provide full cooperation and assistance in assisting the Company to investigate such statements if the Company reasonably believes that you are [the] source of the statements. The foregoing does not apply to statutorily privileged statements made to governmental or law enforcement agencies.

Id at 1203-04. The judge reasoned, with Board approval, that there could be:

> no doubt that an employee reading these restrictions could reasonably construe them as restricting his rights to engage in protected concerted activities. Within certain limits, employees are allowed to criticize their employer and its products as part of their Section 7 rights, and employees sometime do so in appealing to the public, or to their fellow employees, in order to gain their support.

Id at 1205.

In *Clark Distribution Systems*, 336 NLRB 747 (2001), the Board ruled that a Respondent's severance agreement violated Section 8(a)(1). The Board ruled that it was unlawful to condition the benefits of the agreement on the terminated employees' acceptance of

terms that limited their Section 7 rights. *Id* at 748. The question of whether or not a worker's employment has been terminated when the agreement is extended is irrelevant. *Fuji Food Products, Inc.*, 363 NLRB No. 118, slip op at 1 fn. 1 (2016) (citing *Briggs Mfg. Co.*, 75 NLRB 569, 571 (1947) and finding that the Act's definition of "employee" includes former employees); See also *Metro Networks*, 336 NLRB 63, 64 (2001) (finding a severance agreement unlawful even though the agreement was offered to an employee after his discharge). In *Metro Networks,* the Board ruled that because the provision in question prohibited the signatory employee from voluntarily providing information to the Board concerning claims of others, the provision chilled the Section 7 rights of all the employees. *Id* at 67.

The Board has stated that "an employer violates the Act when it acts to prevent future protected activity. After all, the suppression of future protected activity is exactly what lies at the heart of most unlawful retaliation against past protected activity." *Parexel International, LLC*, 356 NLRB 516, 519 (2011) (finding unlawful an employer's decision to discharge an employee to prevent future protected activity). Employees are protected under the mutual aid or protection clause of Section 7 even when they seek to improve conditions through channels outside the employee-employer relationship. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

4. Argument

Respondent presents two arguments in support of its assertion that the ALJ incorrectly ruled that its violated Section 8(a)(1) of the Act by maintaining an unlawful rule.

a. Respondent Misstated the Holdings of Various Cases

In its Exceptions, Respondent argues that the rule in question was not a violation of the Act because it was not provided to statutory employees. Respondent took liberal license in its interpretations of case law, including the well-known case of *Nat'l Labor Relations Bd. v.*

Babcock & Wilcox Co., 351 U.S. 105 (1956), to claim that former employees are not 'employees' under the Act. The portions of case law Respondent chose to cite are provided without essential context, and Respondent provides no argument as to why the rulings should be extended such to overrule the case law cited in the Decision.

Respondent claims that the Supreme Court ruled in *Babcock & Wilcox* that former employees do not have Section 7 rights. *Babcock & Wilcox* dealt with the tension between employers' property rights and employees' right to self-organization and examined the question of whether the right to self-organization required employers to permit non-employee organizers onto their property.[20] In no part does that case state that former employees have no Section 7 rights, and only the greatest stretch of its ruling could support such a conclusion.

In *Allied Chemical Workers v. NLRB*, 404 U.S. 157 (1971), the Supreme Court dealt with the question of whether an employer was obligated to bargain over retirees' benefits and ruled that retirees do not fit the definition of 'employee' under the Act. Respondent correctly points out that the Supreme Court has defined 'employees' as those who work for another for hire. This broad definition says nothing of the actual employment status of the employee at issue. It certainly does not stand for the proposition that, in order to count as an employee under the Act, a worker must be presently employed by the employer against whom an 8(a)(1) unlawful rule charge is brought.[21] Respondent cites other portions of the decision in which the Court discusses the key question of whether an individual remains in the workforce. Respondent's confusion, if any, seems to arise from a lack of understanding of the difference between an employee of an

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[20] *S.B. Thomas, Inc.*, 256 NLRB 791 (1981), also cited by Respondent, dealt with a similar issue.

[21] Respondent also cited *Star Tribune*, 295 NLRB 543 (1989), which held that prospective employees are not employees over whom an employer has an obligation to bargain with a union. The present allegation does not arise under the question of an employer's obligation to bargain with a union. The ruling in *Star Tribune* does not apply here. *NLRB v. Steinberg & Co.*, 182 F.2d 850 (5th Cir. 1950), also cited by Respondent, discussed whether fur trappers were independent contractors. The ruling in that case is inapplicable here. *Polson Industries, Inc.*, 242 NLRB 1210 (1979), also cited by Respondent, discussed whether an employee who had resigned his employment was entitled to rights under *Weingarten*. The ruling in that case is inapplicable here.

employer and an employee generally. Phrases such as "in the workforce" or "expectation of further employment" clearly refer to individuals such as retirees, whose participation in the labor market generally – *not* employment under a specific employer – has ended.

Respondent presented extensive discussion of *Texas Natural Gasoline Corp.*, 253 F.2d 322 (5th Cir. 1958). In that case, the circuit court discussed whether a current employee participating in a picket line with a discharged employee was engaged in protected concerted activity. Because the only other participant in the picket line was a discharged employee, the court held that it was not. *Id* at 325-326. This case comes closest in applicability. However, the ruling was made on the specific facts of the case and does not address the myriad issues under which protected concerted activity might arise and be prohibited by Respondent's rule.

In summary, none of the cases cited by Respondent stands for the propositions urged by Respondent, either because the rulings were not accurately represented or because the context of the cases makes the rulings inapplicable. Respondent presented no argument why the Board should overrule the case law cited by the ALJ in finding that the former employees at issue here are 'employees' under the Act.

b. Respondent's Rule is Facially Unlawful

Respondent also argues the language in its "Employee's Waiver" section[22] negates any unlawful interpretation of the non-disparagement clause because it permits recipients of the

[22] Respondent does not name the section, rather, it describes the content. Based on that description, however, it is clear the Brief is referencing the section titled "Employee's Waiver." Contrary to Respondent's claim in its Brief that the agreement "specifically provided" that recipients of the agreement could file Board charges, etc., the agreement makes no mention of the Board or the Act, instead referring to the "EEOC or any similar state or federal agency," and later to the "U.S. Securities and Exchange Commission, the U.S. Department of Justice, or any other regulatory or governmental authority." GCX 27(c).

agreement to participate with government agencies.[23] The right of an employee to take advantage of the services available through the Board is not the extent – arguably not even the bulk – of the protection offered by the Act. The right to engage in concerted activity is at the core of the protection of the Act. Concerted activity can and should be able to take place without any Board involvement. Here, the prohibition against criticizing Respondent is of the same type and similar wording as the Board found unlawful in *Quicken Loans*. As with the terminated employees in *Clark Distribution Systems*, Respondent's former employees must forfeit their Section 7 rights in exchange for the benefit of the agreement. Although the waiver language allows employees to file charges, employees subject to the non-disparagement clause might reasonably conclude that they are prohibited from communicating with current employees to seek support for their claims. They might also conclude that they are prohibited from assisting current employees in matters of concern. The limitation on assisting current employees is of special concern because discharged employees are often in the best position to aid current employees. They may be more familiar with the employer's practices, and they are mostly invulnerable to retaliation from the employer. This provision eliminates all of these rightful protections and benefits.

Finally, the fact that Respondent has revised its rule does nothing to provide a remedy to those employees who received the previous rule. As the ALJ found, Respondent failed to address its violation by means sufficient to constitute a remedy under Board law. Respondent presented no argument to the contrary. CGC respectfully requests that the Board dismiss Exceptions 19 and 20.

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[23] Respondent raises this argument for the first time in Exceptions. Respondent did not present this argument to the ALJ in its post-hearing brief, arguing instead that the existence of its revised provision excused it from any violation. See Respondent's Post-Hearing Brief at 41-42. Respondent also presented its argument in its post-hearing brief that recipients of the agreement did not meet the definition of 'employee' under the Act.

E. The ALJ's Recommended Remedy and Order are Proper

1. Respondent's Exceptions to the ALJ's Recommended Remedy and Order

Exception 21: IGT excepts to the ALJ's remedy, because it has no basis in established Board law and is not supported by the record evidence. (D. 17; Tr. n/a).

Exception 22: IGT excepts to the ALJ's order requiring IGT to cease and desist from unilaterally subcontracting the work of the unit technicians without affording the Union prior notice and a meaningful opportunity to bargain over the decision and its effects until either an agreement or bona fide impasse has been reached, because it has no basis in established Board law and is not supported by the record evidence. (D. 17-18; Tr. n/a).

Exception 23: IGT excepts to the ALJ's order requiring IGT to cease and desist from failing or refusing to provide the Union with requested information that is relevant and necessary to its role as the exclusive collective-bargaining representative of the full-time and regular part-time technicians in the bargaining unit, because it has no basis in established Board law and is not supported by the record evidence. (D. 17-18; Tr. n/a).

Exception 24: IGT excepts to the ALJ's order requiring IGT to cease and desist from threatening the unit technicians with loss of overtime or other benefits if the Union requests to bargain on their behalf over subcontracting their work or other terms and conditions of their employment, because it has no basis in established Board law and is not supported by the record evidence. (D. 17-18; Tr. n/a).

Exception 25: IGT excepts to the ALJ's order requiring IGT to cease and desist from Maintaining overbroad non-disparagement or other provisions that would reasonably be interpreted by employees to prohibit them from engaging in protected concerted activity, because

it has no basis in established Board law and is not supported by the record evidence. (D. 17-18; Tr. n/a).

Exception 26: IGT excepts to the ALJ's order requiring IGT to cease and desist from interfering with, restraining, or coercing employees, in any like or related manner, in the exercise of the rights guaranteed to them by Section 7 of the Act, because it has no basis in established Board law and is not supported by the record evidence. (D. 17-18; Tr. n/a).

Exception 27: IGT excepts to the ALJ's order requiring IGT to provide the Union with a list of all of IGT's location in the United States, because it has no basis in established Board law and is not supported by the record evidence. (D. 18; Tr. n/a).

Exception 28: IGT excepts to the ALJ's order requiring IGT to cease using AppleOne temporary workers to perform unit work on the Stations Project, in the event it has not yet been completed, until such time as the Union has been afforded a meaningful opportunity to bargain to an agreement or bona fide impasse over the use of such temporary contract employees on the project and its effects on the unit, because it has no basis in established Board law and is not supported by the record evidence. (D. 18; Tr. n/a).

Exception 29: IGT excepts to the ALJ's order requiring IGT to make whole the unit technicians for any loss of pay or benefits resulting from its unlawful unilateral decision to use AppleOne temporary workers to perform unit work on the Station Project, and the related orders about tax consequences and preserving payroll records, because they have no basis in established Board law and is not supported by the record evidence. (D. 18; Tr. n/a).

Exception 30: IGT excepts to the ALJ's order requiring IGT to Notify all former employees who were given the Separation Agreement and General Release containing the unlawfully overbroad non-disparagement provision that the provision has been revised, and

provide them with a copy of the revised provision, because it has no basis in established Board law and is not supported by the record evidence. (D. 18; Tr. n/a).

Exception 31: IGT excepts to the ALJ's order requiring IGT to post the Notice attached to the Decision as the Appendix, and the related order to provide a certification of compliance to the Region, because they have no basis in established Board law and is not supported by the record evidence. (D. 19; Tr. n/a).

2. Authority

Section 102.46(c) of the Rules and Regulations of the National Labor Relations Board states in relevant part:

> Any brief in support of exceptions shall contain no matter not included within the scope of the exceptions and shall contain, in the order indicated, the following:
>
> …(3) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page reference to the record and the legal or other material relied on.

3. Argument

The Brief makes no reference to these Exceptions 21 through 31. It contains no argument in support of these Exceptions. However, given that the Exceptions deal with the ALJ's remedy and order, it is reasonable to assume that Respondent expects that these Exceptions should be considered in connection with the Exceptions taken to the ALJ's findings with respect to the allegations underlying the remedy and order. Otherwise, Respondent makes no argument that the ALJ's order and remedy are improper on their face. Without argument that the remedy and order themselves are improper in some manner, and in the absence of the Board's finding that the allegations underlying the remedy and order are improper, CGC respectfully requests the Board dismiss Exceptions 21 through 31.

III. CONCLUSION

The ALJ's Decision is comprised of proper credibility determinations, thorough reasoning based on the record as a whole, and correct interpretation and application of Board law. Respondent has not shown why any applicable Board precedent or any aspect of the Decision should be overruled. Respondent's Exceptions should be dismissed entirely.

Dated at Las Vegas, Nevada, this 10 day of January 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the **COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS** in **IGT d/b/a INTERNATIONAL GAME TECHNOLOGY** was served via E-Gov, E-Filing, and E-Mail, on this 10 day of January 2017, on the following:

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