

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 501

and

Case No. 28-CA-182296

GNLV CORP. d/b/a
GOLDEN NUGGET LAS VEGAS

**CHARGING PARTY GNLV CORP. D/B/A GOLDEN NUGGET
LAS VEGAS'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGE'S DECISION AND
RECOMMENDED ORDER**

KAMER ZUCKER ABBOTT
Gregory J. Kamer, Esq.
Nevada Bar No. 0270
Kaitlin H. Ziegler, Esq.
Nevada Bar No. 13625
3000 West Charleston Boulevard, Suite 3
Las Vegas, Nevada 89102
Tel: (702) 259-8640
Fax: (702) 259-8646

Attorneys for Charging Party
GNLV Corp. d/b/a
Golden Nugget Las Vegas

I. STATEMENT OF THE CASE.

This case should be simple: GNLV Corp. d/b/a Golden Nugget Las Vegas (“Golden Nugget” or “Charging Party”) requested information from the International Union of Operating Engineers, Local 501 (“Local 501” or “Respondent”) and Local 501 acted unlawfully when it did not provide any documents with respect to two out of three information requests. Local 501’s refusal continued despite Golden Nugget repeatedly narrowing and clarifying the documents it sought, offering to send someone to gather documents if it created too much of a burden, and allowing Local 501 to initially send only documents that were “readily available.” The case solely required the Administrative Law Judge to determine whether Local 501 violated Section 8(b)(3) of the National Labor Relations Act (“the Act”). Based on the evidence before the Administrative Law Judge and the necessarily lenient standard applied to information requests so that parties can evaluate bargaining proposals and properly administer collective bargaining agreements, the Administrative Law Judge should have found Local 501’s conduct unlawful and ordered Local 501 to produce the requested information.

A hearing was held before Administrative Law Judge Mara-Louise Anzalone (“the Judge”) in Las Vegas, Nevada on January 23, 2017. Stephen P. Kopstein, Esq. served as Counsel for the General Counsel of the Board, Kaitlin H. Ziegler, Esq. of the law firm Kameron Zucker Abbott represented Golden Nugget, and Adam N. Stern, Esq. of the law firm The Myers Law Group represented Local 501. Local 501’s President and Lead Business Representative Thomas O’Mahar, Ms. Ziegler, and Agent Organizer Richard Lile were called as witnesses.

In her Decision dated May 25, 2017, the Judge held that Local 501 did not violate the Act by repeatedly refusing to provide Golden Nugget with any information relevant to two of its three requests. Technically, the Judge held that the General Counsel did not meet its burden of showing probable relevance of its requests, so she did not frame her findings with respect to

Local 501's actions, despite Local 501 being the Respondent and having the higher burden of proof.¹ The Judge ultimately found Local 501's actions lawful despite the broad and lenient standards applied to information requests and Local 501's complete refusal to comply with the requests. Despite being "unable to find fault with" General Counsel's rationales for Golden Nugget's requests, the Judge maintained that the requests lacked requisite specificity. ALJD: 8-9. Because information requests from either party are allowed to be broad, Golden Nugget maintains that Local 501's refusal to provide relevant and accessible information should be deemed unlawful.

One volume of transcript containing the testimony presented during the hearing was prepared and transmitted to the parties. References in this brief to the transcript are to the party testifying, the page of testimony in the transcript, and the relevant transcript lines referenced (*e.g.*, Ziegler 57:18-20). There are also references to General Counsel Exhibits (GC Ex.) and the Administrative Law Judge Decision and Recommended Order (ALJD).

II. GOLDEN NUGGET'S EXCEPTIONS.

On July 20, 2017, under separate cover, Golden Nugget filed 33 numbered exceptions to the Judge's Decision pursuant to Section 102.46 of the Board's Rules and Regulations. All of Golden Nugget's exceptions pertain to the Judge's findings and determinations on the allegations regarding Golden Nugget's requests for information and Local 501's refusal to furnish relevant information.

III. FACTUAL SUMMARY IN SUPPORT OF EXCEPTIONS.

Following Local 501's certification as the exclusive collective bargaining representative for a unit of employees at Golden Nugget, the parties met for their first negotiation session on

¹The Judge even erroneously referred to Golden Nugget as the Respondent rather than the Charging Party in her Decision and Recommended Order.

January 7, 2016. Ziegler 55:16-18. At that session, Local 501 proposed a complete collective bargaining agreement (“the proposed CBA”; also referred to as the “packet of proposals”) to Golden Nugget. Id. at 58:7-9. O’Mahar specifically noted that many of the proposals should be acceptable due to its similarity to language agreed to by other employers. See O’Mahar 50:20-22. In response to the packet of proposals, Golden Nugget sent Local 501 a Request for Information dated February 25, 2016, which requested the following documents:

1. Copies of all labor contracts, side letters, and/or memorandum agreements between Local 501 and any company operating in Las Vegas, Nevada and/or the surrounding area that are currently in place and/or expired within the last two (2) years and feature similar language to that proposed by Local 501 to Golden Nugget Las Vegas;
2. A listing of all grievances filed by Local 501 within the last five (5) years concerning similar language to that proposed by Local 501 to Golden Nugget Las Vegas against any company operating in Las Vegas, Nevada, and/or the surrounding area, including the nature of the grievance and the resolution, including whether the matter was resolved through arbitration; and
3. Copies of all arbitration decisions involving Local 501 and any company operating in Las Vegas, Nevada and/or the surrounding area, which interpret similar language to that proposed by Local 501 to Golden Nugget Las Vegas.

GC Ex. 2. On March 17, 2016, O’Mahar hand delivered what Local 501 interpreted to be collective bargaining agreements that contained language “similar in nature” to that contained in the packet of proposals provided to Golden Nugget at the first session. GC Ex. 3. Nevertheless, despite its ability to differentiate what similar meant with regards to collective bargaining agreements with other employers, Local 501 refused to do the same with Golden Nugget’s requests for grievances and arbitration decisions that involved disputes over language in the already-produced similar collective bargaining agreements. Id. Local 501 also claimed to not keep listings of their grievances or arbitration decisions, resulting in allegedly prohibitive costs. Id. However, there was no further explanation as to how looking through self-maintained files

would be prohibitive and no estimated cost was provided to Golden Nugget. See O’Mahar 26:4-9. O’Mahar also attached a bill of copying costs for the collective bargaining agreements, which amount was higher per page than what would be charged by a copying company. Id.

On April 21, 2016, Gregory J. Kamer (“Kamer”), the lead negotiator for Golden Nugget, sent a letter to O’Mahar acknowledging receipt of Local 501’s response to Golden Nugget’s first request, but disputing Local 501’s reasons for refusing to provide documents related to the second (grievances) and third (arbitration decisions) requests. GC Ex. 4. Kamer expressed Golden Nugget’s willingness to discuss the procurement of the remaining items, but wanted to determine what documents Local 501 had “readily available.” Id.; see also O’Mahar 26: 10-12; Lile 101:22-25. Finally, Kamer discussed Local 501’s proposed charges for copies, proposed a more reasonable price, and, as an alternative, offered to check out documents from Local 501 so Golden Nugget could make the copies. Id.

On May 31, 2016, O’Mahar responded to Kamer, contending Local 501’s copy charges were reasonable and claiming he did not know “what the intent of the word ‘similar’ is,” despite the word originating from his mouth and Local 501’s ability to already parse through collective bargaining agreements for similar language. GC Ex. 5. O’Mahar further claimed Local 501 did not have any documents readily available and found the request “virtually impossible.” Id. O’Mahar made this contention, even though at the hearing, he admitted Local 501 only has between four and six arbitrations in Las Vegas per year, files that include arbitrations are noticeably thicker than other files, and he knows “what information [i]s contained in files” he has processed and where they are located. O’Mahar 18:12-25; 19:5-8; 52:8-20. O’Mahar has also described to both Golden Nugget and at hearing that two years’ worth of files is able to be stored in one file cabinet in his office. Id. at 20:4-18. Moreover, O’Mahar admitted he has not looked

through any of the files to see how “impossible” gathering documents would be. O’Mahar 52:5-7. Once again, Local 501 flatly refused to comply with Golden Nugget’s second and third requests without even making a good faith attempt to comply.

On August 1, 2016, Kamer sent a letter to O’Mahar that he believed would bring additional clarity to Golden Nugget’s requests and narrow the requests for ease of production. GC Ex. 6. First, Golden Nugget narrowed its requests from “any company” to “hotels and casinos.” Id.; see also Ziegler 57:14-25. Second, Kamer reminded O’Mahar that he is the one who used the word “similar” with regard to the proposed language in the complete collective bargaining agreement proposed by Local 501. GC Ex. 6; see also Ziegler 86: 20-23; 87:21-88:2. Kamer hoped O’Mahar would be able to provide at least documents related to O’Mahar’s references. GC Ex. 6. Kamer reminded O’Mahar that Golden Nugget wanted at least those documents “readily available” before speaking of costs. Kamer further explained that readily available documents would include those decisions O’Mahar had previously acknowledged he knew existed, even if they needed to be retrieved from files. Finally, Kamer also reminded O’Mahar of Golden Nugget’s offer to send a representative to review potentially relevant documents to save costs for both sides. Id.

On August 5, 2016, O’Mahar again claimed he did not understand what the word “similar” meant in relation to Golden Nugget’s requests because what he considers similar might be different from what Golden Nugget or Kamer considered similar. GC Ex. 7. Contrary to case law discussed *infra*, O’Mahar found Golden Nugget’s offer to send a representative to access documents unreasonable. Id.; see also O’Mahar 23:4-9. O’Mahar further believed that his opinion on the intent of the language was comparable to how other units and arbitrators have interpreted similar language and offered to answer questions about the language as an alternative

to providing the requested documents. Id. Golden Nugget and Kamer highlighted the absurdity of O'Mahar's proposed alternative in its August 12, 2016 letter. GC Ex. 8. Kamer also explained that because Local 501's continued refusal to provide any relevant information in response to Golden Nugget's second and third responses, Golden Nugget would be filing a Charge with the NLRB.

IV. LEGAL ARGUMENTS IN SUPPORT OF EXCEPTIONS.

It is beyond dispute that the good faith exchange of information between employers and unions is essential to the collective bargaining process. As one treatise summarizes:

The collective bargaining process requires that the bargaining *antagonists*—or *partners*, depending on whether one emphasizes the adversary or cooperative nature of a process that partakes of both—have adequate information about the immediate subjects at issue in bargaining or contract administration. The underlying rationale is that without the exchange of essential information, the collective bargaining process cannot function properly...Disclosure of relevant information is integral to the bargaining process. It encourages mutual respect between the negotiators and makes the American collective bargaining system, which so heavily relies on cooperation and open exchange, a viable approach to fashioning 'a generalized civil code' establishing 'a system of industrial self-government.'

John E. Higgins, Jr., The Developing Labor Law, Vol. 1 at 976-77 (Sixth Ed. 2012) [internal citations omitted]. Indeed, parties cannot be expected to effectively represent their respective side or administer the collective bargaining agreement when they do not possess the information that "is necessary to the proper discharge of the duties of the bargaining agent." See id.; see also NLRB v. Whittin Mach. Works, 217 F.2d 593, 594 (4th Cir. 1954), cert. denied, 349 U.S. 905 (1955). In that regard, the duty to furnish information applies to both unions and employers in equal force. See Food Drivers Helpers & Warehouse Employees Local 500, 340 N.L.R.B. 251 (2003) (holding "a union's duty to furnish information relevant to the bargaining process is parallel to that of an employer.").

Here, contrary to the Judge's Decision, this case demands that Local 501 act in good faith by providing the requested information to Golden Nugget. During negotiations, Local 501 proposed a complete contract to the Golden Nugget, which was undoubtedly and admittedly based on collective bargaining agreements containing "similar" provisions with other employers. In that regard, Golden Nugget properly requested grievance and arbitration information from Local 501 in order to gauge Local 501's proposals in negotiations, better understand how the Union's own admitted "similar" language had been interpreted in arbitration with other hotel-casinos, to ensure that Golden Nugget could properly administer such language if agreed upon, and to determine if clearer language would be better suited to the parties' relationship in order to avoid industrial strife. O'Mahar admitted to knowing where the requested information is stored, and even the location of some specific, responsive arbitration information. Yet, Local 501 refused to provide any of the requested grievance and arbitration information to Golden Nugget. Indeed, O'Mahar admitted at the hearing that even though Golden Nugget requested what was "readily available" he refused to provide the information. O'Mahar 27:5-10. In so doing, Local 501 has acted unlawfully and should be ordered to act in good faith in responding to Golden Nugget's request for information.

A. The Judge Erred in Concluding Golden Nugget's Requests Were Irrelevant and Lacked Specificity (Exceptions # 1-28; 31-33).

Golden Nugget sent its requests to Local 501 in order to understand the history of the language proposed by Local 501. Ziegler 64:21 through 65:6. As explained to both Local 501 and the Judge, this is a first contract between the parties, and Golden Nugget needs to know if any proposed language has had interpretation issues and, if so, how the language has been interpreted by members of other units and neutral arbitrators. Id. at 64:16; 64:24 through 65:3; 81:10-17. This knowledge would allow Golden Nugget to decide whether clearer language

needs to be offered as part of negotiations. The need for this information is especially important in the present matter because Local 501 has not been accepting of new language proposed by Golden Nugget, preferring to make minor edits to its own initial proposals instead. *Id.* at 65:4-6.

The Judge erroneously found that these reasons were after-the-fact and lacked probable relevance despite being unable to “find fault with these rationales.” ALJD: 4, 8. A “labor organization’s duty to furnish information is parallel to that of an employer,” Plasterers Local 346, 273 N.L.R.B. 1143, 1144 (1984), and the test for relevance of an information request is a “‘liberal’ broad ‘discovery type’ standard.” Am. Benefit Corp., 354 N.L.R.B. 1039, 1050 (2010) (quoting NLRB v. Acme Industrial Co., 385 U.S. 432 (1967)). Even when the request involves non-unit matters, “the burden to show relevance is ‘not exceptionally heavy.’” Salem Hosp. Corp., 358 N.L.R.B. No. 95 (July 31, 2012) (quoting Alcan Rolled Products, 358 N.L.R.B. No. 11, at *4 (2012)). Essentially, “[t]he Board need only decide whether the information sought has some ‘bearing’ on these issues, or would be of use to the [requesting party].” Am. Benefit Corp., 354 N.L.R.B. at 1051 (quoting Dodger Theatricals Holdings, 347 N.L.R.B. 953, 970 (2006)); see also Shoppers Food Warehouse, 315 N.L.R.B. 258, 260 (1994) (liberal discovery standard favors disclosure to encourage “access to a broad scope of potentially useful information”).

Further, contrary to the Judge’s dismissive label, Golden Nugget’s request did not lack specificity. ALJD: 9. Golden Nugget used enough specificity that O’Mahar knew what was being requested; his request for specific sections of concern was based more on not wanting to provide more than he had to rather than not knowing what to provide or where it was located. As the requests are based on proposals provided by Local 501 and O’Mahar’s contention that many of the proposals are based on similar language agreed to by other employers, O’Mahar is in a better position than Golden Nugget to identify relevant language that has been subjected to

grievances and arbitrations. Indeed, the requests are tailored to O'Mahar's use of the word "similar," not to Golden Nugget's interpretation of that word. Furthermore, because Golden Nugget did not know which sections are particularly troublesome and was having trouble presenting newly-created language acceptable to Local 501, it understandably did not want to specify sections of concern, only to eliminate seemingly innocuous sections that are actually highly misinterpreted. See Ziegler 78:21-24; 80:6-18. Moreover, as Golden Nugget was seeking all grievances and arbitration decisions related to the proposed language, regardless of whether Local 501 won or loss, Local 501 is not at risk of being forced into a position at future arbitrations or at risk of revealing legal theories. ALJD: 9-10.

Especially relevant to this matter, the Board has previously found employers' requests for arbitration decisions relevant, motivated by more than mere suspicion, and specific enough to create an obligation for the union to provide information. See Hotel & Restaurant Employees Local 226 (Caesars Palace), 281 N.L.R.B. 284, 288 (1986). In Caesars Palace, the employers' request similarly sought all arbitration decisions and awards involving facilities in Clark County, Nevada, and the union similarly contended that its filing system was not organized in a way that would make retrieval efficient. Id. at 285, 287. Importantly, the Board noted that "both the Supreme Court and the Board have held that information which aids the arbitral process is relevant and should be provided." Id. at 288. Here, Ziegler explicitly stated that the requests were made to see what language was leading to grievances and arbitrations, so as to figure out which proposals needed to be revised to prevent future grievances – which would clearly aid the arbitral process. Ziegler 84:3-11.

Nevertheless, the Judge attempted to distinguish the present matter from Caesars Palace by emphasizing the union's specific references to *some* decisions during prior arbitrations in the

case. ALJD: 9. The Judge's distinction is misapplied—not every arbitration decision requested had been previously cited nor did the Board hold attachment of previous decisions as the definitive way to obtain awards in an information request. Instead, the Board viewed the attached awards as *evidence of the union's past practice* that would elevate the situation to something more than speculation. Caesars Palace, 281 N.L.R.B. at 289. Here, the *comparable past practice* to elevate the request beyond speculation is Local 501's complete packet of proposals presented at the first session, that O'Mahar specifically stated were similar to proposals to which other employers in the area had agreed. Golden Nugget should not need to specify additional reasons or produce additional evidence if Local 501 was admittedly willing to stand by its entire packet of proposals largely based on other employers' acceptance of the same or similar language. Thus, the Judge should have deemed Golden Nugget's requests relevant and sufficiently specific.

B. The Judge Failed to Evaluate Whether the Union Had a Valid Reason to Refuse to Provide Any Information (Exceptions #29-33).

Once the requesting party has met the low threshold of relevancy, the burden then shifts to the other party to provide a valid reason as to why they cannot or will not provide the information. Samaritan Medical Center, 319 N.L.R.B. 392, 398 (1995). Here, the Judge never reached this stage as she erroneously found Golden Nugget's requests were not relevant.

Thus, the Judge failed to address Local 501's total refusal to provide any information relevant to Golden Nugget's second and third requests. If the Judge had addressed it, she would have found Local 501's actions unlawful as a party "may not simply refuse to comply with an ambiguous or overbroad information request, but must . . . comply with the request to the extent it encompasses necessary and relevant information." In Re Nat'l Steel Corp., 335 N.L.R.B. 747, 748 (2001) (quoting Keauhou Beach Hotel, 298 N.L.R.B. 702 (1990)); see also Island Creek

Coal Co., 292 N.L.R.B. 480, 496 n.24 (1989) (“Even if a [requesting party]'s request for information is overly broad, the [other party] may not refuse to provide the portions of the information that are relevant to the [requesting party]'s performance of its bargaining functions.”). Here, Local 501 did not provide a single document in response to Golden Nugget’s second and third requests, despite acknowledging relevant information within its possession. Local 501’s flat-out refusal was and continues to be unlawful.

The Judge also erroneously ignored Golden Nugget’s efforts to narrow its requests and offer additional solutions in order to accommodate Local 501’s unfounded issues with the requests. As O’Mahar admitted, Local 501’s difficulty in accessing individual files is due to its own dysfunctional filing system, which Local 501 claims would require the hiring of a temp or reassignment of a business agent to look through individual files to identify relevant documents. This tedious and potentially costly method does not excuse Local 501’s duty to provide relevant information. See Int’l Union of Elec., Radio & Mach. Workers, AFL-CIO v. NLRB, 648 F.2d 18 (D.C. Cir. 1980) modified on reh’g, No. 78-2262, 1981 WL 27197 (D.C. Cir. Jan. 22, 1981) (While a substantial burden, in time and money, might be imposed on [a party] in meeting [the requesting party’s] request for detailed information . . . those factors were unpersuasive for initially refusing to supply the requested data; they were factors to be considered at the compliance stage.”); see also Plasterers Local 346 (Brawner Plastering), 273 N.L.R.B. 1143, 1145 (1984) (finding if a party is in possession of information and refuses to furnish it, the party is in violation of Section 8(b)(3)).

The foregoing rationale is especially pertinent here, where Golden Nugget did not even hold Local 501 to providing all relevant information all at once. Instead, Golden Nugget reasonably requested that Local 501 provide documents “readily available” to assess whether the

additional search process was necessary. Once again, however, Local 501 refused to provide even those documents. Moreover, the search is likely not as cumbersome as Local 501 depicts as O'Mahar admitted that Local 501 only has 4-6 arbitrations per year on average in Las Vegas and five years of files only take up "several bankers boxes," with each box being stored onsite and containing an index of arbitrations and properties. O'Mahar 18:12-25; 34:16-21; 39:25; 41:2-4; see also Lile 100:6-10 (admitting he has processed zero arbitrations in the past two years). Moreover, O'Mahar admitted he knows what is in the files he has processed and where they are located. Id. at 52:8-20. One would think that each of the eight representatives would have similar recollection of the matters they have worked on – especially when they might spend years actively trying to resolve the grievance (see O'Mahar 43:12-19) – and could easily advise whoever is tasked with gathering information as to the location of relevant grievances and arbitration decisions.

Significantly, in recognizing the asserted costs and burden on Local 501, Golden Nugget went beyond its obligations and proactively offered numerous reasonable accommodations, such as cutting the scope down to hotels and casinos rather than companies in general and offering to send its own representative to review the files. However, Local 501 still did not provide any documents or allow Golden Nugget to send a representative. While O'Mahar took great offense to Golden Nugget's offer to send a representative, and the Judge incorrectly found this offer an improper substitute for needlessly narrowing Golden Nugget's requests, the Board has found a requesting party asking for access to records appropriate. See Food Employer Council, Inc., 197 N.L.R.B. 651 (1972) (if "no agreement can be reached [regarding cost sharing of information production], the [requesting party] is entitled in any event to access to records from which it can reasonably compile the information."). The Judge did not give Golden Nugget's offers or Local

501's disregard of Golden Nugget's attempts at accommodation any weight in her analysis. Instead, she improperly stopped at the first step of the analysis by incorrectly finding that Golden Nugget's requests are not relevant enough.

V. CONCLUSION.

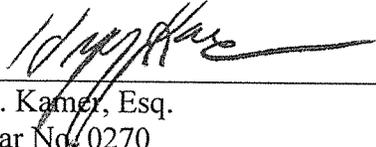
For the aforementioned reasons, the Judge erred in the above-mentioned determination that Local 501 did not violate the Act because Golden Nugget did not have a reasonable factual basis for its information requests. Accordingly, Golden Nugget respectfully requests that the Board modify the Judge's Decision and Recommended Order to correct the aforementioned errors.

DATED this 20th day of July, 2017.

Respectfully submitted,

KAMER ZUCKER ABBOTT

By:



Gregory J. Kamer, Esq.
Nevada Bar No. 0270
Kaitlin H. Ziegler, Esq.
Nevada Bar No. 13625
3000 West Charleston Boulevard, Suite 3
Las Vegas, Nevada 89102
Tel: (702) 259-8640
Fax: (702) 259-8646

Attorneys for Charging Party
GNLV Corp. d/b/a
Golden Nugget Las Vegas

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2017, I did serve a copy of the foregoing **CHARGING PARTY GNLV CORP. D/B/A GOLDEN NUGGET LAS VEGAS'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND RECOMMENDED ORDER** upon:

Stephen P. Kopstein, Esq.,
National Labor Relations Board, Region 28
Resident Office
600 South Las Vegas Boulevard, #400
Las Vegas, Nevada 89101-6637
Stephen.Kopstein@nlrb.gov

**VIA ELECTRONIC MAIL AND
CERTIFIED MAIL WITH RETURN
RECEIPT**

Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, NW
Washington, D.C. 20570

VIA ELECTRONIC FILING

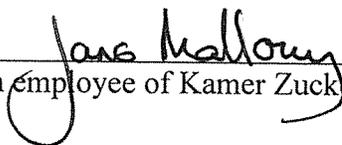
Adam N. Stern, Esq.
Justin M. Crane, Esq.
The Myers Law Group, A.P.C
9327 Fairway View Place, Suite 100
Rancho Cucamonga, California 91730
laboradam@aol.com
jcrane@myerslawgroup.com

**VIA ELECTRONIC MAIL AND
CERTIFIED MAIL WITH RETURN
RECEIPT**

Mr. Rick Lile
Agent Organizer
International Union of Operating Engineers,
Local 501
301 Deauville Street
Las Vegas, Nevada 89106
rlile@local501.org

**VIA ELECTRONIC MAIL AND
CERTIFIED MAIL WITH RETURN
RECEIPT**

By:


An employee of Kamer Zucker Abbott