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**IGT d/b/a International Game Technology and International Union of Operating Engineers Local Union 501, AFL-CIO.** Cases 28–CA–166915, 28–CA–173256, 28–CA–174003, and 28–CA–174526

August 24, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND KAPLAN

On November 15, 2016, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.<sup>1</sup>

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,<sup>2</sup> findings, and conclusions<sup>3</sup>

<sup>1</sup> Member Emanuel is recused and took no part in the consideration of this case.

<sup>2</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we adopt the judge's dismissals of the allegations that the Respondent's threat to union stewards of a loss of overtime also constitutes unlawful direct dealing, that the Respondent unlawfully failed to provide the Union with wage or salary plans, and that the Respondent unlawfully misrepresented the scope of work that would be performed by AppleOne temporary employees.

<sup>3</sup> We adopt the judge's findings that the Respondent violated Sec. 8(a)(5) and (1) of the Act by failing and refusing to engage in decisional and effects bargaining over the subcontracting of the Station Casinos UGA project to AppleOne temporary employees. In adopting the judge's findings, we do not rely on his statements regarding non-labor cost reasons for subcontracting.

We also adopt the judge's finding that the Respondent violated Sec. 8(a)(1) by threatening employees with a loss of overtime. As found by the judge, during a heated exchange at the parties' May 4, 2016 bargaining session, the Respondent's lead negotiator, Theo Gould, said to unit employees Juan Robles and Shane West, "Are you going to let this guy [referring to Union Organizing Director Jose Soto] take overtime away from you, are [you] going to let this guy take money out of your pockets?" In finding that Gould's statement threatened a loss of overtime, the judge observed that the Respondent had already offered additional overtime opportunities to the unit employees and that overtime was not the topic of discussion at the May 4 bargaining session. Rather, the parties were discussing the Respondent's use of a subcontractor on a casino project, which the Union was insisting it had a right to bargain about. In that context, we agree with the judge that Gould's

only to the extent consistent with this Decision and Order.<sup>4</sup>

For the reasons explained below, we reverse the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with a list of all of its locations.

The Information Request

*A. Facts*

The Respondent is a multinational company that assembles, installs, removes, services, and repairs gaming machines. The Union was certified on May 26, 2015, to represent a unit of about 42 technicians at the Respondent's Las Vegas location. In June 2015, the Union requested information to prepare for bargaining, including wage and salary plans at all locations. The Respondent provided wage scale and salary plans for the unit technicians in its Las Vegas location and explained that the same wage scale and salary plan was applied at all of its locations across the country. The Respondent also repeatedly stated during negotiations that it wanted the Las Vegas contract to mirror its contract in New York with the Communications Workers of America (CWA).

On March 28, 2016, the Union requested, via email, that the Respondent provide "any company wage or salary plans" for employees "across the country," as well as "a list of all company locations," stating that the information was needed before the Union could bargain over "shift differentials." On April 6, 2016, the Respondent stated that the wage and salary plans at other locations across the country had already been provided. The Respondent implicitly rejected the Union's request for all company locations, stating, "Responsive information applicable to the bargaining unit members has already

unprompted statement regarding overtime would reasonably be perceived as a threat to take away such opportunities in response to the Union's insistence on bargaining over the subcontracting decision. Unlike our colleague, we find no basis for assuming that employees Robles and West would understand that Gould was referring to a prior conversation regarding overtime.

Contrary to his colleagues, Member Kaplan would dismiss the threat allegation. In his view, the employees would have understood that, when the Respondent's representative Gould asked them whether they were going to let the union representative "take overtime away from you," he was referring to the Union's prior offer to supply temporary workers and its effect on the Respondent's offer of overtime to unit employees to perform that work. The employees would have understood that hiring temporary workers could affect their overtime opportunities, and that Gould was not threatening action by the Respondent.

The judge additionally found that the Respondent's nondisparagement provision in its Separation Agreement and General Release violates Sec. 8(a)(1). We sever that issue and retain it for further consideration.

<sup>4</sup> We have amended the conclusions of law and modified the judge's recommended Order to conform to our findings herein, and have substituted a new notice to conform to the Order as modified.

been provided to the Union.” The Union then restated the request in pertinent part, requesting that, “for the purpose of collective bargaining,” the Respondent provide “a list of all jurisdictions where [the Respondent] conducts business . . . .”

The following day, the Respondent requested “the justification for providing all Company locations.” The Union did not respond. The Union sought and received further clarification about the wage and salary plans. The Respondent explained to the Union that the wage ranges used at all of its locations are based on market analyses, including surveys and purchased wage data, and provided more information about the software program it used to determine geographical wage differentials. The Union did not object to the responses, nor did it renew its request for a list of all company locations.

#### B. Discussion

The judge found that the Respondent’s failure to provide the Union with a list of all of its locations violated Section 8(a)(5) and (1). Relying on the Respondent’s statements during negotiations that it wanted the contract to mirror the CWA contract in New York, the judge found that the relevance of all company locations should have been apparent to the Respondent.

It is well established that an employer is obligated to provide a union with requested information pertaining to employees in the bargaining unit, or otherwise presumptively relevant information.<sup>5</sup> An employer, however, has no obligation to provide a union with nonunit information—such as the list of the Respondent’s locations here—unless the union has demonstrated the relevance of the nonunit information or its relevance should have been apparent to the employer under the circumstances.<sup>6</sup>

Contrary to the judge, we find no basis for concluding that the relevance of this information should have been apparent to the Respondent or that the Union otherwise demonstrated relevance. Although the Respondent had told the Union that it wanted the Las Vegas contract to mirror a contract in New York, it gave no other indica-

tion that its other locations had any bearing on its contract proposals. It had already explained to the Union that it applied the same wage and salary plans across all locations, provided those wage plans, and explained its basis for determining wages and geographical differentials.

Further, although the Respondent informed the Union that it wanted the Las Vegas contract to mirror the New York contract, the Union did not request the New York contract. The Union also failed to respond to the Respondent’s request that it explain the relevance of all company locations.<sup>7</sup> Under the circumstances here, the Union’s silence would reasonably signal to the Respondent that it was satisfied with the information it had received and that the list of locations was not relevant or needed.

Accordingly, we find that the Respondent’s failure to provide a list of all company locations to the Union did not violate Section 8(a)(5) and (1), and the allegation is dismissed.

#### AMENDED CONCLUSIONS OF LAW

1. Substitute the following paragraph for Conclusion of Law 1.

1. The Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act by failing and refusing to provide the Union with a meaningful opportunity to bargain over the Company’s decision to use AppleOne temporary employees on the Station Casinos UGA project and the effects of that decision.

2. Delete paragraph 2(b) of the judge’s Conclusions of Law.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, IGT d/b/a International Game Technology, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Cease and desist from

(a) Unilaterally subcontracting the work of unit employees without affording the Union prior notice and a

<sup>5</sup> *Disneyland Park*, 350 NLRB 1256, 1257 (2007).

<sup>6</sup> *Id.* at 1258; see also *Brazos Electric Power Co-op, Inc.*, 241 NLRB 1016, 1018–1019 (1979) (employer was “on notice” of the relevance of requested information about a wage increase for nonunit employees where it had a practice of maintaining parity between unit and nonunit employees, although the union had not spelled out the relevance of the information to the employer), *enfd.* in relevant part 615 F.2d 1100 (5th Cir. 1980). *Lamar Outdoor Advertising*, 257 NLRB 90, 92–93 (1981), cited by the judge, is distinguishable. In that case, an administrative law judge found that the relevance of the union’s request for wage information for all of the employer’s facilities had been established. Unlike here, the employer in *Lamar* had a practice, which it had told employees about during the election campaign, of setting wages and benefits at new locations based on prevailing conditions at its other locations.

<sup>7</sup> We note that it is not readily apparent that the list of all locations would have enabled the Union to test any representation made by the Respondent. Accordingly, we find that once the Respondent requested an explanation of the request, it was incumbent upon the Union to provide one and that it failed to do so. The outcome here may well have been different had the Union provided at least some insight into why it needed this information.

meaningful opportunity to bargain over the decision and its effects.

(b) Threatening unit employees with loss of overtime if the Union requests to bargain on their behalf over subcontracting their work or other terms and conditions of their employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Before subcontracting the work of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All full-time and regular part-time technicians and technicians-CS employed by the Employer at its Las Vegas, Nevada facility; excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(b) Make whole the unit employees for any loss of pay or benefits resulting from its unlawful unilateral decision to subcontract unit work on the Station Casinos UGA project, in the manner set forth in the remedy section of the decision.

(c) Compensate the affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each employee.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix".<sup>8</sup> Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized repre-

sentative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 30, 2015.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the allegation that the Respondent violated Section 8(a)(1) by maintaining an overly broad nondisparagement provision in its Separation Agreement and General Release is severed from this case and retained for future resolution.

Dated, Washington, D.C. August 24, 2018

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Mark Gaston Pearce, Member

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Lauren McFerran, Member

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Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

<sup>8</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX  
 NOTICE TO EMPLOYEES  
 POSTED BY ORDER OF THE  
 NATIONAL LABOR RELATIONS BOARD  
 An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT subcontract the work of unit employees without affording International Union of Operating Engineers Local Union 501, AFL-CIO (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.

WE WILL NOT threaten you with loss of overtime if the Union requests to bargain on your behalf over subcontracting your work or other terms and conditions of your employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL cease subcontracting the work of our unit employees on the Station Casinos UGA project and, WE WILL, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL make whole our unit employees for any loss of pay or benefits resulting from our unlawful unilateral decision to subcontract unit work on the Station Casinos UGA project.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each employee.

IGT D/B/A INTERNATIONAL GAME TECHNOLOGY

The Board's decision can be found at [www.nlrb.gov/case/28-CA-166915](http://www.nlrb.gov/case/28-CA-166915) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



*Nathan A. Higley, Esq.*, for the General Counsel.  
*Theo E. M. Gould and Matthew T. Cecil, Esqs. (Littler Mendelson, P.C.)*, for the Respondent Company.  
*Adam Stern, Esq.*, for the Charging Party Union.

DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. IGT d/b/a International Game Technology assembles, installs, removes, services, and repairs gaming machines. It is a multinational company with numerous locations in the U.S. and around the world.<sup>1</sup>

In early April 2015, another company, GTECH, purchased and merged with IGT and adopted its name. The following month, on May 26, the Board certified Operating Engineers Local 501 as the collective-bargaining representative of the approximately 42 full-time and regular part-time technicians employed by the newly merged company at its Las Vegas location. Several months later, in late October, the Company and the Union began negotiating an initial collective-bargaining agreement to cover the Las Vegas technicians.

The complaint alleges that the Company committed several unfair labor practices during the Las Vegas negotiations in violation of Section 8(a)(1) and (5) of the National Labor Relations Act. Specifically, it alleges that the Company refused to furnish the Union with requested information about other locations where the Company does business and the wage scales at those locations; used temporary workers employed by a staffing company to perform unit work at certain Las Vegas worksites without bargaining with the Union to agreement or impasse; bypassed the Union and dealt directly with the unit technicians regarding the Company's use of the temporary workers; and threatened the unit technicians with loss of benefits because the Union sought to bargain over the use of the temporary workers. In addition, the complaint alleges that the Company has maintained an overbroad nondisparagement provision in its standard separation agreement.<sup>2</sup>

<sup>1</sup> There is no dispute, and the record establishes, that the Board has jurisdiction.

<sup>2</sup> See GC Exh. 1(v) (the May 31 complaint); GC Exh. 1(ac) (the June 29 notice of intent to amend); and Tr. 10-12 (granting motion to

The hearing was held on June 29 and 30, and July 6. The General Counsel and the Company thereafter filed briefs on August 10. As discussed below, the evidence supports all of the complaint allegations except the refusal-to-provide-wage-information and direct-dealing allegations.<sup>3</sup>

#### I. ALLEGED FAILURE TO PROVIDE INFORMATION RELEVANT TO CONTRACT NEGOTIATIONS

The General Counsel alleges that, since about April 13, 2016, the Company has unlawfully refused to provide the Union with two items of information it requested during the contract negotiations: (1) the wage scale for technicians across the country; and (2) a list of all company locations. As discussed below, a preponderance of the evidence establishes that the Company unlawfully failed to provide the second, but not the first.

The Union initially requested the subject information in late March. The Company had previously provided the Union with information about the wage and salary plan in Las Vegas. However, during the negotiations, the Company repeatedly stated that it wanted the Las Vegas contract to mirror the contract in New York with the Communications Workers of America (Tr. 226, 232). Accordingly, in a March 28 email, the Union requested that the Company provide “any company wage or salary plans” for employees “across the country,” as well as “a list of all company locations.”

Jose Soto, the Union’s director of organizing, testified at the hearing that the Union requested the information 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 (Tr. 226–228, 232). However, the Union did not explain that to the Company. Nor did it specifically reference the Company’s prior statements about mirroring the New York contract. Rather, it just stated that the information was needed before the Union could begin bargaining over shift differentials (GC Exh. 18).

The Company responded on April 6. Regarding the request for wage or salary plans at other locations across the country, the Company stated, “This information has already been pro-

vided to the Union” (GC Exh. 20). At the hearing, Cindy Hartman, the Company’s HR director, testified that this response referred to the wage and salary plan in Las Vegas. Hartman testified that the wage and salary plan is the same across the country, and that the Union was told how it applied across the country in September 2015. (Tr. 105–106.) With respect to the request for all company locations, the Company essentially or implicitly rejected the request for this nonunit information, stating, “Responsive information applicable to the bargaining unit members has already been provided to the Union.”

The Union replied the next day. Regarding wage or salary plans, the Union stated that it wanted to “clarify” its original request. The Union stated that it was requesting “the wage scale for the techs in 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.[,] [i]ncluding premium pay and health benefits.” Regarding company locations, the Union restated the request as follows: “For the purpose of collective bargaining please 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.” (GC Exh. 21.)

The Company responded the next day. Regarding wage scales, the Company stated, “All plans are all the same and have already been provided to the Union.” With respect to other company locations, the Company stated, “Please provide the justification for providing all Company locations.” (GC Exh. 22.)

The Union did not reply to the Company’s query about why the Union was requesting all company locations (Tr. 243). However, it did reply regarding the requested wage information. On May 12, the Union sent an email to the Company stating that the Union had still not received “specific details” regarding either “wages or salary plans” or “the wage scale” where the Company conducts business.

The Company responded on May 17. With respect to wages or salary plans, the Company stated:

IGT participates in surveys and purchases wage data in order to determine our Company wage ranges. The wage data that both legacy companies utilize is out of date. With that said, I am providing the most recent market analysis (mid-points) for Field Services Technicians that we have recently begun to use in various segments of the Field Services organization . . . Level I = \$38,000, Level II = \$42,900, Level III = \$56,000, Level IV = \$62,000.

Regarding the wage scale, the Company stated:

All plans are the same however, we do apply a geographical differential based on national average market data in areas throughout the country where there is a higher or lower cost of living. Geographical differentials are determined based upon where an employee works. A geographical differential does not apply to Murrieta, CA or Las Vegas. In Phoenix, AZ area there is a 7% geographical differential. [R. Exh. 10.]

The Union replied the next day. Regarding wage or salary

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amend the complaint to remove one allegation and add two others). The complaint also alleges that the Company violated Section 8(a)(5) of the Act by misrepresenting to the Union the scope of the work that would be performed by the temporary workers. However, the General Counsel’s posthearing brief does not address this allegation. Nor does it rely on any such alleged misrepresentation as support for the alleged unlawful refusal to bargain over using temporary workers on the project. Thus, the misrepresentation allegation appears to have been abandoned. In any event, it is dismissed for the reasons discussed infra.

<sup>3</sup> Specific citations to the record are provided to aid review, and are not necessarily exclusive or exhaustive. In making credibility findings, all relevant factors have been considered, including the interests and demeanor of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g., *Daikichi Corp.*, 335 NLRB 622, 633 (2001), *enfd.* 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), *cert. denied* 522 U.S. 948 (1997).

plans, the Union did not object to the Company's response. Instead, it simply requested "a copy of the old and updated surveys and purchases wage data that determines bargaining unit members' wage rates." The Union likewise did not object to the Company's response regarding the wage scale. Rather, the Union simply asked for "a copy of the plans used to apply geographical differentials." (R. Exh. 11.)

The Company responded on May 23. With respect to the old and updated data, the Company advised that it "would check and see" if it "still had the old data relating to the bargaining unit members' wage rates," and that "all information provided is applicable to all [field service technicians] throughout the US." Regarding the plans used to determine geographical differentials, the Company stated:

We use a software program called ERI Economic Research Institute, that we purchase, and the data is updated quarterly from them. The way their program works is that we enter the employee's zip code and the system tells us if there is a differential or not. We have already provided you the area differential information you requested. [R. Exh. 13.]

Again, the Union did not object to this response. Nor did it request any further information from the Company related to it.

*A. Whether the requested information was relevant to bargaining*

It is well-established that information concerning nonunit employees is not presumptively relevant to bargaining. Thus, an employer is not obligated to provide such information to the union on request unless the union demonstrates the relevance to the employer at the time of the request or the relevance is obvious or should have been apparent to the employer under the circumstances. See *Kraft Foods North America*, 355 NLRB 753, 754–755 (2010); and *Disneyland Park*, 350 NLRB 1256, 1258 (2007).

Here, as indicated above, the Union did not specifically explain to the Company why it wanted the requested nonunit information about all other company locations and their wage rates. Cf. *E.I. Du Pont de Nemours & Co.*, 264 NLRB 48, 50–52, fn. 5 (1982), enfd. 744 F.2d 536 (6th Cir. 1984) (union explained to employer at a bargaining session that it was seeking the nonunit information about hourly wages at all company plants because it thought internal equity should be applied on a company-wide basis, and that comparable skills should be paid the same at all company locations).

Nor is there any authority holding that the relevance of such information is obvious or apparent on its face, i.e., even without any additional facts or circumstances demonstrating relevance. The lone case cited by the General Counsel—*Salem Hospital Corp.*, 358 NLRB 837, 840 (2012), reaffd. 361 NLRB 684 (2014)—is clearly distinguishable. The union there requested information about the wages of contract employees used by the employer to work side by side with the unit employees.

However, as indicated above, here there is an additional fact or circumstance: the Company repeatedly stated during the negotiations that it wanted the Las Vegas contract to mirror the CWA contract in New York. This is sufficient under Board precedent to find that the relevance of the wage information

should have been apparent to the Company. See *Lamar Outdoor Advertising*, 257 NLRB 90, 92–94 (1981) (finding that the relevance of the newly certified union's request for wage data at all company facilities should have been apparent because the employer had told employees during the election campaign at the Dayton, Ohio facility that they could expect to receive the same wages set forth in a union contract at the parent company's Orlando, Florida facility if the union was elected).<sup>4</sup>

The relevance of the Union's companion request for all company locations likewise should have been apparent to the Company. A union is entitled to information necessary to evaluate or verify the accuracy of claims or representations made by the employer during bargaining. See, e.g., *Dover Hospitality Services*, 358 NLRB 710, 715 (2012), reaffd. 361 NLRB 906 (2014), enfd. 636 Fed. Appx. 826, 827 (2d Cir. 2016); *National Extrusion & Mfg. Co.*, 357 NLRB 127, 128 (2011), enfd. sub nom. *KLB Industries v. NLRB*, 700 F.3d 551, 557 (D.C. Cir. 2012); *Comar, Inc.*, 349 NLRB 342, 355 (2007); and *Wallace Metal Products, Inc.*, 244 NLRB 41 fn. 2 (1979).<sup>5</sup> Here, the Union obviously needed to know where the Company's locations were in order to verify that the wages there were what the Company said they were.

*B. Whether the Company unlawfully refused to provide the requested information*

As indicated above, it is undisputed that the Company did not provide the Union with all company locations. The Company offers two arguments why its failure or refusal to do so was not unlawful.

First, the Company argues that the request was ambiguous or overbroad because it was not expressly limited to locations in the U.S. However, given that the Union's companion request for employee wage or salary plans was limited to locations in the U.S., and that its April 7 email restating the request for all locations only listed examples in the U.S., it should have been clear to the Company that the Union was seeking only U.S. locations.<sup>6</sup>

Second, the Company argues that it was justified in not providing the information because the Union failed to respond to its subsequent April 8 request to justify why the Union was seeking all company locations. In support, the Company cites *Superior Protection, Inc.*, 341 NLRB 267, 269 (2004), enfd. 401 F.3d 282 (5th Cir.), cert. denied 546 U.S. 874 (2005), and similar cases, holding that an employer may lawfully request clarification of an ambiguous or overbroad information request before complying with it. However, as discussed above, the Union's request for all company locations was neither.

It may be that the Company did not fully understand why the Union was requesting all company locations. It might well

<sup>4</sup> The Company does not offer any basis to distinguish *Lamar*. Indeed, although its answer to the complaint denies that the requested wage information at other locations was relevant, its posthearing brief does not dispute its relevance.

<sup>5</sup> An employer is likewise entitled to information necessary to verify the union's representations. See, e.g., *Teamsters Local 122 (August A. Busch & Co.)*, 334 NLRB 1190, 1223–1224 (2001).

<sup>6</sup> Soto confirmed at the hearing that the Union was not seeking information about locations outside the U.S. (Tr. 241).

have been better, as a practical matter, if the Union had responded to the Company's request for an explanation, regardless of whether the law required it to under the circumstances. An ounce of communication is worth a pound of litigation. Nevertheless, as discussed above, the Union was not in fact obligated, as a legal matter, to provide the Company with an explanation under the circumstances. The Company therefore violated the Act by failing to promptly provide the information to the Union on request. See *Depository Trust Co.*, 300 NLRB 700, 705 (1990) (employer unlawfully refused to provide the union with nonunit information, notwithstanding the union's failure to respond to the employer's request for a specific explanation or justification for seeking the information, as the relevance of the information was self-evident under the circumstances).

A different conclusion is warranted, however, with respect to the Union's request for wage or salary plans or scales at other company locations around the country. As indicated above, the Company responded to the Union's requests for that information, on April 6 and 8, and May 17 and 23. Further, the Union did not object to the Company's May 17 and 23 responses, but followed up on the former and did not respond to the latter. Thus, by all appearances, the Union was satisfied with those responses.<sup>7</sup>

Soto testified at the hearing that he was not satisfied with those responses (Tr. 234, 351–352, 366–370). However, he never communicated that to the Company. See *Day Automotive Group*, 348 NLRB 1257, 1262–1263 (2006) (finding no violation where the employer had reason to believe it had satisfied the union's requests and the union never said the information provided was insufficient or requested additional information).<sup>8</sup> Nor were the Company's responses plainly inadequate. Cf. *Airport Aviation Services*, 292 NLRB 823, 824 (1989) (finding a violation, notwithstanding the union's failure to apprise the employer that its responses were insufficient, as the responses were "plainly" inadequate). Accordingly, the allegation that

<sup>7</sup> None of the Union's charges specifically alleged that the Company had unlawfully failed to provide the requested information. The three 8(a)(5) charges were filed between April 5 and 20 and alleged only that the Company had "failed and refused to bargain in good faith with [the Union] by making unilateral changes without affording the Union a meaningful opportunity to bargain," and, "by these and other acts," had "restrained and coerced employees in the exercise of their Section 7 rights guaranteed to them under [the Act]." See GC Exh. 1(l), (r), and (t) (all of which contain identical allegations). The record indicates that the first time the refusal-to-provide-information allegations formally surfaced was in the consolidated complaint issued by the General Counsel on May 31 (GC Exh. 1(v)). And the Company's June 14 answer was consistent with the facts described above. See GC Exh. 1(x), at 6 ("The Union accepted Respondent's final responses to the requests for information without requesting additional information or clarification").

<sup>8</sup> Compare *Boeing Co.*, 364 NLRB No. 24 (2016) (finding a violation where the union contacted and questioned the employer about information that had still not been provided, and the employer replied, "what you've got is all you're going to get").

the Company unlawfully failed to provide the Union with the requested wage information is dismissed.<sup>9</sup>

## II. ALLEGED FAILURE TO BARGAIN OVER USING TEMPORARY CONTRACT WORKERS TO PERFORM UNIT WORK

In April 2016, the Company began using temporary workers employed by a staffing company (AppleOne) to install player tracking devices—so-called universal game adapters (UGAs)—into slot machines at Station Casinos properties in Las Vegas. The General Counsel alleges that the Company unlawfully failed and refused to bargain over this decision and its effects. As discussed below, the allegation is supported by a preponderance of the evidence.

The Company first advised the Union about the Station Casinos UGA project at a bargaining session on March 17, during a discussion of current issues.<sup>10</sup> The Company said the contract was not finalized yet and did not give the Union a start date. However, the Company said that, because the project would be such a large one-time job (approximately 10,000 gaming machines at 16 Station Casinos properties), the Company would not be able to handle it with its own technicians. The Company said it would therefore be using AppleOne temporary workers on the project. However, the Company said it would offer overtime work on the project to any unit technician that wanted it.

The Union stated that it did not object to using the AppleOne temporary workers as long as they did not do unit work. As described in the IGT job description for unit technicians, that work includes "carr[ying] out activities related to" the "semi-routine" to "highly complex" "installation, service, maintenance and upgrading of gaming systems and equipment" (GC Exh. 2).

Shondra Deloach, the Company's pacific region field service director, replied that the temporary workers would be doing "material handling." At the hearing, Deloach testified that, by "material handling," she meant "in relation to moving of the actual material . . . physically handling the material." She admitted that this could "mean different things, depending on what is needed," including but not always installing the material into gaming machines. She also admitted that she did not have a clear idea at that time what work the AppleOne workers would be performing. (Tr. 138–139, 150.)

Whatever Deloach meant, the Union interpreted her response to mean that the AppleOne temporary workers would not actually be installing the UGA system into the slot machines, but just unboxing and prepping the UGA kits for the unit technicians to install.<sup>11</sup> The Union therefore did not request bargaining over the matter at that time.

<sup>9</sup> Nothing in this decision prevents the Union from requesting more specific information concerning the wages of technicians at other locations to the extent the Union believes such information remains relevant and has not been provided to date.

<sup>10</sup> The parties' practice is to hold two-day bargaining sessions, with the first day devoted to contract negotiations, and the second day split between contract negotiations in the morning and current issues in the afternoon.

<sup>11</sup> There is conflicting testimony about whether Deloach specifically stated that the temporary workers would not be doing anything but

The Union did, however, ask the Company to schedule the unit technicians so that they could work on the project. The Union stated that they would not be able to work overtime if the Company continued to schedule them for 14-hour shifts. The Company said it would work with the Union to figure out how to schedule the employees for overtime.

The Union also offered to supply the Company with temporary employees through the union hiring hall. However, the Company said it was not interested because it did not want to actually hire temporary employees; it wanted to utilize them through a staffing company.

Per the usual practice, on March 23, the Company emailed a summary of the meeting to the Union. However, the email nowhere stated that the AppleOne temporary workers would be doing “material handling.” Instead, the email stated that once the unit technicians were fully utilized, the Company would “follow past practice” and use the temporary workers “to complete the needed work” (GC Exh. 5).

Several days later, on March 28, the Union emailed the Company back. The Union stated that it was “concerned about the circumstances which temporary help is hired,” and requested “the opportunity to bargain over this change.” It also requested certain related information (GC Exh. 6).

The Company did not reply. It did not believe there was any legal obligation to bargain with the Union over utilizing the AppleOne temporary workers, and it had already discussed providing the unit technicians with the opportunity for overtime.

The project began the following month. It started at one of the casinos, Sunset Station. The Company assigned two unit technicians, a lead and an assistant lead, to the job on a regular basis. It also offered the other unit technicians an opportunity to work overtime on it, and a few did so.<sup>12</sup>

However, the vast majority of the workers on the job were AppleOne temporary employees. For example, unit technicians Juan Robles and Shane West, who also served as union stewards in the unit, testified that there were about 15–18 AppleOne temporary workers on the job but only 3–4 unit technicians when they worked overtime on the project in April. The AppleOne workers were installing the UGA equipment, and the unit technicians were training or guiding them on how to do it and troubleshooting and fixing any issues or errors. West testified that there were also at least 10 AppleOne workers but only 2 unit technicians when he worked overtime on the project in May. (Tr. 380, 416–420.)

The Company did not notify the Union when the project began. However, the Union eventually learned of it from the unit technicians themselves. The technicians reported that the AppleOne temporary workers were installing the UGA systems in the casino games; that one of them was actually wearing an

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unboxing and prepping the kits. Based on the record as a whole, I find that Deloach did not specifically state this. Rather, this was simply the Union’s understanding of Deloach’s response. See, e.g., Union Organizing Director Soto’s April 21 email to HR Director Hartman (GC Exh. 8). See also fn. 2, above. However, I further find that the Union’s understanding was reasonable under the circumstances.

<sup>12</sup> The Company never adjusted the unit technicians’ schedules to better enable them to work overtime on the project (Tr. 78).

IGT shirt; and that the IGT technicians were being asked to train the temporary workers and fix their mistakes.

On April 20, the Union emailed the Company about these reports. The Union stated that it was “very concerned that non-skilled AppleOne techs are taking trained IGT technicians’ jobs.” The Union again requested to “bargain over this and all other unilateral changes occurring on sites.” (GC Exh. 7.)

The Company emailed a response the following day. The Company stated that it “has, and will continue to, utilize outside contractors for certain distinct projects,” and that it was “unwilling to hire any additional employees for [the Station Casinos UGA] project.” It also stated that it was honoring its previous commitment to the Union to offer the unit technicians first opportunity at overtime on the project. As for the shirts, the Company stated that Station Casinos was requiring the AppleOne workers to wear IGT shirts so that it knows who is working on the project. (GC Exh. 8.)

The Union and the Company continued to email each other the rest of that day and the next, and throughout the following month, repeating their respective positions. (GC Exhs. 8–13; R. Exhs. 13, 14.) They also had a somewhat heated conversation about the matter during a discussion of current issues following their contract negotiations on May 4. The Union again complained that the Company had never bargained over using the AppleOne temporary workers. It also specifically complained that the Company had not adjusted the unit technicians’ schedules so that they could work overtime on the project. The Company responded that “business circumstances” prevented adjusting the technicians’ schedules at that time. The Union also again complained about the AppleOne workers wearing IGT shirts. The Company replied that it would provide the unit technicians with new IGT shirts that were different than the old IGT shirts worn by the AppleOne temporary employees. (Tr. 81–83, 298, 328–331, 373, 389, 477.)

At the end of the meeting, the Union stated that it would submit a written proposal to the Company regarding the project. It did so about 2 weeks later, on May 19, emailing the Company a Letter of Understanding (LOU). Among other things, the LOU proposed that unit work could be contracted out only if the Union could not furnish qualified employees to perform the work. It also proposed that, in the event the Company contracted out unit work, the Company would provide additional training to the unit technicians to reduce the possibility of future use of contractors, and otherwise bargain with the Union over the impact of the contracting out. (GC Exhs 14, 15; Tr. 317, 337.)

There is no record evidence that the parties ever bargained over this proposal, however. And the Company continued thereafter, through at least the date of the hearing, to use the AppleOne temporary workers to install the UGA systems. The original target date to finish the project was July 4, but that date was “pushed out” (Tr. 167).

*A. Whether the Company Unlawfully Refused to Bargain Over the Decision to Use AppleOne Temporary Workers*

An employer’s decision to contract out unit work is ordinarily a mandatory subject of bargaining unless it is consistent with past practice or relates to a change in the scope and direction of

the business. See *Spurlino Materials, LLC*, 353 NLRB 1198, 1218–1219 (2009), reaffd. 355 NLRB 409 (2010), enfd. 645 F.3d 870, 882–883 (7th Cir. 2011), and cases cited there. Here, the Company does not contend that there was a change in the scope or direction of the business. Rather, as indicated in its responses to the Union, the Company contends that using the AppleOne temporary workers on the Station Casinos UGA project was consistent with past practice.

The evidence, however, fails to support the Company's contention. To establish a past practice of subcontracting justifying a refusal to bargain, an employer must show that the previous subcontracting was similar in kind and degree and occurred with such regularity and frequency that employees could reasonably expect the practice to continue or recur on a regular and consistent basis. A history of subcontracting on a random, intermittent, or discretionary basis is insufficient. *Hospital San Cristobal*, 358 NLRB 769, 772 (2012), reaffd. 363 NLRB No. 164 (2016); *Ampersand Publishing, LLC*, 358 NLRB 1415, 1416 (2012), reaffd. 362 NLRB No. 26 (2015); and *Sociedad Espanola de Aulio Mutuo y Beneficiencia de P.R.*, 342 NLRB 458, 468–469 (2004), enfd. 414 F.3d 158, 165–167 (1st Cir. 2005). See also *E. I. Du Pont De Nemours*, 364 NLRB No. 113 (2016) (past practice defense fails unless the employer's unilateral action is consistent with previous recurring unilateral actions that were fixed as to both timing and criteria).

Here, the Company presented evidence at the hearing that IGT had contracted with AppleOne on various projects since 2011. Specifically, IGT had used AppleOne temporary workers for several years to install and remove slot machines and other products at the annual G2E gaming show in Las Vegas.<sup>13</sup> IGT also used AppleOne temporary workers on a job at one of the Station Casinos properties (Sunset Station) in 2014 that required removing and installing slot machines. In addition, IGT's depot department regularly used AppleOne workers for several years to test equipment.

However, none of this previously subcontracted work was similar in kind or degree to the Station Casinos UGA work. It all required at most very simple wire connections, such as plugging and unplugging gaming machines or equipment into an electrical outlet or a testing device. See Field Services Director Deloach's testimony, Tr. 173, 467–469 (the AppleOne material handlers just installed and removed "slot machines" a/k/a "EGMs" (electronic gaming machines), which did not require installing and connecting wires, just "some connections . . . very simple—simple as possible").<sup>14</sup> In contrast, as indi-

<sup>13</sup> This included the show in late 2015, several months after the Union was certified and the Company's bargaining obligation arose. (I take judicial notice that the 2015 G2E show was held on Sept. 29–Oct. 1, 2015.) However, there is no evidence that the Union was ever notified that the Company would use AppleOne workers on the 2015 G2E show, that the parties bargained over it, or that the Union agreed to it. Deloach admitted that she did not tell the Union about it (Tr. 483).

<sup>14</sup> Contrary to the Company's posthearing brief (p. 8), Deloach did not testify that the AppleOne workers removed and installed "parts" on the 2014 Sunset Station project. As for the depot department testing work, Deloach at one point testified that it was the "same exact work" as the work on the UGA project (Tr. 470). However, I discredit that

cated above, the UGA project involved installing the player tracking devices inside the gaming machines themselves. This required retrofitting the device into the slot machine, installing a bracket to hold it, and connecting wires between the device and the slot machine (Tr. 470). This was significantly more technical work, as evidenced by the fact that the unit technicians had to train or guide the AppleOne "material handlers" in performing it.

Further, there is no record evidence that the Company had ever previously used AppleOne temporary employees to actually work alongside the unit technicians. Deloach acknowledged that no IGT technicians worked on the 2014 Sunset Station project (Tr. 479). She also admitted that she did not know if any IGT technicians worked alongside the AppleOne temporary employees at the annual G2E gaming show. She testified that the AppleOne temporary employees start working 2 months before the show. In contrast, she testified that the unit technicians worked the show during the last week or two (the show itself lasts only 3 days). (Tr. 484–486). She also admitted that the depot department where the AppleOne workers perform testing "is not part of the bargaining unit" (Tr. 478).

Indeed, Shane West, a legacy IGT unit technician, credibly testified that he had never previously observed or heard of a temporary worker from AppleOne or elsewhere performing unit work in the entire 10 years he had worked for IGT (Tr. 424, 430).

The Company also argues that it had no obligation to bargain over using the AppleOne temporary employees on the Station Casinos UGA job because labor costs were not a factor in the decision. However, there are two problems with this argument. First, it is not supported by the evidence. Although both HR Director Hartman and Deloach testified that labor costs were not a factor, Hartman acknowledged on further examination that there was no foundation for her testimony and that she did not know what factors the Company considered (Tr. 113–116). She also admitted that the AppleOne temporary employees are paid less than the unit technicians; that even the lowest paid unit technician is paid more than the AppleOne temporary employees (Tr. 67).

As for Deloach, she subsequently admitted that the Company contracted with AppleOne to provide temporary workers because it did not want to go through the hiring, employment, and licensing/regulatory compliance process (Tr. 458–461). The Company's posthearing brief (p. 3) argues that these are "logistics." Maybe so, but they are also labor costs. See generally *Dubuque Packing Co.*, 303 NLRB 386, 391 (1991) (labor costs include both direct and indirect costs of labor), enfd. 1 F.3d 24 (D.C. Cir. 1993), cert. denied 511 U.S. 1138 (1994). See also *Electrical Workers Local 11*, 217 NLRB 397, 400 (1975) (employer's labor costs included man-hours lost training new employees and familiarizing them with employer's equipment).

Second, even if the evidence established that labor costs were not a factor, the Company's argument would not be supported by Board law. An employer is not relieved from bargaining over a subcontracting decision simply because labor

testimony to the extent it is inconsistent with her testimony specifically describing the testing and the UGA work.

costs were not a reason for the decision. Rather, the employer's non-labor cost reasons for the subcontracting decision must relate to a change in the scope and direction of the business. *Overnite Transportation Co.*, 330 NLRB 1275, 1276 (2000), affd. in part and reversed in part mem. 248 F.3d 1131 (3d Cir. 2000).<sup>15</sup> Here, as indicated above, the Company does not contend that the decision to use the AppleOne temporary employees on the Station Casinos UGA project related to a change in the scope and direction of its business.

The Company also argues that no bargaining was required because the unit technicians were offered an opportunity to work overtime on the project, did not suffer any loss of work or pay, and were therefore not adversely impacted in any material, substantial, or significant way by the decision to use AppleOne temporary employees. However, this argument fails as well. It is not, in fact, altogether clear that no technicians lost any work or pay. As noted by the General Counsel, West testified that he was turned away when he arrived to work overtime on the project in mid-May 2016 (Tr. 419–420). In any event, the Board has held that an employer must bargain over subcontracting decisions irrespective of whether any current unit employee lost work or pay. See *ibid* (“We think it plain that the bargaining unit is adversely affected whenever bargaining unit work is given away to nonunit employees, regardless of whether the work would otherwise have been performed by employees already in the unit or by new employees who would have been hired into the unit.”). See also *Spurlino Materials*, 353 NLRB at 1219 (“[I]n the absence of subcontracting, Respondent might have hired additional unit employees, resulting in jobs for them and benefits for the Union and current unit employees in having an expanded unit.”).

Finally, the Company argues that it has repeatedly made clear to the Union that it does not want to hire new employees on either a permanent or temporary basis. However, as indicated above, the Company's position has little or nothing to do with a lack of business. Indeed, Deloach testified that the Company has so much business that it “always” has overtime available, enough that “all” of its unit technicians could work overtime “every single day, seven days a week” (Tr. 172–174). In any event, the Company admits that it did not actually bargain with the Union to pass as required by the Act (Tr. 25, 121).<sup>16</sup>

Accordingly, the Company unlawfully failed or refused to bargain with the Union over the decision to use AppleOne temporary employees on the Station Casinos UGA job, as alleged.

<sup>15</sup> The cases cited by the Company, *Professional Medical Transport*, 362 NLRB No. 19 (2015) and *Mercy Health Partners*, 358 NLRB 566 (2012), are distinguishable as they involved the relocation of unit work.

<sup>16</sup> The Company likewise does not contend that its unilateral decision to use AppleOne temporary employees was compelled by economic exigencies or the specifications of its contract with Station Casinos. Although Robles testified that Deloach stated at the May 4 session that Station Casinos wanted the Company to use AppleOne temporary workers rather than its own technicians (Tr. 389–390), this was not corroborated by any other witness (and the Company's posthearing brief does not even mention it). Nor is there any documentary evidence that Station Casinos required the Company to use AppleOne temporary workers. The Station Casinos contract is not in evidence.

### *B. Whether the Company Unlawfully Failed to Provide the Union With a Meaningful Opportunity to Bargain Over the Effects of the Decision*

An employer must bargain with the union over the effects of a management decision, regardless of whether decision itself was a mandatory subject of bargaining, unless the decision has no material or substantial impact on the unit employees. See *Fresno Bee*, 339 NLRB 1214 (2003), and cases cited there. As discussed above, contrary to the Company's contention, the decision to use the AppleOne temporary employees on the Station Casinos UGA project had a material and substantial impact on the unit technicians. Thus, the Company was obligated to bargain over the effects of the decision.

The Company also argues that, even assuming *arguendo* that it had a duty to bargain over the effects of the decision to use AppleOne temporary employees on the project, it satisfied that obligation. In support, the Company cites its offers to provide the unit technicians with an opportunity to work overtime on the job and with new IGT shirts that differed from those worn by the AppleOne workers. It also cites the Union's failure to make a specific proposal for adjusting their work schedules to permit them to work more overtime.

Again, however, the Company's argument is contrary to Board law. Where, as here, a union is entitled to bargain over both the decision and its effects, the employer must provide the union a prior or contemporaneous opportunity to bargain over the former to fully satisfy its obligation to bargain over the latter. See *Solutia, Inc.*, 357 NLRB 58, 65 (2011), *enfd.* 699 F.3d 50 (1st Cir. 2012), and cases cited there.

The Company does not challenge this rule (indeed, it does not even acknowledge it). In any event, the rule is clearly consistent with, if not compelled by, the “give and take” nature of the statutorily mandated bargaining process.<sup>17</sup> Bargaining over effects may be substantially affected by bargaining over the decision (and vice versa). An employer might well offer or agree to more generous proposals to compensate employees for the effects of a management decision in order to obtain the union's agreement or acquiescence on their behalf to the decision itself without a strike or lockout. Similarly, a union would have more leverage in bargaining with the employer over the effects of a management decision if it also had the right and contemporaneous opportunity to bargain with the employer over the decision itself.

Here, as discussed above, the Company unlawfully refused to bargain with the Union over the decision to use AppleOne temporary employees on the Station Casinos UGA project. Accordingly, the Company unlawfully failed to provide the

<sup>17</sup> See generally *Steelworkers v. CCI Corp.*, 395 F.2d 529, 531 (10th Cir. 1968) (“[L]abor contract negotiation bears the coercion of statute, . . . negotiators often give and take on minor issues to supply the required continuity of bargaining and anticipatory to the main issues, and . . . it would indeed frustrate collective bargaining if the law silently closed a deal while the negotiator was angling for some other point.”), *cert. denied* 393 U.S. 1019 (1969). See also *Renegotiation Board v. Bannerkraft Clothing Co.*, 415 U.S. 1, 22–23 (1974) (“[N]egotiation is a bargaining process, with give and take, and with stress upon and use of the strengths of one's own position and the weaknesses of the position of the other party.”).

Union with a timely and meaningful opportunity to bargain over the effects of that decision as well.

### III. ALLEGED DIRECT DEALING AND THREAT OF LOSS OF BENEFITS

As indicated above, the parties got into a heated conversation about the Company's use of the AppleOne temporary employees on the Station Casinos UGA project during a discussion of current issues following the contract negotiations on May 4. There was a lot of back and forth, with the Company's attorney and lead negotiator, Theo Gould, repeating that the Company had offered the unit technicians overtime and was not interested in hiring anymore employees, and Union Organizing Director Soto repeating that the Company had failed to bargain with the Union. Eventually, the conversation deteriorated to the point that Gould said he did not care what Soto said or thought the law required, and Soto stood up and said that if Gould did not care what he had to say, the meeting was over. At that point, Gould looked at union stewards Robles and West and said, "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?"<sup>18</sup>

The General Counsel argues that the words and context of Gould's statement reveal that he was appealing to Robles and West in their capacity as unit employees rather than union stewards; the statement was an explicit threat that they risked losing overtime if the Union insisted on bargaining; and the threat was intended to persuade them to adopt a different posture than the Union. Accordingly, the General Counsel alleges that the statement constituted both direct dealing in violation of Section 8(a)(5) of the Act, and a threat of loss of benefits in violation of Section 8(a)(1) of the Act.<sup>19</sup>

<sup>18</sup> Tr. 221, 329 (Soto), 424–425 (West). Robles testified that Gould made the statement to Soto, stating "I can't believe you're doing this to your guys, you're affecting their pay, don't do this to your guys" (Tr. 390), or "you're going to take money from the guys, you're going to take wages from them, don't do this to your guys." (Tr. 403). However, I give greater weight to the testimony of Soto and West, as their testimony was mutually corroborative and uncontradicted by the Company's witnesses.

<sup>19</sup> The General Counsel amended the complaint to add both allegations at the beginning of the hearing. See fn. 2, above. The Company asserts that both allegations are barred by Section 10(b) of the Act because they are not contained in or closely related to any of the underlying charges filed by the Union. However, as indicated above, the alleged unlawful statement at the heart of both allegations was made during a discussion of, and directly related to, the Company's obligation to bargain over the subcontracting decision and its effects, the primary allegation in the Union's charges. See fn. 7, above. There was no real danger in these circumstances that the relevant evidence regarding the statement would not be preserved. Accordingly, the Company's 10(b) defense is rejected. See *Columbia Portland Cement Co.*, 303 NLRB 880, 884 (1991), *enfd.* 979 F.2d 460 (6th Cir. 1992) (8(a)(5) direct dealing allegation was closely related to 8(a)(5) unilateral change allegations); *Trim Corp. of America*, 349 NLRB 608 (2007) (alleged 8(a)(1) threat of loss of employment was closely related to 8(a)(5) withdrawal of recognition allegation); *Helnick Corp.*, 301 NLRB 128 (1991) (alleged 8(a)(1) threat of retaliation was closely related to 8(a)(5) refusal to bargain allegation); and *Overnite Transportation Co.*, 296 NLRB 669 (1989), *enfd.* 938 F.2d 815, 820–821 (7th Cir. 1991)

However, as indicated by the Company, to constitute unlawful direct dealing a communication must be made "to the exclusion of the union." See *El Paso Electric Co.*, 355 NLRB 544, 545 (2010), and cases cited there. Here, regardless of whether Gould was speaking to Robles and West as employees, they were there as union stewards and members of the bargaining team (Tr. 404, 144). Further, the statement was made in the presence of Union Organizing Director Soto. Thus, it plainly was not made to the exclusion of the Union. See *FMC Corp.*, 290 NLRB 483, 486 (1988) (finding no unlawful direct dealing in part because union officers were present). Accordingly, the direct dealing allegation is dismissed.

The alleged threat that the employees would lose overtime is a different matter. Although the statement was made at the bargaining table, the parties were not bargaining but arguing about whether the Company was required to bargain. Offering overtime on the Station Casinos UGA project was not a proposal at that point; the Company had already offered it to the unit technicians. And the Union was not seeking to take the overtime away from them, but at a minimum to make overtime on the project more available. In this context, Gould's statement was not excusable "bluster and banter" in the give and take of bargaining. See *Medco Health Solutions of Las Vegas*, 357 NLRB 170, 172 (2011) (rejecting employer's argument that its statements refusing to bargain were mere "bluster and banter"), *enfd.* 701 F.3d 710 (D.C. Cir. 2012). Rather, as indicated by the General Counsel, his statement would reasonably have been interpreted as a threat to take away the employees' overtime opportunities if the Union did not withdraw its rightful demand for bargaining. Accordingly, the statement was unlawful. See *General Trailer, Inc.*, 330 NLRB 1088, 1097 (2000) (employer's statement to employee that his overtime was being restricted or eliminated because he exercised his right to vote for the union as his collective-bargaining representative was an unlawful threat of reprisal).

### IV. ALLEGED OVERBROAD NONDISPARAGEMENT PROVISION

The final allegation is based on the first charge filed by the Union in late December 2015 (GC Exh. 1(a)). At that time, the Company maintained the following provision in the Separation Agreement and General Release that it sometimes gave to employees whose employment had been terminated:

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.

(GC Exh. 27.) The General Counsel contends that the provision violated Section 8(a)(1) of the Act because it would reasonably be construed by former employees to prohibit them from engaging in conduct protected by the Act, including filing charges with the Board, communicating with current employees to seek their support for charges or claims, and assisting current employees in their charges, claims, or concerns.

(alleged preelection 8(a)(1) threats not to bargain in good faith were closely related to 8(a)(5) bad-faith bargaining allegation).

The allegation is well supported by Board precedent. See *Pratt (Corrugated Logistics), LLC*, 360 NLRB 304 (2014) (nondisparagement provision in severance agreement that employer gave to unlawfully laid off employees was unlawfully overbroad to the extent it prohibited them from engaging in conduct that “disparages, criticizes . . . or otherwise casts a negative characterization upon” the company); and *Quicken Loans, Inc.*, 359 NLRB 1201, 1201 fn. 3 (2013), reaffid. 361 NLRB 904, 904 fn. 1 (2014) (nondisparagement provision in employer’s employment agreement stating that employees will not “publicly criticize, ridicule, disparage or defame” the company was unlawfully overbroad).

Nevertheless, the Company argues that no violation may be found because it is undisputed that the separation agreement was not given to employees until after their employment was terminated, rather than before or during their employment, and there is no evidence that it was ever given to any former employee who was unlawfully terminated. The Company argues that only current employees or employees who have been unlawfully terminated are protected under the Act. See, e.g., *Br.* at 39 fn. 31 (“For purposes of the law, a former employee who has lawfully separated from the company has no different status than any other third party in the marketplace”). However, the Board has repeatedly held that the term “employee” as defined in Sec. 2(3) of the Act includes former employees even if they were not unlawfully terminated. See *Employer’s Resource*, 363 NLRB No. 59, (2015), enf. denied on other grounds per curiam 2016 WL 6471215 (5th Cir. 2016); and *Fuji Food Products, Inc.*, 363 NLRB No. 118 (2016), and cases cited there. The argument is therefore rejected.

The Company also argues that no violation should be found because it is undisputed that the provision was revised effective January 25, 2016, approximately a month after the Union filed the charge, to conform to Board law.<sup>20</sup> However, the Company does not contend that it fully repudiated its prior maintenance of the overbroad provision in the manner required to warrant or justify withholding a remedy and order. See *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). See also *Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d 99, 108 (D.C. Cir. 2003), and cases cited there. This argument is therefore likewise rejected.

Accordingly, by maintaining the overbroad nondisparagement provision in its separation agreement prior to January 25, 2016, the Company violated the Act as alleged.

#### CONCLUSIONS OF LAW

1. The Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act by

(a) Failing or refusing to provide the Union on request with a list of all Company locations in the U.S.

(b) Failing or refusing to provide the Union with a meaningful opportunity to bargain over the Company’s decision to use AppleOne temporary employees on the Station Casinos UGA

<sup>20</sup> See R. Exh. 20. The General Counsel’s posthearing brief (p. 32) acknowledges that the revised provision conforms to the requirements of the Act.

project and the effects of that decision on the unit technicians.

2. The Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act by:

(a) Threatening the unit technicians with loss of overtime because the Union sought to bargain on their behalf over the Company’s use of AppleOne temporary employees on the Station Casinos UGA project.

(b) Maintaining an overbroad nondisparagement provision in its Separation Agreement and General Release.

3. The Company did not otherwise violate the Act as alleged in the complaint.

#### REMEDY

The appropriate remedy for the foregoing violations is an order requiring the Company to cease and desist and to take certain affirmative action. As requested by the General Counsel, this properly includes a requirement that the Company cease using the AppleOne temporary employees on the Station Casinos UGA project, in the event it has not yet been completed, and that the Company make the unit technicians whole for any loss of pay or benefits they may have suffered as a result of its unlawful unilateral decision to use the temporary workers.<sup>21</sup> Any backpay due shall be computed in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest compounded daily as prescribed in *New Horizons*, 283 NLRB 1173 (1987) and *Kentucky River Medical Center*, 356 NLRB 6 (2010). The Company shall also be required to compensate the unit technicians for the adverse tax consequences, if any, of receiving a lump sum backpay award, and to file with the Regional Director a report allocating the backpay to the appropriate calendar year(s). See *Advoserv of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

#### ORDER<sup>22</sup>

The Respondent, IGT, d/b/a International Game Technology, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to furnish International Union of Operating Engineers Local Union 501, AFL–CIO 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.

(b) 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.

<sup>21</sup> As discussed above, it is not clear that no technicians lost any work opportunities on the project. A make whole order is therefore warranted so that the appropriate backpay remedy, if any, may be considered and determined at the compliance stage. See *Overnite Transportation*, 330 NLRB at 1276.

<sup>22</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) 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.

(d) Maintaining overbroad nondisparagement or other provisions that would reasonably be interpreted by employees to prohibit them from engaging in protected concerted activity.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Provide the Union with a list of all Company locations in the U.S.

(b) Cease using AppleOne temporary employees to perform unit technician work on the Station Casinos UGA 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.

(c) Make whole the unit technicians for any loss of pay or benefits resulting from its unlawful unilateral decision to use AppleOne temporary employees to perform unit work on the Station Casinos UGA project.

(d) Compensate the affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each employee.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Notify all former employees who were given the Separation Agreement and General Release containing the unlawfully overbroad nondisparagement provision that the provision has been revised, and provide them with a copy of the revised provision.

(g) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix".<sup>23</sup> Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as

by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 30, 2015.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., November 15, 2016

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT refuse to provide International Union of Operating Engineers Local Union 501, AFL-CIO, with information that is relevant and necessary to its role as the collective-bargaining representative of our full-time and regular part-time technicians.

WE WILL NOT subcontract the work of our 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.

WE WILL NOT threaten our 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.

WE WILL NOT maintain overbroad nondisparagement or other provisions that would reasonably be interpreted to prohibit you from exercising your rights under Federal labor law.

WE WILL NOT in any like or related manner interfere with your rights under Federal labor law.

WE WILL cease using AppleOne temporary employees to perform the work of our unit technicians on the Station Casinos UGA project until such time as the Union has been afforded a meaningful opportunity to bargain to an agreement or bona fide

<sup>23</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

impasse over the use of such temporary contract employees on the project and its effects on the unit.

WE WILL make whole our unit technicians for any loss of pay or benefits resulting from our unlawful unilateral decision to use AppleOne temporary employees to perform unit work on the Station Casinos UGA project.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each employee.

WE HAVE revised the unlawfully overbroad non-disparagement provision in our "Separation Agreement and General Release," and WE WILL notify all former employees who were given the Separation Agreement and General Release

containing the unlawfully overbroad nondisparagement provision that the provision has been revised, and provide them with a copy of the revised provision.

IGT D/B/A INTERNATIONAL GAME TECHNOLOGY

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/28-CA-166915](http://www.nlr.gov/case/28-CA-166915) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

