UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

| | |
|---|---|
| IGT d/b/a INTERNATIONAL GAME TECHNOLOGY,<br><br>Respondent,<br><br>-against-<br><br>INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL UNION 501, AFL-CIO,<br><br>Charging Party. | Case Nos. 28-CA-166915<br>28-CA-173256<br>28-CA-17 4003<br>28-CA-174526 |

**SUPPLEMENTAL BRIEF IN SUPPORT OF RESPONDENT IGT'S POSITION THAT THE NON-DISPARAGEMENT PROVISION DOES NOT VIOLATE THE ACT**

Theo E. M. Gould
LITTLER MENDELSON, P.C.
900 Third Avenue
New York, NY 10022.3298
212.583.9600
*Attorneys for Respondent*

## TABLE OF CONTENTS

**PAGE**

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

## I. PRELIMINARY STATEMENT

On March 20, 2019, the Board remanded the complaint allegation that IGT's non-disparagement provision in its Separation Agreement and General Release violates Section 8(a)(1) of the Act for further consideration under *Boeing Co.*, 365 NLRB No. 154 (2017). Respondent IGT respectfully submits this supplemental brief in support of its position that the non-disparagement provision does not violate the Act.

Under the Board's *Boeing* decision, IGT's non-disparagement provision is a facially neutral policy that does not restrict or prohibit Section 7 protected activity. It is undisputed that this contract clause was not promulgated or adopted in response to any union organizing or Section 7 protected activity. Indeed, it was not promulgated to apply to any employee of IGT nor is there any record evidence that any employee of IGT ever saw the non-disparagement clause. Rather, it is undisputed that the non-disparagement clause in question was exclusively part of a voluntary separation agreement that was only presented occasionally to an individual after that person's employment had already been separated from IGT. In fact, it would have only applied if an individual, post-employment from IGT, voluntarily desired to accept consideration for its terms.

In light of these facts, the non-disparagement provision is a Category 1 policy under *Boeing*. As a Category 1 policy, it is lawful and does not violate Section 8(a)(1), because there is no evidence or any allegation that the policy has actually interfered with any Section 7 protected activity engaged in by an IGT employee. The General Counsel ("GC") failed to satisfy his burden and presented no evidence to the contrary. However, even assuming the General Counsel introduced evidence, which he did not, regarding any impact the provision in the severance agreement could have on NLRA rights, any such infringement is hypothetical and de minimis, at best, and the non-disparagement provision is supported by compelling business justifications,

specifically IGT protecting itself from disparagement from non-employees. IGT's business justification outweighs any potential impact the provision could have.

The General Counsel – inaccurately – attempts to compare the instant case to Board decisions involving broad company policies, handbooks or procedures. Indeed, the General Counsel seeks a remedy in this case that implies some sort of consistent application of the Separation Agreement at issue to "current or former" employees in a formulaic manner. Such requests and analysis fundamentally misapprehends and misinterprets the record evidence. To be clear – there is no record evidence that IGT ever offered the Separation Agreement to any active employee - ever. There is no record evidence that IGT regularly or systematically offered this Separation Agreement to any former employees. Rather, the undisputed record evidence was that IGT, on occasion, would offer the voluntary Separation Agreement to certain former employees after they had already been terminated. There is no record evidence that this anyone ever saw or knew of the Separation Agreement during their employment with the company.

These record facts, or lack thereof, are essential to the disposition of the General Counsel's allegation. In any balancing test regarding the potential impact of the Separation Agreement on IGT's employees, the answer must be none because of the undisputed record evidence. In any analysis of the potential impact of the Separation Agreement on former employees, the answer must be no more than occasionally, and without formula or regularity, as there is no record evidence to support a broader conclusion. Further, there is no record evidence that any former employee ever communicated the terms of the Separation Agreement to any current employee, nor that any current or former employee interpreted the Separation Agreement as even potentially infringing on any Section 7 rights. When given a second opportunity to add to the sparse record evidence to satisfy their burden of proof, the General Counsel declined.

Lastly, the non-disparagement clause in question contained a broad and unambiguous savings clause such that no one could construe the term to interfere with any Section 7 right to discuss that individual's terms and conditions of employment with IGT. Specifically, the clause explained that it was not meant to stop the individual to discussing any and all matters regarding their employment with anyone, without qualification.

Accordingly, for the reasons set forth herein, the General Counsel's Complaint should be dismissed.

## II. STATEMENT OF FACTS

### A. IGT's Separation Agreement

The undisputed record evidence established that under certain circumstances, after an employee has had their employment separated, IGT may offer a voluntary separation agreement to a former employee for that person to consider. Doti[1] Tr. 192:12-22. As Doti explained,

> Q. Is this separation agreement [GC 27], is this part of the informing the employee that they will no longer be with the company?
> A. No. We inform the employee that they will no longer be with the company and then after they've been informed of that we, in some cases, offer the separation agreement.

Doti, Tr. 192-93[2]

The voluntary separation agreement contained an exchange of monetary consideration for the post-employment individual in exchange for certain voluntary terms and a release of past claims against the company. Resp. 20. The non-disparagement language set forth certain restrictions and an unambiguous savings clause. It provided:

> You will not disparage or discredit IGT or any of its affiliates, officers, directors and employees. You will forfeit any right to

[1] Julie Doti ("Doti"), Director of Human Resources for Global Field Services, Tr. 188:22-23.

[2] Q. Do you have knowledge of when this agreement is provided to workers, I'll call them?
A. It's not provided to workers. It's provided to former employees.
Doti, Tr. 190.

> receive the payments or benefits described in Section 3 if you engage in deliberate conduct or make any public statements detrimental to the business or reputation of IGT. **Nothing in this clause is intended to prevent you from testifying in a legal proceeding or complying with a subpoena, and nothing is intended to interfere with any of your rights to consult with anyone on employment matters, whether or not those matters lead to court or legal proceedings.**

Resp. Ex. 20, Section 8. *See also* Hunt, Tr. 487:4-17-488:23.[3]

It is undisputed that the voluntary clause in question never applied to any employee of IGT, nor was it a term of employment. There is no record evidence that the Separation Agreement was ever shown to or seen by any employee of IGT, or that anyone ever interpreted or perceived the voluntary clause as potentially restricting any individual's Section 7 rights.

## III. ARGUMENT

The GC has the burden to prove by a preponderance of the evidence the facts sufficient to show alleged violations of Sections 8(a)(1) and (5) of the Act. *Pan American Grain Co., Inc.*, 351 NLRB 1412, n. 9 (2007); *Vista Del Sol Health Servs., Inc.*, 363 NLRB No. 135 (Feb. 24, 2016). In this case, the GC has not carried his burden and the claims must be dismissed.

The GC claims that IGT violated Section 8(a)(1) of the Act by maintaining non-disparagement language in a separation agreement, which allegedly interfered with, restrained, and coerced IGT's employees in the exercise of their Section 7 rights. Compl. ¶¶ 5 & 7. With respect to the alleged Separation Agreement, the Complaint states:

> Since about June 30, 2015, Respondent has maintained the following overly-broad provision in its Separation Agreement and General Release:

[3] Doti testified that GC 27 was an old version of the Separation Agreement, no longer used by the Company. Doti Tr. 189:22-190:1 (emphasis added). The GC never established how long the older version had been used, other than it was no longer relevant.[3] IGT's In-House Counsel, Bethany Hunt, testified that as of January 25, 2016, IGT ceased using GC 27.

> 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.

Compl. ¶ 5.

This claim must be dismissed because: (1) the non-disparagement provision is a Category 1 lawful policy under Boeing; (2) IGT's has a legitimate interest in protecting itself disparaging statements; and (3) the undisputed evidence shows that IGT does not provide its separation agreement to employees, and there is no record evidence that any employee of IGT ever saw the agreement.

### A. Under Boeing, The Challenged Non-Disparagement Provision is Lawful

In *Boeing Co*., 365 NLRB No. 154 (2017), the Board overturned its *Lutheran Heritage* standard for evaluating whether facially neutral employment policies impermissibly infringe on workers' Section 7 rights. Under *Lutheran Heritage*, a facially neutral policy would be found to violate the Act if "employees would reasonably construe the language to prohibit Section 7 activity." *Lutheran Heritage Village-Livonia*, 343 NLRB at 646-47. In recent years the *Lutheran Heritage* standard has received significant criticism, as it led to Board decisions striking down such innocuous policies as workplace civility rules and rules prohibiting abusive/foul language. *See Boeing* at *12-14 (providing examples of how the *Lutheran Heritage* standard has "led to arbitrary results."). Accordingly, in *Boeing* the Board announced a new standard, which, rather than focus solely on whether employees might "reasonably construe" a policy to prohibit protected activities, evaluates: (i) the nature and extent of a policy's potential impact on NLRA rights; and (ii) the legitimate justifications associated with the policy. 2017 WL 6403495, at *15. The new standard set out in *Boeing* endeavors to strike the proper balance between the invasion of employee rights protected by the Act and the asserted business justifications for the rules. *Id*., slip op. at 15.

The Board indicated that its new balancing test will result in classifying employment policies, rules and handbook provisions in the below three categories:

> Category 1 will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Examples of Category 1 rules are the no-camera requirement in this case, the "harmonious interactions and relationships" rule that was at issue in William Beaumont Hospital, and other rules requiring employees to abide by basic standards of civility.
>
> Category 2 will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
>
> Category 3 will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another.

Here, IGT's non-disparagement provision qualifies as lawful under Category 1 since it does not prohibit or interfere with the exercise of NLRA rights and there is a legitimate justification for the rule. It is essential to highlight in this analysis that the clause at issue was in an individual voluntary separation agreement. That is – it is undisputed that it was not a clause that could even arguably be interpreted as applying to any existing employee of IGT and thus could not "prohibit or interfere with the exercise of NLRA rights".[4]

[4] Once an employee ceases to be employed (under lawful circumstances), he/she is no longer covered by the Act's terms, whether he/she is terminated or quits. *See, e.g., Veouvie Foods,* 321 NLRB 328, 344 (1996)(employee was not an employee of employer where not on the payroll, and has no wages); *Model A & Model T Mtr Co.*, 259 NLRB 555, 568 (1981); *S.B. Thomas, Inc.,* 256 NLRB 791, 793 (1981)(laid off employees with no demonstrated reasonable expectancy of recall are non-employees). Similarly, the Supreme Court observed in *NLRB v. Town & Country*, 516 U.S. 85, 90 (1995), an employee under the Act is generally a person who works for another in return for financial or other compensation; the dictionary definition of employee applies to section

Furthermore, IGT has a legitimate interest in asking non-employees not to disparage or discredit IGT or any of its affiliates, officers, directors and employees. Again, as highlighted above, this is a completely voluntary post-employment agreement. Anyone that does not want to be restricted in this manner does not have to be. There is no other ongoing connection or relationship between the individual and IGT. Rather, this provision involves a basic standard of civility. It solely refers to conduct which is not coved by Section 7, such as disloyal statements which can disparage, discredit or be detrimental and harm the business and reputation of IGT. The Board has found that "[o]therwise protected communications with third parties may be so disloyal, reckless, or maliciously untrue [as] to lose the Act's protection. *Valley Hosp. Med. Ctr., Inc.,* 351 NLRB 1250, 1252 (2007). Because employees do not have the absolute right to disparage their employers, the Board has found non-disparagement rules and policies to be lawful when they address conduct that is reasonably associated with actions that fall outside the protection of the Act, such as conduct that is abusive, malicious, injurious, threatening, intimidating, coercing, profane, or unlawful. *See e.g. Palms Hotel and Casino*, 344 NLRB 1363, 1367-1368 (2005) (rule addressing "conduct which is injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees).

Recently in *Baylor University Medical Center*[5], the non-disparagement clause at issue stated:

> **[**Terminated Employee] agrees that she shall not ... make, repeat or publish any false, disparaging, negative, ... or derogatory remarks ... concerning ... [Baylor] and the Released Parties ... or otherwise take

2(3) of the Act. Thus, as Doti's testimony established that the Separation Agreement was not given to any employee of IGT, a violation cannot be found regarding its non-disagreement clause as it relates to anyone who received the agreement.

[5] *Baylor University Medical Center*, 16-CA-195335 (N.L.R.B. Feb. 12, 2018)(ALJ Ringler)

> any action which might reasonably be expected to cause damage ...
> to ... [Baylor] and the Released Parties ....

Applying the *Boeing* analysis, ALJ Ringler found that the non-disparagement clause was lawful because "rules requiring employees to abide by basic standards of civility are generally lawful under Boeing Category 1" and "the non-disparagement provision, which bars false, disparaging, negative, …. or derogatory remarks," is a valid civility standard."

The Board has provided guidance regarding non-disparagement clauses under Boeing. On August 30, 2018, the Board issued an advice memo regarding *Coastal Industries, Inc. d/b/a Coastal Shower Doors*, Case 12-CA-194162. The Board found that a rule that states "[d]isparaging, abusive, profane, or offensive language (materials that would adversely or negatively reflect upon the Company or be contrary to the Company best interests) and any illegal activities – including piracy, cracking, extortion, blackmail, copyright infringement, and unauthorized access to any computers of the Internet or email – are forbidden" can be considered a civility policy and thus a lawful Category 1 rule.

Furthermore, the non-disparagement clause at issue provides a savings clause that makes clear it does not apply to any of the broad panoply of rights protected by Section 7 -- in other words – any employment matter. And the savings clause is not limited to communications with the union or any other individual or entity. Rather, it unambiguously provides that the former employee may discuss any employment matter with literally anyone, without qualification.

Accordingly, under the *Boeing* analysis, the GC's allegation that IGT maintained an unlawful non-disparagement clause in its Separation Agreement must be dismissed.

**B. IGT Has A Legitimate Interest in Preventing Disparagement**

Alternatively, assuming arguendo that the non-disparagement clause is found to restrict any Section 7 rights, under the Board's *Boeing* standard, a work rule is lawful so long as the

legitimate justifications associated with the rule outweigh any potential impact on employees' Section 7 rights. *Boeing Company*, 365 NLRB No. 154, slip op. at 14 (December 14, 2017); *see also, Heartland Coca-Cola*, 2017 WL 4803581, at *2 (Oct. 23, 2017) ("An employer may implement and maintain a rule restricting protected activity, so long as there is an overriding interest in doing so.") (citing *Flagstaff Medical Center*, 357 NLRB at 662-663).

Here, the balancing test clearly falls in favor of IGT. It is well settled (and recognized by the Board) that "an employer has a legitimate interest in preventing the disparagement of its products or services and, relatedly, in protecting its reputation (and the reputations of its agents as to matters within the scope of their agency)..." *Three D, LLC d/b/a Triple Play Sports Bar and Grille*, 361 NLRB 308 (2014). IGT has a right to protect itself from disparagement. As discussed above, disparaging statements are not protected by the Act

In light of this business justification, the GC bears the burden of establishing that a facially neutral policy would be interpreted by a reasonable employee to potentially interfere with the exercised of their Section 7 rights and "a challenged rule may not be found unlawful merely because it could be interpreted, under some hypothetical scenario, as potentially limiting some type of Section 7 activity, or because the employer failed to eliminate all ambiguities from the rule, an all-but-impossible task." *LA Specialty Produce Company*, 368 NLRB No. 93 (2019)(finding confidentiality rule lawful under the *Boeing* analysis).

There is no testimony in the record that any employee of IGT, under any circumstances, has ever seen or become aware of the Separation Agreement, or the contents therein. As such, the record is devoid of a single supporting fact that one of IGT employee's Section 7 rights could be restricted as a result of the Separation Agreement, or that any employees could reasonably construe the language of the non-disparagement clause in the Separation Agreement to prohibit Section 7

rights.[6] Rather, in analyzing a post-employment individual, the question becomes could that individual believe that they were restricted from communicating about their former employment matters with anyone. And in that, as noted above, the record evidence is undisputed. The clause states verbatim– "**[N]othing is intended to interfere with any of your rights to consult with anyone on employment matters, whether or not those matters lead to court or legal proceedings."**

Accordingly, based on the above, the General Counsel's allegation that IGT maintained an unlawful non-disparagement clause in its Separation Agreement must be dismissed.

## IV. CONCLUSION

Based on the foregoing, IGT respectfully submits that the General Counsel failed to meet his burden of proof and the claims should be dismissed.

Dated: December 2, 2019

/s/ Theo E.M. Gould

Theo E. M. Gould
LITTLER MENDELSON, P.C.
900 Third Avenue
New York, NY 10022.3298
212.583.9600

*Attorneys for Respondent*

[6] It is also undisputed that IGT did not promulgate its Separation Agreement in response to union activity. Further, there is no record evidence that the non-disparagement clause was ever enforced. Doti Tr. 198.

## CERTIFICATE OF SERVICE

The undersigned certifies that on the 2nd day of December 2019, the foregoing pleading was filed via electronic filing with:

Honorable Jeffrey D. Wedekind
Administrative Law Judge
NLRB – Division of Judges
901 Market Street, Suite 300
San Francisco, CA 94103-1779

and served via e-mail:

Dawn M. Moore
Administrative Assistant
National Labor Relations Board, Region 28
300 Las Vegas Boulevard Suite, Suite 2-901
Las Vegas, Nevada 89101
Dawn.Moore@nlrb.gov

Adam Stern, Esq.
3424 Wilshire Boulevard, Suite 100
Los Angeles, CA 90010
Email: laboradam@aol.com
Attorney for the Union

/s/ Theo E.M. Gould
Theo E. M. Gould
Littler Mendelson, P.C.
900 Third Avenue
New York, NY 10022.3298
212.583.9600
*Attorneys for Respondent*