

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES**

**IGT d/b/a INTERNATIONAL GAME  
TECHNOLOGY**

**and**

Cases 28–CA–166915

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

*Néstor M. Zárate Mancilla, Esq.,*  
for the General Counsel

*Theo E. M. Gould, Esq. (Littler Mendelson, P.C.),*  
for the Respondent Company

*Adam Stern, Esq.,*  
for the Charging Party Union

**SUPPLEMENTAL DECISION**

JEFFREY D. WEDEKIND, Administrative Law Judge. This case is on remand from the Board to reconsider whether the following nondisparagement provision, which was contained in a Separation Agreement and General Release that the Respondent Company sometimes offered to terminated employees prior to January 25, 2016, violated Section 8(a)(1) of the National Labor Relations Act:

WHEREAS, IGT and Employee wish to establish the terms of Employee’s separation from the Company.

NOW, THEREFORE, in consideration of the premises and conditions set forth herein, the sufficiency of which is hereby acknowledged, IGT and Employee agree as follows:

....

**8. NON-DISPARAGEMENT**

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’s May 31, 2016 consolidated complaint alleged that, by maintaining the foregoing “overly-broad provision” in its separation agreement since June 30, 2015, the Company was interfering with, restraining, and coercing employees in the exercise of their rights guaranteed in Section 7 of the Act (GC Exh. 1(v), pars. 5, 7). More specifically, in the opening statement at the June 29, 2016 hearing and in the August 10, 2016 posthearing brief, the General Counsel argued that the nondisparagement provision in the separation agreement was a facially unlawful policy or rule under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) and its progeny, including *Quicken Loans*, 359 NLRB 1201 (2013), reaffd. 361 NLRB

904 (2014), enfd. 830 F.3d 542 (D.C. Cir. 2016), because employees would reasonably construe it as prohibiting them from criticizing the Company’s employment terms and practices. See Tr. 16–17, and Br. at 30–32.

5           On November 15, 2016, I issued a decision finding that the Company violated Section  
8(a)(1) of the Act by maintaining the nondisparagement provision in its separation agreement as  
alleged. However, the Company filed exceptions, and in August 2018 and March 2019,  
respectively, the Board severed the allegation from the other 8(a)(1) and (5) allegations in the  
proceeding and remanded it for further consideration under *Boeing Co.*, 365 NLRB No. 154  
10 (2017).<sup>1</sup> *Boeing* overruled *Lutheran Heritage* and announced a new framework for analyzing  
facially neutral employer policies, rules, or handbook provisions. Specifically, *Boeing* held that  
the Board will first analyze whether the facially neutral policy, rule or handbook provision, when  
reasonably interpreted, would potentially interfere with the exercise of NLRA rights. If it would  
not, the policy, rule, or handbook provision is lawful. If it would, the Board will weigh any  
15 adverse impact on NLRA-protected conduct against the employer’s legitimate justifications for  
maintaining the policy, rule, or handbook provision. Applying this analysis, the Board found  
that the subject no-camera rule in that case was lawful. It also declared that certain other types  
of rules would be lawful, including rules requiring employees to abide by basic standards of  
civility in the workplace, and overruled previous Board decisions to the extent they held  
20 otherwise. *Id.*, slip op. at 3–4.<sup>2</sup>

Following the Board’s remand, on October 17, 2019, the parties were invited to submit  
position statements addressing whether they wished to reopen the record to introduce additional  
evidence regarding the allegation. On October 25, the General Counsel filed a response stating  
25 that the Agency was satisfied with the original record and did not wish to introduce any  
additional evidence. The Respondent Company did not file a response but advised in an October  
27 email that it agreed with the General Counsel’s response. The Charging Party Union did not  
file a position statement or otherwise respond. Accordingly, the hearing record was not reopened.  
However, by order dated November 4, the parties were given an opportunity to file briefs  
30 addressing the remanded allegation under the *Boeing* framework based on the original record.  
And the General Counsel and the Company filed such briefs on December 2, 2019.

The General Counsel’s brief on remand makes essentially the same argument as the 2016  
posthearing brief, albeit without relying on *Lutheran Heritage* and *Quicken Loans*. Specifically,  
35 the General Counsel argues:

Employee critique of their employer is a core Section 7 right, subject  
only to the requirement that employees’ communications not be so “disloyal,  
reckless or maliciously untrue as to lose the Act’s protection.” *Emarco, Inc.*, 284  
40 NLRB 832, 833 (1987); see *NLRB v. Electrical Workers Local 1229 (Jefferson  
Standard Broadcasting Co.)*, 346 U.S. 464, 477 (1953), and *Linn v. Plant Guards  
Local 114*, 383 U.S. 53 (1966). Broad prohibitions against making statements

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<sup>1</sup> See 366 NLRB No. 170 (Aug. 24, 2018) (severing), and 2019 WL 1314930 (March 20, 2019) (remanding).

<sup>2</sup> See also *Southern Bakeries, LLC*, 368 NLRB No. 59, slip op. at 1 (2019) (summarizing the new *Boeing* framework).

that damage a company’s reputation clearly encompass protected concerted communications. *See Costco Wholesale Corp.*, 358 NLRB 1100 (2012); *see also Knauz BMW*, 358 NLRB 1754 (2012). Broad rules that prohibit disparaging the employer, absent limiting context or language, would cause employees to refrain from publicly criticizing employment problems, and therefore significantly burden protected activity. *See Teletech Holdings, Inc.*, 342 NLRB 924, 931–32 (2004) (finding unlawful rule that employees were not to speak negatively about their job) (citing *Lexington Chair Co.*, 150 NLRB 1328 (1965) (holding unlawful rule prohibiting employees from criticizing company rules and policies), *enfd.* 361 F.2d 283, 287 (4th Cir. 1966)). Indeed, “[p]ublic statements by employees about the workplace are central to the exercise of employee rights under the Act . . . .” 364 NLRB No. 20, slip op. at 16 (2017) (then-Member Miscimarra, concurring in part, citing *Valley Hospital Medical Center, Inc.*, 351 NLRB No. 88, slip op. at 4 (2007)).

Respondent’s Non-Disparagement provision prohibits publicly criticizing Respondent or making statements regarding employment issues such as labor disputes. Additionally, when reasonably construed, the non-disparagement provision would prevent any former employee from engaging in protected discussions with current employees and third parties about working conditions that continue to affect current employees. Such discussions are often a necessary part of employees’ efforts to bring about change in their working conditions. Respondent’s non-disparagement provision significantly burdens protected activity and is unlawful.

The General Counsel further argues that the Company failed to assert or identify any legitimate business interest that outweighs the interference with employees’ Section 7 rights. Accordingly, the General Counsel contends that the nondisparagement provision of the separation agreement was unlawful under *Boeing*. (GC Br. 6–7.)

The Company, on the other hand, argues in its brief on remand that the nondisparagement provision in its separation agreement had no impact on employee Section 7 rights. First, as in its posthearing brief, the Company argues that provision had no such impact because the separation agreement was only offered after employees were informed that they would no longer be employed by the Company (Tr. 192–193); there is no evidence that it was ever offered to an employee who had been unlawfully terminated; and it could not even arguably have been interpreted as applying to any existing employee of the Company. Second, the Company argues that it had no impact on employee Section 7 rights because

[the] provision involves a basic standard of civility. It solely refers to conduct which is not covered 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 Hospital Medical Center, 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).<sup>3</sup>

Further, the Company argues that it “has a legitimate interest in asking non-employees not to disparage or discredit IGT or any of its affiliates, officers, directors and employees.” Accordingly, the Company contends that the nondisparagement provision in its separation agreement was lawful under *Boeing*. (Br. 6–8).<sup>4</sup>

The General Counsel has the better argument. First, Section 2(3) of the Act, 29 U.S.C. § 152(c), states that an “employee” under the Act “shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise . . . .” This provision “expressed the conviction of Congress ‘that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee, and that self-organization of employees may extend beyond a single plant or employer’.” *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 192 (1941), quoting H.R. Rep. No. 1147, 74th Cong., 1st Sess., p. 9. Thus, it is “broad enough to include members of the working class generally.” *Briggs Mfg. Co.*, 75 NLRB 569, 570 (1947).

Second, the subject nondisparagement provision was clearly not a workplace civility rule. As indicated above, the provision was contained in a separation agreement that the Company only offered to employees who had been informed they would no longer be employed in its workplace. Further, the provision is not limited to maliciously or recklessly false statements by separated employees that disparage IGT’s products or services. It prohibits “any public statements” by separated employees that “disparage” or “discredit” IGT “or any of its affiliates, officers, or directors”<sup>5</sup> and/or are “detrimental to the business or reputation” of the Company. Thus, the provision would reasonably be interpreted by employees to include statements that criticize IGT’s employment terms and practices or dispute the claims or defenses of the Company’s officers regarding those terms and practices, even if the statements are true or reasonably believed to be true. *See, e.g., Valley Hospital*, above, 351 NLRB at 1252–1253 (distinguishing disloyal, reckless, or maliciously false statements by employees that disparage their employer’s products or services, which are not protected by the Act, from statements

<sup>3</sup> The Company’s brief on remand also cites an August 30, 2018 General Counsel Division of Advice memo in *Coastal Shower Doors*, 12–CA–194162. However, that memo does not fully support the Company’s position. Compare Memo at 12 (Rule F) with Memo at 13–15 (Rule H). In any event, such memos “have no precedential value or dispositive effect before the Board.” *Longshoremen ILWU Local 12 (Southport Lumber Co.)*, 367 NLRB No. 16, slip op. at 1 n. 1 (2018).

<sup>4</sup> The Company’s brief on remand also argues that the nondisparagement provision in its revised separation agreement (R. Exh. 20), which became effective on January 25, 2016 (Tr. 489), contains a “savings clause” clarifying that it does not apply to Section 7 rights. However, the General Counsel does not allege that the revised provision is unlawful, and it is not at issue in this case. *See* the GC’s posthearing brief at 32.

<sup>5</sup> The General Counsel does not challenge the provision to the extent it also prohibits disparaging or discrediting the Company’s “employees.” *See* the GC’s brief on remand at 5.

related to a labor dispute regarding an employer’s terms and conditions of employment that the employee reasonably believes to be true, which are protected by the Act), enfd. 358 Fed. Appx. 783 (9th Cir. 2009).

- 5 Finally, the Company’s narrow interest in protecting against maliciously or recklessly false statements that disparage IGT’s products or services is clearly insufficient to outweigh such a broad potential impact on employee Section 7 rights.

Accordingly, the provision was unlawful under the *Boeing* analytical framework.<sup>6</sup>

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<sup>6</sup> The General Counsel’s posthearing brief additionally argued that the nondisparagement provision was unlawful because it required terminated employees to forfeit their Section 7 rights in exchange for the benefits of the separation agreement, citing *Clark Distribution Systems*, 336 NLRB 747, 748 (2001), and *Metro Networks*, 336 NLRB 63, 64 (2001). The Board in those cases held that the employers unlawfully conditioned acceptance of their severance agreements on the signatory employee agreeing not to assist in any claims against them, as this would bar the signatory employee from assisting the Board’s investigation of charges filed by others.

This argument is arguably more apt here as the alleged unlawful provision was in a separation agreement rather than a work policy, rule, or handbook. See *Shamrock Foods Co.*, 366 NLRB No. 117 (June 22, 2018), enfd. 779 Fed. Appx. 752, 755 (July 12, 2019). In *Shamrock*, the General Counsel argued that a similar nondisparagement provision that was contained in a separation agreement the employer offered to an unlawfully terminated employee (Wallace) constituted an unlawfully overbroad work rule or policy under *Lutheran Heritage*. And the ALJ found that the nondisparagement provision of the separation agreement was unlawful based in part on Board decisions finding similar provisions in employer rules or policies unlawful. On exceptions, however, the Board held that the cases relied on by the ALJ were “inapposite” because they involved overbroad work rules and the separation agreement offered to Wallace was not a generally applicable work rule but akin to a settlement. Further, consistent with that holding, the Board did not sever and remand the allegation involving the separation agreement along with other allegations in the case involving the employer’s handbook rules for reconsideration under *Boeing*, which had issued the previous year. Instead, the Board majority analyzed the nondisparagement provision of the separation agreement under Board precedent involving settlements; specifically, *S. Freedman & Sons, Inc.*, 364 NLRB No. 82, slip op. at 2 (2016), which cited and followed *Clark Distribution Systems* and *Metro Networks*, above. Based on that precedent, the majority (Members Pearce and McFerran) affirmed the ALJ’s finding that the nondisparagement provision in the separation agreement was unlawful on the ground that the provision was not narrowly tailored to the facts giving rise to the discharge of Wallace given that he had been discharged for an unlawful reason and the provision “broadly required him to waive certain Section 7 rights, including . . . making disparaging remarks or taking actions which would be ‘detrimental’ to” the employer.” Slip op. at 3 n. 12. Member Kaplan concurred with the majority that the nondisparagement provision of the separation agreement was not a generally applicable work rule, but found that the employer’s “mere proffer” of the agreement containing that provision to Wallace was not unlawful “inasmuch as Wallace was the only employee involved, was not required to sign the separation agreement, and did not do so.” *Id.*

However, this case is arguably distinguishable from *Shamrock* as the record indicates that the Company offered the separation agreement to more than one terminated employee and in more than one instance. See the testimony of Julie Doti, IGT’s director of human resources for

## CONCLUSIONS OF LAW

1. By maintaining, from at least June 30, 2015 until January 25, 2016, an overbroad nondisparagement provision in its Separation Agreement and General Release, the Company committed an unfair labor practice in violation of Section 8(a)(1) of the Act.

2. The Company’s unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

The appropriate remedy for the violation found is an order requiring the Company to cease and desist from its unlawful conduct and to take certain affirmative action. Specifically, the Company must rescind the unlawfully overbroad nondisparagement provision in the Separation Agreement and General Release that it maintained and sometimes offered to employees from at least June 30, 2015 until January 25, 2016, and notify all former employees who signed the separation agreement that it has done so and that the unlawfully overbroad nondisparagement provision will not be given effect.<sup>7</sup>

In addition, the Company must sign and post an official notice to employees advising them that it will not violate their Section 7 rights in the same or any like or related manner and will take the affirmative remedial action described above. The General Counsel’s brief on remand requests that the Company be required to post the notice at all of its facilities nationwide “to remedy Respondent’s maintenance of the unlawful rule” (Br. 10), rather than at just the Las Vegas facility involved in this proceeding as ordered in the original decision. However, there is insufficient record evidence that the separation agreement was maintained nationwide or offered

global field services, Tr. 192 (“We typically use the agreement when we have eliminated a person’s position because the position is no longer needed . . . it’s our practice to administer it when we eliminate positions.”). In addition, there is no evidence that the Company offered it to any unlawfully terminated employee. In any event, the Board here did not sever and remand the allegation regarding the nondisparagement provision in the Company’s separation agreement for reconsideration under *Shamrock*. Rather, the Board severed and remanded it for reconsideration under *Boeing*. And that is the only issue the parties have addressed in their briefs on remand. Accordingly, this supplemental decision on remand likewise only addresses the allegation under *Boeing*. See, e.g., *Cassis Mgt. Corp.*, 324 NLRB 324, 325 n. 5 (1997) (judge properly declined to address issue outside scope of Board’s remand order).

<sup>7</sup> Although the Company revised the nondisparagement provision effective January 25, 2016, there is no evidence that it ever advised any employees or former employees that it did so and that the previous provision would not be given effect. Cf. *National Indemnity Co.*, 368 NLRB No. 96, slip op. at 3 (2019) (finding it unnecessary to order rescission of an unlawful confidentiality agreement because the employer had already distributed a revised lawful agreement to employees, but ordering rescission of an unlawful memo because, while the employer ceased distributing the memo, “merely ceasing distribution of an unlawful work rule, without more, is insufficient to rescind the unlawful rule”). See also *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978); and *Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d 99, 108 (D.C. Cir. 2003) (discussing the requirements of an effective repudiation of prior unfair labor practices).

to or signed by any employees at any of the Company’s facilities other than the Las Vegas facility. Accordingly, the General Counsel’s request is denied.

ORDER<sup>8</sup>

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

1. Cease and desist from

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(a) Maintaining a nondisparagement provision in its Separation Agreement and General Release that broadly states, without qualification, that signatory employees “will not disparage or discredit IGT or any of its affiliates, officers, directors and employees” and “will forfeit any right to receive the payments or benefits [set forth in the agreement] if you engage in deliberate conduct or make any public statements detrimental to the business or reputation of IGT.”

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(b) 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.

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

(a) Within 14 days of the Board’s order, rescind the unlawfully overbroad nondisparagement provision in the Separation Agreement and General Release that it maintained and sometimes offered to employees from at least June 30, 2015 until January 25, 2016, and notify in writing all former employees who signed the separation agreement that it has done so and that the unlawfully overbroad nondisparagement provision will not be given effect.

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(b) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached notice marked “Appendix”.<sup>9</sup> Copies of the notices, 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. If, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in this proceeding, Respondent shall duplicate and mail, at its own expense, a copy of the notices to all current and

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<sup>8</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.

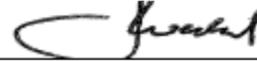
<sup>9</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

former employees employed by Respondent at the closed facility at any time since June 30, 2015.

- 5 (c) 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., January 29, 2020

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Jeffrey D. Wedekind  
Administrative Law Judge

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 maintain a nondisparagement provision in our Separation Agreement and General Release that broadly states, without qualification, that signatory employees “will not disparage or discredit IGT or any of its affiliates, officers, directors and employees” and “will forfeit any right to receive the payments or benefits [set forth in the agreement] if you engage in deliberate conduct or make any public statements detrimental to the business or reputation of IGT.”

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

WE WILL, within 14 days of the Board’s order, rescind the unlawfully overbroad nondisparagement provision in the Separation Agreement and General Release that we maintained and sometimes offered to employees from at least June 30, 2015 until January 25, 2016, and notify in writing all former employees who signed the separation agreement that we have done so and that the unlawfully overbroad nondisparagement provision will not be given effect.

IGT d/b/a INTERNATIONAL  
GAME TECHNOLOGY

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(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

2600 North Central Avenue, Suite 1800, Phoenix, AZ 85004-3099  
(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

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.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**  
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640-2146.