

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

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

and

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

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

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

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I. INTRODUCTION

The decision and recommended order issued by Administrative Law Judge Jeffrey D. Wedekind (the ALJ) in this matter is overwhelmingly supported by the entire administrative record. The ALJ found that IGT d/b/a International Game Technology (Respondent) violated the National Labor Relations Act (the Act or the NLRA), by maintaining an unlawful provision in its Separation Agreement and General Release. Subsequently, Respondent filed exceptions to the ALJ's supplemental decision with the Regional Director for Region 28 (Regional Director) and not with the National Labor Relations Board (the Board).

Counsel for the General Counsel (CGC) respectfully urges the Board to adopt the ALJ's recommended order considering Respondent's failure to file exceptions properly or timely. Notwithstanding Respondent's failure to file exceptions, and in response to Respondent's exceptions filed with the Regional Director, CGC notes that finding in Respondent's favor requires ignoring uncontroverted facts and overruling extant Board law. As such, CGC respectfully requests the Board to adopt the ALJ's recommended order in the absence of exceptions or, alternatively, respectfully urges the Board to reject Respondent's exceptions, affirm the ALJ's findings, and uphold the ALJ's recommended order.

II. ARGUMENT

A. The Board should find that Respondent has failed to file exceptions properly or timely and the Board should adopt the ALJ's recommended order.

A party may file with the Board in Washington, DC, exceptions to the decision of an ALJ within 28 days from the date of service of the order transferring the case to the Board. The Board's Rules and Regulations, §§ 102.46(a) and (h). In this case, Respondent failed to file its exceptions with the Board in Washington, DC, and instead filed them with the Regional

Director. Though Respondent was informed subsequently of the misfiling by the Region, Respondent has failed to correct its misfiling with the Board.

As such, CGC respectfully urges the Board to reject Respondent's improperly and untimely filed exceptions to the ALJ's decision, affirm the ALJ's findings and rulings, and adopt the ALJ's recommended order.

B. Respondent's reference to each of its five (5) exceptions in its brief in support of exceptions can be summarized by the following issues:

1. whether the ALJ properly determined that Respondent's non-disparagement provision was unlawful because it would interfere with employees' exercise of Section 7 rights (Exceptions 1 and 2);
2. whether the ALJ properly determined that Respondent's non-disparagement provision was unlawful under the *Boeing* standard (Exception 3);
3. whether the ALJ properly determined that Respondent's non-disparagement provision was unlawful and not a lawful severance agreement (Exception 4);
4. whether the ALJ properly determined that the appropriate remedy for Respondent's maintenance of its unlawful non-disparagement provision included a notice posting at Respondent's Las Vegas facility where the non-disparagement provision was maintained (Exception 5).

Notwithstanding that CGC respectfully urges the Board to adopt the ALJ's recommended order in the absence of properly filed exceptions, each of the questions raised by Respondent is addressed in turn below.

1. The ALJ properly determined that Respondent's non-disparagement rule was unlawful because it would interfere with employees' exercise of Section 7 rights.

Contrary to Respondent's blanket assertions, the non-disparagement provision in its separation agreement is *not* facially neutral, the potential impact on Section 7 rights is not de minimis, and Respondent's narrow justifications for maintaining the overbroad prohibition on Section 7-protected communication do not outweigh the potential impact on Section 7 rights. As

such, the ALJ properly found that Respondent's non-disparagement provision prohibited employee communications protected by Section 7 and interfered with employees' exercise of Section 7 rights.

Respondent's non-disparagement provision states in full:

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 27(c))¹

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 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 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

¹ As used herein, the numbers following the abbreviation "JD" refer to the page and line numbers of the ALJ's decision, and the numbers following the abbreviation "Tr." refer to the page and line numbers of the hearing transcript. In addition, the terms "GC," "R," and "ALJ" refer to the General Counsel's exhibits, Respondent's exhibits, and ALJ's exhibits from the compliance hearing, and the term "R Br." refers to Respondent's Brief in Support of Its Exceptions.

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)).

The ALJ properly noted that Respondent’s provision is not a workplace civility rule. (JD 4:22-23) As such, Respondent’s reliance on *Ark Las Vegas Restaurant Corp.*, 335 NLRB No. 97 (2001), is misplaced. (R Br. 5) In *Ark Las Vegas*, the Board agreed with the ALJ that the rule was a lawful conduct rule as opposed to an unlawful rule prohibiting public criticism of an employer’s treatment of employees. In doing so, the Board agreed with the ALJ that:

It clearly is true that public criticism of an employer's treatment of employees (“pays substandard wages,” “abusive work practices,” “unfair”) are protected by § 7 and an employer who disciplines an employee for participating in such criticism will run afoul of Section 8(a)(3) and (1). Indeed, most employers are sensitive to public airing of dirty laundry. Yet that airing is protected by Section 7 so long as the employees do not cross the bounds of “disloyalty” such as product disparagement.

Slip op. at 13 (citing *Cincinnati Suburban Press*, 289 NLRB 966 (1988); cf., *Community Hospital of Roanoke Valley*, 220 NLRB 217 (1975), enfd. 538 F.2d 607 (4th Cir. 1976)).

In this case, the ALJ properly determined that Respondent’s provision extends beyond a workplace civility and conduct rule and prohibits communications protected by Section 7. Respondent’s provision prohibits “any public statements” and “is not limited to maliciously or recklessly false statements that disparage Respondent’s products or services.” (JD 4:25-27) Additionally, the ALJ properly determined that the such broad prohibition on public statements would reasonably be interpreted to prohibit statements that criticize Respondent’s employment terms and practices. (JD 4:29-30) Under the same reasoning, the ALJ properly determined that the broad prohibition on public statements would also be reasonably interpreted to include

disputing Respondent's claims or defenses of Respondent's officers regarding Respondent's employment terms and practices. (JD 4:26-29; 4:30-5:3)

Respondent's rule clearly prohibits communications that are protected by Section 7 of the Act. However, activity protected under the Act cannot be suppressed because it may offend an employer. *See Apex Linen Service, Inc.*, JD(SF)-15-18 (2018). As noted by Respondent, the non-disparagement provision is its own section in Respondent's severance agreement. When read in context of a severance agreement aimed at limiting Respondent's liability, the purpose of the singular non-disparagement provision is clear: prohibit public statements protected by Section 7. CGC therefore respectfully requests that the Board affirm the ALJ's finding that the non-disparagement provision in Respondent's severance agreement unlawfully interferes with employees' Section 7 rights.

2. The ALJ properly determined that Respondent's non-disparagement rule was unlawful under the *Boeing* standard.

The ALJ properly found that "[Respondent's] narrow interest in protecting against maliciously or recklessly false statements that disparage [Respondent's] products or services is clearly insufficient to outweigh [the non-disparagement provision's] broad potential impact on employee Section 7 rights." (JD 5:5-7)

In evaluating rules that, when reasonably interpreted, would potentially interfere with employees' rights under Section 7 of the Act, one must balance the nature and extent of the potential impact on Section 7 rights against legitimate justifications associated with the rule. *The Boeing Company (Boeing)*, 365 NLRB No. 154, slip op. at 3 (2017). In conducting this balancing, "when a rule, reasonably interpreted, *would* prohibit or interfere with the exercise of NLRA rights, the mere existence of some plausible business justification will not automatically render the rule lawful." *Id.*, slip op. at 2.

The right to publicize a labor dispute with an employer and the right to communicate with other employees about terms and conditions of employment are core Section 7 rights. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978); *Stanford Hospital & Clinics v. NLRB*, 325 F.3d 334, 343 (D.C. Cir. 2003); *NCR Corp.*, 313 NLRB 574, 576 (1993); *Providence Hospital*, 285 NLRB 320, 322 (1987). In his dissent in *Schwan's Home Service, Inc.*, 364 NLRB No. 20 (2017), then-Member Miscimarra explained, “Public statements by employees about the workplace are central to the exercise of employee rights under the Act” *Id.* at slip op. at 16 (internal citations omitted).

As noted by the ALJ in his decision, the non-disparagement provision at issue would be reasonably construed to prohibit communications protected by Section 7. (JD 4:29-5:3) Such communications are central to the exercise of employee rights. The ALJ further noted the limited justification argued by Respondent is that it “has a legitimate interest in asking non-employees not to disparage or discredit [Respondent] or any of its affiliates, officers, directors and employees.”² Given the “narrow interest” provided by Respondent, when balanced against the potential impact on core Section 7 rights, the ALJ properly found that Respondent’s interests did not outweigh the “broad potential impact on employee Section 7 rights.” (JD 5:5-7). As such, CGC respectfully requests that the Board affirm the ALJ’s ruling that the non-disparagement provision in Respondent’s severance agreement is unlawful under the *Boeing* standard.

² The ALJ properly noted that CGC does not challenge the provision insofar as it also prohibits disparaging or discrediting Respondent’s “employees.” (JD 5:fn. 5)

3. The ALJ properly noted that, in addition to being unlawful under the *Boeing* standard, Respondent's non-disparagement provision is unlawful under the standard applicable to settlements.

The Board's order remanding the allegation regarding Respondent's non-disparagement provision for consideration under *Boeing* did not include a call to consider the non-disparagement provision under *Shamrock Foods Company*, 366 NLRB No. 117 (June 22, 2018), *enfd.* 779 Fed. Appx. 752,755 (July 12, 2019). Moreover, Respondent did not raise the issue in its initial brief or supplemental brief on remand. Respondent now seeks Board review of an issue and defense not previously raised or litigated.

Notwithstanding the appropriateness of its request for review, Respondent is wrong. As noted by the ALJ in footnote 6, the present case is distinguishable to the case in *Shamrock Foods*. More specifically, the ALJ noted that,

the record indicates that [Respondent] 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 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.

As discussed by the ALJ in footnote 6, in *Shamrock Foods*, the Board analyzed a non-disparagement provision in a separation agreement and found the provision to be unlawful because it was not narrowly tailored to the facts giving rise to the employee's discharge. Slip op. at 3 n. 12. Additionally, Member Kaplan found that the "mere proffer" of the separation agreement containing the contested provision was not unlawful insofar as the agreement was only offered to one employee, the employee was not required to sign the agreement, and the employee refused to sign the agreement. *Id.*

In this case, Respondent used its standard separation agreement and offered the same separation agreement to more than one employee on more than one occasion. Though the

employees to whom the separation agreement was offered had the choice to sign or not, the record indicates that the offer was a matter of course and typical as a means to “ease the transition” for an employee whose position has been eliminated. (Tr. 191, 193) Respondent provided no evidence that its separation agreement was narrowly tailored to the facts giving rise to an employee’s discharge. Rather, the record indicates that the separation agreement here was not narrowly tailored, was used as a matter of course when an employee’s position is eliminated, and that the non-disparagement provision was generally applicable to the employees receiving separation agreements.

The separation agreement in this matter and its non-disparagement provision fail the standard involving settlements as discussed in *Shamrock Foods*. CGC therefore respectfully urges the Board to find that Respondent’s non-disparagement agreement is unlawful under the standard applicable to settlements.

4. The ALJ properly determined that the appropriate remedy for Respondent’s maintenance of an unlawful non-disparagement provision included a notice posting at its Las Vegas facility where the non-disparagement provision was maintained.

As discussed above, the ALJ properly found Respondent’s non-disparagement provision to be unlawfully overbroad. As such, the ALJ properly determined that the appropriate remedy for the violations found include rescinding the unlawfully overbroad non-disparagement provision, notify former employees that it has rescinded the non-disparagement provision and that the rescinded provision will not be given effect, and posting an official Board Notice to Employees that Respondent will not violate their Section 7 rights in the same or any like or related manner and will take the aforementioned affirmative remedial action.

CGC therefore respectfully urges the Board to adopt the ALJ's recommended order requiring Respondent to sign and post an official notice to employees at its Las Vegas location advising them that it will not violate their Section 7 rights.

III. CONCLUSION

For the foregoing reasons, CGC respectfully urges the Board to reject Respondent's exceptions as improperly and untimely filed and to adopt the ALJ's recommended order in the absence of exceptions; or alternatively, to reject Respondent's exceptions; affirm the ALJ's rulings, findings, and conclusions; and adopt the ALJ's recommended order.

Dated at Phoenix, Arizona this 11th day of March 2020.

Respectfully submitted,

/s/ Néstor Zárate

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CERTIFICATE OF SERVICE

I hereby certify that a copy of COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS in *IGT d/b/a INTERNATIONAL GAME TECHNOLOGY*, Cases 28-CA-166915, et al., was served by E-Gov, E-Filing, and E-mail this 11th day of March 2020, on the following:

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