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

November 24, 2020

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS KAPLAN, EMANUEL, AND MCFERRAN

On March 20, 2019, the National Labor Relations Board issued an Order Remanding[1] in light of the Board's decision in *The Boeing Co.*, 365 NLRB No. 154 (2017), which issued while this case was pending before the Board. Specifically, the Board remanded the allegation that the Respondent's maintenance of a nondisparagement provision in its Separation Agreement and General Release ("Agreement") violated Section 8(a)(1) of the National Labor Relations Act. In its Order Remanding, the Board instructed the judge to address the allegation "affected by" *Boeing*, supra.[2]

On January 29, 2020, Administrative Law Judge Jeffrey D. Wedekind issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.[3]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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, findings, and conclusions only to the extent consistent with this Supplemental Decision and Order.

The General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act by maintaining an "overly-broad" nondisparagement provision in the Agreement, which the Respondent sometimes offers to lawfully separated employees. The judge found that the provision was unlawful as alleged. For the reasons explained below, we reverse.

The Respondent is a multinational company that assembles, installs, removes, services, and repairs gaming machines. It has a practice of offering the Agreement to employees terminated as a result of the elimination of their positions. The Agreement offers postemployment benefits to employees who agree "to release IGT from all claims relating to [their] employment" and to refrain from certain postemployment conduct.[4] Section 3 of the Agreement, titled, "Conditional Severance Payments and Benefits," describes the benefits, including a 2-week salary continuation, outplacement assistance, and extended medical, dental, and vision coverage, to be granted upon execution of the Agreement.

Section 8 of the Agreement is the allegedly unlawful "Non-Disparagement" provision, which states:

> 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.

The judge found this provision unlawful under the analysis set forth in *Boeing*.[5] He found that, because the provision is not limited to disparaging remarks that are malicious or reckless, employees who receive the Agreement would reasonably interpret the provision to prevent them from making critical public statements about the Respondent's employment terms or practices, and that, therefore, the provision would have "a broad potential impact" on employee Section 7 rights. He concluded that the Respondent's interest in protecting against malicious or false statements that disparage its products and services is insufficient to outweigh such an impact.

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[1] 2019 WL 1314930.

[2] The Board severed and retained the issue in an August 24, 2018 Decision and Order reported at 366 NLRB No. 170 (2018), in which the Board found that the Respondent violated Sec. 8(a)(5) and (1) by failing and refusing to bargain over subcontracting and Sec. 8(a)(1) for threatening employees during contract negotiations with a loss of overtime. On February 13, 2019, the Board issued a notice to show cause why the remaining complaint allegation should not be remanded to the administrative law judge. No party filed a response.

[3] The General Counsel and the Respondent agreed that there was no need to reopen the record and filed briefs to the judge addressing the allegation under *Boeing*.

The General Counsel requests that the Board find that the Respondent failed to file exceptions properly or timely because it filed its exceptions brief with the Regional Director instead of the Board and did not correct its misfiling. We construe the request as a motion to strike the Respondent's exceptions and deny it. Although the Respondent filed its exceptions brief with the incorrect Board office, it did so by the filing deadline. When the Respondent attempted to correct the misfiling, the Executive Secretary notified it that the original filing was accepted as timely. In these circumstances, we will accept the Respondent's exceptions brief. See, e.g., *Eldeco, Inc.*, 336 NLRB 899, 900 (2001) (Board accepts response to notice to show cause, which was timely but improperly filed with the Regional Director).

[4] The General Counsel does not allege that the release from claims is unlawful.

[5] Under *Boeing*, a facially neutral rule or policy must be evaluated in such a way as to strike a proper balance between the asserted business justifications for the rule and the invasion of employee rights in light of the Act and its policies, viewing the rule or policy from the employees' perspective. *Boeing*, supra, slip op. at 3.

Recently, in *Baylor University Medical Center*, 369 NLRB No. 43 (2020), the Board dismissed an allegation that the respondent violated Section 8(a)(1) by offering departing employees an opportunity to sign separation agreements containing allegedly unlawful provisions in exchange for severance pay and postemployment benefits to which they otherwise would not have been entitled. The Board rejected the judge's application of *Boeing* to the separation agreement and affirmed that *Boeing* only applies to allegedly unlawful work rules establishing conditions of employment. Id., slip op. at 1.[6] The Board explained that the separation agreement differed from a work rule in two fundamental ways:

> First, the agreement is not mandatory; signing it was not a condition of continuing employment, as it was optional and applied only in the event of separation. Second, the agreement exclusively pertains to postemployment activities and has no impact on terms and conditions of employment or any accrued severance pay credit or benefits arising out of the employment relationship that the Respondent would be obligated to pay regardless of whether a departing employee signed.

Id. The Board concluded that the mere proffer of the agreement was not coercive and dismissed the allegation.

This case similarly involves a separation agreement offered to departing employees, as opposed to a work rule or policy that establishes conditions of employment. As in *Baylor University*, a departing employee's acceptance of the Respondent's Agreement is entirely voluntary. Further, any benefits to which the employee would already have been entitled as consideration for the work she performed as an employee of the company are unaffected by the employee's decision whether or not to accept the proffered Agreement. Moreover, this case does not involve 8(a)(3) allegations or evidence of other unlawful discrimination, nor is there evidence that the Respondent proffered the Agreement under circumstances that would reasonably tend to interfere with the separating employees' exercise of their own Section 7 rights or those of their coworkers.[7] See *Baylor University*, supra, slip op. at 2 & fn. 6 (citing *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 3 fn. 12 (2018), enfd. mem. 779 Fed.Appx. 752 (D.C. Cir. 2019) (per curiam)).[8]

In conclusion, because the Agreement is entirely voluntary, does not affect pay or benefits that were established as terms of employment, and has not been proffered coercively, we find that the nondisparagement provision would not tend to interfere with, restrain, or coerce employees in the exercise of their rights under the Act.[9] Accordingly, we reverse the judge and dismiss the allegation.[10]

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[6] Citing *Boeing*, supra, slip op. at 14–16 (*Boeing* applies to "facially neutral policies, rules, or handbook provisions").

[7] Although we found in our original decision that the Respondent unlawfully refused to bargain over a subcontracting decision and threatened employees, during bargaining, with a loss of overtime, such violations do not support a finding that the Respondent has discriminated against employees for engaging in Sec. 7 activity. See *Baylor University*, supra, slip op. at 2 fn. 6.

[8] Our dissenting colleague argues that we err in relying on *Baylor University*, supra, because, in her view, that case was wrongly decided. We need not repeat the full rationale for the Board's holding in *Baylor University*. We emphasize, however, that the cases our colleague primarily relies on—*Shamrock Foods*, supra; *Clark Distribution Systems*, 336 NLRB 747 (2001); and *Metro Networks*, 336 NLRB 63 (2001)—do not compel a different result. Unlike in those cases, the severance agreements here and in *Baylor University* were not offered under circumstances that could be considered coercive or that in any way restricted the free will of departing employees to accept or decline their terms. See, e.g., *Shamrock Foods*, slip op. at 3 fn. 12 (finding provisions of a separation agreement proffered to an unlawfully discharged employee, in the context of numerous egregious unfair labor practices, to be unlawful); accord *Clark Distribution Systems*, supra; *Metro Networks*, supra. Further, the Board overruled those cases to the extent they suggested it is "*invariably* unlawful to offer employees a severance agreement that includes a nonassistance clause" or other similar prohibitions. *Baylor University*, slip op. at 2 fn. 6 (emphasis added). Nevertheless, our colleague finds that the mere offer of a quid pro quo separation agreement has "inherent coercive potential" and is therefore unlawful. This amorphous standard is premised on an overbroad and mistaken conception of the scope of Sec. 7 rights that cannot be waived—one emphatically rejected by the Supreme Court in *Epic Systems v. Lewis*, 138 S.Ct. 1612 (2018). It also relies on the equally mistaken belief—which the Board has rejected – that employees necessarily view every employer document or rule through the prism of Sec. 7. See *L.A. Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2 (2019) (citing *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 271 (5th Cir. 2017)).

Finally, we disagree with our dissenting colleague's suggestion that the nondisparagement provision at issue here would be unlawful under *Boeing,* and her attempt to distinguish *Epic Systems* and *L.A. Specialty Produce* on that basis. See *Motor City Pawn Brokers Inc.*, 369 NLRB No. 132, slip op. at 5–7 (2020) (finding work rule with substantially similar language lawful).

[9] The standard for analyzing settlement agreements that resolve specific labor disputes is not applicable here, where there is no evidence that the Respondent proffered the Agreement to any separating employees for such purposes. See *Baylor University*, supra, slip op. at 2 fn. 7; *S. Freedman & Sons, Inc.*, 364 NLRB No. 82 (2016).

[10] Although the judge suggested that *Boeing* may not provide the applicable analysis for a provision in a separation agreement, he declined to reach that question because he determined that the Board had remanded the issue for reconsideration only under *Boeing*. The judge's interpretation of the Order Remanding was not unreasonable, as that order referred to the remanded allegation as "the above complaint allegation affected by *Boeing*." And this was an accurate statement, in the sense that this case, which was originally litigated in part under decisions applying prong one of *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004), was "affected" by *Boeing* when *Boeing* overruled that standard. However, the Order Remanding did not direct the judge and parties to simply apply *Boeing* in place of prong one of *Lutheran*, and nothing in the remand Order precluded the parties from addressing how *Boeing*'s

ORDER

The allegation that the Respondent unlawfully maintained a nondisparagement provision in its Separation Agreement and General Release is dismissed.

Dated, Washington, D.C. November 24, 2020

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

Until the Board's recent decision in *Baylor University Medical Center*,[1] it was well established that severance agreements requiring employees to sign away their rights under the National Labor Relations Act are facially unlawful unless narrowly tailored. *Baylor* wrongly broke with precedent, and the problem with its approach are obvious. It ignores the coercive potential that is inherent in any agreement requiring workers not to engage in protected concerted activity, if they wish to receive the benefits of the agreement. Every such agreement, regardless of the circumstances, clearly threatens to "interfere with, restrain, or coerce employees" in the exercise of their statutory rights, violating Section 8(a)(1) of the Act. Because *Baylor* is completely contrary to statutory policy, and because the majority thus errs in applying it here, I dissent.

I.

It is helpful to briefly review the law as it stood when *Baylor* was decided earlier this year. For nearly 80 years, as Supreme Court precedent establishes, it has been settled that individual employees may not broadly waive their rights under the National Labor Relations Act.[2] The Board, with judicial approval, has repeatedly invalidated agreements between employers and employees that purport to restrict employees from engaging in activity protected by the Act (the equivalent of the notorious "yellow dog" contract[3]) or from filing unfair labor practice charges with the Board,[4] observing that the "future rights of employees as well as the rights of the public may not be traded away in this manner."[5] The Board held that an employer violates the Act if it even proposes an unlawful agreement to an employee, regardless of whether the employee accepts the agreement.[6] At least three Board

applicability to "policies, rules, or handbook provisions" should be interpreted in the context of the separation agreement here. See *Boeing*, 365 NLRB No. 154, slip op. at 14. In any event, *Baylor University*, which issued after the Order Remanding and the judge's supplemental decision, is directly applicable and compels dismissal of the remaining allegation.

[1] 369 NLRB No. 43 (2020). I was not a member of the Board when *Baylor* was decided; otherwise, I would have dissented. My prior Board term ended on December 16, 2019, and my current term began on August 10, 2020, after *Baylor* issued.

[2] *National Licorice Co. v. NLRB*, 309 U.S. 350, 360-361 (1940).

[3] See, e.g., *M & M Affordable Plumbing, Inc.,* 362 NLRB 1303, 1307–1308 (2015) (discussing federal labor law prohibition against "yellow dog" contract). See also *Velox Express, Inc.*, 368 NLRB No. 61, slip op. at 16 fn. 15 (2019) (dissenting opinion) (collecting cases).

[4] In *John C. Mandel Security Bureau*, 202 NLRB 117, 119 (1973), for example, the Board found unlawful a settlement providing reinstatement conditioned on the employee's promise not to file Board charges in the future or engage in protected activity. In *Metro Networks*, 336 NLRB 63, 64–67 (2001), the Board similarly found an agreement barring employees from filing a charge, participating in "any claim" against the employer, or communicating with anyone "concerning your employment" unlawful. In *Clark Distribution Systems*, 336 NLRB 747, 748-749 (2001), an agreement prohibiting the employees from participating in "any claim against the company" was again found to violate Sec. 8(a)(1). In *Ishikawa Gasket America*, 337 NLRB 175, 176 (2001), affd. 354 F.3d 534 (6th Cir. 2004), the Board found a settlement barring the employee from "engag[ing] in any conduct which is contrary to the Company's interests in remaining union-free" unlawful. And more recently, in *Shamrock Foods Co*., 366 NLRB No. 117, slip op. at 2-3 & fn.12 (2018), enfd. 2019 WL 3229142, 779 Fed. Appx. 752 (D.C. Cir. 2019), an agreement was found unlawful because it would have prevented the employee from providing assistance to former coworkers, disclosing information to the Board, or making disparaging remarks that could be "detrimental" to the employer. Cf. *Terex*, 366 NLRB No. 162, slip op. at 3 (2018) (refusing to enforce settlement agreements containing unlawful restrictions, applying standard of *Independent Stave*, 287 NLRB 740 (1987)). Only where a waiver "is narrowly tailored to the facts giving rise to the settlement and the employee receives some benefit in return for the waiver" is the agreement lawful. *S. Freedman & Sons*, 364 NLRB No. 82, slip op. at 2 (2016), enfd. 713 Fed.Appx. 152 (4th Cir. 2017). I dissented there because, in my view, the waiver was not narrowly tailored. Id., slip op. at 7-8 (dissenting opinion).

[5] *John C. Mandel Security Bureau*, supra, 202 NLRB at 119.

[6] See *Shamrock Foods,* supra, 366 NLRB No. 117, slip op. at 2–3 & fn. 12; *Clark Distribution*, supra, 336 NLRB at 748; *Metro Networks*, supra, 336 NLRB at 66–67.

In *Shamrock Foods*, supra, the employer had presented a discharged employee with a separation agreement, which he was not required to sign and did not sign. The Board found that the employer had violated Sec. 8(a)(1), explaining that certain terms of the agreement "broadly required [the employee] to waive certain Sec[tion] 7 rights." 366 NLRB No. 117, slip op. at 2–3 & fn. 12. The Board *rejected* the view of Member Kaplan that under the circumstances, "the *mere proffer* to [the employee] of the agreement … did not violate Sec[tion] 8(a)(1)." Id. (emphasis added). Instead, it adopted the administrative law judge's conclusion of law that the Respondent had engaged in an unfair labor practice by "[o]ffering a 'Separation Agreement and Release and Waiver" to [the] employee." Id., slip op. at 1, 37. The Board ordered the employer to "[c]ease and desist from . . . [m]aintaining [the] Separation Agreement" and to "[r]escind the provisions in the Separation Agreement that" had been found unlawful. Id., slip op. at 4–5.

In *Clark Distribution*, supra, Board adopted the finding of an administrative law judge that the employer had violated Sec. 8(a)(1) "by conditioning acceptance of [a] severance package on a requirement

decisions—*Metro Networks*, *Clark Distribution*, and *Shamrock Foods*, supra—also had made clear that the legality of the severance agreement did *not* depend on the lawfulness of the underlying terminations or on the circumstances surrounding the severance agreement. What mattered, rather, was whether the agreement, on its face, restricted the exercise of statutory rights.[7]

The rationale of these decisions was straightforward. An employer's conduct violates Section 8(a)(1) of the Act if it has a *reasonable tendency* to (in the words of the statute) "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7."[8] Conditioning the benefits under a severance agreement on the forfeiture of statutory rights obviously has a *reasonable tendency* to interfere with, restrain, or coerce the exercise of those rights. This is true whether or not the employee ultimately accepts the agreement, and whether or not the employee is actually coerced by the agreement. The employer's offer has an impermissible aim, the prospective waiver of Section 7 rights.[9] And, of course, if the employee does accept the agreement, then he might well comply with the unlawful provision in order to protect his severance benefits under the agreement and to avoid legal liability. *Clark Distribution*, supra, neatly illustrates the realization of the coercive potential always inherent in a facially unlawful settlement agreement. There, an employee signed a settlement agreement in which he promised not to "assist in the prosecution of any claims … against the company." When the employee was contacted by a Board agent in the course of an unfair labor practice investigation, he refused to assist the agent, citing the agreement and expressing fear that he would lose his severance pay and be sued by the employer.[10] Thus, the settlement agreement actually interfered with the employee's Section 7 right to assist the Board, with the Board's ability to effectively administer the Act, and with the statutory right of other employees not to be subjected to the employer's unfair labor practices. To be sure, no such showing of actual coercion is required to establish a violation of Section 8(a)(1) in this context or any other, as the Board has long held.[11]

II.

The *Baylor* decision discarded the Board's long-established (and sound) analysis of unlawful severance agreements. But the *Baylor* Board offered no good reasons for its radically different approach.

[contained in a settlement agreement] that employees not participate in the Board's investigative process." 336 NLRB at 748. Two employees accepted the package and signed the settlement agreement, but it is clear from the language of the Board's decision—which refers to "conditioning acceptance"—that the violation of Sec. 8(a)(1) did not depend on the employees' acceptance of the agreement; rather, it was the offer that was unlawful. As the judge's decision adopted by the Board explained, the General Counsel had "allege[d] that the terms of the severance agreement violated Section 8(a)(1)." Id. at 761. The judge agreed, explaining that the agreement was "an overbroad restriction of the [statutory] rights of employees." Id. at 762.

In *Metro Networks*, supra, the employer "offered and gave" a laid-off employee a severance agreement that included nonassistance and nondisclosure provisions. 336 NLRB at 66. The employee "did not sign" the agreement. Id. at 64. Because the challenged provisions would have "prohibit[ed] [the employee] from cooperating with the Board in . . . the investigation and litigation of unfair labor practice charges," the Board found "unlawful the [employer's] offer of [the] severance agreement." Id. at 67. Notably, it found "no merit in the [employer's] assertion that its proffer of the severance agreement was lawful because [the employee] did not sign it." Id. at 67 fn. 20. The Board explained that the employer's "proffer of the severance agreement . . . constituted an attempt to deter [the employee] from assisting the Board" and that the employee's "conduct in *not* signing the agreement [did] not render the [employer's] conduct lawful." Id. (emphasis omitted). Accordingly, the Board ordered the employer to "[c]ease and desist from . . . [o]ffering employees a severance agreement prohibiting assisting other employees with regard to any matter arising under the . . . Act and/or disclosing any information to the . . . Board with regard to any investigation or proceeding. Id. at 67–68. It also ordered the employer to "rescind the severance agreement offered to" the employee. Id. at 68.

[7] In the most recent of the three decisions, *Shamrock Foods*, issued in 2018, the Board found that the employer had unlawfully discharged the employee to whom it offered an unlawful separation agreement, but the maintenance of the agreement was an independent violation of Sec. 8(a)(1), separately found and separately remedied, that was based entirely on certain provisions of the agreement that would have required the employee to waive Sec. 7 rights. 366 NLRB No. 117, slip op. at 2–3 & fn. 12.

In *Clark Distribution*, supra, decided in 2001, the Board found that a confidentiality provision in a severance agreement was unlawful on its face, because it effectively prohibited employees from assisting an unfair labor practice investigation by the Board. 336 NLRB at 749. That violation was entirely separate from the issue of whether the employees who signed the agreement had been unlawfully terminated. See id. at 749–750 (examining terminations).

The *Clark Distribution* Board relied on *Metro Networks*, supra, also decided in 2001, to find the violation. In that case, severance agreements were found unlawful based on the terms of the agreement, independent of the discharge allegations in the case. 336 NLRB at 66–67. Indeed, the *Metro Networks* Board observed that an employer's restriction on the exercise of a discharged employee's Sec. 7 rights may be found unlawful even where the Board does "not address the question of whether the discharge was unlawful." Id. at 66 (footnote omitted).

[8] 29 U.S.C. §158(a)(1). E.g., *American Freightways Co., Inc.*, 124 NLRB 146, 147 (1959) ("It is well settled that the test of interference, restraint, and coercion under Section 8(a) (1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.").

[9] The *Metro Networks* Board accordingly referred to the employer's offer of an unlawful severance agreement as an "attempt to deter" the exercise of Sec. 7 rights. 336 NLRB at 67 fn. 20.

[10] 336 NLRB at 748. To be sure, the Board's decisions made clear that a violation in this context does not depend on actual (as opposed to potential) coercion. See, e.g., *Metro Networks*, supra, 336 NLRB at 67 fn. 20.

[11] *American Freightways*, supra, 124 NLRB at 147.

A.

The body of the *Baylor* decision first rejects the administrative law judge's treatment of the severance agreement there as the equivalent of a work rule. That question is immaterial, however. The Board's traditional approach to severance agreements containing unlawful provisions has never been based on the premise that such agreements are the equivalent of work rules.[12]

The cited differences between severance agreements and work rules, moreover, have no bearing on whether an unlawful provision has a reasonable tendency to coerce employees in the exercise of their Section 7 rights. Contrary to the *Baylor* Board's view, and as already explained, a severance agreement inherently has coercive potential even if the agreement is "not mandatory."[13] Even a broad voluntary waiver of statutory rights undermines the public purposes of the Act, which depend on the freedom of all employees to engage in Section 7 activity, and to support each other in doing so.

Also contrary to the view of the *Baylor* Board, the coercive potential of an unlawful severance agreement is not somehow eliminated because it "exclusively pertains to postemployment activities and has no impact on terms and conditions of employment." What matters for purposes of the Act, rather, is that the agreement purports to legally require the employee to forfeit his Section 7 rights. Those rights, as the Act makes explicit and as the Board has long held, do not depend on the existence of an employment relationship between the employee and the employer,[14] and the Board has repeatedly affirmed that such rights extend to former employees.[15]

B.

After unhelpfully distinguishing a severance agreement from a work rule, the *Baylor* decision then refused to find a violation of the Act, observing that the General Counsel had not alleged that any employee to whom the severance agreement was proffered "was unlawfully discharged for conduct protected by the Act" or that the employer's "proffers were made under any circumstances that would tend to infringe on the separating employees' exercise of their own Section 7 rights or those of coworkers."[16] But as a review of pre-*Baylor* precedent shows, the Board had never required proof of either fact to establish a violation of Section 8(a)(1). Rather, as I have explained, the Board had always treated the legality of a severance-agreement provision as an entirely independent issue, turning exclusively on the language of the provision.[17]

The *Baylor* Board, in a footnote, addressed this precedent by abandoning it.[18] The Board wrongly re-rationalized the three key decisions (*Shamrock Foods, Clark Distribution*, and *Metro Networks*), explicitly overruled *Clark Distribution* sua sponte, and limited all three decisions to their facts. According to the *Baylor* Board, in each of the three cases

> the employees to whom the agreements were offered had been discharged in violation of the Act. In other words, the employer in those cases had already demonstrated its willingness to retaliate against employees for engaging in Sec. 7 activity. Thus, it was reasonable to believe that further charges may have been filed or might be forthcoming and that the discharged employees might have relevant information they would wish to disclose to an investigating Board agent. Under those circumstances, offering a severance agreement with a non-assistance clause would reasonably tend to interfere with the exercise of rights protected by the Act.

369 NLRB No. 43, slip op. at 2 fn. 6. No fair reading of any of the Board's prior decisions yields this rationale. Indeed, the *Baylor* Board itself acknowledged the "categorical" holding of *Clark Distribution*—that offering a severance agreement with an unlawful provision violates the Act—but asserted, without real explanation, that "this holding is broader than necessary to safeguard Sec[tion] 7 rights" and so overruled the earlier decision.[19]

There is no support in logic, law, or policy for the approach taken by the *Baylor* Board in reversing long-

[12] The *Baylor* Board's decision to treat severance agreements as distinct from work rules does have an important consequence, however. It means that the Board will not apply the analytical framework for work rules established by *The Boeing Co.*, 365 NLRB No. 154 (2017), and then modified in *LA Specialty Produce Co.*, 368 NLRB No. 93 (2019). Notably, however, the Board does analyze mandatory arbitration agreements involving individual employees under the *Boeing* framework, invalidating agreements that require employees to forfeit rights under the Act, where not permitted by the Federal Arbitration Act. See, e.g., *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10 (2019) (finding arbitration agreement unlawful because it interfered with employees' access to the Board). As I will explain, the *Baylor* Board broke with the Board's traditional approach to severance agreements containing unlawful provisions, but then provided no clear analytical framework as a substitute.

[13] *Baylor*, supra, 369 NLRB No. 43, slip op. at 1.

[14] The Act confers Sec. 7 rights on statutory employees. Sec. 2(3) of the Act provides in relevant part that "[t]he term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer." 29 U.S.C. §152(3).

[15] See *Waco, Inc.*, 273 NLRB 746, 747 fn. 8 (1984); *Little Rock Crate & Basket Co.*, 227 NLRB 1406, 1406 (1977); *Briggs Manufacturing Co.*, 75 NLRB 569, 570 (1947). See, e.g., *Cedars-Sinai Medical Center*, 368 NLRB No. 83, slip op. at 8 fn. 7 (2019).

[16] 369 NLRB No. 43, slip op. at 2.

[17] See fn. 6, supra.

[18] Id., slip op. at 2 fn. 6.

[19] Id.

established precedent sua sponte. As explained, before *Baylor*, the Board consistently recognized that the coercive potential of an unlawful severance-agreement provision is inherent in the agreement itself. It does not depend on an employer's proclivity to violate the Act or on an employee's assessment of how likely the employer is to enforce the unlawful provision in the agreement. What matters is simply that the employer's agreement purports to create an enforceable legal obligation to forfeit Section 7 rights. It may be that if the employee was unlawfully fired, then the coercive potential of the agreement is even *greater* than it otherwise would be. But that possibility does not mean that the agreement itself has no meaningful coercive potential so long as the discharge was lawful. Whatever the circumstances, the agreement illegitimately conditions benefits on a forfeiture of Section 7 rights. Employers should not be entitled to one free violation of the Act (proffering an unlawful severance agreement), based on the Board's baseless assumption that a reasonable employee would not fear a second violation from this particular employer.

The refusal of the *Baylor* Board to recognize as much is arbitrary. But the *Baylor* Board also failed to explain why —under a statute designed to protect *employees* in the exercise of their rights—*employers* should be permitted to maintain severance agreements that contain unlawful provisions requiring employees to forfeit their rights. *Baylor* did not turn on an interpretation of the challenged provision or a determination that the challenged provision was facially lawful. The decision, rather, held that absent coercive circumstances, the employer was free to proffer even a facially unlawful provision. This cannot be right. An employer can have no legitimate interest in maintaining a facially unlawful provision in a settlement agreement, much less an interest that somehow outweighs the Section 7 rights of employees.[20] Even the current Board has recognized as much in striking down employer-maintained individual arbitration agreements that reasonably can be read to interfere with employees' access to the Board.[21] The Supreme Court has held that an agency's action is arbitrary if the agency has "entirely failed to consider an important aspect of the problem."[22] That was clearly the case in *Baylor*, which neither recognized nor addressed the inherent coercive potential of severance agreements that require employees to forfeit Section 7 rights.[23]

III.

Here, the majority (the members of the *Baylor* Board) reflexively applies *Baylor* to find that the Respondent committed no violation of the Act by maintaining a nondisparagement clause in the severance agreement it offered terminated employees.[24] That clause was unlawfully overbroad, for reasons that the administrative law judge here correctly explained. Under the Board's traditional approach to unlawful severance-agreement provisions, the Board certainly would have found a violation of Section 8(a)(1) here.

Instead, however, the majority reiterates *Baylor*'s flawed analysis in every respect, concluding that "because the [severance] [a]greement is entirely voluntary, does not

[20] As explained (see fn. 12, supra), the *Baylor* Board rejected application of the analytical framework currently applied to work rules, which incorporates at least a limited (if badly tilted) balancing of employees' Sec. 7 rights and employer interests in some circumstances. The Board's current approach to work rules is deeply flawed (as I explained in dissents in *Boeing* and *LA Specialty Produce*, supra), but the *Baylor* approach is even less protective of statutory rights.

[21] See *Prime Healthcare*, supra, 368 NLRB No. 10, slip op. at 5–6. There, the Board found that "as a matter of law, there is not and cannot be any legitimate justification for provisions, in an arbitration agreement or otherwise, that restrict employees' access to the Board or its processes." Id. at 6.

[22] *Motor Vehicle Manufacturers Assn. v. State Farm Auto Mutual Insurance Co.*, 463 U.S. 29, 43 (1983).

[23] Contrary to the majority, the Supreme Court's decision in *Epic Systems v. Lewis*, ___ U.S. ___, 138 S.Ct. 1612 (2018), has no bearing on the issue presented in cases like this one. The question here, as in *Baylor*, is whether an employer's mere maintenance of an unlawful severance-agreement provision—a provision that could not be lawfully enforced to restrain protected Sec. 7 activity—is itself unlawful. In contrast, *Epic Systems* involved an entirely different issue: whether, in light of the Federal Arbitration Act, an employer's mandatory arbitration agreement requiring individual arbitration violated the National Labor Relations Act. The Court held that such an agreement was *lawful*. Its decision, then, does not address the legality of maintaining (but not enforcing) an *unlawful* provision in an individual agreement.

Nor does *LA Specialty*, supra, a work-rules case also cited by the majority, support the result here. Correctly or not, *Baylor* held that the standard applied to work rules does not apply to severance agreements (see fn. 12, supra). Of course, treating work rules and severance agreements the same would *support* finding a violation in this case: The Board has long held that the mere maintenance of an unlawful work rule is itself unlawful, even without evidence of enforcement. E.g., *Farah Mfg. Co.*, 187 NLRB 601, 602 (1970), enfd. 450 F.2d 942 (5th Cir. 1971). The Board has adhered to that principle even as its approach to determining *whether* a rule is facially unlawful has shifted. See, e.g., *Holy Cross Health d/b/a Holy Cross Hospital*, 370 NLRB No. 16, slip op. at 12 (2020) (mere maintenance of unlawful rule was unlawful). To be sure, the issue here does not depend on how an employee would reasonably interpret a severance-agreement provision (or a work rule, the issue in *LA Specialty*), but instead on whether the mere maintenance of an unlawful provision is itself unlawful. Even if *LA Specialty* were somehow relevant to this case, it was wrongly decided, as I explained in dissent. 368 NLRB No. 93, slip op. at 8–14.

[24] The provision recites:

> You will not disparage or discredit [the employer] or any of its affiliates, officers, directors and employees. You will forfeit any right to receive the payments or benefits described in [the agreement] if you engage in deliberate conduct or make any public statements detrimental to the business or reputation of [the employer].

affect pay or benefits that were established as terms of employment, and has not been proffered coercively," there can be no violation, regardless of any possible illegality of the non-disparagement provision.[25]

For all the reasons I have explained, *Baylor* was wrongly decided. Today's decision only makes bad law worse. Unfortunately, it reflects both the current Board's eagerness to overrule settled precedent and its consistent refusal to recognize the potential chilling effect of employer actions on the exercise of Section 7 rights by employees.[26] Accordingly, I dissent.

Dated, Washington, D.C. November 24, 2020

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

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 NLRB904 (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.

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 (2017).[1] *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 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 otherwise. Id., slip op. at 3–4.[2]

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 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

[25] The majority does not interpret the challenged non-disparagement clause or determine that the clause was facially lawful. Notably, the majority also finds no coercive circumstances of the sort mistakenly demanded by *Baylor*, although the Board in this case has found that the Respondent unlawfully refused to bargain over a subcontracting decision and threatened employees, during bargaining, with a loss of overtime – facts that might well heighten the coercive potential of the non-disparagement clause even under the *Baylor* approach, inasmuch as these unfair labor practices suggest hostility toward Sec. 7 activity.

[26] See, e.g., *Apogee Retail*, 368 NLRB No. 144 (2019); *LA Specialty Produce Co.*, supra; *Boeing*, supra.

[1] See 366 NLRB No. 170 (Aug. 24, 2018) (severing), and 2019 WL 1314930 (March 20, 2019) (remanding).

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

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, 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 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 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).[3]

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.)[5]

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

[3] 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).

[5] 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.

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"[6] 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 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).

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.[7]

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

[6] 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.

[7] 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." Id. slip op. at 3 fn. 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 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 fn. 5 (1997) (judge properly declined to address issue outside scope of Board's remand order).

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.[8]

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 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[9]

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) 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."

(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.

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.

(b) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix".[10] 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 former employees employed by Respondent at the closed facility at any time since June 30, 2015.

(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

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

[8] 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).

[9] 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.

[10] 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."

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

The Administrative Law Judge's decision can be found at 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.