NP Palace LLC d/b/a Palace Station Hotel & Casino *and* International Union of Operating Engineers Local 501, AFL–CIO. Case 28–CA–218622

December 16, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

The General Counsel seeks partial summary judgment in this case on the grounds that there are no genuine issues of material fact as to certain allegations in the complaint, and that the Board should find, as a matter of law, that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish information necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of a unit of the Respondent's employees.

Pursuant to a charge filed on April 18, 2018, by the Union, the General Counsel issued the complaint on May 2, 2018, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union and by failing and refusing to furnish relevant information. The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses. On May 9, 2018, the General Counsel filed a Motion for Summary Judgment. On May 16, 2018, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response, and the Union filed a Joinder in Motion for Summary Judgment and Request for Remedies.

On May 14, 2019, the Board issued a Decision and Order granting in part the General Counsel's Motion for Summary Judgment and finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union following the Union's certification in Case 28–RC–211644. *NP Palace LLC d/b/a Palace Station Hotel & Casino*, 367 NLRB No. 129 (2019) (*NP Palace I*), appeal pending No. 19-1107 (D.C. Cir.). In that decision, the Board also severed and retained for further consideration the complaint allegations that the Respondent unlawfully refused to furnish relevant information requested by the Union. We now resolve those information-request allegations.

For the reasons stated below, we grant the General Counsel's Motion for Summary Judgment with respect to the presumptively relevant information requested by the Union. The Respondent has articulated legitimate confidentiality interests with respect to some of that requested information. As explained below, those information requests create a legal catch-22 for the Respondent because it is simultaneously challenging the validity of the Union's certification. Under current Board law, the Respondent forfeits its confidentiality defense unless it responds to the Union's information request with an offer to engage in accommodative bargaining over the disputed information. But if it engages in accommodative bargaining, the Respondent waives its right to challenge the Union's certification in the court of appeals. This problematic situation is an unintended consequence of the intersection of these conflicting lines of precedent, and it does not effectuate any of the policies of the Act to perpetuate it. To resolve this issue, we shall modify our precedent to ensure that a certification-testing employer preserves both its right to secure judicial review of the underlying representation case and, if the union's certification is upheld by a court of appeals, to engage in accommodative bargaining with respect to information as to which it has raised a legitimate defense, such as confidentiality, that would normally require such bargaining.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, NP Palace LLC d/b/a Palace Station Hotel & Casino, has been a limited liability company with an office and place of business in Las Vegas, Nevada (the facility), and has been engaged in operating a hotel and casino.

During the 12-month period ending April 18, 2018,[1] the Respondent, in conducting its operations described above, purchased and received at its facility goods valued in excess of $50,000 directly from points outside the State of Nevada and derived gross revenues in excess of $500,000.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that International Union of Operating Engineers Local 501, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Following a representation election held on January 9, the Union was certified on January 18 as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

[1] All dates are in 2018 unless noted otherwise.

> All full-time and regular part-time slot technicians and utility technicians employed by [the Respondent] at its Las Vegas, Nevada facility; excluding, all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.[2]

On January 22, the Union requested bargaining, and the Respondent informed the Union that it would not bargain. By failing and refusing to bargain with the Union since January 22, the Respondent has violated Section 8(a)(5) and (1) of the Act. *NP Palace I,* above.

By letter dated January 22, the Union requested that the Respondent furnish it with the following information:

> 1. A list of current bargaining unit employees including their names, dates of hire, rates of pay, job classification, last known address, phone number, and date of completion of any probationary period.
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> 2. Copies of all manuals, training materials, documentation, memoranda, communications and policies related to the operation of any work distribution system currently in use.
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> 3. A copy of all current company policies, practices and/or procedures bargaining unit members are expected to follow.
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> 4. A copy of all departmental policies, practices and/or procedures that bargaining unit members are expected to follow.
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> 5. Copies of all current job descriptions for all bargaining unit members, including but not limited to information regarding required professional and/or technical licenses.
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> 6. Copies of all job descriptions for non-bargaining unit personnel assigned to supervise bargaining unit members, including but not limited to information regarding required professional and/or technical licenses.
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> 7. Copies of all disciplinary notices, warnings or records of disciplinary actions involving bargaining unit members occurring July 1, 2012 or later.
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> 8. Copies of all job bids posted July 1, 2012 or later involving bargaining unit members, and the results of those bids.
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> 9. Copies of all shift schedules for bargaining unit members effective January 1, 2015 or later.
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> 10. Copies of all written customer complaints involving bargaining unit members. Please also provide copies of all internal memorandums concerning oral customer complaints. If the complaints were oral and there is no written record, please provide a description of each such complaint including the customer's name, nature of complaint, employee involved and disposition both with respect to the complaint as well as any discipline which might have been imposed.
>
> 11. Copies of all OSHA 300 Logs from July 1, 2012 through now.
>
> 12. Copies of all OSHA Forms 301 from July 1, 2012 through now.
>
> 13. Copies of all safety committee minutes from July 1, 2012 through now.[3]

That same day, the Respondent, in writing, denied the Union's request. The Respondent also stated that it "shall satisfy all legal obligations in the event that the Court of Appeals so orders."

By letter dated January 31, the Union requested the following information from the Respondent:

> A list of current employees including their names, dates of hire, rates of pay, job classification, last known address, phone number, date of completion of any probationary period, and social security number.
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> Copies of all current job descriptions.
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> A copy of all company fringe benefit plans including retirement, sick time, profit sharing, severance, stock incentive, vacation, health and welfare, apprenticeship, training, education, legal services, child care or any plans which relate to the employees.
>
> 1. Copies of any company wage or salary plans.
>
> 2. A copy of all current company personnel policies, practices and procedures.

That same day, the Respondent, in writing, referred to its January 22 email as its reply. The Respondent never furnished any of the requested information.

Discussion

The Respondent argues, in its response to the Notice to Show Cause, that there are disputed issues of material fact as to (1) whether the requested information is necessary for and relevant to collective bargaining, and (2) whether the Union's need for information outweighs the Respondent's interest in preserving the confidentiality of certain information requested: internal "wage or salary plans,"

[2] By unpublished order dated April 12, the Board denied the Respondent's request for review of the Regional Director's Decision and Direction of Election.

[3] In its January 22 letter, the Union also requested "[c]opies of all collective bargaining agreements which are currently in effect between the International Game Technologies and any other union." However, the complaint does not allege that the Respondent violated the Act by failing to furnish that information.

confidential policies related to ensuring the security and integrity of its gaming machines, and the precautions it takes to combat illegal gaming activity and money laundering.

For the reasons below, we find that there are no factual issues warranting a hearing, and we grant in part and deny in part the General Counsel's Motion for Summary Judgment.[4]

1. Relevance of the requested information

The Respondent's answer denies that any of the requested information is relevant to the Union's duties as the exclusive bargaining representative of the unit employees. We find that the Respondent's denial fails to raise triable issues of fact requiring a hearing with respect to most of the items in the Union's information requests.[5]

Information that relates to unit employees' terms and conditions of employment is presumptively relevant. See *NP Sunset LLC d/b/a Sunset Station Hotel Casino*, 367 NLRB No. 62, slip op. at 1–2 (2019); *United Parcel Service of America*, 362 NLRB 160, 162 (2015); *Southern California Gas Co.*, 342 NLRB 613, 614 (2004); *International Protective Services*, 339 NLRB 701, 704 (2003).[6] In contrast, "[i]nformation that does not directly concern wages, hours, and terms and conditions of employment does not enjoy a presumption of relevance, and a specific need for it must be established." *F. A. Bartlett Tree Expert Co.*, 316 NLRB 1312, 1313 (1995) (finding that an employer's customer contracts are not presumptively relevant).

Job descriptions for nonunit personnel and unit employees' Social Security numbers, however, are not presumptively relevant.[7] We deny the General Counsel's motion with respect to the Respondent's failure to provide this information, and we remand those issues to the Region for further appropriate action. See *Perkins Management Services Co.*, 366 NLRB No. 130, slip op. at 2 fn. 1 (2018).

We also deny the General Counsel's motion with respect to the Respondent's failure to provide requested information about customer complaints. That information also is not presumptively relevant. *DIRECTV U.S. DIRECTV Holdings LLC*, above, 361 NLRB No. 124, slip op. at 3 (finding that "copies of customer complaints [about unit employees] and reports and records relating to the complaints" were not presumptively relevant).

We recognize that the Board has also found that a request for copies of "all customer complaints . . . with respect to any work performed by any [unit employee]" was a request for presumptively relevant information. See *Mercedes-Benz of San Diego*, 357 NLRB No. 114, slip op. at 2 (2011), enfd. mem. sub nom. *Europa Auto Imports, Inc. v. NLRB*, 576 Fed.Appx. 1 (D.C. Cir. 2014) (per curiam). The Board provided no analysis or explanation for this finding, likely because the respondent did not specifically contest the presumptive relevance of any of the information requested.[8] Having considered the matter, we find that customer complaints about unit employees are not presumptively relevant because customer complaints are not wages, benefits, or other terms and conditions of employment, and they do not, standing alone, directly concern wages, benefits, or other terms and conditions of employment. Rather, a customer's complaint to an employer about a unit employee is a complaint from a third party who has no control over the employee's terms and conditions of employment.[9] Accordingly, *Mercedes-Benz of San Diego*, above, and any other cases finding customer

[4] The Respondent's answer denies par. 5(a) of the complaint, which sets forth the appropriate unit, and par. 5(c), which alleges that the Union is the exclusive collective-bargaining representative of unit employees. As found in *NP Palace I*, above, these issues were fully litigated and resolved in the underlying representation proceeding. Accordingly, we find that the Respondent's denials of these complaint allegations do not raise any litigable issues in this proceeding. See *Voices for International Business & Education, Inc. d/b/a International High School of New Orleans*, 365 NLRB No. 66, slip op. at 1 fn. 1 (2017), enfd. 905 F.3d 770 (5th Cir. 2018).

[5] The fact that the requested information is not specifically limited to bargaining-unit employees does not justify the Respondent's blanket refusal to furnish it. See *DIRECTV U.S. DIRECTV Holdings LLC,* 361 NLRB No. 124, slip op. at 2 (2014). In accordance with well-established precedent, the Union's request is to be construed as pertaining to unit employees. See id.; *Freyco Trucking, Inc.*, 338 NLRB 774, 775 fn. 1 (2003).

[6] See also *Hofstra University*, 324 NLRB 557, 557 (1997) ("Information pertaining to the wages, hours, and working conditions of unit employees is 'so intrinsic to the core of the employer-employee relationship that such information is considered presumptively relevant.'") (quoting *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977)); *Ohio Power Co.*, 216 NLRB 987, 991 (1975) ("Where the information sought covers the terms and conditions of employment within the bargaining unit, thus involving the core of the employer-employee relationship," that information is presumptively relevant.), enfd. 531 F.2d 1381 (6th Cir. 1976).

[7] See *Hamilton Park Health Care Center*, 365 NLRB No. 117, slip op. at 9 (2017) (job descriptions for nonunit personnel); *Maple View Manor*, 320 NLRB 1149, 1151 fn. 2 (1996) (social security numbers), enfd. mem. 107 F.3d 923 (D.C. Cir. 1997) (per curiam).

[8] 357 NLRB No. 114, slip op. at 1 fn. 3. In *Europa Auto Imports, Inc. v. NLRB*, above, the court did not address whether customer complaints about unit employees are presumptively relevant because the employer did not raise that issue in its petition for review.

[9] The dissent posits that some communications by a third party to an employer can be presumptively relevant to a union's statutory duties, giving the example of information provided by a third party to an employer about the health and safety risks of a chemical used by workers on the job. We are not holding that third-party communications to an employer can never constitute presumptively relevant information. We are holding that a specific category of third-party communications—customer complaints about unit employees—are not presumptively relevant. Such do not inherently concern terms and conditions of employment of unit employees, unlike the third-party report the dissent hypothesizes.

complaints about unit employees presumptively relevant are overruled in pertinent part.[10]

Even though customer complaints are not *presumptively* relevant, the General Counsel can establish their relevance in a particular case by showing, for example, that an employer relied on the requested customer complaints to discipline unit employees or deny a scheduled wage increase. See, e.g., *PAE Applied Technologies, LLC*, 367 NLRB No. 105, slip op. at 23 (2019) (finding customer complaint relevant after observing that employer had reviewed complaint when deciding to discipline unit employee). Here, there has not been any such showing.[11] Accordingly, we deny the General Counsel's motion with respect to the Respondent's failure to provide requested customer complaints, and we remand that issue to the Region for further appropriate action.

The remainder of the information requested by the Union is presumptively relevant for purposes of collective bargaining, and the Respondent has not asserted any basis for rebutting its presumptive relevance.[12] See, e.g., *Transit Connection, Inc.*, 365 NLRB No. 143 (2017) (various employee and employment information and disciplinary actions); *Sunrise Health & Rehabilitation Center*, 351 NLRB No. 95 (2007) (OSHA 200 logs), enfd. sub nom. *NLRB v. Richmond Health Care*, 300 Fed.Appx. 717 (11th Cir. 2008) (per curiam); *Maple View Manor*, above (various employee and employment information and health and safety information). Accordingly, we will grant the General Counsel's motion with respect to this information and find that the Respondent violated Section 8(a)(5) by failing to provide it.

2. Legitimate confidentiality interests

In its response to the Notice to Show Cause, the Respondent asserts that it has a legitimate confidentiality interest in certain items encompassed by the Union's information requests: internal "wage or salary plans," policies related to ensuring the security and integrity of its gaming machines, and the precautions it takes to combat illegal gaming activity and money laundering.[13] The party asserting a confidentiality defense must prove that a legitimate and substantial confidentiality interest exists and that it outweighs the requesting party's need for the information. See *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *Jacksonville Area Assn. for Retarded Citizens*, 316 NLRB 338, 340 (1995). The Board considers whether the information withheld is sensitive or confidential based on the specific facts in each case. See *Northern Indiana Public Service Co.*, 347 NLRB 210, 211 (2006). Importantly, the party asserting the confidentiality defense may not simply refuse to furnish the requested information. Rather, it must raise its confidentiality concerns in a timely manner and seek an accommodation from the other party. *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995).

Here, it is undisputed that when the Union requested the information, the Respondent did not offer to engage in accommodative bargaining. Under current Board law, its confidentiality defense was thereby waived. *Postal Service*, 364 NLRB No. 27, slip op. at 2 (2016) (an employer waived its confidentiality defense by failing either to timely assert a confidentiality interest or propose an accommodation). As the Respondent notes, however, this rule of Board law places it in an untenable legal position because a separate line of precedent holds that by bargaining with the Union, the Respondent would waive its right to contest the Union's certification in a court of appeals. See *Nursing Center at Vineland*, 318 NLRB 901, 904 (1995), enfd. mem. sub nom. *Konig v. NLRB*, No. 95-

[10] The dissent asserts that "customer complaints frequently have adverse consequences for employees" and that "it is obvious that customer complaints frequently have a direct and immediate impact on the employer-employee relationship." However, the *employer* decides whether a customer complaint will affect an employee's terms and conditions of employment, not the customer. Moreover, employers are not so naïve as to assume that customer complaints are necessarily valid or reasonable. Customers may have unreasonable expectations; they may complain about something that lies outside the scope of the complained-about employee's duties; and they may be simply mistaken. In our experience, customer complaints do not so frequently lead to tangible employment actions against employees that the Board should presume their relevance and dispense with the requirement of proof of relevance. The dissent also asserts that customer complaints can, under certain circumstances, be useful to a union in preparing for negotiations. However, customer complaints are not so often relevant to disputed issues in collective bargaining that a legal presumption of relevance must or should be adopted.

[11] The dissent would find that the relevance of the requested customer complaints has been demonstrated in this case because the Union's request also referenced discipline. This would be a different case if the Union had limited its request to customer complaints that resulted in discipline. In that case, the relevance of the requested information would be apparent. In fact, however, the Union asked for *all* customer complaints, *plus* "any discipline which might have been imposed." Thus, the reference to discipline did not limit in any way the request for customer complaints. Moreover, in his motion, the General Counsel relies solely on presumptive relevance and does not argue that he demonstrated the relevance of customer complaints. Additionally, the dissent's reliance on *Champion Home Builders*, 350 NLRB 788, 788 fn. 7 (2007), and *Honda of Hayward*, 314 NLRB 443, 452–453 (1994), is misplaced. Those cases involved requests for policies regarding the treatment of customer complaints, not for the customer complaints themselves. In each case, the Board properly found that the requested *employer policies* were relevant to the unions' performance of their statutory duties.

[12] While we agree with the Respondent that the period of time for which the Union requested disciplinary notices and warnings was extensive—six years, as of the date of the request—the Respondent has not provided a basis for us to conclude that a triable issue of fact exists regarding whether it rebutted the presumption of their relevance.

[13] These confidentiality interests were timely asserted even though they were not raised in the Respondent's answer. *NP Palace I,* above, slip op. at 2 fn. 5.

3507, 1996 WL 199152 (3d Cir. Jan. 11, 1996); *Technicolor Government Services v. NLRB*, 739 F.2d 323, 326 (8th Cir. 1984) ("Once an employer honors a certification and recognizes a union by entering into negotiations with it, the employer has waived the objection that the certification is invalid."); *King Radio Corp. v. NLRB,* 398 F.2d 14, 20 (10th Cir. 1968) (same).[14]

The Board has never adequately addressed the manner in which these lines of precedent collide, requiring a certification-testing employer to waive either its challenge to the union's certification or its confidentiality defense to providing requested information.[15] There is no valid justification for forcing such a choice on employers. The Supreme Court has directed the Board to construe the duty to provide requested relevant information with due regard for confidentiality interests that would be adversely affected by disclosure, and to be guided by those considerations when formulating remedies for violations of that duty. *Detroit Edison Co. v. NLRB*, above. At the same time, Congress intended that employers would obtain judicial review of adverse decisions in representation cases by refusing to bargain and then raising their challenge to the propriety of the union's certification as an affirmative defense in an ensuing unfair labor practice case. *Technicolor Government Services v. NLRB*, above, 739 F.2d at 326; see also *Boire v. Greyhound Corp.,* 376 U.S. 473, 476–477 (1964); *American Federation of Labor v. NLRB,* 308 U.S. 401, 411 (1940); *NLRB v. Downtown Bid Services Corp.*, 682 F.3d 109, 112 (D.C. Cir. 2012) (refusal to bargain "sets up judicial review of an election certification that is otherwise insulated from direct review"). It would be contrary to the intent of Congress to hold that an employer must waive this right in order to assert a confidentiality defense to an information request, or vice versa.

Contrary to the Respondent's suggestion, however, these considerations do not warrant denying the General Counsel's Motion for Summary Judgment with respect to the items as to which the Respondent has asserted a confidentiality interest. An employer's duty to bargain in good faith (and with it, the duty to furnish requested relevant information) attaches with the issuance of the certification of representative.[16] Accordingly, we find that the Respondent failed to satisfy its statutory obligations when it failed to either furnish the purportedly confidential (but presumptively relevant) information or seek to engage in accommodative bargaining with the Union.

In our view, the conflict described above can best be resolved by modifying the remedy for the violations found.[17] Under the remedial approach we adopt today, if a certification-testing employer articulates a specific confidentiality interest in particular requested information, the Board will determine from the filings (including the General Counsel's Motion for Summary Judgment, the employer's response to the Board's Notice to Show Cause, and any reply) whether the confidentiality interest is legitimate on its face. If the Board finds that it is, the Board will remedy the violation by ordering the respondent to engage in accommodative bargaining.[18] If the Board finds the defense is not legitimate, it will remedy the violation by ordering the immediate production of the required evidence. In either event, a violation will be found for the refusal to provide information, as well as for the certification-testing refusal to bargain, and a remedy will be provided for both violations.[19]

[14] See also *Terrace Gardens Plaza, Inc. v. NLRB*, 91 F.3d 222, 225 (D.C. Cir. 1996) (holding that the employer "may negotiate with, or challenge the certification of, the [u]nion; it may not do both at once"); *Peabody Coal Co. v. NLRB*, 725 F.2d 357, 365 (6th Cir. 1984) (observing that an employer may jeopardize its certification challenge by consulting with a union).

[15] In one case, *Zeta Consumer Products Corp.*, 326 NLRB 293, 293 fn. 2, 295 (1998), the Board ordered a certification-testing employer to furnish requested information with the caveat that the employer was not precluded from raising any privacy or confidentiality concerns in compliance proceedings and seeking an accommodation from the union in the event the Board's bargaining order were to be enforced by a court of appeals. The Board has not applied *Zeta* on this point in any subsequent case. Instead, the usual approach has been to unconditionally order a certification-testing employer to furnish all requested information, notwithstanding any claim of a legitimate confidentiality interest in some of it. E.g., *Station GVR Acquisition, LLC d/b/a Green Valley Ranch Resort Spa Casino*, 366 NLRB No. 175, slip op. at 3–4 (2018) (*Station GVR Acquisition),* appeal pending No. 18-1236 (D.C. Cir.), and *Mission Foods*, 345 NLRB 788, 793 (2005).

[16] *Didlake, Inc.*, 367 NLRB No. 125, slip op. at 1 fn. 2 (2019) (citing *Allstate Insurance Co.*, 234 NLRB 193, 193 (1978), and *Audio Visual Services Group, Inc. d/b/a PSAV Presentation Services*, 365 NLRB No. 84, slip op. at 2 (2017)); *Bird-Johnson Co.*, 292 NLRB No. 17, slip op. at 1 (1988).

[17] See *Roselle Shoe Corp*., 135 NLRB 472, 475 (1962) ("The determination of the appropriate remedy in unfair labor practice cases is a matter of administrative judgment reached after the Board has balanced all factors and equities in light of the policies of the Act."), enfd. 315 F.2d 41 (D.C. Cir. 1963).

[18] In the test-of-certification context, the remedial approach we adopt today will equally apply to other defenses that may require accommodative bargaining, such as a legitimate claim that an information request is unduly burdensome or overly broad.

[19] We reject the dissent's contention that this modified remedial approach "is contrary to the Act's policy of promoting collective bargaining and improperly favors wrongdoers." This assertion fails to take into account the nature of the wrongdoing at issue, i.e., what is variously called a "technical" or "test-of-certification" 8(a)(5) violation that an employer must commit in order to seek appellate review of the Board's decision in the underlying representation case.

This remedial approach eliminates the dilemma identified above.[20] It accounts for the fact that courts of appeals sometimes find merit in an employer's challenge to the union's certification[21] and that unions may and do request information that is both relevant to collective bargaining and confidential in nature.[22] An employer cannot possibly know in advance whether its arguments regarding the certification will prevail, and no valid reason exists for requiring an employer to abandon a possibly meritorious argument regarding the certification in order to preserve a legitimate confidentiality defense.[23] Further, we believe that ordering accommodative bargaining and thus giving the parties an opportunity to "work together to establish mutually satisfactory conditions" effectuates the Act's policy of maintaining industrial peace through collective bargaining. *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970). The Board's cumulative experience has shown that parties, given the opportunity, typically reach an accommodation that satisfies both the union's informational needs and the employer's confidentiality concerns. *Metropolitan Edison Co.*, 330 NLRB 107, 109 (1999) (citing *Exxon Co. USA*, 321 NLRB 896, 899 (1996), enfd. mem. 116 F.3d 1476 (5th Cir. 1997)). Indeed, the Respondent anticipates as much here, stating in its response to the Notice to Show Cause that "[i]f the Union's certification is upheld [by a court of appeals], it is possible that the parties . . . may negotiate a mutually-agreeable narrowing of the Union's requests, with appropriate confidentiality protections."

We recognize that under this remedial approach, the provision of some information may be delayed even after a union's certification is upheld while accommodative bargaining takes place—and, if that bargaining does not result in an agreement, the information may be further delayed until the union's right to the information is resolved in a subsequent unfair labor practice proceeding. Those delays can only happen, however, where the Board concludes that the asserted confidentiality interest is legitimate. As to such requests, we believe that requiring accommodative bargaining—rather than riding roughshod over those interests by ordering the information furnished forthwith—best effectuates the policies of the Act for all the reasons stated above.

Here, we find that the Respondent has asserted a legitimate confidentiality interest in its policies related to ensuring the security and integrity of its gaming machines and the precautions it takes to combat illegal gaming activity and money laundering.[24] In the wrong hands, that

[20] The dissent says that a "better solution" would be to require the employer to engage in accommodative bargaining while also permitting it to preserve the right to test certification by "clearly and unequivocally" stating that "the bargaining is only for the purpose of preserving its confidentiality defense and that the employer is not waiving its challenge to the Board's certification of the union." However, it is not up to the Board to decide whether an employer has waived the right to test certification in a court of appeals. That is for the courts to decide, and the courts have held that it is an either-or proposition. See, e.g., *Terrace Gardens Plaza, Inc. v. NLRB*, 91 F.3d at 225 (holding that an employer "may negotiate with, or challenge the certification of, the [u]nion; it may not do both at once"); *Technicolor Government Services v. NLRB*, 739 F.2d at 326; *King Radio Corp. v. NLRB,* 398 F.2d at 20.

The dissent cites *WWOR-TV*, 330 NLRB 1265 (2000), while acknowledging that it involved "different circumstances." That it did. In *WWOR-TV*, the union claimed that a prior collective-bargaining agreement had automatically renewed and that it had no duty to bargain with the employer over a successor agreement. The employer announced that it intended to implement new terms and conditions of employment. In response, the union said it would bargain for a new contract without waiving its position that the prior agreement had automatically renewed. The employer then refused to negotiate and unilaterally implemented new terms. The Board held that the union's position did not excuse the employer's refusal to bargain or its unilateral implementation of new terms in the absence of an impasse. In short, *WWOR-TV* is wholly inapposite.

Additionally, the dissent's reliance on unilateral-change cases is misplaced. Those cases do not involve any dilemma; the employer is not forced to choose one potentially successful defense and to waive another one.

[21] See, e.g., *Pennsylvania Interscholastic Athletic Association, Inc. v. NLRB*, 926 F.3d 837 (D.C. Cir. 2019) (finding that Board erred by certifying a union as the bargaining representative of a unit of lacrosse officials who were independent contractors); *FedEx Home Delivery v. NLRB*, 849 F.3d 1123 (D.C. Cir. 2017) (finding that Board erred by certifying a union as the bargaining representative of single-route drivers who were independent contractors); *Bellagio, LLC v. NLRB*, 863 F.3d 839 (D.C. Cir. 2017) (holding that Board erred by finding that casino surveillance technicians were not guards and by certifying a union that represented non-guards as the technicians' bargaining representative); *NLRB v. Lakepointe Senior Care & Rehab Center, LLC*, 680 Fed. Appx. 400 (6th Cir. 2017) (finding that Board erred by certifying a unit of charge nurses who were statutory supervisors).

[22] See, e.g., *Olean General Hospital*, 363 NLRB No. 62, slip op. at 6, 8–9 (2015) (finding legitimate and substantial confidentiality interest in requested patient-care survey); *Kaleida Health, Inc.*, 356 NLRB 1373, 1379 (2011) (finding legitimate confidentiality interest with regard to incident reports); *General Dynamics Corp.*, 268 NLRB 1432, 1433 (1984) (finding legitimate and substantial confidentiality interest in MIT study of defective work in employer's product).

[23] The dissent argues that forcing employers to choose between preserving a confidentiality defense and retaining the right to test certification will serve to incentivize employers to be cautious when evaluating their prospects of successfully challenging the certification. Obviously, we see this situation very differently. We disagree with the dissent's apparent view that employers will not take seriously the decision to challenge a certification in the absence of this "incentive." Moreover, it is worth emphasizing that we are not letting employers off the hook for refusing to provide the requested information. To the contrary, we find that the Respondent *has violated the Act* by refusing to furnish the assertedly confidential information without seeking accommodative bargaining. We merely modify the *remedy* for that violation to eliminate the Hobson's choice under prior law. In our view, this is a modest and eminently fair measure.

[24] The dissent does not dispute the legitimacy of the Respondent's interest in maintaining the confidentiality of its policies related to ensuring the security and integrity of its gaming machines and the precautions it takes to combat illegal gaming activity and money laundering.

information could severely compromise the Respondent's business, advantage would-be malefactors, and detrimentally affect law-abiding patrons. Accordingly, we shall not order the Respondent to furnish that information but rather to engage in accommodative bargaining with the Union over their respective interests.[25] In contrast, we find that the Respondent has failed to identify a specific and legitimate confidentiality interest in the "wage or salary plans" applicable to unit employees. Wages and salaries are the most basic and vital terms and conditions of employment, *Rogers Environmental Contracting*, 325 NLRB 144, 145 (1997), and the Respondent has offered no reason why its wage or salary plans implicate any legitimate confidentiality interest. Consequently, we shall order the Respondent to furnish that information to the Union.

For the reasons set forth above, we grant in part and deny in part the General Counsel's Motion for Summary Judgment with respect to the complaint's allegations that the Respondent unlawfully failed to furnish relevant information.[26]

CONCLUSION OF LAW

By failing to provide the Union with nonconfidential information that is relevant to and necessary for the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees, and by failing to respond to the Union's request for information in which the Respondent has a legitimate confidentiality interest either by furnishing the Union with the information or offering to bargain in good faith with the Union to accommodate their mutual interests, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with information that is relevant to and necessary for the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees, we shall order the Respondent to furnish the Union the information requested by the Union in its letters dated January 22 and 31, 2018, to the extent that the information pertains to current or former unit employees, with the exception of (i) job descriptions for nonunit personnel, (ii) customer complaints, (iii) employees' Social Security numbers, (iv) "[c]opies of all collective bargaining agreements which are currently in effect between the International Game Technologies and any other union," and, as described above, (v) particular information in which the Respondent has identified a specific and legitimate confidentiality interest (i.e., policies relating to ensuring the security and integrity of the gaming machines and the precautions taken to combat illegal gaming and money laundering).[27]

ORDER

The National Labor Relations Board orders that the Respondent, NP Palace LLC d/b/a Palace Station Hotel & Casino, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with International Union of Operating Engineers Local 501, AFL–CIO (the Union) by failing and refusing to furnish it with requested information that is relevant to and necessary for the

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Nevertheless, she would order the Respondent to furnish that information to the Union without any restriction on use or dissemination. She gives no weight whatsoever to the legitimate confidentiality interests an employer may have in not disclosing the information, or to the fact that those confidentiality interests may implicate the rights of employees and third parties, not just the employer. Indeed, under the position advanced by the dissent, a certification-testing employer would be obligated to disclose copies of personality tests administered to employees, and individual employees' scores, despite the Supreme Court's recognition that the Act does not require such disclosures. *Detroit Edison Co. v. NLRB*, above, 440 U.S. 301. As the Court there stated, "[t]he Board's position [requiring disclosure of the test scores] appears to rest on the proposition that union interest in arguably relevant information must always predominate over all other interests, however legitimate. But such an absolute rule has never been established, and we decline to adopt such a rule here." Id. at 318 (internal footnote omitted). Our dissenting colleague's views fail to properly acknowledge these principles.

[25] We recognize that in *Station GVR Acquisition, d/b/a Green Valley Ranch Resort Spa Casino,* above, 366 NLRB No. 175, slip op. at 2, the Board characterized the employer's confidentiality concerns over the same information at issue here ("policies related to the security and integrity of [the respondent's] gaming machines . . . and precautions taken to combat illegal gaming and money laundering") as "a blanket claim of confidentiality." However, *Station GVR Acquisition* did not address the dilemma faced by the employer in that case, which was the same as that faced by the Respondent here. Member Kaplan notes that while he approved the decision in *Station GVR Acquisition*, he agrees with his colleagues that a change in the law is necessary to resolve the dilemma addressed here.

Accordingly, for the reasons stated in the text, and under the remedial approach we adopt today, we find that the Respondent here, in the midst of testing certification, has sufficiently identified a legitimate confidentiality interest in certain items of requested relevant information, such that an order to engage in accommodative bargaining rather than an order to furnish those items is the appropriate remedy. We overrule precedent to the extent inconsistent with this approach, specifically including *Station GVR Acquisition* and *Zeta Consumer Products Corp.*, above.

[26] Accordingly, the Respondent's request that the complaint be dismissed is denied.

[27] The Union's request for special remedies was denied in *NP Palace I,* above, slip op. at 3.

Union's performance of its functions as the exclusive collective-bargaining representative of the Respondent's employees in the following appropriate unit:

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

(b) Failing to respond to the Union's request for information in which the Respondent has a legitimate confidentiality interest, either by furnishing the Union with the information or by offering to bargain in good faith with the Union to accommodate the parties' respective interests.

(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) Furnish to the Union in a timely manner the information requested by the Union in its letters dated January 22 and 31, 2018, to the extent that the information pertains to current or former unit employees, except for job descriptions for non–bargaining unit personnel assigned to supervise bargaining unit members, customer complaints, employees' Social Security numbers, copies of all collective-bargaining agreements which are currently in effect between International Game Technologies and any other union, confidential policies related to the security and integrity of its gaming machines, and precautions taken to combat illegal gaming activity and money laundering.

(b) On request, bargain with the Union in good faith toward an accommodation that satisfies both the Union's need for, and the Respondent's confidentiality interests in, policies related to the security and integrity of its gaming machines and the precautions taken to combat illegal gaming activity and money laundering, and thereafter comply with any agreement reached through such bargaining.

(c) Within 14 days after service by the Region, post at its Las Vegas, Nevada facility copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by 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, 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 the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the closed facility at any time since January 22, 2018.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the General Counsel's Motion for Summary Judgment is denied with respect to the allegation concerning employee Social Security numbers in paragraph 5(h)(1) of the complaint, the allegation concerning job descriptions for non–bargaining unit personnel as described in paragraph 5(g)(6) of the complaint, and the allegation concerning customer complaints as described in paragraph 5(g)(10) of the complaint, and that these allegations are remanded to the Regional Director for Region 28 for further appropriate action.

Dated, Washington, D.C. December 16, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, concurring in part and dissenting in part.

The fundamental policies of the Act are to promote collective bargaining and industrial peace.[1] That means respecting workers' decision to choose a representative,

[28] 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."

[1] See Sec.1 of the Act, 29 U.S.C. Sec. 151.

and, if a union wins certification, ensuring that it promptly receives requested information from the employer to effectively carry out its new representative duties. The majority has now changed the law in two ways that hinder these fundamental policies. First, the majority wrongly overrules precedent holding that customer complaints about bargaining unit employees are presumptively relevant to a union's fulfillment of its duties. That precedent is sound, but even if it were an open question, the Board should easily conclude that such complaints are presumptively relevant. Second, I disagree with the majority's imposition of a new scheme permitting an employer that is unlawfully refusing to bargain with a Board-certified union—in order to test the certification—to simultaneously preserve a confidentiality defense (and other defenses, such as overbreadth and burdensomeness) to the union's requests for relevant information, even where the employer did not raise the confidentiality issue or offer to bargain an accommodation with the union at the time the request was made. As I explain below, the majority's approach contradicts the Act's policy of promoting collective bargaining, inappropriately benefits wrongdoers, and is particularly unjustified as applied here because the Respondent clearly procedurally waived any confidentiality defense by failing to assert it in its answer to the complaint.[2]

I.

The majority's conclusion that customer complaints about bargaining unit employees are *not* presumptively relevant is contrary to Board precedent and in any case reflects the majority's misapplication of the Board's well-established test for presumptive relevance. In *Mercedes-Benz of San Diego*, 357 NLRB No. 114 (2011), enfd. mem. sub nom. *Europa Auto Imports, Inc. v. NLRB*, 576 Fed.Appx. 1 (D.C. Cir. 2014) (per curiam), also a test-of-certification proceeding with an accompanying information request, the Board unanimously concluded that a union's request for "all customer complaints ... with respect to any work performed by any [bargaining-unit] technician" was presumptively relevant, as this information concerned unit employees' terms and conditions of employment. Id. at slip op. 2. As further explained below, the rationale underlying that conclusion is self-evident: customer complaints frequently have adverse consequences for employees and, more broadly, may inform a union's bargaining position on a range of related subjects.

Yet today, the majority holds otherwise, citing one post-*Mercedes-Benz* case, *DirecTV U.S. DirecTV Holdings LLC*, 361 NLRB No. 124 (2014), in which the Board concluded that a union's request for "customer complaints made about any employee in the unit" was not presumptively relevant. But in *DirecTV* the Board neither cited *Mercedes-Benz*—then binding precedent—nor explained its contrary conclusion. The majority now chooses to ratify *DirectTV*'s unexplained departure from precedent, overruling instead *Mercedes-Benz*. The majority's choice not only perpetuates the precedential infirmity of *DirecTV*, but it is wrong on the merits in any event.

The Board's test for distinguishing presumptively relevant information from other classes of information compels a finding that *Mercedes-Benz* was manifestly correct that customer complaints about bargaining unit employees are presumptively relevant. "Under the National Labor Relations Act, '[a]n employer has a duty to furnish requested information to a union which is the collective-bargaining representative of the employees if the requested information is relevant and reasonably necessary to the union's performance of its responsibilities.'"[3] In this context, the Board applies a liberal discovery-type standard that asks only whether requested information is of potential use to the union.[4] In some instances, that connection is obvious. Thus, the Board has long held that information concerning bargaining-unit employees' terms and conditions of employment is "presumptively relevant" to the union's performance of its duties and must be provided upon request. The rationale for this presumption is that such information goes to the "core of the employer-employee relationship."[5] By contrast, where requested information concerns only extra-unit matters that ordinarily would not bear on that relationship, the presumption is inapplicable, and the union must explain its need for the information.[6]

[2] On May 14, 2019, the Board issued an Order granting the General Counsel's Motion for Summary Judgment with respect to the complaint allegation that the Respondent has been unlawfully refusing to recognize and bargain with the Union, but denying the motion as to the complaint's additional allegations that the Respondent has been unlawfully failing to provide the Union with requested information. Instead, a majority of Board decided to sever and retain these allegations for further consideration. For the reasons explained in my partial dissent there, I would have immediately granted the General Counsel's motion in nearly all respects as to these allegations, including the customer complaint and confidentiality-related requests addressed here. Thus, I concur with the majority's present decision to the extent it finds that the Respondent unlawfully failed to comply with the Union's requests for information, and orders immediate production of that information.

[3] *LBT, Inc*., 339 NLRB 504, 505 (2003) (quoting *Allied Mechanical Services,* 332 NLRB 1600, 1601 (2001)); see generally *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 437 (1967).

[4] *Acme Industrial*, above, 385 U.S. at 437.

[5] *LBT, Inc.,* above, 339 NLRB at 505. Accord *Electrical Workers v. NLRB*, 648 F.2d 18, 24 (D.C. Cir. 1980) (endorsing the "core of the employer-employee relationship" test for determining presumptive relevance").

[6] See *E.I. Dupont De Nemours & Co*., 366 NLRB No. 178, slip op. at 3–6 (2018); *Postal Service*, 332 NLRB 635, 636 (2000) (for information

Under those principles, customer complaints *about* bargaining unit employees are presumptively relevant because they implicate employees' job performance and thereby go to the "core of the employer-employee relationship"; indeed, such complaints may lead to the *termination* of that relationship. Not surprisingly, the Board has recognized this connection in a variety of contexts. In some cases, a union needs customer complaints to effectively represent an employee facing discipline or discharge as a result of a complaint.[7] Even absent an immediate threat of discipline, a union needs customer complaints to understand when employees may be subject to discipline in the future, and to assist them in avoiding those situations.[8] In still other cases, a union needs customer complaints to effectively represent employees at the bargaining table, including where the parties may be negotiating policies concerning the impact of such complaints on employees, where customer complaints may inform the parties' thinking on other issues (e.g., complaints about slow service may indicate understaffing), and where complaints may directly affect other mandatory subjects of bargaining.[9] Even my colleagues have expressly recognized that customer complaints can vitally affect the employer-employee relationship, including the long term viability of the relationship.[10] Simply put, it is obvious that customer complaints frequently have a direct and immediate impact on the employer-employee relationship.[11]

The majority's contrary view rests on three erroneous assertions. First, the majority says that "customer complaints about unit employees are not presumptively relevant because customer complaints are not wages, benefits, or other terms and conditions of employment." Second, it asserts that customer complaints, "do not, standing alone, directly concern wages, benefits, or other terms and conditions of employment." In the majority's view, then, "a customer's complaint to an employer about a unit employee is a complaint from a third party who has no control over the employee's terms and conditions of employment." As discussed above, and as further explained below, this reasoning wrongly minimizes the obvious and common connection between complaints about employees and their employment terms.

Given that connection, it is no answer to say that customer complaints are not *themselves* terms and conditions of employment. Customer complaints so clearly flow from and reflect upon employees' on-the-job performance or conduct that unions naturally have a strong interest in seeing such complaints in order to effectively represent employees.[12] For similar reasons, the majority is simply wrong in believing that customer complaints "do not,

requests concerning matters outside the bargaining unit such as supervisors, the union bears the burden of establishing the relevance of the requested information under a broad discovery-type standard under which even potential or probable relevance is sufficient); *Sheraton Hartford Hotel*, 289 NLRB 463, 463–464 (1988) ("Where the requested information concerns wage rates, job descriptions, and other information pertaining to employees within the bargaining unit, the information is presumptively relevant. Where the information does not concern matters pertaining to the bargaining unit, the union must show that the information is relevant."); see also *NLRB v. George Koch Sons, Inc.*, 950 F.2d 1324, 1331 (7th Cir. 1991); *Prudential Insurance Co. of America v. NLRB*, 412 F.2d 77, 84 (2d Cir. 1969).

[7] See, e.g., *PAE Applied Technologies, LLC*, 367 NLRB No. 105, slip op. at 3, 23 (2019) (where an employer issued a final written warning to a bargaining unit employee for "serious improper behavior or discourtesy toward a Customer or Guest" based on a customer's complaint, the link between customer complaints about unit employees and discipline meant that the complaint was relevant and necessary for the union to represent the employee); *Resorts International Hotel*, 307 NLRB 1437, 1437–1439 (1992) (employer violated Sec. 8(a)(5) and (1) by failing to provide names and contact information of complaining guests in connection with grievances over unit employee discipline; employer's confidentiality defense was rejected when it offered no evidence that the complainants expected or were assured of confidentiality); *Fairmont Hotel*, 304 NLRB 746, 746 fn. 3, 748 (1991) (complaint information "plainly would be of use to the Union in investigating [the employee's] alleged misconduct" and grieving her suspension). The majority acknowledges this reality when it cites *PAE* to argue that "[e]ven though customer complaints are not *presumptively* relevant, the General Counsel can establish their relevance in a particular case by showing, for example, that an employer relied on the requested customer complaints to discipline unit employees or deny a scheduled wage increase." However, the majority fails to appreciate that the link between customer complaints and possible employee discipline or other terms and conditions of their employment is already shown to be so common to warrant finding such complaints presumptively relevant.

[8] In *Champion Home Builders*, 350 NLRB 788, 788 fn. 7 (2007), for example, the Board held that an employer violated the Act by failing to provide information concerning its policy for the handling of customer complaints about the quality of employees' work product. Although this case did not involve a request for customer complaints, themselves, contrary to the majority it remains noteworthy here insofar as the Board recognized the connection between customer complaints and the union's ability to effectively represent bargaining-unit employees, both by determining whether there was follow-through on such complaints that might lead to employee discipline and by facilitating the possible formation of a quality committee to help employees avoid such discipline.

[9] Although not involving a request for customer complaints themselves, *Gates & Sons Barbeque of Missouri, Inc.*, 361 NLRB 563, 564 (2014), illustrates the potential connection between such complaints and terms and conditions of employment, as there the employees' monthly bonus was based in part on the number of customer complaints.

[10] See *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 2 fn. 5 (2019) (observing that "Failure to respond to a customer's request can mean loss of business, and of jobs. Greenidge's selfish stunt caused the customer to complain, and failure to remedy the source of that complaint could have resulted in the Respondent losing its contract with Terminal One Management, jeopardizing all the skycaps' jobs.").

[11] The majority states that "in [its] experience, customer complaints do not so frequently lead to tangible employment actions against employees that the Board should presume their relevance" and that "customer complaints are not so often relevant to disputed issues in collective bargaining," but my colleagues offer no empirical evidence to support these conclusory assertions.

[12] In other contexts, the Board has found that requested information is presumptively relevant to a union's representational duties,

standing alone, directly concern" employees' terms and conditions of employment. To the contrary, as explained above, customer complaints bear directly upon whether employees' have performed their assigned duties in a manner that meets the employer's—or the parties' agreed upon—performance and conduct standards and may lead directly to the termination of the employer-employee relationship in its entirety. Finally, it is immaterial that the complaint is "from a third party" customer that does not directly control employees' terms and conditions of employment.[13] As noted, customer complaints may directly impact those terms and conditions, and employers can certainly be expected to respond to complaints in ways that directly affect employees' continued employment.

For all of those reasons I am persuaded that *Mercedes-Benz* correctly found that customer complaints about bargaining unit employees are presumptively relevant to a union's representational duties. Here, then, I would reaffirm that precedent and find that the Respondent violated the Act by refusing to comply with the Union's request for such complaints.[14]

II.

Similarly, I disagree with my colleagues' decision to alter longstanding precedent regarding the treatment of asserted confidentiality claims in a test-of-certification context.[15] When the Board certifies a union, the employer has two options: it may recognize and bargain with the union or it may test the certification by refusing to bargain with the union and then seeking judicial review of the Board's subsequent unfair labor practice finding. As these options make clear—and as the Board has long held—the Board's certification is effective when issued. The workers have spoken and have chosen their representative. Accordingly, the employer's duty to bargain attaches at that time, and an employer that refuses to bargain in order to test the certification does so at its peril.[16] The Board will measure the employer's refusal-to-bargain violation from the date of certification, not from when the certification is upheld by a reviewing court.

These established principles also mean that an employer risks further violating the Act by disregarding subsidiary components of its overall duty to bargain during the certification-to-enforcement period. Board precedent regarding unilateral changes to employees' terms and conditions of employment during that period is instructive here with respect to information requests during the same period. The Board prohibits such unilateral changes for two important reasons: one, barring unilateral changes validates the employees' selection of the union as their collective-bargaining representative and prevents the employer from undermining the union's status as such; and, two, it prevents the employer from unfairly disadvantaging the union in future bargaining by changing the facts on the ground with respect to terms and conditions of employment while the employer's petition for review is pending.[17]

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notwithstanding that the information is not itself a term and condition of employment. See, e.g., *Honda of Hayward*, 314 NLRB 443, 443 (1994) (holding that the name, address, and contact person for the carrier of the employer's workers' compensation plan and the administrator of the employer's health plan were presumptively relevant).

[13] By this logic, information provided by a third-party manufacturer to the employer about the safety or health risks of materials used by workers on the job would not be presumptively relevant because the manufacturer of the chemical does not directly control employees' terms and conditions of employment. This conclusion defies both common sense and Board precedent. See, e.g., *Plough, Inc.*, 262 NLRB 1095 (1982) (finding that a request for "a complete list of all chemical . . . substances in use in this plant by [their] generic and trade names . . . along with any hazardous warnings or instructions associated with these substances, including material hazard sheets . . ." was a request for presumptively relevant information).

[14] Finding customer complaints presumptively relevant does not mean that an employer will always be required to produce the information. An employer can still argue against providing the information because of demonstrable irrelevance, overbreadth, third-party confidentiality, or another defense. E.g. *GTE California Inc.*, 324 NLRB 424, 426 (1997) (name, address, and telephone of the customer whose complaint led to the employee's discharge were relevant, but the employer established confidentiality because of a preexisting obligation not to release contact information for subscribers such as the complaining customer who requested unlisted service; by granting the unpublished listing and accepting payment, the employer promised confidentiality).

But there has been no such showing here. Indeed, even assuming that the Union was required to prove relevance, it has done so. The Union requested customer complaints involving bargaining unit employees and expressly referenced "any discipline which might have been imposed." This made clear that the Union wanted to understand the link between complaints and potential disciplinary consequences for unit employees. Cf. *Champion Home Builders*, 350 NLRB 788, 788 fn. 7 (2007) (reference to discipline adequately communicated union's need for employer's procedures for handling customer complaints); *Honda of Hayward*, 314 NLRB 443, 452–453 (1994) (same). The Union was not required to show that an employee had actually been disciplined, as the majority wrongly demands.

The majority also errs in suggesting that there was no connection between the Union's requests and discipline of employees because "the Union asked for *all* customer complaints *plus* any discipline which might have been imposed." The majority says this would be a different case if the Union's request had been limited to only those complaints that prompted discipline of bargaining-unit employees. But the Union naturally had an interest in gaining a full understanding of both when complaints led to discipline and when they did not.

[15] As indicated above, the majority would also apply this new scheme to an employer's defense that a union's request for information is overbroad or unduly burdensome.

[16] See *Tom Thumb Stores*, 123 NLRB 833, 834–835 (1959) (noting the risk for a union to establish its majority and observing that it "seems both equitable and in conformity with the statute to impose the same risk upon the employer who denies his obligation.")

[17] *Mike O'Connor Chevrolet*, 209 NLRB 701, 703 (1974).

For essentially the same reasons, an employer's refusal to provide relevant information during the certification-to-enforcement period also violates the Act. The employer's refusal to honor a union's request for information is effectively a denial of the union's status as the employees' chosen representative. Refusals to provide relevant information also disadvantage the union with respect to future collective bargaining because they hamper the union's ability to prepare for such bargaining.[18]

These long-established rules of the road have well served Congress's expressed intention to "encourage the practice and procedure of collective bargaining."[19] Yet the majority now carves out an exception to these rules for situations in which an employer—newly organized, yet unlawfully refusing to bargain—asserts a confidentiality defense (or an overbreadth or burdensomeness defense) to a request for relevant information. Under the majority's new framework, "if a certification-testing employer articulates a specific confidentiality interest in particular requested information, the Board will determine from the filings (including the General Counsel's Motion for Summary Judgment, the Employer's response to the Board's Notice to Show Cause, and any reply) whether the confidentiality interest is legitimate." If it is, the Board will find a Section 8(a)(5) violation, but then "order[] the respondent to engage in accommodative bargaining," instead of ordering the employer to produce the information. This change, the majority says, is justified by the uncertainty facing the employer: "[a]n employer cannot possibly know in advance whether its arguments regarding the certification will prevail, and no valid reason exists for requiring an employer to abandon a possibly meritorious argument regarding the certification in order to preserve a legitimate confidentiality defense."

A.

As I will demonstrate below, the present case illustrates the many problems with this new scheme. But initially, it merits notice that there was no reason for the majority to reach this issue and revisit this law in the first place because the Respondent clearly procedurally waived its confidentiality argument. The Respondent unlawfully refused to bargain with the Union, and to comply with its requests for relevant information, in order to test the Board's certification. The Respondent, however, did not claim that any of the requested information was confidential at the time of the request, and significantly, *did not raise this argument its answer to the complaint*. Only later, in responding to the Board's Notice to Show Cause why the General Counsel's motion should not be granted, did the Respondent assert that it has a confidentiality interest in certain items encompassed by the Union's requests.[20] For this reason, and this reason alone, the argument has been procedurally waived, and the issue of the Respondents' confidentiality interest(s), if any, in the requested information is not properly before the Board.

B.

But even if the Respondent had properly raised and preserved this argument in litigation before the Board, its failure to raise its confidentiality interest or offer to bargain over any such concerns with the Union at the time that the information request was made—and the majority's sanctioning of this failure in the new regime it establishes today—is contrary to Board law and the policy goals of the Act.

As my colleagues acknowledge, under longstanding Board law the party asserting a confidentiality interest may not simply refuse to furnish the requested information. Rather, it must raise its confidentiality concerns in a timely manner *and* offer to bargain an accommodation with the other party.[21] The Respondent did neither. The Respondent thus waived its confidentiality defense, and the Board should not only find the violation but also order immediate production.[22] Instead, the majority allows employers testing certification, including the Respondent, to

[18] To that point, the Board has recognized that even an incumbent union may need to request information long before bargaining actually commences to ensure that it receives the information in time to prepare proposals on potentially challenging issues. See, e.g., *Kraft Foods North America, Inc.,* 355 NLRB 753, 755 (2010) (union's requests for information about benefit plans more than a year ahead of bargaining for a successor agreement were not premature in the circumstances). All the more so in a new collective-bargaining relationship, as the Board has recognized that negotiating a first contract "typically involves special problems." *Lee Lumber & Building Material Corp.*, 334 NLRB 399, 404 (2001), enfd. 310 F.3d 209 (D.C. Cir. 2002). As the Board explained there, in addition to the fact that first-contract bargaining may take place in an atmosphere of "hard feelings" resulting from the organizing campaign, the parties' respective negotiators may be inexperienced and, unlike in renewal negotiations, the parties have to develop proposals on and establish basic bargaining procedures and core terms and conditions of employment.

Relatedly, it is immaterial that the union alone may be preparing for bargaining while the employer is testing the Board's certification, as the Board has made clear that "one party's dilatoriness cannot prevent its counterpart from obtaining the information it needs to prepare." *Kraft Foods*, above, 355 NLRB at 755 fn. 8.

[19] See Sec. 1 of the Act, 29 U.S.C. Sec. 151.

[20] My colleagues continue to maintain that the Respondent timely raised its asserted confidentiality interest in response to the Notice to Show Cause. As I explained in my partial denial from the majority's earlier decision to sever and retain most of the complaint's information request allegations, they are mistaken.

[21] *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995).

[22] See *Postal Service*, 364 NLRB No. 27, slip op. at 2 (2016) (an employer waived its confidentiality defense by failing either to timely assert a confidentiality interest or propose an accommodation); *National Steel Corp.*, 335 NLRB 747, 748 (2001) (employer violates Sec. 8(a)(5) if it simply refuses to provide requested information without notifying the

preserve confidentiality defenses, even if, as here, the employers did not offer to bargain an accommodation or even timely raise the defense.[23]

The majority's departure from existing law is contrary to the Act's policy of promoting collective bargaining and improperly favors wrongdoers. As explained, once the Board certifies a union, sound policy reasons warrant treating the certification as valid for all purposes, and the Board must assume that it will be upheld by a reviewing court. To be sure, this approach may require an employer wishing to test a union's certification to forego a potential defense to an information request in the event the certification is upheld.[24] But, contrary to the majority, there *is* a "valid reason" for this approach: in accordance with Act's expressed policy of "encouraging the practice and procedure of collective bargaining," it incentivizes employers to seriously and fairly evaluate their prospects of successfully challenging a Board certification before refusing to recognize and bargain with their workers' chosen representative. Additionally, by ordering immediate production of requested information when an employer does challenge a certification, the Board minimizes any additional delay in the actual production of that information when the certification is upheld.

By contrast, the majority's scheme tends to frustrate collective bargaining by diminishing employers' disincentives to challenging Board certifications. And the majority's approach makes it remarkably easy for employers to preserve potential defenses to information requests. As described, the majority says that if an employer "*articulates* a specific confidentiality interest in particular requested information, the Board will determine from the *filings* . . . whether the confidentiality interest is legitimate." (Emphasis added.) So, an employer merely has to present the Board with a seemingly legitimate confidentiality interest, and it may do so on paper, *not through a contested hearing with the opportunity for cross-examination and rebuttal testimony*. This one-sided process is patently unfair to unions and is unlikely to result in accurate decisions by Board. To the latter point, the majority's approach denies the Board the benefit of assessing the *actual* legitimacy of an asserted confidentiality claim on the basis of a record developed through an adversarial proceeding, thus making it more likely that the Board will mistakenly accept such claims that in fact lack foundation.[25] And, in a further blow to collective bargaining, the majority candidly acknowledges that—even after the Board's certification is upheld—its approach will lead to further delays in unions receiving information that is necessary to productive bargaining. Thus, the majority acknowledges that:

> Under [their] remedial approach, the provision of some information may be delayed even after a union's certification is upheld while accommodative bargaining takes place—and, if that bargaining does not result in an agreement, the information may be further delayed until the union's right to the information is resolved in a subsequent unfair labor practice proceeding.

The majority attempts to minimize the likely occurrence of these delays, stating that they "can only happen, however, where the Board concludes that the asserted confidentiality interest is legitimate." But, as just explained, the majority's new approach makes it more likely that the Board will accept confidentiality claims, so long as they appear legitimate. Add in that the majority's new scheme sweeps in claims of overbreadth and undue burden, as well, and it becomes readily apparent that the Board will be deciding the legitimacy of more and more information requests and defenses, leading to more and more delays. Finally, as explained, that is especially troubling in this context given the known challenges in first-contract bargaining.

It must be recognized, moreover, that the majority makes these unwarranted changes in longstanding precedent out of concern for the *wrongdoer*, all to the detriment of the wronged party. To be clear, the employer, having unlawfully refused to recognize and bargain with the union that its workers have selected, is the wrongdoer in these circumstances. As such, it should not be permitted to have it both ways—test the certification yet be given an opportunity to engage in limited bargaining to preserve its confidentiality defense in the event the union's certification stands. In a variety of circumstances, the Board has rightly taken the position that wrongdoers must bear the consequences of their own unlawful conduct, and here that includes requiring the wrongdoer to accept the consequences of its refusal to bargain and produce the requested

union of the confidentiality claim or refuses to bargain over accommodations for whatever reason); *Metropolitan Edison*, 330 NLRB 107, 107 (1999) (same); *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1105–1106 (1991) (citing cases).

[23] My colleagues assert that because they find the violation, they "are not letting employers off the hook" and are "merely modify[ing] the *remedy* for that violation to eliminate the Hobson's choice under prior law" (emphasis in original). As I demonstrate below, the majority's approach of finding the violation, but then ordering only accommodative bargaining, actually does give the employer at least a partial reprieve from the consequences of its decision to continue challenging the union's certification.

[24] Of course, if the certification is *not* upheld, then the Board's order to produce the requested information will fall away with the Board's order to recognize and bargain with the union.

[25] The majority expresses a concern for the Respondent's confidentiality interest in its gaming security policies. But this interest must be timely asserted and fully tested to ensure its validity.

information.[26] The majority's approach unjustifiably turns this policy on its head. Indeed, the ironic result of this new system is that the employer—who is denying the workers' selection of a representative and refusing to engage in any bargaining requested by the union about issues of priority to the workers—is now able to preserve its right to the very thing it is denying workers—i.e., bargaining—to protect its own priorities and interests.

Furthermore, even if current law were somehow unfair to employers, the better (although certainly not perfect) solution would be to require employers who want to preserve a confidentiality defense to: (1) *timely* inform the union of the confidentiality interest upon receiving its information request; and (2) *timely* offer to bargain an accommodation of that interest with union, while clearly and unequivocally stating that the bargaining is only for the purpose of preserving its confidentiality defense and that the employer is not waiving its challenge to the Board's certification of the union.[27] As compared to the majority's new approach, these requirements would better serve collective bargaining and more closely align with precedent by encouraging an employer to immediately raise any asserted confidentiality interests and quickly engage with the union to resolve them. This certainly would be preferable to permitting an employer to belatedly raise a confidentiality defense for the first time in response to a Notice to Show Cause, as the majority does here. That is flatly contrary to precedent outside the test-of-certification context, where assertions of confidentiality interests and offers to seek accommodations must be timely made,[28] and nothing about the test-of-certification context suggests that an employer should not have to abide by the same rules.[29]

In the end, it is apparent that the majority's new approach to confidentiality defenses in the test-of-certification context is merely a product of its perception that current law is unfair to employers. But for the reasons explained, this perception has no basis in the relevant statutory policies, the relative equities between the wrongdoer and the wronged, or the particular facts of this case.

Dated, Washington, D.C. December 16, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

[26] See, e.g., *Dynatron/Bondo Corp.*, 333 NLRB 750, 757 (2001) (rejecting employer's defense that it could not bargain over its unilateral change in health insurance premiums because "unfair labor practice litigation was pending," explaining that the employer's "unlawful conduct resulted in the unfair labor practice litigation, and it cannot rely upon the consequences of its own unlawful acts to excuse its lawful bargaining obligation."); *Joseph Magnin Co.,* 257 NLRB 656, 657 (1981) (where employer's unlawful refusals to transfer employees to new store made it impossible to know whether union would have had majority support at the new store, the Board ordered make-whole relief nonetheless, observing that, "[a]s the agency entrusted with the administration of the Act," it could not accept a party's attempt to avoid its obligations when the method of avoidance constituted an independent unfair labor practice), enfd. 704 F.2d 1457 (1983), cert. denied 465 U.S. 1012 (1984). The Board's view, moreover, accords with that of the Supreme Court: "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946).

[27] Although in different circumstances, the Board has found that parties may engage in bargaining while still taking a legal position in other litigation that they have no obligation to do so. See, e.g., *WWOR-TV, Inc.*, 330 NLRB 1265 (2000) (citing *International Paper Co*., 319 NLRB 1253, 1264–1265, 1276 fn. 50 (1995), enf. denied on other grounds 115 F.3d 1045 (D.C. Cir. 1997)) (finding that a union could properly exercise its statutory right to engage in successor bargaining with the employer while maintaining its position that it had no obligation to do so because the predecessor agreement had automatically renewed). The majority's criticism of this case is unavailing. Although *WWOR-TV* involved different circumstances, the Board's decision supports the conclusion that a party may bargain while also engaging in litigation in which it argues it has no obligation to bargain at all. Furthermore, the majority errs in citing *Terrance Gardens Plaza, Inc. v. NLRB*, 91 F.3d 222, 226 (D.C. Cir. 1996), for the proposition that the Board may not decide whether an employer has waived its right to test a union's certification. That case merely confirms that the employer has a choice to make—test certification or bargain unconditionally.

[28] See *Postal Service*, 364 NLRB No. 27, slip op. at 2–3 (2016) (ordering the immediate production of all requested documents, unredacted and without any confidentiality agreement, as the employer, by failing to timely assert a confidentiality interest or propose an accommodation, waived its opportunity to raise those defenses), reconsideration denied Case 05-CA-119507 (Aug. 26, 2016) (unpublished decision), enfd. *United States Postal Service v. NLRB*, Appeal No. 16-1313 (D.C. Cir. July 17, 2017) (unpublished decision on stipulation for consent judgment); see also *Olean General Hospital*, 363 NLRB No. 62, slip op. at 6 (2015) (employer's asserted confidentiality interest "does not end the matter"; employer must also notify union in a timely manner and seek to accommodate the union's request and confidentiality concerns); *Howard Industries, Inc*., 360 NLRB 891, 893 (2014) (even assuming requested information was confidential, respondent violated the Act by failing to seek an accommodation); *A-1 Door & Building Solutions*, 356 NLRB 499, 501 (2011) (employer required to provide union's requested information or "to state a legitimate reason for not doing so and to timely offer an accommodation"); *Borgess Medical Center*, 342 NLRB 1105, 1106 (2004) (party asserting confidentiality bears burden of proposing reasonable accommodation).

[29] The majority's willingness to bend the rules for the Respondent (and employers generally in this context) raises the question whether the majority's decision-making is once again being driven by a desire to reach out and establish a new rule of law, as it has been in other cases. See, e.g., *Ridgewood Health Care Center, Inc. & Ridgewood Health Services, Inc.*, 367 NLRB No. 110, slip op. at 15 & fn. 6 (2019) (Member McFerran, dissenting).

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with International Union of Operating Engineers Local 501, AFL–CIO (the Union) by failing and refusing to furnish it with requested information that is relevant to and necessary for the Union's performance of its functions as the collective-bargaining representative of our employees in the following appropriate unit:

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

WE WILL NOT fail to respond to the Union's request for information in which we have a legitimate confidentiality interest, either by furnishing the Union with the information or offering to bargain in good faith with the Union to accommodate our respective interests.

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

WE WILL furnish to the Union in a timely manner the information requested by the Union in its letters dated January 22 and 31, 2018, to the extent that the information pertains to current or former unit employees, except for job descriptions for non–bargaining-unit personnel assigned to supervise bargaining-unit members, customer complaints, employees' Social Security numbers, copies of all collective-bargaining agreements which are currently in effect between International Game Technologies and any other union, confidential policies related to the security and integrity of our gaming machines and the precautions we take to combat illegal gaming activity and money laundering.

WE WILL, on request, bargain with the Union in good faith toward an accommodation that satisfies both the Union's need for, and our confidentiality interests in, policies related to the security and integrity of our gaming machines and the precautions we take to combat illegal gaming activity and money laundering, and thereafter comply with any agreement reached through such bargaining.

NP PALACE LLC D/B/A PALACE STATION HOTEL & CASINO

The Board's decision can be found at www.nlrb.gov/case/28-CA-218622 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.