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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SANDS BETHWORKS GAMING, LLC
d/b/a/ SANDS CASINO RESORT
BETHLEHEM,

Employer,

and

LAW ENFORCEMENT EMPLOYEES
BENEVOLENT ASSOCIATION,

Petitioner

NLRB CASE NO. 4-RC-21833

**EMPLOYER'S REQUEST FOR
REVIEW**

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I. GROUNDS FOR REQUEST FOR REVIEW

The Regional Director has allowed the Law Enforcement Employees Benevolent Association (“LEEBA”) to bypass Section 9(b)(3)’s prohibition of a guard union having any direct or indirect affiliation with a nonguard organization. LEEBA is now proceeding to an election among approximately 93 security guards, excluding the locksmith, employed by Sands Bethworks Gaming, LLC d/b/a Sands Casino Resort Bethlehem (“Casino”). (BX 1; T 52)¹ The Regional Director skirted the Section 9(b)(3) restriction based on LEEBA simply disavowing its own prior admissions of affiliation with nonguard organizations. Thus, the Regional Director erred by:

- Finding that the Putnam Nurses Association (“PNA”), which is *expressly affiliated with LEEBA*, is not a labor organization even though it *is admittedly willing and able to represent nurses and seeks to deal with hospital employers*; and
- Disregarding evidence that United Steelworkers, Local 2599 (“USW”) *initiated authorization card signing* before LEEBA even met with any of the Casino’s guards and that *USW invited both the guards and LEEBA to use USW’s union hall for free, with the USW president at one meeting.*²

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¹ The Reporter’s Transcript is cited herein as “T” followed by the page number(s). Board Exhibits are cited herein as “BX” followed by the number(s). Employer Exhibits are cited herein as “EX” followed by the number(s). The Regional Director’s Decision and Direction of Election is cited as “DDE” followed by the page number(s).

² The Regional Director did not consider that these actions, combined with LEEBA’s failure to file annual reports with the OLMS, unregistered status with the PGCB, and lack of a connection to the Bethlehem area (or even Pennsylvania), point to the unavoidable conclusion that LEEBA rode USW’s coattails in its campaign to organize the Casino’s guards.

LEEBA's limited success in the past 9 years has come at the expense of other labor organizations.³ The Region should not be devoting the agency's limited resources to election gamesmanship by a pseudo-guard labor organization, particularly at a time when the Board has been defending itself from attacks over its representation case processing.⁴

Assuming *arguendo* an election should be held, the Regional Director erred in finding that the locksmith is not a guard by:

- Overlooking that the locksmith's job description expressly requires that he "***ensure the safety and protection of guests, team members, and company property,***" and "***prevent disruption, injuries, and prohibited conduct from occurring on company premises***";
- Focusing on factors such as his uniform, lack of weapons, and lack of training in the use of force that ***the Board has repeatedly held are not relevant considerations***; and
- Disregarding the locksmith's role in ***enforcing Casino rules and state regulations concerning the use and maintenance of keys and locks to safeguard the integrity of the gaming operations.***

Accordingly, pursuant to section 102.67 of the Rules and Regulations of the National Labor Relations Board, the Casino respectfully requests review of the Regional Director's Decision and Direction of Election on the following grounds: (1) a substantial question of law or

³ See *Sea Gate Association*, 29-RD-1096 (2008) (LEEBA raided unit of police officers represented by Special and Superior Officers Benevolent Association); *Vandermark v. City of New York*, 615 F. Supp. 2d 196 (2009), *aff'd* 391 Fed. Appx. 957 (2010) (LEEBA unsuccessfully sued SEIU Local 300 for, among other things, transfer of welfare, annuity and retirement funds after LEEBA raided a unit of environmental police officers); see also *Matter of the Application of Law Enforcement Employees Benevolent Ass'n*, 2010 N.Y. Misc. LEXIS 3247 (N.Y. Sup. Ct. June 28, 2010) (dismissing petition to raid unit of taxi inspectors represented by Teamsters Local 237 due to LEEBA's procedural errors); *Empire City at Yonkers Raceway*, 355 NLRB No. 35 (2010) and *Empire City at Yonkers Raceway*, 2-RC-23503 (Feb. 17, 2011) (dismissing petition to raid unit of guards represented by OPEIU Local 153 due to LEEBA's procedural errors).

⁴ Obviously, there is no shortage of legitimate labor organizations dedicated solely to representing guards.

policy is raised by both (a) the absence of, and (b) departure from, officially reported Board precedent; and/or (2) the Regional Director's decision on substantial factual issues is clearly erroneous on the record and such error prejudicially affects the rights of the Casino.

II. **PROCEDURAL HISTORY**

The Casino, which opened on May 22, 2009, is located in Bethlehem, Pennsylvania on the former Bethlehem Steel site.⁵ (T 37; EX 11) On May 10, 2011, LEEBA filed a Petition to represent "all full-time and part-time security guards" employed by the Casino. (BX 1) A hearing was held on May 23, 2011, before Hearing Officer Joanne M. Sacchetti. The parties stipulated that the Employer is an employer engaged in interstate commerce and the Petitioner is a labor organization under the Act. (BX 2)

On June 21, 2011, the Regional Director issued her Decision and Direction of Election, finding that LEEBA "is not disqualified from representing a unit of security guards." (DDE 1) She also found that the Casino's "locksmith should not be included in the unit."⁶ *Id.* An election is scheduled for July 21, 2011. The Casino timely submits this Request for Review.

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⁵ On May 27, 2011, the employer opened a hotel adjacent to the casino. (T 37)

⁶ While the Regional Director noted in her DDE that LEEBA had been "found eligible for certification to represent guards under Section 9(b)(3) of the Act in two prior Board Cases," *Brink's U.S.*, 29-RC-11291 (2006) and *Sea Gate Association*, 29-RD-1096 (2008) (DDE at 2 and n.3), **that issue was not litigated** in *Sea Gate Association*.

In *Brink's U.S.*, 29-RC-11291, the employer raised several serious concerns about LEEBA's status, which the Regional Director dismissed in his DDE, as did the Regional Director here. The Regional Director's error in *Brink's U.S.*, 29-RC-11291 led only to a colossal waste of Board resources. Three years after LEEBA barely won the representation election in that case, an administrative law judge found LEEBA to be inept at bargaining, lacking in knowledge about its obligations under the NLRA, and its leadership less than credible. *See Brink's USA*, 354 NLRB No. 41 (2009). Not surprisingly, on March 4, 2010, in Case 29-RD-1522, the Regional Director certified the unanimous results (58-0) of a decertification election. Further Board resources should not be wasted here dealing with a pseudo-guard union.

III. STATEMENT OF ISSUES

A. Whether the Regional Director erred in finding that LEEBA may represent a unit of the Casino's guards, when its president is also president of the affiliated nonguard Putnam Nurses Association and when LEEBA has received significant assistance from the United Steelworkers which initiated and sponsored the organizing campaign?

B. Whether the Regional Director erred in finding that the Casino's locksmith is not a security guard, when he is required to "ensure the safety and protection of guests, team members, and company property," and required to "prevent disruption, injuries, and prohibited conduct from occurring on company premises"?

IV. SUMMARY OF FACTS

A. LEEBA's Affiliation With Nonguard Unions

Kenneth N. Wynder, Jr. is president of LEEBA. (T 10, 17; EX 7) He is also president of Putnam Nurses Association ("PNA"). (T 11; EX 3-4) Terrence P. Dwyer, Esq. is advertised as the attorney for both LEEBA and PNA. (T 15, 18; EX 3, 4, 9) PNA promotes on its website that one of its "*Affiliate Unions*" is "**WWW.LEEBA.ORG**," above the logos for the NYC Environmental Police and Sea Gate Police, LEEBA's only two bargaining units.⁷ (EX 5)

When confronted at the hearing about PNA, Wynder incredibly claimed that PNA is a "separate entity" which "attempted to *unionize*" *nurses*, but it "never materialized."⁸ (T 11,

⁷ Curiously, a few days after LEEBA was caught at the hearing being affiliated with PNA, the PNA website was taken down. But *when will it be back?*

⁸ At best, Wynder's testimony might be described as opportunistically truthful. The Regional Director ignored that Wynder first claimed that Drew Brown was the PNA webmaster and that he (Wynder) had nothing to do with the PNA website. (T 25) Wynder subsequently contradicted himself by testifying that he wrote the paragraph on the PNA website about being PNA's President. (T 29-30) Brown is not an independent third party. He is a member of LEEBA's Board of Directors (<http://www.leeba.org/boardmembers.html>) and is LEEBA's benefit coordinator (T 11-12).

emphasis added) The Regional Director failed to adequately address the undisputed facts that the PNA website was “still active” at the time of the hearing (T 13), it expressly states “copyright 2009-**2011**,” and it received 2,962 visits as of May 20, 2011 (EX 2, 3, 5, emphasis added).

PNA boasts that it seeks “to provide better *working conditions and job security*” for nurses. (EX 3-4, emphasis added) It offers “effective, balanced and committed *representation*” that would “act as an equalizing force for nurse’s *job rights and benefits*.” (EX 3-4, emphasis added) PNA guarantees, in addition to various benefits of the organization, that it “*will represent all members collectively*.” (EX 3-4, emphasis added)

LEEBA is located in Catskill, New York, which is approximately three hours away from the Casino.⁹ (T 19) LEEBA has *not registered* with Pennsylvania Gaming Control Board.¹⁰ (T 22) In its 9 years of existence, LEEBA has *never complied* with the Labor-Management Reporting and Disclosure Act’s requirement to file annual financial statements with the U.S. Department of Labor’s Office of Labor-Management Standards (“OLMS”).¹¹ (T 19) Given

The Regional Director also disregarded Wynder’s testimony that he is employed with the Mets as “*supervisor security*.” (T 10, emphasis added) However, in the DDE in *Brink’s U.S.*, 29-RC-11291 (Feb. 21, 2006), the Regional Director wrote, “Wynder testified that he is currently employed as the *head of security* for the New York Mets.” (Emphasis added.) On the PNA website, Wynder wrote that he “worked as a *Security Manager* at Shea Stadium.” (EX 4; T 29-30)

⁹ In an effort to make LEEBA appear independent, Wynder testified that LEEBA would open an office in Stroudsburg, PA, although he has not selected a location. (T 28)

¹⁰ Similarly, when asked if LEEBA had registered with Pennsylvania Gaming Control Board (“PGCB”), Wynder responded that he would do so “upon election certification within the rules of the NLRB.” (T 21-22) Given that nonsensical answer, the question was put to him again and he admitted *LEEBA has not registered with the PGCB*. (T 22; see EX 17 at 109-10)

¹¹ See 29 CFR § 403.2(a) (“Every labor organization shall, as prescribed by the regulations in this part, file with the Office of Labor-Management Standards within 90 days after the end of each of its fiscal years, a financial report signed by its president and treasurer, or corresponding principal officers”). When asked whether LEEBA filed any of the required reports with OLMS, Wynder testified that he “got an extension” to file an LM-3 report from “the National Labor Relations Board.” (T 19) Obviously, the NLRB has no jurisdiction to grant a

LEEBA's obscurity and lack of any connection to the Bethlehem area, the record reveals that USW was involved in obtaining signed authorization cards from the Casino's guards even before LEEBA was introduced. Without any prompting during the hearing, Wynder referred to the Steelworkers by the abbreviation of "USW" in his testimony. (T 24)

Wynder testified that an unnamed person from USW "told me to be there [at USW's union hall] and that was it."¹² (T 21) USW did not charge LEEBA to use its union hall for two meetings. (T 21-22) USW President Jerry Green was present part of the time. (T 23) Wynder subsequently contradicted himself and testified that guards who had "signed the cards" purportedly advised him "that we could use [USW's union hall] to speak and let them know about ourselves. That was the first meeting. And then the second meeting they told us we could come back and meet the rest of the employees." (T 26)

Given that the Casino's guards do not control USW's union hall, and Wynder admitted USW invited him, it is readily apparent that USW obtained signed cards from some of the guards before LEEBA was introduced to them at the "first meeting." USW then invited LEEBA to return to meet other guards which USW solicited to attend. *The Regional Director ignored this evidence.* USW's role became clear when President Green stated to *The Express-Times* that LEEBA's organizing "attempt may bring new life" to USW's previously unsuccessful

labor organization an extension of time to file a report with the OLMS. *Despite testifying that the LM-3 would be filed "this month" (i.e., May 2011), the OLMS website has no record of any LEEBA financial reports.*

¹² The USW union hall is located at 53 East Lehigh Street, Bethlehem, PA 18018, which is less than two miles from the Casino. (T 22; EX 10) In an apparent attempt to avoid implicating USW leadership, *the Regional Director curiously assumed that any USW member could arrange to use the USW hall for free*, when she found that "a rank-and-file member of Local 2599 arranged for the use of the hall without charge to the Petitioner." (DDE 3)

organizing campaign. “I hope they’re successful in their drive and that could open some doors for us,” Green stated.¹³ (EX 11)

B. *The Casino’s Locksmith is a Guard Who Shares a Community of Interest With All Other Security Officers*

The job description for the Casino’s locksmith explains the purpose of the position:

The primary responsibility of the Locksmith is to provide lock services to ***ensure the safety and protection of guests, team members, and company property***. Anticipates potential problems and seeks ways to ***prevent disruption, injuries, and prohibited conduct from occurring on company premises***. Responds to emergency situations as requested and takes appropriate steps to rectify problems and at the same time minimize hotel liability. All duties are to be performed in accordance with departmental and Sands Bethlehem policies, practices, and procedures.

(EX 13, emphasis added) Other than replacing the phrase “lock services to ensure” with “for,” the job description for the Casino’s security officers contains an identical expressly stated purpose. (EX 12-13; T 32-33) Common responsibilities between the locksmith and the security officers include:

- “Able to ***ensure the safety and security of the guests and team members on property and be vigilant in securing the property against potential threats***”
- “[M]aintaining standards despite pressing deadlines”
- “Establish high standards and measures; do work right the first time and inspect material for flaws; test new methods thoroughly; reinforce excellence as a fundamental priority”
- “Able to clearly present information through the spoken or written word; read and interpret complex information; talk with customers or employees; listen well”

¹³ While Wynder attempted to distance himself from the USW, his testimony reveals that USW also assisted LEEBA in promoting the organizing drive in the media, as Wynder testified in reference to the USW and a press release that “they put it out.” (T 24; EX 11)

- “Ability to be tactful and polite, maintain confidences, and foster an ethical work environment; *prevent inappropriate behavior by coworkers*; handle all situations honestly”

(EX 12-13, emphasis added)

The Casino operates in a highly regulated environment. Pennsylvania law and the Pennsylvania Gaming Control Board (“PGCB”) regulations place strict controls on the Casino’s security department and even require the PGCB to approve the Casino’s security department standard operating procedures. (T 34, 66) These include minimum staffing levels for the security department as well as the various supervisory and guard positions therein, including the locksmith.¹⁴ (T 35) The PGCB-approved operating procedures for the security department also cover all procedures concerning locks and keys for the Casino and the gaming equipment, including issues such as lost or missing keys, duplicate keys, inventories of keys, key and lock destruction, etc. (T 35)

The PGCB regulations require, among other things, that the security department provide for the “physical safety of natural persons,” “physical safeguarding of assets,” and “protection of the property of both the patron and the slot machine licensee from illegal activity.” (EX 17 at 233) As Fred Kraus, chairman of the corporate compliance committee, explained, “So spread throughout the security department, including the locksmith, they all have roles in promoting what is the paramount regulatory concern which is ensuring the integrity of gaming operations and protecting the public from poorly conducted gaming operations.” (T 119)

The PGCB regulations require that the Casino avoid incompatible functions by having checks and balances to secure the integrity of games for the public and the tax revenue to the

¹⁴ The locksmith reports to the director of security. (T 34; EX 13) The security officers report to a shift supervisor. (T 40-50; EX 12)

State. (T 67-68) For example, the locksmith maintains the locks on, and controls the blank key stock for, various components of slots machines, such as the compartment containing the printer, the card cage door securing the microprocessor, the main door, the bill validator,¹⁵ and the slot cash storage box.¹⁶ (T 70; EX 17 at 175-78) However, to access the slot machine, a security officer and a slot manager would both have to insert a key to access the machine simultaneously. (T 71) In the case of a progressive slot machine, a security officer and someone from the finance department would both have to insert a key to access the machine simultaneously to access it. (T 72; EX 17 at 187) The same system applies to the trolleys that are used to transport the cash from the slot machines and gaming tables to the count room. (T 80, 97-98; EX 17 at 243) Nonetheless, the locksmith would be responsible for addressing any issues that may arise concerning any of the locks or keys to the equipment. (T 71-73, 81) Thus, if a new key needed to be made, the locksmith controls access to all of the highly specialized and unique key stock.¹⁷ (T 73)

Likewise, access to the count room and the cashier's cage requires access through two locked doors that have different keys held by different departments to ensure the security of the cash therein. (T 78; EX 17 at 239, 251-52) Chips must be stored in a locked cabinet in the cashier's cage. (T 86-87; EX 18 at 73-74) Similarly, dice and cards also must be kept under lock and key in a pit stand to prevent tampering, or under a float cover, with the security department and the table games department having separate keys, both of which must be used to

¹⁵ A bill validator reads dollar bills that are inserted into a slot machine to ensure they are not counterfeit. (T 79; EX 17 at 241)

¹⁶ The slot cash storage box holds the dollar bills deposited into the machine through the bill validator. (T 80; EX 17 at 242)

¹⁷ To avoid incompatible functions, the locksmith or anyone else accessing any gaming equipment, or engaging in any activity on the casino floor, is at all times subject to video surveillance by the Casino's surveillance department. (T 75-76)

gain access. (T 87-90, 92-93; EX 18 at 79-80, 100-03, 117-18, 167-68) However, if there is an issue with any of these locks or keys, the locksmith is responsible for addressing the matter. (T 79, 81-82, 88-90, 92)

The PGCB even regulates the deposit, locked storage, and distribution of gratuities received by dealers and other gaming employees. (T 95-96; EX 185-87) If there is a problem with the lock on a gratuity or other drop box, only the locksmith could repair it. As Kraus explained, “It requires a gaming license to touch anything that relates to gaming revenue and . . . taxes. So you couldn’t have a facilities person who wouldn’t have a gaming license come over and have anything to do with a locked drop box on the table.” (T 96)

The Casino’s security officers work various shifts to provide the necessary coverage 7 days a week, 24 hours a day. (T 37) The locksmith, Greg Brockway, has been employed since March 2009, which was about 2 months before the Casino opened. (T 37) He generally works the same dayshift as other guards, which is 7:00 a.m. to 3:00 p.m., Monday through Friday. He is subject to being called in if needed at any other time.¹⁸ (T 37)

As a necessary member of the security department, the locksmith attends all security department meetings including all pre-shift meetings with other guards. He holds the same gaming license as the other guards. The locksmith may cover a security station or patrol the Casino the same as a security officer. (T 38, 59) All guards, including the locksmith, carry a radio that is tuned to the security dispatch channel. (T 38-39, 44) All guards, including the locksmith, work throughout the entire casino and the hotel, now that the latter is open. (T 39)

¹⁸ While the wage rate for the locksmith is slightly higher than for security officers, all guards enjoy the same benefits. (T 38) All guards, including the locksmith, take their breaks in the same location. (T 60-61) Originally, all guards wore the same uniform with long sleeve shirts. (T 39) Subsequently, the locksmith and the security officers assigned to the “drop team” were given a uniform consisting of polo shirts and pants that are more comfortable as they perform their duties. (T 39, 53-54)

As guards, the locksmith and the security officers have many overlapping duties. For example, both are able to disarm the alarms on emergency exit doors if a guest attempts to open them. (T 39-40) Likewise, the locksmith and the security officers have access to any door or room in the Casino. (T 40-41) With the new hotel, all of the guards are trained on how to open a locked guest room, even if the lock is malfunctioning. (T 41-42, 61-62) Likewise, all guards are trained to open the safes in the guest rooms if a guest has a problem. (T 64)

All guards, including the locksmith, have similar training, such as on how to perform CPR, dealing with guests, and following PGCB regulations. (T 41, 47-49) No guard carries a baton, handcuffs, pepper spray, or any weapon. (T 45) In the event of a serious problem, Pennsylvania State Police are always on site and have jurisdiction over the gaming floor. (T 48)

Significantly, if the locksmith was not included in a unit of all security guards, he would be the only non-supervisory employee in the security department to be excluded. (T 59)

V. **ARGUMENT**

A. ***LEEBA May Not Be Certified to Represent the Casino's Guards due to its Affiliation with both the Putnam Nurses Association and the United Steelworkers***

Section 9(b)(3) of the Act prohibits the Board from certifying a guard labor organization from being “*affiliated directly or indirectly*” with any “*organization which admits to membership, employees other than guards.*” 29 U.S.C. § 159(b)(3) (emphasis added); *see Armored Transport of Cal., Inc.*, 269 NLRB 683 (1984) (Section 9(b)(3) bars affiliation with even “an individual”). “Congress clearly intended by Section 9(b)(3) that the union representing guards should be ***completely divorced*** from that representing nonguard employees.” *Mack Mfg. Corp.*, 107 NLRB 209, 212 (1953) (emphasis added).

Section 9(b)(3) is violated where any “affiliation” exists; it does not require domination or control. *See, e.g., Schenley Distilleries, Inc.*, 77 NLRB 468 (1948) (Board refused to certify

guard union whose charter declared it to be affiliated with American Federation of Labor without regard of any facts demonstrating that guard union lacked independence). “The evils that Congress sought to prevent include not only the domination of guard unions by non-guard unions, but also *the potential for conflict of loyalties* on the part of an employer’s supposedly most faithful and trustworthy employees when encountering demands by another union with whom they share some relation.” *NLRB v. Brinks, Inc. of Fla.*, 843 F.2d 448, 452 (11th Cir. 1988) (emphasis added) (denying enforcement in *Brinks, Inc. of Fla.*, 283 NLRB 711 (1987)).

Thus, LEEBA may not have any “direct or indirect” affiliation with a nonguard organization such as PNA or USW. *The Regional Director erred in finding that PNA is not a nonguard organization simply because Wynder disavowed PNA’s status.* (DDE 3) Section 2(5) of the Act merely requires such an organization to be (1) “willing and able to represent employees,” *Hershey Chocolate Corp.*, 121 NLRB 901, 911 (1958), and (2) exist “for the purpose in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, *or* conditions of work,” 29 U.S.C. § 152(5) (emphasis added). “If an organization fulfills these two requirements, the fact *that it is an ineffectual representative* . . . cannot affect the conclusion which the Act compels us to reach, namely, that the organization is a labor organization within the meaning of the Act.¹⁹ *Alto Plastics Mfg. Corp.*, 136 NLRB 850, 851-52 (1962) (emphasis added).

PNA’s website boasts that PNA is willing to “effectively manage and *represent the interests of employee members.*” (EX 3-4, emphasis added) The organization “was founded to

¹⁹ In *Butler Mfg. Co.*, 167 NLRB 308 (1967), the Board rejected the intervenor’s arguments that the petitioner “Butler Independent Union has never actually come into existence” because it “does not have a constitution or bylaws, and collects no dues or initiation fees.” *Id.* The Board concluded that “[d]espite this lack of formality in its structure,” the petitioner “may still be a labor organization within the broad meaning given that phrase in Section 2(5).” *Id.*

provide *better working conditions and job security* for nursing professionals.” (EX 3-4, emphasis added) PNA seeks to deal with “hospital employers” and provide nurses with “effective, balanced and committed representation.” (EX 3-4) The organization boasts of having several meetings with nurses to address issues of concern, such as vacation scheduling, flex time, employee benefits, elimination of a pension plan, scheduling procedures, and other matters. (EX 1-2) Thus, PNA (and the USW²⁰) is a nonguard organization that may not be affiliated directly or indirectly with a guard organization.

The affiliation between LEEBA and PNA is clear. Both labor organizations share the same president, the same attorney, and the PNA website even advertises LEEBA as one of its “Affiliate Unions.” (EX 5) *The Regional Director failed to recognize that Wynder’s role as president of a nonguard organization such as PNA demonstrates that LEEBA cannot be trusted to remain independent. See Brinks, Inc. of Fla., 843 F.2d at 453 (“the potential for conflict created by the existence of common officers presents a sufficient reason for refusing to certify a guard union”).*

The indirect affiliation between LEEBA and USW is evinced by USW’s initiation of authorization card signing before LEEBA even met with any of the Casino’s guards followed by USW inviting both the guards and LEEBA to use USW’s union hall for free, with the president of USW present at one of the meetings. Those actions, combined with LEEBA’s failure to file annual reports with the OLMS, unregistered status with the PGCB, and lack of a connection to

²⁰ Prior to the Labor Management Relations Act of 1947, it was not uncommon for a labor organization such as the USW to represent guards. *See, e.g., Bethlehem Steel Co., 56 NLRB 1390 (1944)* (USW petitioned for, and Board directed, an election among employer’s guards). Selecting an obscure organization such as LEEBA, and providing it with a union hall and other resources, presents an opportunity for USW to circumvent Section 9(b)(3).

the Bethlehem area (or even Pennsylvania), lead to the unavoidable conclusion that LEEBA has necessarily been riding USW's coattails in its campaign to organize the Casino's guards.

In *Stewart-Warner Corp.*, 273 NLRB 1736 (1985), the Board dismissed a petition filed by the "International Union of Professional Security Guards," where the petitioner had been sought out by Teamsters Local 714, which had previously attempted to organize the employer's guards. The petitioner's president was a friend of Local 714, and Local 714 assisted in obtaining the showing of interest. The Board concluded that the petitioner was indirectly affiliated with Local 714. *Id.* at 1737.

Likewise, in *Mack Mfg. Corp.*, 107 NLRB at 212, the Board dismissed a petition filed by the Amalgamated Plant Guards, Local 504, where the United Auto Workers had conducted most of the organizing efforts. The petitioner held one meeting at the UAW union hall where at least one UAW official attended. In these circumstances, the Board found the petitioner was indirectly affiliated with the UAW. *See also Brinks, Inc.*, 274 NLRB 970, 971 (1985) (dismissing petition for guard unit where individual primarily responsible for the formation and continued existence of the petitioner was an officer in a nonguard union and petitioner's only meeting occurred at nonguard's office); *Armored Transport, Inc.*, 269 NLRB at 683-84 (dismissing petition for guard unit where petitioners were employees of a nonguard union); *The Wackenhut Corp.*, 223 NLRB 1131 (1976) (dismissing petition for guard unit where petitioner's officers were officials in a nonguard union and received free office space and services from the nonguard union); *The Magnavox Co.*, 97 NLRB at 1112-13 (dismissing petition for guard unit where self-formed labor organization of guards used nonguard union hall for 2 meetings without paying rent, as well as receiving office services and supplies from nonguard union); *Willcox*

Construction Co., Inc., 87 NLRB 371 (1949) (dismissing petition for guard unit where officials of petitioner also held offices in nonguard union).

Here, similar to the foregoing cases, Wynder's role as president of both LEEBA and PNA, and PNA's advertised affiliation with LEEBA, demonstrate LEEBA's lack of independence. Moreover, LEEBA received extraordinary assistance from USW initiating and then handing over to LEEBA the Casino guards organizing campaign. USW provided free meeting space for 2 meetings, and USW President Green was present at one of them. USW obviously assisted in obtaining signed authorization cards for LEEBA and solicited guards to attend LEEBA's meetings at USW's union hall. Viewed either separately or collectively, this evidence reveals affiliations prohibited by Section 9(b)(3).

B. *The Locksmith is a Guard Who Shares a Community of Interest with the Other Guards and Must be Included*

Assuming *arguendo* that an election should be held, the Regional Director erred by not including the locksmith in the voting unit. As discussed herein, the locksmith is unquestionably a guard who shares a community of interest with the petitioned-for unit of security officers.

1. *The Locksmith is a Guard*

Section 9(b)(3) defines a guard as anyone who enforces "against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises." It is well settled that this section applies to employees who protect customers' property as well.²¹ "In determining whether employees are guards within the meaning of the Act, the percentage of time which such employees spend in guard duties is not controlling." *United Technologies Corp.*, 245 NLRB 932 (1979). "[I]t is the nature of the duties

²¹ *Wells Fargo Alarm Servs.*, 289 NLRB 562, 563-64 (1988) ("service technicians" who fill in for guards on twenty percent of calls to "protect property" of customers are guards under the Act).

of guards . . . which is and should be controlling.” *Supreme Sugar Co.*, 258 NLRB 243, 245 (1981).

The Regional Director erred in not finding that the locksmith enforces “rules to protect property of the employer [and customers] or to protect the safety of persons on the employer’s premises.” The locksmith’s job description expressly requires that he “***ensure the safety and protection of guests, team members, and company property,***” and that he “***prevent disruption, injuries, and prohibited conduct from occurring on company premises,***” the same as all other security officers. (EX 12-13, emphasis added) As described in great detail in the PGCB regulations, as well as the hearing testimony, the locksmith is a vital function in the Casino’s security department. The department, which is mandated by PGCB regulations, provides for the “physical safety of natural persons,” “physical safeguarding of assets,” and “protection of the property of both the patron and the slot machine licensee from illegal activity.” (EX 17 at 233) ***The Casino and the security department could not comply with and enforce the PGCB regulations in the absence of the locksmith.*** Every aspect of the gaming operation requires locking mechanisms of the utmost integrity. Only the locksmith can maintain those locks, and replace or issue keys as needed, to ensure compliance. Unlike Board cases where the locksmith has been included in a unit of facilities or maintenance employees, under the PGCB regulations the locksmith is required to have the same gaming license as a security guard in order perform his critical functions. (T 38, 96)

In a variety of similar cases, the Board has found employees with non-guard titles to be guards under Section 9(b)(3). *See, e.g., Allen Services Co.*, 314 NLRB 1060, 1062 (1994) (employees hired to sit in an office and watch equipment were found to be guards); *Rhode Island Hosp.*, 313 NLRB 343 (1993) (shuttle van drivers were found to be guards); *Blue Grass Indus.*,

Inc., 287 NLRB 274, 300 (1987) (“watch and sweep” employees, i.e., janitors, who spent only nine percent of their time in security activities were found to be guards); *Wright Memorial Hosp.*, 255 NLRB 1319 (1980) (six ambulance department employees found to be guards); *Raymond Metal Prods. Co.*, 223 NLRB 127 (1976) (storeroom clerks were found to be guards because they substituted for full-time guards when they are away from their post); *Walterboro Mfg. Corp.*, 106 NLRB 1383 (1953) (watchmen who spent seventy-five percent of their time performing regular maintenance work in the plant were found to be guards).

The Regional Director’s analysis is flawed. She erred in finding that the locksmith does not enforce or compel compliance with Casino rules. (DDE 9) Kraus testified that the locksmith (and all other security officers) is charged with “ensuring the integrity of gaming operations and protecting the public from poorly conducted gaming operations.” (T 119) ***One can only imagine the resulting chaos if the locksmith did not enforce compliance with Casino rules and PGCB regulations regarding keys and locks on all games, as well as all doors throughout the facility.*** As Kraus explained, the locksmith’s vital role is “part of the security system.” (T 95) The locksmith holds the same PGCB license as other security officer and he attends all security department meetings and briefings. Like any other security officer, the locksmith may cover a security station, respond to an incident, disarm an alarm on a fire exit, open a locked guest room door, or open a locked safe in a guest room.

The Regional Director also erred in relying upon the fact that “the locksmith does not carry weapons,²² and the record does not show that he is trained in the use of force.” (DDE 9) In *A.W. Schlesinger Geriatric Ctr.*, 267 NLRB 1363 (1983), the Board held that, “although the maintenance employees have ***no special training as guards and do not . . . carry firearms***, we

²² None of the Casino’s guards carries weapons. (T 45)

conclude that the two night and weekend maintenance employees *are employed for security purposes* in addition to their maintenance duties.” *Id.* at 1364 (emphasis added). The Regional Director also erred in relying upon the fact that the locksmith “does not wear a traditional guard uniform.” (DDE 10) In *PECO Energy Co.*, 322 NLRB 1074, 1084 (1997), the Board found a *janitor to be a guard even though he wore the same nonguard uniform as other janitors*, rather the uniform worn by the employees of a contractor who was hired to provide guard services. The Regional Director also erred in concluding that “the record does not disclose any circumstances in which the locksmith would become part of the chain of custody of the Employer’s revenue.” (DDE 10) She failed to consider that the keys and locks used by each employee in that chain of custody arise from the locksmith’s role of “[e]nsuring that all keys are properly accounted for and properly used in accordance with the internal control system.” (T 89, emphasis added) *See Wright Memorial Hosp.*, 255 NLRB 1319, 1320 (1980) (in finding ambulance department employees to be guards, Board emphasized their role in checking locks when making rounds); *see also Rhode Island Hosp.* 313 NLRB 343, 346 (1993) (emphasizing guards’ possession of “keys to open locked doors”).

2. *The Locksmith Shares a Community of Interest with Other Guards*

The Regional Director did not address the scope of the unit because she erred in finding that the locksmith is not a guard. Nonetheless, as to the scope of a guard unit, Board policy is to include all of an employer’s guards in a single unit unless “there is a subgroup with a separate community of interest that warrants separate representation.” *University of Tulsa*, 304 NLRB 773, 774 (1991) (Regional Director erred in excluding part-time guards from a unit of full-time guards due to “significant differences in the authority and responsibilities of the two groups, together with the substantial differences in their rates of compensation and fringe benefits”); *see*

also Broadway, 215 NLRB 46 (1974) (fitting room checkers were guards that must be included in unit with store security inspectors and watchmen). The Board is reluctant to exclude an employee from a voting unit. *see Huckleberry Youth Programs*, 326 NLRB 1272, 1274 (1998), particularly since it is contrary to Board policy to certify a unit consisting of only one employee. *Roman Catholic Orphan Asylum*, 229 NLRB 251, 252 (1977). The locksmith should not be disenfranchised from a unit of all Casino guards, leaving him as the only excluded security officer.

VI. CONCLUSION

For all the reasons discussed herein, the Board should grant the Employer's Request for Review and find that LEEBA may not be certified to represent the Casino's guards. Additionally, the Board should find that the Casino's locksmith is a guard.

Dated: July 5, 2011

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PROOF OF SERVICE

On July 5, 2011, I served the foregoing document described as: **EMPLOYER'S REQUEST FOR REVIEW** via e-mail to Terrence P. Dwyer, Esq., counsel for Petitioner, at tpdlaw@aol.com.

I declare under penalty of perjury that the foregoing is true and correct under the laws of the United States of America. Executed on July 5, 2011, at Charlotte, NC.

By:  _____
Matthew T. Wakefield