

MAY 17 2019

19-1107

CASE No. \_\_\_\_\_

**RECEIVED**  
**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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

*PETITIONER,*

v.

NATIONAL LABOR RELATIONS BOARD,

*RESPONDENT.*

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**ON PETITION FOR REVIEW OF DECISION AND ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD, 367 N.L.R.B. No. 129, CASE No. 28-CA-218622**

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**PETITION FOR REVIEW OF DECISION AND ORDER  
OF THE NATIONAL LABOR RELATIONS BOARD**

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2019 MAY 17 PM 6:04  
RECEIVED  
U.S. COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA



Petitioner NP Palace LLC d/b/a Palace Station Hotel & Casino (“Petitioner”), hereby petitions the Court for review of, and respectfully requests that the Court set aside, the Decision and Order of the National Labor Relations Board entered on May 14, 2019, which summarily affirmed in part the Regional Director’s determination that Petitioner violated Sections 8(a)(1) and (5) of the National Labor Relations Act. *NP Palace LLC*, 367 N.L.R.B. No. 129 (slip op. at 1-2) (attached).

Respectfully Submitted,

DATED: May 17, 2019

**DLA PIPER LLP (US)**  
HARRIET LIPKIN  
STANLEY J. PANIKOWSKI

*/s/ Harriet Lipkin*  
\_\_\_\_\_  
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*NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.*

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

May 14, 2019

**DECISION AND ORDER**

BY CHAIRMAN RING AND MEMBERS MCFERRAN  
AND EMANUEL

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on April 18, 2018,<sup>1</sup> by International Union of Operating Engineers Local 501, AFL-CIO (the Union), the General Counsel issued the complaint on May 2, alleging that NP Palace LLC d/b/a Palace Station Hotel & Casino (the Respondent) has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain and by refusing to furnish requested information following the Union's certification in Case 28-RC-211644. (Official notice is taken of the record in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(d). *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.

On May 9, the General Counsel filed a Motion for Summary Judgment. On May 16, 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.

<sup>1</sup> All dates are in 2018 unless otherwise noted.

<sup>2</sup> See Sec. 9(b)(3) of the Act ("[N]o labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."). 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. These issues, however, 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 and 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).

Additionally, the Respondent's answer denies that it employs "regular part-time slot technicians and utility technicians." However, that denial

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

**Ruling on Motion for Summary Judgment**

The Respondent admits its refusal to bargain and to furnish requested information but contests the validity of the certification based on its contention, raised and rejected in the underlying representation proceeding, that the petitioned-for employees are guards that cannot be represented by the Union, which admits non-guards to its membership.<sup>2</sup> In addition, the Respondent denies that the information requested by the Union is necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.<sup>3</sup>

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding.<sup>4</sup> See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

As indicated above, the Respondent's answer also denies the complaint's allegation that the information requested by the Union is necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit. Additionally, in its response to the Notice to Show Cause, the Respondent contends that the Union requested a host of confidential information. We find that the Act's policies will be best effectuated by severing and retaining for further consideration the allegation that the Respondent unlawfully refused to furnish the requested information and the General

does not warrant denying the General Counsel's motion for summary judgment as to the technical refusal-to-bargain allegation because the Respondent does not deny that it employs full-time slot technicians and utility technicians, who are included in the bargaining unit.

<sup>3</sup> The Respondent's answer also asserts as an affirmative defense that the complaint fails to state a claim on which relief may be granted. However, the complaint does indeed state a claim upon which relief can be granted by alleging that the Respondent violated the Act by refusing to meet and bargain with the Union. See *Wolf Creek Nuclear Operating Corp.*, 366 NLRB No. 30, slip op. at 1 fn. 2 (2018), enfd. 2019 WL 367172, \_\_ Fed. Appx. \_\_ (10th Cir. Jan. 29, 2019).

<sup>4</sup> Chairman Ring did not participate in the underlying representation proceeding. He agrees with his colleagues that the Respondent has not raised any litigable issue in this unfair labor practice proceeding and that summary judgment is appropriate, with the parties retaining their respective rights to litigate relevant issues on appeal.

Counsel's Motion for Summary Judgment with respect to that allegation.<sup>5</sup>

Accordingly, we grant the General Counsel's Motion for Summary Judgment with respect to the technical refusal-to-bargain allegation and sever and retain for further consideration the information-request allegation.<sup>6</sup>

On the entire record, the Board makes the following

#### FINDINGS OF FACT

##### I. JURISDICTION

At all material times, the Respondent 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, 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.

<sup>5</sup> The information request includes requests for job descriptions for nonunit employees and information about customer complaints. We agree with our colleague that summary judgment is inappropriate at this time with respect to these requests. The Respondent has also asserted confidentiality concerns with respect to other information requests in its response to the Notice to Show Cause. Contrary to our dissenting colleague, those confidentiality concerns are not waived on the ground that they were not raised in the Respondent's answer. "The Board has held that a respondent may properly cure defects in its answer before a hearing either by an amended answer or a response to a Notice to Show Cause." *Ellis Electric*, 321 NLRB 1205, 1206 (1996) (citing *Vibra-Screw, Inc.*, 308 NLRB 151 (1992) (treating a response to a Notice to Show Cause as an amended answer)). Here, having denied in its answer the allegation that it violated Sec. 8(a)(5) by failing and refusing to furnish the Union with the information requested by the Union, the Respondent's response cured any defect in its answer by asserting its confidentiality concerns as a specific reason for the denial. In any event, the dissent cites no precedent rejecting a confidentiality defense on the procedural ground that it was not included in the answer, much less any such precedent involving a respondent that, like the Respondent here, still had a right to amend its answer. See Sec. 102.23 of the Board's Rules and Regulations ("The Respondent may amend its answer at any time prior to the hearing."). In these circumstances, we decline to further delay action on the technical refusal-to-bargain allegation in order to comb through the information request for the purpose of determining at this time which items are or are not amenable to disposition through summary judgment. Cf. Rules and Regulations Sec. 102.24(b) (providing that the Board may deny a motion for summary judgment "where the opposing party's pleadings, opposition [to the motion] and/or response [to the Notice to Show Cause] indicate on their face that a genuine issue may exist").

Unlike her colleagues, Member McFerran would immediately grant the General Counsel's motion for summary judgment with respect to the Union's requests seeking information that clearly is presumptively relevant, which encompasses nearly all of the Union's requests. Those requests seek such basic information as a list of current bargaining-unit employees, company policies and procedures applicable to those employees, job descriptions for bargaining-unit positions, and applicable wage, salary, and benefit plans. Contrary to the majority's assertions, it requires no great delay to determine the relevance of these straightforward requests. The Union is entitled to this information. Ordering the

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 the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

##### A. The Certification

Following the representation election held on January 9, the Union was certified on January 18<sup>7</sup> as the exclusive collective-bargaining representative of the 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.

Respondent to provide this information now, moreover, will better serve the collective-bargaining process, as well as administrative efficiency, by ensuring that in the event a reviewing court enforces the Board's Order to bargain, the Union will be prepared to engage in informed bargaining without delay. Member McFerran nevertheless agrees with her colleagues that it is appropriate to retain two of the Union's requests that appear to seek information that may not be presumptively relevant, specifically a request concerning job descriptions for non-unit employees and a request for information about customer complaints. Finally, to the extent that the Respondent first asserted confidentiality concerns in its response to the Board's May 16, 2018 Notice to Show cause, Member McFerran would find that those claims were not timely raised—they should have been asserted in the Respondent's answer to the complaint—and are therefore waived.

There is no merit to her colleagues' assertion that the Respondent's submission following the Notice to Show Cause cures the untimeliness of its confidentiality claims. In *Ellis Electric*, 321 NLRB 1205, 1206 (1996), and *Vibra-Screw, Inc.*, 308 NLRB 151 (1992), cited by the majority, the employer generally denied certain backpay calculations, but failed to do so with the required specificity explaining the reasons for its disagreement. In those circumstances, the Board found that the employer could cure the defect in the answer by means of its response to a Notice to Show Cause. Here, by contrast, the Respondent did not even assert its confidentiality claim in its answer. It merely denied that it violated the Act by refusing to provide the information. Contrary to the majority, this general denial of the violation cannot open the door to a specific claim of confidentiality under a theory that the latter "cures" the former. There was no defect in the initial general denial and entertaining this so-called "cure" would impermissibly enable respondents to later sweep in a wide range of unpled defenses. But even taking the majority's position, the Respondent's broad claim of confidentiality does not specifically identify which presumptively relevant requests are of concern and why. The Board has long rejected such general claims. *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995). The Respondent's belated—and in any event deficient—confidentiality claim therefore remains untimely.

<sup>6</sup> Accordingly, the Respondent's request that the complaint be dismissed is denied.

<sup>7</sup> 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.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

#### B. Refusal to Bargain

About January 22, the Union requested that the Respondent recognize and bargain collectively with it as the exclusive collective-bargaining representative of the employees in the bargaining unit set forth above. Since about January 22, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the bargaining-unit employees.

We find that the Respondent's conduct constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

#### CONCLUSION OF LAW

By failing and refusing since January 22 to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has 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 violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964).

The Union requests additional enhanced remedies. Contrary to the Union's assertion, there has been no showing that the Board's traditional remedies are insufficient to redress the violations found. Accordingly, we deny the Union's request for additional remedies.

#### 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) Failing and refusing to recognize and bargain with International Union of Operating Engineers Local 501, AFL-CIO (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(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) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

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) Within 14 days after service by the Region, post at its Las Vegas, Nevada facility copies of the attached notice marked "Appendix."<sup>8</sup> 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.

(c) 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

<sup>8</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the

United States Court of Appeals Enforcing an Order of the National Labor Relations Board."



attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint allegations concerning the Respondent's refusal to provide information requested by the Union are severed and retained for further consideration by the Board.

Dated, Washington, D.C. May 14, 2019

\_\_\_\_\_  
John F. Ring, Chairman

\_\_\_\_\_  
Lauren McFerran, Member

\_\_\_\_\_  
William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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 fail and refuse to recognize and bargain with International Union of Operating Engineers Local 501, AFL-CIO (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit.

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, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

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

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

The Board's decision can be found at [www.nlr.gov/case/28-CA-218622](http://www.nlr.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.



## AMENDED CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 17, 2019, I caused to be filed one original and four copies of the foregoing Petition for Review of Decision and Order of the National Labor Relations Board (“Petition”) with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit. Further, I caused to be served by overnight express mail the Petition on the parties participating in the underlying National Labor Relations Board proceeding.

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In addition, I caused a file-stamped copy of the Petition to be served by hand delivery to the persons listed below:

Peter B. Robb  
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Washington, DC 20570

John W. Kyle  
Deputy General Counsel  
National Labor Relations Board  
1015 Half Street SE  
Washington, DC 20570

I certify under penalty of perjury that the above is true and correct. Executed at  
Washington, D.C on May 17, 2019.

Respectfully Submitted,

/s/ Jonathan Batten  
An Employee of DLA Piper LLP (US)

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Petitioner NP Palace LLC d/b/a Palace Station Hotel & Casino respectfully submits the following Corporate Disclosure Statement.

Petitioner NP Palace LLC is 100% owned by Station Casinos LLC. 100% of the voting interests in, and management and control of, Station Casinos LLC is held by Red Rock Resorts, Inc., a publicly traded company ("RRR"). Station Holdco LLC holds all of the economic interests in Station Casinos LLC. RRR holds approximately 60% of the economic interests in, and controls, Station Holdco LLC. The economic interests in Station Holdco LLC that are not held by RRR (approximately 40%) are held by non-publicly traded entities (the "Fertitta Entities") controlled by Frank J. Fertitta III, the Chief Executive Officer and Chairman of the Board of Directors of RRR, and Lorenzo J. Fertitta, Vice Chairman of the Board of RRR (individuals or entities associated with current or former management of RRR unrelated to the Fertitta Entities own approximately 3.3% of the economic interests in Station Holdco that are not held by RRR, with the balance, or approximately 96.7%, held by the Fertitta Entities). RRR does not have a parent company and other than the controlling interests of the Fertitta Entities, no entity has a 10% or greater ownership interest in RRR.

The general nature and purpose of NP Palace LLC is to operate a hotel and casino located in Las Vegas, NV.

Respectfully Submitted,

DATED: May 17, 2019

**DLA PIPER LLP (US)**  
HARRIET LIPKIN  
STANLEY J. PANIKOWSKI

*/s/ Harriet Lipkin*  
\_\_\_\_\_  
*Attorneys for Petitioner*  
*NP Palace LLC d/b/a*  
*Palace Station Hotel & Casino*

## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 17, 2019, I caused to be filed one original and four copies of the foregoing CORPORATE DISCLOSURE STATEMENT OF PETITIONER (“Disclosure”) with the Clerk of the Court of the United States Court of Appeals for the District of Columbia Circuit. Further, I caused to be served by overnight express mail the Disclosure on the parties participating in the underlying National Labor Relations Board proceeding.

Cornele A. Overstreet  
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In addition, I caused to be served by hand delivery to the persons listed below:

Peter B. Robb  
General Counsel  
National Labor Relations Board  
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Washington, DC 20570

John W. Kyle  
Deputy General Counsel  
National Labor Relations Board  
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Washington, DC 20570

I certify under penalty of perjury that the above is true and correct. Executed at Washington, D.C on May 17, 2019.

Respectfully Submitted,

/s/ Jonathan Batten  
An Employee of DLA Piper LLP (US)