

**Nos. 18-71124, 18-72079, 18-72121**

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**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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

**v.**

**NATIONAL LABOR RELATIONS BOARD,  
Respondent**

**and**

**STATION GVR ACQUISITION, LLC d/b/a  
GREEN VALLEY RANCH RESORT SPA CASINO,  
Intervenor**

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**STATION GVR ACQUISITION, LLC, d/b/a  
GREEN VALLEY RANCH RESORT SPA CASINO,  
Petitioner/Cross-Respondent**

**v.**

**NATIONAL LABOR RELATIONS BOARD  
Respondent/Cross-Petitioner**

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**ON PETITIONS FOR REVIEW AND CROSS-APPLICATION FOR  
ENFORCEMENT OF AN ORDER OF  
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF SUBJECT MATTER AND APPELLATE  
JURISDICTION**

This case is before the Court on petitions for review and the Board’s cross-application to enforce a Board Order against Station GVR Acquisition, LLC d/b/a Green Valley Ranch Resort Spa Casino (“the Company”). The Board Order issued on April 12, 2018, and is reported at 366 NLRB No. 58. (ER 2-4.)<sup>1</sup> International Union of Operating Engineers Local 501, AFL-CIO (“the Union”), the Charging Party before the Board, filed one of the petitions for review, and the Company intervened on behalf of the Board in that case. The Company also filed a petition for review, and the Board filed a cross-application for enforcement. The petitions for review and cross-application for enforcement are timely because the Act imposes no time limitation for such filings.

The Board had jurisdiction over this unfair labor practice case pursuant to Section 10(a) of the National Labor Relations Act, as amended (“the Act”) (29

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<sup>1</sup> “ER” refers to the Excerpts of Record filed by the International Union of Operating Engineers Local 501, AFL-CIO (“the Union”) with its opening brief. “SER” refers to the Supplemental Excerpts of Record filed by the Company with its opening brief. “Bd. SER” refers to the Board’s Supplemental Excerpts of Record filed with this Brief. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

U.S.C. §§ 151, 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. The Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(f)), because the Order is a final order and the unfair labor practices took place in Nevada.

The Board's unfair-labor-practice Order is based, in part, on findings made in an underlying representation (election) proceeding, *Station GVR Acquisition, LLC*, Board Case No. 28-RC-203653. Pursuant to Section 9(d) of the Act, 29 U.S.C. § 159(d), the record before this Court therefore includes the record in that proceeding. Section 9(d) authorizes judicial review of the Board's actions in a representation proceeding for the limited purpose of deciding whether to “enforc[e], modify[], or set[] aside in whole or in part the [unfair-labor-practice] order of the Board . . . .” 29 U.S.C. § 159(d); *see also Boire v. Greyhound Corp.*, 376 U.S. 473, 476-79 (1964). The Board retains authority under Section 9(c) of the Act, 29 U.S.C. § 159(c), to resume processing the representation case in a manner consistent with the ruling of the Court in the unfair-labor-practice case. *See Freund Baking Co.*, 330 NLRB 17, 17 & n.3 (1999); *Medina County Publ'ns*, 274 NLRB 873, 873 (1985).

## **STATEMENT OF THE ISSUES PRESENTED**

1. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union, which turns on whether substantial evidence supports the Board's finding that the Company failed to prove that company slot technicians are statutory guards.

2. Whether the Union's petition for review should be denied because the Union is not aggrieved by the Board's Order and, in any event, because the Board acted within its broad remedial discretion by not ordering a remedy for a statutory violation that was neither alleged nor litigated.

## **STATUTORY ADDENDUM**

All applicable statutes are included in the brief of the Company and the Union, except for the following full text of Section 10(e) of the Act (29 U.S.C. §160(e)):

[Petition to court for enforcement of order; proceedings; review of judgment] The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code [section 2112 of title 28]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such

temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to question of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

### **CONCISE STATEMENT OF THE CASE**

This unfair-labor-practice case arises from the Company's admitted refusal to bargain with the Union, which the Board certified as the exclusive bargaining representative of a unit of slot technicians working at the Company's casino in Henderson, Nevada. (ER 2-3.) In the underlying representation proceeding, the Company challenged the appropriateness of the bargaining unit, arguing that the slot technicians may not be represented by the Union because they are guards as

defined by the Act. Having found that the employees are not guards, and therefore that the unit is appropriate (ER 33-39, SER 58-65), the Board held (ER 3) that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5) and (1). The facts and procedural histories relevant to both the representation and unfair-labor-practice proceeding are set forth below.

## **I. THE BOARD'S FINDINGS OF FACT**

### **A. The Company, Its Facility, and the Slot Department**

The Company operates the Green Valley Ranch Resort in Henderson, Nevada. (SER 58; SER 71.) The facility is a hotel and casino including gaming space occupied by approximately 2,300 gaming machines including slot machines. (SER 58; SER 73.)

The Company employs 13 slot technicians at its facility. (SER 58; Bd. SER 23.) Nine of those technicians are classified as "slot technicians" and four are classified as "utility technicians" (collectively, "slot technicians"). (SER 58; Bd. SER 23.) Slot and utility technicians have identical job duties, discussed below, but the "utility technician" designation connotes a lower level of experience. (SER 58; Bd. SER 23.) The slot technicians work in the Slot Department, which is overseen by the Director of Slot Operations. (SER 57-58; Bd. SER 10.)

## **B. The Slot Technicians' Duties**

Slot technicians install, repair, and maintain various facets of the gaming machines and spend 90% of time on the gaming floor. (SER 59, 61; SER 73, 89-91.) They are responsible for game installation from beginning to end in terms of the physical game cabinets, software, and the security locks on each game. (SER 59; SER 73, 82.) Slot technicians have keys that provide access to machines' internal mechanisms. (SER 2, ER 35; SER 87.) Guest service attendants, also in the Slot Department, are the only other employees who possess those keys. (SER 59; Bd. SER 25.) If a slot or guest services technician were to lose these keys, he or she would likely be terminated. (SER 59; SER 87.)

The slot technicians are responsible for repairing the gaming machines. (SER 59; SER 73.) For example, they fix machines with malfunctions to which the manufacturers have alerted the facility. (SER 59; SER 79-80.) In addition, if a customer asserts to a facility employee that there is a machine malfunction which, if verified, would lead to the facility paying out legitimate winnings, a slot technician assists the slot management supervisory staff in investigating if the game is operating properly. (SER 59; SER 73, 74, 76, 77, 78.) A slot technician cannot authorize payment on his or her own. (Bd. SER 4, 37, SER 60, ER 35.)

Slot technicians also check to ensure that "bill validators," which are devices on each game that accept cash and vouchers, only accept legal tender. (SER 59,

Bd. SER 4; SER 75-76.) When facility management receives reports of bill validators that have a low rate of bill acceptance, slot technicians perform a test and notify the shift supervisor, who decides about the use of the currency in the machine. (Bd. SER 4; Bd. SER 37.)

Slot technicians' duties also include investigating "game loss reports," which are corporate and manufacturer-generated reports showing games that have lost for five consecutive days. (SER 59, Bd. SER 5; SER 80.) When slot technicians receive such reports from facility management, they open the machine, check to make sure it is operating correctly, and notify their supervisor of the results. (Bd. SER 5; SER 52, 83-84.)

In addition, slot technicians verify jackpots in excess of \$100,000. (Bd. SER 4; SER 32, 66.) In those cases, a manager directs the slot technician to examine the machine and tells the slot technician exactly what needs to be done. The process requires three people to access the machine. (ER 35, Bd. SER 32-34.) The facility's jackpot verification policy states that the slot technicians will not express a judgment or opinion in the presence of the guest. (ER 35; SER 66.) The manager or supervisor makes the decision on payment. (Bd. SER 4; SER 48.) The slot technician cannot authorize payment of a jackpot. (Bd. SER 37.)

Slot technicians are also responsible for interacting with agents of the Nevada Gaming Control Board ("NGCB"). (SER 59, Bd. SER 4; SER 88.) The

facility or a customer may call in the NGCB if the facility has determined that a customer has made a fraudulent claim and the customer wants to pursue the matter further. (SER 42, 88-89, Bd. ER 29-30.) The slot technicians use the keys to open the machines and perform whatever tests the NGCB agent deems necessary, and then repeat them at the NGCB's agent's direction, if necessary, once the slot technician's supervisor is present. (Bd. SER 4; Tr. SER 81-82, 90.) Former NGCB Board Hearing Officer Richard DeGuise has "never seen" a slot technician make the decision of whether any payments would be made. (Bd. SER 4; Bd. SER 31.)

Like virtually all other employees who work on the gaming floor, slot technicians have heightened responsibility to be alert for evidence of money laundering and underage gambling and drinking. (SER 59; SER 91-92.) Slot technicians report any such violations to Security, which is a separate department. Surveillance is also a separate department. (SER 59; SER 90, Bd. SER 15, 17-18, 24.) Moreover, slot technicians' obligation to report misconduct by another employee is no different than that of other employees, except to the extent that inspection of a gaming machine is required. (SER 60; Bd. SER 24, 25-26.)

**C. Slot Technicians Are Separate and Distinct from Security and Surveillance Personnel**

Slot technicians and security guards have completely different job duties, are not interchangeable, and neither classification is qualified to perform the others'

work duties. (SER 60; Bd. SER 20.) Security personnel are tasked with investigating customer-related disturbance and suspected malfeasance by employees. (SER 60; Bd. SER 17-19.) Slot technicians are not expected to restrain or confront guests, and do not patrol the exterior premises. (SER 59-60; Bd. SER 14, 17.) In addition, security personnel have greater access than slot technicians to the facility. (SER 60; Bd. SER 22.) For example, slot technicians are not permitted to enter the surveillance room without permission. (SER 60; Bd. SER 16, 21.) Slot technicians, who wear different colored uniforms than security officers, also do not carry handcuffs or weapons, nor are they trained in typical security functions. (SER 59, 60; Bd. SER 11-13.) When a “sting” operation may be necessary to determine malfeasance by employees or customers, it is conducted by security. Slot technicians are not called upon to participate. (SER 60; Bd. SER 14, 24.)

## **II. PROCEDURAL HISTORY**

In August 2017, the Union filed a petition for certification under Section 9(c) of the Act, 29 U.S.C. § 159(c), seeking to represent a bargaining unit of the Company’s full-time and part-time slot technicians.<sup>2</sup> The Company challenged the

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<sup>2</sup> The petitioned-for bargaining unit consists of “[a]ll full-time, regular part-time, and extra board slot technicians and utility technicians.” The unit excludes “all other employees, office clerical employees, guards, and supervisors as defined in the Act.” (ER 3; SER 72.)

petitioned-for unit as inappropriate, arguing that the slot technicians are guards within the meaning of Section 9(b)(3) of the Act and must be represented by a guard-only union.

On August 16, 2017, after a hearing, the Board's Regional Director issued a Decision and Direction of Election, finding that the slot technicians are not guards and the petitioned-for unit is appropriate. (SER 1-58-65.)<sup>3</sup> A representation election took place on August 25, and the slot technicians voted unanimously 13-0 in favor of union representation. (SER 58; Bd. SER 9.) The Company filed objections to the election, including an objection that the petitioned-for unit was not appropriate because the slot technicians are guards. After a hearing, the Regional Director overruled the Company's objections and certified the Union as the collective-bargaining representative of the employees. (ER 34-39.)<sup>4</sup> The Company requested review of the Regional Director's decisions before the Board, which the Board (Members McFerran, Kaplan, and Emanuel) later denied. (ER 33.)

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<sup>3</sup> The Regional Director also rejected the Company's request to ban electronic devices in the polling area. (SER 61.) That issue is not before the Court.

<sup>4</sup> The Regional Director also overruled the Company's objection that electronic devices should have been banned in the polling area. (ER 36-37.) The Company has not challenged that ruling before this Court.

On October 31, the Union requested that the Company recognize and bargain collectively with it. (ER 3.) Since November 6, the Company has admittedly refused to do so in order to test the validity of the Union's certification. (ER 2.) The General Counsel then issued complaint against the Company, alleging that its refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 8(a)(5) and (1), and moved for summary judgment before the Board.

### **III. THE BOARD'S CONCLUSIONS AND ORDER**

On April 12, 2018, the Board (Chairman Kaplan and Members McFerran and Emanuel) granted summary judgment, finding that the Company violated the Act as alleged. *Station GVR Acquisition, LLC d/b/a Green Valley Ranch Resort Spa Casino*, 366 NLRB No. 58. In its decision, the Board explained that all representation issues raised by the Company were or could have been litigated in the prior representation proceedings. (ER 2.) To remedy the unfair labor practice, the Board's Order requires the Company to cease and desist from failing and refusing to recognize and bargain with the Union, or, in any like or related manner, interfering with, restraining, or coercing employees in their exercise of rights under the Act. Affirmatively, the Order requires the Company to bargain with the Union upon request and, if an understanding is reached, to embody that understanding in a signed agreement. The Order also requires the Company to post a remedial notice. (ER 3-4.)

On April 13, the Union filed a motion for reconsideration of the Board's Order, arguing that the Board should have additionally found that the Company violated Section 8(a)(5) and (1) of the Act by failing to furnish the Union with information requested by the Union. On May 17, the Board (Members McFerran, Kaplan, and Emanuel) denied the Union's motion for reconsideration. (ER 1.)

### **SUMMARY OF ARGUMENT**

The Company admits that it refused to bargain with the Union in order to challenge the Board's certification of the Union as the slot technicians' bargaining representative. This challenge is without merit, as substantial evidence supports the Board's finding that the Company did not establish that the slot technicians are guards under the Act. To classify employees as guards and thereby limit their bargaining choices, an employer must demonstrate that employees enforce the employer's rules in a security context against other employees and persons on the employer's property. Reporting functions alone, without other significant security responsibilities, are not enough. In addition, guard-like duties cannot be a minor or an incidental part of the employees' overall responsibilities.

The slot technicians are primarily responsible for installing, maintaining, and repairing the employer's slot machines. The Company has failed to establish that these employees do more than merely report evidence of tampering or other fraudulent conduct to the Company; the evidence did not show that the slot

technicians have other significant security responsibilities that are more than minor or incidental to their overall responsibilities.

The Company's challenges to the Board's findings lack merit. The Company's claim that the Board's standard departs from Board precedent ignores the Board's analysis in its decision in *Boeing Co.*, 328 NLRB 128 (1999). Moreover, the record fails to establish the statutory requirement that the slot technicians enforce rules against employees, in addition to other persons; this case accordingly does not implicate Congress' concerns about divided loyalty in a bargaining unit. Cases from the Eighth Circuit on which the Company relies are legally unpersuasive and factually distinguishable, particularly because the Company failed to show that the slot technicians here, unlike the employees in those cases, met the statutory requirement of enforcing rules against employees.

Finally, the Company's reliance on the D.C. Circuit's decision in *Bellagio, LLC v. NLRB*, 863 F.3d 839 (2017), is also misguided. The slot technicians here simply do not perform the significant security-related duties like those that the court in *Bellagio* found significant in holding that the surveillance technicians are statutory guards. The Company also reads language in *Bellagio* that employees can be guards if they perform an "essential" step in enforcing rules out of context. In *Bellagio*, the court held that the surveillance technicians performed an essential step in observing and reporting misconduct, because they maintained and

positioned surveillance cameras that were crucial to surveillance operators and security officers' observing and monitoring duties. The slot technicians here, in contrast, are usually called upon to inspect machines only after potential problems have already been flagged. The Company has not shown that they perform any essential step enabling security personnel to carry out their functions that is more than minor or incidental to the slot technicians' regular responsibilities, as the Court found the surveillance technicians did in *Bellagio*. Nor has the Company established that the slot technicians' duties with regard to their co-workers come anywhere close to the surveillance technicians' duties in *Bellagio*. Unlike in *Bellagio*, the slot technicians do not participate in sting operations against coworkers—a duty deemed “crucial” to guard status by the *Bellagio* court. Accordingly, the court should enforce the Board's Order requiring the Company to bargain with the Union.

### **STANDARD OF REVIEW**

The Supreme Court recognizes that “determining what constitutes an appropriate bargaining unit ‘involves of necessity a large measure of informed discretion.’” *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1189 (D.C. Cir. 2000) (quoting *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 491 (1947)). Determining the bargaining unit “is within the particular expertise of the NLRB.” *NLRB v. J.C. Penney Co., Inc.*, 620 F.2d 718, 719 (9th Cir. 1980). This Court has

accordingly held that it will not overturn the Board's bargaining unit determination "unless there has been an abuse of discretion." *J.C. Penney*, 620 F.2d at 719.

Moreover, because unit determinations are dependent on slight variations of facts, the Board "decides each case on an ad hoc basis," and is "not strictly bound" by its prior decisions. *Id.* (citing *Pacific Southwest Airlines v. NLRB*, 587 F.2d 1032 (9th Cir. 1978), *NLRB v. Albert Van Luit & Co.*, 597 F.2d 681, 686 n.3 (9th Cir. 1979)). Each decision ultimately rests on "the particular circumstances of that unique case." *NLRB v. Carson Cable TV*, 795 F.2d 879, 885 (9th Cir. 1986).

Courts uphold the Board's determination regarding guard status under Section 9(b)(3) of the Act if the Board's decision is supported by substantial evidence. *See, e.g., Local 851, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. NLRB*, 732 F.2d 43, 44 (2d Cir. 1984) (Board finding regarding guard status subject to substantial evidence review); *Wells Fargo Alarm Servs. v. NLRB*, 533 F.2d 121, 125 (3d Cir. 1976) (same). Under the substantial-evidence standard, a reviewing court may not displace the Board's choice between two fairly conflicting views, even if the court "would justifiably have made a different choice had the matter been before it de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). *Accord Retlaw Broadcasting*, 53 F.3d at 1005-1006.

Although this court gives no particular deference to the Board regarding questions of law generally, it gives considerable deference to the Board's expertise in construing and applying the labor laws. *Hotel, Motel & Rest. Employees & Bartenders Union Local No. 19 v. NLRB*, 785 F.2d 796, 798 (9th Cir. 1986) (internal citations omitted); *Retlaw Broadcasting Co. v. NLRB*, 53 F.3d 1002, 1005-06 (9th Cir. 1995) (court will defer to "reasonably defensible" interpretation of Act); *NLRB v. Doctors' Hosp. of Modesto, Inc.*, 489 F.2d 772, 776 (1973) ("[w]here, as here, the specific issue involves the application of a broad statutory term ('supervisor') and the Board has the authority to make the interpretation in the first instance, its 'determination . . . is to be accepted if it has 'warrant in the record' and a reasonable basis in law'"). As the D.C. Circuit has specifically held, the Board is "entitled to judicial deference" regarding its determination of guard issues. *Drivers, Chauffeurs, Warehousemen & Helpers, Local 71 v. NLRB*, 553 F.2d 1368, 1374 (D.C. Cir. 1977). *Accord Children's Hosp. of Mich.*, 6 F.3d 1147, 1151 (6th Cir. 1993).

The Company thus wrongly asserts (Br. 17-18) that the Board is entitled to "no deference" on the issue of whether the slot technicians are guards under the Act. Contrary to the Company, this Court has rejected an invitation to conduct de novo review of the Board's "interpretation and application of a labor statute for which the agency is primarily responsible." *Salt River Valley Water Users'*

*Association v. NLRB*, 769 F.2d 639, 642 (9th Cir. 1985). Instead of referencing the above-discussed cases specifically related to guard status under the Act, the Company resorts (Br. 17) to citing *Bui v. INS*, 76 F.3d 268, 269 (9th Cir. 1996), for a more general proposition regarding agency interpretation of regulations. And even in *Bui*, the court says that it “gives some deference to [the agency’s] interpretation of the immigration laws” although it is “not obliged to accept an interpretation that is ‘demonstrably irrational or clearly contrary to the plain and sensible meaning of the statute.’” *Id.* The Company’s citation (Br. 17) to *NLRB v. UFCW Local 23*, 484 U.S. 112, 123 (1987), is also misplaced. In that case, the Court considered whether the Board’s construction of one of its regulations regarding the power of the Board’s General Counsel contradicted the plain meaning of the Act. *UFCW Local 23*, 484 U.S. at 123. It did not involve, let alone determine, the standard of review applicable to the guard provision at issue here, which courts have determined is entitled to deference. *See Local 71 v. NLRB*, 553 F.2d at 1374; *Children’s Hosp. of Mich.*, 6 F.3d at 1151 (6th Cir. 1993).

## ARGUMENT

### **I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY FAILED TO ESTABLISH THAT THE SLOT TECHNICIANS ARE GUARDS; THEREFORE, THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION**

Under Section 8(a)(5) of the Act, it is an unfair labor practice for an employer to refuse to bargain with the exclusive bargaining representative of its employees. 29 U.S.C. § 8(a)(5); *J.C. Penney Co.*, 620 F.2d at 719. A violation of Section 8(a)(5) results in a derivative violation of Section 8(a)(1), which makes it an unfair labor practice to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection [7]” of the Act. 29 U.S.C. § 8(a)(1); *J.C. Penney Co.*, 620 F.2d at 719. Here, the Company admittedly refuses to recognize and bargain with the Union, but argues that the Union’s certification was improper because the slot technicians are guards. Accordingly, the question before the Court is whether the Board properly determined that the Company failed to demonstrate that the slot technicians are guards.

#### **A. The Act Requires Guards To Be Separated From Non-Guard Employees For Collective Bargaining To Minimize Divided Loyalty**

Section 7 of the Act provides that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . .” 29 U.S.C. § 157. “[I]n order

to assure to employees the fullest freedom in exercising the rights guaranteed by [the Act],” Section 9(b) empowers the Board to decide in each case whether “the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . .” 29 U.S.C. § 159(b); *see Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 609-10 (1991). But Section 9(b) also requires statutory “guards” to be separated from all other employees for the purposes of collective bargaining. Specifically, the Board cannot find appropriate a bargaining unit which includes both guard and non-guard employees. And, as is relevant here, the Board cannot certify a labor organization to represent a unit of guards if it also represents non-guard employees, or is directly or indirectly affiliated with a labor organization that represents non-guard employees.<sup>5</sup> Because it is undisputed that the Union represents non-guard employees (SER 58; 72), the Board could not certify it as the bargaining representative of the slot technicians if they are classified as statutory guards. Congress chose to separate guards from all

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<sup>5</sup> Section 9(b)(3), 29 U.S.C. § 159(b)(3) states that:

[T]he Board shall not . . . (3) decide that any unit is appropriate for [collective bargaining] if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer’s premises; but no 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.

other employees for the purposes of collective bargaining in order “to minimize the danger of divided loyalty that arises when a guard is called upon to enforce the rules of his employer against a fellow union member.” *Drivers, Chauffeurs, Warehousemen & Helpers, Local 71 v. NLRB*, 553 F.2d 1368, 1373 (D.C. Cir. 1977); *see also Wells Fargo Alarm Servs. v. NLRB*, 533 F.2d 121, 124 (3d Cir. 1976) (Congress was seriously concerned with preventing split allegiance); *Boeing Co.*, 328 NLRB 128, 130 (1999) (conflict of interest may arise for guards during strike by non-guard employees represented by the same union).

To be certified by the Board, guards must be isolated in their bargaining units and may only be represented by certain unions, in order to separate them from non-guard employees. Therefore, a finding that employees are guards severely limits their rights to freely choose their representative. *Children’s Hosp. of Mich.*, 6 F.3d at 1150 (6th Cir. 1993) (employer may voluntarily recognize a guard/non-guard union but Board cannot compel such recognition; therefore, guards may lawfully join a union that represents non-guards but “will not have all the rights normally associated with belonging to a union”). *Accord Truck Drivers Local Union No. 807 v. NLRB*, 755 F.2d 5, 8 (2d Cir. 1985) (the Act “limits the organizational rights of guards – they must be in units segregated from nonguard employees”). Because the limitation on their choice of bargaining representative is an exception to the general rule that employees have the right to bargain

collectively through any representative of their own choosing, the burden is on the party asserting guard status to prove it. *Cf. NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711 (2001) (burden of proving supervisory status is on party asserting it).<sup>6</sup>

**B. To be a Guard, An Employee Must Enforce Against Employees and Other Persons Rules to Protect the Employer’s Property or the Safety of Persons on the Employer’s Premises**

Section 9(b)(3) of the Act defines a guard as an “individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer’s premises.” 29 U.S.C. §159(b)(3). In its decision in *Boeing Co.*, 328 NLRB 128 (1999), which comprehensively discussed Board precedent on the requirements for guard status, the Board determined, based on the statutory text, that “[g]uard responsibilities include those typically associated with traditional police and plant security functions,” such as “enforcement of rules directed at other employees; the possession of authority to compel compliance with those rules; training in security procedures; weapons training and possession; participation in security rounds or patrols; the monitor and control of access to the employer’s premises; and wearing

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<sup>6</sup> The Company has not contested the Board’s finding (Bd. SER 3, SER 61, ER 35) that the Company bears the burden of proof for overturning the election, based on its claim that the slot technicians are guards. *Cf. NLRB v. Doctors’ Hosp. of Modesto, Inc.*, 489 F.2d 772, 776 (1973) (“burden is on the employer to prove the Board was wrong” in interpreting a broad statutory term like “supervisor”).

guard-type uniforms or displaying other indicia of guard status.” *Boeing Co.*, 328 NLRB 128, 130 (1999). *Accord NLRB v. 675 W. End Owners Corp.*, 304 F. App’x 911, 914 (2d Cir. 1998) (summary opinion).

An excessively broad definition of guard status would restrict the statutory rights of numerous employees. Accordingly, the Board does not consider an employee’s responsibility to report security violations to constitute the requisite “enforcement” necessary for guard status unless that employee also has “other significant security-related responsibilities.” *Boeing*, 328 NLRB at 131.

Moreover, the Board has determined that guard responsibilities must be more than “a minor or incidental part of [an employee’s] overall responsibilities.” *Id.* at 130.

**C. The Company Failed To Demonstrate That the Slot Technicians Are Guards**

Substantial evidence amply supports the Board’s finding (SER 61) that the Company failed to demonstrate that the slot technicians are guards. As the position name indicates, they are technicians who service the Company’s gaming machines. As the Board found (SER 61, Bd. SER 5), the slot technicians do not “perform any of the traditional guard responsibilities” identified by the Board in *Boeing*. To the contrary, as the Board found (SER 61, Bd. SER 5), the slot technicians primarily “provid[e] services to guests” by installing, maintaining, and repairing the machines, as they spend 90% of their time on the gaming floor. In addition, the slot technicians check the machines at the behest of supervisors or the

NGCB if: a customer playing on the machine claims there is a discrepancy; the facility has been informed that a machine or bill validator has been acting suspiciously; or a jackpot over \$100,000 needs to be verified. *See* above at pp. 7-9. In none of those instances do the slot technicians confront customers or decide to pay out (or not to pay out) money; nor do the slot technicians make the final decision if fraud has occurred. *Id.*<sup>7</sup> Thus, although part of the slot technicians' job duties includes reporting evidence of tampering on the gaming machines to their superiors, the Board reasonably relied on its precedent in *Boeing* that just a reporting function, without other significant security-related responsibilities does not confer guard status. *See* SER 60 (citing *Boeing*, 328 NLRB at 131).

Moreover, the slot technicians, as the Board found (SER 61), have virtually no other security-related responsibilities that are different from any other gaming-floor employees, who are similarly required to be on the lookout for underage drinking and gambling, for example. *See* above p. 9. The slot technicians, therefore, are no "different from any other employees in nonguard occupations who during the course of the workday would presumably support suspicious job-related activity to their employer or to the police." *Purolator Courier*, 300 NLRB

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<sup>7</sup> The Company states (Br. 9) that evidence was "undisputed" that the Company follows the recommendation of the slot technician on whether to "payout a jackpot," but ignores the context of the highly-regulated verification process.

812, 814 & n.8 (1990). And as the Board further noted (SER 61), the slot technicians' functions and placement in the Company's organization are wholly distinct from security functions. They are also separate from the surveillance department. Thus, the slot technicians do not have the required significant security-related responsibilities in addition to their reporting functions.

Even assuming that the slot technicians did have such responsibilities, the Board reasonably found (SER 61) that the Company failed to show that they were more than "minor or incidental." *See Boeing*, 138 NLRB at 130 (guard duties must not be a "minor or incidental" to overall responsibilities) (citing *Rhode Island Hospital*, 313 NLRB 343, 347 (1993)). The Company has not made a legal challenge to this established aspect of the Board's analysis. Because the Company did not raise that specific argument to the Board, this court lacks jurisdiction to consider such a challenge. *See* Section 10(e) of the Act (no objection that has not been urged before the Board shall be considered by reviewing court); *NLRB v. Legacy Health System*, 662 F.3d 1124, 1126 (9th Cir. 2011). The Company's brief to this Court is also devoid of any such legal challenge. Accordingly, the Company has waived a legal challenge to the Board's "minor and incidental" standard. *See* Fed. R. App. P. 28(a)(8)(A); *Barnes v. FAA*, 865 F.3d 1266, 1271 n.3 (9th Cir. 2017) (argument not raised in opening brief is waived).

And, factually, the Company does not directly quarrel with the Board's finding that the Company failed to show that security-related functions performed by the slot technicians were more than minor and incidental. It only makes the conclusory assertion (Br. 23) that "a core function" of the slot technicians' duties is "to enforce rules against casino guests and other employees to protect [its] property and assets." However, the record does not reflect that such duties with regard to guests—let alone with regard to co-workers—are anything more than minor or incidental to the slot technicians' primary responsibilities. *See* SER 61. Presumably, the Company's own job description for the slot technicians could have shed some light on the nature of these responsibilities and their relative weight. As the Board noted (SER 5), however, the Company failed to introduce that evidence during the hearing. Accordingly, on this record, the Board reasonably found that the Company failed to prove that the slot technicians were statutory guards.

**D. The Company's Remaining Challenges to the Board's Guard Determination Are Unpersuasive**

The Company's challenges are contradicted by the relevant precedent and record evidence. The Company tries to paint the Board's guard test, as elucidated in *Boeing*, as out-of-sync with Board and court precedent, but the Board's reasoned analysis in *Boeing* and the significant distinctions between the duties of the slot technicians here and the employees in other cases belie the Company's efforts.

Likewise, the Company's attempt to shoehorn this case into the same category as *Bellagio, LLC v. NLRB*, 863 F.3d 839 (D.C. Cir. 2017), is unconvincing.

The Company's primary challenge (Br. 1, 19-22) is that the Board has wrongly departed from its own precedent "broad[ly] interpret[ing]" Section 9(b)(3). But as discussed below, the Company's substantial reliance (Br. 19-22) on three Board decisions for this claim—*Wright Memorial Hospital*, 255 NLRB 1319 (1980); *MGM Grand Hotel*, 274 NLRB 139 (1985); and *A.W. Schlesinger Geriatric Center, Inc.*, 267 NLRB 1363 (1983)—is misguided.

Contrary to the Company, the Board's test for guard status, which it fully described in *Boeing*, and which it applied here, is consistent with the decisions in its earlier cases. In *Boeing*, the Board found that firefighters in an airplane factory whose duties included reporting security violations to others, but not dealing directly with such violations themselves, did not meet the statutory definition of guards. 328 NLRB at 131-132 & n.10. In *Boeing*, the Board then rejected the same argument the Company makes here—that in *Wright Memorial*, *MGM Grand*, and *A.W. Schlesinger*, the Board established that such a reporting function, alone, can, indeed, confer guard status. Specifically, the Board pointed out that in "none of those cases did the Board find that a reporting function alone, without other significant security related responsibilities, could confer guard status." *Boeing*, 328 NLRB at 131. Thus, the *Boeing* Board explained, aside from the reporting

function, the security system operators at issue in *MGM Grand* were charged with monitoring an electronic system for fire and security incidents, including inspecting door exit alarms, stairwell motion detectors, and a watch tour system.” *Id.* (citing *MGM Grand*, 274 NLRB at 139-40). And the Board noted that in *A.W. Schlesinger*, the maintenance employees assumed security responsibilities after their employer eliminated its contract security guards. Specifically, they “spent between 50 and 75 percent of their time on security related functions.” 328 NLRB at 131-32 (citing *A.W. Schlesinger*, 267 NLRB at 1363-64). In *Wright Memorial*, the Board noted, the ambulance drivers made security rounds twice per shift. 328 NLRB at 132 (citing *Wright Memorial*, 255 NLRB at 1319).

The Board in *Boeing* accordingly concluded that “in each of these cases, an essential attribute of the disputed employees’ responsibility encompassed monitoring the employer’s property for security purposes and reporting any findings to others,” while, in *Boeing*, by contrast, “the essence” of the firefighters’ responsibilities was the prevention and suppression of fires. 328 NLRB at 130. Their security functions were “purely incidental” to their primary function. *Id.* Contrary to the Company’s contention, the Board reasonably followed its precedent in the instant case. As shown above, the slot technicians merely report any indicators of fraud to their supervisors. And as the Board additionally found (SER 61), any other guard-like security functions of the slot technicians were not

shown to be more than a “minor and incidental part of their primary responsibility of providing services to guests gambling on the [Company’s] slot machines.”

Thus, the Board did not depart from its precedent in either *Boeing* or in the instant case.

The Company also incorrectly claims (Br. 20-22) that the Board’s guard test places too much emphasis on traditional guard functions because the Board has found employees other than prototypical police-like security officers to be guards. The Company specifically points out (Br. 20-22) that maintenance employees were found to be guards in *A.W. Schlesinger*, and that shuttle van drivers were found to be guards in *Rhode Island Hospital*, 313 NLRB 343 (1993). But the Company (Br. 20) misses the point—neither in *Boeing* nor in the instant case did the Board find that employees must be “prototypical police-like security officers.”<sup>8</sup> As shown above, the Board focuses on the employees’ actual responsibilities, and whether those responsibilities, regardless of the employees’ classification, include

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<sup>8</sup> The Company also argues (Br. 1, 16, 19, 24) that it is not necessary for an employee to directly confront customers or other employees in order to be a guard. To be sure, the Board mentions (SER 61, ER 35) that, in the instant case, the slot technicians do not engage in such confrontation. Although that might not be dispositive, or the most important factor in determining guard status, it is an uncontested factor that supports the Board’s finding in the instant case.

significant security responsibilities that are not incidental to their primary function.<sup>9</sup>

The Company also misplaces reliance (Br. 19, 21, 22) on *McDonnell Aircraft Co. v. NLRB*, 827 F.2d 324 (8th Cir. 1987), and *BPS Guard Servs., Inc. v. NLRB*, 942 F.2d 519 (8th Cir. 1991). As the Board stated in *Boeing*, the Eighth Circuit in those cases found that Section 9(b)(3) status is not limited to security or police-type rule enforcers, but instead exists “whenever any employee is vested with rule enforcement obligations in relation to his co-workers.” *Boeing*, 328 NLRB at 130 (citing *McDonnell Aircraft*, 827 F.2d at 329). In *Boeing*, the Board then explained that it has declined to adopt the Eighth Circuit’s “overly broad” approach because it would “capture in its expansive sweep large categories of prototypically nonguard employees,” 328 NLRB at 130, 131, which it concluded was inconsistent with the Congress’ intent for Section 9(b)(3) to have a “more limited application.” *Id.* at 130. *See also Burns Security Servs.*, 300 NLRB 298, 300-301 (1990) (Congress intended the phrase “as a guard” in Section 9(b)(3) to limit the reach of the statute to those employees “whose duties encompass the security-type functions generally associated with guards . . . .”), *enf. denied sub*

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<sup>9</sup> Indeed, the Board in *Boeing* also reasonably distinguished *Rhode Island Hospital*, noting that, in that case, the Board had specifically found that their duties were not a “minor or incidental part of their overall responsibilities.” *Boeing*, 328 NLRB at 144 n.10 (citing *Rhode Island Hosp.*, 313 NLRB at 347).

*nom.*, *BPS Guard Servs., Inc.*, 942 F.2d 519). The Company has not demonstrated that this Court should adopt the Eighth Circuit’s interpretation rather than the Board’s. *See Retlaw Broadcasting*, 53 F.3d at 1005-06 (court will defer to “reasonably defensible” interpretation of the NLRA).

In any event, the slot technicians’ duties in the instant case include virtually no enforcement of rules against fellow employees, which is both a requirement of the statute and a key distinction from the above Eighth Circuit cases relied on by the Company (and the D.C. Circuit’s *Bellagio* decision, discussed further below). Indeed, the Company’s claims about slot technicians’ duties (Br. 9-11, 21) focus almost exclusively on enforcement of rules against customers, not employees. *See* Section 9(b)(3) of the Act (29 U.S.C. § 159(b)(3) (defining a guard as an individual “employed as a guard to enforce against *employees* and other persons rules to protect property of the employer or to protect the safety of persons on the employer’s premises”). At best, any asserted employee-related duties consist of purely hypothetical scenarios of slot technicians’ possible involvement in the misuse of gaming machines.

The Company’s reliance on the Regional Director’s findings regarding employee investigations is inaccurate and likewise couched in hypotheticals. (Br. 21.) Correctly quoted, the Regional Director stated that the slot technicians “have *no* involvement in investigations of other employees, except to the extent that

inspection of a gaming machine *might* be required.” (SER 60 (emphasis added).) Moreover, even if the hypothetical instances offered by the Company are taken as true, it has not shown that such duties were more than a minor and incidental aspect of the slot technicians’ function of servicing the gaming machines. Thus, the slot technicians’ functions simply do not present the concerns regarding divided loyalties that gave rise to Section 9(b)(3)’s limitations on organizational rights.

In contrast, in *McDonnell*, the firefighters at issue were authorized to issue reports describing incidents that could lead to a fire hazard which, if filed against another employee, could adversely affect the employee’s personnel file.

*McDonnell Aircraft*, 827 F.2d at 329. And in *BPS Guard Services*, the employees at issue were required to testify against other employees in grievance proceedings, as well as monitor employees for compliance with fire and safety standards. *BPS Guard Servs.*, 942 F.2d at 520. Accordingly, the slot technicians’ functions in this regard fall short of the statutory language and the employee-directed functions present in *McDonnell Aircraft* and *BPS Guard Services*.

The record in the instant case also falls short of establishing the general security-related functions present in *McDonnell Aircraft* and *BPS Guard Services*. In *McDonnell Aircraft*, the firefighters at issue were responsible for enforcing rules regarding, among other things, the unauthorized removal of and failure to

safeguard classified material and property, the failure to comply with instructions of those in authority, and the repeated violation of any rule including safety and security. 827 F.2d at 329. And the firefighters in *BPS Guard Services* attended the same orientation as security guards, were registered as private detectives, and were required to report violations of fire and safety rules and monitor employees for compliance. 942 F.2d at 520.

Thus, the slot technicians' duties in the instant case—which include virtually no enforcement against fellow employees, or any security functions beyond reporting possible tampering with machines or doing what all other gaming-floor employees are required to do, such as reporting underage gambling or drinking—are far removed from the employee-directed and security-related duties at issue in *McDonnell* and *BPS Guard Services*. Those firefighters' significant security responsibilities, including ones that they carried out against fellow employees, are worlds away from the slot technicians' responsibilities to install and maintain the Company's slot machines.

In a similar vein, the Company argues (Br. 1, 19, 22-25) that the Board's determination that the slot technicians are not guards is inconsistent with the D.C. Circuit's decision in *Bellagio, LLC v. NLRB*, 863 F.3d 839 (D.C. Cir. 2017). There, the D.C. Circuit found that surveillance technicians at two casinos, who maintained comprehensive security camera coverage and often participated in

targeted investigations of fellow employees, were guards under the Act. 863 F.3d at 843-44, 852. As shown below, the Board reasonably found the court's decision in *Bellagio* eminently distinguishable from the instant case.

As a threshold matter, the *Bellagio* court itself stated that “guard status is a factual question tied to the particulars of each case.” *Id.* at 842. Here, the Board found that, (SER 61, ER 35), although the slot technicians here and the surveillance technicians in *Bellagio* “work in a casino,” that is about the only factor they have in common. Indeed, as the Board found (SER 61, ER 35), the slot technicians here, unlike the surveillance technicians in *Bellagio*, have responsibilities that are “distinct from security functions.” As the D.C. Circuit described in “recap[ping] just the highlights,” the surveillance technicians in the *Bellagio* “control access to all areas of [the] casino and have access to all areas themselves; they maintain alarm systems for the most valuable property in [the] casino; and they help spy on fellow employees suspected of misconduct.” 863 F.3d at 849. But here, the slot technicians are not part of the surveillance department and, in fact, are not allowed to enter the surveillance room without permission—let alone to control access to all areas of the casino. (SER 60; Bd. SER 16, 21.) And ensuring that gaming machines are working properly to determine if customers are making false claims is a far-cry from maintaining the casino-wide surveillance system in *Bellagio*.

Moreover, the *Bellagio* court deemed it “crucial” to its finding that the surveillance technicians were guards because they “help enforce rules against their co-workers, most obviously during special operations.” *Bellagio*, 863 F.3d at 852. In those special operations, the surveillance technicians installed “a secret camera—or covertly lock[ed] an existing camera onto—a co-worker’s work area so that other surveillance and security personnel c[ould] spy on the targeted employee.” *Id.* Moreover, the surveillance technician was “expected to maintain the secrecy of the operation, including by cutting off video coverage to other employees and, if necessary, lying to them about it.” *Id.*

In stark contrast here, the slot technicians do not participate in sting operations or anything similar. *See* SER 60. In addition, contrary to the Company (Br. 21), and as discussed above at pp. 7-9, the evidence does not demonstrate that slot technicians have duties vis-à-vis co-workers like those the court found “crucial” to the surveillance technicians’ guard status in *Bellagio*. The Board did find (SER 60) that a slot machine technician theoretically could be involved in an investigation of another employee if it involved the inspection of a gaming machine. But as shown above, the slot technicians’ responsibilities regarding investigations of anyone—customer or employee—playing on a gaming machine are merely reporting any machine discrepancies to their superiors. In any event, the Company has not shown that any such employee-directed responsibilities in the

instant case are more than “minor or incidental,” which is insufficient to establish guard status. *Boeing*, 328 NLRB at 130; *JC Penney Co.*, 312 NLRB 32, 33 (1993) (finding that although clerk had some contact with employees, the record failed to show that she enforced rules against those employees, or, if she did, “whether that duty constitutes more than a minor or incidental part of her overall, nonguard duties.”)

The Company complains (Br. 24) that the above constitute “superficial and irrelevant differences;” to the contrary, they track closely with the Board’s findings in *Boeing* and the intent of Section 9(b)(3) of the Act in eliminating divided loyalties. As discussed above, in *Boeing*, the Board emphasized that employees who report security problems must also have other “significant security-related responsibilities” in order to constitute guards. *Boeing*, 328 NLRB at 131. As the Board stated in *NP Palace*, involving slot technicians with similar duties, “we reject the employer’s argument that the court’s decision in *Bellagio* dispensed with the requirement that guards act to enforce the employer’s rule in a security context.” *NP Palace LLC*, 2018 WL 1782720 at \*1, n.1, *pets. for review pending*, D.C. Cir. Case Nos. 19-1107, 19-1119. Indeed, the *Bellagio* decision does not even mention, let alone grapple with, the Board’s decision in *Boeing*. To compensate for *Bellagio*’s omission, the Company claims (Br. 23) that the *Bellagio* court “implicitly rejected the Board’s approach in *Boeing*.” But nothing in

*Bellagio* is inconsistent with *Boeing*. Both cases require guards to enforce rules in a security context, including enforcing them against fellow employees to alleviate divided loyalty concerns.

The Company also repeatedly characterizes (Br. 19-20, 23-24) the slot technicians' duties as "essential" to the enforcement of rules, citing (Br. 23) to language in *Bellagio* that the surveillance technicians in that case "perform an essential step in the enforcement of rules." *See Bellagio*, 863 F.3d at 849. The context of the "essential step" language, however, is critical. As the Company acknowledges (Br. 20) in citing *Wright Hospital*, one of the cases relied on in *Bellagio*, the "essential step" contemplated by the case law is "the responsibility to observe and report infractions." *Wright Memorial*, 255 NLRB at 1320; *see also MGM*, 274 NLRB at 140 n.10 ("it is sufficient that [the employees in question] possess and exercise responsibility to observe and report infractions, as this is an essential step in the procedure for the enforcement of the [employer's] rules"); *A.W. Schlesinger*, 267 NLRB at 1364 (same). In *Bellagio*, the court found that the surveillance technicians regularly performed an essential step in assisting the surveillance operators and security officers whose duties were to be on the lookout, mostly surreptitiously, for misconduct. 863 F.3d at 843, 849-50. Not so here. The evidence showed that the slot technicians perform a function that is completely separate from security personnel.

Also unlike *Bellagio*, the Company has not shown that the slot technicians perform an essential step enabling security personnel to carry out their functions that is more than a minor or incidental part of the slot technicians' regular responsibilities. As discussed, most of the slot technicians' reporting functions occur only after some potential problem has already been identified—for example, investigating a customer's claim of discrepancy, verifying a jackpot, inspecting a machine that has been identified in a "loss report," or assisting the NGCB agents who are called to the facility. (See above at pp. 7-9; Br. at 9-10). The Company has not shown that any remaining observation-and-report-type functions are more than minor or incidental to the slot technicians' primary responsibilities.

Finally, the Company's suggestion (Br. 25) that the Board has failed to consider the ultramodern luxury casino context (as it was criticized for doing in *Bellagio*) is unfounded. The Board discussed that factor (SER 61) among the others present in *Bellagio*, compared the facts to those in the instant case, and reasonably concluded that the finding that the surveillance technicians in *Bellagio* are guards does not dictate the guard status of the slot technicians here. While *Bellagio* remarked upon the type of employer involved, it did so in the context of the disputed employees being an integral part of the "all-encompassing surveillance" systems in those casinos. 863 F.3d at 851. And the court did not prescribe either an industry-specific standard or a different analysis under Section

9(b)(3) based on the perceived importance or amount of the assets at issue. To do so would have made little sense, as it is hardly less important to protect from malfeasance and safety risks a facility assembling airplanes in *Boeing* than to protect the assets of even an “ultramodern” casino that houses high-end jewelry and priceless art. *Id.* at 841, 851. In any event, to the extent the *Bellagio* court identified critical circumstances in that case, it was to fault the Board for relying on cases approximately 40-50 years old, although it ignored the Board’s reliance on the more recent *Boeing* (1999). It also faulted the Board for not considering the technology involved at the casinos at issue. 863 F.3d. at 850-51. This case suffers no such flaws where the Board did consider those facts here.

Accordingly, the Board’s finding that Company failed to demonstrate that the slot technicians are guards is consistent with precedent and supported by substantial evidence. The Union is therefore not precluded under Section 9(b)(3) of the Act from representing the slot technicians, and the Company’s refusal to bargain with the Union violates Section 8(a)(5) and (1) of the Act.

**II. THE UNION’S PETITION FOR REVIEW SHOULD BE DENIED BECAUSE THE UNION IS NOT AGGRIEVED AND THE INFORMATION-REQUEST VIOLATION WAS NOT ALLEGED OR LITIGATED**

The Union claims that the Board should have ordered the Company to provide certain information to the Union in addition to ordering the Company to bargain with the Union. However, as the Board explained in its April 27, 2018 Motion to Dismiss the Union’s petition, and again in its May 11, 2018 Reply to the Union’s Opposition, the Union does not have standing to bring this claim because it was not aggrieved by the Board’s Order. *See* Ninth Cir. No. 18-71124, Docket Entry Nos. 10 (Board Motion to Dismiss) & 12 (Board Reply to Union Opposition). As explained in those pleadings, the Order gave the Union all of the relief sought in the complaint and litigated before the Board. On July 18, 2018, this court denied the Board’s Motion to Dismiss “without prejudice to renewing the arguments in the answering brief.” (Ninth Cir. Case No. 18-71124, Docket Entry No. 21). As discussed below, the Board renews its argument regarding the Union’s lack of aggrievement, and shows that, in any event, the Board acted well within its broad remedial discretion.

Under Section 10(f) of the Act, 29 U.S.C. § 160(f), a party must demonstrate that it is aggrieved in order to challenge a Board Order in this Court. Here, however, the Union prevailed on all of the claims at issue in the complaint and resolved by the Board’s April 12, 2018 Order: the Board found that the Company

refused to bargain with the Union under Section 8(a)(5) and (1) of the Act.

Although the Union claimed in an April 13, 2018 motion for reconsideration that the Board should have also ruled on, and provided a remedy for, an unalleged information-request violation, that claim came too late. It is settled law that a party must raise its argument to the Board in a procedurally valid way, and that an objection that is not properly raised prior to a motion for reconsideration is untimely. *See* Board Reply to Union Opposition at 5, citing Section 10(e) of the Act (29 U.S.C. § 160(e)) and *Parkwood Developmental Ctr., Inc. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2008).

Moreover, even if the Union's belated request for an additional remedy is considered sufficient for grievance purposes, the Union has nonetheless failed to demonstrate, as it must, that the Board abused its discretion in failing to order an information-request remedy. As the Union admits (Br. 7), this Court reviews Board remedial orders for "a clear abuse of discretion," citing *IBEW Local 21 v. NLRB*, 563 F.3d 418, 423 (9th Cir. 2009). Such abuse occurs "only if the order is a patent attempt to achieve ends other than those that can fairly be said to effectuate the policies of the Act." *Cal. Pac. Med. Ctr. v. NLRB*, 87 F.3d 304, 38 (9th Cir. 1996).

It is hardly an abuse of discretion for the Board to have ordered only a remedy for the violation alleged in this case. The Union tries (Br. 10) to make hay

out of cases in which the Board provided information-request remedies in addition to failure-to-bargain remedies, but omits that in each of these cases, unlike here, the complaint had also alleged that there was a failure to provide information. *See Ozburn-Hessey Logistics, LLC*, 366 NLRB No. 177 (2018), *petition for review and cross-application for enforcement pending*, Sixth Cir. Case Nos. 19-1054, 19-1090; *Baker Concrete Constr., Inc.*, 338 NLRB 48 (2002); and *Honda of Hayward*, 314 NLRB 443 (1994). Accordingly, those cases do not demonstrate that the Board abused its discretion here.

In addition, the Union's observation (Br. 10-11) that the Board may resolve a claim not alleged in a complaint if the legal theory and facts were fully and fairly litigated is beside the point. Here, although materials in the record before the Board included the Union's information requests, the Company was not provided any notice that those requests were also at issue as a separate violation. Thus, the Company was afforded no opportunity to rebut the presumptive relevance of many of the information requests that the Union now raises, or to litigate any other defenses. This is a far cry from full and fair litigation.

And, in any event, the Board's later actions all but moot the Union's challenge. As the Union admits (Br. 15-16, citing ER 9-13), the Board has now issued a separate Order (366 NLRB No. 175 (Aug. 27, 2018)) providing the Union with much of the identical information it has requested here. The Board did so

after issuing complaint on a specific information-request charge, and after a summary judgment motion and Notice to Show Cause, which resulted in the parties litigating the information-request violation. (ER 9.) The Board also remanded some of the information request allegations to the Board's Regional Office to determine the relevance of employee social security numbers and some information about matters that might be outside the bargaining unit. (ER 10 nn. 5,6, ER 12.) The parties have filed petitions for review of the Board's August 2018 Order, which, along with the Board's cross-application for enforcement of that Order, are currently in abeyance in the D.C. Circuit, pending this Court's determination of the threshold issue of whether the Company has a bargaining obligation giving rise to information-request obligations. *See* D.C. Case Nos. 18-1236, 18-1288, and 18-1291. Given the circumstances, the Union has not established that the Board engaged in an abuse of discretion regarding the remedy in this case.

### **CONCLUSION**

For the foregoing reasons, the Board respectfully submits that this Court should enter judgment denying the petitions for review and enforcing the Board's Order in full.

## STATEMENT OF RELATED CASES

The following consolidated cases are related to the instant case because they involve the issue of whether a separate but similar unit of slot technicians at a casino owed by the same corporate parent are guards under the Act: *International Union of Operating Engineers Local 502, AFL-CIO v. NLRB* (Ninth Cir. No. 19-70092); *NP Sunset LLC d/b/a Sunset Station Hotel Casino v. NLRB* (Ninth Cir. No. 19-70244); & *NLRB v. NP Sunset LLC d/b/a Sunset Station Hotel Casino* (Ninth Cir. No. 19-70279).

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*National Labor Relations Board*  
 June 2019

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

INTERNATIONAL UNION OF OPERATING	)	
ENGINEERS LOCAL 501, AFL-CIO	)	
	)	
Petitioner	)	Nos. 18-71124, 18-72079
	)	18-72121
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	Board Case No.
Respondent	)	28-CA-214925
	)	
and	)	
	)	
STATION GVR ACQUISITON, LLC d/b/a	)	
GREEN VALLEY RANCH RESORT SPA	)	
CASINO	)	
Intervenor	)	
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STATION GVR ACQUISITION, LLC, d/b/a	)	
GREEN VALLEY RANCH RESORT SPA	)	
CASION	)	
	)	
Petitioner/Cross-Respondent	)	
	)	
v.	)	
	)	
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 10,324 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

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Dated at Washington, DC  
this 11th day of June, 2019

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## **CERTIFICATE OF SERVICE**

I hereby certify that on June 11, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they a registered user or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC  
this 11th day of June, 2019