

**Nos. 19-70092, 19-70244, 19-70279**

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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**

**NP SUNSET LLC, d/b/a  
SUNSET STATION HOTEL CASINO  
Intervenor**

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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 NP Sunset LLC, d/b/a Sunset Station Hotel Casino (“the Company”). The Board Order issued on January 7, 2019, and is reported at 367 NLRB No. 62. (ER 1-4).<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.

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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.

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 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, *NP Sunset LLC d/b/a Sunset Station Hotel & Casino*, Board Case No. 28-RC-222992. 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 findings that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with and provide relevant requested information to the Union, both of which turn 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 Board acted within its broad remedial discretion by rejecting the Union's request for enhanced remedies for the Company's violations of the Act.

## 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 and provide relevant information to 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 1-2.) 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 (SER 1, 10-11), the Board held (ER 3) that the Company's refusal to bargain and provide information 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 Sunset Station Hotel Casino in Henderson, Nevada. (SER 5; Bd. SER 27.) The facility is a hotel and casino including gaming space occupied by approximately 2,100 gaming machines including slot machines. (SER 5; SER 50.)

The Company employs 12 slot technicians at its facility. (SER 5; Bd. SER 29.) Nine of those technicians are classified as "slot technicians" and three are classified as "utility technicians" (collectively, "slot technicians"). (SER 5; Bd. SER 29.) Slot and utility technicians have identical job duties, discussed below, but the "utility technician" designation connotes a lower level of experience. (SER 5; SER 48-49.) The slot technicians work in the Slot Department, which is overseen by the Director of Slot Operations and is separate from the Security Department. (SER 6; SER 48-49.)

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

The vast majority of the slot technicians' time is spent on the installation, repair, and maintenance of various facets of the gaming machines and they spend 75% to 80% of their time on the gaming floor. (SER 5-6; SER 49, Bd. SER 7, 17.) Slot technicians have keys that provide access to the machines. (SER 6; SER 55, 74.) Guest service attendants, also in the Slot Department, and supervisors and managers may also possess those keys. (SER 6; SER 74-77, Bd. SER 20.) If a slot or guest services technician were to lose machine keys, he or she would likely be terminated. (SER 6; SER 77.)

As part of their repair duties, slot technicians fix machines with malfunctions about which the manufacturers have alerted the facility. (SER 6; Bd. SER 6-8.) In addition, if a customer asserts that there is a machine malfunction, a slot technician assists the slot management supervisory staff in investigating whether the game is operating properly. (SER 6; SER 51-54, 65-66, Bd. SER 7.) The supervisor or shift manager, not the slot technicians, makes the decision whether there was a malfunction. (SER 51-52.)

Slot technicians also check to ensure that "bill validators," which are devices on each machine that accept cash and vouchers, only accept legal tender. (SER 6; SER 54-57, Bd. SER 2.) When facility management receives a report that a bill

validator has a low rate of bill acceptance, a slot technician perform a test to see if the bill validator is malfunctioning. (SER 54-57, Bd. SER 2.)

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 6; SER 68-69, Bd. SER 3.) 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. (SER 70.)

Slot technicians also interact with agents of the Nevada Gaming Control Board ("NGCB"). (SER 6; SER 78, Bd. SER 18.) 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. (Bd. SER 4.) In that circumstance, the NGCB agent asks the slot technician specific technical questions about the machine. (SER 18.) The NGCB agent then makes the determination. (SER 16.) Like virtually all other employees who work on the gaming floor, including bartenders and servers, slot technicians have heightened responsibility to be alert for evidence of underage gambling and drinking. (SER 7; SER 78.) Slot technicians report any such violations to a slot team supervisor, shift manager, or the separate security department. (SER 7, Bd. SER 5.) A slot technician's 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 might be required. (SER 7; Bd. SER 22.)

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

As noted above, slot technicians are in a separate department from the security department, and both slots and security are separate from the surveillance department. (SER 7; Bd. SER 14-15, Bd. SER 24.) Security guards and slot technicians have different job duties, are not interchangeable, and do not perform the others' work duties. (SER 7; SER 16.) Security personnel are tasked with investigating customer-related disturbances and suspected malfeasance by employees and patrol outside and inside the casino. (SER 7, Bd. SER 25.) Slot technicians, who wear different colored uniforms than security officers, also do not carry handcuffs or weapons. (SER 7; Bd. SER 9-10, 21.) Slot technicians also must contact security to move money from machines. (SER 7; Bd. SER 12.)

When a "sting" operation may be necessary to determine malfeasance by employees or customers, slot technicians are not called upon to participate. (SER 7; Bd. SER 11.)

**II. PROCEDURAL HISTORY**

In July 2018, 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 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 July 13, 2018, 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 5-13.)<sup>3</sup> A representation election took place on July 19, 2018, and the slot technicians voted 11-1 in favor of union representation. (ER 2; Bd. SER 28.) On August 1, 2018, the Regional Director certified the Union as the exclusive collective-bargaining representative of the slot technicians. (ER 2; SER 3-4.) The Company requested review of the Regional Director's decisions before the Board, which the Board (Members McFerran, Kaplan, and Emanuel) denied. (SER 1.)

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<sup>2</sup> The petitioned-for bargaining unit consists of "[a]ll full-time and regular part-time slot technicians, utility technicians, and slot mechanics employed by the [Company] at its facility in Henderson Nevada." (ER 2; Bd. SER 27.) The Company's facility does not have any slot mechanics. (SER 49.) The unit excludes "all other employees, office clerical employees, guards, and supervisors as defined in the National Labor Relations Act." (ER 2.)

<sup>3</sup> The Regional Director also rejected the Company's request to ban electronic devices in the polling area. (SER 10.) That issue is not before the Court.

On July 26, 2018, the Union requested that the Company recognize and bargain collectively with it, and provide it with information related to bargaining, including employee social security numbers. (ER 2.) Since July 27, 2018, the Company has admittedly refused to do so in order to test the validity of the Union's certification. (ER 3.) The General Counsel then issued complaint against the Company, alleging that its refusal to bargain with the Union and provide the requested information 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. The Union joined in the General Counsel's request for summary judgment and requested additional enhanced remedies. (ER 3.)

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

On January 7, 2019, the Board (Chairman Ring and Members McFerran and Kaplan) granted summary judgment, finding that the Company violated the Act in almost all of the ways alleged by the General Counsel. *NP Sunset LLC d/b/a Sunset Station Hotel Casino*, 367 NLRB No. 62. Specifically, the Board found that the Company had an obligation to provide the Union with most of the information that the Union requested because it was presumptively relevant. The Board remanded to the Regional Office the allegation that the Company was required to provide the Union with employee Social Security numbers, because the Board has held that employee Social Security numbers are not presumptively relevant and the

Union did not explain why it needed that information. (ER 2, 2 n.4 (citing *Maple View Manor*, 320 NLRB 1149, 1151 n.2 (1996), *enforced*, 634 F. App'x 800 (D.C. Cir. 1997))). In its decision, the Board also explained that all representation issues raised by the Company were or could have been litigated in the prior representation proceedings. (ER 1.)

To remedy the unfair labor practices, the Board's Order requires the Company to cease and desist from failing and refusing to recognize and bargain with the Union and from failing to provide the Union with the requested relevant information and, in any like or related manner, interfering with, restraining, or coercing employees in their exercise of rights under the Act. Affirmatively, the Board ordered its traditional remedies for the violations found, to wit: requiring the Company to bargain with the Union upon request and, if an understanding is reached, to embody that understanding in a signed agreement, as well as furnish the information requested by the Union with the exception of employee Social Security numbers. (ER 3.) The Order also requires the Company to post a remedial notice for 60 days. (ER 3-4.) The Board stated that contrary to the Union's assertion, there has been "no showing that the Board's traditional remedies are insufficient to redress the violations found." (ER 3.)

## SUMMARY OF ARGUMENT

The Company admits that it refused to bargain with the Union and provide the Union with the requested information 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 maintaining the Company's slot machines. Contrary to the Company's conclusory assertion that a core function of the slot technicians' duties is to enforce rules against guests and other employees, it has failed to establish that these employees do more than merely report evidence of tampering or other fraudulent conduct to the Company. The evidence simply does 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 remaining challenges to the Board's findings lack merit. The Company's claim that the Board's decision in *Boeing Co.*, 328 NLRB 128 (1999), departs from Board precedent ignores the decision itself, which broke no new ground and explained how it was wholly consistent with previous decisions. Moreover, the Company failed to meet its burden of proof to establish that the slot technicians have more than a minor or incidental responsibility to 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 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 has also failed to establish that the slot technicians perform any essential step in observing and reporting misconduct 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.

For its part, the Union has failed to demonstrate that the Board abused its broad discretion by rejecting its request for enhanced remedies. The Board's traditional remedies fully redress the Company's violations of the Act by requiring the Company to bargain with and provide information to the Union as well as to post its standard remedial notice for 60 days. As the Board found, the Union has simply failed to establish, as it must, that the Board's traditional remedies are insufficient.

### **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.*, 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 1005-06.

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. 15-16) 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. 15) 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 stated 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. 15) 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 AND PROVIDE INFORMATION**

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. Under Section 8(a)(5) of the Act, it is also a violation to refuse to furnish relevant and necessary information to the Union upon request because, in the absence of a valid reason that supports non-disclosure, an employer is obligated to produce information “relevant to the union’s collective bargaining duties.” *Retlaw Broadcasting Co. v. NLRB*, 172 F.3d 660, 669 (9th Cir. 1999) (citing *NLRB v. Realty Maintenance, Inc.*, 723 F.2d 746, 747 (9th Cir. 1984)). 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 has refused to recognize and bargain with the Union, and to provide the Union with the requested relevant information, but argues that the Union’s certification was improper because the slot technicians are

guards.<sup>4</sup> Accordingly, the question before the Court is whether substantial evidence supports the Board’s finding 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

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<sup>4</sup> In its opening brief, the Company does not challenge the Board’s finding (ER 2-3) that the information requested by the Union (except for employee Social Security numbers) is relevant to bargaining. Accordingly, the Company has waived any such argument. *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).

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 5, Bd. SER 26), 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 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).

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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.

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) (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>

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<sup>6</sup> The Company has not contested the Board's finding (SER 8, SER 44) that the Company bore the burden of supporting its claim that the technicians are guards. *Cf. NLRB v. Doctors' Hosp. of Modesto, Inc.*, 489 F.2d 772, 776 (9th Cir. 1973) (“burden is on the employer to prove the Board was wrong” in interpreting a broad statutory term like “supervisor”).

**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), the Board comprehensively discussed Board precedent regarding the requirements for guard status. Based on the statutory text, it determined 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 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 to select the union representative of their choice. 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 8) that the Company failed to demonstrate that the slot technicians are guards. As the position name indicates, they are technicians who service and maintain the Company’s gaming machines. Like the Board found (SER 8), 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 9), the slot technicians primarily “provid[e] services to guests” by maintaining the machines. *See also* Bd. SER 26 (“vast majority [of slot technician’ work] “is really maintenance”). Indeed, as discussed above at p. 7, the slot technicians spend 75-80% 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 or the facility has been informed that a machine has been acting suspiciously. *See* above at pp. 7-9. In none of those instances has the Company demonstrated that 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 as to whether fraud has occurred. (*Id.*; Bd. SER 6, 19.)<sup>7</sup> The slot technicians are also not allowed to give their own opinion to the player. (Bd. SER 13.) 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 (D&DE 4), 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 pp. 8-9. The slot technicians, therefore, are no "different from any other employees in nonguard occupations who during the course of the workday would presumably report suspicious job-related activity to their employer or to the police." *Purolator Courier*, 300 NLRB 812, 814 & n.8 (1990). And as the Board further noted (SER 9-10), the slot

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<sup>7</sup> Slot technicians also verify jackpots in excess of \$100,000. (SER 61, SER 24-26, 61-63.) The slot technicians, however, are among numerous other employees who are involved in that process. (SER 62-63.) The Company's record citations (Br. 9; SER 61-63, SER 24-26) do not support its proposition that the evidence is "undisputed" that the Company "always" follows the recommendation of the slot technician on whether to "payout a jackpot." *See* SER 61-63 (merely discussing slot technicians' general duties regarding jackpots); SER 24-26 (statement of slot department policy on jackpots).

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 (D&DE 5) 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 Hosp.*, 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 only briefly addresses (Br. 21) the Board's finding that the Company failed to show that security-related functions performed

by the slot technicians were more than minor or incidental. The Company claims (Br. 21) that the Board “brushed aside nearly all the core duties of the slot technicians” except for their duties reporting underage drinking and gambling, which the Company claims (Br. 21) the Board “could then [ ] dismiss as minor and incidental.” The Board did no such thing. To be sure, the Board found (SER 7, 9) that the slot technicians’ duties to report underage drinking and gambling were “no greater than other employees who work on the gaming floor,” and were “minor and incidental to their primary responsibility” of providing services to guests using the gaming machines. But the Board also found (SER 8, 9) that the Company failed to show that *any* of the slot technicians’ duties, including any possible security-related functions that went beyond the mere reporting or verifying of machine problems, were more than minor or incidental to their primary responsibility of maintaining the machines. As the Board stated (SER 9), “*any* guard-like responsibilities conferred on technicians are, like the firefighters in *Boeing*, a minor and incidental part of their primary responsibility . . .” (emphasis added). Indeed, the Board can hardly be accused of “brush[ing] aside” the core duties of the slot technicians when the Company’s own job descriptions for the slot technicians do not even list any security responsibilities as a function, let alone as a core function. (Bd. SER 30-33.) 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*, which surveyed its previous decisions interpreting Section 9(b)(3), did not create a new test or contradict anything the Board had said in prior cases. 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, 16-19) is that the Board has wrongly departed from its own precedent “broad[ly] interpret[ing]” Section 9(b)(3). But as discussed below, the Board did not depart from its own precedent in either *Boeing* or the instant case. 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), all of which the Board distinguished in *Boeing*—is misguided.

In *Boeing*, the Board cited to its prior decisions on guard status finding that employees are guards if they are charged with guard responsibilities that “are not a minor or incidental part of their overall responsibilities,” and that guard responsibilities include those typically associated with law enforcement functions. 328 NLRB at 130 (citing *Rhode Island Hosp.*, 313 NLRB 343 (1993); *Wolverine Dispatch, Inc.*, 321 NLRB 796 (1996); *55 Liberty Owners Corp.*, 318 NLRB 303 (1995); and *Burns Security Servs.*, 300 NLRB 298 (1990) (*enf. denied sub nom.*, *BPS Guard Servs., Inc.*, 942 F.2d 519 (8th Cir. 1991)). The Board in *Boeing* then 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.

The *Boeing* 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 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 that, 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 that 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 in *Boeing* did not depart from its precedent interpreting Section 9(b)(3); instead, it analyzed that precedent and distilled guiding principles by examining what circumstances have met or failed Section 9(b)(3)’s language. Then, in the instant case, it reasonably followed that law. 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 followed its precedent in both *Boeing* and the instant case.

The Company also incorrectly claims (Br. 18-20) 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. 18) 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.” As shown above, the Board focuses on the employees’ actual responsibilities, and whether those responsibilities, regardless of the employees’ classification, include significant security responsibilities that are not incidental to their primary function.<sup>8</sup>

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<sup>8</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).

The Company also misplaces reliance (Br. 17, 19) 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, 300-01 (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 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. 2, 9-11) 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"). The Company significantly overstates the record by asserting (Br. 10) that slot technicians "[i]dentify and investigate mistakes or intentional misconduct by other Technicians, who are prohibited from gambling at the [Company's] properties due to their insider information on the performance of specific slot machines." Nothing in the Company's citations (SER 48-49, 60-63, 77, or SER 31) links any potential duties of the slot technicians with mistakes or misconduct made by other slot technicians—let alone establishes that any such duties are more than minor or incidental. The Company's assertion (Br. 10-11) that the slot technicians "form[ ] probable cause to effect an arrest when guests are detained for engaging in theft or fraud" also stretches the record beyond its limit. The only example that NGCB Agent Richard DeGuise gave (SER 20-21) was in

the 1990s when the Company's casinos "used to" have coin-based games that the it touts (Br. 22-23) that it has long since abandoned.

At best, this record indicates that any asserted employee-related duties of the slot technicians consist of purely speculative scenarios of their possible involvement in investigating the misuse of gaming machines. Such conjecture does not meet the Company's burden of proving that the slot technicians enforce rules against fellow employees as more than a minor or incidental part of the slot technicians' responsibilities. Moreover, although the Company asserts (Br. 19) that the Regional Director "acknowledg[ed]" that slot technicians "*may* be involved in investigations of other employees to the extent that inspection of a gaming machine *might* be required" (emphasis added), that finding is couched in hypotheticals. The Company omits reference to the first part of the Regional Director's finding in this regard, which states (SER 7) that there was "no record evidence" that the technicians had any such involvement. In any event, even if the Company had been able to establish any instances where slot technicians enforced rules against a fellow employee, the Company has not shown that any such duties were more than a minor and incidental aspect of the slot technicians' function of maintaining the gaming machines. Thus, the Company failed to meet its burden of establishing that the slot technicians' functions 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. 14, 17-18, 20-23) 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 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, (D&DE 6), although the Company’s slot technicians 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 10), 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, the Board found that “the record does not reveal that the [slot] technicians are permitted to enter any surveillance room”—let alone to control access to all areas of the casino. (SER 7.) 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 7. The Board did find (SER 7) that a slot machine technician theoretically could be involved in an investigation of another employee if it entailed 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. 22) that the above constitute “wooden” distinctions between the instant case and *Bellagio*, and that the Board has failed to reconcile *Boeing* and *Bellagio*. To the contrary, the distinctions the Board makes track closely with the Board’s findings in *Boeing* and are consistent with *Bellagio*. 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. The Company wrongly suggests (Br. 20-21) that *Bellagio* eliminated this requirement. As the Board stated, “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.” (SER 9, citing *NP Palace LLC*, 2018 WL 1782720 at \*1, n.1, *pets. for review pending*, D.C. Cir. Case Nos. 19-1107, 19-1119.) And, contrary to the Company (Br. 20), the D.C. Circuit in *Bellagio* did not reject the Board’s approach in *Boeing*. The *Bellagio* decision does not even mention, let alone grapple with the Board’s decision in *Boeing*. In any event, 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. 2, 17-18, 20-22) the slot technicians’ duties as “essential” to the enforcement of rules, citing (Br. 22) 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. 17, 18) 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. Unlike the surveillance technicians in *Bellagio*, the evidence showed that the slot technicians perform a function that is completely separate from security personnel. And most of the slot technicians’ reporting functions occur only after some potential problem has *already* been observed or identified by someone else—for example, investigating a customer’s claim of discrepancy, 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 9-11). 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. 22-23) 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 9) 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 those 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 its 1999 *Boeing* decision. 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 and provide the Union with the requested relevant information violates Section 8(a)(5) and (1) of the Act.

## **II. THE BOARD DID NOT ABUSE ITS BROAD DISCRETION BY DECLINING TO GRANT THE UNION'S REQUEST FOR ENHANCED REMEDIES**

Having found that the Company violated the Act by failing to bargain with and provide information to the Union, the Board ordered the Company to bargain and provide the relevant information. (SER 3.) The Board also issued its standard cease-and-desist provision, ordering the Company to cease and desist from any "like or related" bargaining and information request violations. (SER 3.) In addition, the Board ordered the Company to post the Board's standard remedial notice at the casino for 60 days and electronically distribute the notice if the Company communicates with its employees electronically. The Union asserts that the Board abused its discretion by not going beyond these traditional cease-and-desist and notice-posting remedies for the Company's violations of the Act. As

shown below, the Union has failed to demonstrate, as it must, that the Board's traditional remedies are insufficient to redress the violations found or that the Company's actions otherwise warrant requiring the Board to order enhanced remedies.

**A. The Union Must Demonstrate That The Board Abused Its Broad Remedial Discretion**

The Board's remedial authority is a "broad discretionary one, subject to limited judicial review." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964). Under Section 10(c) of the Act (29 U.S.C. § 160(c)), the Board's discretion in selecting appropriate remedies is "exceedingly broad and is to be given special respect by reviewing courts." *General Teamsters Local No. 162 v. NLRB*, 782 F.2d 839, 844 (9th Cir. 1986). As the Union admits (Br. 5), this Court reviews the Board's choice of remedy for "a clear abuse of discretion." *See United Steelworkers of America v. NLRB*, 482 F.3d 1112, 1116 (9th Cir. 2007). 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). The Board has held that the party seeking extraordinary remedies must demonstrate, "as a precondition for granting [extraordinary remedies], why traditional remedies will not ameliorate the effect of the unfair labor practices found." *First Legal Support Servs., LLC*, 342 NLRB 350, 350 n.6 (2004). As this Court has stated, "the Board's decision to order an

unextraordinary remedy does not merit an extraordinary explanation.” *United Steelworkers*, 482 F.3d at 1118.

**B. The Union Failed to Demonstrate That the Board Was Required To Order Enhanced Remedies**

The Union asserts (Br. 4-14) that the Board should have issued a “broad” cease-and-desist order and changed various aspects of its standard notice posting. Regarding the Union’s request for a “broad” order, the Board explained that such an order is appropriate only if the Company has “a proclivity to violate the Act” or “engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees’ fundamental statutory rights.” (ER 3, citing *Hickmott Foods*, 242 NLRB 1357, 1357 (1979)).<sup>9</sup> But the Union has utterly failed to impugn the Board’s finding (ER 3) that “a broad order is not warranted in the circumstances here.”

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<sup>9</sup> In its brief to the Court, the Union does not specify what it means by a “broad order” other than one which would apply to subsidiaries of the parent company as well as to the Company in this case. (Br. 13-14.) In Board lexicon, a “broad order” typically refers to an order requiring an employer to cease and desist not only from interfering with, restraining, or coercing employees in any “like or related manner,” but also from “in any *other* manner,” which could subject an employer to possible contempt proceedings for further unrelated violations. *See e.g., Ozburn-Hessey Logistics, LLC*, 362 NLRB 1532, 1535 (2015) (emphasis added), *enforced mem.*, 689 F. App’x 639 (D.C. Cir. 2016). As the Board found (ER 3), the Union failed to establish that such an “in any other manner” order is warranted, and the Union does not challenge that finding. Nor has the Union met the standard for requiring any type of broad order, as shown above.

To be sure, the Union correctly observes that there are pending unfair-labor-practice cases involving other casinos owned by the same parent company that owns the Company in this case. But, like the instant case, those are all refusal-to-bargain cases brought to challenge a Board certification of a unit of slot technicians. *See IUOE Local 501 & Station GVR Acquisition, LLC v. NLRB*, Ninth Cir. Case Nos. 18-71124, 18-72079, & 18-72121; *IUOE Local 501 & NP Sunset LLC v. NLRB*, Ninth Cir. Case Nos. 19-70092, 19-70244, 19-70279; *IUOE Local 501 & NP Palace, LLC v. NLRB*, D.C. Cir. Case Nos. 19-1107, 19-1119, & 19-1133; and *NP Lake Mead d/b/a Fiesta Henderson Casino Hotel*, D.C. Cir. Case No. 19-1138, 19-1151. As the Act is structured, refusing to bargain is the only way to seek judicial review of the Board’s bargaining unit determination. *See Wackenhut Corp. v. NLRB*, 178 F.3d 543, 548 (D.C. Cir. 1999). These circumstances are wholly unlike instances in which the Board has issued the type of corporate-wide order that the Union seems to request (Br. 13-14) here. *See J.P. Stevens & Co. v. NLRB*, 380 F.2d 292, 304 (2d Cir. 1967) (ordering corporate-wide relief where “flagrant violations” have been shown to be centrally-determined from the same corporate parties), *J.P. Stevens & Co. v. NLRB*, 638 F.2d 676, 688 (4th Cir. 1980) (ordering corporate-wide relief where corporation has shown “an extraordinary history of lawlessness” with extensive violations). Nor, as the Board found (ER 3), has the Union shown that this is a case in which the Company has a

proclivity to violate the Act or a general disregard for employees' rights. *See Ozburn-Hessey Logistics, LLC*, 362 NLRB at 1535 (broad order issued for “numerous and varying” violations of the Act spanning many years, including—but not limited to—interrogating and soliciting employees, threatening employees with loss of their job and benefits, telling employees who supported the Union to find another job, contacting the police to have union agents removed from public property, and discharging employees); *HTH Corp.*, 361 NLRB 709, 709-10 (2014) (broad order issued for “egregious and pervasive violations” including threats, coercion, unlawful discharges, bad-faith bargaining, and unilateral changes in terms and condition of employment), *enforced in rel. part*, 823 F.3d 668 (D.C. Cir. 2016). Simply put, the Union has not shown that a broad order is needed to remedy the violations in this case or that the Board otherwise abused its discretion in not ordering one.

The Union fares no better with its challenges (Br. 5-13) to the Board's failure to order enhanced notice posting requirements. As the Board found (ER 3), the Union made “no showing that the Board's traditional remedies are insufficient to redress the violations found.” The Union requests (Br. 7-8) a longer notice-posting period, but has failed to demonstrate that the 60-day standard period is insufficient or that there are any circumstances here justifying a longer posting. *See e.g., HTH Corp.*, 361 NLRB at 714 & n.23 (ordering 3-year posting period to

remedy employer's numerous and long-running unfair labor practices, which Board described as "legacy of coercion"); *Ozburn-Hessey*, 366 NLRB No. 177, at \*13 (2018) (ordering 3-year posting period in face of multiple violations with two prior broad orders to dispel "lingering effect" of pervasive violations), *petition for review and cross-application for enforcement pending*, 6th Cir. Case Nos. 19-1054, 19-1090. The Union's entreaty (Br. 8) to this Court to "direct [ ] the Board to explain why it only requires a limited [60]-day notice posting" turns this Court's precedent on its head. To the contrary, the "Board's decision to order an unextraordinary remedy does not merit an extraordinary explanation." *See United Steelworkers*, 482 F.2d at 1118.

The Union has also failed to establish (Br. 7) that it is necessary for the Board to mail the notice to former employees even if the Company has not gone out of business or closed the facility. The Union's suggestion (Br. 7) that the Board is acting inconsistently based on the Board's decision to mail notices in *Bud Antle, Inc.*, 361 NLRB 873, 873 n.1 (2014), is frivolous. In *Bud Antle*, the workforce was migratory, harvesting crops from year-to-year, and the employer did not have a facility to which all employees reported. There are no such

circumstances present here, and the Board was not required to otherwise explain why it issued its traditional order limiting mailings to closure scenarios.<sup>10</sup>

The Union's argument (Br. 8-13) that the Court should remand for the Board to include different notice language is also without merit. The Union is wrong (Br. 13) that the Board gave "no explanation" for adhering to its standard notice language; as stated above, the Board explained why it was not agreeing to any of the Union's requested enhanced remedies, including this one, stating (ER 3) that the Union did not show that the Board's "traditional remedies are insufficient."

Moreover, the Union wants (Br. 9) an additional "non-legalese" statement so that "the workers can understand what the employer actually did," but it has utterly failed to show that the Board's traditional language, used in this case, is insufficient for employees to understand. *See* D&O 4 (stating that the Company will not refuse to bargain or provide information and will affirmatively bargain and provide the information). Indeed, despite spilling a lot of ink (Br. 9-12) on the historical evolution of the Board's order language, the Union ultimately acknowledges (Br. 11-12) that both its preferred language and the Board's standard

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<sup>10</sup> The Union similarly quibbles (Br. 5-6) that the Board should be required to provide signed copies of the notice to the Union, even though the Union admits (Br. 6) that the Casehandling Manual already entitles the Union, as the Charging Party, to a copy of the signed notice upon request. The Union has not demonstrated that any more copies are necessary or that the employees will not otherwise see the notice.

language include statements advising employees that that the employer has violated labor law. The Union has accordingly provided no reason to disturb the Board's broad remedial discretion in this case.<sup>11</sup>

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<sup>11</sup> The Union has complained (Br. 7-8) about the delay in vindicating employee rights in this case, but its own request for remand is inconsistent with prompt vindication of these rights. In particular, if the Union's proposed remedy draws constitutional challenges from the Company as the Union imagines (Br. 13 n.2), the delay could be even longer.

**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: *IUOE Local 501 & Station GVR Acquisition, LLC v. NLRB* (“GVR”), Ninth Cir. Case Nos. 18-71124, 18-72079, & 18-72121. The Board requests that the instant case and *GVR* be heard in *seriatim* on the same day before the same panel.

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August 2019

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

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ENGINEERS LOCAL 501, AFL-CIO	)	
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	)	Nos. 19-70092, 19-70244
NATIONAL LABOR RELATIONS BOARD	)	19-70279
v.	)	
Respondent	)	
	)	Board Case No.
and	)	22-CA-225263
NP SUNSET LLC, d/b/a SUNSET STATION	)	
HOTEL CASINO	)	
Intervenor	)	
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	)	
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NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	
	)	
and	)	
INTERNATIONAL UNION OF OPERATING	)	
ENGINEERS LOCAL 501, AFL-CIO	)	
	)	
Intervenor	)	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 11,687 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 7th day of August, 2019

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	)	
Respondent/Cross-Petitioner	)	
	)	
and	)	
INTERNATIONAL UNION OF OPERATING	)	
ENGINEERS LOCAL 501, AFL-CIO	)	
	)	
Intervenor	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on August 7, 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 address listed below:

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Dated at Washington, DC  
this 7th day of August, 2019