

Nos. 19-70092, -70244, -70279

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

Petitioner, Respondent, and Intervenor,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent and Petitioner,

v.

NP SUNSET LLC, DBA SUNSET STATION HOTEL CASINO,

Intervenor, Petitioner, and Respondent.

On Petition for Review of Decision and Order of National Labor Relations Board
Case No. 367 N.L.R.B. No. 62, Case 28-CA-225263

**REPLY BRIEF OF THE EMPLOYER NP SUNSET LLC
D/B/A SUNSET STATION HOTEL CASINO**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Respondent NP Sunset LLC d/b/a Sunset Station Hotel Casino (“Sunset” or “Employer”) states that its parent company is Station Casinos LLC. Station Casinos LLC, in turn, is wholly owned by Red Rock Resorts, Inc., a publicly-held corporation. No other publicly-held corporation owns 10% or more of the stock of Sunset, Station Casinos LLC, or Red Rock Resorts, Inc.

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I. INTRODUCTION

The crux of the Board’s argument is that the Slot Technicians are not guards because they do not perform the “traditional police and plant security functions” identified by the Board in *Boeing*. (Board Brief at pp. 23-24 (citing *Boeing Co.*, 328 N.L.R.B. 128, 130 (1999).) Under the Board’s approach, “enforc[ing] against employees and other persons rules to protect property of the employer” is not sufficient to confer “guard” status; only “security or police-type rule enforcers” are “guards” within the meaning of the Act. *Compare* 29 U.S.C. § 159(b)(3) and *McDonnell Aircraft Co. v. NLRB*, 827 F.2d 324, 329 (8th Cir. 1987), with *Boeing*, 328 N.L.R.B. at 130.

As the Eighth Circuit pointed out in *McDonnell*, the problem with the Board’s argument is that “the Board’s restriction of Section 9(b)(3) application to the enforcement of security rules only cannot be reconciled with the plain language of the statute.” 827 F.2d at 329. The Board advanced the same argument again in *Bellagio, LLC v. NLRB*, 863 F.3d 839 (D.C. Cir. 2017), and the D.C. Circuit again rejected the Board’s narrow construction of the statute. Although the surveillance technicians in *Bellagio* performed none of the “traditional” guard duties identified in *Boeing*, the D.C. Circuit correctly concluded that the technicians were guards due to the essential role they played in protecting the employer’s assets. The same

is true here, and the same result should follow – the Board’s Order and the certification of the Union should be vacated.

II. THE SLOT TECHNICIANS ARE STATUTORY GUARDS

A. The Board’s Narrow Definition of “Guard” is Contrary to the Plain Language of the Act

Section 9(b)(3) of the Act defines a “guard” as any individual employed “to enforce against employees and other persons rules to protect property of the employer” 29 U.S.C. § 159(b)(3).¹ Notwithstanding this plain language and that the Eighth Circuit had already rejected the Board’s construction of the statute in *BPS Guard Servs., Inc. v. NLRB*, 942 F.2d 519 (8th Cir. 1991), the Board ruled in *Boeing* that “guard” responsibilities are limited to:

traditional police and plant security functions, such as the 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, 328 N.L.R.B. at 130.

¹ Contrary to the Board’s assertion, Sunset’s “primary challenge” to the Board’s decision is that the Board’s approach in *Boeing* is inconsistent with the plain language of the Act. (*Cf.* Board Brief at p. 28.) That *Boeing* is also inconsistent with the Board’s own precedent and appellate case law is simply further evidence that *Boeing* was wrongly decided and that the Board’s reliance on the *Boeing* approach in this case was a reversible legal error.

In *Bellagio*, the D.C. Circuit – like the Eighth Circuit – again rejected the Board’s narrow construction of “guard.” *Bellagio*, 863 F.3d at 848-51 (relying on the plain language of the statute and faulting the Board for “assign[ing] too much weight to the fact that the techs do not perform traditional guard functions”); *see also BPS*, 942 F.2d at 522-26; *McDonnell*, 827 F.2d at 329. En route to concluding that *Bellagio*’s surveillance technicians were statutory guards, the D.C. Circuit specifically noted that:

Unlike a security officer, a tech does not carry a weapon or handcuffs; does not patrol the resort for misconduct; does not restrain an unruly guest; and does not physically confront a cheater or a thief. Unlike an officer or surveillance operator, a tech does not watch live feeds or stored footage for wrongdoing and does not document it. And when a tech participates in a special operation [*i.e.*, a “sting” operation], he does not confront or interview the targeted employee.

Bellagio, 839 F.3d at 845. In other words, the *Bellagio* technicians performed none of the “traditional police and plant security functions” identified by the Board in *Boeing*. *See id.* at 851.

The D.C. Circuit – after conducting an extensive analysis of the Act’s plain text, its legislative history, and NLRB and appellate precedent – nevertheless had little trouble concluding that the surveillance technicians were statutory “guards.” It noted that while the Act requires that a guard “enforce” rules, both Board and federal appellate precedent have long held that it is sufficient that the putative guard perform an “essential step” in the enforcement of the rules; the guard need

not personally confront individuals or compel compliance. *Id.* (citing, among others, Black’s Law Dictionary 645 (10th Ed. 2014); *McDonnell*, 827 F.2d at 327; *Wright Memorial Hosp.*, 255 N.L.R.B. 1319 (1980); *MGM Grand Hotel*, 274 N.L.R.B. 139 (1985)). Above all, “Congressional intent, discernible from plain language, supports the broad interpretation [of the term ‘enforce’] in *Wright Memorial Hospital* and *MGM Grand Hotel*.” *Id.* at 849. Accordingly, despite acknowledging that the surveillance technicians did not perform the traditional guard duties in *Boeing*, the D.C. Circuit correctly concluded that the essential role the surveillance technicians played in enforcing rules to protect the assets of the employer was sufficient to make them “guards” under the Act. *Id.* at 849-52.

B. The Board Committed the Same Analytical Errors as in *Bellagio*

The Board’s analysis in this case repeats the same errors that the D.C. Circuit corrected in *Bellagio*. Just as it did in *Bellagio*, the Board attempts to minimize the duties of the Slot Technicians to the point that they are nothing more than glorified repairpersons. *Compare Bellagio*, 863 F.3d at 845, with Board Brief at pp. 24-25. But the Board does not dispute (nor could it on this largely uncontested record) that the Slot Technicians play a critical role in protecting Sunset’s property and assets from theft and fraud, including by investigating and preventing fraudulent payouts, protecting against the use of counterfeit currency and cash-equivalent “EZ-Pay vouchers,” preventing fraudulent claims of lost

credits or game malfunctions, and protecting against the exploitation of hardware and software vulnerabilities, among other responsibilities. (See SER 15, 49-60, 63-71.)² Indeed, the Slot Technicians’ job could fairly be characterized as “protect[ing] the casino’s property . . . ‘according to policy and procedure,’ especially by ensuring that [other employees] and players do not cheat the games.” See *Bellagio*, 863 F.3d at 842.

As in *Bellagio*, the Board’s approach is to assign no weight to these duties because they are not “traditional guard functions,” such as making rounds and carrying a weapon.³ Compare *Bellagio*, 863 F.3d at 849, 851, with Board Brief at p. 24 and SER 8-9. The Board’s circumscribed analysis of whether the Slot

² “SER” refers to the Supplemental Excerpts of Record filed by the Employer with its initial brief in these consolidated appeals.

³ The Board’s Brief incorrectly asserts that the Board did consider these duties but found them “minor and incidental.” (Board Brief at p. 27.) The Board found instead that “[a]ny *guard-like* responsibilities conferred on the technicians are . . . a minor and incidental part of their primary responsibility of providing services to guests gambling on the Employer’s gaming machines.” (SER 9 (emphasis added).) The preceding page defined what the Board considers to be guard-like responsibilities – those duties identified in *Boeing*. (SER 8.) Because the extensive duties of the Slot Technicians related to preventing fraud and theft against the Employer did not fit within the Board’s narrow understanding of guard duties, the Board gave no weight to those factors in evaluating “guard” status. (See SER 8-9.) Alternatively, to the extent the Board is conceding on appeal that those duties are properly considered “guard” duties, then the Board’s conclusion that they are “minor and incidental” is clearly wrong. The Employer presented overwhelming evidence that the Slot Technicians have extensive duties related to protecting the Employer’s assets from fraud and theft. (Employer Brief at pp. 9-11.)

Technicians “perform traditional guard functions” is the precise flaw for which the Board was faulted in *Bellagio*. 863 F.3d at 851 (criticizing the Board for assigning “too much weight to the fact that the techs do not perform traditional guard functions”). The Board also committed many of the other errors identified by the D.C. Circuit in *Bellagio*. For instance, the Board ignored that:

- Though the Slot Technicians do not themselves decide whether to pay out a guest claim or contact the Nevada Gaming Control Board to effect an arrest of a patron, the decision makers “cannot properly do their jobs without the techs”; the Technicians “are essential to the process.” *See Bellagio*, 863 F.3d at 850; *see also* SER 14-21.
- The Slot Technicians are the “sole means of detecting” the type of theft and fraud discussed above. *Bellagio*, 863 F.3d at 850. Other employees are not trained on, and could not perform, the Technicians’ duties. *See id.*; *see also* SER 15, 49-60.
- Like the camera systems in *Bellagio*, the presence of the Technicians has a deterrent effect and helps prevent theft and fraud in the first instance because players know that fraudulent claims can and will be investigated and discovered. *See Bellagio*, 863 F.3d at 850; *see also* SER 48-49, 77, 79, 82-83.
- In the context of a modern, ultra-luxury hotel-casino, the primary risk to the employer’s assets is not physical theft (such as smashing in a slot machine “cash can” and making a run for it), but rather fraudulent payouts or tampering with the machine. (SER 49-53, 55-58, 61-63, 68-73.) The Slot Technicians are “paramount protectors” against this type of theft in this “unusual setting.” *See Bellagio*, 863 F.3d at 850.
- The Technicians control the physical access to the machines through keys, which would enable a Technician to alter game outcomes.

(SER 74-77; *see also* SER 15, 32.) “The Board ignores that, because of the techs’ know-how and access, the casinos must put ‘quite a bit of trust in their integrity.’” *Bellagio*, 863 F.3d at 851; *see also* SER 31, 72-73.

In short, just as it did in *Bellagio*, the Board ignored crucial evidence establishing that the Slot Technicians play an essential role in enforcing Sunset’s rules and policies to protect Sunset’s property from theft and fraud.

C. The Board’s Attempts to Distinguish *Bellagio* are Unpersuasive

Digging itself into an even deeper hole, the Board’s fallback position is that “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. (Board Brief at p. 39.) That is, of course, facially untrue – the Board in *Bellagio* relied on the argument that to be a guard an employee must perform traditional security functions; the D.C. Circuit disagreed and vacated the Board’s orders. *Bellagio*, 863 F.3d at 851-52.

Further, the Board’s proposed reconciliation of *Boeing* and *Bellagio* is inconsistent with the actual *Bellagio* decision. In resolving whether the surveillance technicians were guards, the D.C. Circuit’s inquiry followed the plain language of the statute: “[t]he question, then, is whether a tech is 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.’” *Id.* at 848. There is no requirement that the rules be

enforced in a “security context” – whatever the Board means by that. *See also McDonnell*, 827 F.2d at 329 (“[T]he Board’s restriction of Section 9(b)(3) application to the enforcement of security rules only cannot be reconciled with the plain language of the statute.”). Moreover, the Board never explains why protecting an employer from theft and fraud would not constitute enforcement of rules in a “security context”; indeed, preventing theft of an employer’s assets would seem to be a core “security” function.⁴

The Board is also wrong that the duties of the Slot Technicians do not pose the same type of concerns over “divided loyalty” present in *Bellagio*. The Slot Technicians do not directly target their co-workers in “sting” operations as did the techs in *Bellagio*. But being called on to investigate suspected fraud and theft by a fellow union member – which may lead to loss of the co-worker’s job, loss of gaming registration (and thus an inability to obtain any other job in the gaming industry), and possible arrest and prosecution – poses the same type of potential for “divided loyalty,” “temptation,” and pressure by the union or its members that the “guard” rule is intended to prevent. *Id.* at 852; SER 18-21, 31, 72-73, 83-86, 89; *see also* NEV. REV. STAT. §§ 463.140, 436.336, 436.337, 436.362. Moreover, while the Board minimizes this possibility as a mere “hypothetical” (Board Brief at

⁴ The Board also argues that the Slot Technicians ordinarily become involved in a dispute “after some potential problem has already been identified,” but never explains the significance of this purported distinction. (Board Brief at p. 40.)

pp. 33-34), “Section 9(b)(3) [of the Act] is meant to minimize the *danger* of divided loyalty.” *Bellagio*, 863 F.3d at 852. Particularly in a situation of labor unrest, an employer has good cause to insist that employees who can alter game outcomes, effectively cause the approval of payouts to other employees, and cause significant financial loss to the company, not be placed in a position where they may be tempted or pressured to place the interests of the union and its members over those of the employer.⁵

III. CONCLUSION

The Board’s conclusion that the Slot Technicians are not “guards” is incorrect as a matter of law. The Board’s Order and the underlying certification of the Union thus should be vacated, and the Union’s appeal should be dismissed.

⁵ Moreover, the Board has repeatedly found that employees were guards even when the employees had no apparent duties with respect to other employees. *E.g.*, *Local 851, Int’l Bhd. of Teamsters v. NLRB*, 732 F.2d 43, 44 (2d Cir. 1984) (affirming Board conclusion that truck drivers were guards despite no apparent responsibilities towards other employees); *Wright Mem’l Hosp.*, 255 N.L.R.B. 1319, 1320 (1980) (ambulance department employees with no apparent duties towards other employees); *Broadway Hale Stores, Inc.*, 215 N.L.R.B. 46, 46-47 (1974) (retail store fitting room “checkers” with no apparent duties towards other employees). As such, while the Slot Technicians are charged with enforcing rules both against employees *and* other persons, Board law makes clear that enforcing rules against customers is sufficient to establish “guard” status.

Dated: September 17, 2019

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UNITED STATES COURT OF APPEALS
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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, several cases involving a substantially similar issue are pending before this Court: *Station GVR Acquisition, LLC v. NLRB* (9th Cir. Case No. 18-72079); *International Union of Operating Engineers Local 501, AFL-CIO v. NLRB* (9th Cir. Case No. 18-71124); *NLRB v. Station GVR Acquisition, LLC* (9th Cir. Case No. 18-72121).

International Union of Operating Engineers Local 501, AFL-CIO v. NLRB (9th Cir. Case No. 19-72157) also involves a substantially similar issue. However, there is a competing petition for review pending in the D.C. Circuit, *NP Red Rock LLC v. NLRB* (D.C. Cir. Case No. 19-1172), and the statutory random selection process to choose a circuit for consolidation of the competing petitions has not yet occurred by the Judicial Panel on Multidistrict Litigation.

Beyond that, Intervenor/Petitioner/Respondent NP Sunset LLC d/b/a Sunset Station Hotel Casino is unaware of any related cases pending in this Court.

Dated: September 17, 2019

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CERTIFICATE OF SERVICE

I certify that I electronically filed this REPLY BRIEF OF THE EMPLOYER NP SUNSET LLC D/B/A SUNSET STATION HOTEL CASINO with the United States Court of Appeals for the Ninth Circuit via the Court's CM/ECF system on September 17, 2019, and that service will be made on counsel of record for all parties to this case through the Court's CM/ECF system.

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