

Nos. 19-1107, 19-1119, 19-1133

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

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

Petitioner

v.

**NATIONAL LABOR RELATIONS BOARD
Respondent**

and

**NP PALACE LLC, d/b/a
PALACE STATION HOTEL & CASINO**

Intervenor

**NP PALACE LLC, d/b/a
PLACE STATION HOTEL & CASINO
Petitioner/Cross-Respondent**

v.

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

and

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

Intervenor

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

USHA DHEENAN
Supervisory Attorney

HEATHER S. BEARD
Attorney
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570
(202) 273-2848
(202) 273-1788

PETER B. ROBB
General Counsel

ALICE B. STOCK
Deputy General Counsel

DAVID HABENSTREIT
Acting Deputy Associate General Counsel
National Labor Relations Board

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

INTERNATIONAL UNION OF OPERATING)	
ENGINEERS LOCAL 501, AFL-CIO)	
Petitioner)	Nos. 19-1107, 19-1119,
)	19-1133
v.)	Board Case No.
)	28-CA-218622
NATIONAL LABOR RELATIONS BOARD)	
Respondent)	
)	
and)	
)	
NP PALACE LLC, d/b/a PALACE HOTEL &)	
CASINO)	
Intervenor)	
_____)	
)	
NP PALACE LLC, d/b/a PALACE STATION)	
HOTEL & CASINO)	
Petitioner/Cross-Respondent)	
)	
v.)	
NATIONAL LABOR RELATIONS BOARD)	
Respondent/Cross-Petitioner)	
)	
and)	
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INTERNATIONAL UNION OF OPERATING)	
ENGINEERS LOCAL 501, AFL-CIO)	
Intervenor)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board (“the Board”) certify the following:

A. Parties and Amici

NP Palace LLC, d/b/a Palace Station Hotel & Casino (“the Company”) was the respondent before the Board in the underlying proceeding (Board Case No. 28-CA-218622). The Company is the Petitioner/Cross-Respondent in Case Nos. 19-1107 and 19-1133, and has intervened on the side of the Board in Case No. 19-1119.

The International Union of Operating Engineers Local 501, AFL-CIO (“the Union”) was the charging party before the Board in the underlying proceeding. The Union is the Petitioner in Case No. 19-1119, and has intervened on the side of the Board in Case Nos. 19-1107 and 19-1133.

The Board’s General Counsel was a party before the Board in the underlying proceeding. The Board is the Respondent/Cross-Petitioner in Case Nos. 19-1107 and 19-1133, and is the Respondent in Case No. 19-1119. There are no *amici curiae*.

B. Rulings Under Review

The matter under review is a Decision and Order of the Board, issued against the Company on May 14, 2019, and reported at 367 NLRB No. 129.

C. Related Cases

The Decision and Order under review has not previously been before this Court, or any other court. There are several cases that come under this Court's definition of other related cases:

- *Station GVR Acquisition LLC & International Union of Operating Engineers Local 501, AFL-CIO v. NLRB* (“GVR I”) (Ninth Cir. Consolidated Case Nos. 18-72079, 18-71124, & 18-72121)
- *NP Sunset LLC & International Union of Operating Engineers Local 501, AFL-CIO v. NLRB* (Ninth Cir. Consolidated Case Nos. 19-70092, 19-70244, & 19-70279)
- *Station GVR Acquisition, LLC v. NLRB & International Union of Operating Engineers Local 501, AFL-CIO v. NLRB* (“GVR II”) (D.C. Consolidated Case Nos. 18-1236, 18-1288, 18-1291) (in abeyance pending resolution of *GVR I*)
- *NP Lake Mead LLC v. NLRB* (D.C. Cir. Consolidated Case Nos. 19-1138 & 19-1151)
- *NP Red Rock LLC v. NLRB* (D.C. Cir. Case No. 19-1172)
- *International Union of Operating Engineers Local 501, AFL-CIO v. NLRB* (D.C. Cir. Case No. pending) (On September 19, 2019, the U.S. Judicial Panel on Multidistrict Litigation, in MCP Case No. 158, assigned this case,

originally filed in the Ninth Circuit as Case No. 19-72157, to the D.C.
Circuit).

/s/ David Habenstreit
David Habenstreit
Acting Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570

Dated at Washington, D.C.
this 20th day of September 2019

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GLOSSARY

“the Act”	The National Labor Relations Act
“Board”	The National Labor Relations Board
“Br.”	The Company’s Opening Brief
“Company”	NP Palace LLC, d/b/a Palace Station Hotel & Casino
“JA”	Joint Appendix
“NGCB”	Nevada Control Board
“Union”	International Union of Operating Engineers Local 501, AFL-CIO

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

JURISDICTIONAL STATEMENT

This case is before the Court on petitions for review and the Board’s cross-application to enforce a Board Order against NP Palace LLC, d/b/a Palace Station Hotel & Casino (“the Company”). The Board Order issued on May 14, 2019, and is reported at 367 NLRB No. 129. (JA 150-53.)¹ 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, the Board filed a cross-application for enforcement, and the Union intervened on behalf of the Board in that case. The petitions for review and cross-application for enforcement are timely because the Act imposes no time limitation for such filings.

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

¹ “JA” refers to the Joint Appendix filed by the Company. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

U.S.C. §§ 151, 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. The Court has jurisdiction because the Board's Order is final, and venue is proper under Section 10(f) of the Act (29 U.S.C. § 160(f)), which provides that petitions for review may be filed in this Court, and, in turn, that the Board may cross-apply for enforcement.

The Board's unfair-labor-practice Order is based, in part, on findings made in an underlying representation (election) proceeding, *NP Palace LLC*, Board Case No. 28-RC-211644. 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 ISSUES

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 the Union, which turns on whether substantial evidence supports the Board's finding that the Company failed to prove that company slot technicians are statutory guards.

2. Whether the Union's petition for review should be dismissed because it failed to file an opening brief.

RELEVANT STATUTORY PROVISIONS

The attached Addendum contains the pertinent statutory provisions.

STATEMENT OF THE CASE

This unfair-labor-practice case arises from the Company's admitted refusal to bargain with the Union, which the Board certified as the exclusive bargaining representative of a unit of slot technicians working at the Company's casino in Las Vegas, Nevada. (JA 150-52.) 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 (JA 151), the Board held (JA 152) that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. § 158(a)(5)

and (1). The facts and procedural histories relevant to both the representation and unfair-labor-practice proceeding are set forth below.

I. THE BOARD'S FINDINGS OF FACT

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

The Company operates the Palace Station Hotel & Casino in Las Vegas, Nevada. (JA 115, 151; JA 128, 135.) The facility is a hotel and casino including gaming space occupied by approximately 1,300 gaming machines including slot machines. (JA 115; JA 24.)

The Company employs 11 slot and utility technicians at its facility. (JA 115; JA 23.) There is no functional distinction between slot and utility technicians (collectively, "slot technicians"). (JA 115; JA 23.) The slot technicians work in the Slot Department, which is overseen by the Director of Slot Operations and is separate from the Security Department. (JA 115, 116; JA 22, 53-54.)

B. The Slot Technicians' Duties

The slot technicians install, maintain, and repair the gaming machines and software. (JA 116; JA 23, 35-36.) A majority of their time is spent ensuring that the games are in proper working order. (JA 116; JA 57-58.) Slot technicians have keys that provide access to the machines. (JA 116; JA 57.)

When there is a problem with a machine, slot technicians use their technical knowledge to check its status. (JA 116; JA 26.) They relay the information to

their supervisors to resolve the problem. (JA 116; JA 26.) If a guest complains about a payout or asserts there has been a machine malfunction, the slot technicians do not have the authority to resolve it on their own. (JA 116 125; JA 27, 63.) The slot technician must bring the issue to a supervisor. (JA 116; JA 26.) The slot technicians then do research to make sure the mechanics of the machine are working properly. (JA 116; JA 26, 63.) The supervisor makes the ultimate decision regarding the complaint and then communicates the decision to the guest. (JA 116, 125; JA 27-28.)

Slot technicians also check to ensure that “bill validators,” which are devices on each machine that identify and validate currency, are in working order. (JA 116; JA 29-30, 37-38.) For example, if a guest claims that a bill validator is jammed, a slot technician would check into it. (JA 116; JA 31.) The supervisor makes the ultimate decision about whether the guest made a false claim. (JA 116; 31.)

Slot technicians’ duties also include investigating machines which management has determined have consecutively lost money on too many days. (JA 116; JA 41-42.) When asked to do so by the Slot Director, the slot technicians check the machine against the setting of the game and, if necessary, fix any problem. (JA 116; JA 41-42.)

Slot technicians also verify jackpots on occasion. (JA 116; JA 101, 32-34.)

The slot technician makes a recommendation to a supervisor about the validity of the jackpot. (JA 26-27.) The supervisor may deviate from a slot technician's recommendation. (JA 27.) The slot technicians are not allowed to express a judgment or opinion concerning the validity of the jackpot claim in the presence of the guest. (JA 116; JA 101.)

Slot technicians also interact with agents of the Nevada Gaming Control Board ("NGCB") to facilitate agents' inspection of machines. (JA 116, JA 125; JA 46-47, 77-78.) 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. (JA 77-78.) In that circumstance, the NGCB agent asks the slot technician specific technical questions about the machine. (JA 80.) The NGCB agent then makes the determination. (JA 78.)

Like virtually all other employees who work at the casino, including bartenders and servers, slot technicians are on alert for evidence of underage gambling and drinking. (JA 116; JA 47, 55-56, 62, 67.) Like other employees, the slot technicians report any such violations to a security officer or supervisor. (JA 116; JA 55-56, 60-62, 66, 68.)

C. Slot Technicians Are Separate and Distinct from Security Personnel and Have No Access to the Surveillance Room

As noted above, slot technicians are in a separate department from the security department. (JA 116, 125; JA 53-54.) Slot technicians have no access to the surveillance room. (JA 64-65.) Slot technicians wear shirts like other non-security employees, in contrast to security officers who wear police-like uniforms. (JA 116; JA 54-55, 64.) Slot technicians also do not carry handcuffs or weapons. (JA 116; 58-59.) Slot techs are not trained in typical security functions, are not interchangeable with security officers, and do not perform regular rounds or patrol the exterior of the facility like the security officers do. (JA 116; JA 58-59, 65.) In the event that a “sting” operation may be necessary to determine malfeasance by employees or customers, slot technicians are not called upon to participate. (JA 116; JA 60.) The Director of Slot Operations stated that slot technicians have never participated in a “sting” operation during his employment. (JA 116; JA 60.)

II. PROCEDURAL HISTORY

On December 15, 2017, the Union filed a petition for certification under Section 9(c) of the Act, 29 U.S.C. § 159(c), seeking to represent a bargaining unit of the Company’s full-time and part-time slot technicians.² The Company

² The petitioned-for bargaining unit consists of “[a]ll full-time and regular part-time slot technicians and utility technicians employed by the [Company] at its Las Vegas, Nevada facility.” (JA 124.) The unit excludes “all other employees, office

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 January 3, 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. (JA 115-22.)³ The Board conducted a representation election on January 9, 2018, and the slot technicians unanimously voted in favor of union representation. (JA 151; 123.) On January 18, 2018, the Regional Director certified the Union as the exclusive collective-bargaining representative of the slot technicians. (JA 124.) The Company requested review of the Regional Director's decisions before the Board, which the Board (Members Pearce, McFerran, and Emanuel) denied. (JA 125.)

On January 22, 2018, the Union requested that the Company recognize and bargain collectively with it and provide it with information related to bargaining. (JA 150, 152; 140-41.) Since then, the Company has admittedly refused to do so in order to test the validity of the Union's certification. (JA 141.) The General

clerical employees, professional employees, guards, and supervisors as defined in the Act." (JA 124).

³ The Regional Director also rejected the Company's request to ban electronic devices in the polling area. (JA 118.) That issue is not before the Court.

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. (JA 148-49.)

III. THE BOARD'S CONCLUSIONS AND ORDER

On May 14, 2019, the Board (Chairman Ring and Members McFerran and Emanuel) granted partial summary judgment to the General Counsel, finding that the Company violated the Act by failing and refusing to recognize and bargain with the Union. *NP Palace LLC d/b/a Palace Station Hotel & Casino*, 367 NLRB No. 129. The Board (Member McFerran, dissenting in part) severed and retained for further consideration the allegation that the Company also unlawfully refused to furnish the requested information. (JA 150-51, 153.) 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. (JA 150.)

To remedy the unfair labor practice, the Board's Order requires the Company to cease and desist from failing and refusing to recognize and bargain with the Union 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. (JA 152.) The Order also requires the Company to post a remedial notice. (JA 152.) 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.” (JA 152.)

STANDARD OF REVIEW

The Supreme Court and this Court have recognized 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)). In *Bellagio, LLC v. NLRB*, 863 F.3d 839 (D.C. Cir. 2017), this Court held that because the question of whether employees are guards under Section 9(b)(3) of the Act is “predominantly factual,” it will only disturb the Board’s determination if it is “unsupported by substantial evidence on the record as a whole.” *Bellagio*, 863 F.3d at 848; *Accord Local 851, Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. NLRB*, 732 F.2d 43, 44 (2d Cir. 1984) (“We are satisfied that the Board’s finding that the subject employees are ‘guards’ is supported by substantial evidence”); *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). In reviewing the record, this Court will thus accord "substantial deference to inferences drawn from the facts," as well as to "the reasoned exercise of [the Board's] expert judgment.'" *Country Ford Trucks*, 229 F.3d at 1189 (quoting *Avecor, Inc. v. NLRB*, 931 F.2d 924, 928 (D.C. Cir. 1991)).

Contrary to the Company's assertion (Br. 13) that the Board's construction of the Act is entitled to "no deference," this Court has specifically held that 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) (stating that Congress has not spoken directly on whether certain employees are considered guards, and therefore the Board's determination must be accepted if it is permissible). Thus, the Company begrudgingly acknowledges (Br. 13) that the Board may be entitled to "some deference," and correctly states that this Court will only reverse the Board's findings if the Board failed to apply the proper legal standard or departed from its precedent without providing a reasoned justification. As shown below, the Board reasonably

interpreted its own statute and precedent, and the Company has provided no grounds to disturb the Board's findings.

SUMMARY OF ARGUMENT

The Company admits that it refused to bargain with the Union in order to challenge the Board's certification of the Union as the slot technicians' bargaining representative. That 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 gaming 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 they 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 in which the Eighth Circuit disagreed with the Board and 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 is wrong that the Board's decision conflicts with this Court's decision in *Bellagio, LLC v. NLRB*, 863 F.3d 839 (2017). The slot technicians here do not perform the significant security-related duties like those that this Court found significant in holding that the surveillance technicians in *Bellagio* are statutory guards. Nor has the Company established that the slot technicians' duties with regard to their co-workers come close to the surveillance

technicians' duties in *Bellagio*. For example, 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. The Company has also failed to establish that the slot technicians perform an 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 this Court found the surveillance technicians did in *Bellagio*. Moreover, this Court did not apply a different test in *Bellagio* than the Board applied in *Boeing* and in the instant case. Accordingly, the Court should enforce the Board's Order requiring the Company to bargain with the Union.

For its part, the Union failed to file an opening brief. Accordingly, this Court should dismiss the Union's petition for review.

ARGUMENT

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

Under Section 8(a)(5) of the Act, it is an unfair labor practice for an employer to refuse to bargain with the exclusive bargaining representative of its employees. 29 U.S.C. § 8(a)(5); *Brewers & Maltsters v. NLRB*, 414 F.3d 36, 41 (D.C. Cir. 2005). 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. *Id.*; 29 U.S.C. § 8(a)(1).

Here, the Company admittedly has refused to recognize and bargain with the Union, but argues that the Union’s certification was improper because the slot technicians are guards. Accordingly, the question before the Court is whether 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 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.⁴ Because it is undisputed that the Union represents non-guard employees, 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*

⁴ 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.

Co., 328 NLRB 128, 130 (1999) (conflict of interest may arise for guards during strike by non-guard employees represented by the same union).

Because of those restrictions, 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”). This limitation on the 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; thus, the burden is on the party asserting guard status to prove it. *Cf. NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-12 (2001) (burden of proving supervisory status is on party asserting it).⁵

⁵ The Company has not contested the Board's finding (JA 117, JA 20) 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 *Boeing Co.*, 328 NLRB 128 (1999), the Board comprehensively discussed Board precedent regarding the standard for guard status and determined that the Board had found that various types of responsibilities in past cases fell under Section 9(b)(3)’s definition of a guard. Specifically, in those cases, “[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) (citing cases).⁶ *Accord NLRB v.*

⁶ The Company repeatedly (Br. 11, 18, 20, 21) mischaracterizes this language from *Boeing* by inserting the word “only” when it describes the Board’s examples from past cases. Despite the Company’s misguided attempt to make those examples appear exhaustive or prescriptive, the word “only” does not appear in the Board’s list of examples from the past cases it cited.

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. An employee must enforce rules in a security context in order to be deemed a guard. *Id.* Moreover, the Board has recognized that the specific nature of the duties is of central concern rather than a numerical accounting of the percentage of time an employee spends on such duties, but such duties nonetheless 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 supports the Board's finding (JA 117) 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 (JA 117), the slot technicians do not "perform any of the traditional guard responsibilities" identified from past cases by the Board in *Boeing*. To the contrary, as the Board found (JA 117-18),

the slot technicians primarily “provid[e] services to guests” by maintaining the machines. Indeed, the undisputed testimony shows that their “core function” is to install and maintain the gaming machines and that “the majority of their day” is spent “mak[ing] sure that the games are in proper working order.” (JA 57, 58, 125.) 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. 6-7. In none of those instances has the Company demonstrated that the slot technicians make the final decision about paying out (or not paying out) money or whether fraud has occurred. (*Id.*; JA 116, 125.)⁷ The slot technicians are also not allowed to give their own opinion to the player. (JA 116.) Thus, although part of the slot technicians’ job duties includes reporting evidence of tampering on the gaming machines to their superiors, the Board

⁷ The Company is incorrect (Br. 6) that the facility “always” follows the recommendation of the slot technician on whether to pay out a jackpot. Rather, two of its citations to the record actually demonstrate that the supervisors do not always follow the slot technicians’ recommendation. Specifically, the testimony on JA 27 states that “under certain circumstances, the supervisor may deviate from the recommendation[,]” and the testimony on JA 31 explains that, although the slot technician’s role is conclusive about the integrity of the machine, “the slot supervisor might decide to go a different route or take care of the guest based on service expectations.” The Company’s remaining citations (Br. 6) do not speak to the issue of when a recommendation is followed, but merely discuss in a general way the slot technician’s role in verifying a jackpot over \$100,000. *See* JA 34, 101.

reasonably relied on its precedent in *Boeing* that just a reporting function, without other significant security-related responsibilities, does not confer guard status. *See* JA 125, and JA 117 (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 p. 7. As the Director of Slot Operations stated, it is “everybody’s” duty to ensure the Company does not lose money and is not a victim of crime. (JA 60.) 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); *Pony Exp. Courier Corp. v. NLRB*, 981 F.2d 358, 363 (8th Cir. 1992) (“common-sense measures which would be characteristic” of any employee of the employer did not transform employee into guard). And as the Board further noted (JA 125, 116), the slot technicians’ placement in the Company’s organization is wholly distinct from security. Thus, the slot technicians do not “enforce the [Company’s] rules in a security context,” let alone “against their co-workers” (JA 125) as discussed further below at p. 31. Nor do they have the required significant security-related responsibilities in addition to their reporting functions.

Even assuming that the slot technicians did have any 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, the 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); *Nova Southeastern University v. NLRB*, 807 F.3d 308, 313 (D.C. Cir. 2015). 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); *Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990) (argument not raised in opening brief is waived).

And, factually, the Company’s argument only briefly challenges (Br. 20) 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. 20) 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. 20) the Board “could then [] dismiss as

minor and incidental.” The Board did no such thing. To be sure, the Board found (JA 117) that the slot technicians’ duties to report underage drinking and gambling were duties “like [those of] all other employees” and were “minor and incidental to their primary responsibility” of providing services to guests using the gaming machines. But the Board also found (JA 117-18) 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 (JA 117), “*any* guard-like responsibilities conferred on technicians are, like the firefighters in *Boeing*, a minor and incidental part of their primary responsibility . . .” (emphasis added).

The Company has not shown otherwise. Its assertion (Br. 7) that the slot technicians “are relied upon by supervisors on a ‘nearly constant’ basis to detect and investigate potential fraud” is greatly exaggerated, and unsupported by its citations to the testimony of the Director of Slot Operations. The Company’s cited testimony generally discusses the slot technicians’ role in researching guest complaints (JA 29-31, 36-38); hypothetical situations involving slot technicians and how multiple employee classifications get information about known cheaters (JA 49-52); and how frequently general cheating attempts occur (JA 69-70); but do not establish that the Company “constantly” relies on slot technicians to detect

and investigate fraud, let alone that slot technicians' duties are linked to all instances of general cheating attempts in the casino. And the Company's contention (Br. 9) that the slot technicians "make rounds to monitor the casino floor for banned or otherwise unauthorized guests or team members," is significantly tempered by the testimony of the Director of Slot Operations that they do not do this "on a set schedule at all" (JA 65), and that other classifications are also required to look out for cheaters. (JA 51-52.) *See Pony Exp. Courier Corp.*, 981 F.2d at 363 (security aspects characteristic of any employee's duties do not transform specific employee classification into guard). The Company has not shown that any such actions are more than "minor or incidental" to the slot technicians' primary responsibility regarding alleged cheating, which the Director of Slot Operations acknowledged, was "to be the professional on the device" and to "do the research on the device."⁸ (JA 66.)

Finally, 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. (JA 108-13.) The burden of proof was on the Company to establish that any guard-like responsibilities of the slot technicians were more than minor or

⁸ The Company incorrectly cites to JA 68 (Br. 9) to support its blanket assertion that slot technicians "monitor the casino for suspicious activities." The Director of Slot Operations did not make such a broad pronouncement; he merely stated that the slot technicians "keep an eye on the drop" from "time to time." (JA 68.)

incidental to their primary duties of servicing and maintaining the machines. Given this record, the Board reasonably found that the Company failed to prove that the slot technicians are 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 prior Board cases. Likewise, the Company’s mantra that the Board’s decision is contrary to *Bellagio, LLC v. NLRB*, 863 F.3d 839, 843 (D.C. Cir. 2017)—a case involving casino surveillance technicians who the Court found were “solely responsible” for the cameras and “the elaborate computer system” that managed “basically every aspect of . . . digital surveillance” and often participated in targeted investigations of fellow employees—is unconvincing.

1. The Board’s test is consistent with its prior precedent

The Company asserts (Br. 15-18) that the Board has wrongly departed from its own precedent “broad[ly]” interpreting 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. 15-17) 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 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 have encompassed a variety of duties in a security context. 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 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 131-32 & n.10.

In doing so, *Boeing* 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 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). *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*, “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, *Boeing* did not depart from Board 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 primarily respond to fraud indicators first noticed by others and then report their technical findings to their supervisors, who make the final decision as to what, if any, action to take. And as the Board additionally found (JA 117), any 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, in both *Boeing* and the instant case, the Board followed its precedent.

Relying on cases in which the Board has found employees other than prototypical police-like security officers to be guards, the Company incorrectly claims (Br. 18-20) that *Boeing's* guard standard places too much emphasis on traditional guard functions. The Company points out (Br. 16-17) 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. 16) 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.⁹

The Company also misplaces reliance (Br. 15, 18) on the Eighth Circuit's disagreement with Board law in two cases: *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 phrase "as a guard" in Section 9(b)(3) to limit reach of statute to employees "whose duties encompass the security-type functions generally

⁹ Indeed, *Boeing* also reasonably distinguished *Rhode Island Hospital*, noting that, in that case, the Board had specifically found that van drivers' duties—being on the lookout for, reporting, and responding to threats—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).

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, which focuses on the enforcement of rules in the security context rather than on just any enforcement of rules. *See Drivers, Chauffeurs, Warehousemen & Helpers, Local 71*, 553 F.2d at 1374 (Board is “entitled to judicial deference” regarding its determination of guard issues).

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 *Bellagio*, discussed further below). Indeed, the Company’s claims about slot technicians’ duties (Br. 6-9) 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. 8) that slot technicians “[i]dentify and investigate mistakes or intentional misconduct by other Slot Technicians.” The Company’s record citations (Br. 8, citing JA 48-50, 63, 107) do not establish that slot technicians’ core duties include investigating

mistakes by or the misconduct of other slot technicians—let alone that any such duties would be more than minor or incidental. Indeed, the Director of Slot Operations affirmed that he was unaware of an actual case of a slot technician attempting to cheat a machine at the casino, significantly undermining the Company’s implication that the slot technicians have duties in this regard that are more than minor or incidental. (JA 42.) The Company’s assertion (Br. 8) 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, given by NGCB Agent Richard DeGuise (JA 82-83), was in the 1990s when the Company’s casinos had coin-based games, which it has long since abandoned. (Br. 22.)

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 their responsibilities. *Cf. Bellagio*, 863 F.3d at 844 (“perhaps most importantly for our purpose, tech[nician]s *often* participate in targeted investigations of fellow employees suspected of wrongdoing”) (emphasis added). 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 court explained that 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 court found significant that 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. 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 that the Eighth Circuit found 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 that concerned the court in *McDonnell* and *BPS Guard Services*.

2. The Board's test does not conflict with *Bellagio*, which presented significantly different facts

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 this Court's decision in *Bellagio*. As noted above (p. 26), *Bellagio* held 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 on the facts. And, contrary to the Company's claims, *Bellagio* and *Boeing* are not inconsistent legally.

As a threshold matter, *Bellagio* emphasized that “guard status is a factual question tied to the particulars of each case.” *Id.* at 842. And in looking at those

particulars, the Board here found that (D&DE 6), although the Company's slot technicians and the surveillance technicians in *Bellagio* both "work in a casino," that is about all they have in common. Indeed, as this Court described in "recap[ping] just the highlights," the surveillance technicians in *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. Ensuring that slot machines are working properly and determining whether customers are making false claims is a far cry from maintaining the casino-wide surveillance system in *Bellagio*. And that is all the more true given that the slot technicians do not even have access to the surveillance room. (JA 65.)

Moreover, *Bellagio* deemed it "crucial" to its guard finding that the surveillance technicians "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, the slot technicians do not participate in sting operations or anything similar. *See* JA 60. To be sure, a slot 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 playing on a gaming machine—customer or employee—are merely reporting machine discrepancies to their superiors. In any event, the Company has not shown that any such employee-directed responsibilities in the instant case would be 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, 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”).¹⁰

The Company complains (Br. 21) that the above constitutes a “wooden” distinction between this case and *Bellagio*, and that the Board has failed to

¹⁰ To the extent that the *Bellagio* court considered the risk of harm from sabotage as relevant to the analysis, 863 F.3d at 851, there is a vast difference between that case and the instant case on that point. The implication of the Court’s concern about dishonest surveillance technicians in *Bellagio* is that they could cripple the entire facility’s surveillance system, jeopardizing all assets, operations, and the safety of everyone in the facility. Here, the Company did not establish that any potential sabotage by slot technicians presents anywhere near the same scale of risk.

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 merely 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. 21) that *Bellagio* eliminated this requirement. As an initial matter, the Board rejected 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." (JA 125.) And, contrary to the Company (Br. 19), *Bellagio* did not cite *Boeing*, let alone reject the Board's approach in *Boeing*. Indeed, the Company itself acknowledges (Br. 21) that *Bellagio* (like the Board in *Boeing*) requires that to be a guard, an employee must have "core" job duties that "include the enforcement of the employer's rules against employees and other persons" As shown above, the Company has failed to establish that with regard to the slot technicians in this case. 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 characterizes (Br. 16, 19) the slot technicians' duties as "essential" to the enforcement of rules, citing (Br. 19) 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. 15-16) 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 enabling the surveillance operators and security officers 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 separate from security personnel and do not control access to the Company’s surveillance technology. (JA 125.) And in contrast to *Bellagio*, where the surveillance technicians were directly involved in the “observing” of infractions, virtually all of the slot technicians’ reporting functions are indirect, occurring only after some potential problem has *already* been observed or identified by someone else. For example, the slot technicians investigate a claims

of discrepancies raised customers, inspect machines that have already been identified as losing on too many days in a row, or assist NGCB agents who are called to the facility. (*See* above at p. 7; Br. at 8.) 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.

The Company's assertion (Br. 21-22) 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 (JA 118) 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. The slot technicians are not so situated. *Bellagio* 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 given that the Board recognized that the technicians provide, as the name indicates, "technical assistance" to investigators or state gaming agents, but that assistance is much different than the assistance with the all-encompassing surveillance in *Bellagio*. (JA 125.)

In short, the Company incorrectly paints *Bellagio* as applying a different test than *Boeing*. Rather, *Bellagio* made clear that it was applying Board law under Section 9(b)(3). 863 F.3d. at 848-49. That *Bellagio* did not address portions of the analysis elucidated in *Boeing*, such as whether the surveillance technicians guard-type duties were more than minor and incidental and were performed in a security context, presumably was because the Court found both elements present on that record. And regarding the import of a reporting function, the Court in *Bellagio* found, as described above, that the surveillance technicians performed an essential step in making possible observation and reporting by other employees via maintaining the system that enabled that function. Here, the slot technicians do not themselves observe and report, nor do they enable others to do so, on more than a minor or incidental basis. As described above, others (customers, supervisors, NGCB agents) are observing or reporting concerns about the functioning of the gaming machines, and draw in the slot technicians only to the extent that a machine needs to be checked. Thus, the Company's efforts to manufacture a conflict between *Bellagio* and *Boeing* fail because on the very different records, the respective analyses focused on different issues while applying the same Board precedent.

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. THIS COURT SHOULD DISMISS THE UNION'S PETITION FOR REVIEW BECAUSE IT FAILED TO FILE AN OPENING BRIEF

The Union failed to file an opening brief in support of its petition for review. And, on September 3, 2019, it filed a Statement of Intent that it does not plan to file one. *See* D.C. Cir. Case No. 19-1119, Dkt #1804784. Accordingly, the Union has waived any argument challenging the Board's order. *See Corson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n.4 (D.C. Cir. 1990) (argument not raised in opening brief is waived). Moreover, pursuant to Federal Rule of Appellate Procedure 31(c), "[i]f an appellant fails to file a [timely] brief, an appellee may move to dismiss the appeal." Under these circumstances, the Board requests that this Court dismiss the Union's petition for review.

CONCLUSION

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

/s/ Usha Dheenan
USHA DHEENAN
Supervisory Attorney

/s/ Heather S. Beard
HEATHER S. BEARD
Attorney

National Labor Relations Board
1015 Half St. SE
Washington, D.C. 20570
(202) 273-2948
(202) 273-1788

PETER B. ROBB
General Counsel

ALICE B. STOCK
Deputy General Counsel

DAVID HABENSTREIT
Acting Deputy Associate General Counsel

National Labor Relations Board
September 2019

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

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 501, AFL-CIO)	
Petitioner)	Nos. 19-1107, 19-1119,
v.)	19-1133
)	Board Case No.
)	28-CA-218622
NATIONAL LABOR RELATIONS BOARD)	
Respondent)	
and)	
NP PALACE LLC, d/b/a PALACE HOTEL & CASINO)	
Intervenor)	
<hr style="width: 40%; margin-left: 0;"/>		
NP PALACE LLC, d/b/a PLACE STATION HOTEL & CASINO)	
Petitioner/Cross-Respondent)	
v.)	
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(g)(1), the Board certifies that its final brief contains 9,609 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2016.

s/ David Habenstreit
David Habenstreit
Acting Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 20th day of September 2019

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

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia 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 are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

Harriet Anne Lipkin
DLA Piper US LLP
500 8th Street, NW
Washington, DC 20004

Stanley Joseph Panikowski, Esquire
DLA Piper LLP (US)
401 B Street
Suite 1700
San Diego, CA 92101-4297

David A. Rosenfeld
Weinberg Roger & Rosenfeld
1001 Marina Village Parkway
Alameda, CA 94501-6430

s/ David Habenstreit
David Habenstreit
Acting Deputy Associate General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 20th day of September 2019

ADDENDUM

**Relevant provisions of the National Labor Relations Act,
29 U.S.C. §§ 151-69 (2000):**

Sec. 7. [§ 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

Sec. 8. [§ 158.] (a) [Unfair labor practices by employer] It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Sec. 9. [§ 159]

(b) Determination of bargaining unit by Board

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or

(3) decide that any unit is appropriate for such purposes 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.

(c) Hearings on questions affecting commerce; rules and regulations

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a); the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with [section 160\(c\)](#) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not

entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(d) Petition for enforcement or review; transcript

Whenever an order of the Board made pursuant to [section 160\(c\)](#) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under [subsection \(e\)](#) or [\(f\) of section 160](#) of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Sec. 10. [§ 160.] (a) [Powers of Board generally] The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

(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.

(f) [Review of final order of Board on petition to court] Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought

may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, 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 proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner 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; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.