Case Nos. 18-1318, 19-1006

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

STATION GVR ACQUISITION, LLC
D/B/A GREEN VALLEY RANCH RESORT SPA CASINO,

Petitioner and Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent and Cross-Petitioner,

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, AFFILIATED WITH UNITE HERE INTERNATIONAL UNION, AFL-CIO,

Intervenor for Respondent.

On Petition for Review of Decision and Order of National Labor Relations Board
Case No. 28-CA-224209, reported at 367 NLRB No. 38

PETITION FOR REHEARING EN BANC

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GLOSSARY OF ABBREVIATIONS

Decision	Unpublished D.C. Circuit Opinion in Station GVR Acquisition, LLC v. NLRB (Oct. 29, 2019)
GVR or Employer	Station GVR Acquisition, LLC d/b/a Green Valley Ranch Resort Spa Casino
JA	Joint Appendix
NLRB or Board	The National Labor Relations Board
Regional Director	Regional Director for Region 28 of the National Labor Relations Board
Union	Local Joint Executive Board of Las Vegas, affiliated with UNITE HERE International Union, AFL-CIO

RULE 35(B) STATEMENT

This appeal involves the following question of exceptional importance:

Does the National Labor Relations Board's longstanding prohibition of list-keeping require setting aside an NLRB election when it is undisputed that the Union (1) maintained an active list of those who had voted and (2) called those who had not yet voted to remind them to do so.

INTRODUCTION

The panel's decision in this appeal threatens the freedom of workers to choose whether and by whom they wish to be represented in collective bargaining. The NLRB has long prohibited unions and employers from making lists of who has or has not voted in an NLRB election. The purpose of this rule "is to protect employees from fear of reprisal or discipline because they did or did not vote." *In re Mead Coated Bd., Inc.*, 337 N.L.R.B. 497, 498 (2002). This prohibition is not a mere technical ground rule. Rather, the Board's rule against unauthorized list-keeping is so "fundamental to [a] free election[]" that a breach is *per se* objectionable, and "the fact that there is no showing of actual interference with the free choice of any voter . . . is of no moment." *Int'l Stamping Co., Inc.*, 97 N.L.R.B. 921, 923 (1951); *see also Days Inn Mgmt. Co.*, 299 N.L.R.B. 735, 736 (1990); *Cross Pointe Paper Corp.*, 330 N.L.R.B. 658, 662 (2000).

By allowing the Board's certification decision to stand despite the Union's undisputed misconduct, the panel decision provides a blueprint for unions (or employers, for that matter) to interfere with employees' freedom of choice yet suffer no consequence. The ban on list-keeping, once sacred, will now be viewed as a mere line in the sand that can be washed away with impunity. As communications technology continues to evolve, unions will have more ways to create, maintain, and transmit impermissible lists. And it will be far too easy for them to get away with it unless *en banc* review is granted here and the Board's certification of the Union is set aside.

BACKGROUND

I. The Tainted Election

GVR's appeal was based entirely on the Board's erroneous application of the law to the Board's own factual findings. GVR did not dispute those underlying findings on appeal. In short, the Board found:

"Pursuant to a Stipulated Election Agreement, an election was conducted on November 8 and 9, 2017 in a [bargaining] unit of certain of the Employer's hotel, resort, and casino employees ('team members')." (JA 342.) Before the election, the Union "organized an in-plant organizing committee comprised of . . . employees of the Employer, whose members were known as committee leaders." (JA 312.) "The Committee Leaders wore a union button that displayed the union

logo and the words 'committee leader.'" (JA 312.) "From about June 2017 to the election," the number of Committee Leaders "increased from about 50 Committee Leaders to about 60-70 Committee Leaders." (JA 312.)

"The Committee Leaders were much involved in [the Union's] organizing efforts." (JA 312.) In particular, "during the critical period preceding the election, the [Union] created and made use of 'Election Day Sign Up' sheets." (JA 346; *see also* JA 291-92.) "These [sheets] contained a list of names and contact information of employees the [Union] had determined were likely to vote for the union opposite a grid with the polling dates and times." (JA 346; *see also* JA 166-69.)

The sheets "targeted approximately 568 team members whom the [Union] believed would vote for the [Union]." (JA 178; *see also* JA 316-17.) The Union "distributed sign-up sheets to approximately 60-70 Committee Leaders." (JA 173-79; *see also* JA 317.) "For the most part, each Committee Leader received a sign-up sheet with a unique list of team members [and their contact information]." (JA 173-79, *see also* JA 317.)

The Committee Leaders were "instructed [by the Union] to contact the team members on their list and get the team members to commit to vote on a certain date and time." (JA 132; *see also* JA 317.) "The record establishes that Committee Leaders followed the [Union's] instructions." (JA 317.) Specifically, the "evidence . . . shows that Committee Leaders did, at the [Union's] instruction, ask

team members on sheets assigned to them whether and when they intended to vote, and reported this information to union organizers . . . ." (JA 312.) The Union had "endowed committee leaders with actual authority" and the "Committee Leaders were special agents of the [Union] for purposes of polling team members regarding whether or when they intended to vote, and to report that information back to the [Union], using the sign-up sheets created by the [Union] for that purpose." (JA 315 n.5, 320; *see also* JA 347.)

On the days of the election, the Union "instructed committee members to ask [the team members on their Sign Up sheets] if they had voted." (JA 331.) The Union further "instructed Committee Leaders to report to them who on their sign-up sheets had voted." (JA 331.) "The record establishes that the Committee Leaders did just that." (JA 331.)

Specifically, "during the election, Committee Leaders did observe and make some verbal reports to [the Union's] organizers that certain team members had voted, or at least told Committee Leaders that they had voted." (JA 352.) The Committee Leaders also gathered information on who had voted through direct "observations of who had voted." (JA 352.) The "Committee Leaders told the [Union] what they had learned and [the Union] electronically recorded the information." (JA 352.)

"This 'data,' which for all intents and purposes was an active list of those who had voted, was stored electronically at the [Union's] office . . . ." (JA 331.) "[The Union] used [this list] to determine which of [its] likely supporters had not yet voted, and then directed 'get out the vote' efforts toward those voters, including calling them to remind them to vote." (JA 352.)

II. The Board Proceedings

Despite finding that the Union had created and maintained an unauthorized list of who had voted, and relied on the unauthorized list to "get out the vote," the Regional Director certified the Union as the unit's exclusive bargaining representative. (*See* JA 316-22, 331, 333; *see also* JA 346-49, 352-54.) The Board gave two reasons for denying GVR's request to review the Regional Director's certification decision.

First, the Board stated that GVR had "failed to prove that any employees knew or would have reasonably inferred that the [Union] had made a list of employees who had not yet voted in the election." (JA 369.) Second, the Board stated that "because all of the [Union's] actions were in response to information that employees voluntarily provided to it . . . , this conduct could not reasonably give rise to an impression of surveillance." (JA 369.) The Board never addressed GVR's argument that the partial lists compiled and transmitted by the Committee

Leaders were themselves objectionable too, even apart from the compilation of the master list. (*See* JA 369.)

GVR then engaged in a technical refusal to bargain, as required to obtain judicial review of the certification decision. After the Board ruled that GVR's refusal to bargain was an unfair labor practice, GVR filed a petition for review in this Court.

III. The Panel Decision

On October 29, 2019, this Court denied GVR's petition for review and granted the Board's cross-application for enforcement in an unpublished decision without oral argument. The Court gave three reasons for its decision.

First, the Court ruled that "the Board reasonably declined to set aside the election on GVR's theory that the committee leaders' questioning created impermissible voter lists." (Decision at 2.) The Court recognized that "[u]nder Board law, keeping a list of voters besides the official eligibility list 'is grounds in itself for setting aside the election when it can be shown or inferred from the circumstances that the employees knew that their names were being recorded.'" (Decision at 2, quoting *Days Inn Mgmt. Co.*, 299 N.L.R.B. 735, 736 (1990).) But the Court rejected GVR's contentions on the ground that "[e]ven assuming oral or mental lists made away from the polls would violate the *Days Inn* principle, here only 'the union adherents involved in the list keeping, whose voting choices could

have hardly been affected,' knew about these 'lists.'" (Decision at 2, citations omitted.) The Court found that "[a]ny list-keeping by the 'union adherents' here falls comfortably within [the Board's] exception" for "'de minimis' conduct." (Decision at 2.)

Second, the Court stated that it "cannot consider GVR's contention that the Union created an 'impression of surveillance' because that objection was not properly raised before the Board." (Decision at 2, citations omitted.)[1]

Third, the Court ruled that "substantial evidence supports the Board's conclusion that no employee knew about the Union's electronic list." (Decision at 2.) This ruling relied heavily on the lack of *direct* evidence that voters knew about the list. The Court noted that "[n]o employee 'testified to hearing or seeing any indications of list-keeping.' J.A. 353." (Decision at 2.) The Court then rejected GVR's reliance on inferences from the Union's undisputed targeting of employee-voters:

> GVR speculates that committee leaders and employees who received targeted get-out-the-vote outreach could have inferred that the Union tracked voting. But neither committee leader who testified at the Board hearing professed to knowing about the list. One even stated that she did not know why the Union wanted to know who voted. J.A. 79. Before the Board, GVR offered no evidence that employees

[1] GVR's rehearing petition does not further address this finding because a challenge to the waiver finding does not itself implicate the question of exceptional importance that warrants *en banc* review.

> targeted for follow-up knew about the list. Its speculation now cannot meet its heavy burden to overturn the election.

(Decision at 2.)

REASONS WHY THE PETITION SHOULD BE GRANTED

I. The Panel Decision Incorrectly Endorses a Board Ruling that Essentially Requires Direct Evidence of Employee Knowledge of List-Keeping Before an Election Can Be Set Aside

The Court's decision in this appeal does not correctly account for the most pivotal undisputed fact: the Union "used [its list] to determine which of [its] likely supporters had not yet voted, and then directed 'get out the vote' efforts toward those voters, including calling them to remind them to vote." (JA 352.) In doing so, the panel decision endorses a Board ruling that essentially requires direct evidence that employees know a list is being kept. This is a significant departure from the *Days Inn* rule that "keeping a list of voters besides the official eligibility list 'is grounds in itself for setting aside the election when it can be shown *or inferred from the circumstances* that the employees knew that their names were being recorded.'" (Decision at 2, quoting *Days Inn*, 299 N.L.R.B. at 736, emphasis added); *see also Masonic Homes of Cal. Inc.*, 258 N.L.R.B. 41, 48 (1981) (list-keeping is objectionable "if employee voters know, or reasonably can infer, that their names are being recorded"); *Med. Ctr. of Beaver Cty., Inc. v. NLRB*, 716 F.2d 995, 999 (3d Cir. 1983) (quoting *Masonic Homes*).

Here, the evidence compels the reasonable inference that at least some of the employees selected for the Union's special election day attention were aware of the Union's maintenance of its "active list of those who had voted." (JA 369.) Their names had been recorded, their participation in the election had been tracked, and they were targeted for follow-up "encouragement" if they had not voted. The rejection of this strongly-supported inference from the undisputed circumstances sets the bar almost impossibly high for the challenger of an election tainted by impermissible list-keeping. While the challenger's burden may be heavy (Decision at 2), the panel decision now makes that weight nearly unbearable.

It is not surprising that an employer would face great obstacles in marshaling *direct* evidence that employees were aware of the union's misconduct. The same fear of reprisal that undergirds the ban on list-keeping in the first place would make such testimony very hard to come by in most cases. *See In re Mead Coated Bd.*, 337 N.L.R.B. at 498 ("The purpose of this prohibition [on list-keeping] is to protect employees from fear of reprisal or discipline because they did or did not vote."). The ability of an election challenger to rely on reasonable inferences from the creation, maintenance, and use of unauthorized voter lists—all of which the Board found to have occurred here—is thus essential. That ability is now severely curtailed, if not eliminated altogether. The panel decision's far-reaching effect on

the viability of such inferences raises an exceptionally important legal question that warrants *en banc* review.

II. The Panel Decision Paves the Way for Significant Election Day Mischief at the Expense of Employees' Freedom of Choice

The panel decision leaves intact a Board decision that is breathtaking in scope. It is undisputed that the Union created and maintained impermissible lists on a large scale here. It is likewise undisputed that the Union used its master list to target employees who had not yet voted with "get out the vote" efforts that included individualized telephone calls. The Union thus engaged in a systematic, coordinated, and intentional effort to uncover the identities of who had and had not voted. If these circumstances are not enough to support an inference that the targeted employees knew their names were being recorded, then the floodgates have been opened to *Days Inn* violations.

Technology has made easier, and will surely continue to make easier, the creation and maintenance of impermissible lists. Artificial intelligence, analytics, and "big data" tools will make these lists even sharper weapons in a union's battle to steer voters toward it. It is therefore more important than ever that the *Days Inn* principle be a strong bulwark against the use of lists to imperil employees' freedom of choice. The principle is so powerful—in theory, at least—that it can invalidate an election "even when there has been no showing of actual interference with the voters' free choice." *Days Inn*, 299 N.L.R.B. at 736.

But now, without fear of repercussion, unions will be free to create and use lists in a manner similar to what the panel decision allows. Only the imagination limits the potential for abuse. *En banc* review therefore should be granted to protect the exceptionally important interest in free voter choice by making clear that, as a matter of law, the Union's conduct in this case crossed an inviolable line.

CONCLUSION

The importance of the integrity of representation elections cannot be understated. The Board's decision poses a grave threat to that fundamental value, and the panel decision has allowed that decision to stand by truncating the appropriate inquiry. *En banc* review is required to close down this pathway to increased manipulation of the election process and more firmly secure the freedom of employee choice.

Dated: December 13, 2019

Respectfully submitted,

/s/ Harriet Lipkin

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Federal Rule of Appellate Procedure 32(g)(1) that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 35(b)(2)(A) because it contains 2,466 words, excluding the parts of the brief exempted by the Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared with Microsoft Word 2016 in a proportional 14 point typeface in Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that I electronically filed this *PETITION FOR REHEARING EN BANC* with the United States Court of Appeals for the District of Columbia Circuit via the Court's CM/ECF system on December 13, 2019, and that service will be made on counsel of record for all parties to this case through the Court's CM/ECF system and first-class mail. I further certify that I caused the required copies of the *PETITION FOR REHEARING EN BANC* to be filed with the Clerk of the Court by first-class mail.

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ADDENDUM

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1318 **September Term, 2019**

FILED ON: OCTOBER 29, 2019

STATION GVR ACQUISITION, LLC, D/B/A GREEN VALLEY RANCH RESORT SPA CASINO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS,
INTERVENOR

Consolidated with 19-1006

On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

Before: GARLAND, *Chief Judge*; TATEL, *Circuit Judge*; and SILBERMAN, *Senior Circuit Judge*.

J U D G M E N T

This petition for review and cross-application for enforcement were considered on the record from the National Labor Relations Board and on the briefs of the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the petition for review be denied, and the NLRB's cross-application for enforcement be granted.

Petitioner Station GVR Acquisition's employees chose the Local Joint Executive Board of Las Vegas ("the Union") as their representative. But GVR refused to bargain with the Union, claiming that the Board-sponsored election was marred by misconduct. The Board certified the election and found that GVR had committed an unfair labor practice by refusing to bargain. GVR now seeks our review.

GVR presses three election objections. All center on the fact that, at the request of the Union, certain pro-Union "committee leaders" asked small groups of their fellow employees whether they had voted and then orally relayed this information to the Union. The Union recorded this information electronically. None of GVR's objections overcomes its "heavy burden" in challenging a Board-sponsored election, *Antelope Valley Bus. Co. v. NLRB*, 275 F.3d 1089, 1095 (D.C. Cir. 2002).

First, the Board reasonably declined to set aside the election on GVR's theory that the committee leaders' questioning created impermissible voter lists. Under Board law, keeping a list of voters besides the official eligibility list "is grounds in itself for setting aside the election when it can be shown or inferred from the circumstances that the employees knew that their names were being recorded." *Days Inn Mgmt. Co.*, 299 N.L.R.B. 735, 736 (1990). GVR contends (1) that the committee leaders' knowledge of who voted and relaying of that information to the Union created partial mental or oral lists of voters; and (2) that because the committee leaders were themselves employees, employees knew about the lists. Even assuming oral or mental lists made away from the polls would violate the *Days Inn* principle, here only "the union adherents involved in the list keeping, whose voting choices could have hardly been affected," knew about these "lists." J.A. 369 n.1 (quoting *Robert's Tours, Inc.*, 244 N.L.R.B. 818, 818 n.5 & 824 (1979)). Although impermissible list-keeping may justify setting aside an election "even when there has been no showing of actual interference with the voters' free choice," *Days Inn*, 299 N.L.R.B. at 736, the Board has long carved out an exception for "de minimis" conduct, *Cerock Wire & Cable Grp.*, 273 N.L.R.B. 1041, 1041 (1984). Any list-keeping by the "union adherents" here falls comfortably within that exception. *See Days Inn*, 299 N.L.R.B. at 736 (citing *Robert's Tours*, 244 N.L.R.B. 818, as an example of de minimis conduct).

Second, we cannot consider GVR's contention that the Union created an "impression of surveillance" because that objection was not properly raised before the Board. *See* 29 U.S.C. § 160(e); *Pace Univ. v. NLRB*, 514 F.3d 19, 24 (D.C. Cir. 2008).

Third, notwithstanding GVR's claim to the contrary, substantial evidence supports the Board's conclusion that no employee knew about the Union's electronic list. No employee "testified to hearing or seeing any indications of list-keeping." J.A. 353. GVR speculates that committee leaders and employees who received targeted get-out-the-vote outreach could have inferred that the Union tracked voting. But neither committee leader who testified at the Board hearing professed to knowing about the list. One even stated that she did not know why the Union wanted to know who voted. J.A. 79. Before the Board, GVR offered no evidence that employees targeted for follow-up knew about the list. Its speculation now cannot meet its heavy burden to overturn the election.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1)(A), counsel for Station GVR Acquisition, LLC d/b/a Green Valley Ranch Resort Spa Casino ("GVR") certifies the following:

(A) Parties and Amici. The parties to this action are Station GVR Acquisition, LLC d/b/a Green Valley Ranch Resort Spa Casino ("GVR" or "Employer") and the National Labor Relations Board ("NLRB" or the "Board"). The Local Joint Executive Board of Las Vegas, affiliated with UNITE HERE International Union, AFL-CIO ("Union") is the only intervenor and there are no *amici curiae* to date. All of the aforementioned were parties in the underlying proceeding (Board Case No. 28-CA-224209) before the NLRB.

(B) Rulings Under Review. Petitioner GVR seeks review of the Board's Decision and Order in Case No. 28-CA-224209, which was entered on November 26, 2018 and reported at 367 N.L.R.B. No. 38. The Board has filed a cross-application for enforcement of the same Decision and Order.

(C) Related Cases. There are no related cases.

Dated: December 13, 2019

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), GVR 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 GVR, Station Casinos LLC, or Red Rock Resorts, Inc.