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/Cross-Respondent v. NATIONAL LABOR RELATIONS BOARD Respondent/Cross-Petitioner and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 501, AFL-CIO Intervenor	Nos. 18-1236 18-1288 Board Case Nos. 28-CA-211043 28-CA-216411
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 501, AFL-CIO Petitioner v. NATIONAL LABOR RELATIONS BOARD Respondent and STATION GVR ACQUISITION, LLC, d/b/a GREEN VALLEY RANCH RESORT SPA CASINO Intervenor	No. 18-1291 Board Case Nos. 28-CA-211043 28-CA-216411

THE NATIONAL LABOR RELATIONS BOARD'S REPLY TO THE UNION'S OPPOSITION TO REMAND

To the Honorable, the Judges of the United States
Court of Appeals for the District of Columbia Circuit:

The National Labor Relations Board ("the Board"), by its Assistant General Counsel, respectfully submits this reply to the International Union of Operating Engineers, Local 501, AFL-CIO's ("the Union") opposition to the Board's motion to take this case out of abeyance and remand it to the Board. As shown below, the Union's objections support, rather than undermine, the Board's request to determine, in the first instance, how to apply its recent decision changing the applicable law.

BACKGROUND

In the instant case ("*GVR II*"), the Board ordered Station GVR Acquisition, LLC d/b/a Green Valley Ranch Resort Spa Casino ("the Company"), in the midst of the Company's challenge to the Union's certification as the bargaining representative of a unit of company employees, to furnish certain information that the Union had requested.[1] This information includes unspecified policies related to "the security and integrity of the [Company's] gaming machines" and "precautions

[1] As noted in the Board's motion to lift abeyance and remand (Mtn. at 4), the Ninth Circuit eventually upheld the Union's certification and the Company's bargaining obligation. *See Int'l Union of Operating Eng'rs Local 501 v. NLRB*, 949 F.3d 477 (9th Cir. 2020) (mandate issued April 27, 2020).

taken to combat illegal gaming and money laundering" over which the Company claimed confidentiality. *GVR II*, slip op. at 2. The Board found that the Company's confidentiality claim amounted to "nothing more than a blanket claim," without "any contention that it has made any offer to accommodate the Union's legitimate interest in relevant information," and then rejected it. *Id*. Under then-current law, the Board ordered the Company to produce that information and other relevant information to the Union. *Id*. at 2-3.

As the Board explained in its motion seeking remand (Mtn. at 3-4), while the instant case was pending in abeyance before this Court, the Board issued *NP Palace LLC d/b/a Palace Station Hotel & Casino*, 368 NLRB No. 148 (December 16, 2019) ("*NP Palace II*"), petitions for review and cross-application for enforcement pending, Nos. 19-1262, 20-1008, 20-1042 (D.C. Cir.). That case set out a new remedial approach to apply when an employer—as in the instant case—simultaneously challenges a union's certification and wishes to assert a confidentiality defense over information it would otherwise be required to provide if the union's certification is ultimately upheld. Specifically, the Board announced that when an employer in those circumstances asserts a defense such as confidentiality that is legitimate on its face, the Board will only require the employer to engage in accommodative bargaining over the information, rather than

to furnish the information, as the Board had ordered in *GVR II*. *NP Palace II*, 368 NLRB No. 148, slip op. at 5.

In *NP Palace II*, the Board acknowledged that the employers in *GVR II* and *NP Palace II* (which are commonly owned) made the same confidentiality claim about policies concerning gaming security. *Id*. at 7 n.25, citing *GVR II*, slip op. at 2. The Board acknowledged that in *GVR II*, it had characterized that claim as an insufficient "blanket claim" of confidentiality, but that a change in the law "is necessary to resolve the dilemma addressed here." *Id*. The Board in *NP Palace* then overruled prior cases, "specifically including [*GVR II*]," to the extent "inconsistent" with its new approach. *Id.*, at slip op. 7 n.25. Accordingly, the Board filed its motion to lift abeyance and remand of *GVR II* to give the Board the opportunity to determine, in the first instance, how *NP Palace II* affects the Order in *GVR II.*

ARGUMENT

As an initial matter, the Union concedes that "*NP Palace II* created a new remedy in these cases . . . ." Opp. at 2. Thus, as the Board stated in its motion, remand is appropriate for the Board to address in the first instance the effects of *NP Palace II* on the Board's Decision and Order in *GVR II*. *See NLRB v. Food Store Emps. Union, Local 347*, 417 U.S. 1, 10 n.10 (1974) ("[A] court reviewing an agency decision following an intervening change of policy by the agency should

remand . . . .”). As shown below, the Union’s claims that the court can enforce parts of the Board’s order without a remand and that events post-*GVR II* militate against a remand are without merit and instead support remand.

The Union asserts (Opp. at 1-2, 4) that some (unidentified) information that the Board ordered the Company to produce in *GVR II* is “presumptively relevant” or not “subject to the confidentiality issue” about gaming security raised in *NP Palace II*. Therefore, the Union argues, the Court can order the Company to produce that information now, rather than wait for the Board’s decision on remand. Although some information requested by the Union in *GVR II* (e.g. “a list of current employees”) may be considered presumptively relevant and not subject to *NP Palace II*’s new confidentiality considerations about gaming security, other information requested is not so clear-cut (*e.g*. a copy of all “current company personnel policies, practices and procedures”). *See GVR II*, 366 NLRB No. 175, slip op. at 1. Given that the Board’s Order in *GVR II* does not identify which specific information requests are subject to the Company’s confidentiality claim in that case and which are not, it is appropriate for the Board, in the first instance, rather than the Court, to make that determination. This is particularly true given that the information items requested are not identical in *GVR II* and *NP Palace II*. *Compare GVR II*, 366 NLRB No. 175, slip op. at 1-2 (including requests for employee names, job descriptions, wage or salary plans, benefit plans, disciplinary

notices, "company personnel policies," and policies "in regards to" slot tournaments), with *NP Palace II*, 368 NLRB No. 148, slip op. at 2 (including above requests made in *GVR II*, with the exception of requests for policies in regards to slot tournaments, and additionally including requests for shift schedules, job bids, written customer complaints, OSHA logs, and safety committee minutes).[2]

The Union's related assertion (Opp. at 1-2)—that the Court should enforce the Board's Order in *GVR II* to the extent the Company did not contest all of the information requests in its opening brief—is similarly flawed. The Company raised its confidentiality defense in its brief but, like the Board, it did not identify specific information requests subject to it. As stated above, the Board should make the determination, in the first instance, as to which information requests its new caselaw should apply. The Union presents no support for its implication that the Company's arguments in its opening brief to the Court in *GVR II*, filed before the Board even issued *NP Palace II*, should constrain the Board's ability to decide, in the first instance, how *NP Palace II* affects the Board's Order in *GVR II*.

The Union's arguments (Opp. at 2-4) about events following the issuance of *GVR II* also counsel in favor of remand. The Board should decide in the first

[2] The Union mistakenly asserts (Opp. at 3-4) that there are information requests for "customer complaints" at issue in *GVR II* that the Court should enforce. To the contrary, there are no such information requests in *GVR II*.

instance the effect, if any, of the Ninth Circuit's recent decision upholding the Union's certification on any new bargaining remedy in *GVR II*. In the same vein, it is the Board, and not the Court, that should decide the import, if any, of the extra-record letter from the Company dated April 30, 2020, concerning recognition of the Union and related company action or inaction. Moreover, the Union's request (Opp. at 2) that the Court delay the Board's application of any new remedy to *GVR II*, pending the result of this Court's review of *NP Palace II*, would similarly and unnecessarily deprive the Board of its ability to apply its own law, in the first instance, to *GVR II*.

WHEREFORE, for the reasons above and in its April 22 motion, the Board respectfully moves the Court to grant the Board's motion to lift abeyance and remand this case to the Board.

Respectfully submitted,

/s/ David Habenstreit

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Dated at Washington, DC
this 22nd day of May 2020

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(l), the Board certifies that the foregoing document contains 1530 words of proportionally spaced, 14-point type, and that the word processing system used was Microsoft Word 2016.

/s/ David Habenstreit
David Habenstreit
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
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Dated at Washington, DC
this 22nd day of May 2020

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v.	)	
NATIONAL LABOR RELATIONS BOARD	)	Board Case Nos. 28-CA-211043 28-CA-216411
Respondent/Cross-Petitioner	)	
and	)	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 501, AFL-CIO	)	
Intervenor	)	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 501, AFL-CIO	)	
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NATIONAL LABOR RELATIONS BOARD	)	
Respondent	)	
and	)	
STATION GVR ACQUISITION, LLC, d/b/a GREEN VALLEY RANCH RESORT SPA CASINO	)	
Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify further that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system.

/s/ David Habenstreit
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Dated at Washington, DC
this 22nd day of May 2020