

*United States Government*  
*National Labor Relations Board*  
OFFICE OF THE GENERAL COUNSEL

## Advice Memorandum

DATE: January 22, 2020

TO: Paul J. Murphy, Acting Regional Director  
Region 1

FROM: Richard A. Bock, Associate General Counsel  
Division of Advice

SUBJECT: Wynn MA, LLC d/b/a Encore Boston Harbor  
Case 01-CA-241556

518-4040-1700-0000

IBEW Local 103 (Wynn MA, LLC d/b/a Encore  
Boston Harbor)  
Case 01-CB-241548

The Region submitted these cases for advice as to whether the Employer, which operates a casino-hotel resort, violated Section 8(a)(2) and (1) by voluntarily recognizing IBEW Local 103 as the bargaining representative of a unit comprised at least primarily of maintenance employees approximately two months before the resort opened to the general public, and whether Local 103 violated Section 8(b)(1)(A) by accepting such recognition. We conclude the Employer and Local 103 violated the Act because the recognition was unlawfully premature in that the Employer was not yet engaged in normal business operations at the time of recognition. Accordingly, the Region should issue complaint, absent settlement.

### FACTS

Wynn MA, LLC d/b/a Encore Boston Harbor (the “Employer”) operates a casino-hotel resort in Everett, Massachusetts, consisting of a casino, a twenty-seven-floor hotel tower, five restaurants, conference facilities, and utility areas (the “Resort”). Construction of the Resort started around 2016 and was completed on a staggered schedule through June 2019.

The first areas of the Resort were turned over to the Employer’s control by contractor Suffolk Construction (“Suffolk”) in the fall of 2018. Around that same time, the Employer began hiring facilities maintenance employees at the Resort.

On April 25, 2019,<sup>1</sup> the Employer recognized IBEW Local 103 (“Local 103”) as the bargaining representative of a unit of employees at least primarily engaged in facilities maintenance. Local 103 demonstrated majority support by card check, and the parties agreed to the following bargaining unit description:

All regular full-time and regular part-time employees and all lead positions in the following maintenance classifications: lead BAS [building automated systems] control technician, lead HVAC technician, HVAC technician, lead HVAC AHU/FCU technician, HVAC AHU/FCU technician, lead electrician, lead plant & Sr watch [senior watch], lead plumber, electricians, I&C [instrumentation and controls] Technician, plumber, HVAC technicians, refrigeration technician, BAS controls tech, kitchen technician, plant & senior watch, lead painter, lead carpenter, general services technician, sign shop (excluding graphic designer), millwork specialist, locksmith, lead stone & tile, general carpenter, frames & drywall, upholstery, carpet installer, wall coverer, painter, stone, mason, tiler, door repair, dispatcher – FCC [Fire Command Center] & maintenance, slot technicians, entertainment production services technicians, sound/audio & video technicians, lighting technicians, lighting control technicians.

At the time of recognition, 80 employees covering 27 job classifications had been hired into the bargaining unit, and those employees worked day shifts at the Resort.

By that date, Suffolk had turned over to the Employer all hotel floors and corridors; eight of ten gaming areas; two of five restaurants; mechanical areas; many administrative areas and ancillary hospitality areas; maintenance employees’ trade shops; and the Central Utility Plant, which controls heating, cooling, and ventilation systems. Still under Suffolk’s control were the remaining gaming areas and restaurants, various meeting rooms, the grand ballroom, several retail facilities, certain convention facilities, elevators, vehicle dispatch and parking offices, and exterior areas. Although, after the Resort’s opening, bargaining unit employees would be fully responsible for maintenance of these areas, during construction employees were generally not allowed to touch anything in them, and, to the extent they were working in these areas at all, their work was limited to tasks such as training, familiarizing themselves with the premises, mapping out the HVAC system, inspecting Suffolk’s work, and creating “punch lists” of items for Suffolk to correct.

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<sup>1</sup> All subsequent dates are in 2019 unless otherwise indicated.

For those areas of the Resort that Suffolk had turned over to the Employer, employees' work was more hands-on, as discussed in the Action section below.

Between June 3 and 23, the Employer for the first time invited certain employees and special guests to overnight, dine, and game at the Resort. During this invitation-only period, Suffolk turned over to the Employer any areas that had remained under its control.

On June 23, the Resort officially opened to the general public. By that date, the bargaining unit had grown to 125 employees in 37 job classifications,<sup>2</sup> and most unit classifications had been switched from day shifts to 24/7 shift coverage.

### ACTION

We conclude the Employer violated Section 8(a)(2) and (1) by prematurely recognizing Local 103 as the unit employees' bargaining representative, and Local 103 violated Section 8(b)(1)(A) by accepting such recognition. Accordingly, the Region should issue complaint, absent settlement.

Voluntary recognition is lawful only if, at the time of recognition, the employer employs a substantial and representative complement of its projected workforce and is engaged in normal business operations.<sup>3</sup>

We conclude that, at the time of recognition, the Employer employed a substantial and representative complement of its projected workforce in the bargaining unit. The Board will generally find a substantial and representative complement if the employer has hired at least 30 percent of its employees in 50 percent of job classifications.<sup>4</sup> Here, at the time of recognition, the bargaining unit exceeded both thresholds by a substantial margin: 80 out of 125 positions (64%) had been filled, and those employees covered 27 of 37 classifications (73%). Accordingly, the Employer had hired a substantial and representative complement under current Board law.

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<sup>2</sup> The number of employees at the time of opening exceeded the Employer's earlier projection that the full complement of employees would comprise 109. There is no evidence of further significant expansion of the bargaining unit.

<sup>3</sup> *Hilton Inn Albany*, 270 NLRB 1364, 1365 (1984).

<sup>4</sup> See, e.g., *id.* at 1365 & n.10 (citing *General Extrusion Co.*, 121 NLRB 1165 (1958)); *MV Public Transportation*, 356 NLRB at 877-78.

However, we further conclude that the Employer's recognition of Local 103 was nevertheless premature because the Employer was not yet engaged in normal business operations. This second prong of the test "recognizes the fact that employees are better able to register their electoral choice when they are actually engaged in the work for which representation is sought."<sup>5</sup> To determine whether employers in service industries are engaged in normal business operations, the Board has considered factors including whether employer facilities are open and serving customers; whether the work conducted by bargaining unit employees at the time of recognition is the same as the their eventual everyday work; whether employees' working conditions at the time of recognition are the same as their eventual everyday conditions; and, finally, the staffing levels at the time of recognition.<sup>6</sup>

Considering these factors in *Elmhurst Care Center*, the Board found a nursing home was not yet engaged in normal business operations when, approximately one month before the first patients would be admitted, the employer recognized the union as the bargaining representative of a unit of licensed practical nurses ("LPNs"), certified nursing assistants ("CNAs"), housekeepers, and dietary technicians.<sup>7</sup> At that time, the unit employees were working relatively few hours and their responsibilities were limited to training and other tasks in preparation for receiving patients.<sup>8</sup> In addition, once the employer began admitting patients, it hired many more LPNs and CNAs to provide nursing care to patients, which was the employer's "normal business operation," while the number of dietary and housekeeping employees remained relatively steady.<sup>9</sup> The Board observed, "Normal operations for a nursing home ordinarily begin when patients are admitted and the demands attendant thereto are felt,"<sup>10</sup> and found, based on the foregoing facts, that the employer was not engaged in

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<sup>5</sup> *Elmhurst Care Center*, 345 NLRB at 1178.

<sup>6</sup> *See, e.g., id.* at 1177; *Hilton Inn Albany*, 270 NLRB at 1366 (hotel was not engaged in normal business operations when it was not yet open, work performed was limited to training of cooks and kitchen personnel and performance of maids' duties, and the size of the employee complement actually working and number of hours worked increased rapidly immediately following recognition).

<sup>7</sup> 345 NLRB at 1176-77, 1183.

<sup>8</sup> *Id.* at 1177.

<sup>9</sup> *Id.* at 1177 & n.10, 1178-79.

<sup>10</sup> *Id.* at 1178.

normal business operations at the time of recognition.<sup>11</sup> The Board noted that, in light of subsequent hiring, waiting until the facility opened to grant recognition would have increased the number of unit employees participating in the decision to select the union while having minimal impact on those employed earlier and also “would have increased the likelihood that the employees would be aware of what their normal work activity and everyday terms and conditions of employment would consist of, before making the decision regarding representation.”<sup>12</sup>

In contrast, in *Herman Brothers, Inc.*,<sup>13</sup> the Board found an employer whose employee-drivers delivered liquified gas products to be engaged in normal business operations even before the facility from which the drivers were to eventually pick up the gas products became operative. The employer had contracted with M. G. Burdett Enterprises to deliver gas products from a new facility owned by Burdett, but the facility was not scheduled to “come on line” until after the date of recognition.<sup>14</sup> However, by the time of recognition, the employer’s drivers had begun hauling gas products purchased by Burdett from other companies to service Burdett’s customers and to charge up Burdett’s new facility.<sup>15</sup> Based on this work, the Board concluded that the employer was engaged in normal business operations at the time of recognition.<sup>16</sup>

Applying the foregoing precedent here, we conclude that the Employer was not engaged in normal business operations when it recognized Local 103 on April 25. Initially, at that time, the Employer was not yet serving any customers at the Resort. It would be more than a month before the Resort would host its first guests on June 3 and about two months before the Resort opened to the general public on June 23.

Moreover, at the time of recognition, unit employees were generally engaged in preparatory work that differed from their everyday duties following the opening. The starkest differences relate to areas of the Resort that were still under construction at the time of recognition, such as three of five restaurants, the grand ballroom, and certain convention facilities. Although by the opening, bargaining unit employees

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<sup>11</sup> *Id.* at 1179.

<sup>12</sup> *Id.* at 1179 & n.16.

<sup>13</sup> 264 NLRB 439, 439, 441 (1982).

<sup>14</sup> *Id.* at 439.

<sup>15</sup> *Id.*

<sup>16</sup> *See id.* at 440-41.

would be fully responsible for the maintenance needs of these areas, as noted above, during the construction phase employees' work was limited to preparatory tasks, which were qualitatively different than even the post-construction tasks discussed immediately below.

With respect to the majority of Resort facilities that Suffolk had turned over to the Employer at the time of recognition, at least six employees in different unit classifications indicate that there were differences in their work between the time of recognition and post-opening. An HVAC technician's pre-opening work consisted of a lot of cleaning, testing equipment, touring the hotel, and attending trainings in preparation for the Resort's opening, whereas after the opening [REDACTED] work consisted mostly of preventive maintenance, changing temperatures, and troubleshooting malfunctioning equipment. A general services technician helped assemble table games before the Resort opened, whereas after the opening, [REDACTED] job has involved largely responding to guest complaints (which necessarily did not exist at the time of recognition) and repairing table games. A kitchen technician's pre-opening work included participating in training on kitchen equipment by equipment manufacturers, while post-opening—when the facilities are actually used to serve guests—the technician has been responding to radio calls and scheduled work orders for repairs such as installing a new part, re-lighting a stove pilot light, addressing a leaking drain, or working on beer and soda systems, in addition to completing general maintenance when [REDACTED] can. An instrumentation and controls technician's crew took on some corrective work from Suffolk to ensure that the work was completed before the Resort's opening, which presumably differed from the crew's eventual everyday work.<sup>17</sup> Although many duties performed by a senior watch employee did not change much after the Resort opened, we find it significant that from the time of opening to early August, [REDACTED] had participated in no trainings, whereas in the six-month period before opening, [REDACTED] attended about 15 trainings. Finally, although a slot technician's crew continued a pre-opening task of adding new machines and moving machines to new locations (as well as troubleshooting, checking settings, and conducting maintenance), after the Facility opened, the rate of machine additions would necessarily have slowed once the gaming areas were prepared for guests. In addition, at least ten employee classifications were entirely unfilled at the time of recognition, and the work of those classifications would thus presumably have commenced only later.<sup>18</sup>

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<sup>17</sup> The precise nature of the crew's post-opening work is unclear, but the instrumentation and controls technician's work generally concerns electronic meters and control systems that operate much of the HVAC systems.

<sup>18</sup> The evidence currently indicates that unit employees performed a variety of preparatory tasks that commenced before the time of recognition, but the end date of

Three further facts indicate more global changes in unit employees' work pre- and post-opening. First is the dramatic change in the number of work orders handled through the Fire Command Center ("FCC"), which processes all maintenance calls and is staffed by dispatchers in the bargaining unit. Whereas in the seven-month period preceding the opening, the FCC processed 2,782 work orders, it processed 4,641 work orders in roughly the first seven weeks post-opening.<sup>19</sup> Second, although currently there is no evidence regarding unit employees' interactions with guests, there is evidence that an HVAC technician received training on such interactions, indicating that the Employer anticipated the interactions would occur. Third, most bargaining unit employees switched from day shifts at the time of recognition to 24/7 shift coverage by the time of the opening.<sup>20</sup> Not only was this a significant change in working conditions in its own right, but it also indicates increased responsibilities on the part of the bargaining unit for handling the Resort's maintenance needs after the opening occurred.

The above evidence demonstrates significant work differences between the pre- and post-opening periods for the brunt of bargaining unit employees. The fact that some employees did not experience specific changes to their responsibilities<sup>21</sup> upon

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which is unclear. Such tasks include, *inter alia*, electricians and plumbers inspecting, cleaning, and testing equipment; multiple classifications of employees, such as general maintenance technicians, slot technicians, carpenters, and stone and tile workers, conducting assembly, testing, and finish work; and various employee classifications installing Employer-furnished equipment and doing painting and other work on the hotel floors.

<sup>19</sup> Unless the Employer dramatically increased the number of FCC dispatchers after opening the Resort—a fact not in the record—the increase in work orders also indicates a change in the work of the dispatchers themselves.

<sup>20</sup> Relatedly, there is Employer-provided evidence that employees were engaged in substantial overtime work prior to the opening, but it is unclear whether overtime work dropped off significantly after the opening as a general matter. To the extent the evidence at trial establishes a difference in overtime work, the Region should rely on that fact as well.

<sup>21</sup> This includes a carpenter whose duties did not change, a lead stone & tile employee who may have experienced changes, since the evidence established only that *many* of [REDACTED] tasks were the same before and after the opening, as well as a lead HVAC technician who described similarity between [REDACTED] pre- and post-opening work, in contrast with the experience of the above-mentioned HVAC technician. In addition,

the Resort opening does not alter our conclusion that, overall, the work conducted by bargaining unit employees at the time of recognition was not the same as the work they performed post-opening.

Nor are we persuaded that unit employees who handled maintenance at peripheral properties (an office building and multiple warehouses) were unaffected by the Resort's opening. Even assuming that work at those properties did not change, the record includes no evidence to support that that work was a major part of any unit employees' responsibilities.

Overall, between the time of recognition and the Resort's opening, at which point it began serving members of the general public, the work of the bargaining unit changed as employees transitioned from preparatory activities to a 24/7 maintenance operation responsive to guest complaints and other demands of everyday facility usage. This transition, together with the fact that the Employer had yet to welcome any guests to the Resort at the time of recognition, establishes that, like the nursing home in *Elmhurst Care Center*,<sup>22</sup> the Employer was not engaged in normal business operations at the time of recognition. Moreover, as in *Elmhurst*, waiting to grant recognition here would have increased the number of unit employees participating in the decision to select a union while having minimal impact on those employed earlier, and also would have increased the likelihood that the employees would be aware of their normal work activity and everyday terms and conditions of employment before making a decision regarding representation.<sup>23</sup> By granting recognition when it did, the Employer necessarily disenfranchised employees whose hire was not necessary until closer to when the Resort opened to the public.

The Charged Parties attempt to distinguish *Elmhurst* largely on the basis that the *Elmhurst* nursing home's bargaining unit conducted patient-care work while the Employer's bargaining unit is limited to maintenance employees whose work is unaffected by the presence of guests. Assuming *arguendo* that unit employees' work is indeed unaffected by guests notwithstanding contrary evidence,<sup>24</sup> that would not

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the Employer's Vice President of Facilities states that the work of sign shop and BAS employees did not change.

<sup>22</sup> 345 NLRB at 1176-77.

<sup>23</sup> *Id.* at 1179 & n.16.

<sup>24</sup> For example, only after the time of recognition did the Employer hire convention services A/V technicians. Although the record currently includes little information about such employees, their job title itself suggests their work entails interaction with

overcome the fact that their work and working conditions changed overall by the time the Resort was open to the public. The limited hours worked by *Elmhurst* employees prior to the opening of the nursing home is also not a meaningful distinction, particularly since here most employees also experienced a significant change in hours: the transition from day shifts to 24/7 shift coverage. Thus, as in *Elmhurst*, it was appropriate to at the very least delay voluntary recognition until guests were admitted “and the demands attendant thereto [were] felt.”<sup>25</sup>

The Charged Parties misplace reliance on *Klein’s Golden Manor*.<sup>26</sup> As the Board has subsequently recognized in *Elmhurst*, the *Klein’s* Board did not address the normal-business-operations prong because the complaint in that case failed to do the same.<sup>27</sup>

Ultimately, the unit employees’ preparatory maintenance work “may [have been] essential to the operation of [the Employer’s] business, but it is not the business itself.”<sup>28</sup> Accordingly, the Region should issue complaint, absent settlement, alleging the Employer violated Section 8(a)(2) and (1) by prematurely recognizing Local 103 as the unit employees’ bargaining representative, and Local 103 violated Section 8(b)(1)(A) by accepting such premature recognition.

/s/  
R.A.B.

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conference patrons. In addition, as noted above, there is evidence that even classifications like HVAC technicians received training on guest interactions, indicating that this would be part of their work.

<sup>25</sup> 345 NLRB at 1178.

<sup>26</sup> 214 NLRB 807, 815-16 (1974).

<sup>27</sup> See *Elmhurst Care Center*, 345 NLRB at 1178 & n.12.

<sup>28</sup> *Id.* at 1178.