

Nos. 19-1235, 19-1259

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

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Davidson Hotel Company, LLC  
(Chicago Marriot at Medical District/UIC),

*Petitioner,*

v.

National Labor Relations Board,

*Respondent.*

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On Petition for Review from the National Labor Relations Board,  
Case No. 13-CA-229523,  
The Honorable McFerran, Kaplan, and Emanuel

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**Petitioner's Response to the Union's Petition for Panel Rehearing**

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### **Introduction**

In its petition for panel rehearing, the Union rehashes arguments already considered and correctly rejected by this Court. As this Court has repeatedly held, “The Board must explain its reasoning when certifying bargaining units.” *Davidson Hotel Co., LLC v. NLRB*, 977 F.3d 1289, 1291 (D.C. Cir. 2020) (citing cases). And the Board must clearly present its reasoning because “[a] decision of the Board that departs from established precedent without a reasoned explanation is arbitrary.” *NLRB v. Sw. Reg’l Council of Carpenters*, 826 F.3d 460, 464 (D.C. Cir. 2016). Despite the Union’s renewed attempt to engage in the type of reasoning that is absent from the Board’s decision, the simple fact remains that the Board failed to explain what factors mattered for certification and also failed to distinguish analogous, contrary precedent. This failure, as the Court already correctly held, is “fatal” and therefore the petition for panel rehearing should be denied.

### **Background**

Davidson has consistently argued that “[t]he fundamental error in the NLRB’s decision in this case is its lack of consistency with prior decisions on the appropriate composition of a bargaining unit at a full-service hotel.” Oral Argument Tr. 3:12–15 (attached as an exhibit). The Court agreed. It issued a unanimous opinion granting Davidson’s petition for review for two reasons. First, the Court recognized that “[t]he previous unit decision by the same Regional Director was sufficiently analogous that it should have been distinguished or otherwise addressed – at least when the Regional Director and Board were

presented with the argument that the first decision required rejection of the union's later petitions." *Davidson*, 977 F.3d at 1293. Second, the Court held in *Davidson*'s favor because "the Board failed to cite – let alone distinguish – a single contrary precedent even though *Davidson* cited several Board precedents that rejected separate units of hotel employees under similar circumstances." *Id.*; see also *id.* at 1293 n.3 (recognizing *Ramada Beverly Hills*, 278 N.L.R.B. 691 (1986), and *Atlanta Hilton Towers*, 273 N.L.R.B. 87 (1984), as analogous, contrary precedent). And thus "[b]ecause the Board did not distinguish its precedents," the Court "grant[ed] the petition for review, den[ied] the cross-application for enforcement, and remand[ed] to the Board." *Id.* at 1291.

The Union petitioned for panel rehearing, focusing almost exclusively on the first reason for the Court's decision—that the Regional Director's decisions are inconsistent. See Pet. 6 ("The Regional Director's decisions are consistent"); Pet. 15 ("[T]he path [the Regional Director] took can be discerned"). On the second reason for the Court's decision, the Union never argues that the Regional Director or the Board distinguished contrary precedent, nor does the Union distinguish *Ramada Beverly Hills* or *Atlanta Hilton* on the facts. Instead, the Union argues that "[t]he Regional Director and Board did not need to cite to contrary precedent regarding the food and beverage unit." Pet. 13.<sup>1</sup>

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<sup>1</sup> The Union's petition for panel rehearing is limited to the "certification of the food and beverage unit," Pet. 1, and the Union does not ask for panel rehearing as to the housekeeping unit.

## Argument

### **I. The Union’s Failure To Identify Any Misapprehended Point of Fact or Law Dooms Its Petition**

In a petition for panel rehearing, the petitioner must “state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended.” Fed. R. App. P. 40(a)(2). But the Union never specifically identifies what point of fact or law the Court overlooked or misapprehended. Because the Union fails to show that the court misapprehended any specific point of law or fact, the petition should be denied. *See Trans Union Corp. v. FTC*, 267 F.3d 1138, 1144 (D.C. Cir. 2001) (“Since Trans Union’s petition for rehearing merely clarifies arguments the company’s briefs had muddied, instead of restating arguments claimed to have been overlooked or misunderstood, the petition comes too late.”); *Richardson v. D.C. Bar Ass’n*, No. 97-7051, 1997 WL 404321, at \*1 (D.C. Cir. June 30, 1997) (“Appellant’s rehearing petition refers to no points of law or facts which the court overlooked or misapprehended in ruling on the merits of this appeal.”).

### **II. The Court Did Not Overlook or Misapprehend Any Point of Fact**

To the extent the Union’s argument is that rehearing is appropriate because Davidson agreed “that the food and beverage unit is appropriate,” the Union is wrong. Davidson has consistently argued that certifying separate units is inconsistent with the Board’s precedent because it operates a highly integrated, full-service hotel with a centralized personnel department that is organized under a general manager. Opening Br. 18 (“The NLRB’s certifications of a Food & Beverage Unit separate from the Housekeeping Unit disregarded long-

established binding precedent without justification.”); Reply Br. 1 (“The NLRB’s decision to certify separate bargaining units was arbitrary and inconsistent with long-established precedent.”).

Davidson maintained this position throughout oral argument. When Judge Randolph asked “[i]f you had to put the front desk people into the single unit [requested in the first petition for certification], why isn’t that also the death knell for the two units [requested in the second petition for certification],” counsel for Davidson unambiguously answered, “[w]e believe it is.” Tr. 10:20. Throughout the oral argument, counsel for Davidson consistently argued that certification of separate units is inappropriate. *See, e.g.*, Tr. 8:20–9:1, 10:1–4, 10:17–20, 12:12–17. The Union’s assertion (at 4) that “Employer’s counsel conceded that the ‘food and beverage unit is okay’” misrepresents the record, and the Union conspicuously failed to include the transcript for the Court to confirm its representations.<sup>2</sup> Davidson has attached the transcript for the Court’s review.

Along with ignoring multiple statements from Davidson’s counsel to the contrary, the Union’s contention also rips an answer to a hypothetical out of context. When considering a hypothetical posed by the Court on the certification

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<sup>2</sup> To the same end, the Union’s claim that Davidson conceded during the administrative proceedings that the food and beverage unit is appropriate (at JA-294) misstates the record. Davidson has always argued that separate units are improper. JA-294 (“[I]t is inappropriate to have separate petitions for Housekeeping and a separate petition for Food and Beverage and exclude others, exclude other members.”). Davidson’s position has been that any subset of food and beverage, housekeeping, or front desk is an improperly fractured unit, but (and in the alternative) that creating a unit with housekeeping but without front desk is especially fractured and “wholly incomplete.” JA-294.

of two units, counsel for Davidson answered that front desk and housekeeping should be in one unit and food and beverage in a second unit. *See* Tr. 12:12–13:9. Counsel clearly stated that “if the Court doesn’t find that the only appropriate unit at this hotel includes food and beverage, housekeeping, and front desk, then alternatively, it should find that housekeeping needs to include...front desk.” Tr. 12:12–17. But Davidson’s willingness to engage the hypothetical, rather than fighting the premise as so often happens in oral argument, does not mean Davidson agreed that the food and beverage unit is appropriate. Nor did the Court misapprehend Davidson’s answer as a concession that the food and beverage unit is appropriate. Tr. 13:5–8 (recognizing Davidson’s answer as an “alternative argument”). As noted above, Davidson’s position has consistently been that separate units are inappropriate because of the shared community of interest between all three sets of employees.

To further clarify, the food and beverage unit is not appropriate for several reasons. First, the food and beverage unit should not be carved out from the Court’s opinion because the Board failed to provide the required *clear* and *reasoned* explanation on why employees in the food and beverage unit do not share a community of interest with excluded employees, such as those in the front desk and housekeeping. From the Board’s opinion, it is not clear why sharing several significant factors (such as the same terms and conditions of employment, same orientation, same scheduling policies, and the same general manager) does not require all employees to be in one hotel-wide unit as in *Ramada Beverly Hills*. This error is fatal, as the Court already held. *Davidson*, 977 F.3d at 1293.

Second, the food and beverage unit is not appropriate because of the community of interests between those employees and the excluded employees. *See* Opening Br. 18–28; Reply Br. 12–13. In considering what common interests matter in terms of collective bargaining, that all of these employees are under centralized management from the hotel’s general manager and centralized personnel policies operated by the HR department is significant. While it makes little sense to distinguish between whether an employee washes plates (such as kitchen personnel) or washes linens (such as housekeepers), it does matter that both of these sets of employees are subject to the same terms and conditions, subject to the same scheduling policies, subject to some of the same working environment (including cafeteria, locker rooms, employee entrance, parking lot), subject to the same orientation, and more. These shared conditions make it inappropriate to have employees classified into separate units for collective bargaining. And if separate units are appropriate, then at the very least the Board must clearly explain why. Because the Board failed to do this, the Union’s invitation to carve out the food and beverage unit should be denied.

### **III. The Court Did Not Overlook or Misapprehend Any Point of Law**

#### **A. The Court Correctly Held That The Board Must Distinguish Contrary, Analogous Precedent, And The Board Failed To Do So**

In precedent cited in the Union’s petition for panel rehearing, this Court held that when “a party makes a significant showing that analogous cases have been decided differently, the agency must do more than simply ignore that argument.” *Point Park Univ. v. NLRB*, 457 F.3d 42, 49 (D.C. Cir. 2006); *see* Pet. 6. In

*Point Park*, this Court found “fault with the Board’s analysis” and held that “without a *clear presentation* of the Board’s reasoning, it is not possible for us to perform our assigned reviewing function and to discern the path taken by the Board in reaching its decision.” *Id.* at 50 (emphasis added).

The Union does not dispute this Court’s finding that “[n]either the Regional Director nor the Board distinguished contrary Board precedents or the Regional Director’s first decision in this case.” *Davidson*, 977 F.3d at 1293. And even a cursory review of the agency decisions confirms the correctness of the Court’s conclusion: none of the decisions mention—much less discuss or distinguish—contrary precedent such as *Ramada Beverly Hills* and *Atlanta Hilton*. See JA-222 (Regional Director’s decision on the first petitioned-for unit); JA-304, JA-324 (Regional Director’s set of decisions on the second petitioned-for units); JA-546 (NLRB’s decision).

The Union’s contention (at 12–13) that *Ramada Beverly Hills* was cited “as an example of the Board considering a prior unit determination decision” is wrong. *Ramada Beverly Hills* is directly on-point because of the overwhelming factual similarities in the proposed bargaining units and the hotels’ organization and practices with regard to those units, not merely because the Board considered two petitions. Just as in this case, *Ramada Beverly Hills* concerned a full-service hotel operated under a general manager where the union petitioned to certify separate bargaining units, with one unit for housekeeping and maintenance and the second unit for food and beverage. Like here, the union excluded front desk and the employer argued that only a single unit was appropriate. The

Board agreed. *See* Opening Br. 30. The Board in *Ramada Beverly Hills* rejected the union's argument for separate units because the employees' "common objective is to provide a highly integrated group of services, directly and indirectly, for the hotel's guests" and the general manager structure and centralized personnel department "militates against a finding that the Employer's operation can be compartmentalized into separate, autonomous units." 278 N.L.R.B. at 692. Despite this precedent and a specific argument from Davidson about the similarity, the Board never explained why Davidson's hotel operation is not functionally integrated like the hotel in *Ramada Beverly Hills*.

Having no argument that the Court applied the wrong legal standard or that the Board actually did distinguish contrary precedent, the Union resorts to arguing that readily distinguished precedent can be ignored. This claim is just rearguing the merits and is not grounds for rehearing. Even there, the Union almost ignores the failure of the Board to provide any explanation for its decision and instead focuses almost exclusively on the reasoning employed by the Regional Director between his first decision and second set of decisions. *See* Pet. 6 ("[T]he Regional Director did not need to cite contrary precedent regarding the food and beverage unit because the precedent is readily distinguishable."); Pet. 13 ("The Regional Director and the Board did not need to cite to contrary precedent.").

The Union's position that relevant, contrary precedent can be ignored is also meritless. To satisfy its obligation to provide a clear and reasoned decision, the Board "must discuss precedent directly on point" because a decision "that

departs from established precedent without a reasoned explanation is arbitrary.” *Sw. Reg’l Council of Carpenters*, 826 F.3d at 464. Contrary to the Union’s position, “the Board ‘cannot ignore its own relevant precedent but must explain why it is not controlling.’” *LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 60 (D.C. Cir. 2004); *see also Int’l Union of Operating Eng’rs, Local 147, AFL-CIO v. NLRB*, 294 F.3d 186, 188 (D.C. Cir. 2002) (“The Board has an obligation to engage in reasoned decisionmaking” and must “give a reasoned explanation when it departs from its own precedent.”). And when the Board “is applying a multi-factor test through case-by-case adjudication,” “[t]he need for an explanation is particularly acute.” *LeMoyne*, 357 F.3d at 61. The Court correctly apprehended that “when faced with contrary precedent directly on point, the Board must distinguish it.” *Davidson*, 977 F.3d at 1294.

The Court thus correctly granted Davidson’s petition for review because “the Board failed to cite—let alone distinguish—a single contrary precedent even though Davidson cited several Board precedents that rejected separate units of hotel employees under similar circumstances. Despite that showing, there is no paragraph, sentence, citation, or footnote that distinguishes these decisions” and “this failure is fatal.” *Id.* at 1293 (footnote omitted).

#### **B. The Court Correctly Rejected The Union’s Post Hoc Explanation**

Recognizing that the Board failed to provide a clear and reasoned decision as required under established precedent, the Union’s petition for rehearing seems to focus on backfilling the missing explanation. To this end, the Union goes on for several pages on why the Court’s holding does not apply to the food

and beverage employees because of similarities and dissimilarities among various sets of employees. *See* Pet. 6–13. This argument misses the mark.

First, counsel is barred from providing the missing explanation. It is well-established that counsel cannot fill-in gaps in the Board’s decision on appeal because “courts may not accept appellate counsel’s *post hoc* rationalizations for agency action.” *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *Temple Univ. Hosp., Inc. v. NLRB*, 929 F.3d 729, 734 (D.C. Cir. 2019); *Yukon-Kuskokwim Health Corp. v. NLRB*, 234 F.3d 714, 718 (D.C. Cir. 2000). The Board’s decision can only be upheld “on the same basis articulated in the order by the agency itself.” *Burlington Truck Lines*, 371 U.S. at 169. Because the Union’s counsel cannot fill-in the missing explanation, the Court need not wade into the details of whether certain sets of employees are similar or dissimilar to other sets of employees. The entire endeavor is an exercise in futility because, as the Court already observed, “the explanation *must come from the Board itself*.” *Davidson*, 977 F.3d at 1293 n.2 (emphasis added). The Board failed to explain itself, and counsel (for either the Union or the Board) cannot cure that failure now. The proper cure is remand.

Second, the Union’s explanation also fails on its own terms.<sup>3</sup> In a nutshell, the Union’s argument is that “the [Regional Director’s] prior ruling charted the

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<sup>3</sup> Because the Board’s failed to provide a reasoned explanation for its decision, the Court declined to “address Davidson’s other challenges to the Board’s decision.” *Davidson*, 977 F.3d at 1294 n.4. The Union’s renewed attempt to reach these factual questions—such as whether one set of employees is similar or not to another set of employees—should be rejected for the same reason that the Court did not reach these issues previously.

course for the latter rulings” and thus “the path is readily discernible.” Pet. 13. Not so. For one thing, the Regional Director never mentioned in either the first decision or the second set of decisions why contrary precedents, such as *Ramada Beverly Hills* and *Atlanta Hilton*, are not controlling. This alone is reason to reject the Union’s explanation—the Regional Director’s decisions even when read together do not explain why a single bargaining unit is not required here when under similar factual circumstances a single bargaining unit was required in *Ramada Beverly Hills*. This fundamental error of ignoring Board precedent has infected the Board’s treatment of this case at every stage.

For another, the Regional Director’s failure to distinguish his own prior opinion is not cured by reading the decisions together. In the first decision, the Regional Director found multiple reasons why the food and beverage employees, housekeeping employees, and front desk employees shared a community of interest such that the first petitioned-for unit (housekeeping and food and beverage) was inappropriate. He explained that all three sets of employees (1) share the same terms and conditions, (2) have daily contact in the employee entrance, employee cafeteria, locker rooms, and parking lot, (3) are all scheduled based on hotel occupancy, (4) receive the same orientation, and (5) have interchange among employees, such as when front desk works banquets with food and beverage or front desk strips sheets with housekeeping. JA-231. Because of these similarities, the Regional Director concluded that excluding front desk employees from the petitioned-for unit was improper. *Id.*

Because the second set of decisions failed to explain why the similarities

above were outweighed by other similarities shared among subsets of employees, the second set of decisions read with the first decision does not provide the required *clear* and *reasoned* explanation for why a bargaining unit is appropriate. *Cleveland Const., Inc. v. NLRB*, 44 F.3d 1010, 1016 (D.C. Cir. 1995) (an agency must provide a “clear presentation” because the court “cannot uphold silence.”). As the Court has explained, when applying a multi-factor test, such as the *PCC Structurals*’ community of interest test, the need for an explanation on what factors matter is particularly acute. *LeMoyne*, 357 F.3d at 61. But here there was no explanation at all for why one factor is more important than another factor.

For example, food servers and front desk personnel both provide guest-facing services, such as handling payments for food in the restaurant or the snack bar. In contrast, kitchen personnel and housekeepers do not provide guest-facing services; instead, both share the similarity of cleaning the hotel, such as through washing plates and washing linens. Yet despite these similarities and dissimilarities, food servers and kitchen personnel are classified into a unit while housekeepers and front desk staff are excluded. And there is no explanation in the decisions below for why this is appropriate under *PCC Structurals* or consistent with other Board precedent to the contrary.

Piecing any reasoning together based on the Regional Director’s decisions fails on the merits because it leaves the Court and counsel guessing as to what factors mattered for certification of the separate units, and “[i]t will not do for a court to be compelled to guess at the theory underlying the agency’s action; nor can a court be expected to chisel that which must be precise from what the

agency has left vague and indecisive.” *SEC v. Chenery Corp.*, 332 U.S. 194, 196–97 (1947). Instead of accepting the Union’s invitation to dig through job descriptions for cooks, servers, housekeepers, room attendants, front desk staff, bellman, and other employees to sort out the similarities and dissimilarities among every job class to make sense of the Board’s silence and reconcile the Regional Director’s inconsistent decisions, this Court should remand for the Board to provide a clear and reasoned explanation. The Union’s petition for rehearing fails to identify any misapprehension of law and should be denied.

### **Conclusion**

The Union fails to show that the Court misapprehended or overlooked any point of law or fact. The petition for panel rehearing should be denied.

Dated: January 29, 2021

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Respectfully submitted,

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**Certificate of Service**

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: January 29, 2021

/s/ Mark W. DeLaquil  
Mark W. DeLaquil

*Counsel for Davidson Hotel Company*

**Certificate of Compliance**

I HEREBY CERTIFY that this response complies with the type-volume limitation of Fed. R. App. P. 40(b) because it contains 3,397 words, excluding the parts of the response exempted by Fed. R. App. P. 32(f). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14-point Calisto MT font, a proportionally spaced typeface.

Dated: January 29, 2021

/s/ Mark W. DeLaquil  
Mark W. DeLaquil

*Counsel for Davidson Hotel Company*

**Corporate Disclosure Statement**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioner Davidson Hotel Company, LLC (Chicago Marriott at Medical District/UIC) (“Davidson” or the “Hotel”) hereby states that it is a limited liability company engaged in the business of hotel management. Davidson has no parent company, and no publicly traded entity owns 10% or more of Davidson’s stock. Davidson was formed in the State of Delaware and is qualified to do business in all of the states where it operates hotels. The sole member of Davidson’s limited liability company is Monroe DHH Holdings, LLC, which is also a limited liability company formed in Delaware.

Dated: January 29, 2021

/s/ Mark W. DeLaquil  
Mark W. DeLaquil

*Counsel for Davidson Hotel Company*

# EXHIBIT

Oral Argument Transcript

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 19-1235, et al.  
  
Thursday, September 10, 2020  
  
Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:  
  
        CIRCUIT JUDGES ROGERS AND RAO, AND SENIOR CIRCUIT JUDGE RANDOLPH

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        ON BEHALF OF THE PETITIONER:  
  
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P R O C E E D I N G S

THE CLERK: Case No. 19-1235, et al., Davidson Hotel Company, LLC, Chicago Marriott at Medical District/UIC, petitioner, versus National Labor Relations Board. Mr. DeLaquil for the petitioner. Ms. Isbell for the respondents. Mr. Treadwell for the intervenor.

JUDGE ROGERS: Good morning.

ORAL ARGUMENT OF MARK W. DELAQUIL, ESQ.

ON BEHALF OF THE PETITIONER

MR. DELAQUIL: Good morning, and may it please the Court, counsel, Your Honors, I'm Mark DeLaquil, arguing on behalf of the petitioner, Davidson Hotel Company. The fundamental error in the NLRB's decision in this case is its lack of consistency with prior decisions on the appropriate composition of a bargaining unit at a full-service hotel. First, the decision is irreconcilable with NLRB precedent in Ramada Beverly Hills. Second, the decision is inconsistent with the court's -- with the Board's reasoning in denying a previous petition of the union to certify a bargaining unit including both housekeeping and food and beverage employees at this hotel, and the inevitable result of these inconsistent decisions is a fractured bargaining unit that does not include front desk employees and that, while putatively including separate units of housekeeping and food and beverage, is being treated functionally as a single

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1 unit.

2 First, I'd like to address the NLRB's precedent in  
3 Ramada Beverly Hills. Our position is that this case is on  
4 all fours with Ramada Beverly Hills. First, concerning the  
5 critical topic of functional integration, both the hotel in  
6 this case and Ramada Beverly Hills employed a single general  
7 manager with final hiring and firing authority as well as  
8 final authority over policy at the hotel. Second --

9 JUDGE ROGERS: Well, let me ask you, in -- the  
10 Board referenced opinions Lodgian and Western Lodging,  
11 correct?

12 MR. DELAQUIL: It did, Your Honor.

13 JUDGE ROGERS: All right. And when you look at  
14 those opinions, the Board reviews its full-service small  
15 hotel cases, specifically Ramada Beverly Hills, Ramada  
16 Atlantic, Ramada Inn West, and it talks about what it looks  
17 for to come within that kind of precedent, and it says  
18 specifically what it's looking for, and the findings here  
19 were that those elements did not exist here, in the Davidson  
20 Hotel.

21 MR. DELAQUIL: And those findings, Your Honor, are  
22 unsupported by substantial evidence, and I'd like to address  
23 briefly Western --

24 JUDGE ROGERS: Counsel, that's a different  
25 argument. Your argument was that the Board's decision was

1 irreconcilable with its precedent, but --

2 MR. DELAQUIL: That's --

3 JUDGE ROGERS: -- I'm saying at least the Board  
4 cited cases where it distinguished its precedent, including  
5 Ramada Beverly Hills.

6 MR. DELAQUIL: Your Honor, the standard of review  
7 for a decision like this, as articulated in Blue Man Vegas  
8 and other cases, is whether the Board's decision is  
9 arbitrary or unsupported by substantial evidence. With  
10 regard to the Board's distinctions of Ramada Beverly Hills,  
11 the distinctions are unsupported by substantial evidence,  
12 which makes its decision arbitrary, i.e., irreconcilable  
13 with the Ramada Beverly Hills cases, and with respect to the  
14 Western Lodging and Lodgian cases, there are serious  
15 distinctions that make this case far more like Ramada  
16 Beverly Hills, even on the record the Board found.

17 In Western Lodging there was no centralized  
18 management and hiring by division supervisors, which cuts  
19 far against the type of functional integration that you see  
20 at this hotel, and in Lodgian the Board's decision was  
21 influenced by a factor, of which there's no evidence in the  
22 record in this case, which is regional industry practice  
23 about the appropriate compositions of bargaining units.  
24 That was a key factor in several of the decisions cited by  
25 the NLRB and the union, including Lodgian as well as Omni.

1 JUDGE ROGERS: All I'm getting at is that there  
2 are distinctions but the findings as to the Davidson Hotel  
3 discussed the nature of the management control, the nature  
4 of transfers between employees and, in the Board's view,  
5 found that that type of management structure and transfer,  
6 for example, did not exist at the Davidson Hotel, and you  
7 argue, as I understand it, that those findings are  
8 unsupported by evidence in the record.

9 MR. DELAQUIL: And I think what I -- the core of  
10 my argument is that those findings are irreconcilable with  
11 Ramada Beverly Hills because they are not in fact  
12 inconsistent with what happened in Ramada Beverly Hills and,  
13 if they were viewed to be inconsistent -- and I don't  
14 necessarily view them to be inconsistent -- that they would  
15 then be unsupported by substantial evidence.

16 So I'd like to address the specific factual  
17 findings of this case and Ramada Beverly Hills to show the  
18 similarities in the key topics that go to determining  
19 whether it's appropriate to exclude a unit of employees like  
20 the front desk employees. First is functional integration.  
21 Both hotels employed a single general manager with final  
22 hiring and firing and policy authority as well as a rotating  
23 manager-on-duty authority system that made the heads of  
24 different groups of employees at the hotel in charge of the  
25 hotel when the general manager was not there. Second were

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1 common terms and conditions. In both cases there are common  
2 terms and conditions that govern all employees. Third is  
3 functional integration to perform services for the guests,  
4 and here is where I think some of the substantial evidence  
5 issue comes in.

6 If you look at Ramada Beverly Hills and other  
7 decisions like Atlanta Hilton and Western Hotel, the core to  
8 functional integration isn't whether there is some type of  
9 job overlap between employees; it's whether all of the  
10 employees are being directed by a central management to  
11 serve the ultimate goal of the employer at the facility --  
12 in this case, to provide a seamless experience for the  
13 hotel's guests.

14 JUDGE ROGERS: But isn't that true of all hotel  
15 employees? When I go to a hotel, I may see the doorman and  
16 I ask him where's the restaurant and I ask him who's the  
17 best, you know, whatever. So I don't understand this  
18 seamless experience when the Board has acknowledged that  
19 approach but broken down some of these things, and at least  
20 it found that your general manager did not have the type of  
21 control in these units that it held were appropriate. That  
22 was true in some of these other hotels, and you're saying  
23 that is a finding that is unsupported by substantial  
24 evidence?

25 MR. DELAQUIL: It is unsupported by substantial

1 evidence inasmuch as it is viewed different than Ramada  
2 hotels, and I, I heard two points in your question, Judge  
3 Rogers. The first is whether all hotels aim to provide a  
4 seamless experience for their guests through central  
5 management, and I don't think that's necessarily the case.

6 JUDGE ROGERS: No, I didn't say that. What I was  
7 trying to get at is that all of these hotels, especially  
8 these small hotels, are trying to make the guest happy. All  
9 right? That --

10 MR. DELAQUIL: I agree with that.

11 JUDGE ROGERS: -- that doesn't mean that there  
12 can't be appropriate units.

13 MR. DELAQUIL: I agree, Your Honor, that trying to  
14 make the guest happy is not mean that it would be  
15 appropriate to have any particular bargaining unit, but  
16 where there is substantial interaction between the employees  
17 -- in this case the Board found regular daily interaction  
18 between the front desk as well as the housekeeping and food  
19 and beverage employees, and there's a centralized  
20 management, and the management is virtually identical in  
21 Ramada Beverly Hills and this hotel with the general manager  
22 and the manager-on-duty system -- that that's the type of  
23 functional integration the Board has looked at to find that  
24 there is -- it is not appropriate to have separate  
25 bargaining units of the housekeeping and the food and

1 beverage industries.

2 JUDGE RAO: So is your -- I mean, are you focusing  
3 more on the lack of substantial evidence here or on the  
4 Board's failure to adequately distinguish its other  
5 precedents, you know, along the lines of LeMoyne-Owens and  
6 other cases like that? Are you making -- are those two  
7 distinct arguments? I'm not clear from what you're saying  
8 if you're viewing them as part of the same argument or if  
9 they're two distinct arguments.

10 MR. DELAQUIL: I think, Your Honor, our argument  
11 is primarily -- and I apologize if this was not clear  
12 earlier -- that this -- that the decision here is not  
13 reconcilable with Ramada Beverly Hills, so the former, and  
14 in response to certain specific factual points, we believe  
15 that they are unsupported by substantial evidence, but even  
16 if you take the Board's findings as a whole, we believe they  
17 are still -- the specific factual findings that it made as  
18 opposed to the ultimate conclusions, applying the law to  
19 those facts -- are irreconcilable with Ramada Beverly Hills.

20 JUDGE RAO: And you raised those claims before the  
21 Regional Director --

22 MR. DELAQUIL: We did.

23 JUDGE RAO: -- as well as the Board?

24 MR. DELAQUIL: We raised those claims before the  
25 Regional Director and the Board, and the Board split 2:1 on

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1 those claims with Member Emanuel dissenting. He would have  
2 found, as we argued, that the only appropriate bargaining  
3 unit at this hotel includes both food and beverage and front  
4 desk.

5 JUDGE RANDOLPH: Can I, just so I understand, I  
6 thought your argument was, number one, in the first  
7 go-round, the reason that the Regional Director rejected the  
8 two units was -- or the single unit was because it didn't  
9 incorporate the front desk employees. Is that correct?

10 MR. DELAQUIL: That's correct, and we do  
11 believe --

12 JUDGE RANDOLPH: Okay.

13 MR. DELAQUIL: -- that the decision -- the second  
14 decision to certify the separate housekeeping and food and  
15 beverage units was inconsistent with the reasoning of the  
16 NLRB's first decision.

17 JUDGE RANDOLPH: If you had to put the front desk  
18 people into the single unit, why isn't that also the death  
19 knell for the two units?

20 MR. DELAQUIL: We believe it is, and we believe,  
21 if you look -- and this is on page 231 of the joint  
22 appendix, and this the second inconsistency, Your Honor --  
23 if you look at page 231 of the joint appendix, the Regional  
24 Director listed five reasons why it was inappropriate to  
25 exclude front desk employees: First, they had substantially

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1 the same terms and conditions. That applies whether you  
2 have separate units for housekeeping and food and beverage.  
3 Second, there was regular contact between employees to serve  
4 guests. That also applies whether or not you have separate  
5 housekeeping and food and beverage units. Third, the  
6 employees were scheduled based on hotel occupancy. That  
7 applies equally, whether you have separate front -- or food  
8 and beverage and housekeeping units. Fourth, the employees  
9 had the same orientation. That applies equally, whether you  
10 have separate food and beverage and housekeeping units. And  
11 fifth, that there was some interchange between front desk  
12 and housekeeping as well as front desk and food and  
13 beverage. That applies equally, whether you have separate  
14 food and beverage --

15 JUDGE RANDOLPH: I had --

16 MR. DELAQUIL: -- and housekeeping units.

17 JUDGE RANDOLPH: Okay. I had a third question to  
18 the follow-up. If in fact the front desk employees, and by  
19 law, should have been included in the single unit and, also,  
20 in the original opinion, the Regional Director said that it  
21 was appropriate to separate out the food and beverage and  
22 the room service, or the room people, correct, then what  
23 unit would you put the -- if you have two units, which is  
24 what was -- you can have two units, which was what was  
25 suggested in the original opinion. What unit, if you tried

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1 to put -- and the union tried to put two units, or separate  
2 the units -- what unit would you put the front desk people  
3 in?

4 MR. DELAQUIL: They would go with housekeeping,  
5 Your Honor --

6 JUDGE RANDOLPH: All right.

7 MR. DELAQUIL: -- and that's an alternative  
8 argument we've made, and the reason --

9 JUDGE RANDOLPH: Right. And so, so -- let me just  
10 understand -- why doesn't that mean that the beverage unit  
11 is okay?

12 MR. DELAQUIL: And that is our alternative  
13 argument, is that if the Court doesn't find that the only  
14 appropriate unit at this hotel includes food and beverage,  
15 housekeeping, and front desk, then alternatively, it should  
16 find that housekeeping needs to include food and -- or  
17 excuse me, housekeeping needs to include front desk.  
18 They're part of the same rooms division at the hotel, and  
19 there's substantial interchange between those units, but you  
20 know, in particular, you know, there are substantial  
21 similarities there.

22 I would say, as to the consistency of the  
23 decisions, we recognize that in an under-reasoned dicta  
24 footnote on the final page of the Regional Director's first  
25 decision, he suggests that a separate unit approach may be

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1 appropriate but we believe, when you consider the  
2 consistency of decisions, particularly in a single case, you  
3 need to go to the reasoning of those decisions, not to a  
4 footnote on the last page.

5 JUDGE RANDOLPH: But I -- my question remains,  
6 why, if -- accepting everything you've just said in your  
7 alternative argument, does that mean that the food and  
8 beverage unit is okay?

9 MR. DELAQUIL: Yes.

10 JUDGE RANDOLPH: Okay.

11 MR. DELAQUIL: I see that I'm out of time. If  
12 there are further questions, I'd be happy to answer them.

13 JUDGE ROGERS: Thank you. We'll hear counsel for  
14 the Board.

15 ORAL ARGUMENT OF KELLIE ISBELL, ESQ.

16 ON BEHALF OF THE RESPONDENT

17 MS. ISBELL: Thank you, Your Honor. May it please  
18 the Court, Kellie Isbell here on behalf of the National  
19 Labor Relations Board. In making a unit determination, the  
20 Board's task is to ensure that the petitioned-for units are  
21 an appropriate unit for bargaining, does not have to choose  
22 the most appropriate unit or the only appropriate unit, and  
23 this Court does not overturn Board unit determinations  
24 unless Davidson has proved that those units are truly  
25 inappropriate, which it has not done on this record.

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1           So if we look at each unit individually, the  
2 housekeeping unit and the food and beverage unit, each of  
3 those units, the Board determined, share an internal  
4 community of interest. They are separately supervised.  
5 They have different skills, different functions, different  
6 training. Then the Board compared those two units to the  
7 front desk employees to see whether or not the differences  
8 between the housekeeping, the food and beverage, and the  
9 front desk, whether or not their differences outweighed  
10 their similarities and determined on the basis of this  
11 record that they do.

12           All three -- I'll just call them units for sake of  
13 ease in speaking -- all three groups of employees, or units,  
14 have separate supervision. There is a general manager who  
15 is over the hotel, but each one of those groups of employees  
16 has a separate manager who is over their work lives, who  
17 decides whether or not to discipline them, who has initial  
18 hiring authority. Each of those groups of employees has  
19 different functions, different jobs within the hotel. They  
20 work somewhat different hours. They have different  
21 training. The food and beverage people have alcohol and  
22 food handling licensing requirements. Front desk employees  
23 get customer service training that the housekeeping  
24 employees don't get.

25           The Regional Director found that yes, this hotel

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1 has some functional integration, but when we're talking  
2 about functional integration, we're not talking about just  
3 whether or not there's a general manager over the hotel.  
4 We're talking about whether or not the employees, how  
5 closely they work together to accomplish a single task. So  
6 housekeepers go clean the rooms. Of course they work in  
7 conjunction with the front desk because, if the front desk  
8 doesn't check people into the hotel, there is no room to  
9 clean. They put the -- I'm sorry. Judge Rao, you --

10 JUDGE RAO: Oh, yes. I mean, I guess, you know,  
11 on a lot of these, you know, factual determinations about  
12 how the hotel works together, of course the Board -- you  
13 know, we defer to a lot of the Board's factual findings in  
14 this area, but I'm concerned about the fact that, that they  
15 raised a number of cases, you know, the cases that were just  
16 discussed by petitioner --

17 MS. ISBELL: Yes.

18 JUDGE RAO: -- that the Board did not address,  
19 right, and it seems that the Board has some obligation,  
20 under LeMoyné-Owens and other cases, to distinguish -- to  
21 distinguish other cases. I mean, if they're going to be  
22 deciding and adjudicating cases on a case-by-case basis and  
23 petitioner raises cases that are arguably very similar  
24 facts, doesn't the Board have an obligation to distinguish  
25 those other cases --

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1 MS. ISBELL: Well --

2 JUDGE RAO: -- and wouldn't that, at a minimum,  
3 require, then, at least a remand to the Board to distinguish  
4 those earlier precedents?

5 MS. ISBELL: I don't recall that they explicitly  
6 raised the issue that the Regional Director did not  
7 distinguish certain cases. I mean, I would have to go back  
8 through the decision and direction of election to make sure  
9 he didn't mention Atlanta Hilton, but in --

10 JUDGE RAO: Well, I think the briefing is pretty  
11 clear that they raised these cases and distinguished them in  
12 an -- you know, in a number of ways.

13 MS. ISBELL: But, I mean, a different issue. If  
14 the argument is actually that the Board failed in its -- or  
15 the Regional Director here failed in his responsibility to  
16 adequately distinguish cases, that has to be raised, but  
17 when -- I don't --

18 JUDGE RAO: Are you saying they didn't raise that  
19 issue?

20 MS. ISBELL: That particular legal issue, no, Your  
21 Honor.

22 JUDGE RANDOLPH: Are you talking raising before  
23 the Board or raising in this Court?

24 MS. ISBELL: Raising before the Board.

25 JUDGE RANDOLPH: Right.

1 MS. ISBELL: They have to file -- if they believe  
2 the Regional Director made either an incorrect factual  
3 finding or an incorrect legal finding, they have to raise  
4 that before the Board, and they filed exceptions to the  
5 Regional Director's decision in direction of election, but  
6 the Regional Director went through many cases and showed why  
7 this is not the kind of case where functional integration  
8 required him to put all these employees together.

9 Functional integration, in a case like Atlanta  
10 Hilton, the general manager there had control over minor  
11 details such that he was controlling how elevator doors were  
12 cleaned. In Ramada Beverly Hills, there was substantial  
13 interchange between employees. Housekeeping employees and  
14 bell staff, who are attached to the front desk, were both  
15 delivering food throughout the hotel. Bell staff and front  
16 desk assisted with housekeeping. So those kinds of findings  
17 are just not here.

18 The front desk, I think the testimony is that  
19 maybe three times a year, when the hotel is severely  
20 overcrowded, they might have to strip beds, but cleaning  
21 hotel rooms is not part of their job. The housekeeping  
22 group does not fill in for the front desk; they do not do  
23 anything at the front desk. Food and beverage employees  
24 don't assist the housekeepers. What we have is a little bit  
25 of contact, which the Regional Director acknowledged, and

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1 some functional integration, because it is a hotel and  
2 everyone is trying to ensure that there is a good guest  
3 experience, but doing a particular task, like preparing a  
4 meal or serving a drink or cleaning a hotel room, you do not  
5 need the front desk to come and help you do that. You need  
6 them to check in people. You need them to do their own  
7 work, and that's the difference between the kind of  
8 functional integration in a case like Atlanta Hilton or  
9 Ramada Beverly Hills.

10           So here the Board did two types of analysis,  
11 right? You first have to determine that the employees in  
12 the petitioned-for unit share a community of interest.  
13 Clearly, they do. Housekeeping and food and beverage units  
14 are traditional industry units. Then it looked at whether  
15 or not they are different from the front desk. Just sharing  
16 similar terms and conditions of employment is not enough to  
17 require the Board to put everyone together and it does not  
18 show that the units are truly inappropriate. They use the  
19 same parking lot, they use the same cafeteria, they clock in  
20 at the same time clock, but they do not have the same  
21 supervision, they do not have the same hours necessarily,  
22 they don't do the same jobs.

23           So I'm not sure if Your Honors have additional  
24 questions for me on this issue. Did -- should we talk a  
25 little bit about the first case? I think there was some

1 concern about the initial Regional Director's decision here  
2 and why the two cases are different and why they came out  
3 differently.

4           In the very first case, the union petitioned for a  
5 combined -- or petitioned for a combined unit of  
6 housekeeping and food and beverage, leaving out the front  
7 desk. The Regional Director did the same analysis he did  
8 here: Do those two groups of employees share a community of  
9 interest? Yes, same terms and conditions of employment,  
10 same parking lot, same time clock, the same general manager,  
11 but when you compare them to the front desk, that's when the  
12 differences appear, because the front desk also uses the  
13 same time clock, same cafeteria, same parking lot, have  
14 almost the same terms and conditions of employment as -- I'm  
15 sorry.

16           JUDGE RAO: Oh. So I was just looking, looking  
17 through the materials here, and it does seem that they  
18 raised this question about the departure -- the Regional  
19 Director's departure from Board precedents before the Board.  
20 In its request for review, they say in their -- in one of  
21 their headers, and then have further discussion, substantial  
22 question exists concerning the legality of the unit based on  
23 the RD's departure from the Board's precedent. So it does  
24 seem that they raised it before the Board.

25           MS. ISBELL: Then, my apologies, because sometimes

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1 those requests for review can be a little long and I don't  
2 remember everything. I think the Regional Director here  
3 adequately distinguished the, the precedent. Remember,  
4 hotel cases, almost every unit determination case, they're  
5 decided on their facts and they're decided on a case-by-case  
6 basis, and the Regional Director was very clear about why he  
7 made the functional integration decision he made in this  
8 case. He relied on cases that are very similar to this  
9 case, and the fact that he didn't distinguish very specific  
10 cases, I don't think that that -- that does not show that he  
11 didn't do his due diligence in reviewing the law in this  
12 area and applying that law to these facts, which show that  
13 there is not enough functional integration to require the  
14 Board to find that individual units of housekeepers and food  
15 and beverage are truly inappropriate. Remember, it just has  
16 to be an appropriate unit for bargaining.

17 JUDGE RANDOLPH: What was the Regional Director's  
18 rationale for not including the front desk employees in  
19 either the beverage or the housekeeping units?

20 MS. ISBELL: His -- first of all, you start with  
21 the petition for a unit, right? So that's your starting  
22 place, and the front desk employees have no more community  
23 of interest with either group. They have very -- they have  
24 similar terms and conditions of employment, but there's  
25 nothing that require them to be in either -- in either

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1 group. They are separately supervised from the housekeeping  
2 employees. They're in the same room division, but the room  
3 division has no manager. They are each supervised by a  
4 separate, either the front desk supervisor or the  
5 housekeeping supervisor, and those two people report to the  
6 general manager. So they're at the same level of -- and  
7 other than that -- and the same, you know, terms and  
8 conditions of employment, time clock, parking lot, some  
9 interchange and some interaction during the day -- there's  
10 not --

11 JUDGE RANDOLPH: You realize that what you've just  
12 said is totally inconsistent with the original decision,  
13 saying you had to include the front desk employees?

14 MS. ISBELL: The original decision said that you  
15 couldn't have a -- you couldn't have a unit that was, that  
16 was a combined housekeeping and food and beverage without  
17 the front desk, because what they share, what all three  
18 groups share are the same. Does that make sense? I'm  
19 thinking of the Blue Man Vegas terms and conditions of  
20 employment.

21 JUDGE RANDOLPH: No, frankly, it doesn't.

22 MS. ISBELL: Okay. So you've got three groups of  
23 employees. They all share some things in common, some terms  
24 and conditions of employment. They all report to the  
25 general manager. They all work at the same hotel. Each

1 group shares those same things, but each group also has its  
2 own internal community of interest, which makes all three  
3 groups different from each other.

4           So if you take two of those groups and put them  
5 together, what they share they also share with the third  
6 group. So if you put front desk and food and beverage  
7 together, they do share some terms and conditions of  
8 employment and some community-of-interest factors but what  
9 they share they also share with the housekeepers. The  
10 differences between the three groups outweigh the  
11 similarities. That's the basis of the Board's findings in  
12 the first --

13           JUDGE RANDOLPH: Like, this rock is heavier than  
14 that string is long?

15           MS. ISBELL: If you want to put it that way,  
16 right, I mean, sharing the same -- some of the same terms  
17 and conditions of employment, because remember, the front  
18 desk now has lower -- higher wages and lower medical costs.

19           JUDGE RANDOLPH: Okay. I think I've got your  
20 argument. Thank you.

21           MS. ISBELL: Okay. Thank you. If there are no  
22 more --

23           JUDGE ROGERS: So to respond to what I think I  
24 understand is petitioner's argument, it said to the Regional  
25 Director, we're just like Ramada Beverly Hills, and the

1 Board never said no, you're not. What it did was to cite  
2 its decisions that discussed Ramada Beverly Hills, Ramada  
3 Atlanta, and a number of hotels, identifying the factors the  
4 Board interpreted those precedents to focus on.

5           What I think I hear in an argument, and I'll ask  
6 counsel for petitioner, is that -- and I heard my colleague  
7 discuss a Supreme Court case; it wasn't cited either -- but  
8 -- to the Board -- but the question is, from the point of  
9 view of this Court's review of the Board's decision, is it  
10 legal error, in the sense of being arbitrary and capricious,  
11 if the Board cites to authority distinguishing its precedent  
12 but doesn't specifically say, and your reliance, saying that  
13 you're exactly the same as Ramada Beverly Hills, is  
14 arbitrary and capricious; in other words, there has to be a  
15 separate paragraph, as it were, saying that petitioner is  
16 relying on Beverly Hills and we don't think that is a proper  
17 case on which to rely, even though in the cases we did cite,  
18 we pointed out why Beverly Hills is different? I just want  
19 to be sure what we're saying the Board has to do in response  
20 to the type of argument that was raised before the Board by  
21 petitioner as to Beverly Hills.

22           MS. ISBELL: Right. I, I don't know of any case  
23 that would require the Board to specifically address every  
24 single case raised. The Board is required to make -- to do  
25 reasoned decision-making, and on this record I don't think

1 that can be assailed. The Regional Director reviewed  
2 multiple cases and laid out all of the factors that the  
3 Board traditionally relies on in making  
4 community-of-interest decisions and, as you point out, Judge  
5 Rogers, went through cases that had -- themselves  
6 distinguished Atlanta Hilton and Ramada Beverly Hills in  
7 cases like this. I don't --

8 JUDGE ROGERS: I'm trying to understand what the  
9 rule would be were we to say that it would be inappropriate  
10 for an agency to cite its precedent, including that  
11 precedent on which petitioner relies, where petitioner is  
12 saying, essentially, we're just like Beverly Hills. I'm  
13 just trying to understand what the administrative principle  
14 would be here in that regard, because that's sort of what I  
15 hear petitioner's counsel arguing today and in its brief:  
16 You didn't talk about Beverly Hills; therefore, your  
17 decision is arbitrary and capricious.

18 MS. ISBELL: That may in fact be a better question  
19 for petitioner's counsel, because I don't know --

20 JUDGE ROGERS: Well, I --

21 MS. ISBELL: -- of any -- I'm sorry?

22 JUDGE ROGERS: I just wanted to be sure, since I  
23 won't be coming back to you -- I am going to ask  
24 petitioner's counsel -- but based on the questions from my  
25 colleagues and from me, to be sure we understood the

1 argument that petitioner's counsel is making, I wanted you  
2 to have an opportunity to say why that principle either is  
3 required or isn't required.

4 MS. ISBELL: I don't believe it is required, Your  
5 Honor. I mean, the Board is required to engage in reasoned  
6 decision-making. I don't know of any case that requires the  
7 Board, in a case where it is reviewing totality of  
8 circumstances tests to determine unit determinations, that  
9 it has to address very specific cases. Of course, if this  
10 were a case where someone raised PCC Structurals and the  
11 Board somehow didn't address the underlying unit  
12 determination test in this case, that's a different issue,  
13 but we're talking about very specific factual cases that the  
14 Board -- I don't, I don't know of any administrative law  
15 principle that would require the Board to literally  
16 distinguish every single case that --

17 JUDGE ROGERS: Not every single case. That's what  
18 I'm trying to distinguish on.

19 MS. ISBELL: Yes.

20 JUDGE ROGERS: Petitioner says you're wrong,  
21 you're wrong for all kinds of reasons and says your decision  
22 is inconsistent with Beverly Hills, and the Board's response  
23 is, look at what we've said about Beverly Hills and all  
24 these other cases in this opinion, and they cite that.

25 MS. ISBELL: That is enough, Your Honor.

1 JUDGE ROGERS: So, counsel -- excuse me. Did my  
2 colleagues have any further questions of --

3 JUDGE RANDOLPH: I don't.

4 JUDGE ROGERS: -- respondent's counsel?

5 MS. ISBELL: Thank you.

6 JUDGE ROGERS: All right. And intervenor comes  
7 next, I believe.

8 ORAL ARGUMENT OF RICHARD TREADWELL, ESQ.

9 ON BEHALF OF THE INTERVENOR

10 MR. TREADWELL: Yes. Thank you. So first I'd  
11 like to situate the two cases that the employer relies  
12 primarily upon, Ramada Beverly Hills and Atlanta Hilton,  
13 within the historical context of NLRB decision-making in  
14 this area. For 50 years, since at least 1970, the NLRB has  
15 found regularly, consistently that front desk employees are  
16 different. They're different because they don't do the  
17 manual labor that housekeepers and food and beverage  
18 employees engage in, and if you look at the cases the  
19 parties cite and the cases cited within those cases, by a  
20 margin of about 2 to 1, front desk employees are excluded.

21 So this is not a situation where the NLRB has gone  
22 back and forth on major rules like, like we've seen with  
23 graduate students, for example, being covered by the NLRA.  
24 This is -- this is a case where there has been remarkable  
25 consistency for half a century, and also --

1 JUDGE RANDOLPH: And so the original decision by  
2 the Regional Director was wrong?

3 MR. TREADWELL: That may be true. That's not --  
4 that's not what's at issue here. The --

5 JUDGE RANDOLPH: Well, it's at issue because -- to  
6 the extent that, that the same Regional Director, Mr. Ohr,  
7 should have distinguished or confessed error in the second  
8 go-round.

9 MR. TREADWELL: So, Your Honor, the, the first  
10 decision arose out of a petition that the union filed, that  
11 the union preferred a combined unit of housekeepers and food  
12 and beverage employees, but the Regional Director found that  
13 the commonalities between those two groups of employees were  
14 also shared with front desk employees, and so what makes  
15 sense to have those two to the exclusion of the third? They  
16 would have the -- that didn't make sense to the Regional  
17 Director, and that's consistent with the second decision,  
18 because once you separate those groups out, their internal  
19 communities of interest do differ enough from each other  
20 group that they can be bargained separately, and that's  
21 what's important here, is, are we going to have a stable  
22 bargaining relationship? Is the union securing the, the  
23 collective goods for each group of employees that makes  
24 sense? I mean, housekeepers have different interests from  
25 food and beverage employees and who have different interests

1 from front desk employees, and so that's what's important  
2 to, to keep in mind here.

3           So not only is there consistency across 50 years  
4 of case law, there's consistency between the two decisions  
5 of the Regional Director. Housekeeping employees, they work  
6 alone in rooms, they have different tools, they deal with  
7 cleaners, and so these are common areas that a union would  
8 bargain over that it wouldn't bargain over, you know, with  
9 front desk employees, and so the internal interests of each  
10 group are distinct and can be bargained separately.

11           To the employer's point that these will be  
12 functionally treated as a single unit, that is not supported  
13 by the record, and in fact, if the employer insisted that  
14 they be bargained separately, the union would have to do  
15 that. They -- it has a duty to bargain for each unit.  
16 That's what a bargaining unit is. So if the employer  
17 doesn't want them to be treated as one unit, it doesn't have  
18 to. It would be an unfair legal practice for the, for the  
19 union to insist on that.

20           I also wanted to clarify, the employer brought up  
21 an unfair labor practice charge that the, that the union  
22 filed and saying that the employer could not go through with  
23 benefits changes. If you look at those cases, Manor Care  
24 and Mercy Hospital, that is absolutely not true. If those  
25 were scheduled, the employer could go through with them, and

1 in fact, that charge was dismissed because the region found  
2 that those wage increases and benefits changes had not been  
3 scheduled. So we're left with discretionary wage increases  
4 that the employer gave to only front desk employees. It's  
5 treated them differently, shows they have a different  
6 community of interest.

7 I see that, that my time is up. If you have more  
8 questions, I'd be happy to address them.

9 JUDGE ROGERS: All right. I don't see any  
10 questions. Counsel for petitioner, would you like to offer  
11 rebuttal?

12 ORAL REBUTTAL OF MARK W. DELAQUIL, ESQ.

13 ON BEHALF OF THE PETITIONER

14 MR. DELAQUIL: First, I'd like to unmute, and now  
15 I'd like to offer rebuttal, and I want to start with the  
16 question that you asked my colleague Ms. Isbell, and that  
17 is, when does the Board have to address a precedent? And,  
18 you know, Ms. Isbell said, I think, what is essentially the  
19 right test, it has to be reasoned decision-making by the  
20 Board, but she also noted that you can't ignore the elephant  
21 in the room. She said you can't ignore PCC Structurals on  
22 community of interest, for example, because it's just too  
23 important, and I agree with that as well, and in this case,  
24 Ramada Beverly Hills, is that important due to the close  
25 similarities between the facts of the Davidson Hotel in

1 Chicago and Ramada Beverly Hills? I don't think that there  
2 is a -- we're dealing a lot with standards in this case as  
3 opposed to rules, and I don't think that there is a crystal  
4 clear rule about when a specific case has to be addressed,  
5 but when it's as close as Ramada Beverly Hills is to this  
6 case, for the Board's decision to be reasoned, it does have  
7 to address it. The Regional Director --

8 JUDGE ROGERS: So let me interrupt, counsel. What  
9 I'm trying to focus on -- and I think you misunderstood my  
10 question to counsel for respondent -- my point is that if in  
11 this case the employer says we are just like Ramada Beverly  
12 Hills and the Board's response is to cite a case in which it  
13 discusses Ramada Beverly Hills and a number of other cases  
14 in this same area, hotel cases, small hotel cases, are you  
15 saying that there can be no reasoned decision-making when  
16 the Board does that, because there must be a separate  
17 statement specifically saying, and this case is not Ramada  
18 Beverly Hills?

19 MR. DELAQUIL: In this case, because it's so  
20 close, I think that there does need to be a separate  
21 statement. I don't think that's a general rule for every  
22 case, but if you look at the Regional Director's decisions  
23 on J.A. 304, continuing on through J.A. 343, it's never  
24 mentioned. We raised it in exceptions to the Board. It's  
25 never mentioned.

1 JUDGE ROGERS: He cited cases that discussed.  
2 That's what I'm trying to get you to focus on. It's like  
3 the Supreme Court decides a case on day one and then it  
4 decides another case on day two and then another case comes  
5 up on day three, and so the court cites to its day two  
6 decision, which discusses its day one decision. Why isn't  
7 that adequate for reasoned decision-making, and your  
8 response is, no, there has to be a separate paragraph on the  
9 day one case, and I'm trying to understand what the  
10 rationale is behind that.

11 MR. DELAQUIL: The rationale is due to how similar  
12 the facts of the case -- the day one case in your  
13 hypothetical and the instant case is. That's the  
14 distinguishing factor.

15 I see that I'm out of time. I had a few other  
16 brief points if the Court is interested in hearing them, but  
17 if not, then I would rest.

18 JUDGE ROGERS: Sure.

19 MR. DELAQUIL: First, I'd like to address the  
20 point about internal communities of interest within food and  
21 beverage and housekeeping. Many of those were not in fact  
22 unit-wide interests. Ms. Isbell mentioned the alcohol  
23 training. That's something that some parts of the food and  
24 beverage unit got, like the servers and the bartenders, but  
25 not other parts of the unit, like the cooks and the

1 stewards. So those aren't the type of communities of  
2 interest that could outweigh the strong interest the front  
3 desk employees, with the same terms and conditions of  
4 employment, share with other members in the unit.

5 And --

6 JUDGE ROGERS: (Indiscernible.)

7 MR. DELAQUIL: And finally, back to Ramada Beverly  
8 Hills, there was some question about the degree of  
9 interchange, and again, the facts are very similar. In that  
10 case there was evidence of the bell staff assisting the  
11 housekeepers. That happens with regard to the bell staff at  
12 this hotel, which there's undisputed, also share  
13 responsibility for cleaning the parts of the hotel where  
14 they work. There's mention of assistance between the food  
15 and beverage, and in this case there is substantial  
16 assistance with front desk and food and beverage for banquet  
17 events. There was one employee who worked, I believe, 150  
18 hours. A front desk employee worked 150 hours in the food  
19 and beverage banquet's business over a two-year period  
20 relevant to the organizing. You know, these sort of  
21 picayune distinctions in the facts, every hotel is a little  
22 bit different, just like every fingerprint is a little bit  
23 different, but those type of picayune factual distinctions  
24 are not a reasoned basis for distinguishing the cases.  
25 Thank you.

WC

1                   JUDGE ROGERS: Thank you. We'll take the case  
2 under advisement.

3                   (Whereupon, the proceedings were concluded.)  
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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



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WENDY CAMPOS

DEPOSITION SERVICES, INC.

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January 22, 2021