

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 8**

**HORSESHOE CLEVELAND
MANAGEMENT, LLC,**

Employer,

and

**INTERNATIONAL UNION, SECURITY,
POLICE AND FIRE PROFESSIONALS
OF AMERICA,**

Petitioner.

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Case 08-RC-088385

**EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S
DECISION AND DIRECTION OF ELECTION
TO THE NATIONAL LABOR RELATIONS BOARD**

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INTRODUCTION

Horseshoe Cleveland Management, LLC (the “Employer”), submits this brief in support of its Request for Review of Acting Regional Director Steve Wilson’s October 18, 2012 Decision and Direction of Election.¹ The Employer objects to the finding that International Union, Security, Police, and Fire Professionals of America’s (the “Union”) petitioned-for unit, consisting of “[a]ll full-time and regular part-time dispatchers, emergency medical technicians (EMTs) and security guards/officers employed by the Employer at its 100 Public Square, Cleveland, Ohio facility excluding all office clerical employees, professional employees and supervisors as defined by the Act and all other employees” is appropriate. The Employer makes this Request for Review because a substantial question of law and policy is raised by the Acting Regional Director’s serious departure from officially reported Board precedent, because the Acting Regional Director’s decision on a number of substantial factual issues is clearly erroneous on the record, and these errors prejudicially affect the rights of the Employer.

The Acting Regional Director’s Decision incorrectly found, inter alia, that:

- EMTs were guards within the meaning of the National Labor Relations Act (the “Act”).

As fully discussed below, the Board should grant the Employer’s Request for Review because the Acting Regional Director’s Decision ignored and misapplied controlling precedent. In addition, the Acting Regional Director made findings that were either unsupported by, or contrary to, the testimony and evidence admitted at the pre-election hearing. Contrary to the conclusions reached in the Acting Regional Director’s Decision, as the record testimony and controlling case law demonstrate, the EMTs must be excluded from the proposed bargaining unit

¹ Citations to pages in the Decision and Direction of Election are “Decision at ___”

because they do not primarily perform guard duties, which is essential for inclusion in a guard's unit.

I. SUMMARY OF ARGUMENT

A. Contrary to The Acting Regional Director's Decision, The Board Has Consistently Determined That Individuals Who Perform Some "Guard-Like" Duties That Are Incidental To Their Actual Duties Are Not Guards Under The Act.

1. Board Precedent Does Not Support The Acting Regional Director's Holding That EMTs Are Guards Within The Meaning Of The Act.

At page 7 of the Decision the Acting Regional Director wrote the following:

The pertinent issue is not the percentage of time the employees spend on guard duties, so long as such duties are not a minor or incidental part of the individuals [sic] overall responsibilities. Rather the key is the specific nature of the duties themselves.

With all due respect to the Acting Regional Director, and as will be discussed in detail below, the amount of time the EMTs spend performing guard duties is pertinent, especially considering the guard duties performed by the EMTs are minor and incidental to their overall responsibilities. Thus, contrary to the Acting Regional Director's assertion, the EMTs should clearly be excluded from the bargaining unit.

2. The Acting Regional Director Misconstrued And Misapplied the Facts Here To Controlling Precedent

The Acting Regional Director erred in finding the facts in the instant case distinguishable from the facts in *55 Liberty Owners Corp.*, 318 NLRB 308 (1995); *Hoffman Security Ltd.*, 302 NLRB 922 (1991); and *Ford Motor Co.*, 116 NLRB 1995 (1956), all cases where the Board held that the petitioned for employees were not guards within the meaning of the Act because to the extent they performed guard duties, they were incidental to their actual duties.

II. STATEMENT OF THE CASE

The Petitioner, International Union, Security, Police and Fire Professionals of America (hereinafter “Petitioner” or “Union”) filed a petition for representation on August 30, 2012. The Union seeks to represent all “full time and/or regular part-time security officers performing guard duties as defined in Section 9(b)(3) of the National Labor Relations Act. . .”.

The hearing was conducted on September 13, 2012. At the hearing the Employer objected to the proceedings to the extent a court ultimately determines that the National Labor Relations Board (the “Board”) does not presently have a proper quorum to act. (Tr. at 10). The Employer also raised issue as to proper service of the petition because it was addressed to Gary Loveman, CEO of Caesar’s Entertainment, and not the Employer.² (Tr. at 10).

In addition, the record evidence presented at the hearing provided no basis for finding the EMTs should be included in the bargaining unit. No representative employee from the security officers testified. The only testimony provided was by an EMT, whose testimony only further demonstrated that the EMTs performed minimal, incidental security officer duties. (Tr. at 238-262).

The evidence presented at the hearing by both the Employer and the Union demonstrated that the EMTs do not primarily perform guard duties. (Tr. at 47-71, 141-149).

On October 18, 2012, the Acting Regional Director issued the Decision and Direction of Election that is the subject of the instant Request for Review.

III. FACTS

Horseshoe Cleveland Management, LLC operates Horseshoe Casino Cleveland (the “Casino”) which is “a full service casino operation”. (Tr. at 19). It is operational 24 hours a day

² Because of the defect in service, this caused the Employer to only have 6 working days to actually prepare for the hearing. (Tr. at 6-7, 293-294).

every day of the year and includes a 400 seat buffet, a three restaurant food court, slot machines, table games, and a World Series poker room. (Tr. at 19-20). The Company employs approximately 1,600 employees. (Tr. at 22). Attendance at the Casino has been extremely high, since it opened in May, 2012, ranging from 15,000 to 25,000 visitors a day. (Tr. at 22).

The security officers, EMTs, and dispatchers are all under the umbrella of the Director of Security. (Em. Ex. 1). There are 6 dispatchers, 14 EMTs and 120 security guards. (Em. Ex. 1).

Security Officers.

The security officers are licensed by the Ohio Casino Control Commission. (Tr. at 32). The security officers are responsible for protecting patrons and employees. (Tr. at 30). The security officers man the entrances and exits of the Casino to ensure patrons are 21 and older. (Tr. at 30). There are five fixed station posts that are available for entrance and exit at the Casino. (Tr. at 147-148). At least one, often more, security officer must be stationed at each of the posts at all times, 24 hours a day, seven days a week. (Tr. at 147-148). Security officers also transport money back and forth throughout the Casino. (Tr. at 30).

The security officers' office is located near the Casino entrance. (Tr. at 32). The security officers are dressed alike so that they are easily identifiable to patrons and employees as security officers. (Tr. at 160-161). The security officers wear a long sleeve shirt with a tie, a metal badge, patches on each sleeve that say "Horseshoe Cleveland Security", dark pants, and leather shoes. (Tr. at 161). Security officers look like law enforcement personnel. (Tr. at 161).

Dispatchers.

The dispatchers receive calls from patrons and employees if there is an emergency or non-emergency situation. (Tr. at 31). The dispatchers then contact either a security officer or EMT to direct them to where the situation is located and explain what assistance, if any, is needed. (Tr. at 31).

The dispatchers are located in the dispatch room. (Tr. at 31). The dispatch room is located on the third floor of the Casino. (Tr. at 32).

EMTs.

The EMTs are specially trained and certified in medical care by the State of Ohio, Department of Public Safety, Division of Emergency Medical Services. (Tr. at 31, 229). EMTs require a minimum of 120 hours of training to be certified as EMTs by the State of Ohio. (Tr. at 140). Many have much more training and experience. (Tr., e.g. at 204). EMTs are also required to pass a test administered by the State of Ohio. (Tr. at 140). Finally, EMTs are required to have a Hepatitis B vaccination. (Tr. at 129). No one else in the Security Department is required to meet these training standards or to be vaccinated. (Tr. at 154-160).

An EMTs primary responsibility is to act as the first responder to any illness or injury involving a patron or employee. (Tr. at 31). Many times, there have been medical emergencies requiring an EMT to spend the entire shift dealing with emergencies. (Tr. at 144).

The EMTs other responsibilities include writing detailed reports on medical incidents, performing inventory of the medical supplies, and ensuring all medical equipment is in place around the Casino and is operational, including the defibrillators. When all EMT functions are concluded, EMTs can act as rovers or to offer back-up support to security officers who are on break. (Tr. at 141-144). The EMTs, indisputably, spend 70%-80% of their time performing pure

EMT duties. (Tr. at 45, 144). During the remaining time to fill gaps in their working time, the EMTs act as rovers for the security team or cover the entrances on break and lunch periods for the security officers. (Tr. at 147-148). The EMT would cover only a 15 minute break or a 30 minute lunch period. (Tr. at 147-148). An EMT would not and could not be assigned to a security officer fixed post position. (Tr. at 147-148). (Importantly, EMTs receive only eight hours of security training, but have already received 120 hours or more of EMT training before starting at Caesars). (Ct. Tr. at 140, 263).

The EMTs office is located in the main back-up house hallway. (Tr. at 32). EMTs wear a plain burgundy Polo style shirt and cargo-type pants with several pockets. (Tr. at 41). The pants allow them to carry medical supplies in their pockets or any other supplies necessary to respond to an emergency medical call. (Tr. at 161). EMTs use and carry stethoscopes, gloves, trauma shears, and other medical devices. (Tr. at 249, 251). EMTs will soon be wearing new uniforms that will have a medical identifying patch on the sleeves and the “EMT” on the back of the shirt. (Tr. at 162). EMTs are paid \$12.50 an hour. (Em. Ex. 2).

IV. THE ACTING REGIONAL DIRECTOR DISREGARDED CONTROLLING BOARD LAW AND IGNORED CLEAR AND UNCONTROVERTED EVIDENCE IN FINDING THE EMTs ARE GUARDS WITHIN THE MEANING OF THE ACT

A. The Acting Regional Director Erred in Finding The EMTs Performance of Guard Duties Was Not Minor Or Incidental

The Board has continuously held that “to qualify as a guard under Section 9(b)(3) of the Act, employees must perform security functions involving the protection of an employer’s property, as an essential part of their duties and those security functions must encompass traditional police and plant security functions as a major and continual part of their job duties”. *Inland Steel Company*, 308 NLRB 868 (1992).

As noted in the summary of argument discussion above, the Acting Regional Director erred in finding the facts in the instant case distinguishable from the facts in *55 Liberty Owners Corp.*, 318 NLRB 308 (1995); *Hoffman Security Ltd.*, 302 NLRB 922 (1991); and *Ford Motor Co.*, 116 NLRB 1995 (1956), all cases where the Board held that the petitioned for employees were not guards within the meaning of the Act because to the extent they performed guard duties, they were incidental to their actual duties.

As previously stated, the Board has consistently determined that individuals who perform some “guard-like” duties that are incidental to their actual duties are not guards under the Act. *55 Liberty Owners Corp.*, 318 NLRB 308 (1995); *Ford Motor Corp.*, 116 NLRB 1995 (1956); *Hoffman Security*, 302 NLRB 922 (1991) (receptionists found not to be guards even though employed by security contractor that provided both security officers and receptionists to a hospital, where the receptionists, assigned to information desks, greeted visitors, provided information, observed and reported irregularities, at most locations distributed visitor passes or asked visitors to sign in, and at two locations monitored closed circuit televisions; and *Madison Square Garden*, 325 NLRB 971 (1998) (Board held entertainment staff not guards even though incidentally performed the function of denying entrance or access to individuals to events). Here, the evidence is overwhelming that any duties the EMTs perform which are “guard-like” are duties incidental to their actual duties.

In *55 Liberty Owners Corp. at 310*, the Board held that door persons and elevator operators who performed certain “guard-like” functions were not guards under Section 9(b)(3). There, the door persons and elevator operators part of the time viewed surveillance monitors and escorted individuals to and from rental apartments in addition to their primary duties. The Board determined that those duties were incidental guard duties to their primary duties and therefore

they were not guards under the Act.

Here, the EMTs are no different than the door persons and elevator operators in 55 *Liberty Owners Corp.* The EMTs occasionally cover the entrance/exit areas for the security officers who are on break or lunch or act as rovers but those duties are incidental to their primary duties of being an EMT. (Tr. at 147-148). In the short four month time period the Casino had been operational before the casino's opening, often EMTs have performed only EMT duties on some working days and, otherwise, have spent only 20-30% of their time is spent assisting the security officers. (Tr. at 44, 145).

The most analogous case to the present is the *Ford Motor Co.* case. There, the Board determined that a receptionist was not a guard under the Act even though some of her duties were more closely aligned with well settled guard duties. The Board held

that the authority to issue keys, badges, or passes only to authorized personnel does not constitute an employee a guard. n4 As for Petitioner's factual assertions (g) and (h), placement of the receptionist in the same department and under the same supervision as guards and her wearing of a uniform would merely reflect an administrative practice of the [**6] Employer. They do not establish that she is a guard if she does not, in fact, perform guard functions. Accordingly, upon all the facts asserted by the Petitioner, we find the receptionist is not a guard. As the Act specifically prohibits the inclusion in a guard unit of any employee not performing the duties of a guard, n5 we shall deny the Petitioner's request that she be included in the certified unit.

In *Ford*, the receptionist was an employee of the security department and was under the same supervision as the security guards. She was stationed near the main entrance of the administration building at a manufacturing facility, communicated with all persons seeking admission, did not permit unauthorized employees to pass through the building lobby, checked in and issued passes to all vendors and visitors, required clearance passes for all incoming and outgoing packages, and reported violations of company security rules. In spite of all of this, the

Board still determined she was not a guard under the Act.

Here, the EMTs are also part of the security team and fall under the supervision of the Director of Security. Their incidental guard duties are similar to those of the receptionist in *Ford*, including temporarily filling in for security officers at the entrances/exits of the Casino. However, the EMTs perform even less guard like duties than the receptionist in *Ford*. Some days EMTs do not even perform guard duties whereas in *Ford*, the receptionist was performing incidental guard duties on a daily basis. Most days, the receptionist in *Ford* spent considerably more than 20-30% of her work day performing guard like duties, whereas here, almost the most an EMT would ever spend performing guard like duties at the Casino is 20-30%.³ Because the Board determined the receptionist in *Ford* was not a guard because her guard-like duties were merely incidental, and the EMTs here perform even less guard-like duties than the receptionist in *Ford*, the EMTs should be excluded from inclusion in the proposed bargaining unit.

The Acting Regional Director erroneously distinguished *Inland Steel Co.* in page 8 of the Decision. In *Inland*, the Board properly determined that the EMS employees were not guards under the meaning of the Act. There, the EMS employees' primary job duties involved driving an ambulance and performing emergency medical services to employees. Although the EMS employees had more down time than the EMTs here, their primary duties, to respond to emergency situations, are the same as the EMTs here.

Here, the EMTs perform their incidental security guard duties only when a security guard is unable to do so. They are temporary and incidental duties. For example, when all EMT functions are concluded, EMTs can act as rovers or to offer back-up support to security officers

³ Union witness James R. Stone, an EMT Technician, testified that he believed the EMT functions to be the most important part of his job. He also identified a mixture of both EMT, security and other functions contained in one job posting that were indicated as "essential." (Tr. at 43). However, the totality of his and others' factual testimony clearly indicated that in practice, security and other functions were incidental.

who are on break. (Tr. at 141-144). During the remaining time, the EMTs act as rovers for the security team or cover the entrances on break and lunch periods for the security officers. (Tr. at 147-148). The EMT would cover only a 15 minute break or a 30 minute lunch period. (Tr. at 147-148). An EMT would not and could not be assigned to a security officer fixed post position. (Tr. at 147-148).

The Acting Regional Director erroneously claims in page 8 of the Decision that “EMTs are responsible for responding to disturbances and taking action to restore order”. That is false. The EMTs respond to emergency situations to provide medical assistance, not security assistance. (Tr. at 31). Rather, much like the EMS employees do in *Inland*, the EMTs here work side by side the security guards during a disturbance. And, as in *Inland*, the EMTs provide the medical assistance and the security guards provide security. This is exactly what occurred in *Inland* where the Board found the EMS employees to not be guards under the Act. Therefore, like the EMS employees in *Inland*, the EMTs should not be included in the bargaining unit here because they do not primarily perform guard duties.

In reaching his Decision that the EMTs should be included in the bargaining unit, the Acting Regional Director ignored all of the above cases and, instead, solely relied upon *A.W. Schlesinger Geriatric Center*, 267 NLRB 1363 (1983). That case is easily distinguishable from the facts at issue here and the Acting Regional Director erred in relying upon it.

In *A.W. Schlesinger*, the Board determined that two maintenance department employees should be considered guards under the Act. The Acting Regional Director analogizes the EMTs here to the maintenance employees in *A.W. Schlesinger*. In *A.W. Schlesinger*, the maintenance employees “made security rounds, had authority to ask that a disturbance stop or an unauthorized individual leave the facility, watched to see if employees left with packages and assured the

safety of employees arriving and leaving work”. Decision, at p. 8. The Acting Regional Director compares their duties to the incidental guard duties the EMTs perform here, which are only temporary back-up duties of a substitute nature.

The Acting Regional Director completely ignored that in *A.W. Schlesinger* those employees were security guards. There, the employees at issue assumed security responsibilities for the employer after the employer terminated the independent contractors who had previously been performing those duties. After the contractors were terminated, the maintenance employees spent up to 75% of their day performing security work. Clearly, at that point, their primary duty was security work. Here, it is just the opposite. The security guards perform the security work so the EMTs can perform EMT work.

Any security work performed by an EMT is incidental to the EMT duties and, therefore, the Acting Regional Director erred by including the EMTs in the proposed bargaining unit.

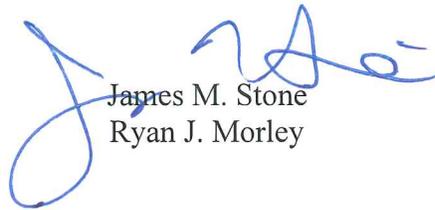
V. CONCLUSION

As the foregoing demonstrates, the Union has petitioned for a unit of employees which contains guards and non-guards. The EMTs should be excluded from the bargaining unit because the EMTs are not guards under the Act. To the extent the EMTs perform guard duties, they are incidental to their primary duties of performing EMT duties.

Accordingly, the Employer respectfully requests that the Board grant its Request for Review of the Acting Regional Director's Decision.

Respectfully submitted,

JACKSON LEWIS LLP



James M. Stone
Ryan J. Morley

Dated: October 31, 2012

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2012, I caused a true and correct copy of the foregoing Employer's Request for Review of the Regional Director's Decision and Direction of Election to the National Labor Relations Board to be served via electronic filing through the National Labor Relations Board's website, www.nlr.gov, upon:

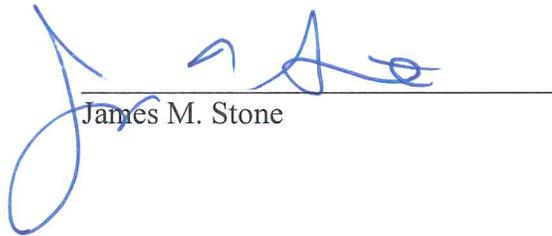
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I hereby certify that on October 31, 2012, I caused a true and correct copy of the foregoing Employer's Request for Review of Regional Director's Decision and Direction of Election to the National Labor Board to be served via electronic mail upon:

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