

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

WHEELING DOWNS RACING ASSOCIATION,
INC.

Employer

and

Case 6-RC-11848

TEAMSTERS LOCAL UNION NO. 697 A/W
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, AFL-CIO¹

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Patricia J. Daum, a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.²

Upon the entire record in this case,³ the Regional Director finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

¹ The names of the Employer and of the Petitioner appear as amended at the hearing.

² Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by August 16, 2000.

³ The Employer filed a timely brief in this matter which has been duly considered by the undersigned.

The parties stipulated that the Employer is engaged in interstate commerce within the meaning of the Act. However the Employer asserted, contrary to the Petitioner, that the Board should decline jurisdiction pursuant to Section 103.3 of the Board's Rules and Regulations.

The Employer, a West Virginia corporation, with a principal place of business located in Wheeling, West Virginia, has for more than 50 years operated continuously as a dogracing track. Since in or about September 1994 the Employer has also maintained video lottery machines at its facility in Wheeling. Video lottery machines are similar to slot machines found in casinos in more traditional gaming forums such as Las Vegas and Atlantic City. The West Virginia State Video Lottery Commission regulates all video lottery machines located in the state. West Virginia law does not authorize the operation of freestanding casinos; rather, all video lottery machine locations must be operated in conjunction with dog or horse racetracks.

Approximately 75 percent of the Employer's gross revenue comes from the video lottery machines, while the remainder is derived from its dogracing operations. While the racetrack currently employs about 200 employees, the casino operation employs between 300 to 400 employees. Currently, except for security guards⁴ and food service workers, employees' work at the site is limited to one or the other operation. Employees of both operations are required to have a license from the State Racing Commission. Casino employees also need a license from the State Video Lottery Commission. As discussed further, *infra*, the employees involved in the instant proceeding work exclusively in the Employer's casino operation.

The Employer contends that the present petition should be dismissed because, pursuant to Section 103.3 of the Board's Rules and Regulations: "The Board will not assert its jurisdiction in any proceeding under sections 8, 9, and 10 of the Act involving the horseracing and dog-racing industries." The Board has long extended its jurisdiction to the gaming industry. El Dorado Club, 151 NLRB 579 (1965). More recently, in Delaware Racing Association d/b/a

⁴ The security guards employed by the Employer are represented for purposes of collective bargaining by Hotel Employees Restaurant Employees Union, Local 57, AFL-CIO, CLC.

Delaware Park, 325 NLRB 156 (1997) and Racing Association of Central Iowa d/b/a Prairie Meadows Racetrack and Casino, 324 NLRB 550 (1997), the Board found it appropriate to assert jurisdiction over casinos that are affiliated with racetracks. In each of these cases, as well as in the instant case, the addition of the casino operation increased revenues substantially. Thus, in the present case the casino provides 75 percent of the Employer's gross revenue, while in Delaware Park the casino operation generated 62 percent and in Prairie Meadows the casino operation generated 98 percent of the Employer's income. In each case the number of employees increased substantially upon the addition of casino operations. At Wheeling Downs, more than half of the employees now service the casino enterprise. As in the cited cases, there does not appear to be any significant functional integration between the casino and dogracing operations. The casino gambling areas are kept separate from the racing areas, and patrons of each area are serviced by employees of the different operations. Further, the employees at issue herein, as in Delaware Park, currently work exclusively in the casino portion of the Employer's facility, and have no job function involving the racetrack. Accordingly, I find that it is appropriate to assert jurisdiction over the Employer.

3. The labor organization involved claims to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

As amended at the hearing, the Petitioner seeks to represent a unit consisting of all full-time and regular part-time surveillance officers employed by the Employer at its Wheeling, West Virginia facility known as Wheeling Downs; excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act.

The Employer contends, contrary to the Petitioner, that the surveillance officers at issue herein are guards within the meaning of Section 9(b)(3) of the Act, and that the petition should

therefore be dismissed inasmuch as the Petitioner concededly admits employees other than guards into membership.

The Employer employs eleven surveillance officers. These officers report to the Surveillance Manager who in turn reports to the Director and Assistant Director of Security and Surveillance. Three of the surveillance officers are lead officers. The casino operates 24 hours per day, seven days each week. It is closed on Christmas Eve and Christmas Day.

Surveillance officers, including a lead officer, are on duty at all times during which the casino is in operation. A lead officer is also on duty when the casino is closed. There is no history of collective bargaining for the surveillance officers at issue herein.

The primary duty of the surveillance officers is to "watch the money." Specifically, they are responsible for keeping watch over all transfers of money to and from the various video lottery machines and other money dispensers to insure that there is no theft of the Employer's monetary assets. In this manner, they enforce the Employer's rules against theft. This work is performed primarily through the use of monitoring devices throughout the casino area. The officers do not monitor the pari-mutuel or dogracing areas of the complex. The casino maintains 272 closed circuit surveillance cameras, with more cameras to be installed. These cameras consist of fixed cameras, and cameras with tilt/pan/zoom capabilities which can be controlled by the officers. Along with their monitoring capabilities, the cameras are used to make videotaped records of activity in the casino. The surveillance officers monitor these cameras in a central monitoring room known as the Surveillance Room located on the second floor of the facility. The cameras are monitored through approximately 20 monitor screens set up in the Surveillance Room. The officers use a computer system to inform them when and where large sums of money are being transferred. The officers can then observe the transactions throughout the casino through the use of the cameras and monitors. Such transactions include filling and emptying the hoppers of slot machines. The officers also observe the money room, where coins are brought to be counted and bagged by employees of the Employer. The officers are mandated to observe the cashiers, machine repairmen and all personnel that work with

money. They are even required to observe the security guards, and to report on each other, as no employees or management personnel are above suspicion.

On at least one occasion surveillance officers observed an employee who, while filling the hopper of a slot machine, held her hands in such a way as to lead them to believe she was pocketing money from the hopper. They reported their suspicion to the Security Supervisor. Apparently, the employee was informed that she had to keep her hands in view while handling money. Shortly thereafter, she quit her employment. Upon observing suspicious activity by employees or patrons, the surveillance officers may report their suspicions to the lead surveillance officer who, in turn, may contact the Surveillance Manager for direction. The Surveillance Manager has a pager with him at all times so that he can be contacted for any significant decisions that need to be made. If directed to do so, the surveillance officers may continue observation of the suspect, review videotapes for past activity by the suspect, and/or take a still photo of the suspect and post it in the observation room to remind other officers to maintain observation of that individual. Their security role is, however, limited to observing and reporting potential violations of the law and of the Employer's rules. They do not physically detain suspects or have any physical or face to face contact with them.

Along with their primary function of observing monetary transactions, the officers are required to observe patrons of the casino. This is done to insure that the patrons are not cheating or stealing from the Employer through the use of devices that may manipulate or damage the slot machines. They also may keep track of, and report to the Security Supervisor, the actions of obviously intoxicated patrons. When officers observe suspicious activity on the floor of the casino, they are required to report such activity to the Security Supervisor. They are not permitted to speak directly to security guards or other employees. Similarly, they may only speak to security supervisors by telephone, so as not to compromise their anonymity and therefore limit their usefulness in catching thieves.

Along with working in the surveillance room, the officers regularly go down to the floor of the casino to conduct undercover surveillance. At least one officer must remain in the

observation room at all times. They do not conduct undercover surveillance in the pari-mutuel or dogracing areas. While in the casino, they are not permitted to intermingle with the security guards or with other employees. Rather, they are supposed to anonymously blend in with the crowd on the floor and look for violations of the Employer's policies by patrons and employees. This activity is coordinated with the officers in the surveillance room through the use of a pager carried by all surveillance officers while on the casino floor. This pager is shared among the surveillance personnel. As in the surveillance room, their primary function while on the casino floor is to observe monetary transactions and detect the theft of money.

Section 9(b)(3) of the Act states, in pertinent part, that "no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards." The intent of Congress in enacting Section 9(b)(3) was "...to insure to an employer that during strikes or labor unrest among his other employees, he would have a core of plant protection employees who could enforce the employer's rules for protection of his property and persons thereon without being confronted with a division of loyalty between the employer and dissatisfied fellow union members." McDonnell Aircraft Corporation, 109 NLRB 967, 969 (1954).

Employees who have an essential role in the security of a facility, without performing all of the regular functions of security guards, have been found to be guards within the meaning of Section 9(b)(3) of the Act. The Employer in its brief relies on the Board's decision in MGM Grand Hotel, Las Vegas, 274 NLRB 139 (1985). In that case, the employees found to be guards within the meaning of the Act operated the Employer's sophisticated life-safety system that encompassed many functions, including significant security functions, as a portion of their duties. The employees in MGM reported possible security problems and infractions to the security guards working in the facility. Similarly, in the more recent Board decision in Rhode Island Hospital, 313 NLRB 343 (1993), employees were found to work as Section 9(b)(3) guards where they maintained traffic control, enforced the Employer's rules including no parking and no

smoking, made rounds of the facility, conducted identification checks and worked with other traditional security guards.

In the present case, like the employees at issue in MGM, the surveillance personnel perform a critical function in the security of the Employer's facility. While the Surveillance Manager is their immediate supervisor, the Director of Security and Surveillance is responsible both for their department as well as for the security guards employed at the facility. The surveillance officers maintain direct responsibility for preserving the Employer's assets by observing, by monitor and in person, the transfer of money within the casino. In doing so, the surveillance officers maintain a vigilant eye upon the Employer's customers and its employees, to insure that they do not violate state law or company rules by stealing from the Employer or by cheating or harming the Employer's video lottery machines. In this way the surveillance officers perform an essential first step in maintaining the security and profitability of the casino by enforcing the Employer's rules and policies relating to theft, and are linked by their duties directly to the other security guards. Rhode Island Hospital, supra. See also A. W. Schlesinger Geriatric Center, Inc., 267 NLRB 1363 (1983).

Therefore, based on the above and the record as a whole, I find that the Employer's surveillance officers are guards within the meaning of Section 9(b)(3) of the Act. Accordingly, inasmuch as the parties have stipulated that the Petitioner represents non-guards and as such, pursuant to Section 9(b)(3) of the Act, cannot be certified to represent a unit of guards, the petition herein must be dismissed.⁵

⁵ The Employer, contrary to the Petitioner, also contends that the lead surveillance officers are supervisors within the meaning of the Act. There is no record evidence or contention that the lead surveillance officers have the authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to adjust their grievances, or effectively recommend the same. The Employer contends that the lead officers have the power to responsibly direct the other surveillance officers. This power appears to consist of deciding whether to continue surveillance of an incident occurring in the casino when such incident is brought to their attention by one of the other surveillance officers. The testimony indicated that this limited authority is more in keeping with the lead officer's greater experience, and is routine in nature. See e.g. North Shore Weeklies, Inc., 317 NLRB 1128 (1995); Byers Engineering Corp., 324 NLRB 740 (1997). Accordingly, I find that the Employer has failed to establish that the lead surveillance officers are supervisors within the meaning of Section 2(11) of the Act.

ORDER

IT IS HEREBY ORDERED, that the petition filed herein be, and it hereby is, dismissed.

Dated at Pittsburgh, Pennsylvania, this 2nd day of August 2000.

/s/Gerald Kobell

Gerald Kobell
Regional Director, Region Six

NATIONAL LABOR RELATIONS BOARD
Room 1501, 1000 Liberty Avenue
Pittsburgh, PA 15222

177-8560
260-3360-8400
280-7990
401-2575-2800