

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

**TRUMP PLAZA ASSOCIATES,
d/b/a TRUMP PLAZA HOTEL AND CASINO**

and

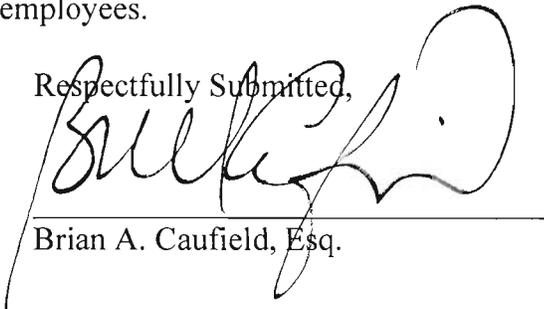
**4-CA-36217
4-RC-21263**

**INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE & AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA, AFL-CIO**

**EMPLOYER'S RESPONSE TO
THE BOARD'S NOTICE TO SHOW CAUSE**

Trump Plaza Associates d/b/a Trump Plaza Hotel & Casino ("Employer"), by and through its attorneys at Fox Rothschild LLP, hereby files this response to the Board's Notice to Show Cause dated September 29, 2010. Counsel for General Counsel's Motion for Summary Judgment must be denied and the Board's Decision and Certification of Representative dated September 29, 2010 must be vacated because, as more specifically set forth in the Employer's Brief in Opposition to Counsel for General Counsel's Motion for Summary Judgment, there exists genuine issues of material fact as to the validity of the Board's certification of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO ("Union") as the exclusive collective bargaining representative of unit of the Employer's employees.

Respectfully Submitted,



Brian A. Caufield, Esq.

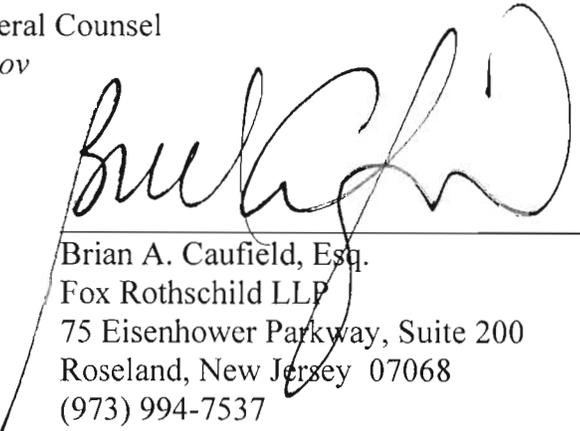
CERTIFICATE OF SERVICE

I, Brian A. Caufield, hereby certify that on this day I e-filed, via the Board's e-filing system, the Employer's Response to the Board's Notice to Show Cause and electronically served the following individuals listed below:

Lester A. Heltzer, Executive Secretary
Via the Board's e-file system

William T. Josem, Esq.
Counsel for Charging Party
wtjosem@clearyjosem.com

Jennifer R. Spector
Counsel for Acting General Counsel
jennifer.spector@nlrb.gov



Brian A. Caufield, Esq.
Fox Rothschild LLP
75 Eisenhower Parkway, Suite 200
Roseland, New Jersey 07068
(973) 994-7537
(973) 992-9125/facsimile
bcaufield@foxrothschild.com

Dated: November 11, 2010

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**INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE & AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA, AFL-CIO**

**EMPLOYER'S BRIEF IN OPPOSITION TO
COUNSEL FOR GENERAL COUNSEL'S
MOTION FOR SUMMARY JUDGMENT**

Brian A. Caufield, Esq.
Fox Rothschild LLP
75 Eisenhower Parkway, Suite 201
Roseland, New Jersey 07068
(973) 994-7533
(973) 992-9125/facsimile

I. STATEMENT OF THE CASE

Trump Plaza Associates d/b/a Trump Plaza Hotel & Casino (“Employer”) operates a casino/hotel in Atlantic City, New Jersey. On February 15, 2007¹ the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (“Union”) filed a representation petition seeking to represent dealers. On March 31, pursuant to a stipulated election agreement, the National Labor Relations Board (“NLRB” or “Board”) held a secret-ballot election, and the Employer lost by a vote of 324 to 149. On April 9, the Employer timely filed Objections to Election. On April 23, the Regional Director for Region 4 (“Regional Director”) issued a Notice of Hearing on Objections to Election, and on May 23 a hearing was held before Administrative Law Judge Robert A. Giannasi (“ALJ”). The facts are undisputed, and in particular:

1. The televised “Certification of Majority Status” by United States Congressman Robert Andrews, in concert with State and Union officials, on the local news station, six days before the election.

2. The display of the executed “Certification of Majority Status . . . in accordance with NLRB rules,” in the Union hall, in the form of the poster board shown on television and reproduced handouts, for dealers, for the five days immediately preceding the election.

3. The multiple communications by federal, state and local politicians, in the form of individual and group messages, petition and resolution, distributed by letter and website, throughout the election period, referencing, *inter alia*, that the Union already established majority status, supporting the Union, praising employees who supported the

Union, referencing the positive working relationship between government and the Union, and otherwise importuning dealers to persevere in their organizational efforts in the face of potential improper conduct by the Employer.

4. The Union's explicit reliance, throughout the campaign, on the pro-Union bias of "Government" to solicit dealer support.

The televising and publication of a competing "Certification of Majority Status . . . in accordance with NLRB rules", usurped the Board's authority, and constituted a fundamental breach of Board neutrality. By referencing a "Certification of Majority Status" procedure performed in "accordance with NLRB rules", the Board's own imprimatur was placed on the determination. This bias extends far beyond a mere endorsement, or misuse of an NLRB form. On its face, the Certification purports to constitute an official governmental declaration that the Union has met the legal test to obtain recognition rights. Standing alone, this conduct/document has a far greater tendency to mislead than the document found objectionable in *Columbia Tanning Corp.*, 238 N.L.R.B 899 (1978).

The Certification of Majority Status occurred against a backdrop of governmental support for the Union, which dwarfs any situation previously considered by the Board. Moreover, the Union explicitly appealed to the pro-Union bias of Government as a basis for dealer support. Thus, the competing Certification was not an isolated event, but the culmination of a calculated campaign to communicate in compelling fashion that the "Government" embraced the unionization of the Atlantic City casino dealers, and Trump Plaza dealers in particular, as a governmental objective.

¹ Unless otherwise noted, all dates hereinafter refer to 2007.

In issuing its May 30, 2008 decision, affirming the ALJ, the Board: (1) failed to recognize the reasonable tendency to mislead of a “Certification of Majority Status” a week before the election, (2) failed to address the cumulative impact of the biasing conduct, and erroneously analyzed aspects of the conduct as isolated and disconnected events, (3) failed to address the overt Union reliance on governmental bias in its appeal for dealer support, (4) substituted its own subjective evaluation of the conduct for an objective evaluation of reasonable tendency, (5) failed to assure the neutrality of the election process, and (6) failed to apply the proper decisional standard, in that where the documents/conduct, taken as a whole, would reasonably engender voter confusion concerning the neutrality of the Board or the Government, the Employer had met its burden.

The Board has never before considered conduct of this type and magnitude, which is a case of first impression. The case law has primarily dealt with the alteration of Board documents, and where party authorship of the document is not clear, a determination of whether the document has a reasonable tendency to mislead voters as to the neutrality of the Board. Although this doctrine has been extended to other types of communications and to Governmental bias generally, the Board had never considered the reasonable impact of a competing “Certification of Majority Status”, in the context of a party’s explicit reliance on Government bias, against a backdrop of multiple declarations of Union support by over sixty government officials.

Following the Board’s Decision and Certification of Representative, the Union requested bargaining and the Employer refused on the basis that the certification was invalid because the Union did not represent an uncoerced majority and the election results were not

in accord with governing law. By Charge dated July 1, 2008, the Union alleged that the Employer unlawfully refused to bargain and on July 10, the Regional Director issued a Complaint and Notice of Hearing alleging the same. The Employer timely filed an Answer admitting its refusal to bargain, but denying the unit and certification. On August 4, 2008, Counsel for General Counsel filed a Motion for Summary Judgment, and the Board, through its Executive Secretary, issued a Notice to Show Cause. The Employer opposed the Motion for Summary Judgment, and on August 29, 2008 the Board, without the appropriate statutorily-mandated quorum, rendered its Decision and Order, reported at 352 N.L.R.B. No. 146 (2008).

Thereafter, the Employer filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, the General Counsel filed a cross application for enforcement and the Court held the cases in abeyance. On June 17, 2010, the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010), holding that under Section 3(b) of the Act, in order to exercise the delegated authority of the Board, a quorum of at least three members must be maintained. On Friday, September 24, 2010, the Court of Appeals issued its mandate, remanding this case for further proceedings consistent with the Supreme Court's decision.

On Wednesday, September 29, 2010, the Board issued the underlying Decision, Certification of Representative and Notice to Show Cause, reported at 355 N.L.R.B. No. 202 (2010). In so doing, the full Board purported to review the entire record in this case within three business days, and adopted the ALJ's, and its own, prior decision

By Order of September 29, 2010, the Board directed General Counsel to file an Amended Complaint, if necessary, permitted the Employer to Answer such, and then allowed for any opposition to General Counsel's July 31, 2008 Motion for Summary Judgment. On October 8, 2010, General Counsel filed an Amended Complaint and the Employer timely answered. The Employer files this Opposition to General Counsel's Motion for Summary Judgment.

II. STATEMENT OF FACTS

The Employer incorporates by reference as if fully stated herein, the Statement of Facts set forth in its August 18, 2008 Opposition to Counsel for General Counsel's Motion for Summary Judgment.

III. ARGUMENT

The Employer incorporates by reference as if fully stated herein, the Argument set forth in its August 18, 2008 Opposition to Counsel for General Counsel's Motion for Summary Judgment, and adds the following in support of its affirmative defenses.

a. The three-day review period between the Circuit Court's mandate and the Board's decision, belies the legitimacy of the decisional process.

The Board states in footnote 2 of the instant decision that under its "standard procedures applicable to all cases assigned to a panel, the Board Members not assigned to the panel had the opportunity to participate in the adjudication of [the] case prior to the issuance of [the] decision." *Trump Plaza Associates*, 355 N.L.R.B. No. 202, fn. 2 (2010). This would mean that all Board Members, including those not assigned to the panel, had the opportunity

to review the entire record (including the transcript, exhibits and briefs filed by the parties, as well as prior decisions) and to assess the issues germane to the proceeding, all prior to the issuance of the instant decision, in three working days.

A cursory review of C-cases (not involving novel issues, default judgments, or cases remanded to the Board for lack of a quorum) reveals that the Board customarily takes at least 4 months to review cases on exceptions before issuing a decision. *See, Satellite Services, Inc.*, 356 N.L.R.B. No. 17 (2010) (over 1 year to review); *Pacific Coast M.S. Indus. Co., Ltd.*, 355 N.L.R.B. No. 226 (2010) (over 3 years to review); *DHL Express, Inc.*, 355 N.L.R.B. No. 224 (2010) (over 3 years to review); *ADT Security Services, Inc.*, 355 N.L.R.B. No. 223 (2010) (nearly 2 years to review); *Titus Electric Contracting, Inc.*, 355 N.L.R.B. No. 222 (2010) (over 7 years to review); *Lansing Automakers Federal Credit Union*, 355 N.L.R.B. No. 221 (2010) (over 8 months to review); *Bally's Park Place, Inc.*, 355 N.L.R.B. No. 218 (2010) (over 2 years to review); *KGTV*, 355 N.L.R.B. No. 213 (2010) (over 2 years to review); *Boulder City Hospital, Inc.*, 355 N.L.R.B. No. 203 (2010) (over 1 year to review); and, *One Stop Kosher Supermarkets, Inc.*, 355 N.L.R.B. No. 201 (2010) (over 4 months to review).

The departure from the Board's normal time frame in deciding cases is telling. The Board's exercise of its decisional process in a three working-day time frame establishes that its determination was not a bona-fide review of the ALJ's decision by a new quorum, as mandated by the Court.

b. The Board failed to address the usurpation of its statutory delegated authority by a Congressional representative, in violation of the Constitutionally mandated separation of powers .

The U.S. Constitution allocates separate and distinct powers among the legislative, executive and judicial branches. Congress is charged with passing laws, such as the National Labor Relations Act, and the NLRB, as an independent agency of the executive branch, is charged with enforcing the Act on behalf of the executive branch. Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them . . .” *Springer v. Government of the Philippine Islands*, 277 U.S. 189 (1928) (holding that the legislature of the Philippine Islands could not provide for legislative appointment to executive agencies). As such, legislators may not usurp the executive power of enforcement. *See Buckley v. Valeo*, 424 U.S. 1 (1976) and *INS v. Chadha*, 462 U.S. 919 (1983). In both *Buckley* and *Chada*, the “legislature usurped the executive’s power by subjecting agency actions to direct political control.” *Ameron, Inc. v. U.S. Army Corps of Engineers*, 787 F.2d 875, 887 (3d Cir. 1986) (noting that in *Buckley* it did so by appointing members of the Federal Election Commission and in *Chadha* it do so by ordering the deportation of an alien by a resolution not passed by both Houses or presented to the President).

Here, Congressman Andrews’ certification of the Union as the exclusive bargaining representative of the Employer’s dealers in conjunction with the Union, with the imprimatur of Legislative authority, usurps the powers specifically delegated to the Board by Congress. 29 U.S.C. 159(e) (West, 2010) (stating “that the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer) (emphasis added).

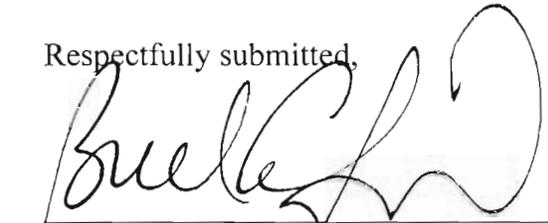
c. **The Board has the inherent power to reconsider its Certification of Election in this summary judgment proceeding.**

As a general rule, the Board's Certification of Election Results cannot be challenged, except in a C-case proceeding, based on a refusal to bargain charge. 29 U.S.C. § 160(f) (a certification of results is not a final order subject to direct review in the Circuit Court). Moreover, in such cases the Board typically does not review the underlying R-case, but takes official notice of the R-case record, and addresses the refusal to bargain, leaving the employer with no recourse except to the Court of Appeals. *See e.g., Trump Plaza Associates*, 352 N.L.R.B. No. 146 (2008) and 29 U.S.C. § 160(f). The Board does however, have the inherent power to reconsider its R-case determination, which is the foundation for the refusal to bargain charge. Section 10(d) of the Act states that "until the record in a case shall have been filed in a court . . . , the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it. 29 U.S.C. § 160(d) (West, 2010). This Section is supported by Section 102.49 of the Board's Rules and Regulations, which mirrors Section 10(d). In *Dorsey Trailers, Inc.*, 322 N.L.R.B. 181 (1996), the Board confirmed these principles by stating that under the plain language of Section 10(d), it has the authority to modify its orders *sua sponte*. Thus, the Board does have the authority to reconsider its decision in the R-case and set it aside. Accordingly, for the reasons, stated above, we ask that the Board vacate the Certification issued in *Trump Plaza Associates*, 352 N.L.R.B. 628 (2008), and issue summary judgment in favor of the Employer.

IV. CONCLUSION

For all of the above reasons, the Employer requests that Counsel for General Counsel's Motion for Summary Judgment be denied and the Board's Decision and Certification of Representative dated September 29, 2010 be vacated.

Respectfully submitted,



Brian A. Caufield, Esq.
Attorney for Trump Plaza Associates, LLC
Fox Rothschild LLP
75 Eisenhower Parkway, Suite 201
Roseland, New Jersey 07068
(973) 994-7537
(973) 992-9125/facsimile

Dated: November 11, 2010.

CERTIFICATE OF SERVICE

I, Brian A. Caufield, hereby certify that on this day I e-filed, via the Board's e-filing system, the Employer's Brief in Opposition to Counsel for General Counsel's Motion for Summary Judgment and electronically served the following individuals listed below:

Lester A. Heltzer, Executive Secretary
Via the Board's e-file system

William T. Josem, Esq.
Counsel for Charging Party
wtjosem@clearyjosem.com

Jennifer R. Spector
Counsel for Acting General Counsel
jennifer.spector@nlrb.gov



Brian A. Caufield, Esq.
Attorney for Trump Plaza Associates, LLC
Fox Rothschild LLP
75 Eisenhower Parkway, Suite 201
Roseland, New Jersey 07068
(973) 994-7537
(973) 992-9125/facsimile
bcaufield@foxrothschild.com

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