United States Government

NATIONAL LABOR RELATIONS BOARD
Region Four
615 Chestnut Street - Seventh Floor
Philadelphia, PA 19106-4404

January 12, 2010

Lester A. Heltzer, Executive Secretary
National Labor Relations Board
14th Street, NW, Suite 5400 East
Washington, DC 20570-0001
VIA E-FILING

RE: Bally's Park Place, Inc. d/b/a Bally's Atlantic City
Cases 4-CA-36109 and 4-RC-21286

Dear Executive Secretary Heltzer:

Attached please find Counsel for the Acting General Counsel's Statement in Support of Motion for Summary Judgment in the above-referenced matter. Copies of the subject document have been served on this day to the parties listed below by email.

Sincerely,

William Slack, Jr.
Counsel for the Acting General Counsel
(215) 597-8207
william.slack@nlrb.gov

cc:
Charles Sykes, Esquire and Judith Sadler, Esquire, Sykes & Sadler LLP via email: jsadler@sadlersykes.com and csykes@sadlersykes.com.
William T. Josem, Esq., Cleary & Josem, LLP, via email: wtjosem@clearyjosem.com

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

BALLY'S PARK PLACE, INC.
d/b/a BALLY'S ATLANTIC CITY

and Cases 4–CA–36109 and 4-RC-21286

INTERNATIONAL UNION, UNITED
AUTOMOBILE, AEROSPACE &
AGRICULTURAL IMPLEMENT WORKERS

STATEMENT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

A. INTRODUCTION AND FACTS

On November 30, 2010 the Board issued a Decision, Certification of Representative, and Notice to Show Cause in these cases, inviting the parties to bring new facts to its attention and providing the parties an opportunity to indicate why it should or should not grant a Motion for Summary Judgment previously filed by Counsel for the Acting General Counsel. This Statement is designed to both alert the Board to several new developments and to address additional arguments which Respondent, Bally's Park Place, Inc., appears poised to make in opposition to the Motion.

This case originated with an April 2007 representation petition filed by the International Union, United Automobile Aerospace and Agricultural Implement Workers of America, AFL-CIO (the Union) seeking to represent a unit of dealers employed by Bally's in Atlantic City, New

Jersey.[1] A representation election was held in early June 2007, with 628 employees voting in favor of Union representation and just 255 employees voting against the Union.

Respondent filed Objections to the Election, and a hearing was held before Administrative Law Judge David Goldman in August 2007. Judge Goldman issued his Report in October 2007, recommending that the Objections be overruled and a Certification of Representative be issued by the Board. Bally's filed Exceptions. On April 11, 2008, a two-member Board adopted the Administrative Law Judge's conclusions with only very minor modifications and certified the Union as the exclusive collective bargaining representative for unit employees. ***Bally's Park Place, Inc. d/b/a Bally's Atlantic City***, 352 NLRB 316 (2008).[2]

The Union quickly requested bargaining by letter dated April 21, 2008. Bally's immediately refused, indicating that it intended to test the Board's certification in Federal Court. On April 24, 2008, the Union filed the charge in this case. Complaint issued on April 25, 2008, alleging the refusal to bargain as unlawful. Bally's submitted its Answer to the Complaint on May 7, 2008, conceding the refusal to bargain but asserting that the Board had improperly overruled its Objections to the Election and that the Union's Certification was invalid because it had been issued by a two-member Board. I filed a Motion for Summary Judgment on May 9, 2008. On June 27, 2008, the Board issued a Decision concluding that Bally's refusal to negotiate was a violation of Section 8(a)(1) and (5) of the Act.. ***Bally's Park Place, Inc., d/b/a Bally's***

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[1] The facts are described in greater detail in the original Motion for Summary Judgment filed in May 2008 with most of the important documents attached as Exhibits.

[2] The Decision takes up less than a full page in the Board's volumes and consists primarily of three footnotes. In the first of these footnotes, the Board explained why it believed it was entitled to act with just two members. The second footnote summarily rejects Bally's objections to the Judge's credibility resolutions and affirms the Judge's denial of a motion for recusal which had been made by Bally's at the hearing. Only the third footnote contains anything of substance, noting that the Board had elected not to rely on one aspect of the Judge's Report and agreed with the Judge's analysis of Bally's claim that failure to translate election notices provided grounds to overturn the election.

Atlantic City, 352 NLRB 768 (2008). This Decision was also issued by a Board consisting of just two members.

Bally's sought review of the Board Decision, ultimately ending up in the United States Court of Appeals for the District of Columbia Circuit. One of the issues raised in Bally's Request for Review was a claim that the Board could not act with just two members. The Board filed a cross-application for enforcement, and the matter was held in abeyance while the two-member Board issue was litigated before the Supreme Court.

The Supreme Court's Decision in ***New Process Steel, L.P. v. NLRB,*** ____ U.S. ____, 130 S.Ct. 2635 (2010), issued on June 17, 2010, finding that a minimum of three members was required for the Board to decide cases. On July 9, 2010, the Board asked the District of Columbia Circuit to remand this case. Board Associate Executive Secretary Henry Breiteneicher wrote the parties on July 23, indicating that the Board has requested remand and would "consider the case and take action as appropriate." A copy of Breiteneicher's letter is attached as Exhibit 1. The Court of Appeals issued an Order remanding the case on September 20, 2010. The Court's Order, a copy of which is attached as Exhibit 2, reads as follows:

> "ORDERED that the petition for review be granted, the cross-application for Enforcement be denied, the decision of the National Labor Relations Board be vacated, and the case remanded for further proceedings before the Board. See New Process Steel, L.P. v. NLRB, 130 S.Ct. 2635 (2010); Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469, 476 (D.C. Cir. 2009)..."

The Board, this time acting through a three member panel, issued a Decision, Certification of Representative and Notice to Show Cause on November 30, 2010, once again adopting the Administrative Law Judge's Report, overruling Bally's Objections and certifying the Union. Although the Board noted that it was relying on the analysis contained in the 2008 Decision overruling the Objections and specifically incorporating that Decision by reference, it

also included a footnote in which it commented on an aspect of the case it had not mentioned in 2008. In this footnote, the Board indicated that it affirmed the Judge's conclusion that an alleged threat could not have impacted the results of the election given the limited evidence of dissemination, the size of the unit and the margin of the Union's victory. But, the Board went on to note that it did not rely on certain of the comments made by the Judge in connection with this issue.

In addition to certifying the Union, the Board issued an Order to Show Cause why General Counsel's pending Summary Judgment Motion should not be granted. Deadlines were included for amendments to the outstanding Complaint, an Answer to any amendments and briefs or statements from the parties regarding why the Motion should or should not be granted. ***Bally's Park Place, Inc. d/b/a Bally's Atlantic City,*** 356 NLRB No. 40 (2010)(copy attached as Exhibit 3). At Bally's request, the time for submitting briefs or statements was extended to January 14, 2011.

On December 8, 2010, the Union renewed its request for bargaining. A copy of the letter incorporating the renewed request is attached as Exhibit 4. An Amended Complaint was issued on December 10. In addition to the claims originally made, this Complaint alleged that the Union had been certified on November 30, 2010, had renewed its request for bargaining on December 8, 2010, and had not received a response to the renewed request. A copy of the Amended Complaint is attached as Exhibit 5.

Bally's filed its Answer to the Amended Complaint on December 22. The Answer admitted the November 30 certification and December 8 request for bargaining, but insisted Bally's did not know whether the request for bargaining had been answered. The Answer also listed 20 "affirmative defenses." While these affirmative defenses consist for the most part of a

repetition of Bally's election Objections, they do also include claims that: (1) the Board's November 2010 Decision is "contrary to and in defiance of" the District of Columbia Circuit's remand order; (2) the Board is violating Bally's Constitutional due process rights; and (3) no violation can be found because Bally's refusal to bargain is not "part of a bad faith effort...to avoid its bargaining obligation." A copy of the Answer is attached as Exhibit 5.

B. ARGUMENT

Bally's most recent Answer presumably reflects the arguments it intends to make in response to the Order to Show Cause. For the most part, the arguments outlined in the Answer are merely a regurgitation of Bally's Objections to the Election. It is well-settled that issues raised, litigated and decided in a prior representation case may not normally be relitigated in a subsequent unfair labor practice proceeding. The findings on those issues are binding on the parties absent newly discovered or previously unavailable evidence or other special circumstances. See ***Magnesium Casting Co. v. NLRB***, 401 U.S. 137, 141-143 (1971); ***Pittsburgh Plate Glass Co. v. NLRB***, 313 U.S. 146, 161-162 (1941); ***Winchell Co.***, 305 NLRB 903 (1991). Here, the Board has already overruled Bally's Objections in the representation case, and Bally's Answer does not allude to any previously unavailable evidence or other special circumstances which might cause the Board to alter its conclusions. Thus, to the extent Bally's is arguing that it has no obligation to bargain because the election in this case was defective, its claim is no bar to summary judgment. Several other points raised by Bally's Answer do, however, deserve more extended comment.

Bally's Response to the Union's Most Recent Request for Bargaining

The Amended Complaint alleges that the Union renewed its request for bargaining on December 8, 2010, and that Bally's has not responded to the renewed request. Bally's Answer, while admitting that the Union submitted a renewed request for bargaining, insists Bally's does not know whether it responded. It is at least theoretically possible Bally's will contend that its failure to acknowledge the lack of a response to the Union's most recent demand for bargaining creates a factual issue which must be resolved at a hearing. Assuming Bally's makes this argument, it should be rejected.

Bally's Answer admits that in 2008 it refused a Union request for bargaining. The Company letter denying this 2008 request is attached to my original Motion for Summary Judgment. The letter indicates that the refusal to negotiate was prompted by a desire to secure Court review of the Union's certification, and Bally's in fact sought such review after the Motion for Summary Judgment was initially granted. In asking for review, Bally's relied on the theory that the Union's certification was based on a flawed election. Bally's recently submitted Answer to the Amended Complaint continues to advance this same argument, insisting that the election was flawed, that the certification is invalid and that Bally's as a consequence has no obligation to bargain. In light of Bally's continued insistence that it has no duty to bargain, it is at least inferable that its refusal to bargain is ongoing.

If this is inaccurate, Bally's can say so. It must know whether it is bargaining with the Union. In fact, it should know whether it has responded to the Union's December 8 bargaining request. It should not be permitted to force a hearing by claiming otherwise.

Bally's Lack of Bad Faith

Bally's Answer to the Amended Complaint suggests that no violation should be found because there is no evidence that its refusal to bargain is part of a "bad faith effort...to avoid its bargaining obligation." Presumably, Bally's will claim that it does not object in principal to collective bargaining. It merely has a sincere belief that the June 2007 election was flawed and wishes to have a Court review its claims. Absent evidence that its claims regarding the representation election are being asserted in bad faith, Bally's will maintain that it can not be found to have violated any statutory obligation to bargain.[3]

This is just wrong. An employer acts at its own peril when it refuses to bargain on the ground that the election which preceded Union certification was invalid. If the employer successfully proves the election was flawed, it can not be ordered to bargain. But, if its election claims are unsuccessful, the employer will be found to have committed an unfair labor practice. ***NLRB v. 1199 National Union of Hospital and Health Care Employees,*** 824 F.2d 318, 320 (4th Cir. 1987); ***NLRB v. Allied Products Corp.,*** 548 F.2d 644, 652 (6th Cir. 1977); ***NLRB v. Laney & Duke Storage Warehouse Co.,*** 369 F.2d 859, 869 (5th Cir. 1966). It does not matter whether the employer honestly believes it is right. Assuming the certification is valid, the employer has an obligation to bargain and commits an unfair labor practice if it fails to satisfy this obligation. Bally's can be found to have committed an unfair labor practice in this case even if it's refusal to bargain is motivated by a good faith belief in the righteousness of its claims regarding the representation election.

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[3] It is worth noting that Bally's good faith is open to question. The Company could have waived its two-person Board argument if it merely wanted Court review of its substantive claims. Similarly, if all Bally's wants is to have a Court look at the election, there is no reason for it to raise the various procedural defenses advanced in its Answer to the Amended Complaint. And, the fact that Bally's continues to erect procedural hurdles to Court review at least suggests that it is more interested in delaying or avoiding bargaining than it is in securing a judicial determination of its substantive claims.

The Board's Supposed Failure to Comply with the Circuit Court Order

It is hard to know exactly what Bally's is claiming here. The District of Columbia Circuit denied enforcement of the Board Order and granted Bally's Request for Review. It may be Bally's is contending that the denial of enforcement bars the Board from taking any further action in this case and precluded the Board from issuing its recent Decision.

If this is Bally's argument, it completely ignores the portion of the Court Order remanding the case to the Board. A remand normally presupposes further action. Cf. ***Service Employees Intern. Union Local 520 v. NLRB,*** 640 F.2d 1042, 1045 (9th Cir. 1981). And, the Supreme Court has recognized that a Court remand to the Board is appropriate in cases where denial of enforcement is due to procedural defects in the decision-making processes. ***Ford Motor Company v. NLRB,*** 305 U.S. 364 (1939). Further, the remand Order in this case cites the Court's opinion in ***Laurel Baye Healthcare of Lank Lanier, Inc. v. NLRB,*** 564 F.2d 468, 476 (D.C. Cir. 2009). In ***Laurel Baye***, the Court remanded to the Board "for further proceedings…at such time as it may once again consist of sufficient members to constitute a quorum." Citation to this Decision suggests that the Court intended the same result in this case and was anticipating the Board would take further action once it acquired more than two members. The Board's recent Decision was decided by three members. It would, therefore, appear that the Board has acted consistently with the Court's remand Order, and any argument by Bally's to the contrary should be rejected.

Bally's Due Process Arguments

Bally's Answer to the Amended Complaint suggests a variety of ways in which the Board in issuing its most recent Decision in this matter supposedly violated Bally's right to due process. According to Bally's, the Board failed to meaningfully consider its claims, improperly incorporated its 2008 Decision into its more recent Decision and unlawfully used the same procedure in this case which it has utilized in other cases. None of these claims have merit.

Turning first to Bally's contention that the Board failed to meaningfully consider its arguments, the Board's recent Decision specifically says that the Board has "considered the postelection representation issues raised by the Respondent." Since Board actions are entitled to a presumption of regularity, this declaration would normally be sufficient to foreclose any claim that the Board denied due process by failing to evaluate the evidence. ***NLRB v. Jasper Chair Co.,*** 138 F.2d 756 (7th Cir. 1943); ***NLRB v. Botany Worsted Mills, Inc.,*** 105 F.2d 263, 265 (3d Cir. 1939). Bally's, however, seems to contend that the Board did not have sufficient time to evaluate its arguments since only a week elapsed between the final Court Order remanding the case and the Board's November 30 Decision. This argument completely ignores the fact that the Board sought remand in July and informed the parties at that time that it intended to consider the case further. While the Board may have been precluded from actually issuing a Decision prior to the final remand Order, nothing prevented the Board's members from considering Bally's arguments in advance. And, the Board members had four months to evaluate Bally's claims. This was more than enough time to review the Company's contentions, and there is no reason to assume the Board was dissembling when it said in its most recent Decision that it had in fact considered Bally's arguments.

Bally's complaint about the incorporation of the 2008 Decision is equally devoid of merit. Due process does not require lengthy Board opinions, and the Board is entitled to adopt and incorporate administrative law judge or hearing officers decisions with only limited comment. ***Pittsburg S.S. Co. v. NLRB,*** 167 F.2d 126, 128 (6th Cir. 1948). And, if the Board can adopt decisions by subordinate officials, it is hard to see why it would be precluded from incorporating its own earlier decisions into a later opinion. Due process did not preclude the Board from relying on its earlier Decision in this case.

Finally, the Board's use of the same procedure in multiple cases seems completely unexceptional. Administrative and judicial tribunals typically have established procedures which they use repeatedly. Due process does not prevent adoption of practicable administrative procedures, and there is no reason to think the Board was obliged to establish special rules in this case just for Bally's. Cf. ***NLRB v. Duval Jewelry Company of Miami, Inc.,*** 357 U.S. 1, 7 (1958)(administrative efficiency permitted Board to delegate the preliminary decision in subpoena revocation cases to subordinates).

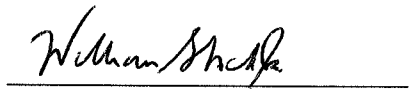
In short, nothing in the Board's handling of this case has denied Bally's due process. The Company has been given a hearing at which it had a chance to present its evidence, an opportunity to make its arguments to both the Administrative Law Judge who heard the case and to the Board and it will have an opportunity to present its claims to a Circuit Court. It is hard to imagine any more could be required.

Conclusion

There is, therefore, no reason to deny the Motion for Summary Judgment in this case. Bally's arguments are mostly a repetition of claims it made in the representation case. To the

extent new contentions have been raised, they lack merit. Counsel for the General Counsel's Motion should be granted.

Signed at Philadelphia, Pennsylvania this 12th day of January, 2011.



WILLIAM SLACK
Counsel for the Acting General Counsel
National Labor Relations Board
Region Four

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UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
1099 14TH STREET NW
WASHINGTON DC 20570

July 23, 2010

Re: Bally's Park Place, Inc. v. NLRB, D.C. Cir.
(Nos. 08-1325; 08-1326)
352 NLRB No. 95; 352 NLRB No. 51
Board Case 4-CA-36109; 4-RC-21286

WILLIAM T. JOSEM
CLEARY & JOSEM, LLP
ONE LIBERTY PLACE, 51ST FLOOR
1650 MARKET STREET
PHILADELPHIA, PA 19103

GERALD A. EINSOHN, ESQ.
HARRAH'S ENTERTAINMENT, INC.
ONE HARRAH'S COURT
LAS VEGAS, NV 89119

NLRB REGION 04 - PHILADELPHIA
DOROTHY MOORE-DUNCAN, REG. DIR.
615 CHESTNUT STREET
SEVENTH FLOOR
PHILADELPHIA, PA 19106-4404

CHARLES E. SYKES
SADLER & SYKES LLP
14701 ST. MARYS LANE
SUITE 315
HOUSTON, TX 77079

RICHARD TARTAGLIO, ESQ.
BALLY'S PARK PLACE, INC. DBA BALLY'S
ATLANTIC CITY
PARK PLACE AND THE BOARDWALK
ATLANTIC CITY, NJ 08401-6709

Dear Counsels:

This is to advise you that, in light of the Supreme Court's ruling in New Process Steel, L.P. v. NLRB, 560 U.S. ___, 2010 WL 2400089 (June 17, 2010), the Board has requested that the Court of Appeals remand the above case. The Board will consider the case and take action as appropriate.

Very truly yours,

Henry S. Breiteneicher

Henry S. Breiteneicher
Associate Executive Secretary

cc: Parties

Exhibit 1

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1325 **September Term 2010**

NLRB-4CA36109

Filed On: September 20, 2010

Bally's Park Place, Inc., doing business as
Bally's Atlantic City,
Petitioner

v.

National Labor Relations Board,
Respondent

Consolidated with 08-1326

BEFORE: Garland, Brown, and Griffith, Circuit Judges

ORDER

Upon consideration of the motion for remand and the opposition thereto; the motion to deny the cross-application for enforcement and dismiss and the response thereto; and the motion for leave to intervene, the opposition thereto, and the reply, it is

ORDERED that the petition for review be granted, the cross-application for enforcement be denied, the decision of the National Labor Relations Board be vacated, and the case remanded for further proceedings before the Board. See New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010); Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469, 476 (D.C. Cir. 2009). It is

FURTHER ORDERED that the motion for leave to intervene be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
MaryAnne Lister
Deputy Clerk/LD

Exhibit 2

CLEARY
JOSEM

CLEARY & JOSEM LLP
One Liberty Place, 51st Floor
1650 Market Street
Philadelphia, PA 19103
215.735.9099
Fax: 215.640.3201
www.clearyjosem.com
E-Mail: labor@clearyjosem.com

William T. Josem, Esquire
wtjosem@clearyjosem.com
Admitted in PA, NJ & NY
Also a member of Schwarz, Cleary
Josem & Schwarz LLC

December 8, 2010

By Email and by Overnight Mail

Richard Tartaglio, Vice President Labor Relations
Bally's Park Place Casino Hotel
Park Place and the Boardwalk
Atlantic City, NJ 08401

Re: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW

Dear Mr. Tartaglio:

The undersigned is counsel to International Union, UAW, the exclusive collective bargaining representative of all full time and regular part time dealers, keno and simulcast employees employed by the Employer at its Park Place and The Boardwalk, Atlantic City, New Jersey facility, excluding all other employees, cashiers, pit clerks, clerical employees, engineers, guards and supervisors as defined in the Act.. On behalf of the UAW, I am writing to renew the Union's request, first made on April 21, 2008, that the Employer recognize and bargain with the UAW in an effort to reach a collective bargaining agreement covering the employees in the bargaining unit.

Kindly contact the undersigned as soon as possible so that we may arrange a mutually convenient time to commence negotiations.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

WILLIAM T. JOSEM

cc: Charles E. Sykes, Esquire (by regular mail)
Scott Adams, Regional Director (by regular mail)
Kim Blake, Assistant Regional Director (by email)
Blair Simmons, Associate General Counsel (by email)

Exhibit 3

10/10/2010

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

BALLY'S PARK PLACE INC., d/b/a
BALLY'S ATLANTIC CITY

and Case 4-CA-36109

INTERNATIONAL UNION, UNITED
AUTOMOBILE AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA, AFL–CIO

AMENDED COMPLAINT

International Union, United Automobile Aerospace and Agricultural Implement Workers of America, AFL-CIO, herein called the Union, has charged that Bally's Park Place, Inc., d/b/a Bally's Atlantic City, herein called Respondent, has been engaging in unfair labor practices as set forth in the National Labor Relations Act, 29 U.S.C. Section 151 *et seq.*, herein called the Act. Based thereon, the Acting General Counsel, by the undersigned, pursuant to Section 10(b) of the Act and Section 102.17 of the Rules and Regulations of the National Labor Relations Board, herein called the Board, issues this Amended Complaint and alleges as follows:

1. The charge in this proceeding was filed by the Union on April 24, 2008, and a copy was served by first class mail on Respondent on April 25, 2008.

2. (a) At all material times, Respondent, a corporation, has been engaged in the operation of a casino at Park Place and the Boardwalk in Atlantic City, New Jersey, herein called the Casino.

(b) During the past year, Respondent, in conducting its business operations described above in subparagraph (a), received gross revenues in excess of $500,000, and purchased and received at the Casino goods valued in excess of $5,000 directly from points outside the State of New Jersey.

(c) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

3. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Exhibit 4

4. (a) The following employees of Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full time and regular part time dealers, keno and simulcast employees employed by Respondent at its Park Place and The Boardwalk, Atlantic City, New Jersey facility, excluding all other employees, cashiers, pit clerks, clerical employees, engineers, guards and supervisors as defined in the Act.

(b) On June 2 2007 and June 3, 2007, a representation election was conducted among the employees in the Unit, and a majority of the Unit selected the Union as their exclusive collective bargaining representative.

(c) On April 11, 2008, the Union was certified as the exclusive collective bargaining representative of the Unit in Case 4-RC-21286 (352 NLRB 316) by a two-member quorum of the Board.

(d) On June 17, 2010, the Supreme Court issued a decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct 2635, holding that under Section 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegee group of at least three members must be maintained. Thereafter, this case was remanded for further proceedings consistent wit the Supreme Court's decision.

(e) On November 30, 2010, a three-member panel of the Board issued a new certification to the Union as the exclusive collective bargaining representative of the Unit in Case 4-RC-21286 (356 NLRB No. 40).

(f) At all times since November 30, 2010, based on Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of the Unit.

5. (a) On or about April 21, 2008, the Union, by letter, requested that Respondent recognize the Union and bargain collectively with the Union as the exclusive collective bargaining representative of the Unit.

(b) By letter dated April 21, 2008, Respondent notified the Union that it refused to recognize and bargain with the Union as the exclusive collective bargaining representative of the Unit.

(c) On or about December 8, 2010, the Union, by letter, renewed its request that Respondent recognize the Union and bargain collectively with the Union as the exclusive collective bargaining representative of the Unit.

(d) The Union has not received a response to its December 8, 2010 request.

6. By the conduct described above in paragraph 5(d), Respondent has been refusing to bargain collectively with the exclusive collective bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

7. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an Answer to the Amended Complaint. The Answer must be **received by this office on or before December 27, 2010, or postmarked on or before December 26, 2010**. Respondent shall file an original and four copies of the Answer with this office and serve a copy of the Answer on each of the other parties.

An Answer may also be filed electronically by using the E-Filing system on the Agency's website. In order to file an Answer electronically, access the Agency's website at http://www.nlrb.gov, click on **E-Gov**, then click on the **E-Filing** link on the pull-down menu. Click on the "File Documents" button under "Regional, Subregional and Resident Offices" and then follow the directions. The responsibility for the receipt and usability of the Answer rests exclusively upon the sender. A failure to timely file the Answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. When an Answer is filed electronically, an original and four paper copies must be sent to this office so that it is received no later than three business days after the date of electronic filing. Service of the Answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The Answer may not be filed by facsimile transmission. If no Answer is filed, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the Amended Complaint are true.

Signed at Philadelphia, Pennsylvania on this 10th day of December, 2010.

Dorothy L. Moore-Duncan

DOROTHY L. MOORE-DUNCAN
Regional Director, Fourth Region
National Labor Relations Board

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

BALLY'S PARK PLACE, INC. d/b/a
BALLY'S ATLANTIC CITY

and Case 4-CA-36109

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

ANSWER TO AMENDED COMPLAINT

Comes Now Bally's Park Place, Inc. d/b/a Bally's Atlantic City and files its Answer to Complaint.

1. Admit.

2 (a). Admit.
(b). Admit.
(c). Admit.

3. Admit.

4. (a). Admit.
(b). Admit that on June 2 and 3, 2007, a representation election was conducted but deny that the selection of the exclusive collective bargaining representative was lawful.
(c). Deny that the Board acted lawfully in certifying the union and therefore the certification is null and void and the allegation is denied.
(d). Admit first sentence of paragraph 4(d). Deny second sentence of paragraph 4(d), which is contrary to the decision of the D.C. Circuit order issued on September 20, 2010, that states:

> . . . the petition for review be **GRANTED**, the cross-application for enforcement be **DENIED**, the decision of the National Labor Relations Board be **VACATED**, and the case **REMANDED** for further proceedings before the Board.

(See Exhibit A attached).

Exhibit 5

(e). Admit that on November 30, 2010, the Board issued a new certification, which was the first and only lawful certification.
(f). Deny.

5. (a). Admit.
(b). Admit.
(c). Admit.
(d). Without knowledge.

6. Deny.

7. Deny.

AFFIRMATIVE DEFENSES

1. The acts and conduct of the three member panel of the Board (Liebman, Becker, and Pierce) in this case are contrary to and in defiance of the September 20, 2010, Order of the U.S. Court of Appeals for the D.C. Circuit wherein the court held:

> ... the petition for review be **GRANTED**, the cross-application for enforcement be **DENIED**, the decision of the National Labor Relations Board be **VACATED**, and the case **REMANDED** for further proceedings before the Board.

2. The three member Board panel (Liebman, Becker, and Pierce) failed to review this matter in a meaningful way as the entire case was processed and allegedly reviewed in less than one business week, which included the Thanksgiving holiday - a federally recognized holiday.

3. The three member Board panel's decision incorporating by reference and relying on an unlawful decision (Case 4-CA-36109), which was denied enforcement and vacated by the U.S. Court of Appeals for the D.C. Circuit, is contrary to due process and constitutes a violation of the due process requirements of the Constitution of the United States.

4. The three member Board panel's continued utilization of Case 4-CA-36109 as a basis for further action after the Respondent's petition for review was granted, the cross-application for enforcement was denied and the decision was vacated also violates Respondent's due process rights under the Constitution of the United States.

5. By adopting the Administrative Law Judge's findings to the extent and for the reasons stated in the April 11, 2008, Decision and Certification of Representative in Case 4-RC-21286, and by incorporating it by reference in its November 30, 2010, Decision, Certification of Representative and Notice to Show Cause, the three member Board panel committed fundamental error.

6. The Board violated Respondent's due process rights and Respondent's right to an unbiased, independent and fair review by utilizing the same exact process and decision in multiple decisions. This violation is evidence by the Board's use of identical language in a raft of decisions as illustrated by its decision in *J.S. Carambola, LLP d/b/a Carambola Beach Resort and Our Virgin Islands Labor Union (OVILU)*, 355 NLRB No. 69.

7. The record is devoid of any evidence that proves that the refusal to bargain was made as part of a bad faith effort by the Respondent to avoid its bargaining obligation.

8. The record reflects that no lawful certification was issued until November 30, 2010.

9. Without waiving affirmative defenses 1, 2, 3, 4, 5, 6, 7, and 8, the Board erred in overruling the Objections to the Election filed in Case 4-RC-21286 (2008) by Bally's Park Place, Inc. d/b/a Bally's Atlantic City.

10. Without waiving any affirmative defenses, Respondent reasserts its objection "[t]o the refusal of the Regional Director to provide Notice(s) of Election printed in various foreign languages that are spoken by hundreds of eligible voters. The Petitioner did object to the Employer's request that the Notice of Election be printed in various foreign languages."

11. Without waiving any affirmative defenses, Respondent reasserts its objection "[t]o the conduct of at least one of the Petitioner's Asian Election observers who had a sample ballot visible for Asian voters to see before they obtained their ballots. The Petitioner's Asian observer would point to the Sample Ballot's "Yes" box, which was clearly visible to the Asian voters prior to the casting of their ballots."

12. Without waiving any affirmative defenses, Respondent reasserts its objection "[t]o the failure of the Region 4 personnel who were in charge of conducting the election to order at least one of the Petitioner's Asian observers to cease the conduct outlined in Objection No. 2 until one of the Employer's observers finally asked one of the Board Agents about the conduct of at least one of the Petitioner's Asian observers that is outlined in Objection No. 2."

13. Without waiving any affirmative defenses, Respondent reasserts its objection "[t]o the failure of Region 4 personnel who were in charge of conducting the election to enforce the NLRB's rules regarding election conduct in the polling area."

14. Without waiving any affirmative defenses, Respondent reasserts its objection "[t]o the conduct of Region 4 personnel who allowed at least one of the Petitioner's observers to engage in electioneering conduct. The conduct of at least one of the

Petitioner's Asian observers was visible to the Region 4 personnel conducting the election."

15. Without waiving any affirmative defenses, Respondent reasserts its objection that "[a]gents, representatives and supporters of the Petitioner threatened, coerced and intimated various eligible voters who did not support the Petitioner."

16. Without waiving any affirmative defenses, Respondent reasserts its objection that "[a]gents, representatives and supporters of the Petitioner offered things of value to eligible voters to induce them to vote for the Petitioner."

17. Without waiving any affirmative defenses, Respondent reasserts its objection that "[a]gents and representatives of the Petitioner asked eligible voters how they were going to vote prior to the election."

18. Without waiving any affirmative defenses, Respondent reasserts its objection that "[a]gents and representatives of the Petitioner threatened eligible voters that if they did not sign a document in support of the Petitioner that they would be the first to go after the Petitioner won the election."

19. Without waiving any affirmative defenses, Respondent reasserts its objection that "[b]y the above, related and other acts and conduct, the Petitioner's agents, representatives and supporters interfered with the election."

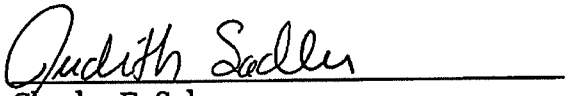
20. Without waiving any affirmative defenses, the three member Board panel (Liebman, Becker, and Pierce) is acting as an advocate rather than a neutral decision maker by granting the General Counsel leave to amend the complaint and to file any briefs or statements in support of the Motion for Summary Judgment by the same date that

Respondent's Opposition to the Notice to Show Cause is due. This action was taken without any request by the General Counsel and without any deadline for the filing of a new Motion for Summary Judgment. The Decision is replete with bias and prejudice.

Respectfully Submitted,

Richard Tartaglio
BALLY'S PARK PLACE, INC. d/b/a
BALLY'S ATLANTIC CITY
Park Place and The Boardwalk
Atlantic City, NJ 08401-6709
(609) 340-2525 - Telephone
(609) 340-2187 - Fax

AND



Charles E. Sykes
Judith Sadler
SADLER & SYKES, L.L.P.
14701 St. Mary's Lane, Suite 315
Houston, Texas 77079
(713) 877-8111 - Telephone
(713) 877-8188 - Fax

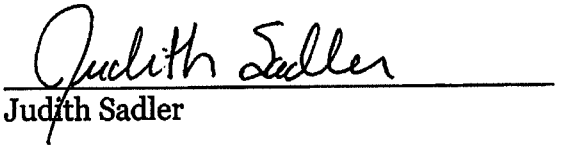
ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

Dorothy L. Moore-Duncan
Regional Director
National Labor Relations Board
Region 4
615 Chestnut Street, 7th Floor
Philadelphia, PA 19106-4404
FedEx No. 796590536219
Original and Four Copies

William T. Josem
Cleary & Josem, LLP
One Liberty Place, 51st Floor
1650 Market Street
Philadelphia, PA 19103
FedEx No. 796590547320

Date: December 22, 2010



Judith Sadler

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-1325 **September Term 2010**

NLRB-4CA36109

Filed On: September 20, 2010

Bally's Park Place, Inc., doing business as
Bally's Atlantic City,
Petitioner

v.

National Labor Relations Board,
Respondent

Consolidated with 08-1326

BEFORE: Garland, Brown, and Griffith, Circuit Judges

ORDER

Upon consideration of the motion for remand and the opposition thereto; the motion to deny the cross-application for enforcement and dismiss and the response thereto; and the motion for leave to intervene, the opposition thereto, and the reply, it is

ORDERED that the petition for review be granted, the cross-application for enforcement be denied, the decision of the National Labor Relations Board be vacated, and the case remanded for further proceedings before the Board. See New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635 (2010); Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469, 476 (D.C. Cir. 2009). It is

FURTHER ORDERED that the motion for leave to intervene be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
MaryAnne Lister
Deputy Clerk/LD