UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

TRUMP PLAZA ASSOCIATES d/b/a TRUMP PLAZA HOTEL AND CASINO	)	
	)	Case No. 4-RC-21263
and	)	
	)	
INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO	)	

MOTION FOR LEAVE TO FILE AMICUS BRIEF AND PROPOSED AMICUS BRIEF

Mark Mix, President of the National Right to Work Legal Defense Foundation, moves for leave to file the attached amicus brief in the above captioned case. Mr. Mix was granted leave to file an amicus brief with the Administrative Law Judge ("ALJ") because the subject matter of Mr. Mix's unfair labor practice charge in *Int'l Union, UAW (Trump Plaza and Hotel)*, Case 4-CB-9834, is being resolved in this representational case. (*See* AJLD 1, n.1) ("I grant the motion and accept the brief because of the relationship between the objection and the charge and because it is in the interest of the deciding official to have the benefit of the brief.").[1] It is respectfully requested that the Board grant Mr. Mix leave to file the attached

[1] The Regional Director of NLRB Region 4 is holding Mr. Mix's charges in Case 4-CB-9834 in abeyance pending disposition of election objections in Case No. 4-RC-21263 because "[t]he objections and unfair labor practice allegations . . . are coextensive and the outcome of the representation case will, after Board review, likely provide an appropriate basis for resolving the unfair labor practice case." May 2, 2007, Order of NLRB Region 4 in Case 4-CB-9834.

amicus brief for the same reasons.

Respectfully submitted this 26th day of October, 2007.

/s/ William L. Messenger
William L. Messenger
Counsel for Proposed Amici Mark Mix, President, National Right to Work Legal Defense Foundation

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AMICUS BRIEF OF MARK MIX, PRESIDENT, NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

Mark Mix, President of the National Right to Work Legal Defense Foundation, files this amicus brief in support of the Employer's Exceptions to the Election Results. It is urged that the Board hold that conduct by government officials is objectionable if the conduct can be construed by employees as an official state action in support of a union, as opposed to a personal opinion by the official.

There is a firm distinction between statements made by government officials in their personal capacity and in their official capacity. The former are merely the opinion of an individual. The latter constitute the position of the government.

The Board has recognized this distinction in the context of Board elections. Statements by government officials that employees will construe "as the personal expression of a political and partisan being speaking for herself" are not objectionable. Chipman Union, Inc., 316 NLRB 107 (1995). By contrast, conduct

that employees may construe as a state action in support of a union are objectionable. *See* Columbia Tanning, 238 NLRB 899 (1978).

In this case, Congressman Robert Andrews did not merely state that he supported the International Union, UAW ("UAW"). He purported to "certify" the UAW's majority status shortly before a Board election, and attested that this verification was "in accordance with NLRB rules."

Employees could reasonably believe that this "certification" by a federal official had a definitive legal effect—i.e., that the UAW was certified as their representative under the authority of law. Indeed, Congressman Andrew's certification of the UAW could have had this legal effect and rendered the Board's election moot. Accordingly, Congressman Andrew's ersatz "certification" of the UAW constituted objectionable conduct that destroyed the laboratory conditions necessary for a free and fair election.

It is imperative that the Board find that this type of conduct objectionable to protect its exclusive jurisdiction over representational proceedings from encroachment by federal and state officials. Otherwise, politicians can (and will) use the authority of their office to mislead employees that the government requires or favors a particular result in Board certification elections.

THE FACTS

The *amici* adopts the facts as stated in the Employers' Brief in Support of its Exceptions. Briefly stated, the UAW conducted a public ceremony with Congressman Robert Andrews shortly before a Board certification election at Trump Plaza Hotel and Casino ("Trump Plaza"). At this event, Congressman Andrews "certified" that a majority of Trump Plaza's dealers had authorized the UAW to be their collective bargaining representative by signing a document that states:

> CERTIFICATION OF MAJORITY STATUS
>
> We, the undersigned, conducted a confidential examination of Union authorization cards for the purposes of determining whether a majority of full time and regular part-time dealers, dual rate dealers, and dual rate supervisors at Trump Plaza Hotel and Casino have authorized the International Union, UAW ("UAW") to represent them in collective bargaining.
>
> The verification of the Union's majority was conducted by means of a comparison of a copy of the original signed cards and a list of current eligible employees in the bargaining unit provided by Trump Plaza Hotel and Casino to the Union in accordance with NLRB rules.
>
> The undersigned certify that, based on a confidential examination of cards, as described above, the majority of Trump Plaza Hotel and Casino full time and regular part-time dealers, dual rate dealers, and dual rate supervisors have authorized the UAW to represent them for the purpose of collective bargaining.

(hereinafter "Certification of Majority Status").

ARGUMENT

I. Conduct by Government Officials Is Objectionable If It Can Be Construed by Employees as Constituting An Official State Action, as Opposed to the Personal Action of the Government Official

The Board recognizes that conduct that employees may reasonably construe as a state action in favor of a union are objectionable, while conduct that employees will recognize as being that of a private party are not objectionable. This distinction is equally applicable to conduct by government officials during Board elections. Conduct by government officials that carries the imprimatur of state authority are objectionable, while statements that employees will recognize as the personal opinion of the official are not objectionable.

The Board's general rule is that, "[a]s long as the campaign material is what it purports to be, i.e., mere *propaganda of a particular party*, the Board [will] leave the task of evaluating its contents solely to the employees." Midland National Life Insurance Co., 263 NLRB 127, 131 (1982) (*quoting* General Knit of California, 239 NLRB 619, 629 (1978) (Member Penello dissenting) (emphasis added). However, campaign material that is not readily identifiable as the "propaganda of a particular party," but rather appear to be the work of the government, is objectionable if misleading or otherwise coercive.

For example, use of altered NLRB election ballots during election campaigns is objectionable if employees could reasonably believe that the altered ballot is from the Board, but is not objectionable if employees would recognize that the altered ballot is the work of a private party. *See* Service Corp. Int'l d/b/a Oak Hill Funeral Home and Memorial Park, 348 NLRB No. 35 (2005), *enforced* 495 F.3d 681 (DC. Cir. 2007); Sofitel San Francisco Bay, 343 NLRB 769 (2004). "The crucial question should be whether the altered ballot in issue is likely to have given voters the misleading impression that the Board favored one of the parties to the election. When it is evident that the altered ballot is the work of a party, rather than the Board, employees are perfectly capable of judging its persuasive value." SDC Investment, 274 NLRB 556, 557 (1985).

The same distinction between official state action and private action applies to conduct by government officials in conjunction with Board elections. Conduct that employees may construe as an official state action in support of a union are objectionable. For example, in Columbia Tanning, 238 NLRB 899 (1978), the Board found that a letter written by a Massachusetts Commissioner of Labor to be objectionable because it "improperly suggests governmental approval of the [union]." Id. at 900.

By contrast, statements that employees will construe as the personal opinion of a government official are not objectionable because they do not convey an imprimatur of state authority. For example, in Chipman Union, Inc., 316 NLRB 107 (1995), the Board held that a letter by a Congresswoman to employees was not objectionable because the letter merely indicated her general support for unionization. Id. "[E]mployees would not reasonably construe the foregoing [communication] as an official institutional endorsement by the Federal Government." Id. Instead, employees would interpret the Congresswoman's statement of support for the union "as the personal expression of a political and partisan being speaking for herself." Id..[1]

This distinction was recognized by former Board Chairmen Hurtgen in Saint Gobain Abrasives, 337 N.L.R.B. 82, 82-83 (2001). In that case, a Congressman campaigned for a union during a Board election. Chairman Hurtgen stated that he did "not question the right of Congress-persons to campaign for one side or the other in connection with a National Labor Relations Board election." Id. at 82. However, he would have found the Congressman's statements regarding what

[1] *See also* Usery Companies, 311 NLRB 399 (1993) (letter from Congressman supporting a union was not objectionable because employees could "identify the Union as the source of the document in question").

federal law permits during organizing campaigns to be objectionable because "employees are likely to view that statement as definitive." Id. at 82.

In short, the dispostive question regarding conduct by government officials during Board elections is whether, as a result of the conduct, "it can be said that the Board or the United States favors one party to the election." Usery Companies Inc., 311 NLRB 399 (1993). As established below, Congressman Andrews "certification" of the UAW is objectionable because employees could reasonably construe it to mean that the UAW had been designated as their collective bargaining representative under authority of federal law.

II. A Federal Official Certifying A Union as Employees Collective Bargaining Representative Is Objectionable Because Employees Could Reasonably Believe That the Certification Has Legal Effect

Congressman Andrew's "certification" of the UAW is objectionable because Trump Plaza's employees could tend to believe that it constituted a state action that bestowed the UAW with the legal authority to act as their collective bargaining representative, which would render the Board's certification election moot. It is improbable that these employees would construe a federal official's certification that they "have authorized the UAW to represent them for the purpose of collective bargaining" as a mere statement of personal support for the union.

Congressman Andrews signed a document literally entitled "*Certification* of Majority Status" that purported to "*certify* that . . . [employees] have authorized the UAW to represent them for the purpose of collective bargaining." (emphasis added). "Certification" of a union is the exclusive province of the government. Only the Board can "certify" that a union enjoys majority employee support, and "certify" a union' status as a collective bargaining representative. *See* 29 U.S.C. 159(c). The UAW having a federal official "certify" the union's majority status clearly has the tendency to mislead employees that this "certification" was done under authority of federal law.

Moreover, the "Certification of Majority Status" states:

> The **verification of the Union's majority** was conducted by means of a comparison of a copy of the original signed cards and a list of current eligible employees in the bargaining unit provided by Trump Plaza Hotel and Casino to the Union **in accordance with NLRB rules**.

(emphasis added). By stating that the verification of the UAW's majority status was " in accordance with NLRB rules," this ersatz "certification" was expressly cloaked with the false imprimatur of legal authority.

Indeed, Congressman Andrews' certification could have had the legal effect of making the UAW the employees' exclusive representative if Trump Plaza had accepted this "certification"—i.e., recognized the UAW based on the card count.

Since the Board's certification election could have been rendered moot by Congressman Andrews' certification under certain circumstance, it certainly was reasonable for employees to believe that it actually had this legal effect.

A sham certification by a federal official is far more egregious conduct than that at issue in Usery Companies, Chipman and Saint-Gobain, in which politicians merely stated their support for a union. Employees could reasonably construe a politician's statement of support for a union "as the personal expression of a political and partisan being speaking for herself." Chipman, 316 NLRB at 107; *accord* Usery Companies, 311 NLRB at 399; Saint-Gobain, 337 NLRB at 82.

By contrast, Trump Plaza's employees could not reasonably interpret Congressman Andrew's "certification" that a majority of employees "have authorized the UAW to represent them for the purpose of collective bargaining" as merely being a statement of personal support by the Congressman for the UAW. Employees could reasonably believe that the UAW had actually been "certified" as their collective bargaining representative under authority of law and that the Board's certification election was a nullity. As such, the Congressman's ersatz certification constitutes objectionable conduct that destroyed the laboratory conditions necessary for a free and fair election.

III. The ALJ Erred by Focusing on Whether Employees May Have Construed The Certification As Being An Action by the Board

The basis of the Administrative Law Judges ("ALJ's") recommended decision is that employees could not reasonably believe that Congressman Andrew's "certification" of the UAW was an action by the Board. (*See* ALJD, 6-8). This conclusion is inapposite irrespective of its truth or falsity,[2] for conduct is objectionable if its carries the false imprimatur of *government* authority, not merely Board authority. *See* Usery Companies, 311 NLRB at 399 (the concern is "under what circumstances it can be said that the Board *or the United States* favors one party to the election") (emphasis added).

For example, assume that the Governor of a state informed employees shortly before a Board election that state law required that they choose a union for collective bargaining. It is unlikely that employees will confuse the Governor of their state with the Board. Yet, the Governor's statement would surely constitute

[2] The ALJ's grounds for reaching his conclusion are erroneous because he attempts to have it **both ways** with respect to the language used in the "Certification of Majority Status" signed by Congressman Andrews. The ALJ states that employees would construe the term "certification" to have "a **generic meaning** far beyond that used in Board parlance for the verification of election results." (AJLD, 7) (emphasis added). But, the ALJ then finds that the employees would construe the phrase "in accordance with NLRB rules" to have its **technical meaning** under Board law of a comparison of union cards with employee lists. (*See* ALJD, 8). Of course, it is untenable to presume that employees will be simultaneously ignorant and knowledgeable about the complexities of Board law.

objectionable conduct because employees would reasonably believe that they were required by state law to select the union.

Here, Congressman Andrew's "certification" of the UAW is objectionable irrespective of whether employees may believe that he acted on behalf of the Board. Employees certainly know that the Congressman is part of the federal government. As such, employees could believe that his "certification" that a majority of employees "have authorized the UAW to represent them for the purpose of collective bargaining" had the legal effect of designating the UAW as their representative under authority of federal law.

IV. The Board Must Protect Its Exclusive Jurisdiction Over Representational Proceedings From Political Interference

It is imperative that the Board find Congressman Andrew's conduct to be objectionable to prevent similar interference by federal and state officials in Board election campaigns the future. Otherwise, any government official —Congressman, governor, mayor, or bureaucrat—could falsely "certify" that a majority of employees have selected a union to be their exclusive representative prior to a Board election meant to resolve that very issue.

Failure to hold that conduct by government officials that carries the imprimatur of state action is objectionable would permit any government official to (mis)use

the authority of their office to influence Board elections. For example, unions could enlist officials from state health or safety departments to inform employees that they need union representation to ensure compliance with health or safety regulations. Employers could enlist a mayor to inform employees that union representation will result in the loss of their employer's contracts with the city. The various manners in which politicians could use the cloak of government authority to mislead employees to vote for or against union representation is endless.

Employees cannot freely choose or reject union representation when federal or state officials inform them that the law requires or favors unionization. While employees may be capable of evaluating the personal opinions of politicians regarding unionization, it is unfair and unreasonable to expect that the same regarding statements made under the cloak of government authority. For example, a governor stating that he supports a union is one thing. But, a governor stating that state law requires union representation is quite another.

An appearance of government neutrality is just as necessary for free and fair elections as is the appearance of Board neutrality. Failure to require it in Board certification elections will open the floodgates to interference by federal, state, and local officials seeking to curry favor with union officials or employers. In order to

protect employee free choice and to protect the Board's exclusive jurisdiction over representational proceedings, it is imperative that the Board find objectionable conduct by government officials that can be construed as a state action in support of a union.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Board find merit to the Employer's Election Objections, hold that conduct by government officials is objectionable if it can be construed by employees as an official state action in support of a union, and set aside the results of the election conducted at Trump Plaza on March 31, 2007.

Respectfully submitted this 26th day of October, 2007.

/s/ William L. Messenger
William L. Messenger
Counsel for Proposed Amici Mark Mix, President, National Right to Work Legal Defense Foundation

CERTIFICATE OF SERVICE

I hereby certify that, on this 26th day of October 2007, I filed the foregoing Motion for Leave to File Amicus Brief and Proposed Amicus Brief electronically with the Board and caused a copy thereof to be served via First Class United States Mail, postage pre-paid to:

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