

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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COMMUNICATIONS WORKERS OF  
AMERICA, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

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PURPLE COMMUNICATIONS, INC.,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

and

COMMUNICATIONS WORKERS OF  
AMERICA, AFL-CIO,

Intervenor.

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Nos. 17-70948  
17-71062  
17-71276

Board Case No.  
21-CA-095151

**COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO'S REPLY TO  
OPPOSITION TO BOARD'S MOTION FOR REMAND**

The Board asks that this Court trust it to do the right thing and evaluate the recusal issues.

In *Caesars Entertainment*, 368 NLRB No. 143 (2019), the Board, at least in part, addressed the recusal issues and found no issue with member Emanuel's participation in *Caesars*. See footnote 11.

We fully addressed those issues in our Opposition to the Motion for Remand, DktEntry 85 at pg. 10-11.

The Board asked for remand to do something which it has already considered. It had its change to reject Member Emanuel's participation in in *Caesars Entertainment*. See footnote 11

Moreover, the Reply of the National Labor Relations Board is submitted on behalf of member Emanuel. It is his General Counsel which filed the Opposition on behalf of member Emanuel and the other two members of the Board.

Member Emmanuel continues to have his attorney (the General Counsel of the Board) on his behalf seek a result which would benefit his former law firm and its client.

Purple Communications in its response makes an argument that Member Emanuel did not participate in in this until 2 years after his appointment to the Board. See DktEnty 87 at p 3, Purple Communications is also wrong about the two year bar. That bar is absolute and is only a minimum. See, Executive Order No. 13770. Member Emanuel took a seat on the Board on September 26, 2017. The two year bar had expired on September 26, 2019. Although the decision in *Caesars* did not issue until December 16, 2019, three months after the two year bar expired, it is not believable that Member Emanuel had not been participating in the decision making process in that case for a substantial period of time before the Board's decision issued. Under the Board's current practice, a case is assigned to a panel. In this case, however, it was clear that all members of the Board would

participate since under consideration was the issue of whether *Purple Communications, Inc.* 361 NLRB No. 1050 (2014) should be overruled. It is clear Member Emanuel was participating in deliberations over *Caesars* since at least the Board's invitation for parties to submit briefs on August 1, 2019. Plainly he had been participating in that decision for months before the decision issued and well within the two year bar.

The Executive Order does not date the disqualification from the date the tainted decision issues. Rather, it is *participating in the deliberations* for the case which matters. Here that would plainly be within the two year bar.

If the Board wants to represent that Member Emanuel played no role in that case until suddenly on September 27, 2019, he jumped in, we doubt such a claim would be credible.

The Court should exercise its supervisory power and deny a remand to the Board which has demonstrated its inability to recognize the recusal issues. A remand would serve no purpose other than to perpetuate the improper conflicts. The Court should issue an Order to Show Cause to the Board to explain the conflict rather than let the Board continued to function with Member Emanuel sitting on a case where his former law firm represents the party.

Date: January 24, 2020

Respectfully Submitted

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**COMMUNICATIONS WORKERS OF  
AMERICA**

**CERTIFICATE OF SERVICE**

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

I hereby certify that on January 24, 2020, I electronically filed and served the forgoing **COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO'S REPLY TO OPPOSITION TO BOARD'S MOTION FOR REMAND** with the United States Court of Appeals For the Ninth Circuit by using the Court's CM/ECF system.

I further certify that counsel for parties listed below are registered users who have been served through the CM/ECF system.

I certify under penalty of perjury that the above is true and correct.  
Executed at Alameda, California, on January 24, 2020.

*/s/Katrina Shaw*  
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Katrina Shaw

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