



United States Government

**NATIONAL LABOR RELATIONS BOARD**

**OFFICE OF THE GENERAL COUNSEL**

Washington, DC 20570

September 9, 2016

Michael E. Gans, Esquire  
Clerk, United States Court of Appeals  
for the Eighth Circuit  
Thomas F. Eagleton Courthouse  
111 South 10<sup>th</sup> Street, Room 24.329  
St. Louis, MO 63102

Re: *MikLin Enterprises, Inc. d/b/a Jimmy John's v. NLRB*,  
Case Nos. 14-3099 & 14-3211

Dear Mr. Gans,

This letter responds to MikLin Enterprises, Inc.'s August 31, 2016, Rule 28(j) letter regarding *Southern New England Telephone Co. v. NLRB*, 793 F.3d 93 (D.C. Cir. 2015). The D.C. Circuit's July 2015 decision in *Southern New England Telephone* addressed a distinct legal issue, subject to a different standard than is applicable in this case.

The issue in *Southern New England Telephone* was whether the employer had shown "special circumstances" permitting it to prohibit employees from "displaying messages on the job" by wearing union t-shirts while they interacted with customers. *Id.* at 95-96. The special-circumstances test does not apply here for two reasons. First, unlike the employee-apparel issue in *Southern New England Telephone*, this case involves employees' more general right to communicate with and solicit the support of the public regarding a labor dispute; the communications in this case were not made on the job. Second, the special-circumstances test operates "to balance the potentially conflicting interests of an

employee's right to display union insignia and an employer's right to limit or prohibit such display." *Id.* at 96 (internal quotations omitted). Rather than balancing competing interests to determine if an employer can prohibit protected activity, the issue here is whether the employees' posters and press release lost protection altogether; the applicable standard is whether the communications were maliciously untrue or so disloyal as to forfeit protection. NLRB Br. 17.

By seeking a special rule for the food industry, MikLin also overreads the D.C. Circuit's decision. The court did not hold that the employer was privileged to ban the t-shirts simply because of the type of industry involved; the special-circumstances test is by nature case specific. Finally, even aside from the distinct legal issue involved, *Southern New England Telephone* is factually distinguishable because, unlike the poster and press release in this case, the court found that the t-shirts "contained no reference to ... the ongoing labor dispute." 793 F.3d at 94.

Very truly yours,

s/Linda Dreeben

Linda Dreeben

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cc: all counsel (via CM/ECF)