

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 150**

And

DONEGAL SERVICES, LLC.

**Case 13-CP-227526
13-CC-227527
13-CC-231597
13-CC-233109**

**COUNSEL FOR THE GENERAL COUNSEL'S
BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

Respectfully submitted:

/s/ Kevin McCormick

Kevin McCormick, Esq.
Counsel for the General Counsel
National Labor Relations Board
Region 13
219 South Dearborn, Room 808
Chicago, Illinois 60604

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I. INTRODUCTION ¹

This case can be summed up in a sentence: Donegal Services LLC either had to recognize Local 150 as the representative of its employees or go out of business. The relevant undisputed facts underlying the labor dispute are as simple as that. Beginning on about July 10, 2018, Respondent International Union of Operating Engineers, Local 150, hereafter “Respondent” or “Local 150”, began a campaign against Donegal Services, LLC, hereafter “Charging Party” or “Donegal,” that included illegal picketing, secondary boycotts, interference, and threats against neutral employers. As the credible testimony and exhibits entered during the trial demonstrate, Respondent engaged in all of this behavior with the object of forcing Donegal to recognize it as the bargaining representative of its employees without being certified under Section 9 the Act. At the same time, Local 150 pressured other neutral employers to cease doing business with the Charging Party. One way or another, Local 150 through its illegal actions would make sure that it sent a coercive message to other employers. If you conduct business in the Respondent’s territory, like Donegal, you will recognize Local 150. The only alternative for employers is to face economic ruin.

While elements of Respondent’s illegal and coercive plan can be seen as early as August of 2017, the plan began in earnest on July 9, 2018, with the filing of an unfair labor practice charge as a cover story for the Respondent’s real objective; either have Donegal sign a contract or run them out of business. Respondent’ illegal picketing began on the next day at Donegal’s facility in Lemont, Illinois. From July 10, 2018, up to the present day at some neutral employer

¹ Hereafter the National Labor Relations Board will be referred to as the “Board”; and the National Labor Relations Act as the “Act”. With respect to the record developed in the case, the transcript will be designated as “Tr.”; the General Counsel's exhibits as “GC”; Respondent’s exhibits as “R” and the Charging Party’s exhibits as “CP”.

locations, Respondent picketed Donegal in violation of Section 8(b)(4)(B) and 8(b)(7)(C) of the Act. As a result, Charging Party Donegal is entitled to a full remedy under Board law.

Respondent has and will present arguments ad nauseum about one of the secondary employers being a joint employer or ally of Donegal and that its actual object of placing union salts at Donegal was just to observe and record safety and environmental law violations. However, Respondent's arguments are distractions from the real issues in this case. Respondent engaged in secondary boycotts of numerous neutral companies, and its object always has been to either have Donegal sign a collective-bargaining agreement or drive them of business.

II. RESPONDENT ENGAGED IN CONDUCT THAT WAS TANTAMOUNT TO PICKETING BEGINNING ON JULY 10, 2018.

Section 8(b)(4)(i) and (ii)(B) makes it unlawful for a labor organization or its agents: (i) to induce or encourage employees to withhold their services from their employer or (ii) to threaten, coerce, or restrain any person engaged in commerce, where an object of the conduct is to force or require any person to cease doing business with any other person.² Concern over unions pressuring neutral, secondary employers prompted Section 8(b)(4)(B), which is meant to simultaneously protect unions' right to exert legitimate pressure on employers with whom they have a primary labor dispute, and to shield neutral businesses from labor disputes not their own.³ The Board has found a wide array of conduct aimed at employees of neutral employers to constitute unlawful inducement or encouragement to cease work in violation of Section 8(b)(4)(i)(B). While traditional picketing at the premises of a neutral employer has long been

² 29 U.S.C. § 158(b)(4)(i) & (ii)(B).

³ *NLRB v. Operating Engineers Local 825 (Burns & Roe, Inc.)*, 400 U.S. 297, 302-303 (1971); *see also NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675, 692 (1951).

held to violate Section 8(b)(4)(i)(B),⁴ the Board and courts have also held that union activity at a neutral's premises that falls short of traditional picketing may still send a "signal" to a neutral's employees that they should withhold their services. For example, in *Electrical Workers Local 98 (Telephone Man)*, a union agent stationed himself at the neutral gate at a construction site with a sign hanging around his neck that read "observer" and, when "conveniently flipped over," revealed language indicating that the primary employer did not pay appropriate wages.⁵ The Board concluded that the agent was not a benign observer but was rather engaged in unlawful signal picketing.⁶ Similarly, in *Sheet Metal Workers Local 19 (Delcard Associates)*, the Board affirmed the ALJ's conclusion that a union engaged in unlawful signal picketing by posting an agent in a rat costume near a neutral gate.⁷ By using a rat costume, the union "intentionally sought to create the impression that this was an unfair job," and thereby unlawfully induced and encouraged neutral employees to cease work.⁸

In determining what exactly constitutes unlawful "threat[s], coerc[ion], or restrain[t]" under Section 8(b)(4)(ii)(B), the Supreme Court has determined that while handbilling at a neutral employer's business is lawful, picketing urging a boycott of the neutral employer is

⁴ *Laborers Eastern Regional Organizing Fund (Ranches at Mt. Sinai)*, 346 NLRB 1251, 1253 (2006) (patrolling and picketing at construction site when only neutrals' employees would be present establishes unlawful inducement and encouragement); *Service Employees Local 525 (General Maintenance Co.)*, 329 NLRB 638, 638-39 & n.10 (1999) (picketing at neutral employers' premises has the "foreseeable consequence" of unlawfully inducing or encouraging neutral's employees to withhold their labor), *affirmed*, 52 Fed. App'x 357 (9th Cir. 2002); *see also Electrical Workers Local 501 v. NLRB (Samuel Langer)*, 341 U.S. 694, 699-704 (1951) (peaceful picketing at construction site where neutral was present was unlawful inducement or encouragement to neutral's employees to withhold their labor).

⁵ 327 NLRB 593, 593 (1999).

⁶ *Id.*

⁷ 316 NLRB 426, 437-38 (1995), *affirmed in relevant part*, 154 F.3d 137 (3d Cir. 1998).

⁸ *Id.* at 438. *See also Warshawsky & Co. v. NLRB*, 182 F.3d 948, 953-54 (D.C. Cir. 1999) (handbilling decrying primary employer's substandard wages and benefits, that took place on access road to construction site at times when only neutral employees would be present, constituted unlawful inducement and encouragement), *certiorari denied*, 529 U.S. 1003 (2000).

coercive and therefore unlawful.⁹ That is because, the Court explained, “picketing is a mixture of conduct and communication and the conduct element often provides the most persuasive deterrent to third persons about to enter a business establishment.”¹⁰ Handbilling, by contrast, relies solely on the persuasive force of the idea within the handbill, rather than the confrontational element inherent in picketing.¹¹

The Board and courts have historically defined picketing in a very broad and flexible manner.¹² Patrolling and the carrying of picket signs have never been prerequisites to establish picketing.¹³ The Board and courts have found a variety of conduct to be picketing or tantamount to picketing, including: planting signs in a snowbank and then watching the signs from a parked car¹⁴; posting stationary agents with signs near an employer’s entrance¹⁵; disorderly conduct in front of a neutral’s business, including attaching a banner to the neutral’s building¹⁶; and the

⁹ *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council (DeBartolo II)*, 485 U.S. 568, 579-80 (1988) (citing *NLRB v. Retail Clerks Local 1001 (Safeco Title Ins. Co.)*, 447 U.S. 607, 607 (1980)).

¹⁰ *DeBartolo*, 485 U.S. at 580 (internal citations and quotation marks omitted).

¹¹ *Id.*

¹² See *Eliason & Knuth*, 355 NLRB at 815 (Members Schaumber and Hayes, dissenting). See also *Lumber & Sawmill Workers Local Union No. 2792 (Stoltze Land & Lumber)*, 156 NLRB 388, 394 (1965); *Mine Workers District 2 (Jeddo Coal Co.)*, 334 NLRB 677, 686 (2001); *Service Employees Local 87 (Trinity Maintenance)*, 312 NLRB 715, 743 (1993), enforced memorandum, 103 F.3d 139 (9th Cir. 1996); *Lawrence Typographical Union 570 (Kansas Color Press)*, 169 NLRB 279, 283 (1968), enforced, 402 F.2d 452 (10th Cir. 1968).

¹³ *Eliason & Knuth*, 355 NLRB at 814-15 (citing, *inter alia*, *Service Employees Local 87 (Trinity Maintenance)*, 312 NLRB at 743, 746); Cf. *DeBartolo II*, 485 U.S. at 571 (“the union peacefully distributed the handbills without any accompanying picketing or patrolling”) (emphasis added).

¹⁴ *NLRB v. Teamsters Local 182 (Woodward Motors)*, 314 F.2d 53 (2d Cir. 1963), enforcing 135 NLRB 851 (1962).

¹⁵ *Jeddo Coal Co.*, 334 NLRB at 686. See also *Laborers Local 389 (Calcon Const.)*, 287 NLRB 570, 573 (1987) (union agents standing near stationary sign or sitting in parked van with sign on outside of van, constitutes picketing); *Painters District Council 9 (We’re Associates)*, 329 NLRB 140, 142 (1999) (“where groups of men are gathered around a sign ... they are engaged in picketing”) (internal citations omitted).

¹⁶ *Trinity Maintenance*, 312 NLRB at 746.

massed gathering of strikers and community members without picket signs or placards in a neutral hotel's parking lot where strikebreakers were staying.¹⁷

Other conduct that the Board has found was not picketing but nevertheless coercive within the meaning of Section 8(b)(4)(ii)(B) includes broadcasting a message at extremely high volume through loudspeakers facing a neutral condominium building¹⁸; throwing bags full of trash into a building's lobby¹⁹; and 20-70 union members marching in an elliptical pattern without signs while some distributed handbills.²⁰ In the latter case, the Board noted that the union's conduct had "overstepped the bounds of propriety and went beyond persuasion so that it became coercive to a very substantial degree."²¹

As the evidence clearly shows and the Respondent admits, on July 10, 2018, Local 150 began posting large inflatable rats, banners, and signs at various locations beginning with Donegal's facility in Lemont, Illinois. Tr. 299-303. GC 33. Donegal owner Simon Bradley testified that he personally witnessed an approximately ten-foot high inflatable rat and a large group of Local 150 representatives holding signs that were around 16 inches by two feet large. Tr. 302. The signs read "unfair labor practice strike against Donegal." Tr. 302. While there were no banners at the site in Lemont, as discussed below, Local 150 used them later at secondary employer sites. Local 150 continued using the inflatable rat and signs at the Lemont location every day from July 9 through at least late September 2018. Tr. 302-303.

¹⁷ *Mine Workers (New Beckley Mining)*, 304 NLRB 71, 72 (1991), *enforced*, 977 F.2d 1470 (D.C. Cir. 1992).

¹⁸ *Carpenters (Society Hill Towers Owners' Assn.)*, 335 NLRB 814, 820-23 (2001), *enforced*, 50 F. App'x 88 (3d Cir. 2002).

¹⁹ *Service Employees Local 525 (General Maintenance Co.)*, 329 NLRB 638, 664-65, 680 (1999), *affirmed*, 52 F. App'x 357 (9th Cir. 2002).

²⁰ *Service Employees Local 399 (William J. Burns Agency)*, 136 NLRB 431, 436-37 (1962) (two members of the Board majority would, in fact, have labeled the union's conduct "picketing").

²¹ *Id.*

Local 150's conduct was not disputed by any of the Respondent's witnesses. In fact, task force organizer Ray Sundine testified about his involvement when the picket started at Lemont on July 10, 2018. Tr. 1138, 1156. Sundine began the picket on the instructions of Local 150 vice president Mike Kresge. Tr. 1115-1117, 1155-56. Sundine explained the signs were red and white and were 16 inches by 2 feet. Tr. 1156. In addition to having the inflatable rat and picket signs at the Lemont facility, Local 150 began an ambulatory picket, that is whenever a driver arrived at the facility and left to go to a jobsite, Local 150 would follow their trucks to the jobsite. Tr. 1157. Once there, Local 150 would get out of their cars with their picket signs and picket the site. Once the Donegal truck left, the particular Local 150 representatives would then follow them. Tr. 1157.

A. Boughton Materials

The Respondent admits that it began using the inflatable rat along with banners at neutral jobsites soon afterwards. John Boughton, the president of Boughton Materials, testified about what he witnessed at the limestone quarry. Tr. 25-26. Donegal Services had been a longtime customer of Boughton Materials. Tr. 28. Boughton testified that in July of 2018, he witnessed two black Local 150 vehicles following a Donegal truck into pit one located at 119th Street in Plainfield, Illinois. Tr. 27. Boughton recalled that one of the Local 150 representatives he saw that day was Tony Deliberto, a business agent. Tr. 29-30. Deliberto asked Boughton to stop loading Donegal trucks and explained that they needed to work together since Local 150 had a big campaign against the Charging Party. Tr. 30. Boughton refused and continued to load their trucks.

Boughton testified that the next day he came to work, Local 150 had erected a twelve (12) foot inflatable rat at the front of the pit in between the two gates on 119th Street. Tr. 30-31.

This time Local 150 had a large banner in front of the inflatable rat. Tr. 31. The banner read “Shame on Boughton Materials Inc for Harboring Rat Contractors.” GC 11, 12. Two to three Local 150 representatives stood at the base of the rat and banner. Tr. 31, 45. Soon after this, John Boughton left on a five-week vacation. Tr. 35. While Local 150 did not engage in what has been considered traditional picketing during those eight days²² at Boughton Materials, the combination of its inflatable rat and bannering, together and separately, under the Board’s historically broad and flexible definition, constituted picketing.

B. Elmhurst Chicago Stone

Local 150’s campaign of picketing neutral employers continued with Elmhurst Chicago Stone (ECS), a landfill used by Donegal Services among others. Tr. 129. Respondent admits in its Answer, and the evidence shows that around July 10, 2018, its agents posted a large inflatable rat and a banner with the words, ““Shame on Elmhurst Chicago Stone for Harboring Rat Contractors.” Timothy Mix, dispatcher and driver for Donegal, testified that the banner was approximately two feet by six feet in front of the business. Tr. 131. A group of three to four representatives stood or sat next to the rat. Mix identified GC 9, GC 10, 26, and 27 as photographs of what he saw on different occasions. Tr. 131-32, 138-39. Mix explained that the rat and banner were on the south side of Royce Road, to the east and next to the entrance into the landfill. Tr. 132. Mix believed that the rat, banner, and rat patrol vehicle were at the Bolingbrook location from July to September of 2018. Tr. 132.

Regarding the Local 150 picket at ECS’s Elmhurst location, Mix noted that in late August, Local 150 moved its rat, banner, and van to the West Avenue side where the ECS offices and batch plant are located. Tr. 135. Field Supervisor William Doherty also confirmed that the

²² Frank Maly, vice president of Boughton Materials, testified the rat and banner were at the facility for eight days. Tr. 58.

first ECS Elmhurst picket was located on Route 83 and then was moved to West Avenue. Tr. 224. Doherty testified that he continued to see the rat, banner, and rat patrol vehicle up to November of 2018. Tr. 225-26.

C. Wilco Green

Local 150 admits in its Answer and the evidence shows that it posted its inflatable rat and banner at employer Wilco Green's facility beginning in July 2018. Numerous witnesses testified that Wilco Green's landfill facility is located on 119th Street in Plainfield, Illinois. Tr. 67, 128, 135. Simon Bradley, owner of Donegal Services, pinpointed the date that Local 150 began its picket of Wilco Green around July 9th or 11th. Similar to the other employers, Local 150 had a banner which read, "Shame on Wilco Green for Using Rat Contractors." Tr. 323. GC 30, 31. CP 13. Bradley as well as other witnesses testified that Local 150's picket was still present at Wilco Green at the time of the trial. Tr. 137, 322, 323.

D. Andy's Frozen Custard.

Respondent admits in its Answer and the evidence shows that it posted "Scabby" and a banner at the Oak Lawn, Naperville, and Countryside, Illinois, locations for Andy's Frozen Custard beginning about August 2018. GC 1(m), Pg. 4. Respondent denies that it posted the rat and banner at the Bolingbrook, facility. Regarding the Oak Lawn, Naperville, and Countryside locations, the General Counsel introduced several photographs showing the activity at these locations. GC 13 through 20. Witnesses identified which locations were shown in the photographs. Tr. 142, 232, 328-29, GC 13 (Naperville), GC 14 (Oak Lawn), GC 15, 17, 20 (Countryside). From the testimony, it is not clear when exactly the picketing stopped at the Naperville, Oak Lawn, and Countryside locations but as Simon Bradley testified that he lost his

business with Andy's because of the rats and banners, it must have ceased at some point between August 2018 and the date of the trial. Tr. 226, 453.

Regarding the Andy's Frozen Custard location at Bolingbrook, Illinois, Timothy Mix, William Doherty, and Simon Bradley all credibly testified that Local 150 was present at that location. Tr. 128, 143-44, 226. Mix had seen both the rat and the banner. Tr. 144. Doherty and Bradley testified that they had only seen a banner. Tr. 143-44, 226. However, at most of the neutral employer sites involved in this case, Respondent was known to have the inflatable rat up at some times, and not on others. Given that Timothy Mix testified that he drove by the Andy's Bolingbrook location around two to three times a week while either leaving ECS or going home, Mix most likely saw the location more than anyone. Tr. 143-44. Mix estimated he saw both the rat and the banner around a dozen times before Donegal had finished the work there. Tr. 144.

The only evidence that Respondent offered to dispute that it was present at the Bolingbrook location was to suggest that it was another union, the Laborers, Local 75. Tr. 197. However, Respondent did not offer any anyone from Local 75 to testify or documentary evidence that this was in fact, the case. Instead, Respondent presented task force organizer Ray Sundine to give a self-serving denial. Tr. 1168. Sundine stated that he drove by once and did not stop. Tr. 1168. He claims to have seen a Local 75 sign and it was against Crana, which Sundine believed to be another one of Simon Bradley's companies. Tr. 1168. Even if this were true, this does not preclude Local 150 from having a rat and banner at the site against Donegal Services on other dates, namely those dates specified by Timothy Mix. Additionally, Local 150 admitted to having a rat and banner at all the other Andy's Frozen Custard locations. Thus, Respondent's denial regarding the Bolingbrook location should not be credited.

E. Greenscape Homes

Respondent admits that beginning in September of 2018, it posted “Scabby” and a banner which read, “Shame on Greenscape Homes for using rat contractors.” GC 1(m), Pg. 4-5.

Photographs of the picket were entered into evidence as GC Ex 6, 7, 8, and 28. According to Timothy Mix, Greenscape Homes is a residential building company in Warrenville, Illinois, that does business with Donegal Services. Tr. 149-50. Mix also stated that the last time he saw the rat and banner at Greenscape Homes was in December of 2018. Tr. 150. At the time of the trial, Simon Bradley believed Local 150 had left that location. Tr. 324.

F. Provencal Construction

Respondent admits beginning in mid-November 2018, it posted the inflatable rat and banner near the entrance of Provencal Construction’s Burr Ridge, Illinois, facility. GC 1(m), Pg. 5. GC Exhibits 4, 5 and 29 are photographs showing the rat and banner. The large banner reads, “Shame on Provencal Construction for Using Rat Contractors.” Tr. 325. GC 4, 5, 29. Simon Bradley testified that he took the photo in GC 29 in early December 2018 and that he had seen it there as recently as the week of Christmas. Tr. 326. Ray Sundine admitted that the rat and banner was still present at that location at the time of the trial. Tr. 1207.

G. Overstreet Builders

Respondent also admitted erecting the rat and banner at Overstreet Builders in Naperville, Illinois, in mid-November, 2018. GC 1(m), Pg. 5. Respondent also admitted to the wording on the banner.²³ GC 1(m), Pg. 5. Although it wasn’t clear from the testimony when exactly the picketing ended, Ray Sundine testified that the rat and banner was no longer present at that location. Tr. 1207-8.

²³ A photograph of the picket was unavailable.

H. Ross Builders

In its Answer to the Amended Consolidated Complaint, Respondent admitted to erecting the rat and banner at Ross Builders located in Hinsdale, Illinois, beginning on December 17, 2018. GC 1(n), Pg. 3. Numerous photographs and video were entered into evidence showing the rat and the large banner. GC 3, 24. R 4. There is also no dispute regarding the wording of the banner, “Shame on Ross Builders, Inc. for Using Rat Contractors.” GC 1(n), Pg. 3. As Craig Ross, the president and owner of Ross Builders, testified, the banner measured approximately three (3) feet by eight (8) feet. Tr. 98. Ross Builders is a general contractor for residential homes and does business with Donegal Services. Tr. 95, 97. The rat patrol box truck was also present at this location along with two Local 150 representatives. Tr. 99. The inflatable rat and banner were still up on the date of trial. Tr. 100-101. Respondent did not present any evidence to dispute this.

III. THE BOARD’S DECISIONS IN *ELIASON & KNUTH*, *BRANDON MEDICAL CENTER (BRANDON II)*, AND *NEW STAR*.

As demonstrated above, under the Board’s historical broad and flexible definition, Respondent’s behavior at the eight neutral secondary employers constitutes picketing. Respondent will rely on *Carpenters Local 1506 (Eliason & Knuth of Arizona)*,²⁴ *Sheet Metal Workers Local 15 (Brandon Medical Center) (Brandon II)*,²⁵ and *Carpenters Southwest Regional Councils Locals 184 & 1498 (New Star)*,²⁶ in defense of its actions. In those decisions, the Board narrowed its definition of picketing, and thereby the scope of unlawful activity prohibited by Section 8(b)(4), and determined that certain union conduct, including the erection of

²⁴ 355 NLRB 797 (2010)

²⁵ 356 NLRB 1290 (2011)

²⁶ 356 NLRB 613 (2011)

stationary banners and an inflatable rat at neutral employers' facilities, was lawful nonpicketing secondary activity under the Act.

In *Eliason & Knuth*, the Board majority concluded that a union's posting of agents holding large, stationary banners proclaiming "labor dispute" and "shame on [the employer]" in front of neutral businesses did not violate Section 8(b)(4)(ii)(B).²⁷ In particular, the Board majority stated its view that stationary bannering is not tantamount to picketing. Thus, for the first time, the Board held that the "carrying of picket signs and persistent patrolling" were necessary predicates to establish picketing.²⁸ In doing so, the Board majority acknowledged prior case law that articulated a broader definition of picketing, i.e., the posting of union agents at a business entrance to keep away employees and/or customers.²⁹ Nevertheless, the Board majority purportedly reconciled that broader precedent by noting that in many of those cases, the display of stationary signs was preceded by union agents' ambulatory picketing, during which they often used traditional picket signs.³⁰ Moreover, the Board majority noted that many of those cases pre-dated the Supreme Court's decision in *DeBartolo II*, and a definition of picketing that relied solely on the posting of a union agent near the entrance to an employer's place of business was incompatible with *DeBartolo II*'s holding that handbilling near an entrance was

²⁷ 355 NLRB at 797.

²⁸ *Id.* at 802.

²⁹ *Id.* at 803-804 (citing, e.g., *Stoltze Land & Lumber Co.*, 156 NLRB at 394 (posting union agents to confront customers and employees near employer's entrance, picketing); *Kansas Color Press*, 169 NLRB at 283 (strikers, who sat in their cars at entrance to employer's premises, and would confront members of public arriving at premises, were engaged in picketing); *Iron Workers Pacific Northwest Council (Hoffman Construction)*, 292 NLRB 562 n.2 (1989) (groups of union agents gathered around a sign constitutes picketing), *enforced*, 913 F.2d 1470 (9th Cir. 1990); *Jeddo Coal*, 334 NLRB at 686 (union agents standing with picket signs without patrolling, constitutes picketing)).

³⁰ *Eliason & Knuth*, 355 NLRB at 804.

lawful.³¹ In addition to concluding that the bannering was not equivalent to picketing, the *Eliason* Board also determined that the bannering was not otherwise coercive within the meaning of Section 8(b)(4)(ii)(B) because, e.g., it did not block ingress or egress to neutral businesses or otherwise disrupt the neutral businesses' operation.³² Finally, applying the doctrine of constitutional avoidance, the Board determined that a finding that the bannering was unlawful would raise serious First Amendment issues, and so it declined to read Section 8(b)(4)(ii)(B) as proscribing the banner displays.³³

Dissenting Members Schaumber and Hayes, meanwhile, would have found the bannering to be unlawful.³⁴ They argued that Section 8(b)(4)(ii)(B) was meant to broadly shield neutral, innocent employers from “nonjudicial acts of a compelling or restraining nature, applied by way of concerted self-help consisting of a strike, picketing, or other economic retaliation or pressure in the background of a labor dispute.”³⁵ The dissent pointed to the extensive body of law in which the Board and courts have defined labor picketing flexibly and broadly.³⁶ Thus, the dissent argued that bannering was the “confrontational equivalent of picketing” that sought to induce the public to react with “emotions” and “fear of retaliation” rather than by appealing to the public’s reason.³⁷ Moreover, the dissent explained, the sheer size of the banners obviated the

³¹ *Id.* at 803.

³² *Id.* at 805-806 (citing *Society Hill Towers Owners’ Assn.*, 335 NLRB at 820-23).

³³ *Id.* at 807-11.

³⁴ *Id.* at 811-21 (Members Schaumber and Hayes, dissenting).

³⁵ *Id.* at 813 (emphasis removed, internal quotation marks omitted) (citing *Carpenters Kentucky District Council (Wehr Constructors)*, 308 NLRB 1129, 1130 n.2 (1992) (quoting *Sheet Metal Workers Local 48 v. Hardy Corp.*, 332 F.2d 682, 686 (5th Cir. (1964))).

³⁶ *Id.* at 814-15.

³⁷ *Id.* at 815 (citing *NLRB v. United Furniture Workers*, 337 F.2d 936, 940 (2d Cir. 1964)).

need for traditional patrolling and created a physical, or at least a “symbolic[ally] confrontational barrier” to those seeking access to the neutral’s premises.³⁸ Disagreeing with the majority’s contention that an expanded definition of picketing was inconsistent with the Supreme Court’s decision in *DeBartolo II*, the dissent noted that the Board had long adhered to an expanded definition of picketing, even in the wake of *DeBartolo II*.³⁹ The dissent argued that *DeBartolo*’s holding was limited to finding that handbilling at a neutral employer’s facility was lawful, inasmuch as the success of handbilling turns solely on persuasion.⁴⁰ Because a banner, by contrast, contains much less speech than a handbill, and mimics the confrontational aspects of a picket line, its success depends on intimidation, rather than mere persuasion.⁴¹ Finally, the dissenters disagreed with the majority’s application of the doctrine of constitutional avoidance. They explained that, since the bannering was tantamount to picketing, no constitutional concerns were raised, as it is settled law that secondary picketing is not entitled to First Amendment protection.⁴² Moreover, even if secondary bannering were entitled to some First Amendment protection, the dissent noted that the government has a substantial interest in regulating labor relations that justifies some restrictions on free speech.⁴³ In this regard, the dissent observed that, unlike with hand billing, the conduct element of secondary bannering predominates over the speech element, and therefore First Amendment concerns are not as strongly implicated.⁴⁴

³⁸ *Id.*

³⁹ *Id.* at 817-18 & n.30 (citing *Trinity Maintenance*, 312 NLRB at 743; *Jeddo Coal Co.*, 334 NLRB at 686).

⁴⁰ *Id.* at 817-18.

⁴¹ *Id.*

⁴² *Id.* at 820 (citing *Safeco*, 447 U.S. at 616).

⁴³ *Id.* 820-21 (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763 n.17 (1976)).

⁴⁴ *Id.* at 821.

In 2011, the Board extended the holding of *Eliason & Knuth* to hold that a union’s use of a large, inflatable rat was neither picketing, nor otherwise coercive.⁴⁵ In *Sheet Metal Workers Local 15 (Brandon Medical Center) (Brandon II)*,⁴⁶ the union had set up a large, inflatable rat on a truck approximately 100 feet from the neutral hospital’s front door.⁴⁷ The same three member Board majority that issued the decision in *Eliason & Knuth* held in *Brandon II* that the union’s large inflatable rat did not constitute picketing where the rat was located at a significant distance from the hospital entrance, and where its attendants did not physically or verbally accost hospital patrons. The Board found that there was insufficient confrontation to render the conduct unlawful.⁴⁸ Notably, the Board majority acknowledged that “the size of a symbolic display combined with its location and threatening or frightening features could render it coercive within the meaning of Section 8(b)(4)(ii)(B).”⁴⁹

Member Hayes dissented in *Brandon II*, as he had done in *Eliason & Knuth*, and, contrary to the *Brandon II* majority, found that the union’s use of an inflatable rat balloon, “a well-known symbol of labor unrest,” was tantamount to picketing.⁵⁰ Member Hayes concluded that the message for “pedestrians or occupants of cars passing in the shadow of a rat balloon,

⁴⁵ *Brandon II*, 356 NLRB at 1292.

⁴⁶ 356 NLRB 1290 (2011). In the original Board decision in that case, the Board concluded that the union violated Section 8(b)(4)(ii)(B) by staging a “mock funeral” on public property in front of a hospital, including patrolling while carrying a fake casket and accompanied by a union member dressed as the Grim Reaper. *Sheet Metal Workers Local 15 (Brandon Regional Medical Center) (Brandon I)*, 346 NLRB 199 (2000), *enforcement denied*, 491 F.3d 429 (D.C. Cir. 2007). However, because the Board determined that finding the rat to be unlawful would simply be a cumulative violation with the mock funeral, it declined to pass on the lawfulness of the rat at that time. *Brandon Regional Medical Center*, 346 NLRB at 200, n.3. The Board’s *Brandon II* decision issued after the D.C. Circuit denied enforcement of *Brandon I*.

⁴⁷ *Brandon II*, 356 NLRB at 1290.

⁴⁸ *Id.* at 1292. As he did in *Eliason & Knuth*, Member Hayes dissented in *Brandon II*.

⁴⁹ *Id.* at 1294.

⁵⁰ *Id.* at 1296.

which proclaims the presence of a ‘rat employer,’” was “unmistakably confrontational and coercive.”⁵¹ Given its frequent use in labor disputes, Member Hayes also concluded that the union’s use of a rat balloon was a signal to third parties of an invisible picket line they should not cross.⁵² As such, the union’s intent in using the rat as a symbol of labor strife was to evoke from those confronted by the rat the same kind of reaction as if they had been confronted by a traditional picket line.⁵³ The predominant characteristic of the rat, like picketing, was to “intimidate by conduct, not to persuade by communication.”⁵⁴

Also in 2011, the Board held in *Carpenters Southwest Regional Councils Locals 184 & 1498 (New Star)* that a union did not violate Section 8(b)(4) by erecting banners at 19 different neutral employers’ premises claiming labor disputes with the neutrals and proclaiming “shame” on them.⁵⁵ In addition to applying *Eliason & Knuth* and determining that the banners did not constitute picketing and did not coerce the neutral employer under Section 8(b)(4)(ii)(B), the Board also concluded that the display of the banners at two construction sites did not induce or encourage neutral employees to cease working in violation of Section 8(b)(4)(i)(B).⁵⁶ The Board explained that the presence of the union’s banners at construction sites closed to the public did not automatically mean they were directed at neutral employees, inasmuch as passing motorists could see the signs from the adjacent road, and because people in addition to the neutral employees entered the construction site, such as the owners and managers of the different

⁵¹ *Id.*

⁵² *See id.*

⁵³ *See id.*

⁵⁴ *Id.*

⁵⁵ 356 NLRB 613, 614 (2011).

⁵⁶ *Id.*

contractors, as well as the property owners and the entity for whom the building was being built.⁵⁷ Moreover, even assuming the banners were directed at neutral employees, the Board would still not have found them to have constituted unlawful inducement of neutral employees because a union might want to simply “educate” neutral employees about the labor dispute, rather than ask them to stop working.⁵⁸

Member Hayes also dissented in *New Star*. In addition to noting that the union’s banners were coercive under Section 8(b)(4)(ii)(B) because they were the “confrontational equivalent” to picketing, Member Hayes would have found that the banners also unlawfully induced or encouraged employees of the neutral to cease work in violation of Section 8(b)(4)(i)(B).⁵⁹ In this regard, Member Hayes argued that even if the union’s conduct fell short of traditional picketing, the union nevertheless engaged in signal picketing that effectively requested that neutral employees refrain from entering and working at the site.⁶⁰ In particular, given that the banners did not correctly identify which employer the union had a primary labor dispute with, Member Hayes rejected as implausible the majority’s position that the union was simply seeking to educate neutral employees about the labor dispute.⁶¹

The Board’s decisions in *Eliason & Knuth* and *Brandon II*, restricting the definition of picketing to circumstances where union agents carry picket signs while patrolling, were wrongly decided, inappropriately departed from the Board’s previously broad and flexible definition of picketing, and should be overruled. The dissenters in those cases were right because the

⁵⁷ *Id.* at 617.

⁵⁸ *Id.*

⁵⁹ *Id.* 619 (Member Hayes, dissenting).

⁶⁰ *Id.*

⁶¹ *Id.* at 620 & n.4.

placement of union agents with large banners or inflatables at the entrances to neutral businesses sought to dissuade the public from entering through coercive conduct, rather than through a persuasive message, and therefore should have been considered tantamount to picketing under well-established law.⁶²

Applying the more reasonable definition of picketing that was in effect before *Eliason & Knuth* and *Brandon II*, Respondent's conduct here violated the Act. Local 150 posted agents holding a big banner, and a large, intimidating inflatable rat, at the entrances to the eight neutral employer sites, with the undisputed aim of forcing those businesses to cease using Donegal Services, with whom Local 150 had a primary dispute.⁶³ Local 150 agents' holding of a large, misleading banner—the functional equivalent of a picket sign—and the posting of a large, hostile-looking rat at the entrance to the site, were each tantamount to picketing because each created a symbolic, confrontational barrier to anyone seeking to enter or work at the sites.⁶⁴ Unlike the handbilling in *DeBartolo II*, Respondent here did not simply seek to persuade the public about the justice of their cause by disseminating information in a non-confrontational manner such as a handbill, but rather sought to dissuade anyone from entering the site through intimidation and coercion.⁶⁵ Any member of the public needing to transact business at the site would—upon encountering a large, frightening rat, and a large banner proclaiming “Shame on [Neutral Employer] for using rat contractors”—most likely stay away from the site due to a

⁶² *Eliason & Knuth*, 355 NLRB at 815-16; *Brandon II*, 356 NLRB at 1296-97.

⁶³ See, e.g., *Stoltze Land & Lumber*, 156 NLRB at 394 (“[t]he important feature of picketing” is posting union agents near the entrance to a neutral’s business); *Jeddo Coal Co.*, 334 NLRB at 686 (same); *Trinity Maintenance*, 312 NLRB at 743 (same); *Kansas Color Press*, 169 NLRB at 283 (same).

⁶⁴ See *Eliason & Knuth*, 355 NLRB at 815 (Members Schaumber and Hayes, dissenting) (banners’ “imposing mass and length obviate the need for any patrolling”); *Brandon II*, 356 NLRB at 1296 (Member Hayes, dissenting) (display of inflatable rat “now frequent in labor disputes, constitutes a signal to third parties that there is, in essence, an invisible picket line that should not be crossed”).

⁶⁵ *Id.* at 817-18.

desire to avoid confrontation, rather than because of the strength of Local 150's message or to engage with the Union agents in an effort to understand their grievances.⁶⁶ Indeed, the efficacy of the Union's approach was demonstrated by the refusal of Boughton Materials to load Donegal Services for several weeks after Local 150 stationed its agents, rat and banner at the quarry. Tr. 316. Similarly, Respondent's confrontational activity at Andy's Frozen Custard resulted in Donegal Service losing it as a customer. Tr. 330.

Additionally, because Respondent here engaged in conduct that was tantamount to picketing, First Amendment concerns are not implicated, inasmuch as it is settled law that the First Amendment does not shield unlawful secondary picketing.⁶⁷

The Board's decision in *New Star*, concluding that bannering at the private entrance to a construction site did not unlawfully induce neutral employees to cease work in violation of Section 8(b)(4)(i)(B), was wrongly decided and should be overruled as well. Dissenting Member Hayes was correct that the stationing of large banners proclaiming a labor dispute with the neutral, near the entrance to a construction site, was a clear attempt to signal neutral employees to strike.⁶⁸ Prior to *New Star*, the Board had consistently found similar union conduct at construction sites to be signal picketing in violation of Section 8(b)(4)(i)(B).⁶⁹

⁶⁶ See *id.* at 816 (“[a]version and avoidance are characteristic behaviors of persons being threatened, restrained, or coerced”).

⁶⁷ *DeBartolo II*, 485 U.S. at 579-80; *Safeco Title Ins. Co.*, 447 U.S. at 607.

⁶⁸ See 356 NLRB at 618 (Member Hayes, dissenting).

⁶⁹ See, e.g., *Telephone Man*, 327 NLRB at 593; *Delcard Associates*, 316 NLRB 437-38. See also *Warshawsky & Co. v. NLRB*, 182 F.3d at 953-56.

The Union’s conduct here was tantamount to picketing that violated Section 8(b)(4)(i)(B).⁷⁰ The predominant element of the banner was confrontational conduct, rather than persuasive speech, designed to promote a total boycott of the eight neutral businesses, and thereby to further Respondent’s objective of forcing those employers to cease doing business with Donegal Services. In addition, applying the Board’s pre-*New Star* precedent involving signal picketing, the Union’s placement of a large, frightening rat and a misleading banner at eight employer sites were intended as a signal to neutral employees to not enter or work at the jobsite.⁷¹ Indeed, for most of the time Respondent engaged in this conduct, Local 150 knew Donegal Services and its employees would not be present at the sites. Nor were the Union’s actions meant to educate neutral employees about its primary labor dispute, since the banner failed to name Donegal Services LLC specifically.⁷² As such, Respondent’s conduct constituted signal picketing that violated Section 8(b)(4)(i)(ii)(B).

IV. RESPONDENT’S PICKETING HAD A CEASE DOING BUSINESS OBJECT

The clearest evidence of Respondent’s “cease doing business” object is contained in the record regarding Respondent’s orders and threats to employees of the secondary employers. “An unlawful ‘cease doing business’ object is demonstrated by conduct that is intended or is likely to

⁷⁰ See *Laborers Eastern Regional Organizing Fund (Ranches at Mt. Sinai)*, 346 NLRB at 1253; *Service Employees Local 525 (General Maintenance Co.)*, 329 NLRB at 638-39 & n.10; *Electrical Workers Local 501 v. NLRB (Samuel Langer)*, 341 U.S. 69 at 699-704.

⁷¹ See *Delcard Associates*, 316 NLRB at 437-38 (observer in rat costume unlawfully induced or encouraged neutral employees to halt work; “rat” connotes destruction of wages); *Telephone Man*, 327 NLRB at 593 (observer posted at neutral gate in reality engaged in unlawful signal picketing). Although the handbill the Union distributed contained language indicating that the Union was not requesting a cessation of work, that language is insufficient to remedy the otherwise unlawful signal created by the inflatable cat and banner, especially because employees might turn away without even reading the handbill. See, e.g., *Teamsters local 917 (Industry City)*, 307 NLRB 1419, 1422-23 (1992) (picket signs asserting area wages dispute and calling for boycott of neutrals “patently sought to induce employees to cease working” despite statement disclaiming intent to induce work stoppage).

⁷² See *New Star*, 356 NLRB at 620 & n.4 (Member Hayes, dissenting).

disrupt or alter the business dealings between the primary employer and a neutral.”⁷³ In the instant case, Respondent began appealing, ordering and threatening individuals employed by neutral employees in July at Boughton Materials.

1. July 17, 2018 Order to Boughton Material Employees

Simon Bradley credibly testified regarding what he heard at Boughton Materials in July of 2018. Tr. 312. According to Bradley, soon after Respondent began picketing at the Donegal Lemont, Illinois, facility, Respondent followed his two trucks to Boughton Materials. Tr. 312. Bradley witnessed two black Local 150 cars drive into the gate and approach Boughton’s scale house. Bradley gave a detailed account of where the scale house was located about 500 feet from Boughton’s 119th street gate. Tr. 313. According to Bradley, he was approximately 10 to 15 feet away from the conversation. Tr. 314. Tr. 312. While there, the two individuals got out with their picket signs, and went up to the scale house operator and ordered him to cease loading Donegal trucks. Tr. 312-13, 315. Bradley heard the Boughton employee working at the scale house say, “Get the F outside my gate. I told you Local 150 don’t pay my bills. Donegal does.” Tr. 314-15.

John Boughton’s testimony corroborates Bradley’s recollection of the events. Boughton testified that Tony Deliberto had requested that he stop loading Donegal trucks. Tr. 30. Boughton informed Deliberto that Donegal was a good customer of theirs and they would continue to load them. Tr. 30. Since Boughton remembered Deliberto’s comment as a question, the Local 150 representative who made the order to the scale house operator was most likely the second representative.

John Boughton testified that he knew from his communications with Frank Maly, vice president at the company, that while Boughton was on vacation, Boughton Materials had to, in

⁷³ *Eliason & Knuth*, supra at 813.

fact, cease doing business with Donegal and stop loading their trucks. Tr. 35. By the time he got back, Boughton testified that the quarry was loading Donegal again. Tr. 35. Boughton estimated that Boughton Materials ceased loading Donegal for approximately two weeks, possibly even three to four. Tr. 32, 38.

Frank Maly, vice president, secretary and treasurer, of Boughton Materials, testified regarding the effects of Local 150's coercive conduct. Tr. 55. Like John Boughton, Maly witnessed Local 150 at pit one in Plainfield in July of 2018. Tr. 56. Maly identified photographs GC 11 and GC 12 as what he witnessed at the site. Tr. 56. The inflatable rat shown in those exhibits only came down after Maly was able to reach Tony Deliberto by phone. Tr. 57-58. He explained to Deliberto that Local 150 had won and they would no longer load Donegal trucks. Tr. 58. Deliberto replied to Maly that everyone won. Tr. 58.

Tony Deliberto's recollection of the July phone call was vague and lacking detail. Tr. 803. Deliberto admitted he had a phone call with Maly but claimed that he only thanked Maly for his support as if Maly's decision was a completely voluntary one. Tr. 804.

2. The September Threat to Boughton Materials.

Local 150's coercion of Boughton Materials did not end with only an inflatable rat, bannered and a coercive order. Frank Maly explained in his testimony that he was threatened directly by Tony Deliberto in September. Tr. 60. Maly explained that RSS was another trucking company and customer of Boughton that loaded stone from the quarry for construction projects. Tr. 60. In late August, early September 2018, Tony Deliberto left a message on Maly's phone. Tr. 60. This phone message and a transcription of it was entered into evidence as GC 23(a) and GC 23(b). Tr. 62. Deliberto said the following:

“Hey Frank, Tony Deliberto Local 150 umm....sorry to bother you this morning over this but uhhh... but you got an ally of Donegal purchasing stone out of your yard right across

from WilCo. The Company is called RSS Concrete and Excavating ummm.... but you know there is gonna be possible picketing activity with this. Give me a call back. I'd like to talk to you about it. Thank you very much.” GC 23(a).

Maly stated that after he received the message, he ceased loading RSS for any jobs involving Donegal Services. Tr. 63, 68, 71.

Local 150 counsel, through Tony Deliberto, later attempted to soften this blatant violation of the Act by asking him about his tone in the voicemail. Tr. 806. Deliberto stated that he wasn't “agitated in any way.” Tr. 806

Deliberto's tone was irrelevant to the message he was conveying to Frank Maly. The Board has routinely held that unqualified threats directed at a neutral violate Section 8(b)(4)(B)(ii).⁷⁴ The Board has also held that threats of economic pressure against neutral persons constitute section 8(b)(4)(ii) conduct. In this regard, even unspecified threats of “trouble” have been found to be violative. “[A]s in other areas of Board law, subjective interpretations of the listener are irrelevant to the analysis; instead, the focal point for consideration is the specific language used. The Board assesses those words on a case-by-case basis, taking into account the entire nature of the conversation at issue.”⁷⁵ In this case, Local 150 had already succeeded once in forcing Boughton Materials to cease loading Donegal using its inflatable rat and banner. Given this context, it would be laughable to suggest that Deliberto's subjective tone rendered his threat to Maly uncoercive and legal. The phone message speaks for itself. Deliberto's coercive message to Maly is clear, stop using an ally of Donegal (RSS) or Local 150 will picket you.

3. The July/August Order to Settler's Hill Employees.

⁷⁴ *Metropolitan Regional Council of Carpenters*, 351 NLRB 1007, 1011 (2007).

⁷⁵ *Id.*

Timothy Mix testified regarding his encounter with Respondent at the Settler's Hill landfill. Tr. 145. Settler's Hill is located in Geneva, Illinois. Tr. 145. In late July, early August, 2018, Mix drove his truck to the landfill to dump a load of clay. Tr. 146. He explained that when you pull into the site, a shack is there where an employee of the landfill inspects a driver's load. Tr. 146. The employee inspects the load with a machine which detects gas and shows whether the load is contaminated or not. Tr. 146. Mix testified that when he arrived at the site, a Local 150 representative was already there with a picket sign. Tr. 146-47. Mix got out of his truck, got his ticket from the inspector, and drove around to the dump site. Tr. 147. When he returned from dumping his load, Mix witnessed the same Local 150 representative speaking with an operator for Settler's Hill. Tr. 147. In addition to the Local 150 representative and the operator, Mix also testified that he saw what he called the check in person. Tr. 147. Mix heard the Local 150 representative tell the operator that Donegal could not dump there and he wanted both Settler's Hill employees to reload Mix's truck. Tr. 147-48. Mix was approximately 20 feet away. Tr. 148. The three people were near the Local 150 representative's car. Tr. 148. Mix heard the Local 150 representative say again that they were on strike against Donegal, Donegal could not dump here, and he wanted the employees to reload Mix's truck. Tr. 148.

Mix subsequently spoke to the check in person who called his boss. Tr.149. Mix explained that it would have been difficult to reload the exact same load that he had dumped as the drivers dump their loads on a hill. Tr. 149. Mix was detained at the site for fifteen minutes to half an hour before he was told by the check in person that Settler Hill's were not going to reload him but he could not come back to the site. Tr. 149. Mix has not been back to the landfill ever since that time. Tr. 149.

On cross examination, counsel for Respondent attempted to cast doubt on Mix's testimony by claiming he dropped a contaminated load at Settler's Hill. Tr. 188. Counsel went on to suggest that Mix was told to reload his dump because of this. Tr. 188. Besides firmly denying that he dumped a contaminated load, counsel for Respondent did not offer any evidence to contradict Mix's version of events. Additionally, whether Mix had dumped a contaminated load is irrelevant to what he heard a Local 150 representative state to Settler's Hill employees.

Respondent later presented business agent Dan Opatkiewicz regarding the Settler Hill's incident. Tr. 821. Opatkiewicz testified that he followed a Donegal truck to Settler's Hill in mid-August of 2018. Tr. 823. Opatkiewicz stated he did not know who the driver was that he was following. Tr. 824. According to Opatkiewicz, the Settler's Hill employee "sniffed" the load and went back into the trailer. Tr. 824. The Donegal truck then drove to the left up where the actual landfill is. Tr. 825. Opatkiewicz only witnessed the "sniffer" employee and the Donegal driver. Tr. 825. When the Donegal truck came back, Opatkiewicz stated the "sniffer" was waving his hands. Tr. 826. In response to leading questions, Opatkiewicz stated that the "sniffer" employee asked the Donegal truck driver where he had gone. Tr. 828. He didn't remember anything else about the conversation except that Opatkiewicz asked the "sniffer" employee why he didn't reload the Donegal truck. Tr. 828-29. According to Opatkiewicz, he said this to the Settler's Hill employee because he believed that the Donegal driver drove away prematurely. Tr. 829. Opatkiewicz further stated in his previous work experience at a clean fill site he had seen many trucks reloaded. Tr. 829.

Opatkiewicz's testimony was extremely lacking in detail. Tr. 825-29. In answer to counsel's leading questions, he could not remember even the most basic details about the date in question. He didn't remember a third employee being present. Tr. 825. He could not remember

what the Donegal driver said in response. Tr. 827. It isn't even clear from Opatkiewicz's testimony whether he and Timothy Mix were even testifying about the same event. After all, Donegal trucks used the landfill frequently.

Even if Opatkiewicz's recollection of the incident is credible, he essentially admitted that he had told a Settler's Hill employee to reload Timothy Mix's truck. It does not matter whether he had seen previous trucks reloaded or not, the statement of a union representative to a neutral employee during a picket clearly demonstrates a cease doing business object. His subjective reasons for making the statement do not matter. Timothy Mix's testimony is therefore undisputed.

V. RESPONDENT'S PICKETING HAD A RECOGNITIONAL OBJECT

Section 8(b)(4)(i)(ii)(B) also prohibits the inducement and encouragement of any individual to cease working where an objective, inter alia, is forcing any other employer to recognize or bargain with a labor organization that is not the certified representative of its employees.⁷⁶ Section 8(b)(4)(ii)(B) prohibits the coercion of a neutral employer in furtherance of such an objective. The question of whether a union pickets with an object proscribed by Section 8(b)(4) is one of fact which may be determined from all of the union's conduct.⁷⁷ "Recognition or organization need not be the sole or principal object of the picketing; it is sufficient to make out a violation if one of the union's objects is within the statutory language."⁷⁸

Here the record overwhelmingly supports a finding of continued unlawful recognitional object. The earliest evidence of this objective was described by Simon Bradley when he was

⁷⁶ *Laborers Eastern Region Organizing Fund*, 346 NLRB 1251, 1252 (2006).

⁷⁷ *Building Service Employees Union, Local No. 87*, 223 NLRB 30, 33 (1976).

⁷⁸ *Id.* In reference to Section 8(b)(7)(B) conduct.

approached by Kevin Burke, the former vice president of Local 150.⁷⁹ Tr. 294, 1090. Bradley testified that Kevin Burke contacted him by phone in August of 2017. Tr. 295. The two agreed to meet for coffee at a local Dunkin Donuts on LaGrange Road. After some small talk about family matters, Burke asked Bradley about signing up Donegal with Local 150. Tr. 296. When Bradley explained that his business was small and was only doing residential houses at the time, Burke persisted saying that he would not be able to protect Bradley from other unions. Tr. 296-97. Bradley, however, did not sign a contract.

Respondent's interest in representing Donegal employees continued after the meeting with Kevin Burke. Current vice president Mike Kresge testified that he instructed task force organizer Ray Sundine to gather information, meet Donegal employees and create relationships with them, and to organize the company. Tr. 1100. Ray Sundine testified that he was told by Kresge to look into Donegal in December of 2017. Tr. 564, 1139. Sundine explained that after he started to research the company, he began communicating with Donegal employees at various jobsites and, among other things, asking them about their wages, and whether they had any benefits. Tr. 1140. Sundine spoke to Kresge about his findings at least six to seven times a week. Tr. 1142.

Ultimately, Kresge's and Sundine's drive to organize Donegal employees resulted in them sending union "salts" like Steve O'Gorman to apply for a job at Donegal in May of 2018. Tr. 565. Sundine testified that he specifically told O'Gorman and six other salts to apply at Donegal with the intention of organizing its employees. Tr. 566, 570. Like the other union salts who applied to Donegal, the part-time employment agreement that Steve O'Gorman signed outlined his duties, and "covenants with the Union to furnish his/her best skill and judgement in cooperation with Ray Sundine, the designated organizer/ business representative in furthering the

⁷⁹ Mike Kresge became vice president on December 18, 2018. Tr. 1090, 1102.

organizing efforts and interests of the Union.” GC 35. Similarly, the agreement, signed on June 1, 2018, provides that the union salt’s duty, among others, is to gather and maintain a record of information for organizing activities as specified by the Union like correspondence, newspaper articles, classified advertisements, names and addresses of contractors, subcontractors, and material suppliers, information on wages, fringe benefits, overtime pay, holiday pay, vacation pay, shift premiums, and perhaps most importantly, the names, addresses, qualifications, and seniority of the “organizing target’s” employees. GC 35. Thus, Sundine had the salts sign agreements which specifically outlined their organizing, or recognitional, duties regarding their undercover work at Donegal. Tr. 567-68. GC 35. R 14, 20. All of the salts received some type of compensation in exchange for working undercover and organizing Donegal including stipends, health insurance, and fringe benefits. Tr. 571-72. Additionally, Sundine admitted that all of the salt agreements are still in effect today. Tr. 576.

While admitting that it was attempting to organize Donegal before that time, Respondent claims that its intent changed on July 9, 2018, when William Hannahan was terminated from Donegal. Tr. 573, 576. The record evidence demonstrates that Local 150’s recognitional object, despite any instructions Ray Sundine might have given to the contrary, never stopped. It is undisputed that Respondent never sent any correspondence to Donegal or any other employer stated that it had ceased any recognitional activities. Significantly, Respondent stipulated that at least one of the salts agreements was signed 30 or more days after the July 11th start of the picketing. Tr. 580. Additionally, after the picketing began on July 11, Simon Bradley testified that Local 150 representatives, including Ray Sundine, spoke to him on a regular basis about recognizing the Respondent. Tr. 308. Bradley remembered that he was at a traffic light at the corner of Archer and Route 83 at when Sundine yelled at him to just sign a contract. Tr. 310,

438. Sundine was standing next to the inflatable rat that Respondent had placed at Donegal headquarters in Lemont. Tr. 310. Bradley estimated this happened in mid-July to the first week of August. Tr. 309, 438. Similarly, other Local 150 representatives told him to “just sign that fucking contract,” around six to a dozen times while he drove away from the Lemont location. Tr. 308-11.

On one notable occasion on July 23, 2018, Simon Bradley took a video on his phone of his conversation with Dennis Martin, a business representative from Local 150. Tr. 347, 372-79. CP 5. Bradley testified that the video shows a conversation that took place near his facility in Lemont, Illinois. Tr. 348. On the video, Martin can be clearly heard saying, “you know the terms. Talk to the big man... Sit down and talk to the big man.” CP 5. From previous interactions, Bradley knew the “big man” to be Jim Sweeney, the president of Local 150. Tr. 348. Martin was obviously pressuring Bradley to speak with Sweeney in order to sign a collective-bargaining agreement. Thus, a mere twelve days after the Respondent claims that its recognitional object ceased, a Local 150 business representative was caught on video telling the owner of Donegal Services to sign a contract.

Employees of Donegal Services had similar encounters with Local 150 attempting to organize. Timothy Mix testified that he had several conversations with union representatives about joining Local 150. Specifically, in early to mid-July, Mix testified that Ray Sundine as well as another Local 150 business agent had approached him near Elmhurst Chicago Stone. Tr. 204-205. Mix explained that the agents would follow him as he drove and if he walked into a Donkin Donuts, they would attempt to buy him a coffee. Tr. 205. Additionally, the agents would ask if there was anything they could do to get him to sign a card. Tr. 205.

Ray Sundine admitted that he had a conversation with Mix at Elmhurst Chicago Stone in Bolingbrook. Tr. 1147-48. However, as Sundine claimed it was cold outside and the conversation was over the phone, it did not appear to be the same conversation that Mix testified about in July at a Dunkin Donuts. Thus, Mix's specific testimony about the mid-July encounter was un rebutted. Interestingly, Sundine did admit to offering to buy Mix lunch at a pizza restaurant but offered few other details other than self-serving denials about ever trying to get Mix to sign a card. Tr. 1150. Also, even though Sundine claimed he did not ask any employee to sign a card, he admitted that he authorized and received three cards from a salt. Tr. 1150. Conveniently, Sundine left out the time frame for when he received the cards. Tr. 1150-51. His general denials are not credible.

Timothy Mix also testified that he knew and worked with the union salt Steve O'Gorman. Tr. 198-99. O'Gorman called Mix by telephone in August of 2018. Tr. 199. Mix indicated he thought this was unusual as he had few conversations with O'Gorman before that time. Tr. 199. Mix also remembered the timing of the conversation as his mother had recently passed away. After talking about Mix's mother, O'Gorman asked if Mix was willing to sign a Local 150 card and mentioned that he could get Mix into the apprenticeship program. Tr. 199-200. Mix replied that he was approaching 50 years old so that did not appeal to him. Tr. 200.

William Doherty, field supervisor for Donegal Services, testified that union agent Dennis Martin had approached him as early as May or June 2018, at a Naperville jobsite in an attempt to get him to sign up with the union. Tr. 238-39. Martin promised him better him better rates and gave him his business card. Tr. 240. When Doherty replied that he was happy with where he was, Martin stated that fate was coming. He had better sign up or Local 150 would put them out of business. Tr. 240.

In July or August, 2018, Doherty testified that he had a similar encounter with an unknown Local 150 representative at a jobsite in Downer's Grove. Tr. 241. Doherty was busy reading blueprints and marking for a new foundation. Tr. 241. One Local 150 representative was already at the site with a picket sign stating on strike against Donegal for unfair labor practices. Tr. 242. The man, who was standing next to the sidewalk, said to Doherty that all the quicker Simon signs up the better. Tr. 242. When Doherty asked what he meant, the man replied, "the quicker he signs up so I can get out of here. If he doesn't sign up that the Local 150 is going to put him out of business." Tr. 242. The conversation ended after that. Doherty explained he did not film the incident because he was working. Tr. 267-68.

At yet another residential jobsite in Hinsdale, Illinois, Doherty stated another Local 150 representative mentioned Donegal signing a collective-bargaining agreement. Tr. 243. The incident happened in August or September. Tr. 243. Doherty remembered the jobsite was located at around Garfield and First Street. Tr. 243. Again, Doherty was working, and one Local 150 representative was standing at the site with a picket sign. Tr. 244. The man stated that Simon should sign. When Doherty asked sign what, the man replied oh you know. Tr. 244. When Doherty said he didn't know, the man replied it would be better for you if he signs up. Tr. 244. The man added that Doherty's brother and family could all sign up too if they wanted. Doherty replied that his family was happy enough. Tr. 244. Doherty then walked away. He witnessed the Local 150 representative meet with another union agent and smoked a cigar. Tr. 244. Doherty later explained that his family also worked in the construction business. Tr. 244.

Doherty on cross examination stated that the man he spoke to in Hinsdale was African American. Tr. 268. Respondent's counsel seized on this one detail and later had Marquis Overstreet, an African American business agent, testify about the incident. Tr. 1061. Overstreet

confirmed, just as Doherty had testified, that in August or September of 2018, he picketed Donegal in Hinsdale. Tr. 1061. Overstreet estimated he had picketed the Hinsdale location around three to four times. Tr. 1061. Overstreet claimed that he never spoke to anyone from Donegal while he was picketing. Tr. 1064-65. Overstreet also testified that Local 150 had another African American business agent who is pictured in CP Ex. 8, Wallace Pendleton. Tr. 1066. Overstreet also claimed that Local 150 only had three African American employees, himself, Pendleton, and Marty Moore. Tr. 1067. Overstreet further believed the local employed around fifty business agents and around thirty task force employees. Tr. 1067.

Overstreet on cross examination could remember very little about the job in Hinsdale. Tr. 1069. He couldn't remember the street address, the cross streets, or any of the other stops the Donegal truck made. Tr. 1070. He didn't know the identity of the driver(s) or the number of truck(s). Tr. 1071-72. He also admitted he didn't know the total number of Local 150 employees who worked on the Donegal campaign or that he knew all of them. Tr. 1072. Overstreet also stated he had not been present at all the Donegal job locations in Hinsdale like the Hinsdale nursery. Tr. 1073.

Wallace Pendleton also stated that he had picketed Donegal in Hinsdale several times in August and September. Tr. 1075. Like Overstreet, Pendleton could not remember any specific times or dates he picketed there though. Tr. 1077. After several general denials about speaking to Donegal employees, Pendleton gave an approximate number of Local 150 business agents of seventy (70). Tr. 1083. Of those business agents, he stated he was not one hundred percent sure of how many of them were African American, but perhaps three. Tr. 1083. Pendleton named Marquis Overstreet and someone else named Brian. Tr. 1084. Counsel for Local 150 then asked

very leading questions to elicit the name Martin Moore. Tr. 1084. Interestingly, Pendleton admitted that he smoked cigars. Tr. 1084.

Like Overstreet, Pendleton's non-specific denials are not to be believed. On cross examination, Pendleton admitted he couldn't remember if he had actually been to Hinsdale at all during the Donegal campaign. Tr. 1085. If he actually had been present in Hinsdale, he couldn't generally or specifically recall the number of times he had been there. Tr. 1085. Pendleton then qualified his denials of speaking to Donegal drivers by saying if there was a picket up, he would not talk to them. Tr. 1086. He also testified that he could not remember if there were other occasions where he may have spoken to Donegal employees. Tr. 1086. He also admitted he didn't know how many Local 150 employees worked on the Donegal campaign. Tr. 1086. Pendleton had no idea when the campaign actually started, even an approximation. Tr. 1086. Pendleton stated that there could have been other "fill in" picketers like himself besides the business agents and task force employees, and that those individuals could have been from the Local 150 office staff. Tr. 1086. Thus, about the only specific fact that Pendleton testified to that was credible was that he smoked cigars, which lends more credibility to William Doherty's account and makes it more likely that Pendleton was the individual who made the "signing up" comment to Doherty, or, was involved in the incident.

In response to Respondent counsel's leading questions, Martin Moore admitted he picketed Donegal in Hinsdale in August and/or September, 2018.⁸⁰ Tr. 1044-45. After testifying that he picketed Willowbrook nursery, Moore made general denials about speaking to Donegal employees. Tr. 1047. Moore thought that the second location he went to was a residential area but couldn't give an address, date, cross streets, or any details other than he went

⁸⁰ Counsel even suggested to Moore that the place he began his truck trail began with an "L" without even asking if he could recall where Donegal's yard was located. Tr. 1045-46.

to big, expensive houses. Tr. 1048, 1052. He again gave blanket denials that he had spoken to anyone on those two occasions. Moore believed that Local 150 had around 15 business agents, three of them being African American. Tr. 1049. Moore also admitted that he smoked cigars, again lending credibility to Doherty's specific recollection of the events in Hinsdale. Tr. 1049-50.

Perhaps the most obvious and blatant evidence of Respondent's recognitional object occurred when union salt Steve O'Gorman came out to other employees and was organizing in public on August 13, 2018. O'Gorman began working at Donegal in May of 2018 on the instructions of Ray Sundine. Tr. 849. O'Gorman admitted that one of his duties under the salt agreement that he signed was to organize Donegal employees. Tr. 858-59, 916. He also admitted that it was his intention to organize Donegal employees among other things when he was hired. Tr. 916. While O'Gorman claimed that once the Respondent began picketing, they ceased organizing, his own actions do not reflect that. Tr. 864. On August 13, O'Gorman testified that he wore a Local 150 shirt to work. Tr. 864. O'Gorman claimed this action was just to show his support. Tr. 864. However, on August 17, 2018, O'Gorman's "support" included organizing the employees. At around 10 am in the morning, at the Wilco Green location outside the gates, O'Gorman began passing out Local 150 stickers to other employees. Tr. 865. O'Gorman walked inside the gates, and once Jim Barry gave him permission, he walked to the scale house to speak with Chris (last name unknown), the dispatcher for Donegal roll off trucks, and gave him stickers as well. Tr. 866. O'Gorman believes he spoke to around 5 to 10 employees that day. Tr. 920.

A photograph of O'Gorman's Local 150 stickers was entered into evidence as well. Tr. 962-63. CP 12. O'Gorman testified that he got the stickers at Respondent's hall in Countryside,

Illinois. Tr. 920. The stickers contained slogans like, “Union Yes. I.U.O.E. Local 150,” “Friends Don’t Let Friends Cross Picket Lines,” “I’m Proud I’m a Local 150 Operating Engineer,” and “United We Stand, Divided We Beg,” among others. CP 12.

Steve O’Gorman also testified about his telephone conversation with Timothy Mix. Tr. 869. O’Gorman testified that he called Mix shortly after he began organizing employees on August 17. Tr. 869. Just as Mix testified, O’Gorman admitted that he spoke to Mix about his mother passing away. Tr. 869. O’Gorman stated he “wanted to see what his take on the union was,” but Mix was not interested. Tr. 869. The two then spoke about Mix wanting to work at a casino with O’Gorman offering to set him up with a Local 150 job at one. Tr. 870. O’Gorman stated that a Local 150 casino worker could make up to \$48 per hour running machines. Tr. 870. Mix again stated he was not interested.

Ray Sundine was clearly aware of O’Gorman organizing activities. Tr. 860, 871. O’Gorman testified that when he began working at Donegal in May, he communicated every day with Sundine about his progress. Tr. 860. After that time, O’Gorman characterized his communications with Sundine as “very often.” Tr. 860. He also admitted that he told Sundine about what he had done on August 17 and which employees took stickers and which ones did not. Tr. 927. Additionally, Sundine knew about O’Gorman’s conversation with Timothy Mix. Tr. 934-35.

O’Gorman also admitted that he spoke to Donegal employees about Local 150 both before and after August 13, 2018. Tr. 928. O’Gorman explained that he had the phone numbers of the employees that he passed stickers out to. Tr. 927-28. O’Gorman was evasive on the witness stand about what specifically about Local 150 he spoke to employees about claiming they were just “general discussions.” Tr. 929. However, eventually he admitted that these

conversations concerned what the employees thought about Donegal working conditions and that he mentioned Local 150 in those conversations. Tr. 929. Later, O’Gorman backed away from this testimony claiming that he only spoke to one individual who was another union salt. Tr. 930.

O’Gorman’s evasiveness and reluctance to admit the entire scope of his organizing activities is easily explained by his history with the organization. He testified that he had been trying unsuccessfully to become a member of Local 150 since he was 18 years old. Tr. 938. At the time of the trial, O’Gorman was 29. Tr. 938. He had put in multiple applications that had been denied over the years. Tr. 938. O’Gorman admitted how difficult it was to obtain membership. Tr. 938-39. Additionally, although it was likely he would obtain membership after the Donegal campaign, it was not certain. Tr. 939. O’Gorman’s previous job, at Tom’s Excavating, was a Local 150 company. Tr. 953. However, as O’Gorman testified, Tom had explained to him that he could not get him into the union. Tr. 953. O’Gorman was also using the Local 150 training site to increase the likelihood that he would be accepted. Tr. 939-40.

Despite O’Gorman’s reluctance, he did admit that he continued to speak with Donegal employees about Local 150. Tr. 951-52. His discussions with other employees continued even as recent as November 2018. Tr. 951-52. As always, O’Gorman reported this information to Ray Sundine including which employees supported the union and which ones did not. Tr. 952, 958.

Other union salts at Donegal also kept in frequent contact with Ray Sundine about organizing information they were collecting. For example, Mike Munch was hired by Donegal in May of 2018. Tr. 602. Like Steve O’Gorman, Munch signed a salt contract and was receiving compensation from Local 150. Tr. 605, 661-62. Ray Sundine informed Munch when he signed

the agreement that Local 150 was organizing Donegal. Tr. 679. Munch admitted to speaking about the union to another driver around August or September, 2018. Tr. 671. While at the Lemont yard getting his truck fixed, Munch asked the person what he thought “about this union stuff.” Tr. 671, 673. The person said that he or she thought their working conditions were ridiculous and they hoped that Local 150 stepped in. Tr. 673. Munch told Ray Sundine about this conversation later. Tr. 675-76.

Although Munch claimed during his testimony that he only spoke to one employee about the union, an exhibit entered into evidence shows otherwise. On August 15, 2018, Munch sent a text to Ray Sundine explaining that he had breakfast with another driver. GC 36. Munch explained that the driver used to be in a union, but the driver had said the union was weak. GC 36. According to the driver, Local 150 was the best union saying that if Simon Bradley continued to treat them poorly, Local 150 would be good to join. GC 36.

Munch also testified about a later text conversation he had with Ray Sundine on October 31, 2018. Tr. 689. Munch was relaying in the message to Sundine about employee complaints about their working conditions. Tr. 689. Ray Sundine told Munch to ask the employee whether he would join the union. Tr. 690. While Munch did not explain the entire conversation with the employee, he did say the employee replied, “that would be fucking amazing.” Tr. 691. What Munch told the employee that elicited this response is not clear but leaves the clear impression it had to do with getting him in contact with the union in some way.

Another text exchange entered into evidence showed a conversation between union salt Nick Ross and Ray Sundine. Tr. 1185. GC 37. Among other things, in August 2018, Nick Ross’ texts mention another employee with union stickers on his hard hat, and that Ross wears his union shirt in the open. GC 37 Bates 1167, 1168. Interestingly, on September 6, Ray

Sundine informed Nick Ross that he was going to provide Ross's phone number to another employee. GC 37 1175. Sundine explained that the other employee would pass Ross's number on to two other people. GC 37. Sundine instructed Ross to tell them about pay, benefits, the Local 150 training site, etc. GC 37. He even warned Ross not to talk on the radio as Tim Mix may be recording the conversations. Thus, despite Respondent's denials, Ray Sundine himself was instructing salts to speak with other employees about the benefits of joining the union in August well after Respondent claims it had ceased organizing.

One Donegal employee, Jose Mauricio Becerra, also know as "Chino," testified regarding his encounter with Steve O'Gorman. Tr. 1429, 1430. In August of 2018, O'Gorman approached Becerra as he had other employees. Tr. 1430. Becerra believed the conversation took place before Labor Day at the end of August. Tr. 1431. Becerra testified it was at the SJZJ/Wilco Green yard location around the shop. Tr. 1431. According to Becerra, O'Gorman stated he was trying to get the employees organized and discussed the benefits of unionization with him. Tr. 1431. O'Gorman also gave Becerra union stickers. Tr. 1434. Thus, O'Gorman's denials that he spoke to employees while he was passing out union stickers is likely not true.

In sum, ample evidence demonstrates that regardless of any other possible motive, the Union never ceased to have a recognitional object to its activity. Thus, its secondary activity in support of that object was unlawful.

VI. RESPONDENT'S PRIMARY PICKETING VIOLATED SECTION 8(b)(7)(C) OF THE ACT.

A labor organization, who has not filed a Section 9(c) petition, violates Section 8(b)(7)(C) of the Act when it engages in picketing beyond a reasonable period of time not exceeding 30 days against an employer with the objective of forcing the latter to recognize

that labor organization as the collective-bargaining representative of its employees.⁸¹ Moreover, “[r]ecognition or bargaining need not be the sole object for a violation to occur.”⁸²

Here, the evidence clearly shows that Respondent picketed at the Donegal Lemont, Illinois, facility for longer than 30 days. In its Answer, Respondent admits that beginning on about July 11, 2018, it picketed Donegal’s facility and other locations with picket signs which read, “On Strike for Unfair Labor Practices: Donegal Services, LLC.” GC 1(m), Pg. 6.

Respondent also admits that it has never been certified as the recognized bargaining agent of the employees at the Lemont facility. GC 1(m), Pg. 6. Finally, Respondent further admits that its picketing ceased on October 4, 2018, a total of eighty-six (86) days from the initial date of picketing. GC 1(m), Pg. 6.

The only fact that Respondent disputes in regard to its primary picket is that it did so with a recognitional object. GC 1(m), Pg. 6. As demonstrated above, the overwhelming evidence in the record demonstrates that Respondent picketed with a recognitional object even if it also had other motives while the picketing went on. Of course, only one object of picketing need be organizational or recognitional for a violation to be found.⁸³ Therefore, even if Respondent was picketing because of an unfair labor practice, or for any other reason, it was also doing so for recognitional purposes in excess of 30 days, which violates Section 8(b)(7)(C) of the Act.

VII. RESPONDENT’S DEFENSES ARE UNTENABLE.

Respondent advanced two main defenses as part of its case during the trial. First, Respondent presented extensive evidence that its agents, including union salts, had as an object of picketing the investigation of safety and environmental law violations of Donegal Services. Second, Respondent presented evidence that Donegal Services was a joint employer with Wilco

⁸¹ *Local 3, International Brotherhood of Electrical Workers*, 325 NLRB 527, 528 (1998).

⁸² *Local 282, International Brotherhood of Teamsters*, 332 NLRB 922, 929-930 (2000).

⁸³ *International Union, United Mine Workers of America, AFL-CIO*, 302 NLRB 441, 448 footnote 21 (1991)

Green. Neither of these defenses shield Respondent from violating the National Labor Relations Act.

1. Safety and Environmental Violations of Donegal Services.

Respondent presented both extensive witness testimony and documentary evidence intended to show that Donegal Services was engaged in violations of various Illinois state and possibly Federal statutes. Respondent, over the objection of the General Counsel and Charging Party, entered numerous photographs depicting what it believed were safety and environmental violations. R 15, 16, 17, 18, 21, 27, and 28. Anticipating that the record would be overburdened with information that distracted from the issues of the case, Counsel for the General Counsel and Charging Party offered to stipulate that at least one of Respondent's objects was to record safety and environmental regulation violations. Tr. 874-76. However, counsel for Respondent refused believing that crafting such a stipulation would take more time than putting on the evidence. Tr. 876-77.

The Counsel for the General submits that the evidence provided by the Respondent that at least one of its objects in picketing was investigating safety and environmental regulation environmental violations is completely irrelevant to the issues of this case. As stated before, "[r]ecognition or bargaining need not be the sole object for a violation to occur."⁸⁴ Thus, Respondent could have multiple objects for its picketing. As long as one of those objects during the relevant time period was recognitional, the General Counsel has carried its burden of proving recognitional object.⁸⁵ Moreover, the many statements discussed above that the Union would

⁸⁴ *Local 282, International Brotherhood of Teamsters*, Id.

⁸⁵ See also *Stage Employees IATSE Local 15*, 275 NLRB 744, 746 (1985) ("At best the Respondent's evidence indicates its picketing had a legitimate object; it does not establish that the sole object of the picketing was permissible. The Respondent's defense therefore fails."); *Plumbers and Pipe Fitters Local Union No. 32*, 315 NLRB 786, 789(1994); *Local 560, International Brotherhood of Teamsters*, 360 NLRB 1067, footnote 4 (2014) ("It is unnecessary to find that the sole object of picketing is unlawful; it is sufficient that the union possess an unlawful object.")

cease its activity if Donegal signed a contract with the Union suggests that safety and environmental issues were not genuinely part of the Union's motivation.

2. *Joint Employer*

Respondent also devoted considerable time to establishing that Donegal Services has a joint employer relationship with Wilco Green. At all times that Respondent bannered at the landfill, the banner read that Wilco Green was using rat contractors. Respondent claims that its picketing at Wilco Green is lawful primary picketing because of the joint employer relationship. The burden of proving joint-employer status rests with the party asserting that relationship.⁸⁶ Under the Board's joint-employer standard, the focus is on whether the putative joint employer "share(s) or codetermine(s) those matters governing the essential terms and conditions of employment."⁸⁷ The Board's current common law joint-employer standard examines hiring, firing, discipline, supervision, and direction. Essential terms indisputably include wages and hours. The Board has found control over mandatory terms and conditions of employment to include dictating the number of workers to be supplied, controlling scheduling, seniority, and overtime; and assigning work and determining the manner and method of work performance.⁸⁸

The great majority of testimonial and documentary evidence presented by Respondent concerned the relationship between Donegal Services and SJZJ, another company owned by Simon Bradley. Tr. 1232, 1234, 1402. SJZJ also has a parent corporation whose exact name was unknown at the time of the trial even by Simon Bradley. Tr. 1402-03. Bradley, although he did not know the name, testified that the parent corporation was not Wilco Green and was instead called Donegal Investments or "Donegal something," possibly Donegal Management. Tr. 1404-06. From the evidence, it is very likely that Donegal Services has some sort of joint

⁸⁶ *Browning Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015)

⁸⁷ *Id.*

⁸⁸ *Id.*

employer relationship with SJZJ. SJZJ also had an option to purchase Wilco Green, which began on September 1, 2016. R 8. Bradley testified that this agreement had been extended to the end of March 2019. Tr. 383. After that time, if Bradley decided to, he could purchase the property. Tr. 383.

However, the record was not clear on exactly whether Donegal had a joint employer relationship with Wilco Green. The owner of that company, Edward Heil, was not subpoenaed to testify. Thus, it was not clear what control, if any, Mr. Heil had over the working conditions of Donegal or SJZJ employees. Presumably, James Barry and Simon Bradley jointly control the working conditions of the SJZJ employees.

Assuming *arguendo* that Respondent establishes that Donegal and SJZJ are joint employers, Respondent still violated Section 8(b)(4)(i)(ii)(B) under the standards announced in *Sailors Union (Moore Dry Dock)*.⁸⁹ Charging Party Donegal introduced photographs of the reserve gate system in place at Wilco-Green. CP 15, 16, 17. Respondent's inflatable rat and banner are stationed outside the main gate located on 119th Street. Jim Barry testified that the sign outside the main gate was posted in July or August, 2018, and was used by all other employees and/or customers of Wilco Green. Tr. 1399. The main gate sign clearly states, "This entrance to Wilco Green is reserved for all persons **other than** employees, subcontractors, suppliers, vendors, and delivery persons of Donegal Services, LLC. All employees, subcontractors, suppliers, vendors, and delivery persons of Donegal Services, LLC are prohibited from using this entrance, and must use the entrance to the property which is located directly to the (North, South, East) of this gate which is marked Entrance #2 which is located at 12052 S. Plainfield-Naperville Rd, Plainfield, IL." *Emphasis added.* CP 16. Barry testified that only Donegal employees use the entrance located on Plainfield Road. Tr. 1398. CP 16, 17. Thus,

⁸⁹ 92 NLRB 547, 549 (1950)

Respondent still violated Section 8(b)(4)(i)(ii)(B) when it failed to place its picket at Entrance #2.

Further, there is no evidence or contention that any of the other neutral businesses that Respondent picketed had a joint employer relationship with Donegal. Even assuming *arguendo* that Wilco Green is a joint employer with Donegal, Respondent's conduct directed at those other employers would still be secondary.

Additionally, if Respondent carries its burden of proving that Donegal Services and Wilco Green are joint employers, it still violates Section 8(b)(7)(C). The inflatable rat and banner have been in front of the main entrance at Wilco Green since July of 2018. GC 1(m), Pg. 4. As Simon Bradley and others testified, both "scabby" and the banner were still there on the day of trial. Tr. 137, 322, 323. This picketing with a recognitional object clearly falls outside of the 30-day limit described in the statute. Thus, Respondent's joint employer defense does not relieve it of its legal liability.

VIII. CONCLUSION

Counsel for the General Counsel has clearly established that Respondent picketed at all eight of the neutral employers named in the complaint. The record also shows that the picketing had a cease doing business and a recognitional object in violation of Section 8(b)(4)(i)(ii)(B). In addition to Respondent's illegal secondary boycott, it engaged in primary picketing for more than 30 days without a petition being filed with the NLRB violating Section 8(b)(7)(C). To remedy Respondent's violations, Counsel for the General Counsel respectfully requests the Administrative Law Judge to enter an appropriate Order and Remedy, post the attached suggested notice, and any other remedies deemed appropriate.

DATED this 22nd day of March, 2019.

Respectfully Submitted,

/s/ Kevin McCormick

Kevin McCormick, Esq.
Counsel for the General Counsel
National Labor Relations Board
Region 13
219 South Dearborn Street, Room 808
Chicago, Illinois 60604
(312) 353-7594

DRAFT NOTICE - APPROVED NOTICE FOR POSTING WILL BE PRINTED ON AN OFFICIAL NLRB FORM



NOTICE TO EMPLOYEES



**POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT**

International Union of Operating
Engineers, Local 150
Case: 13-CC-227526; 13-CC-227527;
13-CC-231597; 13-CC-233109

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

We will not restrain or coerce you in the exercise of the above rights.

WE WILL NOT in any manner engage in, induce, or encourage individuals employed by Greenscape Homes, Provencal Construction, Overstreet Builders, Boughton Materials, Settler's Hill, Elmhurst Chicago Stone (ECS), Willco Green, Andy's Frozen Custard, Ross Builders, or any other person engaged in commerce or in an industry affecting commerce to engage in a strike or a refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities; to perform any services where an object thereof is to force or require Greenscape Homes, Provencal Construction, Overstreet Builders, Boughton Materials, Settler's Hill, Elmhurst Chicago Stone (ECS), Willco Green, Andy's Frozen Custard, Ross Builders, or any other person to cease using, selling, handling, transporting, or otherwise dealing in the products of Donegal Services, LLC; or to cease doing business with Donegal Services, LLC.

WE WILL NOT through the use of inflatable rats, banners, or in any manner threaten, coerce, or restrain, Greenscape Homes, Provencal Construction, Overstreet Builders, Boughton Materials, Settler's Hill, Elmhurst Chicago Stone (ECS), Willco Green, Andy's Frozen Custard, Ross Builders, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Greenscape Homes, Provencal Construction, Overstreet Builders, Boughton Materials, Settler's Hill, Elmhurst Chicago Stone (ECS), Willco Green, Andy's Frozen Custard, Ross Builders, or any other person to cease using, selling,

handling, transporting, or otherwise dealing in the products of Donegal Services, LLC; or to cease doing business with Donegal Services, LLC.

WE WILL NOT picket, or cause to be picketed, Greenscape Homes, Provencal Construction, Overstreet Builders, Boughton Materials, Settler's Hill, Elmhurst Chicago Stone (ECS), Willco Green, Andy's Frozen Custard, Ross Builders, where an object of such picketing is forcing or requiring Donegal Services, LLC. to recognize or bargain with us as the collective-bargaining representative of the employees of Donegal Services, LLC, at a time when we are not certified as such representative and where such picketing has been conducted without a petition under Section 9(c) of the Act being filed within a reasonable period of time not to exceed 30 days from the start of such picketing.

CERTIFICATE OF SERVICE

13-CP-227526; 13-CC-227527; 13-CC-231597; 13-CC-233109

The undersigned hereby certifies that true and correct copies of Counsel for the General Counsel's Brief to the Administrative Law Judge have been e-filed with the Division of Judges and served this 22nd day of March, 2019, in the manner indicated, upon the following parties of record.

ELECTRONICALLY

Kimberly Sorg-Graves, Administrative Law Judge
National Labor Relations Board
Division of Judges
121 West 45th Street, 11th Floor
New York, NY 10036-5503

Melinda S. Hensel
Dale D. Pierson
Steve Davidson
IUOE, Local 150, AFL-CIO
Legal Department
6140 Joliet Road
Countryside, IL 60525-3956
Mhensel@local150.org
Dpierson@local150.org
Sdavidson@local150.org

Scott A. Gore, Esq.
Laner Muchin, Ltd.
515 N. State Street, Suite 2800
Chicago, IL 60654-4688
Sgore@lanermuchin.com

Simon Bradley
Donegal Services, LLC.
13011 Grant Road
Lemont, IL 60439-9367
simon@donegalexexcavating.com

Craig Ross
Ross Builders, Inc.
23 North Lincoln Street
Hinsdale, IL 60521
craig@rossbuilders.com

REGULAR MAIL

Jim Sweeney, President
Local 150, IUOE, AFL-CIO
6200 Joliet Road
Countryside, IL 60535