UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 98,
Respondent

and Case 04-CC-223346

SHREE SAI SIDDHI SPRUCE, LLC, d/b/a
FAIRFIELD INN & SUITES BY MARRIOTT,
Charging Party

Lea Alvo-Sadiky, Esq.,
for the General Counsel.
William T. Josem, Esq., and
Cassie R. Ehrenberg, Esq.,
Philadelphia, PA, for the Respondent.
Wally Zimolong, Esq., Philadelphia,
PA, for the Charging Party.

DECISION

STATEMENT OF THE CASE

Robert A. Giannasi, Administrative Law Judge. This case was tried on April 9, 2019, in Philadelphia, Pennsylvania. The complaint, as amended, alleges that Respondent violated Section 8(b)(4)(ii)(B) of the Act by posting large inflatable rats near the entrance of the Charging Party's hotel (hereafter Fairfield Inn or hotel), along with handbilling and related activity, on three separate occasions in late June 2018; and by using a bullhorn at a high volume, again in front of the hotel and an adjacent restaurant connected to the hotel, along with related activity, on a separate occasion in late June 2018. The complaint alleges that the Respondent's dispute was with a non-union employer who had worked on the renovation of the hotel and was no longer on the premises, thus showing a secondary object affecting the hotel and restaurant. The Respondent denied the essential allegations in the complaint. At the hearing, Respondent admitted that its conduct had a secondary object, thus presenting the sole issue of whether its conduct was undertaken by unlawful means—that it amounted to a threat, restraint or coercion under subsection (ii).

The parties filed post-hearing briefs, which I have read and considered. Based on those briefs and the entire record in the case, including the testimony of the witnesses and my observation of their demeanor, I make the following

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FINDINGS OF FACT

I. Jurisdiction

It is admitted that Respondent is a labor organization within the meaning of
10 Section 2(5) of the Act. Charging Party Fairfield Inn operates a hotel located at 261 S. 13th Street in Philadelphia, Pennsylvania. Shree Sai Siddhi Spruce Restaurant LLC d/b/a Libertines (hereafter Libertines or the restaurant) is a restaurant located on the first floor of the Fairfield Inn. The Wankawala Organization LLC (Wankawala) manages the Fairfield Inn. Tri-M Group (Tri-M) is a non-union electrical contractor with whom
15 Respondent had a dispute during the renovation of the hotel and restaurant before they opened. It is admitted that Fairfield Inn, Tri-M, Wankawala, and Libertines are employers within the meaning of Section 2(2), (6) and (7) of the Act.

II. Alleged Unfair Labor Practices

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Background and Overview

The Fairfield Inn occupies the entire block along the east side of South 13th Street in Center City Philadelphia between Manning Street on the north and Spruce
25 Street on the south. The hotel entrance is roughly at the middle of 13th Street. The Libertine restaurant occupies part of the ground floor to the corner of 13th Street and Spruce. It is open for breakfast from 6 am to 9 am, but primarily for hotel guests. It is open to the public for dinner. Libertine's outside entrance is located to the right of the hotel entrance as one looks toward the east from across 13th Street. But that entrance
30 is locked and cannot be accessed by the public during the morning and afternoon hours. Hotel guests access the restaurant for breakfast from the inside of the hotel itself. The outside entrance is utilized at dinnertime, which begins at about 5 pm, at which time, weather permitting, patrons may sit at tables aligned on the sidewalk outside the restaurant on both sides of the hotel entrance. Overnight, the tables and
35 chairs are stacked, secured and stored along the sidewalk next to the hotel building. In the morning they are unsecured, unstacked and set up, although they are not ordinarily utilized until dinnertime.[1]

The hotel and restaurant occupy a historic building of 12 floors that was built in
40 1923. It was formerly a hotel, but, for about a 2-or 3-year period through May of 2018, the building underwent extensive renovations, supervised by Wankawala. The electrical work was performed by Tri-M, a non-union contractor with whom Respondent had a

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[1] The Libertine restaurant has a permit from the City of Philadelphia that allows the use of tables and chairs on the sidewalk in front of the hotel and restaurant, providing there is no obstruction of pedestrians using the sidewalk.

dispute. In aid of that dispute, the Respondent engaged in protests against Tri-M during the renovations.

After the renovations were completed and the hotel and restaurant opened on June 15, 2018, Tri-M was no longer on the site. But Respondent wanted to publicize its dispute and the fact that the hotel and the restaurant had utilized a non-union electrical contractor in the renovations. In carrying on its publicity campaign, Respondent engaged in handbilling, distributing flyers to pedestrians, hotel guests or visitors, and other members of the public who walked along 13th Street on June 26, 27 and 28, 2018, from about 8 am to about 2 pm on each day. It also distributed flyers in the same area on June 29, 2018, from about 5 pm to about 8 pm.

The flyers or handbills were captioned, "You can't put lipstick on a pig," and featured a cartoon pig covered with dollar bills. They continued as follows (G.C. Exh. 2):

> The Wankawala Organization would like you to believe that by renovating this property at 261 S. 13th Street, Fairfield Inn and Suites by Marriott, things are going to change. **Don't let the fresh paint fool you!**
>
> These are the same people who operated this property as the "Parker Spruce Hotel" which was a well-known hourly/daily rental hotel, with a track record of being a menace to this community.
>
> These blood suckers have continued the same **piggish** behavior by being cited several times for not having permits and had many safety violations during their "renovation." (Really?)
>
> **PIGS WILL ALWAYS BE PIGS!!!**
>
> These greedy pigs hired contractors at DISCOUNTED rates compared to the fair wage and benefit package recognized in this area. Will they pass that savings on to you, the consumer…NOT LIKELY!
>
> **DO NOT BE A FACILITATOR TO THE VIOLATOR!!!**
>
> Please contact owner Mihir Wankawala @215-454-6508 to tell him that you won't support his violation of the area wages and standards
>
> This message is intended for the general public. Please don't stop work, deliveries or litter. Distributed by IBEW Local 98.

Union Organizer and Business Representative John Donohue, an admitted agent of Respondent, led and participated in the activity at the hotel and restaurant. It is stipulated that he did not wear or carry anything that identified himself as affiliated with the Respondent during his activity.

The Amended Complaint Allegations

Paragraph 6(a) of the amended complaint alleges that, on about June 26, 2018, Respondent (i) posted a large inflatable rat near the entrance of the Hotel; and (ii) patrolled on the sidewalk in front of the Hotel and Restaurant.

Paragraph 6(b) alleges that, on about June 27 and 28, Respondent (i) posted two large inflatable rats near the entrance of the Hotel; (ii) moved tables and chairs belonging to the Hotel and Restaurant to accommodate the rats; and (iii) patrolled on the sidewalk in front of the Hotel and Restaurant.

Paragraph 6(c) alleges that, on about June 29, Respondent (i) used a bullhorn at a high volume to disparage the Hotel and Restaurant; and (ii) posted several stationary signs reading "DO NOT BUY HERE."

These specific allegations form the basis for the General Counsel's further allegation that such conduct amounted to picketing or coercion with a secondary object in violation of Section 8(b)(4)(ii)(B).

The Activity of June 26, 27 and 28

The Facts

On the morning of June 26, Respondent placed an inflatable rat on the public sidewalk between the hotel's 13th Street entrance and the locked entrance to the restaurant. The rat was about 12 feet tall, remained stationary about 10 to 12 feet to the right of the hotel entrance, and had no messages written on or attached to it. See G.C. Exh. 3(b). Four of Respondent's officials, including Donohue, accompanied the rat and distributed the flyers mentioned above. The General Manager of the Fairfield Inn, Jack Lawrence-Evans, confronted Donohue and asked him what he was doing there, mentioning that there was no construction going on at the location. Donohue told Evans that Respondent's officials had a First Amendment right to be there and protest, an explanation Evans later gave to people who asked the same question of him. According to Evans, Donohue later passed out flyers to guests who were entering and exiting the hotel, walking back and forth within a span of 15 to 20 feet in front of the entrance. When asked whether Donohue did anything "besides walking back and forth," Evans testified that Donohue talked to him and others but offered nothing more. Here is his entire answer to the question (Tr. 34):

> There were different periods of time that he was engaged with myself or engaged with our valet, employees that were there from a third-party valet, but just handing out flyers and, you know, just telling people, you know, that we were shut down, you know, four times, that—just different variations that he recited from the actual pamphlet that was being handed out.

On the second day, June 27, Donohue and other officials of Respondent arrived at the hotel and set up either the same rat or a smaller 8-foot tall rat at the same location as the day before. But, on this occasion, according to Evans, Donohue moved 2 sets of tables and chairs that were in front of the restaurant to accommodate the width of the rat.[2] Also, on the second day, the Respondent set up a second inflatable rat, this one standing about 8 feet tall. That rat remained stationary on the sidewalk at the corner of 13th Street and Spruce, near the end of the restaurant, with two officials of Respondent standing next to it and one across the street. According to Evans, Donohue was still out in front of the hotel entrance handing out flyers like he was the day before.[3]

On the third day, June 28, the Respondent again showed up in the morning with two 8-foot tall rats. But there were landscapers present on this day who were unloading their truck with plants and placing them at the hotel entrance and along the sidewalk, including where the first rat had previously been stationed. There was some dispute as to where Respondent was to set up that rat and eventually it was placed on the other side of the hotel entrance towards Manning Street. The second rat was initially placed where it was the day before at the corner of 13th Street and Spruce. Evans called the police on this occasion and provided them with evidence of the restaurant's permit for outdoor seating. As a result, and in accordance with a police request, Respondent moved the first rat even further away from the hotel entrance to the corner of Manning Street and 13th Street. At that point, the rat was at the curb facing west across 13th Street. The second rat was moved away from the corner of 13th Street and Spruce and placed further down Spruce Street to the end of the hotel building itself. Tr. 50-53, G.C. Exhs. 4, 5(a), 5(b), 7(a) and 7(b). Evans testified that, on this day like the day before, Donohue moved 2 sets of tables and chairs to accommodate the first rat and they were moved some 2 and ½ to 3 feet. Tr. 52. But that testimony is not credible because, as the General Counsel concedes (G.C. Br. 8 n. 7), the tables and chairs were not even set up until after the rat was moved to Manning Street. According to Evans, on this day, Respondent's officials again distributed handbills, but he gave no details, except to testify that that some stayed with the one rat on Spruce Street and Donohue walked back and forth between the hotel entrance and Manning Street. Tr. 53.[4]

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[2] The small round tables permit seating for 2 people and thus 2 chairs.

[3] Evans testified that, during the first two days, he received "complaints" from guests, but he was not specific about them and he appeared simply to be offering his view of what they were seeing while the activity was going on. He testified, at one point, that the guests were "obviously seeing a large rat" and they "were being handed flyers as they walked in and out of the building." Tr. 35. He also testified that the guests asked him what the Respondent's officials "were doing here," to which he responded that the officials had a First Amendment "right to protest." Tr. 36. Evans also testified that, on the second day, some guests asked "what was going on . . . and why they were there." Tr. 44.

[4] Evans testified that he called the police each morning of the Respondent's activity. His concern appeared to be about the activity as a general matter, except that he also complained about Donohue moving tables and chairs to accommodate the rats. The police came each time, but there is no evidence that they intervened to prohibit Respondent's activity. As indicated above, on the third day, the police asked Respondent's officials to move the rats further away from the locations where the Restaurant had a permit to have outside dining and the Respondent did so.

The above is based in part on evidence provided by a thumb drive entered into evidence that shows a video of about 3 hours of activity back and forth along 13th Street with the camera facing north toward Manning Street. R. Exh. 3. I have viewed the video in its entirety and it provides the most reliable evidence of that happened that day with respect to the first rat. The video shows considerable pedestrian traffic along the sidewalk in front of the hotel, as well as guests and hotel personnel standing around the hotel entrance. It also shows that officials of Respondent stood almost always near the rat distributing handbills to pedestrians and sometimes hotel guests. During the roughly 3 hours they were present at the location, some of Respondent's officials, including Donohue, who was the most identifiable of the group, occasionally left their positions around the rat and walked elsewhere along the sidewalk on 13th Street. But they did not have signs or other indicia identifying themselves or their purpose. They appeared to be walking to the other end of 13th Street where the second rat was located along Spruce Street. Some of the video probably also captured them coming from the second rat back to the first one. Although Donohue often appears in the video, it does not show him regularly distributing flyers while walking back and forth between the hotel entrance and Manning Street, as suggested by Evans in his testimony. Indeed, the video shows only one clear instance of Donohue handing out a flyer at the hotel entrance, and, on that occasion, he walked from his position near the rat to the hotel entrance where he handed a flyer to a hotel guest, said a few words, and then returned to his former position.

Analysis

Handbilling consumers in support of a union's dispute does not constitute a threat, restraint or coercion under subsection (ii) of Section 8(b)(4)(B). *DeBartolo Corp. v. Gulf Coast Trades Council,* 485 U.S. 568 (1988). In *DeBartolo*, the Supreme Court first noted that it was proper to consider whether, in the case before it, Section 8(b)(4) was "open to a construction that obviated deciding" whether the congressional prohibition "would violate the First Amendment." Id. at 578. The Court then cited its previous authority in *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58 (1964) (*Tree Fruits*), for the proposition that Congress did not intend, in Section 8(b)(4)(B), to proscribe all peaceful consumer picketing at secondary sites. It continued as follows (Id. at 580):

> There is even less reason to find in the language of Section 8(b)(4)(ii), standing alone, any clear indication that handbilling, without picketing, "coerces" secondary employers. The loss of customers because they read a handbill urging them not to patronize a business, and not because they are intimidated by a line of picketers, is the result of mere persuasion, and the neutral who reacts is doing no more than what its customers honestly want it to do.

The question here is whether the presence of a stationary inflatable rat, with no message attached, along with protected handbilling, amounts to picketing or otherwise "coerces" secondary employers, as alleged by the General Counsel. The most relevant Board cases to the situation in this case, *Carpenters Local 1506 (Eliason & Knuth of Arizona*), 355 NLRB 797 (2010), and *Sheet Metal Workers Local 15 (Brandon Medical*

Center), 356 NLRB 1290 (2011), support the finding that there was no unlawful picketing or coercion here.

In *Eliason*, the union's protest involved stationary banners 3 or 4 feet high and from 15 to 20 feet long that contained messages shaming secondary employers for utilizing an entity with whom the union had a dispute. The banners were on a public sidewalk and held in place by several union officials, some of whom handbilled pedestrians with flyers that explained the dispute mentioned in the banners. On these stipulated facts, and using the Supreme Court's *DeBartolo* decision as a touchstone, a Board majority found that the bannering did not amount to unlawful picketing or coercion under subsection (ii) of Section 8(b)(4)(B). The Board first considered whether the bannering amounted to picketing, defining what makes picketing coercive: The combination of carrying picket signs and persistent patrolling of picketers back and forth in front of a work site creating a physical or at least a symbolic confrontation between the picketers and the worksite. The Board then found that the bannering in the case before it was not picketing because it did not create a confrontation and was not accompanied by any form of patrolling. Thus, "members of the public wishing to enter the secondaries' sites did not confront any actual or symbolic barrier." 355 NLRB at 802-803. The Board also addressed whether the bannering amounted to non-picketing coercion, which is defined as "conduct which directly caused, or could reasonably be expected to directly cause disruption of the secondary's operations." Noting that there was no blocking of ingress or egress or any other disruption of the operations of the secondary employers by the union, the Board found no violation on this score as well. Id. at 805-806.

Describing use of the banners as speech (355 NLRB at 808-810), the Board found support for its ultimate finding in *Eliason* by invoking the "constitutional avoidance" doctrine discussed in the Supreme Court's *DeBartolo* decision. It stated that "to prohibit the holding of a stationary banner would raise serious constitutional questions under the First Amendment." Id. at 807. Among the cases cited by the Board in its discussion of the Supreme Court's First Amendment jurisprudence in this respect was *Texas v. Johnson*, 491 U.S. 397 (1989). Id. at 808 n. 39. In that case, the Court, in overturning a flag burning conviction, stated that, while government may proscribe expressive conduct, it may not "proscribe particular conduct *because* it has expressive elements." 491 U.S. at 407 (emphasis in original).

In *Brandon Medical*, the Board considered a handbilling case involving a stationary inflatable rat such as the ones in this case at a hospital with which the union did not have a primary dispute. The Board found that use of the rat did not violate Section 8(b)(4)(ii)(B). The inflatable rat in *Brandon* was some 16 feet tall and 12 feet wide and had a sign identifying the employer with whom the union had a dispute. The sign stood on a flatbed trailer some 100 feet from the hospital's front door. Applying the reasoning in the *Eliason* case, the Board in *Brandon* found that use of the rat did not amount to picketing or non-picketing coercion. It found that use of the rat did not contain an element of confrontation in terms of an actual or symbolic barrier as visitors arrived at the hospital. Nor was there any blocking of ingress or egress or similar disruption of hospital business. 356 NLRB at 1291-1292. Finally, the Board noted that

the "rat balloon itself was symbolic speech," but "nothing in the location, size or features of the balloon . . . were likely to frighten those entering the hospital, disturb patients or their families, or otherwise interfere with the business of the hospital" sufficient to amount to unlawful coercion under subsection (ii) of Section 8(b)(4)(B). Id. at 1292.[5]

Like the banner in *Eliason* and the inflatable rat in *Brandon II*, here, the inflatable rats were stationary. Like the banner in *Eliason* and the inflatable rat in *Brandon II*, the rats in this case were simply a way for Respondent to draw attention to its handbilling, and, unlike the banner in *Eliason*, the rats in this case had no message on them. Although the term rat has a derogatory connotation, suggesting someone who turns against another, or, in the context of a labor dispute, a scab or an anti-union person or entity, the inflatable rats in this case were more like cartoon caricatures. The rats did no more than visually reinforce the same message contained in the handbills—that non-union labor was used in the renovations. This was essentially speech in another form. And, as the Supreme Court has recognized, federal labor policy favors uninhibited and robust speech by both management and labor, including use of a pejorative and very unflattering definition of a "scab." *Letter Carriers v. Austin*, 418 U.S. 264 (1974) (libel conviction over the use of the definition overturned).

Neither the placement of the rats, which were always on public sidewalks, nor the Respondent's activity in connection with the rats amounted to picketing or coercion within the definition of those terms as set forth in *Eliason* and *Brandon II.* For the most part the handbillers remained near the rats. Only one person, Donohue, was alleged, at times, to have walked "back and forth" in front of the hotel entrance while handbilling. Although he moved away from the stationary rat nearby, he carried no sign and did not engage in anything that could be called a confrontation. There is no evidence that Donohue established an actual or symbolic barrier that interfered with pedestrians on the sidewalk or the egress or ingress of people utilizing the hotel. Nor did he or the rats cause disruption of the operations of either the hotel or the restaurant. More particularly, there is no evidence that the stationary rats interfered with pedestrian traffic or people entering or exiting the hotel. It is clear from the thumb drive video exhibit (R. Exh. 3) on the third day of the protest, which covered some 3 hours, that the rat in the video had little or no effect on the public. Most pedestrians walked right by the rat without even pausing to look at it.[6]

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[5] The above is considered *Brandon II.* In its original decision in that case, *Brandon I,* the Board found that the union violated the Act by staging a "mock funeral" in front of the hospital while carrying a fake casket accompanied by a union member dressed as the Grim Reaper. However, it declined to pass on the additional allegation that use of the inflatable rat was a violation. The Court denied enforcement of the Board's decision on the mock funeral issue. *Sheet Metal Workers Local 15 (Brandon Medical Center) (Brandon I)*, 346 NLRB 199 (2000) enf. denied, 491 F.3d 429 (D.C. Cir. 2007). Thus, the Board addressed the open inflatable rat issue in *Brandon II*, as discussed above.

[6] The General Counsel asserts (G.C. Br. 8) that the thumb-drive video (R. Exh. 3) shows that pedestrians had to walk around the rat. Although, at one point, for a short period of time before the rat was moved, there might have been some pedestrians who had to walk around the rat, a full viewing of the 3-hour video confirms that the rat posed no significant obstacle to the free flow of pedestrian traffic on the third day of the protest. Indeed, there were other obstacles on the sidewalk on that day that caused pedestrians to walk around them, including landscapers who were installing plants around the hotel

At its essence, Respondent's protest activity on June 26, 27 and 28 amounted to peaceful handbilling, which, under the Supreme Court decision in *DeBartolo*, is protected and lawful. Accordingly, I reject the General Counsel's contention that the presence of a stationary inflatable rat near the handbilling or the handbilling itself, either separately or in combination, constituted picketing or coercion.

Much of the General Counsel's brief is devoted to showing that the placement of the inflatable rats, along with the handbilling, constituted picketing or at least coercion. But, those arguments run counter to *Eliason* and *Brandon II*, as shown above. The General Counsel frankly takes the view that those cases were wrongly decided, and, in reliance on the dissents, that the decisions should be overruled (G.C. Br. 19-20)—a position endorsed by the Charging Party. But I am, of course, bound to apply existing Board law, which I have done.

The General Counsel appears to urge a violation even under the *Eliason-Brandon II* rationale because Respondent's officials moved the restaurant's tables and chairs to accommodate placement of one of the rats on the public sidewalk in front of the hotel and the restaurant and because its officials allegedly "patrolled" back and forth while handbilling. But neither of these factors turned what was legitimate handbilling activity into unlawful coercion.

First of all, there is no evidence that Respondent moved any tables and chairs to accommodate the rat on the first day. According to Evans, Donohue did move 2 sets of tables and chairs on the second day to accommodate the rat that was stationed along the sidewalk parallel to 13th Street. Donohue did not move any tables and chairs on the third day, despite Evans' testimony that he did, since, as the General Counsel conceded and the video exhibit (R. Exh. 3) clearly shows, hotel personnel did not even set up the tables and chairs until the rat was moved to Manning Street. In any event, there were no restaurant patrons sitting outside during the hours of the rat's presence and the outside restaurant entrance was not open. Nor is there any evidence that the movement of the tables and chairs caused any particular problems. The minimal and temporary rearrangement of moveable furniture had no significant effect on secondary employers. This was thus de minimis and did not amount to coercion either separately or in conjunction with the presence of the rat. *See Laborers' International Union of North America, Local 872 (Westgate Las Vegas Resort & Casino),* 363 NLRB No. 168, slip op. 4-5 (2016), citing *Eliason*, 355 NLRB at 807 fn. 30 and *Southwest Regional Council of Carpenters (Richie's Installations, Inc.),* 355 NLRB 1445 (2010).

Nor was there any patrolling as that term is normally understood. The dictionary definition refers to policemen, soldiers or security officers walking a beat around or through a specific area to enforce order or control access. See Random House Webster's Unabridged Dictionary, Second Edition. And, in the context of labor disputes,

entrance and along the sidewalk, as well as hotel personnel, guests and others who were standing along or congregating on the sidewalk. Even focusing solely on those walking around the rat, however, the impact would have been de minimis, as was the moving of tables and chairs to accommodate the rat, which is discussed in text hereafter.

persistent patrolling, usually by more than one person, is viewed as part of picketing that involves confrontation and provides some kind of physical or symbolic barrier preventing people from crossing the barrier. Patrolling in that sense would be systematic, intimidating and coercive. See *Eliason*, cited above, 355 NLRB at 802-803.

But that is not what Donohue was doing while he was handbilling, and only Donohue is alleged to have engaged in persistent patrolling. Although there were video and still pictures introduced into evidence in this case, there were none showing persistent patrolling by Respondent while handbilling in front of the entrance to the hotel. Evans testified that, on the first day, Donohue alone walked back and forth in front of the hotel entrance within a span of 15 to 20 feet while handbilling, but did nothing more except talk with people for "different periods of time." He carried no sign and there is no suggestion of a physical or symbolic barrier in Donohue's handbilling that prevented people from crossing it. Nor was there evidence of any confrontation or intimidation. Evans also offered conclusory testimony that, on the next day, Donohue did the same thing he did on the first day. Evans further testified that, on the third day, Donohue was again walking back and forth between the hotel entrance and Manning Street distributing flyers. But, as shown above, the 3-hour video of the third day does not support that testimony. The single clear instance of Donohue handbilling in the video shows that he left his position near the rat to hand a flyer to a hotel guest at the hotel entrance then returned to his former position. There was nothing remarkable about that brief encounter and it could hardly be called patrolling. Even accepting Evans' testimony in full, however, his testimony is a slim reed upon which to support a finding that Donohoe was engaged in persistent patrolling. Nor was Donohue's conduct otherwise coercive. See *Sheetmetal Workers Local 15 v. NLRB,* 491 F.3d 429, 438 (D.C. Cir. 2007), cited above at footnote 5 (mock funeral procession added element of street theater to handbilling but was not picketing, patrolling or otherwise coercive).[7]

The June 29 Activity

The Facts

On June 29, Respondent again protested in front of the hotel and the restaurant. This time, it was Donohue alone. He arrived at about 5 pm, and he was unaccompanied by an inflatable rat. He did, however, have with him a portable bullhorn, which he used to deliver essentially the same message about Respondent's dispute that was set forth in the flyers, which he distributed as well on this occasion. As indicated above, at this time of the day, the restaurant's entrance on 13th Street was accessible, and tables and chairs were set up to accommodate patrons who wanted to be seated outside. The tables and chairs were lined up both along the curb and along the building with space for pedestrians in between. Donohue placed several stationary

[7] The General Counsel cites *Service Employees Local 399 (William J. Burns Agency),* 136 NLRB 431, 436-437 (1962) for a contrary position (G.C. Br. 13). But that case is clearly distinguishable and the differences between that case and this one highlight why what Donohue was doing was not "patrolling." In *Burns*, some 20-70 union members were marching in an elliptical pattern in front of the entrance to the secondary's premises. Here, only one person, Donohue was handing out handbills or flyers while walking back and forth in front of the hotel entrance.

signs along the sidewalk on the 13th Street side adjacent to the curb, although they did not disturb the tables and chairs. The signs read, "Do not Buy here." When Donohue first arrived, there were a few patrons outside sitting at the tables adjacent to the restaurant. Those patrons soon left and there were none outside thereafter. But the windows to the restaurant were open and there were patrons inside throughout the time Donohue was present at the location. He left at about 8 pm.

During Donohue's time at the location, he walked back and forth along 13th Street, mostly in the bike lane on the street, but sometimes on the sidewalk, speaking through the bullhorn. He paused at the end of each block and spoke through the bullhorn from there. The message he delivered about the use of a non-union company during the renovations was loud and continued for the roughly 3 hours Donohue was present at the location. He repeatedly asked people to take a handbill and his voice could be heard by the patrons inside the restaurant and by workers in the kitchen at some distance from the outside of the restaurant where Donohue was situated. Hotel guests also could hear Donohue; some complained to Fairfield management and had to either be moved or given complimentary gifts as a result.[8]

Analysis

Donohue's broadcast messages over the period of about 3 hours on June 29 were excessively loud and amounted to unlawful coercion. This is confirmed by the video and sound exhibit, as well as the uncontradicted testimonial evidence that shows that the bullhorn messages were loud enough to be heard well inside the restaurant. The uncontradicted testimonial evidence also confirms that hotel guests found the sound excessively loud. Some complained, and their complaints had to be accommodated by hotel management. The loudness of the messages, their effect on patrons and guests of neutral entities and their duration clearly support a finding that Respondent disrupted the operations of secondary employers and thus engaged in coercion. Since the secondary object of Donohue's activity is admitted, I find that the Respondent's conduct in this respect on June 29, 2019, violated Section 8(b)(4)(ii)(B) of the Act. See *Carpenter's (Society Hill Towers' Ass'n.),* 335 NLRB 814, 815, 820-823, 826-829 (2001), enforced, 50 Fed, Appx. 88 (3d Cir. 2002), a case that was cited with approval and distinguished in *Eliason*, 355 NLRB at 806.

Respondent attempts to distinguish *Society Hill Towers* because, in that case, unlike here, there was evidence that the amplified sound exceeded those permitted under the City of Philadelphia's noise regulations and the amplified sound took place in a residential area. R. Br. 21. Neither of those factors provide a defense here. The violation of the noise ordinance was not the only or the exclusive rationale for the decision in *Society Hill*; the rationale included the impact of the excessive noise on

[8] The above findings are based on the testimony of Evans, the general manager of the Fairfield Inn, and Derek Davis, the manager of the Libertine restaurant. The findings are also based on my viewing of 2 DVD discs reflecting a few minutes of Donohue's activity with the bullhorn, which were received in evidence as Exhibits 9(a) and 9(b), as well as 2 still photographs taken by Evans received in evidence as G.C. Exhs. 8(a) and 8(b).

residents. See discussion at pp. 826-829 of 335 NLRB. Nor was the decision restricted to sound amplification only in residential areas. The rationale of the decision was the impact of the excessive noise on people either patronizing or using the secondary employer's facility or premises. The impact there was on residents—here, on hotel guests and restaurant patrons.

Conclusions of Law

1. By using a bullhorn to broadcast excessively loud messages while handbilling in front of the Fairfield Inn and Libertine restaurant on June 29, 2018, where an object was to force those entities to cease doing business with Tri-M, Respondent violated Section 8(b)(4)(ii)(B) of the Act.

2. The above violation constitutes an unfair labor practice affecting commerce.

3. The Respondent has not otherwise violated the Act.

On these findings of fact and conclusions of law, and on the entire record herein, I issue the following recommended[9]

ORDER

Respondent, International Brotherhood of Electrical Workers, Local 98, its officers, agents, successors and assigns, shall

1. Cease and desist from:

(a) Using a bullhorn to broadcast excessively loud messages while handbilling in front of the Fairfield Inn and Libertines restaurant where an object is to force those entities to cease doing business with Tri-M.

(b) In any like or related manner violating Section 8(b)(4)(ii)(B) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days after service by the Region, post at its business offices and meeting places copies of the attached notices marked as "Appendix".[10] Copies of the

[9] If no exceptions are filed, as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

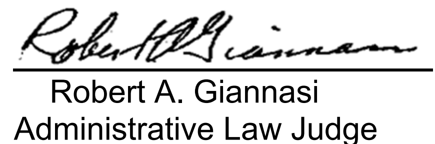
notice, on forms provided by the Regional Director of Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicate with members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn statement of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

(c) Within 14 days after service by the Region, sign and return to the Regional Director sufficient copies of the notices for posting by Fairfield Inn and Libertines, if they are willing, at all places where their notices to the public and patrons customarily are posted.

It is also ordered that the complaint allegations of violations not found herein are dismissed.

Dated, Washington, D.C May 28, 2019



Robert A. Giannasi
Administrative Law Judge

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

WE WILL NOT Use a bullhorn to broadcast excessively loud messages while handbilling in front of the Fairfield Inn and Libertines restaurant where an object is to force those entities to stop doing business with Tri-M.

WE WILL NOT, in any like or related manner, violate Section 8(b)(4)(ii)(B) of the Act.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 98
(Employer)

Dated ____________________ By ____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

615 Chestnut Street, 7th Floor, Philadelphia, PA 19106-4404
(215)-597-7601, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/04-CC-223346 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (215)597-5354.