UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 98	:	
and	:	Case No. 04-CC-223346
SHREE SAI SIDDHI SPRUCE LLC d/b/a FAIRFIELD INN & SUITES BY MARRIOTT	:	

BRIEF *AMICUS CURIAE* OF ASSOCIATED BUILDERS AND CONTRACTORS EASTERN PENNSYLVANIA CHAPTER, INC.

Dated: October 1, 2019

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I. STATEMENT OF INTEREST

ABC-EPA is a non-profit trade association with over 500 construction firm members, including union contractors and contractors with no union affiliation. Many of ABC-EPA's members maintain an active presence and perform a significant amount of work in Philadelphia – ***a city that many consider a stronghold for labor organizations such as Respondent IBEW Local 98.*** ABC-EPA embraces a merit shop philosophy, which encourages open competition and a free enterprise approach that awards contracts based solely on merit, regardless of labor affiliation. ABC-EPA represents members across all specialties of the construction industry and serves as the unified voice of merit shop firms with the legislative, executive, and judicial branches of the federal, state, and local governments. ABC-EPA and its members have a direct interest in this case because labor organizations frequently utilize inflatable rats to exert pressure on customers to refrain from patronizing neutral establishments who transact business with ABC-EPA contractors. ABC-EPA urges the Board to adopt a rule of law that recognizes reality: the utilization of rats is "picketing" and it is threatening, coercing, and restraining within the meaning of the Act.

II. OVERVIEW

Thirty years ago in Chicago, labor unions first began using "Scabby the Rat" – ***giant inflatable rats that range in height from 6-25 feet and are designed to startle people with sharp claws, ugly snarls, and menacing demeanors.*** *See Robert Channick, Born in Chicago, Scabby the Giant Inflatable Protest Rat May Be Banned From Picket Lines by National Labor Relations Board,* Chicago Tribune (Aug. 8, 2019, 5:28 PM), http://www.chicagotribune.com/business/ct-biz-scabby-giant-rat-balloon-union-protest-ban-20190807-fbqnn7rorne75oc2w72wel3ise.story.html. Today, labor unions across the nation are using inflatable rats to exert pressure on members

of the public to refrain from patronizing neutral third party establishments. *See James J. Gillece, Jr., Larry M. Wolf, What Unions Are Doing To Make Life Miserable For Nonunion Employers,* 16 No. 12 Md. Emp. L. Letter 5. This practice has become commonplace in Philadelphia and has been employed by Local 98 as well as numerous other labor organizations representing the various trades. Recently, the Board adopted an overly-rigid definition of secondary picketing, which essentially requires a labor organization to *physically restrain* neutral third parties from entering a construction site, or else its conduct – ***no matter how intimidating*** – will not be deemed unlawful. As a result, labor unions have been able to utilize inflatable rats in a threatening, coercing, and restraining manner with impunity**.**

In his May 28, 2019 decision (the "ALJ Decision"), Chief Administrative Law Judge Robert A. Giannasi found that Respondent, International Brotherhood of Electrical Workers Local Union 98 ("Local 98"), did not violate Section 8(b)(4)(ii)(B) of the Act through its use of large inflated rats, even though when viewed in its totality, Local 98's conduct had the effect of coercing, threatening and restraining the operations of Charging Party, Siddhi Spruce, LLC d/b/a Fairfield Inn & Suites by Marriot ("Fairfield Inn"), and the Libertine Restaurant ("Libertine") – *two neutral establishments.* If the Board fails to adopt a clear, bright-line definition of picketing under Section 8(b)(4)(ii)(B), then similar confrontational tactics will continue to be deployed against neutrals – *the very evil that Congress sought to eradicate when enacting Section 8(b)(4)(ii)(B) of the Act.*

The Board's General Counsel Division of Advice has recognized that the time has come for the Board to step up to the plate and take action. On May 14, 2019, the Division of Advice released a formal Advice Memorandum specifically addressing the exact legal issue presented in this case, i.e., whether or not inflatable animals rise to the level of unlawful secondary picketing

conduct as opposed to mere "free speech." *See* 12/20/18 Advice Mem., 13-CC-225655, at 1.[1] The Division of Advice answered that question in the ***affirmative***, and concluded that the display of inflated animals at a neutral establishment should be treated as unlawful secondary picketing under Section 8(b)(ii)(4)(B). The Division of Advice specifically urged the Board to "reconsider its decisions in *Carpenters Local 1506 (Eliason & Knuth of Arizona)*, 355 NLRB 797 (2010), *Sheet Metal Workers Local 15 (Brandon Medical Center) (Brandon II)*, 356 NLRB 1290 (2011), and *Carpenters Southwest Regional Councils Locals 184 & 1498 (New Star)*, 356 NLRB 613 (2011). ABC-EPA joins the Division of Advice in its request. The Division of Advice's rationale is sound, stating, in pertinent part, as follows:

> 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 stationary banners and an inflatable rat at neutral employers' facilities, was lawful nonpicketing secondary activity under the Act…[T]he Union's erection of a large banner misleadingly claiming a labor dispute with the neutral, as well as the Union's use of a large inflatable cat clutching a construction worker by the neck at a private construction jobsite, was tantamount to unlawful secondary picketing; [] the posting of the banner and cat constituted unlawful signal picketing; and [] even if this conduct was not tantamount to picketing, it was nevertheless unlawfully coercive and not shielded by the First Amendment because the Union was engaged in labor and/or commercial speech, both of which are entitled to lesser constitutional protection, and also because the banners were knowingly false speech unprotected by the First Amendment.

12/20/18 Advice Mem., 13-CC-225655, at 2-3. (emphasis added).

After performing a thorough review of the Board's prior decisions in *Eliason & Knuth of Arizona*, *Brandon Medical Center*, and *New Star*, the Division of Advice determined that those decisions failed to strike the proper balance between protected free speech, on the one hand, and

[1] Although the Advice Memorandum is dated December 20, 2018, it was not released by the Office of the General Counsel until May 14, 2019.

picketing activity that is afforded lesser protections, on the other hand. *Id.* at 14-15. In that regard, the Division explained as follows:

> [T]he 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 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.*
>
> Applying the more reasonable definition of picketing that was in effect before *Eliason & Knuth* and *Brandon II*, the Union's conduct here violated the Act. The Union posted agents holding a big banner, *and a large, intimidating inflatable cat clutching a worker by the neck, at the entrance to the construction site, with the undisputed aim of forcing Summit to cease using its electrical subcontractor Edge, with whom the Union had a primary dispute.* The Union agents' holding of a large, misleading banner—the functional equivalent of a picket sign—*and the posting of a large, hostile-looking cat strangling a worker 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 construction site….*

12/20/18 Advice Mem., 13-CC-225655 at 1, 14-15 (emphasis added).

The Division of Advice's reasoning and recommendations are directly on point with and should be applied to the instant case, in which Local 98 used giant, menacing inflatable rats to entangle neutral establishments, including the Fairfield Inn and Libertine, into a labor dispute not their own. As such, for the reasons discussed herein, the Board should adopt a clear, bright-line rule of law in this case that is: (a) consistent with the plain language of the Act; and (b) protects neutrals from unlawful secondary activity by a labor organization solely because the neutral elected to engage a contractor that has no union affiliation. The Board should also apply that clear, bright-line rule to overturn the ALJ Decision and find that Local 98 engaged in conduct

that was tantamount to secondary picketing, coercive and threatening, and violated Section 8(b)(ii)(4)(B).

III. ISSUE PRESENTED

Whether the Board should adopt a clear, bright-line standard for defining picketing that is consistent with the plain meaning of the Act, where: (a) a labor organization's use of giant, menacing inflated rats is indistinguishable from secondary picketing and spreads the substantive evil of labor discord to coerce neutral establishments; and (b) the Board's recent decisions have allowed that substantive evil to permeate cities across the United States?

Suggested Answer: Yes.

IV. ARGUMENT

A. The Board Should Adopt A Clear, Bright-Line Rule For Defining Picketing.

(1) The Legislative Purpose Behind Section 8(b)(4)(ii)(B) Of The Act.

Section 8(b)(4)(ii)(B) of the Act provides, in pertinent part, that it shall be "an unfair labor practice for a labor organization…to threaten, coerce, or restrain' a person not party to a labor dispute 'where …an object thereof is…forcing or requiring [such person] to…cease doing business with any other person.'" *N. L. R. B. v. Retail Store Emp. Union, Local 1001*, 447 U.S. 607, 611 (1980) (quoting 29 U.S.C. §158 (b)(4)(ii)(B)); *see Silverman v. Verrelli*, No. Civ. A. 11-6576 SRC, 2012 WL 395665, at *3 (D.N.J. Feb. 7, 2012) ("[the Act] specifically prohibits [] a labor union from threatening, coercing, or restraining a person engaged in commerce or in an industry affecting commerce with the object of forcing that person to cease doing business with another."). "Congressional concern over the involvement of third parties in labor disputes not their own prompted 8(b)(4)(B)… this concern was focused on the 'secondary boycott,' which was conceived of as pressure brought to bear, not 'upon the employer who alone is a party (to a

dispute), but upon some third party who has no concern in it 'with the objective of forcing the third party to bring pressure on the employer to agree to the union's demands." *N.L.R.B. v. Local 825, Int'l Union of Operating Engineers, AFL-CIO*, 400 U.S. 297, 302–03 (1971). As recently explained by Board Member Schuamber and Board Members Hayes:

> The legislative history of Section 8(b)(4) demonstrates both that Congress intended the Section *to be applied flexibly and sensibly, drawing upon the Board's unique expertise, to protect neutrals from a broad range of coercive secondary activity*, and that the Section's prohibitions were not limited to secondary activity that involved violence, intimidation, blocking ingress and egress, or similar direct disruption of the secondaries' business.

In Re United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506:355 NLRB 797, 813–14 (2010) (dissent) (emphasis added).

(2) Labor Unions' Use Of Giant, Menacing Inflatable Rats Is Tantamount To Secondary Picketing Under The Plain Meaning Of The Act.

Section (4)(b)(4)(ii)(B) "prohibit[s] peaceful picketing, persuasion, and encouragement, as well as non-peaceful economic action, in aid of the forbidden objective" because "Congress thought that [secondary boycotts] were unmitigated evils and burdensome to commerce." *See In Re United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 355 NLRB at 813–14 (dissent) (quoting *Carpenters (Wadsworth Building)*), 81 NLRB 802, 812 (1949), enfd, 184 F.2d 60 (10th Cir. 1950), cert. denied, 341 U.S. 947 (1951)(cited with approval in *International Bhd. of Elec. Workers, Local 501 v. NLRB*, 341 U.S. 694, 704 (1951)). Therefore, and as correctly pointed out by the Division of Advice, even peaceful picketing or persuasive conduct in aid of the secondary boycott objective is unlawful under Section 8(b)(4). (*See* Brief in Support of the General Counsel's Exceptions to ALJ Decision, at p. 14).

Historically, both the Board and courts across the United States defined picketing in a very broad and flexible manner. *See Lumber & Sawmill Workers Local Union No. 2792 (Stoltze Land & Lumber),* 156 NLRB 388, 394 (1965). In doing so, a broad range of conduct was found to constitute secondary picketing, and neither patrolling nor the carrying of signs were deemed prerequisites to secondary picketing activity. *See, e.g., NLRB v. Teamsters Local 182 (Woodward Motors),* 314 F.2d 53 (2d Cir. 1963)*, enfg.,* 135 NLRB 851 (1962) (planting signs in a snowbank and then watching the signs from a parked car constituted picketing); *Mine Workers (New Beckley Mining)*, 304 NLRB 71, 72 (1991), enfd., 977 F.2d 1470 (D.C. Cir. 1992) (massed gathering of strikers and community members without picket signs or placards in neutral hotel's parking lot where strikebreakers were staying); *Serv. Employees Union,* 312 NLRB 715, 746 (1993) (posting stationary agents with signs near an employer's entrance, disorderly conduct in front of a neutral's business, including attaching a banner to the neutral establishment); *see also Carpenters, Local 2797 (Stoltze Land & Lumber Co.),* 156 NLRB 388, 394 (1965) ("[t]he important feature of picketing" is posting union agents near the entrance to a neutral's business); *United Mine Workers of Am., Dist. 2,* 334 NLRB 677, 686 (2001)(recognizing same principle).

By way of illustration, in *Electrical Workers Local 98 (Telephone Man)*, 327 NLRB 593 (1999), Local 98 placed a stationary agent outside the neutral gate of a construction site, with a sign hanging around his neck that read "observer" and also contained language regarding the primary employer's alleged failure to pay prevailing wage. Despite the fact that the union agent of Local 98 took a stationary position without patrolling, the Board found that he had engaged in unlawful secondary signal picketing in violation of Section 8(b)(4)(ii)(B) of the Act. In reaching its decision, the Board reasoned, in pertinent part, as follows:

> The picketing conducted by Respondent [] violated 8(b)(4)(i) and (ii)(B) by [the union agent] positioning himself at the neutral gate

> with an "observer" sign. There is no allegation and indeed no evidence of misuse of the neutral gate. [The union agent], called to testify by Respondent, offered no explanation of why there was a need for him to stand at the neutral gate. *I find that "observer" activity was for no other purpose than to signal employees of neutral employers*…

327 NLRB at 600 (emphasis added).

As in *Electrical Workers Local 98 (Telephone Man)* – the facts illustrate that Local 98 and labor unions across the nation engage in confrontational activity through their use of giant, menacing inflatable rats, *which cannot be meaningfully distinguished from secondary picketing.* First, Local 98 admits that it's conduct was intended to deter customer patronage of the Fairfield Inn and the Libertine, and therefore, there is no dispute that Local 98's conduct was premised upon an unlawful secondary objective. (ALJ Decision 1:11-14; N.T. 7-9). Second, with their stationary nature, the use of inflatable rats right at the entrance of a neutral establishments in this case is akin to posting stationary picket signs or agents near the entrance of a neutral establishment. In addition, as with the posting of stationary signs or agents, Local 98's use of large inflatable rats for the admitted reason of aiding a secondary boycott, was confrontational and sent a signal to both secondary employees and customers of neutral businesses that they should not cross, thereby restraining them. In light of these circumstances, and because Local 98 admits that its conduct was designed to disrupt the business of operations of the Fairfield Inn and Libertine, it is entirely indistinguishable from secondary picketing and should be treated as such.

Despite the fact that Local 98's conduct was indistinguishable from secondary picketing, Judge Giannasi relied upon *Eliason & Knuth of Arizona* and *Brandon Medical Center* to erroneously conclude that Local 98's conduct was merely tantamount to "peaceful handbilling". In reaching that erroneous conclusion, Judge Giannasi reasoned, in pertinent part, as follows:

> 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 nonunion labor was used in the renovations. This was essentially speech in another form…*

ALJ Decision at 7 (emphasis added).

Contrary to Judge Giannasi's finding, Local 98's erection of a giant inflatable rat right next to the entrance of a neutral establishment was a far cry from *"speech in another form"*, and his finding underscores the need for *Eliason & Knuth of Arizona*, *Brandon Medical Center*, and *New Star* to be overturned. As noted above, in those decisions, the Board applied an overly-restrictive definition of picketing, which belies the plain meaning and improperly undermines the legislative purpose behind the prohibitions set forth in Section 8(b)(4)(ii)(B). *See Hardt v. Reliance Standard Life Ins. Co.,* 560 U.S. 242, 251 (2010) (citing *United States v. Gonzales*, 520 U.S. 1, 4 (1997)) (it is necessary to "enforce plain and unambiguous statutory language according to its terms"). In essence, the Board decisions in those cases improperly restricted the definition of picketing to situations in which union agents *physically restrain* access to neutral establishments. In doing so, the Board failed to account for the well-documented fact that labor unions employ a wide variety of confrontational tactics, which may be non-physical in nature, ***but have the exact same intent and effect.*** The epitome of such tactics is the erection of giant inflatable rats right at the entrance of neutral establishments, which deters access to and disrupts those establishment's business operations.

(3) The Use Of Giant, Menacing Inflatable Rats Is Both Coercive And Intended To Aid Secondary Boycotts Against Neutral Establishments.

Even where conduct does not amount to "picketing", it may still very well be coercive and prohibited by the plain meaning of Section 8(b)(4)(ii)(B). Indeed, the Board has consistently found a broad variety of "non-picketing" conduct to violate Section 8(b)(4)(ii)(B). *See e.g.*, *Metropolitan Regional Council, Carpenters (Society Hill Towers Owners' Assn.)*, 335 NLRB 814, 820-23 (2001), enfd, 50 F. App'x 88 (3d Cir. 2002) (broadcasting a message at extremely high volume through loudspeakers facing a neutral condominium building was coercive conduct that violated § 8(b)(4)(ii)(B)); *Service Employees Local 87 (Trinity Maintenance)*, 312 NLRB at 746-748 (1993) (same); *Service Employees Local 525 (General Maintenance Co.)*, 329 NLRB 638, 664-65, 680 (1999), enfd, 52 F. App'x 357 17 (9th Cir. 2002) (holding that union engaged in coercive conduct by throwing bags full of trash into a building lobby); *Service Employees Local 399 (William J. Burns Agency)*, 136 NLRB 431, 436-37 (1962) (union's non-picketing conduct was nevertheless coercive, where union members marched in an elliptical pattern without signs and while distributing handbills).

In analyzing the broad scope of Section 8(b)(ii)(4)(B), the U.S. District Court for the Northern District of Georgia recently highlighted the fact that unlawful coercive conduct can be found under any of the following circumstances:

> [A] union handbills or banners at the approach of a neutral secondary employer, such as a hospital or hotel, and stages processions; patrols; shouts; acts aggressively; makes threats; physically or verbally interferes with or confronts persons coming and going from the establishment; creates a symbolic barrier to those who would enter the establishment; or uses speakers to broadcast messages at an excessive volume toward a building that hired a primary employer as a subcontractor.

Circle Grp., L.L.C. v. Se. Carpenters Reg'l Council, 836 F. Supp. 2d 1327, 1359 (2011) (citations omitted). As clearly demonstrated in all of these cases, where a labor organization does or threatens to directly disrupt a neutral establishing's operations, its conduct will violate Section 8(b)(4)(ii)(B) of the Act. *See Serv. & Maint. Employees, Local 399 (William J. Burns Detective Agency),* 136 NLRB at 437 (finding that even if union's conduct did not constitute picketing, it still violated Section 8(b)(4)(ii)(B) because it "overstepped the bounds of propriety and went beyond persuasion so that it became coercive to a very substantial degree.").

Here, as discussed above at Section IV(A)(I), Local 98's stationing of large inflatable rat at the entrance of neutral establishments is indistinguishable from unlawful secondary picketing and should be treated as such. However, even assuming, *arguendo*, that Local 98's use of the inflatable rats did not constitute "picketing", it is clear that their presence was still coercive and violated Section 8(b)(4)(ii)(B). First, as noted above, Local 98 admits that its conduct had the secondary objective of deterring patronage of neutral establishments – the Fairfield Inn and the Libertine. (ALJ Decision 1:11-14; N.T. 8:1-3). Second, Local 98 does not dispute the means it used to achieve the secondary objective – namely: the stationing of large inflatable rats right next to the entryway of the Fairfield Inn's lobby, which is also the primary way that guests enter and exit the Fairfield Inn. (N.T. 27:24-25, 28:1-25). Nor does Local 98 dispute the fact that its agent both patrolled the entrance to the Fairfield Inn and personally confronted guests of the Fairfield Inn, as they entered and exited the premises. (N.T. 34:4-7, 35:18-25). Local 98 engaged in the very same conduct the next day, on June 27, 2018, by once again inflating a 12-foot rat right next to the entrance of the Fairfield Inn and using its agents to confront guests of the Fairfield Inn. (N.T. 43:1-10). Then, on June 28, 2018, Local 98 began to engage in even more coercive secondary conduct by blaring a bullhorn in an excessively loud manner for more

than three (3) consecutive hours, for the sole purpose of confronting guests of the Fairfield Inn, as they entered and exited the hotel, as well as to disrupt patrons of the Libertine. (N.T. 56:13-20, 57:21-25, 60:8-23). As Judge Giannasi found, Local 98 also admittedly moved tables and chairs belonging to the Fairfield Inn, and confronted third party vendors in furtherance of its secondary objective. (N.T. 37:16-22, 45:1-8).

Given these circumstances, there can be no doubt that Local 98's conduct – ***and the use of giant inflatable rats across the United States*** – is intended to disrupt the business of those neutral establishments, pull them into a labor dispute not their own, and to further spread labor discord in Philadelphia – *the exact type of conduct that Congress sought to prohibit by enacting Section 8(b)(ii)(4)(B) of the Act* and the same conduct that, if left unchecked, will allow labor organizations to unlawfully interfere with the business relationships of ABC-EPA's members and their customers. Indeed, Local 98 even stipulates that the primary employer was no longer working on the construction site when it engaged in its secondary conduct directed the Fairfield Inn. (N.T. 7:10-14; 7:15-21). Judge Giannasi's erroneous finding to the contrary, which was premised upon the Board's decisions in *Knuth of Arizona* and *Brandon Medical Center,* only further highlights the desperate need for the Board to adopt a clear, bright-line definition of picketing. In the absence of such, labor unions will continue to "test the waters" with conduct which Congress clearly meant to proscribe under the plain meaning of Section 8(b)(4)(ii)(B).

(4) The Use Of Giant, Menacing Inflatable Rats Does Not Invoke Any Protections Under The First Amendment.

It is well-established that unlawful secondary picketing by labor unions does not amount to protected activity under the First Amendment. *See Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Int'l, Inc.*, 456 U.S. 212, 226 (1982) (citing *N. L. R. B. v. Retail Store Emp. Union, Local 1001*, 447 U.S. 607, 615 (1980); *see also F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S.

411, 428 (1990) (citing *Retail Store Emp. Union, Local 1001*, 447 U.S. at 616 ("[s]econdary boycotts and picketing [] may be prohibited, as part of 'Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife.'"); *International Bhd. of Elec. Workers, Local 501 v. NLRB*, 341 U.S. at 705 (First Amendment did not protect secondary picketing or phone calls that emphasized the purpose of that secondary picketing). In short, "[a]s applied to picketing that predictably encourages consumers to boycott a secondary business, § 8(b)(4)(ii)(B) imposes no impermissible restrictions upon constitutionally protected speech." *Retail Store Emp. Union, Local 1001*, 447 U.S. at 607; *see also Kentov v. Sheet Metal Workers' Int'l Ass'n Local 15, AFL-CIO*, 418 F.3d 1259, 1265 (11th Cir. 2005) ("*DeBartolo* reaffirmed longstanding Supreme Court precedent that the Board can regulate union secondary picketing under [§] 8(b)(4)(ii)(B) without implicating the First Amendment."). To that end, in *Mid-Atl. Reg'l Council of Carpenters,* the Board recently explained:

> Although the Court recognized in Tree Fruits that the Constitution might not permit a broad ban against peaceful picketing, the Court left no doubt that Congress may prohibit secondary picketing calculated to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with, or to put pressure upon the primary employer…Such picketing spreads labor discord by coercing a neutral party to join the fray. In *Electrical Workers v. NLRB*, 341 U.S. 694, 705 (1951), this Court expressly held that a prohibition on picketing in furtherance of (such) unlawful objectives did not offend the First Amendment…We perceive no reason to depart from that well-established understanding…

356 NLRB 61, 67 (2010) (citations omitted); *see also Metro. Reg'l Council of Philadelphia & Vicinity,* 50 F. App'x at 91 (denying union's argument that its "broadcasts were protected First Amendment speech," while noting that the Supreme Court has "consistently rejected the claim that secondary picketing by labor unions [] is protected activity under the First Amendment.").

Here, Local 98 argues that its use of inflatable rats creates "serious" First Amendment concerns, which warrant application of the constitutional avoidance doctrine. In the proposed Amicus Brief that they filed on September 16, 2019, the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") and North America's Building Trades Union ("NABTU") take the same position, and contend that the "peaceful" display of a rat balloon is protected by the First Amendment. However, as discussed at Sections IVA(1)-(II), *supra*, the use of giant, menacing inflatable rats to intimidate neutral third parties and spread labor discord is undoubtedly tantamount to secondary picketing and should be treated as such. With respect to this case, in particular, it is undisputed that Local 98 not only stationed the large inflatable rat right next to the primary means of ingress and egress to the Fairfield Inn, but also: (1) patrolled and confronted guests of the Fairfield Inn; (2) used a bullhorn at an excessively loud volume for three consecutive hours; (3) moved tables and chairs belonging to the Libertine; and (4) confronted third party vendors.

When viewed in their totality, Local 98's actions were intended to and did have the effect of spreading and entangling neutral establishments into labor discord. Once again, Local 98's conduct is also a far cry from "peaceful handbilling" and, in actuality, cannot be distinguished from secondary picketing. Simply put, stationing a 12-foot inflatable rat with sharp claws and a perpetual snarl at the entrance of a neutral establishment sends a signal to any individual in the area that they *"shall not cross,"* which removes the conduct from the realm of "free speech" and places it in the same bucket as secondary picketing. Because it is well-settled that conduct tantamount to secondary picketing does not implicate the First Amendment, neither Local 98 nor similarly situated labor unions across the United should be afforded any protection for their use of inflatable rats to spread labor discord.

V. CONCLUSION

For the reasons set forth above, ABC-EPA respectfully submits that the Board should adopt a clear, bright-line rule of law in this case that is: (a) consistent with the plain language of the Act; and (b) protects neutrals from unlawful secondary activity by a labor organization solely because the neutral elected to engage a contractor that has no union affiliation. The Board should also apply that clear, bright-line rule of law to overturn the ALJ Decision and find that Local 98 engaged in conduct that was tantamount to secondary picketing by stationing a large, inflatable rat directly next to the entrance of a neutral establishment, along with coercive activity.

Respectfully submitted,

COHEN, SEGLIAS, PALLAS, GREENHALL & FURMAN, P.C.

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