

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

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|----------------------------------|---|--------------------------------|
| INTERNATIONAL UNION OF OPERATING |) | |
| ENGINEERS, LOCAL 150, AFL-CIO, |) | |
| |) | |
| |) | Cases 13-CP-227526 |
| And |) | 13-CC-227527 |
| |) | 13-CC-231597 |
| |) | 13-CC-233109 |
| DONEGAL SERVICES, LLC, |) | |
| |) | Oral Argument Requested |
| And |) | |
| |) | |
| ROSS BUILDERS, INC. |) | |

**LOCAL 150's RESPONSE TO CHARGING PARTIES' EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

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Respondent International Union of Operating Engineers, Local 150, AFL-CIO (“Local150” or the “Union”), respectfully submits its response to Charging Parties’ exceptions to Administrative Law Judge Kimberly R. Sorg-Graves’ decision (“ALJD”) in this matter issued on December 13, 2019.

A. ARGUMENT

1. The ALJ Correctly Found that Local 150’s Use of Rat and Banner Displays Were Not Tantamount to Picketing or Otherwise Coercive.

Charging Parties’ first exception to the ALJD states:

The ALJ incorrectly concluded that Local 150’s displays outside of secondary employers’ premises, including Greenscape Homes, Provencal Construction, Ross Builders and Andy’s Frozen Custard, was not tantamount to traditional picketing in violation of the Act.

The ALJ found (ALJD at 30):

Upon review of the factors considered by the Board’s holdings in *Eliason*, and *Brandon II*, I find that these displays [by Local 150] were not tantamount to picketing or otherwise coercive conduct in violation of Section 8(b)(4)(ii)(B) of the Act.

Similar to the Board’s findings in *Eliason* and *Brandon II*, I find that the banners, mobile billboard, inflatable rats, and yard signs expressed messages that constitute speech. The banners informed the readers of Local 150’s opinion that the employer named on the banner contracted with a “rat,” which in this context is an employer with which a union has a labor dispute. The inflatable rat draws attention to the banner, and it emphasizes Respondent’s message that the contracted employer is a rat, and by extension, so is the secondary employer for harboring the primary employer. The yard sign provided social media access information so that interested parties could learn more about Respondent’s activities. Respondent posted these displays in the public right-of-way facing the street where all who passed could read the banners. I find that Respondent’s banners conveyed a less ambiguous message with regards to its dispute with the secondary employer than the banners in *Eliason*, which required an inference to decipher why the union was requesting that the secondary employer be boycotted. *Supra* at 798. While Respondent’s message was briefer and lacked the specifics of most handbills, Respondent’s displays clearly convey a message like the Board found in *Eliason* and *Brandon II*. Here, neither the language of the banner nor the entire display specifically asked those who viewed it to take any action. Customers, suppliers, and employees were left to their own decisions on how to react to the information.

2. The ALJ Correctly Concluded that Local 150's Rat and Banner Displays Were Not Signal Picketing.

Charging Parties' second exception to the ALJD states:

The ALJ incorrectly concluded that Local 150's displays outside of secondary employers' premises was not signal picketing in violation of the Act under Section 8(b)(4) or 8(b)(7) of the Act and were "symbolic expressions of disapproval".

The ALJ found (ALJD at 33):

I also find insufficient evidence that Respondent engaged in "signal picketing" in violation of Section 8(b)(4)(i)(B) at these locations. The record contains no information about whether any of the construction employees of Greenscape Homes, Provencal Construction, and Ross Builders ever frequented these companies' offices, nor is there any information about other types of employees that work in these offices. Ross testified about his concerns for the display's effects on other tenants in the building and customers, but never mentioned the presence of any Ross Builders' employees. I find it a reasonable assumption that Andy's shops employ service employees and receive periodic deliveries of product and supplies, but the record contains no information about when these employees report to work or when deliveries are made. The record does not contain evidence that Respondent timed the displays in coordination with the times that employees would report to work or make deliveries. In each case, the displays were erected facing public streets and not the entrance to the entities. Furthermore, there is no evidence that Respondent communicated with any employees to establish the displays as a signal to cease work. Thus, I find insufficient evidence that the displays induced or encouraged secondary employees to withhold their labor.

For the reasons stated below, the Board should reject Charging Parties' first to exceptions.

a. Labor disputes and the First Amendment

The First Amendment to the Constitution of the United States provides that, "Congress shall make no law...abridging the freedom of speech..." U.S. Const. amend. 1. Hence, peaceful picketing is a form of speech entitled to constitutional protection. *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Teamsters Local 695 v. Vogt*, 354 U.S. 284 (1957) (peaceful labor picketing protected by First Amendment); *see, generally*, C. Gregory and H. Katz, *Labor and the Law*, 297 (3d ed. W.W. Norton, N.Y. 1979) ("The Supreme Court must be understood to have decided that [peaceful

picketing] is speech—a pure matter of communicating ideas or information—and nothing more.”).

As Gregory and Katz explained (*id.* at 299):

Naturally, the Court concedes that some instances of picketing may be prohibited, as when it is accompanied by violence or threats of violence, fraud, libel, et cetera, just as a state may prohibit any “wrongs” committed through the medium of speech. But when truly conventional speech—and this includes platform and soap-box talks, placards and handbills, newspaper and periodical matter, skywriting and radio addresses, and books like this one—is devoted to the frank discussion of anything, regardless of how annoying or even harmful it may be to some people, it cannot constitutionally be suppressed or penalized as such if it does not contain any element which would place it within one of the settled categories of illegality, such as libel or fraud.

The Supreme Court confronted the question whether the secondary boycott prohibitions of Section 8(b)(4) were unconstitutional under the First Amendment in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Const. Trades*, 485 U.S. 568, 574-575 (1988). In that case, the unions distributed handbills at shopping mall entrances urging customers not to shop at the mall because one tenant paid non-union construction workers substandard wages. *Id.* at 570-571. The unions did not picket or otherwise patrol the mall entrances while handbilling. *Id.* at 571.

Agreeing with the Court of Appeals, the Supreme Court invoked the “constitutional avoidance” rule of statutory construction applied in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). *Catholic Bishop* posits that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” *Id.* at 575. The Court explained (*id.*):

This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it. *See Grenada County Supervisors v. Brogden*, 112 U.S. 261, 269, 5 S.Ct. 125, 129, 29 L.Ed. 704 (1884).

The Supreme Court agreed with the Court of Appeals because the NLRB's finding that handbilling alone, peacefully and truthfully advising the public of the existence of a labor dispute, without picketing or patrolling, "poses serious questions of the validity of § 8(b)(4) under the First Amendment." *DeBartolo*, 485 U.S. at 575-576. "On its face this was expressive activity, arguing that substandard wages should be opposed by abstaining from shopping in a mall where such wages were paid." *Id.* at 576. "Had the union simply been leafletting the public generally, ... there is little doubt that legislative proscription of such leaflets would pose a substantial issue of validity under the First Amendment." *Id.* Hence, the Court was "quite sure" it "must independently inquire whether there is another interpretation not raising these serious constitutional concerns, that may fairly be ascribed to § 8(b)(4)(ii)(B)." *Id.* at 577.

The Court thus framed the issue as "whether handbilling such as involved here must be held to 'threaten, coerce, or restrain any person' to cease doing business with another, within the meaning of § 8(b)(4)(ii)(B)." *Id.* at 578. The Court held it did not, because "more than mere persuasion is necessary to prove a violation of § 8(b)(4)(ii)(B)." Indeed, under Supreme Court law, it is "untenable" that "any kind of handbilling, picketing, or other appeals to a secondary employer to cease doing business with the employer involved in the labor dispute is coercion" under Section 8(b)(4) because it succeeds in causing them to lose business. *Id.*

Since at least 2005, the federal courts and ultimately the NLRB have applied the principles of *DeBartolo* to distinguish between "picketing" and its confrontational nature and other expressive conduct like bannering and inflatable rats to avoid the First Amendment problem.¹

¹ In several cases, the Board dabbled with theories that various forms of expressive conduct amounted to the "functional equivalent" of picketing, but abandoned that approach after the federal courts rejected it. *See, e.g., Overstreet v. United Brotherhood of Carpenters and Joiners*, 2003 U.S. Dist. LEXIS 19854 (S.D. Cal. 2003), *aff'd.*, 409 F.3d 1199 (9th Cir. 2005); *Benson v. Carpenters Local 184*, 337 F.Supp.2d 1275 (D. Utah 2004) (denying injunction against display of banners and peaceful distribution of leaflets); *Kohn v.*

Absent the “confrontational sometimes intimidating conduct associated with traditional picketing,” bannering raises significant constitutional concerns under the First Amendment which courts and agencies are bound to avoid. *Overstreet v. United Brotherhood of Carpenters and Joiners*, 409 F.3d 1199 (9th Cir. 2005), relying on *DeBartolo Corp. v. Florida Gulf Coast Building & Const.* 485 U.S. 568 (1988).

In *Sheet Metal Workers’ Int. Ass’n. Local 15 v. NLRB*, 491 F.3d 429, 437-438 (D.C. Cir. 2007), the Court went a step further and found that a “mock funeral” procession accompanied by a 16-foot-tall inflated balloon rat and handbilling outside a hospital “was a combination of street theater and handbilling” and was not the “functional equivalent” of picketing and therefore outside the scope of Section 8(b)(4). It had none of the “coercive” characteristics of picketing, did not physically or verbally confront hospital patrons, nor patrol the area “in the sense of creating a symbolic barrier” to those who would enter the hospital. *Id.* at 438. Nor was it “signal picketing” with an “implicit instruction” to union members. *Id.* The Court found the union’s conduct “fully consistent” with those, the Supreme Court’s “abortion cases.” *Madsen v. Women’s Health Center Inc.*, 512 U.S. 753 (1994), and *Hill v. Colorado*, 530 U.S. 703 (2000). The union’s videotape “shows the mock funeral was a quiet affair, not at all like the charged atmosphere surrounding the abortion protests in *Madsen*.”

The NLRB itself finally adhered to the *DeBartolo* principles in finding stationary banners outside the scope of Section 8(b)(4)(ii)(B) in *United Brotherhood of Carpenters and Joiners (Eliason & Knuth)*, 355 NLRB 797 (2010). The Board found that the display of stationary banners did not violate the NLRA prohibitions making it an unfair labor practice “to threaten, coerce, or restrain” persons under Section 8(b)(4). Display of stationary banners constituted neither picketing

Southwest Regional Council of Carpenters, 289 F.Supp.2d 1155 (C.D. Cal. 2003) (denying injunction against display of banners at jobsite as unlikely to succeed on the merits).

nor otherwise coercive non-picketing conduct. Relying on the constitutional avoidance doctrine applied in *DeBartolo*, the Board majority made clear that to rule otherwise would create a conflict with the First Amendment. Relying on *Eliason*, the Board extended the protection afforded banners to inflatable rats in *Sheet Metal Workers Local 15 (Brandon Medical Center) (Brandon II)*, 356 NLRB 1290 (2011). In *Carpenters Southwest Regional Council (New Star)*, 356 NLRB 613 (2011), the Board held that rats and banners did not amount to signal picketing.

b. There is “no doubt” inflatable rats and stationary banners are protected by the First Amendment.

The use of rats and banners to publicize labor disputes is protected by the First Amendment. *Construction and General Laborers Local 330 v. Town of Grand Chute Wisconsin*, 834 F.3d 745, 751 (7th Cir. 2016) (*Scabby I*); *Overstreet*, 409 F.3d at 1212; *Sheet Metal Workers Int. Assn. Local 15*, 491 F.3d at 439; *Tucker v. City of Fairfield*, 398 F.3d 456, 462 (6th Cir. 2005); *Int. Union of Operating Engineers v. Village of Orland Park, Local 150*, 139 F. Supp. 2d 950, 958 (N.D. Ill. 2001). In *Construction and General Laborers’ Union No. 330 v. Town of Grand Chute*, 915 F. 3d 1120, 1123 (7th Cir. 2019) (*Scabby II*), the Court recently emphasized:

As we acknowledged in our earlier opinion, there is no doubt that a union’s use of Scabby to protest employer practices is a form of expression protected by the First Amendment. *Scabby I*, 834 F.3d at 751. Rats, as the manufacturer attests, “Get Attention.”

Under the Supreme Court’s doctrine of constitutional avoidance, the NLRB must adopt an interpretation of the NLRA which construes the statute so as to avoid the First Amendment issue. *DeBartolo*, 485 U.S. at 575. The Board’s decisions in *Eliason*, *Brandon II*, and *New Star* are faithful to this doctrine and therefore were correctly decided. *United Brotherhood of Carpenters (Eliason & Knuth)*, 355 NLRB 797 (2010). The Board has done so with respect to rats and banners, finding their use not coercive or the equivalent of picketing. *See, e.g., Laborers Local 872 (NAV-*

LVH, LLC), 363 NLRB No. 168 (2016) (“stationary union inflatables” “at a secondary/neutral employer’s premises notifying the public of a labor dispute does not constitute picketing or disruptive or otherwise coercive non-picketing conduct violative of Section 8(b)(4)(ii)(B) of the Act.”); *Carpenters Local 1827 (United Parcel Service)*, 357 NLRB 415, 416 (2011) (banners protected by First Amendment require Board to avoid construing the Act to find Section 8(b)(4) violation lest it raise serious constitutional question). Recent cases decided subsequently confirm this law. *See, e.g., King v. Construction & General Laborers’ Local 79*, 2019 WL 2743839 (E.D. N.Y. July 1, 2019) (denying preliminary injunction under Section 10(1)); *Ritz Hotels Services LLC v. Brotherhood of Amalgamated Trades Local 514*, 2019 WL 2635971 (D.Ct. N.J. June 27, 2019) (dismissing tort claims as preempted by NLRA); *International Brotherhood of Electrical Workers Local 96 (Fairfield Inn)*, NLRB Case No. 04-CC-223346, JD-45-19 (May 26, 2019); *International Union of Operating Engineers Local 150 (Lippert Components)*, NLRB Case No. 25-CC-228342, JD-57-19 (July 15, 2019).

Given that it is well settled that the use of rats and banners to publicize labor disputes are protected by the First Amendment, this obvious constitutional problem which the Supreme Court avoided in *DeBartolo* cannot be avoided here. Should the Board seek to revisit this issue now, in light of the Supreme Court’s recent jurisprudence, its position would be untenable. *See, e.g., National Institute of Family and Life Advocates v. Bicerra*, 585 U.S. ___, 138 S.Ct. 2361 (2018) (state-mandated notice of alternatives to customers of anti-abortion clinics is content-based regulation of speech in violation of First Amendment); *Reed v. Town of Gilbert*, 576 U.S. ___, 135 S.Ct. 2218 (2015) (local sign ordinance limiting advertising unconstitutional content-based regulation of speech); *Snyder v. Phelps*, 131 S.Ct. 1207 (2011) (Westboro Baptist Church members picketing funeral of soldier killed in Iraq protected speech under First Amendment); *see generally*

Catherine Fisk and Jessica Rutter, “Labor Protest Under the New First Amendment,” 36 Berkeley Journal of Employment and Labor Law 277, 300-315 (No. 2, 2015) (“The Labor Picketing Cases Are Inconsistent with the Court’s First Amendment Jurisprudence”); *see also Janus v. AFSCME Council 31*, 585 U.S. ___, 138 S.Ct. 2448 (2018) (government interest in “industrial peace” insufficient to overcome employee First Amendment rights).

c. The ALJ correctly found that rat and banner displays are not tantamount to picketing or otherwise coercive.

Charging Parties argue that “the Board and Courts have long held that the traditional use of picket signs and/or patrolling is not a prerequisite for finding that a union’s conduct is the equivalent of traditional picketing” (Charging Parties’ Exceptions and Supporting Brief to the Administrative Law Judge’s Decision (hereafter “CP Brief”) at 2-3). They add, “The Board has long found a wide variety of non-picketing conduct to be coercive under” Section 8(b)(4) (*id.* at 3):

Coercive conduct can be found where a union handbills or banners at the approach to 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.

None of this conduct occurred in this case.

Charging Parties’ argument that the peaceful display of rats and banners at neutral locations unaccompanied by traditional picketing amounts to unlawful coercion under Section 8(b)(4)(ii)(B) is constitutionally untenable. Such displays are not otherwise coercive under Section 8(b)(4), moreover, because they lack the confrontational elements required to be considered coercive.

The NLRA makes it unlawful to “threaten, coerce or restrain” employers where the object is to force them to cease doing business with another employer. 29 U.S.C. § 158(b)(ii)(B). In

finding peaceful handbilling qualitatively different from picketing, the Supreme Court in *DeBartolo* said, it takes “more than persuasion” to establish “threats, coercion or restraints.” *DeBartolo*, 485 U.S. at 588. It is the “mixture of conduct and communication” that allows the NLRB to regulate picketing—the conduct being confrontation. *Id.* at 580, quoting *NLRB v. Retail Stores Emps. Local 1001 (Safeco)*, 447 U.S. 607, 617 (Stevens, J., concurring); *see also Hughes v. Super. Ct. of Cal.*, 339 U.S. 460, 464-465 (1950) (“industrial picketing is more than free speech since it involves a patrol of a particular locality and since the very presence of the picket line may induce action of one kind or another, quite irrespective of the ideas which are being disseminated.”); *520 South Michigan Avenue Ass’n Ltd. v. UNITE HERE :Local 1*, 760 F.3d 708, 720 (7th Cir. 2014) (“courts have noted the defining characteristic of picketing is that it creates a physical barrier between a business and potential customers”).

The matrix of factors identified by Congress, the federal courts, and NLRB factors by which non-picketing conduct can be considered coercive under Section 8(b)(4) confirm the ALJ’s decision here. In *DeBartolo*, the Supreme Court analyzed the “publicity proviso” to Section 8(b)(4)(B). It states that “nothing contained” in Section 8(b)(4) “shall be construed to prohibit publicity other than picketing for the purpose of truthfully advising the public, including members of a labor organization” that the union has a primary dispute with one employer, whose products are distributed by another employer, “so long as such publicity does not induce” employees to refuse to work at the establishment of their own employer.” Rather than seen as an exception to Section 8(b)(4) prohibitions, the proviso “has a different ring to it.” *Id.* at 660. Hence, it may thus be read, “as not covering non-picketing publicity, including appeals to customers of a retailer as they approach the store, urging a complete boycott of the retailer because he handles products produced by nonunion shops.

The *DeBartolo* court’s review of its prior caselaw confirms this broad understanding of non-picketing publicity. Its decision in *NLRB v. Fruit Packers*, 377 U.S. 58 (1964) (*Tree Fruits*), “makes untenable the notion that *any* kind of handbilling, picketing, or other appeals to a secondary employer to cease doing business with the employer involved in the labor dispute is ‘coercion’ within the meaning of Section 8(b)(4)(ii)(B) if it has some economic impact on the neutral.” *DeBartolo*, 485 U.S. at 579. Hence, the court “held that the impact of the picketing was not coercion within the meaning of Section 8(b)(4) even though, if the appeal succeeded, the retailer would lose revenue.” *Id.* In *Safeco*, however, the court clarified the distinction between picketing and non-picketing publicity. “Picketing is qualitatively different from other modes of communication.” It is “a mixture of conduct and communication.” *Id.* at 580. “Handbills” are “much less effective because they depend entirely on the persuasive force of the idea” (*id.*):

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.

While some NLRB cases suggest that “picketing does not require the holding of a sign while patrolling,” they generally involve just that: frequent repeated holding of signs accompanied by patrolling. *Laborers Local 389 (Calcon Constr.)*, 287 NLRB 570, 573 (1987). In *Calcon*, the Board referenced dictionary definitions that indicate patrolling with signs is not essential to picketing,² but then found violations of Section 8(b)(4) where strikers actually patrolled with picket signs. Picketers also displayed signs elsewhere—tied to phone polls, laying on the ground,

² The cases relied upon by the Board also share the common flaw of citing dictionary definitions of “picket” and “picketing” to conclude that by none of them “is the patrolling or carrying of placards a common element.” See, e.g., *Stoltze Land & Lumber*, 156 NLRB at 394; *Calcon*, 287 NLRB at 573; *Kansas Color*, 169 NLRB at 283. More recent definitions are to the contrary at least with respect to patrolling. See, e.g., *Black’s Law Dictionary* (11th ed., 2019), “picket line (1894) A queue of people who stand or march outside a workplace, often chanting and otherwise demonstrating, in an effort to prevent or discourage people from going in or coming out during a strike.”

and resting against cars and structures—but as many as 15 signs were carried by 20 to 25 people. *Id.* at 571. Similarly, in *Lawrence Typographical (Kansas Color Press)*, 169 NLRB 279 (1968), the Board alluded to conduct not involving patrolling with placards as the equivalent of picketing, but only because it followed approximately *five years* of patrolling with signs as well as picket signs resting against cars and attached to a nearby break trailer. *See also Carpenters Local 2797 (Stoltze Land & Lumber Co.)*, 156 NLRB 388 (1965) (union handbilling violated 8(b)(7) where followed 16 months of picketing with signs and patrolling).

The unions in the cases cited by the Board also usually engaged in other coercive conduct such as “mass picketing” (*Calcon*, 287 NLRB at 571 (20 to 25 persons carrying picket signs); *Mine Workers District 29 (New Beckley Mining)*, 304 NLRB 71, 72 (1991) (crowd of 50 to 160 people gathered in motel parking lot at 4 to 4:30 a.m. was “mass activity” form of picketing); *Service Employees Local 399 (William J. Burns Int. Detective Agency)*, 136 NLRB 431, 437 (1962) (groups of 20 to 70 people marching in elliptical pattern caused patrons to force their way into exhibition hall); and/or recording license plate numbers of persons crossing picket lines, *Kansas Color Press*, 169 NLRB at 282; *Stoltze Land & Lumber*, 156 NLRB at 394. “Following in the footsteps of the conventional picketing which had preceded it,” the Board said, in *Kansas Color*, “the conduct as a whole, of which handbilling was merely a part, constitutes picketing.” *Id.* at 284.

The cases relied on to support the arguments that the Board and courts have historically defined picketing broadly all deal with isolated incidents of arguably non-picketing conduct, or conduct not involving picket signs, in a broader context of actual picketing and other plainly coercive conduct. *See, e.g., Laborers Local 389 (Calcon Constr.)*, 287 NLRB 570, 573 (1987) (violations of Section 8(b)(4) where strikers actually patrolled with as many as 15 picket signs

carried by 20 to 25 people; picketers also displayed signs elsewhere—tied to phone polls, laying on the ground, and resting against cars and structures); *Carpenters Local 2797 (Stoltze Land & Lumber Co.)*, 156 NLRB 388 (1965) (union handbilling violated 8(b)(7) where it followed 16 months of picketing with signs and patrolling); *Mine Workers District 29 (New Beckley Mining)*, 304 NLRB 71, 72 (1991) (crowd of 50 to 160 people gathered in motel parking lot at 4 to 4:30 a.m. was “mass activity” form of picketing); *Service Employees Local 399 (William J. Burns Int. Detective Agency)*, 136 NLRB 431, 437 (1962) (groups of 20 to 70 people marching in elliptical pattern caused patrons to force their way into exhibition hall); *Service Emps. Union (Trinity Building Maintenance Co.)*, 312 NLRB 715, 749-750, 752-754 (1993) (In the few instances in which the union did not use “conventional placards” the ALJ found coercive conduct which amounted to picketing where large groups of demonstrators—ranging from 10 to 20 people—marched in a “closed circular formation” in front of building entrances including those reserved for neutral employers, blowing whistles, shouting into bullhorns, chanting and carrying small red “Justice for Janitors” signs). Nothing remotely close to these activities was involved in Local 150’s protest.

Local 150’s displays of rats and banners had no coercive characteristics generally associated with violations of Section 8(b)(4). At most, two or three Union members—often retirees—stationed themselves on public property near the entrance of the neutral employer’s facility (ALJD at p. 6, n.8; p. 9: lines 31-34: “The record contains no evidence that Respondent trespassed onto private property while displaying banners and inflatable rats” (ALJD at 6, n.8). The monitors had no picket signs displayed and engaged in no patrolling—remained seated in lawn chairs for the most part or in their vehicles in inclement weather (ALJD at p. 9: lines 29-37). In general, the monitors did not converse with passersby (ALJD at p. 9: lines 34-35).

There are no allegations that the Union's protest was anything but peaceful. There were no picket signs accompanying the rats and banners, and no "patrolling" such as would create a "physical barrier" (ALJD at p. 31: line 41). The individuals tending the rats and banners sat in lawn chairs or their trucks, and generally avoided contact with passersby (ALJD at p. 9, line 33). There is no evidence the monitors engaged either the public or employees of the companies involved (ALJD p. 9: lines 34-36). Apart from one UPS driver, no neutral employees refused to enter the facilities at which rats and banners appeared, and the UPS driver entered after clarification it was not a picket (ALJD at p. 10: lines 28-36; p. 33: lines 26-29).

d. The ALJ correctly found that rat and banner displays did not amount to signal picketing.

The Charging Parties argue that 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 neutral employees that they should withhold their services (CP Brief at 7).

Charging Parties' argument fails for multiple reasons. First, there is no evidence that anyone, Local 150 members or otherwise, perceived the rat and banner display as a picket line and refused to cross (ALJD at p. 33: lines 19-24).

As the ALJ explained (ALJD at 33):

The record contains no information about whether any of the construction employees of Greenscape Homes, Provencal Construction, and Ross Builders ever frequented these companies' offices, nor is there any information about other types of employees that work in these offices. Ross testified about his concerns for the display's effects on other tenants in the building and customers, but never mentioned the presence of any Ross Builders' employees. I find it a reasonable assumption that Andy's shops employ service employees and receive periodic deliveries of product and supplies, but the record contains no information about when these employees report to work or when deliveries are made. The record does not contain evidence that Respondent timed the displays in coordination with the times that employees would report to work or make deliveries. In each case, the displays were erected facing public streets and not the entrance to the entities. Furthermore, there is no evidence that Respondent communicated with any

employees to establish the displays as a signal to cease work. Thus, I find insufficient evidence that the displays induced or encouraged secondary employees to withhold their labor.

As the court made clear in *Denver Building Trades*, and later emphasized in *DeBartolo*, inducing individuals to strike is an essential element of the 8(b)(4) violation.

In *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 689 (1951), the Supreme Court held that a strike against a neutral general contractor in order to force it to terminate its relationship with the nonunion subcontractor with which the union had a primary dispute, violated the secondary boycott prohibitions of Section 8(b)(4). The picket sign said, “This Job Unfair to Denver Building and Construction Trades Council.” *Id.* at 679. In rejecting an argument that the sign was protected speech under Section 8(c) of the NLRA, the Supreme Court offered what now appears to be a prophetic statement (*id.* at 688):

Section 8(c) does not apply to a mere signal by a labor organization to its members, or to the members of its affiliates, to engage in an unfair labor practice such as a strike proscribed by § 8(b)(4)(A). That the placard was merely such a signal, tantamount to a direction to strike, was found by the Board, the issues in this case turn upon acts by labor organizations which are tantamount to directions and instructions to their members to engage in strike action.

See also International Brotherhood of Electrical Workers, Local 501 v. NLRB, 341 U.S. 694 (1951) (strike against neutral employer which induced neutral employees to leave job not protected speech).

In *Service Emps. Union (Trinity Building Maintenance Co.)*, 312 NLRB 715 (1993), the ALJ said “signal picketing” “as with actual picketing, concerns conduct operating as a signal to induce action by those to whom the signal is given.” 312 NLRB at 743. At no point in his analysis, however, did the ALJ find conduct to be unlawful signal picketing. In general, the union engaged in “traditional” “conventional” picketing—patrolling with placards—and other coercive conduct including mass picketing and noisy demonstrations against neutral building owners and managers

as part of its “Justice for Janitors” campaign. *Trinity Building*, 312 NLRB at 745-749.

In the few instances in which the union did not use “conventional placards” in *Trinity Building*, the ALJ found coercive conduct which amounted to picketing in violation of Section 8(b)(4). Large groups of demonstrators—ranging from 10 to 20 people—marched in a “closed circular formation” in front of building entrances including those reserved for neutral employers, blowing whistles, shouting into bullhorns, chanting and carrying small red “Justice for Janitors” signs. *Id.* at 750, 753-754. At one point, the demonstrators “rushed” into the lobby chanting and blowing whistles, and rode elevators up to a neutral employer’s office. *Id.* Elsewhere, at least 50 people “surged toward the front door,” pinned a neutral employee against one of the glass doors, and another demonstrator “splashed him with red liquid.” *Id.* at 753. Taken in context of the tactics employed at other sites involving “traditional” “conventional” picketing, the ALJ concluded that this too “clearly constituted picketing.” *Id.* As the ALJ explained (*id.* at 754):

[N]otwithstanding the absence of conventional picket signs, the massed patrolling at front entrances to the various commercial office buildings herein constituted picketing...Furthermore, the trespassory entries [on other occasions] accompanied by the marching and shouting and the massed blocking of ingress and egress...occurring in conjunction with picketing those days, were equally and obviously likewise coercive [in violation of the Act].

The concept of “signal” picketing emerged in NLRB cases challenging the use of union observers at so-called “neutral” entrances in reserved gate cases. *Int. Brotherhood of Electrical Workers, Local 98 (The Telephone Man, Inc.)*, 327 NLRB 593 (1999). The NLRB has found and the federal courts have endorsed the use of “reserved gate” systems at worksites where employers and employees with which unions have primary labor disputes work in close proximity to neutral employers and their employees not parties to those disputes. *See., e.g., Mautz & Oren, Inc. v. Teamsters Local 279*, 882 F.2d 1117 (7th Cir. 1989); *Landgrebe Motor Trans. v. Dist. 72 Machinists*, 763 F.2d 241 (7th Cir. 1985). In an effort to “cabin” the lawful and foreseeable effects

of lawful primary picketing on neutrals, property owners and others are permitted to separate the entrances to their facilities and “reserve” an entrance for the primary employer and its employees, while other entrances are reserved for neutrals. *Mautz & Oren*, 882 F.2d at 1122, n.3. Unions must then confine lawful primary pickets of employers at such “common situs” workplaces to the gate used by that employer and its employees. *Id.* at 1122.

One of the many caveats to the NLRB’s regulation of common situs picketing is that the gate reserved for the employer and employees with which the union has its labor dispute is that they use *only* that entrance. *Mautz & Oren*, 882 F.2d at 1122. If primary employers/employees use the entrance reserved for neutrals, that entrance becomes “tainted,” and the union can picket there as well. *Id.* The logical corollary to this caveat then is that unions can station “observers” at the neutral gate to ensure their proper use. The purpose of the observer is to monitor the gate reserved for neutrals to determine whether it has been “tainted” by primary employers and/or their employees, vendors, and suppliers. So long as they only observe, and gather information for the purpose of policing the gate, the presence of observers is lawful.

Once such observers depart from their observer role, and act like picketers, they lose their protection. *See, e.g., Telephone Man*, 327 NLRB at 593, 600. In *Telephone Man*, the Board described the factors which rendered the purported observer a “signal” picket. After the union had notice a reserved gate system had been established, a union representative positioned himself in the middle of the entrance with a sign which said, “observer.” However, from time to time, the sign conveniently flipped over, revealing messages identical to those of the picket signs previously used. Furthermore, the union representative (*id.* at 593):

...was well positioned to talk to employees as they approached to enter the gate, and on at least one occasion, he conversed with [neutral] employees...who then turned away without reporting to work on the project. On yet another occasion,...several pickets walked slowly from the primary gate to the neutral gate, spoke with [the

observer] (who was stationed in his usual location there, wearing his observer sign), turned around, and then slowly walked back to the primary gate. In these circumstances, we find that [the observer] was not merely a benign observer but rather was engaged in impermissible signal picketing at the neutral gate.

The argument that the Union's use of rats and banners amounts to "signal" picketing in violation of Section 8(b)(4) well illustrates the desperate lengths to which he will go to deflate the rat. As was explained *supra*, it is a theory that arises exclusively in the context of reserved gates, where "observers" on neutral gates abandon their observer role and engage in various subterfuges to accomplish what picketers seek to do. Only one of the cases cited by Petitioner to support his argument—*The Telephone Man*—actually found the union to have engaged in signal picketing. There, the union's transgression was through to obvious artifice of having a two-sided sign, one side stating "Observer," while the other was a standard picket sign.

The concept of signal picketing is inapplicable to this case. There were no reserved gates involved, little actual conventional picketing, and more in conjunction with rat and banner displays. There was no other coercive activity as usually accompanies the finding of violations as in *Trinity Building*. There was nothing covert about the inflatable rats and stationary banners—in fact, the opposite in this case. Rats and banners are designed to attract attention, to publicize the Union's labor dispute in the most dramatic way. *Town of Grand Chute*, 915 F.3d at 1123. It is an appeal to consumers based on an idea—that a given employer is unfair to workers, a threat to community standards, or otherwise unworthy of public patronage. Members of the public can agree, disagree, misunderstand, or ignore those ideas, but they are free speech with an historic, symbolic angle. The peaceful use of rats and banners is outside the scope of Section 8(b)(4).

3. The ALJ Correctly Found No Evidence that Local 150's Picketing Forced Andy's Frozen Custard to Cease Doing Business with Donegal.

Charging Parties' third exception to the ALJD states:

The ALJ incorrectly concluded that Andy's shops ceased doing business with Donegal before any picketing activity occurred.

The ALJ found (ALJD at p. 3, n.3):

It is not necessary to show actual work stoppage or refusal by a secondary company to provide goods or services the primary to prove the allegations of the amended consolidated complaint. I note here that despite claims by Bradley that Local 150 stopped Andy's Frozen Custards from contracting with Donegal, I find no evidence that substantiates that claim. Furthermore, if Respondent influenced Andy's shops to cease contracting with Donegal it occurred before any picketing activity began. (Tr. 327).

The ALJ described Local 150's banner and inflatable rat campaign as follows (ALJD at p. 9: lines 1-19):

On approximately July 25, Respondent initiated its banner and inflatable rat campaign that continued in some locations through the date of the hearing. Respondent's banners are approximately 3 to 4 feet by 5 to 6 feet (Tr. 984; 1117, 1162). In each case they were stationary, erected in the public right-of-way facing the street. The banners were supported by stakes and in some cases short support cords attached to ground stakes (Tr. 984, 1162). The banners read, "SHAME ON [contractor's name] FOR HARBORING/USING RAT CONTRACTORS." The name of a company that contracted with Donegal for services or provided goods or services to Donegal was inserted in the space for the contractor's name, including...Andy's Frozen Custards... On either side of the space for the contractor's name is a picture of a cartoon rat. The rat drawings look more villainous on some banners. On other banners they are wearing a hard hat and look more cartoonish like they are jumping in surprise. (GC Exhs. 3-20; R Exh. 4, 5 and 6; CP Exh 13). Respondent also used a box truck sized movable billboard approximately the length and height of a typical box truck. Like the banners, the billboard read, "SHAME ON [contractor's name] FOR USING RAT CONTRACTOR." The record reflects that the yellow billboard truck was parked at one Andy's Frozen Custards location on a few occasions. (Tr. 321, 328, 362, GC Exh. 14).

The ALJ further concluded there was insufficient evidence to conclude that a rat and banner display, with or without a picket sign, was ever present at the Andy's Bolingbrook location (ALJD at p. 15: lines 18-23):

I note that the amended consolidated complaint did not allege that picket signs were present. The pictures that Mix believed he took at that location, which would likely clarify which union was present, were not put into evidence. Furthermore, Bradley never denied that Donegal or another one of his companies had a labor dispute with Laborers Local 75. Thus, I find insufficient evidence to prove that Respondent displayed a banner or an inflatable rat with or without the presence of picket signs at Andy's Frozen Custards Bolingbrook location.

Charging Parties assert that the "ALJ's finding that Andy's stopped doing business with Donegal before any alleged picketing is not supported by the record evidence" and is "inconsistent with the record evidence because it also does not make sense that the Union would have set up displays at Andy's in July 2018 if Donegal stopped doing business with Andy's before that time." (CP Brief at 9). In support, Charging Parties cite *Harry Lunstead Designs*, 270 NLRB 1163, a case concerning credibility findings, apparently suggesting that the ALJ did not appropriately credit the testimony of Charging Parties' witnesses Bradley, Doherty, and Mix.

The ALJ in fact correctly concluded that the record lacks any evidence that: (1) substantiates Donegal's claim that Local 150 stopped Andy's from contracting with Donegal; and (2) there was either picket or banner activity, alone or simultaneously, by Local 150 at Andy's Bolingbrook location.

Charging Parties point to Billy Doherty's testimony on page 220 of the transcript, in which he describes that Local 150 "showed up on our jobs. Then I seen the rat at the yard one day...in Lemont." (Tr. 220-21). Charging Parties go on to cite Bradley testimony at page 330 that Donegal lost Andy's Frozen Custard business based on an objected-to hearsay conversation Bradley allegedly had with Andy, the owner of Andy's, asking Bradley "what's going on with these rats,

outside all my buildings. This is really upsetting. I've got literature—they leaflets flying around this Facebook page called Where's Scabby? And comments of people saying—" (Tr. 330). Following the hearsay objection by Respondent's counsel, counsel for the General Counsel ceased his questioning concerning Andy's. Finally, Charging Parties highlight Bradley's testimony at page 453 that "Well, we didn't do the last two Andy's and we started them—we started the projects and Projects [the general contractor]...kicked us off the Andy's." (Tr. 453).

The sum total of evidence presented that Local 150 unlawfully coerced Andy's to cause Donegal to lose Andy's business is based on hearsay testimony of Bradley that Andy complained to him about inflatable rats, Bradley's statement, without more, that he started two Andy's projects but did not finish them, and Doherty's irrelevant description of an inflatable rat he saw at Donegal's yard in Lemont. Likewise, photographs Tim Mix claimed he took of a Local 150 rat and banner, and simultaneous picket at Andy's Bolingbrook location, or a picket at any Andy's location, were never introduced into the record. The ALJ therefore rightfully concluded that no evidence substantiated Bradley's claim that Local 150 stopped Donegal from doing work for Andy's. The ALJ further reviewed photographic evidence in GC Exhibits 13-20 that show only rats and banners, without pickets, at various Andy's locations, to conclude that that even if Local 150 did influence Andy's to cease business with Donegal, it occurred prior to any picketing (Tr. 327; GC Exs. 13-20).

As has been exhaustively explored above, controlling law laid out in *Eliason*, *Brandon II*, and *New Star* requires the ALJ's conclusion that a rat and banner campaign to publicize a labor dispute is not tantamount to picketing, but is instead First Amendment-protected free speech. In the case of Andy's Frozen Custard, not a single shred of evidence that Local 150 picketed any Andy's location was introduced into the record. If in fact Andy's or "Projects," the general

contractor, was swayed by Local 150's rat and banner shame campaign, it was entirely lawful, protected speech, and Andy's was at liberty to make a business decision to ignore the protest. It is clear that the sheer lack of evidence presented with regard to Andy's, and controlling law differentiating between a picket and protest, drove the ALJ's proper conclusions concerning the Andy's allegations.

4. The ALJD Correctly Resolved Credibility Disputes Against Charging Party Witnesses.

Charging Parties' fourth exception to the ALJD states:

The ALJ incorrectly determined credibility issues.

NLRB administrative law judges are required in the discharge of their duties to make credibility determinations, and such findings are not an exact science. As Administrative Law Judge Joel Biblowitz noted in his supplemental decision in *Global Industrial Services, Inc.*, 1999 WL 33453661 (N.L.R.B. Div. of Judges), "...there is no magic in making credibility findings. Rather, the judge observes the witness and examines his/her testimony together with the testimony of others in order to best determine who is more likely to be telling the truth."

In *Double D Construction*, 339 NLRB 303, 309 (2003), the Board held that "...a true credibility determination...considers the witness' testimony in context, including, among other things, his demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. E.g., *Daikichi Sushi*, 335 NLRB 622, 623 (2001)." It is generally the long-established policy of the Board not to disturb an ALJ's credibility findings unless the clear preponderance of all the relevant evidence convinces the Board that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957).

In *Indianapolis Glove*, 88 NLRB 986, 987 (1950), the Board noted, "We recognize, of course, that a Trial Examiner must make credibility findings as well as findings of fact, and,

accordingly, that it is appropriate for him to question witnesses in order to ascertain their credibility or to clarify their testimony. In doing so, however, he must refrain from impeaching or from examining witnesses to the extent that he takes out of the hands of either party the development of its case. Conversely, a judge's failure to question a witness is not grounds to reverse a credibility determination. *NLRB v. Honaker Mills*, 789 F.2d 262, 265 (4th Cir. 1986); *Advocate South Suburban Hospital*, 468 F.3d 1038, 1048 (7th Cir. 2006).

a. Timothy Mix, Simon Bradley, and Billy Doherty

Charging Parties assert that the ALJ erred by not crediting Timothy Mix's testimony that he saw a Local 150 rat and banner at Andy's Frozen Custard in Bolingbrook, bolstered by the testimony of Bradley and Doherty that they also witnessed a Local 150 rat and banner at this location (CP Brief at 10).

The ALJ properly concluded there was insufficient evidence to conclude that a Local 150 rat and banner display, with or without a picket sign, was ever present at the Andy's Bolingbrook location (ALJD at p. 15: lines 18-23):

General Counsel argues that I should credit Mix's testimony about Respondent's presence at the Bolingbrook Andy's shop because Respondent erected displays at other Andy's shops making Sundine's testimony and Respondent's denial in its answer not credible. To the contrary, I find no logical reason why Respondent would admit to the same conduct elsewhere and not admit to it at this location. I note that the amended consolidated complaint did not allege that picket signs were present. The pictures that Mix believed he took at that location, which would likely clarify which union was present, were not put into evidence. Furthermore, Bradley never denied that Donegal or another one of his companies had a labor dispute with Laborers Local 75. Thus, I find insufficient evidence to prove that Respondent displayed a banner or an inflatable rat with or without the presence of picket signs at Andy's Frozen Custards Bolingbrook location.

The ALJ's conclusion that there was insufficient evidence to establish that a Local 150 banner and rat, with or without a picket, occurred at Andy's in Bolingbrook is proper. On cross-examination, Mix contended that everything he took a photograph of related to Local 150 he sent

either to Bradley or Donegal's attorney, Scott Gore, and later counsel for the General Counsel, and he is certain he sent them photographs that show Local 150 banners and rats and picket signs in the same location (Tr. 162-64, 166-167). However, none of the photos Mix claimed showing co-mingled banners and pickets were presented to Mix (Tr. 167), or any other witness, or ever introduced into evidence, including any of a Local 150 display of any kind at Andy's Bolingbrook.

As the ALJ noted, Local 150 witness Ray Sundine "readily admitted" that Local 150 erected banners and rats at Andy's locations other than Bolingbrook, but testified that there was never a Local 150 rat and banner, or picket, present at Andy's Bolingbrook (Tr. 1168). Sundine testified that he did see a Laborers Local 75 sign targeting Crana Concrete, another of Bradley's companies, at the Andy's Bolingbrook location (Tr. 1168). In the decision, the ALJ aptly noted that Bradley never denied the existence of a labor dispute between Local 75 and Crana or Donegal (ALJD at 15). On that basis, and lacking photographic evidence that Mix asserted existed, the ALJ correctly found that there was insufficient evidence to find a Local 150 banner and rat, or picket, at Andy's Bolingbrook.

When a party asserting a claim testifies to the existence of documentary evidence, but fails to present the alleged corroborating document into evidence, a judge is entitled to make an adverse inference that the missing evidence would not support the testimony. Often referred to as the "missing witness rule," it was not improper for the ALJ to specifically note that documentary evidence that could have corroborated claims made in testimony but was not introduced into the record would not support the complaint allegations or claims made at trial. "[I]t is settled that when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness

is likely to have knowledge.” *Daikichi Sushi*, 335 NLRB 622 (2001); *enfd.* 56 Fed.Appx. 516 (D.C. Cir. 2003) (citation and internal punctuation omitted).

Missing documentary evidence is treated in a similar fashion. The Board held in *Nat'l Specialties Installations, Inc.*, 344 NLRB 191 (2005):

a party's failure to produce a document on which it relies has long been recognized as a permissible basis for drawing an adverse inference that the document does not exist or that its contents would not be favorable to that party. See, e.g., *Mid States Sportswear, Inc.*, 168 NLRB 559, 560 (1967). The adverse inference rule is not mandatory, however; it permits, but does not require, drawing an adverse inference against the party that fails to produce the document. See *Champ Corp.*, 291 NLRB 803, 804 (1988), *enfd.* 933 F.2d 688 (9th Cir. 1990); *accord: Overnite Transportation Co.*, 140 F.3d 259, 266 fn. 1 (D.C. Cir. 1998).

Although she stopped short of stating an adverse inference based on the missing documentary evidence, the ALJ would have been entitled to make such a finding. As described in *Manning Construction, Inc.*, 2010 WL 2180792 (N.L.R.B. Div. of Judges) (citations omitted):

In evaluating the impact of the Employer's failure to provide records that it admittedly created, maintained, or possessed, I have been guided by the Board's precedents. Those precedents all flow from a logical assumption noted long ago by the Supreme Court: “The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. Silence then becomes evidence of the most convincing character.” *Interstate Circuit v. United States*, 306 U.S. 208, 226 (1939).

The ALJ's conclusions therefore, based on missing evidence and other relevant credibility factors, indicate that she scrutinized the record carefully, and made the excepted-to credibility determinations without error. In this instance, Mix was adamant that he took photos showing combined Local 150 banners and rats with picket signs, yet none, including of Andy's Bolingbrook, were introduced into the record. In fact, none of the Andy's photographs put into evidence (GC Exs. 13-20) even depicted a Local 150 rat and banner at the Andy's Bolingbrook location. The ALJ was clear in her assessment that counsel for the General Counsel did not allege mixed banners and pickets in the complaint, no photographs of conduct claimed by Mix, Doherty

and Bradley were presented, and there was no logical reason Local 150 would admit to bannering conduct at other Andy's locations, but not Bolingbrook (ALJD at 15). Charging Parties cannot overcome counsel for the General Counsel's failure to plead the claimed conduct or the lack of documentary evidence in the record to support this exception.

b. Billy Doherty

Charging Parties also challenge the ALJ's decision not to credit the testimony of Billy Doherty that Local 150 agents pressured him to convince Donegal to sign a contract at two different jobsites (CP Brief at 11).

The ALJ concluded (ALJD at p. 11: lines 30-43; p. 12: lines 1-18):

Respondent attempted to refute Doherty's testimony by calling agents who testified that they engaged in ambulatory picketing at Hinsdale residential jobsites but denied speaking to anyone on the jobsites (Tr. 1046-48; 1063-65, 1074, 1079, 1085-86). There was nothing in these witnesses' demeanors that caused me to discredit their testimony. Despite Respondent's attempts to call the witnesses to which Doherty may have been referring, I find it impossible to determine if the agents to which Doherty alleges made the comments testified. Thus, I must decide if I credit Doherty's testimony based upon factors other than the credibility of Respondent's witnesses.

Respondent points to other testimony by Doherty that Local 150 agents made comments him that was disproven by video tape evidence and contends that none of Doherty's testimony is reliable. Doherty testified that sometime between July and September he went through the drive thru at the Andy's shop in Bolingbrook [actually Countryside], and passed by two Local 150 agents displaying a banner. As he passed them, he rolled down his window and said, "It's so delicious." (Tr. 259). Doherty claimed that the Local 150 agents responded that "they wouldn't eat it because it was made by rat contractors." (Tr. 261, 263, 265). After being shown a video tape of this incident that shows Local 150 agents Jeffrey Horne (Horne) and Paul Costin [Keska] not replying in any way, Doherty claimed that the comment must have been made earlier when he was stopped at the nearby intersection (Tr. 260-65); R. Exh. 7, video clips IMG_1350.MP4 and MVI_0556.MP4.) This claim does not make sense because the comment would have been meaningless without the context of Doherty first commenting on the frozen custard, and Horne denied that he or Costin [Keska] ever made the comment (Tr. 1004, 1007-008).

From his tone and mannerisms in testifying, Doherty struck me as very loyal to Bradley and personally opposed to Respondent. He also presented as a person who

is likely to be quick with a comment was evident from the video clip and the testimony concerning his taunting of Respondent's agents at the Andy's shop. It strikes me as odd that there is so little evidence that Respondent's agents made comments to Donegal employees or engaged in taunting or chanting that frequently accompanies picketing, but Doherty claims that short comments were made to him specifically evidencing an organizational motive and economic pressure to achieve that motive. From his demeanor on the stand and his comments at the Andy's shop, it seems equally unlikely to me that Doherty would walk away without commenting, as he claims he did after hearing these remarks. Ultimately, I do not credit Doherty's testimony concerning these statements.

The ALJ carefully discharged her duty in assessing the credibility of Doherty in his testimony in this instance. Once again, a credibility determination reviews the witness's testimony in context, including, among other things, his demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. Charging Parties complain that the ALJ discredited Doherty's testimony on the basis of a single falsehood related to a banner incident at Andy's in which he asserted Local 150 agents made comments to him in response to his comments. Doherty's account of the episode was disproven by video evidence showing the only comments made were by Doherty. However, Charging Parties ignore the other considerations the ALJ took into account in assessing Doherty's credibility. She was clear in her decision that in addition to the inaccurate account of the Andy's episode, she also gleaned from his tone and mannerisms in testifying that Doherty is a Bradley loyalist, personally dislikes the Union, and that he was quick with words and comments, and based on the video evidence at Andy's, found it most unlikely that Doherty would not have responded to alleged comments about signing a contract, as he testified (ALJD at p. 12: lines 8-17). The ALJ further concluded that it was odd that there existed very little record evidence of Local 150 agents speaking at all to Donegal employees, but Doherty claimed not one, but two, agents made comments to him aimed at an alleged organizational motive. Thus, the ALJ very carefully outlined her rationale for discrediting Doherty's testimony in this regard, and her finding should be upheld.

c. Dan Opatkiewicz

Lastly, Charging Parties except to the ALJ's decision to credit the testimony of Local 150 agent Dan Opatkiewicz over the testimony of Timothy Mix regarding an event alleged to have occurred at Settler's Hill, in which counsel for the General Counsel alleged that Opatkiewicz unlawfully ordered employees of Settler's Hill to reload Mix's truck after he dumped a load at the landfill when Opatkiewicz had established a picket of Donegal.

In her decision, the ALJ found (ALJD at p. 16: lines 17-45):

First, I find several things troubling about the evidence involving Mix's testimony. If an agent of Respondent was attempting to encourage or coerce the landfill employees into turning away Donegal trucks, why wait until after Mix had been given a ticket and allowed to dump his material to make such an appeal? Mix said that he was detained while Settler's Hill decided whether to reload him. I do not see why the landfill would go through the trouble of considering whether he should be reloaded if he was given a ticket to dump the load. Mix also stated that he was told not to return, not that Donegal was not to return. This indicates that Settler's Hill was displeased with Mix and not Donegal in general due to a strike. Second, when Bradley was asked if Donegal was kicked out of Settler's Hill, landfill because a driver had dumped a contaminated load without permission, Bradley said he "would be shocked but [with] drivers anything can happen." (Tr. 456). Again, as discussed above, Bradley hedged his answer and did not directly deny the accuracy of the assertion that Mix and/or Donegal was banned from the landfill because of improper conduct by Mix. Third, Donegal maintains copies of dump tickets, but neither the General Counsel nor Charging Party Donegal offered a ticket for Mix's dump that day. Also, Bradley testified that he believed there were emails from Settler's Hill indicating that they were being refused because of Local 150. (Tr. 456). If emails from Settler's Hill exist, I can only assume that they do not support the allegations of the amended consolidated complaint, because they were not offered as exhibits.

General Counsel contends that I should not credit Opatkiewicz because his testimony lacked specifics and that he was responding to leading questions. I find these generalized assertions do not sway my findings in this regard. I find Opatkiewicz' testimony sufficiently detailed to be reliable. I also found his demeanor frank and forthcoming in his responses. The fact that he did not know the other people present or the specific date does not make him any more unreliable than Mix, who also could not identify a specific date or any of the people present. While Respondent counsel's questioning was choppy and sometimes leading, I find that the key details of Opatkiewicz' account were presented in narrative and I never sensed that Opatkiewicz needed to be led. Based on all of the evidence in the

record, I credit Opatkiewicz' account of these events that he made the comment in response to what he witnessed occurring.

The ALJ's reference in her finding that Bradley "hedged his answers," refers to footnote 16 at ALJD 18-19, which states:

Throughout his testimony, Bradley often pled ignorance, lack of comprehension, or a full reliance on others for conducting his business dealings or the events that occurred at his businesses. This struck me as disingenuous and highly unlikely for a man who has amassed numerous businesses in this industry. While he may not understand all the accounting, tax, and business structures recommended by counsel and accountants, I do not accept that he does not know the general structure. Also, he often hedged his answers until some evidence or questing requiring him to admit more. For example, he refused to admit that he ultimately manages the work done by SJZJ as the sole owner of SJZJ and Donegal and the employer of Jim Barry. (Tr. 383-385). This and similar exchanges lead me to find that Bradley's testimony was often not the full unbiased truth.

5. The ALJ Correctly Concluded No Unlawful Threat Occurred at Settler's Hill.

Charging Parties' fifth exception to the ALJD states:

The ALJ incorrectly concluded that Local 150 did not violate the act through its conduct at Settler's Hill.

Charging Parties assert that the ALJ erred by finding that Local 150 did not violate Section 8(b)(4) of the Act when Local 150 agent Dan Opatkiewicz asked a Settler's Hill landfill employee "why don't you reload him?" in response to witnessing Donegal driver Tim Mix dumping his load without permission or a ticket from the Settler's Hill scale house. Charging Parties' recitation in their brief of Mix's testimony mischaracterizes what Mix saw when he arrived at Settler's Hill (CP Brief at 13). In their brief, Charging Parties claim Mix testified that Local 150 was already present with a picket sign (*id.*). In fact, Mix testified that when he arrived onsite, "a Local 150 representative got out, holding its picket sign..." (Tr. 146-47).

In her decision, the ALJ carefully noted the variances between Mix and Opatkiewicz's testimony (ALJD 15: 25-42; 16: 1-16):

Settler's Hill is a landfill in Illinois that does not accept contaminated materials. The record contains no evidence of Respondent erecting a banner or inflatable rat display at this location. Donegal driver Timothy Mix has only hauled debris there a couple of times. (Tr. 145). In approximately late July or early August, Mix hauled a load of clay to Settler's Hill where he encountered Respondent's agent Daniel Opatkiewicz picketing Donegal (Tr. 145-46, 823). Mix and Opatkiewicz have very different accounts of this interaction.

Mix testified that one of Respondent's agents exited his vehicle and established a picket (Tr. 146). Mix stopped at the trailer inside the entrance of the landfill where a landfill employee is required to use a device called a "sniffer" to check the load for contamination. Mix did not state whether his load was checked but that he went into the trailer to get his ticket. (Tr. 146-47). Such tickets indicate whether a load tested clean or contaminated and are used for invoicing. Mix proceeded up the landfill hill and dumped his load. He returned to the trailer and saw the landfill employee who had been standing near the picketer and a Local 150 operator who worked at the facility. The landfill employee signaled for him to stop. Mix stopped and heard the picketer say that "they were on strike against Donegal and that [Donegal] couldn't dump here and he wanted them to reload me." (Tr. 147-48). The landfill employee called his boss and Mix was detained for 15 to 30 minutes before the decision was made not to reload him but that he could not return. Mix has not returned to the landfill. (Tr. 149).

Opatkiewicz stated that he followed a Donegal truck into Settler's Hill and got out of his vehicle to establish a picket. (Tr. 823-24). The truck pulled up to the trailer where the loads are "sniffed" for contaminants. The landfill employee used the "sniffer" to test the load and went back into the trailer. The driver pulled the truck off to the left side of the entrance (Tr. 824). Opatkiewicz returned to his car to follow the truck because he did not know where it was going. After about five minutes, the truckdriver drove up the hill of the landfill and dumped his load. (Tr. 826). Opatkiewicz followed him and witnessed another landfill employee operating a dozer in another part of the landfill. (Tr. 830-33); R. Exh. 25). Opatkiewicz followed the truck back down towards the entrance. As they approached, the landfill employee from the trailer waived [sic] the truck down. (Tr. 826). Opatkiewicz exited his car with a picket sign and heard the landfill employee ask the driver where he went. (Tr. 827, 828). Opatkiewicz does not recall if Mix responded. Opatkiewicz called to the landfill employee, "why don't you reload him?" (Tr. 827). Opatkiewicz said he made the statement because the landfill employee's question indicated to him that the truckdriver was supposed to have waited and in his experience trucks that did not have permission to dump were reloaded. (Tr. 829). Opatkiewicz got in his car and drove over to use the port-a-potty that was there. (Tr. 827).

As set forth immediately above, the ALJ was careful to develop the context of the testimonies in this instance, the lack of asserted documentary evidence, and set forth her rationale

for her deciding to credit Opatkiewicz over Mix in this instance. In putting the testimony into context of the events as they occurred, it is obvious that there was no threat of any kind to Settler's Hill from Opatkiewicz's comment to reload Mix. The comment was made in response to the scale house employee's demand to Mix to know where Mix had gone, thereby suggesting Mix had dumped without permission, and prompting Opatkiewicz to say, "why don't you reload him?" because it was his experience working at a landfill that that was the solution to an unauthorized dump. In particular, the ALJ reviewed the record as a whole to flush out parts of Mix's testimony that did not make sense, including why he would be barred from the site, or why the landfill spent any time deciding whether to reload him if Mix had been given the ticket as he claimed. The ALJ further noted the absence of documentary evidence in the form of the dump ticket that, if it existed, was not offered into evidence. She also noted that other documentary evidence in the form of emails as testified to by Bradley were likewise not offered into the record and there had to assume that any such emails did not support the complaint allegation of unlawful conduct by Opatkiewicz.

As discussed in Charging Parties Exception 4(a) above, the ALJ is permitted to make findings and adverse inferences in the facing of missing documentary evidence which is testified to exist but is not entered into the record, or any explanation given for its absence. In this instance, a dump ticket from Settler's Hill, or the emails from Settler's Hill referred to by Bradley would have supplemented the record beyond what Bradley and Mix said occurred. Instead, the ALJ was left to consider the context of alleged statements, and ultimately concluded Opatkiewicz's comment "why don't you reload him?" made sense only in the scenario to which he testified, and in turn, Mix's account made no sense because the landfill would not waste time deciding whether to reload if the load had in fact been authorized. The ALJ The ALJ's finding is proper and should not be second-guessed by the Board.

6. The ALJ Correctly Found Donegal Services, LLC, and SJZJ LLC to Be a Single Integrated Entity.

Charging Parties' sixth exception to the ALJD states:

The ALJ incorrectly concluded that Donegal Services, LLC and SJZJ, LLC are a single-integrated employer.

The ALJ found (ALJD at 17):

A complex relationship exists between Donegal, SJZJ, and Heil LLC/Willco. As discussed above, Bradley executed an option to purchase the Willco landfill with Heil and paid the first half of the purchase price. In the purchase agreement SJZJ, one of Bradley's solely owned businesses, is listed as one of the entities with an option to buy the landfill. At the time of the hearing, the purchase had not been completed. Starting on September 1, 2016, Bradley as the owner of SJZJ became the manager of the landfill by virtue of an Operating Agreement. The Operating Agreement gives SJZJ extensive control over the operations of the landfill in return for a portion of the profits. Heil LLC/Willco and its associates receive a portion of the profit once SJZJ receives a minimum profit. SJZJ operates out of Heil LLC/Willco's facilities and holds itself out to the public as Willco Green by maintaining Willco Green signage at the facility and answering the telephone as Willco Green as is allowed by the Operating Agreement. The Operating Agreement also provides SJZJ full discretion over who and how many to employ and the terms and conditions of its employees with the caveat that 4 of Heil LLC/Willco's employees be employed by SJZJ until the purchase is completed, unless there is cause for their removal. Heil LLC/Willco's liability insurance covers the operations at the landfill, but per the Operating Agreement SJZJ is responsible for maintaining this coverage.

The ALJ correctly included that Donegal Services, LLC, and SJZJ LLC are a single integrated employer. The ALJ cited *Alcoa, Inc. & Alcoa Commercial Windows, LLC d/b/a Traco, A Single Employer*, 363 NLRB No. 39, fn. 3 (Nov. 16, 2015), for the factors to determine whether two entities constitute a single employer:

(1) Common ownership, (2) common management, (3) interrelation of operations, and (4) centralized control of labor relations. While Board considers control of labor relations to be a significant indication of single-employer status, no single factor is controlling and not all of the factors need to be present. The determination of a single-employer relationship depends on all the circumstances and is characterized by the absence of the arm's-length relationship found among unintegrated entities.

Charging Parties do not dispute that the first factor is met—Bradley is the sole owner of both Donegal and SJZJ (ALJD at p. 24: lines 24-27; Tr. 1223-1224, 1405).

Second, Charging Parties challenge the ALJ’s finding of a significant interrelation of operations between Donegal and SJZJ because the Companies are “different” (CP Brief at 15). However, two entities still can be considered a single employer despite having a separate and distinct corporate existence. *Laborers’ Pension Funds v. Surface Dimensions*, No. 07-C-3860, 2011 WL 841515 (N.D. Ill. Mar. 8, 2011). The evidence of interrelation of operations between Donegal and SJZJ relied on by the ALJ is overwhelming. There are at least 22 employees at the WillCo facility, nominally employed by SJZJ (Tr. 476; U. Ex. 39, Bates No. WCGO1044-1045). But SJZJ is merely a “payroll entity” which invoices WillCo weekly for its entire payroll (Tr. 1256-1257, 1319-1321; U. Ex. 39, SJZJ P&L, Bates No. WCGO01055-58).

WillCo has a maintenance facility onsite which is staffed by SJZJ employees (Tr. 1254). The SJZJ employees work on WillCo-owned equipment as well equipment owned by Donegal (Tr. 1255). Donegal also employs mechanics, and those mechanics sometimes go to WillCo to work on equipment, including both WillCo- and Donegal-owned equipment (Tr. 1256). The Companies invoice each other for services performed for another (Tr. 1255-1256). If SJZJ mechanics work on Donegal equipment, SJZJ bills WillCo for reimbursement, and WillCo then bills Donegal for that service (Tr. 1256).³ If a driver runs into mechanical trouble out on the road, the driver will call Barry, and Barry may try to reach someone at Donegal and propose options, or he may send an SJZJ mechanic out to assist (Tr. 1357). Jim Barry reviews all billing going out from both SJZJ and WillCo to Donegal (Tr. 1256, 1304; U. Ex. 39, Bates No. D10L01047).

³ SJZJ did not produce any invoices pursuant to subpoena that show any mechanic work performed on Donegal equipment was actually billed back to Donegal (Tr. 1388-1390).

Furthermore, there are as many as 12-14 pieces of equipment onsite at WillCo (Tr. 1250-1251; U. Ex. 39, Bates Nos. D10L01060-1081). Some of it is owned by Donegal and some is owned by WillCo (Tr. 1327-1336; U. Ex. 39, Bates Nos. D10L01060-1081).

Sometimes WillCo hires former Donegal employees, and vice versa, Donegal sometimes hires former WillCo employees (Tr. 1300). In 2018, Donegal employee David McElroy was discharged, and Barry confirmed with Bradley that he had been let go and decided to hire him at SJZJ to operate equipment with Bradley's agreement (Tr. 503-508, 1300). In late 2018, SJZJ employee Jose "Chino" Becerra was recruited to come work for Donegal in its maintenance shop (Tr. 532, 1369). Becerra started coming to Donegal's Lemont yard to help with the crusher, and the crusher operator liked him (Tr. 532). Bradley and Barry discussed Becerra before he applied at Donegal; once Donegal hired him, Becerra resigned his employment at WillCo (Tr. 529, 1381). Jared Lee, a Donegal driver assigned to WillCo, started his employment working for WillCo on the pick line and later moved into a driver position for Donegal (Tr. 1364). Barry recommended Lee as a truck driver to Bradley once Lee got his CDL, and Bradley hired him (Tr. 1382-1383). Lee had to fill out a Donegal application which includes DOT information that a WillCo application does not require, and Barry knows his application is in his Donegal personnel file (Tr. 1365). According to Barry, Lee was not given credit at Donegal for his time spent working at WillCo (Tr. 1368-1369). Donegal also employs Panagiotis Kordelakos, a/k/a "Pete the Greek" as an equipment operator (Tr.528). He reports to WillCo to run the crusher as needed to crush concrete for recycling (Tr. 494, 524-527). Running the crusher requires operation of a dozer, loader, and excavator, as well as the crusher itself—the same machines Pete the Greek operates for Donegal (Tr. 494, 528). Pete the Greek has been on SJZJ's payroll in the past at the same time

being on Donegal's payroll (U. Ex. 12). The crusher is mobile and Bradley moves it between Donegal and WillCo as needed (Tr. 533).

It is a common occurrence that a Donegal driver dispatched in the morning by Barry to run garbage or scrap for WillCo will later in the day be dispatched by Donegal to pick up scrap at a construction site and return to WillCo with it (Tr. 1391-1393). When that occurs, Donegal bills WillCo for the construction site scrap run because it is really a WillCo job for which WillCo will take the profit when the scrap is sold (Tr. 1393-1394).

SJZJ employees perform work for Donegal on the weekends doing truck washes on Donegal trucks at Donegal's Lemont yard as a means to get some overtime hours (Tr. 1305; U. Ex. 39, Bates No. D10L01047). SJZJ bills for these services in the range of the employee's overtime rate (Tr. 1306). The bill is transmitted to Donegal through WillCo and includes an extra 25- to 35-percent fee (Tr. 1306). When Donegal pays WillCo, WillCo retains the profit from the fee and reimburses SJZJ for its labor cost (Tr. 1307). Occasionally, SJZJ employees perform work for Donegal not at its yard but at job sites on which Donegal is working (Tr. 1308; U. Ex. 39 at Bates No. 1048). A request to have an SJZJ employee sent out to a construction would come from Donegal to Jim Barry (Tr. 1308).

There is a lockbox with a key in it to open the gate at WillCo (Tr. 1301). Employees who have access to the lockbox code and key include Simon Bradley, Jim Barry, for a time, David McElroy, and Donegal employee Gustavo Contreras (Tr. 1302).

Sometimes people will leave applications for a driver position at the scale house at WillCo (Tr. 1352). Barry does not hire drivers, but when an application is left, he forwards it to the Donegal office for processing (Tr. 1352).

When Barry needs additional equipment for the WillCo site, he calls Bradley and the equipment is purchased through the WillCo bank account (Tr. 1340). Barry approves all of the expenditures from this account and Bradley signs the checks (Tr. 1340). Bradley is the only person with check-signing authority on the WillCo account (Tr. 1387). If the SJZJ account does not have enough funds in it to cover a payroll, Barry can access money from the WillCo account to deposit into the SJZJ account to cover payroll (Tr. 1341-1342). Barry sets the wage rates for SJZJ employees (Tr. 1342-1343).

On occasion, a Donegal employee has operated the equipment at WillCo to load his own truck when no SJZJ operators were available (Tr. 1395-1396). At some point in the last year, Barry installed magnetic key boxes for the equipment keys to hide them, but there is a code widely known to WillCo employees (Tr. 1302, 1396; CP Ex. 14).

Donegal, WillCo, and SJZJ use some of the same professional service providers. For instance, they all use accountant Stuart Lerman, and he is also listed as the registered agent of the Companies in publicly available annual corporate reports online. Attorney Jack Cerone has been WillCo's attorney for years, but here appeared for WillCo in the subpoena matter and produced documents relative to SJZJ as well as WillCo. As noted previously, Cerone also appeared at the June 2018 contract meeting with Bradley and Barry on behalf of Donegal.

Third, again without citing to any judicial or administrative authority whatsoever, Charging Parties argue that Donegal Services, LLC, and SJZJ LLC cannot be single employers because the Companies are managed separately because Barry only makes "major decisions" for SJZJ and that interactions between Bradley and Barry are "very small" does not hold water (CP Brief at 2). Charging Parties make a substantial mischaracterization of Bradley's role in making decisions for SJZJ. Barry regularly meets with Bradley at least once per week to discuss management decisions

for SJZJ and operations at WillCo (Tr. 429-430). The ALJ noted that Bradley was “terribly vague and opened about what is discussed at those meetings” (ALJD at p. 24: line 32); at a minimum the two discussed streamlining operations and providing health insurance to employees, which are undoubtedly management decisions (Tr. 509-510, 513, 1263, 1362). In fact, both were present when meeting with an insurance broker to choose healthcare plans for both Donegal and SJZJ’s employees, and Barry prepared healthcare plans at Donegal and SJZJ (*id.*).

Bradley also asked Barry for “input” on the purchase of WillCo and its business structure (Tr. 1265). Furthermore, the ALJ correctly inferred from the overwhelming record evidence and Bradley’s poor credibility determination that, due to the absence of management structure at SJZJ and Donegal and Barry and Bradley’s regularly scheduled meetings, it is “unlikely that Bradley does not *at least* tacitly approve of the managerial and labor relations decisions made by Barry at SJZJ” (ALJD at p. 24: lines 34-37) (emphasis added). Barry, as an agent of Donegal, also communicated with Local 150 agents about becoming signatory with the Union (Tr. 1107-1108, 1110-1114; U. Exs. 31-32)—another transparent example of managerial authority that Barry has for Donegal.

Finally, Charging Parties’ argument that there is no centralized control of labor relations between Donegal and SJZJ fails. Barry, who Charging Parties claim has no authority to hire or fire Donegal employees and has never done so, even Donegal drivers at the WillCo worksite. However, hiring and firing employees are not the only factors assessed in the centralized control of labor relations analysis. Labor relations is much broader than hiring and firing employees—it requires an assessment of all factors including disciplining employees, and exercising control and direction over the employees. *Shaw, Inc., Rapid River Enterprises, Inc., S & R Cable, Inc., & Kimron Res., Inc., A Single Employer &/or Joint Employer & United Ass'n of Journeymen & Apprentices of the*

Plumbing & Pipefitting Indus. of the United States & Canada, AFL-CIO & Local 1098, Laborers Int'l Union of N. Am., AFL-CIO & Local 324, Int'l Union of Operating Engineers, AFL-CIO, 350 NLRB 354, 375 (2007).

Bradley testified Barry “counsels” him on matters including personnel and employee discipline (Tr. 385-386). The record evidence shows that Barry has management authority over Donegal-employed drivers while they are working at WillCo, although sometimes he is a driver’s contact if the driver experiences a problem out on the road (Tr. 1281). Barry then checks with Donegal if they want him to handle it or how to handle the problem (Tr. 1281). Barry monitors the Donegal employees and disciplines them if he feels it is warranted (Tr. 1283). Barry issued written warnings to Donegal driver O’Gorman in 2018 at Bradley’s request holding himself out as a WillCo official (Tr. 1283-1285; U. Exs. 37, 38). Barry also gave Donegal driver Jared Lee a written warning when Lee hit and bent a gate post with his truck (Tr. 1353).

Additionally, the execution of Operating Agreement left Barry responsible for the enforcement of the federal Illinois EPA regulations which govern WillCo’s landfill (Tr. 1253), and generally responsible for enforcing rules for anyone who goes to WillCo (Tr. 1266). Barry decides how many loads each Donegal driver will take for WillCo and obtains those drivers from Donegal dispatcher Tim Mix or occasionally Donegal’s Matt Winders (Tr. 1267). All the truck drivers assigned to WillCo are Donegal employees (Tr. 1272) who work there for months at a time (Tr. 1271). Donegal is the “exclusive hauler” for WillCo (Tr. 1269).

Charging Parties also assert that SJZJ employees are not required to hold a Commercial Driver’s License, which is a requirement for Donegal employees, without citing to record evidence. Yet, Bradley testified that Barry “manages” the WillCo facility in Plainfield (Tr. 385) and “manages” the Donegal truck drivers who report to and work out of WillCo (Tr. 386-388).

Donegal applicants also have mistakenly given applications to SJZJ (Tr. 1376:1-10), demonstrating the lack of an arm's-length relationship between the two entities. The record evidence relied upon by the ALJ makes it abundantly clear that Barry and Bradley both exercise significant and centralized control over each Company's labor relations, and the ALJ correctly held that SJZJ and Donegal are a single-integrated employer.

For these reasons, the ALJ correctly found SJZJ to be a single-integrated employer with Donegal, and therefore, was not a neutral to Respondent's primary labor dispute with Donegal (ALJD at p. 25: lines 20-22).

7. The ALJ Correctly Vound that Local 150 Had a Separate Primary Dispute with E.F. Heil / WillCo Green.

Charging Parties' seventh exception to the ALJD states:

The ALJ incorrectly concluded that the union had a separate primary labor dispute with E.F. Heil/Willco.

The ALJ found (ALJD at 26):

Respondent also asserts that it had a separate primary labor dispute with Heil LLC/Willco for violations of the HHU-CBA. Through the date of the hearing, Heil LLC/Willco still maintained an ownership interest in the landfill and contracted through the Operating Agreement with Bradley and SJZJ, which as discussed above is a single-integrated employer with Donegal, to operate the landfill until a final sale is completed. Heil LLC/Willco still received compensation from the operation of the landfill. Thus, through the time of the hearing, I find that Heil LLC/Willco acted as a contractor subcontracting the operations of the landfill. While I make no determination on the validity of Respondent's grievances, based upon the HHU-CBA subcontracting language and the Operating Agreement, it appears that Respondent's grievance filed with Heil LLC/Willco on September 26 was not frivolous. Accordingly, I find that Respondent had a separate primary labor dispute with Heil LLC/Willco which afforded Respondent the right to protest it's[sic] conduct as a primary labor dispute.

Charging Parties argue that the ALJ's determination was "needless" and "not an issue in the hearing...for the ALJ's review" (CP Brief at 17). Moreover, Charging Parties argue that a finding of a labor dispute requires a "legitimate contract between the Union and Willco Green,"

specifically the HHU-CBA (*id.*). Charging Parties' argument is inconsistent with the definition of a "labor dispute" under the NLRA, and is contrary to the position taken by the counsel for the General Counsel who does not except to the ALJ's findings regarding WillCo Green (Counsel for the General Counsel's Brief in Support of Exceptions at 7, n.8).

The NLRA defines "labor dispute" to "include[] *any* controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 152(9) (emphasis added). The merits of the underlying dispute are irrelevant to the determination of whether a "labor dispute" exists or not. *N.L.R.B. v. Modern Carpet Indus., Inc.*, 611 F.2d 811, 814 (10th Cir. 1979). As the statutory definition clearly states, the existence of a labor dispute does not depend upon the existence of an employer-employee relationship. As long as the union acts for some job-related reason in order to exert economic pressure, the conflict constitutes a labor dispute. *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, 840 F. Supp. 697, 702 (E.D. Mo. 1993), *aff'd*, 39 F.3d 191 (8th Cir. 1994). "Rarely have courts found concerted union activities to fall outside this broad definition. Where the union acts for some arguably job-related reason, and not out of pure social or political concerns, a 'labor dispute' exists." *Hasbrouck v. Sheet Metal Workers Local 232*, 586 F.2d 691 (9th Cir.1978); *Aarco v. Baynes*, 391 Mass. 560, 462 N.E.2d 1107, 1110 n.3 (1984).

On or about March 1, 2003, E.F. Heil LLC and its "successors and assigns," by its then-President Edward F. Heil, signed a Memorandum of Agreement ("MOA") that adopted the terms of a Master Agreement between Local 150 and Excavators, Inc., known as the Heavy & Highway & Underground agreement ("HHUA") (ECF #1-1 at PageID #99). The HHUA incorporates and

adopts the Agreements and Declarations of Trust of various Taft-Hartley fringe benefit funds governed by ERISA, 29 U.S.C. § 1002(3).

Furthermore, on May 20, 2019, the various fringe benefit funds to which Heil LLC/WillCo are required to make contributions filed a two-count Complaint under the terms of the HHUA to submit all delinquent monthly contribution reports as required under the HHUA and Agreements and Declarations of Trust incorporated therein and audits to determine contribution amounts due under the HHUA (Case No. 1:19-cv-03394, ECF Doc. #1). On September 25, 2019, Local 150 joined the aforementioned action and counter-sued Heil LLC/WillCo to enforce an arbitration award in Plaintiffs and Counter-Plaintiff's First Amended Complaint (Case No. 1:19-cv-03394, ECF Doc.22).⁴

Local 150 has a present labor dispute with Heil LLC/WillCo that has been ongoing since around August 2018 under the terms of the HHUA. Local 150 alleged that the Company failed to allow representatives of the Union access to the facility at which bargaining unit members were employed in violation of the "ACCESS TO PREMISES" provision of the Master Agreement (Article I, Section 5). The parties attempted to resolve the dispute at a Step One conference pursuant to the Master Agreement, but were unable to do so (Case No. 1:19-cv-03394, ECF Doc. #22, Page 9 of 11, ¶ 8).

On March 6, 2019, pursuant to Step Two of the HHUA, Local 150 reduced the grievance against the Company to writing and sought to set up a meeting whereby it could be resolved. The

⁴ *NLRB Division of Judges Bench Book* § 16–201 FRE 201. Judicial Notice of Adjudicative Facts (January 2020); e.g. *Nashville Corp.*, 94 NLRB 1567, 1569 (1951) (Board can take judicial notice of a foreign judicial proceedings per 28 USC Sec. 1738, even if it had been rejected by the Trial Examiner); *Cfp Fire Prot., Inc.*, 365 NLRB No. 83 (May 23, 2017) (Board takes administrative notice of two federal district court decisions involving the parties); *Cellular Sales of Missouri, LLC & John Bauer*, 362 NLRB 241, 243 FN2 (2015) (Board took administrative notice of related court decision).

parties were unable to resolve the dispute at the Step Two proceeding. Consequently, pursuant to Step Three of the contractual grievance procedure, Local 150 submitted the grievance against the Company to the Joint Grievance Committee (hereinafter referred to as the “JGC”) (Case No. 1:19-cv-03394, ECF Doc. #22, Page 9 of 11, ¶ 9).

On March 13, 2019, the JGC conducted a hearing into the grievance brought by Local 150 against the Company. Based upon the evidence presented at the hearing, the JGC awarded Local 150 \$10,000.00 per week until the violation was remedied (Case No. 1:19-cv-03394, ECF Doc. #22, Page 9 of 11, ¶ 10).

By letter dated March 13, 2019, the JGC informed the Company of its decision and award. Despite repeated demands by Local 150, the Company has failed and refused to comply with the JGC award (Case No. 1:19-cv-03394, ECF Doc. #22, Page 9 of 11, ¶ 11).

The Company failed to comply with the JGC award within seven (7) days. Therefore, pursuant to Step Three of the contractual grievance procedure, the Company is required to pay an additional ten (10%) percent of all amounts owed as liquidated damages for its failure to comply with the decision or award (Case No. 1:19-cv-03394, ECF Doc. #22, Page 9 of 11, ¶ 12). In addition, the Company must pursuant to the Master Agreement pay the attorneys’ fees and costs of Local 150 incurred due to the necessity of pursuing the action (Case No. 1:19-cv-03394, ECF Doc. #22, Page 9 of 11, ¶ 13).

The broad scope of what constitutes a “labor dispute,” as interpreted by the NLRB and federal courts cited in this response, requires the NLRB to consider the above-mentioned grievance and pending federal lawsuit a labor dispute. For these reasons, the ALJ’s decision that the ALJ concluded correctly that the Union had a separate primary labor dispute with Heil LLC/WillCo and Charging Parties’ arguments must be rejected.

B. CONCLUSION

For all the above-stated reasons, the National Labor Relations Board should reject the exceptions filed by Charging Parties and uphold the decision of the Administrative Law Judge.

Dated: February 7, 2020

Respectfully submitted,

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 150, AFL-CIO

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CERTIFICATE OF SERVICE

The undersigned, an attorney of record, hereby certifies that on February 7, 2020, she electronically filed the attached *Respondent's Brief in Support of Its Exceptions to the Administrative Law Judge's Decision* via the National Labor Relations Board website and sent a copy to the following via electronic mail:

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