

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

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 150

And

DONEGAL SERVICES, LLC.

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

COUNSEL FOR THE GENERAL COUNSEL'S
REPLY TO RESPONDENT LOCAL 150'S RESPONSE
TO THE GENERAL COUNSEL'S EXCEPTIONS TO THE
DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respectfully submitted:

/s/ Kevin McCormick

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

INTRODUCTION

In Respondent Local 150's Response to the General Counsel's Exceptions to the Administrative Law Judge's Decision¹, Respondent rehashes arguments which were already addressed in detail by the General Counsel's previous submissions. Contrary to what Respondent claims, the inflatable rats and banner displays are not protected by the First Amendment. Respondent then argues that the General Counsel waived its right to raise any arguments based on the proximity of the rats/banner displays to traditional picketing even though that has not been his theory of the case. Respondent's legal citations have no application to the powers of an administrative law judge and are a misapplication of relevant law. Finally, even if the administrative law judge properly relied on *Held Properties* and *Oak Construction*, as shown in the previous submissions by the General Counsel, this is not the only way its conduct violated the Act.

I. Respondent's First Amendment Arguments.

In its RGCEALJD, Respondent Local 150 argues that its conduct with the inflatable rats and banners at the eight secondary employers in this case are peaceful and thereby protected by the First Amendment and not subject to regulation under Section 8(b)(4) of the National Labor Relations Act. Respondent claims that even if the Board overturns *Carpenters Local 1506 (Eliason & Knuth of Arizona)* 355 NLRB 797 (2010), *Sheet Metal Workers Local 15 (Brandon Medical Center) (Brandon II)* 356 NLRB 1290 (2011), and *Carpenters Southwest Regional Councils Locals 184 & 1498 (New Star)* 356 NLRB 613 (2011), and adopts the broad and flexible definition of picketing as advocated by the General Counsel, the broad and flexible approach cannot survive constitutional scrutiny. RGCEALJD Pg. 3.

¹ Hereafter RGCEALJD.

Counsel for the General Counsel has already briefed this issue extensively and refers to the arguments made in both his Brief to the Administrative Law Judge, Exceptions to the Administrative Law Judge's Decision, and his Answering Brief to Respondent Local 150's Exceptions and Brief in Support of its Exceptions to the Administrative Law Judge's Decision. As found by the dissent in *Eliason & Knuth*, no constitutional concerns were raised, as it is settled law that secondary picketing is not entitled to First Amendment protection. *Id.* at 821. Moreover, even if secondary bannering were entitled to some First Amendment protection, as the dissent noted, the government has a substantial interest in regulating labor relations that justifies some restrictions on free speech.

II. Respondent's Waiver Argument.

In its RGCEALJD, Respondent falsely claims that because the General Counsel cannot raise new arguments, somehow this means the administrative law judge cannot come to a different conclusion about how the Respondent's behavior violates the Act. Respondent cites to cases like *Bud's Woodfire Oven LLC d/b/a Ava's Pizzeria*, 368 NLRB No. 45, slip op. at 1, n. 3 (2018)(Board rejects Respondent's deferral related argument as untimely as it was raised for the first time in its exceptions), *Yorkaire, Inc.*, 297 NLRB 401² (1989), *Lamar Central Outdoor*, 343 NLRB 261 (2004), among others for the proposition that because the General Counsel did not raise the proximity arguments specifically in the complaint, it cannot now be part of the administrative law judge's decision.

Again, this waiver argument was fully addressed by Counsel for the General Counsel in his Answering Brief to Respondent Local 150's Exceptions and Brief in Support of its Exceptions to the Administrative Law Judge's Decision. Pg. 2-4. The General Counsel and

² Respondent's citation has a typographical error.

Administrative Law Judge are not the same thing. The Board, with court approval, “has repeatedly found violations for different reasons and on different theories from those of the administrative law judge or the General Counsel, even in the absence of exceptions, where the unlawful conduct was alleged in the complaint.” *DirectSat USA, LLC*, 366 NLRB No. 40 (2018)(citing *Local 58, Int’l Brotherhood of Electrical Workers (IBEW)*, 365 NLRB No. 30, slip op. at 4, fn. 17 (2017)(“Although the General Counsel has not clearly pursued a violation on this theory, it is well within established Board practice to find a violation under the circumstances of this case, where all of the underlying facts are undisputed”). Here, the violation is alleged in the complaint, the factual basis for the violation is clear from the record, the law is well established, and no due process concerns are implicated. Thus, nothing in Board law prevented Administrative Law Judge Sorg-Graves from appropriately finding Respondent’s conduct violative of the Act based on a different theory than the General Counsel.

Respondent also appears to be making the bizarre argument in its Response that because the General Counsel’s broad theory of picketing was not specifically mentioned in the complaint, he is somehow now precluded from making this “new” argument now. RGCEALJD Pg. 25. Once again, this a straw man argument. The General Counsel’s theory of how and why Respondent’s use of inflatable rats and banners at the secondary employer locations listed in the complaint violated the Act has been consistent from the beginning and Respondent has been given extensive opportunity to address the issue. While the Administrative Law Judge based her findings on *Held Properties* and *Oak Construction*, her findings of violations were not exclusive. As urged in the Counsel for the General Counsel’s previous submissions, the Board should overrule *Carpenters Local 1506 (Eliason & Knuth of Arizona)*, *Sheet Metal Workers Local 15 (Brandon Medical Center)(Brandon II)*, and *Carpenters Southwest Regional Councils Locals*

184 & 1498 (*New Star*), and find that Respondent Local 150 has violated Section 8(b)(4)(B)(i)(ii) of the Act based on the Board's historically flexible and broad view of picketing.

III. Conclusion.

For all the above-stated reasons, Counsel for the General Counsel respectfully requests that the Board deny all of Respondent's exceptions to the Administrative Law Judge's Decision and grant his exceptions.

DATED this 6th day of March, 2020.

Respectfully Submitted,

/s/ *Kevin McCormick*

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

CERTIFICATE OF SERVICE
13-CP-227526; 13-CC-227527; 13-CC-231597; 13-CC-233109

The undersigned hereby certifies that true and correct copies of Counsel for the General Counsel's Reply to Respondent Local 150's Response to the General Counsel's Exceptions to the Administrative Law Judge's Decision to have been e-filed with the Executive Secretary and served this 6th day of March, 2020, in the manner indicated, upon the following parties of record.

ELECTRONICALLY

Office of the Executive Secretary
Mr. Gary Shinnars, Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D. C. 20005-3419

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

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

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

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

/s/ Kevin McCormick

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